No. 14-_____

IN THE

Supreme Court of the United States

ESTATE OF ADAM BROWN,

Petitioner,

v.

BROWN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 16, 2015

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QUESTION PRESENTED

What initial burden does Fed. R. Civ. P. 56 impose on a moving party that seeks summary judgment on the ground that the non-moving party cannot prove its case?

PARTIES TO THE PROCEEDING

Petitioner, the Estate of Adam Brown, was plaintiff in the trial court and appellant in the U.S. Court of Appeals for the Seventh Circuit. Respondent, Brown County (Wisconsin), was defendant in the trial court and appellee in the Seventh Circuit. Petitioner has dropped its claims against the two other defendants originally named in the lawsuit (Timothy Thomas and Matthew Secor).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Estate of Adam Brown, respectfully submits this petition for a writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The panel decision of the Court of Appeals (App., *infra*, 1a-9a) is reported at 771 F.3d 1001. The decision denying *en banc* review (App., *infra*, 10a-11a) is unreported. The district court decision granting summary judgment, from which appeal was taken (App., *infra*, 12a-32a), is reported at 7 F.Supp.3d 906.

JURISDICTION

The Court of Appeals denied the timely petition for *en banc* review on Dec. 15, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part:

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court

should state on the record the reasons for granting or denying the motion.

* * *

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record . . .; or

(B) showing that . . . an adverse party cannot produce admissible evidence to support the fact.

* * *

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

INTRODUCTION

This case poses a fundamental, unsettled question at the heart of the *Celotex* trilogy regarding what burden a summary judgment movant must satisfy before the nonmovant has any burden to respond. This Court's last substantial discussion of the Rule 56(c) burden was in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986); *see also id.* at 328 (White, J., concurring). Reflecting the importance of summary judgment, as of 2005 *Celotex* and the other two decisions in the

trilogy had each been cited more frequently by federal courts than any other decision in this Court's history.[1]

Despite its practical importance, the lower federal courts have never been able to agree on the proper interpretation of *Celotex*. See pp. 15-21, *infra*. Procedure scholars are likewise divided, with some viewing the Rule 56(c) burden as substantial, and others viewing it as minimal or even nonexistent — but with a consensus that, however the Rule 56(c) burden should be formulated, the current confusion is traceable to ambiguities in this Court's *Celotex* decision and in Justice White's concurrence.[2] That confusion has never

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[1] Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 86-87, 142-43 (2006).

[2] Scholarship viewing Rule 56(c) as imposing a substantial burden includes Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards*?, 63 Notre Dame L. Rev. 770, 775-76 (1988) (Rule 56(c) "specifically requires an initial showing by the moving party," including one "who does not have the burden of production at trial"); *id*. at 778 ("differences among the Justices" in their *Celotex* opinions "are confusing to say the least"); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1039, 1062-63 (2003) (agreeing that "*Celotex* unfortunately fails to provide clear guidance" on the Rule 56(c) burden, and observing that "confusion" created by various aspects of the decision and by Justice White's concurrence has led some courts to conclude that "the moving party's burden need only be cursory"); Steinman, *supra* note 1, 63 Wash. & Lee L. Rev. at 104, 109 (*Celotex* presents "significant ambiguities" which have led many courts and commentators to read it "as placing essentially no burden at all on a defendant seeking summary judgment"). Scholarship viewing Rule 56(c) as imposing a minimal or nonexistent burden includes Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 Stan. L. Rev. 1329, 1334 (2005) ("it is not clear with

been addressed through the Rules-revision process, deliberately so.[3] Certiorari should be granted to resolve this fundamental, unsettled matter of civil procedure which the lower federal courts confront on a regular basis.

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what approach the *Celotex* Court replaced the preexisting [Rule 56(c)] standard"); *id*. at 1344-45 (complaining that "obscure" language and "sloppy reasoning" in *Celotex* have led some courts and scholars to resist "*Celotex*'s apparent conclusion that no more than a minimal burden should be imposed on a movant who lacks a burden of proof at trial"). *Compare* 11 *Moore's Federal Practice* § 56.40[1][b][iv], at 56-109 (Daniel R. Coquillette, *et al.*, eds., 3d ed. 2014) ("most courts" have adopted "[t]he better position" of reading *Celotex* to require all summary judgment movants to make a record-based showing).

[3] Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 Duke L.J. 597, 647 (2010) (Advisory Committee's 1992 redraft of Rule 56 was rejected by the Standing Committee on the view "that it would be inappropriate for our committees to trespass on a lawmaking role that the high Court had appropriated for itself"); Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 Notre Dame L. Rev. 1761, 1780 (2004) (approach of Style Project for the Civil Rules was that even slight substantive changes "must be addressed by other means"); Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 Lewis & Clark L. Rev. 591, 595 (2014) (Style Project made no "effort to make the rule conform to practice" or introduce any "new wrinkles," nor did the substantive revisions of Rule 56 commenced in 2005, which took effect in 2010, address "[t]he allocation of the moving burden"); *id*. at 609 (final revised Rule 56 evinced "no attempt to solve the mystery of how a movant who does not have the trial burden" may meet its Rule 56(c) burden).

STATEMENT OF THE CASE

In 2012 petitioner, the Estate of Adam Brown, filed a lawsuit pursuant to 42 U.S.C. § 1983 against Brown County, Wisconsin, and members of the County's sheriff's department, alleging that they had executed a search warrant in "violation of Adam J. Brown's constitutional rights," Complaint ¶ 1, resulting in his death. *Id.,* ¶¶ 7-21.[4] The Estate pled two distinct Fourth Amendment claims.

First was an unreasonable-seizure claim against the sheriff's deputy who shot and killed Brown during a SWAT-style raid on Brown's home, launched in total darkness, to obtain evidence of a misdemeanor theft — one committed not by Brown, but by a teenage guest. The complaint alleged that in killing Brown, the deputy used force "unreasonable under the circumstances," in violation of "clearly established constitutional rights of which reasonable officers knew or should have known." Complaint ¶¶ 22-26.

Second was an unreasonable-search claim against the County on a theory of *Monell* liability,[5] alleging that the County's policies and procedures caused its sheriff's department "to execute a search warrant in an unreasonably dangerous manner," Complaint ¶ 5; *see also id*., ¶ 33 (County's policies and procedures caused execution of "search warrant in an unreasonably dan-

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[4] The complaint appears in the Appellant's Appendix in the Seventh Circuit ("7th Cir. App.") at 1-3. At the time of his death, Adam Brown was a young adult with no dependents, and thus the litigation on behalf of his estate is being pursued by his mother, Nancy Brown.

[5] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-95 (1978).

gerous and threatening manner given the nature of the warrant"); App. 5a (characterizing nighttime search as "foolish" because "there doesn't seem to have been any reason not to postpone the search of Brown's apartment till daylight"); App. 6a ("suspicious-looking undercover officer at the front of the police team" likewise presented an apparently unnecessary danger).

Under the scheduling order agreed to by the County, it had approximately six months to depose the Estate's two surviving eyewitnesses and the Estate's expert witness, prior to filing for summary judgment. 7th Cir. App. 12-15. It declined to conduct any such discovery. No depositions of the eyewitnesses were taken, and the County stipulated to amending the scheduling order so that it would not even know the identity of plaintiff's expert witness until after moving for summary judgment. *Id*. at 16. Thus, the County's summary judgment papers made no reference to the "formidable expert report by William T. Gaut, holder of several degrees, including a Ph.D in Criminal Justice, and a police officer for 24 years who attained high rank in the Birmingham, Alabama police department," App. 6a, a report which "concludes that the search of the apartment was a 'gross deviation from accepted police practices and procedures . . . .'" App. 7a. (The expert report is at 7th Cir. App. 97-123.)

Although the County's one-page motion for summary judgment sought dismissal of all claims, 7th Cir. App. 18, its memorandum did not even mention the Estate's unreasonable-search claim. *Id*. at 79-96.[6]

[6] On appeal the County did not dispute this point. It contended that its filing of a motion seeking dismissal of all claims was sufficient to discharge any Rule 56(c) burden. Appellees' Br., July 30, 2014, at 9 ("the motion for summary judgment sought dismissal of all of the Estate's claims"); *id*. at 17 (same).

Accordingly, the Estate's opposition brief focused on addressing the narrow argument advanced in the County's memorandum regarding the unreasonable-seizure claim (that only the circumstances which existed at the moment of seizure, and nothing that occurred earlier, were relevant). The Estate made no effort to canvass the evidence relevant to the unreasonable-search claim. *Id*. at 124-36.

