NO. 16-_____

In the Supreme Court of the United States

MATTHEW MCKNIGHT and
LEWIS COUNTY, WASHINGTON,

Petitioners,

–v–

STEVEN O. PETERSEN, on Behalf of L.P., a Minor and Beneficiary and as Personal Representative of the Estate of Steven V. Petersen,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Mullenix v. Luna*, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015), this Court issued a per curiam reversal of a denial of qualified immunity. The instant case presents circumstances equally compelling. Lewis County Sheriff's Deputy Matthew McKnight confronted suspect Steven V. Petersen, who was reported as forcibly attempting to break into a residence and carrying a large knife. Petersen kept his hand concealed and ignored officer directions to show his hands and to go to the ground. Petersen came at Deputy McKnight who fired in self defense. The Circuit Court, reversing the district court, held that Deputy McKnight was not entitled to qualified immunity. The questions presented are:

1. Viewing the facts from Deputy McKnight's perspective, did he act reasonably, under the Fourth Amendment, when an officer in his situation would believe that the suspect was armed, was suspected of a violent crime, refused to show his concealed hand, refused commands, and came at the officer?

2. When existing precedent did not clearly establish that the use of deadly force was unlawful under the particular situation faced by the officer, and the Ninth Circuit's analysis contravened this Court's explicit directions, was Deputy McKnight entitled to qualified immunity?

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INTRODUCTION

Petitioners respectfully request that this Court reverse the Ninth Circuit's denial of qualified immunity.

OPINIONS BELOW

The October 3, 2016, Memorandum of the Ninth Circuit was electronically reported in *Petersen v. Lewis County, et al.*, 2016 WL 5682718 (9th Cir. 2016), and is reproduced in the Appendix at pages 1a-4a. The February 13, 2014, district court Order Granting Summary Judgment was electronically reported in *Petersen v. Lewis County, et al.*, 2014 WL 584005 (W.D. WA 2014), and is reproduced in the Appendix at pages 5a-18a.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit had appellate jurisdiction because the district court's order granting summary judgment disposed of all of the claims in the case and was a final decision within the meaning of 28 U.S.C. § 1291.

The Ninth Circuit Court of Appeals denied a timely filed petition for rehearing en banc on November 15, 2016. (Appendix ("App.") at 19a-20a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

- **42 U.S.C. § 1983**

The underlying action was brought by the Respondent pursuant to 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- **U.S. Const. Amend. IV.**

Respondent has alleged that Petitioners violated the decedent's rights under the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

A. Introduction

This case involves the applicability of the qualified immunity defense to a Fourth Amendment excessive force claim. On June 20, 2011, after 2:00 a.m., Deputy Matthew McKnight saw a suspect matching the description of Steven V. Petersen who was suspected of attempting to break into an occupied mobile home and having stabbed a knife through the door of the home. Instead of complying with Deputy McKnight's instructions to show his concealed hand and to get down, Steven V. Petersen was verbally defiant and came toward Deputy McKnight. Fearing for his safety, Deputy McKnight fired his service pistol and fatally wounded Steven V. Petersen. The Ninth Circuit held that Deputy McKnight did not have probable cause to use deadly force and acted in violation of clearly established law that an officer must have probable cause to believe a person poses a threat of serious harm to the officer or others before using deadly force.

The Ninth Circuit's decision contradicts this Court's ruling in *Mullenix v. Luna*, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015), by applying a generalized test for qualified immunity instead of framing the inquiry based upon the particular facts faced by Deputy McKnight at the time he was forced to fire his weapon. In so doing, the Ninth Circuit ignored well-settled law that qualified immunity shields officers from personal liability unless existing precedent has established "beyond debate" that the officer's conduct was improper under the actual circumstances the officer faced.

The Ninth Circuit also failed to identify any existing precedent considering the use of force against a confrontational suspect, who is believed to be armed, is suspected of a violent crime, and who came at the officer. The end result is a ruling that fails to provide actual guidance to officers in the field and, which, if left unreviewed, will place officers and civilians in danger because officers will be hesitant to use any force.

This is especially problematic in our current climate where officers are facing an increasing risk of physical attack by suspects. As such, this case presents issues of exceptional national importance justifying acceptance of review.

B. Facts

Shortly before 2:00 a.m. on June 20, 2011, Jared Brockman and Anita Mecca called 911 from Mecca's Napavine, WA mobile home to report a man trying to break into the home. (App.7a). *See also*, Supplemental Excerpts of Record (hereinafter "SER") 67 and 250.

Jared Brockman informed the dispatcher that " . . . we got a guy trying to break into our house here." SER 80-81 and 250; (App.7a). Mr. Brockman identified Steven Petersen as the man attempting to enter the home. SER 80-81 and 250; (App.7a). He also described what he believed Petersen was wearing. (App.7a). Mr. Brockman indicated that Mr. Petersen was attempting to " . . . kick the door down." SER 80-81 and 250; (App.7a). Dispatch was also informed that Mr. Petersen had been living at that address with Anita Mecca, who was the primary resident at that address, but had been asked to leave the house and not return. SER 80-81 and 250. Ms. Mecca also identified Mr. Petersen to the 911 operator. *Id.*

During the call, Mr. Brockman and Ms. Mecca armed themselves with a baseball bat. Ms. Mecca indicated to the 911 dispatcher that Mr. Petersen was hitting Mr. Brockman's truck. SER 80-81 and 250; (App.7a). In the background of the 911 call banging and yelling are audible. SER 81 and 250. Ms. Mecca and Mr. Brockman informed the 911 operator that they were physically blocking the door in an attempt to prevent Mr. Petersen from entering the home. SER 81-82 and 250. During the call, Ms. Mecca also indicated that Mr. Petersen was stabbing a large knife through the door in an attempt to stab Mr. Brockman. SER 82 and 250; (App.7a). The 911 call ended when Napavine Police Officer Noel Shields arrived at the home. SER 83 and 250. By the time police had arrived, Petersen had fled the scene. (App.7a). While at the scene, a responding officer confirmed that a large knife had been used to stab the front door. (App.7a).

During the course of the phone call, dispatch began relaying information to law enforcement officers in the area. SER 80-84. Deputy Matt McKnight, who was on patrol in Onalaska, WA, heard the dispatch and responded. SER 111:18-23; (App.7a). Also responding to the call were Lewis County Sheriff's Sergeant Patrick Smith and Deputies Kevin Anderson and Gabe Frase. SER 183-187 and 191-199.

While the officers were responding, the 911 dispatcher indicated over primary radio frequency that:

- The burglary suspect, Steven Petersen, was known to the callers;
- Mr. Petersen was trying to kick down the door;
- Mr. Petersen might be armed with a knife; and
- Mr. Petersen may have attempted to stab one of the callers by stabbing the knife through the front door of the residence.

(App.24a-26a), SER 83-85, 178:8-179:2 and 250.

Dispatch then advised that all was quiet outside the residence, and that Mr. Petersen may have left wearing a camouflage hooded jacket and light, or possibly white, colored jeans. SER 84. In addition, after arriving at the site of the alleged attempted burglary, Napavine Police Officer Noel Shields radioed, "By the marks in the door, he's got a large knife with him." SER 85:19-23 and 192; (App.7a). He further advised that he saw foot tracks through the wet grass headed toward Meadow Lane. SER 121 and 85:6-10.

