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In The  
**Supreme Court of the United States**

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MICHELLE ALVIS, JOHN KESSOR,  
and PAUL MORGADO,

*Petitioners,*

v.

KATHLEEN ESPINOSA, individually and as  
personal representative of the Estate of Asa Sullivan,  
ASA SULLIVAN, A.S., a minor, by and  
through his Guardian Ad Litem Nicole Guerra,

*Respondents.*

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

—◆—  
**BRIEF OF AMICI CURIAE SAN FRANCISCO  
POLICE OFFICERS ASSOCIATION, PEACE  
OFFICERS RESEARCH ASSOCIATION OF  
CALIFORNIA, THE CALIFORNIA STATE  
ASSOCIATION OF COUNTIES, AND THE  
LEAGUE OF CALIFORNIA CITIES IN SUPPORT  
OF PETITION FOR WRIT OF CERTIORARI**

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## INTEREST OF THE AMICI<sup>1</sup>

The Peace Officers Research Association of California (PORAC) is a professional federation of local, state, and federal law enforcement associations. Consisting of more than 705 member organizations, PORAC represents over 61,000 sworn law enforcement officers in the States of California, Nevada, and Arizona, making it one of the largest law enforcement professional federations in the nation. Formed in 1953, PORAC's main objective is to further the welfare of its law enforcement members, as well as the delivery of professional law enforcement service to the constituents served by the various member organizations.

The written mission statement of PORAC states that it exists:

“ . . . to maintain a leadership role in organizing, empowering, and representing the interests of rank and file peace officers:

- To identify the needs to the law enforcement community and to provide programs to meet those needs;

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<sup>1</sup> Michael Rains and Lara Cullinane-Smith, counsel for PORAC and SFPOA, authored this brief. No counsel for either party authored the brief in whole or in part and no one apart from the Amici made any monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

- To represent and protect the rights and benefits of peace officers;
- To create an environment in which peace officers interact and work toward achieving common goals and objectives;
- To conduct research, to provide education and training, to define and enhance standards for professionalism;
- To promote public awareness that encourages and maintains the image of a ‘Professional Peace Officer.’”

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels’ Association of California and is overseen by the Association’s Litigation Overview Committee, comprised of county counsels throughout the state.

The League of California Cities is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The league is advised by its Legal Advocacy Committee, which is comprised of 224 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance.

The San Francisco Police Officers' Association (SFPOA) consists of over 2,200 sworn police officers employed by the City and County of San Francisco. Their members hold ranks in that agency from police officer to deputy chief. The San Francisco Police Officers' Association was formed and exists today for the purpose of working collaboratively with the police department administration and the City and County of San Francisco to provide its members the most current training and education in usual and recurring situations where police officers must act in situations which are tense, uncertain, and rapidly evolving. The SFPOA believes high quality of education and training of its members will improve the level of professional law enforcement service to the constituents served by that law enforcement agency, and will provide those constituents cherished protection from threats to property and life.

Amici urge the Court to grant the Petition for Certiorari because the issues presented will have a profound impact on the members of each organization, as well as all the police officers in the Ninth Circuit and constituents they serve. This case is of interest to the SFPOA and PORAC because they believe that the decision of the Circuit Court will lead directly to an increased risk of both injury and loss of life for its members if the decision is allowed to stand. They further believe that the decision impacts the ability of their members to protect and defend members of the public. Additionally, the Committees of the

CSAC and the League of California Cities have determined that this case is a matter affecting all counties and cities in view of the law enforcement responsibilities undertaken by the counties and cities.



### **SUMMARY OF THE ARGUMENT**

At the risk of being accused of provincialism, peace officers in California are among the most highly trained law enforcement officers in the nation, and much of their statutorily mandated training in the Police Academy, and in later “in service” training, emphasizes compliance with the most current legal decisions regarding officers’ use of force.

Prior to the issuance of the Ninth Circuit’s decision in this case, California peace officers were trained that the courts, through published opinions, recognized the difficulties police officers must face when making split second decisions concerning the type and amount of force to use in a given situation. Prior to this decision, the Ninth Circuit appeared to disfavor the issuance of opinions which would “. . . inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in the second guessing of police decisions under stress and subject to the exigencies of the moment.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Prior to the Ninth Circuit decision here, California law enforcement training embodied the decision in *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334 (1996):

Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

47 Cal. App. 4th at 343 (citing *Smith v. Freeland*, 954 F.2d 343, 347 (6th Cir. 1992)).



### **DECISION OF THE NINTH CIRCUIT**

In this case, the Circuit Court impermissibly second guesses a reasoned and good faith entry into an apartment by a San Francisco Police officer after he had received a report that the front door was swinging open and the unit might be a “drug house.” *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010). After being told by a security guard that the front door lock was not an approved lock installed by the landlord, and pushing on the door, which opened, the officer observed a bloody shirt hanging on an interior door and entered

the apartment moments later with two other San Francisco Police officers to conduct a search. *Id.* at 532, 534. On the second floor of the apartment, the officers located and handcuffed a young man with a four inch “ninja” knife. *Id.* at 533, 540. As the officers were handcuffing that young man, they heard movement above them which ultimately led to their entry into a dark attic, where Asa Sullivan was found to be crouched between two exposed beams and partially covered in insulation. The officers displayed firearms and ordered Sullivan to show his hands but he refused. *Id.* at 540-41. Over the next several minutes, Sullivan told the officers such things as “kill me or I’ll kill you,” and “are you ready to shoot me?” *Id.* at 538. Twelve minutes into the standoff, the officers saw Sullivan with a “weird look” on his face and all three officers saw Sullivan bring up his right hand while holding a dark object; simultaneously, two officers heard a “pop” sound and fired at Sullivan, killing him. *Id.* at 541-42. Sullivan was unarmed but had been holding a dark eyeglasses case. *Id.* at 542.

