No. 15-58

In The
Supreme Court of the United States

CITY OF LOS ANGELES, JULIO BENAVIDES, AND MARIO FLORES,

Petitioners,

v.

ROBERT CONTRERAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

JOHN FATTAHI
LAW OFFICE OF JOHN FATTAHI
1301 W. Glenoaks Blvd.
Glendale, CA 91201
Tel: (818) 839-1983
Fax: (818) 561-3600
E: jfattahi@gmail.com

DALE K. GALIPO
LAW OFFICES OF
DALE K. GALIPO
21800 Burbank Blvd.,
Suite 310
Woodland Hills, CA 91367
Tel: (818) 347-3333
Fax: (818) 347-4118
E: dalekgalipo@yahoo.com

PAUL L. HOFFMAN
Counsel of Record
SCHONBRUN SEPLOW
HARRIS & HOFFMAN, LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 399-7040
E: hoffpaul@aol.com

WILLIAM L. SCHMIDT
377 W. Fallbrook Ave.,
Suite 207
Fresno, CA 93767
Tel: (559) 261-2222
Fax: (559) 436-8163
E: bschmidt@ncinternet.net

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Petitioners waived the "fleeing felon" argument they advance in this Court, as the court of appeals determined.

2. Whether Petitioners may challenge the Court of Appeals' affirmance of the jury verdict in Respondent's favor under the Fourth Amendment when there is no challenge to the jury instructions, and the facts, when taken in the light favorable to the verdict, are that Petitioners shot an unarmed, already wounded and disabled man in the back, when he posed no threat of serious harm to the officers or the public in the circumstances found by the jury.

3. Would a reasonable officer know that he could not use deadly force against an unarmed man who might have been involved in some unknown way in a crime and who is not posing any immediate threat to the officers or the public at the time he is shot in the back while wounded and disabled.

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STATEMENT

Respondent Robert Contreras ("Respondent" or "Mr. Contreras") submits this brief in opposition to the petition for writ of certiorari filed by petitioners City of Los Angeles, Julio Benavides and Mario Flores ("Petitioners"). Petitioners ask this Court to reverse a jury verdict and judgment finding that Petitioners used excessive force when they shot Mr. Contreras in the back when he was unarmed, disabled and no longer attempting to run away. The use of deadly force in the circumstances of this case, viewed in the light most favorable to the verdict, was prohibited by *Tennessee v. Garner*, 471 U.S. 1 (1985), and its progeny, as the jury and courts below found. There is no split in the circuit courts over the applicable law. Indeed, Petitioners make little effort to argue that this case meets the criteria for review in this Court. This is a case where Petitioners simply will not accept the jury's verdict and continue to assert facts that the jury rejected at trial.

Apart from rehashing their own rejected version of the facts, Petitioners provide no reason for this Court to hear this case. Petitioners raise no novel legal question, and this Court's intervention is not required to settle Fourth Amendment law regarding the use of deadly force. This law has been settled for decades. *Id.* Petitioners identify no conflict in the circuits concerning any issue relevant to the judgment in this case. Indeed, there was so little controversy over the application of established law to these facts that a unanimous Ninth Circuit panel

issued an unpublished Memorandum Opinion.[1] Moreover, Petitioners explicitly waived their "fleeing felon" argument in the district court.

Petitioners inappropriately continue to base their arguments on facts the jury rejected after a full and fair trial. Even if there were a need for this Court to revisit any aspect of the law governing the use of deadly force, this case would be an unsuitable vehicle for such reconsideration. Police officers, including these police officers, are trained, based on established constitutional law, *not* to use deadly force in the circumstances faced by these officers. The jury held Petitioners accountable to their training and to the Constitution. There is no basis to disturb the jury's verdict or the decisions of the trial judge and a unanimous court of appeals panel affirming that verdict.

This case involves no more than a jury applying undisputed jury instructions based on clearly established law to the record evidence. The case raises no novel issue of law or legal issue of national importance.

The petition should be denied.

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[1] Unpublished dispositions do not create binding precedents in the Ninth Circuit. Ninth Circuit Rule 36-3.

A. Factual Background[2]

At approximately 7:30 p.m. on September 3, 2005, Officers Benavides and Flores heard gunshots while on patrol. ER 305-06. Unidentified pedestrians told the officers that someone in a van they identified had fired shots from the van. ER 374. Based on this information Petitioners pursued the van to a Jack-in-the-Box several blocks away. ER 310, 406.

