18-55035

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.R. Nehad, an individual; K.R. Nehad, an individual; and Estate of Fridoon Rawshan Nehad, an entity,

Plaintiffs and Appellants,

v.

Neal N. Browder, an individual; San Diego, City of, a municipality; Shelley Zimmerman, in her personal and official capacity as Chief of Police; Does 1 through 10, inclusive,

Defendants and Respondents.

Appeal From The United States District Court,
Southern District of California, Case No. 15-cv-1386-WQH-NLS,
Hon. William Q. Hayes

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

INTRODUCTION & SUMMARY OF ARGUMENT

On April 30, 2015, San Diego Police Officer Neal Browder shot and killed Fridoon Nehad ("Fridoon"). Fridoon was walking at a slow pace down an alleyway while holding a ballpoint pen. He did not present a danger to Browder or anyone else. Undisputed video evidence shows Fridoon walking slowly and not acting aggressively in any way. Fridoon did not resist arrest or attempt to flee.

Fridoon's estate and his parents K.R. and S.R. Nehad (collectively, "Plaintiffs") brought claims against Browder, the City of San Diego, and San Diego Chief of Police Shelley Zimmerman (collectively, "Defendants") for violations of the Fourth and Fourteenth Amendments of the United States Constitution, municipal and supervisory liability, and claims under state law. Defendants brought a motion for partial summary judgment as to seven of Plaintiffs' nine causes of action, arguing that Browder acted reasonably in shooting Fridoon as a matter of law. The district court granted summary judgment on the entirety of Plaintiffs' claims.

The district court's ruling was based on a series of legal errors, each of which merits reversal.

When considering material disputed facts on summary judgment, a court is required to accept the version of facts most favorable to the non-moving party. *A. K. H. by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1010 (9th Cir.

2016). But the district court here consistently and repeatedly accepted the version of facts most favorable to Defendants, even when those facts contradicted video evidence.

The court overstated the severity of the crime at issue by assessing events that occurred prior to Browder's arrival. Under binding Ninth Circuit case law, the only relevant inquiry is the severity of the conduct occurring at and after the officer's arrival. *George v. Morris*, 736 F.3d 829, 833-34 (9th Cir. 2013).

The court declared that Fridoon engaged in "objectively threatening" conduct, based solely on Browder's claim that Fridoon held a knife. But even if Fridoon had been holding a knife (he wasn't—he was holding a ballpoint pen), the law is clear that an officer is not justified in using lethal force merely because the suspect is holding a weapon. *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011).

The court conceded that it must apply a specific three-part test in assessing the government's interest in using force. *Graham v. Connor*, 490 U.S. 386, 396 (1989). But it then failed to consider the third part of that test, completely ignoring that Fridoon did not resist or evade arrest in any way.

The law requires a court to consider whether an officer had alternative, less intrusive means of force at his disposal when assessing the reasonability of a

shooting. *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010). The district court refused to do so.

The court ruled that Browder was entitled to qualified immunity, even though its ruling was based upon disputed issues of fact. The law requires a court to wait until a jury resolves all relevant disputed issues of fact before making a ruling on qualified immunity. *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1021-22 (9th Cir. 2017).

The district court granted summary judgment on Plaintiffs' state law claims for negligence and wrongful death based solely on its judgment against Plaintiffs' constitutional excessive force claim. But the law is clear that claims for negligence and wrongful death are judged on standards that are separate and distinct from the standard for excessive force. *Hayes v. County of San Diego*, 57 Cal. 4th 622, 638 (2013).

Finally, the court granted summary judgment on Plaintiffs' claims for negligence and wrongful death *sua sponte*; Defendants did not move on these claims. A court may not grant summary judgment *sua sponte* without providing parties with notice and an opportunity to respond. *Norse v. City of Santa Cruz*, 629 F.3d 966, 971-72 (9th Cir. 2010). The court did not do so, and therefore had no authority to make its *sua sponte* ruling.

Neither the facts of this case nor the relevant law support the court's ruling. The evidence presented by the parties, including the video evidence of the shooting, presents triable issues of fact that must be resolved by a jury.

JURISDICTIONAL STATEMENT

1. District court jurisdiction. The district court had jurisdiction over this civil rights action under 28 U.S.C. section 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The district court had supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367(a).

2. Timeliness of appeal. On December 18, 2017, the district court granted Defendants' Motion for Partial Summary Judgment by granting summary judgment for Defendants on the entirety of Plaintiffs' claims. [Plaintiffs' Excerpts of Record ("ER") 19:15-22.] Plaintiffs timely filed their appeal of this order on January 9, 2018. [ER 20.] 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

3. Appellate jurisdiction. This Court has jurisdiction under 28 U.S.C. section 1291, which gives the circuit courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States."

ISSUES PRESENTED

This appeal presents five questions:

1. Whether the district court erred in finding that Browder acted reasonably as a matter of law in shooting and killing Fridoon.

2. Whether the district court erred in determining that Browder acted with a "legitimate law enforcement objective" as a matter of law in shooting and killing Fridoon.

3. Whether the district court erred in determining that Browder was entitled to qualified immunity.

4. Whether the district court erred in granting summary judgment on Plaintiffs' remaining claims on the sole basis of its finding that Browder did not commit a constitutional violation as a matter of law.

5. Whether the district court erred in granting summary judgment *sua sponte* on Plaintiffs' negligence and wrongful death claims despite not giving notice that the claims were at issue.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Fridoon's Background

Fridoon was the Nehads' eldest child and only son. As a teenager, he was drafted by the Afghani army to fight in that country's civil war. [ER 255:25-

256:18.] He was subsequently captured by a warlord and held prisoner, suffering torture as well. [ER 256:23-257:14.] Though ultimately released, Fridoon suffered from mental illness and Post-Traumatic Stress Disorder as a result. [ER 258:5-259:1.]

His family immigrated to the U.S., where they continue to reside. [ER 260:1-14.] They all became American citizens. Fridoon's sisters established careers in medicine, law, and business.

After years of effort, the family was finally able to secure Fridoon's immigration to the U.S. [*Id.*] His family did everything they could to protect and care for him. But on occasion, Fridoon's mental illness would send him into manic episodes. [ER 258:17-259:1.]

B. The Shooting

Just after midnight on April 30, 2015, Browder received a call from the dispatcher that there was a "417 with a knife" (referring to Penal Code Section 417, a misdemeanor offense for exhibiting a weapon). The call did not identify the suspect by name, nor did it state that he had any criminal history. The call did not state that the suspect had harmed anyone. [ER 288:19-293:15, 492:9-13, 493:5-10.]

Upon arriving at the scene, Browder activated his car's high beams, but not the flashing red lights or siren. [ER 293:16-294:7, 295:18-296:2.] Fridoon was

walking down the alley toward Browder's vehicle, at what Defendants' expert described as a "relatively slow" pace. [ER 500:6-19, 501:3-13, 502:17-20; ER 543.] He was not threatening anyone or committing any crime. As the video shows, he did not make any aggressive movements or threatening gestures. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.] He did not say anything to Browder or anyone else. [ER 299:8-18, 300:6-8.] He did not accelerate in Browder's direction, or act in an agitated manner. [ER 299:8-18, 300:6-15, 307:9-308:14.]

He was unarmed and held only a blue pen; there was no knife. [ER 310:15-19, 407:6-19, 409:23-410:15, 417:8-418:10, 419:21-420:8.] It was approximately 12:10 a.m., and it was dark outside. [ER 401:2-4.] The high beams of Browder's patrol car were aimed directly at Fridoon, likely impairing his vision. [ER 295:18-296:2, 297:2-8, 298:21-24, 305:2-7.]

Seconds later, Browder opened his car door, got out, and pointed his gun at Fridoon. [ER 306:2-9; ER 595 1:24.] Browder did not activate his body-worn camera, contrary to SDPD policy. [ER 311:9-18.] He did not retreat to a safe distance, though there was empty space behind him. [ER 314:20-24, 315:19-316:21.] He was carrying a Taser, mace, and collapsible baton, but admits he did not consider using them. [ER 312:16-314:11; ER 603, ¶ 24.]

