No. _____

IN THE

Supreme Court of the United States

POLICE OFFICER THOMAS WILSON, #5675,

Petitioner,

—v.—

CHRISTOPHER CALLAHAN, INDIVIDUALLY AND AS ADMINISTRATOR D.B.N. OF THE ESTATE OF KEVIN CALLAHAN, PATRICIA CALLAHAN, INDIVIDUALLY,

Respondents.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The defendants-appellant, and petitioner herein, is Police Officer Thomas Wilson.

The plaintiffs-appellees, and the respondents herein, are Christopher Callahan as Administrator of the Estate of Kevin Callahan. Christopher Callahan and Patricia Callahan were named as plaintiffs for additional claims not relevant to this writ.

The jury below returned a defense verdict on the claim against Sergeant Scott Greene which the plaintiffs did not challenge. Claims against the remaining named defendants were either dismissed by the district court or withdrawn by the plaintiffs and are not relevant to this writ. It appears that the district court dismissed the claims against the County of Suffolk based upon the jury verdict in favor of the individual defendants.

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in continuing to require in deadly force shooting cases, that the jury must be instructed regarding the specific legal justifications for the use of deadly force, and that the usual less specific instructions regarding the use of excessive force are not adequate, when such a requirement is in direct conflict with this Court's decision in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 1772, 167 L. Ed. 2d 686 (2007), and subsequent decisions, which abrogated the use of special standards in deadly force cases and established "reasonableness" as the ultimate and only inquiry.
2. Whether, in light of the direct conflict with several of its sister circuits, the Second Circuit's continuing requirement that juries must be instructed regarding the specific legal justifications for the use of deadly force, creates an uncertainty preventing law enforcement officers from having adequate fair notice of what conduct is proscribed or constitutionally permissible, thereby further hampering the application of qualified immunity at the earliest stage of a case.

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OPINION BELOW

On July 12, 2017 the United States Court of Appeals for the Second Circuit entered its judgment and opinion vacating the judgment of the district court and remanding the case for a new trial. The opinion of the Court of Appeals is reported at *Callahan v. Wilson*, 863 F.3d 144 (2d Cir. 2017). A copy of the final judgment and the opinion of the Court are attached as Appendix A and B.

JURISDICTION

Federal Court jurisdiction in the District Court is premised upon 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202.

The within petition for a writ of certiorari is timely in accordance with Supreme Court Rule 13. The Order of the United States Court of Appeals for the Second Circuit was dated and entered on July 12, 2017.

Jurisdiction is being sought in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

For the purposes of the within petition, the applicable federal statute that is implicated is 28 U.S.C. § 1291 which provides the following:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CONCISE STATEMENT OF THE CASE

In the early afternoon of September 20, 2011, Suffolk County Police Officer Thomas Wilson responded to a radio call from a dispatcher reporting a situation involving a gun at the single-family home of Patricia Callahan in Selden, New York. The radio transmission indicated that Patricia Callahan—who was not at her home—had been on the phone with her son, Kevin Callahan, who was at the home in Selden and had told his mother that another person with him had a gun.[1]

When Officer Wilson arrived at the Callahan home, two other Suffolk County officers, Dan Furey and Elisa McVeigh, had already arrived in response to the dispatch. Officers Wilson, Furey, and McVeigh approached the front entrance to the home, where the screen door was closed but the front door was open. The officers knocked on the screen door, announced their presence, and entered to investigate; McVeigh searched the upstairs while Furey and Wilson went downstairs. Officer Wilson repeatedly announced the officers' presence and asked if anybody was in the home or needed help. The officers did not hear any response.

Once they reached the bottom of the stairs, Officers Wilson and Furey split up—Wilson went to the left, and Furey went to the right. Officer Wilson testified that he saw a cleaver knife in the den area downstairs, which heightened his concern. Wilson

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[1] Recitation of facts are from the majority opinion below which were compiled from the combined Record on Appeal as constituted before the Court of Appeals. The Final Judgment of the Circuit and its decision remanding the case to the District Court for a new trial are attached hereto as Appendix A and B.

checked one bedroom downstairs and then turned to another bedroom to his right. The door was partially open, and as Officer Wilson began to walk through it, he saw an individual through the partially opened door and called out, "police, I see you, . . . don't move." According to Wilson, the person in the room "start[ed] to square off towards the door" and then forcefully attempted to close the bedroom door on Wilson.

Officer Wilson testified that he had been holding his semi-automatic service pistol in his left hand down by his left leg, and when the door partially closed on him, he was pinned in the doorframe such that his hand holding the gun was on the other side of the door. Wilson testified that he then saw "some type of object" on the other side of the door, but his flashlight had been knocked out of his right hand and he had only a limited view, so he did not know what the object was. He testified that the person on the other side of the door also made a sound like "some type of growl" that was "scar [ ]y." According to Wilson, he feared that he could be shot through the door or that his gun might be used against him, so he tried to free himself. He testified that, while he was trying to pull himself out of the door, he saw "a shadow coming around the door" and "a hand thrusting towards [him] with an object." Still unable to get out of the doorway, Officer Wilson fired his weapon while the gun was on the other side of the door. Wilson testified that after the initial gunshots, the door let up, which caused him to fall back. As he fell, he continued to fire, but now through the door.

According to Wilson, he then stood up and ran toward Officer Furey, took cover, and reported over the radio: "shots fired, man behind the door, unknown weapon or object." Emergency services arrived with more police officers. Officers entered the

downstairs bedroom and saw a person later identified as Kevin Callahan behind the bedroom door, sitting on his heels with his hands under his chest and his chest on his thighs. The officers asked to see his hands and did not receive a response, at which point they placed him in handcuffs and called medical services for him. Callahan died from his gunshot wounds.

Forensic analysis and an autopsy later established that Officer Wilson fired a total of four shots, three of which struck Callahan. Two shots were fired from inside the bedroom, and the other two shots were fired through the door. The first shot fired inside the bedroom resulted in a contact wound to Callahan's back, and the second shot from inside the bedroom entered Callahan's back right shoulder and exited from his right abdomen. The shot fired through the door that hit Callahan caused a wound in his front upper abdomen/chest. No weapon was found in the bedroom where Callahan was located.

In 2012, Christopher and Patricia Callahan filed suit in the United States District Court for the Eastern District of New York against Suffolk County, Officer Wilson, and other Suffolk County police officers and employees. The complaint asserted several state and federal claims in connection with Kevin Callahan's death, including excessive force pursuant to 42 U.S.C. § 1983 and the Fourth Amendment to the U.S. Constitution. The excessive force claim proceeded to trial in July 2015. The jury returned a verdict in favor of Officer Wilson. Plaintiffs moved for judgment as a matter of law or a new trial pursuant to Federal Rules of Civil Procedure 50 and 59, which the district court denied. Judgment was entered on January 29, 2016.

Thereafter the plaintiffs perfected an appeal to the Court of Appeals for the Second Circuit.

On appeal, plaintiffs argued that a new trial was necessary because the jury was not properly instructed regarding the legal standards that governed the use of deadly force in police shooting cases under the Supreme Court's ruling in *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and the Second Circuits prior decision in *O'Bert ex rel. O'Bert v. Vargo,* 331 F.3d 29, 36 (2d Cir.2003). The plaintiff's argued that, pursuant to *Garner* and *O'Bert*, the jury had to be instructed that the deadly use of force by the defendant was unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others, and that the charge given by the district court did not properly convey that standard.[2]

The defendants opposed the plaintiffs appeal arguing that the district court's charge was consistent with the *Garner* requirements or was the functional equivalent of the standard. The defendants also argued that in light of this Court's holding in *Plumhoff v. Rickard,* ___U.S.___, 134 S.Ct. 2012, 2020, 188 L.Ed.2d 1056 (2014), the continuing application of the *Garner* rule as distinct from a general reasonableness inquiry may be in doubt.

On July 12, 2017, relying exclusively on its prior holding in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), the Court of Appeals for the Second Circuit

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[2] Although the decision of the Second Circuit attached as Appendix B embodies the relevant portion of the district court's charge, a complete transcript of the charge is attached as Appendix C.

vacated the judgment of the district court and remanded the case for a new trial. (Appendix B). In reaching its determination the Circuit found that in light of its decision in *Rasanen*, which it was bound to follow, the standard announced in *Tennessee v. Garner* and adopted in *O'Bert* applied to deadly force police shooting cases and the instruction to the jury "must" convey "that the use of force highly likely to have deadly effects is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." Failure to so instruct the jury constitutes plain error, as it "deprives the jury of adequate legal guidance to reach a rational decision on [the] case's fundamental issue." *Callahan v. Wilson*, 863 F.3d 144, 148–49 (2d Cir. 2017).

The determination of the Second Circuit is in direct conflict with the decisions of this Court which have abrogated the use of special standards in deadly force cases and have established "reasonableness" as the ultimate and only inquiry. *See*, *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Cty. of Los Angeles, Calif. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017). Moreover, the decision of the Second Circuit continues to set it apart from four of its sister circuits that have concluded that the requirement of a "deadly force instruction" in addition to an instruction based upon the Fourth Amendment's reasonableness standard was expressly contradicted by and clearly irreconcilable with *Scott*. Thus, the Circuit's decision to vacate the district court judgement and remand the case for a new trial must be reversed.

ARGUMENT

The defendants-appellants have filed the within petition seeking a writ of certiorari in accordance with Supreme Court Rule 10. As demonstrated below, the decision of the Second Circuit Court of Appeals dated July 12, 2017 vacating the judgement of the district court and remanding the case for a new trial is in direct conflict with four other circuits that have rendered determinations on the issue presented. Moreover, the Second Circuit's decision that is the subject of the within petition conflicts with this Court's relevant decisions on the issue of the standard to be applied in assessing the use of deadly force in police shooting cases. Based upon these conflicts, it is respectfully submitted that this Honorable Court should exercise its supervisory role under Supreme Court Rule 10 and grant the writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Certiorari to Clarify that a Special Jury Instruction on the Specific Legal Justifications for the Use of Deadly Force is Not Required and that "Reasonableness" is Ultimate and Only Inquiry, thereby Resolving an Unwarranted Split Among the Circuits.

A. The Circuits Courts Are Divided.

By continuing to require that a jury must be charged in Section 1983 deadly force shooting cases regarding the specific legal justification for the use of deadly force, the Second Circuit remains in direct conflict with the decisions of this Court which have abrogated the use of special standards in deadly force

cases and have established "reasonableness" as the ultimate and only inquiry. *See*, *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Cty. of Los Angeles, Calif. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017). Moreover, the decision of the Second Circuit continues to set it apart from its sister circuits that have concluded that the requirement of a "deadly force instruction" in addition to an instruction based upon the Fourth Amendment's reasonableness standard was "expressly contradict[ed]" by and "clearly irreconcilable with" *Scott*. *See*, *Rasanen v. Doe*, 723 F.3d 325, 340 (2d Cir. 2013)(Raggi, J., dissenting, *citing Acosta v. Hill,* 504 F.3d 1323, 1324 (9th Cir.2007)).

