

67628-8

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No. 67628-8

COURT OF APPEALS

DIVISION I

FOR THE STATE OF WASHINGTON

**David R. Gallegos,**

**Appellant-Plaintiff,**

v.

**Jeremy Freeman and Whatcom County, WA,**

**Respondents-Defendants.**

**BRIEF OF RESPONDENT JEREMY FREEMAN**

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## I. INTRODUCTION

This is not a case of what could have happened, should have happened, or would have happened had circumstances been different on the night of February 10, 2005, when Respondent, Deputy Jeremy Freeman, shot and injured Appellant, David Gallegos. It is a case of what did happen after a series of highly-charged, emotional events, and the split-second decision that Deputy Freeman was forced to make under chaotic circumstances. It is the case of a Deputy, who, in unfamiliar territory, in pitch darkness, and with limited information, was required to evaluate whether his life was in danger, and whether he needed to take steps to ensure that he would return home safely to his family and fellow officers. As discussed herein, Deputy Freeman believed he was in grave danger, and opted to protect himself. That decision was both reasonable and lawful.

While the parties and this Court now have the benefit of 20/20 hindsight, and while Mr. Gallegos would have you believe that such hindsight consideration is appropriate in this matter, such consideration is simply not allowed under the law. Rather, this Court must look at the circumstances at the time they were occurring, with the information and facts known to Deputy Freeman on that date, and under the applicable law at the time he made his decision. Judge Cook did so, and determined that

qualified immunity was appropriate. For the reasons discussed below, Deputy Freeman respectfully requests that this Court affirm Judge Cook's decision to dismiss all claims against him.

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

David Gallegos filed his original Complaint against Whatcom County and Deputy Jeremy Freeman in this matter on February 9, 2007. Clerk's Papers ("CP") at 1-14. The Complaint alleged a number of causes of action against Deputy Freeman, including an alleged civil rights claim under 42 U.S.C. § 1983, asserting that Deputy Freeman violated Mr. Gallegos' 4<sup>th</sup> and 14<sup>th</sup> Amendment rights through the use of excessive force. CP at 5-6. Mr. Gallegos also alleged state law causes of action against Deputy Freeman for negligence and battery based on the same set of operative facts.<sup>1</sup> CP at 7-9. Initially, all of the named Defendants were represented by the same counsel. CP at 2.

On November 25, 2007, before any significant discovery had been completed, Mr. Freeman's prior counsel filed a Motion for Summary Judgment. CP at 22 and 23-77. That motion was ultimately denied

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<sup>1</sup> In addition to his allegations against Deputy Freeman, Plaintiff alleged negligence against Chief Deputy Steven Cooley and a cause of action under §1983 for municipal liability against Whatcom County. CP at 9-10. Whatcom County subsequently moved separately for summary judgment as to the claims against it. CP at 364-375. Mr. Gallegos ultimately stipulated to the County's dismissal. CP at 740-741. Deputy Cooley was voluntarily dismissed from the action prior to summary judgment. CP at 376-378.

because the judge found there were genuine issues of material fact at that time. *See* CP at 348-349. Mr. Gallegos, having prevailed on the motion, did not appeal. Shortly thereafter, Mr. Freeman retained the undersigned counsel. Significant discovery occurred over the subsequent years.

On May 31, 2011, Mr. Freeman filed a Motion for Summary Judgment, seeking dismissal of all claims against him individually, which was supported with numerous documents and declarations. CP at 379-381.<sup>2</sup>

On June 27, 2011, Judge Susan K. Cook heard oral argument on Defendant Freeman's motion and granted summary judgment in his favor. CP at 742-744. As explained in her oral ruling, Judge Cook found "the officer's actions were not unreasonable under the circumstances, and, therefore, he should be granted qualified immunity for his actions on that day." *Supplemental Report of Proceedings* ("SRP") at p. 17:2-4.<sup>3</sup> Judge Cook also dismissed the state law claims against Deputy Freeman, finding qualified immunity precluded those as well. SRP at pp. 18:24 – 19:1-13.

On July 7, 2011, Mr. Gallegos filed a motion for reconsideration. CP at 771-781. Deputy Freeman opposed the motion. CP at 782-789. On

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<sup>2</sup> Defendant Whatcom County filed a separate motion for summary judgment at the same time. CP at 363.

<sup>3</sup> This Court allowed Deputy Freeman to file a supplemental report of proceedings after hearing a motion to correct the record in this matter. *Order on Dep. Freeman's Motion to Correct the Record, Dated Oct, 12, 2011.*

July 26, 2011, Judge Cook denied Mr. Gallegos' motion for reconsideration. CP at 796.

On August 17, 2011, Appellant filed notice of the instant appeal. CP at 799-806. Appellant designated the 2011 "Order Granting Defendant Freeman's Motion for Summary Judgment" and the subsequent denial of Appellant's "Motion for Reconsideration of the Ruling Granting Defendant Freeman's Motion for Summary Judgment" as the orders from which he appeals. CP at 799.