The Ninth Circuit determined that there were triable issues of fact concerning whether the officers used unreasonable force when initially pointing loaded guns at Sullivan and regarding the shooting of Sullivan. The Ninth Circuit also found the officers were not entitled to qualified immunity because there were genuine issues of fact regarding whether the officers intentionally or recklessly provoked a confrontation with Sullivan as a result of the initial unlawful entry.

The Ninth Circuit decision misinterprets the law regarding qualified immunity and exposes thousands of California peace officers to high levels of danger when they are routinely forced to make split second decisions to protect their own lives and those of the constituents they serve. Specifically, the decision misapplies the law regarding (1) when officers can point a weapon at a resisting suspect who is attempting to evade the police and (2) whether officers have to in fact see a weapon pointed at them by a suspect before they may discharge their firearms. The decision also creates an unworkable and improper standard regarding when provocation on the part of officers creates a situation so violent that qualified immunity will no longer apply to officers' use of self-defense. Finally, the decision improperly fails to acknowledge the second prong of the qualified immunity analysis relating to officers' use of firearms, leading to the result that, in the Ninth Circuit, officers who make a mistake are no longer protected by qualified immunity. These errors, taken together, create a situation where officers will be tentative in subduing dangerous suspects or even in responding to calls for backup. Such a result puts both the officers and the public in danger.



## **ARGUMENT**

The Ninth Circuit's decision leaves police officers with an impossible choice – be exposed to potentially lethal levels of danger and yet do nothing if use of a

weapon is threatened but the weapon is not actually seen, or fail to uphold their responsibilities to protect their own life and those of others. The decision fails to recognize the difficult decisions made by the subject officers in this case, demonstrates a lack of understanding of what all officers face in day-to-day situations, and misinterprets the law of qualified immunity. Amici urge this Court to accept this Petition for Certiorari in order to establish a bright-line standard which will allow police officers to operate with certainty and ensure their safety and that of the public.

**A. The Ninth Circuit Decision Misinterprets the Law Regarding When Officers Are Liable For Provoking a Suspect's Conduct.**

The Ninth Circuit held that because Officer Morgado, the initial officer on the scene, had entered the apartment improperly, all of the officers, including those who arrived later, were liable for “provoking” the later events including the confrontation with and the shooting of Sullivan. *Espinosa*, 598 F.3d at 538-39. This holding is improper because it imputes knowledge to Sullivan he could not have had (that Officer Morgado’s entry was illegal), ignores the tenet of qualified immunity that officers are allowed to make mistakes, and fully ignores the reality of police work.

To find actionable provocation, the majority opinion summarily concluded that Officer Morgado’s initial entry was unlawful, ignoring whether the

circumstances of the entry were likely to provoke anyone to violence. Officer Morgado had entered by pushing on the front door of an apartment that was reportedly being used as a drug house. The front door was unlatched, yielding to a push. The other two officers entered equally without any physical behavior that would reasonably have provoked anyone to violence.

The Circuit Court's decision effectively imputed knowledge to Sullivan that this non-violent entry was constitutionally improper, and therefore his fleeing from the police and threat to kill them was justified. But there is no evidence to suggest such knowledge. There is no evidence that Sullivan fled to the attic because he believed Officer Morgado's entry was illegal, but there is evidence that he appeared to be under the influence of drugs and that he had every intention of forcing the officers to shoot him rather than to surrender peacefully. Objective reasonableness must be judged "from the perspective of a reasonable officer on the scene – not from the perspective of the person seized or of a court reviewing the situation with 20/20 hindsight." *Bryan v. MacPherson*, 630 F.3d 805, 817 (9th Cir. 2010). In this case, any arguable provocation was in the mind of Sullivan alone and any other interpretation can only be made from the impermissible perspectives of speculation and hindsight.

This decision also ignores the reality that the mere presence of uniformed officers acting lawfully in every sense may "provoke" the actions of anyone they come in contact with. In *Plakas v. Drinski*, 19 F.3d

1143 (7th Cir. 1994), the Seventh Circuit discussed the recognition by courts that decisions to use lethal force by police officers are often made in a split-second. The court noted that:

Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

*Plakas*, 19 F.3d at 1150. Because knowledge of the allegedly improper entry cannot and should not be imputed to Sullivan, or to any suspect who willingly flees from the police (which is far different from simply ignoring them), this decision must be reviewed by this Court for error.

The D.C. Circuit has directly addressed the issue of provocation and has found that even where an officer negligently instituted the confrontation between the officer and the decedent, the decedent's failure to follow the officer's instructions was a superseding cause which broke the chain of causation between the improper stop and the subsequent shooting

death. See *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007). The court stated that individuals “have a duty to obey a police officer’s orders” and that officers could not properly protect the public if the law “deterred them from approaching and detaining potentially violent suspects.” *Id.* Here, it is clear that Sullivan’s fleeing from the officers, attempts to conceal himself in the attic, and attempts to provoke the police into shooting him break the chain of causation from Morgado’s initial non-violent entry into the premises.

This decision also creates the catastrophic possibility that officers who are later determined by a court to have made an improper entry (even though they believed the entry was lawful at the time) might be precluded, through judicial edict, from any use of force irrespective of what they are confronted with inside. Seemingly, if the officers improperly force entry into a dwelling and a resident then goes upstairs and begins to assault another resident, the police would be powerless to use force to stop that assault.

