No. 23-

IN THE

Supreme Court of the United States

SAMI AZMI AND JONATHAN CONCETTI,

Petitioners,

v.

JOHN SYLVESTER PENNY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In ruling on a claim for qualified immunity raised in a motion for summary judgment, does a court's obligation to view the evidence in the light most favorable to the plaintiff allow that court to ignore undisputed clear video evidence which, if considered, would require the court to draw the inference that the force used by the defendants was not excessive, and the further inference that the unlawfulness of the defendants' conduct was not clearly established?

PARTIES

Petitioners Sami Azmy and Jonathan Concetti are both members of the Los Angeles Police Department. Each Petitioner was a defendant in the district court and an appellant in the Ninth Circuit Appeal from which this petition is taken.

Respondent Jonathan Sylvester Penny was the plaintiff in the district court and the appellee in the Ninth Circuit.

RELATED PROCEEDINGS

Penny v. Azmy, et al., United States District Court, Central District of California, Case No. CV 20-7211-DMG (MAAx), summary judgment granted in part and denied in part on May 9, 2022.

Penny v. Azmy, et al., United States Court of Appeals for the Ninth Circuit, Case No. 22-55572, judgment entered on February 8, 2024, rehearing and rehearing *en banc* denied on March 20, 2024.

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1. The Ninth Circuit's unpublished Memorandum Opinion affirming the denial in part of petitioners' motion for summary judgment (App. 1-8) is at 2024 U.S. App. LEXIS 2934.

2. The district court's unpublished order granting in part and denying in part petitioners' motion for summary judgment (App. 9-49) is at 2022 U.S. Dist. LEXIS 104588.

3. The Ninth Circuit's order denying rehearing and rehearing *en banc* (App. 50-51) is at 2024 U.S. App. LEXIS 6672.

JURISDICTION

The Ninth Circuit Court of Appeals issued its Memorandum affirming the district court's order on February 8, 2024. The Ninth Circuit issued its order denying rehearing and rehearing *en banc* on March 20, 2024.

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit by petition for writ of certiorari. 28 U.S.C. § 1254(a).

This petition is being timely filed within 90 days after the denial of the order denying hearing and rehearing *en banc* in the Ninth Circuit, pursuant to United States Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent's claims are under the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

The Fourth Amendment states:

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

Section 1 of the Fourteenth Amendment states:

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

Title 42 U.S.C. Section 1983 states:

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

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

INTRODUCTION

In *Scott v. Harris*, 550 U.S. 372 (2007), this Court was presented with a situation in which a plaintiff in a civil rights case told a version of a story which was contradicted by the video evidence in the case. Under plaintiff's view, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty." *Id.* at 378. However, the video evidence showed something entirely different. Scott was shown "racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see multiple red lights and travel for considerable periods of time in the

occasional left-turn-only lane, chased by numerous police cars forced to engage in some hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort. . . ." *Id.* at 379-380.

Based on the presence of the video evidence, Justice Scalia, writing for the majority of this Court, stated, "When opposing parties tell different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of facts for the purposes of ruling on a motion for summary judgment." *Id.* at 380. In so ruling, Justice Scalia reasoned, "[Plaintiff's] version of events is so utterly discredited by the record that no reasonable jury could have believed him. **The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape**." *Id.* at 380-381 (emphasis added).

Justice Scalia's insight was prescient. In the intervening seventeen years, cell phones with video-recording capability have become ubiquitous and the vast majority of law enforcement agencies are moving toward the use of body-worn cameras. These two changes have resulted in more transparency and an increased accountability for law enforcement and have fostered an enhanced sense of trust between the law enforcement community and the citizenry as a whole.

However, in recent years, courts of inferior jurisdiction have started to drift further and further away from Justice Scalia's sage reasoning. In summarizing the facts

of the case, some circuit courts will cherry pick certain facts while ignoring the vast amount of other undisputed evidence (shown on video) which puts the facts recited by the panel in context. Once these additional uncontroverted facts are considered, there is only one inference that can be drawn: that the use of force was not excessive, and the unique circumstances of this incident make clear that the law was not clearly established.

This dilution of the uncontroverted facts is readily apparent in this case. Here, the Ninth Circuit does not even engage in a factual recitation in an unpublished memorandum opinion which takes up a scant eight pages, including just three pages on the issue of qualified immunity.

The proper resolution of issues of qualified immunity, however, cannot be based on an artificial and selective recitation of the facts; rather, it requires a deep dive into the particularized facts of the case. *White v. Pauly*, 580 U.S. 73, 79 (2017) ("clearly established law" should not be defined "at a high level of generality" but must be "particularized" to the facts of the case). In limiting the appropriate factual analysis, panels are using unpublished memorandum decisions to evade binding Supreme Court authority which outlines not only the substantive law, but also the proper use of uncontroverted and dispositive video evidence.

Unfortunately, the Ninth Circuit's dilution of *Scott v. Harris* in this matter is no isolated incident. Recently, in *Wright v. City of San Bernardino*, 2023 U.S. Dist. LEXIS 192897 (C.D. Cal. 2023), a California district court rejected an argument based on *Scott v. Harris*, sneering:

> Whatever else might be said about the majority opinion in *Scott*, with the rise of 'deep fake' videos and other manipulated media, the Court questions whether the decision's approach should have long-term affect [sic]. No party in this litigation has argued that any of the video evidence has been manipulated to show something that did not actually occur on the evening in question.

Id. at *34-35, n. 15.

And a similar issue recently occurred in *City of Los Angeles v. M.A.R.*, 2023 U.S. App. LEXIS 18078 (9th Cir. 2023), in which similar issues were raised to this Court in United States Supreme Court Case No. 23-689 and in which this Court requested a response from respondents.[1]

As these cases aptly demonstrate, the various district and circuit courts are in desperate need of guidance. Is *Scott v Harris* no longer binding precedent? How should *Scott* be applied when there are no allegations or evidence of video tampering, and no reason to question the validity of the undisputed video evidence? And what should happen when—as was the case here—the reviewing court evades a comprehensive review of all relevant facts and video evidence to offer a facially plausible reason to deny qualified immunity in an unpublished memorandum opinion?

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1. During the pendency of the Petition for a Writ of Certiorari in *City of Los Angeles v. M.A.R.*, the parties entered into a tentative settlement agreement. Consequently, the petition in this matter is being held in abeyance pending the finalization of the settlement agreement.

Petitioners, therefore, ask that this Court grant the petition for a writ of certiorari to provide the much needed instruction and advice on this critical issue. Alternatively, Petitioners request that this Court grant the petition and reverse the Ninth Circuit's judgment by way of summary disposition. See *Los Angeles County v. Rettele*, 550 U.S. 609 (2007).

STATEMENT OF THE CASE

On August 14, 2019, members of the Los Angeles Police Department were dispatched after receiving multiple 911 calls that a suspect, later identified as Plaintiff/Respondent John Penny ("Penny"), was shirtless, yelling incoherently, and acting in an erratic manner. When officers arrived, they observed Penny sweating profusely, holding a bottle and padlock, and yelling incoherent statements. As the LAPD officers approached Penny, he told them, "Hey, you get to kill me today." The subsequent events were captured on video, rendering the facts undisputed for both the purposes of the underlying motion for summary judgment and the subsequent appeal. *Scott v. Harris*, 550 U.S. 372, 380-381 (2007).[2]

The responding officers called for backup and repeatedly directed Penny to put the bottle down. Penny

2. Multiple body worn camera videos were submitted in support of the motion for summary judgment, which were transmitted to the Ninth Circuit. Ninth Cir. Dkt. 49; District Court Dkt. 72. For the convenience of the court and the parties, hypertext links to the petitioners' videos are provided below and throughout this petition:

- Azmy BWC Video, https://rb.gy/6twjfs
- Concetti BWC Video, https://rb.gy/ro9rni

again refused and continued to pace back and forth while yelling. Penny then pulled an empty cardboard box out of the recycling bin and threw it at Officer Robles, making contact. Officer Antalek then deployed his Taser at Penny; however, it did not connect properly and was ineffective.

As backup arrived, Penny continued his erratic behavior and the officers later testified that they believed he was under the influence of drugs or alcohol or suffering from mental illness. As the newly reinforced officers attempted to approach Penny, they again asked him to put the bottle down. Penny did not comply and instead picked up an object consisting of a cloth tied around a metal object which the officers described in hindsight as a "makeshift slungshot."[3] Penny then appeared to fall behind a fence out of view, with the sound of glass breaking. He subsequently reappeared with a broken bottle in one hand and the slungshot in his other hand.

The uncontroverted video in this case demonstrates that the officers attempted to de-escalate the situation with Penny for approximately 15 consecutive minutes. However, Penny neither responded to these attempts nor did he attempt to flee from the officers. Instead, he chose to stand his ground and confront the law enforcements officers who had responded to the scene.

Eventually, toward the end of the standoff, Penny began jumping up and down with the slungshot in his hand while moving toward Officer Azmy. Officers ordered

3. Not to be confused with a slingshot, a slungshot consists of a weight affixed to end of a rope that may be used as a weapon similar to a flail or a blackjack.

Penny to "get back," and Penny said, "Fuck you." Penny then dropped the glass and picked up a long wooden board from the ground and walked quickly toward the officers. Officers repeatedly told Penny to drop the weapons and not approach them to which Penny responded "no." The video evidence demonstrates that Penny was not receptive to de-escalation strategies and showed his speed and agility both in improvised manipulation and physical movement across the alley. Azmy BWC at 6:15-7:25; Concetti BWC at 6:55-8:05.

Penny then abruptly approached Officer Concetti, getting to within six to eight feet of him. At the time he approached the officers, Penny had armed himself with a large board and was holding it in an aggressive posture. Officer Concetti fired two shots from his pistol, hitting Penny in his left thigh and left forearm. Simultaneously, Officer Robles fired his 40-milimeter launcher (i.e., rubber bullet gun) and Officer Spraggins fired his bean bag shotgun. However, even after he was shot, Penny did not immediately submit to the officers. Azmy BWC at 7:25-8:25; Concetti BWC at 8:05-9:05. Eventually, Penny was backed into a corner and handcuffed without further incident. Azmy BWC at 8:25-16:30; Concetti BWC at 9:05-17:10.

Based on these events, Penny filed a complaint alleging multiple federal and state causes of actions against the involved officers arising out of this non-fatal officer-involved shooting. The officers filed a motion for summary judgment asserting that the undisputed facts demonstrated that the force used was not excessive under *Graham v. Connor*, 490 U.S. 386 (1989), and that they were entitled to qualified immunity as they did not knowingly

violate any clearly established law. After reviewing all the documentary and video evidence, District Judge Dolly Gee issued an order denying summary judgment. App. 9-49.