Deputy McKnight was sent to the intersection of 3rd and Vine in Napavine to assist in containment until a K-9 unit could respond. (App.7a); SER 112:8-11 and 85:25-28. After confirming there was a person in the intersection behind him, Deputy McKnight turned around and drove down the block to the intersection of 2nd and Vine. (App.7a); SER 112-113. He was in a marked vehicle and in his Sheriff's Deputy's uniform. SER 200-206. Deputy McKnight used his spotlight to illuminate the intersection and saw a person wearing dark clothing and a hoodie. SER 113-114 and 86:20-22; (App.7a). Deputy McKnight radioed that he would be going "out with one," and stepped out of his vehicle and identified himself. (App.7a-8a); SER 86:27-28 and 115:22. The person in the road matched the description given for Petersen, and Deputy McKnight correctly believed the person to be Petersen. (App.7a). Because he believed that the person was the attempted robbery suspect and was armed with a knife, Deputy McKnight stood just outside of his vehicle in the "V" created by the open car door and the car. (App.7a-8a); SER 115:21-116:6.

Deputy McKnight made contact with Petersen and identified himself as a police officer. (App.8a). Petersen had one hand in his pocket, and Deputy McKnight verbally commanded him to show both of his hands. (App.8a); SER 116. Petersen ignored the commands and continued to pace in the intersection. (App.8a); SER 115-116. As a result of the erratic behavior and failure to comply, Deputy McKnight drew his gun. (App.8a). Deputy McKnight continued to verbally command Petersen to show his hands, assuring Petersen that he (Deputy McKnight) just wanted to talk to him. (App.8a); SER 116-117. Peter-

sen continued to ignore the commands, at one point stepping toward Deputy McKnight. (App.8a); SER 116-117. Therefore, Deputy McKnight ordered Petersen to get on the ground. (App.8a). Again, Petersen refused to comply and said, "that ain't going to happen, buddy." (App.8a); SER 116.

According to Deputy McKnight, Petersen's body posture changed and Deputy McKnight saw the muscles in Petersen's arm flex. (App.8a). Petersen leaned forward and came toward McKnight. (App.8a). Because Deputy McKnight believed that Petersen was going to stab him, he shot Petersen four times, killing him instantly. (App.8a). Petersen, was pronounced dead shortly thereafter. SER 65 and 158. At the time he was shot, Petersen was approximately 20-25 feet from Deputy McKnight's patrol car. (App.8a). Ultimately, it was determined that Petersen was not armed at the time and he did not have anything in his concealed hand. (App.8a).

Contemporaneously, while investigating the alleged attempted burglary, Officer Noel Shields heard the gunshots. SER 122. Officer Shields began running toward the sound of the shots, following the foot tracks he had seen in the grass. SER 122-123 and 86-87. Upon his arrival at the scene, Officer Shields also identified the deceased as Steven Petersen, whom he knew from prior encounters. SER 122.

Neighborhood witnesses corroborate Deputy McKnight's account of the incident. Witness Andera Ryan stated that she awoke at approximately 2:00 a.m. to use the restroom. SER 137-139 and 155-156. Her dog was whining like he wanted to go outside. *Id.* She noticed a parked car outside, but did not

realize it was a police officer's car. *Id.* She also observed someone standing by the car. *Id.* As she watched through the window, she realized that it was an officer, and saw that he was pointing a gun at another man. SER 156; (App.8a). She first saw the man moving away from the officer, but then saw the man turn and "rush" toward the officer. SER 156; (App.8a). She heard three shots and saw the muzzle flashes. SER 137-139 and 156.

Witness Carly Pinkerton heard yelling outside and went to the window to see what was happening. SER 140-142 and 146-148. She heard a male voice saying, "stop, let me see your hands, stop, let me see your hands," four or five times. *Id.*; (App.8a). She then heard four gunshots. SER 140-142 and 146-148. James and Debra Dills woke up at about 2:05 a.m. after hearing three loud pops, which sounded like gunshots. SER 143-145 and 146-148.

Witness Victor Madaris was standing outside his cousin's house, in the driveway. SER 149-151. He heard yelling, then he heard an officer yell, "get down" twice, and then three or four gun shots. *Id.*; (App.8a). Victor's cousin, Jake Madaris, heard yelling, dogs "going crazy," and then three or four gun shots. SER 152-154.

C. District Court Opinion

Petersen's estate brought suit against Deputy McKnight and Lewis County and asserted the following claims: 1) 42 U.S.C. § 1983 liability for allegedly violating Petersen's Fourth Amendment rights through the use of excessive force and violating the Fourteenth Amendment rights of Petersen's son; 2) *Monell* claims

against Lewis County; and 3) negligence claims against both Deputy McKnight and the County. (App.6a). The district court dismissed all claims on summary judgment. (App.5a-18a).

Relying on *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001), the district court held that "[t]he relevant inquiry [was] whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" (App.12a (citing to and quoting *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001)). As a result, the district court granted qualified immunity because there was no Supreme Court or circuit court precedent that would have given Deputy McKnight fair warning that he could not use deadly force when confronted by a person who was suspected of trying to break into an occupied home, who was believed to be armed with a knife, who repeatedly ignored commands, and who came toward Deputy McKnight. (App.12a-13a). Additionally, the district court dismissed all other counts against McKnight and the County (App.13a-18a).

D. Ninth Circuit Memorandum Opinion[1]

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[1] As noted above, the Estate of Petersen also alleged other constitutional violations as well as various state law claims. The Ninth Circuit affirmed dismissal of all claims except the Fourth Amendment claim and the state law negligence claim. (App.1a-4a). If this Court determines that Deputy McKnight acted reasonably, the state law negligence claim should also be dismissed because an officer is entitled to qualified immunity under Washington law where the officer is carrying out a statutory duty, pursuant to procedures dictated by statute and superiors, and acts reasonably. *Guffey v. State*, 103 Wn.2d 144, 152, 690 P.2d 1163 (1984), *impliedly overruled on other grounds* by *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991); *McKinney*

The Ninth Circuit reversed the grant of qualified immunity. (App.2a). In reaching its conclusion, the Ninth Circuit stated that " . . . even if McKnight has reasonable suspicion to stop Petersen's son under *Terry v. Ohio* . . . McKnight did not have probable cause to use deadly force . . . ." (App.2a).

The Ninth Circuit specifically held the district court erred by citing the absence of clearly established federal law based on the application of a general statement of the right set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985) as cited in two Ninth Circuit opinions:

> McKnight did not have probable cause to use deadly force and therefore acted in violation of clearly established law. *See Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1119 (9th Cir. 2005) (noting that, by 2000, reasonable officers would be on notice that using deadly force "required probable cause (supported by objectively reasonable facts) to believe that [a plaintiff] posed threat of serious physical harm" to the officers or others); *see also A.K.H. v. City of Tustin*,— F.3d—2016 WL 4932330, at *6 (9th Cir. 2016) (relying on *Tennessee v. Garner*, 471 U.S. 1 (1985), as clearly established federal law when affirming the denial of qualified immunity in a deadly shooting case.

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v. City of Tukwila, 103 Wn. App. 391, 409, 13 P.3d 631 (2000). There is no dispute that Deputy McKnight was carrying out a statutory duty according to procedures dictated to him by statute and/or his superiors. The only question is whether his conduct was reasonable.

(App.2a).

