APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.R. NEHAD; K.R. NEHAD; ESTATE OF FRIDOON RAWSHAN NEHAD,
Plaintiffs-Appellants,

v.

NEAL N. BROWDER; CITY OF SAN DIEGO; SHELLEY ZIMMERMAN, in her personal and official capacity as Chief of Police,
Defendants-Appellees.

No. 18-55035
D.C. No. 3:15-cv-01386-WQH-NLS

OPINION

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted February 27, 2019
Southwestern Law School Los Angeles, California

Filed July 11, 2019

Before: Sidney R. Thomas, Chief Judge, Michael Daly Hawkins, Circuit Judge, and Dean D. Pregerson,[*] District Judge.

Opinion by Judge Pregerson

SUMMARY[**]

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment in favor of defendants and remanded in an action alleging that a City of San Diego police officer used excessive deadly force when he shot and killed Fridoon Nehad.

The panel held that there were several genuine disputes of material fact regarding plaintiffs' Fourth Amendment claim. At a broad level, the panel held that a triable issue remained regarding the reasonableness of the police officer's use of deadly force. More specifically, there were genuine disputes about: (1) the officer's credibility; (2) whether Nehad posed a significant, if any, danger to anyone; (3)

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[*] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

whether the severity of Nehad's alleged crime warranted the use of deadly force; (4) whether the officer gave or Nehad resisted any commands; (5) the significance of the officer's failure to identify himself as a police officer or warn Nehad of the impending use of force; and (6) the availability of less intrusive means of subduing Nehad.

The panel further held that disputed factual questions also precluded a grant of summary judgment on qualified immunity grounds, as it was well-established at the time of the shooting that the use of deadly force under the circumstances in this case, viewed in the light most favorable to plaintiffs, was objectively unreasonable.

The panel held that plaintiffs presented sufficient evidence of police department customs, practices, and supervisory conduct to support a finding of entity and supervisory liability. Furthermore, the district court never afforded plaintiffs an opportunity to be heard before granting summary judgment on the negligence and wrongful death claims sua sponte. The panel therefore reversed the grant of summary judgment in favor of defendants on plaintiffs' Fourth Amendment and state law claims.

The panel affirmed the grant of summary judgment in favor of defendants on plaintiffs' claim for violation of their Fourteenth Amendment interest in the companionship of their child. The panel held that the police officer's use of force, even if unreasonable, did not evidence a subjective purpose to harm.

COUNSEL

Daniel S. Miller (argued), Sean G. McKissick, J. Mira Hashmall, and Louis R. Miller, Miller Barondess LLP, Los Angeles, California, for Plaintiffs-Appellants.

George Frederick Schaefer (argued), Assistant City Attorney; Kathy J. Steinman, Deputy City Attorney; Mara W. Elliott, City Attorney; Office of the City Attorney, San Diego, California; for Defendants-Appellees.

Scott J. Street, Baute Crochetiere & Hartley LLP, Los Angeles, California; Brian Hardingham, Public Justice P.C., Oakland, California; Adrienna Wong and Peter Bibring, ACLU Foundation of Southern California, Los Angeles, California; for Amici Curiae American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego & Imperial Counties, and Public Justice.

Lee H. Roistacher, Daley & Heft LLP, Solana Beach, California, for Amici Curiae California State Association of Counties, League of California Cities, and International Municipal Lawyers Association.

OPINION

PREGERSON, District Judge:

On April 30, 2015, Officer Neal Browder of the San Diego Police Department responded to a 911 call

about a man making threats with a knife. Browder arrived at the scene, where he encountered Fridoon Nehad walking at a steady pace in Browder's direction. The subsequent series of events, which is in dispute, culminated in Browder exiting his vehicle and, less than five seconds later, fatally shooting Nehad.

Appellants brought Fourth Amendment, Fourteenth Amendment, and state law claims against Browder, San Diego Chief of Police Shelley Zimmerman, and the City of San Diego. The district court granted summary judgment to Appellees on all claims.

We have jurisdiction under 28 U.S.C. § 1291. Reviewing the district court's grant of summary judgment de novo, we affirm with respect to Appellants' Fourteenth Amendment claim, reverse with respect to all other claims, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after midnight on April 30, 2015, Andrew Yoon encountered Fridoon Nehad outside the bookstore where Yoon worked. Nehad showed Yoon an unsheathed knife and said that he wanted to hurt people. Nehad was incoherent and "didn't seem like he knew what was going on[,]" so Yoon returned to work inside the store. A few minutes later, Nehad entered the store without a knife in hand, again said he wanted to harm people, then left the store via a side door into an adjoining alley. Yoon called 911 and told

the emergency dispatcher that Nehad had threatened him with a knife.

Around 12:06 a.m., the police dispatcher put out a "Priority 1" call for a "417 (Threatening w[ith] weapon)," and indicated that a male in a back lot was threatening people with a knife.[1] San Diego Police Department Officer Neal Browder volunteered to respond to the call and drove to the scene in his police cruiser.

Surveillance camera footage shows that Nehad was walking down the alley behind the bookstore toward the street before Browder arrived. Browder turned his car from the street into the alley and turned on his car's high headlight beams. Browder did not activate his car's siren or police lights. Browder saw two people in a parking lot adjoining the alley and, soon after turning into the alley from the street, saw Nehad in the alley. Browder confirmed with dispatch that Nehad matched the description of the person brandishing a knife.

Once in the alley, Browder brought his vehicle to a halt and opened the driver's side door. Nehad continued to walk down the alley toward Browder and the street. Browder's vehicle advanced a short distance with the driver's door open before again coming to a

[1] California Penal Code § 417 provides that anyone who draws or exhibits a deadly weapon, other than a firearm, "in a rude, angry, or threatening manner" is guilty of a misdemeanor. Cal. Pen. Code § 417(a)(1).

stop. Nehad continued to walk toward Browder at a steady pace. Browder did not hear Nehad say anything, and did not see Nehad change his pace or make any sudden movements. Approximately twenty-eight seconds after pulling into the alley and eighteen seconds after opening his car door, Browder exited his vehicle. Browder did not activate his body camera.

Eyewitness accounts of what happened next differ. One witness, Andre Nelson, testified that Nehad was stumbling forward at a "drunken pace" in a nonagressive manner, "like he wasn't all there," while "fiddling with something in his midsection." Nelson could not recall Browder audibly identifying himself as a police officer, giving any type of warning, or saying anything at all. Nelson did recall Browder extending his left hand in a "stop" motion. No such motion is clearly visible on the surveillance video. Another witness, Albert Gallindo, testified that he heard Browder say, "Stop, drop it" two or three times.[2] Yoon, who was still on the phone with the emergency dispatcher when Browder arrived, recalled hearing Browder say "Stop, drop it" one time, no more than a "couple seconds" after Browder got out of the police car. Browder did not recall identifying himself or saying anything to Nehad. Video surveillance shows Nehad slowed down a few moments after Browder exited his vehicle, although it is unclear whether

[2] Gallindo also testified that Browder said, "Throw it down. Throw it down." It is unclear, however, whether Gallindo meant that Browder gave that command in addition to or as a variant of, "Stop, drop it."

Browder perceived or could have perceived Nehad's change of pace.

Less than five seconds after exiting his vehicle, Browder fired a single shot at Nehad, fatally striking him in the chest. Nehad was approximately seventeen feet away at the time Browder shot him.

A few hours later, after police investigators arrived at the scene, they asked Browder whether he saw any weapons and where in the alley they might be. Browder told the investigators that he had not seen any weapons. Browder's attorney would not allow investigators to ask Browder any more questions that night. The investigators did not find any weapons in the alley, and determined that Nehad had been carrying a metallic blue pen when Browder shot him.[3]

On May 5, five days after the shooting, Browder and his attorney met with homicide investigators at a police station. Police officials provided Browder and his attorney with surveillance video of the shooting, which Browder and his attorney reviewed in a police lieutenant's office for approximately twenty minutes before an interview commenced. During the interview, Browder stated that he first saw Nehad when Nehad was twenty-five to thirty feet from Browder's car and that Nehad was "aggressing" the car and "walking at a fast pace . . . right towards [the] car." Browder also stated, for the first time, that he had thought Nehad was carrying a knife, and that he had fired on Nehad

[3] Investigators did find a knife sheath in the alley.

because he thought Nehad was going to stab him.

Appellants, Nehad's parents and estate, filed suit against Browder, the City of San Diego, and San Diego Chief of Police Shelley Zimmerman (collectively, "Appellees"). In the operative Second Amended Complaint ("SAC"), Appellants allege 42 U.S.C. § 1983 claims for Fourth and Fourteenth Amendment violations and *Monell* and supervisory liability, two civil rights claims under state statutes, and common law claims for assault and battery, negligence, and wrongful death. Appellees filed a motion for summary judgment on seven of the nine claims, excluding the SAC's common law claims for negligence and wrongful death.

