[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10600

JANET TURNER O'KELLEY,
Individually and as Personal Representative
of the Estate of John Harley Turner,
JOHN ALLEN TURNER,

Plaintiffs-Appellants,

versus

SGT. TRAVIS PALMER CURRAN,
a.k.a. Travis Lee Palmer,
DEP. FRANK GARY HOLLOWAY,
DEP. KEELIE KERGER,
DEP. BILL HIGDON,
DEP. TODD MUSGRAVE,

Defendants-Appellees,

OFC. JONATHAN SALCEDO, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:17-cv-00215-RWS

Before ROSENBAUM and LAGOA, Circuit Judges, and WETHERELL,* District Judge.

PER CURIAM:

This case makes its second appearance before us. Plaintiffs-Appellants Janet Turner O'Kelley ("Janet") and her ex-husband, John Turner, appeal the district court's entry of summary judgment against them in their 42 U.S.C. § 1983 action relating to an alleged warrantless seizure of their son John Harley Turner

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* Honorable T. Kent Wetherell, II, United States District Judge, for the Northern District of Florida, sitting by designation.

("Harley").[1] Defendants-Appellees Sergeant Travis Palmer Curran, Deputies Bill Higdon, Keelie Kerger, Frank Holloway, and Todd Musgrave, and various other officers[2] responded to a 911 call reporting that a drunk individual had threatened to shoot hunters for trespassing on land situated in Pickens County, Georgia. When the deputies arrived, they took up positions outside the fence line of Janet's property, on which various buildings were located, including Janet's son Harley's home. Harley walked out of his home with a handgun, and a thirty-minute standoff between the deputies and Harley ensued. Eventually, two deputies crossed the fence line to deploy beanbag shotgun rounds at Harley in an attempt to disarm him. When the beanbags struck Harley, he shot at police with his handgun. In response, various officers shot back at Harley, striking him and tragically causing his death.

Harley's parents brought a wrongful-death suit, claiming unlawful seizure and excessive force, among other things. The lawsuit set forth both federal and state-law claims. The district court dismissed the case, and Harley's parents appealed. The first time this case came before us, a panel of this Court reversed in part

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[1] We refer to Harley by his middle name because that is how the district court and parties refer to him. We refer to the O'Kelleys (Janet and her husband Stan) by their first names to avoid confusion.

[2] Although other law-enforcement officers responded to the call and were initially named as defendants, we affirmed the dismissal of the claims against the other officers in the prior appeal.

and remanded the case for further proceedings. *See O'Kelley v. Craig*, 781 F. App'x 888 (11th Cir. 2019) ("*O'Kelley I*").

On remand, and following discovery, the deputies moved for summary judgment, again relying on the defenses of qualified immunity on the federal claims and Georgia law official immunity on the state claims. On the fuller record, the district court granted summary judgment in favor of the deputies on both the federal and state-law claims.

Harley's parents now appeal the district court's grant of summary judgment in favor of the deputies. The appeal, though, involves only the issue of whether the deputies violated Harley's Fourth Amendment rights when they crossed the fence line and seized him. It does not concern the federal excessive-force claim Harley's parents initially alleged because they do not contest the use of beanbags against Harley, and they concede that once Harley shot at Sergeant Curran, the other deputies were justified in shooting back at him. Harley's parents contend that the district court improperly determined that the deputies were justified in crossing over onto the O'Kelley property to subdue their son. This appeal also involves the issue of whether the deputies were entitled to official immunity on the state-law claim.

The primary question we must address in this case is whether exigent circumstances existed when the officers entered the O'Kelley property to detain Harley. We conclude that a material question of fact on this point requires us to vacate the grant of qualified immunity and remand the case for trial. But we

agree with the dismissal of the state-law claim and therefore affirm the district court's entry of judgment in favor of the deputies on it.

I.

On October 24, 2015, at around 8:30 p.m., Kevin Moss called 911 and reported that he and a group of individuals had been hunting when a person on the neighboring property yelled through the woods, accusing them of trespassing and threatening to shoot them. Moss believed the person was drunk and told the 911 operator, "This son of a bitch is crazy." He later specified that the man threatened to "shoot us, shoot our dogs, he was going to cut us up for Halloween." According to Moss, the man then became involved in a heated verbal argument with an older gentleman who Moss thought might have been his father or grandfather.

When Deputies Higdon, Kerger, and Holloway responded to the call, they met the hunters—two men with two kids—near the property. The hunters reiterated the threats that the man in the woods had made—that he was yelling at them, "threatening to shoot them and cut off their arms and legs and feed them to dogs." But they indicated they could not see whether the person was armed since it was dark outside.