Three people exited the van when it stopped. First, Mr. Contreras got out of the sliding right rear passenger door. ER 406-09. He was not wearing a bandana over his face. ER 406. He had no gun in his possession. ER 409. According to the officers' testimony, a person (who they claimed was Mr. Contreras) exited the driver's door with a gun in his hand and a bandana over his face. ER 315-17, 362. At trial, Mr. Contreras played surveillance footage showing him exit the passenger side of the van without a bandana or gun to impeach Petitioners' testimony. *Id.*

When they first encountered Mr. Contreras, Petitioners had no information about him or his

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[2] The facts are presented here, unlike in Petitioners' account, in the light most favorable to the verdict. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011).

actions apart from his exit from the passenger side of the van. After exiting the passenger side, Mr. Contreras ran down the sidewalk for a few seconds before he was struck in his ankle by a bullet fired by petitioner Benavides. ER 411; SER 172, 177. At trial, the officers claimed that Mr. Contreras was armed and was aiming a gun at them. Mr. Contreras denied Petitioners' account and testified that he was unarmed and never pointed anything at the officers. The jury believed Mr. Contreras.

After being wounded, Mr. Contreras entered a driveway and leaned over with his back to the officers to attend to his wound. ER 411-13. When petitioners reached the driveway seconds later they immediately, without warning, shot Mr. Contreras in the back leaving him paralyzed for life. Petitioners gave Mr. Contreras no opportunity to surrender before shooting him in the back. ER 413-14. Mr. Contreras was trapped and incapacitated when he was shot. ER 414. All four shots were to the back of his body. ER 169-70. Petitioners testified at trial that Mr. Contreras faced them and pointed a gun at them during the incident and that this was the *only* basis of their decision to use deadly force. Mr. Contreras denied petitioners' account and the jury found his version of these events more credible.

Petitioners and other officers conducted a thorough search for the gun they claimed Mr. Contreras possessed and aimed at them but no gun was ever found, despite the fact that the chase lasted no more than 15 seconds and Mr. Contreras was in

their sight for virtually every second of that time. ER 401-03; SER 171.

The evidence supported a jury finding that, although it was feasible for the officers to do so under the circumstances, they did not give Mr. Contreras a warning that deadly force would be used if he did not surrender. Although Petitioner Benavides claimed he said, "Stop. Police," and "Drop the gun," Officer Savedra, who was 15-20 feet behind the shooting officers during the pursuit on the sidewalk, did not recall hearing any such warnings or commands being given. ER 391-92. Petitioner Flores also did not recall hearing any warnings. ER 389-91. Mr. Contreras heard no warnings, or commands, throughout the entire foot pursuit. ER 348, 414, 423. The jury was entitled to find that none were given.

The jury heard substantial evidence regarding the officers' training. Petitioners testified that they were trained it would be inappropriate to use deadly force under various scenarios indistinguishable from Mr. Contreras's account of the incident, and that they understood they could not shoot Mr. Contreras as a fleeing felon, even under Petitioners' own account of the facts, if Mr. Contreras had not pointed a gun at them. SER 136-37, 139-40, 142-43, 147. Petitioners took the position at trial that the *only* reason they shot Mr. Contreras was that he pointed a gun at them. The jury rejected this testimony.

B. Proceedings Below

On February 17, 2011, Mr. Contreras filed two claims in the United States District Court for the Central District of California under 42 U.S.C. § 1983: one for excessive force in violation of the Fourth and Fourteenth Amendments and one for municipal liability.

Petitioners filed no pre-trial motions to dismiss or for summary judgment. In the pre-trial conference order, Petitioners explicitly waived any argument that they shot Mr. Contreras because he was a "fleeing felon." No "fleeing felon" theory was advanced at trial. For this reason, Mr. Contreras never addressed or developed the facts relevant to address this theory.

The trial was bifurcated into liability and damages phases. The liability phase of the trial resulted in a jury verdict for Mr. Contreras. Before the damages phase of the trial commenced, the parties agreed to a $4.5 million settlement, conditioned on the approval of the Los Angeles City Council. A majority of City Council members ultimately voted not to approve the settlement and the case returned to district court for the damages phase.