The district court granted Appellees' motion. The court granted summary judgment on Appellants' Fourth Amendment claim because, according to the district court, Browder's use of force was objectively reasonable. The court granted summary judgment on Nehad's parents' Fourteenth Amendment claim because there was no evidence that Browder acted with a purpose to harm unrelated to legitimate law enforcement objectives. The court further concluded that Browder was entitled to qualified immunity because there was no clear precedent establishing that Browder's use of deadly force would be considered excessive. The court also, in light of its determination that no constitutional violation had occurred, dismissed the *Monell* and supervisory liability claims against all Appellees. Lastly, the court concluded that, because Browder's use of force was objectively

reasonable, Appellees were entitled to summary judgment on "all" state law claims.

Appellants now appeal the district court's grant of summary judgment.

STANDARD OF REVIEW

We review de novo a grant of summary judgment to determine whether "a rational trier of fact might resolve the issue in favor of the nonmoving party." *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). In so doing, we view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor. *Id.* We also review de novo a district court's grant of summary judgment on qualified immunity grounds. *Id.*

ANALYSIS

A. *Whether a Jury Could Conclude that Browder's Use of Force Was Unreasonable*

In Fourth Amendment excessive force cases, we examine whether police officers' actions are objectively reasonable given the totality of the circumstances. *Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 642 (9th Cir. 2018); *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010). Our analysis must balance the nature of the intrusion upon an individual's rights against the countervailing government interests at stake, without regard for the officers' underlying intent or motivations. *Graham v. Connor*, 490 U.S. 386, 396–97

(1989). Whether a use of force was reasonable will depend on the facts of the particular case, including, but not limited to, whether the suspect posed an immediate threat to anyone, whether the suspect resisted or attempted to evade arrest, and the severity of the crime at issue. *Id.* at 396. Only information known to the officer at the time the conduct occurred is relevant. *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546–47 (2017); *Glenn v. Washington Cty.*, 673 F.3d 864, 873 n.8 (9th Cir. 2011).

1. *Whether Nehad Posed a Danger*

The most important *Graham* factor is whether the suspect posed an immediate threat to anyone's safety. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc). The use of deadly force is only reasonable if a suspect "poses a *significant* threat of death or serious physical injury to the officer or others." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014) (emphasis added) (internal quotation omitted).

Here, there is a genuine dispute as to whether Nehad posed a significant threat to Browder's safety.[4] To be sure, there is some evidence in the record that Nehad did pose a threat to Browder. Browder stated

[4] Although two bystanders were present in a parking lot adjoining the alley, Browder testified that he did not believe that anyone else was under threat of immediate bodily harm when he shot Nehad, and there is no evidence that either bystander was or felt threatened.

that he thought Nehad had a knife, and two witnesses heard Browder say some variant of, "Stop, drop it." Browder further testified that Nehad was "aggressing" Browder's vehicle, and that Browder thought Nehad was going to stab him. The question on summary judgment, however, is not whether some version of the facts supports Appellees' position, but rather whether a trier of fact, viewing the evidence in the light most favorable to Appellants, could find in Appellants' favor. *Blankenhorn*, 485 F.3d at 470. We therefore proceed by viewing the evidence in the record through that lens.

a. *Browder's Credibility*

As an initial matter, "summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt." *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016). Here, approximately three hours after the shooting, Browder told homicide investigators that he did not see any weapons, and made no mention of feeling threatened by Nehad. Five days later, however, after consulting with his attorney and reviewing surveillance footage inside a police station, Browder claimed that he thought Nehad had a knife, that Nehad was "aggressing" the car, and that he thought Nehad was going to stab him. These possible inconsistencies, along with video, eyewitness, and expert evidence that belies Browder's claim that Nehad was "aggressing," are sufficient to give rise to genuine doubts about Browder's credibility.

b. *The Reasonableness of Browder's Beliefs*

Appellees, relying upon an out of context quotation from *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010), suggest that when examining the immediacy of the threat a suspect posed, the "critical inquiry is what the officer perceived." Appellees are mistaken. Where, as here, "an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact." *See Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011).[5] "[W]hether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one." *Id.* at 1127.

In that regard, Appellees assert that it was not unreasonable for Browder to mistake a pen for a knife because Browder knew that someone matching Nehad's description had been reported as carrying a

[5] *Wilkinson* is not to the contrary. There, the question was whether a reasonable officer could have believed fellow officers were in danger where a suspect driver had failed to yield to police sirens or commands and was accelerating his vehicle in a muddy yard near two disoriented police officers. *Wilkinson*, 610 F.3d at 551. We explained that whether one of the disoriented officers was, in actuality, out of the suspect's vehicle's trajectory was less important than the shooting officer's reasonable perception, *uncontradicted by any evidence* and supported by bystander testimony, that his fellow officer had been run over and was in danger of being hit again. *Id.* We did not suggest, in *Wilkinson* or elsewhere, that the objective reasonableness of an officer's response is dependent upon that officer's subjective perceptions.

knife and there is evidence that Nehad was "fiddling with something" as he walked down the alley.[6] A reasonable trier of fact could, however, conclude that Browder's mistake was not reasonable. Appellants' police practices expert opined that officers are trained to recognize what suspects are carrying and to distinguish pens from knives, and that Browder had "very sufficient time to determine that it was not a knife in Nehad's hand and, in fact was a pen . . . ." Furthermore, one of the homicide investigators testified that the lighting in the alley was sufficient to enable an observer to identify the color blue in the pen, even taking into account the distance between Browder and Nehad. Whether Browder reasonably mistook the pen for a knife is therefore a triable question of fact.

c. *Whether, Even if Armed, Nehad Posed a Threat*

Even if it were established that Browder reasonably believed Nehad was carrying a knife, or even if Nehad had actually been carrying a knife, Browder's use of lethal force was not necessarily

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[6] Simmie Barber, a bouncer at a nearby club, told detectives that he had heard from Yoon that Nehad had a knife. Nehad showed Barber the shiny, polished, silver tip of what Barber understood to be a knife. Nehad did not threaten Barber in any way, and Barber was not worried. Although none of this information was known to Browder, Barber's testimony could support a finding of reasonable mistake, to the extent a factfinder could conclude that Nehad actually showed Barber the metallic tip of a pen and that Barber, too, mistook it for a knife.

reasonable as a matter of law. That a person is armed does not end the reasonableness inquiry. *Glenn*, 673 F.3d at 872; *see also Hayes v. County of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013) ("[T]he mere fact that a suspect possesses a weapon does not justify deadly force.") (alteration in original). Indeed, we have often denied summary judgment in excessive force cases to police officers who use force against armed individuals. *See, e.g.*, *N.E.M. v. City of Salinas*, 761 F. App'x. 698, 699–700 (9th Cir. 2019) (affirming denial of summary judgment to officers who shot garden shear-wielding suspect when he turned toward officers less than nine feet away, after having swung shears at officers); *S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1014 (9th Cir. 2017) (finding triable issue where decedent was armed with a knife); *Hayes*, 736 F.3d at 1233–34 (same); *Glenn*, 673 F.3d at 878–79 (finding triable issue where police used beanbag rounds on knife-wielding subject prior to using lethal force); *cf. Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1017 (9th Cir. 2017) (denying summary judgment where decedent was holding toy AK-47 rifle).

Here, an eyewitness testified that Nehad "wasn't aggressive in nature" and "didn't make any offensive motions." Browder himself testified that Nehad did not say anything, make any sudden movements, or move the supposed knife in any way. Browder further testified that he did not believe anyone else was under threat of immediate bodily harm when he shot Nehad. When Browder fired on Nehad, Nehad was seventeen feet away from Browder and walking at what Appellees' own expert described

as a "relatively slow pace." Appellants' expert, Roger Clark, explicitly opined that Nehad "was actually not a lethal threat" to Browder. Under these facts, even if Browder had reasonably perceived Nehad as holding a knife, a reasonable factfinder could conclude that Nehad did not pose a danger to anyone.

d. *Browder's Role in Creating the Danger*

Appellees make much of the (asserted) fact that Browder had less than five seconds between the time he exited his vehicle and the moment he shot Nehad. We recognize, as we have often done before, that officers must act "without the benefit of 20/20 hindsight," and must often make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Gonzalez*, 747 F.3d at 794 (quoting *Graham*, 490 U.S. at 396–97); *see also Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001). Sometimes, however, officers themselves may "unnecessarily creat[e] [their] own sense of urgency." *Torres*, 648 F.3d at 1127; *see also Porter v. Osborn*, 546 F.3d 1131, 1141 (9th Cir. 2008) ("When an officer creates the very emergency he then resorts to deadly force to resolve, he is not simply responding to a preexisting situation.").[7] Reasonable triers of fact can, taking the totality of the

[7] Although *Porter* involved a Fourteenth Amendment claim, we looked to "analogous jurisprudence" involving Fourth Amendment excessive force claims. *Porter*, 546 F.3d at 1141.

circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, "with undue haste." *Torres*, 648 F.3d at 1126.