In 1985, the Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). *Garner* held that the use of deadly force violates the Fourth Amendment unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or in the case of a fleeing suspect, "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm," and "where feasible, some warning has been given." *Garner,* 471 U.S. at 11.

Four years after *Garner,* the Court applied the Fourth Amendment "reasonableness" standard to a claim of excessive, non-deadly force. *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Graham* held that the question of reasonableness of force required a "careful balancing"

of the facts and circumstances of each case, including "the severity of the crime at issue, whether the suspect 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." *Id.* at 395-396.

For several decades *Garner* guided courts' Fourth Amendment reasonableness analyses where officers used deadly force. However, in 2007, in *Scott v. Harris*, this Court explicitly cautioned against an interpretation of *Garner* as "a magical on/off switch that triggers rigid protections whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. Instead, the Court reasoned, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." *Id.* (citation omitted). In *Scott,* the Court considered allegations that officers improperly used deadly force when an officer attempted to stop a fleeing motorist by ramming the motorist's car from behind. The motorist sought application of the *Garner* prerequisites for the use of deadly force, but *Scott* rejected that effort. *Scott* held that *Garner* could not be applied to the "vastly different facts" of Scott's use of force. The Court concluded that regardless of whether force is viewed as deadly or non-deadly, the Fourth Amendment requires that "in the end we must still slosh our way through the fact bound morass of reasonableness." Ultimately, "all that matters is whether Scott's actions were reasonable." *Id.* at 383.

In deciding the matter below, and remanding the case for a new trial, the Second Circuit relied heavily if not exclusively on its earlier decision in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), stating:

> In *Rasanen v. Doe*, decided approximately two years before the trial here, we explained that the jury charge in a Section 1983 police shooting case alleging excessive use of force by a police officer in circumstances similar to those here must include a specific instruction regarding the legal justification for the use of deadly force. 723 F.3d at 333, 337. The instruction "must" convey "that the use of force highly likely to have deadly effects is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." *Id.* at 334. Failure to so instruct the jury constitutes plain error, as it "deprives the jury of adequate legal guidance to reach a rational decision on [the] case's fundamental issue." *Id.* at 334–35 (alteration and internal quotation marks omitted).
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> *Callahan v. Wilson*, 863 F.3d 144, 148–49 (2d Cir. 2017).

Rasanen, in turn had relied upon the Supreme Court's holding in *Tennessee v. Garner,* and its own prior decision in *O'Bert ex rel. O'Bert v. Vargo,* 331 F.3d 29, 36 (2d Cir.2003), which adopted the *Garner* standard. Although the court in *Rasanen* discussed *Scott*, and acknowledged that the Supreme Court had declined to apply the *Garner* analysis in that "deadly force" case, and even went so far as to described *Scott* as clarifying "that a special instruction based on *Garner* is not necessary (or even appropriate) in all deadly-force contexts", it nonetheless concluded that "this limitation does not apply in the original *Garner* context: the fatal shooting of an unarmed suspect." *Id.*, at 334.

In support of its determination in *Rasanen*, the Second Circuit cited to its holding in *Terranova v. New York*, 676 F.3d 305, 309 (2d Cir.2012). In *Terranova,* the court interpreted the Supreme Court's holding in *Scott* not as abrogating the *Garner* rule, but as limiting its application to a smaller class of cases. The deadly force used in *Terranova*, like *Scott*, involved a car chase and not the fatal shooting of a suspect. In applying *Scott* the court noted "absent evidence of the use of force highly likely to have deadly effects, as in *Garner,* a jury instruction regarding justifications for the use of deadly force is inappropriate, and the usual instructions regarding the use of excessive force are adequate." *Terranova* at 309. The *Rasanen* majority then interpreted *Terranova's* holding as having a "strong negative pregnant" and concluded that in cases where an officer's "use of force [is] highly likely to have deadly effects," the *Garner* standard continued to apply, and a jury instruction regarding the justifications for the use of deadly force is required and the usual less specific instructions are not adequate. *Rasanen* at 334.

Rasanan was not a unanimous opinion, and the dissent (Raggi, J) correctly warned that the majority's reading of *Scott* "create[d] an unwarranted circuit split." *Id.*, at 340 (citing the Ninth Circuit's decision in *Acosta v. Hill,* 504 F.3d 1323 (9th Cir.2007) and the Fourth Circuit's decision in *Noel v. Artson,* 641 F.3d 580 (4th Cir. 2011)). Judge Raggi directly addressed the majority's reliance upon *Garner* and *O'Bert* as a basis to require a deadly force justification charge, and rejected its analysis in the wake of *Scott*.

> To the extent such language might be construed to establish a "precondition" for

> the use of deadly force, the Supreme Court has since ruled to the contrary in *Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). "*Garner* did not establish a magical on/off switch that triggers *340 rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382, 127 S.Ct. 1769. *Scott* counseled that "[w]hether or not [an officer's] actions constitute[ ] application of 'deadly force,' *all that matters* is whether [his] actions were reasonable." *Id.* (emphasis added) (disclaiming existence of "easy-to-apply legal test in the Fourth Amendment context," and concluding that, in any given case, court must "slosh . . . through the factbound morass of 'reasonableness'"). Following *Scott,* two of our sister circuits have rejected challenges to jury charges in deadly force cases that relied only on "the general rubric of reasonableness." *Noel v. Artson,* 641 F.3d 580, 587 (4th Cir. 2011); *see Acosta v. Hill,* 504 F.3d 1323, 1324 (9th Cir. 2007) (concluding that requirement of "deadly force instruction" in addition to "excessive force instruction based on the Fourth Amendment's reasonableness standard" was "explicitly contradict[ed]" by and "clearly irreconcilable with" *Scott* (internal quotation marks omitted)).
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> *Rasanen v. Doe*, 723 F.3d 325, 339–40 (2d Cir. 2013)

By requiring a *Garner* "probable cause" instruction in cases where the agent of deadly force is a firearm, but not where the deadly force is administered by a motor vehicle or some other fashion, the majority in *Rasanen* attempted to cabin *Scott* to its facts.

However, there is nothing in *Scott* that supports such a conclusion. Indeed, *Scott*'s emphasis on the "particular situation" in which "a particular type" of deadly force was used in *Garner* precludes lumping all shooting cases together. "The shooting of a fleeing suspect in the back as he tried to run away from the police, as in *Garner,* is hardly the same "particular situation" as the shooting of a suspect who lunges toward the officer and turns his gun against him. This distinction signals caution in the application of "rigid preconditions" for determining reasonableness in deadly force cases generally, even those involving shootings." *Rasanen*, at 342 (2d Cir. 2013)(Raggi, J., dissenting, citing *Scott v. Harris,* 550 U.S. at 382, 127 S.Ct. 1769)

Indeed, far from distinguishing among deadly force cases, *Scott* instructs that a single legal standard applies to all excessive force cases, deadly or otherwise: "Whether or not [an officer's] actions constitute [ ] application of 'deadly force,' all that matters is whether [his] actions were reasonable." *Scott* at 382. This is a "factbound" determination that requires "'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983))." *Rasanen*, at 342 (2d Cir. 2013)(Raggi, J., dissenting).

As noted above, in deciding the appeal below, the Second Circuit majority made clear that it was bound by its holding in *Rasanen* until it was reversed *en banc* or by the Supreme Court. *Callahan v. Wilson,* 863 F.3d 144, 149–50 (2d Cir. 2017), *citing Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009). In doing so, it continued to

apply a standard in deadly force shooting cases that is at odds with *Scott v. Harris*, and further widens the split in the circuits, which has only grown since the decision in *Rasanen*.

At the time *Rasanen* was decided, two other circuits had rejected challenges to jury charges in deadly force cases that had relied upon general reasonableness, placing them in direct conflict with the Second Circuit. *See*, *Noel v. Artson,* 641 F.3d 580, 587 (4th Cir. 2011); *Acosta v. Hill,* 504 F.3d 1323, 1324 (9th Cir. 2007). In deciding *Callahan* below, the majority acknowledged that, when faced with the question it had previously addressed in *Rasanen*, the number of other circuits that had reached different if not opposite conclusions had grown to four. *Callahan v. Wilson*, 863 F.3d 144, 150, n.6 (2d Cir. 2017). In addition to being in conflict with the Fourth and Ninth Circuits, the Second Circuit had now set itself apart from the Third and Eleventh Circuits as well. *See Johnson v. City of Phila.*, 837 F.3d 343, 349 (3d Cir. 2016); *Penley v. Eslinger*, 605 F.3d 843, 850 (11th Cir. 2010).[3]

Indeed, in *Johnson v. City of Phila.*, prior to addressing the merits of the argument before it, the Third Circuit felt compelled to clarify the standard to apply in deadly force cases, making it clear that *Scott* "abrogates our use of special standards in deadly-force cases and reinstates "reasonableness" as the ultimate—and only—inquiry." *Johnson v. City of Phila.*, 837 F.3d 343, 349 (3d Cir. 2016). "Whether or

[3] New York courts likewise do not require a special deadly force charge for excessive-force claims brought under § 1983. *See N.Y. Pattern Jury Instructions—Civil* § 3:60.3 & cmt. (excessive force claims governed by "the objective reasonableness standard"; no special instruction for deadly force).

not [an officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable." *Id*., quoting *Scott*, and citing *Acosta v. Hill,* 504 F.3d 1323, 1324 (9th Cir. 2007). The court in *Johnson* correctly pointed out that while the considerations enumerated in *Garner* may still have relevance to the reasonableness analysis, for example in assessing the threat of injury or risk of flight as it relates to the magnitude of the governmental interest at stake, such considerations are not constitutional requirements in their own right. *Johnson v. City of Phila.*, 837 F.3d 343, 349–50 (3d Cir. 2016).[4]

Four Circuits outside of the Second Circuit have properly followed the Supreme Court's clear teaching in *Scott* and have rejected attempts to mandate a special deadly force instruction in §1983 police shooting cases. The Second Circuit's continued reliance upon its holding *Rasanen* not only maintains this "unwarranted spilt" but is also in direct conflict with Supreme Court rulings since *Rasanen* was decided that have re-affirmed *Scott*'s abrogation of the use of a special standard in deadly force cases.