## **B. Summary of Facts**

### *1. Prior History and Entry of No Contact Order*

The facts relevant to this matter arise several years prior to the incident on February 10, 2005. In 2002, Plaintiff David Gallegos was married to Emma Gallegos (now Emma Alanis-Veras). CP at 434 and 438. During that year, he suffered an on the job injury. CP at 435. This on the job injury resulted in significant lower back problems for Mr. Gallegos. *Id.* As part of his treatment for these lower back problems, he was prescribed a number of different pain-killers. CP at 441. Further, due to the injury, Mr. Gallegos was unable to work. CP at 435. As a result, Mr. Gallegos began to suffer profound depression, and he attempted suicide. CP at 436-437. In addition, his marriage to Ms. Alanis-Veras

began to deteriorate, and they contemplated divorce. CP at 439. The couple eventually reconciled. CP at 439-440.

Between 2003 and early 2005, Mr. Gallegos continued to struggle with depression and continuing pain and physical limitations from his lower back injury. CP at 435 and 436-437. As a father of four and the primary financial provider to his family, his inability to work and support his family created a large division in his relationship with Ms. Alanis-Veras. Ms. Alanis-Veras alleges that Mr. Gallegos was abusive, both physically and mentally. CP at 449-450 and 453-456. Ms. Alanis-Veras also alleges that Mr. Gallegos was having an affair during that time. CP 451-452. Mr. Gallegos also believes that Ms. Alanis-Veras was also having an affair during that time. CP at 436. It appears that Mr. Gallegos attempted suicide during those years on at least three or as many as four or five times. CP at 436-437 and 480-494.

In the late summer and fall of 2004, Mr. Gallegos appeared to be recovering from a bout of severe depression. He had been participating in an in-patient program to manage his lower back injury at the United Back Care Center and was feeling positive about his future. CP at 471-472. According to his mental health treatment provider, Dr. Leslie Aaron, he had learned how to effectively cope with his pain and had the most positive attitude she had seen since she started working with him. *Id.*

However, once Mr. Gallegos left the structured program at United Back Care, his depression quickly returned. CP at 472-473. His behavior became increasingly aggressive, and he was moody and severely depressed. CP at 468-470 and 471-475. As a result, Dr. Aaron became more concerned about his risk of suicide. CP at 476-477.

Mr. Gallegos' depression reached its height in February of 2005, when, on February 2<sup>nd</sup> of that year, Sheriff's Deputies and first responders were dispatched to the home shared by Mr. Gallegos and Ms. Alanis-Veras based on reports of a suicide attempt by Mr. Gallegos. CP at 490-493. Mr. Gallegos had taken an overdose of his prescription for Neurontin in an apparent attempt to take his own life. *Id.* As a result, he was hospitalized until February 8, 2005.

During that time period, Ms. Alanis-Veras became concerned for her own safety and the safety of her children. She sought and received a temporary order for protection from the Whatcom County Superior Court for herself and the children that the two had together. CP at 496-497 and 503-506. The Order prevented Mr. Gallegos from coming within 100 feet of Ms. Alanis-Veras, Ms. Alanis-Veras' home and the children, and contained other general prohibitions on contact between Mr. Gallegos and the protected parties. *Id.*

Mr. Gallegos was served with the Order by Whatcom County Sheriff's Deputies on the early morning of February 9, 2005. CP at 508-509 and 443. Mr. Gallegos was upset that Ms. Alanis-Veras had requested and received the Order. CP at 433.

2. *Violation of No Contact Order*

Unable to return to the home that he shared with Ms. Alanis-Veras, Mr. Gallegos went to stay with his sister Maria Rodriguez and her husband Lorenzo Rodriguez. He was there on the day of February 10, 2005, and consuming alcohol while Lorenzo worked around the home. CP at 431-432 and 442. In an effort to gather his belongings from his former home, Mr. Gallegos called his daughter, Cindy Bravo (formerly Gallegos), to see if she would be willing to go to Ms. Alanis-Veras' home to retrieve them. CP at 513. Ms. Bravo agreed, went to the home and retrieved some clothes and tools, and then returned to the Rodriguez home where Mr. Gallegos was waiting. CP at 513 and 514-515. However, Mr. Gallegos was upset that Ms. Bravo had not returned with all of the items he had requested, including his guns.

At approximately 7:00 p.m. on the evening of February 10, 2005, Ms. Alanis-Veras was having dinner with some friends and her children at her home on Van Dyk Road. CP at 457. Present at the home with her were her children – Kim Gallegos, David Gallegos Jr. and Max Gallegos –

and Delfina Reyes and Dinah Souder, who were friends of Ms. Alanis-Veras'. *Id.* As they were sitting in the kitchen, Mr. Gallegos entered the home through the front door. CP at 458. One of the young Gallegos children came into the kitchen and exclaimed, "Daddy's coming!" *Id.*

Mr. Gallegos and Ms. Alanis-Veras began arguing, and Mr. Gallegos demanded his belongings. CP at 458-459. Ms. Alanis-Veras believed that Mr. Gallegos was specifically looking for his guns, which she had previously hidden for safety concerns. CP at 460. During their argument, Mr. Gallegos picked up a large butcher knife that had been sitting on the kitchen counter. CP at 461. Fearing for her children's safety, Ms. Alanis-Veras attempted to move them into her bedroom. *Id.* Mr. Gallegos remained in the kitchen and pressed the knife to himself as if he was attempting to stab himself with the knife. CP at 462.