Here, evidence in the record could support such a determination. As described above, Nehad was walking down the alley at a relatively slow pace without saying anything or threatening anyone. The lighting was sufficient to allow an observer to identify the color of a pen at a distance of seventeen feet, yet Browder, responding to a call about a man brandishing a knife, drove his car several car lengths into the alley, opened his door, then drove further toward Nehad before exiting his vehicle.[8] Although Browder himself testified that it is important that police officers identify themselves because people may respond differently once they know they are interacting with a police officer, it is undisputed that Browder never identified himself as a police officer or warned Nehad that he was going to shoot. Two witnesses, including Browder himself, could not recall Browder giving any verbal command or saying anything at all. Video surveillance shows that as Nehad continued to walk toward Browder, Browder stepped out sideways from the protection of his vehicle door, closed the door, and, less than two seconds later, fired.

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[8] Nelson, who was facing away from Nehad until approximately ten seconds prior to the shooting, was able to see Nehad "fiddling with something in his midsection" from his position five to ten feet behind Browder.

Appellants' expert emphasized that Browder had "a lot of time" to determine what to do before shooting Nehad, but "squandered all the opportunities tactically." Appellants' expert further elaborated, "It is not a five second decision[,]" and, "[Browder] had all the time he wanted to take . . . ."[9] Given such evidence, a reasonable factfinder could conclude that any sense of urgency was of Browder's own making.

2. *The Severity of the Crime at Issue*

Also relevant to the reasonableness inquiry is the severity of the crime at issue. *Graham*, 490 U.S. at 396. We have applied this factor in two slightly different ways. In *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), for example, we emphasized the government's interest in apprehending criminals, and particularly felons, as a factor "strongly" favoring the use of force. *Miller*, 340 F.3d at 964. Under our logic in *Miller*, a particular use of force would be more

[9] Appellees make several references to the "21-foot rule that a suspect can close a 21-foot distance before an officer can react." Although a suspect's distance from an officer is undoubtedly a relevant factor in a reasonableness analysis, there is evidence in the record calling into question the applicability of the "21-foot rule" here. As Appellees' expert, Geoffrey T. Desmoulin, acknowledged, Browder had more time than average to react because, although the average time for an officer to remove his gun, aim, and shoot is 1.5 seconds, Browder had already unholstered his weapon, and took only 0.83 seconds to raise his weapon, aim, and fire. Furthermore, even if the "rule" were applicable, that fact would have to be balanced against Browder's potential role in creating the urgent circumstances that made the rule applicable. *Torres*, 648 F.3d at 1127.

reasonable, all other things being equal, when applied against a felony suspect than when applied against a person suspected of only a misdemeanor. Here, police dispatch records suggest that Browder was assigned a "Priority 1" call regarding a "417 (Threatening w[ith] weapon)" offense. Because brandishing a knife in violation of California Penal Code § 417 is only a misdemeanor, a strict application of *Miller's* reasoning would provide little, if any, basis for a use of deadly force.

Perhaps recognizing this (notwithstanding their citation to *Miller*), Appellees argue that the police dispatcher's decision to characterize Yoon's 911 call as a "417" misdemeanor should not be dispositive because Nehad's reported conduct "posed a serious threat" and could have been characterized as felonious. This argument reflects the second way in which we have sometimes applied the severity of the crime factor. Although the danger a suspect posed is a separate *Graham* consideration, courts, including this one, have used the severity of the crime at issue as a proxy for the danger a suspect poses at the time force is applied. *See, e.g.*, *Lowry v. City of San Diego*, 858 F.3d 1248, 1257 (9th Cir. 2017) (holding, where officer reasonably concluded that a burglary might be in progress, severity-of-crime factor weighed in favor of use of force because burglary is "dangerous" and "can end in confrontation leading to violence"), *cert. denied sub nom. Lowry v. City of San Diego, Cal.*, 138 S. Ct. 1283 (2018); *Smith v. City of Hemet*, 394 F.3d 689, 702–03 (9th Cir. 2005) (en banc) (holding, where suspect had physically assaulted his wife but was standing alone

on his porch when officers arrived,"the nature of the crime at issue provid[ed] little, if any, basis" for the use of force); *Conatser v. City of N. Las Vegas*, No. 206CV01236PMPLRL, 2009 WL 10679150, at *6 (D. Nev. Nov. 9, 2009) (finding severity of the crime "very low" where no crime was in progress when police arrived, even though suspect might have threatened his mother before police arrived).

This severity-of-crime as proxy-for-danger approach, however, does little to support Appellees' arguments here. Even if Nehad had made felonious threats or committed a serious crime prior to Browder's arrival, he was indisputably not engaged in any such conduct when Browder arrived, let alone when Browder fired his weapon. A jury could, therefore, conclude that the severity of Nehad's crimes, whether characterized as a misdemeanor or an already completed felony, did not render Browder's use of deadly force reasonable. *See Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997) ("[T]he fact that [the suspect] had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight.").[10]

3. *Whether Nehad Was Resisting or Seeking to Evade Arrest*

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[10] We applied this principle in *Harris* notwithstanding the fact that the suspect had fired upon, and possibly killed, a federal agent—a crime far more serious than Nehad's suspected offense. *See Harris*, 126 F.3d at 1193.

In analyzing whether a use of force was reasonable, we also look to whether the suspect was resisting arrest. *Graham*, 490 U.S. at 396. Here, video of the incident clearly shows that Nehad made no attempt to flee from Browder. Appellees argue, nevertheless, that Nehad resisted by failing to obey Browder's command to, "Stop, drop it." As discussed above, although two witnesses heard Browder give a command a few seconds before firing, neither Nelson nor Browder himself had any such recollection. Thus, whether Nehad resisted arrest by ignoring Browder's command is, at best, a disputed issue of fact.

4. *Other Factors*

Other factors, in addition to the three *Graham* factors, may be pertinent in deciding whether a use of force was reasonable under the totality of the circumstances. *Smith*, 394 F.3d at 701; *see also Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994). Here, we consider whether Browder provided Nehad appropriate warnings and whether less intrusive alternatives to deadly force were available.

a. *Failures to Warn*

I. Failure to Order to Halt

In some cases, the absence of a warning or order to halt prior to deploying forceful measures against a suspect may suggest that the use of force was unreasonable. *Deorle v. Rutherford*, 272 F.3d at 1283–84. In *Deorle*, for example, we determined that

"[s]hooting 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" where "the officer neither orders the individual to stop nor drop the can or bottle . . . ." *Id.* at 1284 (finding use of beanbag round unreasonable). We recognize, of course, that it may not always be feasible for an officer to warn a suspect prior to deploying force. Here, however, as discussed above, there is evidence that, like the suspect in *Deorle*, Nehad was walking toward Browder at a slow, steady pace, with no indication of violent intent. And here, as in *Deorle*, there is evidence that Browder never ordered Nehad to halt or to drop whatever he was carrying. Such facts could support a conclusion that Browder's decision to shoot Nehad was unreasonable.

ii. Failure to Warn that Failure to Comply Would Result in the Use of Deadly Force

Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis. *Deorle*, 272 F.3d at 1284. The seemingly obvious principle that police should, if possible, give warnings prior to using force is not novel, and is well known to law enforcement officers. Indeed, it was already common police practice to warn recalcitrant suspects of imminent forceful measures when we decided *Deorle* nearly two decades ago. *Id.* ("Appropriate warnings comport with actual police practice. Our cases demonstrate that officers provide

warnings, where feasible, even when the force used is less than deadly."); *see also Glenn*, 673 F.3d at 864 (holding that an officer's use of a beanbag round without an appropriate prior warning weighed against reasonableness, even though officers had earlier warned the suspect that they would use lethal force and the shooting officer did yell "beanbag, beanbag" before firing).[11] A prior warning is all the more important where, as here, the use of lethal force is contemplated. Even assuming Browder did command Nehad to "Stop, drop it," there is no dispute that Browder never warned Nehad that a failure to comply would result in the use of force, let alone deadly force.[12] A jury could consider Browder's failure to provide such a warning as evidence of objective unreasonableness.

iii. Failure to Identify as a Police Officer

Although not specifically discussed by the parties, we have also considered as relevant a police

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[11] Although Appellees assert that Browder did not have time to give a warning, whether a warning was feasible here is also a triable issue.