More than three months after the liability verdict, Petitioners filed a motion to dismiss Mr. Contreras's entire action based on a statute of limitations, a motion which the District Court denied,

finding defendants had waived their statute of limitations defense and that it failed on the merits.

On September 21, 2012, a second jury awarded Mr. Contreras $5,725,000 in damages. Petitioners filed a post-trial motion for judgment as a matter of law asserting qualified immunity for the first time and a new argument, explicitly waived before trial, that the shooting was justified because Mr. Contreras was a "fleeing felon." The District Court denied the motions.

Petitioners appealed. In a brief memorandum decision, the court of appeals found that when viewing the facts in the light most favorable to the verdict, the evidence was sufficient to support a reasonable jury's finding that Petitioners used excessive force. As a result, the court of appeals affirmed the rejection of petitioners' motion for judgment as a matter of law, Pet. App. 2, and found that petitioners had waived their "fleeing felon" argument. Pet. App. 3. The court of appeals also found that Petitioners were not entitled to qualified immunity because the law was settled that the use of deadly force in the circumstances found by the jury was unconstitutional. Pet. App. 3-4.

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REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS FULLY CONSISTENT WITH ESTABLISHED LAW APPLICABLE TO THE USE OF DEADLY FORCE.

A. Petitioners Waived Their "Fleeing Felon" Theory.

This Court should not even reach Petitioners' "fleeing felon" argument because they waived it below by expressly disclaiming the argument in pre-trial filings and in their conduct at trial. Pet. App. 3. This Court does not ordinarily hear arguments which have been waived in the lower courts. *See Nelson v. Adams USA*, 529 U.S. 460, 469 (2000); *Stewart v. LaGrand*, 526 U.S. 115, 116 (1999).

Petitioners expressly denied in pre-trial filings that they shot Respondent as a "fleeing felon." ER 257, SER 126 ("Mr. Contreras was not shot because he was a 'fleeing felon.'"). Petitioners repeatedly argued at trial that they shot Respondent because he pointed a gun at them. ER 255-57. In fact, Petitioners conceded that they had been trained not to use deadly force against fleeing felons under these circumstances. SER 136-37, 148.

Petitioners also clearly stated in their Memorandum of Contentions of Fact and Law, "Mr. Contreras was not shot because he was a 'fleeing felon.'" ER 257. Petitioners relied on the argument

that respondent was shot because he threatened Petitioners with a gun. ER 255-57. The court of appeals therefore correctly found that Petitioners' "fleeing felon" argument was affirmatively waived. Pet. App. 3**.**

Petitioners should not be allowed to present this argument for the first time on appeal.

B. The Court of Appeals, District Court and Jury Applied Established Law to the Facts as the Jury Found Them.

Petitioners do not argue that this Court must resolve a conflict in the circuit courts regarding the use of deadly force under the Fourth Amendment. To the contrary, Petitioners acknowledge that the law is clear. Pet. 4. Instead, Petitioners complain that the court of appeals mistakenly focused on the fact that respondent turned out to be unarmed in its short opinion unanimously affirming the judgment. Pet. 15-16.

Petitioners' argument misconstrues the court of appeals' opinion and the record in this case. Review of a jury verdict in a case like this is highly fact-specific and requires deference to the jury's fact-finding. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (requiring the court on a motion for judgment as a matter of law to "draw all reasonable inferences in favor of the nonmoving party, and . . . not make credibility

determinations or weigh the evidence"). Petitioners identify no error in the court of appeals' review of the trial record under well-established law.

Nor do Petitioners challenge any of the instructions given to the jury. For the jury, the test for whether Petitioners used excessive force during a seizure is governed by the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Garner*, 471 U.S. at 6. The inquiry into the "reasonableness" of the force used requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*. 490 U.S. at 396. In the "fleeing felon" context, deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3.

As this Court emphasized in *Graham*,

> "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," [citing *Bell v. Wolfish*, 441 U.S. 520 (1979)], however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the subject

> poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

490 U.S. at 396. In other words, the reasonableness inquiry must take into account the "totality of the circumstances." *See Garner*, 471 U.S. at 8-9 (framing the question as "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"). Further, the "'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

The court of appeals, viewing the facts in the light most favorable to the verdict, highlighted at least two pieces of undisputed evidence that reasonably supported the jury's determination of excessive force: (1) that respondent was shot four times in his back and (2) that respondent was unarmed. Pet. App. 3-4. However, this was not the only evidence that supported the verdict and contradicted Petitioners' testimony at trial. The entire trial record was before the court of appeals.