In the meantime, Mr. Gallegos' daughter, Kim Gallegos, called 911 and reported that Mr. Gallegos was in the home in violation of the order. CP at 425. Ms. Gallegos also requested that someone come to the house because her father had tried to stab himself with a large kitchen knife. *Id.* Ms. Gallegos identified her father as David Gallegos, and said that there was a no contact order prohibiting him from being at the house. *Id.* Ms. Gallegos then reported that Mr. Gallegos had left the house traveling to an unknown location in a red Chevrolet Beretta. *Id.* Ms.

Gallegos also told the 911 operator that Mr. Gallegos had left the house with a large kitchen knife. *Id.*

The operator then spoke with Ms. Alanis-Veras who confirmed she was Mr. Gallegos' wife and that she had a no contact order against him. *Id.* Ms. Alanis-Veras also reported that Mr. Gallegos had tried to stab himself. *Id.* Ms. Alanis-Veras also reported that while he was at the house, Mr. Gallegos had been asking for his guns. *Id.*

### *3. Whatcom County Sheriff's Deputies Are Dispatched*

In response to the 911 call, Whatcom County Dispatch relayed the information received to Whatcom County Sheriff's Deputies over the standard emergency communication channel. *Id.* These communications were directed to call signs 2SAM4, Deputy Sean Crisp, and 2SAM40, Deputy Jeremy Freeman. *Id.* First, the dispatcher relayed that dispatch had received a 911 call reporting that Mr. Gallegos was at the home of Ms. Alanis-Veras in violation of a no contact order, that Mr. Gallegos had threatened to stab himself while in the home, and that he had picked up a knife while in the home. *Id.* The dispatcher then relayed that Mr. Gallegos left the home in a red Chevrolet Beretta in an unknown direction of travel. *Id.* The dispatcher also indicated that Mr. Gallegos had taken the knife with him. *Id.*

After completion of the dispatch communication to the Deputies, the operator telephoned now-Chief Inspector Cooley<sup>4</sup> (who was Sergeant at the time) to inform him that dispatch had received a report of a suicidal subject at 1490 Van Dyk Road (Ms. Alanis-Veras' address). *Id.* The dispatcher indicated that Deputies Freeman and Crisp were available and sought permission to send them both to the property at 1490 Van Dyk Road, which Sergeant Cooley granted. *Id.* The operator then telephoned Ms. Alanis-Veras at the number she had provided during the initial 911 phone call. *Id.* Ms. Alanis-Veras reported that Mr. Gallegos was likely traveling to his parents' house at 1778 East Pole Road. *Id.* The dispatch operator indicated that she would pass this information on to the responding officers. *Id.*

The dispatch operator then contacted Deputies Crisp and Freeman over the emergency traffic channel and indicated that Mr. Gallegos' direction of travel was unknown but that Ms. Alanis-Veras believed that Mr. Gallegos was going to his parents' house at 1778 East Pole Road. *Id.* The dispatch operator also reported that Mr. Gallegos had arrived at Ms. Alanis-Veras' residence demanding his guns, and that Mr. Gallegos had a history of making suicidal threats. *Id.* The dispatch operator further noted

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<sup>4</sup> For ease of reference to the exhibits in support of this motion, Deputy Freeman will refer to now-Chief Inspector Cooley as Sergeant Cooley, as that was his title at the time of the incident in question.

that Mr. Gallegos had not left with any guns, but that he did have a kitchen knife. *Id.*

Hearing the radio traffic, and already being in the vicinity of 1778 East Pole Road, Sergeant Cooley headed to that address to attempt to locate Mr. Gallegos. CP at 382-385. Deputy Freeman, who was originally responding to the 1490 Van Dyk Road location, changed his direction of travel and headed to the 1778 East Pole Road location. CP at 386-387. As Sergeant Cooley and Deputy Freeman traveled to the 1778 East Pole Road location, Deputy Crisp arrived at the 1490 Van Dyk Road location and requested confirmation from dispatch that the no contact order being discussed was valid and prohibited Mr. Gallegos from being at the residence. CP at 425. Upon receiving such confirmation, Deputy Crisp communicated over the emergency channel that there was probable cause to arrest Mr. Gallegos for violating a confirmed no contact order. *Id.*

#### *4. Sergeant Cooley and Deputy Freeman Search for Mr. Gallegos*

Sergeant Cooley was the first to arrive at 1778 East Pole Road. CP at 383. The location is in an unlit, rural area of Whatcom County and, given that it was after 7:00 p.m. on a February night, it was extremely dark outside. CP at 387; CP at 383. In fact, according to Mr. Gallegos'

brother, it was dark enough that he had difficulty seeing any further than five feet in front of him. CP at 541-542.