[12] A suspect's refusal to comply with police commands despite warnings of serious or deadly consequences, could, of course, weigh in favor of the use of force, either as an "other" factor or as an indication of the threat posed by the suspect. Conversely, a jury could view a suspect's behavior, including failure to comply with police commands, as innocuous where an officer gave no indication of any possible, let alone deadly, consequences.

officer's failure to identify himself or herself as such. *See, e.g.*, *McKenzie v. Lamb*, 738 F.2d 1005, 1010–11 (9th Cir. 1984); *see also, e.g.*, *Vlasak v. Las Vegas Metro. Police Dep't*, 213 F. App'x 512, 514 (9th Cir. 2006) (unpublished disposition); *Bluestein v. Groover*, 940 F.2d 667, 1991 WL 136179, at *2 (9th Cir. 1991) (unpublished disposition); *Kiles v. City of N. Las Vegas*, No. 2:03CV01246 KJDPAL, 2006 WL 1967469, at *2, 4 (D. Nev. July 12, 2006), *aff'd*, 276 F. App'x 620 (9th Cir. 2008). Here, Browder acknowledged he was trained to identify himself as a police officer and that it is important to do so, particularly before using force. However, it is undisputed that Browder never verbally identified himself as a police officer or activated his police lights or siren. A jury could consider those failures in assessing Nehad's response to Browder and in determining whether Browder's use of force was reasonable.

b. *Failure to Use Less Intrusive Alternatives*

Another relevant factor is "the availability of alternative methods of capturing or subduing a suspect." *Smith*, 394 F.3d at 703 (citing *Chew v. Gates*, 27 F.3d 1432, 1441 n.5 (9th Cir. 1994)). Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct. *Glenn*, 673 F.3d at 876 (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). "However, 'police are required to consider [w]hat other tactics if any were available,' and if there were 'clear, reasonable and less intrusive alternatives' to the force employed, that 'militate

against finding [the] use of force reasonable.'" *Id.* (alterations in original) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010)) (internal quotation marks omitted).

Here, Browder carried a taser, mace, and a collapsible baton in addition to his firearm. Appellants' expert described these less-lethal alternatives as "obvious," and it is undisputed that, at the time of the shooting, Nehad was within the taser's effective range. However, Browder admitted he never considered any of the available alternatives. Although Appellees contend the alternatives were not practical for various reasons, that is a question of fact best resolved by a jury. *See id.* at 877 (questions of fact precluded summary judgment where plaintiff's expert testified that taser, rather than beanbag round, was the "'ideal less-lethal option to temporarily disable the decedent, at approximately 15 feet away'").

5. *Conclusion*

Viewing the evidence in the light most favorable to Appellants, we conclude that a rational trier of fact could find that Browder's use of deadly force was objectively unreasonable.

B. *Fourteenth Amendment*

Nehad's parents also assert a claim for violation of their Fourteenth Amendment interest in the companionship of their child. Police action sufficiently shocks the conscience, and therefore violates

substantive due process, if it is taken with either "(1) deliberate indifference or (2) a purpose to harm[,] unrelated to legitimate law enforcement objectives." *A.D. v. California Highway Patrol*, 712 F.3d 446, 453 (9th Cir. 2013) (internal quotation marks omitted). Here, Appellants argue Browder's shooting satisfies the purpose to harm standard because Nehad assertedly posed no danger to Browder or anyone else.[13]

"The purpose to harm standard is a subjective standard of culpability." *Id.* It is well established that a use of force intended to "teach a suspect a lesson" or "get even" meets this standard. *Id.* at 1141. For example, in *A.D.*, we affirmed the denial of the defendant officer's motion for judgment as a matter of law in light of evidence that the decedent posed no danger to anyone and repeatedly insulted the officer before the officer shot her twelve times, even though no other officer opened fire and a supervisor had ordered the officer to stop. *A.D.*, 712 F.3d at 451. We have also reversed a grant of summary judgment where a police officer, who had reasonably fired eighteen shots at a suspect who had just stabbed another officer, walked in a circle around the suspect and then took a running start before stomping on the

[13] "The lower 'deliberate indifference' standard applies to circumstances where actual deliberation is practical." *A.D.*, 712 F.3d at 453 (internal quotation marks omitted). Although Appellants suggest in a brief footnote that the deliberate indifference standard "may apply," we limit our analysis to the argument Appellants actually raise.

suspect's head three times. *Zion v. County of Orange*, 874 F.3d 1072, 1077 (9th Cir. 2017).

The circumstances here are distinguishable from those in *A.D.* and the like. While those cases, like this case, did involve some evidence that a suspect posed no danger, they also involved some additional element suggesting an improper motive on the part of the shooting officer. Here, there is no evidence that Browder fired on Nehad for any purpose other than self-defense, notwithstanding the evidence that the use of force was unreasonable.

Although "[o]bjective reasonableness is one means of assessing whether" conduct meets the "shocks the conscience" standard, an unreasonable use of force does not necessarily constitute a Fourteenth Amendment substantive due process violation. *Brittain v. Hansen*, 451 F.3d 982, 991 n.1 (9th Cir. 2006) (citing *Moreland v. Las Vegas Metropolitan Police Dep't*, 159 F.3d 365, 371 n.4 (9th Cir. 1998) ("[I]t may be possible for an officer's conduct to be objectively unreasonable yet still not infringe the more demanding standard that governs substantive due process claims.")). In *Gonzalez*, for example, we reversed a grant of summary judgment in officers' favor on a Fourth Amendment excessive force claim, but nevertheless affirmed the grant of summary judgment on a Fourteenth Amendment claim because "plaintiffs produced no evidence that the officers had any ulterior motives for using force . . . ." 747 F.3d at 797–98; *see also Hayes*, 736 F.3d at 1231.

We acknowledge that some district courts have indeed denied summary judgment on Fourteenth Amendment claims in the absence of evidence of bad intent separate and apart from evidence of an objectively unreasonable use of force. *See, e.g.*, *F.C., III v. Cty. of Los Angeles*, No. CV 10-169 CAS (RZX), 2011 WL 13127347, at *4 (C.D. Cal. Sept. 13, 2011); *Ramirez v. Cty. of San Diego*, No. 06 CV 1111JM (JMA), 2009 WL 1010898, at *6–7 (S.D. Cal. Apr. 15, 2009). The circumstances of those cases, however, are easily distinguished from those presented here. In *FC, III*, for example, there was evidence that two officers shot a fleeing suspect in the back. 2011 WL 13127347, at *2. In *Ramirez*, there was evidence that an officer shot a fleeing robbery suspect twice in the leg and then, while the suspect was on the ground and possibly raising his hands in surrender, reloaded and shot the suspect six more times in the chest. 2009 WL 1010898, at *2.

Thus, although most meritorious purpose to harm claims will involve evidence of ulterior motive or bad intent separate and apart from evidence of an unreasonable use of force, we decline to hold that such evidence is required as a matter of law. In some cases, a use of force might be so grossly and unreasonably excessive that it alone could evidence a subjective purpose to harm. Here, Browder's use of force, even if unreasonable, does not present such a case. We therefore affirm the district court's grant of summary judgment on the Fourteenth Amendment claim.

C. *Qualified Immunity*

A government official's entitlement to qualified immunity depends on "(1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). Courts may examine either prong first, depending on the relevant circumstances. *Id.* Here, the district court granted Browder qualified immunity on the second prong.

A review of the district court's order, however, reveals that the court construed the facts in the light most favorable to Browder, asserting as established fact not only Browder's version of events, but also other facts favorable to Browder, such as the disputed fact that Browder verbally warned Nehad to "Stop[,] Drop it." "[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." *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) (citing commentary to Ninth Circuit Model Civil Jury Instruction 9.34 (2017)); *see also Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010). As discussed above, there are numerous genuine disputes of material fact, which preclude a grant of summary judgment on qualified immunity.

Appellees argue that even if, under the Appellants' version of the facts, a constitutional right was violated, that right was not clearly established at the time of the shooting. That argument is unconvincing. In determining whether Browder's

mistake as to what the law requires was reasonable, and thus whether he is entitled to qualified immunity under the clearly-established prong, we "assume []he correctly perceived all of the relevant facts and ask whether an officer could have reasonably believed at the time that the force actually used was lawful under the circumstances." *Torres*, 648 F.3d at 1127 (internal quotation marks omitted). This analysis must be made "in light of the specific context of the case, not as a broad general proposition." *S.B.*, 864 F.3d at 1015. There need not be a prior case "directly on point," so long as there is precedent "plac[ing] the statutory or constitutional question beyond debate." *Id.*

Under Appellants' version of the facts, Browder responded to a misdemeanor call, pulled his car into a well-lit alley with his high beam headlights shining into Nehad's face, never identified himself as a police officer, gave no commands or warnings, and then shot Nehad within a matter of seconds, even though Nehad was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to Browder or anyone else. Appellees cannot credibly argue that the prohibition on the use of deadly force under these circumstances was not clearly established in 2015. *Torres*, 648 F.3d at 1128 ("[F]ew things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, non-dangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the [] suspect poses a threat of serious physical harm . . . .'" (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985))). Indeed, nearly twenty years ago, we explained that it was

sufficiently established that a police officer could not reasonably use a beanbag round on "an unarmed man who: has committed no serious offense, . . . 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 1285.