At least two people were standing in the parking lot adjacent to the

alleyway, behind Browder. [ER 595 1:10-1:26.] Neither one ran away or gave any indication that they were afraid or in danger until Browder took out his gun. [*Id.*] Browder testified that he did not believe any third parties were at risk of harm. [ER 299:8-18, 301:19-302:21, 325:2-7.] Browder was aware that backup was on its way. [ER 288:19-289:17, 314:25-315:1, 324:20-325:1; ER 595 1:26-2:00, 596 0:00-0:05.]

Browder did not identify himself as a police officer, nor did he give any warning that he was about to shoot. [ER 302:22-304:2.] In fact, he does not remember saying anything to Fridoon at all. [ER 303:25-304:2.] Two witnesses recall Browder telling Fridoon to "stop" or "drop it," while a third witness testified that Browder did not say anything at all. [ER 279:11-19; ER 724:10-725:6, 725:20-22, 726:8-15, 726:19-21, 727:13-16; ER 763:24-764:9, 766:14-16, 767:21-24.]

When Fridoon had reached a distance of approximately 17 feet from Browder, he slowed down and appeared to stop. [ER 413:9-20; ER 595 1:25-1:26.] He began to turn in a direction *away* from Browder. [ER 471:6-16, 507:8-17; ER 595 1:26.] Fridoon gave no indication that he was about to lunge at or attack Browder. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-11.] A witness described Fridoon as "non-aggressive." [ER 273:10-274:8, 274:23-275:21, 277:3-25.]

Browder nevertheless fired his pistol, hitting Fridoon in the chest. [ER 595 1:28.] Less than five seconds elapsed between the time that Browder got out of his car and the moment that he fired. [ER 306:2-9; ER 595 1:24-1:26.] Less than 30 seconds total elapsed between the time that Browder arrived in the alley and the moment that he fired. [ER 595 1:00-1:26.]

Police investigators arrived at the scene shortly after the shooting. One investigator asked Browder whether he had seen any weapons at the scene. [ER 319:1-21, 322:18-23, 408:6-14, 430:6-19, 436:20-25, 437:1-438:18, 453:9-17; ER 828-839.] He replied, "No." [*Id.*] Browder's attorney ended the interview and prohibited the investigator from asking any further questions. [ER 319:1-320:7.]

Browder was interviewed again by police investigators five days after the shooting. [ER 321:15-25, 433:21-434:6, 436:20-25, 439:21-440:10; ER 604, ¶ 31.] Browder was allowed to consult with his attorney and watch the video of the shooting prior to this interview. [ER 309:3-13, 440:11-441:2, 442:5-9; ER 604, ¶ 32.] This time, Browder claimed to have thought that Fridoon was holding a knife when Browder shot him. [ER 304:6-20, 306:2-19, 323:9-21.]

Browder was allowed to return to his duties and was not disciplined in any way for the shooting. [ER 325:8-326:21, 343:16-18, 348:21-349:2, 373:15-374:1; ER 605, ¶ 42, 606, ¶ 46.] And though the SDPD has a policy requiring officers to turn on their body cameras prior to confronting a suspect, Browder was not

disciplined for his violation of this policy. (ER 327:21-328:22, 365:13-366:3, 367:20-369:2, 385; ER 605, ¶ 42, 606, ¶ 46.]

C. Plaintiffs' Expert Opinions

Plaintiffs offered the testimony of police tactics and procedures expert Roger A. Clark. Mr. Clark has nearly three decades of experience as a police officer with the Los Angeles County Sheriff's Department. [ER 599, ¶ 2.] For the last five and a half years before he retired, Mr. Clark served as the commander of a special unit tasked with investigating some of the most complex and heinous crimes committed by career criminals. [ER 600, ¶ 7.] As commander, he supervised roughly 1,000 homicide investigations, establishing a remarkable record of arresting more than 2,000 career criminals without a single shot fired—either by his officers or the suspects. [*Id.* ¶¶ 8-9.]

Mr. Clark's review of the evidence in this case allowed him to identify a number of factors that indicated that Browder's decision to shoot fell well short of reasonable police standards. [ER 602-603, ¶¶ 21-22.] The video evidence tells the story.

First, Mr. Clark testified that Browder had plenty of room and time to retreat and stay safe. [ER 472:3-475:3, 476:16-477:12; ER 602-603, ¶¶ 21-23.] Moving back to a safer position, called "tactical repositioning," is standard police procedure that allows the officer to stay in cover, wait for backup, and use time to

make an accurate assessment of any perceived threat. [ER 603, ¶ 23.] Though Defendants' expert testimony contended that a police officer should not consider repositioning to avoid the use of force, that testimony is contradicted by plain Ninth Circuit law. *See Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001) (the shooting officer "could easily have avoided a confrontation . . . by retreating to his original position").

Mr. Clark offered undisputed testimony that police officers receive training to recognize weapons and differentiate them from ordinary objects. [ER 604, ¶ 27.] Though ordinary civilians may have mistaken a ballpoint pen for a knife, a reasonable police officer should be able to distinguish the two. [*Id.*]

Moreover, Mr. Clark opined, again undisputed, that it is standard police procedure for a police officer arriving on a scene to not assume the allegations of a dispatch broadcaster to be correct (knowing that such secondhand information may be inaccurate), but instead to confirm the actual facts of any situation. [ER 602, ¶ 21(a).]

Finally, Mr. Clark testified that, given the distance between Browder and Fridoon, Fridoon's slow pace, and Fridoon's nonthreatening conduct, Browder was "required" to use nonlethal force in arresting Fridoon. [ER 603, ¶¶ 23-24.] Mr. Clark referred to the Taser and mace that Brower carried on his belt as "obvious" alternatives that were appropriate for the circumstances. [*Id.*] Tasers are effective

at a distance of up to 21 feet. [ER 313:18-20.] The video does not show any evidence of wind, rain, or other inclement weather that may have made the Taser less effective. [ER 595 0:55-2:00.] Defendants' experts asserted that Browder was justified in not even considering alternative means of force, but their opinions are once again contradicted by law. *See Bryan*, 630 F.3d at 831 (that the shooting officer "apparently did not consider less intrusive means of effecting [the] arrest factor[s] *significantly*" into a reasonability analysis) (emphasis added).

II. PROCEDURAL HISTORY

Plaintiffs filed their initial complaint in this action on June 24, 2015. [ER 795.] Plaintiffs filed the operative Second Amended Complaint on August 28, 2015, bringing claims against Browder, the City of San Diego, and San Diego Chief of Police Shelley Zimmerman for deprivation of Plaintiffs' Fourth and Fourteenth Amendment rights, deprivation of civil rights under *Monell* and supervisory liability, deprivation of civil rights under California's Bane Act, and state law claims of assault and battery, negligence, and wrongful death. [ER 773-774.] Plaintiffs' claims were premised, in part, on the fact that Browder acted with excessive force in shooting and killing Fridoon.

Defendants filed a Motion for Partial Summary Judgment on March 16, 2017, requesting summary judgment of Plaintiffs' first seven causes of action

(consisting of all of Plaintiffs' claims except for those for negligence and wrongful death). [ER 772:23-24.]

III. RULING PRESENTED FOR REVIEW

On December 18, 2017, the district court granted Defendants' Motion and ordered summary judgment for Defendants on the entirety of Plaintiffs' claims.

The court granted summary judgment for Defendants on Plaintiffs' Fourth Amendment claim after erroneously deciding that Browder acted reasonably in shooting and killing Fridoon, an unarmed man who was committing no crime and presented no threat to Browder or anyone else. [ER 7:21-14:2.] The linchpin of the court's reasoning was the perplexing conclusion that Fridoon, who had only a ballpoint pen, engaged in "objectively threatening behavior" by continuing to walk down an alleyway at a "relatively slow pace" in Browder's general direction after Browder arrived. [ER 17:19-23.] The court granted summary judgment on Plaintiffs' Fourteenth Amendment claim on the same grounds.[1] [*Id.*]

The district court further granted summary judgment for Defendants on the entirety of Plaintiffs' state law claims, reasoning again that the state law claims were meritless on the same grounds as Plaintiffs' Fourth Amendment claim. [ER

[1] The court also granted summary judgment for Defendants on Plaintiffs' *Monell* and supervisory liability claims, as its ruling on the first two claims meant that Browder had committed no constitutional violation, a necessary underpinning of *Monell* and supervisory liability. [ER 14:3-19:8.]

