No. 21-___

IN THE

Supreme Court of the United States

ISMAEL RIVERA

Petitioner,

v.

GLENNIS GELABERT-DE-PEGUERO; M. P.-R, MINOR; S. P.-A, MINOR; MARIA CONFESOR-ROSARIO; NANCY ORFELIA-ALVAREZ

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether Police Officer Ismael Rivera was correctly denied his entitlement to qualified immunity?

2. Whether the District Court correctly applied current doctrine on qualified immunity to its findings of fact?

Parties to the Proceedings and Rule 29.6 Statement

Petitioner, a Defendant-Appelant in the court below, is Ismael Rivera, a Police Captain.

Respondents, Plaintiffs-Appellees in the court below, are Glennis Gelabert De-Peguero; M. P.-R, a minor; S.P.-A, a minor and Maria Confesor-Rosario and Nancy Orfelina-Alvarez.

Other parties to the original proceedings below who are not Petitioner or Respondents include Defendants Municipality of San Juan, former Mayor Carmen Yulín Cruz, former Commissioner Guillermo Calixto Rodriguez, Police Officer Edwin Rosario-Cordova, Police Officer Jermari Serrano-Borrero, Police Officer Luis D. Vazquez-Crespo, Police Officer Luis A. Burgos-Nieves and Police Officer Gilberto Y. Febus-Perez.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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Table of Cited Authorities

Cases

Federal Statutes

Federal Rules

Opinions and Orders and Judgment Below

The Order of the First Circuit Court of Appeals denying Petitioner's petition for rehearing and petition for rehearing en banc issued on November 25, 2020 and is reproduced at Petitioner's Appendix below. The First Circuit Court of Appeals' judgment dismissing Petitioner's appeal was entered on August 10, 2020 and is reproduced below at Petitioner's Appendix. The District Court for the District of Puerto Rico's Opinion and Order and Partial Judgment dismissing Petitioner's request for summary judgment and denying the protection of qualified immunity was issued on February 22, 2019 and is reproduced at Petitioner's Appendix. It was published at 2019 U.S. LEXIS 229982; 2019 WL 8301063.

Basis for Jurisdiction

This Supreme Court has jurisdiction to review on writ of certiorari the order in question under Rule 10 (a) of the Rules of the Supreme Court of the United States because a United States Court of Appeals sanctioned a departure of precedent by a lower court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes Involved

Alleged use of deadly force or use of excessive force under 42 U.S.C. § 1983; Fourth Amendment of the U.S. Constitution; Federal Rule of Civil Procedure 56, Summary Judgment.

Statement of the Case

On February 24, 2019, Petitioner filed an interlocutory appeal from the District Court for the District of Puerto Rico's *Opinion and Order* that denied his request for summary judgment based on qualified immunity. On March 19, the United States Court of Appeals for the First Circuit ordered Petitioner to show cause "why this appeal should not be dismissed for lack of jurisdiction." On August 10, 2020, a Court of Appeals' Panel dismissed the appeal finding that Appellant "has failed to establish a jurisdictional basis for his appeal." On August 24 Petitioner filed a Petition for Hearing En Banc arguing that the proceeding involved a question of exceptional importance. On November 25, the court of appeals [Chief Judge Howard and Circuit Judges Lynch, Thomson, Kayatta and Barron] denied the petition for rehearing and petition for hearing en banc stating that "a majority of the judges [did not vote] that the case be heard en banc."

A. This proceeding involves a compelling reason where a United States court of appeals has sanctioned a departure by a United States district court from applicable doctrine, thus warranting exercise of the Supreme Court's supervisory power.

The ruling of the District Court denying Captain Rivera the protection of qualified immunity is inconsistent with the United States Supreme Court cases of *Kisela v. Hughes*, 138 S. Ct. 1148 (April 2, 2018) and *City of Escondido v. Emmons*, 139 S. Ct. 500 (January 7, 2019).

When the District Court issued its *Opinion and Order* on February 22, 2019, denying Captain Rivera his entitlement to qualified immunity, it did not

consider the United States Supreme Court recent cases of *Kisela v. Hughes* and *City of Escondido v. Emmons*. Both of these cases broadened and further explained the entitlement to qualified immunity that attaches to a police officer in a context like in the case at hand. Had the District Court applied these cases' doctrine to its Findings of Fact, Captain Rivera would "at least [have been] entitled to qualified immunity." *Kisela*, at 1152. Thus, the District Court's application of the United States Supreme Court's qualified immunity doctrine to the present case is erroneous and constitutes a grave injustice to Captain Rivera. The protection of qualified immunity to Puerto Rico's police officers, in the same fashion as the doctrine is applied to their counterparts in the mainland United States, is a compelling reason to grant this writ of certiorari.

B. Based on the District Court's *Opinion and Order's Findings of Fact* alone, Captain Rivera was "*at least entitled to qualified immunity*" under *Kisela v. Hughes* and *City of Escondido v. Emmons*

The District Court's *Opinion and Order* contains 34 numbered *Findings of Fact* (Pages 4-8) in total. The *Opinion and Order* prefaced the *Findings* with introductory narrative that partially stated:

> On November 8, 2013, municipal police officers arrived at San Antonio Street in San Juan, Puerto Rico in response to two (2) 911 calls reporting the presence of an aggressive individual, later identified as Agustin Javier Peguero ("Peguero"), who was attempting to collect on a debt owed to his mother. The

> situation quickly escalated. Other than a baton, the officers were not equipped with non-lethal weapons that would allow them to ensure their safety and, fearing for his life, one officer shot Peguero in the chest.

The *Opinion and Order* contains 21 *Findings of Fact* that are key to the determination of qualified immunity. Those are reproduced below, as follows:

> The November 8, 2013 Shooting
>
> 14. On November 8, 2013, the 911 Emergency System received two (2) calls in the early morning hours reporting the presence of an aggressive individual—later identified as Agustin Javier Peguero ("Peguero")—in San Antonio Street, San Juan, Puerto Rico.
> 15. The first caller informed the 911 operator that "it seem[ed] they were beating someone;" and that she did not "know if there is a fight or what, because they were using foul language and shouting." The caller stated that this was happening in front of her house, located at 627 San Antonio Street.
> 16. The 911 Operator alerted the S.J. Municipal Police about an "aggressive person" in San Antonio Street. Then, the Command Center for the S.J. Municipal Police contacted the Barrio Obrero Precinct so that it would respond to the call.
> 17. Thereafter, another individual, Desiado Deseado Alejandro Larcen ("Larcen"), called 911, asking for police to be sent to his house at 620 San Antonio Street because "[t]here [were] people breaking the door down here" and

"[t]hey [were] killing someone here, breaking down the door to kill someone." Larcen also stated that "[a] guy became crazy, it seems, because, I don't know, he's breaking the door here;" and that he did not "know if he [was] armed."

18. According to the transcript of Larcen's 911 call, Peguero could be heard shouting "we are going in and if we get in we are going to kill you;" and "[w]e are going to f*** you, mother f*****."

19. From the second floor of his house, Larcen heard and saw an agitated Peguero hitting the windows of the first floor of his house with a bat. Peguero damaged four windows and completely ripped out another.

20. Officer Serrano, Badge No. 1985, and Officer Rosario, Badge No. 1931, were the first officers to arrive at the scene.

21. Officer Rosario established a dialogue with Peguero, who told the officers that the person who lived in the residence owed his mother approximately $4,000 and that he was not leaving until he received payment. The officers continued talking to Peguero, telling him that this was not the correct way to collect on a debt.

22. Then, Captain Rivera arrived at the scene. At that point, Officers Serrano and Rosario were positioned in the street across from 620 San Antonio Street, the house where Peguero was located. Officers Serrano and Rosario were pointing their weapons downwards at a 45- degree angle.

23. Captain Rivera, also holding his weapon at a 45-degree angle, walked towards the

residence at 620 San Antonio Street and observed Peguero hitting the windows with a bat while cursing and yelling. Upon noticing that Peguero "only ha[d] a bat," Captain Rivera put his weapon back in his holster; identified himself; and asked Peguero to drop the bat and "calm down." Peguero continued walking around Larcen's residence, hitting the windows, uttering expletives, and yelling.

24. On or around 3:11 A.M., Captain Rivera positioned himself behind a parked vehicle and requested reinforcements at their location.