Without giving notice pursuant to Fed. R. Civ. P. 56(f)(2) that it might grant summary judgment on the unreasonable-search claim not argued in the County's memorandum, the District Court granted summary judgment on all claims. App. 10a-32a.

On appeal, the Estate argued that by *sua sponte* granting summary judgment on the unreasonable-search claim, the district court had violated Fed. R. Civ. P. 56.[7] It invoked this Court's holding that Rule 56(c) imposes on summary judgment movants an affirmative burden to identify record materials that "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also id*. at 328 (White, J., concurring). It also invoked this Court's holding that, absent such an initial showing, the nonmovant need not come forth with any admissible evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

Instead of reversing the grant of summary judgment on the unreasonable-search claim due to the County's failure to meet its Rule 56(c) burden, the

[7] Appellant's Br., June 30, 2014, at 17-18, 27-28 & n.7; Appellant's Reply Br., Aug. 13, 2014, at 2-3 & n.3. The burden placed on defendants by *Celotex* and *Adickes* was also emphasized at oral argument (at 4:55 to 7:30 and 20:55 to 22:52 of the oral argument audio, available at http://media.ca7.uscourts.gov/sound/2014/rt.14-1867.14-1867_10_03_2014.mp3).

Court of Appeals affirmed in full. App. 1a-9a. The court did not discuss this Court's decisions in *Celotex* and *Adickes* defining the Rule 56(c) burden. Indeed, it skipped over the Rule 56(c) burden issue entirely. It focused instead on whether certain record material submitted by the Estate had been put in admissible form (which the Estate had emphasized was irrelevant under *Adickes* given that the County never met its Rule 56(c) burden). App. 9a.

The Estate sought panel rehearing and rehearing *en banc*, pointing out that the panel decision was contrary to *Celotex* and *Adickes* and in conflict with well-considered decisions of most circuits. Petition for Panel Rehearing or Rehearing *En Banc*, Dec. 1, 2014, at 11-12 & note 3. Rehearing was denied, without dissent. App. 10a-11a. This petition (involving only the unreasonable-seizure claim against the County, see p. ii, *supra*) follows.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. The decision below is contrary to *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), which recognized that to meet its "burden of showing the absence of a genuine issue," a summary judgment movant must "foreclose the possibility" of the opponent proving the "critical element" at issue, *id.* at 157-58 — and that unless and until that burden is met, the nonmovant has no obligation to put any of its evidence in admissible form. *Id.* at 160. The decision below is also contrary to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Id.* at 323 ("Of course, a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."); *id.* at 325 (burden entails "'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case."). Review is thus warranted under Rule 10(c) to enforce this Court's precedents in the important and frequently litigated area of summary judgment practice.

2. Review is also warranted under Rule 10(a) to resolve a sharp conflict among the circuits concerning what initial burden Rule 56(c) imposes on a moving party that seeks summary judgment on the ground that the nonmoving party will be unable to prevail at trial. By the decision below, the Seventh Circuit has now joined the Sixth and Ninth Circuits in the view that merely by asserting its opponent cannot win, a summary judgment movant can impose on its opponent the laborious task of compiling its case in admissible form. Nine circuits reject this approach. *E.g.*, *Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993) ("It is not enough for the moving party to merely make a conclusory statement that the other party has no evidence to prove his case."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("it is never enough simply to state that the non-moving party cannot meet its burden at trial"). What burden Rule 56(c) imposes on the moving party is an important question that arises regularly in federal district courts throughout the nation. The answer should not vary depending on the circuit in which a case is being litigated. In deference to this Court, the Advisory Committee on Civil Rules has refrained from any effort to clarify the matter. It should now be settled by this Court through a grant of certiorari in this case.

Argument

I. The Seventh Circuit's Ruling is Irreconcilable With This Court's Decisions in *Adickes* and *Celotex*

The Court of Appeals decision affirming summary judgment on all claims, even though the unreasonable-search claim was not argued in the County's opening memorandum, is irreconcilable with *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Adickes* held that a summary judgment movant bears a Rule 56(c) burden to show, by referring to record materials, that its opponent will be unable to prevail at trial — and that absent such a threshold showing, the opponent need not come forth with any admissible evidence. *Celotex* affirmed this central holding of *Adickes*. Because the County concededly did *nothing* to meet its Rule 56(c) burden on the unreasonable-search claim, the decision below cannot be reconciled with *Adickes* and *Celotex*.

In *Adickes* the Section 1983 plaintiff, a white school teacher, alleged a conspiracy between the police and a store to refuse to serve her lunch while accompanied by six black students. A critical factual issue was whether any police officer was in the store when service was refused. 398 U.S. at 152, 158. The lower courts had granted summary judgment because plaintiff failed to submit admissible evidence that a police officer was in the store. *Id.* at 153. She had merely pointed to pleadings, hearsay, and an unsworn witness statement. *Id.* at 156, 159 n.19. For example, she relied on the account of a store cashier that a policeman was present, but this was in "an unsworn statement," the account not having been put in affidavit form. *Id.* at 156 & n.14. The defendant store

had successfully argued that to avoid summary judgment, "it was incumbent on [plaintiff] to come forward with an affidavit properly asserting the presence of the policeman in the store . . . ." *Id.* at 159.

This Court reversed, holding that plaintiff's failure to submit evidence in admissible form on a critical factual issue was irrelevant because defendant never met its threshold Rule 56(c) burden. "As the moving party, [defendant] had the burden of showing the absence of a genuine issue as to any material fact," and it "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in" defendant's store when service was denied. *Id.* at 157.

As Dean Martin Louis long ago summarized in a leading article on summary judgment (cited in *Celotex*, 477 U.S. at 324 n.5), a summary judgment movant "who would not have the trial proof burden" has two separate ways of discharging his Rule 56(c) burden. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 749-50 (1974). "First, through discovery he can obtain a preview of his opponent's evidence on an essential element" and then summarize why "the evidence is insufficient to discharge the opponent's production burden." *Id.* at 750. "Second, by previewing his own proof he can attempt to show the nonexistence of an essential element asserted by the opposing party." *Id.*

The defendant store in *Adickes* took the second approach, attempting affirmatively to prove that there was no conspiracy between the police and the store to refuse service to plaintiff. It submitted testimony from the store manager, that he had not communicated with the police about refusing service to plaintiff; from the chief of police and two arresting officers, that the store manager had not asked them to arrest plaintiff; and from plaintiff, admitting she did not know of any

communication between any store employee and the police. 398 U.S. at 153-55 & nn.8-12.

The Court held that defendant's preview of its proof "failed to carry its burden of showing the absence of any genuine issue of fact," *id*. at 153, because the testimony failed "to foreclose the possibility that there was a policeman in the Kress store . . . ." *Id*. at 157. For example, in their affidavits neither police officer "foreclose[d] the possibility . . . that he was in the store while [plaintiff] was there . . . ." *Id*. at 158. Because defendant "failed to fulfill its initial burden of demonstrating . . . that there was no policeman in the store," *id*., the motion failed, and plaintiff did not have to meet Rule 56(e)'s requirement that materials filed in response be admissible. The 1963 amendment to Rule 56, the Court held, "was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact." *Id*. at 159 & n.20. Thus, plaintiff "was not required to come forward with suitable opposing affidavits." *Id*. at 160.

This *Adickes* holding was reaffirmed in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which observed: "Of course, a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id*. at 323. But *Celotex* also endorsed the first method of satisfying Rule 56(c) identified by Dean Louis: supplying a preview of the nonmovant's case. 83 Yale L.J. at 750. The Court made clear that in moving for summary judgment, a litigant need not submit "affidavits or other similar materials *negating* the opponent's claim." 477 U.S. at 323. Instead, "the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court —

that there is an absence of evidence to support the nonmoving party's case." *Id*. at 325. For example, in *Celotex* the critical factual issue was whether plaintiff's decedent had ever been exposed to Celotex's asbestos products. Rather than try to prove a negative, Celotex sought to meet its Rule 56(c) burden by showing that plaintiff "had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify" to exposure. *Id*. at 320.[8]

In *Celotex* it was conceded that when a movant focuses not on its *own* evidence, but on the nonmovant's inability to prove *its* case, an actual showing to that effect — not simply an assertion — is required. Celotex did not dispute that if plaintiff had "named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact." *Id*. at 328 (White, J., concurring). "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case," Justice White observed. *Id*.