For example, Petitioners testified that Mr. Contreras turned and pointed a gun at them. ER 365. Mr. Contreras testified that this was not true. ER 319-23. Petitioner Benavides testified he gave

respondent a warning. ER 348. Respondent's testimony, supported by the testimony of other officers, disputed this. ER 389-92, 414, 423. In other words, the jury was presented with two completely inconsistent versions of the events leading up to this shooting and they found for Mr. Contreras unanimously and rejected Petitioners' account.

The court of appeals did not find, or even suggest, that the fact that Mr. Contreras was found to be unarmed was dispositive of Petitioners' liability. Instead, the court correctly noted that this fact acted as one reasonable evidentiary basis for the jury to find for Mr. Contreras and reject Petitioners' only asserted justification for shooting him.

C. Petitioners Identify No Conflict in the Circuits on Any Issue Decided Below.

Petitioners cite no cases revealing a conflict in the circuits that requires this Court's intervention. Instead, Petitioners merely cite to cases in which no excessive force was found despite the victim being unarmed. Pet 24-25. These cases merely demonstrate that other triers of fact have found sufficient evidence of the justification to use deadly force based on the "totality of circumstances" in those cases, not that those cases authorized the use of deadly force in the facts as found by the jury in this case. *See Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (holding there was no excessive force because "[suspect] communicated that he had a gun . . . [and] emerged

from the house covering what could reasonably be interpreted as a weapon"); *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995) (holding that there was no excessive force because the decedent had pointed a gun at the officer); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (holding that there was no constitutional violation because the decedent had recently fired shots and was "acting crazy").

In each case, the court emphasized the "totality of circumstances." The fact that the suspect turned out to be unarmed at the time deadly force was used was just one of the circumstances. None of these cases have facts similar to the facts before the jury in this case.

Petitioners rely heavily on *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997), to argue that possession of a gun is not a crucial factor in determining whether the "totality of circumstances" permits officers to use deadly force to capture a fleeing felon. But the facts in *Forrett* are easily distinguishable from the facts in this case, as both the district court (Pet. App. 19) and court of appeals found below. Pet. App. 4.

Forrett involved an hour-long police chase through a residential neighborhood after police received a firsthand account from victims of a home-invasion robbery in which the plaintiff had shot two individuals and was heavily armed. In *Forrett,* the plaintiff conceded that the police had probable cause to believe he committed a serious crime, and there

was no genuine issue of fact that they had issued a warning to the plaintiff before they shot him. In contrast, here Mr. Contreras fled the police for only fifteen seconds and the evidence conflicted on whether a warning was given by Petitioners before deadly force was used. Moreover, there was no probable cause that Mr. Contreras committed a serious crime or wielded a weapon; the only evidence of such was anonymous witness descriptions of a shooting involving the van in which respondent was riding with others. Nothing in *Forrett* would cause reasonable police officers to believe that they had the right to use deadly force against Mr. Contreras.

Lamont v. New Jersey, 637 F.3d 177 (3d Cir. 2011), is similarly unhelpful for Petitioners. In that case, after a chase and warnings that deadly force would be used if he did not comply, the officers shot the plaintiff when they observed him concealing his right hand in his waistband and appearing to clutch an object (which turned out to be a crack pipe), then suddenly pulling his hand out as though he were drawing a pistol. *Id.* at 179. Here, the jury accepted Mr. Contreras's testimony that he made no such movements when he was shot and paralyzed for life. Instead, Mr. Contreras was hunched over, facing away from Petitioners, with both hands visible to Petitioners and was immobilized from a shot to the ankle.

Similarly, in *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001), the officer had a reasonable belief that the plaintiff posed an immediate threat to law

enforcement and others: he saw the plaintiff in a stolen car associated with a reported bank robbery, he saw the plaintiff flee immediately after hearing gun shots, and he saw plaintiff drive toward oncoming traffic and then smash into the driver's door of his own vehicle placing the officer in a precarious position. *Id.* at 723-25. In this case, petitioner never observed Mr. Contreras commit any offense other than trying to run away, and he was not threatening or even facing Petitioners or anyone else at the time they shot him in the back. At best, petitioners were informed that someone in the van had fired shots from it and saw that Mr. Contreras had ceased his brief effort to flee from the van on foot. In *Dudley* there was substantial evidence of the suspect's danger to the officers and the community not present here.