19:9-14.] The court made this ruling even though established law makes clear that state negligence and wrongful death claims are evaluated on a standard that is separate and distinct from constitutional excessive force claims. *See Hayes*, 57 Cal. 4th at 638.

Finally, the court's decision granted summary judgment *sua sponte* as to the negligence and wrongful death claims, relief that was not requested in the Motion. The court did not give any party notice that these claims were at issue, nor did any party present, or have the opportunity to present, evidence or arguments as to these claims. Indeed, the court did not even acknowledge that it was granting *sua sponte* relief in its decision. [ER 19:15-22.]

STANDARD OF REVIEW

An appellate court reviews the district court's grant of summary judgment de novo to determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). In reviewing a summary judgment ruling, this Court assumes the version of the material facts asserted by the non-moving party to be correct. *A. K. H.*, 837 F.3d at 1010.

ARGUMENT

I. THE DISTRICT COURT ERRED BY ACCEPTING DEFENDANTS' VERSION OF THE FACTS AS TRUE

By clearly established law, a court deciding a motion for summary judgment is required to consider all disputed facts in the light most favorable to the non-moving party. *See A. K. H.*, 837 F.3d at 1010; *Harris v. Roderick*, 126 F.3d 1189, 1192 (9th Cir. 1997) ("We state the facts, as we must on this appeal, as they are set forth in [the operative] Complaint."). The district court failed to adhere to this rule.

Instead, the court applied the version of material disputed facts most favorable to Defendants. Indeed, the ruling cited to Browder's testimony throughout its summary of the facts, even where that testimony was contradicted by plain evidence, and by the shooting video itself. [ER 3:18-20, 3:25-28, 4:1-3, 4:4-8.]

A few examples of the district court's improper recitation of Defendants' version of material disputed facts, alongside the contradicting evidence presented by Plaintiffs, are set forth in the table below:

District Court's Ruling	**Plaintiffs' Evidence**
Browder thought that Fridoon had a knife. [ER 3:16-22.]	A pen does not look like a knife. Fridoon was holding the pen out in the open, and it was fully illuminated by Browder's headlights, which Browder had focused on Fridoon. [ER 295:18-

District Court's Ruling	Plaintiffs' Evidence
	296:2, 297:2-8, 298:21-24, 305:2-7; ER 594 1:58-2:18.] Expert testimony established that police officers receive training to recognize weapons and differentiate them from ordinary objects. [ER 604, ¶ 27.] Browder told investigators there were no weapons at the scene. [ER 319:1-21, 322:18-23, 408:6-14, 430:6-19, 436:20-25, 437:1-438:18, 453:9-17; ER 828-839.]
Browder gave a warning to Fridoon before he shot him. [ER 4:12-18.]	Browder testified he did not remember saying anything. [ER (Browder Dep. 302:22-304:2.] A bystander testified that he did not hear Browder say anything. [ER 279:11-19.] The video gives no indication that Fridoon heard or understood any warning. [ER 595 1:24-1:26.]
Browder put out his hand in a gesture to tell Fridoon to stop. [ER 4:19-21.]	The video shows that Browder did no such thing. [ER 595 1:24-1:26.]
Fridoon was "aggressing" Browder. [ER 3:25-28.]	Plain video evidence shows that Fridoon was walking down the alleyway at a casual pace. [ER 595 1:10-1:26.] Defendants' own expert described Fridoon's pace as "relatively slow." [ER 500:6-19, 501:3-13, 502:17-20; ER 543.] Eyewitness testimony states that Fridoon was not acting in an aggressive manner. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.] The two individuals in a neighboring parking lot did not act in any way to indicate that they felt they were in danger, and instead remained standing in the parking lot until Browder unholstered his gun. [ER 595 1:10-1:26.] Fridoon did not say anything threatening, did not brandish the pen in a threatening manner, did not accelerate in Browder's direction, or act in an agitated manner. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.] Fridoon was playfully twirling the pen in his hand in an absent-minded, plainly nonaggressive manner. [ER 273:10-

District Court's Ruling	Plaintiffs' Evidence
	274:8, 274:23-275:21, 277:3-25.]

In *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154 (9th Cir. 2014), the Ninth Circuit overturned the district court's summary judgment rulings on excessive force and qualified immunity because the district court improperly weighed conflicting evidence with respect to disputed material facts. *Id.* at 1166. Specifically, the court drew conclusions based upon conflicting testimony, relying upon the officers' version of events rather than the non-moving party's version. *Id.* "[I]n weighing the evidence in favor of the officers, rather than the Sandovals, the district court unfairly tipped the reasonableness inquiry in the officers' favor," an error that mandated reversal. *Id.* at 1167.

As in *Sandoval*, the district court unfairly tipped the scales by resting its ruling on Defendants' version of disputed facts. This was legal error.

A. The Court Must Accept The Facts Shown By Video Evidence

The court's error in accepting Defendants' version of the "facts" is compounded by video evidence that contradicts that version. This error alone warrants reversal.

In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court took issue with the Eleventh Circuit's acceptance of facts clearly contradicted by video evidence.

Id. at 380-81. Video had captured the events at issue (a high-speed car chase), and that there were no allegations or indications that the video was doctored or altered in any way. *Id.* at 379-80. The Eleventh Circuit had adopted a version of the facts that was "clearly contradict[ed]" by the events captured on video. *Id.* at 378. This warranted reversal. *Id.* at 380-81; *see also Longoria v. Pinal County*, 873 F.3d 699, 706 (9th Cir. 2017) ("These videos provide some of the most important evidence as to what occurred before and during the shooting and what Rankin actually saw. This evidence alone raises material questions of fact about the reasonableness of Rankin's actions and the credibility of his post-hoc justification of his conduct."); *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) ("[W]e 'may not simply accept what may be a self-serving account by the police officer.' This is especially so where there is contrary [video] evidence. . . . This is a dispute of fact that must be resolved by a jury." (citation omitted)).

Here, as in *Scott*, there is video evidence. And here, as in *Scott*, the lower court adopted a version of the facts that is plainly contradicted by the video. The video shows that Browder did not gesture with his hand for Fridoon to stop. [ER 595 1:24-1:26.] Most importantly, Fridoon was not "aggressing" Browder or engaging in any "objectively threatening conduct"—rather, Fridoon was casually walking down an alleyway, exhibiting no aggressive or threatening behavior. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15,

307:9-308:14; ER 595 1:15-1:26.] The district court erred in accepting Defendants' version of the facts rather than the video evidence, and this error warrants reversal.

II. THE DISTRICT COURT ERRED IN FINDING THAT BROWDER DID NOT VIOLATE FRIDOON'S FOURTH AMENDMENT RIGHTS AS A MATTER OF LAW

Under federal law, a claim of excessive force under the Fourth Amendment is governed by the reasonable force standard. *Graham*, 490 U.S. at 394-95. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

Determining the reasonability of a police officer's use of force is a three-step analysis, which requires the court to evaluate: (1) the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted; (2) the government's interests; and (3) the gravity of the intrusion on the individual against the government's need for that intrusion. *See Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010).

Matters of excessive force by police are not typically resolved at summary judgment. *See* 598 F.3d at 537 ("[T]his court has often held that in police

misconduct cases, summary judgment should only be granted 'sparingly' because such cases often turn on credibility determinations by a jury." (citation omitted)).

A. Browder Inflicted The Most Severe Force Possible Upon Fridoon

"'The intrusiveness of a seizure by means of deadly force is unmatched.' The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a 'fundamental interest in his own life' and because such force 'frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.'" *A. K. H.*, 837 F.3d at 1011 (citations omitted).

Browder shot Fridoon dead in less than five seconds. This is the most severe use of force that could have been used and, thus, is only reasonable under the most extreme circumstances.

B. The District Court Overstated The Government's Interest In Using Force

To determine the gravity of the government's interest, the three primary factors to be considered are: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer[s] or to others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. A court should also consider additional factors in its analysis, including: (4) the availability of alternative methods to

subdue the suspect (*Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)); (5) the parties' relative culpability, i.e., which party created the dangerous situation and which party is more innocent (*Espinosa*, 598 F.3d at 537); (6) whether it was practical for the officer[s] to give warning of the imminent use of force and whether such warning was given (*Glenn*, 673 F.3d at 872); and (7) whether it should have been apparent to the officer[s] that the person [he] [she] [they] used force against was emotionally disturbed (*id.*). "The most important factor is whether the suspect posed an immediate threat." *Zion*, 874 F.3d at 1075.