At the time of his arrival, Sergeant Cooley was aware that Mr. Gallegos had violated a no contact order and had fled the home of Ms. Alanis-Veras with a butcher knife. CP 383. Sergeant Cooley immediately encountered Mr. Gallegos' brother, Mr. Santos Gallegos. *Id.* Sergeant Cooley began speaking with Santos, who claims that, at that time, he was not aware the Sheriff's Deputies were looking for his brother David. *Id.* Santos was accompanied by his father Sylvestre Gallegos. *Id.*

During Sergeant Cooley's conversation with Santos, Deputy Freeman arrived at that location. *Id.* At the time of his arrival, Deputy Freeman was also aware that Mr. Gallegos had violated a no contact order and had fled the home of Ms. Alanis-Veras with a butcher knife. CP at 386-387. Deputy Freeman exited his vehicle with his K-9 partner Deuce. CP at 387. Deputy Freeman also attempted to locate Sergeant Cooley but could not do so because of the darkness. *Id.* Sergeant Cooley then clicked his flashlight and emitted a quick burst of light so that Deputy Freeman could find him. *Id.* While walking over to meet Sergeant Cooley, Deputy Freeman observed that the immediate area had some buildings, a residence, and some trees. *Id.* He also observed a large open field

behind the buildings and trees. *Id.* Deputy Freeman then joined Sergeant Cooley who was still speaking with Mr. Gallegos' brother, Santos. *Id.*

5. *Whatcom County Dispatch Receives a Second 911 Phone Call Revealing Mr. Gallegos' Whereabouts*

While Sergeant Cooley and Deputy Freeman were speaking with Santos and Sylvestre Gallegos, Whatcom County Dispatch received a 911 phone call from Ms. Skyla McKee. CP at 425 and 522-537. Ms. McKee indicated that "her boyfriend [was] going to commit suicide" and that she was located at 1778 East Pole Road. CP at 524. She further indicated that she was located "way back in the field" and stated that her boyfriend's name was "David Gallegos." CP at 524-525.

The Whatcom County Dispatch operator immediately relayed this information to the responding deputies and specifically to Sergeant Cooley and Deputy Freeman. CP at 425. The dispatcher reported that Ms. McKee had called and reported that Mr. Gallegos had a knife, had taken several pills and was located behind the residence back in the field. *Id.* The dispatcher further reported that Ms. McKee was still on the line and that Mr. Gallegos could be heard yelling in the background screaming various obscenities and threatening to stab himself if law enforcement showed up. *Id.* The dispatcher confirmed that Mr. Gallegos and Ms. McKee were at the 1778 East Pole Road address and were located behind

the residence back in the field. *Id.* The dispatcher also reported that Mr. Gallegos was still sitting in the vehicle, and that Ms. McKee was calling from outside the vehicle on a cell phone. *Id.* The dispatcher indicated that Mr. Gallegos was driving a red Chevrolet that Mr. Gallegos had driven to the rear of the property. *Id.*

As Ms. McKee was speaking with the 911 operator, Deputy Freeman scanned the field with his flashlight. CP at 387. He was able to ascertain that the area was a large, open, grassy field. *Id.* Deputy Freeman also observed a pathway which appeared to have been made by farm equipment going in and out of the field. *Id.* Deputy Freeman quickly scanned the field with his flashlight, and then turned it off fearing that any prolonged use would reveal his location to Mr. Gallegos. *Id.* At that time, Deputy Freeman was primarily concerned with providing back-up support to Sergeant Cooley and locating Mr. Gallegos' vehicle. *Id.*

#### *6. Deputy Freeman Hears a Scream*

Suddenly, Deputy Freeman heard a scream coming from somewhere in the field. *Id.* Deputy Freeman asked Sergeant Cooley if he also heard the scream, but he had not. *Id.* Both Deputies listened for further screams, but heard nothing. *Id.* Aware that Mr. Gallegos was reportedly in the back of the field with a woman, that Mr. Gallegos was suicidal and had taken an unknown quantity of some type of medicine, and

that Mr. Gallegos had armed himself with a butcher knife, Deputy Freeman became concerned for the safety of the person he heard scream. CP at 388. He asked permission from Sergeant Cooley to enter the field in the direction of the scream. *Id.*

Sergeant Cooley granted permission to Deputy Freeman to follow the sound of the scream, and both of the officers began to travel in that direction, with Deputy Freeman leading. Before heading into the field, the deputies ordered Santos and Sylvestre Gallegos to stay behind. *Id.* Deputy Freeman carried his unlit flashlight and dog lead in his left hand, and kept his right hand free. *Id.* Deputy Freeman jogged along the dirt pathway to decrease his chance of tripping in the rough terrain. *Id.* Sergeant Cooley followed at some distance behind him. *Id.*

Deputy Freeman followed the dirt path toward the rear of the field where he believed the scream had come from. *Id.* As he moved up the path, he heard a car engine revving and then observed headlights illuminate in the back of the field. *Id.* Deputy Freeman believed the vehicle was approximately 200 yards away from him. *Id.*

Deputy Freeman was fearful that the person in the car was using the headlights to light up the field in an attempt to locate the officers. *Id.* Accordingly, Deputy Freeman drew his handgun from its holster with his right hand, and held it at a low ready position – at a 45-degree angle with

the muzzle pointing at the ground. *Id.* Deputy Freeman indexed his trigger finger on the firearm, meaning that his index finger was outside the trigger guard and pressed against the barrel of the firearm pointing in the same direction as the muzzle of the firearm. *Id.* He did this to prevent accidental discharge of the firearm. *Id.* With his gun in his right hand, and his flashlight and dog lead in his left hand, Deputy Freeman continued traveling in the direction of the scream and the vehicle. *Id.*