Likewise, if this decision stands, even if late-arriving officers have no knowledge of an improper entry on the part of the first officer, and mistakenly believe that it was proper, they are legally precluded from using force against a fleeing, non-compliant suspect because the first officer would have “provoked” the confrontation. If this case stands, officers will be forced to act with the understanding that, in tense, rapidly-escalating confrontations, the lawfulness of their self-defense and their potential individual

liability for defending themselves against a violent assailant depends upon what a different officer may have done at an earlier time. Such an outcome is clearly not within the best interest of police officers or the public they protect.

**B. The Ninth Circuit Decision Effectively Changes the Law Regarding When Officers Can Draw and Point Weapons at Suspects, Endangering Officers' Lives.**

The *Espinosa* court improperly denied qualified immunity to the officers because they had pointed their weapons at a non-compliant suspect who had hidden in a dark attic. *Espinosa*, 598 F.3d at 537-38. This decision departs from precedent in the Ninth Circuit and others.

The primary case on this point in the Ninth Circuit is *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002), which sets forth several factors which must be considered in determining whether simply pointing a weapon constitutes a Fourth Amendment violation. These factors include whether a suspect is armed, whether a suspect is or has resisted, whether more than one officer or arrestee is involved, whether the suspect was sober, the nature of the crime being investigated, and whether any dangerous or exigent circumstances existed. *See Robinson*, 278 F.3d at 1014. "While police are not entitled to point their guns at citizens when there is no hint of danger, they are allowed to do so when there is reason to fear

danger.” *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009); *see also Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001) (shows of force involving drawing and displaying weapons “should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time”).

Here, the court ignored most of the *Robinson* factors and the fact that the officers had concrete reasons to fear they were in danger. The officers were investigating a call that the apartment was a suspected drug house. This factor alone would support officers drawing weapons, as courts have found that “drug crimes” are strongly associated with violence. *See Renbarger*, 576 F.3d at 344. The officers had strong evidence that injury or death had occurred, because they found a bloody shirt in the apartment. Additionally, by the time the officers entered the attic, they had already found one armed suspect in the apartment. While they did not know whether Sullivan was armed, it was reasonable for them to assume he was. *See id.*, (possession of illegal weapons associated with violence).

Sullivan was purposefully concealing himself from police in the attic, another factor weighing towards the reasonableness of the officers drawing firearms. *See Renbarger*, 576 F.3d at 344 (resisting detention and attempting to flee factor towards reasonableness of drawing and pointing weapons). Sullivan also ignored requests by the police to show his hands and to surrender. The police also perceived

danger because they could not exit the attic without exposing themselves fully to harm if Sullivan was, in fact, armed. In *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), the Ninth Circuit acknowledged that “from the viewpoint of an officer confronting a dangerous suspect, ‘a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death.’” 340 F.3d at 965, *citing Manuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994). Yet the Circuit Court ignored all of these factors and found that the singular act of pointing weapons at Sullivan could be a constitutional violation.

This case is clearly distinguishable from the facts of *Robinson*, where a former police officer calmly approached police outside his home, in daylight, wearing an unbuttoned shirt and jeans with his hands out of his pockets, to discuss his shooting of animals that had been killing his livestock. 278 F.3d at 1010. Despite the non-threatening appearance of the plaintiff in that case, and the circumstances which brought police to his house, the police officers pointed two guns at his head from point blank range, handcuffed him and forced him into a police cruiser before eventually releasing him. *Id.*

Nor is this case remotely like *Tekle v. U.S.*, 511 F.3d 839 (9th Cir. 2006), in which “approximately twenty-three armed officers saw a barefoot, eleven-year-old boy, clad in shorts and a t-shirt emerge from his home.” *Id.* at 845. The officers pointed their weapons at him, handcuffed him on the ground, then

sat him on a stool and continued to point their weapons at him for fifteen minutes. *Id.*

Police properly draw weapons in situations when suspects may be hiding behind locked doors or resist or conceal themselves in other ways. If this ruling is allowed to stand, police officers will be trained, consistent with “established law,” not to draw their weapons in situations which threaten their lives, or the lives of others, thereby facing serious physical peril. This is clearly not the intent of *Robinson* and *Tekle* and thus in this case, the Ninth Circuit misapplied the law regarding the right of officers to display their weapons to achieve compliance.

**C. The Ninth Circuit has Misapplied the Law Regarding When Officers Can Fire Their Weapons, Placing Officers’ Lives in Danger.**

The Ninth Circuit ignored the law regarding qualified immunity when it found that the officers were not entitled to immunity for the shooting of Sullivan. It found that the fact that the suspect was unarmed and that officers did not wait to identify the object Sullivan was holding before firing more important than a multitude of countervailing facts: (1) the suspect had fled the officers; (2) was in a dwelling where a weapon had already been found; (3) was purposefully concealing himself; (4) was non-compliant with orders to show his hands (among other orders); (5) had made statements such as “kill me or I’ll kill you” and “are you ready to shoot me?”

and, (6) rapidly moved his hand and arm while holding the dark oblong object with which he made a noise that sounded like a gun shot in a small enclosed space. This finding misunderstands prior case law and also creates a threshold for the use of lethal force which will result in officers becoming tentative, if not altogether hesitant in the use of their firearms, increasing the likelihood of additional carnage of California peace officers.

Contrary to the Circuit Court's holding, police officers "need not, in all circumstances, 'actually detect the presence of an object in a suspect's hands before firing on him.'" *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998), *citing* *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994). In *Sigman*, the court found it reasonable for the officers to have acted on the perception that something was in the Plaintiff's hands while he was rushing towards the officers. *Id.* Also, in *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001), the court found that officers were "not constitutionally required to wait until [they] set eyes upon the weapon before employing deadly force" where a fleeing suspect moved as if to draw a weapon. "Police officers do not enter into a suicide pact when they take an oath to uphold the Constitution." *Lamont v. New Jersey*, 637 F.3d 177, 183 (3rd Cir. 2011).