The Court also held there were questions of fact as to the reasonableness of Deputy McKnight's use of force. (App.2a). Because it found issues of fact as to the reasonableness of Deputy McKnight's conduct, the Ninth Circuit also reversed the district court's summary dismissal of the state-law negligence claims. (App.3a-4a). It affirmed dismissal of all other claims. (App.3a-4a).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT OPINION DISREGARDS THIS COURT'S OPINION IN *MULLENIX V. LUNA*

"The core purpose of § 1983 is 'to provide compensatory relief to those deprived of their federal rights by state actors.'" *Hardy v. N.Y.C. Health & Hosps. Corp.*, 164 F.3d 789, 795 (2d Cir.1999) (quoting *Felder v. Casey*, 487 U.S. 131, 141, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988)). Because the threat of § 1983 suits could negatively impact a government actor's ability to do his or her job, the doctrine of qualified immunity was developed. *See Wyatt v. Cole*, 504 U.S. 158, 167, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). Government officials and law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances. *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692 (1999).

Qualified immunity is the rule, not the exception. *See*, *e.g.*, *Rowe v. Schrieber*, 139 F.3d 1381, 1385 (11th Cir. 1998) (citing *Harlow v. Fitzgerald*, 457 U.S. 800,

816, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) and others). A law enforcement officer is entitled to qualified immunity unless "existing precedent [has] placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *See Malley v. Briggs*, 475 U.S. 335, 335, 1106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). To overcome qualified immunity, a plaintiff must plead and prove both "'(1) that [a defendant] violated a statutory or Constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The formulation and application of the appropriate test for qualified immunity under the Fourth Amendment is undisputedly a question of national import. Absent national uniformity in the formulation and application of the test for qualified immunity, it is impossible for officers to determine whether their conduct comports with or violates another's constitutional rights.

Here, the Ninth Circuit applied a generalized statement of the law to determine that the right at issue was clearly established. In so doing, the Ninth Circuit's opinion directly conflicts with this Court's precedent including, but not limited to, this Court's opinion in *Mullenix v. Luna*, 136 S.Ct. 305, 193 L.Ed. 2d 255 (2015).

The Ninth Circuit's ruling creates an unnecessary and unacceptable risk to officers and others because

the ruling does not provide clear guidelines for when and what force is appropriate under a given circumstance. As a result, officers may hesitate in responding to a threat. This endangers themselves and others. Given the current climate where officers face physical threats at an increasingly alarming rate[2], acceptance of this petition is appropriate to correct the Ninth Circuit's error and provide the proper guidance to officers for their own protection and the protection of others.

A. The Ninth Circuit Failed to Identify a Clearly Established Particularized Right That Was Violated

Whether a right is clearly established is judged in the context of the specific case. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (1999)). This Court has repeatedly emphasized this in its qualified immunity analysis as evidenced by the following quote from *Ashcroft v. al-Kidd*:

> We have repeatedly told courts—and the Ninth Circuit in particular, *see Brosseau v. Haugen*, 543 U.S. 194, 198-199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) *(per curiam)*—not to define clearly established law at a high level of generality. *See also*, *e.g., Wilson*,

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[2] *See*, *e.g.*, 2015 Statistics on Law Enforcement Officers Killed and Assaulted (Fall 2016), online at: https://ucr.fbi.gov/leoka/2015/officers-feloniously-killed/felonious_topic_page_-2015; https://ucr.fbi.gov/leoka/2015/officers-assaulted/assaults_topic_page_-2015 (all Internet materials as last visited January 31, 2017).

> *supra*, at 615, 119 S.Ct. 1692, 143 L.Ed.2d 818; *Anderson*, *supra*, at 639-640, 107 S.Ct. 3034, 97 L.Ed.2d 523; *cf. Sawyer v. Smith*, 497 U.S. 227, 236, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established. *See Saucier v. Katz*, 533 U.S. 194, 201-202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Wilson*, *supra*, at 615, 119 S.Ct. 1692, 143 L.Ed.2d 818.

Ashcroft, 131 S.Ct. at 2084.

In other words, using a non-particularized test to determine whether the law is clearly established is improper because it does not and cannot provide sufficient notice to officers when in the line of duty. Yet, that is exactly what the Ninth Circuit did in this matter when it held:

> McKnight did not have probable cause to use deadly force and therefore acted in violation of clearly established law. *See Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1119 (9th Cir. 2005) (noting that, by 2000, reasonable officers would be on notice that using deadly force "required probable cause (supported by objectively reasonable facts) to believe that [a plaintiff] posed threat of serious physical harm" to the officers or others).

(App.3a) (emphasis added).

This formulation of the right at issue is too broad and does not provide the notice necessary to deny qualified immunity as this Court has repeatedly advised. *See*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (holding that the right to be free from warrantless searches absent probable cause and exigent circumstances did not provide sufficient warning of what circumstances would constitute probable cause and exigent circumstances in a particular case); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (noting that one could "plausibly" assert that any violation of the Fourth Amendment is "clearly established" because "it is clearly established that the protections of the Fourth Amendment apply to actions by the police[,]" but reemphasizing that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). In fact, the very test applied by the Ninth Circuit has itself been repeatedly rejected by this Court. *See*, *e.g.*, *Mullenix v. Luna*, 136 S.Ct. 305, 308-309, 193 L.Ed.2d 255 (2015).

In *Mullenix*, this Court rejected the Fifth Circuit's framing of clearly established law where the Fifth Circuit held it was clearly established an officer could not use deadly force against a fleeing felon who did not pose a threat of harm to the officer or others because the formulation was too broad. *Id.* at 308-309 The *Mullenix* Court pointed out that it had rejected an almost identical statement of the question in an earlier opinion:

> In *Brosseau*, . . . the Ninth Circuit denied qualified immunity on the ground that the officer had violated the clearly established

> rule, set forth in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Haugen v. Brosseau*, 339 F.3d 857, 873 (C.A.9 2003) (internal quotation marks omitted). This Court summarily reversed, holding that use of *Garner*'s "general" test for excessive force was "mistaken." *Brosseau*, 543 U.S., at 199, 125 S.Ct. 596.

Id. at 309 (emphasis added).

General statements of the law can only "clearly establish" the law "in an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). This is not such a case as evidenced by the fact that the Ninth Circuit did not even determine that the force used was excessive. Instead, it held that there were questions of fact as to whether the force was excessive. Thus, a reasonable officer could have concluded that deadly force was necessary. And, officers who "reasonably but mistakenly conclude probable cause is present" are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam). The fact that a knife was ultimately not present appears to have influenced the Ninth Circuit's opinion. However, such an analysis is inverted. The proper analysis is to view the circumstances from the officer's point of view.

B. It Was Not Clearly Established That Deadly Force Was Prohibited Under the Circumstances Faced by Deputy McKnight

Qualified immunity applies unless existing precedent has placed the issue beyond debate. *See City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1774, 191 L.Ed.2d 856 (2015) (citing and quoting *al-Kidd*, 563 U.S. at 741). In other words, "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite'" that every reasonable officer would have known he was violating the right. *Id.*

In support of its decision that the law was clearly established, the Ninth Circuit cited to *Blanford v. Sacramento Cty.*, 406 F.3d 1110 (9th Cir. 2005) and *A.K.H. v. City of Tustin*, 837 F.3d 1005 (9th Cir. 2016). (App.3a). This Court has not explicitly ruled that controlling circuit precedent can make the law clearly established. *Sheehan*, 135 S.Ct. at 176. Even if it could, neither of the cases cited by the Ninth Circuit would have put Deputy McKnight, or any officer, on notice that Deputy McKnight's conduct would violate a Constitutional right.