On appeal, the panel issued an eight-page, unpublished, Memorandum Opinion (App. 1-8) which stated that viewing the evidence in the light most favorable to Penny, the officers used excessive force and did so in violation of clearly-established law. The Ninth Circuit's opinion, however, did not address the uncontroverted nature of the video evidence, pursuant to *Scott v. Harris*' mandate. In addition, the Ninth Circuit's opinion did not address the fact that officers are entitled to qualified immunity, as the district court correctly concluded, even where there is a reasonable mistake of fact. *Pearson v. Callahan*, 555 U.S. 223, 230 (2009).

The Ninth Circuit's opinion also did not address the fact that at the time the shot was fired, the suspect charged towards the officers with a board in his hand and with a slungshot in his other hand, both of which could be used as deadly weapons. Although the undisputed facts demonstrate that officers attempted to de-escalate the situation for approximately 15 minutes, the Ninth Circuit neglected to mention that the shots were fired after Penny advanced to within six to eight feet of officers and, instead, discusses an officers' duty to retreat, duty to warn, and duty to use less intrusive means. This focus on the officers rather than Penny's clear and present danger considering his possession of multiple deadly weapons is misplaced.

Finally, the Ninth Circuit's decision was inconsistent with multiple reported decisions, *Woodward v. City of Tucson*, 870 F.3d 1154 (9th Cir. 2019), in which qualified

immunity was granted where a suspect charged the officers with a hockey stick and was fatally shot as a result. Given this prior case authority, the shooting officers, at a minimum, were entitled to qualified immunity. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (Qualified Immunity is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law.").

Petitioners filed a timely Petition for Rehearing and Petition for Rehearing *En Banc* on March 20, 2024, App. 50-51.

ARGUMENT

A. A Court's Obligation to View the Evidence in the Light Most Favorable to the Plaintiff Does Not Allow the Court to Ignore Undisputed Video Evidence Which, if Considered, Would Require the Court to Draw the Inference that the Force Used by the Defendants Was Not Excessive, and the Further Inference that the Unlawfulness of the Defendants' Conduct Was Not Clearly Established

1. Applicable Law

In *Graham v. Connor*, 490 U.S. at 388, this Court held that an excessive force claim is properly analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor* set forth a non-exhaustive list of factors to be considered in evaluating whether the force used to affect a particular seizure is reasonable: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers

or others; and (3) whether the suspect actively resists detention or attempts to escape. *Id.* at 394-395. The test is an objective one, viewed from the vantage of reasonable officers at the scene, and is highly deferential to the police officer's need to protect himself or others. *Id.* at 396-397.

This Court has also indicated that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Moreover, the most important single element of the three specified factors is whether the suspect poses an immediate threat to the safety of the officers or others. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005).

In analyzing the use of force question, the district court noted, "This is one of the rare use-of-force cases where there can be no dispute as to what Penny was physically doing prior to and when he was shot because clear video evidence, the authenticity of which is undisputed, shows the incident from multiple angles." App. 24. Although the District Court noted that the board Penny was holding could have been used as a weapon and that he approached the officers to within six to eight feet, the Court opined that Penny "was not holding the board in a manner as if he was about to strike Concetti." App. 26.

The District Court launched into a discussion about several issues of fact which were not germane to the proper disposition of the case (i.e., despite multiple warnings that force would be used, no warning that deadly force would be used was given; the availability of less intrusive alternatives; the suspect's mental state; the presence of backup units; whether Concetti's decision

violated the LAPD's "best practices"). Thereafter, the District Court concluded:

> In light of all the uncontroverted circumstances—the lack of criminal conduct or flight, **the fact that Penny never attacked or attempted to attack the officers throughout the encounter**, the commanding officer's order to use less-lethal force, **the absence of imminent harm towards Concetti just prior to the shooting, the failure to warn**, the availability of less intrusive force, Penny's evident impaired mental state, the large number of police officers present, and the extend timeframe of the incident—**the singular fact that Plaintiff was holding a wooden board and refusing to drop it** "is insufficient by any objective measure to justify the force deployed. The Court therefore concludes that Concetti violated the Fourth Amendment in using deadly force against Penny."

App. 30, emphasis added, internal quotations and citations omitted.

This analysis, however, is contrary to the undisputed video evidence and inconsistent with the District Court's prefatory statements that there can be no dispute as to what Penny was doing prior to being shot. See App. 24. Indeed, when this video is viewed from the perspective of Officer Concetti, one thing is perfectly clear: Penny was approaching him in an aggressive manner with a large board canted toward him in a hostile and provocative fashion. Concetti BWC at 8:00-8:20. Moreover, it is clear that Penny advanced to within a few feet of Officer

Concetti prior to Officer Concetti's use of force. To say that Penny never posed a threat to Officer Concetti—or that Officer Concetti was in no risk of imminent harm—is completely farcical and inconsistent with this Court's mandate in *Scott v. Harris.* Had Penny struck Concetti in the head with the board—or jammed it into his face or throat—it most certainly could have resulted in death or serious bodily injury.

In reviewing this decision, the Ninth Circuit engaged in even less analysis, stating:

> None of the *Graham* factors indicate that Concetti's use of force was reasonable. First, Penny did not commit any serious crime. The only potential crime committed was resisting arrest, a "minor" offence. Second, Penny did not pose an immediate threat to Officer Concetti or any of the twelve other officers present. Although Penny held onto a wooden board at the time of the shooting, he held it perpendicular to his body, like a shield, and did not brandish [it] at anyone. Officer Concetti had plenty of officer cover as well as space to move away from Penny. Third, when Officer Concetti shot him, Penny was not attempting to flee. And although he disobeyed Officer Concetti's repeated command to "get back," thereby arguably resisting arrest, Penny's noncompliance did not present an immediate threat. Penny's noncompliance thus did not rise to a level of behavior justifying the use of deadly force against him.

App. 4.

2. Factual Analysis

To properly analyze this case, the Court must look to the nature of the factual record. In this case, however, the recitation of facts as articulated by both the District Court and the Ninth Circuit is fatally flawed and leads to an incorrect result which is not in compliance with this Court's mandates. Here, both the District Court and the Ninth Circuit's recitation of the facts and subsequent conclusion that Penny was not resisting, was compliant, and was not a threat is wholly inconsistent with the incontrovertible BWC evidence. The BWC video demonstrates that Penny rushed toward Officer Concetti in an aggressive manner while holding the large board. Officer Concetti did not fire for no reason; he waited until Penny had advance to within six to eight feet of him, a close enough distance that he could have been struck and seriously injured by the board wielded by Penny. Azmy BWC at 6:15-8:25; Concetti BWC at 6:55-9:05. These facts are uncontroverted pursuant to *Scott v. Harris.*

In this case, the uncontroverted video evidence shows that the officers were reasonable with respect to the force used on an unsearched suspect who advanced upon them in an aggressive manner while in possession of a deadly weapon. Given this evidence, there are no facts for a jury to resolve. *Scott v. Harris*, 550 U.S. at 380. When viewed through this lens, the uncontroverted facts demonstrate that the force used under the totality of the circumstances was reasonable and the officers are entitled to qualified immunity as a matter of law. *Graham v. Connor*, 490 U.S. at 388.

In sum, if this Court's mandate to view the evidence in the light depicted in the undisputed video evidence is not followed, it is a direct violation of binding precedent and leads to an absurd result. The suggestion that *Scott v. Harris* is no longer good law or that it should be blithely disregarded even in the absence of a claim of fabrication is worrisome and would eradicate a long line of caselaw, as is the notion that a reviewing court can use an incomplete version of the uncontroverted facts to overturn grants of qualified immunity. This Court can and should mark a brighter line rule on the use of undisputed video evidence and provide further instruction to courts of inferior jurisdiction on this critical issue.

B. Since the Doctrine of Qualified Immunity Contemplates the Possibility of an Officer's Reasonable Mistake of Fact, Issues of Fact Do Not Preclude Summary Judgment Where Any Alleged Mistakes Were Reasonable

The law is clear that qualified immunity protects government officials from suit under federal law claims if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "**The protection of qualified immunity 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**.'" *Pearson v. Callahan*, 555 U.S. at 230 (emphasis added).

To evaluate qualified immunity, a court must first decide whether the facts show that the government official's conduct violated a constitutional right. *Jackson v.*

County of Bremerton, 268 F.3d 646 (9th Cir. 2001). Second, a court decides whether the government official could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established right. *Id*. However, the court may skip the first step and proceed to the second. *Pearson v. Callahan*, 555 U.S. at 227.

This Court has recently clarified that a government official is entitled to qualified immunity from suit/liability where, at the time of the conduct, there was no prior precedent or case law with facts specifically and substantially identical to the facts of the incident at issue which would have put the defendant on notice that his or her conduct was unconstitutional. *White v. Pauly*, 580 U.S. at 79 ("clearly established law" should not be defined "at a high level of generality" but must be "particularized" to the facts of the case). This Court has emphasized this point again and again, because qualified immunity is important to society as a whole and because the immunity from suit is effectively lost if a case is erroneously permitted to go to trial. *Id*. at 551-555.

Under the doctrine of qualified immunity, if a government official's mistake as to what the law requires is reasonable, the government official is entitled to qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 205 (1984). Moreover, this doctrine is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. at 341.

Applying the two-pronged qualified immunity analysis, this Court must first look to whether the officers'

conduct violated a constitutional right. *Jackson*, 268 F.3d at 646. However, there is no relevant case authority which holds that the officers' conduct in this matter was constitutionally deficient.

In this case, the District Court analogized the case to three matters: *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001); *N.E.M. v. City of Salinas*, 761 Fed. Appx. 698 (9th Cir. 2019); and *Hayes v. County of San Diego*, 736 F.3d 1223 (9th Cir. 2013). All these cases are inapposite.

In *Deorle*, the Ninth Circuit denied qualified immunity judgment where an officer fired a "beanbag round" into the face of an unarmed, emotionally disturbed individual who approached him walking at a "steady gate" *Deorle v. Rutherford*¸ 272 F.3d at 1284. Such a case hardly establishes that an officer cannot fire when a suspect advances to within a few feet of an officer while carrying a piece of wood that could be used as a weapon.

In *N.E.M.*, the Ninth Circuit denied qualified immunity where an officer shot a suspect who had turned towards him in a "normal manner" while holding a pair of gardening shears. *N.E.M. v. City of Salinas*, 761 Fed. Appx. at 699. Again, this is a fair cry from Penny's rapid advance upon Officer Concetti.

Finally, in *Hayes*, the Ninth Circuit denied summary judgment where a dispute of fact existed as to whether a suspect was charging towards law enforcement with a knife raised or whether he was merely approaching them after stating, "You want to take me to jail or you want to take me to prison, go ahead." *Hayes v. County of San Diego*, 736 at 1228.