Here, the standard set forth by the Ninth Circuit comes perceptively close to the creation of such a pact. Noted researcher Bill Lewinski, Ph.D. has demonstrated in studies that the average police officer, with

gun drawn and finger on the trigger ready to fire, can react to a received deadly threat, and fire only as fast as 30/100 of a second. App. 2. By contrast, studies done by Dr. Lewinski establish that the average time for an individual who has a gun tucked in his/her waistband to draw the weapon and fire it without extending the arm outwards is 23/100 of a second, with the fastest time being 9/100 of a second. App. 6. The average time for an individual to draw a firearm from the waistband, extend the hand holding the firearm in front of the body is 26/100 of a second, with the fastest time being 9/100 of a second. App. 6. Dr. Lewinski explained this latter test as follows:

In a street situation involving the “furtive” move to the waistband, if the officer had a finger on the trigger and waited before firing until the average suspect initiated a movement pulling the weapon out of the waistband, the two bullets would pass each other in the air. If the suspect was as fast as some of the subjects in the study, the officer would not even be able to think of squeezing the trigger before the suspect would have fired his weapon. Further, if an officer was to wait to identify that the suspect actually did have a weapon, the fastest suspect would be able to discharge at least two rounds before the average officer could react with one.

App. 7.

The decision of the Ninth Circuit becomes particularly ominous when considering the data and research gathered by Dr. Lewinski. Under this decision,

officers could be required to wait until one to three shots had already been fired at them before returning fire.

Here, the officers perceived something in Sullivan's hands and heard a popping noise which they believed was a gunshot. Nonetheless, the Ninth Circuit decision establishes that the court's preference, if not its mandate, is that officers wait until they are certain the item is a gun before firing. This goes against established law that the courts will not second-guess split second decisions of trained officers just because the officers turn out to be mistaken, especially "where inaction could have resulted in death or serious injury to the officer and others." *McLenagan*, 27 F.3d at 1007. The Fourth Circuit, properly refusing to second-guess the split second decisions of officers facing life or death choices in the field, has found that "a suspect's failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe that the suspect is armed." *McLenagan*, 27 F.3d at 1007. Here, the Circuit Court's decision improperly second-guesses the decisions of the officers and improperly creates a rule which will endanger the lives of officers and the public.

**D. The Ninth Circuit Has Failed to Consider the Second Prong of the Qualified Immunity Analysis Relating to the Pointing of Weapons and the Firing of Weapons.**

The qualified immunity analysis has two steps: first the court determines whether there was a constitutional violation at all. If there was, the court then determines whether the law regulating the officer's conduct was clearly established at the time of the violation, an analysis which must be considered in light of the specific facts of the individual case. *See Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

Qualified immunity “protects law enforcement officers from ‘bad guesses in grey areas’ and ensures that they are liable only ‘for transgressing bright lines.’” *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005), *citing Maciarelo v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). It is well established that where officers make a reasonable mistake of the state of the law as it pertains to the facts of the particular case, they will not be subject to liability. *Saucier*, 533 U.S. at 205.

The court in *Espinosa* failed to properly consider the second prong of the qualified immunity analysis, after initially determining that there were factual issues concerning whether the entry violated a constitutional right. Under the findings in *Espinosa*, officers would no longer be able to make a “bad guess” about the lawfulness of an initial entry into a building. Instead, officers would be forced to defend their

actions in a jury trial when an entry was found to be improper after-the-fact, even if the officer was reasonable in making a mistake as to the constitutionality of the entry.

The Circuit Court's requirement that the officers should have verified that Sullivan had an actual firearm before discharging their weapons, is also problematic.<sup>2</sup> Unless an officer waited to see that a suspect was in fact armed (which, as discussed above, would put the officer in an untenably dangerous position), he/she would never receive a grant of qualified immunity for shooting an unarmed suspect, no matter how reasonable his/her mistake may have been that the suspect was armed.

Such a holding improperly truncates the qualified immunity analysis and defeats the purpose of qualified immunity. Such an abridgement of qualified immunity has been expressly rejected by the Ninth Circuit itself. "Whether a search is 'unreasonable' within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment." *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir. 1991). It also goes against

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<sup>2</sup> The Ninth Circuit acknowledged that Sullivan claimed to have a weapon, that the officers saw Sullivan bring his hand up rapidly, that at least two of the officers heard a popping sound that they thought was gunfire, and at least one of them saw a dark object in his hand, which turned out to be a hard plastic eyeglass case. 598 F.3d at 542-43.

the finding in *Saucier* that “[o]fficers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances . . . and in those situations courts will not hold that they have violated the Constitution.” 533 U.S. at 206. Officers are not liable for mistakes in judgment, whether they result from mistakes of law, fact, or application of the law to the facts of a particular situation. *See, e.g., Butz v. Economou*, 438 U.S. 478, 507 (1978). Because the Ninth Circuit improperly abridged the qualified immunity analysis in this case, Amici urge this Court to grant Certiorari so that these issues may be resolved.

**E. The Ninth Circuit Decision Contravenes Public Policy Because it Causes Officers to be Tentative When Called Upon to Protect Themselves and Others.**

The California Supreme Court has pronounced peace officers “alone” as the “guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them.” *Pasadena Police Officers Association v. City of Pasadena*, 51 Cal. 3d 564, 572 (1990).