In *Blanford* the Ninth Circuit held that officers were entitled to qualified immunity for shooting and maiming the plaintiff, who had been carrying a sword. 406 F.3d at 1119. Specifically, the officers had cause to believe that the plaintiff posed a serious danger to the officers and the people in the house he was trying to access, because he failed to heed warnings or commands to put down the weapon. *Id.* at 1116. At the time he was shot, the suspect was not approaching anyone, was about 20 to 25 feet away

from the officers, and was not holding the sword in any threatening manner. *Id.* at 1112-13. Furthermore, the plaintiff had likely been unresponsive to the commands because he was wearing headphones, which the officers only discovered after the fact. *Id.* The Court held that it was objectively reasonable for the officers to fire when considering all the facts and the perspective of the deputies at the time. *Id.* at 1117-19.

If anything, the holding in *Blanford* would have told Deputy McKnight that his conduct was appropriate. Like the situation in *Blanford*, Deputy McKnight was faced with a suspect who had failed to heed warnings and who was 20 to 25 feet away from him. Unlike *Blanford*, Petersen actually came toward Deputy McKnight. At that point in time, Deputy McKnight reasonably believed that Petersen was armed and that Petersen had attempted a violent crime earlier in the evening. Accordingly, there is nothing in *Blanford* clearly establishing that Deputy McKnight's use of force was inappropriate.

A.K.H. v. City of Tustin also does not provide the necessary advisement because it is too factually distinguishable. In *A.K.H.*, an officer responded to a domestic violence/theft call after the suspect had left the scene of the incident. 837 F.3d at 1011. The officer was aware that the suspect had supposedly taken a cell phone, but had no information to indicate that the suspect was armed. *Id.* at 1011-12. In fact, the dispatcher had advised that the suspect was "not known to be armed" and/or "not known to carry weapons." *Id.* The suspect did not immediately stop when confronted by the officer, put his hand in his

pocket, and refused to "get down" or remove his hand when ordered, but never really attempted to flee. *Id.*

The evidence showed that less than a second had elapsed between the officer ordering the suspect to show his hand and the officer shooting. *Id.* Moreover, the evidence showed that the suspect was in the process of taking his hand out when he was shot. *Id.* It was under these circumstances that the Ninth Circuit ruled the officer was not entitled to qualified immunity and that he had violated the suspect's Fourth Amendment rights. *Id.* at 1012-13. In reaching its conclusion, the *A.K.H.* Court found it compelling that the officer had no basis to believe the suspect was armed. *Id.* at 1013.

This situation is wholly different from that faced by Deputy McKnight. Petersen was suspected of a violent crime in the area where he was found. Deputy McKnight also had a reasonable basis to believe that Petersen was armed because it had been reported that Petersen was likely armed and that he had tried to stab through a door with people behind it earlier in the evening. Moreover, Petersen came at Deputy McKnight. Simply put, there is no way that the *A.K.H.* holding would have put Deputy McKnight on any type of notice. This is especially true given the Ninth Circuit's statement in *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), where, in discussing a 2009 officer-involved shooting incident, the Ninth Circuit stated as follows:

> This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected

> of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat.

Id. at 838.

If the above was true in a 2009 shooting, then how could it be clearly established that Deputy McKnight's conduct would violate a constitutional right where Petersen kept his hand concealed, was reasonably suspected of being armed with a knife, and made a harrowing gesture of coming at Deputy McKnight? Simply put, it could not. Examining two unpublished Ninth Circuit decisions makes this abundantly clear.

In *Dague v. Dumesic*, 286 Fed.Appx. 395 (9th Cir. 2008), the Ninth Circuit granted qualified immunity and found no constitutional violation where officers shot and killed a suspect based upon their perception that the suspect made a threatening movement with his concealed hand. *Id.* at 396. The *Dague* Court held that the officers reasonably believed the suspect was an immediate threat because of his conduct (concealing his hand) and because of earlier statements that he had something that could force the officers to do something and that it would be easy to provoke officers to shoot him. *Id.*

Similarly, in *Corrales v. Impastato*, 650 Fed.Appx. 540 (9th Cir. 2016), the Ninth Circuit held that an officer did not violate a constitutional right and was entitled to qualified immunity where he used deadly force against a suspect who pulled a previously concealed hand from his waistband while coming at the officer. *Id.* at 541. At the time of the shooting, the officer in *Corrales* was undercover and attempting to

make an undercover drug buy. *Id.* The Court found the officer reacted reasonably in shooting the suspect because the officer was reacting to the threat of the rushing suspect who pulled his concealed hand from his waistband while forming his hand into the shape of a gun. *Id.*

The situation faced by Deputy McKnight was similar to the situations faced by the officers in both *Dague* and *Corrales*. He was faced with a suspect he reasonably believed to be armed based on all information he possessed, who was defiant and refused to comply with repeated commands, came at Deputy McKnight in an aggressive manner, and who kept his hand concealed despite orders to show his hand. Yet, here, the Ninth Circuit denied qualified immunity.

This Court has stated, "[i]f judges thus disagree on a constitutional question, it is unfair to subject [a police officer] to money damages for picking the losing side of the controversy." *Reichle v. Howards*, 132 S.Ct. 2088, 2096, 182 L.Ed.2d 985 (2012). Here, the Ninth Circuit cannot even agree with itself. The inconsistent rulings and resultant confusion for police officers necessitates acceptance of review.

II. THE NINTH CIRCUIT'S RULING CREATES A CIRCUIT SPLIT

The Ninth Circuit's holding that Deputy McKnight's conduct violated clearly established law creates a circuit split. Specifically, it creates a split with the Fourth Circuit's opinion in *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) and the Fifth Circuit's opinion in *Salazar-Limon v. City of Houston.* 826 F.3d 272 (5th Cir. June 16, 2016).

In *Anderson v. Russell*, an officer was approached by a patron at a mall because the patron believed that Anderson appeared to have a gun under his sweater. 247 F.3d at 128. The officer spent several minutes observing Anderson and believed that Anderson was armed based upon a visible bulge under Anderson's clothing. *Id.* Accordingly, the officer approached with another officer and had Anderson get on his knees and raise his hands. *Id.* Anderson initially complied, but then started to lower his hands purportedly to try and turn off a Walkman in his back pocket. *Id.* Because he believed Anderson was reaching for a weapon, the officer shot Anderson three times. *Id.* It was later determined that Anderson was not armed. *Id.*

The Fourth Circuit ultimately concluded that the officer's conduct was not in violation of the Fourth Amendment and affirmed the trial court's judgment as a matter of law that the officer was entitled to qualified immunity. *Id.* at 129. The *Anderson* Court, relying on numerous Fourth Circuit cases, found that the officer reasonably believed his life was in danger based upon the report of the mall patron, the officer's belief that the concealed object was a gun, and the fact that Anderson reached toward the concealed object all of which combined to make it reasonable for the officer to believe Anderson posed a deadly threat. *Id.* at 131-132.

Similarly, Deputy McKnight reasonably believed Petersen was armed because of the civilian report and report from the officer at the mobile home. Deputy McKnight could not know for certain because Petersen kept his hand concealed and refused to comply

with instructions to show his hands. Thus, it was reasonable for Deputy McKnight to believe Petersen was armed at the time Petersen came at him. Like the officer in *Anderson*, Deputy McKnight was entitled to qualified immunity.