In affirming the denial of qualified immunity, the Ninth Circuit did not refer to any of these cases but, instead, cited a single case—*Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018)—for the proposition that the officers were not entitled to qualified immunity.

In *Vos*, officers responded to a scene where a suspect had armed himself with scissors, cut one of the employees with the scissors, and was pretending to have a gun. *Id.* at 1028-1029. As officers entered the building, Vos charged towards them with the scissors over his head. When Vos was within 20 feet of the officers, the officers fired. *Id.* at 1033. Under these disputed facts, the Ninth Circuit determined, "The facts and circumstances confronting the officers here are such that whether Vos posed an immediate threat is a disputed question of fact, and one the jury could find in the Parents' favor." *Id*. Again, this is far cry from Penny's rapid approach to within six to eight feet of Officer Concetti.

In sum, none of these four cases cited by either the District Court clearly established that the shooting of a suspect who aggressively advances to six to eight feet while armed with a dangerous weapon would constitute a constitutional violation. *White v. Pauly*, 580 U.S. at 79 ("clearly established law" should not be defined "at a high level of generality" but must be "particularized" to the facts of the case). And, indeed, such a rule would exponentially increase the risk of danger to police officers and have a chilling impact on police officers who are attempting to protect the public in the lawful performance of their duties.

Rather, this case is more analogous to *Woodward v. City of Tucson*, 870 F.3d 1154 (9th Cir. 2017). In *Woodward*, the Ninth Circuit reversed a denial of qualified immunity where a suspect charged an officer with a two-foot long raised stick and approached to a distance of within approximately five to six feet. *Id.* at 1157, 1162. In reversing the denial of qualified immunity, the Ninth Circuit stated:

> We conclude that reasonable officers in Defendants' positions would not have known that shooting [the suspect] violated a clearly established right. Indeed, the case makes clear that the use of deadly force can be acceptable in such a situation. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) ("[I]f the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."); *Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1111-13, 1117-19 (9th Cir. 2005) (holding that deputies were entitled to qualified immunity for shooting a suspect wandering around a neighborhood with a raised sword, making growling noises, and ignoring commands to drop the weapon). Thus, even assuming that a constitutional violation occurred, the district court erred by denying Defendants qualified immunity from this claim.

Id. at 1162-1163, parallel citations omitted.

Indeed, the basic factual underpinning which has been so blithely ignored by both the District Court and the

Ninth Circuit is that, like *Woodward*, when Penny charged officers to within six to eight feet while holding a piece of wood that could easily constitute a deadly weapon, he did constitute an immediate threat justifying the use of deadly force under *Tennessee v. Garner*, 471 U.S. at 11-12.

Thus, the Ninth Circuit's analysis that the law is clearly established that Officer Concetti could *not* use deadly force is not based on a substantive summary of the facts as established by the irrefutable video evidence. Given that the facts demonstrated in the BWC video are so fundamentally different from those contained in prior reported cases, these prior cases cannot stand for the proposition that the law was clearly established that the officers could not act in the way they did.

Finally, to the extent that the officers were wrong about either the nature of the law or whether Penny constituted a threat, they are nonetheless entitled to qualified immunity. The doctrine is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. at 341.

Respondents have maintained that the video evidence in this case supports the reasonable interpretation that Penny did not constitute a danger. Although the presence of multiple reasonable interpretations might ordinarily preclude a grant of summary judgment, this is not the case when analyzing a qualified immunity case which specifically allows for a defense when there is a reasonable mistake regarding the nature of the facts or, as here, when all relevant uncontroverted facts are considered. See *Pearson v. Callahan*, 555 U.S. at 320.

Still photo taken from Concetti BWC at 8:10.

Indeed, when one puts oneself in the position of Officer Concetti in the seconds before shots was fired, it is easy to see how he could have felt that the rapidly approaching Penny—who had already demonstrated remarkable speed and agility—presented an imminent threat to him when he approached to within six to eight feet. If Penny had continued full speed toward Concetti, none of the other officers would have been able to do anything until after the strike. And although there might have been sufficient backup to take him into custody, this would not have protected Officer Concetti.

Thus, when one considers the uncontroverted video evidence, Officer Concetti's decision to respond with force rather than attempting to employ additional de-escalation techniques when Penny approached to within six to eight feet of him was not so unreasonable such that he could

only be described as "plainly incompetent" or to have "knowingly violated the law." *Malley v. Briggs*, 475 U.S. at 341.

Stated another way, issues of fact do not preclude a grant of summary judgment based on qualified immunity where any alleged mistake of fact was **reasonable**. Because this was neither considered nor addressed in the Ninth Circuit's opinion, a writ of certiorari is warranted.

C. This Case is an Ideal Vehicle to Both Enforce and Clarify *Scott v. Harris* and *White v. Pauly*

Finally, this case is a particularly good vehicle for the Court to address lower courts' various questions related to the scope of *Scott* and *White.* As stated above, there are no factual disputes, there is hypertext-linked video evidence which is uncontested, a clear evidentiary record, and experienced counsel on both sides.

As evidenced in the very cases upon which the District Court and the Ninth Circuit relied, the danger of misapplication of law in these areas is real, and sure to continue unabated unless this Court grants review in a case like this one. There are no questions of fact here to be decided; indeed, one advantage of reviewing this case is precisely that both sides concede the authenticity of the video evidence in this case. Instead, this case is resolved by a simple but important and recurring question of law: does a court's obligation to view evidence in the light most favorable to the plaintiff allow the court to ignore undisputed clear video evidence which, if considered, would require the court to draw the inference that the force used by defendants was not excessive, and the

further inference that the unlawfulness of the defendants' conduct was not clearly established at the appropriate level of specificity?

Simply stated, the Ninth Circuit rested its holding on a notion at odds with the central premises of *Scott, White*, and opinions of other courts of appeals. Given that the Ninth Circuit did not cite to either of these cases, it is difficult to credibly assert that the Ninth Circuit's opinion was consistent with them.

CONCLUSION

This Court should issue the requested writ of certiorari to clarify to lower courts the proper use of undisputed video evidence, which will only be increasingly part of civil and criminal litigation, in general, and civil rights litigation, in particular.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55572, D.C. No. 2:20-cv-07211-DMG-MAA
No. 22-55579, D.C. No. 2:20-cv-07211-DMG-MAA

JOHN SYLVESTER PENNY,

Plaintiff-Appellee,

v.

SAMI AZMY; JONATHAN A. CONCETTI,

Defendants-Appellants,

and

CITY OF LOS ANGELES; *et al.*,

Defendants.

JOHN SYLVESTER PENNY,

Plaintiff-Appellee,

v.

Appendix A

CITY OF LOS ANGELES; *et al.*,

Defendants-Appellants,

and

SAMI AZMY; *et al.*,

Defendants.

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted August 21, 2023
Pasadena, California

Before: BERZON, RAWLINSON, and BRESS, Circuit Judges.

MEMORANDUM*

In this § 1983 excessive force case, Jonathan Concetti, a City of Los Angeles police officer, appeals the denial

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

of his motion for summary judgment based on qualified immunity.[1]

"A district court's decision denying summary judgment on the ground of qualified immunity is reviewed *de novo*." *Hopkins v. Bonvicino*, 573 F.3d 752, 762 (9th Cir. 2009). To conclude that qualified immunity is improper, we must first "ask whether the facts, viewed in the light most favorable to the plaintiff, demonstrate that the [officer] violated a constitutional right." *Peck v. Montoya*, 51 F.4th 877, 887 (9th Cir. 2022). Second, we ask "whether that right was clearly established at the time of the alleged constitutional violation." *Id.* (internal quotation marks and citation omitted). Where relevant, "[w]e do not credit a party's version of events that the record, such as an unchallenged video recording of the incident quite clearly contradicts." *Rice v. Morehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021) (internal quotation marks omitted) (citing *Scott v. Cnty. of San Bernadino*, 903 F.3d 943, 952 (9th Cir. 2018)).

1. To evaluate a Fourth Amendment excessive force claim, we ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *Graham* identified three factors that indicate an action was objectively reasonable: (1) the severity of the suspect's alleged crime, (2) the presence or lack of an immediate

1. John Penny represents that he will no longer pursue his secondary liability claim against Sergeant Sami Azmy due to the stipulated dismissal of the relevant officer. We therefore remand with instructions to dismiss that claim with prejudice.

threat to officer or bystander safety, and (3) the suspect's resistance to or evasion of arrest. *Id.* at 396. "Other relevant factors include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used was mentally disturbed." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1033–34 (9th Cir. 2018). Additionally, "the ratio of officers to suspects present" can be considered. *Washington v. Lambert*, 98 F.3d 1181, 1190 (9th Cir. 1996).

None of the *Graham* factors indicate that Concetti's use of force was reasonable. First, Penny did not commit any serious crime. The only potential crime committed was resisting arrest, a "minor" offense. *Mattos v. Agarano*, 661 F.3d 433, 445–46 (9th Cir. 2011). Second, Penny did not pose an immediate threat to Officer Concetti or any of the twelve other officers present. Although Penny held onto a wooden board at the time of the shooting, he held it perpendicular to his body, like a shield, and "did not brandish [it] at anyone." *Glenn v. Washington Cnty.*, 673 F.3d 864, 873 (9th Cir. 2011). Officer Concetti had plenty of officer cover as well as space to move away from Penny. Third, when Officer Concetti shot him, Penny was not attempting to flee. *See Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). And although he disobeyed Officer Concetti's repeated command to "get back," thereby arguably resisting arrest, Penny's noncompliance did not present an immediate threat. Penny's noncompliance thus did not rise to a level of behavior justifying the use of deadly force against him. *Cf. O'Doan v. Sanford*, 991 F.3d 1027, 1033, 1037 (9th Cir.

2021) (holding that the third *Graham* factor weighs in favor of qualified immunity when a suspect is "combative" while repeatedly resisting officer commands).

Finally, each of the "other relevant factors" weigh against Officer Concetti's use of deadly force. *Vos*, 892 F.3d at 1033. Officer Concetti relayed no warnings; the officers had less intrusive means of force available such as a taser, a beanbag shotgun, or a projectile launcher;[22] and Penny was visibly emotionally disturbed during the confrontation in a way that did not present an immediate threat. *See Vos*, 892 F.3d at 1033–34. There were thirteen officers on the scene when Concetti shot Penny. Further, Officer Concetti in his mind determined that he would shoot if Penny came a certain distance from him but did not warn Penny not to come that close or he would be shot. Instead, Officer Concetti continued to walk towards Penny, an emotionally disturbed individual, rather than backing off into the large surrounding open space. Officer Concetti's decision to shoot Penny was objectively unreasonable and therefore excessive force, in violation of Penny's Fourth Amendment rights.

