Case No. 21-6081

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VICKI JO LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased; and TROY LEVET LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased,

Plaintiffs/Appellees,

v.

POLICE OFFICER DENTON SCHERMAN,

Defendant/Appellant.

APPELLANT DENTON SCHERMAN'S REPLY BRIEF

Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable David L. Russell
District Court No. CIV-19-489-R

January 25, 2022

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Appellant Denton Scherman respectfully files his Reply and states:

I. ARGUMENTS

A. This Court Has Jurisdiction Of Scherman's Appeal.

This Court has "jurisdiction 'to review (1) whether the facts the district court ruled a reasonable jury could find would suffice to show a legal violation, and (2) whether the law was clearly established at the time of the alleged violation.... In conducting this analysis, we must leave the district court's factual findings undisturbed...." *Dalton v. Reynolds*, 2 F.4th 1300, 1307-08 (10th Cir. 2021).

Appellees argue that Scherman's appeal is a fact challenge to the finding that Scherman violated clearly established law cloaked as a legal challenge. Aple. Br. 23, 28-29. Quite the opposite, Scherman's legal argument utilizes only the facts that either the district court found uncontroverted, Appellees admitted, or that Appellees failed to rebut in response to summary judgment and does not in any way challenge the district court's factual findings and accepts them as true. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1161 n. 1 (10th Cir. 2021) (noting that the Court "must accept any facts that the district court assumed in denying summary judgment" and "[a]ccordingly, we draw the facts from the district court's summary judgment order").

Specifically, Appellees' primary assertion is that because the district court concluded that a jury could find that Lewis was no longer "barreling" toward

Scherman after the first shot, Scherman's insistence that Lewis continued to move toward him is an impermissible fact challenge. However, the district court's rendition of the facts and the conclusions it drew from them lead to no other conclusion than Lewis continued to approach Scherman after the first shot. According to the district court:

> Still the Plaintiffs do not dispute that after his fight with Box in the living room, Lewis turned toward Scherman and advanced in his direction as Scherman backed down the entry hallway toward the front door. Four gunshot wounds in the front of Lewis's body and the bullet casings recorded in the Edmond police department's crime sketch confirm this account. Instead of arguing that Lewis did not advance toward Scherman, the Plaintiffs state that Lewis 'mov[ed] his arms in a windmill motion' rather than in a tackling position and that Lewis was more than one and half to two feet away from Scherman when Scherman discharged his firearm four times. The parties agree that the incident ended at the front door when Lewis fell to the ground.

App. Vol. 3, 493. Moreover, although Appellees denied that Lewis continued to *violently* advance toward Scherman after being shot, Appellees nevertheless conceded that Lewis continued to move forward by claiming that Lewis "*tr[ied] to crawl out the [front] door after being shot and call[ed] for help*." App. Vol. 2, 190, ¶ 59.

The district court's conclusion that a jury could find that Lewis did not continue to "barrel" toward Scherman simply does not negate that the altercation with Scherman began close to the entrance to the living room and ended at the front door. App. Vol. 1, 61. Had Lewis stopped moving toward Scherman after the first

shot, it is physically impossible that he could have attempted to crawl out the front door. The district court's conclusion – that a jury could find that after the first shot, Lewis's approach was no longer aggressive, and, therefore, Scherman could have perceived that Lewis was no longer an immediate threat – is not inconsistent with Lewis's continued approach to Scherman. Instead, the district court determined that it was the alleged lack of aggressiveness in Lewis's continued forward movement, not a total lack of forward movement, which could lead a jury to believe Lewis was no longer a threat. Thus, Scherman's appeal does not raise a challenge to the district court's finding that a jury could conclude that Scherman's use of deadly force after his first shot was objectively unreasonable.

Appellees also posit that, "[i]n seeking to distinguish on-point precedent, Scherman describes the 'crucial distinction between this case' and prior precedent" based on Lewis's movement toward Scherman, Scherman is attempting to improperly re-litigate whether Lewis posed a threat after the first shot. Aple. Br., 29. To the contrary, as recent Supreme Court authority makes crystal clear, the qualified immunity analysis *requires* Scherman to distinguish the facts of prior precedent from the facts of this case in arguing that the clearly established law does not give fair notice that his conduct violated the Constitution.

