FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMON CORTESLUNA, *Plaintiff-Appellant*, v. MANUEL LEON; ROBERT KENSIC; DANIEL RIVAS-VILLEGAS; CITY OF UNION CITY, California, *Defendants-Appellees*.	No. 19-15105 D.C. No. 3:17-cv-05133-JSC OPINION

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, Magistrate Judge, Presiding

Argued and Submitted April 29, 2020
San Francisco, California

Filed October 27, 2020

Before: Ronald Lee Gilman,* Susan P. Graber, and Daniel P. Collins, Circuit Judges.

Opinion by Judge Graber;
Partial Concurrence and Partial Dissent by Judge Gilman; Partial Concurrence and Partial Dissent by Judge Collins

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* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

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 brought pursuant to 42 U.S.C. § 1983 and state law alleging that police officers used excessive force in effecting plaintiff's arrest.

The panel affirmed the district court's summary judgment in favor of officer Leon. The panel held that even taking plaintiff's version of the facts as true, as was required at this stage of the proceedings, a reasonable jury would not find a Fourth Amendment violation because Leon's acts were objectively reasonable under the circumstances. The panel first determined that the alleged crime was severe: a twelve-year-old girl told a 911 dispatcher that plaintiff had threatened his girlfriend and her daughters with a chainsaw. The panel then determined that Officer Leon faced an immediate threat. The panel noted that plaintiff had a knife in the left pocket of his pants and had lowered his hands toward his thighs—and thus toward the knife—after which Leon fired a beanbag shotgun. Finally, the panel determined that plaintiff's hands remained near the knife in his pocket at the time of the second beanbag shot.

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

The panel reversed the district court's summary judgment in favor of officer Rivas-Villegas. The panel first held that there was a genuine issue of issue of fact as to whether the force that Rivas-Villegas used when he kneeled on plaintiff's back when he was lying face down on the ground was excessive. The panel then determined that controlling precedent at the time put officers on notice that kneeling on a prone and nonresisting person's back so hard as to cause injury was excessive.

The panel affirmed the district court's summary judgment in favor of Sergeant Kensic, determining that he lacked any realistic opportunity to intercede to stop the excessive force. Finally, because the panel reversed the grant of summary judgment as to officer Rivas-Villegas, it remanded to the district court for consideration of the other elements of plaintiff's claim against the City of Union City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). For the same reason, the panel reinstated plaintiff's state-law claims relating to Rivas-Villegas' conduct.

Concurring in part and dissenting in part, Judge Gilman fully concurred in the portions of the majority opinion regarding the disposition as to Sergeant Kensic and Officer Rivas-Villegas. He respectfully dissented from the portion affirming the grant of summary judgment in favor of Officer Manuel Leon, stating that he had no doubt that a jury could reasonably find in plaintiff's favor based on the facts that he has presented.

Concurring in part and dissenting in part, Judge Collins concurred in the majority opinion insofar as it partially affirmed the district court's judgment dismissing plaintiff's claims of excessive force in connection with his arrest. However, he disagreed with the majority's reversal of the judgment in favor of Officer Rivas-Villegas and its partial reversal of the judgment dismissing plaintiff's claims against the City. Judge Collins would affirm the judgment in its entirety.

COUNSEL

Audrey Smith (argued) and Robert G. Howie, Howie & Smith LLP, San Mateo, California, for Plaintiff-Appellant.

Lori A. Sebransky (argued) and Kevin P. Allen, Allen Glaessner Hazelwood & Werth LLP, San Francisco, California, for Defendants-Appellees.

OPINION

GRABER, Circuit Judge:

Plaintiff Ramon Cortesluna appeals from the summary judgment entered in favor of Defendants Manuel Leon, Daniel Rivas-Villegas, Robert Kensic, and the City of Union City, California ("City"), in this action alleging that the individual Defendants used excessive force in effecting Plaintiff's arrest. We affirm in part, reverse in part, and remand.

I

FACTUAL AND PROCEDURAL BACKGROUND[1]

On the night of November 6, 2016, a 911 dispatcher received a call in which a 12-year-old girl, I.R., reported that she, her mother, and her 15-year-old sister were barricaded in a room at their home because her mother's boyfriend, Plaintiff, had a chainsaw and was going to attack them. I.R. said that Plaintiff was "always drinking," had "anger issues," was "really mad," and was using the chainsaw to "break something in the house." I.R. said that her mother was holding the door closed to prevent Plaintiff from entering and hurting them. I.R.'s sister then took the phone and confirmed that Plaintiff was "right outside the bedroom door" and was "sawing on their door knob." A manual sawing sound was audible to the 911 operator. I.R.'s sister described Plaintiff and his clothing.

A police dispatcher requested that officers respond. The dispatcher reported that a 12-year-old girl said that her mother's boyfriend had a chainsaw and was trying to hurt her, her sister, and her mother, who were together in a room. The dispatcher also relayed the girl's statement that the boyfriend was "always drinking" and was using the chainsaw to break something in the house. The dispatcher further reported that there had been another potentially related 911

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[1] The underlying facts, except those regarding Plaintiff's alleged injuries, are undisputed.

call in the area and that, on that call, crying could be heard, but the caller hung up without speaking.

Defendants Leon, Rivas-Villegas, and Kensic, along with two other police officers, responded to the scene. When the first three officers, including Rivas-Villegas and Kensic, arrived, they observed Plaintiff's home for several minutes and saw that "[Plaintiff] is right here" in his window and "doesn't have anything in his hand" except, at some points, a beer. The officers checked with dispatch to confirm that the caller really reported a chainsaw. The dispatcher acknowledged "we can't hear [a chainsaw] over the phone" but suggested that Plaintiff could be using the chainsaw "manually." One officer asked the 911 operator if the girl and her family could leave the house. The operator replied that they were unable to get out and that, during the call, she heard sawing sounds in the background, as if the boyfriend were trying to saw the bedroom door down.

Defendant Leon arrived at the scene later and might have heard the radioed conversation with the dispatcher. When Leon arrived, another officer told him, "so, he's standing right here drinking a beer. What do you think [about] just giving him commands, having him come out, and do a protective sweep?" The officers formulated a plan to approach the house and "breach it with less lethal, if we need to," a reference to Leon's beanbag shotgun.[2]

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[2] A beanbag shotgun is a twelve-gauge shotgun loaded with beanbag rounds, consisting of lead shot contained in a cloth sack. *Deorle v. Rutherford*, 272 F.3d 1272, 1277 & n.8 (9th Cir. 2001).

Rivas-Villegas knocked on the front door, stating, "[P]olice department, come to the front door, Union City police, come to the front door." A few seconds later, Plaintiff emerged through a sliding glass door near the front door, holding a large metal object. Kensic said, "He's coming . . . he's got a weapon in his hand" that looks "like a crowbar." Plaintiff was ordered to "drop it," which he did. Meanwhile, Leon said, "I'm going to hit him with less lethal," that is, his beanbag shotgun, and told another officer to get out of his way.

Rivas-Villegas then ordered Plaintiff to "come out, put your hands up, walk out towards me." Plaintiff put his hands up, as Rivas-Villegas told Plaintiff to "keep coming."

As Plaintiff walked out of the house and toward the officers, Rivas-Villegas said, "Stop. Get on your knees." Plaintiff stopped approximately ten to eleven feet from the officers. Immediately after Rivas-Villegas' order, Kensic saw a knife in the front left pocket of Plaintiff's sweatpants, and he announced that Plaintiff had "a knife in his left pocket, knife in his pocket." Kensic then told Plaintiff, "[D]on't, don't put your hands down" and "hands up." After Kensic shouted this last order, Plaintiff turned his head toward Kensic, who was on Plaintiff's left side, (and away from Leon, who was on Plaintiff's right side) and simultaneously lowered his head and his hands. Leon immediately shot Plaintiff with a beanbag round from his shotgun

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By design, beanbag shotguns typically cause serious injury rather than death, although death can result.

and quickly fired a second beanbag shot while Plaintiff's hands were still in a downward position near his belly, where the first shot hit. The second shot hit him on the hip. Roughly two seconds elapsed between Kensic's "hands up" order and the second shot.

After the second shot, Plaintiff again raised his hands over his head. The officers ordered him to "[G]et down." As Plaintiff was lowering himself to the ground, Rivas-Villegas used his foot to push Plaintiff to the ground. Rivas-Villegas then pressed his knee into Plaintiff's back and pulled Plaintiff's arms behind his back. Leon handcuffed Plaintiff's hands while Rivas-Villegas held his position. A few moments later, Rivas-Villegas lifted Plaintiff up by his handcuffed hands and moved him away from the doorway. Other officers then entered the house, and the incident ended.

Plaintiff filed a complaint asserting (a) a claim under 42 U.S.C. § 1983 against Leon and Rivas-Villegas for excessive force; (b) a § 1983 claim against Kensic for failing to intervene and stop the excessive force; (c) a claim against the City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for the officers' actions; and (d) several state-law claims. Plaintiff claims that he suffers physical, emotional, and economic injuries as a result of the officers' conduct.

The district court granted summary judgment to the individual Defendants on the federal claims. As to Leon and Rivas-Villegas, the court ruled both that the force used was objectively reasonable in the circumstances and that they were entitled to qualified

immunity. As to Kensic, the court ruled that he had no reasonable opportunity to intervene and therefore could not be liable. With summary judgment granted in favor of the individual Defendants, the court dismissed Plaintiff's claim against the City. The court then declined to exercise supplemental jurisdiction over Plaintiff's state-law claims and dismissed them without prejudice. This timely appeal followed.

II

STANDARD OF REVIEW

We review de novo the propriety of summary judgment. *S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017). Summary judgment is appropriate only if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Blight v. City of Manteca*, 944 F.3d 1061, 1065–66 (9th Cir. 2019).

We also review de novo the ruling that a police officer is entitled to qualified immunity. *S.B.*, 864 F.3d at 1013. If the parties' versions of the facts differ, we use the version most favorable to Plaintiff, the non-moving party. *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005) (en banc).

III

DISCUSSION

A. *Principles of Qualified Immunity*

Qualified immunity protects individual officers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). In evaluating an assertion of qualified immunity, we undertake a two-part analysis, asking (1) "whether the facts taken in the light most favorable to the plaintiff show that the officer's conduct violated a constitutional right," and (2) whether that right was "clearly established at the time of the officer's actions, such that any reasonably well-trained officer would have known that his conduct was unlawful." *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020).

At step one, we determine whether a reasonable jury could conclude that an officer's use of force violated the Fourth Amendment by "balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). That analysis incorporates many factors,[3] but

[3] Those factors include the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injuries; any effort made by the officer to temper or to limit the amount of force; the threat reasonably perceived by the

the most important factor is "whether the suspect posed an immediate threat to the safety of the officers or others." *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016) (internal quotation marks omitted). Although we take disputed facts in the light most favorable to the plaintiff, we view the facts from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Because of the factual disputes typical of excessive-force claims, we have recognized that summary judgment at this step "should be granted sparingly." *Smith*, 394 F.3d at 701 (internal quotation marks omitted). Nonetheless, summary judgment may be granted to an officer if, "after resolving all factual disputes in favor of the plaintiff," the court concludes that the force used was "objectively reasonable under the circumstances." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

At step two, we determine whether the officer's conduct violated "clearly established" law. *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014). In doing so, we are mindful of the Supreme Court's repeated instruction "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Rather, we must decide "whether the violative nature of particular conduct [was] clearly established."

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officer; the severity of the plaintiff's crime; whether the plaintiff posed an immediate threat to the safety of the officers or others; and whether the plaintiff actively resisted arrest or attempted to flee. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *Orn*, 949 F.3d at 1174.