Based on these statements, the deputies proceeded to the neighboring O'Kelley property. There, they were met by Stan O'Kelley (Janet's husband and Harley's stepfather), who came out of the house with his hands in the air. He told the officers that he owned the property, that the 911 call was about his stepson, and

that Harley was armed. Stan further explained which structures he and his wife and Harley lived in, specifically noting that Harley lived in a building behind his and Janet's own house. He also told the deputies that Harley was "out of his ever-loving mind" and that he had two guns—a ".45 and an SKS."[3]

While they spoke to Stan, deputies noticed Harley approaching the other side of a closed gate in the lower driveway of the property. They saw that Harley was shirtless, had a spotlight in his left hand, and a handgun in his right hand. Harley was wearing a makeshift bandolier with the holster across his chest. The deputies did not see the SKS anywhere. When the deputies saw that Harley was holding a handgun, they raised their own guns, pointed them at Harley, and ordered him to put his hands up, drop the gun, and get on the ground. They said that they were police officers and wanted to talk.

Harley responded by telling the deputies they were trespassing. The deputies repeatedly yelled at Harley to put the gun down. When Harley did not, one officer told the others to "Get cover."

According to the deputies, Harley began beaming his spotlight on each of them and waving the gun around by pointing it wherever the light was shining. Harley made "sweeping passes"

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[3] An SKS is a semi-automatic rifle. *See* https://www.sportsmans.com/shooting-gear-gun-supplies/rifles/norinco-sks-type-56-blued-semi-automatic-rifle-762x39mm-used/p/1542592.

with the gun and the spotlight, aiming the spotlight and temporarily blinding the deputies as he did so. All the while, Harley asked nonsensical questions and repeatedly accused the police of trespassing and stealing his property from him. Harley also told the deputies to leave, walked away from them, cursed at them, and encouraged them at various times to "shoot [him] in the back" and "open fire."

At some point, Harley holstered his gun across his chest. While this was going on, Stan repeatedly interjected, yelling at Harley, even though the deputies asked him to stand back or go inside. Stan's actions forced the deputies to move him from the area more than once, until the deputies finally convinced Stan to wait at the neighbor's house for the remainder of the encounter. Based on Harley's behavior and refusal to surrender his gun, the deputies took cover behind trees and bushes on the sides of the driveway and they called for backup. Deputy Holloway specifically requested that back-up bring less-than-lethal weapons support.

After several minutes of back and forth with the deputies, Harley turned and headed from the lower driveway to the upper driveway of the property, where Deputies Higdon and Kerger followed without crossing the fence line. Deputy Holloway remained at the lower driveway for the duration of the encounter.

At the upper driveway, Harley began pacing back and forth in the yard behind the fence, coming in and out of the deputies' sight. His gun was holstered at this point. When Harley approached the fence line, he again repeatedly aimed his spotlight

into the deputies' eyes, making it difficult for them to see. But Harley never directly threatened the deputies, either verbally or with his handgun, and there is no evidence that Harley's gun ever left his holster at the upper driveway.

Meanwhile, Harley's mother Janet arrived at the property and attempted to speak with Harley. But the deputies escorted her further down the driveway to her truck, telling her to stay back "in case he starts shooting." After this, Harley disappeared behind the house.

Additional law-enforcement officers arrived on the scene, including Georgia State Patrol Officers, who took up sniper positions with their rifles, and Appellees Sergeant Curran and Deputy Musgrave, who joined the other deputies.

Sergeant Curran was certified in the use of bean-bag rounds—a less-than-lethal option for apprehending suspects. When he arrived, Sergeant Curran saw Harley at the fence with a gun in a "bandolier type thing" on his bare chest and a spotlight, and Stan standing on the porch. Various deputies instructed Harley to talk to them and repeatedly directed him to put his firearm down. But Harley was unwilling to do so and continuously accused the deputies of trespassing and stealing. He also repeatedly told law enforcement that he was tired and wanted to go to bed.

Given the circumstances and Harley's refusal to comply with their demands to give up his gun, the deputies formed a plan to use non-lethal force on Harley. Sergeant Curran believed the

deployment of the less-than-lethal beanbags would not be effective from where he was situated, so he would have to get closer and cross the fence line. He told deputies Higdon and Kerger that he was going to look for a good place to deploy the beanbags. Towards that end, Sergeant Curran and Deputy Higdon went past a privet hedge on the side of the O'Kelleys' house and jumped over the fence, taking positions in a narrow alleyway between the house and the fence. The two deputies moved from the alleyway around the back of the house and into the O'Kelleys' backyard but retreated to the alleyway when their movement activated a floodlight.

Sergeant Curran instructed the other deputies to draw Harley to the fence so he could shoot Harley in the right shoulder with a beanbag. He thought this would knock Harley down or back him up and stun his right arm—which was the hand he had held the gun with earlier in the encounter. The intent was to prevent Harley from drawing his gun from his holster while Sergeant Curran disarmed him. Deputy Higdon was to provide cover for Sergeant Curran as this occurred.