Almost immediately, the vehicle started traveling toward Deputy Freeman. CP at 388-389; *see also* CP at 532-533. The vehicle appeared to be traveling at a high rate of speed. *Id.* Deputy Freeman was illuminated by the vehicle's headlights so he began stepping to the side of the path to get out of the way. CP at 388-389. However, the vehicle continued to approach Deputy Freeman, and as he stepped off the path, it appeared to Deputy Freeman that the vehicle's lights continued to track him. *Id.*

When the vehicle came within what Deputy Freeman perceived to be 50 feet from him, Deputy Freeman turned on the flashlight he held in his left hand and loudly ordered the driver of the car to stop by commanding, "Sheriff, canine, stop!" CP at 389. At approximately the same time, Sergeant Cooley was behind Deputy Freeman radioing dispatch for a Code Two response by all officers, meaning that any

responding deputy should activate his or her emergency lights and sirens and travel at a greater than posted rate of speed. CP at 425. As the vehicle approached, Deputy Freeman could see that the vehicle was occupied by a driver only, and that the driver was a male. CP at 389. Deputy Freeman could also see that the car was red, which was the same color as the car Mr. Gallegos was reported to be driving. *Id.* Despite Deputy Freeman's command to stop, the vehicle did not slow down and showed no signs of stopping. *Id.*

Fearing that he was about to be run over, fearing for the safety of Sergeant Cooley and the citizens behind him, and aware of reports that Mr. Gallegos was suicidal, had taken an unknown quantity of some type(s) of prescription drug(s), and had armed himself with a butcher knife, Deputy Freeman decided to fire his gun at the driver. *Id.* Deputy Freeman fired three shots. *Id.* These events occurred in a matter of seconds. *Id.*

Hearing that shots were fired, Sergeant Cooley immediately called Code Three, asking that responding officers use emergency lights, sirens, and travel as quickly as possible while maintaining safety. CP at 425.

Meanwhile, the vehicle veered east and stopped. CP at 389. Deputy Freeman approached the vehicle and observed Mr. Gallegos slumped over the steering wheel unconscious. *Id.* He began checking to make sure the vehicle was safe and advanced around the car toward the

driver's side. *Id.* Sergeant Cooley then approached the vehicle. CP at 383. Deputy Freeman asked permission to check on the person he heard scream, received it, and continued jogging in the direction from which he had heard the scream and from which the car had departed. CP at 389. Sergeant Cooley tended to Mr. Gallegos and secured the vehicle. CP at 383. Deputy Freeman found Ms. McKee in the field. CP at 389 and 535. After confirming that she was unharmed, Deputy Freeman escorted Ms. McKee to a location on the property where a number of emergency personnel had begun to accumulate. CP at 389.

Mr. Gallegos remained unconscious for a short period of time, and then regained consciousness. CP at 383. Almost immediately, Mr. Gallegos started cursing and screaming. *Id.* Mr. Gallegos also exclaimed that he knew Sergeant Cooley did not shoot him because he saw the person that shot him and that person had a dog. *Id.* Sergeant Cooley ascertained that Mr. Gallegos had been shot once in the upper left arm and had also been shot in his left hand. *Id.*

By this time, aid personnel had arrived and began to administer aid to Mr. Gallegos. CP at 547. Additional law enforcement personnel arrived at the scene. *Id.* Eventually, pursuant to standard procedure when an officer-involved shooting has occurred, the Bellingham Police

Department (“BPD”) took control of the scene and investigation. CP at 552-599.

The BPD conducted a comprehensive investigation, which included numerous witness interviews and examination of forensic evidence gathered from the scene of the shooting. *Id.* Mr. Gallegos survived the shooting, and was later tried and convicted of violation of a no contact order and burglary in the first degree. CP at 601-608.

### III. ARGUMENT

#### A. Standard of Review

On an appeal from summary judgment, this Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860–61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The Court’s standard of review is *de novo*. *Id.*

Accordingly, summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). This Court construes all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109

P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). But “bare assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

**B. This Court Should Disregard Inadmissible Evidence Relied Upon by Mr. Gallegos**

As an initial matter, Deputy Freeman respectfully requests that the Court disregard certain inadmissible evidence in reviewing this matter. In support of his appeal, Mr. Gallegos has relied upon several Declarations, including a Supplemental Declaration of David Gallegos, dated June 13, 2011, a Declaration of Gaylan Warren, dated June 13, 2011, and a Declaration of D.P. Van Blaricom, dated June 14, 2011. *See* CP at 614-616, 710-723 and 617-648. For the reasons discussed below, and as argued to the trial court on summary judgment, the Declaration of D.P. Van Blaricom should be disregarded in its entirety, as it contradicts his prior deposition testimony, and significant portions of the Warren and Gallegos declarations should be disregarded by the Court as they either contradict prior sworn testimony, contain inadmissible hearsay, are not facts, and/or are clearly not based on the Declarant’s personal knowledge.

