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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (APRIL 21, 2020)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ARLANE JAMES, IN RE: WILLIE GIBBONS; J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS; L.M.G., A MINOR, BY HER MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS

v.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; JOHN DOES 1-10; NOAH BARTELT, STATE TROOPER; PHILLIP CONZA, STATE TROOPER; DANIEL HIDDER, STATE TROOPER; MICHAEL KORIEJKO, STATE TROOPER; JAMES MCGOWAN, SERGEANT, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

and

NOAH BARTELT,

Appellant.

No. 18-1432

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 1-13-cv-03530)
District Judge: Honorable Joseph H. Rodriguez

Before: HARDIMAN, PORTER, and PHIPPS,
Circuit Judges.

PORTER, Circuit Judge.

Qualified immunity protects government officials from being held liable for damages when their conduct does not violate a citizen's clearly established rights. As the Supreme Court has noted, qualified immunity advances a policy of "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The issue here is whether New Jersey State Trooper Noah Bartelt is entitled to qualified immunity after using deadly force against Willie Gibbons, a suspect who refused to drop his gun when Trooper Bartelt ordered him to do so. Gibbons's mother (Arlane James) and minor children (J. R. G., D. K. L., and L. M. G.) (collectively, "James") filed an action under 42 U.S.C. § 1983 against Trooper Bartelt and other state actors alleging constitutional violations arising from Trooper Bartelt's use of force against Gibbons. All individual defendants moved for summary judgment based on qualified immunity. The District Court granted qualified immunity to all individual defendants except Trooper Bartelt. The District Court then denied James's and Trooper Bartelt's cross-motions for reconsideration.

Trooper Bartelt is entitled to qualified immunity because he did not violate Gibbons's clearly established rights. Thus, we will reverse the District Court's denial

of qualified immunity to Trooper Bartelt and remand with instructions to grant judgment in his favor.

I

Trooper Bartelt appeals the District Court's order denying summary judgment based on qualified immunity under the "collateral-order doctrine." *See E.D. v. Sharkey*, 928 F.3d 299, 305 (3d Cir. 2019).[1] Under this doctrine, our review is plenary and "strictly limited to the legal questions involved." *In re Montgomery Cty.*, 215 F.3d 367, 372 (3d Cir. 2000). We lack jurisdiction to review the District Court's determination that a factual dispute is genuine, but we have jurisdiction to consider whether the disputed fact is material to the issue on which a party sought summary judgment. *See Davenport v. Borough of Homestead*, 870 F.3d 273, 278 (3d Cir. 2017); *see also* Fed. R. Civ. P. 56(a). Thus, we accept the District Court's facts as true for purposes of this appeal, *see id.*, and we will review "the record to determine what [other] facts the [D]istrict [C]ourt . . . likely assumed," *Johnson v. Jones*, 515 U.S. 304, 319 (1995).

II

Willie Gibbons lived with Angel Stephens in Bridgeton, New Jersey. After the two had a domestic argument on May 24, 2011, Stephens called 911 and reported that "[Gibbons] hit her" and that Gibbons had a "gun in his truck." A12–13. The police drove to Stephens's house, and Stephens and Gibbons each

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[1] The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction over this appeal under 28 U.S.C. § 1291 and the collateral-order doctrine. *See E.D.*, 928 F.3d at 305.

completed written statements describing the incident. Stephens then obtained a temporary restraining order from Fairfield/Downe Joint Municipal Court against Gibbons. The order prohibited Gibbons from possessing firearms and from returning to Stephens's house.

The next day, on May 25, 2011, Gibbons requested a police escort to retrieve possessions from Stephens's house, but the police informed him that he needed judicial approval for the visit. Gibbons went to Stephens's house alone anyway, in violation of the court's temporary restraining order. Another argument followed between Gibbons and Stephens. Stephens was speaking with a friend on the phone at the time, so the friend called the police to report that Gibbons had violated the restraining order. Gibbons then left Stephens's house.

Trooper Philip Conza soon arrived at the house and Stephens told him that Gibbons had waved a gun throughout their argument. Trooper Conza told Stephens to make a complaint against Gibbons at the police barracks and reported over the police radio that Gibbons had brandished a firearm. Trooper Conza, joined by Troopers Bartelt and Michael Korejko, then searched for Gibbons at the nearby home of Gibbons's mother, Arlane James. James told the Troopers that she did not know where Gibbons was and that he may be off his medication.[2]

While Stephens was driving to the barracks, she saw Gibbons walking alongside the road. She called 911 and reported Gibbons's location. Troopers Bartelt,

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[2] Gibbons was diagnosed with schizophrenia and had been prescribed medication to treat this condition.

Conza, and Korejko, along with Trooper Daniel Hidder responded to the location.

When Trooper Bartelt pursued Gibbons, he knew that Gibbons: (1) had violated a restraining order; (2) was in possession of a firearm that he had brandished within the last hour; and (3) was reportedly mentally ill and may not have been taking his medication.[3]

Trooper Bartelt was the first officer to engage Gibbons. As Trooper Bartelt approached Gibbons by car (with his window down), he heard Gibbons say, "stay away from me." A16. Trooper Bartelt then parked his car and, while exiting, observed that Gibbons was holding a gun in his left hand and pointing it at his own head. Trooper Bartelt drew his weapon, stood behind his car door, twice told Gibbons to drop his weapon, and ordered him to "come over here." *Id.* Gibbons did not comply with the commands and may have repeated, "stay away from me." *Id.* Separated by seven to fifteen yards, Trooper Bartelt then shot Gibbons twice. Trooper Bartelt shot Gibbons within seconds of stopping his car. Trooper Conza arrived on the scene before Trooper Bartelt fired the shots. Troopers Korejko and Hidder arrived shortly after. Gibbons was flown to the hospital but died that night.

III

Trooper Bartelt challenges the District Court's ruling denying him qualified immunity. Qualified immunity has two prongs. "First, a court must decide

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[3] The District Court did not specifically find these three facts. But because these facts are undisputed by the parties, we find that they are among the facts that the District Court "likely assumed." *See Johnson*, 515 U.S. at 319.

'whether the facts that a plaintiff has . . . shown make out a violation of a constitutional right.'" *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 637 (3d Cir. 2015) (alteration in original) (quoting *Pearson*, 555 U.S. at 232). "And second, the court must determine 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.'" *Id.* We may begin with either prong. *Id.*

The District Court held that Trooper Bartelt failed to satisfy both prongs, so he was not entitled to qualified immunity. On appeal, Trooper Bartelt argues that the District Court erred by finding that he may have violated one of Gibbons's constitutional rights and by concluding that the constitutional right was clearly established.

We will not review the District Court's holding that Trooper Bartelt may have violated a constitutional right—the first prong of qualified immunity. The District Court based this holding on its conclusion that "genuine issues of disputed fact" existed, but it did not identify these disputed facts. *See* A30. To the extent that the District Court is correct that these unstated facts are material to the inquiry, we lack jurisdiction under the collateral-order doctrine to review its holding on this prong. *See Davenport*, 870 F.3d at 278; *see also Johnson*, 515 U.S. at 319. Thus, we will assume without deciding that Trooper Bartelt violated one of Gibbons's constitutional rights and proceed to qualified immunity's second prong.[4]

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[4] To aid our review in qualified immunity cases, we announced a supervisory rule in *Forbes v. Township of Lower Merion* for all cases "in which a summary judgment motion based on qualified immunity is denied on the ground that material facts are subject

IV

Qualified immunity's second prong "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson*, 555 U.S. at 231).

"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) (internal quotation marks and citation omitted). The inquiry is an "objective (albeit fact-specific) question," under which "[an officer]'s subjective beliefs . . . are irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Because the inquiry is from the perspective of a reasonable officer, we "consider[] only the facts that were knowable to the defendant officer[]." *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (citation omitted).

In rare cases, a plaintiff may show that a right is clearly established if the "violation [is] 'obvious.'" *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). In the

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to genuine dispute." 313 F.3d 144, 146 (3d Cir. 2002). Under *Forbes's* supervisory rule, district courts must "specify those material facts that are and are not subject to genuine dispute and explain their materiality." *Id.*

Here, the District Court found that genuine disputes of material fact precluded it from concluding whether Trooper Bartelt violated one of Gibbons's constitutional rights. But it did not specify which material facts were in dispute or explain their materiality. We reiterate that *Forbes's* supervisory rule remains in effect. *See E.D.*, 928 F.3d at 310–11 (Smith, C.J., concurring).

excessive-force context, "obvious cases" are those that obviously violate *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). *See Brosseau*, 543 U.S. at 199. "[Graham] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Id.* at 198 (citation omitted). And *Garner* held that "[deadly] force may not be used unless it is necessary to prevent . . . escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3.

But in most cases, a plaintiff must show that a right is clearly established because "the violative nature of particular conduct [was] clearly established.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Mullenix*, 136 S. Ct. at 308). In other words, "settled law," *Wesby*, 138 S. Ct. at 590, must "'squarely govern[]' the specific facts at issue," *see Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Mullenix*, 136 S. Ct. at 309). The Supreme Court has explained that a plaintiff may satisfy this standard by "identify[ing] a case where an officer acting under similar circumstances as [the defendant officer] was held to have violated the [constitutional provision at issue]." *White*, 137 S. Ct. at 552.

For qualified-immunity purposes, "clearly established rights are derived either from binding Supreme Court and Third Circuit precedent or from a 'robust consensus of cases of persuasive authority in the Courts of Appeals.'" *Bland v. City of Newark*, 900 F.3d 77, 84 (3d Cir. 2018) (citation omitted); *see Wesby*, 138 S. Ct. at 589–90 ("To be clearly established, a legal principle must . . . [be] dictated by controlling authority

or a robust consensus of cases of persuasive authority[.]" (citations and internal quotation marks omitted)). So we first look to factually analogous precedents of the Supreme Court and the Third Circuit. *See L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 247–48 (3d Cir. 2016). Then, we examine persuasive authorities, such as our nonprecedential opinions and decisions from other Courts of Appeals. *See id.* We may consider all relevant cases under this inquiry, not just those cited by the parties. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994).

V

On appeal, Trooper Bartelt argues that he did not violate a clearly established right. We agree because, at the time, no Supreme Court precedent, Third Circuit precedent, or robust consensus of persuasive authority had held that "an officer acting under similar circumstances as [Trooper Bartelt] . . . violated the Fourth Amendment." *See White*, 137 S. Ct. at 552. Because the events here occurred on May 25, 2011, we will consider only precedents that clearly established rights as of that date. *See Bryan v. United States*, 913 F.3d 356, 363 (3d Cir. 2019).

A

First, we consider whether Trooper Bartelt violated a right that was clearly established by Supreme Court precedent.[5] He did not.

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[5] The District Court identified the clearly established right that Trooper Bartelt may have violated as follows: "an officer may not use deadly force against a suspect unless the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others." A28 (quoting *Lamont v. New Jersey*, 637

The closest factually analogous Supreme Court precedent, *Kisela v. Hughes*, 138 S. Ct. 1148, is instructive. *Kisela* involved a May 2010 police standoff bearing some similarity to the standoff between Trooper Bartelt and Gibbons. *Id.* at 1150–51. In Kisela, the Supreme Court held that an officer did not violate a clearly established right by shooting a suspect who was armed with a knife. *Id.* at 1154– 55. The suspect had not responded to at least two police commands to drop the knife and "had been acting erratically" before the police arrived. *Id.* at 1151. And the officer "had mere seconds to assess the potential danger to [a bystander who was less than six feet away]." *Id.* at 1153.

The Supreme Court distinguished "the specific facts at issue" in *Kisela* from the facts in precedents that a lower court had relied on to find that the defendant had violated a clearly established right. *Id.* The Supreme Court assumed that the defendant had violated a right but held that neither Supreme Court nor

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F.3d 177, 185 (3d Cir. 2011) (citing Garner, 472 U.S. at 3, 11)). We disagree because the District Court viewed the "right" at too "high [a] level of generality." *See City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). As the Supreme Court has explained, "Garner . . . do[es] not by [itself] create clearly established law outside 'an obvious case.'" *White*, 137 S. Ct. at 552 (citation omitted).

This is not an obvious case. The facts here show that a reasonable officer could have perceived that Gibbons posed "a serious threat of immediate harm to others." Davenport, 870 F.3d at 281 (collecting cases and observing that "courts have found 'obvious' cases [based on Garner] only in the absence of a serious threat of immediate harm to others"); *cf. Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (finding that a violation was "obvious" because "it seem[ed] absurd to analyze whether the right . . . was clearly established by case law at the time of [the defendant's] conduct"). We thus reject the District Court's clearly established analysis.

circuit precedent was factually analogous enough to clearly establish the right. *Id.* at 1152–53. It identified several facts that distinguished the scenario it considered from the factual scenarios of earlier precedents: (1) "[the suspect] was armed with a large knife"; (2) the suspect "ignored officers' orders to drop the weapon"; (3) the suspect "was within striking distance of [a bystander]"; and (4) "the situation unfolded in less than a minute." *Id.* at 1154. It concluded that these factual differences "leap[ed] from the page" and that the unlawfulness of the "new set of facts" in Kisela was not clearly established by Supreme Court or circuit caselaw. *Id.* (citation omitted).

Many of the same distinguishing facts are present here: (1) Gibbons was armed with a gun; (2) Gibbons ignored Trooper Bartelt's orders to drop his gun; (3) Gibbons was easily within range to shoot Troopers Bartelt or Conza; and (4) the situation unfolded in "seconds." *See* A16–18.

In sum, Trooper Bartelt did not violate a right that had been clearly established by Supreme Court precedent.

B

Next, we consider whether Trooper Bartelt violated a right that had been clearly established by Third Circuit precedent. None of our relevant precedents present a sufficiently similar factual scenario at the "high 'degree of specificity'" that Supreme Court precedent requires. *See Wesby*, 138 S. Ct. at 590 (citations omitted). So we conclude that he did not.

We begin by examining our closest factually analogous precedential opinion, *Bennett v. Murphy*, 274

F.3d 133 (3d Cir. 2002). In *Bennett*, we held that a police officer violated the Fourth Amendment by shooting an armed, suicidal suspect during a prolonged police standoff. *See id.* at 136. We recounted the facts in Bennett by quoting the district court's factual summary:

> The state police were called to the courtyard of a group of apartment buildings on the evening of January 4, 1994 to confront [the suspect], who they soon learned was distraught at being unable to see his girlfriend. He was armed with a single shot shotgun that he held vertically in front of him, with the barrel pointed up at his head, and the stock facing down. He was "very deliberate in holding the gun toward himself or in the air," and did not point the gun at anyone, including state troopers. He stated that he wanted to kill himself. As the troopers took up positions surrounding him in the open area between the apartment buildings, he became agitated and began moving toward a group of them[] but stopped for perhaps four seconds before he was shot. [The police officer defendant] was positioned 80 yards behind [the suspect] when he fired. Almost an hour passed between the time the state troopers first arrived on the scene, and the time [the suspect] was shot.
>
> [The suspect] admittedly was angry and defiant in the face of a group of determined, armed state troopers.

Id. at 135 n.2 (alterations in original omitted) (quoting *Bennett v. Murphy*, 127 F. Supp. 2d 689, 690–91 (W.D. Pa. 2000)). The *Bennett* district court also noted that

the suspect was around twenty-seven yards from the nearest group of police officers when the defendant shot him. *See* 127 F. Supp. 2d at 691 (describing the suspect as "one third" of eighty yards from the nearest group of officers). And in a later nonprecedential opinion, we observed that the suspect had refused commands to drop his firearm but obeyed other commands. *See Bennett v. Murphy*, 120 F. App'x 914, 917–18 & 918 n.1 (3d Cir. 2005).

Viewing the evidence in the light most favorable to the plaintiff, we opined that the suspect "did not pose a threat to anyone but himself." *Bennett*, 274 F.3d at 136. Thus, we held that the defendant police officer's deadly force was "objectively excessive" in violation of the Fourth Amendment. *Id.*

Three factual differences lead us to conclude that Trooper Bartelt did not violate a clearly established right. First, Trooper Bartelt's pre-standoff knowledge of Gibbons differs from the *Bennett* officer's pre-standoff knowledge of the suspect. Trooper Bartelt was aware of several facts from which he could reasonably conclude that Gibbons posed a threat to others: Gibbons had violated a restraining order; Gibbons was carrying and earlier that evening had brandished a firearm; and Gibbons was reportedly mentally ill and may not have been taking his medication. Each of these facts would lead a reasonable officer entering an encounter with Gibbons to perceive that Gibbons presented an increased risk of harm compared with the suspect in *Bennett*.

Second, Gibbons was much closer to and less compliant with Trooper Bartelt than the suspect in *Bennett*. Gibbons was just seven to fifteen yards from Trooper Bartelt, unlike the suspect in *Bennett* who

was eighty yards away from the defendant officer. Trooper Bartelt could not rely on closer officers to give commands to Gibbons and evaluate his compliance. *See Bennett*, 120 F. App'x at 918 n.1 (noting that the suspect was complying with commands from closer officers when the defendant officer shot him). Instead, Trooper Bartelt was the closest officer to Gibbons. So when Gibbons ignored Trooper Bartelt's orders to drop his gun, Trooper Bartelt was the officer with the best opportunity to evaluate whether Gibbons posed a threat to others. A reasonable officer would have difficulty concluding that using force against the distant, comparatively compliant, and unknown suspect in *Bennett* was clearly factually analogous to using force against the much-closer, noncompliant Gibbons, whose recent behavior was known to Trooper Bartelt.

Third, Trooper Bartelt's standoff with Gibbons lasted only moments, unlike the nearly hour-long standoff in *Bennett*. Trooper Bartelt's interaction with Gibbons was over within seconds of his arrival on the scene. He necessarily "had mere seconds to assess the potential danger" posed by the armed and noncompliant Gibbons. *See Kisela*, 138 S. Ct. at 1153. The Supreme Court stressed the importance of this kind of temporal difference when conducting the clearly established inquiry. *See id.* at 1154 (distinguishing a case involving a standoff that lasted "roughly 40 minutes" and a case involving a standoff that "unfolded in less than a minute," finding that a constitutional violation in the former did not clearly establish a right that was applicable to the latter). So the substantially shorter duration of Trooper Bartelt's standoff with Gibbons further distinguishes the facts here from those in *Bennett*.