Although Appellees attempt to distinguish *Deorle* because the suspect there was suicidal and officers took several minutes to observe him before using less than lethal force, those facts, to the extent they are distinguishing, weigh against qualified immunity in this case. Here, there is no evidence that any eyewitness to the shooting considered Nehad to be a threat. In light of the evidence that Browder could have taken more time to evaluate the situation, Browder's brief observation of Nehad before using lethal force only makes Browder's conduct *less* reasonable. Browder is therefore not entitled to qualified immunity under the clearly established prong.

D. *Monell and Supervisory Liability*

The district court granted summary judgment in favor of Zimmerman and the City on Appellants' *Monell* claim and in favor of Zimmerman on Appellants' supervisory liability claim on the grounds that (1) there was no constitutional violation, and (2) Appellants presented no evidence that "any policy or deficient training was a 'moving force' behind the

shooting."[14] As discussed above, there are genuine disputes of material fact regarding the first basis for the district court's decision.

The record also belies the district court's second conclusion. As an initial matter, Appellants need not show evidence of a policy or deficient training; evidence of an informal practice or custom will suffice. *See Los Angeles Cty. v. Humphries*, 562 U.S. 29, 30, 36 (2010); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Appellants submitted evidence that: (1) 75% of the San Diego Police Department's officer-involved shootings were avoidable; (2) the Nehad shooting was approved by the department, which took no action against Browder; and (3) the department looks the other way when officers use lethal force. Indeed, Chief Zimmerman explicitly affirmed that Browder's shooting of Nehad "was the right thing to do," and the department identified Browder as the victim of the incident and conducted his interview several days after the shooting, once Browder had watched the surveillance video with his lawyer. This evidence is sufficient to create a triable issue at least as to the

[14] A local government is liable for a constitutional violation if its policies, official decisions, or informal customs cause the violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988). "A defendant may be held liable as a supervisor under [42 U.S.C.] § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (internal quotation marks omitted); *see also Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

existence of an informal practice or policy and, thus, *Monell* and supervisory liability.

E. *State Law Claims*

1. *Triable Issues of Fact Preclude Summary Judgment*

The district court concluded that because Browder's use of force was objectively reasonable, Appellees were entitled to summary judgment "on all state law claims." This included not only Appellants' state civil rights claims under California Civil Code §§ 52.1 and 52.3 and Appellants' assault and battery claim, but also two claims, for negligence and wrongful death, on which Appellees never sought summary judgment. As discussed at length above, whether Browder's use of force was objectively reasonable is a disputed issue of fact. We therefore reverse the district court's grant of summary judgment on all state law claims.[15]

[15] Appellees also argue, briefly, that Appellants' state civil rights claims under California's Bane Act require threats or intimidation other than an underlying use of excessive force. We have squarely rejected that argument, as has the California Court of Appeal. *See Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (discussing *Cornell v. City & Cty. of San Francisco*, 17 Cal. App. 5th 766 (2017)). Although Bane Act claims do require the specific intent to deprive a person of constitutional rights, such intent can be proven by evidence of recklessness. *Id.* at 1045.

2. *Sua Sponte Grant of Summary Judgment on Negligence and Wrongful Death Claims*

Appellees do not dispute that Appellants' state law claims for negligence and wrongful death were not the subject of Appellees' motion for summary judgment and were not briefed to the district court. A district court may only grant summary judgment sua sponte if the losing party has reasonable notice that the claims are at issue and an opportunity to be heard. *Norse v. City of Santa Cruz*, 629 F.3d 966, 971–72 (9th Cir. 2010). Here, Appellants were not provided with such notice or opportunity. We therefore reverse the district court's grant of summary judgment on Appellants' negligence and wrongful death claims for that additional reason.[16]

CONCLUSION

We conclude that there are several genuine disputes of material fact regarding Appellants' Fourth Amendment claim.

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[16] Appellants raise the additional argument that summary judgment was improper because state law negligence claims are judged by different standards than federal constitutional claims. We have observed that state negligence law is indeed broader than federal Fourth Amendment law. *See Vos v. City of Newport Beach*, 892 F.3d 1024, 1037–38 (9th Cir. 2018). Because, however, we reverse the district court's grant of summary judgment on Appellants' state law claims for the reasons discussed above, we need not and do not reach any question regarding the potential differences between state law and constitutional claims.

At a broad level, a triable issue remains regarding the reasonableness of Browder's use of deadly force. More specifically, there are genuine disputes about: (1) Browder's credibility; (2) whether Nehad posed a significant, if any, danger to anyone; (3) whether the severity of Nehad's alleged crime warranted the use of deadly force; (4) whether Browder gave or Nehad resisted any commands; (5) the significance of Browder's failure to identify himself as a police officer or warn Nehad of the impending use of force; and (6) the availability of less intrusive means of subduing Nehad. These disputed factual questions also preclude a grant of summary judgment on qualified immunity grounds, as it was well-established at the time of the shooting that the use of deadly force under the circumstances here, viewed in the light most favorable to Appellants, was objectively unreasonable. Appellants have also presented sufficient evidence of police department customs, practices, and supervisory conduct to support a finding of entity and supervisory liability. Furthermore, the district court never afforded Appellants an opportunity to be heard before granting summary judgment on the negligence and wrongful death claims sua sponte. We therefore **reverse** the grant of summary judgment on Appellants' Fourth Amendment and state law claims. We **affirm**, however, the grant of summary judgment on Appellants' Fourteenth Amendment claims.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

Each party to bear its own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

S.R. NEHAD, an individual, K.R. NEHAD, an individual, ESTATE OF FRIDOON RAWSHAN NEHAD,
Plaintiffs,

v.

SHELLEY ZIMMERMAN, in her personal and official capacity as Chief of Police, NEAL N. BROWDER, an individual, CITY OF SAN DIEGO, a municipality, and DOES 1 through 10, inclusive,
Defendants.

CASE NO. 15cv1386 WQH - NLS

ORDER

HAYES, Judge:

The matter before the Court is the motion for summary judgment (ECF No. 116) filed by Defendants Neal N. Browder, Shelley Zimmerman, and the City of San Diego.

BACKGROUND

On August 28, 2015, Plaintiffs S.R. Nehad, K.R. Nehad, and the Estate of Fridoon Rawshan Nehad (collectively "Plaintiffs") filed a Second Amended Complaint. Plaintiffs allege that Defendant Neal N. Browder is liable under 42 U.S.C. § 1983 for violating the Fourth Amendment rights of Fridoon Rawshan Nehad ("Nehad") by using excessive force and for violating the Fourteenth Amendment rights of S.R. Nehad and K.R. Nehad by depriving them of the companionship of their child. Plaintiffs further allege a § 1983 *Monell* claim against the Chief of Police Shelley Zimmerman and the City of San Diego and a § 1983 *Monell* claim for failure to supervise against Zimmerman. Plaintiffs allege claims under state law against all Defendants.

FACTS

Just after midnight on April 30, 2015, an individual clerking at an adult bookstore store in the Midway District of San Diego called 911 dispatch to report that a man had threatened him with a knife. Police dispatch asked the clerk to stay on the line and immediately put out a broadcast that a suspect was threatening people with a knife. The suspect was described as an Asian or Hispanic man, between fifty or sixty years old, wearing a red shirt and gray sweater. The "hot call" was assigned the highest priority possible by dispatch. Because this was a high risk situation, dispatch activated the Emergency Tone to limit radio traffic.

Officer Browder responded to the call. Officer Browder was first on the scene and initially saw two civilians in the parking lot. Officer Browder made a left turn into an alley, turned his headlights to high beam, and stopped his vehicle. Officer Browder saw the suspect in the alley walking toward his vehicle. Officer Browder confirmed the description of the suspect by communicating with dispatch.

Officer Browder observed the suspect cross from the left side of the alley to the right side of the alley and advance toward him. Officer Browder testified,

> [] I initially saw Fridoon as he was approaching the car, then I confirmed the description with communications. . . . [A]fter I confirmed that he was the right person that I had, that's when I noticed that it appeared to me that he had a knife in his hand, and that's when I threw the mic in the passenger seat and then put the car into park, and that's when I got out of the car.

(ECF No. 118 at 9).

Officer Browder exited his marked patrol car and drew his handgun. Officer Browder was carrying a taser, mace, and a collapsible baton at the time he exited his patrol car. Officer Browder took a step to the left and closed the door. Officer Browder testified "When I saw him as he was aggressing me, he didn't slow down. . . . it appeared to me he was definitely

focusing on me and was walking toward me with that purpose – with a purpose . . . I felt that he was walking – he was walking to stab me with the knife because that's what I saw. That's what I saw in his hand." (ECF No. 118 at 13). Officer Browder testified that Nehad was holding a "pointy metallic object" in his hand, "his arm was bent and it appeared that it was – the weapon was being pointed at me." *Id*. at 16-17. Officer Browder testified at his deposition as follows:

> Q: Did he make any threatening gesture towards you?
>
> A: Can you explain what you mean by "threatening"?
>
> Q: Did he ever ... did he raise his arm above his head at any point in time?
>
> A: No.
>
> Q: Did he make any thrusting motion with either of his arms?
>
> A: Well, he had what appeared to me the knife in his hand, and it was held in this manner here. . .
>
> Q: And when you observed that, about how far away was he from you, if you could estimate?
>
> A: I'd estimate... maybe a car length, a

car length and a half.