CR 56(e) requires that supporting and opposing affidavits be based on “personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e) (emphasis added). “Facts” required by CR 56(e) are evidentiary in nature, and merely repeating or alleging ultimate facts or conclusions of law is insufficient. *See Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). Accordingly, hearsay cannot be considered in an affidavit in connection with a summary judgment motion. *See Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

*1. Declaration of D.P. Van Blaricom*

To the extent that the Declaration of D.P. Van Blaricom is offered in opposition to Deputy Freeman’s federal constitutional arguments, such Declaration should be dismissed in its entirety because it is contradictory to Mr. Van Blaricom’s prior deposition testimony in this matter. Indeed, Mr. Van Blaricom has offered no opinions on the reasonableness of Deputy Freeman’s actions under federal constitutional standards. CP 612. It is well-settled that “[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation,

previously given clear testimony.”” *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wash. App. 203, 227, 242 P.3d 1, 14 (2010) (citations omitted); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991). To the extent that Mr. Van Blaricom’s declaration contradicts his prior testimony, an issue of material fact does not arise. See *Klontz v. Puget Sound Power & Light Co.*, 90 Wash. App. 186, 192, 951 P.2d 280 (1998).

Further, Mr. Van Blaricom confirms that his “review of the defendant’s recent summary judgment motion . . . [has] not caused me to change any of my opinions. To the contrary, they confirmed my opinions.” CP at 618. Accordingly, his prior testimony that this is not a federal constitutional case must stand.

However, should the Court consider Mr. Van Blaricom’s Declaration on this appeal, it should disregard his recitation of the “facts” of this case, as he has no direct knowledge of the events on February 10, 2005, and therefore his “factual” statements constitute inadmissible hearsay. Further, the Court should disregard all portions of Mr. Van Blaricom’s Declaration where he simply agrees with or restates the opinions of expert witness Gaylan Warren. Hearsay statements of the opinions of third parties are inadmissible. *State v. Nation*, 110 Wash. App. 651, 662, 41 P.3d 1204, 1210 (2002).

## 2. *Declaration of Gaylan Warren*

For similar reasons, the Court should disregard certain portions of Gaylan Warren's Declaration as inadmissible hearsay. CP at 710-723. Specifically, paragraph 16 should be stricken, as it purports to set forth a laundry list of "facts" that "are true." Not only does Mr. Warren impermissibly invade the purview of the fact-finder in this matter by declaring certain facts to be true, the record in this case speaks for itself. Likewise, the Court should disregard all portions of Mr. Warren's Declaration where he simply agrees with or restates the opinions of Plaintiff's former expert witness Joe Dozal. As noted above, hearsay statements of the opinions of third parties are inadmissible. *State v. Nation, supra.*

## 3. *Declaration of David Gallegos*

Finally, the Court should disregard paragraphs 7-10 of Mr. Gallegos' supplemental declaration. CP at 614-616. The statements made in these paragraphs are self-serving and nothing but speculation, and therefore do not constitute facts. Further, to the extent that his supplemental declaration now contradicts testimony previously given in his deposition in this matter, the statements must be stricken. *See Cornish College of the Arts, supra.*

### C. Legal Standard for Violations of 42 U.S.C. § 1983

Deputy Freeman now turns to the merits of Mr. Gallegos' federal claim. In his federal claim against Deputy Freeman, Mr. Gallegos has alleged a violation of his Fourth Amendment right to be free from excessive force during an arrest. For the reasons below, Defendant Freeman is entitled to qualified immunity on this claim.

#### 1. *Qualified Immunity Under Federal Law*

Government officials and law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances. *Wilson v. Layne*, 526 U.S. 603, 614 (1999). The traditional determination of whether an officer is entitled to summary judgment based on the affirmative defense of qualified immunity required applying a three-part test. *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151 (2001). Under *Saucier*, courts were required to first ask whether “[t]aken in the light most favorable to the party asserting the injury, [ ] the facts alleged show the officer’s conduct violated a constitutional right?” *Id.* at 201. If the answer was no, the officer was entitled to qualified immunity. If the answer was yes, the court was required to proceed to the next question: whether the right was clearly established at the time the officer acted. *Id.* at 201-202. That is, “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202. If

the answer was no, the officer was entitled to qualified immunity. If the answer was yes, the court was required to answer the final question: whether the officer could have believed, “reasonably but mistakenly ... that his or her conduct did not violate a clearly established constitutional right.” *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). If the answer was yes, the officer would be entitled to qualified immunity. If the answer was no, he would not be. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1229 (9th Cir. 2006). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The United States Supreme Court has since modified this standard. *Pearson v. Callahan*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 808 (2009). In *Pearson*, the Court examined *Saucier* and held that reviewing judges are now permitted to exercise their discretion in deciding which of the first two prongs of the qualified immunity analysis should be addressed first in each particular case. *Pearson*, 129 S. Ct. at 818. This is because “the judges of the district courts and courts of appeals are in the best position to determine the order of decision-making [that] will best facilitate the fair and efficient disposition of each case.” *Id.* at 821.