As recently as May of 2017, the Supreme Court has reiterated that the "settled and exclusive framework" for analyzing claims of excessive force is "reasonableness." *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S.Ct. 1539, 1546, 198 L.Ed.2d 52 (2017). *Mendez*

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[4] Subsequent to the Second Circuit's decision in *Callahan*, a court in the 11th Circuit again reaffirmed that none of the *Garner* conditions are prerequisites to the lawful application of deadly force by an officer seizing a suspect. *See*, *Mitchell v. City of Mobile, Alabama*, 2017 WL 1740364, at *10–11 (S.D. Ala. May 3, 2017), *motion for relief from judgment denied,* 2017 WL 3262130 (S.D. Ala. July 28, 2017).

involved a claim of excessive force arising out of a police shooting where the Supreme Court was asked to examine the Ninth Circuits application of the "provocation rule" beyond the standard of general reasonableness announced in *Graham v. Connor*, 490 U.S. 386, 109 S,Ct. 1865, 104 L.E.d2d 443 (1989). In rejecting the Ninth Circuits application of the 'provocation rule" the Court reiterated that the touchstone of Fourth Amendment analysis is reasonableness:

> The Fourth Amendment prohibits "unreasonable searches and seizures." "[R]easonableness is always the touchstone of Fourth Amendment analysis," *Birchfield v. North Dakota,* 579 U.S. ___, 136 S.Ct. 2160, 2186, 195 L.Ed.2d 560 (2016), and reasonableness is generally assessed by carefully weighing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner,* 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (internal quotation marks omitted).
>
> Our case law sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment. See *Graham,* 490 U.S., at 395, 109 S.Ct. 1865. As in other areas of our Fourth Amendment jurisprudence, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' " requires balancing of the individual's Fourth Amendment interests against the relevant government interests. *Id.,* at 396, 109 S.Ct. 1865. The operative

> question in excessive force cases is "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Garner, supra,* at 8–9, 105 S.Ct. 1694.
>
> *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546, 198 L. Ed. 2d 52 (2017)

While the Court in *Mendez* cited to *Garner's* requirement to assess reasonableness through the balancing of the individual's Fourth Amendment interests against those of the government to justify the intrusion, it said nothing of *Garner's* "probable cause" requirement in deadly force cases. Its focus is entirely upon *Graham* and the general reasonableness standard establish by that decision.[5] By reaffirming the standard of general reasonableness in a case involving the application of the very force contemplated in *Garner* (the shooting of an unarmed suspect), the Supreme Court's decision in *Mendez*, effectively overruled *Rasanen*.

However, even prior to its decision in *Cty. of Los Angeles, Calif. v. Mendez*, the Court had established that in cases where an officer's use of force is highly likely to have deadly effects, the conduct is governed by the Fourth Amendment's "reasonableness' standard." *Plumhoff v. Rickard,* ___ U.S. ___, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014). The holding in *Plumhoff* likewise signaled that that use of special standards in deadly-force shooting cases was not required and the standard reasonableness test applied. This becomes even more evident when

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[5] At the trial in *Mendez* the District Court applied *Graham*'s general reasonableness standard in analyzing if the use of force by the defendant was excessive. Of significance is that the Supreme Court did not question that application.

examining the Second Circuit's reliance upon its prior decision in *Terranova v. New York,* 676 F.3d 305, 309 (2d Cir.2012), to form the foundation of its conclusion in *Rasanen*.

As noted above, in *Terranova,* the Second Circuit interpreted the Supreme Court's holding in *Scott v. Harris*, 550 U.S. 372 (2007) not as abrogating the *Garner* rule, but as limiting its application to a smaller class of cases. In *Terranova*, like *Scott*, the deadly force used by officers involved a car chase and not the fatal shooting of a suspect. In applying *Scott* the Circuit conceded "absent evidence of the use of force highly likely to have deadly effects, as in *Garner,* a jury instruction regarding justifications for the use of deadly force is inappropriate, and the usual instructions regarding the use of excessive force are adequate." *Terranova* at 309. However, it distinguished *Rassanen* (a shooting case) and held that in cases where an officer's "use of force [is] highly likely to have deadly effects," the *Garner* standard continued to apply. *Rasanen v. Doe*, 723 F.3d 325, 334 (2d Cir. 2013).

Although in *Plumhoff,* the events of the claim were precipitated by a high speed car chase, the deadly force employed involved the shooting of the driver of the vehicle by police officers, placing it squarely among cases where an officer's use of force is "highly likely to have deadly effects." *Rassanen* 723 F.3d at 334 n. 5 (noting that "firing a gun aimed at a person" is a use of force likely to have deadly effects). In deciding *Plumhoff*, the Supreme Court acknowledged that "[a] claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard," but did not look to the question under *Garner* of whether the officers had probable cause to believe that the

suspect was dangerous. *Plumhoff*, 134 S.Ct. at 2020. Nor did *Plumhoff* mention the *Graham* factors. Rather, it instructed that assessing the objective reasonableness of an officer's use of force "requires analyzing the totality of the circumstances." *Id.* at 2020 (citing *Graham,* 490 U.S. at 396). In doing so the Court clearly affirmed that in cases of the use of deadly force, including those involving police shootings, the general Fourth Amendment reasonableness standard applies.

The Majority below addressed both *Mendez* and *Plumhoff* and concluded that neither overruled its decision in *Rasanen*. *Callahan v. Wilson*, 863 F.3d 144, 149 (2d Cir. 2017). However, it did so only by distinguishing those cases as not speaking to the issue of how juries should be charged. But, as pointed out by the Judge Raggi in her dissent in *Callahan*, neither did *Tennessee v. Garner*, 471 U.S. 1 (1985), or *O'Bert ex rel. O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003), the cases on which *Rasanen* relied to identify a probable cause charging requirement, speak to jury charges. Indeed, *Garner* arose in the context of a bench trial, and the issue in *O'Bert* was the denial of summary judgment to a defendant who invoked qualified immunity to avoid trial. *Callahan v. Wilson*, 863 F.3d 144, 155 (2d Cir. 2017) (Raggi, J. dissenting).

Additionally, in *Mullenix v. Luna*, 136 S. Ct. 305, 307, 193 L. Ed. 2d 255 (2015), a case that involved the application of qualified immunity to a deadly police shooting, the Court notes that *Plumhoff* reaffirmed *Scott*, and while the Court discusses some of the *Garner* considerations, its general analysis remains focused on the reasonableness of the officers use of force. *Mullenix*, at 310. It should also be noted that, in her dissenting opinion, Justice Sotomayor

engages in a discussion of the Court's precedents, finding that they "clearly establish that the Fourth Amendment is violated unless the "'governmental interests' " in effectuating a particular kind of seizure outweigh the " 'nature and quality of the intrusion on the individual's Fourth Amendment interests.'" *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)). There must be a "governmental interes[t]" not only in effectuating a seizure, but also in "how [the seizure] is carried out." *Tennessee v. Garner,* 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)." *Mullenix v. Luna*, ___U.S.___, 136 S. Ct. 305, 314, 193 L. Ed. 2d 255 (2015)(Sotomayor, J., dissenting). Of significance is that, although Justice Sotomayor references *Garner's* balancing of the interests test, she makes no mention of the *Garner* "probable cause" requirement in her analysis.

The cases above all confirm that *Scott v. Harris* abrogated the use of special standards in deadly force cases and established "reasonableness" as the ultimate and only inquiry. It is respectfully submitted that this Court should grant Certiorari to clarify that a special jury instruction on the specific legal justification for the use of deadly force is not required in police shooting cases, and to resolve the ever growing spilt among the Circuits.

B. This Case Presents an Optimal Vehicle for Resolving This Issue.

This case is an optimal vehicle for the Court to clarify that, in all deadly force cases, "reasonableness" is the ultimate and only inquiry, and that a special jury instruction on the specific legal justifications for the use of force is not required. The

record in this case is well developed and the matter was fully briefed before the Second Circuit. More importantly, the facts of this case fit squarely within the *Garner* context that has given rise to the split in the circuits, that is, the use of deadly force involving a law enforcement shooting of an unarmed individual.

Moreover, the split among the circuits is outcome determinative. Had this trial occurred in the Third, Fourth, Ninth or Eleventh Circuit, the jury verdict would have been sustained as the charge given by the District Judge more than adequately instructed the jury on the applicable legal standard as it applies in those jurisdictions. Further, the Second Circuit's opinion here means that the standard to be applied against § 1983 defendants is more demanding in that Circuit than in other circuits, and that the existence of "probable cause" is the *only* situation in which an officers use of deadly force in shooting cases can be constitutionally permissible. A law enforcement defendant in one circuit should not have to face a higher, or even different standard, in evaluating his conduct when faced with an allegation of the use of deadly excessive force, than one who engages in the identical conduct in another circuit.

Although Certiorari was sought in 2015 by the State of Ohio seeking a clarification regarding the application of the *Garner* standard, the issue in that case was different than that presented here. *Ohio v. White*, ___U.S.___, 136 S. Ct. 73, 193 L. Ed. 2d 207 (2015) and ___U.S.___, 136 S. Ct. 125, 193 L. Ed. 2d 98 (2015). *White* involved a criminal case in which a police officer was criminal charged arising out of an incident in which he shot an unarmed motorcyclist. The defendant police officer sought to have the more stringent *Garner* instruction included as part of the

charge to the jury on justification. The Ohio Supreme Court had upheld reversal of a criminal conviction of the officer on the grounds that the jury should have been charged with the *Garner* standard when explaining the affirmative defense of justification. Although the parties in *White* briefed the Ohio Supreme Court on *Scott v. Harris*, the majority opinion did not analyze the case or address its holding regarding the application of the general "reasonableness" standard. *State v. White*, 2015-Ohio-492, 142 Ohio St. 3d 277, 29 N.E.3d 939. The petition was denied. This case, on the other hand, provides the Court with its first opportunity to resolve this issue from a Circuit opinion that directly addressed existing Supreme Court precedent in reaching its conclusion regarding the standard to be applied in assessing the use of deadly force in a 42 U.S.C. § 1983 civil rights action.

This Court should grant Certiorari to clarify that the standard of general reasonableness pronounced in *Scott*, and confirmed in *Plumhoff* and *Mendez* is that which should be applied nationwide.

2. The Court Should Grant Certiorari to Resolve the Ever Growing Split among the Circuits as the Continuing Conflict Creates an Uncertainty Preventing Law Enforcement Officers from Having Adequate Fair Notice of what Conduct is Proscribed or Constitutionally Permissible.

A. Qualified Immunity and Fair Notice

The Second Circuit's continuing requirement that juries must be instructed regarding the specific legal justifications for the use of deadly force, which is in direct conflict with several of its sister circuits,

creates an uncertainty preventing law enforcement officers from having adequate fair notice of what conduct is proscribed or constitutionally permissible, thereby further hampering the application of qualified immunity at the earliest stage of a case.

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards,* 566 U.S. ___, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (internal quotation marks and alteration omitted). While there need not be a case "directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015), citing, *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

This Court has repeatedly instructed Courts "not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) The dispositive question is "whether the violative nature of particular conduct is clearly established." *al–Kidd,* 563 U.S. 731, at 741. This inquiry "'must be undertaken in light of the specific context of the case, not as a broad general

proposition.'" *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, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. 305, at 308, 193 L. Ed. 2d 255 (2015), citing *Saucier*, 533 U.S., at 205. The crux of the qualified immunity test is whether officers have "fair notice" that they are acting unconstitutionally. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Moreover, because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Indeed, the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery.'" *Anderson v. Creighton,* 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 231–32, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009), *quoting*, *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam).*

The Second Circuit continues to adopt the *Tennessee v. Garner* standard in deadly force police shooting cases requiring that in cases where "the use

of force highly likely to have deadly effects" an officer's conduct is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." *Rasanen v. Doe*, 723 F.3d 325, at 334 (2d Cir. 2013). By doing so, it not only sets itself apart from four other circuits, it also creates an uncertainty that prevents law enforcement officers from having adequate fair notice of what conduct is proscribed or constitutionally permissible, and makes it even more difficult for an officer "to determine how the relevant legal doctrine . . . will apply to the factual situation [he] confronts." *Mullenix*, 136 S. Ct. 305, at 308, 193 L. Ed. 2d 255 (2015), citing *Saucier*, 533 U.S., at 205.