(ECF No. 138-3 at 87-88). Officer Browder fired his handgun hitting Nehad in the chest. No weapons were found at the scene. Nehad had a pen in his hand.

Officer Browder testified at his deposition that he did not recall saying anything to the suspect prior to firing his gun. Three witnesses at the scene gave testimony that they heard Officer Browder give a verbal warning to Nehad prior to firing his weapon. One witness testified that he heard Officer Browder say "Stop" and "Drop it" "two to three times" before he heard a gunshot. (ECF No. 118-1 at 4). The witness who reported the threat to dispatch testified that he heard the police officer say "something along the lines of 'Stop. Drop it,' and then I heard the gunshot." (ECF No. 117-3 at 8). A witness who was approximately ten steps from Officer Browder at the time of the shooting, testified that he observed Officer Browder put his hand out in a gesture to tell the suspect to stop. The witness testified that the suspect was "fiddling with something in his midsection" about ten steps from Officer Browder walking toward Officer Browder. (ECF No. 118-2 at 4-5). The witness stated, "It wasn't in an aggressive manner." *Id*. at 5. The witness testified:

> Q: And you testified the object you saw that he was fiddling with in his left hand, you weren't sure what it was –
>
> A: No. . . . But he was fiddling with it and

> it was shiny and silver like in color.
>
> Q: And you testified you thought it might be a gun?
>
> A: That would be my assumption, but I don't know what it is. So it could be a weapon of opportunity. . . . It could have been anything. It could have been ninja stars for all I know. Like – but I didn't know what it – what it was.

Id. at 8.

Thirty-three seconds elapsed between the time Officer Browder arrived in the alley and the time he fired his handgun. Less than five seconds elapsed between the time Officer Browder got out of his car and the time he fired his handgun. Plaintiffs' expert testified that Nehad was approximately "17 feet" from Officer Browder at the time of the shooting. (ECF No. 118-3 at 10). Defendants' expert testified that it would have taken Nehad "several seconds" to reach Officer Browder at the pace Nehad was walking. (ECF No. 138-3 at 333.) Expert witnesses employed by the parties provided conflicting evidence regarding reasonable alternatives to the use of deadly force under the facts of this case.

Officer Browder was wearing a body-worn camera and did not activate his body-worn camera. A stationary video camera on a building in the alley recorded Officer Browder arrive and turn his vehicle

into the alley. The video shows the suspect appear and walk at steady pace toward Officer Browder's vehicle. The video shows Officer Browder exit his vehicle and the suspect continue to advance toward Officer Browder. The video shows Officer Browder shoot the suspect at a distance of between fifteen and twenty feet. The video shows the suspect begin to slow less than a second before he was shot by Officer Browder.

Officer Browder gave a voluntary interview five days after the shooting. Before the interview, Officer Browder and his attorney were given the video of the shooting. Officer Browder stated in the interview that he believed Nehad was holding a knife and aggressing him. Officer Browder returned to his duties after the shooting and was not disciplined for the shooting.

Nehad had convinced multiple people that he was armed with a knife on the night of the shooting and in the days before the shooting. On April 24, 2015, Nehad threatened to stab a caller while in the Midway District. On April 25, 2015, Nehad was detained by police after a hotel security guard reported Nehad had threatened him with a knife. The weapon was in fact a pen. Nehad was also contacted in the Midway District after it was reported that a man was threatening people with a weapon.

Approximately five minutes before the shooting, the clerk at the adult book store who made the 911 call told the dispatcher that the man identified as Nehad threatened him with a knife. A few minutes before the call by the clerk at the adult bookstore, another

witness saw what he later reported to police as a knife in Nehad's hand.

CONTENTIONS OF THE PARTIES

Defendant Browder contends that he is entitled to summary judgment on the grounds that he did not violate the Fourth or Fourteenth Amendment rights of Nehad and Plaintiffs. Defendant Browder asserts that the undisputed facts in the record show that he reasonably believed he faced an immediate threat of serious bodily injury or death, and that his use of force was reasonable under the circumstances. Defendant Browder further asserts that the undisputed facts establish that he is entitled to qualified immunity. Defendants City of San Diego and Shelley Zimmerman contend that there is no *Monell*[1] liability and no supervisory liability because there was no constitutional violation of Plaintiffs' civil rights and no facts to support supervisor liability. All Defendants contend that the state claims for deprivation of civil rights, assault and battery, and negligence fail as a matter of law.

Plaintiffs contend that summary judgment must be denied because the objective factors do not justify the force used against Nehad by Officer Browder. Plaintiffs assert that no serious crime was occurring and that Nehad was unarmed. Plaintiffs assert that Nehad made no threatening motions toward Officer Browder or anyone else, and that Nehad held his pen

[1] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

out in the open where Officer Browder could see it. Plaintiffs assert that a ballpoint pen does not look like a knife, and that a reasonable officer of Officer Browder's experience and training should be able to distinguish a knife from a pen. Plaintiffs assert that Officer Browder was in a secure position with room to retreat and that a reasonable jury could find that Officer Browder used more force than necessary under the circumstances. Plaintiffs further contend that Officer Browder is not entitled to qualified immunity because he violated a "clearly established right" relying upon precedent in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).

APPLICABLE STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that summary judgment is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970). The burden then shifts to the opposing party to provide admissible evidence beyond the pleadings to show that summary judgment is not appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986).

To avoid summary judgment, the nonmovant must designate which specific facts show that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989). A

"material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The materiality of a fact is thus determined by the substantive law governing the claim or defense. *See Anderson*, 477 U.S. at 248, 252; *Celotex*, 477 U.S. at 322; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ANALYSIS

I. Constitutional violation

The Fourth Amendment permits law enforcement officers to use force "'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). "Proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect posed 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." *Id.* at 396. "Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." *Glenn v. Washington Cty.*, 673 F.3d 864, 872 (9th Cir. 2011). "[T]he 'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of the officers or

others.'" *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97. "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available so long as they act within the range of reasonable conduct." *Hughes v. Kisela*, 862 F.3d 775, 780 (9th Cir. 2016).

At this stage, "all justifiable inferences are to be drawn in [the plaintiff's] favor." *Anderson*, 477 U.S. at 255. The Court of Appeals has recently "noted that '[b]ecause [the question of excessive force] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.'" *Hughes*, 862 F.3d at 782 (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)).

Viewing the facts in the light most favorable to Plaintiffs, the Court concludes that the first factor noted in *Graham*, the severity of the crime at issue,

weighs in favor of the reasonableness of Officer Browder's actions. Officer Browder responded to a hot call that a suspect was threatening people with a knife at midnight in the Midway District. Officer Browder received a hot call to investigate a serious crime and could reasonably anticipate that he would encounter a suspect with a knife. Officer Browder had no indication that the dispatch call involved mental illness or emotional distress.[2] *See Hughes v. Kisela*, 862 F.3d 775, 780 (9th Cir. 2017) (finding that the first factor weighed in favor of plaintiffs in an excessive force case where the officer was responding to welfare check with no crime reported).

The second and "most important" factor in determining the reasonableness of the use of force is "whether the suspect posed an immediate threat to the safety of the officers or others." *George*, 736 F.3d at 838 (internal quotation omitted). In this case, the undisputed facts in the record show that Officer Browder was responding to a potentially dangerous situation involving a suspect reported to be threatening people with a knife. Officer Browder initially observed two civilians and then observed an

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[2] Nehad did suffer from mental illness. The record contains information regarding numerous instances of threatening conduct by Nehad which had been reported to police beginning as early as in 2004, many of which involved knives. (ECF No. 118-4 at 11-14). However, the Court only considers evidence known to Officer Browder in assessing the objective reasonableness of the force used in this case. *See Kingsley v. Hendrickson*, 576 U.S. __, 135 S.Ct. 2466, 2473 (2015); *Hayes v. County of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013).

individual fitting the description of the suspect approaching down an alley toward his vehicle, arm bent at the elbow with a pointy metallic object in his hand. Officer Browder confirmed the description of the suspect with dispatch, as the suspect continued to advance toward his vehicle. Officer Browder exited his vehicle with his weapon drawn believing that the suspect had a knife. All of the actions taken by Officer Browder were consistent with his stated belief that the suspect had a knife in his hand. Three civilian witnesses at the scene heard Officer Browder verbally warn the individual saying "Stop" and "Drop it." A witness testified that Officer Browder put his hand out in a gesture to tell the suspect to stop. A witness ten steps away from Officer Browder testified that the suspect was "fiddling with something in his midsection". . . "shiny and silver like in color." (ECF No. 118-2 at 5, 8). The Court concludes that the objective facts in this record support Officer Browder's belief that the suspect was advancing toward him with a knife and posed an immediate threat to his safety.[3] The only evidence in this record that Officer Browder's belief was not reasonable is the discovery that the "pointy metallic object" was a pen and not a knife, a fact known to Officer Browder only after the decision to shoot had been made. (ECF No. 118 at 13).