For these reasons, although *Bennett* may be the most analogous precedent from our Court, its holding does not "'squarely govern[]' the specific facts at issue" here. *See id.* at 1151 (citation omitted). And because no other Third Circuit precedent is factually analogous to this case, we conclude that Trooper Bartelt did not violate a clearly established right under our precedent.[6]

C

Finally, we consider whether Trooper Bartelt violated a right that had been clearly established by a robust consensus of persuasive authority in the Courts of Appeals. The caselaw of our sister circuits prohibits the use of deadly force against non-threatening suspects, even when they are armed and suicidal.[7] But

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[6] Our decision in *Lamont* supports our conclusion that Trooper Bartelt did not violate a clearly established right under our precedent. 637 F.3d 177. There, police officers did not violate the Fourth Amendment by using deadly force against a suspect who made abrupt movements that a reasonable officer could perceive as drawing a firearm. *Id.* at 183–84. *Lamont* shows that if Gibbons had been unarmed but made abrupt movements that an officer could perceive as drawing a firearm, Trooper Bartelt would not have violated clearly established law by using deadly force against him.

Gibbons had already drawn a firearm when Trooper Bartelt shot him. As we explained in Lamont, "[p]olice officers do not enter into a suicide pact when they take an oath to uphold the Constitution." *Id.* at 183. Given *Lamont*, we cannot say that *Bennett* "move[s this] case beyond the otherwise 'hazy border between excessive and acceptable force.'" *See Kisela*, 138 S. Ct. at 1153 (citation omitted).

[7] *See, e.g., Walker v. City of Orem*, 451 F.3d 1139, 1159–61 (10th Cir. 2006) (holding that using deadly force against a suicidal, knife-wielding, and non-threatening suspect violated one of the

none of the cases that stand for this general principle involve the "high 'degree of specificity'" required to clearly establish a right under the circumstances Trooper Bartelt faced. *See Wesby*, 138 S. Ct. at 590 (citation omitted).

James argues that several cases from our sister circuits are factually analogous enough to show that Trooper Bartelt violated a clearly established right. *See Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015) (denying qualified immunity when an officer used deadly force against an armed suspect); *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) (same); *see also Connors v. Thompson*, 647 F. App'x 231 (4th Cir. 2016) (same); *Glenn v. Washington Cty.*, 673 F.3d 864 (9th Cir. 2011) (same). Even if these cases bear some factual similarity to the scenario Trooper Bartelt faced, we do not agree that they create a clearly established right. And in any event, they were all decided after the events here (i.e., after May 25, 2011). Thus, they "'could not have given fair notice to [Trooper Bartelt]' because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *See Kisela*, 138 S. Ct. at 1154 (quoting *Brosseau*, 543 U.S. at 200 n.4).

Thus, we conclude that Trooper Bartelt did not violate a right that had been clearly established by a robust consensus of persuasive authority in the Courts of Appeals.

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suspect's constitutional rights); *Mercado v. City of Orlando*, 407 F.3d 1152, 1157–58 (11th Cir. 2005) (same); *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998) (same).

VI

For these reasons, Trooper Bartelt did not violate a clearly established right by using deadly force against Gibbons. "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.' [Trooper Bartelt] deserves neither label[.]" *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (citations omitted). The District Court erred by concluding otherwise and denying him qualified immunity.

We will reverse the District Court's orders as to Trooper Bartelt and remand this case with instructions to grant judgment to him based on qualified immunity.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (FEBRUARY 12, 2019)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ARLANE JAMES, IN RE: WILLIE GIBBONS; J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS; L.M.G., A MINOR, BY HER MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS

Appellants in 18-1603,

v.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; JOHN DOES 1-10; NOAH BARTELT, STATE TROOPER; PHILLIP CONZA, STATE TROOPER; DANIEL HIDDER, STATE TROOPER; MICHAEL KORIEJKO, STATE TROOPER; JAMES MCGOWAN, SERGEANT, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

NOAH BARTELT,

Appellants in 18-1432.

Nos. 18-1432 & 18-1603

(D.N.J. No. 1-13-cv-03530)

Present: JORDAN, GREENAWAY, JR., AND NYGAARD, Circuit Judges.

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1. Clerk's Submission for Possible Dismissal Due to Jurisdictional Defect

2. Response filed by Appellant Noah Bartelt in 18-1432 to clerk order advising of possible dismissal

3. Response on behalf of Appellees Noah Bartelt, Phillip Conza, Daniel Hidder, Michael Koriejko, James McGowan, New Jersey State Police and Sate of New Jersey in 18-1603 to possible dismissal due to jurisdictional defect

4. Response filed by Appellants J.R.G., L.M.G., Arlane James and D.K.L. in 18-1603 to clerk order advising of possible dismissal.

Respectfully
Clerk/JK

ORDER

The issue of this Court's jurisdiction over Appeal No. 18-1432 is hereby referred to the merits panel. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Appeal Nos. 18-1603, however, is hereby dismissed for lack of jurisdiction as the appeal is taken from and order that is not final within the meaning of 28 U.S.C. § 1291 and is not otherwise immediately appealable, and we decline to exercise pendent appellate jurisdiction. *See In re Montgomery County*, 215 F.3d 367, 375-76 (3d Cir. 2000).

By the Court

s/ Kent A. Jordan
Circuit Judge

Dated: February 12, 2019
JK/cc: All counsel of Record

A True Copy:

s/ Patricia S. Dodszuweit
Clerk
Certified Order Issued in
Lieu of Mandate
(Dismissing 18-1603 only)

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (DECEMBER 19, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: WILLIE GIBBONS, ET AL.,

Plaintiffs,

v.

NEW JERSEY STATE POLICE, SERGEANT JAMES MCGOWAN, STATE TROOPER NOAH BARTELT, STATE TROOPER PHILLIP CONZA, STATE TROOPER MICHAEL KOREJKO, STATE TROOPER DANIEL HIDER,

Defendants.

Civil Action No. 13-3530

Before: Hon. Joseph H. RODRIGUEZ, U.S.D.J.

This matter has come before the Court on motion of Defendants for summary judgment pursuant to Federal Rule of Civil Procedure 56. Oral argument on the motion was heard on December 6, 2017 and the record of that proceeding is incorporated here. For the reasons set forth below, and those discussed during oral argument, Defendants' motion will be granted in part and denied in part.

Jurisdiction

This matter was removed to this Court from the Superior Court of New Jersey, Law Division, Cumberland County. It is a civil action over which the district court has original jurisdiction based on a question "arising under the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. § 1331. Here, Plaintiffs assert a violation of civil rights pursuant to 42 U.S.C. § 1983.

On Defendants' prior motion, the Court found that Plaintiffs sufficiently pled a case under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment, withholding medical treatment in violation of the Fourteenth Amendment, a custom and practice of treating persons of certain races or with mental disabilities in a manner violative of their civil rights and/or a failure to train officers to properly handle situations involving those citizens (only insofar as that claim seeks injunctive relief). The Court dismissed all other claims brought by the twelve-count Second Amended Complaint.

Background

The matter arises out of the fatal police shooting in Bridgeton, New Jersey of Willie Gibbons, an African-American male diagnosed with schizophrenia. Plaintiffs are Arlane James, Gibbons' mother; JRG, Gibbons' minor son, by his mother and guardian Ikeya Crawford; DKL, Gibbons' minor son, by his mother and guardian Angel Stephens; and LMG, Gibbons' minor daughter, by her mother and guardian Angel Stephens. Defendants are the New Jersey State Police, State Trooper Noah Bartelt, State Trooper Daniel Hider, State

Trooper Phillip Conza, State Trooper Michael Korejko, Sergeant James McGowan.

Gibbons lived with Stephens and her mother in Bridgeton, New Jersey. On the Tuesday evening of May 24, 2011, Gibbons and Stephens had an argument and Stephens called 9-1-1 at about 10:24 p.m. with a domestic dispute. (Freeman Decl. Ex. A, NJSP Computer-Aided Dispatch ("CAD") Rpt. from 5/24/11 call.) Dispatch noted that that Stephens reported "boyfriend hit her" and "gun in his truck." (*Id.*) The NJSP Investigation Report generated from this incident confirmed that "Dispatch stated that a male struck a female and that he has a gun in his truck." (Freeman Decl. Ex. B, NJSP Investigation Rpt.)

State Police Troopers responded and one frisked Gibbons for the officers' safety. (NJSP Investigation Rpt.) Stephens informed the troopers that Gibbons had prevented her from leaving the house, a struggle ensued, and Gibbons put a hole in the wall with his hand. (*Id.*) Both Gibbons and Stephens were asked to report to the State Police Bridgeton Barracks to be interviewed. (*Id.*) Because Stephens had accused Gibbons of having a gun, he was transported to the barracks in a troop car. (*Id.*)

Both Stephens and Gibbons completed written statements of the incident at the barracks. (Freeman Decl. Ex. C.) Stephens informed an officer that earlier in the day, Gibbons threatened to kill her with the gun that she accused him of carrying in his truck. (NJSP Investigation Rpt.) Indeed, Stephens's written statement reports, "he threatened to kill me," "he needs to take his medicine," and "I need a restraining order." (Freeman Decl. Ex. C, Stephens Stmt.) Further, during her deposition, Stephens recalled telling a trooper that

Gibbons threatened to kill her with a gun that he was carrying in his truck. (Sterling Rev. Cert. Ex. 22, Stephens Dep., 103:17-22.) Gibbons denied making such a statement and insisted he did not have a gun. (NJSP Investigation Rpt.) Nonetheless, at about 1:50 a.m. on May 25, 2011, a restraining order was issued against Gibbons and served upon him. (5/24/11 CAD Rpt.; Freeman Decl. Ex. D, TRO.) The restraining order prohibited Gibbons from "returning to the scene of the violence" and "possessing any and all firearms." (TRO.) The issuing judge also authorized a search of Gibbons's truck, but no weapons were found. (5/24/11 CAD Rpt.)

On Wednesday, May 25, 2011, Gibbons delivered a citizen complaint on a NJSP form indicating that he felt he had been harassed the previous night. (Freeman Decl. Ex. F, Citizen Compl.) When Korejko began his shift on May 25, 2011, he was informed that Gibbons had filed a complaint during the previous shift. (Freeman Decl. Ex. E; Sterling Rev. Cert. Ex. 9, Korejko Dep., 104:19-21.) Later that Wednesday evening, Gibbons called for a police escort to retrieve some items from Stephens's house–specifically, his drill, TV, and bed, among other items. (Korejko Dep., 59:4-60:7.) Korejko informed Gibbons that for that amount of time to be spent at the residence, he would have to get permission from the judge because he was under a restraining order. (*Id.*)

Gibbons went to Stephens's house, but ended up leaving without his possessions. While Gibbons was there, Stephens was on the phone with her friend, Clarence Dunns, who called the State Police at 8:24 p.m. to report that Gibbons and Stephens were arguing despite the restraining order that prohibited Gibbons from contacting Stephens. (Freeman Decl. Ex. G,

Dunns recording; Freeman Decl. Ex. H, 5/25/2011 CAD Rpt. ("CAD2").)[1] Conza responded to Stephens's house as a result of the call. (CAD2.)

Stephens advised Conza that Gibbons had arrived at her residence, insisting that she go downstairs to retrieve his drill; the "whole time he was at the front door, he had a gun, a handgun in his hand that he was waving around." (Freeman Decl. Ex. N, Sterling Rev. Cert. Ex. 7, Conza Dep., 81:2-6.) Conza reported over the State Police radio that Gibbons had brandished a gun. (Conza Dep., 82:11-16.)[2] After speaking to Stephens, Conza told her to go to the State Police barracks to lodge a complaint and he headed to Gibbons's mother's house, where he met Bartelt and Korejko. (Freeman Decl. Ex. M, Bartelt Dep., 59:7-61:1.)

On her way to the barracks, Stephens saw Gibbons walking on the 400 Block of North Burlington Road and contacted the State Police, describing what Gibbons was wearing.[3] (Bartelt Dep., 62:24-63:16.) Dispatch asked if she saw a gun and Stephens responded that

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[1] The 5/25/11 CAD Report reflects in the notes for the date and time, "05/25/2011 20:34:04" "REPORTS ANGEL STEVENSON AND A WILLIE GIBBONS ARGUING IN FRONT YARD. REPORTS POSS REST ORDER IN EFFECT." (CAD2, p. 6.)

[2] The 5/25/11 CAD Report reflects in the notes for the date and time, "05/25/2011 20:41:15" "STEVENSON REPORTED PRIOR TO TROOPER ARRIVING WILLIE CAME TO DOOR WITH A GUN. SAME DEPARTED UNK DIRECTION IN A FORD F150 BLK." (CAD2, p. 6.)

[3] The CAD Report reflects in the notes for the date and time, "05/25/2011 21:07:50" "ANGEL ON PHONE ADVISED SHE PASSED WILLIE ON BURLINGTON RD AREA OF INDIAN RUN." Further, at "05/25/2011 21:08:33," "SAME IS WEARING BK JACKET WITH YELLOW,BLU JEANS" (CAD2, p. 6.)

Gibbons had a back pack, she did not see a gun at that time, although she earlier told a trooper that he possessed a gun. (Sterling Rev. Cert. Ex. 22, Stephens Dep. 123:9-125:23.)

Korejko, Bartelt, Conza, and Hider responded to the Burlington Road location. Hider passed Gibbons walking on North Burlington Road, but did not report seeing a gun. He radioed the other officers[4] and turned around down the road to return to the scene. (Freeman Decl. Ex. L, Sterling Rev. Cert. Ex. 16, Hider Dep., 56:14-65:13.) Bartelt saw Gibbons walking northbound on the southbound side of Burlington Road wearing jeans and a black jacket that had yellow, reflective lettering on it, carrying a book bag. (Bartelt Dep., 83:10-15.) At that time, Bartelt was unaware that Gibbons had filed a citizen complaint earlier. (*Id.,* 68:4-21.) Bartelt had his window down and heard Gibbons say "stay away from me." (*Id.,* 83:17-84:15.)

Bartelt parked, angling his troop car in the southbound lane of travel, facing any oncoming traffic (which was non-existent at the time), and said something to the effect of "come over here." (*Id.,* 85:4-14.) At that point, Bartelt testified that Gibbons turned around and pointed a gun in his left hand to his own head, again saying "stay away from me." (*Id.,* 85:15-19; 88:24-25; 109:6-17.) Bartelt instructed Gibbons "to drop it." (*Id.,* 89:1-5.) Gibbons did not do anything, but may have continued "to say stay away from me." (*Id.,* 89:6-9.) Bartelt estimated that Gibbons was anywhere between

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[4] The CAD Report reflects in the notes for the date and time, "05/25/2011 21:08:11" "SAME WALKING ON FOOT HEADING TOWARD STATION ON SOUTHBOUND SIDE OF BURLINGTON." (CAD2, p. 6.)

seven and fourteen or fifteen yards away. (*Id.,* 89:14-17.) At that point, Bartelt exited his vehicle, placed himself inside the door jamb of his car, and drew his weapon. (*Id.,* 89:18-90:19.)

When Conza arrived on the scene, Bartelt had his door open and gun drawn, yelling commands at Gibbons; Conza could only see the right side of Gibbons's body.[5] (Conza Dep., 97:21-98:22.) As he exited his troop car, Conza yelled to Bartelt "does he have a gun? Does he have a gun?" (*Id.,* 101:23-102:10.) Bartelt was yelling, but Conza could not tell if he was responding to him or yelling commands at Gibbons. (*Id.*) "Two shots were fired and [Conza] observed the recoil in Officer Bartelt at that point." (*Id.*) Conza then ran toward Gibbons to secure him. (Conza Dep., 102:21-23; 104:6-8.) Conza observed a gun to Gibbons's left side. (*Id.,* 104:22-105:8.) He called dispatch to request an ambulance and relayed that Gibbons had been shot in the chest and needed immediate medical attention. (*Id.,* 120:6-121-4.) Bartelt had shot Gibbons twice; a third attempt was thwarted by his handgun jamming. (Bartelt Dep., 93:2-94:2.)

Korejko and Hider arrived at the scene after the shooting. (Korejko Dep., 72:3-19; Hider Dep., 65:14-23).[6] While stile driving, Korejko saw Gibbons standing

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[5] When asked during his deposition about his prior statement to the State Police, Conza agreed that he stated as he exited his troop car, he observed the male standing with one arm up. However, he stated "I don't recall which arm it was, but if I could only observe the right side of his body--[at that point he was interrupted and did not finish his statement]. (Conza Dep., 182:19-183:9.)

[6] The CAD Report reflects in the notes for the date and time, "05/25/2011 21:09:47" "REQ EMS BURLINGTON PAST IRVING/ SUSPECT BRANDISHED WEAPON/SUSPECT WAS SHOT/

then fall to the ground. (Korejko Dep., 72:3-19.) When asked how far behind the other two officers he was, Korejko's response was "it all happened in seconds." (*Id.* 72:20-22.) Korejko assisted Conza in putting handcuffs on Gibbons behind his back. (*Id.,* 78:12-79:3; 80:10-12.) He "immediately contacted OAU for the ambulance to respond in an expedited manner" and applied pressure to Gibbons's wound while trying to keep him verbally engaged and conscious. (Korejko Dep., 83:10-84:7.) During this time, Gibbons told Korejko that "he didn't pull the trigger." (Korejko Dep., 84:8-9.)[7] When EMS arrived, Korejko asked his supervisor whether he had permission to remove the handcuffs from Gibbons's hands for treatment. He then moved the handcuffs from Gibbons's back to his front in order for the paramedics to insert an IV. (*Id.,* 87:1-11.)

Records from Bridgeton Emergency Medical Services (EMS) reflect that at 9:10 p.m., EMS received a call and was dispatched to Burlington Road to the scene of the shooting; EMS arrived at 9:14 p.m. (Freeman Decl. Ex. P, Sterling Rev. Cert. Ex. 15, EMS Rpt. p.1). Records from Inspira Health Network reflect that they were dispatched at 9:10 p.m., and arrived at 9:17 p.m. (Freeman Decl., Ex. Q, Inspira Rpt. p.2). Records from Bridgeton EMS and Inspira reflect that at 9:25 P.M., they left the scene with Gibbons, transporting him to a helicopter for medical evacuation to

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TROOPERS OK/REQ EMS." (CAD2, p. 6.)