The district court failed to properly apply these factors.

1. The District Court Erred in Finding the Crime at Issue to Be Severe

The district court found that Browder acted reasonably in shooting Fridoon because the crime at issue was severe. The court's analysis was limited, consisting of little more than a statement that Browder responded to a call that a suspect was threatening people with a knife. [ER 8:25-27.] But the court's reasoning was flawed—this factor is judged based on what occurred at and after a shooting officer's arrival, not what took place before he got there.

In *George v. Morris*, the Ninth Circuit ruled that summary judgment was inappropriate on an excessive force claim where officers shot a man standing on his patio holding a firearm that was pointed at the ground. 736 F.3d at 832-33.

The officers argued that their actions were reasonable because they had received a call that the victim had been threatening his wife with a gun. *Id.* at 839. The Ninth Circuit rejected the argument, because when the officers arrived, the victim was standing alone, nowhere near his wife, and was not threatening anyone. *Id.* The victim's threatening conduct, even if it had occurred, was not occurring by the time the officers arrived. *Id.*

Similarly, in *Harris v. Roderick*, an officer attempted to justify his shooting by pointing out that his victim had engaged in a shoot-out with law enforcement officers on the previous day, and in fact may have even shot and killed a police officer. 126 F.3d at 1203. The Ninth Circuit rejected the argument. *Id.* At the time the officer shot him, the victim had made no threat or aggressive move of any kind toward the shooting officer or anyone else. *Id.* The fact that the victim may have engaged in a violent shooting the day before was irrelevant to the reasonableness of the officer's decision to shoot. *Id.* His past conduct was not sufficient to justify the use of deadly force. *Id.*

Here, the district court made its finding based on what had occurred prior to Browder's arrival—alleged threats with a knife. [ER 8:23-28.] But a police officer's decision to use lethal force cannot be reasonably based on what may have happened before his arrival. A police officer cannot reasonably shoot and kill an individual based on unverified reports of illegal conduct. Indeed, undisputed

expert testimony in this case establishes that it is standard police procedure to confirm the actual facts of any situation, and not assume the allegations of a dispatch broadcast to be correct. [ER 602, ¶ 21(a).]

Even assuming *arguendo* a crime occurred before Browder's arrival, it was no longer occurring by the time he got there. The plain evidence demonstrates that no crime, let alone a severe crime, was occurring when Browder arrived. Browder observed Fridoon slowly walking down an alleyway, holding a ballpoint pen. Fridoon was not acting aggressively, threatening anyone, or doing anything that could possibly be perceived as dangerous.

The mere act of a person holding a pen, or even a knife, is not a crime, let alone a severe one. *See Harris*, 126 F.3d at 1204 ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."); *George*, 736 F.3d at 838 (same). Accordingly, the district court erred in finding that this factor weighed in favor of the reasonableness of Browder's conduct.

2. The District Court Erred in Finding Fridoon Posed an Immediate Threat as a Matter of Law

The district court found that Browder acted reasonably in shooting Fridoon because Fridoon posed an "immediate threat." But the court's finding was premised entirely on Browder's alleged belief that Fridoon had a knife. [ER

18:11-26.] This was error, because: (1) the reasonableness of Browder's perception that a blue pen was a knife is a disputed fact; and (2) the mere possession of a weapon does not convert an otherwise unthreatening person into a threat. Instead, the court must take all circumstances into account when making this determination.

(a) Browder's Alleged Belief That Fridoon Had a Knife Is a Disputed Fact

The version of facts most favorable to Plaintiffs indicates that Browder did not believe that Fridoon had a knife in his hand. (*See supra* Section I.) Browder himself gave a statement directly after the shooting saying that he had not seen any weapons at the scene. [ER 319:1-21, 322:18-23, 408:6-14, 430:6-19, 436:20-25, 437:1-51:18, 453:9-17; ER 828-839.] The only evidence indicating that Browder believed Fridoon was holding a knife is his own contradictory testimony five days later, which a factfinder is not required to accept. *See Reed v. City of Modesto*, 122 F. Supp. 3d 967, 974 (E.D. Cal. 2015) (the shooting officer "is an interested witness and the jury is not required to believe his testimony"). The jury must decide Browder's credibility given his change of story *after* consulting with his attorney. [ER 304:6-20, 306:2-19, 309:3-13, 321:15-25, 323:9-21, 433:21-434:6, 436:20-25, 439:21-441:2, 442:5-9; ER 604, ¶¶ 31-32.]

But even if Browder believed that Fridoon was holding a knife, the reasonableness of that perception is itself a question of fact. Plaintiffs presented contrary evidence: a ballpoint pen does not look like a knife; the high beams from Browder's car fully illuminated the pen; and, per Plaintiffs' expert on police tactics and training, an officer of Browder's experience and training should be able to distinguish a knife from a ballpoint pen. [ER 295:18-296:2, 297:2-8, 298:21-24, 305:2-7; ER 594 1:58-2:18, 604, ¶ 27.]

Uncontradicted expert testimony shows that police officers are trained to recognize weapons and distinguish them from ordinary objects. [ER 604, ¶ 27.] This is a material dispute that must be resolved by a jury. *See Longoria*, 873 F.3d at 707 (summary judgment was inappropriate when the record revealed "many other facts in dispute that are material to the determination of whether a reasonable officer would have perceived that Longoria posed any immediate threat," including whether the shooting officer, "who has 20/20 vision, reasonably perceived a weapon in Longoria's hands from his position as he said he did").[2]

[2] Though not included in its analysis, the district court made mention of past instances in which Fridoon was alleged to have threatened individuals with a knife. [ER 5:24-25.] Whether or not those instances actually occurred is irrelevant—the reasonableness of Browder's conduct must be judged only on the facts known to him at the time of the shooting. *See Graham*, 490 U.S. at 397 ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them."); *Glenn*, 673 F.3d at 873 n.8 ("We cannot consider evidence of which the officers were unaware."). Browder conceded that

(b) The Mere Possession of a Weapon Does Not Make a Person a Threat

Even assuming *arguendo* that Browder thought Fridoon was holding a knife, and further assuming *arguendo* that this belief was reasonable, Browder's decision to shoot was still not reasonable. It is thoroughly unreasonable for a police officer to shoot an otherwise nonthreatening victim merely because he is holding a weapon.

In *Glenn v. Washington County*, the Ninth Circuit overturned a district court's summary judgment ruling that police reacted reasonably in shooting a young man holding a pocketknife with a nonlethal beanbag gun. 673 F.3d at 878. The victim's family had called police after he had arrived at home, intoxicated and agitated, damaging car windows and the front door. *Id.* at 867. The district court found that the victim had posed an immediate threat, relying primarily on the fact that the victim held a knife in his hand. *Id.* at 872. In overturning the ruling, the Ninth Circuit held that the mere possession of a knife was not sufficient to deem the victim an "immediate threat." *Id.* at 874 (citation omitted).

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he had no knowledge of Fridoon's past or background when he shot him. [ER 288:19-293:15.]

(c) The Totality of Circumstances Shows That Fridoon Did Not Pose an Immediate Threat

It is legal error to find, as the district court did, that a shooting victim posed an immediate threat simply because he held a weapon. Instead, a court must examine the totality of the circumstances to make such a determination. Here, the circumstances demonstrate that Fridoon did not pose a threat.

In *Glenn v. Washington County*, the court's analysis did not stop at the fact that the victim held a pocketknife, but rather looked at all relevant circumstances to determine whether the victim posed a threat. There, as here, the victim was *not* a threat: (1) he was not attacking anyone; (2) he was not threatening to attack anyone; (3) no one was trying to get away from him; (4) the other individuals present moved behind the officers, where they could not be harmed before police would intervene; (5) the police had guns trained on him; (6) he was "several feet" from the officers; and (7) the police "could have moved farther away at any time, had they wanted to." 673 F.3d at 873-74. Ultimately, the Ninth Circuit held that "[v]iewing the evidence in the light most favorable to the plaintiff, even though [the victim] remained in possession of the pocketknife, a jury could conclude that at the moment the officers shot him with the beanbag gun there was little evidence that he posed an 'immediate threat' to anybody." *Id.* at 874 (citation omitted).