In *Salazar-Limon*, an officer spotted a truck driving erratically and believed that the driver may have been intoxicated. 826 F.3d at 275. He stopped the truck and, after interactions with the driver, went to arrest him. *Id.* When he tried to handcuff the suspect, the suspect resisted, struggled with the officer, and began to walk away. *Id.*

The officer ordered the suspect to stop and the suspect did not comply. *Id.* Instead, he took a few more steps, turned left, and reached toward his waistband, which was at least partially obscured by an untucked shirt. *Id.* Because the officer believed that the actions were consistent with someone reaching for a weapon, the officer shot the suspect. *Id.* It was later determined that the suspect was not armed. *Id.* Nevertheless, the Fifth Circuit held that the officer's conduct was reasonable under the Fourth Amendment and that the officer was entitled to qualified immunity because, under the totality of the circumstances, the officer's fear for his safety was reasonable. *Id.* at 279.

Here, Deputy McKnight was not faced with a suspect who was walking away. Instead, he was faced with a suspect that was coming toward him. He was also not faced with a suspect who, at most, was suspected of driving under the influence and resisting arrest. Deputy McKnight was facing a suspect who was believed to have stabbed a knife into or through

a door with people behind the door, who refused to show his hand, was defiant, and refused to follow commands.

Like the officers in *Salazar-Limon*, Deputy McKnight was also faced with someone who he reasonably believed to be armed. If the officer in *Salazar-Limon* was entitled to qualified immunity because his conduct was reasonable and not an excessive use of force, it follows that Deputy McKnight's use of force was reasonable and he was entitled to qualified immunity.

The Ninth Circuit's denial of qualified immunity injects unnecessary uncertainty into qualified immunity law and places officers and others in danger because an officer faced with the situation faced by Deputy McKnight will not know whether and/or what force to use given the conflicting law. Moreover, the conflict between the Ninth Circuit's holding and the holdings in *Anderson* and *Salazar-Limon* evidences that the right at issue was not clearly established. *See Reichle v. Howards*, 132 S.Ct. at 2096.

CONCLUSION

It is of paramount importance that police officers are provided with clear direction regarding the use of force. The Ninth Circuit's failure to apply the tests mandated by this Court unnecessarily muddies the waters on when officers are constitutionally justified in their application of force. Application of the proper tests reveals that Deputy McKnight was entitled to

qualified immunity. Additionally, the Ninth Circuits opinion injects further confusion to the issues because it conflicts with existing precedent from the Fifth Circuit.

In situations where officers must make an instantaneous determination regarding their use of force, the uncertainty created by the Ninth Circuit's opinion places both officers and civilians at risk. This is especially problematic in our current climate where officers are facing an increasing risk of physical attack by suspects. Granting of this Petition is necessary to rectify these issues, to ensure uniform application of the law, to apply the appropriate standards, and to provide the guidance necessary to law enforcement for their own protection and those of the people they serve.

Respectfully submitted,

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FEBRUARY 13, 2017

APPENDIX TABLE OF CONTENTS

MEMORANDUM* OPINION
OF THE NINTH CIRCUIT
(OCTOBER 3, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN O. PETERSEN, on Behalf of L.P., a Minor and Beneficiary and as Personal Representative of the Estate of Steven V. Petersen,

Plaintiff-Appellant,

v.

LEWIS COUNTY, a Political Subdivision of the State of Washington; MATTHEW MCKNIGHT,

Defendants-Appellees.

No. 14-35201

D.C. No. 3:12-cv-05908-RBL

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Before: HAWKINS, McKEOWN, and DAVIS,**
Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Andre M. Davis, Senior Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

Steven Petersen appeals the district court's grant of Lewis County's ("the County") and Matthew McKnight's motion for summary judgment on qualified-immunity grounds in Petersen's 42 U.S.C. § 1983 lawsuit arising from the shooting of his son. We have jurisdiction under 28 U.S.C. § 1291, and we review de novo the grant of summary judgment. *See Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135 (9th Cir. 2001). We affirm in part, reverse in part, and remand.

The district court correctly found that there were material factual disputes regarding the reasonableness of McKnight's actions as to Petersen's excessive force claim. However, viewing the facts in the light most favorable to Petersen, even if McKnight had reasonable suspicion to stop Petersen's son under *Terry v. Ohio*, 392 U.S. 1 (1968), McKnight did not have probable cause to use deadly force and therefore acted in violation of clearly established law. *See Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1119 (9th Cir. 2005) (noting that, by 2000, reasonable officers would be on notice that using deadly force "required probable cause (supported by objectively reasonable facts) to believe that [a plaintiff] posed a threat of serious physical harm" to the officers or others); *see also A.K.H. v. City of Tustin*, ___F.3d___, 2016 WL 4932330, at *6 (9th Cir. 2016) (relying on *Tennessee v. Garner*, 471 U.S. 1 (1985), as clearly established federal law when affirming the denial of qualified immunity in a deadly shooting case). In citing the absence of clearly established federal law, the district court therefore erred in granting qualified immunity to McKnight on the excessive force claim.

The district court appropriately granted summary judgment to the County on Petersen's municipal liability claim. Petersen failed to present evidence that any of the County's policies were a "moving force" behind the shooting. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Additionally, Petersen failed to identify deficiencies in McKnight's training that establish a showing of deliberate indifference. *See Connick v. Thompson*, 563 U.S. 51, 61 (2011) ("[A] municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (alteration in original))).

Likewise, the district court appropriately granted summary judgment to the County and McKnight on Petersen's substantive due process claim because he failed to show that McKnight's actions "shock[] the conscience." *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (outlining the standard for executive action that violates substantive due process).

However, summary judgment should not have been granted for McKnight on the state-law negligence claim because the reasonableness of McKnight's actions raises factual issues that should be left to a jury. *Gallegos v. Freeman*, 291 P.3d 265, 277 (Wash. Ct. App. 2013) ("An officer is entitled to state law qualified immunity where the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) *acts reasonably*." (emphasis added) (internal quotation marks and citations omitted)). The public duty doctrine does not bar Petersen's claim because "[t]he [public duty] doctrine provides only that an individual has no cause of action

against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care." *Coffel v. Clallam Cty.*, 735 P.2d 686, 690 (Wash. Ct. App. 1987). Therefore, summary judgment was also improperly granted for the County on Petersen's vicarious liability claim. *See LaPlant v. Snohomish Cty.*, 271 P.3d 254, 256 (Wash. Ct. App. 2011) (holding that a county may be vicariously liable for officers' negligent actions taken within the scope of their employment).

Finally, the district court appropriately granted summary judgment for the County on Petersen's state-law claims for failure to train and negligent supervision because there is no indication that McKnight acted outside the scope of his employment. *Id.* at 257 ("Under Washington Law, . . . a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of the employment.").

Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ORDER OF DISTRICT COURT GRANTING SUMMARY JUDGEMENT (FEBRUARY 13, 2014)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN O. PETERSEN,

Plaintiff,

v.

LEWIS COUNTY and MATTHEW MCKNIGHT,

Defendants.