While Sergeant Curran and Deputy Higdon got into position, Deputy Kerger believed she might be able to talk Harley into putting his gun down. She had gotten permission from Sergeant Curran to engage Harley in this way before Sergeant Curran crossed the fence line. Harley was in the driveway at the time, so Deputy Kerger tried to draw him to the fence line—an area where the officers could see him (due to lighting) and where

Sergeant Curran could get a good shot at him with the non-lethal beanbags.

Deputy Kerger stepped into the open driveway, raised her hands, and approached the fence to see if she could speak with Harley. Deputy Kerger told Harley that she did not have her gun and asked him to put his own gun down on the ground. Harley approached the fence with his gun holstered. He was still carrying his spotlight in one hand and he had a jug of water, which he had retrieved from his house, in the other. Despite commands to do so, Harley continued to refuse to place his holstered gun on the ground. Again, Harley repeatedly told the deputies that he wanted to end the encounter and that he was tired and wanted to go to bed.

As Harley moved closer to the fence towards Deputy Kerger, he abruptly turned to his right, moved, and saw Sergeant Curran. Harley's hands were down at his side. Harley lifted his arm and shined his spotlight into Sergeant Curran's eyes, temporarily blinding him. At this point, Sergeant Curran fired three beanbag rounds at Harley, striking him, but not knocking him down as intended. Harley drew his gun and fired at Sergeant Curran two times, hitting him in the elbow. In response, several officers shot back at Harley, killing him.

Thereafter, Harley's parents filed suit. The deputies moved to dismiss, and the district court granted the motion. On appeal, we vacated the dismissal order, in part. The parties returned to the district court, where they engaged in discovery. Then the deputies

moved for summary judgment, arguing that they were entitled to qualified immunity on the federal claim and official immunity on the state-law claim. Appellants filed a cross-motion for summary judgment contending that the deputies unlawfully entered the curtilage of the property without a warrant. The district court agreed with the deputies and entered judgment in their favor. Harley's parents now appeal.

II.

We review de novo a grant of summary judgment based on qualified immunity and state-agent immunity. *Hill v. Cundiff*, 797 F.3d 948, 967 (11th Cir. 2015). "When considering a motion for summary judgment, including one asserting qualified immunity, 'courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, [they must] credit the nonmoving party's version.'" *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (quoting *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006)). Summary judgment is appropriate only when the evidence shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *McCullough v. Antolini*, 559 F.3d 1201, 1204 (11th Cir. 2009) (quotation marks omitted).

III.

At the outset, we note that, at the time the district court granted summary judgment, only Sergeant Curran, Deputy

Higdon, and Deputy Kerger were implicated by the remaining claims. It is undisputed that Deputies Holloway and Musgrave were not directly involved in either the plan to cross the O'Kelleys' fence line or the plan to deploy less-than-lethal beanbags against Harley. Thus, irrespective of the parties' other arguments, the trial court's grant of summary judgment is due to be affirmed to the extent that it eliminated Deputies Holloway and Musgrave from the case.

IV.

The federal claim here requires us to consider whether the deputies should have attempted to obtain a warrant while Harley behaved as he did or whether deputies were justified in jumping the fence and attempting to disarm Harley because they thought he presented an imminent threat to himself or others. This is a close case, but we conclude that a reasonable jury could find that, when the deputies entered the O'Kelley property to seize Harley,[4] they were not faced with exigent circumstances that justified their entry onto the O'Kelleys' curtilage. We therefore vacate the district court's entry of summary judgment for the deputies on qualified-immunity grounds on the § 1983 claim.

We divide our discussion into five substantive sections. Section A discusses the governing principles of qualified immunity.

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[4] It is undisputed that shooting Harley with the beanbag rounds was a "seizure" for Fourth Amendment purposes. *See Vaughan v. Cox*, 343 F.3d 1323, 1328-29 (11th Cir. 2003).

In Section B, we review Fourth Amendment law. In Section C, we consider whether the property the deputies entered qualified as "curtilage" for Fourth Amendment purposes. In Section D, we apply the law to determine whether the deputies were entitled to qualified immunity. And in Section E, we discuss whether any Fourth Amendment right that was violated here was clearly established.

A.

Qualified immunity protects police officers from being sued in their individual capacities for discretionary actions performed in the course of their duties. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This protection shields them from suit as long as their conduct does not violate a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity balances the need for official accountability with the need to permit officials to engage in their discretionary duties without fear of personal liability or harassing litigation. *Pearson*, 555 U.S. at 231; *Durruthy v. Pastor*, 351 F.3d 1080, 1087 (11th Cir. 2003).

Officers who assert entitlement to qualified immunity must first establish that they were acting within the scope of their discretionary authority. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). No dispute exists here that the deputies were acting within the scope of their discretionary authority when they crossed over the fence line and engaged Harley.