Far from challenging the district court's finding on the first prong of the analysis, Scherman is establishing that, even assuming a jury could find that

Scherman violated Lewis's constitutional rights because Lewis no longer posed a threat to Scherman after the first shot, extant case law does not give an officer faced with the circumstances then facing Scherman fair notice that Lewis no longer posed a threat. In other words, this is the first case in which courts have held that an officer – who has witnessed a violent, nude, unarmed, mentally ill individual both beat his larger partner about the head, neck and shoulders and resist the use of non-lethal force immediately prior to his encounter with the individual – violates the Constitution when, after he fires a shot, the individual slows his movement but, nonetheless continues advancing toward the officer.

And, since the specific fact situation in which the officer finds himself is vitally important in determining whether the unconstitutionality of his use of force is clearly established, *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021), Scherman must distinguish the facts of prior precent from the specific facts as the district court found them. The Supreme Court in *City of Tahlequah* reviewed whether the circuit court correctly determined that the officers violated clearly established law. Noting that *Allen*[1] clearly established "that an officer violates the Fourth Amendment when his or her reckless or deliberate conduct results in the need for lethal force ... in confronting an irrational suspect who is armed with a weapon of short-range lethality and who has been confined on his own property," the circuit court concluded that

[1] *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997).

officers recklessly manufactured a situation that led to the fatal shooting when they knowingly confronted and cornered a potentially irrational suspect armed only with a hammer. *Bond v. City of Tahlequah*, 981 F.3d 808, 825-26 (10th Cir. 2020). Therefore, *Allen* clearly established that applying lethal force after manufacturing a situation violated constitutional law, officers were not entitled to qualified immunity. *Id*.

The Supreme Court reversed holding that the circuit court "contravened [] settled principles" of the qualified immunity analysis by "defining clearly established law at too high a level of generality." 142 S. Ct. at 11. "The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Id*. (quotation marks and citations omitted) (emphasis added). That is, a reasonable officer must not be able to "miss the connection between" the comparator case and his situation. *Id*. at 12.

The *City of Tahlequah* Court found an insufficiently tailored inquiry when the circuit court merely asked whether officers had confronted and cornered an irrational suspect, armed with a weapon of short-range lethality on his own property. Rather, *Allen* did not "come[] close to establishing that the officers' conduct was unlawful" (recklessly precipitated the need to use deadly force) because in *Allen*, officers responded to a suicide call by rushing toward the suspect while screaming at him, and when they arrived at the vehicle in which he was seated, attempting to wrest the

gun he was holding away from him. *Id*. By contrast, in *City of Tahlequah*, the officer followed the suspect into the garage at a distance and did not yell until the suspect picked up a hammer. *Id*. Neither the circuit court nor plaintiff "identified a single precedent finding a Fourth Amendment violation under similar circumstances." *Id*.

Because Scherman's challenge is to the district court's legal conclusion regarding whether the law was clearly established, this Court has jurisdiction.

B. Clearly Established Law Did Not Give Fair Notice To Scherman That His Conduct After The First Shot Was Unconstitutional.

As noted, the district court concluded a jury could find Scherman's use of force unreasonable because Lewis had stopped his aggressive approach after the first shot such that Scherman was no longer in immediate threat of serious physical harm from Lewis. Thus, at issue here is whether the district court or Appellees identified a case with the requisite rigorous factual specificity that would have told Scherman, under the circumstances he faced, that his second shot was an unreasonable use of force.

Per the district court, *Allen* gave fair notice since it holds that a reasonable jury could conclude that the officers' actions were reckless and precipitated the need for deadly force when they aggressively approached and surrounded an armed, dangerous individual. App. Vol. 3, 507. Moreover, *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) "surely did" as it demonstrates that it is unconstitutional to use deadly force against a man "acting crazy," "carrying a bat," and moving

toward officers. *Id*., 507-08. Consequently, "even though Lewis was approaching Scherman, an objective officer would have been on notice that employing deadly force in the "precise moments" violated the Fourth Amendment." *Id*., 508.