Id. That is, existing precedent must already have placed the constitutional or statutory question beyond debate. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). We have interpreted those instructions to mean that liability does not attach unless a case exists in which a police officer acting under similar circumstances was held to have violated the Fourth Amendment. *Emmons v. City of Escondido*, 921 F.3d 1172, 1174 (9th Cir. 2019) (per curiam).[4]

B. *Officer Leon*

Plaintiff asserts that Leon violated the Fourth Amendment by shooting him twice with a beanbag shotgun. Even taking Plaintiff's version of the facts as true, as we must at this stage, a reasonable jury would not find a Fourth Amendment violation, because Leon's acts were objectively reasonable in the circumstances. Therefore, we affirm the district court's grant of summary judgment to Leon.

The reasonableness of an officer's use of force "traditionally is a question of fact for the jury." *Scott*, 39 F.3d at 915. Nevertheless, we may depart from that traditional rule if any reasonable juror would find that

[4] An exception exists for "the rare `obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)). That exception does not apply here.

the use of force was "objectively reasonable under the circumstances." *Id.*

As to the personal intrusion, because beanbag rounds are "potentially lethal at thirty feet and could be lethal at distances up to fifty feet," they are "not to be deployed lightly." *Deorle*, 272 F.3d at 1279–80. Their use "is permissible only when a strong governmental interest compels the employment of such force." *Id.* at 1280. In assessing the governmental interest, we consider "(1) 'whether the suspect poses an immediate threat to the safety of the officers or others,' (2) 'the severity of the crime at issue,' and (3) 'whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Glenn v. Washington Cty.*, 673 F.3d 864, 872 (9th Cir. 2011) (quoting *Graham*, 490 U.S. at 396)).

Here, first, the alleged crime was severe: a twelve-year-old girl told a 911 dispatcher that Plaintiff had threatened his girlfriend and her daughters with a chainsaw. The threat was just as great even if Plaintiff had been using the saw manually.

Leon faced an immediate threat, the second and most important factor. *C.V. ex rel. Villegas*, 823 F.3d at 1255. Although Plaintiff did not have a chainsaw when the officers arrived, Plaintiff emerged from the house holding a large metal object. Plaintiff dropped the object when ordered to do so, but he still had a knife in the left pocket of his pants. Leon, who was standing diagonally to Plaintiff's right, could not see the knife from his position. Kensic announced that Plaintiff had a knife and ordered Plaintiff to put his hands up.

Plaintiff instead lowered his hands toward his thighs—and thus toward the knife—after which Leon fired the beanbag shotgun.

The third factor pertains to Plaintiff's resistance. Before the first shot was fired, Plaintiff put his hands down, and closer to the knife in his pocket, after police repeatedly told him to put his hands up. Plaintiff's hands remained near the knife in his pocket at the time of the second shot.

In summary, even viewing the facts in Plaintiff's favor, the force that Leon applied was objectively reasonable in the circumstances, considering both the level of intrusion and the strength of the government's interest. It bears repeating that our inquiry is an objective one. Despite our colleague's suggestion, Judge Gilman's dissent at 22, we cannot consider that Leon announced that he was "going to hit [Plaintiff] with less lethal" twenty seconds before pulling the trigger. As the Supreme Court has repeatedly stressed, we must assess officers' use of force "without regard to their underlying intent." *Graham*, 490 U.S. at 397. Accordingly, we affirm the summary judgment entered in favor of Leon.

C. *Officer Rivas-Villegas*

Plaintiff alleges that Rivas-Villegas violated his Fourth Amendment right to be free from excessive force by leaning too hard on his back, causing injury. Taking Plaintiff's version of the facts as true, we agree. Because we also hold that controlling precedent put

officers on notice that such force is excessive, Rivas-Villegas is not entitled to qualified immunity. We therefore reverse and remand for a jury to decide whether Rivas-Villegas used excessive force and, if so, to assess damages.

1. *Rivas-Villegas' use of force was excessive.*

Although we have held that Leon did not violate Plaintiff's Fourth Amendment rights by using excessive force, the objective situation altered dramatically after Leon shot Plaintiff twice with beanbag rounds. By the time Rivas-Villegas put pressure on Plaintiff's back, Plaintiff no longer posed a risk. He was lying face down on the ground, experiencing visible pain from having been shot by the two beanbag rounds, and not resisting. Although the knife remained in Plaintiff's pocket, Rivas-Villegas—unlike Leon—could have seen that the knife was protruding blade-up such that it would not have been possible for Plaintiff to grab it and attack anyone. Thus, the governmental interest that we must consider had decreased greatly from when Leon fired on Plaintiff.

And although a knee on the back is a lesser personal intrusion than beanbag rounds, it still constitutes a meaningful personal intrusion when it causes injury. *LaLonde v. County of Riverside*, 204 F.3d 947, 952 (9th Cir. 2000). In evaluating reasonableness, we may consider the presence and severity of a plaintiff's injuries, but injuries are not required. *Felarca v. Birgeneau*, 891 F.3d 809, 817 (9th Cir. 2018). This court long

ago recognized that a plaintiff asserting a claim of excessive force "is not required to show a significant injury." *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993), *as amended on denial of reh'g* (Oct. 28, 1993); *see also Morales v. Fry*, 873 F.3d 817, 820–21 (9th Cir. 2017) (discussing this circuit's requirement under *Floyd v. Laws*, 929 F.2d 1390, 1402–03 (9th Cir. 1991), that a court award nominal damages where a jury finds for a plaintiff on an excessive-force claim but awards no damages). If the use of force is excessive and there is a case on point that alerted the officer to the unconstitutionality of his conduct (an issue to which we will turn next), there is no added requirement for a specific level of damage or injury. Here, Plaintiff alleges that he now suffers ongoing neck and back pain, headaches, and emotional distress on account of Rivas-Villegas' actions. That is sufficient to create a genuine dispute of material fact that requires resolution by a jury. The credibility and weight of Plaintiff's evidence are for the jury, not us, to decide.[5] Because we must view all the

[5] Judge Collins' dissent errs by "disregard[ing]" Rivas-Villegas' brief use of his foot to press Plaintiff to the ground. Judge Collins' Dissent at 28 n.2. The fact that Plaintiff did not feel the foot on his back does not make the push irrelevant, because that fact does not negate the possibility that the push contributed to Plaintiff's alleged injuries. Once again, the significance of the push is for the jury, and not us, to decide. Nor is it particularly surprising that Plaintiff did not feel a foot on his body after he had absorbed two rounds from a beanbag shotgun. *Cf. Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008) ("Because she was focused on regaining control of her breathing, [the plaintiff] does not recall feeling the impact of the pepper ball rounds on her body. . . .").

evidence in Plaintiff's favor, Rivas-Villegas used excessive force.

2. *Rivas-Villegas violated clearly established law.*

At step two, Rivas-Villegas is not entitled to qualified immunity because existing precedent put him on notice that his conduct constituted excessive force. In *LaLonde*, an officer grabbed the plaintiff, knocked him to the ground, straddled him, and handcuffed him. 204 F.3d at 952. Allegedly, another officer then "forcefully put his knee into LaLonde's back, causing him significant pain" and a lingering back injury. *Id.* We reversed the summary judgment entered in favor of the officers because the allegations, if true, "constitute[d] a clear violation of [LaLonde's] Fourth Amendment rights." *Id.* at 962.[6]

Judge Collins' dissent asserts that the facts here differ from those in *LaLonde* so much that a reasonable officer would not have been put on notice that pushing his knee into the back of a prone, unresisting, injured person violates the Fourth Amendment. Judge Collins' Dissent at 35–37. We disagree. Although the officers here responded to a more volatile situation than did the officers in *LaLonde*, the context was substantially similar. Indeed, rarely is a precedent as

[6] Although *LaLonde*'s discussion of the test for qualified immunity may be outdated, it nonetheless establishes that certain uses of force, including the use of force similar to that employed in this case, violate the Fourth Amendment.

precisely aligned with the relevant actions. Both *LaLonde* and this case involve suspects who were lying face-down on the ground and were not resisting either physically or verbally, on whose back the defendant officer leaned with a knee, causing allegedly significant injury.

In *LaLonde*, officers responded to reported yelling inside a residence. 204 F.3d at 950–51. And much like here, the officers were warned that the plaintiff possessed a deadly weapon—a rifle in that case. *Id.* at 951. The officers also were told that they "should be careful because [the plaintiff] might be willing to use [that weapon]." *Id.* And much like here, the plaintiff at first declined to comply with police requests. *Id.* at 951–52.

The similarities increase at what *Graham* teaches to be the most critical moment: when excessive force was employed. 490 U.S. at 396. In *LaLonde*, an officer "forcefully put his knee into [the plaintiff's] back" after the plaintiff had been sprayed with pepper spray and had stopped resisting arrest. 204 F.3d at 952, 959 n.17. Here, at the time in question, Plaintiff was prone, similarly was not resisting arrest, and similarly was visibly injured by a prior use of force. If anything, Plaintiff was more subdued—and thus less of a threat—after having been shot twice by a beanbag shotgun rather than having been pepper-sprayed. As in *LaLonde*, Rivas-Villegas "deliberately dug his knee into [Plaintiff's] back" with enough force to cause injury.[7] *Id.* at

[7] Plaintiff's arrest was captured on videotape. The videotape shows that Rivas-Villegas intentionally dug his knee into

959 n.17. The court concluded in *LaLonde* that the officers were not entitled to qualified immunity. *Id.* at 962. Officers in Rivas-Villegas' position were thus on notice that their substantially similar conduct is unconstitutional.

Judge Collins' dissent seems to argue that, because Plaintiff was accused of a serious crime and initially appeared noncompliant, police could use force throughout the encounter without violating the Fourth Amendment. Judge Collins' Dissent at 29–30. But just as circumstances can escalate rapidly, justifying "split-second judgments" to use force that might have been excessive a moment earlier, *Graham*, 490 U.S. at 397, circumstances can de-escalate rapidly. Logic thus dictates that the reverse is true, too: a use of force that may have been reasonable moments earlier can become excessive moments later.

Defendants also argue that the method they used to handcuff Plaintiff is a standard procedure, designed to minimize injuries and confrontations. But the fact that a particular practice is standard, or that it usually results in no harm, does not insulate its use in every case. For example, we have repeatedly held that "tight handcuffing can constitute excessive force," even though handcuffing is a generally standard and appropriate practice. *LaLonde*, 204 F.3d at 960 (citing

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Plaintiff's back. Although the videotape does not establish how strenuously Rivas-Villegas dug his knee into Plaintiff's back, that factual dispute is for the jury to consider. And the existence and degree of any resultant injury are for the jury, as fact-finder, to determine.

Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989)). And the amount of force that may be reasonable when applied to the back of a large, fit individual to effect an arrest may be excessive as applied to a small, frail individual. The facts of each case matter.

For similar reasons, the dissent's fear that our holding likely will "eliminate the use of a knee to protectively hold down a non-resisting suspect while handcuffing him," Judge Collins' Dissent at 36, is unwarranted. We hold only, as we have before, that police may not kneel on a prone and non-resisting person's back so hard as to cause injury. *LaLonde*, 204 F.3d at 959. Just as our tight-handcuff cases have not eliminated handcuffs, our holding today should not infringe on an officer's ability to secure a compliant and prone suspect without injury.

We conclude that there is a genuine issue of fact as to whether the force that Rivas-Villegas used was excessive and that, if Plaintiff's allegations are true, precedent informed Rivas-Villegas that the force was excessive. We therefore reverse the judgment in favor of Rivas-Villegas and remand for further proceedings.