Case No. C12-5908 RBL

Before: Honorable Ronald B. LEIGHTON,
United States District Judge

This case is the result of Lewis County Sheriff's Deputy Matthew McKnight shooting and killing Steven V. Petersen ("Steven") on June 20, 2011. Steven was suspected of forcibly attempting to break into an acquaintance's mobile home and was thought to be armed with a large knife. When McKnight found and confronted Steven, Steven started to pace back and forth, refused to take one of his hands out of his pocket, and repeatedly ignored McKnight's commands to get on the ground. The brief stand-off came to an end when McKnight shot and killed Steven because he

thought that Steven was charging towards him. It was discovered after the shooting that Steven did not actually have a knife when he was killed.

Steven's father, Steven O. Petersen ("Plaintiff"), is the named Plaintiff in this suit as Steven's estate's personal representative and as guardian of Steven's minor son, L.P. McKnight and Lewis County are the Defendants. Plaintiff claims that McKnight is liable under 42 U.S.C. § 1983 for violating Steven's Fourth Amendment rights by using excessive force and for violating L.P.'s Fourteenth Amendment right to the companionship and society of his father by killing Steven. Plaintiff has also asserts § 1983 *Monell* claims against Lewis County for McKnight's alleged constitutional violations and negligence claims against both McKnight and the County. Defendants have asserted a counter-claim for malicious prosecution.

Currently before the Court are Defendants' Motion for Summary Judgment (Dkt. #24) and Plaintiff's Motion for Summary Judgment on Defendants' counterclaims (Dkt. #27). The main issues are whether McKnight violated Steven's Fourth Amendment rights by using excessive force, whether McKnight is entitled to qualified immunity even if he did, and, if McKnight did use excessive force, whether the County is liable for McKnight's transgression.

As explained below, Defendants are entitled to summary judgment even though the reasonableness of McKnight's use-of-force cannot be determined at this stage of the litigation because McKnight is entitled to qualified immunity, and Plaintiff's other claims fail as a matter of law. Plaintiff is entitled to summary judgment on Defendants' counter-claims because he had a good-faith basis for this lawsuit.

I. Background[1]

On June 20, 2011, just before 2:00 a.m., Jared Brockman and Anita Mecca called 911 from Mecca's Napavine, WA mobile home because a man was trying to break into the home. Brockman identified the intruder as "Steven Petersen" and described what he thought Steven was wearing. Steven had apparently been staying at Mecca's mobile home during the weeks prior to the incident, but Mecca had told him to leave and not to return. While Mecca and Brockman were on the phone with the dispatcher, Steven tried to kick the door down, beat on Brockman's truck, and stabbed the front door with a knife. Steven fled from the scene before the police arrived. An officer who responded to the house confirmed that the suspect had used a large knife to stab the front door.

McKnight was one of the officers to respond to Brockman and Mecca's 911 call. McKnight was told to go to the intersection of 3rd and Vine to help establish a perimeter until a K-9 unit arrived. While at that intersection, McKnight saw someone in his rearview mirror a few blocks behind him. McKnight turned his car around and drove closer to investigate. McKnight shined his spotlight on the individual in the middle of the road. Because the person closely matched the suspect's description, McKnight believed that he was the suspect. He was correct.

Believing that Steven was armed with a knife, McKnight informed dispatch that he was "out with

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1 The background section is based on all of the evidence submitted to the Court, but it is worth noting that the Plaintiff is unable to dispute much of what happened because Steven was killed and cannot offer his own version of events.

one," and then he exited his patrol vehicle. He stood in the "V" between the open door and the car and made contact with Steven. When McKnight got out of his car, Steven's right hand was visible, but his left hand was concealed in his sweatshirt pocket. McKnight identified himself as a police officer and told Steven that he needed to see his hands.

Steven started to pace back and forth in the street and kept his left hand hidden inside of his pocket. Because Steven did not comply and was acting erratically, McKnight drew his gun. He continued to repeatedly order Steven to show his hands, but Steven continued to ignore his commands. McKnight ordered Steven to get on the ground, but Steven refused and said, "that ain't going to happen, buddy." McKnight claims that he saw the muscles in Steven's arm flex and his whole body posture change. Then, Steven leaned forward and took two steps towards McKnight. McKnight does not remember how fast Steven moved towards him, but one witness saw the incident from her front window. She claims that Steven "rushed forward." McKnight believed that Steven was going to stab him, so he shot him four times, killing him instantly. A number of witnesses nearby heard McKnight order Steven to get on the ground and show his hands just before the shots were fired. Steven was 20-25 feet away from McKnight's patrol car when he was shot. As it turns out, Steven was unarmed. He may have been holding his wallet in his right hand, but he did not have anything in his concealed hand, and he did not have a weapon in his possession. The entire interaction lasted 1 minute and 11 seconds.

II. Discussion

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy*, 68 F.3d at 1220.

A. Excessive Force Claim

Plaintiff claims that McKnight used excessive force when he shot and killed Steven. He contends as a threshold matter that Steven did not pose an immediate threat to McKnight's safety when he was shot, so deadly force could not have been justified. He also contends that McKnight unreasonably failed to consider and utilize alternative options short of using deadly force, like calling for backup or warning Steven that he would be shot if he did not halt.

Plaintiff's excessive force claim is analyzed under the Fourth Amendment's prohibition of unreasonable searches and seizures. Under the Fourth Amendment, a police officer may only use such force as is "objectively reasonable" under all of the circumstances. *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001) (citing *Graham*, 490 U.S. at 396, 109 S.Ct. 1865).

To determine whether an officer used excessive force, the nature and quality of the intrusion must be weighed against the countervailing governmental interest in the use of force. *Id.* That evaluation must be based on all of the circumstances known to the officer on the scene. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005). Important considerations include (1) the severity of the crime or situation that the officer was responding to; (2) whether the plaintiff posed an immediate threat to the safety of the officer or others; (3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight; (4) the amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary; and (5) the availability of alternative methods to subdue the plaintiff. *Id.*; *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865 (1989). The most important of the articulated factors, especially when an officer has used deadly force, is whether the plaintiff posed an immediate threat to the safety of the officers or others. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th

Cir. 2011) (en banc). The reasonableness of an officer's use of force is highly fact-dependent, so parties are rarely entitled to summary judgment on the merits of an excessive force claim. *Smith*, 394 F.3d at 701.

Plaintiff is unable to dispute that, based on the information available to McKnight at the time, McKnight reasonably believed that Steven had a large knife. The fact that Steven did not actually have a weapon cannot factor into the reasonableness analysis. But the inquiry is not over just because Steven was thought to be armed. "[T]he mere fact that a suspect possesses a weapon does not justify deadly force," *Haugen v. Brosseau*, 351 F.3d 372, 381 (9th Cir. 2003), but threatening an officer with a weapon does, *Hayes v. County of San Diego*, 736 F.3d 1223, 1234 (9th Cir. 2013).

The question presented in this case, therefore, is whether a suspect who is armed with a knife and 20-25 feet away from an officer is an immediate threat to the officer's safety as soon as he starts "rushing" towards the officer and whether it is reasonable for an officer to use deadly force in that situation without first warning the suspect that he will be shot if he does not halt.[2] This is quintessentially a question of fact that cannot be resolved on summary judgment. A reasonable jury could conclude that it was unreasonable

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[2] Plaintiff also argues that McKnight could have called for backup before confronting Steven as a reasonable alternative to using deadly force. Notably, Plaintiff does not argue that McKnight should have called for backup after Steven started to advance towards him and the need to use force materialized. Thus, calling for backup was not an *alternative to* using force at all and McKnight's decision to not call for backup before exiting his vehicle will not be considered in the reasonableness evaluation.

for McKnight to shoot a man that he thought was armed with a knife who was still 20-25 feet away, at least without first warning him that he would be shot. But a reasonable jury could also conclude that McKnight reasonably perceived Steven as a threat to his own safety based on all of the circumstances and that he had to react immediately before Steven was close enough to attack. The Court cannot say as a matter of law whether McKnight's use of force was or was not reasonable.