25. Shortly thereafter, Peguero jumped the house's fence and walked towards Captain Rivera.

26. The officers repeatedly asked Peguero to drop the bat.

27. Captain Rivera fired one shot, hitting Peguero in the chest.

28. After falling face down to the ground and while bleeding, Peguero was handcuffed with his hands behind his back.

29. Captain Rivera requested an ambulance at approximately 3:13 A.M.

30. According to the pre-hospitalization attendance report, paramedics arrived at the scene at 3:22 A.M.

31. Peguero was declared dead at 3:52 A.M.

32. Captain Rivera submitted a Use of Force Report, dated November 8, 2013.

33. The Municipality conducted an administrative investigation into Captain Rivera's use of force.

34. On March 24, 2017, the Puerto Rico Secretary of Justice certified that the

> Commonwealth's Department of Justice had administratively closed the investigation into these events.

It must be noted that the District Court found that "[p]laintiffs have similarly failed to put forth evidence that Captain Rivera participated or was involved in the decision to arrest and handcuff Peguero." *Opinion and Order*, Section II (B) Excessive force - Arrest

On these facts, the District Court denied Captain Rivera's defense of qualified immunity and his Motion for Summary Judgment (*Opinion and Order*, page 12), without an explanation of the law that cancelled Captain Rivera's qualified immunity. The District Court in effect cancelled his right to the protection of qualified immunity and forced Captain Rivera to face trial. Notably, the District Court dismissed with prejudice "[t]he § 1983 use of excessive force during an arrest claim asserted against Ismael [Captain] Rivera Gonzalez." (*Partial Judgment*, item 2).

Qualified immunity is immunity from suit rather than a mere defense to liability and is effectively lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Appellant is mindful of the limitations imposed by *Johnson v. Jones*, 515 U.S. 303 (1995). The instant *Petition for Writ of Certiorari* addresses the application of *Kisela* and *City of Escondido* against the *Findings of Fact* determined by the District Court in its *Opinion and Order*. Petitioner challenges the erroneous application of that recent Supreme Court law to the findings of fact determined by the District Court. Thus, Captain Rivera respectfully submits that his position in the Petition at hand pertains to a pure legal matter. Accordingly, Petitioner submits that under the

applicable law, he had the right to appeal the District Court's Judgment denying qualified immunity and summary judgment as an interlocutory appeal. If Appellant faces trial in these circumstances, his qualified immunity, as framed under *Kisela* and *City of Escondido*, would be effectively lost.

Like the case at bar, *Kisela* and *City of Escondido*, originated when police officers where denied the protection of qualified immunity in the context of motions for summary judgment. In *Kisela*, the District Court granted summary judgment but the 9th Circuit Court of Appeals reversed and after the Court of Appeals denied a *Petition En Banc*, the United States Supreme Court granted a Petition for Certiorari and the case was reversed and remanded. In *City of Escondido*, the District Court granted summary judgment for two officers but the 9th Circuit Court of Appeals reversed and remanded for trial with regard to two officers. The Supreme Court, on certiorari, reversed the Court of Appeals' judgment, vacated judgment as to one of the officers and remanded the case to the Court of Appeals "to conduct the analysis required" whether the other officer "is entitled to qualified immunity."

The facts in *Kisela* are strikingly similar to the Gelabert (Peguero) case here. In *Kisela*, like here, neighbors called 911 to report Hughes, who was acting erratically and was armed with a large knife. *Kisela* at 1151, (here, the individual was armed with a bat, *Opinion and Order*, *Finding* 23). Kisela, a Tucson, Arizona officer, was one of three officers who arrived at the scene. There (Hughes), like here (Peguero), was told at least twice to drop the weapon (*Findings* 23, 26) but did not. (In fact, *Finding* 26 reads that "[t]he officers repeatedly asked Peguero to drop the bat.") When Hughes approached another woman, Police

Officer *Kisela*, fearing that Hughes would harm the other woman, dropped to the ground to gain the line of fire and shot Hughes four times, *Id.* (Captain Rivera fired only once. *Finding* 27). There, like here (*Finding* 28), Hughes was handcuffed by the officers, *Id.* Here, Captain Rivera did not handcuff the individual but immediately called an ambulance (*Finding* 29). In *Kisela*, less than a minute transpired between the moment the police officer saw the other woman to the time the shots were fired. *Id.* Here, two minutes transpired between the moment Captain Rivera took cover behind a vehicle to call command control and ask for reinforcements to the time he called the ambulance (*Findings* 24 and 29). In *Kisela*, the officer shot Hughes when she approached the other woman with a knife and ignored commands to drop the weapon (*Id.*). Here, Captain Rivera "fired one shot" after "Peguero jumped the house's fence and walked towards Captain Rivera", and after "[t]he officers repeatedly asked Peguero to drop the bat." (*Findings* 25, 26 and 27). These events must be weighed against the context of the tumultuous, violent and threatening conduct exhibited by Peguero (*Findings* 14, 15, 16, 17, 18 ("*we are going in and if we get in we are going to kill you*"), 19 ("*Peguero damaged four windows and completely ripped out another*").

The Supreme Court stated that in *Kisela*, the issue was "whether at the time of the shooting Kisela's actions violated clearly established law." *Id.* 1150. The Supreme Court reasoned that it need not decide whether Kisela violated the *Fourth Amendment* "*[f]or even assuming a Fourth Amendment violation occurred . . . on these facts Kisela was at least entitled to qualified immunity.*" *Id.* 1152. The Court also restated that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs'

the specific facts at issue." *Id*. 1153. In the case at hand, there was not such existing precedent prohibiting the action that Captain Rivera took. In explaining its reasoning, the Supreme Court highlighted the particular facts in *Kisela* that: (a) the police officer shot Hughes, although he was not in danger, because he thought that Hughes was a threat to the other woman, (b) that Hughes had an erratic behavior, (c) had a large knife, (d) disregarded at least two commands to drop the weapon, (e) was within striking distance of the potential victim, (f) in events that unfolded very rapidly, in less than a minute. *Kisela*, 1153, 1154. All those elements are present in the case of Captain Rivera, who acted to protect his life after Peguero jumped the fence, bat in hand, and walked towards him (*Finding* 25), while ignoring the "*officers [who] repeatedly asked Peguero to drop the bat*" (*Finding* 26), in the context of events that unfolded very rapidly, in less that two minutes (*Findings* 24 and 29).

The Supreme Court also restated that "the calculus of reasonableness [in weighing use of force] 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." *Kisela*, 1152.

Like *Kisela* and the case at hand (*Gelabert*), in *City of Escondido* the police officers responded to a disturbance alerted through a 911 call. The officers there were charged with alleged excessive use of force in forcibly apprehending a man at a scene of a domestic violence incident. The District Court granted qualified immunity finding that "the law did not clearly established that [the officer] could not take down an arrestee in these circumstances." *Id*. 502.

The Supreme Court restated the doctrine of *Kisela* that "[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." *City of Escondido*, at 503. Reversing the Ninth Circuit in favor of recognizing police officers' entitlement to qualified immunity, the Supreme Court determined that the Courts must explain how a particular law prohibited an officer's actions in order to deny him or her the protection of qualified immunity. The Court stated that in this task "[w]hile there does not have to be a case directly on point, existing precedent [to deny the officer qualified immunity] must place the lawfulness of the particular [action] beyond debate…" *Id*. 504. Thus, "[w]here constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, at 1153.

In City of *Escondido v. Emmons*, the Supreme Court chastised the Ninth Circuit Court of Appeals for defining "the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established." Id. 503. The Supreme Court questioned that "[w]ith the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial." In the case at hand, the District Court felt content to state "[f]irst, the 'clearly established' prong is easily satisfied." And then continued:

> Excessive force claims are governed by the Fourth Amendment's 'objective

> reasonableness' standard. The Fourth Amendment, for its part, protects citizens against unreasonable force, searches and seizures by the government. More specifically, 'under clearly established law, the use of deadly force is constitutional only if, at a minimum, a suspect poses an immediate threat to police officers and civilians.' Accordingly, Peguero had a clearly established right not to be subjected to deadly force unless he posed an immediate threat to Captain Rivera, the Police Defendants, or other bystanders in the area." Opinion and Order, pages 10-11(internal citations omitted).