Certainly, the *Garner* standard adopted by the Second Circuit has been recognized and established since its inception in the seminal decision in 1985. But as noted by this Court, the test set out in *Garner* is cast at a high level of generality and is not sufficiently capable of providing adequate fair warning to an officer that his or her conduct is constitutionally permissible. s*ee*, *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004). In evaluating the officer's conduct to determine if he is entitled to qualified immunity the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015). By continuing to adopt the *Garner* standard in the first instance, the Second Circuit makes it difficult if not impossible to properly examine the specific context of a law enforcement officer's conduct when attempting to resolve the qualified immunity question at the earliest stage of the case. A district court attempting to analyze the

specific actions of an officer will be hard pressed to determine that the conduct violated "clearly established law" when several other circuits have determined that the standard to be applied is general reasonableness and not the *Garner* standard. Of course a district court in the Second Circuit would be bound to apply the *Garner* standard to that part of the analysis as to what the "established right" is in that Circuit, but it cannot be said, in light of the circuit conflict, that the court would be bound to determine that the law was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[6] While at times, this may inure to the benefit of the § 1983 defendant, district courts may be more likely to simply apply the *Garner* standard, and find an issue of fact regarding the reasonableness of the officers understanding of the law. Should the court determine that based upon the uneven application of the standard throughout the nation, the law was not sufficiently clear to the reasonable officer, plaintiffs will be unfairly harmed. On the other hand, defendants may often be faced with the prospect of discovery and a trial, where a more clearly defined application of the standard would allow courts to resolve the qualified immunity issue at the outset of the case.

The continuing adoption of the *Garner* standard by the Second Circuit likewise is at odds with a number of the most significant law enforcement leadership

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[6] The issue of whether the law is clearly established and would be sufficiently understood by a reasonable officer is further clouded by the fact that New York courts do not require a special deadly force charge for excessive-force claims brought under § 1983.

and labor organizations in the United States.[7] Eleven of the Nation's most prominent law enforcement bodies and accrediting agencies, have adopted a policy on the use of deadly force that is consistent with a general reasonableness standard that examines the totality of the circumstances. While they adopt *Garners* "probable cause" standard with respect to escaping felons, their policy on use of deadly force when facing an immediate threat of death or serious injury is one of objective reasonableness.

It is not unreasonable for law enforcement agencies, as well as individual officers, to look to the policies of prominent national accrediting police organizations for guidance in the application of how and when to apply the appropriate uses of force in certain situations. A continuing split among the circuits fosters an uncertainty whereby law enforcement officials are prevented from receiving the adequate fair notice to properly determine what conduct is proscribed or constitutionally permissible.

The Court should grant Certiorari to resolve the Circuit conflict which creates an uncertainty regarding what the clearly established Fourth Amendment right is with respect to the use of deadly force in § 1983 police shooting cases.

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[7] See, "National Consensus Policy on Use Of Force" January 2017; http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf

CONCLUSION

As demonstrated by the within petition, the basis for the Second Circuit's vacating of the judgment of the district court and remanding for a new trial is contrary to four other Circuit Courts that have considered the same issue, and is contrary to the weight of precedent that has been issued by this Court. Each of the foregoing militates in favor of this Court exercising its supervisory powers under Supreme Court Rule 10.

As such, it is respectfully requested that the petition for writ of certiorari should be granted.

DATED: Hauppauge, New York
October 10, 2017

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of July, two thousand and seventeen.

Before: Barrington D. Parker,
Reena Raggi,
Christopher F. Droney,
Circuit Judges.

Docket No. 16-336

CHRISTOPHER CALLAHAN, INDIVIDUALLY AND AS ADMINISTRATOR D.B.N. OF THE ESTATE OF KEVIN CALLAHAN, PATRICIA CALLAHAN, INDIVIDUALLY,

Plaintiffs-Appellants,

—v.—

POLICE OFFICER THOMAS WILSON, #5675, SERGEANT SCOTT GREENE, #960,

Defendants-Appellees,

THE COUNTY OF SUFFOLK, DETECTIVE RIVERA, DETECTIVE O'HARA, JOHN DOE, SUFFOLK COUNTY POLICE OFFICERS #1-10, RICHARD ROE, SUFFOLK COUNTY EMPLOYEES #1-10, POLICE OFFICER ROBERT KIRWAN, #2815, POLICE OFFICER JAMES BOWEN, #1294, DETECTIVE SERGEANT THOMAS M. GRONEMAN, DETECTIVE LIEUTENANT GERARD PELKOFSKY,

Defendants.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is VACATED and the case is REMANDED for a new trial.

For The Court:

/s/_____
Catherine O'Hagan Wolfe,
Clerk of Court
[SEAL]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016
No. 16-336-cv

CHRISTOPHER CALLAHAN, INDIVIDUALLY AND AS ADMINISTRATOR D.B.N. OF THE ESTATE OF KEVIN CALLAHAN, PATRICIA CALLAHAN, INDIVIDUALLY,

Plaintiffs-Appellants,

—v.—

POLICE OFFICER THOMAS WILSON, #5675, SERGEANT SCOTT GREENE, #960,

Defendants-Appellees,

THE COUNTY OF SUFFOLK, DETECTIVE RIVERA, DETECTIVE O'HARA, JOHN DOE, SUFFOLK COUNTY POLICE OFFICERS #1-10, RICHARD ROE, SUFFOLK COUNTY EMPLOYEES #1-10, POLICE OFFICER ROBERT KIRWAN, #2815, POLICE OFFICER JAMES BOWEN, #1294, DETECTIVE SERGEANT THOMAS M. GRONEMAN, DETECTIVE LIEUTENANT GERARD PELKOFSKY,

*Defendants.**

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* The Clerk of Court is directed to amend the caption as set forth above.

Appeal from the United States District Court
for the Eastern District of New York.
No. 12-cv-2973 — Leonard D. Wexler, *Judge*.

ARGUED: FEBRUARY 8, 2017

DECIDED: JULY 12, 2017

Before: Parker, Raggi, and Droney,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Wexler, *J.*) entered following a jury verdict finding defendant police officer Thomas Wilson did not use excessive force, under 42 U.S.C. § 1983 and the Fourth Amendment, in fatally shooting Kevin Callahan. We conclude that the jury instruction regarding the legal justification for the use of deadly force by a police officer did not comply with our prior decision in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013). Accordingly, we **VACATE** the judgment of the district court and **REMAND** for a new trial.

Judge RAGGI concurs in part and dissents in part in a separate opinion.

DONNA ALDEA (Alexander R. Klein, *on the brief*), Barket Marion Epstein & Kearon, LLP, Garden City, NY, *for Plaintiffs-Appellants*.

BRIAN C. MITCHELL, Assistant County Attorney, *for* Dennis M. Brown, Suffolk County Attorney, Hauppauge, NY, *for Defendants- Appellees.*

DRONEY, *Circuit Judge*:

On September 20, 2011, Kevin Callahan ("Callahan") was shot and killed during a confrontation with Thomas Wilson, a police officer employed by Suffolk County, New York. Christopher and Patricia Callahan—the decedent's brother and mother—filed this suit pursuant to 42 U.S.C. § 1983 against Wilson, other Suffolk County police officers and employees, and Suffolk County, alleging, among other causes of action, that Officer Wilson's use of deadly force violated the Fourth Amendment prohibition against excessive force. The case proceeded to trial. Following the completion of evidence, the district court declined to give plaintiffs' proposed jury instruction regarding the use of deadly force by a police officer that tracked the deadly force instruction we endorsed in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013). The jury returned a verdict in favor of Officer Wilson.

We agree with plaintiffs that the district court's jury charge concerning deadly force was inconsistent with *Rasanen*, and this error was not harmless. Accordingly, we **VACATE** the judgment of the district court and **REMAND** for a new trial.

BACKGROUND

I. Fatal Shooting of Kevin Callahan

In the early afternoon of September 20, 2011, Suffolk County Police Officer Thomas Wilson responded to a radio call from a dispatcher reporting a situation involving a gun at the single-family home of Patricia Callahan in Selden, New York. The radio transmission indicated that Patricia Callahan—who was not at her home—had been on the phone with her son, Kevin Callahan,[1] who was at the home in Selden and had told his mother that another person with him had a gun.

When Officer Wilson arrived at the Callahan home, two other Suffolk County officers, Dan Furey and Elisa McVeigh, had already arrived in response to the dispatch. Officers Wilson, Furey, and McVeigh approached the front entrance to the home, where the screen door was closed but the front door was open. The officers knocked on the screen door, announced their presence, and entered to investigate; McVeigh searched the upstairs while Furey and Wilson went downstairs. Officer Wilson repeatedly announced the officers' presence and asked if anybody was in the home or needed help. The officers did not hear any response.

Once they reached the bottom of the stairs, Officers Wilson and Furey split up—Wilson went to the left, and Furey went to the right. Officer Wilson testified that he saw a cleaver knife in the den area downstairs, which heightened his concern. Wilson checked one bedroom downstairs

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[1] At the time, Kevin Callahan was twenty-six years old.

and then turned to another bedroom to his right. The door was partially open, and as Officer Wilson began to walk through it, he saw an individual through the partially opened door and called out, "police, I see you, . . . don't move." J.A. 270. According to Wilson, the person in the room "start[ed] to square off towards the door" and then forcefully attempted to close the bedroom door on Wilson. J.A. 271.

Officer Wilson testified that he had been holding his semi-automatic service pistol in his left hand down by his left leg, and when the door partially closed on him, he was pinned in the doorframe such that his hand holding the gun was on the other side of the door. Wilson testified that he then saw "some type of object" on the other side of the door, but his flashlight had been knocked out of his right hand and he had only a limited view, so he did not know what the object was. J.A. 275. He testified that the person on the other side of the door also made a sound like "some type of growl" that was "scar[]y." J.A. 275. According to Wilson, he feared that he could be shot through the door or that his gun might be used against him, so he tried to free himself. He testified that, while he was trying to pull himself out of the door, he saw "a shadow coming around the door" and "a hand thrusting towards [him] with an object." J.A. 309. Still unable to get out of the doorway, Officer Wilson fired his weapon while the gun was on the other side of the door. Wilson testified that after the initial gunshots, the door let up, which caused him to fall back. As he fell, he continued to fire, but now through the door.

According to Wilson, he then stood up and ran toward Officer Furey, took cover, and reported over the radio: "shots fired, man behind the door, unknown weapon or object." J.A. 311–12. Emergency services arrived with more police officers. Officers entered the downstairs bedroom and saw a person later identified as Kevin Callahan behind the bedroom door, sitting on his heels with his hands under his chest and his chest on his thighs. The officers asked to see his hands and did not receive a response, at which point they placed him in handcuffs and called medical services for him. Callahan died from his gunshot wounds.