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[8] This two-track aspect of *Celotex*, under which a summary judgment movant may meet its burden *either* by previewing the nonmovant's case (as in *Celotex* itself), *or* by previewing its own case (as in *Adickes*), is reflected in the revised wording of Rule 56(c) promulgated in 2010 as part of the Style Project of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure (*see generally* Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 Lewis & Clark L. Rev. 591, 595, 608-09 (2014)). Revised Rule 56(c)(1) provides in most pertinent part: "A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by: (A) citing to particular parts of material in the record . . .; or (B) showing . . . that an adverse party cannot produce admissible evidence to support the fact."

The result below is irreconcilable with both *Adickes* and *Celotex*. In its motion for summary judgment, the County did nothing to meet its Rule 56(c) burden regarding the unreasonable-search claim. It neither previewed its own proof nor previewed the Estate's proof. It merely filed a motion seeking summary judgment on all claims, supported by a memorandum arguing the unreasonable-*seizure* claim, but not even mentioning the unreasonable-*search* claim. See p. 6 & note 6, *supra*. Yet the District Court granted summary judgment on *all* claims. See p. 7, *supra*.

On appeal the Estate demonstrated that *Adickes* and *Celotex* precluded summary judgment, given the County's failure to make the required record-based showing that no genuine dispute as to any material fact existed on the unreasonable-search claim. See p. 7 & note 7, *supra*. In response, the County did not dispute that it had made no record-based showing on the unreasonable-search claim. It was enough, it insisted, that its one-page motion had sought summary judgment on all claims. See p. 6, note 6, *supra*.

In its decision affirming summary judgment, the Court of Appeals skipped over the Rule 56(c) burden issue entirely and addressed only the Estate's summary judgment response, which it faulted for not having put certain record material in admissible form (which the Estate had emphasized was irrelevant given the *Adickes* holding in the same context). App. 9a. Review is thus warranted under Rule 10(c) to enforce this Court's precedents in the important and frequently litigated area of summary judgment practice.

II. The Circuits Are in Conflict Over What Initial Burden Rule 56(c) Imposes on a Summary Judgment Movant Who Would Not Have the Trial Proof Burden

A grant of certiorari is also warranted because the Seventh Circuit decision, affirming summary judgment in a case in which the defendant merely *asserted* in a motion (unaccompanied by any factual or legal argument) that the plaintiff will be unable to prevail at trial, exacerbates a circuit conflict over the proper interpretation of *Celotex* concerning what initial burden Rule 56(c) imposes on a summary judgment movant who would not have the trial proof burden.

A. Circuits in Which Summary Judgment Movants Always Bear a Rule 56(c) Burden to Make a Record-Based Showing

Nine circuits adhere to the conclusion of Justice White (who supplied the fifth vote necessary for a majority) in his *Celotex* concurrence: "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 U.S. at 328 (White, J., concurring). These circuits agree that even a summary judgment movant who would not have the trial proof burden must, under Rule 56(c), make *some* record-based showing that there is no genuine dispute as to any material fact before any burden of response shifts to the nonmoving party.

First Circuit*: In re Schifano*, 378 F.3d 60, 66 (1st Cir. 2004) ("If the initial burden is met, the burden shifts to the non-moving party")*; Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006) ("the burden rests on the moving party . . . to demonstrate"

no genuine dispute); *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 1991) ("The movant may affirmatively produce evidence that negates an essential element of the non-moving party's claim" or "may point to evidentiary materials already on file . . . that demonstrate that the non-moving party will be unable to carry its burden of persuasion at trial.") (citations omitted).

Second Circuit: *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002) ("The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists."); *Giannulo v. City of New York*, 322 F.3d 139, 141 (2d Cir. 2003) ("non-movant is not required to rebut an insufficient showing").

Third Circuit: *Budhun v. Reading Hosp. and Medical Center*, 765 F.3d 245, 251 (3d Cir. 2014) ("The initial burden is on the party seeking summary judgment to identify evidence that demonstrates an absence of a genuine issue of material fact"); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987) (burden may be met "by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden at trial"); *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 84 (3d Cir. 1987) (defendants "properly supported their motions for summary judgment" with "more than mere 'conclusory assertions,'" by extensively addressing the evidence on whether plaintiffs were exposed to defendants' products).

Fourth Circuit: *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004) (movant "must demonstrate the absence of an essential element of the nonmoving party's case"); *Higgins v. Scherr*, 837 F.2d 155, 157 (4th Cir. 1988) (nonmovant "was not required to prove his entire case upon the mere incantation by

[defendant] of 'summary judgment as to but one aspect").

Fifth Circuit: *Capitol Indem. Corp. v. United States*, 452 F.3d 428, 430 (5th Cir. 2006) ("The moving party bears the burden of identifying an absence of evidence to support the nonmoving party's case."); *Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993) ("It is not enough for the moving party to merely make a conclusory statement that the other party has no evidence to prove his case."); *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991) ("Simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrated material issues of fact as to every element of its case."); *Isquith for and on Behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198-99 (5th Cir. 1988) (a movant's claim "that the record contains no evidence of an essential element" does not meet Rule 56(c) if the claim is not true).

Eighth Circuit: *Tenbarge v. Ames Taping Tool Systems, Inc.*, 128 F.3d 656, 658 (8th Cir. 1997) (reversing grant of summary judgment due to district court's reliance on a deposition the defendant movant did not discuss in its moving papers, thereby failing to meet Rule 56(c) burden); *Handenn v. Lemaire*, 112 F.3d 1339, 1345-46 (8th Cir. 1997) (despite total inadequacy of response under Rule 56(e), reversing grant of summary judgment because the movant set forth no discussion of the record evidence on point and hence failed to meet Rule 56(c) burden).

Tenth Circuit: *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (meeting Rule 56(c) burden requires "pointing to places in the record showing a lack of disputed fact"); *Windon Third Oil and Gas Drilling Partnership v. Federal Deposit Ins. Corp.*, 805

F.2d 342, 345 n.7 (10th Cir. 1986) ("conclusory assertions to aver the absence of evidence remain insufficient to meet" Rule 56(c) burden).

Eleventh Circuit: *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1313 (11th Cir. 2007) ("The movant bears the responsibility for demonstrating the basis for the summary judgment motion."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("it is never enough simply to state that the non-moving party cannot meet its burden at trial").

D.C. Circuit: *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (movant "bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact"); *Bias v. Advantage Intern., Inc.*, 905 F.2d 1558, 1560-61 (D.C. Cir. 1990) ("moving party must explain its reasons for concluding that the record does not reveal any genuine issues of material fact").

B. Circuits in Which Some Summary Judgment Movants Bear No Rule 56(c) Burden to Make a Record-Based Showing

Three circuits (including the Seventh Circuit, in its decision below) depart from this majority approach. They read *Celotex* as relieving some summary judgment movants — those who would not have the ultimate burden of proof at trial — of any Rule 56(c) burden to make a record-based showing.[9] This interpretation of *Celotex* "has not been accepted by most courts," which have adopted "[t]he better position" of reading Rule 56(c) to require *all* movants to make a record-based showing. 11 *Moore's Federal Practice* § 56.40[1][b][iv], at 56-109 (Daniel R. Coquillette, *et al.*, eds., 3d ed. 2014) (citing examples).