With that generality that Peguero had a clearly established right not to be subjected to deadly force under the Fourth Amendment, the District Court, denied the Petitioner Police Officer his entitlement to qualified immunity. The District Court failed to define the clearly established right that Peguero had in the context of his overall extemporaneous violent conduct that caused multiple 911 calls from different persons, the threats of Peguero to break into the tenant's house and kill him, the rage he displayed during and after the police showed up, his jumping over the fence bat in hand, his immediate walking towards Captain Rivera -bat in hand- and his stubborn refusal to drop the bat while walking towards the Petitioner. That is the context wherein the District Court had to define Peguero's "clearly established right" as opposed to a generality about Fourth Amendment protection. The District Court failed to adequately and properly do that analysis. The District Court failed to explain why in these exigent circumstances, when Petitioner had no non-lethal tools at hand, the Court could properly

deny to Petitioner his entitlement to qualified immunity.

Conclusion

Petitioner is a hard-working police officer with an unblemished record, who rose to the rank of Captain with great sacrifice. Notwithstanding that there are more pieces of evidence that support the proposition that Petitioner is entitled to qualified immunity, Petitioner submits that the District Court's *Findings of Fact*, standing alone, support his position that he should not be deprived of his qualified immunity protection. The *Findings of Fact* in the Honorable Court's *Opinion and Order* are revealing. Captain Rivera was called upon to face a tense and explosive situation of an individual who was enraged due to circumstances not created or provoked by Captain Rivera. Captain Rivera established oral communication with the person (Peguero), identified himself as a high-ranking officer, invited Peguero to reason, to depose his anger and to talk. Captain Rivera tried to de-escalate the tense situation to no avail. When Peguero did not respond to reason, Captain Rivera took cover behind a vehicle parked on the street and called command and control for reinforcements. At that moment, an enraged Peguero jumped the fence in the house where he was trying to break in and had damaged or destroyed the windows, and walked towards Captain Rivera, bat in hand. Peguero disobeyed multiple commands by all the officers to drop the bat. When Peguero aimed his wrath and walked towards Captain Rivera, Captain Rivera, as the District Court correctly prefaced its *Opinion and Order*, "*fearing for his life*", fired one shot with unfortunate consequences.

Captain Rivera's predicament was not different from that of Police Officer Andrew Kisela in Arizona. In fact, Captain Rivera acted to defend his life by firing one shot. Kisela acted to defend a third person's life that he thought was in grave danger, and fired not one, but four shots. The facts that evolved around Captain Rivera are strikingly similar to those that Officer Kisela faced. However, the Supreme Court protected Officer Kisela's right to qualified immunity because there was no law that prohibited officer Kisela from acting the way he did. In fact, the Supreme Court stated that, regardless of a Fourth Amendment violation or not, in those exigent circumstances where the police officer had to do a split-second decision, "Kisela was at least entitled to qualified immunity." *Kisela* at 1152. The District Court did not adequately explain the statute that prohibited Captain Rivera from defending himself. According to case law, such statute cannot be defined in general terms. Two strikingly similar situations, two police officers presumptively covered by the same Constitution, the same set of protections and both entitled to the protection of qualified immunity. One Police Officer in Arizona –Andrew Kisela- recognized his entitlement to qualified immunity. The other, Captain Ismael Rivera, from Puerto Rico, denied his entitlement to qualified immunity and forced to face trial. Petitioner also submits that the application of the qualified immunity doctrine should not be cancelled or modified just because the result of the Police Officer's action was an unfortunate death. The doctrine does not change because of the result. Rather, it must be uniformly applied.

Petitioner respectfully submits that both referenced Supreme Court cases, *Kisela* and *City of Escondido* had issued by the United States Supreme

Court recently from the time of issuance of the *Opinion and Order* by the District Court. *Kisela* issued in 2018, about a year before and *City of Escondido* issued in January 2019, just a month before the *Opinion and Order*. It is very likely that the Honorable District Court did not have these holdings before it when the *Opinion and Order* issued. Accordingly, it is probably fair to remand the matter before the District Court to allow the Court to re-issue its *Opinion and Order* considering these two Supreme Court landmarks on the issue of qualified immunity.

Wherefore, Captain Rivera respectfully requests that the Honorable United States Supreme Court either: (a) grant the Petitioner's Motion for Summary Judgment filed before the District Court and Petitioner's request for the protection of qualified immunity, or (b) remand the case to the District Court for a new determination on whether, based on *Kisela v. Hughes* and *City of Escondido v. Emmons* and the District Court's Findings of Fact, Captain Rivera should be recognized his entitlement to qualified immunity and summary judgment.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 19-1221

Glennis Gelabert De-Peguero; M.P.R., Minor; S.P.A., Minor; Maria Confesor Rosario; Nancy Orfelina-Alvarez,
Plaintiffs - Appellees,
v.
Ismael Rivera, Police Officer,
Defendant - Appellant,
Municipality of San Juan: Carmen Yulin Cruz Soto, Mayor of San Juan; Guillermo Calixto -Rodriguez, Commissioner of the Municipality of San Juan Police; John Does, 1-100 Conjugal Partnership Doe-Cruz; Conjugal Partnership Calixto-Doe; Edwin Rosario-Cordova, San Juan Municipal Police Officer; Jermari Serrano-Borrero, San Juan Municipal Police Officer; Luis D. Vazquez-Crespo, San Juan Municipal Police Officer; Luis A. Burgos Nieves, San Juan Municipal Police Officer; Gilberto Y. Febus-Perez, San Juan Municipal Police Officer
Defendants

Before
Howard, Chief Judge
Lynch, Thompson, Kayatta
And Barron, Circuit Judges

Entered: November 25, 2020

The petition for rehearing having been denied by the panel of judges who decided the case, and the

petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

United States Court of Appeals
For the First Circuit

No. 19-1221

Glennis Gelabert De-Peguero; M.P.R., Minor; S.P.A., Minor; Maria Confesor Rosario; Nancy Orfelina-Alvarez,

Plaintiffs - Appellees,

v.

Ismael Rivera, Police Officer,

Defendant - Appellant,

Municipality of San Juan: Carmen Yulin Cruz Soto, Mayor of San Juan; Guillermo Calixto -Rodriguez, Commissioner of the Municipality of San Juan Police; John Does, 1-100 Conjugal Partnership Doe-Cruz; Conjugal Partnership Calixto-Doe; Edwin Rosario-Cordova, San Juan Municipal Police Officer; Jermari Serrano-Borrero, San Juan Municipal Police Officer; Luis D. Vazquez-Crespo, San Juan Municipal Police Officer; Luis A. Burgos Nieves, San Juan Municipal Police Officer; Gilberto Y. Febus-Perez, San Juan Municipal Police Officer

Defendants

Before

Thompson, Kayatta and Barron
Circuit Judges

Judgment

Entered: August 10, 2020

In response to this court's order to show cause why this interlocutory appeal from an order denying summary judgment based on qualified immunity

should not be dismissed for lack of jurisdiction, defendant-appellant Ismael Rivera states that he intends to argue that the district court erred in failing to consider whether plaintiff's version of events was "blatantly contradicted" by record evidence, as required under Scott v. Harris, 550 U.S. 372, 380 (2007). But the district court's Opinion and Order makes clear that it reviewed the evidence Rivera cited and concluded that it was insufficient to conclusively refute certain witness testimony Rivera disputes. Because it appears that Rivera is, in essence, asking this court to review the district court's determination that the record evidence was sufficient to support a jury's finding on an issue of fact, he has failed to establish a jurisdictional basis for this appeal. See Johnson v. Jones, 515 U.S. 304, 311 (1995); Begin v. Drouin, 908 F.3d 829, 834 (1st Cir. 2018). Accordingly, the appeal is dismissed.

By the Court:

Maria R. Hamilton, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GLENNIS GELABERT DE-PEGUERO, et al., Civil No. 14-1812 (JAG)

Plaintiffs,

v.

MUNICIPALITY OF SAN JUAN, et al.,

Defendants.

OPINION AND ORDER

GARCIA GREGORY, D.J.