Forensic analysis and an autopsy later established that Officer Wilson fired a total of four shots, three of which struck Callahan. Two shots were fired from inside the bedroom, and the other two shots were fired through the door. The first shot fired inside the bedroom resulted in a contact wound to Callahan's back, and the second shot from inside the bedroom entered Callahan's back right shoulder and exited from his right abdomen. The shot fired through the door that hit Callahan caused a wound in his front upper abdomen/chest area. No weapon was found in the bedroom where Callahan was located.

II. Plaintiffs' Excessive Force Claim

In 2012, Christopher and Patricia Callahan filed suit in the United States District Court for the Eastern District of New York against Suffolk County, Officer Wilson, and other Suffolk County police officers and employees. The complaint asserted several state and federal claims in connection with Kevin Callahan's death, including

excessive force pursuant to 42 U.S.C. § 1983 and the Fourth Amendment to the U.S. Constitution.[2]

The excessive force claim proceeded to trial in July 2015.[3] The jury returned a verdict in favor of Officer Wilson.[4] Plaintiffs moved for judgment as a matter of law or a new trial pursuant to Federal Rules of Civil Procedure 50 and 59, which the district court denied. Judgment entered on January 29, 2016,[5] and this appeal followed.

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[2] Kevin Callahan's claim under Section 1983 survived his death for the benefit of his estate, and is brought by his brother, Christopher, the administrator of his estate. *See Barrett v. United States*, 689 F.2d 324, 331 (2d Cir. 1982). Christopher Callahan and Patricia Callahan were named as plaintiffs for additional claims not relevant to this appeal.

[3] The trial also included an Eighth Amendment claim against Suffolk County Police Sergeant Scott Greene for deliberate indifference to the medical needs of Kevin Callahan after the shooting. The district court bifurcated the trial of plaintiffs' claims, such that the excessive force and deliberate indifference claims were tried together in the first phase, after which a second trial would address *Monell* liability of Suffolk County and other related claims if necessary. The first trial also originally included false arrest claims, but plaintiffs voluntarily dismissed those claims after their case-in-chief.

[4] The jury also returned a defense verdict on the deliberate indifference claim against Sergeant Greene, which plaintiffs have not challenged here. Defendants raised a qualified immunity defense as to both the excessive force and deliberate indifference claims as part of their oral Rule 50 motion, which the district court denied in its entirety. Qualified immunity was not otherwise litigated at trial, and defendants have not raised it on appeal.

[5] Although the jury's verdict addressed plaintiffs' claims against only Wilson and Greene, it appears that the district court entered judgment in favor of all defendants.

DISCUSSION

On appeal, plaintiffs argue that a new trial is necessary because the jury was not properly instructed regarding the legal standards that govern the use of deadly force under these circumstances. We review jury instructions *de novo*, considering the challenged instruction in light of the charge as a whole. *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016). A jury instruction is erroneous if it "misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Velez v. City of N.Y.*, 730 F.3d 128, 134 (2d Cir. 2013) (internal quotation marks omitted). An erroneous jury instruction requires a new trial unless the error is harmless. *Id.* We conclude that the use of force instructions here were inconsistent with our prior decision in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), and we cannot say that the error was harmless.

I. Instructional Error

In *Rasanen v. Doe*, decided approximately two years before the trial here, we explained that the jury charge in a Section 1983 police shooting case alleging excessive use of force by a police officer in circumstances similar to those here must include a specific instruction regarding the legal justification for the use of deadly force. 723 F.3d at 333, 337. The instruction "must" convey "that the use of force highly likely to have deadly effects is

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The record is not entirely clear, but it appears the district court concluded that the defense verdict in the first phase of the bifurcated trial necessarily defeated plaintiffs' remaining claims.

unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." *Id.* at 334. Failure to so instruct the jury constitutes plain error, as it "deprives the jury of adequate legal guidance to reach a rational decision on [the] case's fundamental issue." *Id.* at 334–35 (alteration and internal quotation marks omitted).

Defendants-Appellees suggest that *Rasanen* may no longer control in light of the Supreme Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Plumhoff*, a dangerous police car chase of a fleeing suspect ended when police officers fired at the vehicle, killing the driver and a passenger. *See id.* at 2017–18. The Supreme Court concluded that the officers did not violate the Fourth Amendment's prohibition against the use of excessive force. *See id.* at 2020–22. *Plumhoff* did not, however, involve any claim of instructional error, nor does the opinion alter the authorities on which *Rasanen* relied regarding the appropriate jury charge concerning the fatal shooting of suspects in the circumstances presented here. In particular, *Plumhoff* involved an application of *Scott v. Harris*, 550 U.S. 372 (2007), which was decided several years before *Plumhoff* and was discussed at length in *Rasanen*, *see* 723 F.3d 15 at 333–34.

Nor does the Supreme Court's recent decision in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), undermine *Rasanen*'s holding as to the requirements for a jury charge in the type of excessive force case presented here. In *Mendez*, the Supreme Court rejected the Ninth Circuit's

"provocation rule" because that rule allowed a prior independent Fourth Amendment violation "to manufacture an excessive force claim where one would not otherwise exist." *Id.* at 1546. In explaining its decision, the Court noted that "[t]he operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). Importantly, *Garner* articulated the probable cause requirement for police shooting cases upon which this Court relied in *Rasanen*. *See Rasanen*, 723 F.3d at 333 ("In *Garner*, the Supreme Court explained that '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'" (quoting *Garner*, 471 U.S. at 11)).

Thus, as relevant here, we conclude that neither *Plumhoff* nor *Mendez* overrules *Rasanen*, which remains the controlling law of this Circuit. Defendants do not attempt to distinguish *Rasanen* on the facts, which is unsurprising given the similarity between the circumstances of the shooting in that case and the underlying facts here. Accordingly, we are bound to follow *Rasanen* in this case.[6] *See Shipping Corp. of India v. Jaldhi*

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[6] We acknowledge that, when faced with the question we previously addressed in *Rasanen*, other Circuits have reached different, and sometimes opposite, conclusions. *See Johnson v. City of Phila.*, 837 F.3d 343, 349 (3d Cir. 2016); *Noel v. Artson*, 641 F.3d 580, 587 (4th Cir. 2011); *Penley v. Eslinger*, 605 F.3d 843, 850 (11th Cir. 2010); *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007).

Overseas Pte Ltd., 585 F.3d 58, 67 (2d Cir. 2009) ("[A] panel of our Court is bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." (internal quotation marks omitted)).

Applying *Rasanen*, we conclude that the jury charge regarding deadly force was erroneous. Plaintiffs' proposed jury instructions included the specific language we endorsed in *Rasanen* and cited that decision. At the charge conference, plaintiffs' counsel also orally requested that the jury charge include that language, arguing that "it's not just a matter of semantics."[7] J.A. 566. The district court denied plaintiffs' request, and instead instructed the jury in accordance with the general excessive force instructions that apply in situations involving non-deadly force,[8] with two modifications: the charge specifically referred to "deadly force" in two places, and it included language about an officer's probable cause to believe that he or she faces a threat of death or serious injury. The exact language of the district court's charge was as follows:

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[7] Unlike *Rasanen*, which considered the excessive force charge under plain-error review because no clear objection was made to that portion of the charge, *see* 723 F.3d at 333, plaintiffs here clearly preserved their objection. *See* J.A. 565–67.

[8] *See, e.g.*, *Terranova v. New York*, 676 F.3d 305, 307, 309 (2d Cir. 2012); *United States v. Schatzle*, 901 F.2d 252, 254–55 (2d Cir. 1990).

A person has the right, under the United States Constitution, to be free from the use of excessive force.

A police officer is entitled to use reasonable force. A police officer is not entitled to use any force beyond what is necessary to accomplish a lawful purpose. Reasonable force may include the use of deadly force.

A police officer may use deadly force against a person if a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others.

In determining whether the police officer used reasonable force, the actions of the police officer are measured by the test of what a reasonable and prudent police officer would have done under the same circumstances confronting the police officer without regard to the police officer's underlying subjective intent or motivation.

That means the evil intentions will not be considered excessive force if the force used was in fact reasonable.

On the other hand, an officer's good intentions will not make the use of excessive force constitutional. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with hindsight.

> The nature of reasonableness must allow for the fact that police officers are often forced to make split-second judgments under circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.
>
> This reasonableness inquiry is an objective one. The question is whether the defendant police officer's actions w[ere] objectively reasonable in light of the facts and circumstances confronting the police officer.
>
> In determining whether the police officer used excessive force, you may consider, one, the need for the application of force; two, the relationship between the need and the amount of force used; three, the threat reasonably perceived by the police officer; and, four, any efforts made to temper the severity of a forceful response.

J.A. 605–06.

Unlike in *Rasanen*, the charge here did refer to the probable cause necessary for an officer to reasonably use deadly force. But the instruction did not track the language from *Rasanen*, and we conclude that it is materially different from the language we approved there, even with the reference to "probable cause." In *Rasanen*, we held that the jury "must" be instructed that the use of deadly force is "*unreasonable unless* the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others," 723 F.3d at 334

(emphasis added); here, the jury was instructed that an officer "*may* use deadly force . . . *if*" the officer has the requisite probable cause, J.A. 605 (emphases added).

Although these two formulations both refer to the probable cause requirement for the use of deadly force, they are not functionally equivalent. In *Rasanen*, we explicitly distinguished between the permissive "may/if" language and the restrictive "unless/only" language by reference to the New York State Police administrative manual before the jury in that case. *See Rasanen*, 723 F.3d at 335–37. The relevant provision in that manual used nearly identical language to the charge here, stating: "A[n officer] may use deadly physical force against another person when they reasonably believe it to be necessary to defend the [officer] or another person from the use or imminent use of deadly physical force." *Id.* at 336 (internal quotation marks omitted). In concluding that this formulation did not correctly instruct the jury, we explained that the problem with the "may/if" language is that it "is not framed in exclusive and restrictive terms." *Id.* at 337. That formulation was insufficient because it did not convey that an officer's use of deadly physical force is reasonable, and therefore legally permissible, only in a specific circumstance.[9] *Id.*

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[9] The dissent understates the prominence of this manual provision in *Rasanen* by characterizing it as one piece of evidence among many in the trial record. *See* Dissenting Op., *post* at 5–6. To the contrary, *Rasanen* explained that the deadly force provision played a more important role at the trial in that case: the district court instructed the jury that certain manual provisions, including the deadly force

Thus, the charge given to the jury here—which used the same permissive "may/if" language that we specifically rejected in *Rasanen*—was deficient. This error in the formulation of the specific deadly force instruction was compounded by the balance of the charge regarding excessive force, which further weakened the probable cause requirement. For example, the jury was also told that an officer "is entitled to use reasonable force," which "may include the use of deadly force." J.A. 605. Later in the charge, the district court again instructed the jury according to language that applies to non-deadly uses of force.