2. As to whether the law regarding the Fourth Amendment excessive force claim was clearly established, "at the time of [Officer Concetti's] conduct, the law was sufficiently clear that every reasonable official would understand that what he [did was] unlawful." *District of Columbia v. Wesby*, 583 U.S. 48, 63, 138 S. Ct. 577,

2. Officer Concetti in particular had non-lethal alternatives to the use of deadly force—pepper spray and two types of batons.

199 L. Ed. 2d 453 (2018) (citations and quotation marks omitted). The decision in *Vos* confirms that as of 2018, a reasonable police officer would have understood that the use of deadly force against a possibly mentally ill suspect when there were numerous officers present, multiple less intrusive options readily available, and no immediate threat of serious physical injury—even where the suspect held an object that officers could have perceived to be dangerous if used as a weapon—was excessive force and so a Fourth Amendment violation. 892 F.3d at 1034–35.

In *Vos*, "[t]he officers knew that Vos had been simulating having a gun and that he was agitated, appeared angry, and was potentially mentally unstable or under the influence of drugs." *Id.* at 1029. Officers at the scene believed that Vos was holding a pair of scissors when he ran towards them. *Id.* Vos asked the police to shoot him on multiple occasions and acted erratically during the encounter. *Id.* at 1028–29. Eight police officers were on the scene, armed with AR-15 rifles, handguns, and at least one "40-millimeter less-lethal projectile launcher." *Id.* at 1029. When Vos left the 7-Eleven, one police officer shot him using less-lethal force, and two fatally shot him using lethal force. *Id.* at 1029–30. After the incident, medical records confirmed that Vos had a diagnosis of schizophrenia. *Id.* at 1030. We held in *Vos* that, although at that time the law was not clearly established, "a reasonable jury could find that the force employed was greater than is reasonable under the circumstances." *Id.* at 1034, 1035–36 (internal quotation marks and citations omitted).

Here, Penny exhibited consistently erratic behavior signaling mental illness, including repeatedly speaking to the officers in incoherent non-sequiturs and referencing his own death several times. Penny held various objects during the encounter, including (at the time of the shooting) a wooden board, but did not use or threaten to use any objects in a way that presented a risk of immediate harm to the officers. Officer Concetti shot Penny with his pistol without issuing a warning of deadly force. Several officers, including Officer Concetti himself, had access to and adequate time to deploy less-intrusive means of force including a beanbag shotgun, a 40-millimiter projectile launcher, or a taser; two did so, at the same time Officer Concetti used lethal force. On these facts, *Vos* makes it "sufficiently clear" that Officer Concetti's actions were unlawful. *Wesby*, 583 U.S. at 63. If anything, this presents a considerably more obvious violation of the Fourth Amendment than in *Vos*. We therefore affirm the district court's denial of summary judgment.

3. Several LAPD officers involved in the events leading to this case stipulated to their dismissal from the appeal. Those officers ask this Court to vacate the district court order "as it applies to [those] individual officers." Because the parties settled during the pendency of the appeal, the Appellants "forfeited the right to appeal and therefore lost their equitable entitlement to vacatur." *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007). Appellants' request for vacatur is denied.

We therefore **REMAND** with instructions to dismiss Penny's secondary liability claim against Sergeant Azmy, and **AFFIRM** the district court's denial of summary judgment.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED MAY 9, 2022

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 20-7211 DMG (MAAx)

JOHN SYLVESTER PENNY,

Plaintiff,

v.

CITY OF LOS ANGELES, *et al.*,

Defendants.

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT [73, 74]

Before the Court are Defendants the City of Los Angeles, Michel Moore, Sami Azmy, Jonathan Concetti, Daniel Antalek, Blair A. Spaggins, Antonio Robles, Lawrence Park, and Miguel Lara's Motion for Summary Judgment ("DMSJ") [Doc. # 74] and Plaintiff John Sylvester Penny's Motion for Partial Summary Judgment ("PMSJ") [Doc. ## 73, 103].[1] The motions are fully briefed. [Doc. ## 120 ("Def. Opp."), 107 ("Pl. Opp."), 109 ("Def. Reply"), 122 ("Pl. Reply")]. The Court held a hearing on

1. The parties refiled some of their briefs in response to the Court's Orders on their Applications to file documents under seal. *See* Doc. ## 100, 118. The Court cites to these refiled briefs herein.

the motions on April 8, 2022. For the reasons set forth below, the Court **GRANTS** in part and **DENIES** in part Plaintiff's Motion and **GRANTS** in part and **DENIES** in part Defendants' Motion.

I.

RELEVANT PROCEDURAL BACKGROUND

Penny initiated this action on August 11, 2020. [Doc. # 1.] He filed the operative First Amended Complaint ("FAC") on February 10, 2021, asserting various civil rights and state law claims against the City of Los Angeles, Los Angeles Police Department ("LAPD") Chief Michel Moore, and various individual LAPD officers, including Azmy, Concetti, Antalek, Spraggins, Robles, Park, and Lara.[2] [Doc. # 33.]

On February 25, 2022, Penny moved for partial summary judgment only as to Concetti and Azmy on his constitutional claims under 42 U.S.C. section 1983 for excessive use of force and failure to intervene, and on his related state law claims for assault, battery, negligence, and violation of the Bane Act, Cal. Civil Code § 52.1. [Doc. ## 73, 103.] The same day, Defendants moved for summary judgment on the same claims as to all of them, as well as Penny's claim under section 1983 for failure to provide medical care. [Doc. # 74.]

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2. On November 12, 2021, the Court approved the parties' joint stipulation to dismiss Defendants Jorge Estrada, Amjad Aziz, Sergio Graciano, and Jose Hernandez. [Doc. # 64.]

II.

EVIDENTIARY OBJECTIONS

Both sides—but especially Penny—interpose numerous kitchen-sink, frivolous evidentiary objections to a substantial amount of each other's proposed undisputed facts.[3] The Court need not address in detail vague, boilerplate evidentiary objections lodged without any explanation and not targeted at any specific evidence. *See Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1033 (C.D. Cal. 2013) ("All of the parties' objections are boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence. . . . On this basis alone, the Court will not scrutinize each objection and give a full analysis of identical objections raised as to each fact."). These objections are all **OVERRULED**.

Defendants repeatedly object to three specific pieces of evidence offered by Penny: (1) excerpts from the transcript of a detective's interview with Jack Susser, a resident of Thornton Court who was familiar with Penny, Shanbhag Decl., Ex. 1 [Doc. # 103-4]; (2) the

3. For example, Penny responds as follows to Defendants' Statement of Undisputed Fact No. 4, which merely states the plainly uncontroverted and admissible fact that Antalek ordered Penny to put a bottle down but Penny did not comply: "Objection: Inadmissible hearsay. Fed. R. Evid. 801, 802. Objection: Lacks foundation; assumes facts not in evidence. Fed. R. Evid. 602. Objection: Relevance. Prejudicial. Fed. R. Evid. 401, 402, 403. Objection: Best evidence rule. Fed. R. Evid. 1002."—all in one go.

Appendix B

Force Investigation Division ("FID") Report of Officer-Involved Shooting ("FID Report"), Shanbhag Decl., Ex. 4 [Doc. # 103-5]; and (3) the Office of Inspector General ("OIG") Intradepartmental Correspondence ("OIG Report"), Shanbhag Decl., Ex. 5 [Doc. # 103-6]. Defs. Evidentiary Objections [Doc. # 94-2]. Defendants primarily object on the grounds that they contain unsworn hearsay statements. But "at summary judgment a district court may consider hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony." *JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016). Susser can testify at trial in admissible form, as can the officers whose statements appear in the FID and OIG Reports. Moreover, most of the officers are party-opponents, such that their statements are admissions. *See* Fed. R. Evid. 801(d)(2). Additionally, the FID and OIG Reports satisfy the public records exception to the hearsay rule. *See* Fed. R. Evid. 803(8)(A)(iii). And because Defendants produced these Reports during discovery in this matter, there can be no objection based on failure to authenticate. *See Anand v. BP W. Coast Prods. LLC*, 484 F. Supp. 2d 1086,1092 n.11 (C.D. Cal. 2007) ("Documents produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent."). The objections are therefore **OVERRULED**.

III.

FACTUAL BACKGROUND[4]

This case arises out of an encounter between Penny and the individual officer Defendants that resulted in the use of force against Penny, including a use of deadly force by Defendant Concetti, who shot Penny with a firearm. The facts of this case are largely uncontroverted.

A. Initial Response and Tasing

At approximately 5:42 p.m. on August 14, 2019, the Los Angeles Police Department ("LAPD") Dispatch radioed a call for service regarding a man screaming "don't shoot" on Thornton Court, a residential alleyway in Venice Beach near the beach boardwalk, where there is heavy pedestrian traffic. PSUF 4; DSUF 7. LAPD Officers and Defendants Antalek and Robles responded to the call. PSUF 5. Antalek drove with Robles as his passenger, and Robles reviewed the comments on the radio call, which stated: "A male subject, male black, shirtless with dark pants screaming in the alleyway of Thornton Court and Pacific." PSUF 7. Antalek and Robles both saw Penny from the police car as they approached. PSUF 8, 9. Penny

4. Facts are drawn from Penny's Statement of Undisputed Facts ("PSUF"), as set forth in his Reply [Doc. # 122-1], and Defendants' Statement of Undisputed Facts ("DSUF"), as set forth in their Reply [Doc. # 109-1]. The Reply Statements contain the parties' responses and sur-responses, which are incorporated in the Court's citations. Many of the parties' purportedly disputed facts are not in fact controverted by the evidence, and the Court therefore cites to them as uncontroverted facts.

was shirtless, sweating profusely, and holding a bottle and padlock in his hand, yelling incoherent statements. *Id.*; DSUF 3. Antalek parked at Pacific and Thornton, exited the vehicle, and approached Penny to get him out of the road and into the alley. PSUF 10. Penny told the officers, "Hey, you get to kill me today." PSUF 11. Antalek ordered Penny to "put the bottle down." PSUF 12. Robles exited the vehicle, and at 5:50 p.m., he requested an additional unit and a supervisor over the radio. PSUF 13, 14. Penny was walking towards Antalek and Robles, and towards bystanders, holding the bottle in his hand. PSUF 18; DSUF 11. Throughout the encounter, Penny was sweating, rambling, and making incoherent statements, including repeatedly asking "what's a real blunt?" PSUF 17, 19.