By making the legality of police conduct dependent on an after-the-fact determination by a court concerning the constitutionality of an officer’s initial entry into a building, by requiring officers to see what

they know to be a weapon before using force, and by finding that an improper entry will create a triable issue of fact that the officer(s) intentionally or recklessly provoked a confrontation, the Ninth Circuit has departed from prior decisions which acknowledge the danger of the courts, through the issuance of opinions, causing officers to be tentative in subduing dangerous suspects. Such a result goes against the efforts of the Ninth Circuit to avoid just such an outcome. In *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), the court stated that:

In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

*Scott*, 39 F.3d at 915. Just as in *Scott*, if officers are unable to respond appropriately to a threat because they did not have time to intellectually ponder or diligently research whether an initial entry was proper, and are unable to respond to a possible threat of use of force against them without actually seeing the suspect holding a weapon, they will act tentatively

and fail to protect themselves and the public. Surely, this Court will not allow a decision to stand when, as here, it constitutes a head-on collision with public policy.

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## CONCLUSION

The decision of the Ninth Circuit exposes officers to extreme individual danger. Moreover, the constituents officers serve will not benefit, because the decision creates a climate of police officer hesitation, particularly in situations calling for them to use force, to perform their duties for fear of being held liable for their actions. Finally, the holding in *Espinosa* conflicts with both the Circuit Court's own precedents and those established in other circuits. Amici curiae thus respectfully request the Court to grant the Petition for Certiorari.

Respectfully Submitted,

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## **WHY IS THE SUSPECT SHOT IN THE BACK?<sup>1</sup>**

### ***Finally, Hard Data on How Fast the Suspect Can Be – in 11 Different Shooting Scenarios***

*By: Bill Lewinski, Ph.D*

[Pictures Omitted In Printing]

We have always known that generally action beats reaction. And, we've been able to demonstrate this in a variety of civilian and law enforcement situations. Since the invention of the shot timer, we've known how quickly officers can react in shooting situations. Now, for the first time, we have accurate, sophisticated measurements on how quickly the suspects in the street can actually do what they do in 11 different kinds of shooting scenarios. Some of you may find the results depressing, for this research proves that in the street, action really does beat reaction. For others, it will provide a clear explanation for problems, such as why so many suspects get shot in the back. Readers should find the results of this study truly amazing – the implications for law enforcement training are profound.

In a previous article in *The Police Marksman*, (September/October, 1999) Dave Grossi and I presented my research data on three movements subjects have done in officer-involved shootings. In this current research those movements have been modified to make them more consistent with some types

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<sup>1</sup> Originally printed in *The Police Marksman* (November/December 2000), pp. 25-33.

## App. 2

of street shooting situations. This research also measures the time for suspect movement in 9 other street shooting situations.

It's important for readers to remember that the average officer, with his finger on the trigger, and being psychologically set, is able to "react" to a shot timer and pull the trigger of his weapon in about a quarter to a third of a second. I'm currently working on research on this topic with an entire police department, and the preliminary data indicates it is closer to a third of a second or even longer for most officers to react (at least with that department). Some officers are quicker and others are slower. Keep this "average" reaction time in mind as you read about the different motions studied, and learn just how fast the suspects action can be.

The purpose of both the current and previous research was not to replicate any specific shooting situation, for this would be functionally impossible. It was not the intent to come up with measurements that could represent all population samples, for instance from the young to old and the fit to unfit. Instead, the approach was to begin to come to an understanding of some of the time parameters of the specific motions studied, so that more intelligent conversions can be conducted regarding officer shooting situations by tactical instructors, internal affairs or shooting review boards, attorneys and judges. This is not a study on the biomechanics of shooting. For instance, in the combat tuck shooting motion, the concern was only with the time of the motion. The

timer started when the subject started his motion, and ended when the camera recorded the discharge of flame from the barrel. Whether the subject pulled from the elbow or shoulder was not relevant to this study, nor whether he rolled the weapon over his belt and discharged it, or pulled it high and then dropped it low. I was simply concerned with beginning to define the time parameters so the law enforcement community can now know how fast these motions really can be.

The population for the study was 25 subjects who, for the most part, were undergraduate majors in the Law Enforcement Program at Minnesota State University, Mankato. Most of the subjects had not received firearms training or ever handled a firearm. All of the motions in the study were self initiated, and therefore were "action" motions to which an officer would presumably be "reacting." The weapon used in the study was a Smith and Wesson .22 caliber revolver, armed with black power blanks.

Each subject did five repetitions of each motion. The motions were recorded on a Canon GL1 digital video camera in the frame mode. The speed of the camera was 30 frames per second. The camera and motions were cross matched with a digital timer that was accurate to 1/1,000 of a second. The error factor in the timing is a plus or minus 03/100ths of a second for each of the motions studied.

A more extensive statistical analysis than is presented in this article is available. However, the most important data for officers to know is the average

time, and specifically the fastest time in which these motions can be done. In an actual street encounter, an officer will never know whether he is facing the fastest, slowest or just the average person. The only way an officer can ensure his survival is to prepare for, and react as if he's facing the fastest person out there. All of the motions studied here have come from actually officer-involved shootings, and reflect the real-life threats or circumstances.

## **1 GUN AT CONSOLE/CROSS BODY/DRIVER'S WINDOW DISCHARGE**

*– 15/100ths of a Second*

The first motion studied simulated a vehicle stop where the suspect has a weapon hidden beside the right thigh/next to the console, and shoots at the officer as he approaches the driver's side door post. The subjects were instructed to hide the gun by their right thigh. Then, on their own initiative, to move the weapon from the right thigh position, across the body, point it slightly over and to the rear of the left shoulder and discharge the weapon. They were instructed to do this as quickly as possible. The average time from start to discharge was 25/100ths of a second. The fastest time for this motion, and there were several subjects who were close to this, is 15/100ths of a second, or almost twice as fast as an average officer can pull the trigger on his weapon, if he is set with his finger on the trigger and ready to fire. If in this scenario, the "reactive" officer has his weapon drawn and in the "bootleg" position, he doesn't stand a chance to react and return fire before at least one,

and more likely three or more rounds are fired in his direction.

## **2 GUN AT CONSOLE/CROSS BODY/PASSENGER'S WINDOW DISCHARGE**

*– 09/100ths of a Second*

The second motion studied was another automobile simulation, where the suspect is in the front passenger's seat and has reached across his body to the console position with his right hand. The suspect then pulls the weapon from beside the left thigh/console position, swings the barrel of his weapon across his body and back, so it is pointed to the rear of his right shoulder. He then discharges the weapon toward the passenger's side door post. This simulates a shooting on a passenger side approach, by a suspect who has a weapon hidden near the console. The average time for his motion was 26/100ths of a second, with the fastest time being 09/100ths of a second. This is three times faster than the average officer (who is set to fire) can pull the trigger.

## **3 GUN IN WAISTBAND/COMBAT TUCK/DISCHARGE**

*– 09/100ths of a Second*

The third and fourth motion studied involved the "furtive" threatening motion where the subject reaches toward the waistband – presumably for a weapon. In this third motion, the subjects were

requested to place the weapon in their waistband and then, on their own initiative, pull and fire in a very close “combat tuck” maneuver. Again, the timing started with the first frame in which movement occurred, and ended with the first frame recording the weapon discharge. This is a definite skill maneuver, and would get faster with practice, but the subjects were not allowed to practice. As is, the average time, from the start of the motion to discharge, was 23/100ths of a second, with the fastest time being 09/100ths of a second, or about three times faster than the average officer would be able to pull the trigger if he were set to react to this movement. An officer caught in the open in a “Dodge City showdown,” (with even the average subject in this study) literally would not stand a chance if the subject has his hand at his waistband, an actual weapon in that waistband, the intent to shoot, and any accuracy at all with this weapon.

#### **4 GUN IN WAISTBAND/ARM EXTENDED/DISCHARGE**

*– 09/100ths of a Second*

The fourth movement involved the same waistband position, but this time the subject was to pull the gun from the waistband, extend the arm fully and discharge the weapon. The average time for this motion was 26/100ths of a second, with the fastest being 09/100ths of a second. Again, this is three times faster than an officer who is already set with target acquisition and finger on trigger can react with a

trigger pull. There was a very tight distribution on this motion and the vast majority of subjects were able to fire their weapons before the time the average officer would've reacted and fired theirs.

In a street situation involving the "furtive" move to the waistband, if the officer had a finger on the trigger and waited before firing until the average suspect initiated a movement pulling the weapon out of the waist band, the two bullets would pass each other in the air. If the suspect was as fast as some of the subjects in the study, the officer would not even be able to think of squeezing the trigger before the suspect would have fired his weapon. Further, if an officer was to wait to identify that the suspect actually did have a weapon, the fastest suspect would be able to discharge at least two rounds before the average officer could react with one. The implications for officer safety are profound.

The next series of movements involved suspects running away from an officer, and then turning back in some fashion, firing at the officer and coming back into a full run position. In my previous research, I had looked at the time to complete the full motion of turning, pointing, firing and then returning to the running position. Suspects in the street may or may not "throw shots" back at an officer in this fashion. It is equally probable for the suspect to, while running, hold the weapon pointed at an officer and fire several times before he pulls back into a full forward running position. Therefore I needed to start the timing of the motion from the point at which the suspect would no

longer be a threat to the officer. Also, it seemed more important to determine when the suspect's back might be fully exposed to the officer, so the officer's round would directly enter the back at an approximate 90 degree angle rather than the time in which the subject was again into a full running position. Subsequently in the next movements, (numbers 5, 6, and 7) the measurements begin when the subject ceases firing, and end when the subject's back is directly exposed to the officer, so a bullet would enter an approximately a 90 angle.

## **5 GUN EXTENDED BACK STRONG SIDE/DROP OFF TO SQUARE BACK**

*– 00/100ths of a Second*

The fifth movement was a recreation of a shooting scenario with a suspect running away from an officer. The weapon in in [sic] his strong arm, pointing the weapon back on his strong side, toward the officer, firing at the officer and then coming back into a full forward running position. The subject in the study was instructed to run away from the "fictional officer," point the gun back, pull the trigger and then bring the weapon back into a bent arm running position. All of this was to be done as quickly as possible. Because suspects in the street could shoot one or more rounds at an officer before returning to a full forward running motion, the timing of the movement started after the subject pulled the trigger and the moved into the "drop off" position where the barrel of the weapon would no longer be pointed

directly at the officer, and subsequently no longer be an immediate, direct threat. This “drop off” position was the start of the return of the arm to a running movement, and happened in different ways. Sometimes the subjects simply turned the barrel as they started to bring the weapon forward and into the arm position for running. Sometimes they dropped their hand by a few inches or twisted it away. The timing of the motion ended when the subject had returned to a “square back” running position. The “square back” position is one where the subject would be moving in a straight line directly away from the officer and in the same direction as the officer would be facing. The “square back” would be at an 80-90 degree shoulder angle to the lateral plane of the movement of the subject. In this study, in almost all subjects, the hip or waist was often “square back” to the “officer” for the full motion of rotating and shooting, and did not shift from his position, so the measurement for this study was done on only the shoulder axis. Even in the full 90 degree “square back” position almost all subjects had a slight forward lean to the their upper body. The angle of forward lean was not measured in this study. All actions were completed and the measurements were done within 20 yards of the subject starting to run.