D. *Officer Kensic*

Plaintiff asserts that Kensic failed to intervene to prevent the excessive force employed by Leon and Rivas-Villegas. But there is no evidence that Kensic knew what the other defendants would do, and the events unfolded very rapidly—in a matter of seconds.

Kensic therefore lacked any realistic opportunity to intercede. *See Cunningham v. Gates*, 229 F.3d 1271, 1289–90 (9th Cir. 2000) (holding that officers can be held liable for failing to intervene only if they had a realistic opportunity to do so). We therefore affirm the judgment in favor of Kensic.

E. *Monell and State-Law Claims*

Plaintiff asserts that, under *Monell*, the City is liable for the officers' constitutional violations. The district court dismissed Plaintiff's *Monell* claim because it had granted summary judgment to the individual Defendants. Because we reverse the grant of summary judgment as to Rivas-Villegas, we remand to the district court for consideration of the other elements of Plaintiff's *Monell* claim and whether that claim "can properly be resolved on summary judgment even if the constitutional violation question cannot." *Glenn*, 673 F.3d at 880. For the same reason, we reinstate Plaintiff's state-law claims relating to Rivas-Villegas' conduct. *See Wall v. Cty. of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004) (reinstating state-law claims in similar circumstances). On remand, the district court can reconsider whether to exercise jurisdiction over those claims.

AFFIRMED as to the federal claims against Defendant Leon and Defendant Kensic; **REVERSED** and **REMANDED** for further proceedings as to all other claims. The parties shall bear their own costs on appeal.

GILMAN, Circuit Judge, concurring in part and dissenting in part:

I fully concur in the portions of the majority opinion regarding the disposition as to Sergeant Robert Kensic and Officer Daniel Rivas-Villegas. On the other hand, I respectfully dissent from the portion affirming the grant of summary judgment in favor of Officer Manuel Leon. We are not being asked to decide whether Cortesluna will prevail at trial on his excessive-force claim against this officer. The question before us is simply whether a jury could reasonably find in Cortesluna's favor based on the facts that he has presented. I have no doubt that it could.

I

The key question for a jury to decide is whether a reasonable officer would have felt immediately threatened by Cortesluna at the time that Officer Leon shot Cortesluna with two rounds from the officer's beanbag shotgun. *See C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016) (holding that the most important question is "whether the suspect posed an immediate threat to the safety of the officers or others" (internal citation and quotation marks omitted)). The two photos attached to this dissent clearly support the proposition that Cortesluna posed no immediate threat to any of the officers present. In both photos, which are exhibits from Cortesluna's home-security camera, Cortesluna is shown standing still with his head and hands down. Photo 1 shows Officer Leon

firing the first beanbag round at Cortesluna from a distance of approximately 10 feet. Roughly a second later, Photo 2 shows the second beanbag round being fired.

Even with a knife shown protruding blade up in Cortesluna's left front pocket, there is no indication that he was in the act of reaching for it when the rounds were fired. And with the knife blade up rather than down, there was no way that he could have quickly taken it from his pocket to threaten the officers. This is especially so when one takes into account that *five* police officers were present, *all with their guns trained on Cortesluna.* I frankly fail to see how anyone looking at these photos would deduce that Cortesluna was an immediate threat to any of the officers under the circumstances. A jury could instead easily find that Officer Leon was a trigger-happy member of the police force who literally "jumped the gun" in a display of excessive force. This is amply shown by Officer Leon saying "I'm going to hit him with less lethal" (the beanbag shotgun) even before Cortesluna had emerged from the house. Maj. Op. at 7.

The majority, moreover, appears to acknowledge the strength of Cortesluna's claim against Officer Leon despite their unwillingness to let a jury decide the issue. In denying qualified immunity to Officer Rivas-Villegas, for example, the majority acknowledges that "the knife was protruding blade-up such that it would not have been possible for Plaintiff to grab it and attack anyone." Maj. Op. at 15. Yet Officer Leon proceeded to shoot Cortesluna twice with the beanbag rounds without making any effort whatsoever to

ascertain that Cortesluna's possession of the knife posed no immediate threat.

The majority also recognizes the teaching of *Graham v. Connor*, 490 U.S. 386, 396 (1989), that the most critical moment is "when excessive force was employed." Maj. Op. at 17. Yet Cortesluna was totally passive at the time he was shot, despite his earlier aggressive actions as reported to the police dispatcher. And even well before the shooting, when the officers first saw Cortesluna, he was observed doing nothing more that standing in the house "drinking a beer." Maj. Op. at 6.

Finally, the majority acknowledges the need to consider the various factors set forth in *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), when analyzing an excessive-force claim, Maj. Op. at 10, n. 3, but fails to give them appropriate weight. The application of these factors—including the serious harm that can be caused by a beanbag shotgun, the lack of any effort by Officer Leon to warn Cortesluna, and the absence of any resistance or attempt to flee by Cortesluna—all tilt in his favor. In sum, I believe that there is more than sufficient evidence to raise a genuine dispute of material fact regarding the excessive-force claim against Officer Leon.

II

The use of excessive force by a police officer, of course, is in violation of the victim's constitutional rights. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086,

1090 (9th Cir. 2013). And whether the force used was excessive is generally a question for the jury. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc). This brings us to the second issue of whether Cortesluna's right not to be shot was "clearly established at the time of [Officer Leon's] actions, such that any reasonably well-trained officer would have known that his conduct was unlawful." *See Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020).

Existing precedent does not require a prior case with the exact same facts. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("[T]his Court's caselaw does not require a case directly on point for a right to be clearly established[.]" (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017))). The law instead requires "[p]recedent involving *similar* facts." *See id.* at 1153 (emphasis added). And here the existing precedent is close enough to have put Officer Leon on notice that his actions constituted excessive force.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), for example, this court held that shooting a beanbag round at an emotionally disturbed individual who was walking directly towards an officer was excessive. *Id.* at 1282. The court emphasized that its "conclusion [wa]s strongly supported by [the] failure to give Deorle any warning that he would be shot if he approached any closer." *Id.* So too here: Officer Leon gave Cortesluna no warning that he would be shot if he did not put his hands up. And Deorle arguably presented a greater threat to the officers than did Cortesluna because Deorle had been "brandishing a hatchet at a

police officer," "remained agitated and continued to roam on or about the property," and was carrying "an unloaded plastic crossbow in one hand and what may have been a can or a bottle of lighter fluid in the other." *Id.* at 1276–77. Although Deorle dropped the hatchet and crossbow when instructed to do so, he had been walking directly towards the officers when he was shot. *Id.* The court in *Deorle* made clear that "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Id.* at 1281.

Other precedent exists regarding the concept of passive resistance. *See Emmons v. City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019) ("The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008." (quoting *Gravelet-Blondin*, 728 F.3d at 1093)). In *Gravelet-Blondin*, the police tased a suspect who refused requests to show his hands. 728 F.3d at 1089. Although the police had been warned that the suspect "owned a gun and would have it with him," *id.*, this court nonetheless concluded that "Blondin engaged in no behavior that could have been perceived . . . as threatening or resisting," *id.* at 1094. His refusal to obey commands instead constituted "mere passive resistance," *id.* 1093, and, "[a]s a result, the use of non-trivial force of any kind was unreasonable," *id.* at 1094.

So even if Cortesluna was disobeying Sergeant Kensic's instruction to put his hands up (probably because Cortesluna was understandably confused by

Officer Leon's immediately preceding instruction to get down on the ground), a jury could find that this was at most passive resistance. The attached photos support such a finding, where Cortesluna is shown standing still, head down, and approximately 10 feet away from the five assembled officers when the first beanbag round was fired. *See* Photo 1.

Officer Leon's firing of the *second* round (Photo 2) strikes me as even less justified. At that point Cortesluna's hands are moving away from his sides and thus further from the knife in his left front pocket. In my opinion, this evidence is more than sufficient to place this case in the category acknowledged by the majority as an obvious case "where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." Maj. Op. 12, n. 4 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)).

For all of the above reasons, I would reverse the grant of summary judgment in favor of Officer Leon and remand the case for further proceedings as to all of the defendants other than Sergeant Kensic.

APPENDIX

Photo 1

Photo 2

COLLINS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion insofar as it partially affirms the district court's judgment dismissing Ramon Cortesluna's claims of excessive force in connection with his arrest. However, I disagree with the majority's reversal of the judgment in favor of Officer Daniel Rivas-Villegas and its partial reversal of the judgment dismissing Cortesluna's claims against the City of Union City. I would affirm the judgment in its entirety, and I therefore respectfully dissent from sections III(C) and III(E) of the majority's opinion.

I

The arrest in this case was videotaped by Cortesluna's home-security camera. Where, as here, "[t]here are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened," we should review the summary judgment order by "view[ing] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 378, 380–81 (2007).[1] That videotape shows that, after being hit by the beanbag rounds, Cortesluna turned and began to lie face-down on the ground. As Cortesluna was doing so, Rivas-Villegas approached and briefly placed

[1] At my request, the Clerk of the Court has posted the videotape on the Court's public website at this link: https://cdn.ca9.uscourts.gov/datastore/opinions/media/19-15105-Cortesluna-Videotape.mp4.

his foot on Cortesluna's back in order to more quickly get him to lie flat on the ground.[2] Rivas-Villegas then straddled Cortesluna, with his right foot on Cortesluna's right side and his left leg bent at the knee on Cortesluna's left side, where Cortesluna had a knife in his pocket. Both Rivas-Villegas and Cortesluna testified that the knee was *on* Cortesluna's back; Rivas-Villegas said that he did that in order to prevent Cortesluna from trying to get back up while he was being handcuffed. In that limited sense, it can perhaps be said, as the majority tendentiously puts it, that Rivas-Villegas's holding Cortesluna down with his knee amounted to having "dug his knee into Plaintiff's back." *See* Maj. Opin. at 18 n.7. But the videotape also confirms that, to the extent that Rivas-Villegas placed his knee on Cortesluna's back, Rivas-Villegas did not jump on his back or otherwise "drop" his knee into his back. Rivas-Villegas was in this position for no more than eight seconds before standing up, at which time another officer handcuffed Cortesluna's hands.

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[2] For excessive force purposes, we may disregard this brief placement of Rivas-Villegas's foot, because Cortesluna testified at his deposition that he did not even recall feeling the officer's foot, but only his knee. The majority contends that there is a triable issue as to whether "the push contributed to Plaintiff's alleged injuries," *see* Maj. Opin. at 16 n.5, but that misses the point. The push is only relevant if it constituted *excessive* force in violation of constitutional standards, and a push that was so minor that Cortesluna does not even recall feeling it cannot reasonably be viewed as "excessive." *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992) ("the nonmoving party's inferences [must] be reasonable in order to reach the jury").

Having viewed this videotape multiple times, I do not think that the force Rivas-Villegas used could reasonably be described as excessive. But even if I did, I think it is clear that Rivas-Villegas would be entitled to qualified immunity.

A

The test for determining the reasonableness of the force used to effectuate an arrest "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The obvious severity of the suspected crime in this case weighs in favor of affirmatively using protective force in arresting Cortesluna, but the majority concludes that the circumstances concerning the other two principal *Graham* factors "altered dramatically" in the mere eight seconds after Cortesluna was shot with the beanbag rounds. *See* Maj. Opin. at 14. I disagree.

The suggestion that Cortesluna suddenly "no longer posed a risk" at the moment the beanbag shots were fired, *see* Maj. Opin. at 14–15, is factually unreasonable. Cortesluna was carrying a pick tool when he first approached the officers and, after putting that down, he disobeyed the officers' instructions to keep his hands up and instead lowered his hands to where a long knife was protruding from his pocket. *See id.* at

7–8. After being shot with the beanbag rounds and starting to get on the ground, Cortesluna still had the knife in his *left* pocket—*i.e.*, on the side where Rivas-Villegas placed his knee. Using a knee on that side to ensure that Cortesluna stayed down and did not make a motion toward the knife was eminently reasonable in light of what the officers knew about the situation. *Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015) ("we have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer"). The majority erroneously discounts the threat presented by the knife, asserting that, because it was "protruding blade-up" in Cortesluna's pocket, "it would not have been possible for Plaintiff to grab it and attack anyone." See Maj. Opin. at 15. The majority overlooks the fact that, as the videotape makes clear, the knife was loosely sitting in the large pocket of Cortesluna's baggy pajama bottoms—meaning that Cortesluna could have fit his hand into the pocket to reach the handle.

The majority's reasoning is also legally flawed, because it ignores the Supreme Court's pointed admonition to this court not to confidently downplay, from the comfort of our chambers, the dangers that officers face in making arrests:

> [T]he panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm

> deliberation, the panel majority concluded that it was unreasonable for [the officers] to fear that violence was imminent. But we have instructed that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness 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."

Ryburn v. Huff, 565 U.S. 469, 477 (2012) (citation omitted). And for the same reason, the majority improperly discounts the need for precautionary measures (such as holding the suspect down during handcuffing) in order to address the risk that a suspect who is not then actively resisting may decide to start resisting before the handcuffs are actually placed on him. It is quite wrong for the "panel majority—far removed from the scene and with the opportunity to dissect the elements of the situation—confidently [to] conclude[ ] that the officers really had no reason to fear for their safety or that of anyone else." *Id.* at 475.

The majority also relies on the fact that Cortesluna claims to be experiencing ongoing pain as a result of Rivas-Villegas's eight-second use of his knee to hold Cortesluna down during his arrest. *See* Maj. Opin. at 15. I agree that, on summary judgment, we have to take as true Cortesluna's statements that he has experienced ongoing pain in his back and neck ever since his arrest, but I disagree with the suggestion that, on

this record, that contention is sufficient to raise a reasonable inference of excessive force.

Although "injuries are not a precondition" to an excessive force claim, we have sensibly recognized that the extent and nature of any injuries that do or do not result from a given use of force may reveal something about the extent of the force used. *Felarca v. Birgeneau*, 891 F.3d 809, 817 (9th Cir. 2018). For example, where the force used produced "a broken vertebra which caused [the arrestee] both pain and immobility," a reasonable trier of fact could conclude that the force used was "severe." *Santis v. Gates*, 287 F.3d 846, 853–54 (9th Cir. 2002). Conversely, "[w]e may infer from the minor nature of a plaintiff's injuries that the force applied was minimal." *Felarca*, 891 F.3d at 817. However, we must always keep in mind that, because the excessive force inquiry turns on what the officer knew at the time, *see Kingsley*, 576 U.S. at 399, any later-occurring claimed injuries are only relevant to the extent that their severity suggests an objective level of force that a reasonable officer on the scene would have recognized at the time to be significant and potentially injurious. Under these standards, Cortesluna's claim of subjective pain is not enough to defeat summary judgment.

Here, the videotape confirms that nothing about Rivas-Villegas's brief use of his knee involved an objective level of force that was likely to produce serious injury. And in contrast to *Santos*, Cortesluna has not submitted any evidence in opposition to summary judgment (such as medical records) that would show

that the claimed subjective pain has its origin in an underlying physical injury of a type that would support an inference that the force that produced it was excessive.[3] *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (affirming summary judgment on excessive force claim and noting that "Arpin's claim of injury is equally unsupported as she does not provide any medical records to support her claim that she suffered injury as a result of being handcuffed"); *see also Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (arrestee's claims that "he has suffered nerve damage in his arms as a result of being in handcuffs" and experiences "pain" as a consequence were insufficient to defeat summary judgment on excessive force claim where arrestee "presents no medical records indicating he suffered any long-term injury as a result of the handcuffs"). On this record, and given these objective circumstances, the mere fact that Cortesluna subsequently claimed ongoing subjective pain is not enough, by itself, to raise a reasonable inference that an objectively unreasonable level of force was used at the time of the arrest. But under the majority's opinion, it is now apparently the law in the Ninth Circuit that all an arrestee has to do to get a jury trial on an excessive

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[3] In connection with their reply in support of their summary judgment motion, *Defendants* submitted summaries of the medical testimony that Plaintiffs expected to present at a trial, and those summaries focus largely on hip and leg injuries from the incident—*i.e.*, injuries attributable to the bean-bag shots. In all events, those summaries do not specifically tie any injury to the knee-press.

force claim—including defeating qualified immunity—is to assert that the arrest resulted in ongoing subjective pain. For the reasons I have explained, that is not correct.

I would hold that, even construing the record evidence in the light most favorable to Cortesluna, no reasonable jury could find that Rivas-Villegas used excessive force.[4]

B

Alternatively, I conclude that, at a minimum, Rivas-Villegas's actions did not violate clearly established law and that he therefore is entitled to qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The majority errs in holding otherwise.

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[4] The majority properly does not rely on Cortesluna's further claim that Rivas-Villegas should not have lifted him from the ground by grabbing his handcuffs. As the district court noted, Cortesluna does not claim that his "handcuffing and movement" caused any injury, *see Cortesluna v. Leon*, 2018 WL 6727824, at *11 (N.D. Cal. Dec. 21, 2018), and on this record, no reasonable jury could find that this method of lifting Cortesluna amounted to excessive force. The only federal case Cortesluna cites to support his argument on this score is *Wall v. County of Orange*, 364 F.3d 1107 (9th Cir. 2004). But in *Wall*, the arresting officer suddenly twisted the arm of a compliant, unarmed arrestee, slammed him face-first into a nearby vehicle, put "extremely tight" handcuffs on him, and then threw him by his handcuffed arms head-first into a patrol car. *Id.* at 1109–10, 1112. Of course, nothing similar is involved here. Moreover, in *Wall*, our finding of excessive force rested on the officer's overly tight handcuffing, and not on the officer's movement of the suspect by his handcuffs or handcuffed hands. *See id.* at 1112.

Officers are entitled to qualified immunity in § 1983 actions unless they violate "clearly established" rights. *Reichle v. Howards*, 566 U.S. 658, 664 (2012). " 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that *every reasonable official* would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (emphasis added) (citations and internal quotation marks omitted). Moreover, in explaining how to determine whether the law was sufficiently clear for purposes of qualified immunity, the Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citations and internal quotation marks omitted); *see also City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). This obligation to define clearly established law with specificity "is particularly important in excessive force cases." *Emmons*, 139 S. Ct. at 503. As the Supreme Court has explained:

> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that 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. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are

> entitled to qualified immunity unless existing precedent *squarely governs* the *specific* facts at issue."

Emmons, 139 S. Ct. at 503 (emphasis added) (quoting *Kisela*, 138 S. Ct. at 1153).

In concluding that "existing precedent squarely governs the specific facts" of this case, *see id.*, the majority relies solely on our decision in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). *See* Maj. Opin. at 16–18. In my view, the facts of *LaLonde* are materially distinguishable from this case and are therefore insufficient to have made clear to "every reasonable" officer that the force Rivas-Villegas used here was excessive. *Wesby*, 138 S. Ct. at 589.

In *LaLonde*, while responding to a noise complaint, a police officer first tried to pin down an unarmed LaLonde and then sprayed him in the face with pepper spray. 204 F.3d at 952. After that, a different officer, while handcuffing LaLonde, "deliberately dug his knee into LaLonde's back with a force that caused him long-term if not permanent back injury." *Id.* at 952, 959 n.17; *see also id.* at 952. The only material similarities between *LaLonde* and this case are that Rivas-Villegas briefly pressed his knee into Cortesluna's back while securing his arms for handcuffing; Cortesluna was not then actively resisting; and Cortesluna claims that the press of Rivas-Villegas's knee has caused him continuing pain. The majority finds those commonalities to be dispositive, *see* Maj. Opin. at

17–18, but in doing so, it ignores several critical differences between *LaLonde* and this case.

In *LaLonde*, the officers were responding merely to a neighbor's complaint that LaLonde was making too much noise in his apartment, *see* 204 F.3d at 950–51, whereas Rivas-Villegas and his colleagues were responding to an alleged incident of domestic violence that, according to the police dispatch he heard, reportedly included the suspect's manual use of a chainsaw to break something in the house. And LaLonde was unarmed, *see* 204 F.3d at 951, whereas Cortesluna was carrying a pick tool when he first approached the officers and, after putting that down, he still had a long knife protruding from his *left* pocket (*i.e.*, on the side where Rivas-Villegas placed his knee). There is a very significant difference between using a knee to hold down a person who is suspected of a serious violent crime who is armed with a knife (as in this case) and using a knee to hold down a noisy neighbor armed with nothing more than a sandwich (as in *LaLonde*). *See id.* at 951–52 (noting that LaLonde was "holding a sandwich in his hand" and that, when the officer first grabbed LaLonde, he "knocked the sandwich to the floor").

By ignoring the multiple critical differences between this case and *LaLonde*, the majority thereby improperly defines the legal rule established in *LaLonde* at too high a level of generality. *See Kisela*, 138 S. Ct. at 1152. Indeed, the practical effect of the majority's ruling today will likely be to eliminate the use of a knee to protectively hold down a non-resisting suspect while

handcuffing him. The majority discounts that possibility, claiming that it has merely reaffirmed that "police may not kneel on a prone and non-resisting person's back *so hard as to cause injury.*" *See* Maj. Opin. at 19 (emphasis added). But this disregards the fact that an officer on the scene *cannot know whether the arrestee will later claim ongoing subjective pain;* the officer can only know what his or her objective actions are and what the arrestee's contemporaneous response is. Here, the officers' body-cameras' audiotapes confirm that, from the moment he was shot with the beanbags, Cortesluna moaned in pain during his arrest and that Cortesluna did not say at the time that the *knee* was hurting him. On this record, there was nothing about the then-knowable circumstances that would suggest to the officer that the force here was excessive. Under the majority's opinion—in which a later claim of ongoing subjective pain from the use of a knee is all you need to get to a jury—an officer would be taking a significant risk by using a knee to secure an arrestee during handcuffing. The majority discounts this concern, noting that our "tight-handcuff cases" have not "eliminated handcuffs." *See* Maj. Opin. at 19. But our tight-handcuff cases have not done so presumably because (unlike today's flawed ruling) those cases have not allowed arrestees to defeat summary judgment on an excessive force claim merely by claiming ongoing subjective pain. *See*, *e.g.*, *Arpin*, 261 F.3d at 921–22; *Peterson v. Union Pac. R.R. Co.*, 480 F. App'x 874, 874 (9th Cir. 2013); *see supra* at 31–33.

Once again, a panel of this court disregards the Supreme Court's repeated admonition that, in the excessive force context, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citation omitted). Because neither *LaLonde* nor any other existing precedent governs the specific facts presented here, Rivas-Villegas is entitled to qualified immunity.

II

Finally, the majority reinstates Cortesluna's state-law claims and his claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), insofar as they relate to Rivas-Villegas's conduct. *See* Maj. Opin. at 20. Given that I conclude that Rivas-Villegas did not use excessive force, there is no predicate for *Monell* liability against the City. And because I would thus affirm the district court's judgment with respect to all of the § 1983 claims, there is in my view no basis for reversing the district court's dismissal of the pendent state-law claims without prejudice.

Accordingly, I would affirm the judgment of the district court in its entirety. I respectfully dissent from the majority's decision to the extent that it fails to do so.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAMON CORTESLUNA, Plaintiff, v. MANUEL LEON, et al., Defendants.	Case No. 17-cv-05133-JSC **ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Re: Dkt. No. 47 (Filed Dec. 21, 2018)

Plaintiff Ramon Cortesluna brings this civil rights action against the City of Union City and three Union City Police Officers alleging violation of state and federal law in connection with an incident at his home on November 6, 2016. Defendants' motion for summary judgment is now pending before the Court.[1] (Dkt. No. 47.) Having considered the parties' briefs and having had the benefit of oral argument on December 20, 2018, the Court GRANTS Defendants' motion for summary judgment on the federal claims and dismisses the state law claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

[1] All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 4, 14.)

SUMMARY JUDGMENT EVIDENCE

A. Undisputed Facts

On November 6, 2016, 12-year old Isabelle Ramos called 911 to report that she, her mother, and her 15-year old sister were in a room at 34877 Starling Drive and she was worried that their mother's boyfriend, Ramon Cortesluna, was going to hurt them.[2] (Dkt. No. 41-1 (Ex. A, 911 audio); Dkt. No. 41-1 (Ex. B, Dispatch audio).[3]) Dispatch requested a unit to respond to ascertain the problem and advised that the reporting party, a 12-year-old girl, was crying saying that her mom's boyfriend was trying to hurt them and that he had a chainsaw. (Dkt. No. 41-1, Ex. B.) Dispatch advised that the reporting party was in a room with her mom and 15-year-old sister and that the mom was holding the door so the boyfriend would not open it. (*Id.*) Dispatch reported that there had been another crying hang-up 911 call in the area that might be related. (*Id.*) The reporting party advised that the boyfriend was "using a chainsaw to break something in the house" and the dispatcher reported that the 911 operator stated that she could hear sawing in the background, but that it had stopped. (*Id.*) The reporting party stated that the boyfriend was always drinking. (*Id.*)

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[2] Isabelle Ramos identifies the individual as Ramon Cortez. Because there is no dispute that the individual Isabel was referring to is the plaintiff Ramon Cortesluna, the Court refers to him by the name under which he filed this action.

[3] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

City of Union City Police Officers Leon, Rivas-Villegas, and Bellotti heard the broadcast as did Lieutenant Graetz and Sergeant Kensic. (Dkt. No. 41-2 (Leon Depo.) at 26:13-27:4; Dkt. No. 41-3 (Rivas-Villegas Depo.[4]) at 18:13-15, 21:14-20; Dkt. No. 41-4 (Bellotti Depo.) at 13:19-14:15); Dkt. No. 41-5 (Graetz Depo) at 20:2-4; Dkt. No. 41-6 (Kensic Depo.) at 22:18-21, 24:4-14.) They all responded to the scene. (Dkt. No. 41-2 (Leon Depo.) at 32:1-6; Dkt. No. 41-3 (Rivas-Villegas Depo) at 18:18:18-19 [sic]; Dkt. No. 41-4 (Bellotti Depo.) at 16:11-16); Dkt. No. 41-5 (Graetz Depo) at 20:5-17; Dkt. No. 41-6 (Kensic Depo.) at 24:21-25:12.) Lieutenant Graetz, Officer Bellotti, and Officer Rivas-Villegas all arrived at the same time (Dkt. No. 41-3 (Rivas-Villegas Depo) at 18:24-19:1.)

Lieutenant Graetz asked dispatch if the reporting party and her family could exit the house and dispatch responded that they "were unable to get out" and that the 911 "call taker could hear sawing in the background, sounds like the male is trying to saw the door down." (Dkt. No. 41-1, Ex. B.) Dispatch confirmed that they were in a bedroom in the rear of the house. (*Id.*) Dispatch reported they were trying to confirm whether it was a chainsaw or a normal manual saw. (*Id.*) Dispatch advised that the reporting party told the call

[4] The cover page for Exhibit D states that it is the August 13, 2018 deposition of Manuel David Leon and this same header appears at the top of each page of the exhibit. However, the Allen Declaration, to which Exhibit D is attached, states that Exhibit D is the deposition of Daniel Rivas-Villegas and in fact the substance of the transcript reflects that it [sic] the deposition of Daniel Rivas-Villegas notwithstanding the heading to the contrary.

taker that it was a chainsaw, but that the call taker could not hear it and "he might be using it manually on the door." (*Id.*) Officer Rivas-Villegas asked Dispatch if the caller was using a landline or cell phone because he was concerned that it was a "swatting call." (Dkt. No. 39.) Dispatch confirmed that it was a cell phone. (Dkt. No. 41-1, Ex. B.) Dispatch advised that the only people in the house were the reporting party, her sister, her mother, and the boyfriend. (*Id.*) Dispatch provided the following description of the boyfriend: Ramon Cortseluna, Hispanic, 5'7", with a skinny build, wearing red sweatpants. (*Id.*) Dispatch also noted that Mr. Cortesluna was "1026" and "clear in AFS."[5] (Dkt. No. 54-4.)

Around this same time, one of the officers can be heard on Officer Rivas-Villegas's body camera saying that he had visual on a man in red sweatpants with a beer in his hand—later to be identified as Mr. Cortesluna. (Dkt. No. 39; Dkt. No. 48.) Officer Rivas-Villegas confirmed with other officers that they could not hear any sounds coming from the residence. (*Id.*) Another officer can be heard on the on the body camera stating that the man in the sweatpants was walking back to the rear of the residence. (*Id.*) The officers then made a plan to enter the residence. (*Id.*) The officers confirmed they had "less-lethal"—a "less-lethal shotgun." (*Id.*) They decided to all approach the front of the residence together and give the suspect verbal commands to come out. (*Id.*) At the time they decided this,

[5] Plaintiff states this means he was free of warrants.

they had visual of Mr. Cortesluna drinking a beer in the kitchen. (*Id.*) The four officers approached the front door and Officer Rivas-Villegas knocked loudly stating "police department, come to the front door, Union City police, come to the front door." (*Id.*) Another officer shouted, "he's coming and has a weapon" at which point one officer stated, "use less-lethal."[6] (*Id.*) Officer Rivas-Villegas ordered Mr. Cortesluna to "drop it" multiple times, which he did. (*Id.*) Officer Rivas-Villegas then ordered him to "come out, put your hands up, walk out towards me." (*Id.*) Officer Rivas-Villegas ordered him a second time to "walk towards me," and as Mr. Cortesluna did so Officer Rivas-Villegas said, "keep coming" and then "stop, get on your knees." (*Id.*) As Officer Rivas-Villegas was giving this latter order, Sergeant Kensic shouted "he has a knife in his left pocket, knife in his pocket." (*Id.*) Sergeant Kensic shouted "don't, don't put your hands down" and "hands up." (*Id.*) As Sergeant Kensic shouted this last order, Mr. Cortesluna turned his head toward him, and simultaneously lowered his head and hands. (*Id.*) Officer Leon then shot Mr. Cortesluna once with less lethal and nearly immediately thereafter a second time with the less-lethal. (*Id.*) Officer Leon hit Mr. Cortesluna in the lower stomach and then in the left hip. (Dkt. No. 41-2 (Leon Depo.) at 61:4-19.)

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[6] The "weapon" was later identified as a metal tool. (Dkt. No. 55-1 (Cortesluna Depo.) at 31:18-24.) It is undisputed that Mr. Cortesluna put it down when ordered prior to exiting the residence. (Dkt. No. 41-3 (Rivas-Villegas Depo.) at 40:21-24.)

Following the shooting, the officers all shouted for Mr. Cortesluna to "get down" which he did. (Dkt. No. 39; Dkt. No. 48.) Mr. Cortesluna was moaning and crying in pain. (*Id.*) Sergeant Kensic shouted "stay there ma'am, stay inside, go back in the room." (*Id.*) Sergeant Kensic also stated "left pocket, he's got a knife." (*Id.*) Officer Rivas-Villegas ordered Officer Bellotti to "get the house" and Sergeant Kensic stated that "there is a female to the left inside." (*Id.*) Officer Rivas-Villegas then held Mr. Cortesluna down while Officer Leon handcuffed him. (Dkt. No. 41-3 (Rivas-Villegas Depo) at 53:6-19.)

B. Individual Accounts of the Incident

1. Mr. Cortesluna

Mr. Cortesluna was on his way back to his bedroom, which he had locked himself out of earlier in the day, when he heard the police knocking at his door. (Dkt. No. 53 (Cortesluna Decl.) at ¶¶ 4, 6.) He used one hand to open the sliding door and in the other hand he had a metal tool (a chisel bit). (*Id.* at ¶ 6; Dkt. No. 55-1 (Cortesluna Depo.) at 31:14-19.) When the officers told him to drop it, he did, and then he stepped outside with his hands up. (Dkt. No. 55-1 at 31:22-25.) He heard officers tell him to put his "hands up" but "I kind of put down, because I was hearing something on the left side. And that's when they shot at me." (*Id.* at 36:10-13.) He lowered his hands because he was "confused by all the orders and the shouting from the police." (Dkt. No. 53 at ¶ 6.) English is not his first language. (*Id.*)

He was 10-11 feet from the officers when he was shot. (*Id.* at ¶ 7.) After the first shot to his lower belly/groin, he turned to the left and his hands went to the area of impact and then he was hit again in his right hip. (*Id.* at ¶ 8.) As he was following orders to get to the ground, he felt someone put their foot and weight on his back. (*Id.* at ¶ 9.) It was very painful and then he was handcuffed and lifted by his handcuffed arms, which was also very painful. (*Id.*)

2. Officer Leon

Once he got to the scene, Officer Leon armed himself with the less-lethal shotgun and went to meet with Lieutenant Graetz. (Dkt. No. 41-2 (Leon Depo.) at 32:21-23.) Officer Leon shot his less-lethal shotgun after Sergeant Kensic said "don't put your hands down" because he "believed the subject was preparing to arm himself, he was going for a weapon." (*Id.* at 57:5-20.) At that point Mr. Cortesluna was seven to ten feet from Officer Leon and Officer Rivas-Villegas. (*Id.* at 57:21-22, 58:4-8.) Officer Leon felt that Mr. Cortesluna was a risk to himself and the other officers because he was close enough to engage with the officers if he armed himself and he could reenter the residence. (*Id.* at 58:9-22.) Officer Leon did not feel it was feasible to warn Mr. Cortesluna before he shot him because "it was immediate and [Mr. Cortesluna's] response to Sergeant Kensic's instructions w[as] the opposite." (*Id.* at 60-5-15.) Officer Leon fired a second shot "[b]ecause he was still posing a threat. His hands were still in the vicinity

of the knife, and he was turned away from me, so, I couldn't see what he was doing." (*Id.* at 61:1-10.)

3. Officer Rivas-Villegas

Officer Rivas-Villegas observed Mr. Cortesluna with a heavy rod in his left hand when he came to the sliding door. (Dkt. No. 41-3 (Rivas-Villegas Depo.) at 37:4-12.) He believed that Mr. Cortesluna was confronting them "[be]cause he came up to talk to [them] with that rod in his hand." (*Id.* at 38:15-20.) Mr. Cortesluna never made any verbal threats and complied with the order to put the rod down. (*Id.* at 40:15-24.) Mr. Cortesluna complied with all of Officer Rivas-Villegas's subsequent orders but did not comply with Sergeant Kensic's order not to put his hands down. (*Id.* at 44:2-6.) Instead, Mr. Cortesluna "put his hands down and started reaching for the knife." (*Id.* at 44:5-9.) After Plaintiff was shot, Officer Rivas-Villegas ordered him to the ground, but he did not do so quickly and Officer Rivas-Villegas "didn't know if he was formulating a plan in his head to grab for the knife or run back inside the house" so he "pushed him down to the ground. In order to stop him from escaping." (*Id.* at 52:17-23.) Officer Rivas-Villegas then "got over him so [he] could grab his hands to prevent him from arming himself." (*Id.* at 53:6-8.) He used his foot to push him down and his knee to hold him there. (*Id.* at 56:9-15.) Officer Leon then handcuffed Mr. Cortesluna while Officer Rivas-Villegas "maintained" his hands. (*Id.* at 53:15-19.) Officer Rivas-Villegas then lifted Mr. Cortesluna by the handcuffs because he "needed to quickly

get him out of the doorway" since the house still had not been cleared. (*Id.* at 57:1-11.)

PROCEDURAL BACKGROUND

Plaintiff filed this action in September 2017, a little less than a year after the incident, against Officer Rivas-Villegas, Officer Leon, Sergeant Kensic, and the City of Union City ("the City"). (Dkt. No. 1.) He alleged nine claims: (1) violation of his Fourth Amendment rights under 42 U.S.C. § 1983 as to Officers Rivas-Villegas and Leon; (2) municipal liability under 42 U.S.C. § 1983 as to the City; (3) negligence; (4) assault and battery; (5) intentional infliction of emotional distress; (6) violation of California's Civil Rights Action, Cal. Civ. Code §§ 51, 51.7, 52.1(a), (b); (7) negligent infliction of emotional distress; (8) respondeat superior liability as to the City; and (9) negligent hiring, training, and supervision as to the City. (Dk. No. 1.) Before the Defendants answered, Plaintiff filed a First Amended Complaint omitting his negligent infliction of emotional distress and respondeat superior claims. (Dkt. No. 9.) Defendants thereafter appeared and answered the First Amended Complaint. (Dkt. No. 15.)

Defendants filed the now pending motion for summary judgment on November 15, 2018. (Dkt. No. 47.) The motion is fully briefed and came before the Court for a hearing on December 20, 2018.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). The Court must draw "all reasonable inferences [and] resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004). A fact is material if it "might affect the outcome of the suit under the governing law," and an issue is genuine if "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There can be "no genuine issue as to any material fact" when the moving party shows "a complete failure of proof concerning an essential element of the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When the party moving for summary judgment does not bear the burden of proof at trial (usually the defendant), the party has the burden of producing evidence negating an essential element of each claim on which it seeks judgment or showing that the opposing party cannot produce evidence sufficient to satisfy her burden of proof at trial. *Nissan Fire & Mar. Ins. Co., Ltd. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets that burden, the nonmoving party must show that a material factual dispute exists. *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). When the party moving for summary judgment would bear the burden of proof at trial (usually the plaintiff), "it must come forward with evidence

which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal quotation marks and citation omitted). "In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. Once the moving party comes forward with sufficient evidence, the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *Id.* (internal quotation marks and citation omitted).

EVIDENTIARY OBJECTIONS

Defendants have raised a number of evidentiary objections regarding the evidence Plaintiff has submitted in opposition to Defendants' motion for summary judgment, and Plaintiff has raised objections to Defendants' reply evidence. Because the disputed evidence is not material to the Court's decision, it is unnecessary to resolve these objections.

DISCUSSION

Defendants move for summary judgment on each of Plaintiff's claims, but a threshold question is whether the officers' actions constituted excessive force, and if so, whether the officers are entitled to qualified immunity.

I. Section 1983 Claims against the Officers

"Section 1983 does not create any substantive rights, but is instead a vehicle by which plaintiffs can bring federal constitutional and statutory challenges to actions by state and local officials." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). To prevail on a Section 1983 claim, Plaintiff must show that the alleged conduct both occurred "under color of state law" and deprived Plaintiff of a constitutional or federal statutory right. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003). There is no dispute that Officer Rivas-Villegas, Officer Leon, Sergeant Kensic were acting under color of law; thus, the only question is whether they are entitled to summary judgment because there is no dispute of material fact as to the use of force, or, even if there is, whether they are entitled to qualified immunity. Plaintiff's excessive force claim against each defendant is predicated on a different basis. The excessive force claim as to Officer Leon is based on his use of the less-lethal shotgun. His excessive force claim against Officer Rivas-Villegas is based on the handcuffing and moving of Plaintiff once handcuffed. Finally, his claim against Sergeant Kensic is based on a failure to intervene theory.

A. Fourth Amendment-Excessive Force Claim as to Officer Leon

Whether a defendant's use of force was "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on

the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Thus, the question is "whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. In making that determination, courts consider "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley v. Hendrickson*, 135 S Ct. 2466, 2472 (2015) (citing *Graham*, 490 U.S. at 296). The *Kingsley* factors are not exclusive; instead, courts should consider all of the circumstances it deems relevant. *See 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." *Graham*, 490 U.S. at 396. This determination is normally a question for the jury because it requires "resolution of disputed questions of fact and determinations of credibility, as well as on the drawing of inferences." *Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002) ("[E]xcessive force claims typically boil down to an evaluation of the various accounts of the same events. Thus, the circumstances surrounding those events may be critical to a jury's determination of

where the truth lie."). Summary judgment may be appropriate, however, when the facts concerning an incident are largely undisputed. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("[D]efendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.").

Defendants contend that Officer Leon's use of the less-lethal beanbag shotgun was reasonable as a matter of law given the totality of the undisputed circumstances: the officers were responding to a request to investigate a 911 call from a minor that reported that she, her 15-year old sister, and mother were locked in a room, the mother's intoxicated boyfriend was trying to hurt them and he had a chainsaw, and when Plaintiff approached the officers he was observed with a knife in his pocket and despite an order to raise his hands, he lowered his hands toward the area of the knife. Plaintiff for, his part, contends that a reasonable jury could conclude that the use of force was unreasonable because he was confused by the officers' contradictory orders, English is not his first language, he was generally compliant with the officers' orders, he was not aware that he had a knife, he was not reaching for the knife, and he was given no warning before he was shot.

1. Nature and Quality of the Intrusion

The first step is to "assess the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted." *Glenn v. Washington Cty.*, 673 F.3d 864, 871 (9th Cir. 2011) (internal citation and quotation marks omitted). Here, Officer Leon used a beanbag shotgun which is "a twelve-gauge shotgun loaded with . . . 'beanbag' round[s]," which consist of "lead shot contained in a cloth sack." *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir. 2001). "It is intended to induce compliance by causing sudden, debilitating, localized pain, similar to a hard punch or baton strike. Although bean bag guns are not designed to cause serious injury or death, a bean bag gun is considered a 'less-lethal' weapon, as opposed to a non-lethal weapon, because the bean bags can cause serious injury or death if they hit a relatively sensitive area of the body, such as [the] eyes, throat, temple or groin." *Glenn*, 673 F.3d at 871 (internal quotations marks omitted; alterations in original). "In light of this weapon's dangerous capabilities, [s]uch force, though less than deadly, . . . is permissible only when a strong governmental interest compels the employment of such force." *Id.* at 872 (internal citation and quotation marks omitted).

2. Government's Interest at Stake

a) Severity of the Crime

"The character of the offense is often an important consideration in determining whether the use of force

was justified." *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001).

Here, officers responded to a dispatch telling the officers there was a 911 call from a minor saying that she, her sister, and mother were locked in a bedroom, her mother was holding the door, and her mother's intoxicated boyfriend was trying hurt them and perhaps saw the door open with a chainsaw. Three crimes were thus alleged: California Penal Code § 236 (false imprisonment), California Penal Code 245(a)(1) (assault with a deadly weapon), and California Penal Code 273a (child endangerment). Plaintiff does not address whether these are the appropriate crimes for Plaintiff's alleged conduct; instead, he insists that the whole thing was a misunderstanding based on a "misperception the part of the teens." (Dkt. No. 52 at 23:3.) However, the severity of the crime is judged from the perspective of the officer at the time of the incident—not with the benefit of hindsight. *See Graham*, 490 U.S. at 396. The officers understood they were responding to a domestic violence call and "[w]hen officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Indeed, more officers are killed or injured on domestic violence calls than on any other type of call"; thus, "[w]e take very seriously the danger that domestic disputes pose to law enforcement officers, and we have no trouble concluding that a reasonable officer arriving at the [] residence reasonably could be concerned about his or her safety." *Mattos v. Agarano*, 661 F.3d 433, 450 (9th Cir. 2011) (internal citations and quotation marks

omitted). A reasonable officer responding to a domestic violence call under the undisputed circumstances present here would have had a heightened concern about the safety of himself and fellow officers as well as the safety of the woman and minors inside the residence.

b) Immediacy of the Threat to the Officers or Others

"The most important factor under *Graham* is whether the suspect posed an immediate threat to the safety of the officers or others." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). In weighing this factor, "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent" but the reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). "The calculus of reasonableness 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." *Graham*, 490 U.S. at 396-97. "[A]an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts." *Deorle*, 272 F.3d at 1281.

Defendants contend that a reasonable officer in their position would have perceived Plaintiff as a

threat because (1) they were responding to a domestic violence call of an intoxicated suspect with a chainsaw and with a woman and minors locking themselves in a bedroom trying to stay away from the suspect, (2) Plaintiff had a knife in his left pocket, (3) in response to a command to put his hands up he instead lowered his hands toward the area of the knife, (4) at the time this occurred he was in close proximity of the officers, and (5) Plaintiff thus could have engaged the officers who were 10-11 feet away if he had armed himself. Plaintiff insists that drawing all inferences in his favor, it was not reasonable for Officer Leon to conclude that he posed an immediate threat either to the residents of the house or the officers. In particular, Plaintiff notes that on the home security video it is apparent that he was not reaching for the knife, he was lowering his hands to the front of his thighs, his fingers were out and not curled toward the knife, he lowered both hands at the same time slowly and steadily, which is not consistent with someone reaching for a knife, and the knife was blade up in his pocket at the time.