Antalek told Penny to "Put the bottle down, I'll Tase you," pointing his Taser at Penny. PSUF 21. Penny did not comply; instead he replied, "Don't follow me! You'll tase me? You think that hurts?" and walked past Antalek, toward the street. DSUF 12. He then turned back into the alley and continued to pace back and forth, yelling, while Antalek continued to tell him to put the bottle down, to no avail. DSUF 13, 14. Penny then pulled an empty cardboard box out of a recycling bin and threw it at Robles, not making contact, after Robles told him to drop it. PSUF 22; DSUF 16. Antalek then fired his Taser at Penny, which did not connect properly and was ineffective. PSUF 23, 24. Penny then backed away from Antalek and Robles and walked away from the officers down Thornton Court. PSUF 25.

Appendix B

B. Arrival of Backup

At this time, LAPD Officers Concetti, Spraggins, Lara, and Sergeant Azmy arrived. PSUF 26. Concetti had no information that a crime had been committed or that anyone had been injured at the time of arrival. PSUF 29. Upon arrival, Concetti observed Penny to be agitated and holding the glass bottle in his right hand. PSUF 30. Lara had seen Penny on approximately 10 to 15 occasions before this incident, in which Penny was walking around Venice Beach going through trash cans, but had never ticketed Penny or had any negative interactions with him. PSUF 31. Lara did not inform any officers on the scene of his prior experience with Penny. PSUF 32. All the officers later testified that Penny appeared to be under the influence of drugs or alcohol or suffering from mental illness. PSUF 33-40. Officers Graciano and Estrada, no longer party to this action, also arrived just prior to the shooting and parked their vehicle blocking Thornton Court, controlling vehicle and pedestrian traffic at the location. PSUF 84.

Azmy, as the highest-ranking officer on the scene, took command upon arrival and took the lead in communicating with Penny. PSUF 41, 43; DSUF 26. He directed Antalek to be the designated lethal cover officer and ordered Lara to retrieve a shield. PSUF 45, 46. Concetti did not receive a specific assignment, but was never the designated lethal cover officer prior to the shooting. PSUF 48, 49. Spraggins retrieved a beanbag shotgun, but also was not given any specific assignment. SUF 50. Azmy told Penny to calm down and drop the bottle, but Penny walked away. PSUF

44. The officers formed a line and tracked Penny as he walked away from the officers down Thornton Court, at some point losing sight of him. PSUF 56, 58. Three other individuals were in the alleyway at this time. PSUF 59. One of these bystanders was Susser, who attempted to convey information about Penny to the officers, but the officers instead ordered him to stay in his yard and would not engage with him. PSUF 64, 65.

Azmy reencountered Penny on the north side of Thornton Court with the glass bottle still in his right hand. PSUF 67. Azmy continued attempting to speak with Penny, including by asking, "Do you want to hurt yourself today?" DSUF 31. Penny responded with his incoherent questions about "a real blunt." PSUF 68. Azmy asked Penny to put the bottle down; Penny did not comply, instead picking up an object consisting of a cloth tied around a metal object—which Defendants describe in hindsight as a "makeshift slungshot"—in his left hand. DSUF 29. Penny then appeared to fall behind a wooden fence out of view, with the sound of glass breaking. PSUF 72; DSUF 31, 32. Penny reappeared at the wooden fence with the broken bottle in his right hand and the metal-cloth object in his left hand. PSUF 73; DSUF 34. Concetti, positioned further back in the alley behind several of the officers, requested an "airship" over the radio, stating that the "suspect is being uncooperative at this time." PSUF 74.

Azmy again ordered Penny to put the bottle down, and Penny threw the bottle into the middle of the road. PSUF 76; DSUF 35. Against Azmy's orders, Penny walked into the street toward the broken glass, picked up a piece, and

retreated behind the wooden fence. PSUF 77; DSUF 36, 37. Azmy warned Penny that he would "beanbag" him if he did not comply, which would "cause a lot of harm and a lot of pain." PSUF 78. In response, Penny said, "just kill me" and, "I don't want to be around to save the world." PSUF 79. Concetti heard these statements. PSUF 80. Throughout this portion of the incident, Penny was walking back and forth toward the officers, moving erratically, and swinging the glass and metal-cloth object. PSUF 82; DSUF 41. Azmy continued to ask Penny to drop the items in his hands, and Penny continued to respond about a "real blunt." DSUF 40, PSUF 83.

Park arrived on the scene approximately two minutes before the shooting. PSUF 85. Upon arrival, he spoke to a resident of the area that said to him, "I know that person," referencing Penny. PSUF 86. Park told the resident to go back inside. *Id.* None of the officers ever asked bystanders any questions about Penny nor allowed bystanders or residents to assist by providing any information about Penny. PSUF 59-60. Just before the shooting, six other officers arrived at the scene, some of whom helped control vehicle and pedestrian traffic at the entrance to Thornton Court. PSUF 84, 88. Around this time, Azmy radioed that he had sufficient units and to downgrade the response. PSUF 89.

C. The Shooting

Penny then began jumping up and down with the metal-cloth object in his hand while moving towards Azmy. PSUF 90, DSUF 46. Azmy directed Spraggins to beanbag

Penny, though he did not immediately do so. PSUF 90. Antalek and Spraggins simultaneously ordered Penny to "get back," and Penny said, "Fuck you." PSUF 91, 92. Penny then walked away from the officers, dropped the glass and picked up a long wooden board from the ground, and walked quickly back towards the officers. PSUF 94; DSUF 49. At this point, Concetti unholstered his pistol. PSUF 95. Azmy warned Penny that if he took another step, he would be shot with the beanbag shotgun. PSUF 100. Azmy repeatedly told Penny to drop the bottle and not approach, and Concetti repeatedly ordered Penny to "Stop" and "Get Back," to which Penny responded, "no." PSUF 102, 108, 109; DSUF 56, 57.

At this time, Concetti, Robles, and Spraggins stood on the south side of the Thornton Court alleyway while Antalek, Lara, Azmy, and Park stood on the other side. PSUF 103. Penny briefly stopped advancing toward the officers and held the board in a vertical position with both hands in front of his body, close to his chest, with his body angled perpendicular to and head turned towards Concetti. PSUF 110; Shanbhag Decl., Ex. 19 (Azmy Body Camera) at 7:30 [Doc. # 89-12]. Park later stated that Penny was holding the board "perpendicular" and "like a shield." PSUF 121. Penny then took two small steps toward Concetti. PSUF 111; Azmy Body Camera at 7:33-36. At this point, Concetti fired two shots from his pistol, hitting Penny in his left thigh and left forearm. PSUF 116. Simultaneously, Robles fired his 40-millimeter launcher (*i.e.*, a rubber bullet gun), and Spraggins fired his beanbag shotgun. PSUF 113. Penny was six to eight feet from Concetti when he shot him. PSUF 114. Concetti never

warned Penny that he would shoot him prior to firing the rounds. PSUF 124. Concetti would later tell investigators that he had set a threshold on the ground which if Penny crossed, it "is pretty much saying that he wants to use his weapon towards us." PSUF 105, 106. The incident prior to the shooting lasted approximately ten minutes, with Concetti present at the scene for approximately six minutes. PSUF 122. The entire incident was captured on video from multiple angles via the officers' body-worn cameras. *See* Shanbhag Decl., Ex. 18-21, 24 [Doc. # 89-12].

Concetti told other officers to summon an ambulance, which they did. DSUF 64. Despite being shot, Penny did not immediately submit to the officers. DSUF 61-63, 66-68, 70. Finally, Penny was backed into a corner and handcuffed without further incident. DSUF 71. Within 20 seconds of being arrested, paramedics were cleared to attend to Penny. DSUF 72-73.

D. Post-Incident Investigations

The LAPD's Office of the Inspector General ("OIG") made several recommendations regarding the incident to the Los Angeles Board of Police Commissioners ("BOPC"), a body of civilians appointed by the Los Angeles Mayor with civilian oversight over the LAPD. PSUF 134-45. It included the recommendation that "[w]hile Penny was clearly resisting arrest," Concetti's decision to use lethal force against Penny was "not objectively reasonable and violated Department policy." PSUF 140. The report noted that "Penny's actions with the board at the time of the shooting (holding the board

near its middle with both hands, close to his own chest) could not reasonably be perceived as an imminent threat of serious bodily injury or death." PSUF 139. The OIG further criticized Azmy's decision to assume a role of communication with Penny, finding that it substantially deviated from approved Department supervisory training by placing officers at unnecessary risk and unable to hear his instructions. PSUF 141-43. The BOPC adopted the OIG's recommendations and found both that Azmy's decision to be the point of contact with Penny warranted administrative disapproval and that Concetti's use of force was out of policy. PSUF 145-52. The report further found that the less-lethal uses of force by Antalek, Robles, and Spraggins did not deviate substantially from Department Policy. OIG Report at 2-3.[5]

IV.

LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d

5. All page references herein are to the page numbers inserted by the CM/ECF system.

202 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "Rather, it draws all inferences in the light most favorable to the nonmoving party." *Id.*

A court presented with cross-motions for summary judgment should review each motion separately, giving the nonmoving party for each motion the benefit of all reasonable inferences from the record. *Center for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008).

V.

DISCUSSION

Penny moves for summary judgment on six of his claims as against only Concetti and Azmy: (1) excessive use force in violation the Fourth Amendment, (2) failure to intervene in violation of the Fourth Amendment, (3) violation of the Bane Act, (4) assault, (5) battery, and (6) negligence. Defendants move for summary judgment on the same claims as to all of the Defendants, in addition to Penny's claims for: (1) failure to provide medical care in violation of the Fourth and Fourteenth Amendments, (2) intentional infliction of emotional distress, and (3) failure to furnish or summon medical care under state law.

A. Excessive Use of Force

Penny moves for summary judgment on his excessive force claim to the extent it is based on Concetti's use of deadly force in shooting Penny. Penny also moves for summary judgment as to Azmy's liability for Concetti's use of force as a supervisor and integral participant, as well as for his failure to intervene in Concetti's use of force. Defendants move for summary judgment on these same claims, and also as they pertain to the nonlethal uses of force—namely, Antalek's the initial use of the Taser, and Robles and Spraggins' use of the 40-millimeter launcher and beanbag, respectively.

The Fourth Amendment permits police officers to use only so much force as is "reasonable" under the

circumstances. *Scott v. Harris*, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The reasonableness inquiry is both objective and attuned "to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). In any particular case, the reasonableness of the force used must be judged from the perspective of a reasonable officer at the scene rather than with the perfect vision of hindsight. *Id.* Police officers often must make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving. *Id.* at 396-97. The inquiry is nonetheless an objective one: just as an officer's evil intentions will not turn an otherwise objectively reasonable use of force into a Fourth Amendment violation, an officer's good intentions will not make an objectively unreasonable use of force constitutional. *Id.* at 397.

Courts in the Ninth Circuit employ a three-step analysis in evaluating excessive force claims. The first step is to assess the severity of the intrusion on the plaintiff's Fourth Amendment rights based on the type and amount of force inflicted. Next, a court must evaluate the government's interests in light of the three *Graham* factors: (1) the severity of the crime; (2) the threat posed to officers or bystanders; and (3) any resistance to arrest and risk of flight. Finally, a court must balance the gravity of the intrusion on the plaintiff against the government's

need for the intrusion. *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010); *see also Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003).