In the Sixth Circuit, when the movant "does not bear the ultimate burden of persuasion," *Celotex* is read as requiring only that the movant assert "the absence of a genuine factual issue," with no need to point to admissible evidence. *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071-72 (6th Cir. 1993). Its view is that "the movant [can] challenge the opposing party to 'put up or shut up' on a critical issue," and if it does "not 'put up,' summary judgment [is] proper." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). Under this approach, "a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence . . . ." *Id.*

The Ninth Circuit also applies this view of *Celotex*, at least on occasion. For example, in *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992), it concluded that this Court in *Celotex* "held that 'the plain language of Rule 56(c) mandates the entry of

[9] Often courts reaching this result rely on this Court's statement in *Celotex* that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. However, this statement was qualified in the next paragraph: "Of course, a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. Further, as Professor Steinman has pointed out, to read *Celotex* as holding "that a defendant should face no burden when moving for summary judgment" would mean "that *Adickes* was wrongly decided," contrary to this Court's statement in *Celotex* (477 U.S. at 325) that, "on the basis of the showing before the Court in *Adickes*," *Adickes* was correctly decided. Steinman, *supra* note 1, 63 Wash. & Lee L. Rev. at 111-12 & n.192.

summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," so "the moving party's burden in such situations is simply to identify the elements of its adversary's case with respect to which it considers there to be a deficiency in proof." *Id*. at 1295 (quoting 477 U.S. at 322). *See also Hansen v. Black*, 885 F.2d 642, 643-44 (9th Cir. 1989) ("The plain language of Rule 56(c) mandates that the moving party is entitled to judgment as a matter of law when the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").[10]

The minority interpretation of *Celotex*, under which a summary judgment movant may put its adversary to its proof merely by asserting that its adversary has no case, has been sharply criticized by several circuits on doctrinal grounds, most notably the Fifth Circuit, which has observed that "the Court in

[10] *E.g.*, *Ewert v. eBay, Inc.*, 2015 WL 310228, at *1 (9th Cir. Jan. 26, 2015); *Upper Skagit Tribe v. Washington*, 576 F.3d 920, 925 (9th Cir. 2009); *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892, 899 (9th Cir. 1993); *United States v. 45/194 Kg. Drums of Pure Vegetable Oil*, 961 F.2d 808, 811, 813 (9th Cir. 1992); *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1462 (9th Cir. 1992); *Grimes v. City and County of San Francisco*, 951 F.2d 236, 239 (9th cir. 1991); *Orloff v. Allman*, 819 F.2d 904, 906 (9th Cir. 1987). *Compare Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103-04 (9th Cir. 2000) (acknowledging burden on movant, and summarizing how "*Adickes* and *Celotex* dealt with the two different methods by which a moving party can carry its initial burden of production"); *id*. at 1105 ("A moving party may not require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence.").

Celotex did not hold that any time a party with the burden of proof at trial is faced with a motion for summary judgment it must come forward with competent evidence to support its theory of liability, regardless of what showing the movant has made." *Russ*, *supra*, 943 F.2d at 592. The Fourth Circuit agrees that the "mere incantation . . . of 'summary judgment'" is insufficient," *Higgins*, *supra*, 837 F.2d at 157, as does the Tenth Circuit. *Windon*, *supra*, 805 F.2d at 345 n.7 ("conclusory assertions" are insufficient).

Pragmatic considerations heavily favor the majority interpretation of *Celotex*, which advances both efficiency and fairness in the administration of justice. Under the approach to Rule 56(c) accepted by the Seventh Circuit below, defendants become eligible for summary judgment simply by stating that they "respectfully move this court . . . for an Order dismissing plaintiff's claims . . . pursuant to F. R. C. P. 56." 7th Cir. App. 18. As Dean Friedenthal has explained, permitting a defendant, "merely by filing an unsupported motion, [to] force an opponent to make a substantial showing" creates "a strong incentive to make such a filing, if for no other reason than to harass the other party and raise its costs of litigation." Friedenthal, *supra* note 2, 63 Notre Dame L. Rev. at 776. The probable result of such an approach is a "likely increase [in] aggregate legal expenditures, thus producing a corresponding deadweight loss to society." Samuel Issacharoff and George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 103 (1990). *See also* David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw. U. L. Rev. 774, 775-76 (1983) ("when motions for summary judgment are improperly employed, they create an additional layer of time-consuming activity in the litigation process"); D.

Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35, 41-42 (1988) (Rule 56(c) should not be construed to permit movant, with little effort, to force nonmovant "to dredge, structure, collate and cross-reference all materials in the file," a task that "can sometimes take as long or longer than actually trying the case," at the risk of losing "if this task is done with less than complete thoroughness").

* * *

Whatever the correct interpretation of Rule 56(c) in light of *Celotex*, the need for resolution of the conflict among the circuits is evident. The question of what initial burden Rule 56(c) imposes on a moving party that seeks summary judgment on the ground that the nonmoving party cannot prove its case is an important one which frequently arises in federal courts throughout the nation and which can have outcome-determinative effects, as demonstrated by this case. The answer should not vary depending on the circuit in which a case is being litigated. It should be promptly and definitively settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 16, 2015

APPENDICES

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 14-1867

Estate of Adam Brown,

Plaintiff-Appellant,

v.

Timothy Thomas, Matthew Secor,
and Brown Couty,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 1:12-cv-01202-WCG –
William C. Griesbach, Chief Judge

Argued October 3, 2014 — Decided November 13, 2014

Before Posner, Rovner, and Tinder, Circuit Judges.

POSNER, Circuit Judge. Adam Brown, age 22, was at home with two friends in his ground-floor apartment in Green Bay, Wisconsin at 6:20 p.m. on a

December evening, when there was a sudden knocking on his door and a yell of "police, search warrant!" As the police began to force open the front door when no occupant opened it, Brown ran upstairs to his bedroom and grabbed an unloaded shotgun that he kept there. Police followed. As they reached the top of the stairs they saw him standing in a corner of the bedroom pointing the shotgun at them. One of the officers, defendant Secor, shot Brown dead with an automatic rifle, precipitating this suit under 42 U.S.C. § 1983 against Secor, another officer in the search party (Thomas, who has, however, since been dismissed from the case), and their employer, Brown County. The district court granted summary judgment in favor of the defendants, precipitating this appeal by Brown's estate.

Secor had no way of knowing that the shotgun was unloaded. Had it been loaded with buckshot a single shot at so close a range would have been fatal. The estate contends not that Secor shouldn't have pulled the trigger when he saw a shotgun was pointed at him but that the police search was executed in an unreasonable manner (see, e.g., *Terebesi v. Torreso*, 764 F.3d 217, 233-36 and n. 16 (2d Cir. 2014); cf. *Petkus v. Richland County*, 767 F.3d 647, 650-52 (7th Cir.2014)), violating the Fourth Amendment and causing Secor mistakenly to think he had to kill Brown in self-defense.

According to the estate's version of events, when Brown peered out of his front window in response to the knocking and the shout he found himself face to face with a man — it was Officer Secor — holding an automatic rifle, dressed in dark civilian clothes, with long hair, earrings, a goatee, and sideburns, and wearing a hoodie and a baseball cap. Brown turned

away from the window, yelled "What the fuck . . . we are getting robbed again" (recently the apartment had been robbed by a person pretending to be an acquaintance), and fled upstairs. One of Brown's friends yelled to him "Get the shotty!" as Brown streaked to the back of the apartment and up the stairs to his bedroom (the apartment was a duplex). Within seconds the police broke down the front door and entered — five in all, two others having gone around to the back of the house to stop anyone from leaving by the rear door.

The officers had a valid search warrant; there was probable cause to believe that a burglar had hidden stolen property in Brown's apartment. The County's practice is for almost all searches to be executed by a drug task force trained in SWAT tactics and therefore heavily armed. In order to be sure that the search will indeed be of the building specified in the warrant, the team dispatches undercover officers to find the building and lead the team into it. Secor was one of the undercover officers, which was why he was accoutered as he was. The only indication that he was a police officer rather than a criminal was a badge he was wearing around his neck, and it's unclear whether Brown could have seen the badge in the dark when he looked through his window to see who was outside shouting. The officer standing behind Secor was wearing a jacket that said "police," as well as a badge, but was otherwise dressed in civilian clothes like Secor. The other three officers in the group that entered the apartment were wearing standard police uniforms but had been in the background, in darkness, when Brown peered outside.

The estate's case begins with the contention that the police had no need to conduct the search after dark

(it is dark at 6:20 p.m. in December in Green Bay — sunset was at 4:14 p.m. the day of the search). There was no urgency. It was not like the search of a stash house, which might contain large quantities of drugs and money. The police were looking for some loot of modest value (a video game system, a couple of video games, and a few other small items) plus the burglar who had stolen it, whom the police correctly believed to be in Brown's apartment. Brown himself was not the suspect. In these circumstances, the estate argues, the search didn't have to be conducted by a heavily armed SWAT team, let alone a team led by an undercover police officer who looked like an armed thug. It was especially dangerous, the argument continues, for him to be the first officer whom an occupant of the apartment would see, because home invasions by criminals pretending to be police are apparently common, though remember that the previous break-in to Brown's apartment had been by someone pretending to be an acquaintance rather than a cop.