Here, as in *Glenn*, the totality of circumstances demonstrates that the district court erred in finding that Fridoon posed an "immediate threat" as a matter of law. Fridoon was not committing any crime. (*See supra* Section II.B.1.) Fridoon was not attacking anyone. Fridoon was not acting aggressively or threatening to attack anyone. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10, 299:8-18, 300:6-15, 307:9-308:14, 500:6-19, 501:3-13, 502:17-20; ER 543, 595 1:15-1:26.] No one was trying to get away from Fridoon; the two passersby in the parking lot adjacent to Browder showed no desire to leave the location until Browder brandished his gun. [ER 595 1:10-1:26.] Those two individuals were located behind Browder, where Fridoon could not harm them before police intervened. [ER 299:8-18, 301:19-302:21, 325:2-7.] Browder had his gun drawn and pointed at Fridoon, making him ready to respond to any change in circumstances. [ER 306:2-9; ER 595 1:24.] Fridoon was at least 17 feet away from Browder, much further than the "several feet" in *Glenn*.[3] [ER 411:4-412:1, 413:9-20; ER 595 1:24-1:26, 703-704, ¶ 16; ER 843-844.]

[3] Defendants have previously cited the "21-foot rule" to argue that an officer does not have sufficient time to defend himself against an assailant armed with a knife once the assailant is within 21 feet of the officer. [ER 751:12-752:7.] But Defendants' expert concedes that the "21-foot rule" incorporates the time it takes for an officer to unfasten his holster, remove his gun, bring it up to a shooting position, and fire. [ER 181-182, ¶ 5(d).] Here, Browder had already drawn his gun and pointed it at Fridoon, giving him far more time to assess any potential threat before firing.

Per Plaintiffs' expert Roger Clark, Browder could have and should have moved further away from Fridoon and tactically repositioned himself (*see also Deorle*, 272 F.3d at 1282 (the shooting officer "could easily have avoided a confrontation . . . by retreating to his original position")). [ER 603, ¶ 23.] Fridoon never argued with or threatened Browder, or even addressed him in any way (nor was he given the opportunity to, as Browder shot him in less than five seconds). Witness testimony establishes that Fridoon did not appear threatening or aggressive. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14]

The sum total of Fridoon's conduct paints a calm, uneventful portrait—Fridoon did nothing more than walk down an alleyway, at what Defendants' expert referred to as a "relatively slow" pace, and hold a ballpoint pen in his hand. Fridoon did not pose an "immediate threat" to anyone, even if he had been holding a knife (he wasn't). [ER 310:15-19, 407:6-19, 409:23-410:15, 417:8-418:10, 419:21-420:8, 500:6-19, 501:3-13, 502:17-20; ER 543.]

3. The District Court Failed to Consider Whether Fridoon Was Resisting or Seeking to Evade Arrest

The court did not analyze whether Fridoon resisted or evaded arrest. This was legal error. Moreover, the video evidence makes the analysis of this factor

simple. Fridoon did not attempt to flee from Browder, nor did he resist arrest in any way. [ER 595 1:16-1:26.]

In *Glenn v. Washington County*, discussed above, the Ninth Circuit found no evidence that the victim, who was holding a pocketknife at the time he was shot, was attempting to resist or evade arrest. 673 F.3d at 874-75. He did not attack the officers or anyone else, nor did he threaten to do so. *Id.* at 875. The only possible indication of resistance was the fact that the victim continued to hold his knife, rather than drop it as the officers ordered him to. *Id.* The Ninth Circuit found, however, that merely holding a knife was not resistance sufficient to warrant being shot with a beanbag gun. *Id.*

As in *Glenn*, Fridoon did not attack, or threaten to attack, Browder or anyone else. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14, 413:9-20, 471:6-16, 500:6-19, 501:3-13, 502:17-20, 507:8-17; ER 543, 595 1:15-1:26.] Under *Glenn*, merely continuing to hold a pen, or even a knife, cannot be considered "resisting arrest."

Indeed, Fridoon may not have even known Browder was a police officer. Browder never identified himself as police. [ER 302:22-304:2.] It was late at night and dark out. [ER 401:2-4.] Browder's patrol car high beams were pointed directly at Fridoon, impairing his vision. [ER 295:18-296:2, 297:2-8, 298:21-24, 305:2-7.] The siren on Browder's patrol car was turned off. [ER 293:16-294:7.]

The light bar on top of the car was also turned off. [*Id.*] Fridoon could not have "resisted arrest" if he did not even know that he was being arrested.

Defendants contend that Fridoon resisted arrest because he disobeyed instructions from Browder to drop the pen. But the existence of said "instructions" is a disputed issue of fact. Testimony on the matter is conflicted. While two witnesses remember Browder saying something like "stop" or "drop it," a third witness testified that Browder did not say anything. [ER 279:11-19; ER 724:10-725:6, 725:20-22, 726:8-15, 726:19-21, 727:13-16; ER 763:24-764:9, 766:14-16, 767:21-24.] And Browder does not remember saying anything. [ER 302:22-304:2.] Accepting the version of facts most favorable to Plaintiffs (as the Court is required to do), Browder gave no such instructions at all. Fridoon cannot be said to have "disobeyed instructions" that were never given.

Moreover, neither the video evidence nor the eyewitness testimony gives any indication that Fridoon either heard or understood any instructions. Fridoon cannot disobey instructions that he never heard. *See Glenn*, 673 F.3d at 876 (instructions to drop the knife did not render the shooting reasonable when there was no indication that the victim heard or understood the instructions).

4. The District Court Failed to Consider Additional Factors

Courts must also take additional factors into account when evaluating the government's interest in using force. (*See supra* Section II.B.)

(a) Browder Did Not Warn Fridoon That He Would Use Force

The Ninth Circuit holds that "warnings should be given, when feasible, if the use of force may result in serious injury, and . . . the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test." *Deorle*, 272 F.3d at 1284. The district court did not take into account Browder's failure to warn Fridoon that he would use force.

It is undisputed that Browder did not warn Fridoon that he would use force, let alone deadly force. At best, Defendants contend that Browder may have said "stop" or "drop it." [ER 724:10-725:6, 725:20-22, 726:8-15, 726:19-21, 727:13-16; ER 763:24-764:9, 766:14-16, 767:21-24.] This is not enough.

In *Glenn v. Washington County*, the Ninth Circuit confirmed that officers who shot a nonthreatening victim did not act reasonably even though they shouted warnings like "drop the fucking knife or I'm going to kill you," because: (1) there was no indication that the victim heard or understood the warning; and (2) they never actually warned about the force they were going to use (i.e., they never informed him he was in danger of getting shot). 673 F.3d at 876; *see also Deorle*, 272 F.3d at 1284 ("Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to

do so when the officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt.").

As in *Glenn*, Browder never told Fridoon that he would shoot him. And as in *Glenn*, a generic warning that did not specify the danger that Fridoon was in, even if such a warning was actually given, does not justify Browder's use of force.

(b) Browder Failed to Use Less Intrusive Alternatives

When evaluating the government's interest in using force, a court must take the availability of less intrusive methods to subdue the suspect into account. *See Smith*, 394 F.3d at 701. The court refused to do so, instead asserting that "the appropriate inquiry is whether Officer Browder acted reasonably, not whether he had less intrusive alternatives available to him." [ER 11:6-8.]

But the Ninth Circuit has disavowed the district court's reasoning: "[w]e see no conflict between the rule that an officer need not use the least intrusive means in apprehending a suspect and the concept that there are nonetheless circumstances in which an officer who does not use the least intrusive means might use a level of force that cannot be justified." *Bryan*, 630 F.3d at 813. It is a "clear rule" in the Ninth Circuit that "the presence of feasible alternatives is a *factor* to include in our analysis." *Id*. (citation omitted).