Because the parties agree that the deputies were acting within the scope of their discretionary authority, the burden shifts to the plaintiffs to establish that qualified immunity is inappropriate. *Penley ex. rel. Estate of Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). First, the plaintiffs must establish that the officers' conduct violated a constitutionally protected right. Second, the plaintiffs must show that the right was clearly established at the time of the misconduct. *Pearson*, 555 U.S. at 232; *Grider v. City of Auburn*, 618 F.3d 1240, 1254 (11th Cir. 2010). The plaintiffs must make both showings to avoid qualified immunity.

Qualified immunity is an objective test, asking "whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir. 1990). Accordingly, the facts of the case, and the reasonable inferences that can be drawn therefrom, are crucial to determining an officer's entitlement to qualified immunity. At summary judgment, a court must resolve any dispute in the facts material to the alleged Fourth Amendment violation in favor of the non-movant (Harley's parents), such that "the court has the plaintiff's best case before it." *Wate v. Kubler,* 839 F.3d 1012, 1019 (11th Cir. 2016) (quoting *Penley*, 605 F.3d at 848). Then, "[o]nce we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the

reasonableness of the officer's actions is a pure question of law." *Id.* (cleaned up).

B.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV. The Supreme Court has interpreted this text to generally require law-enforcement officers to secure a search warrant before entering or searching within a home. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). That is so because, at the Fourth Amendment's very core is the right of an individual "to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citation and internal quotation marks omitted). The same protection extends to "the area immediately surrounding and associated with the home"—what courts refer to as the "curtilage"—which is regarded "as part of the home itself for Fourth Amendment purposes." *Id.* (citation and internal quotation marks omitted).

Warrantless searches and seizures inside a home or its curtilage are presumptively unreasonable. *United States v. Walker*, 799 F.3d 1361, 1363 (11th Cir. 2015) (per curiam); *Brigham City*, 547 U.S. at 403; *Bashir v. Rockdale Cnty., Ga.*, 445 F.3d 1323, 1327 (11th Cir. 2006). Still, the warrant requirement is not absolute and is subject to certain exceptions. One exception occurs when the "exigencies of the situation" obviate the need to obtain a

warrant. *Brigham City*, 547 U.S. at 403-04; *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). In the absence of consent or exigent circumstances plus probable cause, a warrantless entry into a home (or its curtilage) by police violates a person's Fourth Amendment rights. *Bashir*, 445 F.3d at 1328; *see also United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002).

The exigent-circumstances exception recognizes that a "warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant." *Bashir*, 445 F.3d at 1328 (citations omitted); *Feliciano*, 707 F.3d at 1251 ("Exigent circumstances . . . arise when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.") (quotation marks omitted).

We have found exigent circumstances to exist in various situations, but the "most urgent" of these exigencies is the need to protect or preserve life. *United States v. Timmann*, 741 F.3d 1170, 1178 (11th Cir. 2013). Indeed, we have said that "[i]t is difficult to imagine a scenario in which immediate police action is more justified than when a human life hangs in the balance." *Holloway*, 290 F.3d at 1337.

Typically, for the exigent-circumstances exception to apply, the government must show both exigency and probable cause. *Id.* But the probable-cause element may be satisfied where officers reasonably believe a person is in danger. *Id.* at 1338. Courts have found exigency to exist when "the indicia of an urgent, ongoing

emergency, in which officers have received emergency reports of an ongoing disturbance, arrived to find a chaotic scene, and observed violent behavior, or at least evidence of violent behavior" are present. *Timmann,* 741 F.3d at 1179 (collecting cases).

We look to the "totality of the circumstances" to determine whether officers were justified in acting without first obtaining a warrant. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013). Put another way, we "evaluate each case of alleged exigency based on its own facts and circumstances." *Id.* at 150 (citation and quotation marks omitted). As the Supreme Court has explained, "[w]hether a 'now or never situation' actually exists—whether an officer has 'no time to secure a warrant'—depends upon the facts on the ground." *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). Police do not "need ironclad proof of a likely serious, life-threatening injury to invoke" the exigent-circumstances exception, but the circumstances must be such that a reasonable officer "could have objectively believed that an immediate search was necessary to safeguard potential victims." *United States v. Evans*, 958 F.3d 1102, 1106 (11th Cir. 2020) (quoting *Michigan v. Fisher*, 558 U.S. 45, 49 (2009)).

We engage in a two-part analysis to determine whether exigent circumstances existed. *See Ornelas v. United States*, 517 U.S. 690 (1996). At the first step, we identify the historical facts that led to the trespass onto curtilage without a warrant. *See id.* at 1661–62. And at the second step, we review de novo whether a reasonable officer would believe these historical facts created

exigent circumstances justifying entry without a warrant. *See id.* at 1661–62. Here, we do not get past the first step because the evidence reveals a genuine issue of fact as to the urgency of the situation at the time the deputies crossed onto the O'Kelleys' property.