The third factor cited in *Graham* is whether the

[3] In this case, the material facts are not in dispute. The evidence includes a video recording which captured the actions of Officer Browder and Nehad, and the testimony of civilian witnesses who had a view of the entire incident.

suspect was resisting or seeking to evade arrest. The entire event in this case took place in thirty-three seconds. Officer Browder was required to make a split-second decision to use deadly force. There is evidence in the record that Officer Browder attempted warnings by stating "Stop. Drop It." However, the opportunity to warn and the opportunity to consider using less intrusive force were necessarily limited by the less than five seconds that elapsed from the time Officer Browder left his police car and the shooting. Opinions of experts hired by the parties differ as to whether less than deadly force was a reasonable alternative under the facts.

In this case, Officer Browder was responding to a hot call describing a suspect who had reportedly threatened the person making the 911 call with a knife. Officer Browder immediately observed two civilians on the scene and the suspect advancing down an alley with his arm bent and a pointy metallic object that appeared to be a knife in his hand. Witnesses at the scene testified that the suspect was "fiddling with something in his midsection" and that Officer Browder warned the suspect to "Stop. Drop it." (ECF No. 118-2 at 5). Believing that the suspect was advancing toward him with a knife, Officer Browder exited his vehicle with his handgun drawn. After warning the suspect, Officer Browder shot the suspect fifteen to twenty feet from his location. It is an undisputed fact in this record that "Nehad had convinced multiple people that he was armed with a knife the night of the shooting and in the days before the shooting." (ECF No. 146-1 at 12). The objective, undisputed facts in this record

support Officer Browder's perception that Nehad posed an immediate threat to his safety under the facts and circumstances presented.

Expert witnesses employed by the parties provide conflicting testimony regarding reasonable alternatives to the use of deadly force. Plaintiffs' expert offers the opinion that Officer Browder had obvious reasonable alternatives that he was required to take rather than opt for the use of lethal force in this set of facts.[4] However, "the appropriate inquiry is whether [Officer Browder] acted reasonably, not whether [he] had less intrusive alternatives available to [him]." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). In *Scott,* the Court of Appeals explained:

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose

[4] "They include (but are not limited to) simply not confronting [Nehad] one-on-one (Back-up units were due to arrive in seconds), tactically repositioning to cover to gain time and properly assess the true nature of any perceived threat, using less lethal weapons in his possession, etc." (ECF No. 138-3 at 443).

> that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.
>
> Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.

Id. In *Peterson on behalf of L.P. v. Lewis Cty.*, 697 F. App'x 490, 491 (9th Cir. 2017), sheriff deputies responded to a 911 call stating that a man identified as "Steven Peterson" was trying to break into their mobile home and that the man had tried to kick the door down and stabbed the front door with a knife. Officer McKnight responded to the call and spotted an individual closely matching the suspect's description that he believed was the suspect. Believing that the suspect was armed with a knife, Officer McKnight exited his patrol car and made contact with Peterson. Peterson's right hand was visible but his left hand was concealed in his sweatshirt pocket. Officer McKnight identified himself as police officer and told Peterson that he needed to see his hands. Peterson started to pace back and forth and kept his left hand hidden inside of his pocket. Officer McKnight drew his gun,

Peterson continued to ignore his commands, leaned forward and took two steps toward Officer McKnight. Officer McKnight shot Peterson four times when Peterson was fifteen-twenty feet away. Peterson was unarmed. The entire interaction lasted one minute and eleven seconds. The district court concluded that a reasonable jury could find that Officer McKnight's use of force was not reasonable but that Officer McKnight was entitled to qualified immunity. *Peterson v. Lewis Cty.*, 2014 WL 58005 (W.D. Wash. 2014). The Court of Appeals found that the district court erred in granting qualified immunity. *Peterson v. Lewis Cty.*, 663 F. App'x 531 (2016). The United States Supreme Court vacated the judgment and remanded to the Court of Appeals for further consideration in light of *White v. Pauly*, 580 U.S. – , 137 S. Ct. 548 (2017) (*per curiam*). *McKnight v. Peterson*, 137 S. Ct. 2241 (2017). On remand, the Court of Appeals concluded that the district court erred by finding that there were material factual disputes regarding whether Officer McKnight's use of deadly force was reasonable. The Court of Appeals stated:

> The record reflects that Peterson refused to heed McKnight's commands and started to charge McKnight. At the time he used force, McKnight knew that a person matching Peterson's description was in the area and might be armed with a knife. Given these facts, McKnight's actions were reasonable; he did not act with excessive force in violation of Peterson's constitutional rights.

Peterson, 697 F. App'x at 491.[5] While this unpublished case is not precedent, the factual similarities with the case before this Court are significant and define a range of conduct found to be reasonable by the Court of Appeals.

At the time that Officer Browder used force, he had confirmed that the description of the suspect matched the person approaching him holding a shiny metallic object in his hand with his arm bent at the elbow. At the time that Officer Browder used force, Officer Browder had reason to believe that the suspect approaching him had used a knife to threaten people just a few minutes earlier. Officer Browder warned the suspect approaching him to "Stop. Drop it." Officer Browder used his weapon against the suspect fifteen to twenty feet away that he had reason to believe was armed with a knife. The entire incident took thirty-three seconds. Given these facts, the relevant factors in *Graham* weigh in favor of finding that the force used was objectively reasonable. Drawing another conclusion based upon potential alternatives to the use of deadly force would be "second-guessing of police decisions made under stress and subject to the exigencies of the moment." *Scott*, 39 F.3d at 915. The Court concludes that Officer Browder is entitled to summary judgment in his favor on the grounds that there was no violation of Nehad's Fourth Amendment

[5] The Court of Appeals further stated: "Even if McKnight had acted unreasonably, Peterson failed to identify any clearly established law putting McKnight on notice that, under the facts, his conduct was unlawful." *Id.*

right.

As to the Fourteenth Amendment claim, Plaintiffs allege that the Officer Browder violated Plaintiffs' liberty interest in the companionship of their eldest child and only son, a right secured by the Fourteenth Amendment. "The Ninth Circuit recognizes that a parent has a constitutionally protected liberty interest under the Fourteenth Amendment in the companionship and society of his or her child. . . ." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). In *A. D. v. California Highway Patrol*, 712 F.3d 446, 453 (9th Cir. 2013), the Court of Appeals explained:

> Police conduct violates due process if it "shocks the conscience." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). Conscience-shocking actions are those taken with (1) "deliberate indifference" or (2) a "purpose to harm . . . unrelated to legitimate law enforcement objectives." *Id.* The lower "deliberate indifference" standard applies to circumstances where "actual deliberation is practical." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). However, in circumstances where an officer cannot practically deliberate, such as where "a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a

purpose to harm unrelated to legitimate law enforcement objectives." *Id*.

In this case, Officer Browder had no time to deliberate and the heightened "purpose to harm" standard applies. *Id*. There are no facts in this record to support liability on the grounds that Officer Browder acted with a purpose to harm unrelated to legitimate law enforcement objectives. Officer Browder is entitled to summary judgment on Plaintiffs' claim under 42 U.S.C. § 1983 that he violated Plaintiffs' liberty interest secured by the Fourteenth Amendment.

II. Qualified Immunity

Assuming a constitutional violation, "[q]ualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *White*, 137 S.Ct. at 551, (quoting *Mullenix v. Luna*, 577 U.S. – , 136 S. Ct. 305, 308 (2015) (*per curiam*)). "The purpose of qualified immunity is to strike a balance between the competing 'need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Hughes*, 862 F.3d at 782 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004)). The United States Supreme Court recently stated that "qualified immunity is important to society as a whole and . . . effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S. Ct.

at 552 (internal quotations and citations omitted). At summary judgment,

> an officer will be denied qualified immunity in a Section 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation.

Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011).