These instructions were further "dilute[d]," *Rasanen*, 723 F.3d at 335, by suggesting that the jury could find that Officer Wilson's shooting of Callahan complied with constitutional standards for reasons other than the fact that Wilson had probable cause to believe that Callahan posed a significant threat of death or serious injury to Wilson or others. Similar to *Rasanen*, the entirety of the charge here allowed the jury to conclude that "the shooting seemed necessary" because Wilson "acted reasonably under the circumstances," even if the jury concluded that Callahan did not pose that type of threat. *Id.* at 336 (emphasis omitted). *Rasanen* makes clear, however, that an officer's use of deadly force in a police shooting case is not, as a matter of law, reasonable *unless* that officer had probable cause to believe that the individual

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provision, "apply to the case," and the jury indicated that it was specifically considering that provision during its deliberations. 723 F.3d at 336–37 (internal quotation marks omitted).

posed a significant threat of death or serious physical injury to the officer or others. *Id.* at 334. Thus, the charge here suffers from the same "fatal defect" as the charge in *Rasanen*—"the jury did not know, because it was not told," that it could not properly conclude that the shooting was justified unless it found that the probable cause requirement was met. *Id.* at 336.

Even though the jury was told that Officer Wilson would have been permitted to use deadly force *if* he had probable cause to believe that Callahan posed a significant threat of death or serious injury, our required charge is more demanding; under *Rasanen*, such probable cause is the *only* situation in which Wilson was permitted to use deadly force, and the jury must be so instructed.

II. Harmlessness Analysis

An erroneous jury instruction requires a new trial unless the error was harmless. *Uzoukwu v. City of N.Y.*, 805 F.3d 409, 418 (2d Cir. 2015). "An error is harmless only if the court is convinced that the error did not influence the jury's verdict." *Id.* (internal quotation marks omitted). We are not persuaded that the error in the deadly force charge given here was harmless.

The focus of the trial was how the events unfolded in the Callahan basement that afternoon. As discussed above, under the instructions the jury was given, the jury could have reached its verdict without concluding that Officer Wilson had probable cause to believe that Callahan posed a threat of death or serious injury. That conclusion is compelled by the fact that the instructions here

allowed the jury to return a defense verdict if it found that Wilson acted according to an overly general standard of "reasonableness" that does not comport with the holding of *Rasanen*—that deadly force in this context is reasonable only if the requisite probable cause standard is satisfied. On this record, we cannot determine whether the jury answered the critical question and concluded that probable cause existed, or instead decided the case according to a more general standard that is inconsistent with our Circuit's precedent in this particular type of case. Because this error allowed the jury to decide the case on different grounds than *Rasanen* permits, we are not convinced that the error did not influence the jury's verdict, and we therefore cannot say that it was harmless.[10]

III. Evidentiary Rulings

Because we have concluded that plaintiffs are entitled to a new trial on the basis of instructional error, we need not consider their remaining arguments. Nevertheless, we briefly address the evidentiary issues raised on appeal in order to provide some guidance in connection with the retrial in this case, as the issues appear likely to recur. *See Rentas v. Ruffin*, 816 F.3d 214, 223 (2d Cir. 8 2016).

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[10] That the parties referred to probable cause during their summations does not, as the dissent suggests, render the error here harmless. *See* Dissenting Op., *post* at 7–9. The parties' various arguments did not cure the instructional error described above, especially in light of the court's instructions that the jury was required to follow the law as articulated by the court, not the lawyers.

Plaintiffs contend that the district court erred by excluding two pieces of evidence at trial: (1) expert testimony about police protocol, and (2) prior incidents in which Officer Wilson fired his weapon. We review a district court's evidentiary rulings, including those as to expert testimony, for abuse of discretion. *Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012). A district court abuses its discretion if it makes "an error of law or a clear error of fact." *Abascal v. Fleckenstein*, 820 F.3d 561, 564 (2d Cir. 2016) (internal quotation marks omitted). Upon review of the trial record, we identify no such error in the district court's decisions.

At trial, plaintiffs attempted to introduce expert testimony by former New York City police officer Joseph Zogbi regarding police training and protocol. As explained in his report, Zogbi concluded that Officers Wilson and Furey did not act in accordance with standard police room clearing techniques when they arrived at the Callahan residence, and that the officers had not been properly trained with respect to "basic tactical movement and mindset." J.A. 156. The district court precluded Zogbi from testifying as to plaintiffs' excessive force claim.[11]

We conclude that this decision was not an abuse of discretion. As we have explained, a district court has "broad discretion" to carry out its "gate-keeping function" with respect to expert testimony,

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[11] Because the trial was bifurcated, the district court ruled that Zogbi would be permitted to testify in the second phase of the proceedings as to plaintiffs' municipal liability claims.

which involves ensuring that the proffered testimony "is relevant to the task at hand." *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 658 (2d Cir. 2016) (internal quotation marks omitted). Here, Zogbi's expert report focused on whether Officer Wilson's training was adequate and what a properly trained officer would or would not have done in a similar situation. Contrary to plaintiffs' arguments, the district court acted within its discretion in concluding that these opinions are not relevant to Wilson's liability on the excessive force claim, as the type of training that Wilson received does not shed light on the dispositive question here—whether Wilson had probable cause to believe that Callahan posed a significant threat to his safety. Nor are Zogbi's opinions about police training relevant to Wilson's credibility in recounting what happened in the Callahan basement that afternoon.

Moreover, expert testimony is not admissible under Federal Rule of Evidence 702 if it "usurp[s] . . . the role of the jury in applying th[e] law to the facts before it," as such testimony "undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's." *Nimely v. City of N.Y.*, 414 F.3d 381, 397 (2d Cir. 2005) (first alteration in original) (internal quotation marks omitted). In this case, Zogbi's suggestions that Officer Wilson did not act reasonably under the circumstances intrude on the jury's exclusive role as the finder of facts. The district court therefore acted within its discretion in precluding Zogbi from testifying with respect to plaintiffs' excessive force claim against Officer Wilson.

Regarding Officer Wilson's prior discharges of his weapon, plaintiffs sought to introduce evidence that Wilson had twice fired his pistol at dogs that he perceived to be threatening him while he was on duty. The district court ruled that the evidence was not admissible, and we conclude that this decision was also within the court's discretion.

Plaintiffs point to this Court's "inclusionary approach" to evidence of prior bad acts under Federal Rule of Evidence 404(b), *United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007), and argue that the evidence should have been admitted to show Officer Wilson's mental state when he fired at Callahan and to discredit Wilson's testimony that he perceived the situation to be dangerous. Even if this evidence was offered for a proper non-propensity purpose—an issue that we need not and do not reach—the district court was nevertheless entitled to conclude that the prejudicial effect of the evidence substantially outweighed its limited probative value. *See United States v. Scott*, 677 F.3d 72, 79, 83–85 (2d Cir. 2012). It was therefore not an abuse of discretion for the court to conclude that the evidence was inadmissible.

In sum, on the record of this trial, the district court acted within its discretion in excluding Zogbi's expert testimony and the evidence concerning Officer Wilson's prior weapons discharges. Although we conclude that there was no abuse of discretion here, we note that any retrial may present different circumstances that lead to different conclusions.

CONCLUSION

The instructions given to the jury in this case regarding the lawfulness of Officer Wilson's use of force against Kevin Callahan misstated the law of our Circuit as articulated in *Rasanen*, 723 F.3d at 333–38, and we cannot say that this error was harmless. We therefore **VACATE** the judgment of the district court and **REMAND** for a new trial.

REENA RAGGI, *Circuit Judge*, concurring in part and dissenting in part:

I concur in so much of the panel decision as concludes that the district court acted within its discretion in excluding testimony regarding police protocols and prior instances in which Officer Wilson fired his weapon. *See* Majority Op., *ante* at 25–30. I respectfully dissent, however, from that part of the decision identifying reversible charging error in reliance on *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013). *See* Majority Op., *ante* at 11–24.

At the outset, I recognize that this panel is bound by *Rasanen*'s holding that in a civil action against a police officer for the unconstitutional use of deadly force, a district court cannot charge a jury that the standard for assessing the officer's use of such force is simply "reasonableness." Rather, the court must charge that the constitutional use of deadly force requires the officer to have had probable cause to believe that the person killed posed a significant threat of death or serious injury to the officer or to others. *See Rasanen v. Doe*, 723 F.3d at 334, 337; *see generally Harper v. Ercole*, 648 F.3d 132, 140 (2d Cir. 2011)

(stating that panel is bound by prior decisions of court unless reversed *en banc* or by Supreme Court). I, therefore, do not repeat here my reasons for dissenting in *Rasanen*. *See Rasanen v. Doe*, 723 F.3d at 338–46 (Raggi, J., dissenting).

I note only that *Rasanen* continues to set this court apart from our sister circuits, which construe the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), to "abrogate" the use of any special standards for deciding when the use of deadly force is constitutionally excessive and to "reinstate[] 'reasonableness' as the ultimate—and only—inquiry."[1] *Johnson v. City of Philadelphia*, 837 F.3d 343, 349 (3d Cir. 2016); *see Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) ("*Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force. Instead, all that matters is whether [police] actions were *reasonable*." (emphasis in original) (internal quotation marks omitted)); *see also Noel v. Artson*, 641 F.3d 580, 587 (4th Cir. 2011) (rejecting argument for special charge on use of deadly force where district court "submitted the case to the jury under the general rubric of

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[1] In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court clarified that *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that where officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force"), "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force[]'"; rather, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test," *Scott v. Harris*, 550 U.S. at 382.

reasonableness" because "*all* claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard" (emphasis in original)); *Penley v. Eslinger*, 605 F.3d 843, 849–50 (11th Cir. 2010) (holding that "Fourth Amendment's 'objective reasonableness' standard supplies the test to determine whether the use of force was excessive").

Moreover, since *Rasanen*, the Supreme Court has reiterated that the "settled and *exclusive* framework" for analyzing claims of excessive force is "reasonableness." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (emphasis added) (rejecting Ninth Circuit rule that otherwise reasonable defensive use of force is unreasonable as a matter of law where officers provoked violence to which they then responded with deadly force); *see Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) ("A claim that law-enforcement officers used excessive [deadly] force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."). Insofar as neither *Mendez* nor *Plumhoff* spoke to the issue of how juries should be charged in excessive force cases, the majority concludes that they do not overrule *Rasanen*. *See* Majority Op., *ante* at 15. But neither did *Tennessee v. Garner*, 471 U.S. 1 (1985), or *O'Bert ex rel. O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003)—the cases on which *Rasanen* relied to identify a probable-cause charging requirement—speak to jury charges. Indeed, *Garner* arose in the context of a bench trial, and the issue in *O'Bert* was the denial of summary judgment to a defendant who invoked qualified immunity to avoid

trial. *See Rasanen v. Doe*, 723 F.3d at 340 (Raggi, J., dissenting).