If the search was conducted in an unreasonable manner and therefore violated the Fourth Amendment — more precisely the principles of the Fourth Amendment, deemed applicable by interpretation of the due process clause of the Fourteenth Amendment to state and local searches — and Brown would not have been killed had the search been conducted in a reasonable manner, then his estate has a valid claim against Officer Secor and maybe (as we'll see) against Brown County as well.

The police had considered whether to conduct so forceful a search, and had decided to do so mainly because they thought that the burglar who had stashed the loot in the apartment was an escapee from

jail, where he was serving time for robbery, and might put up a struggle. (He didn't.) The police also had "word" that Brown and his girlfriend (who lived with him but was not in the house at the time) were always in "trouble." What type of trouble was not further specified but the fact that Brown turned out to possess illegal shotguns (he had two, only one of which he brandished) suggests that their suspicion may have been justified.

The judge ruled that the search was reasonable, although nighttime searches, especially of a residence (which unlike a store or an office building is likely to be occupied at night), are risky undertakings, and disfavored. Although there is a difference between a search late at night, when the residents are likely to be asleep, and a search in late afternoon or early evening, there doesn't seem to have been any reason not to postpone the search of Brown's apartment till daylight. Indeed since it was dark and the police could not be clearly identified until they entered, the decision to search before daybreak seems to have been foolish. The defendants say that the police were heavily armed because they anticipated several occupants, one a "robber" who had escaped from jail and two others who were regarded as "trouble." But the robber (the burglar) was not an escapee in the traditional sense. A participant in a work-release program at the county jail, he had been authorized to go to work in the morning but required to return in the evening — which he'd failed to do at some point before the search took place.

The defendants don't argue that the police had to be heavily armed because the occupants might be armed; they didn't know about the shotguns in the apartment, or any other weapons. Putting the

suspicious-looking undercover officer at the front of the police team has not been explained. True, the undercover officer is the member of the team who knows the address and is therefore least likely to knock on the wrong door, cf. *Balthazar v. City of Chicago*, 735 F.3d 634 (7th Cir.2013), but Secor could have told one of the officers with him "that's the door," and having done so stepped back so as not to be visible from the doorway or a window. But who knocked is not important. What is important is that when Brown, alarmed by the knocking, peered out of the window, there in plain view was ominous-looking, no-uniform Secor. No doubt the undercover officer, having superior knowledge of the suspects, maybe of the interior of the residence, and so forth, should be part of the search team; the question is whether he should be at the very front of the team, hence the person most likely to be seen by an occupant of the residence.

The appendix to the estate's brief contains a formidable expert report by William T. Gaut, holder of several degrees, including a Ph.D. in Criminal Justice, and a police officer for 24 years who attained high rank in the Birmingham, Alabama police department and has also been employed by private security firms. His report emphasizes the difference between drug searches and searches for stolen property, and the need to utilize the kind of methods used in the search of Brown's apartment when one is searching for illegal drugs — but not otherwise — because drug dealers tend to be heavily armed and drugs often can easily be disposed of. Although it was the drug task force that conducted the search of Brown's apartment, it was not looking for drugs; and Gaut argues in his report that when searching merely for stolen property (unless of course the property consists of illegal drugs), the

search "should be conducted during daylight hours" and "an easily identifiable police officer shall knock and notify persons inside" in order "to reduce or eliminate the possibility of misidentification. It is well known that perpetrators of a home invasion, for the purpose of gaining entry, sometimes impersonate police officers" but rarely "have the complete visual identity including clothing with the word 'POLICE' prominently written on both the front and back." The report also notes that there was a lot of confused shouting by the officers as they piled into Brown's apartment; apparently one officer shouted "Get down, mother fucker!" which might have made the occupants including Brown further suspect that the intruders weren't really cops.

Gaut's report concludes that the search of the apartment was a "gross deviation from accepted police practices and procedures by the Brown County Sheriff's Office," a deviation that rose "to the level of substantial, deliberate indifference for the rights and safety of" Brown.

But even if Gaut's report is 100 percent on the mark, it can't justify imposing liability on Secor. Secor did not devise the search policy adopted by Brown County. He was doing what he was told to do when, accoutered as he was, he led the search of Brown's apartment. Of course if one is told by one's superiors to do something that is obviously illegal, it is no defense that one was just obeying orders; that was a defense conclusively rejected at the Nuremberg trials of Nazi war criminals. But the situation in this case was not that extreme. There were as we mentioned reasons for having the undercover officer, who needs a goatee, sideburns, etc. in his undercover work, lead the search. There was no compelling reason for him to be the one

to knock on the door, but it wasn't because of that, but because he was visible through the window, that Brown saw him and commenced his fatal flight.

Even if we thought Secor may have been exceeding proper constitutional bounds in leading the search given his appearance, he would still be entitled to qualified immunity, thus defeating the estate's claim against him. As explained in *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014), "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.' In addition, '[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced" (citations omitted).

Gaut's report is, however, evidence that the County — the other remaining defendant — may have failed, through reckless indifference to the safety of persons who find themselves in premises subjected to a police search, to teach its police how to conduct a competent search. It's true that a suit under section 1983 is not governed by the common law doctrine of respondeat superior; liability for a police officer's violation of constitutional rights while acting within the scope of his employment is not automatically imposed on his employer, in this case Brown County. *Monell v. Department of Social Services*, 436 U.S.658 (1978); *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 469 (7th Cir.2001). But if the

violation stems more or less directly from acts of the employer, as it did in this case if indeed the County prescribed an unconstitutional search protocol for its police to follow, the employer is liable.

Gaut's report severely criticizing the County's search policy might, if admissible (compare *Florek v. Village of Mundelein*, 649 F.3d 594, 601-03 (7th Cir. 2011)), entitle the estate to a trial, were it not for a fatal procedural error by its lawyer: failing to authenticate Gaut's expert report. It was filed with the district court but could not be admitted into evidence without an affidavit attesting to its truthfulness. Fed.R.Civ.P. 56(e)(3); Fed.R.Evid. 901(a); *Scott v. Edinburg*, 346 F.3d 752, 759–60 and n.7 (7th Cir. 2003). There was no affidavit. Nor did the plaintiff's lawyer cite Gaut's report in opposing the defendants' motion for summary judgment. On appeal he made the convoluted argument that it was the defendants' burden to depose Gaut and that having failed to do that they admitted that everything in his report was true. Not so. Deposing a witness is optional. Anyway the report could not be used to oppose summary judgment because it was inadmissible. Without the report there is insufficient evidence to justify imposing liability on the County.

AFFIRMED.

APPENDIX B

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

December 15, 2014

Before

RICHARD A. POSNER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 14-1867	Appeal from the United States District Court for the Eastern Disrict of Wisconsin
ESTATE OF ADAM BROWN, *Plaintiff-Appellant*,	
v.	No. 1:12-cv-01202-WCG
TIMOTHY THOMAS, MATTHEW SECOR, and BROWN COUNTY, *Defendants-Appellees*.	William C. Griesbach, *Chief Judge*

O R D E R

On December 1, 2014, plaintiff-appellant filed a petition for rehearing and rehearing *en banc*. All the judges on the original panel have voted to deny rehearing, and none of the court's active judges has requested a vote on whether to rehear the case *en banc*. The petition is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ESTATE OF ADAM BROWN,

Plaintiff,

v. Case No. 12-C-12-2

SERGEANT TIMOTHY THOMAS, et al.,

Defendants.

DECISION AND ORDER

Plaintiff, the Estate of Adam Brown, brought this action under 42 U.S.C. § 1983 seeking damages against Brown County,along with Sergeant Timothy Thomas and Deputy Matthew Secor of the Brown County Sheriff's Department, for the fatal shooting of Adam Brown. The defendants have moved for summary judgment. For the reasons given below, the motion will be granted.

I. BACKGROUND

On December 1, 2006, Brown County Sheriff's Department Sergeant Timothy Thomas obtained a

warrant to search the residence of Adam Brown. Based on a burglary investigation he was conducting, Thomas believed a teenager named Stone Moreaux was staying with Brown. Moreaux had an open warrant for his arrest after absconding from a work-release program at Brown County Jail, and Thomas believed Moreaux had stolen a video game system and other property from an apartment in the Village of Howard. Prior to obtaining the warrant, Sergeant Thomas contacted the patrol division for assistance in executing it.