[7] Simultaneously, Bartelt cleared Gibbons's handgun and handed it to Hider; the gun ultimately was secured in Bartelt's trunk. (Korejko Dep., 82:7-25; Bartelt Dep., 101:5-24; Hider Dep., 68:15-69:4.)

Cooper Hospital. (EMS Rpt.; Inspira Rpt.) Emergency Medical Technician Brian Marks testified that when Gibbons was on the stretcher, he told Marks that he has no allergies, he takes Abilify, and that he "didn't pull the trigger." (Sterling Rev. Cert. Ex. 16, Marks Dep., 42:17-43:12; *accord* EMS Rpt.) EMT Christopher Lamkin testified there was no delay in any of Gibbons's medical care. (Reply Decl Ex. C, Lamkin Dep., 80:4-5.)

In a nearby residence, Joanne Leyman was sitting in her living room at about 9 p.m. or a little after 9 when she heard "pop pop." (Sterling Rev. Cert. Ex. 24, Leyman Dep., 8:9-18.) When she looked out her bedroom window, she saw a trooper leaning over someone saying "Willie can you hear me, Willie can you hear me." (*Id.*, 8:21-24.) From her bedroom window, Leyman did not see a gun. (*Id.*, 9:22-10:2.)

Gibbons was pronounced dead at 1:28 a.m. on Thursday, May 26.

Summary Judgment Standard

"Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 482 n.1 (3d Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *accord* Fed. R. Civ. P. 56 (a). Thus, the Court will enter summary judgment in favor of a movant who shows that it is entitled to judgment as a matter of law, and supports the showing that there is no genuine dispute as to any material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

stipulations . . . admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56 (c)(1)(A).

An issue is "genuine" if supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.,* 870 F. Supp. 1254, 1258 (D.N.J. 1994). Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Andersen,* 477 U.S. at 256-57. "A nonmoving party may not 'rest upon mere allegations, general denials or . . . vague statements. . . . '" *Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs,* 982 F.2d 884, 890 (3d Cir. 1992) (quoting *Quiroga v. Hasbro, Inc.,* 934 F.2d 497, 500 (3d Cir. 1991)). Indeed,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate

> time for discovery and upon motion, 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, 477 U.S. at 322. That is, the movant can support the assertion that a fact cannot be genuinely disputed by showing that "an adverse party cannot produce admissible evidence to support the [alleged dispute of] fact." Fed. R. Civ. P. 56(c)(1)(B); *accord* Fed. R. Civ. P. 56(c)(2).

In deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide 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). Credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992).

Discussion

42 U.S.C. § 1983

Plaintiffs' Constitutional claims are governed by Title 42 U.S.C. § 1983, which provides a civil remedy against any person who, under color of state law, deprives another of rights protected by the United States Constitution. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Any analysis of 42 U.S.C. § 1983 should begin with the language of the statute:

> Every person who, under color of any statute,

> ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See 42 U.S.C. § 1983.

As the above language makes clear, Section 1983 is a remedial statute designed to redress deprivations of rights secured by the Constitution and its subordinate federal laws. *See Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). By its own words, therefore, Section 1983 "does not . . . create substantive rights." *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (citing *Baker*, 443 U.S. at 145, n.3).

To state a cognizable claim under Section 1983, a plaintiff must allege a "deprivation of a constitutional right and that the constitutional deprivation was caused by a person acting under the color of state law." *Phillips v. County of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008) (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996)). Thus, a plaintiff must demonstrate two essential elements to maintain a claim under § 1983: (1) that the plaintiff was deprived of a "right or privileges secured by the Constitution or the laws of the United States" and (2) that plaintiff was deprived of his rights by a person acting under the color of state law. *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 464 (3d Cir. 1989).

Moreover, the United States Supreme Court has held that "neither a State nor its officials acting under their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). As such, an employee of the state named as a defendant in a civil rights action may be held liable only if that person has personal involvement in the alleged wrongs and is sued in their personal capacity. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991) ("state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983").

Qualified Immunity

The doctrine of qualified immunity provides that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, government officials are immune from suit in their individual capacities unless, "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right" and "the right was clearly established" at the time of the objectionable conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts may exercise discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield

officials from harassment, distraction, and liability when they perform their duties reasonably" and it "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Id.* (internal quotation omitted). Properly applied, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 5623 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Couden v. Duffy*, 446 F.3d 483, 492 (3d Cir, 2006). "If the officer's mistake as to what the law requires is reasonable," the officer is entitled to qualified immunity. *Id.* (internal citations omitted). Further, "[i]f officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley,* 475 U.S. at 341. *See also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (The general touchstone is whether the conduct of the official was reasonable at the time it occurred.). Finally, because qualified immunity is an affirmative defense, the burden of proving its applicability rests with the defendant. *See Beers-Capital v. Whetzel*, 256 F.3d 120, 142, n.15 (3d Cir. 2001).

Fourth Amendment

The Fourth Amendment provides:

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

A Fourth Amendment excessive force claim calls for an evaluation of whether police officers' actions are objectively reasonable in light of the facts and circumstances confronting him. *Graham v. Conner*, 490 U.S. 386, 397 (1989). While the question of reasonableness is objective, the court may consider the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* In a claim for excessive force, "the central question is 'whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Brooks v. Kyler*, 204 F.3d 102, 106 (3d Cir. 2000) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)).

Furthermore, appropriate attention should be given "to the circumstances of the police action, which are often 'tense, uncertain, and rapidly evolving.'" *Groman v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995) (quoting *Graham,* 490 U.S. at 396). *See also Graham*, 490 U.S. at 396-97 (analyzing reason-

ableness of use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight").

"Whether or not [an officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable." *Scott v. Harris*, 550 U.S. 372, 383 (2007). The reasonableness of a seizure is assessed in light of the totality of the circumstances. *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999).

Analysis

Excessive Force by Bartelt

The *Garner* deadly force analysis applies in this case. *See Connor v. Thompson*, 647 F. App'x 231, 237 (4th Cir. 2016) (applying *Garner* to deadly force used on a suicidal subject); *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015) (applying *Garner* to deadly force used on a suicidal subject); *Glenn v. Washington County*, 673 F.3d 864, 876 (9th Cir. 2011) (applying *Garner* to deadly force used on a suicidal subject, and explaining "[e]ven when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual").

The Court therefore proceeds with a qualified immunity analysis regarding Officer Bartelt's use of deadly force. First, Willie Gibbons's right to be free from excessive, deadly force was clearly established on the night of the shooting. "It has long been the law that an officer may not use deadly force against a

suspect unless the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others." *Lamont v. New Jersey*, 637 F.3d 177, 185 (3d Cir. 2011) (Further noting "the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.") *See also Connor*, 647 F. App'x at 239 ("*Garner* . . . constitutes sufficient notice to bar qualified immunity in this case."); *Weinmann*, 787 F.3d at 450 ("*Graham* and *Garner* stand for the proposition that a person has a constitutional right not to be shot unless an officer reasonably believes that he poses a threat to the officer or someone else. The court of appeals cases are even more specific: they say that officers may not use deadly force against suicidal people unless they threaten harm to others, including the officers.").

Next, the Court turns to whether Bartelt's use of deadly force was objectively reasonable, given the totality of the circumstances, with the belief that Gibbons posed a significant threat of death or serious physical injury to either Bartelt or another person. "[H]olding a weapon in a non-threatening position while making no sudden moves fails to support the proposition that a reasonable officer would have had probable cause to feel threatened." *Connor*, 647 F. App'x at 237-38. *Accord Weinmann*, 787 F.3d at 449 (in a suicidal subject deadly force case, affirming the district court's denial of summary judgment observing, among other things, that "the way in which [the plaintiff] was holding the gun is disputed."). The Third Circuit Court of Appeals reversed a district court's finding that qualified immunity shielded a state trooper's use deadly force against a suspect from a distance of eighty yards after a prolonged standoff, where the

suspect was facing away from the trooper with a gun pointed at his own head, but had begun to advance toward fellow officers who were closer to him. *Bennett v. Murphy*, 120 F. App'x 914 (3d Cir. 2005). The Circuit questioned whether the trooper was faced with an immediate threat of death or physical injury. *Id.* at 918 (finding it had been clearly established that "[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or the safety of others simply because they are armed").

Similarly, here, genuine issues of disputed fact prevent the Court from holding that Trooper Bartelt was reasonable in his belief that Gibbons posed a danger to him or someone else to warrant an entitlement to qualified immunity on Plaintiffs' claim for excessive force in violation of the Fourth Amendment. Summary judgment on that claim against Bartelt will be denied.

Failure to Intervene

Regarding the merits of Plaintiffs' claim for failure to intervene, "a police officer has a duty to take reasonable steps to protect a victim from another officer's use of excessive force, even if the excessive force is employed by a supervisor." *Smith v. Mensinger*, 293 F.3d 641, 650-51 (3d Cir. 2002) (citing *Putnam v. Gerloff*, 639 F.2d 415, 423-24 (8th Cir. 1981) (liability exists only if the non-intervening officer saw the beating or had time to reach the offending officer)).

In this case, the record indicates that Conza did not have a realistic and reasonable opportunity to intervene. Conza did not know whether Gibbons was armed; as Conza yelled to Bartelt, asking if Gibbons was armed, he heard two shots and he observed the

recoil from Bartelt's gun. After that, he saw Gibbons fall to the ground and he immediately approached Gibbons, began handcuffing him, and called dispatch for an ambulance. Korejko and Hider arrived at the scene after Gibbons had been shot. McGowan did not go to the scene of the shooting. (Freeman Decl., Ex. W, 30:23-31:11.)

Delay of Medical Care

Officers are under a duty to render emergency medical assistance to those in their custody. *Rosario v. Union City Police* Dep't, 131 F. App'x 785 (3d Cir. 2005). The Eighth Amendment's "deliberate indifference" standard applies, through the Fourteenth Amendment, to a claim that an arrestee was delayed in receiving medical attention. *See, e.g., City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (noting that "the due process rights of a person [who was injured while being apprehended by the police] are at least as great as the Eighth Amendment protections available to a convicted prisoner"). To succeed under the "deliberate indifference" standard, a plaintiff must prove: (1) that his medical needs were "objectively serious"[8] and (2) that the defendants exhibited "deliberate indifference" to Plaintiff's medical needs. *Monmouth County Correctional Inst. Inmates v. Lanzaro*,

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[8] A "serious medical need" is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention" or "where the denial of treatment would result in the unnecessary and wanton infliction of pain or a life-long handicap or permanent loss." *Atkinson v. Taylor,* 316 F.3d 257, 272–73 (3d Cir. 2003) (internal citations omitted).

834 F.2d 326, 346 (3d Cir. 1987) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

There is no doubt that Gibbons had a serious medical need. The record reflects, however, that immediate attention was given to his medical need; there was no delay and certainly no support in the record for a finding of deliberate indifference. Upon seeing that Gibbons had been shot, Conza called dispatch to request an ambulance for "immediate" medical attention. Korejko testified that on his arrival at the scene, he also "immediately contacted OAU for the ambulance to respond in an expedited manner," and then he administered aid to Gibbons while waiting for the ambulance to arrive. EMS records indicate that within minutes, Gibbons was transported by helicopter to an appropriate facility. Therefore, summary judgment will be granted for the defense as to Plaintiffs' claim of withholding medical treatment in violation of the Fourteenth Amendment. *NJSP*

Finally, there is no record evidence of any custom or practice by the New Jersey State Police that would tend to indicate a violation of citizens' civil rights and/or a failure to train officers. Summary judgment is granted as to any such claim.

Conclusion

In summary, Plaintiffs' claim against Defendant Bartelt for excessive force in violation of the Fourth Amendment will survive. Summary judgment will be granted as to all other claims.

An appropriate Order will be filed.

/s/ Joseph H. Rodriguez
U.S.D.J.

Dated: December 19, 2017

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC (AUGUST 6, 2020)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: WILLIE GIBBONS; ARLANE JAMES, J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS; L.M.G., A MINOR, BY HER MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS,

v.

NEW JERSEY STATE POLICE, ET AL.,

and

NOAH BARTELT,

Appellant.

No. 18-1432

(D.C. Civil No. 1-13-cv-03530)

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges.

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judges McKee, Ambro, Jordan, Greenaway, Jr., Krause and Restrepo would grant rehearing by the court en banc. Judge McKee files the attached dissenting opinion sur rehearing, which is joined by Judges Ambro, Greenaway, Jr., Krause and Restrepo.

By the Court,

/s/ David J. Porter
Circuit Judge

Dated: August 6, 2020
JK/cc: All Counsel of Record

CIRCUIT JUDGES JOIN DISSENTING OPINION ON SUR DENIAL OF REHEARING EN BANC (AUGUST 6, 2020)

McKEE, Circuit Judge, with whom AMBRO, GREENAWAY, JR., KRAUSE, and RESTREPO, Circuit Judges, join, dissenting.

Today, we deny the Petition for Rehearing in this case even though our Opinion squarely contradicts controlling precedent established by our decision in *Bennett v. Murphy.*[1] There, under circumstances substantively identical to those here, we held that "[if the victim] had stopped advancing and did not pose a threat to anyone but himself, the force used against him, *i.e.* deadly force, was objectively excessive[,]" and thus unreasonable.[2] *Bennett* has been the law of this Circuit for eighteen years. The victim here posed no greater threat than the victim in *Bennett.* Yet, now we hold that Trooper Noah Bartelt is entitled to qualified immunity as a matter of law. We reach that conclusion even though Willie Gibbons, the victim here, was pointing a gun at his own head when fatally shot by Bartelt. There has been no intervening change in the law in the eighteen years since we decided *Bennett*, and our Opinion here does not suggest otherwise.

We can take some solace in the fact that, absent a substantive distinction between the facts here and those in *Bennett,* the rules of this Circuit dictate that *Bennett* continues to control and the decision here is

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[1] 274 F.3d 133 (3d Cir. 2002).

[2] *Id.* at 136.

a nullity insofar as it purports to reach a holding that is contrary to our decision in *Bennett*.[3] A unanimous en banc court recently affirmed that "[w]e adhere strictly to that tradition."[4] Nevertheless, as six judges of this Court agree, institutionally it would be far better for us to grant this petition for rehearing so that we could resolve the tension between this Opinion and *Bennett* en banc.[5] I therefore must dissent from our failure to do so.

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[3] 3d Cir. I.O.P. 9.1 (2018) ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.").

[4] *Joyce v. Maersk Line Ltd*, 876 F.3d 502, 508 (3d Cir. 2017) (en banc) (quoting *In re Grossman's Inc.*, 607 F.3d 114, 117 (3d Cir. 2010) (en banc)); *see also Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008) ("[T]his Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents") (citation omitted); *Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 278 n.8 (3d Cir. 2001) ("[T]o the extent that [a panel decision] is read to be inconsistent with earlier case law, the earlier case law. . . controls"); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981) (citing Third Circuit Internal Operating Procedures to explain that "a panel of this court cannot overrule a prior panel precedent. . . . To the extent that [a later case] is inconsistent with [an earlier panel decision, the later decision] must be deemed without effect").

[5] *See* Fed. R. App. P. 35(a)(1) (explaining that en banc review was created to resolve such inconsistencies, in order to allow the legal community and the public to rely upon the "uniformity of the court's decisions").

I. The Facts of *Bennett* and *James*

Assuming the truth of these allegations (as we must on summary judgment review),[6] the relevant circumstances surrounding the shooting of Willie Gibbons here, and David Bennett in *Bennett v. Murphy*, are indistinguishable.

A. Bennett

On the evening of January 4, 1994, Pennsylvania State Police responded to a domestic dispute call in Greenburg, Pennsylvania.[7] David Bennett, a 25-year-old volunteer firefighter, had told his girlfriend that he was going to kill himself after discovering her with another man.[8] His girlfriend called 911.[9] When police arrived, they found Bennett standing in the courtyard outside of her apartment holding a shotgun pointed vertically at his own head. He repeated to the police that he wanted to kill himself.[10]

A standoff began, which lasted for over an hour. Finally, as police began to encircle Bennett, he became agitated and started walking towards the officers. When they ordered him to halt, he stopped moving. Four seconds later, a police sharpshooter, Francis

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6 *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

7 *Bennett*, 274 F.3d at 134; *id.* at 135 n.2.

8 Torsten Ove, *Retrial Set for Trooper in Fatal Shooting*, PITT. POST-GAZETTE (Mar. 14, 2005), https://www.post-gazette.com/uncategorized/2005/03/14/Retrial-set-for-trooper-in-fatal-shooting/stories/200503140131.

9 *Id.*

10 *Bennett v. Murphy*, 127 F. Supp. 2d 689, 690 (W.D. Pa. 2000).

Murphy, fatally shot Bennett. When Murphy opened fire, he was outside of the police cordon and approximately 80 feet away from Bennett.[11]

Bennett's estate brought a civil rights action under 42 U.S.C. § 1983 alleging police had used excessive force. The District Court denied the defendant officer's motion for summary judgment based on qualified immunity and the officer appealed. In affirming the denial of summary judgment and remanding for trial, we held: "[i]f, as the plaintiff's evidence suggested, David Bennett had stopped advancing and did not pose a threat *to anyone but himself*, the force used against him, *i.e.* deadly force, was objectively excessive."[12]

B. *James* (the current case)

In late May of 2011, Angel Stephens became concerned that her boyfriend, Willie Gibbons, had stopped taking his medication for schizophrenia. Stephens called the police after she and Gibbons had an argument.[13] However, when police arrived at their house, they could not initially identify who was the victim as the statements of Gibbons and Stephens conflicted.[14] Police told Stephens that she could not get a restraining order because "there was no fighting or nothing done," unless Gibbons had threatened her "with a knife or a gun."[15]

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[11] *Id.* at 690-91.

[12] *Bennett*, 274 F.3d at 136 (emphasis added).

[13] Plaintiffs-Appellees' (PA) App. 224-27.

[14] A72.

[15] PA192.

At that point, Stephens for the first time accused Gibbons of threatening her with a gun.[16] Police then questioned Gibbons, but he denied threatening Stephens.[17] Police searched Gibbons' truck for weapons before leaving the scene; they found none.[18] Thereafter, Stephens did obtain a restraining order from Municipal Court prohibiting Gibbons from possessing firearms or returning to the shared house.[19] The police escorted Gibbons back to the house to retrieve essential items and informed him that he would need to "request a police escort" to go there again.[20]

The next day, May 25, Gibbons returned to the police station to file a Citizen's Complaint based upon the events of the previous night. He alleged that police had harassed him.[21] Later that day, while working with his father, Gibbons discovered he had left a tool that he needed in the shared house. As previously instructed, Gibbons called to ask for a police escort in order to retrieve the tool. Trooper Michael Korejko answered the phone. Korejko knew that Gibbons had filed a complaint against the police.[22] When Gibbons explained that he needed to get his drill and other

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16 *Id.*

17 A72.

18 A73. Later, Gibbons' mother also searched the truck because she feared that police would plant a gun on Gibbons. *See* PA200-01.

19 A77-79.

20 A73.

21 PA419.

22 A13.

items from the house, Korejko declined to help, saying "we are pretty busy."[23] He now told Gibbons that he was not "allowed over there unless [he had] a court order from a judge to get those items."[24]

Gibbons then tried to call Stephens. When he could not get her on the phone, he went to the house to ask her for the drill he needed.[25] Stephens was on the telephone with a friend when Gibbons arrived, and the friend took it upon himself to call the police.[26] Even though Stephens' friend only told police that "he's out there in front of her house," the dispatcher inexplicably told the officer who eventually responded that Gibbons had "showed up [at the house], with a handgun . . . "[27]

When Trooper Phillip Conza arrived at Stephens' house, he told Stephens he had heard that Gibbons had a gun.[28] Stephens did not express any concern for her safety.[29] Nevertheless, Conza suggested she come down to the police station.[30] As she drove to the station, Stephens passed Gibbons walking on the side of the road. She called the police to report that he was headed towards the police station, believing he was

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[23] PA92.

[24] *Id.*

[25] PA239.

[26] PA18-19.

[27] PA19-20.

[28] PA243.

[29] PA249.

[30] *Id.*

likely going there to turn himself in.[31] The dispatcher asked Stephens whether Gibbons had a gun and Stephens told the officer that she hadn't seen him holding one.[32] The dispatcher then asked whether she had seen a gun earlier and Stephens confirmed that she had.[33]

Hearing that a gun might be involved, Bartelt, who was on desk duty at the state police barracks, asked for permission to "head that way" in order to look for Gibbons.[34] Four officers in the area then converged on the sparsely populated stretch of road where Stephens had indicated she saw Gibbons. Trooper Daniel Hider was the first to arrive, and he saw someone matching Gibbons' description.[35] Rather than immediately confront him, Hider decided to continue driving and made an immediate right turn to loop back so he could get in front of Gibbons.[36]

Bartelt was only a few blocks away when he heard Hider report a sighting. Conza, who had spoken with Stephens earlier, was directly behind Bartelt in another car, and Korejko was moments behind the two of them.[37] The video camera in Bartelt's car was

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[31] PA250-51.

[32] PA22-23.

[33] PA251-53.

[34] PA281.

[35] A121.

[36] A126.

[37] PA295, A85.

active, but as he proceeded towards Gibbons' location, Bartelt inexplicably manually disabled his camera.[38]

Driving northbound, Bartelt immediately identified Gibbons from across the street. Gibbons was also heading northbound on foot at "a normal" walking pace on the other side of the road.[39] Bartelt slowed and rolled down his window; Gibbons noticed him and said clearly, without shouting, "stay away from me."[40] Bartelt responded by driving his car across the double yellow line, directly towards Gibbons on the far side of the road. Gibbons repeated, "stay away from me,"[41] and Bartelt ignored him. Instead, he instructed Gibbons to "come over here."[42]

What happened next is disputed. Conza, who was approximately seven feet behind Bartelt,[43] stopped his car and jumped out. He saw Bartelt pointing his gun at a "male standing with one ar[m] up."[44] Conza was interrupted at this point when giving a subsequent

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[38] PA292. When asked to explain why he had turned the camera off, Bartelt merely stated: "[t]here's no requirement to have the camera on." *Id.* Yet, he conceded that it is required "during generic pedestrian contacts," PA290, and when pressed during his deposition whether one could describe his encounter with Gibbons, who was on foot, in such terms, Bartelt eventually admitted, "I guess you can call it that." PA291.

[39] PA300.

[40] PA295-96.

[41] PA297-98.

[42] PA298.

[43] A182.

[44] A266.

report of the incident.[45] When he resumed, he became more vague, saying that even though "[i]t was still light" out,[46] he could only see one side of the suspect's body from his angle: "there is nothing on his right side, there is no gun, nothing that I see on his right side."[47] He stated that Bartelt yelled something "inarticulateable."[48] "I don't know if he's responding to me or Willie[.]"[49] Without waiting for a response, Bartelt opened fire. Conza stated: "I observed the recoil in Officer Bartelt's [sic] at that point."[50]

Bartelt recalled the situation differently. According to him, it was dark. "There might've been a few house lights on here and there."[51] As he got out of his car, Bartelt saw that Gibbons was holding a gun in his left hand, "pointed towards his temple on his left side."[52] Bartelt immediately drew his own gun.[53] His first instinct was to open fire, but he noticed that Gibbons was standing in front of a house, "which is why I initially did not shoot right away."[54] But once he

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45 *Id.*

46 A182. Korejko agreed that it was still light out at the time of the shooting. A86.

47 A181.

48 *Id.*

49 *Id.*

50 *Id.*

51 PA72.

52 *Id.*

53 PA73.

54 PA75.

realized that there were no lights on in the house, he felt comfortable using his weapon. He yelled "drop it, drop it,"[55] and within a couple of seconds, while Gibbons "still had the gun to his head and he was just standing there facing me, looking right at me," Bartelt fired twice.[56] Gibbons collapsed, and Bartelt later said he knew Gibons, "wasn't gonna move to get that gun again."[57]

A third version of events emerges from the deposition of the sole eye witness, who lived in a nearby house. When Joanne Leyman heard gunshots, she rushed to her window.[58] Outside, she saw a single officer and a single police car.[59] According to Leyman, Bartelt was there alone; Conza did not arrive until after the shooting had already occurred.[60] She reports that Bartelt walked up to Gibbons after shooting him and said "Willie, can you hear me?"[61]

What is undisputed is that the entire incident from police first seeing Gibbons to Bartelt fatally shooting him was over in "[s]econds."[62] By the time Hider swung

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[55] PA74.

[56] PA75.

[57] PA79.

[58] PA345.

[59] PA347-48.

[60] PA348.

[61] *Id.*

[62] A164. Only 74 seconds elapsed between Hider's initial report that he had observed a potential suspect and the call for an ambulance, which did not occur until after Bartelt had already shot Gibbons. A101, PA375. In those 74 seconds, Bartelt had to

back around and arrived at the scene, Gibbons was lying on the ground.[63] Shortly after midnight, Willie Gibbons was pronounced dead.[64]

It is impossible to effectively evaluate the credibility of these three differing accounts of the incident on the "dry record" before us.[65] Given these divergent stories, the District Court correctly concluded, "genuine issues of disputed fact prevent the Court from holding that Trooper Bartelt was reasonable in his belief that Gibbons posed a danger to him or someone else . . . "[66]

II. The Opinion Disregards Our Decision in *Bennett*

As the Opinion rightly notes, "[q]ualified immunity's second prong 'shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[67] For a right to

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drive to the location Hider had identified, speak with Gibbons, close the distance between them, emerge from his car, and finally open fire. After which, Conza, Hider, and Korejko all had to arrive and handcuff Gibbons; finally, Conza called for medical assistance. PA375. We can thus surmise that the actual confrontation must have been exceedingly brief.

[63] PA111.

[64] A270.

[65] *United States v. Friedland*, 83 F.3d 1531, 1546 (3d Cir. 1996) ("[O]ur review of a dry record, of necessity, cannot be as comprehensive as the review of the judge who watched and heard the issues being played out.") (Rosenn, J., concurring and dissenting).

[66] *Gibbons v. New Jersey State Police*, CV 13-3530, 2017 WL 11504779, at *8 (D.N.J. Dec. 20, 2017).

[67] *James v. New Jersey State Police*, 957 F.3d 165, 169 (3d Cir.

be clearly established, it "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."[68] Instead of demanding the impossible—an exact repetition of two situations with different actors separated by time and place—this "clearly established" prong asks a legal question focused on notice: would a reasonable officer objectively understand that his or her action was unconstitutional?[69] "[E]xisting precedent must have placed the statutory or constitutional question beyond debate."[70] Such is the case here.

A. *Bennett* clearly establishes the law here

Admittedly, these two situations are not completely the same. If the law allowed us to disregard *Bennett* because the circumstances surrounding Gibbons' killing were not *absolutely identical* to those surrounding Bennett's, I would accept the denial of rehearing en banc. However, total congruence of two different incidents has never been required, nor could it be.[71] Such a rule would institute absolute, not qualified, immunity.

2020) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted)).

68 *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citation omitted)).

69 *Id.*

70 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

71 Given the limitless randomness created by the vagaries of life, no two incidents will ever be the exact reflection of one another. *See also id.* ("We do not require a case directly on point").

Instead, the Supreme Court has instructed that the precise "action in question" need not have "previously been held unlawful."[72] And we have reiterated this standard: "although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."[73] Simply put, the law "do[es] not require a case directly on point . . . " with no variation whatsoever.[74] What it does demand is that the unconstitutional nature of the present conduct "follow immediately" from the prior case's holding.[75]

Bennett readily satisfies that requirement. As I've noted, we held there that if the victim "did not pose a threat to anyone but himself . . . deadly force, was objectively excessive."[76] Viewed at summary judgment in a light favorable to the non-movant, Gibbons posed a threat to no one but himself. It thus "follow[s] immediately" that Bartelt's use of deadly force violated clearly established law.

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[72] *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (internal quotation marks and citation omitted).

[73] *Mirabella v. Villard*, 853 F.3d 641, 648 (3d Cir. 2017) (quotation omitted); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("The same is true of cases with 'materially similar' facts."). And even if this were not so and a case with materially, or even fundamentally, similar facts were required, *Bennett* is certainly "fundamentally" similar.

[74] *Ashcroft*, 563 U.S. at 741 (Scalia, J.).

[75] *Mullenix*, 136 S. Ct. at 309 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

[76] *Bennett v. Murphy*, 274 F.3d 133, 136 (3d Cir. 2002).

B. Applying *Bennett* to *James*

In *Bennett*, based on the view of the facts set forth in Part I.A above, Officer Murphy was not shielded by qualified immunity. As recounted above, we held: "[i]f, as the plaintiff's evidence suggested, David Bennett had stopped advancing and did not pose a threat *to anyone but himself*, the force used against him, *i.e.* deadly force, was objectively excessive."[77] We reached that conclusion even though Bennett was armed with a shotgun, he was visibly agitated, and he had advanced threateningly on the officers. Nevertheless, based upon the facts—viewed in the light most favorable to the plaintiff—we determined that, as a matter of law, an individual who is manifesting only self-harm *cannot* be a sufficient threat to warrant deadly force.

It is axiomatic that qualified immunity does not protect officers "who knowingly violate the law."[78] After *Bennett*, any officer who used deadly force against an individual who "did not pose a threat to anyone but himself" knowingly violated the law of this Circuit and could appropriately be held accountable for that violation.

Obviously, *Bennett* does not apply if an individual threatening self-harm also poses a risk to others.[79]

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77 *Id.* (emphasis added).

78 *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted).

79 This principle was well-established by the time of our decision in *Bennett*. In *Rhodes*, the Sixth Circuit offered qualified immunity to an officer who shot and killed a man advancing with a machete. *Rhodes v. McDannel*, 945 F.2d 117, 118 (6th Cir. 1991) (per curiam). Similarly, in *Sigman*, the Fourth Circuit awarded qualified immunity where a suicidal man was shot after rushing a crowd of police officers armed with a kitchen knife,

Just as the circumstances in *Bennett* (construed in the plaintiff's favor) compelled the conclusion that a reasonable officer could not have believed that David Bennett posed a threat to anyone but himself, the circumstances here, viewed in a light favorable to Gibbons, compel the conclusion that Willie Gibbons only posed a threat to himself. When asked whether Gibbons had threatened him "in any way," Bartelt responded unequivocally: "No."[80] Thus, when he opened fire, Bartelt violated clearly established law.

C. Reviewing the disputed facts in the record

A wrinkle in its analysis prevented the Opinion from readily arriving at that obvious conclusion. Our jurisdiction on interlocutory appeal extends "only 'to the extent that it turns on an issue of law.'"[81] This means we only "possess jurisdiction to review whether the set of facts identified by the district court is suffi-

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shouting "I want to die." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 785 (4th Cir. 1998). In *Montoute*, the Eleventh Circuit granted qualified immunity to an officer who shot a man who was running away and had only ever pointed his gun into the air because the man had fired a warning shot near a large crowd and posed a risk to that public gathering. *Montoute v. Carr*, 114 F.3d 181, 182–83 (11th Cir. 1997). We distinguished these situations from non-threatening suicidal ones in a later iteration of *Bennett*. *Bennett ex rel. Est. of Bennett v. Murphy*, 120 Fed. Appx. 914, 919 (3d Cir. 2005).

[80] A160. Defendants concede that Gibbons did nothing Bartelt could have considered a threat other than holding a gun to his own head. A268.

[81] *Davenport v. Borough of Homestead*, 870 F.3d 273, 278 (3d Cir. 2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

cient to establish a violation of a clearly established constitutional right[.]"[82] When the District Court identifies a set of facts, that legal analysis can readily proceed. But when it fails to do so, we must "undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[83] We have established a supervisory rule that requires "at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues."[84] We very recently reiterated this rule's significance, as "we are hard pressed to carry out our assigned function when district courts fail to specify the set of facts they assumed."[85] As we have repeatedly stressed, failure to follow the rule is grounds for remand.[86]

Here, the District Court concluded that "genuine issues of disputed fact prevent[ed]" it from awarding qualified immunity.[87] However, as the Opinion points out, the District Court "did not identify these disputed

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82 *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 986 (3d Cir. 2014) (quoting *Ziccardi v. City of Phila.*, 288 F.3d 57, 61 (3d Cir. 2002)).

83 *Johnson v. Jones*, 515 U.S. 304, 319 (1995).

84 *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 149 (3d Cir. 2002) (Alito, J.).

85 *Williams v. City of York*, 18-3682, 2020 WL 4249437, at *4 (3d Cir. July 24, 2020) (Hardiman, J.) (quotation omitted).

86 *Blaylock v. City of Philadelphia*, 504 F.3d 405, 410 (3d Cir. 2007) (collecting instances of remand for failure to follow the *Forbes* rule).

87 *Gibbons*, 2017 WL 11504779, at *8.

facts."[88] That may well be because it believed that the factual disputes on this record were obvious and did not require elaboration. Nonetheless, this violates our supervisory rule. Thus, remand (not reversal) is required for the District Court to address that deficiency in the first instance.[89]

In choosing to instead undertake a "cumbersome review" of the record on its own, the Opinion ignores both the District Court's finding that there were material disputed facts and the Supreme Court's instruction to "determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[90] The Opinion professes to accept the

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[88] *James*, 957 F.3d at 168.

[89] The Opinion identifies the District Court's failure and "reiterate[s] that *Forbes*'s supervisory rule remains in effect." 957 F.3d at 169 n.4. But it provides no explanation for its own failure to remand in accordance with the rule, other than a bare cite to a concurring opinion which proposed to exempt from *Forbes* "narrow legal claims that are capable of resolution without the need to closely examine the nuances of the District Court's fact-finding." *E. D. v. Sharkey*, 928 F.3d 299, 310 (3d Cir. 2019) (Smith, C.J., concurring). However, the complex disputes here do not fit within that exception. *See, e.g.*, A182 (Conza says, "I don't remember it being dark. It was still light"), A86 (Korejko agrees), PA72 (Bartelt claims "[i]t was dark"), A181 (Conza says Bartelt's shouting was "inarticulate-able"), PA74 (Bartelt claims he issued clear commands). Another rare exception to the *Forbes* rule occurs when disputed evidence is "blatantly contradicted by the record." *Blaylock*, 504 F.3d at 413 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). *We have no such evidence here, in part because Bartelt purposefully deactivated his video camera.* PA292.

[90] *Johnson*, 515 U.S. at 319. This comports with our general rule requiring de novo review of the entire record when reversing a denial of summary judgment. *Est. of Arrington v. Michael*, 738 F.3d 599, 604 (3d Cir. 2013); *see also United States v. Diebold,*

"conclusion that 'genuine issues of disputed fact' exist[]," [91] but when it actually "proceed[s] to qualified immunity's second prong," [92] that awareness falls away.

Determining the purely legal question of whether the law was clearly established "from the perspective of a reasonable officer," [93] does not absolve us from viewing the underlying material facts in a light favorable to Gibbons. Without a clear conception of what happened, we cannot answer the legal question of whether clearly established law applies to the given circumstances. In forming its view of these events, without the benefit of the District Court elucidating the disputed facts, the Opinion was bound to examine the record itself and to view the disputed facts—which were not obscure, Appellees' brief repeatedly highlighted several of them [94]—in a light favorable to Gibbons.

Inc., 369 U.S. 654, 655 (1962) (per curiam) (examining de novo and reversing a grant of summary judgment because the underlying record did not accord with the District Court's finding of fact).

91 *James*, 957 F.3d at 168.

92 *Id.* at 168-69.

93 *Id.* at 169 (citing *White v. Pauly*, 137 S. Ct. 548, 550 (2017)).

94 Appellees' Br. at 8 (noting that Conza's version of events "differs from the account provided by Bartelt"), 21 (citing where the record "directly contradict[s]" the officers' testimony). The Plaintiffs' dispute many more facts in the record. *See* A235 (disputing whether Bartelt ordered Gibbons to drop his gun, whether Gibbons understood and refused, whether Bartelt considered Gibbons a threat, whether Bartelt was afraid, and whether the other officers arrived on the scene in time to witness the incident).

Moreover, more than once, this Court has advised that "a court ruling on summary judgment in a deadly-force case" must be careful "to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'"[95] The Supreme Court has likewise emphasized "the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."[96]

Instead, the Opinion improperly resolves multiple disputed issues of material fact in Bartelt's favor when determining if clearly established law applies.[97] For example: whether Gibbons' right arm was raised in surrender or at his side (ignored by the Opinion), whether it was light or dark when Bartelt shot Gibbons (ignored), whether Bartelt told Gibbons to drop his gun or spoke unintelligibly (Opinion

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[95] *Lamont v. New Jersey*, 637 F.3d 177, 181-82 (3d Cir. 2011) (quoting *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999)).

[96] *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

[97] *City of Escondido v. Emmons*, 139 S. Ct. 500, 501 (2019) (viewing the record "in the light most favorable to the plaintiff."). This is an especially serious flaw when, as here, we have only one side of the story. *See Lamont*, 637 F.3d at 181-82 (describing the cautious, skeptical approach such circumstances necessitate). A "court may not simply accept what may be a selfserving [sic] account by the officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (quotation omitted). Yet even without the benefit of Gibbons' testimony, the two officers' own versions of events are inconsistent.

repeatedly assumes Bartelt gave the order[98]), whether Bartelt even gave Gibbons a chance to comply with any command he may have given or opened fire immediately after issuing such command (Opinion repeatedly assumes Gibbons chose not to comply[99]), and most importantly, whether Gibbons threatened Bartelt in any way (ignored).[100] The Opinion implicitly or explicitly resolves each of these inferences against Gibbons when determining whether clearly established law governs this case.

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98 *See, e.g.*, *James*, 957 F.3d at 166 ("Willie Gibbons, a suspect who refused to drop his gun when Trooper Bartelt ordered him to do so"), 168 ("Trooper Bartelt . . . twice told Gibbons to drop his weapon . . . "), 171 ("Gibbons ignored Trooper Bartelt's orders to drop his gun . . . "), 172 ("Gibbons ignored Trooper Bartelt's orders to drop his gun . . . ").

99 *James*, 957 F.3d at 168 ("Gibbons did not comply with the commands"), 172 (referring to "noncompliant Gibbons.").

100 A reasonable jury reaching the merits could readily find each of those facts in favor of Plaintiffs on this record. A jury could also consider the fact that Gibbons had filed a complaint against police officers for harassing him earlier the same day, and repeatedly pleaded for Bartelt to "stay away from me." PA295-96. Of course, we cannot know exactly what actually happened the night Gibbons was shot. And I in no way suggest that the prior complaint for police harassment instilled some degree of callousness or hostility towards Gibbons. Yet, we have no way of predicting how a jury would interpret Bartelt's admission that he turned his video camera off en route to meet Gibbons even though that would have been the kind of pedestrian encounter that required him to have it on. We certainly cannot prognosticate how a jury may factor that complaint into its deliberations. Jurors are, after all, free to consider any evidence that they deem relevant. That is another reason why a grant of summary judgment at this stage is so very wrong.

But it does not stop there: Bartelt never stated that Gibbons threatened him or anyone other than himself.[101] In fact, Bartelt admits Gibbons made no threat.[102] Here, there is no factual dispute. So the Opinion simply invents one and then resolves it in favor of Bartelt.[103] That is not merely wrong, it is indefensible.

If we instead properly view each of the uncertainties in Gibbons' favor, a jury could readily conclude that a reasonable officer would have recognized the impermissibility of unleashing deadly force upon an individual who had displayed no sign whatsoever that he intended to harm anyone but himself. That places this case squarely within *Bennett*'s ambit, and the holding there clearly established the law in this situation.

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101 Defendants have conceded as much, admitting that Gibbons made no threats against Bartelt or anyone else. A268.

102 A160. The Opinion simply ignores the fact that there is no factual dispute whether Gibbons was threatening anyone but himself. While Bartelt later claimed to have been subjectively afraid, A170, he first admitted that Gibbons made no objective threat. A160. Bartelt's "subjective beliefs . . . are irrelevant," as we must conduct this analysis solely from the perspective of an objective officer. *Anderson*, 483 U.S. at 641. It is thus impossible to conclude that the Opinion is consistent with our scope of review at summary judgment because that crucial fact of the threat posed is actually undisputed. That should have been enough to affirm the District Court's denial of summary judgment by itself. Given the clear legal pronouncement of *Bennett*, this may be why the District Court did not think it necessary to recite the factual disputes before denying qualified immunity (an omission which nonetheless violated our *Forbes* supervisory rule).

103 *James*, 957 F.3d at 172 ("Trooper Bartelt . . . could reasonably conclude that Gibbons posed a threat to others.").

D. The Opinion's three distinctions between *James* and *Bennett*

Faced with on-point precedent, the Opinion first improperly views the facts here in a light favorable to Bartelt, and then claims *Bennett* is distinguishable based upon those skewed facts. This approach is directly contrary to our scope of review on summary judgment.[104] Further, each purported distinction crumples under scrutiny.

1. Knowledge

The Opinion suggests that Bartelt knew more about Gibbons than Officer Murphy knew about David Bennett.[105] It highlights three facts in particular: (1) "Gibbons had violated a restraining order," (2) "Gibbons was reportedly mentally ill and may not have been taking his medication," and (3), "Gibbons was carrying and earlier that evening had brandished a firearm."[106] It infers that a reasonable officer would "perceive that Gibbons presented an increased risk of harm" as a result.[107]

To begin with, it is hardly self-evident that knowing more about a suspect would lead an officer to

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104 *Tolan*, 572 U.S. at 651 (remanding where "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

105 *James*, 957 F.3d at 172.

106 *Id.*

107 *Id.*

perceive a greater threat. In fact, the exact same argument could be made in reverse. That is, Officer Murphy could have perceived a greater threat from David Bennett because he knew nothing of Bennett's history or motivation. For all Murphy knew, Bennett could have had a history of violent and assaultive behavior or a vendetta against the police. We are, after all, at the summary judgment stage. Bartelt is free to convince a jury that his knowledge of the decedent informed the reasonableness of his actions. That is not for us to determine. It is simply not relevant here and the Opinion does not explain why it is. Rather, it merely states that Bartelt knew three facts about Gibbons, none of which materially distinguish *Bennett*.

First, there is no reason here to conclude that violating a restraining order would entitle an officer to use lethal force. David Bennett presumably also violated the law during the standoff with police (*e.g.*, by resisting arrest). But that was not relevant to the threat he posed to officers on the scene. Police frequently respond to allegations that someone has violated the law. Clearly, they are not thereby permitted to automatically resort to lethal force. Moreover, it is uncontested that Bartelt did not know the terms of the restraining order that Gibbons had violated.[108] Thus, Bartelt's knowledge that Gibbons had violated a restraining order is irrelevant, and the Opinion does not attempt to explain why it is relevant. Rather, it simply states that this factor is different than the circumstances in *Bennett.* It may be, but that does not meaningfully distinguish the two sets of circumstances.

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[108] PA288.

Second, the Opinion does not explain the relevance of knowing that Gibbons may not have taken his medications and may have been mentally ill. Those circumstances are simply offered as another *ipse dixit* to establish a material distinction. To the extent that it is a material consideration, it counsels against opening fire on Gibbons rather than supporting that response. Both the Ninth and Tenth Circuit Courts of Appeals have found:

> Even when an emotionally disturbed individual is acting out and inviting officers to use deadly force, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.[109]

Here, of course, the mentally ill individual was not "inviting officers to use deadly force." Rather, Gibbons was pleading to be given space and threatening only himself as Bartelt drove his car towards him. Nonetheless, the Opinion appears to suggest these circumstances would have been different if Gibbons had either not been mentally ill or had taken his medications. That is as troubling as it is irrelevant and incorrect. Further, it would have been apparent to the nearby officers that David Bennett was also suffering from a mental health crisis. Someone who is mentally stable

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109 *Glenn v. Washington County*, 673 F.3d 864, 876 (9th Cir. 2011) (internal quotation omitted); *see also Bryan v. MacPherson,* 630 F.3d 805, 829 (9th Cir. 2010) ("[I]f Officer MacPherson believed [the plaintiff] was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means.").

does not usually point a shotgun at his own head in front of police. Thus, that is no basis to distinguish this case. To be sure, if there were any factual basis to conclude Gibbons' illness played some part in the confrontation, it would be a relevant factor. But on this record, the fact that Gibbons may have been off his medications counseled a compassionate response, not unleashing deadly force. Concluding otherwise is distasteful and, moreover, draws an unfair distinction to *Bennett*, where the victim's mental health status was undiagnosed, unduly favoring Bartelt at summary judgment.

Finally, the Opinion purports to distinguish *Bennett* based on the fact that "Gibbons was carrying and earlier that evening had brandished a firearm."[110] Of course, it is obvious that David Bennett was also carrying a firearm, which he also brandished. This attempted distinction is purely puzzling.

2. Control

The Opinion stresses that whereas Officer Murphy was eighty yards from David Bennett, Bartelt was approximately fifteen yards away from Gibbons. Of course, that is because Bartelt drove his car toward Gibbons and then stopped at that distance. Moreover, distance is merely one of the factors the Supreme Court has considered.[111] The Opinion reasons that the distance matters because in *Bennett*, Officer Murphy could "rely on closer officers to give commands . . . and

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110 *James*, 957 F.3d at 172.

111 *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018). The discussion at nn. 122-23 below, distinguishing *Kisela*'s rationale for weighing such factors, applies with equal force here as well.

evaluate his compliance."[112] Here, "Trooper Bartelt *was* the closest officer to Gibbons."[113] Yet this, too, could be argued in reverse. An officer who fired from a distance could perhaps be given greater latitude because s/he could more easily mistakenly conclude the victim's weapon was pointed at someone other than the victim, or not even be sufficiently sure of where the victim was pointing it to confidently refrain from shooting. Again, the Opinion simply states a difference without explaining why it is a material distinction.

The Opinion also characterizes Gibbons as uncooperative, noting that David Bennett was "comparatively compliant" by contrast.[114] This is just plain wrong given our standard of review. The Opinion describes Gibbons as "a suspect who refused to drop his gun when Bartelt ordered him to do so."[115] There is a dispute about what Bartelt said as well as whether whatever he said was audible or intelligible to Gibbons.[116] The District Court failed to specify whether that was one of the disputed facts it "assumed."[117] Even assuming arguendo that Gibbons did hear a command to drop

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112 *James*, 957 F.3d at 172.

113 *Id.* (emphasis in original).

114 *Id.*

115 *Id.* at 166, 168, 171, 172 (repeatedly discussing Gibbons' purported failure to drop his weapon on command).

116 Conza was approximately seven feet behind Bartelt, less than half the distance between Bartelt and Gibbons. A182. Conza did not hear Bartelt order Gibbons to drop the gun. He says Bartelt was "screaming" and that the words were "inarticulate-able [sic]." A180-81.

117 *Johnson*, 515 U.S. at 319.

the gun, it is not clear that Bartelt gave him time to comply. Assuming even further that Gibbons had time to comply, it remains undisputed that Gibbons never pointed the gun anywhere but at his own head. Thus, *Bennett* clearly established the governing law here.

The Opinion seeks to avoid that result by refusing to view the facts in a light favorable to Gibbons. Bennett actually advanced towards officers while armed, after engaging in an extended stand-off with police.[118] By contrast, Gibbons did not advance on Bartelt. Rather, Bartelt advanced on him when Gibbons asked him to "stay away from me."[119] Describing Bennett as compliant compared with Gibbons is simply incorrect.

3. Chronology

The Opinion also attempts to distinguish Bartelt's killing of Gibbons from Officer Murphy's killing of Bennett because Bartelt had much less time to reflect than Murphy had when he shot Bennett. This is perhaps the weakest part of the Opinion's attempt to raise a distinction between the two cases. It is both legally unpersuasive and relies on a terribly cruel irony. Under this view, Bartelt had "mere seconds to assess the potential danger"[120] whereas the standoff in *Bennett* lasted close to an hour. The Opinion notes that the Supreme Court has "stressed the importance

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[118] *Bennett*, 127 F. Supp. 2d at 690–91.

[119] PA295.

[120] 957 F.3d at 172 (quoting *Kisela*, 138 S. Ct. at 1153).

of this kind of temporal difference when conducting the clearly established inquiry" in *Kisela v. Hughes*.[121]

However, time was an important factor in *Kisela* because the victim was threatening a bystander with a large knife and that bystander was within reach of the victim when police opened fire.[122] Such an immediate threat to others is a prime example of a situation where police must act reflexively. But as the Court of Appeals for the Fifth Circuit concluded en banc last year, the reason the Supreme Court stressed the temporal difference in the face of that imminent threat is inapplicable where, as here, there is no imminent threat.[123] As in *Bennett,* this victim was only threatening himself. In addition, the only reason there was no hour-long standoff here (and the cruel irony of relying on timing as a distinguishing factor) is that Bartelt opened fire on Gibbons almost immediately after confronting him. And he confessed that his instinct was to shoot even sooner.[124]

Police cannot immediately open fire on someone who poses no threat to others and then seek refuge in qualified immunity by claiming there was no time to

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[121] *Id.*

[122] 138 S. Ct. at 1153 ("Hughes had moved to within a few feet of [the bystander]; and she failed to acknowledge at least two commands to drop the knife.").

[123] *Cole v. Carson*, 935 F.3d 444, 455 (5th Cir. 2019) (en banc), *as revised* (Aug. 21, 2019) (concluding that the presence of the bystander, "heightened the risk of immediate harm to another . . . "), *cert. denied sub nom. Hunter v. Cole*, 19-753, 2020 WL 3146695 (U.S. June 15, 2020).

[124] PA75.

assess the situation.[125] The urgency here was of Bartelt's own making.[126] Had he withheld fire this situation may well have also developed into the kind of standoff that is ostensibly so material to our holding in *Bennett*. The irony is exacerbated by Bartelt's taped post-shooting incident report, which, inexplicably, the Opinion totally ignores.

There, Bartelt stated that the scene was dark, "[t]here might've been a few house lights on here and there."[127] As he left his car, Bartelt said he perceived that Gibbons was holding a gun in his left hand, "pointed towards his temple on his left side."[128] Bartelt immediately drew his gun.[129] According to Bartelt's own account, *his first instinct was to open fire*, but he noticed that Gibbons was standing in front of a residential house, "which is why I initially did not shoot right away."[130] He said that he only fired once he realized that there were no lights on in the house and no car in the driveway because he then felt

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[125] Such an argument is akin to the "legal definition of chutzpah," a defendant who kills his/her parents and then pleads for mercy as an orphan. *Harbor Ins. Co. v. Schnabel Found. Co., Inc.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991).

[126] The *Kisela* dissent made a similar observation. 138 S. Ct. at 1160 (Sotomayor, J., dissenting). But there, unlike here, the police felt they had to act rapidly to protect a vulnerable bystander who appeared to be in imminent danger from a knife-wielding assailant. *Id.* at 1153.

[127] PA72.

[128] *Id.*

[129] PA73.

[130] PA75.

comfortable using his weapon. Gibbons "still had the gun to his head and he was just standing there facing me, looking right at me," when Bartelt shot him twice.[131]

Thus, according to Bartelt's own report, he had time to realize that there was a nearby house and someone might be injured if he fired his gun, then look more closely and process the fact that there were no lights on in the house, no car in the driveway and conclude no one was home, before opening fire on Gibbons. According to Bartelt's own description of the incident, this was not an immediate reflexive action to defend himself from Gibbons or to prevent Gibbons from harming fellow officers or anyone else. Rather, according to Bartelt, he opened fire after processing all of the above and seeing that Gibbons held a gun "pointed towards his temple on his left side."[132] Only then, despite conceding that Gibbons had not threatened him,[133] did Bartelt act on his initial impulse, which was to fatally open fire.

This is a far cry from the numerous situations where officers feel instinctively compelled to use deadly force to prevent someone from harming an officer or bystander, thereby justifying the protective umbrella of qualified immunity. In such urgent situations, qualified immunity is appropriate even if the officer's instant perception of the situation was inaccurate. Officer Bartelt's own undisputed account—if accepted by a fact finder—establishes that he did not act as

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131 *Id.*

132 PA72.

133 A160.

instantly or instinctively as the Opinion attempts to suggest.[134]

Thus, to the extent the Opinion seizes upon urgency as one of the factors that distinguish this case from *Bennett*, it is just wrong. According to Bartelt's own testimony, the specter of urgency painted by the Opinion simply did not exist given our standard of review here. Moreover, to the extent an interpretation of the facts suggests that an urgency did exist, it was a circumstance of Bartelt's own making. There was no accompanying justification of imminent harm, which was the crucial foundation of the Court's reasoning in *Kisela*. The Opinion's three-part attempt to differentiate the facts here from those in *Bennett* is as inaccurate as it is unpersuasive.

E. Misplaced reliance on other precedent

Finally, the Opinion is misguided to the extent that it suggests our decision in *Lamont v. New Jersey* supports its reasoning.[135] There, police chased a suspect through woods at night. When they finally

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[134] Reasonable jurors could also conclude that this testimony—suggesting that Bartelt carefully surveyed the area, observed a house, but inferred no one was home before firing—was self-serving testimony offered to establish that he exercised reasonable care before shooting. That is true even though it tends to undermine his immunity claim because it shows that there was more opportunity for observation and deliberation than Bartelt's rapid fire suggests. Thus, reasonable jurors might well conclude that this testimony negates Bartelt's entitlement to qualified immunity, just as the District Court held.

[135] 637 F.3d 177 (3d Cir. 2011).

cornered him, he yanked something out of his waistband and police opened fire, believing it was a gun.[136] The *Lamont* Court held that response was reasonable.[137] The Opinion here concludes that the confrontation with Gibbons was therefore justified because although the suspect in *Lamont* ultimately did not have a gun (although officers reasonably believed that he did), Gibbons actually did have a gun. Simply put, that non sequitur defies logic.

The fact that the suspect in *Lamont* was perceived to pose a threat to others without a gun says nothing about whether Gibbons posed a threat to others with one. In fact, unlike the *Lamont* suspect, who fled through the dark woods and suddenly pulled something from his waistband in response to an order not to move, Gibbons made no sudden moves. He was pointing the gun only at himself, not at the officers, and had been walking down the street, not fleeing from arrest or resisting in any way. In *Lamont*, unlike here, the police unquestionably had justification to fire. The Opinion's reliance on *Lamont* is unhelpful.

The Opinion also quotes our statement in *Lamont* that "[p]olice officers do not enter into a suicide pact when they take an oath to uphold the Constitution."[138] No rational person could disagree. However, neither do police thereby obtain a license to *unreasonably* use force, let alone deadly force. This is even a basic tenet of official New Jersey State Police policy. That Policy forbids shooting someone (such as Gibbons) who is

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136 *Id.* at 183.

137 *Id.*

138 *James*, 957 F.3d at 173 n.6 (quoting *Lamont*, 637 F.3d at 183).

threatening only himself. The Policy states: "Deadly force shall not be used against persons whose conduct is injurious only to themselves."[139] As I have reiterated, we are among those courts that hold it is unreasonable to shoot someone who only threatens harm to him/herself. Invoking the concept of a "suicide pact" to justify deadly force and qualified immunity here may add a rhetorical flourish to the Opinion, but it is seriously misplaced and misleading given the record before us.

Finally, despite the fact that the use of deadly force in *Lamont* was justified, it should be remembered that we nevertheless ultimately did not grant qualified immunity in that case. We declined to do so because it was disputed whether officers continued firing after the decedent no longer reasonably posed a threat.[140]

III. The Opinion Ignores Supreme Court Precedent

The Opinion's reliance upon disputed facts also contravenes on-point Supreme Court precedent for qualified immunity cases on review from denial of summary judgment. The Opinion looks to what it terms, "[t]he closest factually analogous Supreme Court precedent, *Kisela v. Hughes*."[141] As I have already explained, *Kisela* is distinguishable since the police there needed to act quickly because Amy Hughes was holding a large knife within reach of an innocent bystander. By contrast, Willie Gibbons did not threaten

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139 PA428.

140 637 F.3d at 185 ("[T]he dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.").

141 *James*, 957 F.3d at 170.

anyone but himself and Bartelt has never said that he did.[142] Because the Opinion erroneously views the facts in a light favorable to Bartelt, the "closest factually analogous Supreme Court precedent" is not *Kisela*, but *Tolan v. Cotton*,[143] which the Opinion fails to even mention as part of its summary judgment analysis. *Tolan*, like *Kisela*, was decided after Bartelt shot Gibbons and therefore could not have informed Bartelt about the reasonableness of his actions. Nevertheless, it is directly relevant to the legal analysis here insofar as it instructs how factual disputes must be analyzed under the clearly established prong of a qualified immunity inquiry.

In *Tolan*, as here, the parties disputed several aspects of a police confrontation resulting in a fatal shooting. Like here, the disputed facts included whether there was enough light to see clearly.[144] The Court of Appeals for the Fifth Circuit granted qualified immunity on the grounds that it was possible for an officer to have "reasonably and objectively believed that [the

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[142] A160 (conceding that Gibbons never issued any sort of threat).

[143] 572 U.S. at 657 ("In holding that [the victim's] actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to [the officer] with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party[.]") (quoting *Anderson*, 477 U.S. at 249).

[144] *Id.* at 657–58 (contrasting the officer's testimony that the area "was fairly dark" with the victim's attestation that "he was not in darkness.") (internal quotation marks and citations omitted).

victim] posed an immediate, significant threat of substantial injury to him."[145] The Supreme Court reversed because, "the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion."[146] That is precisely what our Opinion does here, despite the Supreme Court unanimously rejecting such an approach.[147]

The Fifth Circuit's careful en banc decision in *Cole v. Carson*[148] amplifies the relevance of *Tolan*. There, officers pursued a suicidal young man, Ryan Cole, and fatally shot him while he pressed a gun to his own head.[149] As here, it was disputed whether the officers warned the victim before opening fire, and, if so, whether they gave him an opportunity to comply.[150] The circumstances are not identical; Ryan Cole survived and his suit subsequently alleged that the officers conspired to lie about the threat he posed in

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[145] *Id.* at 655 (quoting *Tolan v. Cotton*, 538 Fed. Appx. 374, 377 (5th Cir. 2013)).

[146] *Id.* at 659.

[147] *See id.* at 662 (Alito, J., concurring in the judgment) ("I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.").

[148] 935 F.3d 444 (5th Cir. 2019) (en banc).

[149] *Id.* at 448–49.

[150] *Id.* at 455 ("[A] reasonable jury could find that [the victim] made no threatening or provocative gesture to the officers and posed no immediate threat to them. . . . [It] could find [the officers] opened fire upon [the victim] without warning.").

order to justify having shot him.[151] A panel of the Fifth Circuit initially denied qualified immunity, but the Supreme Court summarily reversed and remanded for reconsideration *Ilenix v. Luna*.[152] On remand, the panel reaffirmed its earlier decision, and the Fifth Circuit granted rehearing before the full court. The en banc court explicitly followed *Tolan*'s requirement that disputed facts be viewed in the non-movant's favor,[153] and found from that perspective:

> Ryan was holding his handgun pointed to his own head, where it remained. [He] never pointed a weapon at the Officers, and never made a threatening or provocative gesture towards [the] Officers. [The officers] had the time and opportunity to give a warning for Ryan to disarm himself. However, the officers provided no warning . . . that granted Ryan a sufficient time to respond, such that Ryan was not given an opportunity to disarm himself before he was shot.[154]

Viewed in that light, the en banc court affirmed the denial of qualified immunity. The court explained: "[w]e conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in . . . the record as to the [plaintiffs'] excessive-force

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[151] *Id.* at 448-50.

[152] *Id.* at 447; *Hunter v. Cole*, 137 S. Ct. 497 (2016) (vacating and remanding for reconsideration).

[153] 935 F.3d at 456 n.72 (citing *Tolan*, 572 U.S. at 660).

[154] *Id.* at 449 (quotations omitted).

claim."[155] While Gibbons' death leaves us reliant on the officers' recounting of events, there are many similarities between *Cole* and *James*. In both cases, *Tolan* requires that the facts be viewed in the non-movant's favor. As noted before, the Opinion entirely ignores *Tolan*; it also ignores *Cole*. Under *Tolan*, we must view the facts in Gibbons' favor; when we do so, *Bennett* clearly governs this case.

IV. *Bennett* is Not an Outlier

I realize that, given the controlling precedent of *Bennett*, precedents from other Circuits are not relevant to our qualified immunity analysis. Nevertheless, before concluding, I think it helpful to note that every Circuit Court of Appeals that has addressed this issue in a precedential opinion, and there are ten of them,[156] has held that it is a *clear violation* of the Constitution to shoot someone who is only threatening self-harm.[157]

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[155] *Id.* at 447.

[156] Every circuit except the Second and D.C. Circuits has issued a precedential opinion on this subject. *Cf. Chamberlain Est. of Chamberlain v. City of White Plains*, 960 F.3d 100, 103, 110–13 (2d Cir. 2020) (denying qualified immunity on excessive force and other claims when police fatally shot a mentally ill but not suicidal man in his own apartment after he begged them to leave him alone).

[157] *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc) (denying qualified immunity at summary judgment for officers who shot a suicidal man as he held a gun to his own head because the facts viewed in plaintiffs' favor showed he was no threat to anyone but himself), *cert. denied sub nom. Hunter v. Cole*, No. 19-753, 2020 WL 3146695 (U.S. June 15, 2020); *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 567 (8th Cir. 2019) (declining to permit qualified immunity for officers who shot a 17-year-old with a gun pressed to his own head when he allegedly started moving it,

This holds particular force and urgency when police confront individuals suffering a mental health crisis. The Court of Appeals for the First Circuit

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finding "no reasonable officer could conclude [the victim] posed an immediate threat of serious physical harm."); *McKenney v. Mangino*, 873 F.3d 75, 79 (1st Cir. 2017) (emphasizing that "[n]one of the officers had warned [the suicidal individual] that they would use deadly force if he refused to drop his weapon."); *Weinmann v. McClone*, 787 F.3d 444, 446–47 (7th Cir. 2015) (affirming a denial of qualified immunity where an officer shot a suicidal man who was holding a gun to his own head); *Cooper v. Sheehan*, 735 F.3d 153, 159–60 (4th Cir. 2013) (rejecting a claim to qualified immunity by officers who opened fire at a man who was holding a gun but not aiming it at them); *Glenn v. Washington Cty.*, 673 F.3d 864, 873–74 (9th Cir. 2011) (declining to award qualified immunity where officers gunned down a suicidal young man who had a knife and had threatened to "kill everybody" because the officers needlessly opened fire); *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006) (reversing a grant of qualified immunity where police "acted precipitously in shooting [a suicidal individual whom they believed to be holding a gun], who posed a danger only to himself. . . . [the victim] did not pose an immediate threat to the safety of the officers or others. He had made no threats and was not advancing on anyone . . . "); *Mercado v. City of Orlando*, 407 F.3d 1152, 1157–61 (11th Cir. 2005) (finding officers who found a man holding a knife to his own chest, "should not be afforded the protection of qualified immunity" when they fired within seconds and without warning); *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998) (remanding a qualified immunity grant to two officers who shot and killed a man who had stabbed himself with a knife and who they believed had a gun, "[b]ecause the District Court failed to view the evidence about how the shooting happened in the plaintiffs' favor and overlooked contentious factual disputes concerning the officers' actions . . . "); *Cf. Rogers v. King*, 885 F.3d 1118, 1120, 1122 (8th Cir. 2018) (finding qualified immunity proper where police officers encountered a suicidal woman with a gun to her head and did not shoot her initially but then opened fire once she started waiving the gun around and eventually pointed it in the officers' direction).

observed, "federal courts have afforded a special solicitude to suicidal individuals in lethal force cases when those individuals have resisted police commands to drop weapons but pose no real security risk to anyone other than themselves."[158] Here, of course, the Opinion points to Gibbons' failure to drop his gun even though it is not even certain that Gibbons resisted a command to drop his weapon.

The Opinion dismisses several of these cases by other Circuit Courts of Appeals as either too vague, or too recent,[159] to have formed a "robust consensus of cases of persuasive authority in the Courts of Appeals."[160] Even if the Opinion is correct that the uniform conclusion already reached by several other Circuit Courts of Appeals at the time Bartelt shot Gibbons had failed to establish a clear right, it offers no principled reason for departing from our own binding precedent. As I have explained, the Opinion's efforts to explain why *Bennett* does not control either rely upon differences that yield no distinction or are just plain wrong in describing relevant "facts."[161]

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158 *McKenney*, 873 F.3d at 82.

159 *James*, 957 F.3d at 173.

160 *Id.* at 170 (citing *Bland v. City of Newark*, 900 F.3d 77, 84 (3d Cir. 2018)).

161 *See, e.g.*, the Opinion describing David Bennett as "comparatively compliant," 957 F.3d at 172; incorrectly distinguishing *Bennett* based on the purported difference that "Gibbons was carrying and earlier that evening had brandished a firearm," *id.*; repeatedly adopting a view unduly favorable to Officer Bartelt when it takes as true the disputed facts that Gibbons was ordered to drop his weapon, was given time to respond, and failed to comply. *Id.* at 166, 168, 171-72.

V. Conclusion

To summarize: *Bennett* controls this analysis and failing to grant the Petition for Rehearing is a serious mistake.[162] There will always be differences between two events featuring different participants, separated by time and place. The Supreme Court has never required a prior case that is absolutely identical to the circumstances surrounding a plaintiff's claim, nor could it. No such case will ever exist and requiring one tacitly transforms qualified immunity into absolute immunity.

What is required is notice. Controlling precedent that is based upon circumstances sufficiently similar (when analyzed at an appropriate level of generality) to inform a reasonable officer that his/her conduct violates clearly established law.[163] *Bennett* is exactly such a case. To reiterate once again our unqualified pronouncement there, if the victim "did not pose a threat to anyone but himself, the force used against him, *i.e.* deadly force, was objectively excessive."[164]

For the reasons I have explained, *Bennett* remains the law of this Circuit even after the denial of this Petition for Rehearing. However, institutionally, en banc reconsideration of the Opinion is certainly

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[162] At minimum, we should comply with the *Forbes* supervisory rule and remand the case to the District Court for it to spell out the disputed material facts. *Forbes*, 313 F.3d at 149. That rule exists so that we will not decide a weighty question such as this—whether our precedent created clearly established law in a given scenario—without clarity in the record as to the disputed facts.

[163] *See Kisela*, 138 S. Ct at 1152 (cautioning against defining "clearly established law at a high level of generality.").

[164] *Bennett*, 274 F.3d at 136.

preferable to relying on the operation of I.O.P. 9.1 to prevent an officer from subsequently attempting to claim that our law on this issue is not clearly established. It is, and it will remain so after today.

While remaining appreciative and cognizant of the risks that law enforcement officers face daily, we must nevertheless take care not to transform the shield of qualified immunity into a sword that licenses unreasonable force. I therefore must respectfully dissent from my colleagues' decision to deny the petition for rehearing in this case. I do not reach that conclusion lightly. This is only the second time in 26 years on our Court that I have thought it necessary to draft an opinion dissenting from a denial of rehearing. But, in Justice Frankfurter's words: "justice must satisfy the appearance of justice."[165] Given our controlling law here, that appearance is sorely lacking if we grant Trooper Bartelt immunity as a matter of law.

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165 *Offutt v. United States*, 348 U.S. 11, 14 (1954).

DEPOSITION OF JOANNE LEYMAN– RELEVANT EXCERPTS (FEBRUARY 23, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: WILLIE GIBBONS; ARLANE JAMES, J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS; L.M.G., A MINOR, BY HER MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS,

Plaintiffs,

v.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; SERGEANT JAMES MCGOWAN, STATE TROOPER NOAH BARTELT; STATE TROOPER PHILLIP CONZA, STATE TROOPER MICHAEL KORIEJKO, STATE TROOPER DANIEL HIDDER IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, JOHN DOES 1-10

Defendants.

No. 1:13-cv-03530

[February 23, 2016, Transcript, p.8]

. . . correct?

A. Right, right.

Q. Now, if you look at this picture, could you tell us—there was an incident that happened. Could you just describe what time you actually heard a commotion the day of May 25th?

MR. FREEMAN: Objection.

BY MS. STERLING:

Q. You heard anything that was out of the norm on May 25th, 2011?

A. I would say it was around 9 or a little after 9 in the evening.

Q. And was it dark outside?

A. Yes, it was.

Q. What did you hear?

A. I was sitting in my living room and I heard a pop, pop, which. I thought was a tire that was blown.

Do you want me to continue?

Q. Yes, um-hum.

A. I got up and went in my bedroom and looked out the window and I saw a trooper leaning over somebody. And all I could hear him say was, Willie, can you hear me? Willie, can you hear me? And after that, I went back in my living room and didn't look out there anymore.

Q. And you said you saw a trooper leaning over someone?

A. Yes.

Q. Now, were the shots fired quickly after the other or was it like one—

A. It just went pop, pop. That's it.

Q. Twice. Did you hear any exchange of words before that outside?

A. No.

Q. When you came outside you said you looked through your window. When you looked through your window, you saw an officer leaning over a person?

A. Right.

Q. Did you get a chance to see that person at all?

A. Just the body that was laying on the ground.

Q. And do you know the race of the body—of the person that was laying on the ground?

A. No, I did not.

Q. Did you see anything in the person's hand that was laying on the ground?

A. No, I did not.

Q. Did you see a gun or anything next to the person that was laying on the ground?

A. No, I did not.

Q. And when you went to the window and you saw him, that person, lying on the ground, was he already on the ground when you got to the window?

A. Yes.

Q. How quickly after you heard the pop, pop did you go to the window?

A. Maybe one, two minutes. I just got up and went and looked.

Q. How far is your living room from your window—where you were sitting, rather, from the window?

A. Maybe 25 feet, if that.

Q. Did you go immediately?

A. Yes.

Q. And when you went to the window, you said—how many officers did you see?

A. One.

Q. You saw just that one officer over him?

A. Right.

Q. You didn't see any other officers around?

A. No.

Q. Did you see any other—did you see any cars, police cars there?

A. Just the one that was in the road.

Q. Just one car was in the road?

A. Yes.

Q. And you said that the officer—and the officer that shot him was—was there. So there was only one officer and Willie was on the ground, and there was one police car. And the officer was saying, Willie, Willie—what was he saying to Willie?

A. He was saying, Willie, can you hear me? Willie, can you hear me?

Q. Did you hear Willie say anything to the officer?

A. No, I did not.

Q. And how long did you look outside?

A. Oh, gosh, it was maybe five minutes.

Q. And so there was one car there. There was one officer over Willie and you looked on the ground and Willie was on the—did you see a backpack or anything else around Willie?

A. No.

Q. Did you happen to see a wallet or anything?

A. No.

Q. Did you happen to see the officers—the . . . .

[. . .]

DEPOSITION OF PHILIP CONZA– RELEVANT EXCERPTS (OCTOBER 20, 2015)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF CAMDEN

IN RE: WILLIE GIBBONS; ARLANE JAMES, J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L AND L.M.G., MINORS, BY THEIR MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS,

Plaintiffs,

v.

NEW JERSEY STATE POLICE, STATE OF NEW JERSEY; SERGEANT GREGORY LEACH IN HIS INDIVIDUAL CAPACITY, AND JOHN DOES 1-10,

Defendants.

Civil Action No: 13-cv-3530

Before: Hon. Joseph H. RODRIGUEZ, U.S.D.J.

[October 20, 2015, Transcript, p. 101]

A. I didn't hear Willie say anything There was talk back and forth, I think. I remember Bartelt because his voice was, you know, he was—he was elevated as far as using constructive force, yelling, screaming.

Q. Was Willie still walking at that point or did Willie stop?

A. He was standing there, yeah.

Q. Did Willie—when you saw, did Willie turn at any time or whenever you saw Willie, where Willie was until the time he was shot, do you recall?

A. I don't remember him turning. Basically he was standing there ablated to me.

Q. And he was standing north—he was still facing a little bit northeast at that point?

A. I couldn't see him during my approach.

MR. HUNT: Where are you?

A. This is my Troop car.

MR. HUNT: Put your name or initials there.

A. I exit mv Trop car and I might have even been a little further over here, I make a diagonal approach towards Willie and Trooper Bartelt. At this point, I am yelling to Bartelt because the only thing I see is his right side, there is nothing on his right side, there is no gun, nothing that I see on his right side. I am yelling to Bartelt, does he have a gun, does he have a gun. Bartelt has his gun raised, he yells, he responds, I don't know if he's responding to me or Willie, it was inarticulate-able but at that time that's when the two shots were fired and I observed the recoil in Officer Bartelt's at that point.

MR. HUNT: How far were you at that point, distance wise?

A. Not far—I am probably at the back of the Troop car though.

MR. HUNT: Wait a minute, in relationship to Gibbons, how close are you? You can't tell me the distance? You are the first Trooper who can't.

A. An exact distance—

MR HUNT. An approximate distance.

A. I am, within feet because after it occurs, Gibbons goes down and I am on top of him handcuffing him.

MR. HUNT At the point in time when the first shot is fired, are you five feet, ten feet, seven feet, give me an approximate not exact.

A. I would say seven feet

Q. Was it light or dark at that point?

A. Was I seven feet?

MR. HUNT: Approximately?

A. You are asking me, this is five years ago, five feet, seven feet that's pretty specific.

MR HUNT: I am asking you.

A. I am trying to think of where I was in relation to the Troop car,

MR. HUNT: More than five, less then ten?

A. I think in between.

Q. So you saw Willie, You could see him pretty clearly, it was light at that point?

A. I could see the right side of Willie, correct.

Q. And it was not dark, you didn't have your lights on?

A. I don't remember it being dark. It was still light. It was starting to get, but, yeah

Q, You said that you ran and secured him—after he was shot, you heard two shots?

A. Correct.

Q. And you saw the recoil?

[. . .]

DEPOSITION OF NOAH BARTELT– RELEVANT EXCERPTS (SEPTEMBER 22, 2015)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF CAMDEN

IN RE: WILLIE GIBBONS; ARLANE JAMES, J.R.G., A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; D.K.L AND L.M.G., MINORS, BY THEIR MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS,

Plaintiffs,

v.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; SGT JAMES MCGOWAN, TPR NOAH BARTELT; TPER PHILLIP CONZA, TPR MICHAEL KORIEJKO, TPR DANIEL HIDDER IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, JOHN DOES 1-10

Defendants.

Civil Action No: 13-cv-3530

[September 22, 2015, Transcript, p. 75]

A. No.

Q. Okay. Is there a policy that when you actually accost a citizen that you should turn on the video cam?

A. I'm not sure. I believe during generic pedestrian contacts, you should have a video camera.

Q. So during generic you would have it on, but not when there is a situation that—

A. When you're like in a continuing investigation or a situation that where you're already investigating something it's not, it's considered a continuing invest, not a pedestrian contact.

Q. But even though Willie Gibbons was on foot at that point, you didn't feel that you should turn on the video because he was a pedestrian at that point? He wasn't in his car when you saw him, correct?

A. Excuse me?

Q. Willie Gibbons was not in the car when you saw him, correct?

A. No.

Q. He was walking.

A. Correct.

Q. So he would be a pedestrian at that moment, correct?

A. I guess you can call it that.

Q. And so the video was not turned on at that point?

A. No, there was no video used.

Q. Was it operational?

A. Yes.

Q. And how do you know it was operational, do you test it when you get in the car?

A. At the start of our shift we do a pre-op check to make sure that the cameras and the mike boxes work.

Q. Do you recall, do you know if any one of you had a camera on that night?

A. I don't recall, no. I think I had it at some point when I used my lights driving from the Mom's house to Burlington Road, I think I might have put it on. But then I just—when you turn your lights on, it automatically activates so I turned my lights off, I didn't need it anymore so I shut the camera off.

Q. So if you had turned on the lights when you were going, it would automatically come on?

A. Correct.

Q. But the minute you turned the lights off, it automatically turns off?

A. No, you have to manually turn the camera off.

Q. So you turned off the lights and the camera?

A. Yes, because I didn't want to—when I approached Burlington Road, I didn't want to have any lights on because I didn't want the lights to scare Mr. Gibbons to have him run away and for us to get in a foot pursuit and not be able to find him.

Q. So why do you turn the camera off because the camera doesn't make any noise, does it?

A. There's no requirement to have the camera on.

Q. Do you wish you had turned the camera on today?

A. It probably would have helped if I had it on.

Q. And did anyone have their lights on when they were coming, going towards Willie Gibbons?

A. No.

Q. You were the only one with a siren on?

A. No, I didn't have my siren on. I didn't even have my lights on, like I said.

Q. When you left the mother's house, did you and Conza—you and Conza left together, correct?

A. Correct.

Q. And did you both have the lights on when you left initially or just you had your lights on?

A. No. I think I said I believe at some point, from what I can remember, at some point I activated my lights and somehow the camera was turned on usually from activating the lights and then that's when I turned my lights off and the camera off.

Q. So the camera was on for a little while?

A. Yes.

Q. Did you give that footage to anyone, the little time the camera was on?

A. I told, I told the shooting response team about that. They just informed me that they reviewed the tape and it was just me for a split second, not a split second, but a few seconds just the trooper car driving down the road.

Q. Okay. And so you said that you then drove, you and Officer Conza, you both left at that point and you were driving towards Burlington Road, correct?

A. Correct.

Q. And in what direction were you going at that point?

A. We started out we were going northbound on Walden Street which was the address of the mother's house. We made a left-hand turn onto Reeves Road which would have been heading in a west direction and that's when we got to the intersection at Burlington Road and we made a right on Burlington Road which would have us traveling northbound.

Q. And' is that in direction of your station or would that northbound being going towards your—

A. The State Police barracks?

Q. The barracks.

A. Yes, that would have taken us directly to the barracks with two turns.

Q. Did you wonder where Willie Gibbons was going on foot at that point?

A. After the fact I thought about it, but at the time it wasn't really, it was more of a concern of getting him, making sure everything's safe and that the victim's safe and then making an arrest.

Q. Could he have been going towards the barracks?

MR. RIZZO: Object to the form of the question.

A. He was walking in. that direction.

Q. So he could have been going towards to give himself up then, correct?

[Transcript, p. 83]

. . . together, though, correct?

A. Yeah. He was either behind me or one or two cars behind me, I don't know.

Q. And approximately what time was that?

A. I'm just going with 8:30 the whole time. I mean that's when the whole kind of thing happened. I don't know the exact minutes and all that stuff.

Q. So you came up and what did you do after that?

A. I was driving down northbound lane, as I said. At that point I see a male subject walking northbound, however, he was on the southbound side of the street. He was wearing jeans, he had a bookbag on and he was wearing a black jacket that had yellow, reflective lettering on it, bright yellow lettering.

Q. And what do you do at that point?

A. At that point it kind of clicks in my head that this fits the description that was just given to me through dispatch so I'm staying in the north-bound lane. I kind of get close to the subject which is identified as Mr. Gibbons. At that point Mr. Gibbons, he sees me driving down, kind of slowing down. He turns his head to the right, looks at me and he says stay away from me.

Q. And were you in your car then when he said stay away from me?

A. I was in my car in the northbound lane.

Q. And how close was he to you when he said stay away from me?

A. I would say this whole intersection was within 15 yards.

Q. Was your car on and you were driving or you stopped your car?

A. I was either going very slow or at a stop.

Q. And was the window at that point?

A. My window was open.

Q. When he said stay away from me, how loud did he say stay away from me?

A. He didn't mumble it, he didn't shout it at the top of his lungs, it was just—he spoke loudly.

Q. And you knew then that Mr. Gibbons was a black man because, of course, the whole—you knew that he was black, correct?

A. Correct. Because I pulled his picture up in my computer, like I said, before I left the station.

Q. Okay. Great. And you said—did you stop your car then when he said stay away from me?

A. At that point when he turned, looked at me and says stay away from me, that's when with the clothing description coupled with the photo that I did, as I pulled up the first time, he looked at me, I didn't say anything to him and he said stay away from me. And then as I was kind of going across traffic to kind of stop my troop car, again, he said, stay away from me or something to that extent and then he turned around and put the gun to his head.

Q. So while he was talking to you he kept walking?

A. Yes. But the first few—

Q. What was he doing? I mean I'm just trying to find out when you said he said stay away from me, what exactly was he doing when he said stay away from me?

A. He was walking and turning his head to the right so his chin was kind of at his shoulder and he was still walking. He kind of looked back at me, looked at me and said stay away from me.

Q. So he was walking and said stay away from me and, so, he kept walking?

A. Yeah, correct, and he continued to walk.

Q. And you continued to drive up towards him?

A. I mean he was walking so, yeah, I closed the distance a lot faster with a car so I was kind of—he was walking and then the first time he said stay away from me I was like, alright, I have to get out of the car because he's probably going to run from me. So that's when I tried to pull my car over to him and get out of my car so I could put it in park and get out.

Q. So you moved your car closer to him to block him from running, is that what you mean?

A. No, because he was on the grass. Like I said, I just kind of to get me closer to him kind of, I just kind of pulled my car into the southbound lane of travel and kind of slanted a little bit kind of facing directly at him to a certain extent.

Q. And you said he was walking. Describe walking to me because I don't know, walking could mean —what do you mean by walking?

A. Just—he wasn't stumbling, he wasn't moving slow, he wasn't running and he was just a normal like a walk.

Q. Okay. And when he said stay away from me, what do you say to him?

A. That's when I turned my car over, my window was down and I said come here.

Q. And did you identify yourself at any time?

A. I'm not sure if I verbally identified myself, but it would have been by my car, the uniform I was wearing as visible state police identifiers on the car, on my uniform.

Q. Was it light during that time, 8:30, you said 8:30 in May, was it still light outside?

A. I'm not sure, but I think it was dark out.

Q. Did you have your light on at that point?

A. My headlights were on.

Q. Your headlights. But were your headlights facing Mr. Gibbons or were they facing the street?

A. I think they were still facing the street.

Q. And did you get a clear view of Willie Gibbons because you said your light was on, correct?

A. Yes. I could see—like I said, I could see, I could see his bookbag, I could see his jeans, I could see his black jacket and I could definitely see the yellow lettering on this jacket.

Q. And then you said that he—at that point what happened next? So then you said and so he then after you said come over here, what did Willie Gibbons do next?

A. He turned with the gun, put the gun to his head in his left hand and said stay away from me.

Q. What did you do next?

A. At that point I said, I told him to drop it.

Q. Do you recall saying that or you might have said it?

A. No, I know I said it.

Q. And what did he say?

A. He didn't any anything or do anything. He might have like continued to say stay away from me, I'm not sure.

Q. So he had the gun to his head and you say drop it and he just had the gun to his head looking. Was he looking at you, directly at you?

A. Yes.

Q. How far was he in feet?

A. I'd say approximately anywhere's—like I said, I can't tell distance, but anywhere between seven to 14, 15 yards.

Q. And were you still within your door speaking to him when you said drop it?

A. That's when—I was still in my car when he turned with the gun in his hand, that's when I got out of my car and I drew my gun on him.

Q. So when he turned with the gun to his head, you were already, you were in your car?

A. Yeah.

Q. And when you saw him with a gun to his head, you got out of your car?

A. Correct.

Q. And then you—and then where did you go, did you go towards him or did you—what did you do?

A. I stayed inside the, door jamb of my car because it was kind of—once you see the gun in play you kind of have to almost stay where you're at and kind of hold your ground.

Umm, it did happen really fast. You have to understand when I say I was in my car when he drew the gun, I was putting the car in park, like opening the door, at some point I might have been stepping out. So there was just a lot going on that I wasn't just sitting in my car with two hands on the steering wheel, I was making an attempt to get out of my car as he was turning around with the gun in his hand.

Q. And did you normally, would you normally ask for backup when you're dealing with something like this where you have to arrest someone?

A. I knew Trooper Conza was behind me. I mean we had four guys working that night so having two guys on the scene at once is pretty good for us, so.

Q. So and you knew that Hidder because Hidder turned around, so you knew he was coming back.

A. Yeah, he knew where we were at. I think Trooper Koriejko was probably heading in that direction.

All four of us were on the road in that area so there's no need to call for backup because everyone knows where, you're at and what's going on.

Q. So you could have waited at that point to allow the others, since he is on foot and he wasn't running, you could have waited at that point for others to come up at the same time and then you would have had backup at that point, correct?

A. No, because if someone who thinks they did something wrong, they might possibly think they might be under arrest isn't just going to sit down and wait and I'm going to sit down and wait and kind of call a timeout until other people arrive, that's not kind of how it works.

Q. Oh. So from your training he had a gun to his head threatening himself.

A. You're talking about when he has the gun to his head?

Q. I'm saying to you when you came up and you saw him and if you were going to get out to arrest him, is it normally, would you have waited for someone to come normally or you would just get out on your own and arrest him or since there are other people around, other officers around?

A. No. You just, you got to get out, you got to diffuse the situation as fast as possible. You can't sick back and wait and wait, again, it doesn't make sense.

Q. So you then decide that you were going to take care of this yourself, you didn't need, because they're all coming and you were going to move on your own at this moment?

A. Correct.

Q. Because that makes more sense, correct?

A. Yes.

Q. Okay. So then, you got out of your car, he was there, he had the gun to his head and you got out of your car and. then you went to the door jamb, you said, and what happened next?

A. That's when I told him to drop it. He refused the command, he just didn't do anything. So I told him to come here, he didn't do that. I told him to drop the gun, he didn't do that. At that point Trooper Conza comes from my left, he's coming from behind me on foot. And Trooper Conza, he sees the gun, at that point he sees the gun and he asked me like is that a gun.

At that point I might I might have responded to him, I might not have if I said yeah or whatever and at that point is when I shot and fired my handgun twice.

Q. You fired more than twice because you fired a third time, but it jammed; is · that correct?

A. Correct. Two rounds came out of my gun.

Q. So you were firing at that point. When you fired the first time, what did Willie do?

A. State Police during our firearms training were taught to double tap, it's a military and law enforcement, it's called double tap. So when you fire, you usually fire twice and then you assess the situation after those two rounds of fire.

Q. Why do you fire a third time?

A. I couldn't tell you. Adrenalin, I don't know.

Q. And what happened when you fired a third time?

A. Nothing happened. So at that point I kind of see Mr. Gibbons drop, kind of collapse to the ground. So I kind of, I play with my handgun for a second, try to figure out the problem, make sure I reengage it, make sure it's still alive again and I see Mr. Gibbons on the ground. At that point I put the gun in my holster.

Q. And just describe for me, you said he dropped. Can you describe exactly how he dropped?

A. Umm, just collapsed. I mean his—

Q. He just fell—

A. Fell, yeah, fell, on the ground.

Q. Did he turn to the left, did he turn to the right?

A. I'm not sure, just kind of straight down. And then once he got to the ground I'm sure his body manipulated a certain way, but.

Q. And when he was going down, what happened to, did you see what happened to, you said, that the gun was in his hand, what happened to the gun that was in his hand.

A. Yeah, the gun fell—I mean he dropped the gun, the gun fell approximately two to three feet away from his body.

Q. And you knew then that he was shot, correct?

A. Yes. I inferred that based on his reaction, yes.

Q. And you then, you said that he—just one question I want to ask you. When he was—before you shot him, where exactly was his body?

A. On Burlington Road.

Q. Was he facing you directly, was he facing—was he still like turned? I mean could you describe exactly how his body was when you shot him?

A. I can tell you he was looking at me and his—whether or not his shoulders were, directly facing me like mine and yours are right now, I can't tell you that. He might have been pivoted over a little bit to the left or the right, but I know that his head was in line with my head because we were making eye contact with each other.

Q. He was about your height?

A. I'm not sure.

Q. How big a person was he?

A. I would say normal of average size, normal.

Q. He wasn't a big guy by any means, correct?

A. No.

Q. And he didn't except to say leave me alone or stay away from me, he didn't threaten you in any way, did he?

A. No.

MR. RIZZO: You mean verbally?

MS. STERLING: Verbally, yes.

. . . pulled up, all that stuff about the whole investigation, that's when I realized, alright, this is Mr. Gibbons, the guy we're looking for?

Q. And what do you say to him at that point?

A. At that point I kind of angle my troop car in the southbound lane of travel. So now I'm in the southbound lane of travel kind of facing traffic coming at me. There was no traffic on the road at the time, but I'm in that lane of travel. Again, at that point, I might say something to him to the extent of come over here.

Q. So you said come over here?

A. Something to that extent.

Q. And what did he say?

A. At that point he turned and—sorry. He turned and turned with his left hand—he turned around, he had a gun in his left hand and pointed the gun to his head and, again, said stay away from me.

Q. When you say—and that's a detail, not—when you said that he turned, tell me what he was doing. So when you and he were talking, did he turn his head to say stay away from me?

A. Yeah. He turned his head either one time or two times, I don't remember how many times. But as he . . . .

[. . .]

STATEMENT OF NOAH BARTELT TO DETECTIVE TIMOTHY COYLE - DIVISION OF CRIMINAL JUSTICE (MAY 27, 2011)

DIVISION OF CRIMINAL JUSTICE
LAW ENFORCEMENT SERVICES

Case:	Police Involved Shooting
Case Number:	DCJ 2011-05844-SRT
Statement Date:	May 27, 2011
Statement Time:	11:45 a.m.
Statement Location:	Bridgeton Station
Statement Of:	Trooper Noah Bartelt New Jersey State Police
Interviewer:	Detective Timothy P. Coyle, New Jersey State Police
Transcribed By:	Francine Lucchesi

Legend:

TC: Detective Timothy P. Coyle, New Jersey State Police

KP: Detective Kiersten Pentony, Division of Criminal Justice

CS: Charles H. Schleiger, Attorney for STFA

CB: Trooper· Christopher Burgos, New Jersey State Police

NB: Trooper Noah Bartelt,

New Jersey State Police

TC: This is the tape recorded statement of Trooper Noah Bartelt. It is Friday May 27, 2011. The time is now 11:45 a.m. We are present at the New Jersey State Police Bridgeton Station, more specifically we're in the Assistant Station Commander's office. I am Detective One Timothy P. Coyle, badge number 5687 of the New Jersey State Police Major Crime Unit. Trooper Bartelt, your statement is being tape recorded and the information you have to offer is very important. It is necessary for you to speak loud, slow and clear. If necessary, it is suggested that you wait a moment to compose your . . .

[Excerpts; Pg. 18]

NB: At the time it was very uh minor traffic.

TC: And again the lighting conditions?

NB: It was dark, no street lights. There might've been a few house lights on here and there.

TC: But having said that, even with those conditions um you were still able to clearly see . . .

NB: Yes.

TC: . . the suspect?

NB: Yes I could still see him. I could still see enough to see IA.

TC: Did you have your lantern on or spotlight?

NB: No I did not have my spotlight on.

TC: Okay. So go ahead, you pull in.

NB: I pull in, he uh I go to put the car in park, getting ready for a foot pursuit. He says again, turns his head not his body and says "stay away from me."

TC: Are you still in the car at this point?

NB: I'm still in the car at this point.

TC: Okay.

NB: So I put the car in park. As I uh . . I guess I say "come here", something to that extent, he ignores me, I'm getting ready to jump out to start chasing after him and then at that point he turns, he has a gun . . I see a gun in his left hand and the gun is pointed towards his temple on his left side.

TC: As he's turning, the first time you saw that . . . did you see where the weapon came from or it was just . . you just saw it coming up in his hand?

NB: Uh no I just saw the weapon come up in his hand. As . . on my approach to him, all I saw was his back and the right side of his body. So he may have had the gun in his hand the whole time or he could've had it in his pocket. Like I could not see his left hand during my initial approach to him.

TC: As he's turning and the gun's coming up, are you still partially in the car or were you already out?

NB: I don't know. I could . . . I was either partially in or out.

TC: Okay. Did you have your weapon out? Did you have your weapon out at this point?

NB: No I did not.

TC: Okay. Describe his actions next.

NB: Like I said he turned . . . he's me and him he's directly facing me and had the gun pointed towards his head and he says "stay away from me" again. At that point, that's when I saw the gun, right when I saw the gun as he was turning, I immediately drew my weapon and had my weapon on him.

TC: Now so when you're pulling your weapon . . when you're drawing your weapon, are you out of the car or are you still partially in the car?

NB: I'm out. When I drew my weapon I was out of the car.

TC: Where are you standing?

NB: Uh the door was open I was standing inside the door right there, in the door jam, right next to my car.

TC: Okay so the door is open as wide as it can get?

NB: Correct.

TC: And so you're between the door and the chassis or the body of the vehicle?

NB: Yes.

TC: And you're standing almost in that V that's created?

NB: Yes.

TC: Or you're through the window?

NB: No I'm standing above the window.

TC: Okay so in that V that's created?

NB: Yes.

TC: Okay um and now . . . are you giving him commands? Is he yelling at you? What's going on right now?

NB: Alls he said was the one . . . he said "stay away from me", I said "drop it, drop it". Um at that point Trooper Conza, he must've . . . I didn't know where he was, I just heard his voice say "is that gun", I may have replied yes.

TC: Alright if I can stop you right there. Your weapon's out. Are you um how do you have it pointed? Do you have it like um . . . there's a pistol shoot we're all trained . . . there's a ready position and there's on target.

NB: I was on target.

TC: Okay. Are you um making any other . . . are you . . . in addition to watching the suspect and where was the gun? Was it pointed at his . . .

NB: It was pointed at his . . . right at his head.

TC: Do you . . . to the best of your ability . . can you describe . . . was it pressed again his skin or was there a space? If you remember.

NB: I don't know.

TC: Um are you making any other observations other than the Suspect?

NB: Yes I was looking at . . . behind him there was a house there which kinda made me . . . this is all going through my head fast so I hesitate I saw the house behind me, which is why I initially did not shoot right away. I saw the house, and then I continued I said there are no lights on, it didn't

appear there were any cars in the driveway, in front of the house and um . . .

TC: And now . . . so you're making these . . . now you're making these assessments, what is the suspect doing? Is he making any motions? Is he . . .

NB: I mean this all happened within a few seconds and he still had the gun to his head and he was just standing there facing me, looking right at me.

TC: Okay and then what . . now what happened?

NB: Trooper Conza says "is that a gun?" I think I replied "yeah" and then that's when I . . . I shot twice, hitting the suspect.

TC: Okay immediately before firing. What's the thought going through your head?

NB: I'm thinking this guy could potentially turn that gun on me, squeeze a round off before I can get a chance to realize that he's turned the gun towards me.

TC: Approximately how far did you feel you were from him?

NB: Ten to fifteen yards.

TC: Although the weapon is at him was he still acting aggressively? Was he speaking in an aggressive manner?

NB: Uh I'm not sure. I don't believe he was speaking at all at that point besides when he was "stay away from me."

TC: Well even the stay away from me, was it . .

NB: It was pretty . . .

TC: aggressive?

NB: Nah he was aggressive from the first time he said 'it, it was in an aggressive manner, "stay away from me."

KY: Was he moving around at this point? Or did he just stop where he was?

NB: Stopped, standing still, facing me.

TC: From the distance that you're describing, is it your opinion that a shot could've . . he could've fired a shot in a relatively almost instantaneous manner?

NB: Yes.

TC: And in the position he was standing, did you have a lot of options if you had to dive out of the way or move around?

NB: No I didn't . . I had . . there was no cover to my left. The only cover was my car but I was . . the way my car was parked I could not hide behind any IA or anything like that. I was either . . had to run around my car to the back, I was out there.

TC: Did you have any, knowledge that the door you were standing behind has had any fortification to make it a totally ballistic uh . . .

NB: No the door . . there's no uh all's it is just uh something to stand behind, a bullet would go right through it in my understanding.

TC: From your perspective at that point the bullet can pass through that door?

NB: Correct.

TC: Um so do you feel that your mobility was limited due to the position that you were in?

NB: Yes.

TC: Um is there a more advantageous position you would've taken had not his weapon been raised so quickly? If you had a chance, would you have put yourself in a better position?

NB: Uh yes.

TC: But you . . . is it fair to say that you were kind of forced into that position due to . . .

NB: Yes.

TC: . . . due to his raising of the weapon?

NB: Yes.

TC: And is it fair to say that as the weapon was raised it was as surprise to you? Or did you almost anticipate that gun coming up.

NB: No I think IA anticipated a foot pursuit; I anticipated him just keep walking and running and then those . . . to see him turn with a gun I did not anticipate that.

TC: So when you saw that gun in his hand coming up that was a shock to you?

NB: Yes.

TC: So when you saw him walking before you got out of the car, you didn't brace yourself, before I get out of this car did you know that this individual had a gun in, his hand?

NB: No I did not know he had a gun in his hand.

TC: From your training and experience, can you take anything from the fact that somebody has a gun in their hand before they even encounter the police? Does that say anything to you as a police officer?

NB: Can you say that again?

TC: Does that say anything to you the fact that before you even encountered somebody they had a gun in their hand? Can you read something froth that?

NB: Uh yes it basically means the IA situation I could potentially not walk away from that situation and I'm in fear of my life at that point you know? I'm getting ready to do what I have to do.

TC: Now um the gun's of his head, you give your commands drop it, and I'm lust refreshing what you said, and Conza asks you if he has a gun, what's your response?

NB: Uh yea.

TC: And then what was the next action then?

NB: Uh I fired my gun two times.

TC: Okay. Um you took . . made a decision to fire, what made you stop firing? Cause how many . . . do you know how many or . . how many uh rounds does your magazine or weapon hold?

NB: The magazine holds thirteen rounds and one in the chamber, so you can put fourteen in there.

TC: Okay so you have . . at least in your mind you have fourteen rounds. What made you stop firing at two?

NB: Uh I believe I squeeze the trigger a third time and nothing happened. That's when I uh I looked at the suspect, the suspect was on the ground, he was moaning so I . . .

TC: How did he get to the ground? Did he fall? Did he leap?

NB: Uh kinda just slowly made his way to the ground I mean . . .

TC: Did he still have the weapon in his hand?

NB: Uh as he was dropping to the ground the weapon fell approximately two to three feet away from his body. It was laying on the grass.

TC.: Okay but you did mention that you felt you had a malfunction with the weapon. Let's say your weapon was still functioning. Would you have stopped firing after the third round? Or did you . . .

NB: Yes. I mean after I saw him indicate that he did get hit and he was on the ground, the confrontation was over, the situation was de-escalated and I was done at that point.

TC: So after . . . after those two rounds and possibly if you could've got the third off, you were ready to reassess the . . . reassess the threat as it was posed to you?

NB: Yes.

TC: And your assessment after that second rout couldn't get the third off, but that assessment was what?

NB: It was that the situa . . . that pretty much I'm safe now.

TC: That immediate threat.

NB: Yes that immediate threat is gone. I mean the gun's still out there but the way he was . . he was on the ground, I knew he wasn't gonna move to get that gun again.

TC: Okay so he's on the around, the gun is . . again you said I think two to three feet? Is that fair to say?

NB: Yes.

TC: Okay what's your next action?

NB: Um that's when Trooper . . I see Trooper Conza out my left eye or in my left view I see Trooper Conza walking onto the scene now. I kinda dropped down, because I checked my gun because like ah what happened? I remember uh I don't know if I pulled the . . . .

STATEMENT OF DISPATCH AND NEW JERSEY STATE POLICE RADIO TRANSMISSION (MAY 25, 2011)

DIVISION OF CRIMINAL JUSTICE
LAW ENFORCEMENT SERVICES

Case:	Police Involved Shooting
Case Number:	DCJ 2011-05844-SRT
Incident Date:	May 25, 2011
Statement Of:	911 Dispatch and New Jersey State Police Radio Transmissions
Transcribed By:	Marge Straccio

(Start of first Track on CD)

State Police IA

Uh hi yes this is Clarence I'm calling in reference to uh my friend Angel Stephens she had filed a uh some kind of a restraining order against her boyfriend.

Yeah

And he's out there in front of the house harassing her.

What's her address?

Uh oh man I knew it it's Barend; Barend Street, Fair, Fairfield Manor Barend Street I think it's

Fairfield Manor is Bridgeton City.

No that's, that's Gouldtown.

What's the address then?

It is Barend Road I think I don't know if it's Road or Street. I'm, I live like three houses down from her in Fairfield.

Well I don't know where I'm going Barend you said?

Yeah Barend

Hold on please

Now you said Barend Street?

Yeah

What's it off of?

Uh IA it's off of uh Duchess, it's like when, when you come in you make that, when you come in you make that first left

Yeah

You, you make the first left and it's middle block

Oh okay so it's in Gouldtown then right

Yeah Gouldtown yeah it's like the middle block

So you don't know what the address is alright I see B-a-r-e-n-d.

Yeah

How far is it off Duchess or is it off Lee?

Off Lee

How far off of Lee?

Oh well she got a big uh

She on the left or right when you come off of Lee on to Barend is she on the left or the right?

Uhhh the, the right.

What's your last name?

Uh Dunns, D-u-n-n-s

First name?

Clarence

And what's your phone number?

uh 856-uh [redacted] uh put [redacted]

And what's her name?

Her name is Angel Stephenson but she had called earlier because he was out here and I guess the police the State Trooper told her she had to come down there I don't know

Okay

what for but

Okay and he's out there arguing with her?

Well he's out there in front of her house yeah.

What's what's his name?

Uh Willie Gibbons. He has a restraining order, I guess she filed one last night.

She did?

Yeah she did.

She did alright where do you live uh Clarence?

I live 51 Seena Drive

What is it?

Seena, S-e-e-n-a Drive

That's the one all the way in the back?

Yes

Okay we'll have somebody come out.

Okay

How, how many houses down off of um Lee is it on the right?

Uh about 1, 2, 3 about 4 she has a [redacted] in her yard.

Okay thanks

Okay thank you.

(Dialing phone)

Answered - Thank you for calling the Bridgeton Police Department, if this is an emergency

Please hold while I try that extension.

Ringing - Bridgeton City Police Detective IA

Uh yeah IA

Yeah what's up

Uh we just had a verbal out in uh Fairfield Manor

Uh huh

On Barend Street

Uh huh

Uh it was a male that apparently departed he, he showed up uh arguing I guess with his ex. and he

Hold on Please

Yeah

Okay

Uh he um his name is Willie Gibbons

Uh huh

He apparently showed up on Barend Street uh with a handgun and then he departed uh he's driving a black F 150 pick'em up and it got some type of stripe going down the side of it.

You got a tag?

Zulu, Tango, Zulu 47

Zulu, Tango Zulu

47 Echo

47 Echo and there's a there's a Warrant for him?

Uh didn't say anything about a warrant he had a verbal and he had a gun with him, if you do find him let us know.

Okay do you have any idea where he's going to headed?

No unknown

I'm sorry

Unknown direction on where's he going

Okay and that was Fairview Manor?

Yup and Barend Street is where he went to.

Had a verbal with his ex and then he departed but he, he did show he had a handgun.

Okay Thank you

Alright

(End)

State Police can I help you.

Uh this is Angel Stephens the cops just sent a dispatch to my house for my baby dad with a gun. I just passed him on uh-Burlington Road walking. He's on foot.

Burlington, what's he wearing?

He got on a black jacket it's got yellow on it, he's walking on a I'm coming towards the station so he's walking on the left side of the road like, like

He's on Burlington walking towards the station.

NEW JERSEY STATE POLICE
INVESTIGATION REPORT
NARRATIVE OF MAY 24, 2011 INCIDENT

Technicians Involved N/A

Assisting Troopers

Badge #	Name
7048	TPR. B P MCCARTY
7059	TPR. H I PEREZ
7111	TPR. M M DISIBIO
7128	TPR. L F MARANDINO

Other Supporting Agencies N/A

Related Cases N/A

Summons/Warnings & Statutes N/A

Suspects/Summoned

WILLIE D GIBBONS
DL Number: [redacted]
Area Code & Phone: [redacted]
State: New Jersey
S.S.N.: [redacted]
Address: 1309 SECOND AVE,
BRIDGETON, NJ 08302
D.O.B [redacted]
Age 33
Sex Male
Race 2B
Height 5' 08"
Weight 180
Hair Black
Eyes Brown
Complexion Medium Dark

Criminal Complaint Warrant/ Summons No. S2011000130

Persons Arrested N/A

Narrative
05/24/2011

On the above date troopers from the Bridgeton barracks were detailed to 6 Barend St. in Fairfield Two, Cumberland County reference a domestic dispute. Dispatch stated that a male struck a female and that he has a gun in his truck. Upon arrival I observed a black male in the front of the residence. I approached the male and immediately identified him as Willie Gibbons from previous contacts. Knowing that Mr. Gibbons has been accused of possessing a gun in the past, and the that that the caller stated he had one in his truck this incident, I conducted a non intrusive frisk of his outer garments for trooper safety. Once determining that Mr. Gibbons was not a threat to trooper's on scene, I engaged in conversation with him.

Mr. Gibbons was observed to be sweating profusely and appeared to be impatient. I also observed several bags of clothing and other articles just outside of the doorway to the residence. Mr. Gibbons was not cooperative at first, just like previous contacts with him. I asked him what happened, to which he responded that it doesn't matter what happened because no one listens to him. I asked him what happened again, to which he replied that he is a victim. He stated that his girlfriend cheated on him and he wanted to leave the residence, but she didn't want him to leave. While gathering his belongings and trying to leave, she grabbed him and prevented him from leaving. Mr. Gibbons further stated that he has been living at the above residence for a

short period of time after he had left his old residence in Seabrook. I asked him why we were informed that he may have a gun in his truck. He stated that he does not know, and that he does not have a gun. Mr. Gibbons did not provide anything else that would aid in this investigation.

I then spoke with the female identified as Angel Stephens, Ms. Stephens stated that she attempted to leave the residence but Mr. Gibbons prevented her from doing so. A struggle ensued inside of her bedroom which was then brought out into the hallway where Mr. Gibbons put a hole in the wall with his hand. She stated that she wanted to sign a complaint against Mr. Gibbons for the hole in the wall and to apply for a restraining order.

Due to the fact that, the statements provided by the male and female contradict each other and a victim could not be identified at this time, I requested both individuals to return to the barracks so that written statements could be completed and to determine a victim in this incident. Due to the fact that Ms. Stephens accused Mr. Gibbons of carrying a hand gun in his pick-up truck, he was transported in the rear of my troop car to the barracks.

Upon arrival at the barracks, both individuals completed written statements of the incident (see case jacket). Upon speaking with Ms. Stephens· further, she also claimed that earlier in the day Mr. Gibbons threatened to "kill her" with the same gun that he is accused of carrying in his truck. She is scared that Mr. Gibbons may do harm to herself or her children.

I then asked Mr. Gibbons if he threatened Ms. Stephens with a gun, which he denied ever stating that.

He insisted that he does not have a gun, therefore he could not threaten her with one.

After being provided with this information, I determined that Ms. Stephens was the victim in this incident. She was provided with a V.I.N.E form and indicated that she wished to apply for a restraining order. I contacted SERVE representative, Lyan Aiallo, who spoke to Ms. Stephens over the telephone. I then contacted JMC Casarow in reference to the TRO. Judge Casarow granted the TRO, and authorized a search of Mr. Gibbons' truck. A search of the truck was made with negative results for any weapons.

Mr. Gibbons was served with his copy of the restraining order. Citizens summons complaint S201 100G130 was signed by Ms. Stephens for criminal mischief (2C:17-3A (1)) and issued to Mr. Gibbons. Mr. Gibbons, was later transported to the above residence with the assistance of Troopers where he gathered, a small amount of belongings and departed the residence. He was advised that if he wished to gather the rest of his belongings to request a police escort.

Due to the fact that there is no evidence in this case and that same has been turned over to the court, it is requested that this case be considered closed.

Closed . . . .

Report Dare: 06/15/2011
TPR. M R GORE
#7207
/s/ M.R. Gore

1st Approval
Date 06/16/2011
SSGT. E F KEEBLER
#4397
Signature: /s/ SSGT. E F Keebler

2nd Approval
Date 07/01/2011
DSG M L PETERSON
#5389
/s/ DSG M L Peterson