On November 8, 2013, municipal police officers arrived at San Antonio Street in San Juan, Puerto Rico in response to two (2) 911 calls reporting the presence of an aggressive individual, later identified as Agustin Javier Peguero ("Peguero"), who was attempting to collect on a debt owed to his mother. The situation quickly escalated. Other than a baton, the officers were not equipped with non-lethal weapons that would allow them to ensure their safety and, fearing for his life, one officer shot Peguero in the chest. Peguero fell to the ground, bleeding. He was then handcuffed and left lying on the street while the ambulance arrived. Peguero died at the scene. Based on these tragic events, Plaintiffs filed suit under 42 U.S.C. § 1983 alleging (i) use of deadly force, (ii) use of excessive force during an arrest, and (iii) failure to provide medical assistance. Docket No. 68.

Pending before the Court are the Motions for Summary Judgment filed by Defendants Captain

Ismael Rivera Gonzalez ("Captain Rivera"), Docket No. 264; Hon. Carmen Yulin Cruz Soto, Mayor of the Municipality of San Juan (the "Mayor"), Docket No. 266; former Commissioner of the San Juan Municipal Police ("S.J. Municipal Police"), Guillermo Calixto Rodriguez (the "Commissioner"), Docket No. 267; the Municipality of San Juan (the "Municipality"), Docket No. [2] 268; S.J. Municipal Police Officer Jermary Serrano ("Officer Serrano"), id.; and S.J. Municipal Police Officer Edwin Rosario ("Officer Rosario"), id.[1]Plaintiffs Glennis Gelabert de Peguero, Stacy Peguero Alvarez, and Melvin Peguero Rosario ("Plaintiffs") opposed, Docket No. 273; and Defendants thereafter replied, Docket Nos. 288; 292; 294. After considering the Parties' respective positions and the applicable law, the Court hereby GRANTS IN PART and DENIES IN PART Defendants' Motions for Summary Judgment.

STANDARD OF REVIEW

The Court will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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[1] Plaintiffs' Second Amended Complaint ("Complaint") also included as co-Defendants the following S.J. Municipal Police Officers: Luis D. Vasquez Crespo, Luis A. Burgos Nieves, Gilberto Y. Febus Perez, and John Does 1-100. Docket No. 68 at 2, 5. The Complaint alleges the same claims against these co-Defendants as those asserted against Officers Serrano and Rosario. As such, the Court will refer to these co-Defendants, including Officers Serrano and Rosario, as the "Police Defendants." The Mayor and the Commissioner, on the other hand, will be jointly addressed as the "Supervisor Defendants."

the affidavits if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a). Under this standard, a fact is in "genuine" dispute if it could be resolved in favor of either party; and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. United States DOJ, 355 F.3d 6, 19 (1st Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The party requesting summary disposition bears the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Once the moving party has properly supported [its] motion for summary judgment, the burden shifts to the nonmoving party. "Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) [3] (citation omitted). The non-movant must then demonstrate through submissions of evidentiary quality . . . that a trial worthy issue persists. "Iverson v. City of Bos., 452 F.3d 94, 98 (1st Cir. 2006) (citations omitted).

In evaluating a motion for summary judgment, the Court must view the entire record "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Winslow v. Aroostook Cty., 736 F.3d 23, 29 (1st Cir. 2013) (citation omitted). The Court, however, may safely ignore "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Rivera v. MVM, Inc., 713 F.3d 132, 134 (1st Cir. 2013) (citation omitted). And it cannot make credibility determinations or weigh the evidence, as these are jury functions and not those of

a judge. See Anderson, 477 U.S. at 255; Garcia-Gonzalez v. Puig-Morales, 761 F.3d 81, 99 (1st Cir. 2014)(citations omitted).

FINDINGS OF FACT

The Court makes the following factual findings based on Defendants' Statements of Uncontested Facts and supporting documentation.[2] In accordance with Local Rule 56(e), the Court only credits facts properly supported by specific and accurate record citations. It also disregards all argumentative and conclusory allegations, speculations, and improbable inferences disguised as facts. See Forestier Fradera v. Municipality of Mayaguez, 440 F.3d 17, 21 (1st Cir. 2006); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

[4] Captain Rivera

1. Captain Rivera joined the S.J. Municipal Police in 1992. As of November 8, 2013, he held the rank of "Captain" within the S.J. Municipal Police.

2. As of November 12, 2013, Captain Rivera had no administrative investigations pending; no history of administrative or criminal complaints, except for an official vehicle accident reported in 2007 that was

[2] Plaintiffs failed to timely comply with Local Rule 56(c) because they did not submit a separate statement admitting, denying, or qualifying any fact in Defendants' Statements of Uncontested Facts. Accordingly, the Court deems the facts therein to be undisputed insofar as they find support in the record. See Fed. R. Civ. P. 56(e); Local Rule 56(e).

ultimately dismissed; and no disciplinary actions during his career as a S.J. Municipal Police Officer.

3. Captain Rivera's performance evaluations for the years 2010-2012 were satisfactory.

4. As of November 8, 2013, Captain Rivera had completed the required training for his rank and obtained the required annual shooting certifications.

Officer Serrano

5. As of November 8, 2013, Officer Serrano had worked as a S.J. Municipal Police Officer for approximately four (4) years.

6. As of November 12, 2013, Officer Serrano had no history of administrative or criminal complaints other than an incident whereby she made impolite comments to an arrestee.

Officer Rosario

7. As of November 8, 2013, Officer Rosario had worked as a S.J. Municipal Police Officer for approximately five (5) years.

8. Prior to November 12, 2013, Officer Rosario had no pending administrative investigations.

Municipality's Policies and Regulations

9. S.J. Municipal Police Officers must complete the basic training courses offered by the University College of Criminal Justice of Puerto Rico before being certified as municipal police officers. P.R. Laws Ann. tit. 21, § 1066(p). The course offerings address

topics such [5] as force management and control, regulations and standards for use of force, police misconduct, human rights, and civil rights. Id.

10. The S.J. Municipal Police Regulation requires, inter alia, that municipal police officers comply with all laws and ordinances; protect the life and the property of all citizens; be diligent in the compliance of their duty; act at all times in an equitable, impartial, and just manner; observe an exemplary conduct at all times; respect and protect the civil rights of the citizen; and take all necessary measures to guarantee the security and protection of all persons under their custody. It also provides training programs for municipal police officers through the Training and Education Institute. Moreover, the Regulation considers the excessive use of force to be a serious violation subject to disciplinary measures.

11. The Municipality's Manual on Use and Handling of Firearms describes the different levels of use of force, as well as the instances where a municipal police officer may use a particular level of force and the extent to which he may do so. It states that "when using any level of force to respond to a violent threat, the response must be to repel the attack nonviolently."

12. Per Internal Rule of June 2007-01, S.J. Municipal Police Officers who use any kind of force while on duty must prepare a report on the use of force; failure to do so is considered a serious violation.

13. Per the S.J. Municipal Police General Order No. 2006-05, S.J. Municipal Police Officers must regularly complete firearm shooting training.

The November 8, 2013 Shooting

14. On November 8, 2013, the 911 Emergency System received two (2) calls in the early morning hours reporting the presence of an aggressive individual—later identified as Agustin Javier Peguero ("Peguero")—in San Antonio Street, San Juan, Puerto Rico.[6]

15. The first caller informed the 911 operator that "it seem[ed] they were beating someone," and that she did not "know if there is a fight or what, because they were using foul language and shouting." The caller stated that this was happening in front of her house, located at 627 San Antonio Street.

16. The 911 Operator alerted the S.J. Municipal Police about an "aggressive person" in San Antonio Street. Then, the Command Center for the S.J. Municipal Police contacted the Barrio Obrero Precinct so that it would respond to the call.

17. Thereafter, another individual, Desiado Deseado Alejandro Larcen ("Larcen"), called 911, asking for police to be sent to his house at 620 San Antonio Street because "[t]here [were] people breaking the door down here" and "[t]hey [were] killing someone here, breaking down the door to kill someone." Larcen also stated that "[a] guy became crazy, it seems, because, I don't know, he's breaking the door here;" and that he did not "know if he [was] armed."

18. According to the transcript of Larcen's 911 call, Peguero could be heard shouting "we are going in and if we get in we are going to kill you" and "[w]e are going to f*** you, mother f*****."

19. From the second floor of his house, Larcen heard and saw an agitated Peguero hitting the windows of the first floor of his house with a bat. Peguero damaged four windows and completely ripped out another.

20. Officer Serrano, Badge No. 1985, and Officer Rosario, Badge No. 1931, were the first officers to arrive at the scene.