1. Concetti's Use of Lethal Force

There is no question that Concetti used deadly force against Penny. This most severe of intrusions must be justified by the governmental interests at stake. *See A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016). Penny argues that none of the *Graham* factors are satisfied, as Concetti had no information to support a reasonable belief that Penny committed any crime, much less a severe one, Penny did not pose an immediate threat to Concetti or anyone else at the time he was shot, and he did not try to flee.

This is one of the rare use-of-force cases where there can be no dispute as to what Penny was physically doing prior to and when he was shot, because clear video evidence, the authenticity of which is undisputed, shows the incident from multiple angles. When confronted with a videotape of the events in question, the Court must "view[] the facts in the light depicted by the videotape." *Scott*, 550 U.S. at 380-81. And "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by [the video], so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. Indeed, in light of the clear video evidence, there are no genuine disputes of material fact concerning Concetti's shooting. "In the absence of material factual

disputes, the objective reasonableness of a police officer's conduct is 'a pure question of law.'" *Lowry v. City of San Diego*, 858 F.3d 1248, 1254 (9th Cir. 2017) (quoting *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011)).

a. Threat Posed to Officers or Bystanders

The "most important single element of the . . . factors" identified in *Graham* is whether the suspect poses an immediate threat to the safety of the police officers or others. *Id.* at 702 (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994)). "[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. In short, an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001).

While the wooden board Penny held could have been used as a weapon, the Ninth Circuit has held repeatedly that the "mere fact that a suspect possesses a weapon does not justify deadly force." *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013) (collecting cases). The suspect must actually create an immediate, objective threat to the officer, such as by making a "furtive movement, harrowing gesture, or serious verbal threat." *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013); *see also Glenn v. Washington Cty.*, 673 F.3d 864, 873 (9th Cir. 2011) (distinguishing situations where suspect "wielded [a weapon] in a more threatening manner" from case in "which he did not brandish at anyone"). Penny never once

tried to outright attack the officers during the minutes-long encounter, and his movements at the time he was shot were consistent with his general erratic pacing in which he had been engaged the whole time. He was not holding the board in a manner as if he was about to strike Concetti. On point case law establishes that in this situation, there is no immediate threat to the officer such that deadly force would be justified. *See Deorle*, 272 F.3d at 1284 ("Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable."); *Est. of Aguirre v. Cty. of Riverside*, 29 F.4th 624, 628 (9th Cir. 2022) ("[A]lthough eyewitnesses agree that Najera was holding at least one bat-like object when he was shot . . . [n]othing in the record suggests that Najera was threatening bystanders or advancing toward them when he was killed. Here, on Najera's facts, he presented no threat at all to the officer—or anyone else—in that moment.").[6]

6. Defendants urge the Court to consider other cases that are not factually analogous. *Woodward v. City of Tucson*, 870 F.3d 1154 (9th Cir. 2017), involved a suspect who "immediately advanced towards the officers, yelling or growling" and had a "two-foot length of broken hockey stick raised in a threatening manner." *Id.* at 1162 (emphasis added). The court also noted that the space was small and made it "difficult tor the officer to retreat." *Id.* Similarly, in *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987), the suspect "threatened to kill" the officer, "brandish[ed] [a] stick and rock with upraised arms," and "drew closer," when the officer shot him as he approached within three to five feet. *Id* at 808.

b. Severity of Crime and Resistance of Arrest/ Risk of Flight

The other two *Graham* factors also favor Penny. Defendants do not dispute that Concetti had no reason to believe that Penny had committed a serious crime, and he certainly was not doing so at the time of the shooting. *See S.R. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019) ("Even if Nehad had made felonious threats or committed a serious crime prior to Browder's arrival, he was indisputably not engaged in any such conduct when Browder arrived, let alone when Browder fired his weapon."). Penny was also not fleeing, though he may have been resisting arrest by ignoring Azmy's and Concetti's commands. Of course, resisting arrest alone does not warrant the use of deadly force. *See Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

c. Other Factors

In addition to the *Graham* factors, the Court may consider other factors. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1033-34 (9th Cir. 2018). Virtually all of the additional factors that the Ninth Circuit has at times invoked are present in this case, and they all weigh heavily against the reasonableness of Concetti's conduct.

Significantly, Concetti gave no warning that he would use deadly force, which is evidence of objective unreasonableness. *Nehad*, 929 F.3d at 1137-38 ("The seemingly obvious principle that police should, if possible, give warnings prior to using force is not novel, and is well

known to law enforcement officers. . . . A prior warning is all the more important where . . . the use of lethal force is contemplated."); *Aguirre*, 29 F.4th at 628 ("Before using deadly force, law enforcement must, 'where feasible,' issue a warning."). Concetti fired his pistol suddenly and without warning, despite ample opportunity to do so while Penny moved around with the board and other objects—and despite warnings from the other officers that a beanbag round would be used.

Another compelling factor here is the availability of "less intrusive alternatives to deadly force." *Nehad*, 929 F.3d at 1137; *see also Glenn*, 673 F.3d at 876 ("[P]olice are required to consider what other tactics if any were available, and if there were clear, reasonable and less intrusive alternatives to the force employed, that militates against finding the use of force reasonable.") (internal alterations and quotation marks omitted). Concetti had with him non-lethal alternatives, such as pepper spray, a side-handle baton, and a collapsible baton—not to mention the many other officers surrounding him with less-lethal weapons. PSUF 96. Concetti's supervisor had in fact vocally and explicitly *ordered* less-lethal force to be used, making Concetti's unprompted, inexplicable decision to fire his handgun unreasonable. Moreover, the officers could have employed de-escalation tactics that might have militated against the need for force at all. They refused to engage with local residents who knew Penny and his circumstances and may have had insight into how to calm him down.

Another factor is whether the suspect was evidently mentally or emotionally unstable or seeming to invite officers to use deadly force against him. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018). In such circumstances, "when dealing with an emotionally disturbed individual who is creating a disturbance or resisting arrest, as opposed to a dangerous criminal, officers typically use less forceful tactics." *Glenn*, 673 F.3d at 877. It is undisputed that Penny was acting erratically and bizarrely, and all the officers believed Penny to be either mentally impaired or under the influence of drugs or alcohol. The uncontroverted evidence demonstrates that a reasonable officer would have viewed Penny as a disturbed or unstable individual, rather than a dangerous criminal. But by using deadly force against him, Concetti treated Penny as the latter.

Also significant is the fact that Penny was heavily outnumbered and outgunned by the officers present. *See Deorle*, 272 F.3d at 1283 ("[T]he situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence. . . ."); *Washington v. Lambert*, 98 F.3d 1181, 1190 (9th Cir. 1996) ("[T]he ratio of officers to suspects present . . . weighs against Lambert's using such intrusive action."). At the time of the shooting there were six officers in a line directly in front of Penny, and in total there were 13 officers on the scene.

Additionally, this was not a split-second incident. Most of the officers present, including Concetti, had been monitoring Penny for several minutes prior to the

shooting. They had become familiar with his antics and patterns and the threat (or lack thereof) that he posed, and they had the opportunity to develop a plan and set ground rules for engagement. *See Deorle*, 272 F.3d at 1283 ("Rutherford had had an opportunity to observe Deorle for a considerable period of time prior to firing at him. He also had the opportunity to consult with his superiors concerning the tactics to be employed.").

Finally, although by no means dispositive or binding, it is also relevant that the OIG found Concetti's decision to shoot violated LAPD's policies and best practices. The fact that Concetti did not follow his own department's guidelines for the use of deadly force weighs against the reasonableness of his conduct.

In light of all the uncontroverted circumstances—the lack of criminal conduct or flight, the fact that Penny never attacked or attempted to attack the officers throughout the encounter, the commanding officer's order to use less-lethal force, the absence of imminent harm towards Concetti just prior to the shooting, the failure to warn, the availability of less intrusive force, Penny's evident impaired mental state, the large number of police officers present, and the extended timeframe of the incident—the singular fact that Plaintiff was holding a wooden board and refusing to drop it "is insufficient by any objective measure to justify the force deployed." *Id.* at 1282. The Court therefore concludes that Concetti violated the Fourth Amendment in using deadly force against Penny.

2. Use of Less-Lethal Force by Antalek, Spraggins, and Robles

Defendants (but not Penny) also move for summary judgment on the use-of-force claim as to Antalek, Robles, and Spraggins' less-lethal uses of the Taser, the 40-millimeter launcher, and the beanbag, respectively.

Many of the same facts regarding whether Concetti's use of lethal force was appropriate are also relevant to the less-lethal uses of force. Robles and Spraggins fired at the same time as Concetti did, so the factual circumstances are largely identical as described above, at least with regard to Penny's conduct.

Antalek fired his Taser earlier in the incident, but the circumstances were very similar—an erratic Penny, armed with what could be a weapon (in this case, a glass bottle, held by the neck of the bottle), moved slowly towards Antalek, in close proximity, when Antalek fired the taser.

The same overarching rule that applies to Concetti's use of deadly force—the mere fact that the suspect possesses a weapon does not justify the force unless the suspect actually threatens the officer or a bystander—applies equally under Ninth Circuit precedent to the less-lethal force used here. *See id.* (use of beanbag round was unreasonable when "Deorle was walking . . . in Rutherford's direction with a can or bottle in his hand"); *Glenn*, 673 F.3d at 874 (use of beanbag round against suspect in possession of pocketknife was unreasonable

because "at the moment the officers shot him with the beanbag gun there was little evidence that he posed an 'immediate threat' to anybody").

Not all of the factors relevant to Concetti's deadly force apply equally to the less-lethal uses of force—*e.g.*, warnings were provided prior to them, and the less-intrusive alternatives analysis is different for the officers who chose something less than deadly force. Nonetheless, only Defendants move for summary judgment as to the less-lethal uses of force, so at least viewing the facts in the light most favorable to Penny, a reasonable jury could find that Antalek, Robles, and Spraggins violated the Fourth Amendment by firing a Taser, beanbag, and 40-milimeter round at a non-threatening, emotionally unstable individual.[7]

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7. At the hearing, the Court *sua sponte* raised the issue of whether Penny has any evidence that he suffered any actual injuries from the less-lethal uses of force, and whether his claim based on those uses of force can proceed if not. Case law is somewhat mixed as to whether an excessive force claim can proceed without physical injury. *Compare Tekle v. United States*, 511 F.3d 839, 845 (9th Cir. 2007) ("We have held that the pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury."), *with Arrieta v. Cty. of Kern*, 161 F. Supp. 3d 919, 928 (E.D. Cal. 2016) (requiring "evidence of non-de minimis injury to overcome a summary judgment motion") (citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir.2001)). The Court need not resolve this legal issue, however, because in supplemental filings, Penny provided evidence that he suffered physical injuries from the less-lethal uses of force. [Doc. # 133.] The Court therefore discharges its *sua sponte* inquiry.