B. Qualified Immunity

An officer is entitled to qualified immunity unless the right that he or she allegedly violated was "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The relevant inquiry is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001). Thus, even though the Court cannot say as a matter of law whether McKnight's use of force was reasonable, he may nevertheless be entitled to summary judgment if it was not clearly established at the time that his conduct would violate Steven's Fourth Amendment rights.

Plaintiff contends that it would be clear to a reasonable officer that it would not be permissible to shoot an unarmed, unidentified man without warning from 25 feet away who does not pose an immediate threat to the officer. While that may be true, that is not the question before the Court. Again, the inquiry must be based on the facts and circumstances known to McKnight at the time. Most importantly, Steven

was suspected of forcibly attempting to break into an occupied mobile home, was thought to be armed with a large knife, and had repeatedly ignored McKnight's commands to show his hands and get down on the ground. While a jury could conclude that McKnight misjudged the immediateness of the threat that Steven posed to his safety, there was no Supreme Court or circuit precedent at the time that would have given him fair warning that he could not use deadly force without waiting for Steven to advance further. Plaintiff cites no analogous cases to support his assertion that the law was clearly established such that McKnight was on notice that his conduct would violate Steven's rights. Accordingly, McKnight is entitled to qualified immunity.

C. Municipal Liability

A municipality cannot be held liable under § 1983 on a theory of respondeat superior. *Monell v. Dept. of Soc. Servs. Of City of N.Y.*, 436 U.S. 658, 691, 98 S.Ct. 2018 (1978). For a local governmental entity to be liable under § 1983, a plaintiff must show that "'action pursuant to official municipal policy' caused [his or her] injury." *Connick v. Thompson*, ___U.S.___, 131 S.Ct. 1350, 1359 (2011) (quoting *Monell*, 436 U.S. at 691). In this context, "official policy" includes a government's lawmakers' decisions, its policymaking officials' acts, and practices so persistent and widespread that they constitute standard operating procedure. *Id.*

A governmental entity's decision not to train its employees in a particular respect may rise to the level of an official governmental policy for *Monell* liability in limited circumstances. *Id.* To impose § 1983 liability, a municipality's failure to train must amount

to "'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197 (1989)). Deliberate indifference is a stringent standard. *Id.* at 1360. It requires proof that the municipality disregarded a known or obvious consequence of its action or inaction. *Id.* Thus, in this context, a municipality can only be liable for its failure to adequately train its employees if it had actual or constructive notice that its training program would cause its employees to violate citizens' constitutional rights. Ordinarily, a plaintiff must show a pattern of similar constitutional violations by untrained employees to establish deliberate indifference for purposes of failure to train. *Id.*

Plaintiff's first *Monell* claim theory is that Lewis County failed to adequately train McKnight. Specifically, Plaintiff claims that the County failed to train McKnight to provide a verbal warning prior to using deadly force, when feasible, and when to call for backup. Plaintiff has presented no evidence, however, that the County did not train McKnight to provide verbal warnings or that his use of force training was otherwise inadequate. Plaintiff certainly has not presented evidence that shows a pattern of similar constitutional violations, and he has not otherwise established that the County was on notice that its training program would cause one if its employees to violate a citizen's constitutional rights. Plaintiff's assertion that McKnight was not adequately trained is pure speculation, so his failure-to-train *Monell* claim fails as a matter of law.

Plaintiff's next *Monell* claim theory is that the County's official policy was for officers to not give

verbal warnings prior to using deadly force, even when feasible. This argument is, frankly, absurd. Plaintiff points to the fact that the County did not have an explicit policy that a verbal warning should be given before using deadly force, when feasible, and the County's conclusion that McKnight did not violate County policy when he shot Steven to reach its ridiculous conclusion. Just because the County does not have an explicit policy regarding verbal warnings, it does not mean that the County's policy is to not give warnings. Likewise, just because the County found that McKnight's use of force was acceptable even though he did not give a warning, it does not mean that the County has a policy that warnings should not be given when feasible. Indeed, Lewis County Sheriff Steve Mansfield testified that it was the County's policy to give warnings before using deadly force, if feasible. Accordingly, Defendants' motion for summary judgment on Plaintiff's *Monell* claims must be granted.

D. 14th Amendment Claim

Plaintiff has also asserted a § 1983 claim on behalf of Steven's minor son. He claims that McKnight's alleged excessive force violated L.P.'s Fourteenth Amendment right to "companionship and society" of his father.

The Ninth Circuit recognizes the right to a parent or child's companionship and society as a protected liberty interest. *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). To establish an actionable due process violation, a plaintiff must show that the official's conduct that deprived the parent or child of that interest "shocks the conscience." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

When considering whether excessive force shocks the conscience, if the officer makes a snap judgment because of an escalating situation and does not have time to deliberate, then his conduct can shock the conscience only if "he acts with a purpose to harm unrelated to legitimate law enforcement objectives." *Id.*

Here, McKnight's decision to shoot Steven was a snap judgment that he made without the luxury of deliberation. Accordingly, for Plaintiff to have a cognizable Fourteenth Amendment claim, he would have to show that McKnight shot Steven for some illegitimate purpose not related to law enforcement objectives. There is no evidence that McKnight shot Steven for any purpose other than self-defense. Indeed, Plaintiff does not claim otherwise. Plaintiff's Fourteenth Amendment claim thus fails as a matter of law.

E. Negligence Claim

Petersen alleges that McKnight was negligent by "fail[ing] to take reasonable and appropriate steps prior to and during his use of deadly force. . . ." McKnight argues that Petersen's negligence claims must be dismissed because he is entitled to state law qualified immunity. It is unnecessary to consider whether McKnight is entitled to qualified immunity under state law, however, because Petersen has not established that McKnight owed a duty to him, individually; he has only alleged that McKnight breached a duty that he owed to the public in general.

In Washington, a plaintiff who sues a public official for negligence must show that "'the duty breached was owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a

duty to no one).'" *Babcock v. Mason Co. Fire Dist. No. 6*, 144 Wash.2d 774, 785, 30 P.3d 1261, 1267 (2001) (quoting *Taylor v. Stevens Co.*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988) (internal citation omitted)).

Regarding the duty element, Petersen alleged in his Complaint:

> 41. Defendant McKnight, by virtue of his employment as [sic] law enforcement officer, owed a duty of reasonable and ordinary care to the citizens of Lewis County. The duty of care owed by McKnight includes, among other things, to not negligently or recklessly undertake official actions that needlessly create the situation to use deadly force against the citizens he is assigned to protect and serve.
>
> 42. Defendant McKnight owed this duty of care to Steven, who was a resident of Lewis County.

Thus, according to Petersen's own allegations, his theory is that McKnight breached a duty that he owed to the public in general. Because a duty to all is a duty to no one, McKnight is entitled to judgment as a matter of law on Petersen's negligence claim.