21. Officer Rosario established a dialogue with Peguero, who told the officers that the person who lived in the residence owed his mother approximately $4,000 and that he was not [7]leaving until he received payment. The officers continued talking to Peguero, telling him that this was not the correct way to collect on a debt.

22. Then, Captain Rivera arrived at the scene. At that point, Officers Serrano and Rosario were positioned in the street across from 620 San Antonio Street, the house where Peguero was located. Officers Serrano and Rosario were pointing their weapons downwards at a 45-degree angle.

23. Captain Rivera, also holding his weapon at a 45-degree angle, walked towards the residence at 620 San Antonio Street and observed Peguero hitting the windows with a bat while cursing and yelling. Upon noticing that Peguero "only ha[d] a bat," Captain Rivera put his weapon back in his holster; identified himself; and asked Peguero to drop the bat and "calm down." Peguero continued walking around Larcen's residence, hitting the windows, uttering expletives, and yelling.

24. On or around 3:11 A.M., Captain Rivera positioned himself behind a parked vehicle and requested reinforcements at their location.

25. Shortly thereafter, Peguero jumped the house's fence and walked towards Captain Rivera.

26. The officers repeatedly asked Peguero to drop the bat.

27. Captain Rivera fired one shot, hitting Peguero in the chest.

28. After falling face down to the ground and while bleeding, Peguero was handcuffed with his hands behind his back.

29. Captain Rivera requested an ambulance at approximately 3:13 A.M.

30. According to the pre-hospitalization attendance report, paramedics arrived at the scene at 3:22 A.M.

31. Peguero was declared dead at 3:52 A.M. [8]

32. Captain Rivera submitted a Use of Force Report, dated November 8, 2013.

33. The Municipality conducted an administrative investigation into Captain Rivera's use of force.

34. On March 24, 2017, the Puerto Rico Secretary of Justice certified that the Commonwealth's Department of Justice had administratively closed the investigation into these events.

ANALYSIS

Captain Rivera, Officer Serrano, Officer Rosario, the Supervisor Defendants, and the Municipality move for summary judgment as to the claims asserted against them. The Court addresses each argument individually, starting with the federal claims and the qualified immunity defenses before turning to the state law claims.

I. The Section 1983 Claims (Second Cause of Action)

Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. "Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 104 L. Ed. 2d 443

(1989) (internal quotation marks and citation omitted). To prevail in a § 1983 suit, a plaintiff must establish that the defendant, acting under color of state law, deprived him of a federal right. Santiago v. Puerto Rico, 655 F.3d 61, 68 (1st Cir. 2011) (citation omitted). A defendant has acted under color of state law if he has abused the power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (citation omitted). Further, to establish the deprivation of a federal right, "plaintiffs must show that the defendants' conduct was the cause in fact of the alleged deprivation." Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997) (citation omitted).[9]

In this case, Defendants do not dispute that they acted under color of state law. Instead, Defendants argue that the Court should enter summary judgment in their favor because (i) they are entitled to qualified immunity; and (ii) Plaintiffs have failed to present cognizable claims. The Court first addresses the arguments raised by Captain Rivera, Officer Serrano, and Officer Rosario as to the federal causes of action. Then, it addresses the supervisory liability and municipal liability claims asserted against the Supervisor Defendants and the Municipality. The Court concludes with the analysis of the state law causes of action.

II. Qualified Immunity

Qualified immunity shields "[a] government official sued under § 1983 . . . unless the official violated a statutory or constitutional right that was

clearly established at the time of the challenged conduct." Carroll v. Carman, 574 U.S. 13, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014) (citing Ashcroft v. al—Kidd, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). In this way, the "doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Id. (internal quotation marks and citation omitted). To this effect, qualified immunity is governed by a two-part inquiry:

> First, we inquire whether the facts, taken most favorably to the party opposing summary judgment, make out a constitutional violation. Second, we inquire whether the violated right was clearly established at the time that the offending conduct occurred. The second, "clearly established," step itself encompasses two questions: whether the contours of the right, in general, were sufficiently clear, and whether, under the specific facts of the case, a reasonable defendant would have understood that he was violating the right.

Ford v. Bender, 768 F.3d 15, 23 (1st Cir. 2014) (emphasis added) (citations omitted). Finding a "clearly established" right requires "identify[ing] either controlling authority or a consensus of [10] persuasive authority sufficient to put an officer on notice that his conduct fell short of the constitutional norm." Conlogue v. Hamilton, 906 F.3d 150, 155 (1st Cir. 2018) (citation omitted).

Captain Rivera, Officer Serrano, and Officer Rosario seek summary judgment as to the § 1983 excessive force claims, claiming they are entitled to qualified immunity. Officers Serrano and Rosario also seek dismissal on the merits of the § 1983 causes of action.

A. Excessive force — Use of Deadly Force

Plaintiffs have failed to put forth evidence that any municipal police officer, except for Captain Rivera, participated or was involved in the decision to shoot Peguero. For this reason, the Court construes Plaintiffs' first excessive force claim—based on the use of deadly force—as asserted only against Captain Rivera, the Mayor in her supervisory capacity, and the Commissioner in his supervisory capacity.[3] To the extent that Plaintiffs also sought to assert this claim against the remaining Police Defendants, those claims are hereby DISMISSED WITH PREJUDICE.

As to this claim, Captain Rivera argues that he should be immune from suit, pursuant to the qualified immunity doctrine, for fatally shooting Peguero. Docket No. 264-18 at 5-20. The Court disagrees.

1. Clearly Established

[3] The Court shall address the Mayor and the Commissioner's arguments on this issue below. Infra at III.

First, the "clearly established" prong is easily satisfied. Excessive force claims are governed by the Fourth Amendment's "objective reasonableness" standard. See Graham, 490 U.S. at 388; Whitfield v. Melendez-Rivera, 431 F.3d 1, 7 (1st Cir. 2005). The Fourth Amendment, for its part, protects citizens [11] against unreasonable force, searches, and seizures by the government. U.S. Const. amend. IV. More specifically, "under clearly established law, the use of deadly force is constitutional only if, at a minimum, a suspect poses an immediate threat to police officers or civilians." Jarrett v. Town of Yarmouth, 331 F.3d 140, 149 (1st Cir. 2003). Accordingly, Peguero had a clearly established right not to be subjected to deadly force unless he posed an immediate threat to Captain Rivera, the Police Defendants, or other bystanders in the area.

2. Constitutional Violation

Second, Plaintiff's proffered version of the facts, if true, makes out a violation of a constitutionally protected right." Morelli v. Webster, 552 F.3d 12, 18 (1st Cir. 2009). An excessive force claim requires a showing that a defendant's use of force was objectively unreasonable considering the totality of the circumstances and "without regard to the [] underlying intent or motive." Graham, 490 U.S. at 397; see Morelli, 552 F.3d at 23. To assess reasonableness, courts must evaluate "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; see Raiche v. Pietroski, 623 F.3d 30, 36

(1st Cir. 2010). This analysis requires a careful balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interest" against the countervailing governmental interests at stake. Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (citations omitted).

Here, there is a genuine issue of material fact as to whether Peguero posed an imminent threat at the time he was shot and, by extension, whether Peguero suffered a Fourth Amendment violation as a result. Captain Rivera contends that, immediately prior to shooting, Peguero was walking towards him "aggressively, in a threatening fashion, swinging the bat." Docket No. 264-[12]18 at 14; see Docket Nos. 271-15 at 25-27; 271-19 at 3-4; 271-20 at 3. He also maintains that, when Peguero was four or five feet away from him, Peguero "lifted his bat as if to hit [him]." Id. However, Plaintiffs have produced a witness[4]who testified that she personally observed that, at the time of the shooting, Peguero "came to a stop at the street . . . [and] he remained standing there and he had the bat in one hand, and he had the other hand down. He just didn't make any movements. He just stood there." Docket No. 273-6 at

[4] Captain Rivera argues that the Court should not credit this witness's testimony because it is "blatantly contradicted by the record" and it is "unreliable and questionable." Docket No. 288 at 3-9. The Court rejects the first argument because the record contains no objective evidence, such as a video, discrediting the testimony. Instead, the record shows contradicting testimonies from various witnesses, which creates a genuine issue of fact. The Court also rejects the second argument since, at the summary judgment stage, courts cannot make credibility determinations or weigh the evidence, as these are jury functions. See Anderson, 477 U.S. at 255.