Under the second prong of the qualified immunity test, the Court must decide if the alleged violation of Nehad's constitutional right against excessive force under the Fourth Amendment "was clearly established at the time of the officer's alleged misconduct." *S.B. v. Cty of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) (quoting *C.V. by and through Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016) (citations omitted)). Officer Browder is entitled to qualified immunity unless it was "'sufficiently clear' that 'every reasonable official would have understood that what he was doing violates [Plaintiff's] right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

After identifying the context-specific conduct, "[t]he relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances 'beyond debate.'" *Mullenix*, 136 S. Ct. 305, 309 (quoting *al-Kidd*, 563 U.S. at 741). The Supreme Court has repeatedly stated that "clearly established law" should not be defined "at a high level of generality." *al–Kidd*, 563 U.S. at 742. "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. – , 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 640). In *White*, the Supreme Court concluded that the Court of Appeals failed to identify a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment. The Supreme Court explained:

> Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson v. Creighton*, supra, at 640, 107 S.Ct. 3034. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law

> outside "an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam); *see also Plumhoff v. Rickard*, 572 U.S. ——, ——, 134 S.Ct. 2012, 2023, 188 L.Ed.2d 1056 (2014) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'").

Id.

In the specific context of this case, Officer Browder responded to a hot call of a suspect threatening people with a knife after midnight. Officer Browder identified the suspect in an alley with other civilians nearby. The suspect was holding a metallic object at waist level advancing toward the officer. Believing that the suspect was advancing with a knife, Officer Browder warned the suspect to "Stop. Drop it." Officer Browder used deadly force when the suspect was fifteen-twenty feet away. The entire incident was over in approximately thirty-three seconds.

Before this Court can impose liability on Officer Browder, the Court must identify precedent as of April 30, 2015, that put Officer Browder "on clear notice that using deadly force in these particular circumstances would be excessive." *S.B.*, 864 F.3d at 1015. "While the case law does not require a case directly on point, for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White,* 137 S. Ct. at 551. (internal quotations and citations omitted). "[T]he

clearly established inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition, especially in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *S.B.*, 864 F.3d at 1015 (internal citations omitted); *see Estate of Lopez by and through Lopez v. Gelhaus,* 871 F.3d 998 (9th Cir. 2017) ("The district court erred by failing 'to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.'") (citing *White,* 137 S.Ct. at 552).

Plaintiff asserts that *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) provided clear notice to Officer Browder that the use of deadly force was objectively unreasonable under the circumstances of this case. In *Deorle*, the officer responded to a call from a woman seeking help for her distressed husband, Deorle. Deorle was upset, drunk, and suicidal. At different points, Deorle brandished a hatchet, shouted "kill me," threatened to "kick [a police officer's] ass," and walked around with an unloaded crossbow. *Id*. at 1276-77. At least thirteen officers responded to the request for back up. Officer Rutherford observed Deorle for five to ten minutes from the cover of some trees. Deorle started shouting at the officers while carrying an unloaded plastic crossbow in one hand and what may have been a bottle of lighter fluid in the other hand. Officer Rutherford shouted at Deorle to put down the crossbow and Deorle discarded it. Deorle began walking in the direction of Officer Rutherford.

Officer Rutherford waited until Deorle reached a predetermined point then fired a twelve-gauge shotgun loaded with a bean bag round. Deorle was hit in the face and suffered permanent injuries.

In contrast to *Deorle*, Officer Browder was called to the scene at midnight to locate a suspect reported to have threatened an individual with a knife. This dispatch call was not a welfare check or a report from a distressed family member. Officer Browder was immediately confronted with an individual that fit the description of the suspect advancing in his direction holding in his hand what Officer Browder believed was a knife. Unlike the officer in *Deorle,* who observed Deorle for a significant amount of time, Officer Browder was forced to react to the facts presented within thirty seconds and was forced to decide what level of force was necessary within five seconds from exiting his patrol car. The facts of *Deorle* differ significantly from the facts presented to Officer Browder and are not sufficiently analogous to place Officer Browder on fair notice that it was objectively unreasonable to use deadly force under the facts of this case.

Plaintiffs have not identified any preexisting precedent establishing that Officer Browder's use of deadly force violated any clearly established right of Nehad to be free from excessive force. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Officer Browder was forced to

make "split-second judgments—in circumstances that [were] tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97. Unlike *Estate of Lopez by and through Lopez,* postdating this case, and *George v. Morris*, 736 F.3d 829 (9th Cir. 2013) relied upon as clearly established precedent in *Lopez*, Officer Browder was confronted with objectively threatening behavior from a suspect reported to have threatened an individual with a knife.

Plaintiffs further assert that the exception to the requirement of pre-existing precedent in an "obvious case" applied to put Officer Browder on notice of the unlawfulness of his conduct. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). In *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938 (2017), the Court of Appeals recently affirmed that the general standard in *Garner*[6] and *Graham* can clearly establish law governing the use of deadly force "even without a body of relevant case law." *Id.* at 951. The Court of Appeals stated: "We recently held in *Hughes* that an officer was not entitled to qualified immunity for his shooting of an individual in part because, when the facts were construed in plaintiff's favor, the officer's use of deadly force was . . . 'obvious[ly]' unlawful." *Id.* (quoting *Hughes*, 862 F.3d at 785). "[T]aking the facts in the light most favorable to the plaintiff and comparing them to the facts in available precedent involving excessive force," the Court of Appeals held that "no officer could have reasonably believed that the

[6] *Tennessee v. Garner*, 471 U.S. 1 (1985).

plaintiff posed a risk of serious injury or death." *Id.* at 951-52.

In this case, construing the facts in the light most favorable to Plaintiffs, the Court concludes that Officer Browder had a reasonable belief based upon the objective facts that Nehad posed a risk of serious injury to himself or others. Officer Browder had information that Nehad had threatened others with a knife, encountered Nehad advancing toward him in a threatening manner, and warned Nehad to "Stop. Drop It." While experts may offer the opinion that Officer Browder should have waited another second or allowed Nehad to advance another few feet before using deadly force, Officer Browder could have reasonably believed that Nehad posed a risk of serious injury or death. The Court concludes that Officer Browder's use of force was not obviously unlawful.

Because no case holds that conduct closely analogous to the conduct at issue in this case violated a plaintiff's constitutional rights and Officer Browder's use of force was not obviously unlawful, the Court concludes that Officer Browder is entitled to qualified immunity. Officer Browder is entitled to judgment in his favor on the federal claim under 42 U.S.C. § 1983 that excessive force was used in violation of the Fourth Amendment.

Having dismissed any claim for liability under 42 U.S.C. § 1983 for a constitutional violation, and based upon the undisputed facts in this case, the Court concludes that there is no triable issue of fact as to

whether any custom and practice of the San Diego Police Department caused the shooting in this case. Plaintiffs have failed to present evidence that any policy or deficient training was a "moving force" behind the shooting in this case. *Monell*, 436 U.S. at 694. The Court concludes that Defendants Zimmerman and the City are entitled to summary judgment on the *Monell* claim and that Defendant Zimmerman is entitled to summary judgment on the claim for supervisory liability.

III. State law claims

Because the Court concluded that Officer Browder's use of force was reasonable under the objective, undisputed facts, Defendants are entitled to summary judgment on all state law claims. *Yount v. City of Sacramento*,183 P.3d 471,484 (Cal. 2008) ("[C]ommon law battery cause of action, like his Section 1983 claim, requires proof that [the officer] used unreasonable force.").

VI. Conclusion

IT IS HEREBY ORDERED that motion for summary judgment (ECF No. 116) filed by Defendants Neal N. Browder, Shelley Zimmerman, and the City of San Diego is granted.

IT IS FURTHER ORDERED that motions #114, #115 and #121 are denied without prejudice as moot.

The Clerk of the Court shall enter judgment in

favor of Defendants and against Plaintiffs.

DATED: December 18, 2017

/s/
WILLIAM Q. HAYES
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
OCT 2 2019
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U.S. COURT OF APPEALS

S.R. NEHAD; et al.,
Plaintiffs-Appellants,

v.

NEAL N. BROWDER; et al.,
Defendants-Appellees.

No. 18-55035

D.C. No. 3:15-cv-01386-WQH-NLS
Southern District of California, San Diego

ORDER

Before: THOMAS, Chief Judge, HAWKINS, Circuit Judge, and PREGERSON,[*] District Judge.

[*] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX D

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tom Bane Civil Rights Act,
2015 Cal. Stat. 5882

a) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the

Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a).

(c) An action brought pursuant to subdivision (a) or (b) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (a) also may be filed in the superior court for any county wherein the Attorney General has an office, and in that case, the jurisdiction

of the court shall extend throughout the state.

(d) If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

(e) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or the clerk of the court to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section.

(f) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure.

(g) An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.

(h) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees.

(I) A violation of an order described in subdivision (d) may be punished either by prosecution under Section 422.77 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure. However, in any proceeding pursuant to the Code of Civil Procedure, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine.

(j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon

a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

(k) No order issued in any proceeding brought pursuant to subdivision (a) or (b) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined.

(l) The rights, penalties, remedies, forums, and procedures of this section shall not be waived by contract except as provided in Section 51.7.

California Civil Code Section 52.3 (2001)

(a) No governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California.

(b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of conduct specified in subdivision (a), whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred.