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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEANINE LIBERTI; MICHAEL LIBERTI, individually and as surviving parents of Dylan Liberti, decedent, Plaintiffs-Appellants, v. CITY OF SCOTTSDALE, et al., Defendants-Appellees, and DOES, named as John and/or Jane Does I through V, fictitious individuals; ABC Corporations and/or Partnerships and/or Sole Proprietorships and/or Joint Ventures I-X, fictitious entities, Defendant.	No. 18-16938 D.C. No. 2:17-cv- 02813-DLR MEMORANDUM* (Filed Jun 5, 2020)
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Appeal from the United States District Court
for the District of Arizona; Douglas L. Rayes,
District Judge, Presiding

Argued and Submitted March 5, 2020
Phoenix, Arizona

* This disposition is not appropriate for publication and is
not precedent except as provided by Ninth Circuit Rule 36-3.

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Before: HAWKINS, OWENS, and BENNETT, Circuit Judges.

Plaintiffs Jeanine Liberti and Michael Liberti appeal from the district court’s grant of summary judgment to Defendants. Plaintiffs’ claims arise out of the interaction between Officer Wilmer Fernandez-Kafati, Officer Marjorie Bailey, and Dylan Liberti (“Liberti”), which tragically ended in the fatal shooting of Liberti. The district court granted summary judgment on Plaintiffs’ 42 U.S.C. § 1983 claim based on qualified immunity, and granted summary judgment on Plaintiffs’ negligence and wrongful death claims after finding Plaintiffs’ counsel had conceded that the state law counts rose or fell with their § 1983 claim.¹ We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court correctly found that qualified immunity barred Plaintiffs’ claim that the officers violated Liberti’s Fourth Amendment rights by using excessive and deadly force against him. Qualified immunity’s availability depends upon (1) whether the facts “taken in the light most favorable to the party asserting the injury show[s] that the officers’ conduct violated a constitutional right and (2) [whether] the right was clearly established at the time of the alleged violation.” *Thompson v. Rahr*, 885 F.3d 582, 586 (9th Cir. 2018) (internal quotation marks and alterations

¹ The district court overread counsel’s “concession.” However, we nonetheless affirm the district court’s grant of summary judgment on the state law claims for the reasons stated below.

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omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). We need only address the second prong.

Even if we agree that the officers violated one of Liberti’s constitutional rights, Supreme Court precedent prevents us from considering it a “clearly established right.” An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable [officer] in the defendant’s shoes would have understood that he was violating it.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (internal quotation marks and citation omitted). The Supreme Court has explicitly warned against defining “clearly established law at a high level of generality.” *Id.* at 1152 (internal quotation marks and citations omitted).

No existing precedent would have given the officers notice that Officer Bailey’s grabbing of Liberti’s elbow in an attempt to get him to sit down or that the officers’ additional attempts to subdue him when he fled were unconstitutional. These uses of force fall “far from an obvious case in which any competent officer would have known [their uses of force] . . . would violate the Fourth Amendment.” *Id.* at 1153. Likewise, there is no case that would establish that Officer Fernandez-Kafati’s use of deadly force was obviously unconstitutional where: (1) Liberti had already fled from the officers and was not complying with their orders; (2) Liberti had a knife in his hand; (3) Officer Bailey’s prior use of a Taser to subdue Liberti had proven ineffective; (4) Liberti was moving toward either Officer Fernandez-Kafati or the shopping center with a

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knife in hand; and (5) Officer Fernandez-Kafati was the only officer standing between Liberti and the rest of the open-air shopping center where members of the public were present. This keeps us from finding that the officers had “fair and clear warning” that their actions were unconstitutional. *Id.* (citation omitted).

2. We are similarly constrained by Arizona law with respect to Plaintiffs’ state law claims based on officer negligence. In Arizona, plaintiffs cannot base a negligence claim on an intentional use of force nor on a law enforcement officer’s negligent “‘evaluation’ of whether to intentionally use force.” *Ryan v. Napier*, 425 P.3d 230, 236 (Ariz. 2018). Any negligence claim must be based on conduct independent of the intentional use of force. *Id.* at 238.

3. Plaintiffs’ remaining claims fail as there are no wrongful acts for which the officers can be liable. No reasonable juror could find that the initial use of force was wrongful, given the information known to the officers. They were responding to a hang-up 911 call; they had been told that the man making the call did not look well; and a bystander had flagged down Officer Fernandez-Kafati to point out Liberti. In addition, when they wanted to reasonably limit Liberti’s movements while they were talking to him, giving Liberti many verbal commands and requests to sit down, Liberti refused. The officers were faced with a difficult situation: they did not know exactly why Liberti was behaving the way he was but wanted to continue the conversation while maintaining control and limiting Liberti’s options to escalate the situation. Their actions

were modest and tailored to the situation, and no reasonable juror could have found them wrongful. When Liberti subsequently attempted to run away, no reasonable juror could find that the officers' increased use of force to attempt to subdue him was wrongful. Furthermore, once Liberti had his knife in hand, he clearly posed a danger to himself and others. No reasonable juror could find that the officers' escalating attempts to subdue him, up to and including Officer Fernandez-Kafati's use of deadly force, constituted wrongful acts.

AFFIRMED.

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

Dylan Liberti died tragically on a hot summer Arizona day in July 2016, shot by police officers in a Scottsdale shopping mall. Dylan was just twenty-four when he died. Many of the salient events of that tragic day are captured on police video. Police officers approached Dylan, primarily because he had made a hang-up 911 call from a nearby restaurant and a passer-by thought Dylan was acting erratic and "looked weird." The restaurant manager gave no indication that Dylan posed any danger and neither did the passer-by. Though it likely exceeded 100 degrees at the time the police approached Dylan, they were intent and insistent on physically forcing Dylan to sit down on hot concrete. The video demonstrates that Dylan answered their questions cogently and lucidly, though

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because of their errors in processing what Dylan said, they may have believed Dylan was not being as cooperative as the video shows him to be. Dylan became obviously agitated (but still not threatening) as they became more and more insistent that he sit down. One officer then physically grabbed Dylan's arm to force him to the ground. The tragic aftermath is accurately described by the majority.

Dylan's parents, the Plaintiffs, brought this case. Though I agree with the majority that the Defendants are entitled to summary judgment on Plaintiffs' federal claims and state law negligence claims, I respectfully dissent from the majority's affirmance of the district court's grant of summary judgment on Plaintiffs' wrongful death claims. I believe the evidence, when viewed in the light most favorable to Plaintiffs, would allow a reasonable jury to find that the officers committed a battery and false arrest, both wrongful acts under Arizona's wrongful death statute, and that either or both proximately caused Dylan's death. I would therefore reverse the district court's grant of summary judgment on the wrongful death claims and remand those claims for further proceedings.¹

Arizona's wrongful death statute provides that "when the death of a person is caused by wrongful act, neglect or default, [the actor] who would have been liable if death had not ensued shall be liable to an action

¹ I would not simply remand for trial, as I believe Defendants should be given the opportunity to try to show that Plaintiffs' wrongful death claims are barred, as a matter of law, by state law defenses, such as state law qualified immunity.

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for damages.” *Walsh v. Advanced Cardiac Specialists Chartered*, 273 P.3d 645, 648 (Ariz. 2012) (internal alterations omitted) (quoting A.R.S. § 12-611).

The events that eventually led to Dylan’s death started out as a welfare check in response to a hang-up 911 call. Officers Fernandez-Kafati and Bailey knew that a male who had used a phone in a restaurant to make the call had subsequently left the restaurant without incident. The officers were told that the male did not look well, but there was no report that he posed a danger to anyone, or even that he looked like he might pose a danger to anyone. Officer Fernandez-Kafati was directed toward Dylan by a shopper who thought that Dylan “looked weird” and “didn’t look right.” Officer Bailey arrived shortly thereafter with her on-body camera actively recording. The on-body camera video shows that the officers spoke to Dylan in front of a grocery store, asking him for identifying information and whether he wanted them to call paramedics because he did not look well. Dylan answers the officers’ questions cogently and accurately but declines additional assistance. For example, Dylan accurately provided the officers his name, date of birth, and home address. Dylan does not appear irrational, dangerous, in obvious need of assistance, or obviously intoxicated.²

² The district court’s conclusions that Dylan’s failure to follow the officers’ directions constituted an ignoring of “questions and commands,” appears to disregard that Dylan answered the officers’ questions regarding his identifying information and clarified when asked to do so. Though the video speaks for itself; to the extent the video is ambiguous on these points, of course we must construe the facts in the light most favorable to Plaintiffs.

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Dylan is not acting in a threatening manner—either to the officers or anyone else. The officers are in possession of no evidence that Dylan committed a crime. The officers repeatedly ask (and then demand) that Dylan sit down. As Plaintiffs note, it was a hot day and the concrete the officers wanted Dylan to sit on was possibly painfully hot. Historic records show that the temperature in Scottsdale was as high as 111 degrees the day Dylan was shot.³ Dylan obviously does not want to sit, but continues to answer the officers’ questions, while not following their commands to sit.

After approximately six minutes of discussion, Officer Bailey grabs Dylan’s elbow to get him to sit down because Dylan was “moving around too much” for her. Again, there is nothing in the video that demonstrates (and certainly not in the light most favorable to Plaintiffs) that Dylan’s “moving around” is dangerous, evidence of a crime, or another reason for the officers to arrest him. Dylan pulls away from Officer Bailey’s grasp and attempts to run away. The officers attempt to subdue Dylan but he pulls free and runs into the open-air shopping area. The officers give chase and

C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist., 654 F.3d 975, 983 (9th Cir. 2011). In its finding that the officers acted reasonably in response to “Liberti’s jittery, confused demeanor, [and] complaints of feeling ill,” the district court substituted its own reasoning for that of the factfinder and improperly resolved a question of fact against the non-moving party on summary judgment.

³ See Record of Climatological Observations at Scottsdale Municipal Airport, AZ—July 27, 2016, NOAA, <https://www.ncdc.noaa.gov/cdo-web/search>.

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find Dylan with a small knife. The officers order him to drop the weapon, but he resumes running away from the officers. When they catch up to him a second time, Officer Bailey deploys her Taser, but it does not incapacitate Dylan. He gets up and begins to run. Officer Fernandez-Kafati then fatally shoots Dylan.

Viewing the facts in the light most favorable to Plaintiffs, the chase, tasing, and shooting might not have occurred at all had Officer Bailey not grabbed Dylan and tried to force him to sit down against his wishes. Put another way, a reasonable trier of fact could find that that initial use of force was the proximate cause of all that followed. Thus, under Arizona's wrongful death statute, if that use of force (and the actions surrounding it) was a "wrongful act, neglect or default," then Plaintiffs could make out a case for wrongful death.

The videotape simply does not resolve all questions of material fact. A reasonable factfinder could, for example, find that Officer Bailey's initial use of force to grab Dylan's shoulder to force him to sit down on painfully hot concrete, could constitute false arrest or battery which proximately caused the chase, tasing, shooting, and death. The video shows Dylan politely, cogently, and fully answering the officers' questions. Sadly, it appears from the video that part of the officers' unease was caused because they perhaps felt that Dylan gave them a false name (like they thought he was somehow making up a name—like "Liberty"). Also, Officer Bailey called in Dylan's date of birth

incorrectly, possibly adding to her unease when the information does not appear to turn up anything.

Dylan only attempts to flee when Officer Bailey grabs him in order to force him to do something he clearly does not want to do—sit down on hot concrete. Construing the facts in the light most favorable to Plaintiffs, there is a question of fact as to whether Officer Bailey had probable cause to believe that Dylan had committed an offense when she grabbed him. *See State v. Keener*, 75 P.3d 119, 122 (Ariz. Ct. App. 2003) (defining probable cause as “reasonably trustworthy information and circumstances that would lead a person . . . to believe that a suspect has committed an offense” (internal quotation marks, alterations, and citation omitted)). Without probable cause, a jury could find that Officer Bailey had no legal authority to effect a detention of Dylan, therefore falsely arresting him. *See Torrez v. Knowlton*, 73 P.3d 1285, 1287 (Ariz. Ct. App. 2003) (“[T]he tort of false arrest occurs when a person is unlawfully detained without consent.”).⁴

The facts surrounding Officer Bailey’s use of force, construed in the light most favorable to Plaintiffs, may also support a battery claim. *See Ryan v. Napier*, 425

⁴ While a jury could find that Officer Bailey’s use of force was reasonably used in the exercise of her community care role or that it was merely detention pursuant to reasonable suspicion, the evidence simply does not compel this conclusion. Similarly, while the jury might find that the officers were justified in using force because Dylan’s actions violated certain Arizona state laws and city ordinances, as argued by Defendants on appeal, the evidence similarly does not compel such a conclusion, and certainly not when viewed in the light most favorable to Plaintiffs.

P.3d 230, 238 (Ariz. 2018) (acknowledging that the facts pled for a police officer's intentional use of force supported an intentional battery claim). Battery is a wrongful act, and on the record before us, a reasonable jury could find such a battery proximately caused Dylan's death. For these reasons, Officer Bailey's use of force could constitute a wrongful act that ultimately led to and proximately caused Dylan's death. That the officers are entitled to qualified immunity for Plaintiffs' constitutional claims does not bear on this question.

A reasonable jury could find that Dylan should not have died that hot Arizona summer day. And that jury could find that the proximate cause of Dylan's death were wrongful acts under Arizona law. As I believe that Dylan's parents, the Plaintiffs here, should have the opportunity to further proceed with their wrongful death claims, I respectfully dissent from that portion of the majority's disposition upholding summary judgment in favor of Defendants on those claims.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jeanine Liberti, et al.,
Plaintiffs,
v.
City of Scottsdale, et al.,
Defendants.

No. CV-17-02813-PHX-DLR
ORDER
(Filed Sep. 11, 2018)

Plaintiffs are Jeanine and Michael Liberti, individually and as successors in interest to their deceased son, Matthew Liberti (“Liberti”). Defendants are the City of Scottsdale (“Scottsdale”), Scottsdale Police Officers Wilmer Fernandez-Kafati and Marjorie Bailey (“the Officers”), and Scottsdale Police Chief Alan Rodbell. At issue is Defendants’ Motion for Summary Judgment. (Doc. 30.) The motion is fully briefed and the Court heard oral argument on July 19, 2018. For the following reasons, Defendants’ motion is granted.

BACKGROUND

This case arises out of a fatal police-involved shooting. On July 27, 2017, Liberti reached over the counter at a Chompie’s restaurant in Scottsdale, dialed 911, and hung up after being confronted by the manager. (Doc. 31 ¶¶ 23-26, 30-38, 41.) When Scottsdale Police Dispatch called back, the manager described Liberti and explained that the caller had left the store without incident. (¶¶ 34-36.) Dispatch sent the Officers

to perform a well-check shortly after 5:00 PM. (§§ 41, 56.)

When Fernandez-Kafati arrived at the scene, a shopper waved him down to point out Liberti and say he was “acting erratic . . . he looks weird; I don’t know what’s wrong with him.” (§ 47.) The Officers approached Liberti, who was pacing outside the entrance of a Sprouts Farmers Market near Chompie’s. (§ 46.) When asked if he needed help, Liberti admitted to feeling “weird.” (§§ 66-67.) As captured by Bailey’s On Body Camera (“OBC”), Liberti was pacing, fidgeting, ignoring questions and commands, and intermittently swaying closer to the Officers. (§§ 49-55, 58-61, 67-68, 72-93.) Liberti’s pacing and swaying grew increasingly close to Bailey, who eventually insisted Liberti sit. (§§ 90-92.) By the time Bailey insisted, Liberti had ignored or refused twenty-two police commands to sit down. (§§ 92-93.) When Liberti ignored Bailey’s command, Bailey grabbed Liberti’s arm to force him to the ground. (§ 92.) Liberti jerked away, briefly grappled with the Officers, and fled toward the nearby Courtyard Shoppes (“the Shoppes”). (§§ 92-104.)

The Officers pursued Liberti to the Shoppes. (§§ 104-07.) Although both parties agree that the Officers drew their firearms and Liberti drew his knife upon arriving at the Shoppes, they disagree on the order. Defendants contend that Liberti drew his knife and the Officers drew their firearms in response. (§§ 109-11.) Plaintiffs argue that the Officers drew their firearms while Liberti was empty-handed, but concede Liberti eventually drew his knife, rendering

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the disagreement immaterial. (Doc. 43 ¶¶ 110-11.) The Officers demanded Liberti “get down” and drop the knife. (Doc. 31 ¶ 113.) Liberti yelled “Please! Shoot me in the head!” (¶ 114.) Bailey holstered her firearm and drew her TASER. (¶ 118.) Liberti then began moving past the Shoppes downstairs to a covered parking lot with the Officers in pursuit. (¶¶ 121-24.)

The Officers found Liberti downstairs still holding his knife. (¶ 125.) After again commanding Liberti to sit and drop his knife, Bailey warned “Get down now or I’m going to tase you!” (¶ 129.) Liberti refused, saying “Don’t tase me, shoot me!” (¶ 130.) Bailey tased Liberti. (¶ 137.) Liberti collapsed, but soon recovered. (¶¶ 138-40.) Liberti slashed his neck with his knife several times and asked the Officers to shoot him. (¶ 141.) Moments later, Liberti stood up. (¶ 149.)

Liberti then ran in Fernandez-Kafati’s direction with the knife in his hand. (¶ 149.) Fernandez-Kafati retreated backward while continuing to aim his firearm at Liberti. (¶ 154.) Liberti advanced several feet before Fernandez-Kafati fired twice, striking Liberti. (¶ 160.) Fewer than two seconds elapsed between Liberti standing and Fernandez-Kafati firing. (¶ 162.)

Liberti was pronounced dead at the scene, having suffered gunshot wounds to his abdomen and right leg, as well as seven self-inflicted neck wounds. (¶¶ 183-190.) The medical examiner confirmed that, at the time of his death, Liberti tested positive for “high level[s] of methamphetamine/amphetamine in cardiac blood and liver.” (¶ 180.)

Plaintiffs brought this action in November 2017, alleging state law and constitutional torts, and claims under Title II of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973. Defendants move for summary judgment on all counts.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and, viewing those facts in a light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment may also be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could find for the nonmoving party based on the competing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. The burden then shifts to the non-movant to establish the existence of material factual issues that “can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 250. Summary

judgment, however, cannot be denied based solely on “[s]urmise, conjecture, theory, speculation and an advocate’s suppositions.” *McSherry v. City of Long Beach*, 584 F.3d 1129, 1136 (9th Cir. 2009). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

DISCUSSION

I. Section 1983 Claims Against the Officers (Count III)

Plaintiffs bring two claims under 42 U.S.C. § 1983. First, they allege that the Officers violated Liberti’s Fourth Amendment rights by unconstitutionally seizing him and using excessive force during the seizure. Second, they allege that the Officers violated Liberti’s and Plaintiff’s Fourteenth Amendment right to due process by “interfering in their familial relationship by causing Liberti’s untimely death.” (Doc. 28 ¶ 103.) Defendants argue that summary judgment is warranted because the undisputed evidence shows there was no constitutional violation and, in the alternative, the Officers are entitled to qualified immunity.

Section 1983 creates a cause of action against any person who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution and laws of the United States. Section

1983 is not a source of substantive rights but merely a method for vindicating federal rights established elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). To state a claim under § 1983, a plaintiff must allege “(1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law.” *Long v. Cty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).

Qualified immunity insulates government actors from suit under § 1983 unless the plaintiff can show (1) that the actor violated a statutory or constitutional right by acting unreasonably under the circumstances, and (2) that the right was “clearly established” at the time of the challenged conduct. *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). Because establishing a constitutional violation is a threshold issue for both the § 1983 and qualified immunity inquiries, the Court will first assess Plaintiffs’ Fourth and Fourteenth Amendment claims.

A. Fourth Amendment

Plaintiffs allege that detaining Liberti was an unreasonable seizure, and grabbing, tasing, and shooting Liberti to subdue him constituted excessive force. The Court addresses each in turn.

1. Detention

To the extent that Plaintiffs argue the Officers’ investigatory stop of Liberti—as opposed to the physical

grabbing itself—violated Liberti’s Fourth Amendment rights, the Court disagrees. A police officer may seize a person for a brief investigatory stop if the officer has reason to believe the person has broken the law. *See Terry v. Ohio*, 392 U.S. 1, 23-27 (1968). Under Arizona law, an officer may detain a mentally ill person if there is probable cause to believe the person is a danger to himself or others. A.R.S. § 36-525. “Probable cause exists where ‘the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.’” *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009). Officers may also detain individuals under their community caretaking function to ensure the safety of the public or the individual. *See Martin v. City of Oceanside*, 360 F.3d 1078, 1082 (9th Cir. 2004).

Here, a reasonable jury could only find that the Officers were reasonable in their belief that Liberti’s jittery, confused demeanor, complaints of feeling ill, and 911 call indicated that he might have been under the influence of a controlled substance. *See Tatum v. City & Cty. of S.F.*, 441 F.3d 1090, 1094-95 (9th Cir. 2006) (noting that a detainee mumbling, disobeying commands and perspiring heavily created “a fair probability he had committed a crime”). Finally, the Officers would have been within their rights as community caretakers to detain Liberti for his own safety. *Oceanside*, 360 F.3d at 1082. No reasonable jury could

find that the Officers' investigatory stop violated Liberti's Fourth Amendment rights.

2. Excessive Force

Plaintiffs claim that three acts of force violated Liberti's Fourth Amendment rights – Bailey grabbing Liberti to force him to the ground, Bailey tasing Liberti, and Fernandez-Kafati shooting Liberti. Defendants argue that the Officers acted reasonably, entitling them to summary judgment.

When assessing a police officer's use of force, the Court asks "whether the force that was used to effect a particular seizure was reasonable." *Gregory v. Cty. of Maui*, 523 F.3d 1103, 1107 (9th Cir. 2008). To determine if force was reasonable, the Court must give "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*, 490 U.S. at 396. The reasonableness determination is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and must allow "for the fact that police officers are often forced to make split-second judgments . . . about the amount of force necessary in a particular situation." *Id.* at 396-97.

Before addressing each discrete use of force, the Court will address Plaintiffs' frequent reference to

Liberti's mental illness. Plaintiffs argue that Liberti was "obviously" in mental crisis, and that his mental illness should bear on the Court's determination of reasonableness in every instance. It is true that an officer's awareness of a suspect's mental illness may be considered in a reasonableness determination. Plaintiffs, however, offer no evidence that it was—or should have been—apparent to the Officers that Liberti was mentally ill, whereas there is substantial evidence that Liberti was both apparently and actually under the influence of methamphetamine. Plaintiffs' argument that Liberti was "in crisis,"¹ and that the Officers "knew" Liberti was mentally ill, is purely speculative. Reasonableness is determined from the perspective of an officer on the scene without the benefit of hindsight, and here there is no evidence that the Officers were warned that Liberti was mentally ill before the incident or that they should have known his erratic behavior was attributable to some unidentified mental illness as opposed to intoxication.

a. Grabbing

Plaintiffs allege that Bailey grabbing Liberti by the arm to direct him to a seated position—and the ensuing force used to prevent him from fleeing—was excessive. "[T]he degree of force used by the police is permissible only when a strong government interest

¹ Other than Plaintiffs' vague description of Liberti as "in crisis," there is no competent evidence of what kind of mental illness, if any, Liberti was experiencing at the time of the incident.

compels the employment of such force.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003) (internal quotation and citation omitted). Here, the Officers had reasonable suspicion and probable cause to lawfully stop Liberti, as discussed above, and using physical coercion to effect a stop is not excessive so long as it is reasonable. *See Graham*, 490 U.S. at 396 (“[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”).

Plaintiffs claim that Liberti was “mostly compliant” during his detention, but this allegation is unsupported by evidence. Liberti ignored police commands several times. (Doc. 31 ¶ 93.) Liberti’s refusal to obey police commands, combined with his apparent intoxication, created a government interest in subduing him before he harmed himself or the public. Bailey was not required to use the least intrusive degree of force possible to pursue that interest, but still did so by escalating from verbal commands to empty-hand coercion.² (Doc. 31 ¶ 92); *Gregory*, 523 F.3d at 1107. Once Liberti began struggling against Bailey’s empty-hand coercion, he was resisting arrest and posed an immediate threat to the Officer’s safety. Thus, no reasonable jury could find Bailey’s use of force in grabbing and later attempting to restrain Liberti was objectively unreasonable.

² The Scottsdale Police Department uses four escalating levels of force: verbal commands, empty hand tactics, intermediate weapons (TASER), and deadly force. (Doc. 43 ¶ 52.)

b. Tasing

Plaintiffs allege that Bailey tasing Liberti was excessive. A TASER used in probe mode is an intermediate or medium level of force that must be justified by the government's interest. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). It is not unreasonable for a police officer to use a TASER, even without warning, on suspects who fail to obey police commands and create a "difficult, tense and uncertain" situation.³ See *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004) (holding officer's use of TASER without warning was justified when suspect in traffic stop repeatedly refused to comply with commands); *Roell v. Hamilton Cty.*, 870 F.3d 471, 481 (6th Cir. 2017) (citing *Cockrell v. City of Cincinnati*, 468 Fed. App'x 491, 495 (6th Cir. 2012) as "recognizing numerous cases holding that an officer's use of a TASER against a plaintiff who is actively resisting arrest by physically struggling with, threatening, or disobeying officers is not a violation of the plaintiff's clearly established Fourth Amendment rights, even if the plaintiff is suspected of committing only a misdemeanor").

When Bailey deployed her TASER, she had already attempted verbal commands and empty-hand coercion. (Doc. 31 ¶ 92.) Liberti at that point was wielding a knife, had assaulted Bailey while resisting arrest, and still was apparently under the influence of

³ Bailey did, however, give Liberti warnings to drop the knife and "get down now or I'm going to `tase' you." (Doc. 31 ¶ 129.) Under *Graham*, a warning weighs in favor of reasonableness.

methamphetamine. The government's interest in subduing Liberti, who was continuing to disobey police commands and becoming a significant threat to the Officers and the public, had become substantial. No reasonable jury could find that Bailey's use of force in tasing Liberti was objectively unreasonable.

c. Deadly Force

Plaintiffs allege that Fernandez-Kafati's use of deadly force against Liberti was excessive. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The Constitution, however, "permit[s] the use of deadly force against a suspect who poses . . . an imminent threat of danger to a police officer or others." *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1246 (11th Cir. 2003).

By the time Fernandez-Kafati fatally shot Liberti, verbal commands, empty-hand coercion, and TASER incapacitation had all failed to subdue Liberti. According to Bailey's OBC, Liberti collapsed after being tased, slashed his neck, screamed "Kill me, motherfucker!", stumbled to his feet, screamed "Kill me!", and lunged in Fernandez-Kafati's direction with knife in hand, ultimately coming within five feet of the Officer's position.⁴ (Doc. 31 ¶¶ 137-156.) Plaintiffs argue that

⁴ Suspects within 21 feet of a police officer are within "the zone of danger," which is considered the distance that can be

Liberti was trying to escape along the parking structure's wall. (Doc. 43 ¶ 150.) It is unclear if Liberti was intentionally threatening Fernandez-Kafati by moving in his direction with knife in hand, but under *Graham*, the Court must view the incident from the perspective of a reasonable officer on the scene rather than guess at Liberti's motivations. Based on Bailey's OBC, a reasonable officer would not have known that Liberti was attempting to escape. But even taking Plaintiffs' version of events as true, Liberti was armed with a dangerous weapon and, at the very least, trying to evade arrest by fleeing into a crowded shopping center. Based on the undisputed evidence and the totality of the circumstances, it was reasonable for Fernandez-Kafati to believe that Liberti posed an immediate threat to himself or the public. Thus, no reasonable jury could find Fernandez-Kafati's use of force in shooting Liberti was objectively unreasonable. Defendants therefore are entitled to summary judgment on Plaintiffs' Fourth Amendment claim.

closed by an attacker before the officer can react to protect herself. See *Prostrollo v. City of Scottsdale*, 676 F. App'x 678, 679 (9th Cir. 2017) (holding an officer acted reasonably in shooting mentally disturbed man wielding pool cue who was within 17 feet of officers).

B. Fourteenth Amendment

Plaintiffs allege that the Officers violated Liberti's and Plaintiffs' Fourteenth Amendment rights to due process, specifically by "interfering in their familial relationship by causing Liberti's untimely death." (Doc. 28 ¶ 103.) A police officer using deadly force violates the Fourteenth Amendment if he acts with "a purpose to harm without . . . legitimate law enforcement objectives." *Zion v. Cty. of Orange*, 874 F.3d 1072 (9th Cir. 2017). Legitimate law enforcement objectives include "stopping a dangerous suspect." *Id.* The Court has determined that a reasonable jury could only find the Officers acted with the legitimate objective of stopping Liberti, a dangerous suspect, from harming the Officers or the public. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' Fourteenth Amendment claim.

II. Vicarious § 1983 Claims (Count III)

Plaintiffs allege that the City of Scottsdale and Rodbell violated Plaintiffs' rights by, among other things, failing to implement appropriate policies on the use of deadly force. Yet no reasonable jury could find that the Officers committed a constitutional or statutory violation while interacting with Liberti. Neither the City of Scottsdale nor the Rodbell may be liable under § 1983 without an underlying statutory or constitutional violation. *See Tatum*, 441 F.3d at 1100. Defendants are entitled to summary judgment on this claim.

III. Negligence & Wrongful Death (Counts I & II)

In Count I, Plaintiffs allege that the Officers breached a duty of care owed to Liberti by failing to carry out their duties in a reasonably prudent manner. They claim grabbing and tasing Liberti to effect an arrest was an unreasonable use of force in violation of A.R.S. § 13-3881(B), constituting negligence per se. In Count II, Plaintiffs allege that the Officers' negligence caused Liberti's death, and under A.R.S. § 12-611 they are entitled to injuries and losses stemming from that death. Counsel for both parties, however, agreed during oral argument that Counts I and II necessarily fail if the Court grants summary judgment to Defendants on Count III based on a finding of objective reasonableness. The Court therefore grants summary judgment in favor of Defendants on both counts because a reasonable jury could only find that the Officers acted reasonably under the circumstances.

IV. Title II of the ADA & Rehabilitation Act of 1973 (Count IV)

Plaintiffs allege the City of Scottsdale and Rodbell breached their obligations under the ADA and the Rehabilitation Act by, among other things, failing to provide police services that were appropriate in light of Liberti's disability. At oral argument, Plaintiffs' counsel expanded on the allegation, propounding that Defendants discriminated against Liberti by failing to dispatch officers trained to deal with mentally ill suspects. Counsel suggested that dispatching Scottsdale's

“Police Crisis Intervention Specialists” might have prevented unnecessary escalation leading to the use of force. Plaintiffs’ counsel conceded, however, that Count IV would necessarily fail if the Court grants summary judgment to Defendants on Count III based on a finding of objective reasonableness. The Court therefore grants summary judgment for Defendants on Count IV.

CONCLUSION

Based on the undisputed evidence, no reasonable jury could conclude that the Officers acted unreasonable under the circumstances. Accordingly,

IT IS ORDERED that Defendants’ Motion for Summary Judgment (Doc. 30) is **GRANTED**. The Clerk shall enter judgment in favor of Defendants, terminate all remaining motions and deadlines, and close this case.

Dated this 10th day of September, 2018.

/s/ Douglas L. Rayes

Douglas L. Rayes
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jeanine Liberti, et al.,

Plaintiffs,

v.

City of Scottsdale, et al.,

Defendants.

**NO. CV-17-02813-
PHX-DLR**

**JUDGMENT IN A
CIVIL CASE**

(Filed Sep. 11, 2018)

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed September 11, 2018, which granted the Motion for Summary Judgment, judgment is entered in favor of defendants and against plaintiffs. Plaintiffs to take nothing, and the amended complaint and action are dismissed with prejudice.

Brian D. Karth

District Court Executive/Clerk of Court

September 11, 2018

s/ L. Dxon

By Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEANINE LIBERTI; MICHAEL LIBERTI, individually and as surviving parents of Dylan Liberti, decedent, Plaintiffs-Appellants, v. CITY OF SCOTTSDALE; et al., Defendants-Appellees, and DOES, named as John and/ or Jane Does I through V, fictitious individuals; ABC Corporations and/or Partner- ships and/or Sole Proprietor- ships and/or Joint Ventures I-X, fictitious entities, Defendant.	No. 18-16938 D.D. No. 2:17-cv-02813- DLR District of Arizona, Phoenix ORDER (Filed Jul. 30, 2020)
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Before: HAWKINS, OWENS, and BENNETT, Circuit
Judges.

Appellants, Jeanine Liberti and Michael Liberti,
filed a petition for panel rehearing and for rehearing
en banc. [Dkt. 46] . A majority of the panel has voted to

deny the petition for panel rehearing. Judge Bennett voted to grant the petition for panel rehearing.

Judges Owens and Bennett vote to deny the petition for rehearing en banc, and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing en Banc, and no judge has requested a vote on whether to rehear the matter en Banc. *See* Fed. R. App. P. 35

The petition for panel rehearing and rehearing en Banc is **DENIED**.

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No. 18-16938

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JEANINE LIBERTI; MICHAEL
LIBERTI, individually and as
surviving parents of Dylan
Liberti, decedent,

Plaintiffs - Appellants,

v.

CITY OF SCOTTSDALE;
WILMER FERNANDEZ-
KAFATI, Officer, #1476;
FERNANDEZ-KAFATI, named
as Jane Doe Fernandez-Kafati;
MAJORI E BAILEY, #1469;
BAILEY, named as John Doe
Bailey; ALAN ROD BELL,
in his individual and official
capacity as Chief of Scottsdale
Police Department; RODBELL,
named as Jane Doe Rodbell,

Defendants – Appellees,

and

DOES, named as John and/or
Jane Does I through V, ficti-
tious individuals; ABC Corpora-
tions and/or Partnerships
and/or Sole Proprietorships
and/or Joint Ventures I-X,
fictitious entities,

Defendants.

No. 18-16938

D.C. No. 2:17-cv-
02813-DLR

U.S. District Court
for Arizona, Phoenix

OPENING BRIEF

OPENING BRIEF

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* * *

Statement of Facts

1. Reconstructing the fatal shooting based on the police officers' untested statements tells a story that is unverifiable and subjective.

The July 27, 2016 “check-welfare call” that ended with City of Scottsdale Police Officer Wilmer Fernandez-Kafati fatally shooting Dylan Liberti started near the Sprouts grocery store located at 9301 East Shea Boulevard in Scottsdale, Arizona. (Doc. 31-4, Exh. 42 at Page 7 of 125) (ER-051).

City of Scottsdale Police Officer Marjorie Bailey stated that she and Officer Fernandez-Kafati were responding to “a check welfare” call “because there was a gentleman [Dylan] that went into Chompie’s which is next to Sprouts . . . and he used a phone in there to call 911 and . . . they said he – he didn’t look well . . . and then he left the store.” (Doc. 31-1, Exh. 1 at Page 6 of 109, 6:54-63) (ER-028).

A 911 dispatcher had called back to the Chompie’s restaurant to see if everything was okay there. Unlike

the version of the 911 call and its aftermath that Officer Fernandez-Kafati provided, the Chompie's employee who responded to the 911 dispatcher actually explained that everything was okay as far as the people at Chompie's could say. "There was a young man," the Chompies employee said, "that came in here and was reaching for the phone. I asked him if he needed anything and he shook his head and exited the front door." (Doc. 31-1, Exh. 18 at Page 106 of 109) (ER-043).

Actually, after Officer Fernandez-Kafati was dispatched to the area for the 911 call, he stated that the call was "then changed to a check welfare call for a white male subject," who turned out to be Dylan Liberti. (Doc. 31-1, Exh. 18 at Page 100 of 109) (ER-039). In other words, the 911 call ended before the police officers had any contact or issues with Dylan.

In a post-shooting interview, Officer Bailey claimed that, during her encounter with Dylan, he supposedly kept trying to touch his pockets, which, according to Officer Bailey, was something that supposedly "made us a little bit uncomfortable because we don't know what he has on him." (Doc. 31-1, Exh. 1 at Page 7 of 109, 3:85-86) (ER-029). Officer Bailey claimed that Dylan "continued to try to go after his pockets and he was – he seemed as though he was looking for something." (Doc. 31-1, Exh. 1 at Page 7 of 109, 3:95-97) (ER-029).

- But Officer Bailey's body-camera video never showed Dylan trying to touch his pockets, from first contact until after the

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police unexpectedly grabbed him with no provocation and then chased after him, screaming and with aimed service pistols. He usually had his hands casually on his hips or crossed over his chest.

Officer Bailey explained they had not patted Dylan down for weapons because: “It was just a check welfare call.” (Doc. 31-5, Exh. 58, at Page 28 of 141, 28:735-736) (ER-058). In one of his post-shooting interviews, however, Officer Fernandez-Kafati claimed that from the very start of their encounter, Dylan was supposedly not free to go and was being lawfully detained. (Doc. 31-6, Exh. 71 at Page 17 of 71, 17:225-231) (ER-075).¹

- But Officer Bailey’s body-camera video shows that at no point in the encounter between Dylan and the two police officers—until *after* Officer Bailey unexpectedly and with no warning or provocation grabbed Dylan—did the police officers indicate to Dylan that he was under arrest, that he was being detained, that he was

¹ The district court stated that “by the time [Officer] Bailey insisted [that Dylan sit down], Liberti had ignored or refused twenty-two police commands to sit down.” (Doc. 053 at 2:10-11) (ER-011). But that misconstrues the facts. Officer Bailey’s body-camera video shows the police officers were trying to persuade Dylan to sit down on the floor or ground. When Dylan refused, which was his right, the efforts at persuasion turned into rude and increasingly discordant demands. Dylan had the right to stand if he wanted to stand. Refusing to sit (at a place with no seats or benches) gave the police officers no right to grab Dylan and try to wrestle him to the ground.

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not free to go, or that he *had* to do anything. If Dylan was being detained, no one ever told him that.

Officer Bailey admitted she initiated physical contact with Dylan when she “placed [her] hand on his shoulder.” (Doc. 31-1, Exh. 1 at Page 8 of 109, 8:104) (ER-030). Officer Bailey claimed that she “touched his shoulder with my hand, not in an aggressive manner at all.” (Doc. 31-1, Exh. 1 at Page 8 of 109, 8:104-05) (ER-030). Officer Fernandez-Kafati, however, said that “Officer Bailey attempted to grab [Dylan] by the arm to sit him down.” (Doc. 031-1, Exh. 18 at Page 100 of 109) (ER-039).

- But Officer Bailey’s body-video confirms she assaulted Dylan with no provocation by unexpectedly and forcibly grabbing him with both of her hands. Officer Fernandez-Kafati then joined in on the unprovoked, violent, sudden, and aggressive attack.

In a post-shooting statement, Officer Fernandez-Kafati claimed Dylan had “continued to ‘break that safety zone’ and he told him repeatedly to move back.” (Doc. 031-1, Exh. 18 at Page 100 of 109) (ER-039). Officer Fernandez-Kafati even claimed that Dylan was “trying to circle us.” (Doc. 031-1, Exh. 18 at Page 100 of 109) (ER-039).

- But Officer Bailey’s body-camera video shows that not once did either police officer tell Dylan to move back; not once did Dylan try to crowd close to either police

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officer. He was certainly not trying to “circle” them. In fact, Dylan edged away from them as much as he could as they crowded into his space.²

Officer Bailey claimed the police officers were trying to “forcibly sit him down because we weren’t sure why he was running away.” (Doc. 31-1, Exh. 1 at Page 8 of 109, 8:106-108) (ER-030).

- But Officer Bailey’s body-video shows that, *before* she assaulted Dylan, he was simply standing next to the police officers, was talking calmly and quietly with them, and was *not* running away.

Officer Bailey admitted “forcibly” trying to compel Dylan to sit down was “really when everything started.” (Doc. 31-1, Exh. 1 at Page 8 of 109, 8:106-109) (ER-030).³

² The district court claimed Dylan had been “pacing, fidgeting, ignoring questions and commands, and intermittently swaying closer to the Officers.” (Doc. 053 at 2:6-8) (ER-011). But Officer Bailey’s body-camera video shows Dylan was mostly standing still, did not fidget, answered questions, and never swayed closer to the police officers. He did not ignore commands; he simply chose not to comply with the police officers’ increasingly strident demands that he sit down at a place lacking seats or benches, and only had a concrete floor. In the heat of the day in a Scottsdale summer, only someone wanting to get very hot or get a contact burn sits on an outdoor concrete floor. In any event, even Officer Fernandez-Kafati admitted Dylan “was really quiet.” (Doc. 31-6 at Page 14 of 71, 14:129) (ER-072).

³ The district court claimed “Liberti’s pacing and swaying grew increasingly close to [Officer] Bailey.” (Doc. 053 at 2:6-8) (ER-011). That is incorrect. Officer Bailey’s body-camera video

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Kelly Johnson, a civilian witness, stated that “the officer goes to grab him and he just starts breaking away and they’re both holding onto him and he is fighting them. Not – not swinging, but backing up, moving around – slippery probably. Just trying to get away.” (Doc. 31-3, Exh. 35 at Page 12 of 117, 12:59- 61) (ER-047). The Sprouts store video showed “the two officers grabbing and trying to get their hands [on] and [get] control of Dylan who is pulling and twisting away.” (Doc. 31-4, Exh. 42 at Page 12 of 125, at 12) (ER-054).

Officer Fernandez-Kafati said that Dylan struggled, pulled away, and ran south—away from Officer Fernandez-Kafati and Officer Bailey. (Doc. 31-1, Exh. 18 at Page 100 of 109) (ER-039). Along the way, Dylan pulled a small knife from a pants pocket, whether in a gesture of panic, desperation, or self-defense we shall never know. (Doc 31-1, Exh. 1, Page 8 of 109, 8:123-24) (ER-030).

After Dylan had stopped running at the parking garage and was pacing back and forth, Officer Bailey shot a Taser into Dylan, who, Officer Fernandez-Kafati said, “locked up,” fell to the ground, rolled onto his back, and then later got up. (Doc. 31-1, Exh. 18 at Page 101 of 109) (ER-040). Officer Fernandez-Kafati claims he had his own Taser out. He then claims that he put away his Taser and drew his service weapon. (Doc. 31-1, Exh. 18 at Page 100 of 109) (ER-039).

shows that Liberti was not pacing and that he kept trying to edge away from the police officers, who kept crowding toward him.

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- But Officer Bailey's body-video does not show Officer Fernandez-Kafati ever pulling out his Taser.

Officer Bailey claims that, despite having received a shot from the Taser, Dylan "gets up very quickly and still has that knife in his hand." (Doc. 31-5, Exh. 58, Page 40 of 141, 40:1108) (ER-059).

- But Officer Bailey's body-camera video shows that, after being shocked with the Taser, Dylan got up slowly.

Officer Bailey claims that before she could do anything about a second deployment of the Taser or anything else, Dylan supposedly "runs straight toward" Officer Fernandez-Kafati. (Doc. 31-5, Exh. 58 at Page 40 of 141, 40:1112-1116) (ER-059). "I mean to me," Officer Bailey said, "what it looked like is him running straight at" Officer Fernandez-Kafati. (Doc. 31-5, Exh. 58 at Page 41 of 141, 41:1142) (ER-060).

Officer Fernandez-Kafati claimed Dylan supposedly "charged toward him with the knife in his hand." (Doc. 31-1, Exh. 18 at Page 101 of 109) (ER-040). Officer Fernandez-Kafati was then holding a .40 caliber Model 11 Glock pistol and aiming it at Dylan. (Doc. 31-1, Exh. 18 at Page 99 of 109) (ER-038).

- But Officer Bailey's body-camera video is ambiguous about whether Dylan was actually staggering in Officer Fernandez-Kafati's direction or whether Dylan was staggering more to his right to get around

the wall and evade Officer Fernandez-Kafati.

An eyewitness who saw Officer Fernandez-Kafati before the shooting said the officer looked “frightened,” and “panicked” and was “shaking” and “breathing heavily.” (Doc. 31-4, Exh. 42 at Page 9 of 125) (ER-000).

Officer Fernandez-Kafati claimed “he backtracked” and fired two rounds from his pistol into Dylan. (Doc. 31-1, Exh. 18 at Page 101 of 109) (ER-053). More fully, Officer Fernandez-Kafati claimed that after Dylan had been shot by the Taser: “And that’s when he got up – charged me with the knife in hand. I stepped back a little bit – kept stepping back – shot – shot – shot and that’s where he fell right there.” (Doc. 31-5, Exh. 66 at Page 130 of 141, 130:734-736) (ER-064).

Officer Fernandez-Kafati claimed Dylan “was within five feet easily” when he shot Dylan. (Doc. 31-5, Exh. 66 at Page 133 of 141, 133:821-828) (ER-065).

- But Officer Bailey’s body-camera video indicates the distance was greater than that. Of course, the exact distance, or even an estimate of it, is a difficult judgment call solely for the trier of fact to make.

Although Officer Fernandez-Kafati fired twice, Officer Bailey said she “heard . . . three gunshots” and Dylan “went to the ground still kind of holding his head up and with the knife in his hand.” (Doc. 31-5, Exh. 58 at Page 41 of 141, 41:1150-1151) (ER-060).

As far as what Officer Fernandez-Kafati was thinking just before shooting Dylan, in a post-shooting interview he admitted:

Officer Fernandez-Kafati: Um, by the time I was done looking at [Officer Bailey using the Taser] he had already gotten up and he was charging me. A – from what I remember. And at that point I was like I'm pointing a gun at him. Why is he coming? And then I kept replaying it in my head – uh-oh, media stuff.

Question: Uh-yeah.

Officer Fernandez-Kafati And it was like okay whatever.

(Doc. 31-6, Exh. 71 at Page 15 of 71, 15:178-185) (ER-000).

When discussing the effect on him of killing Dylan, Officer Fernandez-Kafati said: "It was too cookie cutter for me I thought. . . . It wasn't personalized." (Doc. 31-6, Exh. 17 at Page 27 of 71, 27:553-557) (ER-076).

Officer Fernandez-Kafati said that *after* he shot Dylan, the young man fell to the ground and seemed to try to cut his neck with a knife. (Doc. 31-1, Exh. 18 at Page 101 of 109) (ER-040). Officer Bailey said that *after* Officer Fernandez-Kafati shot Dylan, he supposedly

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“proceeded to stab himself in the neck and also slit his own throat.” (Doc. 31-1, Exh. 1 at Page 10 of 109, 10:162-163) (ER-032). Why the defense keeps bringing up the alleged neck self-stabbing is unclear, since Dylan rapidly bled to death at the scene from the gunshot wounds.

In any event, a bystander said that after the police officer shot Dylan he was “motionless, nonresponsive on the ground.” (Doc. 31-3, Exh. 35 at Page 30 of 117, 30:599-601) (ER-048).

Over and over, in matters great and small, Officer Bailey’s objective body-camera video repeatedly contradicts the subjective, inaccurate, and often self-serving stories Officers Fernandez-Kafati and Bailey told after the shooting. As far as the police officers’ credibility and the weight to give their testimony, the jury will have much to weigh and consider. But “when ruling on a summary judgment motion, the district court is not empowered to make credibility determinations or weigh conflicting evidence.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1113 n. 5 (9th Cir. 2004). The district court here, however, did just that.

2. Reconstructing the fatal shooting based on Officer Bailey’s body-camera video tells a story that is verifiable and objective.

Officer Bailey’s body-camera video depicts objectively events the police officers who caused Dylan’s death remember subjectively. Reasonable jurors could view the body-camera video, weigh what it depicts, and

conclude the police officers had themselves needlessly precipitated a crisis with Dylan by suddenly and without provocation grabbing and startling him.

Reasonable jurors could view the body-camera video and conclude that the police officers used excessive force in shooting Dylan when he was trying to evade Officer Fernandez-Kafati and find refuge elsewhere from the police officers who had unexpectedly attacked him without provocation, who had chased him screaming and pointing service pistols at him, and who had electrically shocked him—all because he had not wanted to sit down.

Officer Bailey's body-camera video gives objective evidence that reasonable jurors can replay and test as often as they need. It is objective evidence from which reasonable jurors can reach their own conclusions about the officers' conduct and particularly about the ambiguous seconds just before Officer Fernandez-Kafati fatally shot Dylan Liberti.

We thus implore the Court to watch the first 10 minutes of Officer Bailey's body-camera video with great care. Parts are ambiguous. For instance, was Dylan moving toward the police officer just before Dylan was shot, or was he stumbling sideways to try to slide by that officer? Was Dylan a viable threat as he stumbled along the wall to his right? Or was Dylan simply trying to get away from the police officers who had first unexpectedly and without provocation grabbed him, attacked him, screamed at him, chased

him with drawn service pistols aimed at him, and then shocked him with a high-voltage Taser?

Ambiguities are inherent in capturing any event in any medium. The best example of an ambiguous video remains the Abraham Zapruder home-movie film of John F. Kennedy's assassination in Dallas on November 23, 1962.⁴ In a summary-judgment setting, however, ambiguities *must* be resolved in favor of the nonmoving party. See, e.g., *Porter v. Osborn*, 546 F.3d 1131, 1133 (9th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

3. The first ten minutes of Officer Bailey's body-camera video precludes summary judgment because it offers objective evidence that reasonable jurors can weigh to find that, under the circumstances, the police officers used excessive force.

Officer Bailey's body-camera video speaks for itself. It captures the initial police contact, the sudden and unprovoked assault on Dylan, the screaming

⁴ "Example of inscrutable images are everywhere once you look for them, from the most popular to the most mundane. The images of the Zapruder film capturing images from a particular perspective of the assassination of President John F. Kennedy, are notoriously ambiguous concerning the issue for which people inspect them: Who killed JFK? We may watch these films over and over, witness the violence and horror of the moments, but in doing so we know no more or less about the mysteries of the shooter and his mechanism." Jessica Silbey, *Images In/Of Law*, 57 N.Y. L. Sch. L. Rev. 171, 173-74 (2012/2013) (citations omitted).

police foot chase with drawn and aimed service pistols, the Taser attack, and the fatal shooting. A “videotape of undisputed validity should be treated as providing undisputed facts at summary judgment.” *Recchia v. City of Los Angeles Dept. of Animal Services*, 889 F.3d 553, 556 n.1 (9th Cir. 2018) (citing the holding in *Scott v. Harris*, 550 U.S. 372, 380-81 (2007)).

In an Order filed on December 28, 2017, the district court directed that the Clerk of the Court was to accept for filing a number of non-paper exhibits, including “Officer Bailey’s OBC [body-camera] Video (Exh. 4).” (Doc. 33 at 1:15- 21). At oral argument on the motion for summary judgment, the district judge confirmed that he had “viewed the video” and “saw the video.” Transcript at 3:14, 3:25~4:1; 12:14 (ER-096, ER-097, ER-105). As the district court said, “we’ve all seen this video, and it’s a terrible thing to see.” Transcript at 27:3-4 (ER-120).

Officer Bailey’s body-camera is an essential part of the record and an item of evidence that the district court weighed in determining the truth of the matter and granting summary judgment against the Libertis.

The district court did that, although “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). “In assessing whether a genuine issue of material fact exists for trial,” neither the district court nor this Court can “weigh the evidence, nor

make factual or credibility determinations.” *Fuller v. Idaho Dept. of Corrections*, 865 F.3d 1154, 1161 (9th Cir. 2017).

As an aid to the Court in watching Officer Bailey’s body-camera video, these are the highlights of the body-camera video’s crucial first 9 minutes and 56 seconds:

<u>Time</u>	<u>Audio and/or actions</u>
00:00	[Officer Bailey arrives at the Sprouts shopping center and makes her first contact with Dylan outside Sprouts. Officer Fernandez-Kafati is already there, speaking with Dylan. The audio is off until 00:30.]
00:30	Officer Fernandez-Kafati: “Take a seat man, you seem like you’re jittery. Here, just sit down so we can talk with you.”
00:34	Officer Bailey: “Have a seat.”
00:36	Officer Fernandez-Kafati: “The guy told me you walked into Chompie’s and dialed 911. You need help? What’s up? You all right?”
00:42	Dylan: “Yeah.”
00:42	Officer Fernandez-Kafati: “We can get Fire over here to check you out, man.” [The police officers did not call for any assistance from the Fire Department until <i>after</i> Officer Fernandez-Kafati fatally shot Dylan.]
00:43	Dylan: “No, I’m good.”
00:44	Officer Fernandez-Kafati: “So what’s up?”

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- 00:44 Officer Bailey: "Here, come over here and sit down in the shade, all right?"
- 00:46 Dylan: "I'm good, man."
- 00:47 Officer Bailey: "No. I want you to. Go over there and sit down."
- 00:49 Dylan: "No."
- 00:50 Officer Fernandez-Kafati: "You need to come, to come listen to us, man."
- 00:52 Officer Bailey: "Go sit down."
- 00:52 Officer Fernandez-Kafati: "Just sit over here in the shade. That way you're not in the sun. Come on."
- 00:53 Officer Bailey: "Come on, let's go. We can talk."
- 00:56 Officer Bailey: "Go sit down."
- 00:57 Dylan: "Can I just stand and talk with you guys?"
- 00:58 Officer Bailey: "No. I want you to stand in the shade over there."
- 00:59 Officer Fernandez-Kafati: "Cover over here in the shade, man. Come over here in the shade, man. Come over."
- 01:01 Officer Bailey: "Okay? You're in the sun. It's hot out."
- 01:04 Officer Fernandez-Kafati: "You don't feel like . . . you don't look like you're too good, man. You all right?"

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01:06 Dylan: "It's just really, it's just really fucking. . . . It's really hot."

01:08 Officer Bailey: "Yeah, okay. Go sit down."

01:09 Officer Fernandez-Kafati: "Yeah. Come on, be in the shade. Come talk to us in the shade. Come on."

01:11 Dylan moves over closer to a shaded area by a store entrance.

01:14 Officer Fernandez-Kafati: "Stay right here."

01:15 Officer Bailey: "Right there."

01:15 Officer Fernandez-Kafati: "You want to sit down? You want to sit down right here?"

01:19 Officer Fernandez-Kafati: "Yeah, just have a seat right there, man."

01:21 Officer Bailey: "Right there."

01:22 Officer Fernandez-Kafati: "We need to talk to you. Come on."

01:22 Officer Bailey: "It's shady, right there. Sit down. Now."

01:27 Officer Fernandez-Kafati: "So what's up? What's going on? Tell us."

01:30 [Dylan mumbles.] "Ah . . . [unclear]."

01:38 Officer Bailey: "Do you have ID on you, or anything?"

01:40 Officer Fernandez Kafati: "He said he doesn't have any."

01:41 Officer Bailey: "No? What's your name?"

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01:44 Dylan: "Dylan."
01:44 Officer Fernandez Kafati: "Dylan your first name? What's your last name, Bud?"
01:46 Dylan: "Liberti."
01:47 Officer Fernandez-Kafati: "Leeb?"
01:48 Dylan: "No. Liberti."
01:49 Officer Fernandez-Kafati: "What?"
01:50 Dylan: "Liberti."
01:51 Officer Fernandez-Kafati: "Liberty?" [unclear]
When were you born? What's your date of birth, man?"
01:52 Dylan: "4-1-92"
01:57 Officer Fernandez-Kafati: "I can't hear you." [unclear]
01:57 Dylan: "4-1-92."
01:59 Officer Fernandez-Kafati: "4-1-92?"
01:59 Officer Bailey: "4-1-92."
02:00 Officer Fernandez-Kafati: "All right. Just tell me what's up."
02:01 Officer Bailey: "How do you spell your first name? Is it with 'on' or . . . ?"
02:03 Dylan: "D-y-l-a-n."
02:05 Officer Bailey: "What?"
02:06 Dylan: "D-y-l-a-n."
02:07 Officer Bailey: "Okay."

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- 02:08 Officer Fernandez-Kafati: "Here's, here's what happens. Someone said you just called 911. That's what we're here for. Do you need help? What's up?"
- 02:15 Dylan: "Umm . . ."
- 02:19 Officer Fernandez-Kafati: "You can talk with us, man. That's why we're here. You call 911. We respond. So . . ."
- 02:26 Officer Fernandez-Kafati: "What's going on? Tell me."
- 02:29 Dylan: [unclear] "Uhm. I'm just feeling . . . weird."
- 02:36 Officer Fernandez-Kafati: "Huh?"
- 02:36 Dylan: "A little weird, kind of." [unclear]
- 02:36 Officer Bailey: [Talking to dispatcher in background.] "Need assistance on 9-1-1. Last name 'Liberty.' Lincoln, Ida, Bravo, Edward, Robert, Taylor, Young. First name 'Dylan.' David, Young, Lincoln, Adam, Nora. Date of birth 4-1-93."
- 02:38 Officer Fernandez-Kafati: "Do you feel weird, kind of? Do you, do you need medical attention? We'll get Fire to check you out. They take your blood pressure, see if you're all right. And if you're good, you're good."
- 02:48 Officer Fernandez-Kafati: "You want someone to check you out? Did you eat something? Do you feel terrible? What's up?"
- 02:54 Dylan: "Uhm . . ."

App. 50

- 03:01 Officer Fernandez-Kafati: "Keep talking."
- 03:09 Officer Bailey: "Come on. Did you take something? Do you need Fire to come check you out? Get you some water or something like that?"
- 03:17 Officer Fernandez-Kafati: "We'll get the paramedics out here, man. They'll take a look at you. They'll give you some water. At least you'll feel better. You okay with that?"
- 03:24 Dylan: "Uhhh . . ." [unclear]
- 03:27 Officer Fernandez-Kafati: "What?"
- 03:28 Dylan: "I'm going to hang out for right now."
- 03:30 Officer Bailey: "What was your date of birth again?"
- 03:31 Dylan: "4-1-92."
- 03:33 Officer Bailey: "92. Okay. Out of Arizona?"
- 03:39 Dylan: "Yeah."
- 03:41 Officer Bailey: [background] "12-13. It's going to be the year 92, not 93."
- 03:44 Officer Fernandez-Kafati: "Have you . . . you drink water today? What's up? You're like jittery man. Obviously something's up. I know you feel it. That's why you called us. But, you need to tell us. That way we can help you, man. Cause, because if anything we'll call the paramedics over here. They'll take a look at you. They take your blood pressure. And if they see that you're all right, you're all right, he's good to go and then that's it."

App. 51

04:05 Officer Fernandez-Kafati: “You got to remember you just can’t call 911 and walk away from wherever you call 911. That’s the only thing. We had to go out and look for you, man.”

04:13 Officer Bailey: “Dylan, how do you spell your last name?”

04:16 Dylan: “Uhhh . . . Liberti, Liberti.”

04:20 Officer Bailey: “Liberty? How do you spell it?”

04:22 Dylan: “L-i-b-e-r-t-i.”

04:23 Officer Bailey: “r-t-i? Okay”

04:24 Dylan: “Yep.”

04:25 Officer Bailey: “Okay.”

04:30 Officer Bailey: [on radio] “12-13. Can you try running it with the last name Liberti, with an Ida on the end, and not a Young?”

04:35 Officer Fernandez-Kafati: “How’re you feeling, guy? All right?”

04:37 Dylan: “Yeah.”

04:40 Officer Fernandez-Kafati: “You all right?”

04:41 Dylan: “Yeah. I was just, uhh . . . ”

04:49 Officer Fernandez-Kafati: “You were just what?”

04:55 Officer Fernandez-Kafati: “You need help, man? You need the paramedics to check you out? They’ll come and check you and give you some water. Send you on your way if you’re all right.”

App. 52

- 05:03 Dylan: "Uh, no. I'm just . . . I mean I'm just feeling a little like, you know. . . . [fades]."
- 05:12 Officer Bailey: "Yeah. You don't look good. Let's get Fire over here and just evaluate you."
- 05:14 Dylan: "No. I don't need, I don't need Fire, I mean. . . ."
- 05:17 Officer Fernandez-Kafati: "What ends up happening, seriously, when we call them, they show up, they ask you what's going on, they ask you a couple of questions, take your blood pressure. And what have you got, man, . . . [fades]."
- 05:28 Dylan: "Yeah, I don't . . . " [unclear]
- 05:29 Officer Bailey: "Where do you live at?"
- 05:31 Dylan: "Uh, 8197 Del Rubi Drive."
- 05:36 Officer Bailey: "Okay. Is that around here? What are you doing out, like over here? What's going on today?"
- 05:42 Dylan: "Uhhh . . . " [Dylan moved one or two feet to his right, more into the shade. Dylan makes no move to run away from the officers.]
- 05:49 Officer Bailey: "Okay. Sit down! You're moving around too much for me. All right?" [Dylan is practically motionless.]
- 05:51 Officer Fernandez-Kafati: "Okay. Sit down."
- 05:51 Dylan: "I just wanted to walk away." [While saying that, Dylan is standing still with his arms crossed in front of him.]

App. 53

- 05:52 Officer Bailey: "No. You're going to sit down now when I'm telling you to sit down. Okay? Sit down!"
- 05:54 Officer Fernandez-Kafati: "Yeah. Take a seat. Listen to her. Take a seat. Trust me. It's better for you. Trust me."
- 05:59 Officer Bailey: "Sit down right there in the shade."
- 06:01 Officer Fernandez-Kafati: "She's telling you, man. You don't want to get [fades]."
- 06:02 Officer Bailey: "Dylan. Sit down."
- 06:04 Officer Fernandez-Kafati: "Just take a seat, man."
- 06:05 Dylan: "Okay, what?"
- 06:05 Officer Bailey: "Sit down, now!"
- 06:07 Dylan: [unclear]
- 06:07 Officer Bailey: "Sit down. Go on. Sit down." [Officer Bailey moves toward Dylan, who flinches. Officer Bailey grabs Dylan just above his left elbow with her right hand and then grabs his upper left arm with her left hand. Dylan pulls away.]
- 06:09 Dylan: "Hey! Hey! Why are you holding me?" [Dylan moves away as both officers rush at him and try to grab him.]
- 06:11 Dylan: "Stop! Please! Stop! Please! Please! Please!" [Dylan screams incoherently.] "Oh, please!" [More screaming.]

App. 54

[Confused and intermingled general shouting and yelling.]

06:12 Officer Bailey: “Dylan! Stop! Stop it! Get on the ground, now!”

06:22 [Dylan breaks away and runs down the sidewalk.]

06:22 Officer Fernandez-Kafati: “Get down on the ground!”

06:23 Officer Bailey: “Stop it!”

06:23 Dylan: “Get away from me!” [Dylan is running away. The police officers are chasing him.]

06:31 Officer Fernandez-Kafati: “Stop! Stop! Police!” [unclear]

06:35 [By now, although Dylan has threatened no one and is just trying to run away, both officers have almost caught up with Dylan, who is now walking. Both officers have their service pistols drawn, and are aiming them at Dylan. At no point does it appear on the video that Officer Fernandez-Kafati pulls out his Taser.]

06:37 Officer Bailey: “Stop it, right now! Stop it!”

06:39 Officer Fernandez-Kafati: [Unclear] “Get out of your pocket! Get your hand out of your pockets! Get on the ground! Police! Get on the ground! Get on the ground!”

06:42 Officer Fernandez-Kafati: “Get on the ground! Get on the ground! Get on the ground now!”

06:45 Dylan: “Please. Shoot me in the head. Please.”

App. 55

06:46 Officer Fernandez-Kafati: "Get on the ground! Get on the ground, now! Stop using your pockets!"

06:50 Dylan: "Shoot me in the head."

06:51 Officer Fernandez-Kafati: "Get on the ground!"

06:53 Officer Fernandez-Kafati: "Get on the ground!"

06:54 Officer Bailey: "Get down now!"

06:55 Officer Fernandez-Kafati: "Stop using your pocket! Let go of that knife! Let go of that knife!"

06:57 Dylan: "Please!"

07:00 Officer Bailey: "Get down!"

07:02 Officer Fernandez-Kafati: "Let go of that knife!"

07:09 Officer Fernandez-Kafati: "Let go of that knife!"

07:11 Officer Bailey: "Get down now!"

07:19 Officer Fernandez-Kafati: "Where the fuck did he go?"

07:24 Officer Bailey: "Hey!"

07:27 Officer Fernandez-Kafati: "[unclear] . . . Drop the knife!"

07:29 Officer Bailey: "Get down now or I'm going to Tase you!"

07:30 Dylan: [unclear] "The spirits catch me!"

07:32 Officer Bailey: "Get down!"

07:33 Dylan: "Please!"

App. 56

07:35 Dylan: [unclear]
07:36 Officer Bailey: "Get down!"
07:37 Officer Fernandez-Kafati: "Get on the ground!"
07:37 Dylan: "Shoot me." [Unclear if referring to the Taser or to a pistol.]
07:39 Officer Fernandez-Kafati: "Get on the ground!"
07:42 Officer Fernandez-Kafati: "Drop that knife!"
07:43 Officer Bailey: "Drop it!"
07:44 Officer Fernandez-Kafati: "Drop that knife, now!"
07:46 Officer Fernandez-Kafati: "Drop that knife, now!"
07:48 Dylan: "Shoot me, dude. . . . [unclear]." [possibly directed at Officer Bailey, who is aiming a Taser at Dylan]
07:50 Officer Bailey: [into radio] "We're underneath the parking garage."
07:52 Dylan: "Now."
07:53 [Officer Bailey shoots Dylan with her Taser. Dylan screams, convulses, and collapses.]
07:54 Officer Bailey: "Taser! Taser! Taser!"
07:56 Dylan: [screams incoherently]
08:01 Officer Fernandez-Kafati: "Let go of the knife!"
08:03 Dylan: "Shoot me, motherfucker!"
08:05 [Dylan staggers to his feet.]

App. 57

- 08:05 Dylan: "Shoot me, mother!"
- 08:06 [Keeping the parking garage wall close to his right side, unsteady on his feet from the Taser's high-voltage shock, and not apparently looking at either police officer, Dylan tries to run.]
- [From Dylan's perspective, Dylan seems to be staggering to the right alongside the parking-garage wall and Officer Fernandez-Kafati is rapidly backing away from Dylan to Dylan's left.]
- 08:07 [Outside of Dylan's wall-hugging line of travel, and while backing faster and ever further away from the staggering Dylan, Officer Fernandez-Kafati shoots Dylan twice.]
- 08:08 [Dylan falls on his back. He is screaming, in shock and pain, and helpless. But the police officers continue to order Dylan to drop the knife. They stand back and watch him bleed to death. They do nothing to help him until 09:56.]
- 08:08 Officer Bailey: "Shit!"
- 08:11 Officer Bailey: "Drop it!"
- 08:12 Officer Fernandez-Kafati: "Drop it! Drop it!"
- 08:15 Officer Bailey: "Drop the knife now!"
- 08:17 Officer Bailey: "No, no, no! No, no! Shit!"
- 08:19 Officer Fernandez-Kafati: "Drop the knife!"
- 08:21 Officer Bailey: "Drop it!"

App. 58

08:22 Officer Fernandez-Kafati: "Drop the knife!"

08:23 Officer Bailey: "Drop it!"

08:29 Officer Fernandez-Kafati: "Drop the knife!"

08:29 Officer Bailey: "Put it down!"

08:31 Officer Bailey: "Put it down!"

08:32 Officer Fernandez-Kafati: "Drop the knife!"

08:33 Officer Bailey: "Put it down!"

08:36 Officer Fernandez-Kafati: "Drop the knife!"

08:38 Officer Bailey: "Put it down so that we can help you!"

08:53 Officer Fernandez-Kafati: "Drop the knife!"

08:54 Officer Bailey: "Drop it!"

08:55 Officer Fernandez-Kafati: "Dude, drop the knife!"

08:57 Officer Bailey: [into radio] "Could we have Fire stage, please?"

09:01 Officer Bailey: "Drop it."

09:06 Officer Maldonado: [unclear] "Go around. Get me an 'L' that way." [unclear]

09:15 Officer Maldonado: "What's his name?"

09:15 Officer Fernandez-Kafati: "Dylan."

09:15 Officer Bailey: "Dylan."

09:16 Officer Maldonado: "Dylan, put the knife down!"

09:17 Officer Bailey: "Dylan, put the knife down. We need to help you. Drop the knife!"

App. 59

09:18 Officer Maldonado: "Dylan! Can you hear me, Dylan? Move your left arm."
09:22 Officer Maldonado: "Move your left arm."
09:27 Officer Maldonado: "Dylan!"
09:29 Officer Bailey: "Dylan, drop it."
09:31 Officer Bailey: "He's fading."
09:33 Officer Maldonado: "Dylan!"
09:35 Officer Bailey: "He's fading. Let's step on it [the knife]. Yeah."
09:43 [Still holding back from Dylan, Officer Bailey starts to put on surgical gloves.]
09:50 Officer Maldonado: "Dylan, stay with us, Bud."
09:51 Officer Maldonado: "Pat him down. Pat him down . . . [indistinct]."
09:52 Officer Fernandez-Kafati: "I am going to. I am going to right now."
09:54 Officer Maldonado: "Where else did you shoot him? Just one shot right here?"
09:56 [Almost two full minutes after Officer Fernandez-Kafati shot Dylan, leaving him helpless on the ground, Officer Bailey is the first police officer to finally touch Dylan to start rendering any aid.]

[Video continues until 14:16.]

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