44; see also id. at 49 ("Immediately after he came out, he stood on the street . . . he did not move . . . he was standing there with the bat down. After he was told a couple of times to let go of the bat, he did not let go of it, that's when the [gunshot] occurred."); id. at 96 (stating that, prior to being shot, Peguero was holding the bat "[o]n his right hand . . . pointing down."). If Plaintiffs' version of the events is true, Captain Rivera's use of deadly force would constitute excessive use of force in violation of the Fourth Amendment. As such, the Court hereby DENIES Captain Rivera's defense of qualified immunity and, accordingly, his Motion for Summary Judgment.

B. Excessive force — Arrest

Plaintiffs have similarly failed to put forth evidence that Captain Rivera participated or was involved in the decision to arrest and handcuff Peguero. Consequently, the Court construes the excessive force claim based on Peguero's arrest as asserted only against the Police Defendants. [13] To the extent that Plaintiffs also sought to assert this claim against Captain Rivera, it is hereby DISMISSED WITH PREJUDICE.

Turning to Officers Serrano and Rosario, they request dismissal of the § 1983 excessive force claims asserted against them for arresting Peguero after he was shot, on the grounds that Plaintiffs have failed to present a cognizable claim and, in the alternative, that they are entitled to qualified immunity. Docket No. 268 at 19-24. The Court addresses the qualified immunity defense first.

1. Constitutional Violation

At the outset, the qualified immunity analysis evaluates whether the facts, taken in the light most favorable to Plaintiffs, make out a constitutional violation. Officers Serrano and Rosario argue that they are entitled to qualified immunity for handcuffing Peguero because (i) they had probable cause to arrest him; and (ii) the right to be free from handcuffs was not clearly established. Docket No. 268 at 12-14, 20-26. The Court disagrees, finding that, at a minimum, there exists a genuine issue of material fact precluding a grant of immunity.

First, the issue is not whether the officers could arrest Peguero, but whether they used excessive force while doing so. See Raiche, 623 F.3d at 36 ("The Fourth Amendment is implicated where an officer exceeds the bounds of reasonable force in effecting an arrest or investigatory stop.") (citation omitted). Plaintiffs' claim that the Police Defendants used excessive force when they handcuffed Peguero requires a showing that "the defendant[s'] actions in handcuffing [him] were objectively unreasonable in light of the circumstances and the facts known to the officer[s] at the time."; Calvi v. Knox Cty., 470 F.3d 422, 428 (1st Cir. 2006) (citations omitted).

As noted above, the Fourth Amendment's reasonableness analysis "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime [14] at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9). Here, the officers observed Peguero committing several, non-minor crimes including trespassing, property damages, and

disorderly conduct. However, Officers Serrano and Rosario do not point to evidence showing that, after being shot in the chest, Peguero continued posing a safety threat; nor do they claim that Peguero was resisting arrest or attempting to flee the scene. In fact, the Court is skeptical that Defendants could plausibly argue that a man lying on the street, bleeding from a gunshot wound to the chest, posed a safety or flight risk warranting handcuffing, especially since he was surrounded by at least three armed police officers. As such, the Court finds that, at the very least, there exists a genuine issue of fact as to whether the Police Defendants' actions in handcuffing Peguero were objectively reasonable considering the surrounding circumstances.

2. Clearly Established

As to the second prong of the qualified immunity defense, First Circuit case law on the right to be free from excessive force by an arresting officer is clear and extensive. See Morelli, 552 F.3d at 23. However, "[t]he clearly established inquiry must be undertaken in a more particularized, and hence more relevant, sense," analyzing "whether the law is clearly established in light of the specific context of the case, not as a broad general proposition." Hunt v. Massi, 773 F.3d 361, 367-68 (1st Cir. 2014) (internal quotation marks and citations omitted). Hence, the Court must determine whether Peguero had a clearly established right not to be handcuffed—or to be handcuffed with his hands in front of him—in light of his visible—and fatal—gunshot injury.[15]

While the First Circuit has not directly addressed whether this constitutes a clearly established right, "[i]n cases involving suspects who

display some objective indicia of injury or disability . . . there appears to be general agreement that officers must take note of the suspect's complaints and make some effort to accommodate the claimed conditions or injuries, provided the circumstances permit such an accommodation." Caron v. Hester, 2001 U.S. Dist. LEXIS 19382, 2001 WL 1568761, at *5 (D.N.H. Nov. 13, 2001) (emphasis added); see, e.g., Aceto v. Kachajian, 240 F. Supp. 2d 121, 126 (D. Mass. 2003) (holding that it was "clearly established that the police must take known injuries into account in handcuffing a non- threatening individual."); Guite v. Wright, 147 F.3d 747, 750 (8th Cir. 1998) (affirming the denial of summary judgment after finding genuine issue of fact as to excessive force claim where, despite visible shoulder injury in sling, officer grabbed the plaintiff's wrist, pushed him, and held him up against a door); Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993) ("An excessive use of force claim could be premised on [arresting officer]'s handcuffing [arrestee] if [the officer] knew that [the arrestee] had an injured arm and if [the officer] believed that [the arrestee] posed no threat to him."); Eason v. Anoka-Hennepin E. Metro Narcotics & Violent Crimes Task Force, 2002 U.S. Dist. LEXIS 10645, 2002 WL 1303023, at *7 (D. Minn. June 6, 2002) (holding that "[b]ecause there is a general consensus among courts that police officers must factor a suspect's alleged preexisting injury into this calculus, at least when there is an objective manifestation of that injury . . . the Fourth Amendment right at issue was clearly established at the time of the incident.")(emphasis added); Ferguson v. Hall, 33 F. Supp. 2d 608, 612 (E. D. Mich. 1999) (denying qualified immunity on excessive force claim, where plaintiff alleged that he

showed his "deformed" arm to the officer and requested to be handcuffed in front of his body, but the officer ignored his request); Pritzker v. City of Hudson, 26 F.Supp. 2d. 433, 444 (N.D.N.Y. 1998) (denying qualified immunity on excessive force claim where [16] the arrestee advised the police officer of his wrist injury, noting the "numerous cases . . . holding that handcuffing a non-threatening individual in the face of a known medical condition violates clearly established constitutional rights.").

The closest the First Circuit has come to tackling this issue is Hunt, 773 F.3d 361, which held that the police officer defendants were entitled to qualified immunity because it was "aware of no case . . . where a court held that ignoring an uncooperative suspect's claim of invisible injury (such that handcuffing could be harmful) made during the course of handcuffing constituted excessive force." Id. at 370 (quoting Beckles v. City of N.Y., 492 Fed. Appx. 181, 183 (2d Cir. 2012)) (emphasis added). The First Circuit reasoned that

> The officers knew of [the plaintiff's serious and recent criminal history, and they encountered some admitted resistance [to arrest]. They had also looked at the site of his recent surgery and determined that no new injury or exacerbation would result from the standard technique for handcuffing. Nor was this determination unreasonable since [the plaintiff]'s scar was on his stomach. Most of the cases finding excessive force incident to handcuffing involve injuries to the shoulder or arm.

Id. (citation omitted). In so holding, the First Circuit "easily" distinguished two cases relied upon by the lower court—Howard v. Dickerson, 34 F.3d 978 (10th Cir. 1994) and Eason, 2002 U.S. Dist. LEXIS 10645, 2002 WL 1303023—noting that these "involved much more serious, and visible, injuries that would have been exacerbated by the standard police procedure for handcuffing." Hunt, 773 F.3d at 368.

It is beyond dispute that the case before us involves an extremely serious and patently obvious injury—a gunshot wound in the chest inflicted by one of the officers at the scene—that would likely be exacerbated by handcuffing. Additionally, as discussed above, supra at II.B.1, Defendants do not allege that, after being shot, Peguero continued posing a safety threat, was resisting arrest, or was attempting to flee, such that handcuffing was warranted despite his [17] obvious gunshot wound. Accordingly, the Court finds that, at the time of Peguero's arrest, there was sufficient case law showing that he had a clearly established right not to be handcuffed behind his back when he had a visible and fatal injury in his chest that would likely be exacerbated by the handcuffing, and when he did not pose a serious threat of danger or flight. See al—Kidd, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.") (citations omitted).