The usual time from the frame where the weapon was directly pointed back at the officer in “discharge” position to “drop off” was one frame or 03/100ths of a second. Subsequently there was very little difference in the overall time from “weapon discharge” to “square back” and “drop off” to “square back.”

In this fifth movement or “strong arm back” position, the average time to go from the “drop off” position to a “square back” position was 14/100ths of a second. The fastest time was 0/100ths of a second. In other words, in the fastest return, the subject had flexible shoulders and was able to extend the arm back without much upper body rotation. From this position, the mere act of changing the direction of the barrel seemed to release the pressure on the shoulder, and let him return to a full “square back” run position immediately. In general, regardless of how fast the subject was running, he was able to return from a “weapon discharge” position to a full “square back” run position within half a stride or a little more. In some cases the subject’s back was so square to the “fictional officer” as they were shooting, that even if the officer was to discharge his weapon at the subject as the subject’s weapon was pointed at them, and continued to be trained at them for all intents and purposes, the bullet would still enter the subject’s back at very close to 90 degrees.

## **6 GUN CROSS BODY/OVER SHOULDER/DROP OFF TO SQUARE BACK**

*– 00/100ths of a Second*

The sixth movement was a recreation of a shooting scenario with the suspect running away from an officer with the weapon in his strong arm. The suspect then looked over his weak side shoulder, brought the weapon across the body, pointed it back toward the officer, over his weak side shoulder, discharged

the weapon and pulled the weapon and hand back into a bent arm run position. The subjects were instructed to do this motion as quickly as possible. The timing started from the weapon “drop off” position and ended when the subject was square backed. The drop off position here was the turning away of the barrel from the direction of the officer – however that was accomplished. The average time to return from the “drop off” position to a full “square back” position was 09/100ths of a second. Again, the fastest was 0/100ths of a second. In some subjects, the drop off of the weapon was all that was needed to return them to the position where if an officer was to hit them with a bullet at that point, the bullet would enter at an approximate 90 degree angle to the lateral plane.

## **7 GUN CROSS BODY/UNDER ARM/DROP OFF TO SQUARE BACK**

*– 00/100ths of a Second*

The seventh movement was a recreation of a shooting scenario with the suspect running away from an officer, with the weapon in his strong arm. The suspect then looks over his weak side shoulder, brings the weapon across the body and under the arm/shoulder of the weak side. The suspect then points it back toward the officer, discharges the weapon and pulls the weapon and hand back into a bent arm run position. The subjects were instructed to do this as quickly as possible. The timing started from the weapon “drop off” position and ended when

the subject was square backed. The drop off position here was the turning away of the barrel from the direction of the officer – however that was accomplished. The average time to return from the “drop off” position to a full “square back” position was 13/100ths of a second. The fastest was 0/100ths of a second. Again, in some subjects, the drop off of the weapon was all that was needed to return them to the position where, if an officer was to hit them with a bullet at that point, the bullet would enter at an approximate 90 degree angle to the lateral plane.

Regardless of how the weapon was pointed back at the “fictional” officer as the subject ran away, it was apparent in most subjects that almost no hip rotation and little shoulder or upper body rotation was used to point the weapon back at the officer and shoot. The consequence of this is that any officer who shoots a subject in this position – either when the weapon is pointed at them or in immediate reaction to that pointing, will hit the subject in the back at very close to a direct 90 entry from the lateral lane of the back. This is a very different angle of entry than the average, uninformed civilian, law enforcement officer or officer of the court would expect.

## **8 90 DEGREE TURN/WEAPON DISCHARGE/ SQUARE BACK**

*– 50/100ths of a Second*

The eighth movement is the 90 degree turn. In this study the subjects were positioned so they were

in front of the camera and facing at a 90 degree angle to the officer/camera, with a weapon in their strong hand and positioned down by their thigh. They were instructed to do the 90 degree turn, and during this turn to actually point the weapon at the officer/camera and pull the trigger. Again, we were not studying the biomechanics of the motion, but simply beginning to establish the time parameters of the motion. It is noteworthy that, in this as well as in all the other motions studied, each person had his own unique way of doing the general movement. Some subjects raised the weapon toward the camera/officer pulled the trigger and turned; others dropped or "charged" their body then started to turn and raise the weapon, all in one motion; others started to turn first and then raised the weapon. Some subjects turned by almost spinning in place and then running away. Others ran and turned and took more than 10 yards to reach the shoulder "square back" position. The timing of the motion started with the first frame the weapon began to move as the subject started to bring it into motion from beside the thigh. The timing stopped when the subject was within 10 degrees of a full square back position facing away from the officer/camera.

In my previous study, the subjects were measured on simply turning. This study had some "street encounter" emphasis in that the subjects had a gun in hand and most accidentally swung or in some way raised the weapon at the officer/camera as they turned. This reflected a street encounter in which the

suspect did not intentionally point the weapon at the officer and discharge it, but did threaten the officer. There have been an undocumented number of street encounters like this where the subject was armed, facing or walking at a right angle to the officer, and then the suspect initiates or continues his motion into a 90 degree turning movement where they are subsequently facing or moving directly away from the officer. The suspects in these encounters invariably swing the weapon as part of the turning movement. The swing then results in the weapon, at some point, being pointed in or beginning to be pointed in the direction of the officer. The suspect never does discharge the weapon, but by the time the officer has reacted, to believing the weapon is going to be pointed and shot, the suspect has turned and is shot in the back. In my previous study, the average time for the subject to turn 90 degrees was 32/100ths of a second with the fastest being 18/100ths of a second.