F. Negligent Training and Supervision Claim

In Washington, plaintiffs have a cause of action for negligent training and supervision against an employer only if the employee acted outside the scope of his or her employment. *LaPlant v. Snohomish County*, 162 Wn. App. 476, 479-80, 271 P.3d 254, 256-57 (2011). If an employee is negligent within the scope of his or her employment, then the employer can be held liable under the theory of vicarious liability and a claim for

negligent training and supervision is not available. *Id.* Petersen has alleged, and no one disputes, that Officer McKnight was acting within the course and scope of his employment when he shot and killed Petersen. Plaintiff's claim against the County for negligent training and supervision is thus barred as a matter of law.

G. Malicious Prosecution Counterclaims

Plaintiff seeks summary judgment on Defendants' malicious prosecution counterclaim. In a civil malicious prosecution action, the action itself must be groundless and motivated by malice. *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d, 956, 963 (1979). Here, although Defendants are entitled to summary judgment on all of Plaintiff's claims, the action certainly is not groundless. Accordingly, Plaintiff's are entitled to summary judgment on Defendants' counterclaims.

III. Conclusion

For the reasons stated above, McKnight is entitled to qualified immunity on Plaintiff's § 1983 excessive force claim and all of Plaintiff's other claims fail as a matter of law. Additionally, Plaintiff is entitled to judgment as a matter of law on Defendants' counterclaims. Accordingly, Defendants' motion for summary judgment on all of Plaintiff's claims (Dkt. #24) and Plaintiff's motion for summary judgment on Defendants' counterclaims (Dkt. #27) are both GRANTED.

Dated this 13th of February, 2014

/s/ Ronald B. Leighton
United States District Judge

ORDER OF NINTH CIRCUIT DENYING PETITION FOR REHEARING (NOVEMBER 15, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN O. PETERSEN, on Behalf of L.P., a Minor and Beneficiary and as Personal Representative of the Estate of Steven V. Petersen,

Plaintiff-Appellant,

v.

LEWIS COUNTY, a Political Subdivision of the State of Washington; MATTHEW MCKNIGHT,

Defendants-Appellees.

No. 14-35201

D.C. No. 3:12-cv-05908-RBL
Western District of Washington, Tacoma

Before: HAWKINS, McKEOWN, and DAVIS,*
Circuit Judges.

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* The Honorable Andre M. Davis, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

Judge McKeown votes to deny the petition for rehearing en banc, and Judges Hawkins and Davis so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

911 TAPE TRANSCRIPTION
RELEVANT EXCERPTS
(NOVEMBER 25, 2013)

Case No. 11-02992

Q=Dispatch

A=Caller #1–Male, (sounds like) Jared Brockman

A1=Caller #2–Female, (sounds like) Anita Mecca

TRACK01:

Q 911, emergency.

A Uh, yeah, we got a guy trying to break into our house here.

Q Okay, what's the address?

A It's, uh, Napavine,

Q What's the address?

A What's it? 514 West Washington Street, Napavine.

Q Okay.

A Uh, it's 514B, it's in the back. He's been, uh, trying to kick the door down and–

Do you know who it is?

A Um, yeah, yeah, we do.

Q Okay, just stay on line with me, okay?

A Okay.

Q One in progress for county. Okay, and who is it?

A Uh, his name's Steve Peterson.

Q And was he there before or did he just, do, where do you . . .

A Uh, yeah.

Q . . . know him from?

A Um, yeah, he was, uh, he was staying here with, uh, the woman that lives here, and he, she, uh, she told him to leave earlier today and not come back, and yeah.

Q So who's the woman that lives there?

A Uh, (sounds like) Anita Mecca.

Q Okay. And does he have any weapons?

A Uh, he might. Yeah, he's coming back to the front door here. So I gotta baseball bat but I don't want to use it on him.

Q Yeah.

A Oh. (Female in background: He's hitting your truck) Alright, take the phone. Alright, motherfucker.

[. . .]

Q . . . name is?

A1 Rick Burlingame. Gosh. My stomach's in knots.

Q And does he, is he a, um, on good terms with him? Like would he run there?

A1 Uh, as far as I know, he's not on good terms with him but I, I–

Q He's not or he is?

A1 I, I don't know, as far as I know, he's not but I . . .

Q Okay.

A1 . . . things coulda changed, I don't know.

Q Okay.

A1 (Indistinguishable)

Q Is there an officer there now?

Al Is there an officer here? Um, I'll go look through the window. Uh, yes, there is.

Q Okay, and what's you guys' phone number?

A1 Um, it's (indistinguishable). Oh, my God, he broke through my light. He broke my light. He broke the dog key. I have a (indistinguishable) and he just broke the key. Um, here's, (indistinguishable) and call you back? (Male-indistinguishable) There's no minutes on his phone, we can only call out.

Q Okay, but (indistinguishable) 2072?

A1 Yeah.

Q Okay.

Al What? (Conversation in background-indistinguishable)

Q Okay, go ahead and talk to the officer, okay?

A1 Okay, thank you.

Q You're welcome, bye.

A1 O-, okay, bye. Here, you turn it off.

END OF CALL.

TRACK02—8 seconds—Radio Traffic
—Indistinguishable

TRACK03—8 seconds—Radio Traffic
—Indistinguishable

TRACK04—9 seconds—Radio Traffic:

A=Officer

A 53, Radio, who's the R/P?

TRACK05—Radio Traffic—17 seconds

Q=Dispatch

A=Officer

Q (Indistinguishable) trying to get the information, right now, subject (indistinguishable) Steve Peterson trying to kick down the door. Uh, R/P's armed with a bat, uh, trying to get a name.

TRACK06—Radio Traffic—11 seconds

Q Radio, 520, R/P is the first of Jared.

A Received.

TRACK07—Radio Traffic—38 seconds

Q Radio, 520, (indistinguishable) on the phone, he said it's quiet there now. I don't know (indistinguishable) and it'd be a Steve Peterson and Radio, 520, I ran him and no wants, no orders.

A Received.

Q 2201.

A I'm in the area.

Q Also, uh, R/P's saying that, uh, he might have a knife. He was stabbing a knife through the front door trying to get 'em.

A Received.

TRACK08—Radio Traffic—8 seconds

Q 2202.

TRACK09—Radio Traffic—20 seconds

Q 520, coming in, it's, uh, (indistinguishable) clothing was a camouflaged coat with a hood and believe light colored or white jeans.

A Received, they didn't see which way he went?

TRACK10—Radio Traffic—13 seconds

Q (Indistinguishable) they do not know which way he went.

A Received, I'm out.

Q (Indistinguishable)

TRACK 11—Radio Traffic—8 seconds

A 520, Sam 2.

A Go ahead.

A I got–

TRACK 12—Radio Traffic—9 seconds

A (Indistinguishable) going towards Meadow Lane, see if you can go over that way, through the yard.

A Okay.

TRACK13—Radio Traffic—8 seconds.

Q Radio, last unit.

TRACK14—Radio Traffic—8 seconds

A Received, 26, how far out are you, I may be closer.

A I'm just coming into town.

TRACK15—Radio Traffic—13 seconds

A 520, S 2.

A Go ahead.

A By the marks in the door, he's got a large knife with him.

A Okay.

TRACK16—Radio Traffic—8 seconds

A 86 is coming into the area, where do you want me?

A Go to 3rd and Vine and head (indistinguishable)

TRACK17—Radio Traffic—7 seconds
—Indistinguishable