Browder was carrying a Taser, mace, and a collapsible baton with him that evening, but never even considered using one of them in place of his gun. [ER

312:16-314:11; ER 603, ¶ 24.] Plaintiffs' expert described Browder's nonlethal alternatives as "obvious," and stated that the circumstances of the case mandated that Browder was "required" to use them in place of lethal force. [ER 603, ¶ 23.] Browder's failure to use these nonlethal options is further evidence that Browder acted unreasonably in using his gun instead. *See Glenn*, 673 F.3d at 876 (where there were "'clear, reasonable, and less intrusive alternatives' to the force employed, that 'militate[s] against finding [the] use of force reasonable'" (citation omitted)); *Vos v. City of Newport Beach*, No. 16-56791, 2018 WL 2771049, at *6 (9th Cir. June 11, 2018) (lethal force was not reasonable, even in the face of a charging suspect, where "officers had non-lethal means ready and available").

Per Defendants, the range of a Taser is 21 feet. [ER 313:18-20.] Fridoon was within that range, at 17 feet from Browder. [ER 182, ¶ 5(e).] There was no rain, excessive wind, or other weather factor that would have rendered use of a Taser less viable. [ER 595 0:55-2:00.] The Taser thus presented an obvious, reasonable alternative.

C. The District Court Erred In Finding Browder's Use Of Force To Be Reasonable

Finally, the district court erred in balancing Browder's use of force against the government's need for that force as a matter of law. There are questions of fact that must be weighed by a jury before making that determination.

1. The Case Law Indicates That Browder Acted Unreasonably in Shooting Fridoon

As set forth above, *Glenn v. Washington County* found summary judgment inappropriate in circumstances very similar to those present here. Police in *Glenn* were called in response to a disturbance by an agitated man wielding a knife. 673 F.3d at 867. But upon the arrival of the police, the victim was not attacking or threatening to attack anyone, no one was fleeing from him, the police had guns trained upon him and were standing "several feet" away from him, bystanders were situated behind the police, the police could have retreated to a safer position, the police never warned him they were about to use a beanbag gun on him, and there was no indication that the victim heard or understood the instructions. *Id.* at 873-74.

The Ninth Circuit held that "[v]iewing the evidence in the light most favorable to the plaintiff, even though [the victim] remained in possession of the pocketknife, a jury could conclude that at the moment the officers shot him with the beanbag gun there was little evidence that he posed an 'immediate threat' to anybody." 673 F.3d at 874 (citation omitted). The Ninth Circuit found that summary judgment was inappropriate even though police had used a beanbag gun, a much less lethal form of force than a gun. *Id.*

The present case is also similar to *Estate of Lopez by & through Lopez v. Gelhaus*. In that case, the Ninth Circuit found that defendants were not entitled to summary judgment because a reasonable jury could determine that the shooting victim, a thirteen-year-old boy carrying a toy gun, did not pose an immediate threat to the safety of the shooting officer or others. 871 F.3d at 1011. In support of its ruling, the Court noted that the evidence could indicate that: (1) the victim was walking normally; (2) the victim made no aggressive motions; (3) the shooting officer did not identify himself as a police officer; (4) the officer never warned the victim that deadly force would be used despite having the time to do so; (5) the victim was not carrying a weapon, but rather a harmless toy; (6) the toy was never used in an aggressive manner, but rather stayed pointed at the ground; and (7) the only evidence indicating that the victim posed a threat came from the self-serving testimony of the shooting officer and his partner, which a jury might not believe. *Id.* at 1010-12.[4]

[4] Case law from other circuits also holds that deadly force may not be used against an individual holding a knife, who is neither using it nor threatening to use it. *See, e.g., McKinney by McKinney v. DeKalb County*, 997 F.2d 1440, 1442 (11th Cir. 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other, where the person threw the stick and began to rise from his seated position); *Reyes v. Bridgwater*, 362 F. App'x 403, 404–05 (5th Cir. 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer's multiple commands to drop the knife); *Phong Duong v. Telford Borough*, 186 F. App'x 214, 214-15, 217-18 (3d Cir.

2. The District Court Erred in Distinguishing *Deorle*

The present case is also similar to *Deorle v. Rutherford*, where the Ninth Circuit found summary judgment of an excessive force claim inappropriate when the shooting officer did not see the victim harm or attempt to harm anyone, backup was on the way, the officer was in a secure position, with a clear line of retreat, the officer did not consider other, less dangerous alternatives, the danger to others was minimal, and there was no clear risk of flight. 272 F.3d at 1281-82. The Ninth Circuit made its ruling even though, as in *Glenn*, the officer used a beanbag gun rather than a firearm like Browder's, and even though the victim in *Deorle* gave the shooting officer far more reason to be concerned for his safety. When the police first saw the victim in *Deorle*, he was swinging a two-by-six board with nails protruding from the end around like a baseball bat and screaming, and subsequently proceeded to pick up two hatchets and a crossbow. *Id.* at 1286-87. He even explicitly threatened the officer, telling him, "I'm going to kick your ass, motherfucker." *Id.* at 1287.

But the district court distinguished *Deorle* from the present case, stating that the officer in *Deorle* took a "significant amount of time" to make the decision to

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2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from the officer at the time he was shot).

shoot, as opposed to Browder, who decided to shoot within 30 seconds of his arrival on the scene. [ER 595 1:00-1:26.] But that distinction makes Browder's decision *less* reasonable, not more. While the shooting officer in *Deorle* took time to assess the situation, Browder plunged into the scene and shot almost immediately. Less than 30 seconds elapsed between the time that Browder arrived in the alley and when he shot Fridoon [*id.*], and *less than five seconds* elapsed between the time that Browder exited his car and the moment of the shooting [ER 306:2-9; ER 595 1:24-1:26.] Browder did not take *any* time to assess the situation, nor did he reposition himself so as to give himself more time. [ER 602-603, ¶¶ 21-24.] If he had, then he would have recognized that Fridoon carried only a ballpoint pen and posed no threat. The short timeframe, coupled with the absence of any threatening conduct by Fridoon, suggests that Browder reacted only to the dispatcher's call, and not to the circumstances as he found them.

3. A Jury Could Find That Browder Acted Unreasonably in Shooting Fridoon

In the present case, like in *Glenn*, *Deorle*, and *Lopez*, the evidence is sufficient for a jury to find that Browder acted unreasonably. Specifically, the evidence is such that a jury could find that: Fridoon was walking at a normal, slower-than-average pace [ER 500:6-19, 501:3-13, 502:17-20; ER 543]; Fridoon made no aggressive movements or motions [ER 273:10-274:8, 274:23-275:21,

277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26]; Fridoon did not know that Browder was a police officer [ER 295:18-296:2, 297:2-8, 298:21-24, 305:2-7, 504:3-7, 504:23-505:4, 506:10-13, 507:1-7]; Browder never identified himself as a police officer [ER 302:22-304:2]; Browder never warned Fridoon that he would shoot despite having the time to do so [*id.*]; Fridoon was not carrying a weapon, but rather a harmless ballpoint pen [ER 310:15-19, 407:6-19, 409:23-410:15, 417:8-418:10, 419:21-420:8]; Browder did not reasonably perceive the pen to be a knife [ER 604, ¶ 27]; Browder did not consider using less intrusive means of force [ER 312:16-314:11; ER 603, ¶ 24]; Fridoon never wielded the pen in any aggressive manner [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26]; and Browder's self-serving testimony that he perceived Fridoon to be a threat, which was belied by video evidence and his own statements on the scene, was not credible [ER 304:6-20, 306:2-19, 323:9-21.]

4. The District Court Relied on Inapplicable Law

The only case cited by the district court as comparable to the present case is *Petersen on behalf of L.P. v. Lewis County*, 697 F. App'x 490 (9th Cir. 2017), an unpublished case, not cited by any party in its briefing, that affirmed a grant of summary judgment to a shooting officer on an excessive force claim. [ER 11:18-

12:23.] But while *Petersen* dealt with a shooting officer responding to reports of a man making threats with a knife, the similarities to the present case end there.