C.

Because Harley's Fourth Amendment rights could be violated here only if the deputies entered his home or its curtilage, we address the curtilage issue first. The parties raise a number of opposing arguments regarding whether the area of the O'Kelley property where the deputies crossed constituted the curtilage of Harley's home. The district court did not reach this issue, but none of the facts relevant to the curtilage issue are in dispute, and the record is sufficiently developed for us to make the determination in the first instance.

After consideration, we conclude that the area in question constituted the curtilage of Harley's home even though the property was owned by Janet and Stan O'Kelly and the area upon which the deputies stood when they crossed the fence line was just outside the O'Kelleys' home, not Harley's.

The Supreme Court has established a test that includes four factors to determine if a particular area of the property of a home is curtilage: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area

is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn,* 480 U.S. 294, 301 (1987). Still, though, these factors are merely "tools" to help courts determine the curtilage issue and are not dispositive. *Id.*

Here, on the first factor, the area where Sergeant Curran and Deputy Higdon crossed onto the property was situated close to the O'Kelley home, such that when they crossed the fence line, they were in a narrow space between the O'Kelleys' home and the fence—a space immediately adjacent to the O'Kelleys' kitchen. The space in which the deputies maneuvered was approximately two-feet wide, so they likely touched the house or came within inches of it.

As to the second factor, the area traversed by the deputies was included in the home's enclosure, as the fence ran the length of the property line, which included the O'Kelleys' house and Harley's house.

On the third factor, the areas where Sergeant Curran and Deputy Higdon walked to deploy the beanbags were used for family purposes. Although the alleyway between the O'Kelley house and the fence was too narrow to serve as a passageway, it was used to store and protect items like sawhorses, ladders, and trash cans, and it featured windows into the kitchen where the O'Kelleys—including Harley—prepared their meals. *See Jardines*, 569 U.S. at 6 ("The [Fourth Amendment] right to retreat [into one's home] would be significantly diminished if the police could enter a

man's property to observe his repose from just outside the front window").

Additionally, the deputies moved into the O'Kelley backyard at one point, which contained a garden. The record shows that Harley himself was an avid gardener, and "[g]ardening is an activity often associated with the curtilage of a home." *See United States v. Cousins,* 455 F.3d 1116, 1122-23 (10th Cir. 2006) (citing *United States v. Breza*, 308 F.3d 430, 436 (4th Cir. 2002)); *accord United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997).

Finally, as to the fourth factor, the area was shielded from public observation because it was screened by a triangular wood line and the O'Kelley home. A privet hedge higher than a person's head was also present to shield the side where the neighbors' trailer was situated. All of the factors set forth in *Dunn* are therefore met.

While Harley lived in a different structure than the O'Kelleys, his house was located on the same property, close to their home. Curtilage is not limited to one particular building. Rather, it is instead "formed by the buildings constituting an integral part of that group of structures making up the [] home, . . . or the immediate domestic establishment of the home." *United States v. Berrong*, 712 F.2d 1370, 1374 (11th Cir. 1983) (internal quotation marks and citations omitted); s*ee also Fixel v.*

Wainwright, 492 F.2d 480, 483 (5th Cir. 1974)[5] (finding that the backyard of a four-unit apartment building was curtilage); and *United States v. Maxi*, 886 F.3d 1318, 1327 (11th Cir. 2018) (in the context of a duplex).

The record here shows that Harley's home was part of the same immediate domestic establishment as the O'Kelleys' home, as discussed in *Berrong*. The two homes were enclosed by the same wooded area on two sides and the same fence and hedge on the side where the deputies crossed the property. Significantly, Harley was not a stranger renting his home. Rather, he was a member of the O'Kelley family, living at the same mailing address as Janet and Stan. Indeed, Harley lacked a kitchen in his home, so he frequently visited his mother and stepfather's home and prepared and ate his meals at the O'Kelleys' house. In short, he used the O'Kelleys' home as if it were an extension of his own. *See United States v. Noriega*, 676 F.3d 1252, 1262 (11th Cir. 2012) (explaining that the focus of the *Dunn* factors is "whether an individual reasonably may expect that the area in question should be treated as the home itself." (quoting *Dunn*, 480 U.S. at 300)).

Based on these facts, the area of the O'Kelley property where Sergeant Curran and Deputy Higdon crossed the fence line to deploy the beanbags fell within the curtilage of Harley's home.