3. Failure to State a Claim

As to Officers Serrano and Rosario's dismissal request for failure to state a claim, the triable issues of fact precluding a grant of qualified immunity

similarly preclude summary judgment as to this claim. To wit, the Parties have failed to put forth sufficient evidence for the Court to determine whether, as a matter of law, the Officers' conduct was objectively reasonable in light of the circumstances. For this reason, the Court DENIES Officers Serrano and Rosario's Motion for Summary Judgment as to Plaintiffs' § 1983 claims for excessive use of force during Peguero's arrest.

C. Failure to Provide Medical treatment

Plaintiffs' Complaint also alleges that Defendants should be held liable for failing to provide medical assistance to Peguero. Docket Nos. 68 at 6-10, 15-16, 17-18; 273 at 6, 18-21. Such a claim is governed by the Due Process Clause of the Fourteenth Amendment. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) ("The Due Process Clause . . . does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police."); see Docket No. 273 at 18. However, this Court already dismissed Plaintiffs' Fourteenth Amendment claims on April 2017, Docket No. 112, because it read Plaintiffs' § 1983 claims as asserting only an excessive force claim under the Fourth Amendment, [18] Docket No. 110. Nowhere in Plaintiffs' Complaint do they allege a due process violation or otherwise sufficiently plead a Fourteenth Amendment claim. Thus, Plaintiffs' claims for failure

to provide medical assistance were dismissed by this Court.[5]

III. Supervisory Liability and Qualified Immunity (Third Cause of Action)

A. Failure to Train Claim

The Supervisor Defendants argue that Plaintiffs have failed to establish a cognizable claim of supervisory liability and, in the alternative, that they are entitled to qualified immunity. Docket Nos. 266; 267. Because, here, the second prong of the qualified immunity defense is intertwined with the merits of the supervisory liability claims, the Court tackles both arguments jointly.[6]

For § 1983 supervisory liability claims, "the 'clearly established'; prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor

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[5] Moreover, "the injured detainee's constitutional right is to receive the needed medical treatment; how the [Municipality] obtains such treatment is not a federal constitutional question." City of Revere, 463 U.S. at 245. Here, it is undisputed that Defendants did obtain medical treatment for Peguero—thus complying with their duty—by calling an ambulance immediately after Captain Rivera shot Peguero. See Docket Nos. 271-12; 271-21; 271-22.

[6] While, generally, "[t]he inquiry into qualified immunity is separate and distinct from the inquiry into the merits," Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998), "some aspect of the merits may be inexorably intertwined with the issue of qualified immunity," Morales v. Ramirez, 906 F.2d 784, 787 (1st Cir. 1990) (internal quotation marks and citation omitted).

would be liable for constitutional violations perpetrated by his subordinates in that context." Camilo-Robles v. Hoyos, 151 F.3d 1, 6 (1st Cir. 1998) (citations omitted). Here, both elements are satisfied. As discussed above, supra at II.A.2 and II.B.1, construing the facts in Plaintiffs' favor, the officers'; actions violated Peguero's clearly established rights under the Fourth Amendment; at a minimum, genuine issues [19] of fact exist as to this issue. Additionally, "it is equally well settled that a deliberately indifferent police supervisor may be held liable for the constitutional violations of his subordinates." Id. (citation omitted).

Turning to the other element of the defense, the Court must determine "whether, in relation to a clearly established right, a defendant's conduct was (or was not) reasonable." Hoyos, 151 F.3d at 6. Therefore, we now address the standard for supervisory liability in the context of § 1983 claims. While § 1983 does not provide or respondeat superior liability, supervisors "may be liable on the basis of their own acts or omissions." Sanchez v. Pereira-Castillo, 590 F.3d 31, 49 (1st Cir. 2009) (citation omitted). This requires a showing that (i) "one of the supervisor's subordinates abridged the plaintiff's constitutional rights" and (ii) "the [supervisor]'s action or inaction was affirmative[ly] link[ed] to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference." Guadalupe-Báez v. Pesquera, 819 F.3d 509, 514-15 (1st Cir. 2016) (citations omitted).

Since the first prong is satisfied, as already stated, the Court moves to the deliberate indifference inquiry.

A plaintiff asserting deliberate indifference by supervisors must show "(1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk." Hoyos, 151 F.3d at 7 (citation omitted). While actual knowledge is not required, a supervisor "may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness." Id. (citation omitted). Causation is also an important element of this analysis, requiring "proof that [20] the supervisor's conduct led inexorably to the constitutional violation." Guadalupe-Báez, 819 F.3d at 515 (quoting Hegarty v. Somerset Cty., 53 F.3d 1367, 1380 (1st Cir. 1995)).

Supervisory liability under § 1983 may be premised on an inadequate training allegation, provided that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Thus, a plaintiff must show that the supervisor "disregarded a known or obvious risk of serious harm from its failure to develop a training program "that meets adequate standards. Young v. City of Providence, 404 F.3d 4, 28
(1st Cir. 2005).

Here, the Complaint alleges that the Supervisor Defendants failed to develop or implement policies and procedures regarding the use of force, the provision of medical services to injured individuals, and the reporting and review of

instances involving such use of force, among other matters. Docket No. 68 at 15-16. Defendants have shown that the Municipality did have policies and procedures in place addressing these issues. See Docket Nos. 266 at 12-13; 267 at 12-13. In response, Plaintiffs concede the existence of a use of force policy but argue that it was not adequately implemented and that municipal police officers were not adequately trained on this policy. Docket No. 273 at 14- 18.[7]

The Manual on Use and Handling of Firearms (the "Manual") includes a use of force policy, establishing five different levels of permitted force depending on the Officer's perception of the subject's conduct. Docket No. 271-3 at 3-9. Three of the five levels provide for the use of physical [21] and defensive tactics such as impact with open hand, escort positions, grabs, and pressure point techniques, as well as using electrical (e.g., tasers) or chemical (e.g., pepper spray) weapons. Id. However, Defendants have failed to point to evidence showing that, to ensure compliance with the Manual, the S.J. Municipal Police specifically trained its officers on either physical or defensive tactics. Nor have they

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[7] Regarding the supervisory liability claims, Plaintiffs' Opposition only addresses the inadequate implementation of, and deficient training on, the use of force policy. Docket No. 273 at 13-18. Because Plaintiffs have failed to point to any evidence supporting the remaining allegations pertaining to the Supervisor Defendants, the Court DISMISSES WITH PREJUDICE all other supervisory liability claims. Therefore, the only remaining supervisory liability claims are those relating to the implementation of, and training on, the use of force policy.

pointed to evidence showing that the S.J. Municipal Police provided its officers with any chemical or electrical weapons.

Meanwhile, Captain Rivera testified in his deposition that he had never received training on the use of tasers and that he had never been provided with one. Docket No. 271-15 at 30. It seems impossible for municipal police officers to abide by the Manual if they are not provided with the necessary resources to do so; that is, if they were not given the tools and training needed to implement levels two through four of the use of force policy.

Moreover, if Supervisor Defendants had knowledge of the contents of the Manual, the contents of the different training components, and the equipment provided to municipal police officers, a reasonable jury could find that they had constructive knowledge that the use of force policy was inadequately implemented but nevertheless failed to take easily available measures, e.g., equipping officers with chemical and electrical weapons. Indeed, a jury could find that it was foreseeable that failure to train or equip officers with chemical and electrical weapons would result in an officer prematurely escalating the use of force because he lacked non-lethal tools to ensure his safety and that of others.[8]

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[8] Indeed, Captain Rivera did just that. He started using verbal commands pursuant to the first level of the use of force policy, but he quickly escalated to the fifth level, deadly force. The record does not show that Captain Rivera attempted to execute levels two, three, or four of the use of force policy. Similarly, the record does not show that, while Peguero walked towards him, Captain Rivera attempted any non-lethal tactics including, for example, brandishing his weapon, shooting near Peguero's feet,

[22] Consequently, the Court finds that triable issues of fact exist as to whether the Supervisor Defendants should have known that failure to provide chemical or electrical weapons created a risk that municipal police officers would not be able to abide by the different levels of force and, as a result, prematurely respond with deadly force. Accordingly, issues of fact as to the implementation of the use of force policy and the
adequacy of training preclude both a grant of qualified immunity and summary judgment as to this claim. For this reason, the Court DENIES the Supervisor Defendants' Motions for Summary Judgment on the failure to train claim.