The problem is, neither case on which the district court relied addresses whether a suspect still poses an immediate threat to an officer when the officer fires his second shot. *See also* Aplt. Br. 11-15. *Estate of Ceballos* holds that if officers force a crazy man, carrying a bat, who was not otherwise threatening to officers, into a corner where he feels the need to protect himself, and he aggressively approaches officers with the weapon as a result, officers recklessly created the need to use lethal force and its use, therefore, is not reasonable. Both are about whether the *initial use* of deadly force was unreasonable.[2]

Since the facts of both *Allen* and *Estate of Ceballos* are "dramatically different" from the facts of this case (and indeed they address a legal issue not before this Court), *City of Tahlequah* teaches that this Court must look elsewhere for comparators. 142 S. Ct. at 12. The facts of the comparators must "*squarely govern*." *Id*. at 13; *Mullenix v. Luna*, 577 U.S. 7, 13-14 (2015) (in determining

[2] In fact, the proposition underlying the *Allen* line of cases is that despite the fact that firing the first shot at a crazy man, wielding a weapon, who aggressively approaches officers is, at first blush, objectively reasonable, it is the officers' actions immediately prior to the first use of deadly force that renders its use unconstitutional.

whether the suspect posed an immediate threat, the facts of comparator cases must "place "beyond debate" that in similar circumstances, the threat was immediate.).

Scherman could not locate a case in which this Court[3] or the Supreme Court has concluded that after an officer has taken the objectively reasonable first shot, the continued use of deadly force on a suspect who continues to advance, although he is no longer "barreling" toward to the officer, is unconstitutional. Apparently, neither could Appellees.

At the highest level of generality, the law is clearly established that shooting a suspect who has already been apprehended or subdued violates the Fourth Amendment because the suspect no longer poses a threat of immediate harm. Appellees argue that since this Court has applied the general rule in "a variety of circumstances" showing wide factual disparity in the cases denying qualified immunity when a suspect has surrendered, been apprehended or been subdued, "the underlying rule was [] was sufficiently specific to deny qualified immunity." Aple. Br., 31-32. This articulation of the qualified immunity analysis runs directly afoul of *City of Tahlequah*'s prohibition on "defining clearly established law at too high a level of generality." 142 S. Ct. at 11.

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[3] Scherman identified a worthy comparison in a case from the Fifth Circuit, *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997). Appellees argue that this case must yield to the numerous in-Circuit cases they believe are specific enough to give Scherman fair notice. Given Appellees' failure to identify a relevant comparator, the Court should consider *Colston*.

This Court must go beyond the generalities to determine whether the conclusion that Scherman unreasonably used deadly force by shooting a suspect who was not barreling toward him but still continuing to advance "follow[s] immediately from" the principle that it is unconstitutional to shoot a suspect who has surrendered, been apprehended or has been subdued. 142 S. Ct. at 13. Scherman cited *Francher v. Barrientos*, 723 F.3d 1191, 1194 (10th Cir. 2013), *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1164 (10th Cir. 2020) and *Reavis v. Frost*, 967 F.3d 978, 982-83 (10th Cir. 2020) as examples of what a reasonable officer would believe "subdued" to mean.[4]

In *Francher*, after the first shot, the suspect "was no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger" and the officer had already stepped back from the vehicle where he testified he felt safer and had noticed the suspect had slumped. This pause "allowed him enough time to recognize and react to the changed circumstances and cease firing his gun." 723 F.3d at 1201 (quotation marks omitted). In *Smart by Smart*, although "the mere fact that a suspect has fallen and been disarmed does not necessarily mean

[4] Contrary to Appellees' assertion, Scherman does not argue "that the cases finding force unconstitutional after a threat has passed apply only when the victim is incapacitated." Aple. Br., 33. In *Smart by Smart* and *Reavis*, the suspect was not incapacitated when the officer fired the shots that killed the suspect.

an officer acts unreasonably by firing additional shots," after the first shot, the suspect was face down on the ground attempting to surrender. 951 F.3d at 1175-76.[5] In *Reavis*, the threat had literally driven past the officer when he fired (he shot the fleeing suspect in the back). 967 F.3d at 995.[6] *See also Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008) (the justification for using force ceased "once Mr. Weigel was handcuffed and his legs were bound"); *Dixon v. Richer*, 922 F.2d 1456, 1463 (10th Cir. 1991) (once the plaintiff "had already been frisked, his hands were up against the van with his back to the officers, and was not making any aggressive

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[5] To the extent Appellees claim *Smart by Smart* is a comparator case, even if it were factually similar enough to this case to merit consideration, it was published after the events at issue in this case.

[6] *Reavis* was also decided after the events giving rise to this action occurred as was *Huff v. Reeves*, 996 F.3d 1082 (10th Cir. 2021). Notwithstanding, *Huff* would not give Scherman fair notice that he violated Lewis's rights by taking a second shot. There, Norris took Huff hostage during a bank holdup and fled. When officers forced the fleeing vehicle from the road, Norris exited the vehicle, fired at officers and took off in one direction, while Huff exited the vehicle and fled away from Norris. As she ran, Huff had her hands in the air. As she turned to face the officers, she was shot twice when, the district court concluded, a jury could find that Huff posed no immediate threat of harm since she had raised her hands in surrender as she approached, and officers shot her when she was clearly not evading apprehension. *Id*. at 1091. In this case, the district court found only that, after the first shot, Lewis was no longer "barreling" toward Scherman, a finding with which Appellees agree. App. Vol. 3, 492-93 (Appellees took issue with "any assertion by Scherman 'meant to imply [Lewis] was continuing to charge and punch Scherman while/after [Lewis] was being shot and fatally wounded by Scherman."). Absent from the district court's analysis is a finding (nor did Appellees offer evidence to support such a finding, App. Vol. 2, 191-96) that, in addition to slowing his approach, Lewis made any sign of surrender or submission.

moves or threats," it was clear the plaintiff no longer posed a threat of immediate harm).

Appellees also mention *Perea v. Baca*, 817 F.3d 1198 (10th Cir. 2016) where police, called to perform a welfare check, knew that Perea was unarmed, suffered from mental illness and was on drugs. By the time officers arrived, Perea had left on his bicycle. When officers located him, Perea attempted to evade them. After forcing him to stop, officers pulled Perea from his bicycle. In attempting to restrain Perea, Jaramillo deployed his taser once. When that proved ineffective, Jaramillo dry stunned Perea nine more times. At some point during the two minutes of tasering, Perea "fell and the officers pushed him to the ground with his arms under his body." *Id*. At 1203. One officer was on 'the upper part of his body' while the second officer was on his legs. *Id*. Yet, Jaramillo continued to use the taser "until he pulled [Perea's] arms out and handcuffed both hands." *Id*.

The Court held "[e]ven if Perea initially posed a threat to the officers that justified tasering him, the justification disappeared when Perea was under the officers' control." *Id*. At 1204. The Court observed, "[m]ore specifically, it is [] clearly established that officers may not continue to use force against a suspect who is effectively subdued." *Id*. 1204 (citing *Fancher*, 723 F.3d at 1201 (10th Cir. 2013)

After Scherman fired his first shot, the Court must ask whether Lewis was (1) "visibly slumping" with Scherman out of harm's way, (2) laying face down on the

ground with his arms outstretched attempting to surrender, (3) already past Scherman such that he was fleeing and Scherman hit him in the back, or (4) forced to the ground by Scherman who consequently had him in complete physical control. In light of applicable authority, would a reasonable officer know that shooting a suspect who was initially "barreling" toward him, who slowed after the first shot but continued to move forward was unconstitutional? These cases show that it takes more than merely altering the speed at which the suspect advances to put an officer on fair notice that the suspect no longer poses an immediate threat of harm.

Appellees apparently lobby for a restricted view of the circumstances Scherman faced when he took his second shot insisting the only relevant fact is that Lewis was no longer "barreling," toward Scherman after the first shot. Appellees' assert that Scherman is attempting to challenge this finding by arguing the district court failed to consider Lewis's altercation with Box in determining whether Lewis's continued movement toward Scherman after the first shot. Appellees are not correct that in conducing the clearly established analysis, the district court must isolate Scherman's second shot from the circumstances that made the first shot objectively reasonable.

In *Francher*, the district court expressly determined not to consider the circumstances leading to the first shots when deciding whether the following shots constituted a constitutional violation. Because the district court had concluded that

the officer "had time between the first and the following shots to take a few steps back to get out of the way of the car, to assess the situation, and to know that Mr. Dominguez had slumped and may not have presented a continuing danger to himself or the public," 723 F.3d at 1200, the officer's argument that the court erred in separating the first shot from the following shots for analysis "cannot reasonably be understood as anything other than an attack on these conclusions," which this Court has no jurisdiction to consider. *Id*.

In this case, the district court did not make similar findings. Moreover, as noted in n. 6, *supra*, Appellees neither claimed nor offered evidence that, in addition to slowing his approach, Lewis made any sign of surrender or submission. Therefore, Scherman is not challenging any finding of the district court in arguing that the "all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case," *Francher*, 723 F.3d at 1201 (citation and quotations omitted), should include a consideration of what occurred prior to Scherman taking his first shot.

Contrary to Appellees' claim, all of the circumstances surrounding Box's and Scherman's confrontation with Lewis matter. It matters that Scherman witnessed at least one failed nonlethal attempt to control Lewis, a large, unarmed, mentally unstable young man. It matters that even after the use of nonlethal force, Lewis knocked Box, a man significantly larger than Scherman, out of Scherman's line of

sight where Scherman could not ascertain his safety.[7] It matters that after Scherman's first shot, the district court did not find that Lewis slumped, fell to the ground, or was visibly bleeding. Rather, as the district court concluded, although the speed of his approach may have changed, Lewis nonetheless continued to advance toward Scherman.

Because the law was not clearly established that Lewis was effectively subdued by Scherman's first shot, Scherman was not on fair warning that Lewis no longer posed a threat of immediate harm when he took his second shot.

C. The District Court did not deny Qualified Immunity to Scherman for the First Shot.

1. Appellees clearly misinterpret the district court's judgment in arguing that the district court concluded Scherman's first shot was an excessive use of force.

Appellees did not argue below that Scherman's first shot was objectively reasonable, but his following shots were not. Instead, they argued that because Box and Scherman recklessly precipitated the encounter with Lewis, the use of force was not objectively reasonable. App. Vol. 2, 207-09. Appellees concluded from the *Allen* line of cases that because Lewis was naked, unarmed, and mentally unstable when

[7] Appellees assert that Lewis neither knocked Box down nor knocked him unconscious. The only testimony in the record on this issue is Box's who stated that Lewis hit him and he "went to the ground for ever how brief a second," and that he remembers "being on the floor on his back next to a black table in the living room." App. Vol. 1, 123.

they approached him, Box and Scherman recklessly created the need to use lethal force by approaching him. *Id*., 210.

The district court rejected Appellees' argument about reckless precipitation of the encounter. Notwithstanding, the district court determined, first, that a jury could find Scherman's subsequent use of force was clearly necessary although ....

> .... *deadly force* was not justified against the naked unarmed Lewis 'at the precise moment[s]' Scherman discharged his firearm....Construing the facts in Plaintiffs' favor, *after Scherman first shot Lewis*, Lewis no longer 'continued to barrel toward [him] managing to punch [him] once in the face [...]....A reasonable jury could conclude that, *after Scherman discharged his firearm once*, Lewis no longer presented a threat of serious physical harm.

App. Vol. 3, 505. Then, applying *Allen* and *Estate of Ceballos* as comparators, the district court determined that Scherman had fair notice that his unreasonable use of force was unconstitutional. The court stated, "[h]ere, it is undisputed that Lewis was unarmed, *and even though Lewis was moving toward Scherman*, an objective officer would have been on notice that employing deadly force at that "precise moments" [after firing the first shot per the court's prior discussion of how a jury could determine that Scherman violated Lewis's constitutional rights] violated the Fourth Amendment" in taking the seconds shot. *Id*., 508. (Emphasis added).

That the district court held that Scherman's first shot was objectively reasonable is buttressed by the district court's determination that if the first shot

constituted an unconstitutional use of deadly force, why even address the second shot at all? The analysis would have stopped at the first shot.

2. Even if the district court held that Scherman violated Lewis's constitutional rights by firing his weapon in the first place, extant case law would show Scherman that his first shot was objectively reasonable.

In *Clark v. Colbert*, 895 F.3d 1258 (10th Cir. 2018), Clark while in the midst of a psychotic episode, cut his brother with a long kitchen knife prompting his brother to call law enforcement. The officers who arrived first confronted the knife-holding Clark on his porch. When officers attempted to communicate with Clark, he responded with obscene and threatening gestures." *Id*. 1262. The officers called for backup who brought several types of nonlethal resources. *Id*. The officers surrounded the porch. *Id*. After Clark refused commands to drop the knife, officers fired pepperballs prompting Clark to charge with the knife. When officers' attempts to tase Clark failed, they shot him. *Id*.

This Court affirmed that no Fourth Amendment violation occurred. Because officers tased Clark only after he charged them with a knife, and they employed deadly force only after the taser failed to subdue Clark, the only use of force which could be considered excessive was the use of the pepperballs. *Id*. 1263. The Court rejected that simply because Clark was in the throes of a psychotic episode, any use of force against him was unreasonable noting that his "illness factors into our analysis only as one circumstance in the totality." *Id*. at 1264. Other circumstances

– Clark's refusal to drop the knife and submit to arrest and his failure to respond to verbal commands – required officers to use of physical force. *Id*. at 1263. "And because Clark had already attacked his brother with a dangerous weapon, the officers reasonably treated him as a threat to himself and others. *Id*. The Court further rejected Clark's attempt in invoke *Allen* observing that although "police officers can incur liability for 'reckless' conduct that begets a deadly confrontation," officers did not recklessly provoke Clark. *Id*. at 1264. Instead, they confronted him only after he had already attacked his brother, had refused to submit to arrest, and nonlethal measures had failed to subdue him. *Id*.

The circumstances existing when Scherman fired his first shot are similar to those preceding the officers' use of lethal force in *Clark*. As in *Clark*, Scherman knew that Lewis was suffering from mental incapacity. As in *Clark*, Lewis refused to submit to arrest and failed to respond to verbal commands. Importantly, Lewis attacked Box just as Clark had attacked his brother. The district court found uncontroverted:

> .... As Box moved down the entry hallway, he observed Lewis attempting to exit the back door and again commanded him to stop and get on the ground. In response, Lewis turned toward Box and charged him. As he charged, 'Box deployed his taser." Lewis and Box then fought in the living room. Box deployed his taser once again, but the taser had no effect.

App. Vol. 3, 493. Moreover, as Scherman looked on, Box's attempt(s) to use nonlethal force failed. As the district court stated:

> Around this time, Scherman walked down the entry hallway into the living room of the home and observed 'Lewis pummeling Box.' Lewis 'continued to strike Box in the head, face and neck,' and Box attempted to use his taser to 'drive-stun' Lewis. The taser failed to subdue Lewis and Box disappeared from Scherman's line of sight. Lewis then turned toward Scherman and Scherman drew his firearm.
>
> From this point, the parties' factual assertions diverge....

App. Vol. 3, 493. As the district court observed, "the Plaintiffs do not dispute that after his fight with Box in the living room, Lewis turned toward Scherman and advanced in his direction ...." App. Vol. 3, 493. "Instead of arguing that Lewis did not advance toward Scherman, the Plaintiffs state that Lewis 'mov[ed] his arms in a windmill motion...." *Id*.

Of course, unlike plaintiff in *Clark*, Lewis was unarmed. Nonetheless, Scherman[8] witnessed Lewis pummeling Box[9] before turning and advancing toward him. "If an officer reasonably, but mistakenly believes that a suspect was likely to fight back ... the officer would be justified in using more force than in fact was

[8] Appellees assert multiple times that Scherman was in his second week of on-the-job training likely to show that his inexperience led him to use excessive force. Aple. Br., 7-8). The testimony on which Appellees relied to support this assertion at the summary judgment stage actually states that Scherman was two weeks away from being released on the streets by himself after graduating a twenty-one-week police academy and completing phases 1, 2, and 3 of his field training program. App. Vol. 3, 299-300 (citing Scherman Depo. Tr. at 18:5-10; 20:8-12).