Because of the more complicated and extensive motions the subjects went through in this study, the time for the 90 degree turn was relatively much greater than in previous studies but more accurately represents a more dynamic, realistic street encounter, where the suspect actually shoots at the officer. The average time for this motion in this study was 90/100ths of a second, with the fastest being 50/100ths of a second.

A second set of times was taken for each movement to assist in more clearly understanding the 90 degree turn and how it might interface with the

threat to the officer and the officer's reaction time. The average time, from start of the motion to discharge and "weapon drop off," was 53/100ths of a second. The average time from weapon "drop off" to the full square back position was 37/100ths of a second.

## **9 180 DEGREE TURN/WEAPON DISCHARGE/ SQUARE BACK**

*– 50/100ths of a Second*

The ninth movement is the 180 degree turn, and is similar to the 90 degree movement studied previously, in that it more accurately reflected a street encounter where the suspect engages in a more dynamic turn and actually discharges a weapon at the officer as they are turning. In this study, the subject was instructed to start by facing directly at the camera/officer with the weapon in a concealed, bootleg position beside and behind the strong side thigh, then to do the turn and actually point the weapon at the officer/camera and pull the trigger. As in the 90 degree study, the motion was very dynamic, varied among subjects, and sometimes covered quite a distance before the subject achieved a full "square back" position.

In my previous study with just the pure motion of the 180 degree rotation, and with the subject (weapon in hand), but only inadvertently pointing it at the officer, the time was 54/100ths of a second, with the fastest being 37/100ths of a second. In this study, the

subject directly pointed the weapon at the officer and pulled the trigger while turning. The average time for this more dynamic motion was 89/100ths of a second, with the fastest being 50/100ths of a second. From the start of the motion to drop off, the average time was 48/100ths of a second. The fastest time was 40/100ths of a second. From “drop off” to square back position the average time was 42/100ths of a second. The fastest time was 10/100ths of a second.

### **10 180 DEGREE TURN WITH MOMENTUM/ POINT GUN/SQUARE BACK**

*– 33/100ths of a Second*

The tenth motion studied involved the subjects doing a specific movement out of a door and a [sic] then a 270 degree turn. This turn is interesting because it was done in close proximity to a wall. That significantly affected the rotation and the direction in which the weapon was pointed. All subjects held the weapon in the direction of the officer for much of the turn as they rotated close to the wall. I also analyzed the main motion and subportions of the motions to be able to extract portions of the turn such as the quarter turn from “drop off.” The main result from this study was the time for a dynamic 180 degree turn. In the midst of the 270 degree turn, the subjects were instructed to point the weapon directly at the officer/camera and continue their motion to a 180 degree turn in the opposite direction from the officer, and run away from the officer. The average time for this

dynamic 180 degree turn is 58/100ths of a second. The quickest was 33/100ths of a second. It is also interesting that subjects doing this maneuver covered a long distance before actually completing the turn. Not one subject simply pivoted and turned. Most subjects covered 6 to 10 feet to accomplish this motion in the time reported. I presume this 180 degree turn is faster than the 180 degree turn looked at in motion #9, because the subjects in this segment had already developed momentum before they started into this 180 degree turn.

## **11 360 DEGREE TURN**

*– 60/100ths of a Second*

The eleventh motion studied was a 360 degree turn, which has happened in a small number of shooting situations where the suspects were shot as they were attempting a 180 degree turn. The suspects then continued the rotation after they were shot and fell to the ground face up. The subjects in this study did not fall to the ground, but they did complete a 360 degree turn. They were instructed to do this as quickly as possible. This motion in particular covered a long distance especially by some subjects, and subsequently the average time was just under 3 seconds. Some subjects traversed almost 15 yards before completing the motion. The closer approximation to a more realistic street encounter, where these shootings have actually occurred, was a time of just under a second. The fastest time of 60/100ths of a second was

done by a subject who traversed about 4 feet as he did the 360 degree turn.

By studying the “dynamic” rotation, while the subjects were doing a 90, 180 or 360 degree turn, not only can we see that the subjects would be shot in the back if they were actually in a street encounter, and the officer was to really “react,” also, the subjects would be shot at quite a distance from where the officer said they were when the officer made the decision to fire. This study makes it very clear that regardless of the best intentions of the officer, given what the suspect is doing, and how quickly he can do it, the suspect will be shot in the back in some situations.

All of the responses of the average officer referred to in this study assumes that he is set, and has made the decision to shoot as soon as the subject presents a threat to him. It also assumes the officer is completely focused on the subject and then is able to react to the first movement of the subject. In the real world this may not be the case – the officer is then forced into playing “catch up.” This is really dangerous, particularly now that we know how rapidly these scenarios can develop.

Readers of this article may believe that regardless of how alert or set an officer is to react, the only way to survive some of [sic] situations in the street is to triple the reaction time of their trigger pull. This is impossible. Realistically, the way an officer can survive the “Dodge City Showdown” or being a victim of

the “Split Second Syndrome,” is to (as much as they can) prevent these circumstances from happening at all. If there is one primary lesson for the officer to take from this study, it is the value of good basic officer survival skills, such as pre-event decision making, visual and mental alertness, tactical positioning, and always having the suspects keep their hands in plain view. Other supportive tactics like those taught in their academy, presented in magazines like *The Police Marksman* and in texts like **The Tactical Edge** would all be helpful for an officer to survive the unknown threat in the street. So much of any sophisticated skill is always based on a solid foundation of basics.

### ***About the Author***

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