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[5] The Eleventh Circuit has adopted as binding precedent all decisions issued by the former Fifth Circuit prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

The area was close to where Harley lived, he used the O'Kelley house for meals, and he had a reasonable expectation of privacy in that area. *See Berrong*, 712 F.2d at 1374. Because the area Sergeant Curran and Deputy Higdon treaded upon was the curtilage of Harley's home, the deputies necessarily violated Harley's Fourth Amendment rights by crossing over onto the property without a warrant unless they received consent to enter the property or probable cause and exigent circumstances were present.

D.

We now turn to the question of whether exigent circumstances justified the deputies' breaching of Harley's curtilage. Though the deputies argue that they are entitled to qualified immunity on the Fourth Amendment claim, they rely somewhat on material facts that Harley's parents dispute. Taking the facts in the light most favorable to Harley's parents, as we must, we cannot find as a matter of law that an "urgent need for immediate action" existed when the deputies crossed the fence line. Rather, viewing the facts in Harley's parents' favor, we conclude that a jury could find that an objectively reasonable police officer faced with the same circumstances would not have believed that exigent circumstances existed at the time Sergeant Curran and Deputy Higdon crossed the fence line. We therefore leave it to a jury to make the determination of exigency after hearing all the evidence at trial.

The deputies direct us to various facts to persuade us that exigency excused them from obtaining a warrant before seizing

Harley. First, they note, law enforcement responded to a scene where Harley had just threatened to kill the hunters. And when one of the hunters—Kevin Moss—called 911, he informed the dispatcher that the person who threatened him was "crazy" and "drunk." Moss also indicated that the perpetrator was later engaged in a heated argument with his father or grandfather. Plus, when deputies met with Stan, he told them that Harley was the perpetrator and he was armed with two guns—a handgun and a semi-automatic assault rifle. Stan also voiced his opinion that Harley was "out of his ever-loving mind."

Not only that, but the deputies also emphasize, when deputies arrived at the O'Kelley property, they saw for themselves that Harley drew his gun and pointed it at them.[6] It was very dark, and Harley appeared shirtless, agitated, and holding a spotlight. He used the spotlight to blind the officers as he simultaneously waved his gun. And when deputies repeatedly commanded Harley to put his gun down, he refused and instead kept yelling and cursing at the officers, sometimes incoherently. Indeed, Harley repeatedly accused the deputies of stealing from him and poaching his deer. Along with these unusual statements, Harley paced back and forth, into and out of darkness.

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[6] There is a factual dispute as to whether Harley pointed his gun "at" the officers or only in their general direction in the lower driveway, but that dispute is immaterial. What matters is the undisputed fact that Harley's gun was holstered in the upper driveway—the point at which the deputies actually crossed the fence line.

Further, at various times, Harley told the deputies to "shoot me in the back," and at other times he told them to "open fire." And besides all this, the deputies continue, during the encounter, other people were present—the O'Kelleys and two neighbors who were on their porch. Stan reportedly interjected himself into the situation at times.

Despite the deputies' reliance on this narrative, we cannot affirm the district court's qualified-immunity ruling. To be sure, most of these facts the deputies rely upon are not disputed. But some are. Plus, some of the facts on which the deputies rely occurred earlier in the encounter at the lower driveway. And by the time Sergeant Curran and Deputy Higdon crossed the fence line to the O'Kelley property, it is possible that any exigency arguably created by the events at the lower driveway had dissipated.[7]

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[7] Exceptions to the warrant requirement are "justified by and limited to the exigent circumstances of the moment" and "cannot be put in the bank and saved for use on a rainy day, long after any claimed exigency has passed." *United States v. Valerio*, 718 F.3d 1321, 1325 (11th Cir. 2013); *accord Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011) ("[An] officer's warrantless search must be strictly circumscribed by the exigencies which justify its initiation" (cleaned up)). Accordingly, as the Sixth Circuit has succinctly stated, "[t]ime is an essential factor when an *immediate* threat forms the basis for police claims of exigency . . . . [E]xigent circumstances terminate when the factors creating the exigency are negated." *Carlson v. Fewins*, 801 F.3d 668, 674 (6th Cir. 2015) (cleaned up).

For starters, by the time Sergeant Curran and Deputy Higdon crossed on to the O'Kelleys' curtilage, no civilians remained in harm's way. Although Harley had threatened to shoot the hunters, when law enforcement arrived, the hunters were already a safe distance away from the property. As for Stan's involvement, that likewise ended before the deputies crossed over onto the curtilage of the O'Kelley property. And Janet and the neighbors were also away from the area and not in direct danger.

Second, during the latter part of the encounter with law enforcement in the upper driveway, Harley repeatedly told the deputies that he was tired and just wanted to go to sleep. He did not threaten the deputies verbally and simply wanted to end the encounter without violence.

Third, although Harley held a gun in his hand during the initial part of the encounter with the deputies on the lower driveway, he had holstered his weapon when he reached the upper driveway. And Harley's gun remained holstered during the entire latter part of the encounter leading up to the deputies' crossing of the fence line.