Finally, in *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1987) officers had a proper basis to use deadly force to prevent escape when, during a bank robbery, they observed a masked plaintiff's arms extended (and apparently pointing a gun) towards a group of customers who were facing plaintiff with their hands up, and the officers had warned the plaintiff twice before shooting. *Id.* at 1271. Here, again, the jury weighed the totality of the evidence and found that there was no threat to officers or others that warranted the use of deadly force where respondent was tending to his already immobilizing gunshot wound at the time he was shot and rendered a quadriplegic.

II. Clearly-Established Law Provided the Officers Fair Warning that their Conduct Was Unlawful.

This Court has held that "[s]ince a reasonably competent public official should know the law governing his conduct," qualified immunity does not apply when the relevant law is clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). "[T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was lawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). State officials are not entitled to qualified immunity simply because no case with materially similar facts has held their conduct unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002). In evaluating qualified immunity, "[a department]'s training materials are relevant not only to whether the force employed in [a] case was objectively unreasonable . . . but also [to] whether reasonable officers would have been on notice that the force employed was objectively unreasonable." *Drummond v. City of Anaheim*, 343 F. 3d 1052, 1062 (9th Cir. 2003); *see also Hope*, 536 U.S. at 741-42, 744 (considering department regulations and a DOJ advisory opinion in concluding the conduct at issue violated clearly established constitutional rights).

Contrary to Petitioners' statements that they were not put on fair notice that their actions would violate the Fourth Amendment, the facts show that

petitioners were indeed aware that their conduct was unlawful. This is true for two primary reasons: (1) *Garner* and its progeny provided fair notice that Mr. Contreras could not be shot as a "fleeing felon;" and (2) the LAPD actually trained its officers, including Petitioners, to refrain from using deadly force in the particular circumstances found by the jury.

In affirming the district court, the Court of Appeals held that "Defendants [were] not entitled to qualified immunity because the law was clearly established that shooting an unarmed, physically trapped suspect in the back four times is excessive force." Pet. App. 4. Petitioners argue that the panel erred in reaching this conclusion because unlike in *Garner*, where the officer "had no articulable basis to think Garner was armed," 471 U.S. at 21, here, the officers "undisputedly did have an articulable basis to reasonably believe Mr. Contreras was armed." Pet. 23.

Despite Petitioners' repeated claims that the officers had probable cause to believe Mr. Contreras was armed, the jury rejected this conclusion as a matter of fact based on all the testimony at trial. Petitioners cannot relitigate this issue in this Court. During the chase, the officers never saw a gun or anything that looked like a gun. In fact, the jury reasonably found that the officers lied when they testified that they saw a weapon and shot Mr. Contreras as a result. No gun was ever found despite an exhaustive search of the path of pursuit and the scene of the shooting, including adjoining properties.

Moreover, Petitioners testified that they shot Mr. Contreras because he turned to face them with a gun in his hand pointed at them, but physical and medical evidence revealed that all the shots were to the back of Mr. Contreras's body. The jury rejected their story. Given the facts, the jury acted reasonably in finding that the officers had no probable cause to believe that Mr. Contreras was a serious threat or that he had committed the drive-by shooting.

Petitioners also argue that *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997) supports the officers' decision to use deadly force in these circumstances. As indicated in § IB, *supra*, *Forrett* gives officers no license to use deadly force in the circumstances found by this jury. Moreover, certiorari is not appropriate to resolve an alleged conflict within the Ninth Circuit. Petitioners' petition for en banc review was denied without a single judge requesting a vote. Pet. App. 32.