I do not pursue the matter further, however, because even following *Rasanen*'s holding, as this panel must, I would not identify charging error in this case. The jury instructions on the reasonable use of deadly force in *Rasanen* failed to make *any* mention of a need for probable cause to believe that the suspect posed a significant threat of death or serious physical injury. *See id.* at 330–31 (majority opinion). By contrast, the district court here cited such probable cause as the *only* example of when an officer might permissibly use deadly force:

> A police officer is entitled to use reasonable force. A police officer is not entitled to use any force beyond what is necessary to accomplish a lawful purpose. Reasonable force may include the use of deadly force.
>
> A police officer *may use deadly force against a person if a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others.*

App'x 605 (emphasis added). The majority nevertheless concludes that this charge is constitutionally inadequate because the jury could have construed "may," in the italicized text, as merely illustrative and, therefore, thought that deadly force might also be "reasonable" in other circumstances where the cited probable cause was lacking. *See* Majority Op., *ante* at 18–22. I cannot agree.

The context in which the probable cause instruction was given indicates that the word "may" was used to convey legal authorization rather than mere illustration. *See, e.g.*, Black's Law Dictionary 1068 (9th ed. 2009) (defining "may" as "[t]o be permitted to"); Webster's Third New International Dictionary (Unabridged) 1396 (1986 ed.) (defining "may" as to "have power," or "be able" and to "have permission to"). Thus, when the two quoted paragraphs were heard together, a reasonable jury would understand that (1) it can sometimes be "reasonable" for an officer to use deadly force, and (2) when such force may be used, *i.e.*, when it is constitutionally authorized, is when the officer has "probable cause to believe that the person poses a significant threat of death or serious physical injury." App'x 605. This was sufficient to avoid the prejudicial error identified in *Rasanen*, *i.e.*, the district court's failure in that case "to instruct the jury with regard to the justifications for the use of deadly force articulated in *O'Bert* and *Garner*." *Rasanen v. Doe*, 723 F.3d at 334.

Nor do I think a different conclusion is compelled by *Rasanen's* determination that the instruction's omission in that case was not rectified by inclusion in the record of a police manual provision advising officers that they "may use deadly physical force against another person when they reasonably believe it to be necessary to defend" themselves or others "from the use or imminent use of deadly physical force." *Id.* at 336 (quoting N.Y. State Police Admin. Manual § 16B1(A)); *see id.* at 337 (observing that manual's language was not framed in "exclusive and restric-

tive terms"). As *Rasanen* itself concluded, a jury's opportunity to consider a manual provision that is in evidence is not the same as receiving an instruction from the court. *See id.* at 337 (noting that manual provisions were of little relevance in any event, as they could "not substitute for an instruction" to the jury).[2]

More to the point, whatever a jury could have inferred from these manual provisions in *Rasanen*, where the district court provided no instructions as to the probable cause required to use deadly force, a similar concern is not warranted here. Not only did the district court follow its general reasonableness charge with the specific instruction that an officer may use deadly force when he has the probable cause to believe that a person poses a significant threat of death or serious physical injury to him or others, but also, that was

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[2] The majority states that the district court in *Rasanen* told the jury "that certain manual provisions, including the deadly force provision, 'apply to the case.'" Majority Op., *ante* at 20 n.9 (quoting *Rasanen v. Doe*, 723 F.3d at 336). I respectfully submit that the circumstances are more complex than our decision in *Rasanen* reports. While the deliberating *Rasanen* jury sent the district court a note referencing manual provision § 16B1(A) (Self Defense or Defense of Others) in evidence, what it asked was whether "certain other provisions" of the manual applied, *id.* at 336, specifically, "[§16B1](C), (E), (F), [and] (H)," App'x 1490, *Rasanen v. Doe*, 723 F.3d 325 (No. 12-680-cv). With no further mention of § 16B1(A), the district court told the jury that § 16B1(C) (Prevention of Termination of Felonies) did not apply to the case, but that subdivisions (E), (F), and (H), which related to the feasibility of using warnings or alternatives to deadly force and an officer's responsibility for the use of force, did apply. *See id.* at 1501–04; *see also Rasanen v. Doe*, 723 F.3d at 336–37.

the only justification for the use of deadly force that was identified for the jury. The district court's charge did not suggest, and the parties did not argue, the existence of any other circumstances in which deadly force might reasonably be used.

Indeed, even if there was charging error in the district court's failure to employ "only if" language respecting such probable cause, I would think that error harmless beyond a reasonable doubt in this case because the parties' singular focus at trial and on summation was the presence or absence of probable cause for Officer Wilson to believe that the deceased Callahan posed a significant threat to the officer's life at the time he used deadly force.

Plaintiffs' counsel told the jury that he did not even dispute that Officer Wilson held a "subjective" fear for his life when he discharged his firearm, thereby killing Callahan. App'x 573. Counsel argued only that the circumstances failed—"objectively"—to demonstrate probable cause for that fear. *Id.*; *see Dancy v. McGinley*, 843 F.3d 93, 116 (2d Cir. 2016) (observing that "Supreme Court [has] made clear" that standard for assessing propriety of officer's use of force is "objective reasonableness"). Repeatedly, plaintiffs' counsel emphasized that Wilson could not lawfully "use deadly physical force, firing a gun, unless there's probable cause to believe that his life is at risk, somebody else is going to use deadly force against him, or that somebody is going to cause serious physical injury to him or somebody else." App'x 576; *see id.* at 580 ("The law says . . . you're to rule for the plaintiff, . . . unless there's probable cause, reasonably, objectively, probable cause to

believe that [the officer's] life was in danger or that someone else was in danger, and that's clearly not the case here, clearly not the case.").

The defense, in its summation, neither objected to these statements of the applicable legal standard nor argued otherwise. To the contrary, defense counsel embraced the probable cause standard, telling the jury that his summation would "discuss with you how the evidence has shown that on that day in September 2011, Tom Wilson had probable cause to believe that he was facing a significant threat of death or serious injury and . . . that it was reasonable and necessary to use deadly force." *Id.* at 584. Counsel then argued how discrete evidence satisfied that standard. He maintained that (1) the call reporting a dispute involving "a man with a gun" at Callahan's home, (2) the officers' observation of a cleaver in plain view in the home, and (3) the officers' failure to receive a response upon announcing their presence in the home objectively supported Officer Wilson's belief of "a real and present threat of danger . . . that there may be a person there that had a gun." *Id.* at 585. Counsel further argued that when Callahan slammed a bedroom door on Officer Wilson, "pinning him with his gun inside that room," the officer "was facing a real fear that the person behind that door could get his weapon and use it against him or, more significantly, was armed himself and was going to shoot [the officer] through that door." *Id.* at 586. Thus, he maintained, the officer confronted "a significant threat of death," *id.* at 594, that put him "in fear of a real threat of death," *id.* at 595. Moreover, in response to the plaintiffs' argument that Officer Wilson's

real subjective fear of risk to his life did not equate to objective probable cause to hold such a fear, defense counsel argued that "[a]ny other officer would have faced that same threat and would have had that same reasonable fear." *Id.*

It was for the jury to decide how persuasive counsel were in arguing that the evidence did or did not establish probable cause, but the cited record convincingly demonstrates that the singular issue in dispute was whether such probable cause existed.[3]

That distinguishes this case from *Rasanen*. There, the jury "did not know, because it was not told," to frame the reasonableness of the officer's actions in terms of probable cause. *Rasanen v. Doe*, 723 F.3d at 336. Here, the jury was so told, both by the court and by counsel. After generally charging the jury that the use of deadly force could be reasonable, the district court cited a single circumstance in which such a conclusion would be warranted: when an officer had probable cause to fear a risk to life or serious physical injury. Meanwhile, counsel for both parties, in summation, told the jury that the determinative

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[3] As the Supreme Court has instructed, probable cause is a "flexible, common-sense standard." *Florida v. Harris*, 568 U.S. 237, 240 (2013). While it requires more than "mere suspicion," its focus is on "probabilities," not "hard certainties." *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (internal citations and quotation marks omitted). Thus, it does not demand "proof beyond a reasonable doubt or by a preponderance of the evidence," standards that "have no place in a probable cause determination." *Id.* (internal quotation marks and citations omitted); *accord Zalaski v. City of Hartford*, 723 F.3d 382, 393 (2d Cir. 2013).

issue in the case was whether the officer had probable cause to believe that he was facing a significant threat of death or serious injury. On this record, I identify no charging error. But even if I were to do so, I would find the error harmless beyond a reasonable doubt because I think that on the charge given and the arguments made, the verdict can only have been based on the jury's finding that, when Officer Wilson shot Callahan, the officer had probable cause to believe that Callahan posed a significant threat of death or serious physical injury to the officer or to others.

Accordingly, I vote to affirm the judgment in favor of defendants.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jury Charge

[Transcript pages 432 to 448]

objectively reasonable.

Officer Wilson overreact. He shot and killed a man in his own home who posed no threat. He didn't have a gun, a weapon, or anything.

Real and present danger? It wasn't real or present and he should be held to account for that.

And when Sergeant Greene showed up he knew somebody was injured in that house and he had an obligation, as Mr. Mitchell said, in the face of danger to go in and help them. Instead, he left a man that Wilson had shot for no reason die on his knees in his own room.

They ought to be held to account for both of those acts civilly and that's why I ask you to return a verdict in favor of the plaintiff in this case.

Thank you.

THE COURT: Now it's my turn.

Now that the evidence in the case has been presented, and the attorneys for the parties have concluded their closing arguments, it's my responsibility to instruct you on the law that governs this case.

My instructions will be in three parts. First, I'll give you instructions regarding the general rules that define and govern the duties of a jury in a civil case.

Second, I will instruct you as to the legal elements of the causes of action relevant to this case; and, finally, instructions regarding the general rules for your deliberation as jurors.

It is your responsibility and duty to find the facts from all the evidence in this case. You are the sole judges of the facts, not counsel, not myself.

I want to impress upon you again the importance of that role. It is for you, and you alone, to pass upon the weight of the evidence, to resolve such conflicts as may have appeared in the evidence, and to draw such inferences as you deem to be reasonable and warranted from the evidence or the lack of evidence.

With respect to any question concerning the facts, it is your recollection of the evidence and yours alone that controls.

Parties are equal before the Court.

This case should be considered and decided by you as an action between parties of equal standing in the community.

All persons, corporations or entities, stand equal before the law and are to be dealt with as equals in this Court. All parties are entitled to equal consideration. No party is entitled to sympathy or favor. You must judge the facts and apply the law as I shall instruct you without bias, prejudice or

sympathy either to the plaintiffs or the defendants.

The burden of proof. In a civil case such as this, the plaintiff has the burden of proving the essential elements of his claims against the defendants by a preponderance of the evidence.

To establish a claim by a preponderance of the evidence means simply to prove that something is more likely. A preponderance of the evidence means the greater part of the evidence. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase preponderance of the evidence refers to the quality of the evidence, the weight and effect it has on your minds.

For the plaintiff to win, the evidence that supports his claim must appeal to you as more nearly representing what took place than the evidence opposed to his claim.

To put it differently, if you where to put plaintiff's and defendant's evidence on opposites sides of the scale, plaintiff would have to make the scales tip slightly on his side. If the evidence weighs so evenly that you're unable to say there's a preponderance on either side, then you must resolve it in defendant's favor.