Fourth, the fact that Sergeant Curran authorized Deputy Kerger to approach Harley unarmed in an effort to draw him to the fence line suggests that he did not view Harley as an imminent threat to law enforcement.

Taking all these facts as true and in the light most favorable to Harley's parents, a reasonable jury could find that the once-tense

situation had de-escalated to the point that no exigency existed at the time Sergeant Curran and Deputy Higdon crossed over onto the property to seize Harley. That is not to say that the deputies should have left the O'Kelleys alone at the property with an agitated Harley, but there is no evidence that the O'Kelleys would have faced imminent harm if the deputies took the time to obtain a warrant before crossing the fence line.[8]

It is undisputed that at no time did Harley threaten to shoot the officers, himself, or anyone else during the thirty-minute encounter with the deputies. And more importantly, Harley's gun remained holstered for the entire encounter at the upper driveway.[9]

But Harley's multiple remarks to the deputies to shoot him raise a genuine issue of material fact. On the one hand, the deputies argue that the eleven times Harley implored them to shoot him constituted unstable, suicidal utterances—statements by someone

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[8] Sergeant Curran testified that, had they tried, it would have taken 45 minutes to an hour to obtain a warrant. It is unclear if someone would have needed to physically leave to obtain a warrant (Deputy Musgrave suggested that in "an emergency" they could "[c]all detectives" and obtain a warrant "fairly quickly"), but even if *someone* had to leave, there were seven law-enforcement officers on the scene at the time.

[9] Other testimony confirms that, at the time the deputies crossed the fence line to subdue Harley, his gun was holstered and both of his hands were occupied—with a jug of water in one and a spotlight in the other.

who wished to commit suicide by cop.[10] And in *Smith v. LePage*, we noted that a "clear-cut" justification for entry into a home (or its curtilage) without a warrant is an emergency involving a "need to protect or preserve life." 834 F.3d 1285, 1292-93 (11th Cir. 2016) (citation and internal quotation marks omitted). There, we also clarified that "[t]his can include the lives of people threatened by a suspect, or the suspect's life if he is suicidal." *Id.* at 1293 (citation omitted).

Yet on the other hand, Harley's parents point to the record as a whole to contend Harley's statements indicated that he was simply frustrated and wanted to be left alone, and no reasonable officer would have thought him to be suicidal.

If a jury determines that the deputies reasonably understood Harley's statements to reflect an intention to commit suicide by cop, and it further concludes that the deputies reasonably viewed those statements to reflect a state of mind that continued at about the time Sergeant Curran and Deputy Higdon crossed onto the curtilage, exigency was present. That is so because their actions would be in furtherance of disarming an individual considered to be a danger to himself. But on the other hand, if a jury finds that

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[10] "Suicide-by-cop" is a colloquial term for the act of intentionally provoking police to kill oneself. *See N. Am. Co. for Life & Health Ins. v. Caldwell*, 55 F.4th 867, 869 (11th Cir. 2022).

no deputy reasonably could have understood Harley's statements to indicate that he was suicidal when Sergeant Curran and Deputy Higdon crossed onto the curtilage, exigent circumstances did not exist. A jury should decide this key issue. *See Caldwell*, 55 F.4th at 871; *Hardigree v. Lofton*, 992 F.3d 1216, 1229 (11th Cir. 2021) (citing *McClish v. Nugent*, 483 F.3d 1231, 1240-41 (11th Cir. 2007)).

In sum, assuming Harley's parents' version of the facts to be true—one in which Harley did not act in a manner evincing suicidal intentions, had holstered his gun for the entirety of the exchange with law enforcement in the upper driveway, had repeatedly expressed a desire to end the standoff and go to bed, and where Sergeant Curran allowed Deputy Kerger to engage Harley without her gun drawn—a reasonable officer would not believe that Harley presented an immediate threat to himself or others requiring urgent action to seize Harley. *See Hardigree*, 992 F.3d at 1229. But under the deputies' version of the facts—where Harley was reasonably perceived as an unstable individual who wished to commit suicide by cop—a jury could conclude that a reasonable officer would have believed that Harley presented an immediate threat to himself or others and thus, exigent circumstances justified entry onto the O'Kelleys' property.

For all these reasons, we conclude that genuine issues of material fact exist as to whether exigent circumstances justified the deputies' entry onto the O'Kelley property.

E.

That brings us to the second part of the qualified-immunity analysis: whether the alleged constitutional violation was clearly established. Indeed, even if the deputies violated Harley's Fourth Amendment rights by entering the curtilage without justification, they would still be entitled to qualified immunity unless the law was clearly established that their actions violated Harley's constitutional rights.

As we explained when this matter was before us on the initial appeal,

> [B]inding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home [or on its curtilage] without a warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures. And the parameters of the exigent-circumstances doctrine were well-established before then, including, as relevant here, that circumstances do not qualify as exigent unless "the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger.