As further discussed below, Deputy Freeman enjoys qualified immunity under these circumstances because it is not clear that a

reasonable officer under the same circumstances would have known that his conduct was unconstitutional. As a result, the dismissal of Mr. Gallegos' federal claim should be affirmed.

## 2. *Alleged Fourth Amendment Violations*

The Fourth Amendment guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Supreme Court has held that the Fourth Amendment also prohibits the use of excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court set forth the specific constitutional rule governing when police officers may use deadly force:

. . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

*Id.* at 11-12.

The application of *Garner* is clear in many cases. For example, where a suspect threatens an officer with a weapon such as a gun or a

knife, the officer is justified in using deadly force. *See, e.g., Billington v. Smith*, 292 F.3d 1177, 1185 (9th Cir. 2002) (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (suggesting that the use of deadly force is reasonable where a suspect points a gun at officers); *Garcia v. United States*, 826 F.2d 806, 812 (9th Cir. 1987) (holding that deadly force was reasonable where the decedent attacked an officer with a rock and stick). Likewise, in some circumstances, deadly force may be justified based on the nature of the crime committed by the fleeing suspect. *See, e.g., Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) (holding that deadly force was reasonable where a fleeing suspect had shot a victim in the course of a burglary).

However, the Supreme Court has since explained that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions when an officer's actions constitute deadly force.” *Scott v. Harris*, 550 U.S. 372 (2007). Rather, *Garner* is an application of the Fourth Amendment's reasonableness test. *Id.* The Ninth Circuit has recognized this

reasonableness standard and has explained that its “case law requires that a reasonable officer under the circumstances believe herself or others to face a threat of serious physical harm before using deadly force.” *Price v. Sery*, 513 F.3d 962, 971 (9th Cir. 2008). The officer must have a reasonable belief deadly force is necessary, based on the nature of the threat – not the officer’s subjective fears. *Id.* at 969-70. Further, “[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . Not every push or shove, even if it may later seem unnecessary in the peace of the judge’s chambers, violates the Fourth Amendment.” *Graham v. Connor*, 490 U.S. at 396-97.

It is significant that, instead of addressing this standard directly, Mr. Gallegos spends most of his brief on an academic discussion of what should be the law, rather than what is the law. Mr. Gallegos’ discussion simply highlights what is obvious from the record before this Court; namely, when viewed in the totality of the circumstances on February 10, 2005, there is no doubt that Deputy Freeman’s decision to use lethal force was reasonable because it was in response to an objective fear for his own safety and the safety of those around him.

The Ninth Circuit Court of Appeals has also made clear that police officers are not required to use the least amount of force necessary, rather they need only act within the range of reasonable conduct:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subject determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

*Scott*, 29 F.3d at 915.

Courts determine the reasonableness of police use of force by balancing the “nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing government interests at stake.” *Graham*, 490 U.S. at 396. Courts assess the intrusion based on the type and amount of force inflicted. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994). The next step of the analysis requires that the court weigh the government interest by considering: 1) the severity of the crime at issue, 2) whether the individual posed an immediate threat to

the safety of the officers or others, and 3) whether he or she actively resisted arrest. *Graham*, 490 U.S. at 396.

In addition to these factors, courts may consider the reasonableness of officers' use of force in light of whether officers knew that an individual was mentally unstable. *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) ("The problems posed by an unarmed emotionally distraught individual who is creating a disturbance are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal.").

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. "Reconsideration [of an officer's actions] will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer." *Plakas v. Drinski*, 19 F.3d at 1143, 1150 (7th Cir. 1994). Generally, police officers are not required to retreat or take cover before resorting to deadly force. *Reed v. Hoy*, 909 F.2d 324, 330-31 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). When viewed under the totality of the circumstances on February 10, 2005, there is no

doubt that Deputy Freeman made the decision to use lethal force out of an objective fear for his own safety and the safety of those around him. CP at 389.

There is also no dispute that there were only two people in the field with or near David Gallegos just before he was shot. Those two people were Skyla McKee and Deputy Freeman. Significantly, those two witnesses recount the same circumstances.

Skyla McKee was standing next to Plaintiff's car, when he suddenly revved his engine, and with tires spinning took off driving at a high speed back down the road toward Deputy Freeman. CP at 532. The 911 phone call, which is in the record before this Court, recorded the sound of Plaintiff's car engine revving and Mr. Gallegos admits that his tires spun before he began to drive. CP at 100 and 615. The only two witnesses to Plaintiff's actions, other than Plaintiff himself, both note that Plaintiff was driving at a high speed. CP at 388-389 and 532.

There is also no dispute that Skyla McKee was on the phone with the 911 operator at the moment this was occurring, and can be heard screaming, "He's leaving! 719MUG. He's leaving! . . . He's coming straight towards them at a very high speed. . . . Look out! Look out!" CP at 532-533.

Further, there is no dispute that Deputy Freeman, who was walking up the driveway toward the back of the field, saw Mr. Gallegos' headlights illuminate, heard the engine revving and saw the vehicle start driving toward him. CP at 388-389.