Patrol Sergeant Todd Delain, who was in charge of the search, decided to use the Drug Task Force in executing the search warrant. The Drug Task Force consisted of officers with training in the execution of search warrants and special weapons and tactics (SWAT). According to Thomas and Delain, the decision to use the DTF was made because they were uncertain whether the individuals at the residence would be cooperative and the DTF officers had extensive experience in conducting searches. Moreover, because the residence had multiple entrances and exits, a team of officers was required to cover them.

DTF officers are not used to assisting in the execution of all search warrants. When police have no reason to believe that there will be violence or an attempt to destroy evidence, Sergeant Thomas explained, the officer will simply knock on the door, wait for the occupants to answer, and then explain that they have a search warrant and would like to come in. (Aff. of Timothy M. Johnson, Ex. D., Dep. of Sgt. Thomas, 15:8-15, ECF No. 14-4 at 5.) When there is reason to think the occupants might be violent, Sergeant Thomas explained, "you take a different approach which is more commonly known to people

who work in SWAT or DTF fields because they work with that more often." (*Id*. at 15:18-21.)

In this case, Sergeant Thomas explained that even though the crime he was investigating was a property crime, he "had word" that Brown and his girlfriend were always in trouble. In addition, Moreaux was an escapee from the jail where he had been serving time on a robbery or burglary, and the officers were concerned what his frame of mind would be in being taken back to jail. (*Id*. at 15:25-16:11.) These matters were discussed at a briefing held prior to the search. Based on the information available, Sergeant Delain concluded that the more low-key approach would not be appropriate. The decision was made to have several officers approach the door, knock and announce who they were and why they were there. If the occupants did not open the door after approximately 15 seconds, they would breach the door with a ram and force entry. (*Id*., Ex. C, Secor Dep. at 22, ECF No. 14-03 at 7.)

Prior to executing the search, Deputy Secor, who worked as an undercover officer for the DTF, and another deputy conducted surveillance of the property and were able to observe two males playing video games inside. At 6:20 p.m. five officers lined up outside the front door of the duplex. In front was Deputy Secor, who was dressed in street clothes but was wearing a badge around his neck. As an undercover drug investigator, Secor also wore a ponytail, sideburns and a goatee, so that he would fit in with the drug culture. The officer immediately behind him also had a badge around his neck and was wearing a DTF jacket that said POLICE and DTF on it. The other officers behind Secor were wearing standard police uniforms.

Secor knocked on the door and yelled "Police — Search Warrant." While waiting, they saw Brown come to the window, look out, and then retreat away from the door. Another man also moved away from the door. At that point an officer yelled "Compromise," which apparently operates as a signal that immediate entry should be made. The officers quickly broke the door open and entered yelling, "Police, search warrant, get down on the ground!" Moreaux and another individual who was there dropped to the ground. Adam Brown, however, fled the officers and ran up the stairs. Deputy Secor and another deputy followed Brown upstairs, yelling "Police, stop!" When they arrived at the top of the stairs, they saw Brown standing in a bedroom pointing a shotgun, which turned out to be unloaded, in their direction. Secor shot Brown with his automatic assault rifle, striking him four times. Brown was later pronounced dead at the hospital.

In addition to the shotgun he pointed at the officers who followed him up the stairs, Brown also kept a sawed-off shotgun under his mattress. Because of prior convictions, Brown's possession of each of these guns was illegal.

II. ANALYSIS

Summary judgment is proper if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055,1060 (7th Cir. 2014). In considering the factual evidence, a court must construe all facts and reasonable inferences in the light most favorable to the plaintiff as the non-moving party. *Casna v. City of Loves Park*, 574

F.3d 420, 424 (7th Cir. 2009). Based on the undisputed facts in this case, the Estate concedes that its claim against Deputy Thomas fails and that he should be dismissed. As to its claims against Deputy Secor and the County, however, the Estate argues the case should proceed to trial.

A. Fourth Amendment Claim Against Deputy Secor

The nature and extent of force that may reasonably be used by officers depends on the specific circumstances of the arrest, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703(1983)). The inquiry is an objective one, meaning that the subjective feelings or intent of the officers is not relevant. *Id.*

The Estate essentially concedes that at the moment he confronted Brown in the upstairs bedroom, Deputy Secor was justified in shooting him because Brown had leveled a deadly weapon at the deputies: "Plaintiff does not dispute that at the moment of confronting Adam Brown with a shotgun in the upstairs bedroom, the officers may have been justified in using deadly force." (Pl.'s Br. in Opp. at 7.) *See*

Plakas v. Drinski, 19 F.3d 1143 (7th Cir.1994) (affirming summary judgment dismissing claim of excessive force by estate against officer who fatally shot deceased as he was about to strike him with a poker). Rather than focusing on the shooting, the Estate argues that the officers and the County should be liable because the unreasonable time and manner in which they chose to execute the search warrant created the very dangerous situation in which Brown was ultimately shot.

To support its argument, the Estate relies on *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993). In *Starks*, officers surrounded a stolen taxi cab in a parking lot. Like here, there was no suggestion of violence in the underlying theft. Starks, the thief, started to maneuver the taxi to allow himself an escape route, and when he stepped on the gas the officers opened fire and killed him to prevent his escape. Key to the analysis was a factual dispute as to whether one of the officers was in the path of the taxi or whether he deliberately jumped out in front of the car when it started accelerating. If the officer was already in the car's path, then the plaintiff conceded that the officers were justified in using deadly force to prevent the taxi from injuring the officer. But if the officer had stepped in front of the rapidly moving cab, leaving the subject no time to brake, then the officer "would have unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him." *Id*. at 234. That is, if the jury believed the plaintiff's story that the officer jumped in front of the moving car, it could find that the officer essentially forced the situation by placing Starks — involuntarily — in a position in which he now posed a deadly threat to the officer. If that were true, the officers cannot

escape liability on the grounds that the shooting was a reasonable exercise of force. The point of Starks is that deadly force is allowed in order to prevent injury or death. An officer cannot unreasonably create circumstances in which injury or death would occur and then claim to be "preventing" that injury by using deadly force. As the court explained, "Police officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force." *Id*.

The Estate argues here that the use of seven officers in a night-time raid to conduct a search for a stolen video game was patently unreasonable. It contends that the manner in which the officers conducted the search caused Brown to believe his apartment was being broken into by a violent gang of unknown people, and thus the officers forced his hand and required him to turn a deadly weapon on them. The Estate notes that the lead officer, Deputy Secor, was in street clothes and had a ponytail. Although he had a badge hanging around his neck, we cannot know whether Brown actually saw the badge. Brown had experienced some kind of break-in in the past, and thus may have been especially sensitive to that possibility. By proceeding in the aggressive way they did, the Estate contends that the officers essentially created the need to shoot Brown by giving him little choice but to defend himself with deadly force. In doing so, the Estate contends, they violated his rights under the Fourth Amendment.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amend. IV. As a general rule, this means that police

who are executing a search warrant must first identify themselves, announce that they have a warrant, and allow a reasonable time for the occupants to open the door before they forcibly enter the premises. *Wilson v. Arkansas*, 514 U.S. 927, 934(1995). There are several reasons for this rule. First, is "the protection of human life and limb,because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Hudson v. Michigan*, 547 U.S. 586, 594,(2006). The second reason is the protection of property: "The knock-and-announce rule gives individuals 'the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.' " *Id*. (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393, n. 5 (1997)). A third reason for the rule is that it "protects those elements of privacy and dignity that can be destroyed by a sudden entrance." *Hudson*, 547 U.S. at 594. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Richards*, 520 U.S. at 393, n. 5.

The requirement that police give the occupants of a premises to be searched an opportunity to allow entry is not absolute, however. The rule may be dispensed with and forcible entry made when law enforcement officers "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id*. at 394. Thus, where police executing a search warrant for readily disposable contraband such as drugs have reason to suspect that the occupants of the premises are likely to dispose of the drugs or that they intend to arm themselves, immediate, forcible

entry is permissible. *United States v. Dumes*, 313 F.3d 372, 381 (7th Cir. 2002). Forcible entry is also reasonable when after identifying themselves as police officers and announcing they have a warrant, entry is refused. 2 LaFave, Wayne, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(c) (5th ed.); see also *United States v. Peterson*, 353 F.3d 1045, 1050 (9th Cir. 2003) ("When Edwards affirmatively refused to admit the police, the factors of futility, danger, and potential destruction of evidence supported the officers' decision to enter immediately."). Moreover, the refusal need not be verbal. "Indeed it would be an unusual case coming before the courts where an occupant affirmatively 'refused admittance' or otherwise made his refusal known verbally after being given notice." *Masiello v. United States*, 317 F.2d 121, 122 (D.C. Cir. 1963).