[9] "[C]losed-fisted blows may constitute deadly force." *Davenport v. Causey*, 521 F.3d 544, 553 (6th Cir. 2008) (quoting *Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (brackets and ellipses omitted)).

needed." *Saucier v. Katz*, 533 U.S. 194, 205 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). *Clark* gives fair notice that the use of lethal force against a violent, mentally incapacitated suspect who has refused both verbal commands to stop and to submit to custody and who has rushed toward officers prompting failed attempts to use nonlethal force is constitutional.

3. Appellees' comparator cases are factually distinct.

In an attempt to make the comparator cases on which the district court relied – *Allen* and *Estate of Ceballos* – fit the circumstances, Appellees purposefully misconstrue the *Allen* line of cases. Aple. Br., 41 n. 19. Admittedly, the Court in *Estate of Ceballos* stated that "rely[ing] on lethal force unreasonably as a first resort" violates the Fourth Amendment. 919 F.3d at 1219. As noted, this pronouncement decidedly does not apply here since it is uncontroverted that Scherman witnessed Box's first use of nonlethal force which failed to subdue Lewis. App. Vol. 3, 492. Though Appellees claimed that neither officer should have used *any* force against Lewis, the district court rejected this argument, and the *Clark* Court confirms the argument is illusory.

Further, as Appellees are surely aware simply reading them, the *Allen* line of cases do not address the use of lethal force as a first resort. *Estate of Ceballos* is about "whether the officers' own conduct during the seizure unreasonably created the need to use [deadly] force." 919 F.3d at 1214. Not a fact in the case pointed to

an unconstitutional use of lethal force as a first resort. Moreover, *Estate of Ceballos* heavily relied on *Allen*, *id.* at 1215, which does not purport to address a situation in which officers unreasonably relied on lethal force as a first resort. *See* 119 F.3d at 840. Both *Estate of Ceballos* and *Allen* turned on officers immediately on arriving at the scene and approaching emotionally distraught suspects (one armed with a gun, and another a bat) screaming commands. 919 F.3d at 1216.[10] In *Estate of Ceballos*, after cornering Ceballos, the shooting officer refused to retreat from Ceballos when he came at officers. *Id*.

Since the officers did not recklessly create the need to use deadly force, cases which inform officers that they cannot recklessly create the need to utilize deadly force do nothing to inform Scherman that it was against clearly established law to fire his first shot at Lewis.

As hard as Appellees try, existing authority does not permit them to isolate Scherman's confrontation with Lewis from the immediately preceding confrontation with Box. The comparison of the specific circumstances facing the officer to existing case law lies at the heart of the qualified immunity analysis. *City of Tahlequah*, 142 S. Ct. at 11; *Mullenix*, 577 U.S. at 17. Even though they deal with mentally unstable individuals, the remaining comparator cases Appellees identify are, for various

[10] In this case, Appellees assert that Scherman "gave no warning prior to firing his gun and shooting" Lewis. App. Vol. 2, 194.

reasons, not enough alike to the facts of this case to alert Scherman that Lewis did not pose a threat to him when he fired his first shot.

For instance, Appellees do not inform the Court that in *Carr v. Castle*, 337 F.3d 1221 (10th Cir. 2003), at issue was whether it was clearly established that the officers could not constitutionally shoot an unarmed fleeing suspect in the back. In this case, even Appellees admit that after appearing unfazed by Box's attempt to use nonlethal force, Lewis turned toward Officer Box and moved toward him windmilling his arms. App. Vol. 3, 493. He was shot in the front of his body. *Id*. He had not, unlike the suspect in *Carr*, fled past officers.