In *Petersen*, the shooting officer responded to a call of a man attempting to break into an acquaintance's mobile home armed with a large knife. *Petersen v. Lewis County*, No. C12-5908 RBL, 2014 WL 584005, at *1 (W.D. Wash. Feb. 13, 2014). Prior to the officer's arrival, the suspect had tried to kick the door down, beat on a truck, and stabbed the front door of the mobile home with the knife. *Id.*

Upon encountering the suspect at the scene, the shooting officer identified himself as a police officer and told the suspect he needed to see his hands. 2014 WL 584005, at *2. The suspect began to pace back and forth in the street, keeping his left hand hidden. *Id.* The officer ordered the suspect to get on the ground, but the suspect refused and said "that ain't going to happen, buddy." *Id.* The officer saw the muscles in the suspect's arm flex and his whole body posture change. *Id.* The suspect then "charge[d]" the officer, and the officer shot him with his gun. *Petersen*, 697 F. App'x at 491. The encounter lasted one minute and eleven seconds, over 14 times longer than the time after Browder exited his car. *Petersen*, 2014 WL 584005, at *2.

Unlike Fridoon, who did nothing more than walk slowly down an alleyway, the suspect in *Petersen* acted erratically, and explicitly informed the officer that he would not comply with his instructions. The officer in *Petersen* took the time to

assess the situation and observe the suspect, unlike Browder who shot within a few seconds and did not take the time to differentiate a knife from a ballpoint pen. Finally, the officer in *Petersen* waited to shoot until he was clearly in danger, with a possibly armed and agitated suspect *charging directly at him*. Browder fired his gun without any reasonable reason to suspect he was in danger.

As in *Glenn*, *Deorle*, and *Lopez*, there are triable issues of fact as to the reasonableness of the shooting, and the district court's grant of summary judgment should be reversed. *See Gregory v. County of Maui*, 523 F.3d 1103, 1106 (9th Cir. 2008) (excessive force claims "nearly always require[] a jury to sift through disputed factual contentions, and to draw inferences therefrom . . . summary judgment . . . should be granted sparingly" (citation omitted)).

III. THE DISTRICT COURT ERRED IN FINDING THAT BROWDER DID NOT VIOLATE PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS AS A MATTER OF LAW

The district court further erred in granting summary judgment on Plaintiffs' Fourteenth Amendment claim. The court conceded that a Fourteenth Amendment violation occurs when a shooting officer acts with a purpose to harm, unrelated to legitimate law enforcement objectives.[5] [ER 17:11-18:28.] Accepting as true the

[5] Browder had sufficient time to deliberate his response to the situation, such that the "deliberate indifference" standard of Fourteenth Amendment liability may

facts most favorable to Plaintiffs, Browder's shooting met this standard because neither he nor anyone else was in danger at the time of the shooting.

In *A.D. v. Cal. Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), the Ninth Circuit upheld a jury's determination that a highway patrolman acted without a legitimate law enforcement objective when he shot and killed a suspect despite a lack of danger to himself or others. Following a prolonged car chase, the suspect had stopped and refused to exit her car when the officer decided to shoot. *Id.* at 458. Other officers at the scene did not feel threatened or perceive an immediate threat. *Id.* While the officer testified that the suspect's car was moving toward a fellow officer's car, other evidence indicated that the car was actually stopped. *Id.* The Court held that under the circumstances, the jury had sufficient evidence to find that the officer had acted with a purpose to harm unrelated to a legitimate law enforcement objective. *Id.* at 461.

Similarly, in *Ortega v. San Diego Police Dep't*, No. 13cv87-LAB (JMA), 2014 WL 6388488 (S.D. Cal. Nov. 14, 2014), the district court denied summary judgment for an officer who shot and killed a suspect where the evidence indicated that it was only the officer, not the suspect, who posed a lethal danger. *Id.* at *8. *Ortega* dealt with a police officer pursuing a suspect following a domestic violence

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apply instead. The applicable standard is irrelevant, however, as the circumstances of this case show triable issues of fact under either standard.

call. *Id.* at *1. The officer and the suspect got into a physical struggle. *Id.* Though the officer claimed that he shot the suspect after the suspect tried to grab his gun, competing evidence cast this into doubt. *Id.* at *3. Specifically, witnesses testified that before the shooting, in response to the officer's warning, the suspect shouted, "Are you kidding me?" and "Get the f**k off of me, I'm gonna sue you!" *Id.* The testimony also indicated that the suspect's tone of voice was "one of compliance and disbelief, not confrontational or violent." *Id.* The court found that this evidence was sufficient for a jury to find that the officer acted with an impermissible intent to harm, rather than to protect himself. *Id.* at *8.

In this case, a jury could find that Fridoon did not pose a danger to Browder or anyone else at the time of the shooting. (*See supra* Section II.B.2.) Thus, under *A.D.* and *Ortega*, a jury could find that Browder acted not with a legitimate law enforcement objective to protect himself or others, but rather with intent to harm.

IV. THE DISTRICT COURT ERRED IN FINDING THAT BROWDER IS ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

The district court erred in ruling that Browder is entitled to qualified immunity. A public official is not entitled to qualified immunity under section 1983 where a plaintiff can show that the official (1) violated a statutory or constitutional right, (2) that was "clearly established" at the time of the challenged

conduct. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (citation omitted). The evidence in this case creates triable issues of fact.

Specifically, a court cannot grant qualified immunity at summary judgment where disputed factual issues exist. *See Lopez*, 871 F.3d at 1021 (where a shooting officer's "entitlement to qualified immunity ultimately depends on disputed factual issues, summary judgment is not presently appropriate"); *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) (quoting the Ninth Circuit's Model Civil Jury Instructions for its finding that "[w]hen there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity").

A. The District Court Erred In Finding That Browder Did Not Violate Plaintiffs' Constitutional Rights

As set forth herein, the evidence and law demonstrate that triable issues of fact exist as to whether Browder's conduct violated Plaintiffs' rights under the Fourth and Fourteenth Amendments. (*See supra* Sections II and III.)

B. Browder Violated A Clearly Established Right By Shooting Fridoon

The district court also erred in finding that Browder did not violate a "clearly established right" in shooting and killing Fridoon as a matter of law. Specifically, the district court held that Browder is entitled to qualified immunity because no

legal precedent put Browder on "clear notice" that using deadly force would be excessive. [ER 15:26-17:14.] That ruling was in error, both because no such precedent is required in the case of an obvious constitutional violation, and also because such precedent did indeed exist.

1. Browder Committed an Obvious Violation of Constitutional Rights by Shooting an Unarmed Man

Ninth Circuit law holds that a right can be "clearly established," even without a specific precedent that matches the facts of the case, where the conduct at issue is obviously violative of constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle*, 272 F.3d at 1286.

Browder used lethal force against an unarmed man who was not committing any crime, not fleeing from police, and posed no threat to Browder or to anyone else. Fridoon was walking slowly down an alleyway holding a ballpoint pen. Shooting Fridoon under these circumstances constituted an obvious violation of the Fourth Amendment. As the Ninth Circuit has held, "[t]he law governing this case is clearly established: 'A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'" *Longoria*, 873 F.3d at 709 (citation omitted).

"While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the . . . suspect poses a threat of serious physical harm, either to the officer or to others.'" *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011).

The Ninth Circuit has held that it is inappropriate for a judge to make a decision on qualified immunity before a jury has resolved disputed issues of fact. *See Morales*, 873 F.3d at 823 ("A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved."). In such circumstances, the jury must resolve the disputed issues, and then the trial judge can make his legal decision in accordance therewith.

Here, the court erred in finding as a matter of law that Browder did not commit an "obvious" constitutional violation. Its holding was based on its findings that Fridoon exhibited "objectively threatening behavior" [ER 17:19-23], that Browder warned Fridoon to drop the knife [ER 18:13-15], and that Fridoon "advanc[ed] toward [Browder] in a threatening manner" [*id.*].

Each of these propositions, however, is directly contradicted by evidence. (*See supra* Section I.) They are, therefore, matters to be determined by a jury, not

by a judge at the summary judgment stage. *See Lopez*, 871 F.3d at 1021 (summary judgment was not appropriate where "qualified immunity ultimately depends on disputed factual issues").

2. Clear Precedent Existed to Put Browder on Notice That His Conduct Was Unconstitutional

The district court found that no precedent put Browder on notice that his conduct was unlawful. To the contrary, multiple Ninth Circuit decisions should have advised Browder that lethal force was unwarranted in these circumstances.