Forrett had such extreme facts that the issue of excessive force could be decided as a matter of law. Here, unlike in *Forrett*, the officers had very limited information about the van and Mr. Contreras, and whether Mr. Contreras was armed. Respondent ran for approximately 15 seconds before being shot in the back. Moreover, there were no residents or schoolchildren in the vicinity, and respondent never jumped a fence or attempted to elude officers other than by running. Although the officers had "warned Forrett before using deadly force," *Forrett*, 112 F. 3d at 420, here the jury found that no such warning or

even commands were given to Mr. Contreras. Mr. Contreras heard no warnings, commands, or voices throughout the foot pursuit, and the jury was free to discredit Benavides's testimony that he gave such commands. Finally, unlike the suspect in *Forrett*, who was shot when he appeared likely to escape over a fence, here, Mr. Contreras was shot when he was doubled over and stationary in a driveway. Thus, perhaps the most defining aspect of a "fleeing felon" – that the person is actually fleeing and deadly force is necessary to prevent escape – was wholly absent here.

Thus, no case gave Petitioners any indication that they could use deadly force in these circumstances. Indeed, there was substantial evidence at trial that showed that their LAPD training taught them not to use deadly force in these circumstances. SER 136-37, 147-49; see, e.g., *Drummond*, 343 F. 3d at 1062 (holding that departmental training materials relevant to whether a reasonable officer would have been on notice that the force used was objectively unreasonable.); *Hope v. Pelzer*, 536 U.S. at 741-42 (considering department regulations and a Department of Justice advisory opinion in the qualified immunity analysis).

Further, decisions from the courts of appeals following *Garner* and *Graham* provided additional notice to Petitioners that deadly force was inappropriate here. In *Harris v. Roderick*, 126 F. 3d 1189 (9th Cir. 1997), the Ninth Circuit held that it was unreasonable to shoot an armed suspect who had

recently been involved in a shoot-out with officers because he was not escaping and was not given an opportunity to surrender even though it was feasible to do so. *Id.* at 1201 ("The fact that Harris had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight.").

In *Ting v. United States*, 927 F. 2d 1504, 1513 (9th Cir. 1991), the court refused to grant qualified immunity to officers who shot a narcotics suspect who had previously pointed a gun at them, because it was not reasonable to believe the use of deadly force against "an unarmed and injured felon lying or kneeling on the floor surrounded by five heavily armed agents" was lawful. *Id.* at 1511.

In *Vaughan v. Cox*, 343 F. 3d 1323 (11th Cir. 2003), the Eleventh Circuit noted that there are three elements in the *Garner* rule and the failure to satisfy any one of them violates clearly established law: (1) an officer lacks probable cause to believe that a fleeing suspect's flight poses an immediate threat of serious harm to officers or others; (2) the use of deadly force is not necessary to stop the suspect; and (3) it is feasible to warn of the possible use of deadly force but no such warning is given. *Id.* at 1329-30, 1332. The plaintiffs in *Vaughan* satisfied the first element with evidence that they had not menaced officers and had led the officers on a high speed but not otherwise reckless vehicle pursuit. *Id.* at 1330. The second element was supported by evidence the vehicle was easily identifiable and closely followed by

police units. *Id*. at 1330-31. Third, the court found that it was feasible to give a warning before shots were fired. *Id*. at 1331.

Here, Petitioners confronted similar circumstances and were on notice that the use of deadly force was inappropriate for three separate reasons: (1) Mr. Contreras gave no indication that he was in possession of a weapon and was not observed threatening anyone, and both of his hands were visible when he was shot in the back; (2) deadly force was not necessary to stop him because he was stationary and no longer attempting to flee; and (3) no warning was given even though warnings were feasible. Petitioners were on ample notice that their actions violated clearly established constitutional norms.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: October 13, 2015 Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Schonbrun Seplow
Harris & Hoffman, LLP
723 Ocean Front Walk
Venice, California 90291
Tel: (310) 396-0731
Fax: (310) 399-7040
E: hoffpaul@aol.com

John Fattahi
Law Office of John
Fattahi
1301 W. Glenoaks Blvd.
Glendale, CA 91201
Tel: (818) 839-1983
Fax: (818) 561-3600
E: jfattahi@gmail.com

Dale K. Galipo
Law Offices of
Dale K. Galipo
21800 Burbank Blvd.,
Suite 310
Woodland Hills, CA
91367
Tel: (818) 347-3333
Fax: (818) 347-4118
E:
dalekgalipo@yahoo.com

William L. Schmidt
377 W. Fallbrook
Suite 207
Fresno, CA. 93767
Tel: (559) 261-2222
Fax:(559) 436-8163
E:
bschmidt@ncinternet.net

Counsel for Respondent