A reasonable trier of fact could not find that many of these facts alleged by Plaintiff would have been known by Officer Leon; namely, what exactly Plaintiff's hands were doing, that he was not reaching for the knife, and that the knife blade was facing up. The video establishes that it was dark and that the knife was on the opposite side of Plaintiff's body away from Officer Leon. And Officer Leon testified that he could not see the knife, he heard Sergeant Kensic yell that Plaintiff had a knife and command Plaintiff not to put

his hands down, and that Plaintiff instead started lowering his hands. (Dkt. No. 41-2 (Leon Depo.) at 57:5-20.) Plaintiff does not identify any evidence that supports a reasonable inference that Officer Leon knew that Plaintiff was not going for his knife. Thus, a reasonable trier of fact would have to find that Officer Leon reasonably believed that Plaintiff posed a threat to the officers when he moved his hand toward his knife as opposed to away as ordered, especially given that the officers were responding to a domestic violence call.

c) Actively Resisting or Evading Arrest

There is no dispute that Plaintiff complied with all the officers' orders until the order to put his hands up when Sergeant Kensic saw the knife. Plaintiff had previously come to the door, dropped the chisel when ordered by officers, exited the home with his hands up, and stopped moving toward the officers when ordered. Nor is there a dispute that when Plaintiff was ordered to raise his hands, he did the opposite. Plaintiff explains, however, that this was because he was confused by the order because Officer Rivas-Villegas was also giving him other orders to get on his knees and English is not his first language and further that active resistance cannot be based simply on a failure to follow orders. *See Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2012) ("active resistance is not to be found simply because of a failure to comply with the full extent of an officer's orders" and noting that use of intermediate force is not "where an individual's resistance

was [not] particularly bellicose"). Here, however, under the undisputed facts, Plaintiff's resistance was not his failure to comply with orders, but his act of doing the *opposite* and moving his hands in the direction of a weapon. That he did not do so intentionally is not material as there was no way for a reasonable officer to know whether Plaintiff intentionally or accidentally moved his hands down when told to put them up; all a reasonable officer would know is that he moved his hand toward the knife.

d) The Absence of a Warning

The absence of a warning is also considered when weighing the reasonableness of the use of force. Officers should "provide warnings, where feasible, even when the force used is less than deadly." *Deorle*, 272 F.3d at 1284 (collecting cases re: same). Warnings are not required whenever less than deadly force is employed, but where feasible they should be given and "the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test." *Id.* It is undisputed that Officer Leon did not give a warning prior to shooting Plaintiff with the less-lethal shotgun; however, only seconds elapsed between Sergeant Kensic noting that there was a knife, the order to put his hands up, and Plaintiff lowering his hands. Further, as five officers had guns "pointed at [Plaintiff] when he was instructed [to raise his hands]; the consequences of a failure to comply with the command should have been clear." *Hill v. Bay Area Rapid Transit Dist.*, No. C-12-00372 DMR, 2013 WL 5272957,

at *6 (N.D. Cal. Sept. 18, 2013) (collecting cases re: non-verbal warnings). Under the undisputed facts, a reasonable trier of fact could not conclude that there was time for a warning as an officer in Officer Leon's position would have perceived an imminent threat to his safety and that of his fellow officers and the residents in the home.

e) Availability of Alternative Means

"Officers 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. 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[s] against finding [the] use of force reasonable." *Glenn*, 673 F.3d at 876 (internal citation and quotation marks omitted; alterations in original). Plaintiff argues that officers should have considered using Spanish commands or repositioning themselves to a safe distance once they observed the knife. However, Plaintiff had responded to the first set of commands when given in English, and Plaintiff does not identify any evidence that would support an inference that the officers had reason to believe he did not understand English. As for Plaintiff's repositioning argument, it is undisputed that the officers were in an enclosed patio with Plaintiff with their backs to the wall at the time of the incident. If Officer Leon believed that Plaintiff was going for the knife

when he lowered his hands, there was no time for the officers to reposition.

3. Balancing the Interests

To determine whether Officer Leon's use of the less-lethal shotgun was objectively reasonable as a matter of law, the Court must determine "whether the degree of force used was warranted by the governmental interests at stake." *Deorle*, 272 F.3d at 1282. "The calculus of reasonableness 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." *See Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) (quoting *Graham*, 490 U.S. at 396-97).

While the facts underlying the incident are generally not in dispute, Plaintiff contends that drawing the following inferences in his favor a reasonable jury could conclude that the use of force was not objectively reasonable:

- the 911 call might not have been credible given that the Officers observed Plaintiff calmly in the kitchen and the officers themselves questioned the credibility of the call given the statement that they were concerned about swatting;
- Plaintiff appeared calm;

- Plaintiff complied with all orders up until the order from Sergeant Kensic that he put his hands up;
- Plaintiff was confused by the conflicting orders;
- Sergeant Kensic's order included a double negative: "Don't don't put your hands down";
- English is not Plaintiff's first language;
- no warning was given before Plaintiff was shot;
- Plaintiff was lowering his hands, but not *reaching* for the knife that he was unaware was in his pocket;
- Plaintiff's failure to raise his hands following the first shot was a result of his involuntary reaction—holding the injury area.

The Court disagrees. Plaintiff's inferences are almost all based on hindsight and not what facts were known to Officer Leon at the time he deployed the less-lethal shotgun. Officer Leon did not know that English was not Plaintiff's first language or that Plaintiff was confused by the orders.[7] Officer Leon knew that he was

[7] Plaintiff's argument that Sergeant Kensic's use of a double negative—"Don't don't put your hands down"—made the order doubly confusing is specious as among other things it ignores that Sergeant Kensic's undisputed final command before less-lethal was deployed was "hands up." Further, a requirement that officers cannot use force unless their commands are delivered in perfect grammar in volatile situations is neither supported by the law or common sense.

responding to a domestic violence call of an intoxicated man with a chainsaw threatening to hurt a woman and two minors, that one of his fellow officers saw a knife in the suspect's pocket when he and his fellow officers were within 10-11 feet of the suspect with their back to a wall, and that when the suspect was given an order to put his hands up he did the opposite lowering his hands in the direction of the knife. Under these circumstances, a reasonable officer in Officer Leon's shoes would have concluded that there was an imminent threat to his safety and that of his fellow officers. A use of intermediate, less-lethal force under these circumstances was objectively reasonable. *Smith*, 394 F.3d at 704. Likewise, that Officer Leon deployed a second less-lethal shotgun blast less than a second after the first when Plaintiff still failed to raise his hands was not objectively unreasonable: the knife was on the opposite side of Plaintiff's body from Officer Leon and thus he could not have perceived during the second between deployments that Plaintiff was reaching for his stomach and not the knife. Thus, the deployment of the second shotgun blast was likewise objectively reasonable.

B. Officer Leon is Entitled to Qualified Immunity

Even if the Court were to conclude a reasonable jury could find that Officer Leon's use of force was not objectively reasonable, Officer Leon would nonetheless be entitled to qualified immunity. Individual officers are protected "from liability for civil damages insofar

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "In determining whether an officer is entitled to qualified immunity, we consider (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).

"[C]learly established law [is not to be defined] at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, in deciding whether a constitutional right was clearly established at the time of the alleged violation, a court must ask "whether the violative nature of *particular conduct* is clearly established." *Id.* (emphasis added). "The plaintiff bears the burden to show that the contours of the right were clearly established." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 236. "Although this Court's caselaw 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." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.*

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that 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." *Mullenix v. Luna*, 577 U.S. ___, ___, 136 S.Ct. 305, 308 (2015) (internal quotation marks omitted). "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (internal citation and quotation marks omitted). In making this determination, courts consider the state of the law at the time of the alleged violation and the information that the official possessed to determine whether a reasonable official in a particular factual situation should have been on notice that his or her conduct was illegal. *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007).

The question here then is whether at the time of this incident in November 2016 the law was clearly established that officers could not use non-lethal force under the circumstances after drawing all reasonable inferences in Plaintiff's favor:

- officers respond to a 911 call that two minors and their mother have locked themselves in a bedroom because the mother's intoxicated boyfriend is trying to hurt them and has a chainsaw,
- officers are told the reporting minor is crying, that the mother is holding the door, and that

the 911 employee can hear what sounds like a chainsaw,

- officers confront Plaintiff who complies with orders, but when one officer observes a knife in Plaintiff's pocket and orders him to put his hands up, Plaintiff instead lowers his hands in the direction of the knife and the officer and his fellow officers are in a confined space 10-11 feet away from Plaintiff.

Plaintiff insists that "[i]t has long been established that a failure to comply fully or immediately with an officers' orders, especially where there is no immediate threat, neither rises to the level of active resistance nor justifies the application of force" and cites a string of cases in support of this position. (Dkt. No. 52 at 27:23-25.) There are two primary defects with Plaintiff's argument. First, it is based on the premise that there was no immediate threat and no active resistance, but as discussed above, the undisputed facts are that Plaintiff had a knife in his pocket and when ordered to put his hands up he, instead, lowered his hands toward the knife. "[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force." *Smith*, 394 F.3d at 704. Indeed, in *Smith*, on which Plaintiff relies, the Ninth Circuit contrasted the facts there—an unarmed individual who was pepper sprayed and attacked by a police canine when he disobeyed officers orders to turn around and put his hands on his head—with facts which would justify the use of deadly force such as where a suspect threatens an officer with a knife. *Id.* at 694, 704.

Second, none of the cases upon which Plaintiff relies—*Nelson v. City of Davis*, 685 F.3d 867, 879 (9th Cir. 2012); *Smith*, 394 F.3d 689; *Glenn v. Washington Cty.*, 673 F.3d 864, 871 (9th Cir. 2011); *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001); *Hesterberg v. United States*, 71 F. Supp. 3d 1018, 1032 (N.D. Cal. 2014)—are analogous let alone "existing precedent [that] 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. In *Nelson*, the Ninth Circuit held that "a reasonable officer would have been on notice that both the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors, and the release of pepper spray in the area occupied by those individuals, would constitute unreasonable force in violation of the Fourth Amendment." 685 F.3d at 886; *see also Hesterberg*, 71 F. Supp. 3d at 1036 (holding that it was objectively unreasonable for a park ranger to use a taser on "a fleeing, nonviolent, non-serious misdemeanant, who posed no threat to [the officer] or the public, who was not sufficiently warned prior to the tasing, and who [the officer] knew had an undefined heart condition"). Here, in contrast, the officers were responding to domestic violence call that reported the attempted use of lethal force on a mother and her children—not a minor misdemeanor or infraction—and Plaintiff lowered his hands towards a weapon—facts very different from *Nelson* and *Hesterberg*.

The Ninth Circuit's decision in *Glenn* likewise fails to establish that Officer Leon's use of less-lethal

force violated clearly established law. In *Glenn*, officers fatally shot a suicidal and intoxicated man in his own driveway after he did not comply with orders to drop a pocketknife which he held to his own neck. 673 F.3d at 867-69. The officers shot him six times with a beanbag shotgun and then with their semiautomatic weapons. *Id.* at 869. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the defendant police officers. *Glenn* is readily distinguishable from the facts here as the man there was "suicidal on the night in question and the threats of violence known to the responding officers focused on harming himself rather than other people," he did not threaten the officers, and only held the knife to his own neck. *Id.* at 873. Here, the undisputed facts are that officers had been told that Plaintiff had been using a chainsaw and was threatening to hurt a woman and two children who had locked themselves in a bedroom with the mother holding the door to keep the boyfriend out and when Plaintiff was told to put his hands up after the knife was spotted in his pocket, he lowered his hands in the direction of the knife; thus, in contrast to *Glenn* "there was [significant] reason to believe [Plaintiff] could have done [] immediate harm." *Id.* at 874.

In *Deorle*, an officer shot the plaintiff, an emotionally disturbed man, in the face with a beanbag shogun because he "was walking at a 'steady gait' in his direction" although the plaintiff "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." 272 F.3d

at 1275. The Ninth Circuit reversed the district court's grant of summary judgment in the officer's favor, holding that such use of force was excessive and that the officer was not entitled to qualified immunity because "[e]very police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.* at 1285. While *Deorle* is arguably more analogous than the other cases upon which Plaintiff relies, the Supreme Court has twice cautioned courts in the Ninth Circuit from "read[ing] its decision in [*Deorle*] too broadly in deciding whether a new set of facts is governed by clearly established law." *Kisela*, 138 S. Ct. at 1154; *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) ("Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page.").

In contrast to the cases relied upon by Plaintiff, recent Ninth Circuit and Supreme Court case law compels the conclusion that Officer Leon is entitled to qualified immunity. In *S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1011 (9th Cir. 2017), the Ninth Circuit held that officers were entitled to qualified immunity after they fatally shot a man with knives in his pocket. The officers were responding to a 911 call of an intoxicated and mentally unstable individual (Mr. Brown) who had

"been acting aggressively." *Id.* When the officers encountered Mr. Brown in his home, he had knives in his pocket, ignored orders to put his hands up, and instead, reached for a knife at which point the officers opened fire. *Id.* at 1011-13. The Ninth Circuit held that *Glenn* was inapposite because there the decedent held the knife to his own neck, whereas Mr. Brown "grabb[ed] the knife from his pocket despite orders to place his hands on his head." *Id.* at 1016. The court also distinguished *Deorle* because in *Deorle* "that emotionally disturbed individual was unarmed at the time an officer shot him in the face with a beanbag gun." *Id.* at n.5. The Ninth Circuit concluded that the officers use of deadly force under the circumstances did not violate clearly established law.