To recapitulate briefly, a preponderance of the evidence means such evidence as when considered and compared with that opposed to it, produces in your mind a belief that what was sought to be proved is more likely the case than not the case.

Evidence to be considered. The evidence upon which you are to decide what the facts are comes

in several forms; sworn testimony from witnesses both on direct and cross-examination and regardless of who called them, exhibits that the Court has received in evidence, facts to which the lawyers have agreed or stipulate. This simply means that they both accept the fact to which they stipulated and there's no need to produce any further evidence on that point.

What is not evidence. Certain things are not evidence and are to be disregarded in deciding what the facts are.

Arguments or statements by lawyers are not evidence, objections to questions are not evidence, testimony that has been excluded or stricken or that you have been instructed to disregard must be disregarded, and of course anything you may have seen or heard outside the courtroom is not evidence.

In deciding what the facts are, you must consider all of the evidence that has been offered. In doing this, you must decide which testimony to believe and which testimony not to believe.

In making that decision there are a number of factors you may take into account, including the following:

The witness' opportunity to observe the events he or she described, the witness' intelligence and memory, the witness' manner while testifying, does the witness have any interest in the outcome of the case, does the witness have any bias or prejudice concerning any part of the matter involved in the case, the reasonableness of the

witness' testimony considered in light of all of the evidence in the case.

In deciding the testimony of a plaintiff or a defendant you must apply the same standards as you apply to any other witness.

If you find that a witness's testimony is contradicted by what that witness has said or done at another time, or by testimony of other witnesses, you may disbelieve all or any part of the witness' testimony.

In deciding whether or not to believe a witness, keep this in mind. People sometimes forget things. A contradiction may be an innocent lapse of memory or it may be an intentional falsehood.

Therefore, consider whether it has to do with an important fact or only a small detail. Different people observing the same event may remember it differently and, therefore, testify about it differently.

You may consider these factors in deciding how much weight to give to the testimony. You are not to give any greater weight or credence to a witness solely because of his or her title or position.

Now, ordinarily, opinions of witnesses are not received in evidence. However, opinions of expert witnesses qualified by training and experience in a particular field of specialized learning are received in evidence and the expert witness is permitted and expected to give you the reasons for and the basis of his or her opinion. You should weigh and evaluate the testimony of an expert witness precisely as you weigh the testimony of any other witness.

We know now go to the law portion, the main portion.

Plaintiff, Christopher Callahan, on behalf of decedent Kevin Callahan, brings two claims; one, a claim against defendant Police Officer Thomas Wilson for the use of excessive force in the shooting of Kevin Callahan; and, two, a claim against defendant Sergeant Scott Greene for deliberate indifference to serious medical needs of Kevin Callahan.

Plaintiff has the burden of proving these claims by a preponderance of the evidence. Each claim must be considered separately as against each defendant.

The first claim, excessive force. Plaintiff claims that defendant Wilson used excessive force in the shooting of Kevin Callahan.

A person has the right, under the United States Constitution, to be free from the use of excessive force.

A police officer is entitled to use reasonable force. A police officer is not entitled to use any force beyond what is necessary to accomplish a lawful purpose. Reasonable force may include the use of deadly force.

A police officer may use deadly force against a person if a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others.

In determining whether the police officer used reasonable force, the actions of the police officer

are measured by the test of what a reasonable and prudent police officer would have done under the same circumstances confronting the police officer without regard to the police officer's underlying subjective intent or motivation.

That means the evil intentions will not be considered excessive force if the force used was in fact reasonable.

On the other hand, an officer's good intentions will not make the use of excessive force constitutional. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with hindsight.

The nature of reasonableness must allow for the fact that police officers are often forced to make split-second judgments under circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one. The question is whether the defendant police officer's actions was objectively reasonable in light of the facts and circumstances confronting the police officer.

In determining whether the police officer used excessive force, you may consider, one, the need for the application of force; two, the relationship between the need and the amount of force used; three, the threat reasonably perceived by the police officer; and, four, any efforts made to temper the severity of a forceful response.

The second cause of action, deliberate indifference to serious medical need.

Plaintiff claims that after defendant Wilson shot Kevin Callahan, defendant Greene denied Kevin Callahan adequate medical care.

The United States Constitution imposes a duty upon law enforcement officers to ensure that persons in their custody receive adequate medical care.

To establish this claim, the plaintiff must prove the following:

One, that Kevin Callahan had a serious medical need; and, two, that defendant was deliberately indifferent to that serious medical need.

A medical need is serious when, for example, (a) the problem is so obvious that non-doctors would easily recognize the need for medical attention, or (b) denying and delaying medical care creates a risk of permanent physical injury or death; or (c) denying or delaying medical care causes needless pain.

To show that a defendant was deliberately indifferent to the serious medical need, plaintiff must show that the defendant knew of an excessive risk to Kevin Callahan's health, and that defendant disregarded that risk by failing to take reasonable measures to address it.

Plaintiff must show that defendant actually knew of the risk. If they prove that there was a risk of serious harm to Kevin and the risk was obvious, however you are entitled to infer from the

obviousness of the risk that defendant knew of the risk.

However, if you find that the defendant was actually unaware of the obvious risk, you must find the defendant was not deliberately indifferent.

That brings us to the end. I must tell you these are very short charges but there are a lot of powerful words in there that you have to consider.

The conclusion. I remind you once again it is your responsibility to judge the facts in this case from the evidence admitted during the trial, and apply the law as I have just given it to you.

Your deliberations should include a rational discussion of the evidence in this case by all of you. So basically what I'm saying now is discuss the case, discuss it among yourselves.

In your deliberations you're entitled to your own opinion but you should exchange views of your fellow jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced another opinion is correct, your decision must be your own.

If you wish to have some of the testimony repeated, you may make such a request. I'll call you into court and have the court reporter read those portions you desire to hear. If you wish some portions of the instructions repeated, you may make that request as well.

If it becomes necessary during your deliberations to communicate with me for any reason, send a note through the clerk.

When you send a note, don't tell me how you stand numerically. Don't tell me 6 to 1, 5 to 2, 4 to 3, or anything like that.

The reason? The lawyers are not supposed to know how you stand until you all have agreed upon your verdict. Any note you give me I have to give to them. It doesn't matter whether I know you're 6 to 1 or 5 to 2. It doesn't matter. They're not supposed to know and any note you give me I have to give to them, so don't describe where you stand when you ask me something.

No communication with the Court except by a writing. The Court will not communicate with any member of the jury on any subject touching on the merits of the case other than in writing or orally here in open court.

Don't reveal to any person, not even to the Court, how you stand numerically or otherwise on the merits of the case until you all have agreed upon your verdict. Any verdict you reach must be unanimous. It must be unanimous for all seven.

Your oath sums up your duty. That is, you will, without fear or favor to any person, conscientiously and truly try the issues before you according to the evidence given to you in open court.

Now I normally have a sidebar with the lawyers and ask them if I read the charges right. The reason I say that is they have a copy of the law portion of this and if I made a mistake or left out something, they'll tell me.

Sidebar if it's necessary. Any objections to the reading?

MR. MITCHELL: No, your Honor.

MS. MARION: I would like a sidebar, Judge.

(The following takes place at sidebar.)

THE COURT: Only on the reading, not anything else that we went over.

MS. MARION: Correct. I would ask that you inform the jury that the court reporter is here for a read back.

THE COURT: I said it.

MR. BARKET: Is there a verdict sheet?

THE COURT: You're going to get that.

MS. MARION: I don't think he said it. There was no charge to a police officer as a witness, they don't get any extra credit.

THE COURT: I said that.

MS. MARION: I didn't even hear that.

THE COURT: Do you want to see it? Treat everybody equally. It doesn't matter their title. I didn't specifically say police officer.

MS. MARION: You didn't specifically say police officer.

THE COURT: I said everybody is treated equally. It doesn't matter their rank or anything else.

MS. MARION: I heard that part. I didn't hear it as to a police officer. You said we have to prove the essential elements by a preponderance of the evidence. When you went through the law, you didn't say what the essential elements were. I thought that—

THE COURT: Anything else?

MS. MARION: I thought it was confusing. Nothing. I renew my objection to the excessive force charge as stated in chambers.

THE COURT: Do you want to say it again?

MR. MITCHELL: Judge, did you tell them it has to be unanimous?

THE COURT: Yes.

(The following takes place in open court.)

THE COURT: Now, the first thing that you have to do is you have to select a foreperson. Now that person doesn't get two votes, they only get one vote. They don't get anymore money. They're just charged to relay messages and so forth. That should be a very easy job.

Next, we're going to send in everything that was marked in evidence that can go back. If you want the door, we will send it in, but you have to ask for it.

Now, certain 911 calls or other calls, if you need them we will call you back in and you'll hear it. Anything you need we can provide for you if you let me know what you want.

Now, read backs mean when you want certain testimony read back. Example. If this was an accident case, and you wanted to know what a witness said about the color of the light, you would ask what did witness A say about the color of the light. I would confer with the lawyers and if we all agree on what was said, I would send it back to you.

But there are times when you want a flavor of what a witness said and you don't know how to put it in writing. I will call you back in and we will start reading the testimony of witness C. When you are all satisfied you heard enough, and you have to be unanimous, we stop the reading. I don't care what phase it is so long as you're satisfied you heard enough. How do I know you heard enough? I see you all looking at each other and saying that's enough, that's enough, and then I'll ask you do you all agree it was enough? And if you all say yes, we stop the reading. I don't care who the witness is or what time it is.

Now the most important thing is I'm going to send you the law. I realize it's complicated so you're going to get a copy of what I read and I'll give each one a copy so you have it in front of you and you can look at certain points and it's there.

I'm also going to send in a verdict sheet. The verdict sheet is very simple. It will say, do you find that plaintiff won against so and so defendant or not, and the same thing with respect to claim two. That will come in. All of the evidence will be put together and sent back to you. Everything that was marked in evidence will come back to you. If it wasn't marked in evidence, you'll never see it. Any recordings will not be sent in. If you want it, let me know and we will bring you in and play it back.

With that I say go do justice. Good luck. Lunch comes at 12:30.

The first thing you should do is pick your foreperson, start deliberating and we will get

everything to you slowly but it will all come in shortly.

(The jury commences deliberations at 11:35 a.m.)

THE COURT: Do we have all of the exhibits?

MR. MITCHELL: Yes.

THE COURT: Bring them up so we know what goes back. And check it again because sometimes in civil cases things not in evidence go back.

MR. MITCHELL: Yes, Judge. I believe we did do that, but we will do it one more time.

THE COURT: Do we have all of the exhibits?

MR. MITCHELL: Yes, your Honor.

THE COURT: Where are the exhibits?

MS. MARION: They are right here.

MR. MITCHELL: I was assured it's all there.

satisfied?

MR. MITCHELL: Yes. Thank you.

THE COURT: Send them all in. Any objections to the verdict sheet?

MS. MARION: No, your Honor.

THE COURT: I'm shocked.

MS. MARION: What about the door, does that go in?

MR. BARKET: If they ask for it.