The *Deorle* decision made it clear that "[e]very police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Deorle*, 272 F.3d at 1284, 1285 (further holding that "[s]hooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with [an innocuous object] in his hand is clearly not objectively reasonable"). As in *Deorle*, Fridoon was unarmed, had committed no serious offense, was not fleeing, and presented no reasonable threat to Browder's or anyone else's safety. (*See supra* Section II.B.)

Glenn v. Washington County is on point. 673 F.3d 864. As set forth above, the details of the shooting in *Glenn* are very similar to the present case, and in that case the Ninth Circuit refused to find it reasonable that police shot the victim with a beanbag gun, a less lethal option than Browder's weapon. (*See supra* Section II.B.2.c.) *Glenn* thus presented notice to Browder that lethal force would have been unlawful under the circumstances, and Browder is not entitled to qualified immunity.

This case is distinguishable from the Supreme Court's recent decision in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), which granted qualified immunity to a shooting officer. First, Browder's violation of Plaintiffs' constitutional rights was far more obvious than the alleged violation in *Kisela*. The victim in *Kisela* was armed with a large kitchen knife, was acting erratically, and stood only six feet away from an innocent bystander. *Id.* at 1151. Fridoon, in contrast, held a ballpoint pen, was 17 feet away from Browder and much further from any bystander, and was doing nothing more than walking slowly down an alleyway, by himself. (*See supra* Section II.B.2.c.) The *Kisela* victim thus presented a much more threatening image than Fridoon.

But more importantly, the *Kisela* shooting took place before the Ninth Circuit handed down its *Glenn* decision in 2011. 138 S. Ct. at 1154. *Glenn*, described in *Kisela* as the "most analogous Ninth Circuit case," thus could not

have placed the shooting officer on notice that his conduct was unconstitutional. *Id*. Browder, however, shot Fridoon in 2015, four years after *Glenn* was decided. Unlike the officer in *Kisela*, *Glenn* could thus provide Browder with clear notice that his conduct was unconstitutional.

V. THE DISTRICT COURT ERRED BY DENYING PLAINTIFFS' *MONELL* AND SUPERVISORY LIABILITY CLAIMS

The district court granted summary judgment to Defendants on Plaintiffs' *Monell* and supervisory liability claims. The court's ruling, however, was based upon the erroneous finding that Browder did not violate Plaintiffs' constitutional rights as a matter of law. As set forth herein, there exist questions of fact as to whether Browder violated Plaintiffs' constitutional rights under the Fourth and Fourteenth Amendments. (*See supra* Sections II and III.)

Accordingly, the district court's decision should be reversed and remanded. *See Glenn*, 673 F.3d at 880 (reversing and remanding *Monell* claim to the district court where the "district court's dismissal of Glenn's *Monell* claim was based entirely on the erroneous entry of summary judgment in the defendants' favor on the excessive force question"); *Vos*, 2018 WL 2771049, at *8 (remanding summary judgment on *Monell* claim where the judgment was based only on a denial of the constitutional claim, and the judgment on the constitutional claim had been reversed).

VI. THE DISTRICT COURT ERRED BY REJECTING PLAINTIFFS' STATE LAW CLAIMS

A. The District Court's Ruling On Plaintiffs' State Law Claims Was Premised On Its Erroneous Ruling On The Constitutional Claims

The Ninth Circuit will reverse and remand summary judgment rulings as to state law claims where those claims are based exclusively on erroneous summary judgment rulings on a corresponding constitutional claim. *See Glenn*, 673 F.3d at 880 (where summary judgment of a wrongful death claim was based solely on summary judgment of a Fourth Amendment excessive force claim, "our reversal of the summary judgment on the § 1983 claim also requires reversal of the summary judgment on the wrongful death claim"); *Zion*, 874 F.3d at 1078 (remanding state law claims to the district court where the court had relied on an erroneous summary judgment of plaintiff's Fourth Amendment claims to rule against state law claims).

Like its decision on the *Monell* and supervisory liability claims, the district court granted summary judgment to Defendants on Plaintiffs' state law claims based entirely on its ruling on Plaintiffs' excessive force claim. [ER 19:9-14.] As set forth herein, questions of fact exist as to whether Browder used excessive force in shooting and killing Fridoon, and the district court's ruling to the contrary

should be reversed. (*See supra* Section II.) The district court's ruling as to Plaintiffs' state law claims must therefore be reversed as well.

B. Plaintiffs' State Law Claims Are Judged On Standards Distinct From Their Constitutional Claims

The law is clear that state law negligence and wrongful death claims, which Plaintiffs brought as their eighth and ninth causes of action, respectively, consider different conduct and are judged on different standards than federal excessive force claims. *See Hayes*, 57 Cal. 4th at 638 (criticizing a federal decision for not adequately considering "the differences between federal constitutional liability and state tort liability," and observing that "[t]he Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law" (citation omitted)); *Vos*, 2018 WL 2771049, at *10 (reversing summary judgment of a negligence claim based on an excessive force ruling because, to determine police liability on a negligence claim, "a court applies tort law's 'reasonable care' standard, which is distinct from the Fourth Amendment's 'reasonableness' standard").

For example, an officer's pre-shooting conduct, while not relevant to constitutional liability, is indisputably relevant to determining negligence under state law. *Hayes*, 57 Cal. 4th at 629-30 ("[T]he preshooting conduct of the officers[] might persuade a jury to find the shooting negligent."). Neither party

briefed the issue of Browder's pre-shooting conduct, as neither party was on notice that such conduct was at issue in the motion for partial summary judgment.

The district court failed to acknowledge these distinctions. Instead, it granted summary judgment on Plaintiffs' negligence and wrongful death claims as a matter of course, on the same grounds that it disposed of their excessive force claim. [ER 19:9-14.] This is legal error, and warrants reversal.

C. The District Court Had No Power To Grant Summary Judgment *Sua Sponte* Without Providing Notice

A district court has no authority to grant summary judgment *sua sponte* without first providing the parties with notice and a reasonable time to respond. *See* Fed. R. Civ. P. 56(f) (granting courts the power to grant summary judgment independent of a motion only after "giving notice and a reasonable time to respond"). The district court, however, granted summary judgment *sua sponte* for Defendants on Plaintiffs' negligence and wrongful death claims, without notice to either party. The court had no power to do so, and this ruling must be reversed.

Defendants moved for summary judgment only on Plaintiffs' first seven causes of action. [ER 772:23-24.] Notably, they did not move on either Plaintiffs' eighth or ninth causes of action, for negligence and wrongful death. The district court nevertheless granted summary judgment for Defendants on all of Plaintiffs' claims, including the entirety of their state law claims. [ER 19:9-22.]

This was legal error:

> "*Sua sponte* grants of summary judgment are only appropriate if the losing party has reasonable notice that the sufficiency of his or her claim will be in issue." "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." A district court that "does not comply with the advance notice and response provisions of Rule 56(c) has no power to enter summary judgment."

Norse, 629 F.3d at 971-72 (citations omitted).

The district court did not provide notice to either party that it was considering summary judgment *sua sponte* as to these claims. The court did not provide either party with an opportunity to present evidence or argument as to these claims. Indeed, the court did not even acknowledge in its decision that it was granting summary judgment *sua sponte*.

The district court's ruling as to Plaintiffs' negligence and wrongful death claims must therefore be reversed. *See Norse*, 629 F.3d at 971-72; *see also Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993) (reversing summary judgment where the district court's *sua sponte* ruling did not afford the losing party notice or opportunity to present relevant arguments).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the judgment below, and remand the case with directions to the district court to deny Defendants' Motion for Partial Summary Judgment.

DATED: June 20, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

No other cases in this Court are deemed related to this case pursuant to Ninth Circuit Rule 28-2.6.

DATED: June 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(g)(1), the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,821 words, as indicated by the word count function in Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced Times New Roman typeface in 14-point font.

DATED: June 20, 2018 MILLER BARONDESS, LLP

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1999 Avenue of the Stars, Suite 1000, Los Angeles, CA 90067.

On June 20, 2018, I served true copies of the following document(s) described as:

APPELLANTS' OPENING BRIEF

on the interested parties in this action as follows:

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BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 20, 2018, at Los Angeles, California.

/s/*Alexandria Alamango*
Alexandria Alamango

SERVICE LIST
Nehad v. City of San Diego
Case No. 18-55035

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