B. Negligent Hiring Claim

Plaintiffs' Complaint also alleges that the Supervisor Defendants hired individuals who were not qualified for their positions. Docket No. 68 at 14. In response, the Supervisor Defendants aver that Captain Rivera, Officer Serrano, and Officer Rosario were hired before the Supervisor Defendants' tenures. Docket Nos. 266 at 16; 267 at 17. Plaintiffs did not oppose this argument, and have simply failed to show that the Supervisor Defendants participated in the hiring of the Police Defendants or that the Supervisor Defendants were otherwise negligent in the hiring of any municipal police officer. Accordingly, claims premised on the hiring practices

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or shooting Peguero in the arm or leg. Had Captain Rivera been equipped with a taser, or even pepper spray, it seems probable that the officers would have been able to subdue Peguero without inflicting serious injury.

at the S.J. Municipal Police are hereby DISMISSED WITH PREJUDICE.

IV. Municipal Liability (Third Cause of Action)

The Municipality moves for dismissal of the claims asserted against it, arguing that Plaintiffs have failed to establish the existence of an official unconstitutional policy or custom. Docket No. 268 at 5-10. The Court agrees.

[23] In Monell v. Dep't of Soc. Servs. of City of N.Y, the Supreme Court held that municipalities could be held liable for violations of § 1983, but not on the basis of respondeat superior. 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, municipal liability must be based on the enforcement of an "official policy" that serves as the "moving force of the constitutional violation." Id. at 694-95; Haley v. City of Bos., 657 F.3d 39, 51 (1st Cir. 2011) ("[A] plaintiff who brings a section 1983 action against a municipality bears the burden of showing that, through its deliberate conduct, the municipality was the moving force behind the injury alleged.") (internal quotation marks and citation omitted). Therefore, "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (citation omitted).

Under certain limited circumstances, a municipality's "decision not to train certain employees about their legal duty to avoid violating citizens" rights may rise to the level of an official

government policy for purposes of § 1983." Connick v. Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011). Still, municipal liability "is at its most tenuous where a claim turns on a failure to train." Id. In these cases, § 1983 liability attaches only when the municipality's failure to train "amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton, 489 U.S. at 388. Only then can inadequate training be considered an official "policy or custom that is actionable under § 1983." Connick, 563 U.S. at 61 (internal quotation marks and citation omitted).

To meet this deliberate indifference standard, a plaintiff must show that "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights," yet choose to retain the [24] training program. Connick, 563 U.S. at 61 (citation omitted). Notably, the Supreme Court has held that "[a] pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train." Id. at 62 (citation omitted). This proves fatal to Plaintiffs' municipal liability claims.

Here, Plaintiffs have presented no evidence of a pattern of similar constitutional violations. While the Supreme Court did not "foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre- existing pattern of violations," id. at 64 (emphasis added), such is simply not the case here. The Court cannot find, based on the record, that it

was patently obvious that failing to train on the use of chemical and electrical weapons would result in constitutional violations. As such, the Court hereby GRANTS the Municipality's Motion for Summary Judgment and DISMISSES WITH PREJUDICE the corresponding claims.

V. State Law Claims

Finally, Plaintiffs assert several state law claims against the Police Defendants, including assault and battery as well as illegal arrest. Docket No. 68 at 16-20. Officers Serrano and Rosario request dismissal of the state law claims asserted against them. Docket No. 268 at 24-25. The Court addresses each in turn.

A. Assault and Battery (Fourth and Fifth Cause of Action)

Officers Serrano and Rosario move to dismiss the assault and battery claims, arguing that "[t]he undisputed facts show that they did not participate in any way in the alleged battery and even less in the death of Mr. Peguero." Docket No. 268 at 24. The Court agrees. Plaintiffs have not disputed this characterization of the facts and have failed to put forth evidence that any municipal [25] officer, except for Captain Rivera, participated or was involved in the decision to use deadly force against Peguero. As a result, the assault and battery claims against the Police Defendants, including Officers Serrano and Rosario, are hereby DISMISSED WITH PREJUDICE.

B. Illegal Arrest (Sixth Cause of Action)

Similarly, Officers Serrano and Rosario move to dismiss the illegal arrest claim, positing that they had probable cause to arrest Peguero. Docket No. 268 at 25. The Court again agrees.

Under Puerto Rico law, "[a] claim for false arrest arises . . . when [a] person, whether or not a law enforcement officer, may by himself or through another one unlawfully detain or cause the unlawful detention of another person. In both cases, said person would be liable for damages if said action is tortious or negligent." Díaz Nieves v. United States, 858 F.3d 678, 684 (1st Cir. 2017) (quoting Ayala v. San Juan Racing Corp., 12 P.R. Offic. Trans. 1012, 1021, 112 D.P.R. 804 (1982)) (internal quotation marks omitted). Such a claim focuses on "whether the arresting officers lacked reasonable cause for believing that [the suspect] committed a felony." Abreu-Guzman v. Ford, 241 F.3d 69, 75 (1st Cir. 2001) (internal quotation marks and citation omitted).

Here, it is undisputed that the Police Defendants arrived at the scene in response to two 911 calls about an aggressive person in the area who was shouting, using foul language, and potentially posing a threat to the safety of others. It is also undisputed that, upon arrival, the Police Defendants saw that Peguero had jumped a fence to gain entrance to a private residence. The Police Defendants also personally observed Peguero shouting, uttering insults, and hitting the windows and fence of a private residence with a bat, causing property damage. As such, the record demonstrates that the Police Defendants had reasonable cause for believing that Peguero [26] had committed several

criminal offenses, such a trespassing, damages,[9]and disorderly conduct. Accordingly, Plaintiffs' false arrest claims are hereby DISMISSED WITH PREJUDICE.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART Defendants' Motions for Summary Judgment. Specifically, the Court hereby DENIES Captain Rivera's Motion for Summary Judgment, Docket No. 264; GRANTS IN PART and DENIES IN PART the Mayor's Motion for Summary Judgment, Docket No. 266; GRANTS IN PART and DENIES IN PART the Commissioner's Motion for Summary Judgment, Docket No. 267; GRANTS the Municipality's Motion for Summary Judgment, Docket No. 268; and GRANTS IN PART and DENIES IN PART Officers Serrano and Rosario's Motion for Summary Judgment, id.

As a result, the Court hereby DISMISSES WITH PREJUDICE the following claims: (i) the excessive force claims against the Police Defendants based on the use of deadly force; (ii) the excessive force claim against Captain Rivera based on the arrest; (iii) all claims premised on the hiring practices of the S.J. Municipal Police; (iv) all claims against the Municipality; (v) the assault and battery

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[9] Under Puerto Rico law, the crime of aggravated damages is a felony. See P.R. Laws Ann. tit. 33, § 4836(b) ("Any person who commits the crime of damages set forth in § 4835 of this title shall be guilty of a fourth degree felony if any of the following circumstances concur . . . when the damage caused is assessed in one thousand dollars ($1,000) or more.").

claims against the Police Defendants; and (vi) the false arrest claim.

The only surviving claims are the following: (i) the excessive force claim against Captain Rivera based on the use of deadly force; (ii) the excessive force claim against the Police Defendants based on the arrest; (iii) the supervisory liability based on training and implementation of the use [27] of force policy; and (iv) the assault and battery claims against Captain Rivera. Partial Judgment shall be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 22nd day of February, 2019.
[Original numbering in brackets]

/s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge

PARTIAL JUDGMENT

Pursuant to this Court's Opinion and Order issued today, Docket No. 302, Judgment is hereby entered DISMISSING WITH PREJUDICE the following claims:

1. The § 1983 use of deadly force claims asserted against Jermary Serrano, Edwin Rosario, Luis D. Vasquez Crespo, Luis A. Burgos Nieves, Gilberto Y. Febus Perez, and John Does 1-100;

2. The § 1983 use of excessive force during an arrest claim asserted against Ismael Rivera Gonzalez;

3. All § 1983 claims premised on the hiring practices of the San Juan Municipal Police;

4. All claims asserted against the Municipality of San Juan;

5. The state law assault and battery claims asserted against Jermary Serrano, Edwin Rosario, Luis D. Vasquez Crespo, Luis A. Burgos Nieves, Gilberto Y. Febus Perez, and John Does 1-100; And

6. The state law false arrest claim.

IT IS SO ORDERED.

In San Juan, Puerto Rico this Friday, February 22, 2019.

/s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
U.S. DISTRICT JUDGE