More recently, the Supreme Court in *Kisela* reversed the Ninth Circuit's denial of qualified immunity to an officer who shot a woman armed with a kitchen knife. *Kisela*, 138 S. Ct. at 1153. The officer was responding to a 911 call from a bystander that a woman—later identified as the plaintiff—had been acting erratically and "was seen hacking a tree with a large kitchen knife." *Id.* When the police arrived, they saw the plaintiff still armed with a kitchen knife walking towards another woman—later identified as her roommate. *Id.* at 1151. The officer was separated from the women by a locked chain-link fence. *Id.* The plaintiff appeared calm but ignored commands to drop the knife. *Id.* The officer opened fire, shooting her four times, and she sustained non-life threatening injuries. *Id.* at 1151. Less than a minute transpired between

when the officer saw the plaintiff and when the shots were fired. *Id.*

Here, as in *Kisela*, the plaintiff had a knife and ignored the officer's commands. Further, unlike *Kisela*, the officers here were responding to a report of domestic violence with minors involved, and unlike *Kisela*, the plaintiff here did not just ignore the officer's commands—he did the *opposite*. Under these circumstances, *Kisela* requires the Court to conclude that Officer Leon is entitled to qualified immunity. To put it another way, the caselaw cited by Plaintiff does not place the constitutionally beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

C. Fourth Amendment-Excessive Force Claim as to Officer Rivas-Villegas

Plaintiff alleges that Officer Rivas-Villegas violated his Fourth Amendment rights during the handcuffing and when he was moved via his handcuffs thereafter. In particular, Plaintiff attests that after he was shot and as he was ordered to the ground "someone put their foot and their weight on my back" and he "felt tremendous pain from that and then again while being lifted and moved by my arms handcuffed behind my back." (Dkt. No. 53, Cortesluna Decl. at ¶ 9; *see also* Dkt. No. 55-1, Cortesluna Depo. at 40:8-41:3.) Plaintiff contends that the knife was away from his body so there was no reason for this level of force citing to the security camera footage, but the Court's review of the footage establishes that it was not until the officers

were in the process of handcuffing Plaintiff that one of the officers removed the knife from his pocket and tossed it away. (Dkt. No. 53 at Ex. 1 at 14:59.) Further, the entire incident—from the moment Officer Rivas-Villegas secured Plaintiff until he was moved out of the way—lasted less than 30 seconds. (*Id.* at 14:46-15:11.)

Generally, handcuffing a suspect to effect an arrest is standard practice. *See Malek v. Green*, No. 17-CV-00263-BLF, 2017 WL 4284117, at *18 (N.D. Cal. Sept. 27, 2017) (collecting cases re: the same). In *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003), the Ninth Circuit held that a reasonable jury could conclude that it was excessive force where an officer investigating a non-violent tax invasion offence grabbed the plaintiff by the arms, forcibly threw her to the ground, and, handcuffed her while twisting her arms although she did not make any attempt to flee nor was she a safety risk. Here, in contrast, Officer Rivas-Villegas was attempting to secure an armed suspect after responding to a domestic violence call. While Plaintiff alleges that the handcuffing and movement were painful, he does not allege that Officer Rivas-Villegas twisted his arms or prolonged the handcuffing beyond that reasonably necessary to restrain him.[8] Nor does he allege that he

[8] Plaintiff's reliance on caselaw regarding "abusive application of handcuffs," "overly tight handcuffing," and "lifting an individual by a handcuff" as "spiteful excessive force" is unpersuasive. Each of the cases Plaintiff relies upon involve factual scenarios far afield from that here. *See*, *e.g, Blankenhorn v. City of Orange*, 485 F.3d 463, 469 (9th Cir. 2007) (after the plaintiff refused to kneel to be handcuffed and used profanity, the officers tackled the plaintiff and struggled with him for several seconds

was injured as a result of his handcuffing and movement. *Compare Crump v. Bay Area Rapid Transit Dist.*, No. 17-CV-02259-JCS, 2018 WL 4927114, at *12 (N.D. Cal. Oct. 10, 2018) (holding that plaintiff's claim that the handcuffing resulted in a torn rotator cuff presented a dispute of fact that precluded summary judgment on the excessive force claim but finding that the officers were entitled to qualified immunity); *with Wall v. Cty. of Orange*, 364 F.3d 1107, 1110 (9th Cir. 2004) (denying qualified immunity where the force used was excessive under the circumstances and the plaintiff suffered nerve damage as a result of the handcuffing). Plaintiff cites no authority for the proposition that under the facts here—where officers encounter and need

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during which time the plaintiff was punched in the head and body); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 (9th Cir. 2003) (after calling an ambulance to take an unarmed, hallucinating individual to a medical facility on a 5150 hold, officers decided to take him into custody, and in doing so, one officer knocked him to the ground and handcuffed him while another officer put his weight on the plaintiff's back); *Palmer v. Sanderson*, 9 F.3d 1433, 1434-35 (9th Cir. 1993) (plaintiff was stopped on suspicion of driving while intoxicated and after he became tired of standing in the rain, he returned to his vehicle at which point the officer pulled him "out of his car, pushed him against it, frisked him, handcuffed him, and pushed him into the back seat of the patrol car with such force that [plaintiff] fell over sideways" and placed the handcuffs "tight enough to cause pain and discoloration to his wrists"); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) (the plaintiff stated "that the handcuffs were put on in an abusive manner and that she was physically injured in the arrest"); *Wall v. Cty. of Orange*, 364 F.3d 1107, 1109 (9th Cir. 2004) (the plaintiff's hands were handcuffed "extremely tight" behind his back, the officer picked the plaintiff up by his handcuffed arms and threw him "upside down" and head first into the patrol car).

to effectuate an arrest on an armed suspect and secure a premise—the level of force used was excessive.

Drawing all inferences in Plaintiff's favor, the Court concludes that a reasonable jury could not conclude that the level of force used here was excessive. Even if this were not the case, Officer Rivas-Villegas would be entitled to qualified immunity for any such use of force because while the Ninth Circuit has held that overly-tight handcuffing can constitute a Fourth Amendment violation, *see LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000), Plaintiff's complaint here is not about overly tight handcuffing, but rather, about the amount of pressure used to restrain him and the fact that he was moved via his handcuffed hands, but Plaintiff has not "identif[ied] a case where an officer acting under similar circumstances as [defendants] was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

D. Fourth Amendment-Failure to Intervene as to Sergeant Kensic

Officers may be held liable under Section 1983 when their fellow officers use excessive force if they have an "opportunity to intercede" but fail to do so. *Cunningham v. Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2000), as amended (Oct. 31, 2000). Here, Plaintiff contends that Sergeant Kensic, who was present, but did not use any force against Plaintiff is liable because he failed to "intercede when Officer Leon announced, while Mr. Cortesluna was still in the house, that he was

going to 'hit him with less lethal,' did not interceded when Officer Leon did 'hit him with less lethal,' not when Officer Leon and Rivas stomped and stood on Mr. Cortesluna and lifted him by the handcuffs."[9] (Dkt. No. 52 at 15:15-18.) Plaintiff, however, has presented no evidence that Sergeant Kensic knew that Officer Leon was going to deploy less lethal—as opposed to knowing that he had less lethal—and the decision to deploy less lethal was a split section decision when Plaintiff lowered his hands towards the knife after being given the order to put his hands up. Under these circumstances, even drawing all inferences in Plaintiff's favor, Sergeant Kensic had no "realistic opportunity" to intercede under these circumstances. *See Cunningham*, 229 F.3d at 1290 (finding that the non-shooting officers who were present at the shootouts had no "realistic opportunity" to intercede and thus could not be liable for failing to intervene to prevent the shooting). Further, or more fundamentally, because

[9] Defendants construe Plaintiff's argument as including a claim based on a theory of supervisory liability. A supervisor may be held liable under Section 1983 for "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others." *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 961 (9th Cir. 2010) (internal quotations and citations omitted). However, as Defendants note, Plaintiff did not plead a claim for supervisory liability and cannot inject one now in opposing summary judgment. *See Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011). Thus, to the extent that Plaintiff's claim as to Sergeant Kensic is predicated on a supervisory liability theory, the Court declines to consider it.

the Court concludes that Officer Rivas-Villegas did not use excessive force in handcuffing and moving Plaintiff, Sergeant Kensic cannot be liable for failing to intervene to stop the handcuffing or movement.

* * *

Accordingly, the Court concludes that even if a reasonable jury could conclude that Officer Leon's use of the less-lethal shotgun here constituted excessive force, he is entitled to qualified immunity. Likewise, even if a reasonable jury could conclude that Officer Rivas-Villegas used excessive force in handcuffing Plaintiff and moving him—which the Court does not believe it could—he too would be entitled to qualified immunity for any such use of force. Finally, no reasonable jury could conclude that Sergeant Kensic had a realistic opportunity to intervene to stop the use of force here were a jury to conclude that the use of force here was unreasonable. Summary judgment will be granted in Officer Leon, Officer Rivas-Villegas, and Sergeant Kensic's favor on the Section 1983 claim.

II. Section 1983 Claim against the City

Because the Court grants summary judgment in the officers' favor on the Section 1983 claim, Plaintiff's *Monell* claim against the City is moot as it is predicated on a constitutional violation and this Court concludes that a reasonable trier of fact could not find one. *See Forrester v. City of San Diego*, 25 F.3d 804, 808 (9th Cir. 1994).

III. State Law Claims

Because the Court grants summary judgment on the federal claims in Defendants' favor, the Court declines to exercise supplemental jurisdiction of the state law claims and instead dismisses them without prejudice. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). "[S]tate courts routinely handle assault, battery, and negligence claims against police officers, and the similarity between the analyses for these state law claims and federal claims does not mean that federal courts can or should exercise jurisdiction over these matters." *Martinez v. City & Cty. of San Francisco*, No. C-13-04197 DMR, 2014 WL 7387809, at *3 (N.D. Cal. Dec. 29, 2014) (also noting that many courts in this district have remanded or dismissed state court tort claims against officers when the federal claims have been resolved).

CONCLUSION

For the reasons stated above, the Court GRANTS summary judgment in Defendants' favor on the federal claims and dismisses the state law claims without prejudice.

This Order disposes of Docket No. 47.

IT IS SO ORDERED.

Dated: December 21, 2018

/s/ Jacqueline Scott Corley
JACQUELINE SCOTT CORLEY
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMON CORTESLUNA, Plaintiff-Appellant, v. MANUEL LEON; et al., Defendants-Appellees.	No. 19-15105 D.C. No. 3:17-cv-05133-JSC Northern District of California, San Francisco ORDER (Filed Dec. 3, 2020)

Before: GILMAN,* GRABER, and COLLINS, Circuit Judges.

Judges Graber and Gilman have voted to deny Appellees' petition for panel rehearing, and Judge Collins has voted to grant the petition for panel rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judge Gilman has so recommended. Judge Collins has voted to grant the petition for rehearing en banc.

The full court has been advised of Appellees' petition for rehearing en banc, and no judge of the court has requested a vote on it.

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appellees' petition for panel rehearing and rehearing en banc, Docket No. 53, is DENIED.