In *Zia Trust Co. ex rel Causey v. Montoya*, 597 F.3d 1150, 1154-55 (10th Cir. 2010), the suspect was in a vehicle which, although pointed at officers, was clearly immobilized on a retaining wall. The officer nonetheless shot the suspect from more than fifteen feet away when the vehicle "jumped forward less than a foot" as the suspect was revved the engine. "[W]e cannot say that a van fifteen feet away, ... stuck on a pile of rocks, gave [the officer] probable cause to believe that there was a threat of serious physical harm to himself or others." *Id*. at 1155. In this case, although the distance at which Scherman fired his first shot is disputed,[11] Appellees

[11] Appellees assert that Scherman received no observable injuries from his encounter with Lewis, and therefore Lewis could not have been as close to him as he claims. Aple. Br., 17. The evidence on which Appellees rely establishes the exact opposite. App. Vol. 2, 190, 319-20 (citing Scherman's deposition testimony where in stated that, after the incident, he received an x-ray at McBride Clinic because his "jaw was

have never claimed that it was as much as fifteen feet away. And, unlike the high-centered vehicle in *Montoya*, Lewis was able to move, and in fact was advancing toward, Scherman when he took his first shot.

Pursuant to *King v. Hill*, 615 F. Appx. 470, 471 (10th Cir. 2015), officers cannot shoot an unarmed man who is off his medications, but who does not pose an immediate threat. The suspect was holding something and standing on his front porch at least twenty-five yards from several officers and seventy-five yards from Hill, who was not visible to the suspect. The suspect began yelling and perhaps moving his hands but not moving toward officers in what could be perceived in a threatening way when Hill shot him. As in *Montoya*, the law is clearly established that it is unreasonable for an officer to believe that his fellow officers, standing twenty-five to thirty yards from the suspect, would be substantially threatened by an agitated man with no confirmed firearm who had made no threatening gestures or movements toward the officers. The facts of *King* are not in any way like the facts of this case.

Finally, in *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989), as officers approached an altercation between a disturbed and disoriented transient and a group of teenagers, a teenager yelled that the suspect had a knife. The officer shot the

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still hurting," and although his jaw was not broken, he probably had "a bruise or deep bruise"); 389 (PX 10 is a photograph which shows that Scherman's face is visibly reddened, and Scherman testified that Lewis inflicted the marks).

transient from a distance of ten to twelve feet when he was not charging or stabbing at the officer but, rather, had "stopped and was trying to explain what was going on." *Id*. at 275. Appellees in this case has never asserted that Lewis had stopped moving toward Scherman or ever attempted to communicate with him. Rather, they acknowledge that Lewis continued to advance toward Scherman windmilling his arms.

Far from being "on all fours" as Appellees claim, none of these cases would give Scherman notice that it was unconstitutional to use deadly force against Lewis in the first instance.

II. CONCLUSION

The law was not clearly established that, considering the entire circumstances with which Scherman was presented before and during his encounter with Lewis at 520 Gray Fox Run, Scherman violated Lewis's Fourth Amendment rights by using lethal force to protect himself and his partner, Box. The clearly established law would not have given Scherman fair notice that either taking his first shot or his second shot at Lewis, who continued to advance toward Scherman after the first shot, no longer posed an immediate threat of harm to Scherman. Consequently, the district court erred in denying Scherman summary judgment on his qualified immunity defense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Because this Brief contains 6,063 words, it complies with the applicable type-volume limitations of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)(iii). This certification was prepared in reliance on the word count of the word-processing system (Microsoft Word 2016) used to prepare the Brief.

This Brief complies with the typeface requirements of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(5) and the type style requirements of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 14 font.

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I certify that a virus check was performed on the PDF version of this Brief using Security Manager AV Defendant version 7.2.2101, and that no virus was indicated on September January 25, 2022.

CERTIFICATION OF PRIVACY REDACTIONS

I certify that this Brief meets the requirements of FEDERAL RULE OF APPELLATE PROCEDURE 25(a)(5) and 10th CIR. R. 25.5 concerning privacy and redactions of sensitive personal data.

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I certify that the hard copies of this Brief to be submitted are exact copies of the version submitted electronically.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2022, the foregoing Brief was filed and served on all counsel of record via the ECF system.

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I further certify that on January 26th, 2022, seven printed copies of the foregoing will be sent via Federal Express for overnight delivery to the Clerk of the Court.

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