Here, it is undisputed that after police knocked on the door to Brown's apartment, identified themselves as police officers and stated they had a warrant, one of the male occupants "looked out the window towards the officers and then moved away from the door as if to hide." (DPFOF ¶ 39, ECF No. 20.) "A second individual was also seen walking away from the door so that he was out of sight." (*Id*. ¶ 40.) Based on these undisputed facts, the defendants concluded entry had been refused. They therefore immediately and forcibly entered the residence in order to prevent the occupants from arming themselves. (Johnson Aff., Ex. B., Dep. of Brad Dernbach at 21:17-21, ECF No. 14-2.) The question presented is whether their conduct violated Brown's rights under the Fourth Amendment and essentially caused his death.

The Estate first suggests that given the relatively small value of the property they were looking for, the

time and manner in which the officers chose to execute that warrant was unreasonable. It is important to keep in mind, however, that while the property sought by the officers in the warrant may not have had significant value, the Estate concedes they were investigating a burglary, which is a felony under Wisconsin law. (DPFOF, ECF No. 20, ¶ 10.) They also had reason to believe that the suspect in the burglary, who was also on escape status from a sentence for a robbery, would be present. (*Id*. at ¶ 21.) These are not petty offenses.

The Estate also suggests that it was unreasonable to execute the warrant at night. This, too, is not true. Wisconsin has no law restricting searches to daylight hours, and the warrant contained no such limitation. It is no doubt true that "searches conducted in the middle of the night . . . involve a greater intrusion than ordinary searches . . . ." *Gooding v. United States*, 416 U.S. 430, 464 (1974) (Marshall, J., dissenting). But 6:20 p.m. is the dinner hour, not the middle of the night, and while it may have been dark out at that time, this is not enough to make the search unreasonable. In Green Bay, the sun sets as early as 4:15 p.m. during the winter months, before many people are home from work, and it does not rise until well after 7 a.m. To hold that search warrants can only be executed during daylight hours would mean that they would often be executed when no one is home, thereby necessitating forcible entry more often than would otherwise be necessary. Especially where the premises to be searched is located in a city where most homes have outdoor lights and street lights are common, one would not expect that executing a search warrant in the early part of the evening would not cause unwarranted emotional distress or trauma. In

addition, the officers knew from their surveillance that the occupants of the premises were up and about playing video games. The officers were also concerned that the property they were looking for could be easily moved if they delayed further. Under these circumstances, the decision to execute the warrant at 6:20 p.m. was not unreasonable.

Nor can it be said that the use of seven officers to execute the warrant was unreasonable. As Sergeant Thomas explained, the officers thought there would be at least three occupants of the apartment, including Moreaux who "was an escapee from jail serving time on a robbery — use of force charge." (DPFOF ¶ 21, ECF No. 20.) Because of Moreaux's history and escape status, the officers concluded he might not be inclined to cooperate and comply with their directives, and thus a less aggressive "knock and talk" approach would not be prudent. And considering the number of individuals inside the house and the need to cover other entrances and exits to the premises, the officers concluded a team of officers would be used. Given the uncertainties inherent in executing a search warrant, their seemingly excessive caution was not unreasonable.

The Estate argues that Brown likely did not know the people at the door were police officers because Deputy Secor was an undercover officer wearing only a badge for identification. But even if we assume that Brown did not see Secor's badge, the other officers were either wearing standard police uniforms or jackets that said POLICE on them. In addition, Deputy Secor yelled "police — search warrant" prior to entering. The Estate concedes that the officers yelled this and that they then began counting out-loud: one-thousand, one-thousand-one, one-thousand-two, etc. (ECF No. 20 at ¶¶ 37-38.) The next-door neighbor

heard the yelling and came out of her house to investigate. (Id. at ¶ 45.) Even the officers covering an exit on the other side of the house heard Secor announce "police — search warrant." (*Id*. at ¶ 44.) Very soon after, an individual looked out the window and then retreated within the house, at which time the officers yelled "compromise" and broke the door in. When they got inside, they yelled "Police search warrant, get down on the ground," and the other two occupants of the house complied, while Brown fled. (*Id*. at ¶ 46.)

As the Estate acknowledges, one of the reasons police officers forcibly enter immediately after entry is refused is to prevent the occupants from arming themselves, which is precisely what Brown proceeded to do. The Estate contends that Brown would not have acted as he did had the police proceeded to execute the warrant in a less aggressive manner. The fact that Brown continued up the stairs to arm himself even as he heard the officers behind him yell "Police, stop!," suggests otherwise. But even if Brown would have acted differently had police utilized less aggressive tactics, it does not follow that Deputy Secor and the County could be liable.

As noted above, officers attempting to execute a search warrant may forcibly enter a premises when entry is refused. *LaFave*, *supra*. And because an occupant will often say nothing to police, a refusal must frequently be inferred from his actions. *Id*.;*see also United States v. Gallegos*, 314 F.3d 456, 459 (10th Cir. 2002) ("It is by now well-established that an occupant of a home need not affirmatively refuse admittance to trigger the right of the police to enter by force . . . . On the contrary, the refusal may be constructive or reasonably inferred from the

circumstances.") (internal quotations omitted). In *United States v. Stotts*, for example, the court held that the occupant's refusal to allow entry could be inferred from the fact that he turned and ran after the agent identified himself and said he had a search warrant. 176 F.3d 880, 883 (6th Cir. 1999). Likewise, in *McClure v. United States*, the court found that entry had been refused where law enforcement agents observed occupant turn and run after she saw them through a window and then heard "footsteps running in the wrong direction" when they arrived at the door. 332 F.2d 19, 21-22 (9th Cir. 1964), *cert. denied*, 380 U.S. 945(1965); *see also United States v. Augello*, 368 F.2d 692, 694-695 (3rd Cir. 1966) ("When, after making their announcement, the officers saw the appellant's sister running away from the door and calling the name of the very person for whose arrest they possessed a warrant, they were justified in making an immediate entry."), reversed on other grounds, 390 U.S. 200(1968); *United States v. Aldrete*, 414 F.2d 238, 239 (5th Cir. 1969) ("Searching officers demanded entry to the residence. Fifteen to 20 seconds elapsed, they could see two persons rushing to the rear of the house, then they broke in the door. The entry was not invalid."); *Stamps v. United States*, 436 F.2d 1059, 1060 (9th Cir. 1971) ("The arresting officers gave notice of their authority and purpose when they appeared at the house in which Stamps was arrested. Only after hearing a commotion within and footsteps sounding to the officers as if one were running away from the door, did the officers break open the door and make their entry . . . . There having been adequate reason to believe that permission to enter had been denied, reasonable force to effect the entry was permissible.").

It is true that all but one of the searches in the foregoing cases were for drugs, which are readily disposable and are often associated with guns. It is also true that the defendants here have offered no evidence that either Moreaux or Brown were keeping firearms at Brown's residence. The rule allowing force when entry is refused, however, is not limited to drug cases, and as this case shows, the risk that an occupant may attempt to arm himself is not limited to drug cases. In light of the authority cited above, the conduct of the officers here cannot be held to have been in clear violation of Brown's Fourth Amendment rights. At the very least, Deputy Secor would be entitled to good faith immunity since it was reasonable for him to believe his forcible entry, along with the other officers, did not violate clearly established law. *See Hinnen v. Kelly*, 992 F.2d 140, 142 (7th Cir. 1993) ("Government officers performing discretionary functions are shielded from civil liability unless their actions violate clearly established statutory or constitutional rights of which a reasonable officer would have known.") (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It follows that if Deputy Secor did not act unreasonably in entering Brown's residence, then he cannot be liable for responding as he did when Brown pointed a shotgun at him.