3. Qualified Immunity

Defendants argue that they are entitled to qualified immunity on Penny's excessive force claim. To determine whether officers are entitled to qualified immunity, the Court must answer two separate questions: (1) whether the officers violated a federal statutory or constitutional right, and (2) whether the unlawfulness of their conduct was "clearly established" at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018). As discussed, Concetti violated Penny's constitutional rights by using deadly force against him as a matter of law, and a jury could find that the other Defendants violated Penny's Fourth Amendment rights with their uses of less-lethal force. The next question then is whether those violations were "clearly established."

Demonstrating that the unlawfulness of an officer's actions was "clearly established" requires a showing 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." *Wesby*, 138 S. Ct. at 589; *Hardwick v. Cty. of Orange*, 844 F.3d 1112, 1118 (9th Cir. 2017). The party asserting the injury bears the burden of "showing that the rights allegedly violated were clearly established." *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017), *cert. denied sub nom. Shafer v. Padilla*, 138 S. Ct. 2582, 201 L. Ed. 2d 295 (2018).

A clearly established right cannot merely be implied by precedent, and plaintiffs may not defeat qualified immunity by describing violations of clearly established

general or abstract rights outside "an obvious case." *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 551-52, 196 L. Ed. 2d 463 (2017) (quoting *Brousseau v. Haugen*, 543 U.S. 194, 199 (2004)); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality"). The Ninth Circuit has emphasized that "it is the facts of particular cases that clearly establish what the law is." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017). The standard, however, does not "require a case directly on point for a right to be clearly established," so long as "existing precedent" places "the statutory or constitutional questions beyond debate." *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551).

It is clearly established that "the use of deadly force against a non-threatening suspect is unreasonable." *Zion v. Cty. of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1548 (2018); *see also Garner*, 471 U.S. at 11-12; *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). Binding precedent places this constitutional question—the right of a non-threatening suspect not to be killed—beyond debate. Penny posed no immediate threat to anyone at the time that Concetti shot him, making Concetti's use of lethal force an "obvious case" involving the unreasonable use of deadly force against a non-threatening suspect. *Aguirre*, 29 F.4th at 629 ("Assuming that Najera posed no immediate threat to Ponder or others at the time of his death, this 'general constitutional rule' applies 'with obvious clarity' here and renders Ponder's decision to shoot Najera objectively unreasonable.").

Defendants argue that this rule is too high a level of generality and therefore inappropriate for considering the applicability of qualified immunity. The Court disagrees. *See id.* ("[N]o 'body of relevant case law' is necessary in an 'obvious case' like this one."). Nonetheless, several Ninth Circuit precedents clearly establish the unconstitutionality of using lethal force on these specific facts.

Deorle is quite similar to this case. Deorle was intoxicated and "behaved erratically," was "verbally abusive," picked up and dropped various objects that could be used as weapons, and "remained agitated and continued to roam on or about the property but well within the police roadblocks." 272 F.3d at 1276. He did not touch or attack anyone, though he did make verbal threats. *Id.* at 1276-77. Several officers observed him over an extended period. As he walked directly towards one officer at a "steady gait" with a bottle or can in his hand, the officer shot him with a beanbag round, without warning, as he crossed a certain predetermined threshold. *Id.* at 1277-78. *Deorle* clearly establishes that not only was Concetti's use of lethal force unconstitutional, but so too potentially were the other officers' uses of less-lethal force.

Similarly, in *N.E.M. v. City of Salinas*, 761 F. App'x 698 (9th Cir. 2019), a suspect who appeared drunk pulled out shears, reportedly swung them at the officers, fell over a small partition, and continued to slowly walk away. He then turned toward the officers in a "normal" and "not sudden" manner, and an officer shot him. *Id.* at 699. The court found that at the time of shooting, "it was clearly established that officers may not use deadly force against

a person who is armed but cannot reasonably be perceived to be taking any furtive, harrowing, or threatening actions." *Id.* at 700; *see also Kendrick v. Cty. of San Diego*, 776 F. App'x 530 (9th Cir. 2019) ("In March 2015, when this incident occurred, it was clearly established that the use of lethal force against someone who is armed and mentally unstable, but not suspected of any criminal wrongdoing, is reasonable only if that individual made a 'furtive movement,' 'harrowing gesture,' or 'serious verbal threat.'").

In *Hayes v. County of San Diego*, officers responded to a call that Hayes was acting in a way that was potentially suicidal. 736 F.3d at 1227. While taking one to two steps towards the officer, Hayes raised both his hands to approximately shoulder level, revealing a large knife. *Id.* at 1227-28. He was not "charging" at the officers and had a "clueless" expression. *Id.* at 1228. The officer then shot him without warning. *Id.* The court found that Hayes' movement towards the officer while holding a knife did not justify the belief that Hayes was an immediate threat when there was no evidence that he actually threatened the officers with the knife. *Id.* at 1233-34. Further, that court found it significant that no warning was given prior to the use of lethal force. *Id.* at 1234-35.

As discussed above, the facts of *Deorle* clearly establish that even the use of less-lethal but still severe force such as a Taser, beanbag, and 40-milimeter rubber bullet is unconstitutional when, as here, an emotionally disturbed suspect does not actively threaten the officers or bystanders, is not fleeing or committing a serious

crime, and is only resisting in the sense of not complying with commands. *See also Glenn*, 673 F.3d at 874-877 (use of less-lethal beanbag round not objectively reasonable when "although [suspect] did not heed orders to put down the pocketknife, he 'did not attack the officers; indeed at no time did he even threaten to attack any of them,' or anyone else.").

Because their alleged Fourth Amendment violations[8] were clearly established at the time of the incident, Concetti, Antalek, Robles, and Spraggins are not entitled to qualified immunity as to Penny's excessive force claim. Consequently, the Court **DENIES** Defendants' MSJ as to Penny's excessive force claim pertaining to Antalek, Spraggins, and Robles, and **GRANTS** Penny's MSJ as to his claim against Concetti.

B. Supervisor Liability, Integral Participation, and Failure to Intervene

Penny moves for summary judgment as to Azmy's secondary liability for Concetti's deadly use of force as a supervisor or based on his "integral participation" or failure to intervene. Defendants also move for summary judgment on all these claims as to each of them, as they pertain to both the lethal and less-lethal uses of force.

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8. In the case of Antalek, Robles, and Spraggins, the Court refers to the violations that are established when the facts are viewed in the light most favorable to Penny.

Appendix B

A defendant may be liable for constitutional violations committed by another officer where their involvement in that violation rises to the level of "integral participation." *Boyd v. Benton Cty.*, 374 F.3d 773, 780 (9th Cir. 2004). "'[I]ntegral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation." *Id.* "But it does require some fundamental involvement in the conduct that allegedly caused the violation." *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). Further, "[a] defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989)). A supervisor's "failure to bring his subordinates under control could support liability," even when the supervisor does not use or direct any force himself. *Lolli v. County of Orange*, 351 F.3d 410, 418 (9th Cir. 2003). Additionally, "police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000). Importantly, however, officers can only be held liable for failing to intercede if they had a "realistic opportunity" to intercede or prevent a constitutional violation. *Id.* at 1290-91 (citing *Bruner v. Dunaway*, 684 F.2d 422, 426-27 (6th Cir. 1982)).

Appendix B

1. Concetti's Deadly Force

There is no evidence that any officer intended Concetti to fire his gun or had any knowledge that Concetti would do so at the moment that he did. The jury could find that the other officers saw Concetti with his gun unholstered and pointed at Penny, but that does not mean they knew Concetti would fire it. Moreover, as the foregoing discussion makes clear, the difference between an unconstitutional shooting and a constitutional one could turn on a split-second, if Penny had indeed made a sudden, imminently threatening movement to strike Concetti or another officer. The fact that Concetti pointed his weapon therefore does not mean that the other officers knew Concetti would use deadly force unreasonably. Nor could any officer stop Concetti in the act once he decided to shoot—Concetti gave no warning that he would do so, and the act of firing a gun happens in an instant.

Penny argues that the other officers were integral participants in Concetti's shooting because they provided him with "armed backup," citing *Boyd*, 374 F.3d at 780. But critically in *Boyd*, "every officer was aware of the decision to use the flash-bang, did not object to it, and participated in the search operation knowing the flash-bang was to be deployed." *Id.* Moreover, the other officers here were not truly providing "armed backup" to Concetti's shooting. "Armed backup" suggests intentionally providing cover so that a fellow officer can carry out a specific police activity. The officers here were not providing Concetti with cover so that he could use force against Penny. Concetti was not designated to engage with Penny while

the other officers provided cover, nor was he designated to be the lethal cover officer himself. In fact, Azmy, the officer in charge, had ordered non-lethal force be used. Without either advance knowledge that force would be used or knowing assistance in the force in progress, the officers were "mere bystanders" to Concetti's shooting, not integral participants. *Id.* And because they lacked the ability to stop the force as it occurred, they cannot be liable for failure to intervene. *See Ting v. United States*, 927 F.2d 1504, 1511-12 (9th Cir. 1991) (summary judgment appropriate in favor of officers where there was no evidence that other officers present knew that officer would shoot, nor that they would have been able to prevent it).

Penny also argues that Azmy in particular can be liable as a supervisor. He argues that Azmy's failure to control the situation appropriately and provide adequate direction and oversight to his subordinate officers contributed to Concetti's shooting. He provides the testimony of a police practices expert who opines as such. *See* Noble Decl. ¶ 7 [Doc. # 103-2]. But even if this theory of tactical negligence could support supervisor liability for excessive use of force, Penny provides no case law that clearly establishes such a theory. To be liable "without overt personal participation," a supervisor must "implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Hansen*, 885 F.2d at 646 (9th Cir. 1989) (quoting *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir.1987)). Penny provides no case remotely similar to this one that would clearly establish

that poor tactical decisions in dealing with an erratic individual amount to a repudiation of constitutional rights and are the moving force behind another officer's unplanned use of excessive force.

Accordingly, Penny's MSJ as to Azmy's liability under Section 1983 for Concetti's use of force as a supervisor, integral participant, or for failure to intervene is **DENIED**. Defendant's MSJ as to Azmy, Spraggins, Robles, Antalek, Park, and Lara's liability under Section 1983 based on integral participation and failure to intervene is **GRANTED**. Defendant's MSJ as to Azmy's liability as a supervisor is **GRANTED** based on qualified immunity.

2. Spraggins' Beanbag Round

In contrast with Concetti's deadly use of force, Spraggins' firing of the beanbag round was very much planned and anticipated. Spraggins had been ordered to retrieve the beanbag shotgun, and Azmy both warned Penny and ordered Spraggins to "beanbag him" multiple times before the beanbag was actually fired, and with enough time for the other officers to know that it was intended and to intervene. A reasonable jury could conclude that the other officers knowingly provided cover for the beanbag round (or in the case of Azmy, personally ordered it himself) and therefore were integral participants. They also had an opportunity to intervene between when Azmy ordered the beanbag and when it was fired. Therefore, Defendants' MSJ as to each theory of secondary liability for each officer with respect to

Spraggins' firing of the beanbag is **DENIED**.[9]

3. Robles' 40-milimeter Round

Robles' firing of the 40-milimeter round is more like Concetti's shooting of his gun than Spraggins' use of the beanbag. Penny provides no evidence that any other officer knew that he would use the 40-milimeter or ever intended for him to do so. Azmy never ordered the 40-milimeter to be fired, and there is no evidence that Robles was ever instructed to have it at the ready. Therefore, Defendants' MSJ as to their secondary liability for Robles' firing of the 40-milimeter round is **GRANTED**.

4. Antalek's Taser

Only Robles was present on the scene when Antalek fired his Taser at Penny. Unlike with respect to Spraggins' use of the beanbag, there is no evidence of any supervising officer ordering Antalek to fire the Taser or to be prepared to use it. On the other hand, unlike with Concetti's shooting, Antalek warned that he would use the Taser, which may have put Robles on notice that such force would be used—though that does not mean that Robles would have known that Antalek would fire at the moment that he did. This is a more difficult case, but viewing the evidence in the light most favorable to Penny, a reasonable jury could conclude that Robles was intentionally providing cover to Antalek

9. It was clearly established at the time that an officer who knowingly provides cover as part of a plan to use less-lethal but excessive force violates the Fourth Amendment himself as an integral participant in that use of force. *See Boyd*, 374 F.3d at 780.

as he fired the Taser, making him an integral participant, or that he had an opportunity to prevent Antalek from firing the Taser. Defendants' MSJ as to Robles' liability as an integral participant or for failure to intervene in Antalek's use of the Taser is therefore **DENIED**.

C. Failure to Provide Medical Care

Defendants move for summary judgment on Penny's constitutional and state law claims for failure to provide medical care. Penny does not oppose Defendants' MSJ as to these claims. Defendants' evidence suggests that the officers provided medical care to Penny as soon as they were able to detain him. Therefore, Defendants' MSJ is **GRANTED** as to these claims.

D. Bane Act

California Civil Code section 52.1, known as the Bane Act, creates a cause of action against those who interfere with constitutional rights "by threat, intimidation, or coercion." Cal. Civ. Code § 52.1. In an excessive force case, the Bane Act requires not merely establishing a Fourth Amendment violation, but also "a specific intent to violate the arrestee's right to freedom from unreasonable seizure." *Reese v. Cty of Sacramento*, 888 F.3d 1030, 1043 (2018) (quoting *Cornell v. City and Cty. of San Francisco*, 17 Cal. App. 4th 766, 801-802 (2017)). A plaintiff must prove that the offending officer "intended not only the force, but its unreasonableness, its character as more than necessary under the circumstances." *Id.* at 1045 (internal quotation marks omitted). The specific intent requirement

can be satisfied by "a reckless disregard for a person's constitutional rights." *Reese*, 888 F.3d at 1045.

This claim presents the same issues and conclusions as do Penny's excessive use of force claims under Section 1983. Concetti's use of deadly force interfered with Penny's right against excessive use of force. Given that Concetti's use of force violated clearly established law, it also demonstrated a reckless disregard for that right. As it pertains to Concetti's use of force, Penny's MSJ is **GRANTED** and Defendants' MSJ is **DENIED** with respect to the Bane Act claim. Even if Azmy's poor tactical conduct could give rise to supervisory liability under the Fourth Amendment, his conduct did not represent a reckless disregard for Penny's rights. Penny's MSJ is **DENIED** and Defendants' MSJ is **GRANTED** as it pertains to Azmy's Bane Act liability for Concetti's use of deadly force. Defendants' MSJ is **DENIED** as it pertains to Antalek, Robles, and Spraggins' individual Bane Act liability for each of their less-lethal uses of force. Defendants' MSJ is **GRANTED** as it pertains to any officers' Bane Act liability for integral participation or failure to intervene in Concetti's or Robles' uses of force, but **DENIED** with regard to integral participation or failure to intervene in Spraggins' and Antalek's uses of force.

E. Intentional Tort Claims: Intentional Infliction of Emotional Distress, Assault, Battery

Penny's intentional tort claims under California law involve the same standards as that of an excessive use of

force claim under the Fourth Amendment. *See Brown v. Ransweiler*, 171 Cal. App. 4th 516, 527, 89 Cal. Rptr. 3d 801 (2009) ("A state law battery claim is a counterpart to a federal claim of excessive use of force."); *Nelson v. City of Davis*, 709 F. Supp. 2d 978, 992 (E.D. Cal. 2010), *aff'd*, 685 F.3d 867 (9th Cir. 2012) ("[T]he same standards apply to both state law assault and battery and section 1983 claims premised on constitutionally prohibited excessive force. . . ."); *see also Wallisa v. City of Hesparia*, 369 F. Supp. 3d 990, 1020 (C.D. Cal. 2019) (denying summary judgment for intentional infliction of emotional distress, assault, and battery based on the same issues present in Fourth Amendment claim). Penny moves for summary judgment on his assault and battery claims pertaining to Concetti and Azmy, and Defendants move for summary judgment on these claims pertaining to all of them, as well as the intentional infliction of emotional distress claim. The basis for Defendants' motion on these claims is simply that Penny fails to establish a constitutional violation. Accordingly, as to these intentional tort claims, Penny's MSJ is **GRANTED in part** and **DENIED in part**, and Defendants' MSJ is **GRANTED in part** and **DENIED in part** in the same formulation as with the Fourth Amendment and Bane Act claims.

F. Negligence

"California negligence law regarding the use of deadly force overall is broader than federal Fourth Amendment law." *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1125 (9th Cir. 2021) (citing *Villegas ex rel. C.V. v. City of Anaheim*, 823 F.3d 1252, 1257 n.6 (9th Cir. 2016)) (internal

quotations omitted). Officers can be liable "if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable." *Id.* (citing *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 639, 160 Cal. Rptr. 3d 684, 305 P.3d 252 (2013)).

The parties' negligence claims rise and fall to the same degree as their Fourth Amendment, Bane Act, and intentional tort claims, with one important difference. Viewing the facts in the light most favorable to Penny, Azmy's poor tactical decisions could amount to negligence that caused Concetti's and Robles' uses of force. Unlike with the Fourth Amendment or Bane Act, California negligence law does not incorporate qualified immunity or a "reckless disregard" standard. Significantly, it also expressly allows for the consideration of tactical decisions that lead to the use of force. *Tabares*, 988 F.3d at 1125. Azmy was directly responsible for those decisions, and the jury could determine that they were the proximate cause of Penny being injured by Concetti's and Robles' shots.

Although Defendants do not controvert Penny's evidence—via his expert and the OIG Report—that Azmy was negligent, Penny has not foreclosed triable issues as to causation. Drawing all reasonable inferences in favor of Defendants, the jury could conclude that Concetti's and Robles' decisions to shoot were completely rogue and had nothing to do with Azmy's tactics, or lack thereof. Accordingly, both sides' MSJs are **DENIED** as to the negligence claim against Azmy based on Concetti's and Robles' uses of force. As to each of the other officers'

negligence, based on all other theories of liability discussed, the parties' MSJs are **GRANTED in part** and **DENIED in part** in the same formulation as above.

V.

CONCLUSION

In light of the foregoing, the Court issues the following orders:

1. Penny's MSJ is:

   a. **GRANTED** as to Concetti's direct liability for excessive force, violating the Bane Act, assault, battery, and negligence based on his own use of force; and

   b. **DENIED** as to Azmy's secondary liability for excessive force, failure to intervene, violating the Bane Act, assault, battery, and negligence based on Concetti's use of force.

2. Defendants' MSJ is:

   a. **DENIED** as to Concetti's direct liability for excessive force, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on his own use of force;

b. **DENIED** as to Antalek, Robles, and Spraggins' direct liability for excessive force, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on each of their own uses of force;

c. **GRANTED** as to Antalek, Robles, Spraggins, Park, and Lara's secondary liability for excessive force, failure to intervene, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on Concetti's use of force;

d. **GRANTED** as to Antalek, Concetti, Spraggins, Park, and Lara's secondary liability for excessive force, failure to intervene, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on Robles' use of force;

e. **GRANTED** as to Azmy's secondary liability for excessive force, failure to intervene, violating the Bane Act, assault, battery, and intentional infliction of emotional distress based on Concetti's and Robles' uses of force;

f. **DENIED** as to Azmy's secondary liability for negligence based on Concetti's and Robles' uses of force;

g. **DENIED** as to Azmy, Concetti, Antalek, Robles, Park, and Lara's secondary liability for excessive

force, failure to intervene, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on Spraggins' use of force;

h. **DENIED** as to Robles' secondary liability for excessive force, failure to intervene, violating the Bane Act, assault, battery, intentional infliction of emotional distress, and negligence based on Antalek's use of force; and

i. **GRANTED** as to all Defendants' liability for failure to provide medical care under both federal and state law.

3. By no later than **May 23, 2002**, the parties shall meet and confer and file a stipulation and proposed order regarding a new date for their final pretrial conference and trial. If the parties are unable to agree on dates, they shall file a joint status report and the Court will impose new dates which may be equally inconvenient to both sides.

IT IS SO ORDERED.

DATED: May 9, 2022

/s/ Dolly M. Gee
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 20, 2024

UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

No. 22-55572

D.C. No. 2:20-cv-07211-DMG-MAA
Central District of California, Los Angeles

JOHN SYLVESTER PENNY,

Plaintiff-Appellee,

v.

SAMI AZMY; JONATHAN A. CONCETTI,

Defendants-Appellants,

and

CITY OF LOS ANGELES; MICHAEL MOORE, Chief of Police; DANIEL ANTALEK; BLAIR A. SPRAGGINS; ANTONIO ROBLES; LAWRENCE PARKS; MIGUEL LARA; DOES, 7-10,

Defendants.

Appendix C

ORDER

Before: BERZON, RAWLINSON, and BRESS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. Judge Berzon, Judge Rawlinson, and Judge Bress have voted to deny the petition for panel rehearing. Judge Rawlinson and Judge Bress have voted to deny the petition for rehearing en banc, and Judge Berzon has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.