See O'Kelley I, 781 F. App'x at 898 (quoting *Holloway*, 290 F.3d at 1337).

So if a jury finds that the deputies' actions in crossing over the fence line onto the O'Kelleys' property to disarm Harley were not warranted by exigent circumstances, clearly established law supports the conclusion that Appellees violated Harley's Fourth

Amendment rights. And because Harley's rights were clearly established, the deputies are not entitled to qualified immunity on the Fourth Amendment claim at this juncture. For these reasons, we find that the district court erred in entering summary judgment in favor of Sergeant Curran and Deputies Higdon and Kerger.

Ultimately, we conclude that genuine issues of material fact exist as to whether the deputies were entitled to judgment as a matter of law. We therefore remand this case to the district court for a trial on the issue of whether exigent circumstances justified the deputies' entry onto the O'Kelley property without a warrant. Put another way, a jury should determine whether reasonable officers would construe the situation as involving exigent circumstances—one involving an urgent need for immediate action. *Feliciano*, 707 F.3d at 1251.

V.

Finally, we turn to Harley's parents' state-law claim. Harley's parents set forth cursory arguments in their initial brief as to why the district court's decision with respect to the state-law claim was erroneous. We are not persuaded.

First, the Federal Rules of Appellate Procedure require that an appellant's brief contain "a statement of the issues presented for review." Fed. R. App. P. 28(a)(5). We have held that any issues not raised in the "Statement of Issues" are generally deemed to be waived. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Harley's parents did not present their official-

immunity and state-law claim in their Statement of Issues—rather, they presented only the curtilage and qualified-immunity issues. Arguably, any issues relating to the state-law claim have been waived.

But even if the issues were not waived, they fail on the merits. On this record, no evidence exists that the deputies acted with malice or an intent to injure Harley. And in Georgia, "county law-enforcement officers . . . generally enjoy official immunity from suits alleging personal liability in tort for performance of official functions." *Bailey v. Wheeler*, 843 F.3d 473, 485 (11th Cir. 2016). As a result, state officials may not be held liable for injuries caused through their performance of discretionary functions unless they act "with actual malice or with actual intent to cause injury." *Id.* (citing Ga. Const. art. I, § 2, para. IX(d) and *Brown v. Penland Constr. Co, Inc.*, 281 Ga. 625, 641 S.E.2d 522, 523 (2007)).

"'[A]ctual malice' requires a deliberate intention to do wrong." *Id.* (quoting *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336, 337 (1996)). And "actual intent to cause injury" requires an "actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury." *Kidd v. Coates*, 518 S.E.2d 124, 125 (1999) (quoting *Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo.App.1989)).

Here, nothing in the record supports the conclusion that the deputies acted with actual malice or an intent to injure when they crossed the property line to engage Harley with less-than-lethal

force. The testimony of each of the deputies shows that, while they intended to hit Harley with the beanbags, their objective in doing so was to de-escalate the situation by disarming Harley. And Sergeant Curran's testimony reflects that he employed the beanbags because he did not want to seriously injure Harley. Even if the plan was ill-conceived or poorly executed, mere recklessness is insufficient to overcome official immunity in Georgia. *Hanse v. Phillips*, 623 S.E.2d 746, 750 (Ga. Ct. App. 2005). Because nothing in the record supports a finding that the entry onto the curtilage was malicious or meant to injure Harley, the district court correctly granted the deputies official immunity from the state-law claim. We affirm the dismissal of the state-law claim.[11]

VI.

For the foregoing reasons, we reverse the district court's decision to deny on mootness grounds Harley's parents' motion for summary judgment on the curtilage issue. We vacate the

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[11] Harley's parents, citing our prior opinion, argue that the deputies are not entitled to state-law official immunity because the use of the beanbag rounds was not justified by self-defense. However, self-defense is not the standard for official immunity in Georgia—actual malice or intent to injure is. *Bailey*, 843 F.3d at 485. Although we noted in our prior opinion that the official immunity analysis "*often* comes down to whether the officer acted in self-defense," *O'Kelley I*, 781 F. App'x at 899 (emphasis added), "often" does not mean "always," and both this Court and the Georgia courts have granted official immunity in use-of-force cases not involving self-defense. *See Peterson v. Baker*, 504 F.3d 1331, 1339-40 (11th Cir. 2007) (per curiam); *Tittle v. Corso*, 569 S.E.2d 873, 877-78 (Ga. Ct. App. 2002).

district court's grant of summary judgment in favor of Sergeant Curran and Deputies Higdon and Kerger on the Fourth Amendment claim and remand that claim for trial. We affirm the district court's grant of official immunity on the state-law claim and the grant of summary judgment in favor of Deputies Musgrave and Holloway

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART and REMANDED IN PART.