For these reasons, *Starks* does not apply. Whereas *Starks* involved a factual dispute about whether an officer had unreasonably placed himself in a position where he had no choice but to shoot a fleeing citizen, here the facts are undisputed and the claim that Deputy Secor created the need to shoot Brown by acting unreasonably finds no support in the law. In *Starks*, the officer's actions allegedly made Starks a deadly threat *despite* Starks' attempt to flee the scene

nonviolently. By jumping in front of the car (if that's what he did), the officer essentially created the very situation that ostensibly required the use of deadly force. But here, the officers were justified in forcibly entering the residence when entry was denied, or were at least acting in good faith in believing they were justified. No one forced Brown to flee and then point a gun at Deputy Secor. He could have surrendered at the door or, at a minimum, tried to escape. Instead, he ran to a room containing weapons and then drew a gun on someone he knew or should have known to be a police officer. *Starks* does not say that officers who use aggressive police tactics cannot use deadly force if it becomes necessary. It merely says that police cannot escape liability if their actions turn a nonviolent fleeing suspect into a violent threat to life and limb. That is not what happened here.

The Estate also relies on *Deering v. Reich*, where officers executed an arrest warrant in the middle of the night with similarly disastrous results. 183 F.3d 645 (7th Cir. 1999). Deering, whom the court described as an "elderly" sixty-nine-year-old man with mental problems, lived alone on a farm in the country. After backing his car into a motorcycle, he had failed to appear in court for his misdemeanor case. Deputy sheriffs snuck up on his house and, through a window, observed Deering sleeping. When they announced themselves, Deering awoke and grabbed a shotgun. Commotion ensued. Deering went into the yard with his gun and fired a shot. The deputies scattered, and one of them believed Deering was pointing the shotgun at him. The deputy then fired eleven rounds at Deering, killing him. *Id.* at 648-49. The case proceeded to trial, and the jury found in favor of the officers. The Estate argues that in this case, as in *Deering*, "the jury

should be permitted to evaluate the totality of the circumstances and determine whether Deputy Secor and the Brown County officers used appropriate force for those circumstances." (Pl.'s Br., ECF No. 18 at 8.)

This case differs from *Deering*, however, in that in this case there is no doubt that Deputy Secor was justified in shooting Brown when Brown pointed a shotgun at him and his fellow officer. In Deering that was not the case. Deering had fired a shot, it is true, and the court thus recognized that "it is hard to imagine that any prior circumstances would cause the jury to fail to focus on the fact that Deering fired at the deputies." *Id*. at 652. Even so, the Deering court recognized that the other circumstances could have been relevant. What Deputy Reich knew was limited: it was dark out, the subject was old, and the situation was chaotic. "Deputy Reich could not see Deering but, hearing the commotion, he moved forward and drew a bead on Deering." *Id*. at 648. He "thought" Deering was facing him, holding a shotgun at his shoulder. Id. But this was after Reich himself advanced on Deering after taking shelter in a shed. In short, there was enough uncertainty and flux in the situation that a jury could conceivably have considered circumstances other than the fact that Deering had fired at an officer. Perhaps the officers could have found shelter and negotiated with Deering. Maybe they could have retreated, or perhaps disarmed the elderly man in some way other than by firing eleven shots at him. The point is that in Deering the need for the officer to shoot Deering was not a given. Nevertheless, the jury found in favor of the officer, and the Seventh Circuit affirmed, finding that the jury knew enough about all of these factors to entitle it to render a judgment on the proper use of force.

In sharp contrast to *Deering*, here there are no other circumstances that would be relevant to an analysis of the shooting: Deputy Secor was justified in shooting Brown because Brown pointed a shotgun at him. None of the other circumstances would trump that fact, which explains why the Estate has conceded that the shooting was justified. Simply put, in this case the fact that Brown was pointing a gun at him *was* the totality of the circumstances, as far as the use of force was concerned. All that was left here was the manner in which the warrant was executed which, for the reasons set forth above, was reasonable and does not give rise to individual liability on the part of Deputy Secor. Summary judgment will therefore be granted on the claim against him.

B. Monell Claim Against Brown County

Finally, the Estate argues that it has alleged a proper Monell claim against Brown County. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a government entity may be held liable if a constitutional violation arises from an official policy or custom. The Estate argues that the procedure used here was cleared by policymakers (sergeants), who also considered (but rejected) less intrusive means of executing the warrant. Whether the decision to use the DTF to conduct the search in the manner which led to Brown's death is viewed as the result of the County's policy or the absence of a policy, the Estate contends that the County is liable.

"[A] municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee." *Sallenger v. City of Springfield, Ill*., 630 F.3d 499, 504 (7th Cir. 2010)

(citation omitted). Thus, if the actions of Deputy Secor and the other officers involved in the search did not violate Brown's constitutional rights, the County cannot be liable in any event. If, on the other hand, those who carried out the search are merely immune from liability because they acted in good faith, the County could be liable for any violation that resulted from its unconstitutional policy or custom. *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (rejecting claim that municipalities should be afforded qualified immunity like that afforded individual officials based on the good faith of their agents). Even if a constitutional violation is shown, however, the County cannot be liable under § 1983 unless the constitutional violation was caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with "final policymaking authority." *Milestone v. City of Monroe*, 665 F.3d 774, 780 (7th Cir. 2011).

Here, the Estate has failed to identify any express County policy or widespread custom or practice that has given rise to frequent constitutional violations. Sergeant Thomas explained that, in general, an investigator with a warrant will simply knock on the door and wait for the occupant to answer when there is no reason to worry about violence, the destruction of evidence or flight. Where there is a concern that the target of the search might not cooperate, the investigator contacts the patrol division for assistance. The Estate notes that the officers in this case discussed using a more low-key approach, but concluded that the fact that Moreaux was an escapee and a suspect in a burglary with a previous record for a violent felony warranted a more cautious approach. While one may disagree with the conclusion that

Moreaux, no matter how one characterizes his crimes, really posed a threat sufficient to warrant a team of officers trained in special weapons and tactics, the Estate has not pointed to any County policy or custom that required the use of the DTF to conduct the search. Nor has it presented any evidence of similar incidents occurring in the past. Instead, the evidence indicates that the decision to use the DTF was made by Sergeant Delain. The Estate offers no evidence that Sergeant Delain, or anyone else involved with the search, had final policy making authority for the County or even for the Sheriffs Department. Based on the record before the court, there is therefore no basis on which the County could be found liable under Monell even if a violation of Brown's constitutional rights could be shown. Summary judgment will therefore be granted on the Estate's claim against the County as well.

III. CONCLUSION

This case is tragic, and the Estate's indignation is to some extent understandable. One cannot help but wonder whether this sad sequence of events could have been avoided if Sergeant Thomas had simply knocked on Brown's door, waited for him to answer it, and then calmly explained that he had a warrant to search his house for a video game Moreaux was suspected of stealing. In simpler times, this most likely would have been the approach. Unfortunately, those times appear to have passed. Today, partly in response to the "war on drugs" and the proliferation of guns, especially assault weapons, but perhaps due more to federal funding and incentives, law enforcement agencies across the country have established SWAT Teams that

use military-style tactics to execute search warrants in certain cases, particularly those involving drugs or guns. *See, generally*, Balko, Radley, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA (Cato Institute White Paper 2006) available at http://object.cato. org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf. SWAT Teams specialize in making what are called "dynamic entries" that involve using an extraordinary and overwhelming show of force in order to deal with difficult and dangerous situations. *See Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001). The theory underlying the tactic is that by entering a home quickly and with overwhelming force, law enforcement can discourage or prevent any attempt by the occupants to arm themselves or destroy evidence. Though intended to insure safety for both the officers and the occupants, substantial evidence suggests that the tactic may be overused and too often results in tragedy. *See* OVERKILL, *supra*, Appendix of Case Studies. The use of such tactics has the potential of turning officer fears into self-fulfilling prophecies.

On the other hand, this case can also be seen as support for the view that such tactics should be employed even in cases that on the surface, seem relatively minor. Here, for example, though police thought they were looking for a stolen video game and a walk-away from jail, Brown was unlawfully in possession of two firearms. (DPFOF ¶ 62, ECF No. 20.) Perhaps if Sgt. Thomas had not sought the assistance of the Drug Task Force to execute the warrant, it would have been his life that was lost. We will never know.

Regardless of whether it was necessary to call out the Drug Task Force to execute the search warrant in

this case, however, the undisputed facts indicate that the individual defendants here did not act in violation of Brown's constitutional rights in executing the search warrant on his house. At the very least, they acted in good faith. The Estate has also failed to demonstrate any basis on which the County could be liable. Accordingly, the defendants' motion for summary judgment is granted. The Clerk is directed to enter judgment accordingly.

SO ORDERED this 17th day of March, 2014.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court