It is of no import that Plaintiff's experts, in hindsight, have opined that Deputy Freeman was not in harm's way, that he could have moved off the path, or that the car was not going as fast as he believed. In *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (citing to *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996)), the Ninth Circuit Court of Appeals cautioned trial courts about their consideration of expert testimony:

We affirmed summary judgment for the defendant police officers despite experts' reports stating – like the expert report in the case at bar – that the officers should have called and waited for backup, rather than taking immediate action that led to deadly combat. We held that, even for summary judgment purposes, “the fact that an expert disagrees with the officer's actions does not render the officer's actions unreasonable.” Together, *Scott* and *Reynolds* prevent a plaintiff from avoiding summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. Rather, the court must decide as a matter of law “whether a reasonable officer could have believed that his conduct was justified.”

*Billington*, 292 F.3d at 1189 (citation omitted).<sup>5</sup>

The only two witnesses in the field at the time confirm the same facts, *contemporaneously* with the events happening around them. Those undisputed facts alone make Deputy Freeman's use of force objectively reasonable under the circumstances. Indeed, in *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court examined an excessive force claim which involved a high speed car chase that had been caught on video. The Court of Appeals had viewed the record in the light most favorable to the Plaintiff and had virtually ignored the video evidence, which contradicted the Plaintiff's version of events. The Supreme Court reversed the Court of Appeals' decision, explaining that:

“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

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<sup>5</sup> Interestingly, in *Billington*, the Court of Appeals rejected the issues of “fact” raised by Plaintiff's expert, D.P. Van Blaricom, finding that the issues were immaterial, and, under the circumstances evidenced by the record, a reasonable officer would have perceived a substantial risk of harm. *Billington*, 292 F.3d at 1184-85.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent'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.

*Scott*, 550 U.S. at 380-81 (citations omitted).

In addition to those discussed above, the following facts are also undisputed:

- Plaintiff had been in his wife's home in violation of a no contact order;
- While at his wife's residence, Plaintiff picked up a large kitchen knife and acted as if he was stabbing himself;
- Plaintiff left his wife's residence with a butcher knife;
- Plaintiff was at 1778 East Pole Road, in his vehicle, and was threatening to commit suicide;
- Deputy Freeman heard a person scream from the direction of the back of the field;
- David Gallegos can be heard in the background of Skyla McKee's 911 phone call repeatedly yelling, "Tell them to get the hell away from here!"

- Skyla McKee told the 911 operator that the car driven by David Gallegos was traveling at a high rate of speed toward the officers;
- Skylee McKee told the 911 operator that David Gallegos drove away with the knife held to his throat;
- It was extremely dark outside, and Deputy Freeman felt as if the vehicle's lights were illuminating him as it traveled down the path;
- Deputy Freeman observed the vehicle to be traveling at what he believed was a high rate of speed;
- Although, Deputy Freeman attempted to remove himself from the path on which the car was traveling, he believed that the vehicle tracked him as he stepped off the path; and
- The driver of the vehicle did not obey Deputy Freeman's order to stop and continued driving towards Deputy Freeman.

Further, Deputy Freeman had heard a car's engine revving and saw a vehicle's headlights come on. CP at 386-389. In less than 30 seconds, the vehicle began to travel down the path directly toward Deputy Freeman. CP at 388-389. It was extremely dark outside, and Deputy Freeman felt as if the vehicle's lights were illuminating him as it traveled down the path. *Id.* Additionally, he observed the vehicle to be traveling at what he

observed was a high rate of speed. *Id.* Although, Deputy Freeman attempted to remove himself from the path on which the car was traveling, he believed that the vehicle tracked him as he stepped off the path. *Id.* Based on all of these facts, Deputy Freeman feared for his safety and the safety of those behind him. CP at 389.

Deputy Freeman's actions in response were reasonable. When the gap between the vehicle and Deputy Freeman had closed from approximately 600 feet to 50 feet, Deputy Freeman turned on his flashlight and illuminated the passenger compartment. *Id.* He was then able to observe that the approaching vehicle was red, and that only a male driver occupied the vehicle. *Id.* He then identified himself as a Whatcom County K-9 Sheriff's Deputy and ordered the vehicle to stop. *Id.* There is no dispute that the driver of the vehicle did not obey the order and continued driving towards Deputy Freeman. *Id.* At that moment, Deputy Freeman believed the car was going to hit him. *Id.*

In the next one to three seconds, Deputy Freeman made the decision to use his last and only option for protection – his gun – and he fired three shots at the driver of the vehicle. *Id.* The vehicle then veered east and came to a stop. *Id.*

Under these circumstances, the *Graham* factors weigh heavily in favor of Deputy Freeman's use of lethal force. The crime at issue was

severe – Mr. Gallegos had violated a no contact order and armed himself with a weapon. More importantly, as described above, he posed an immediate threat to Deputy Freeman and those behind him on the path. Finally, he actively resisted arrest by failing to stop his vehicle when ordered to do so. Deputy Freeman acted as any other reasonable officer would have in the situation, and fired his weapon.<sup>6</sup>

Under similar circumstances, the United States Supreme Court has held that qualified immunity is appropriate. In *Brosseau v. Haugen*, 543 U.S. 194 (2004), Officer Rochelle Brosseau was sued after shooting Kenneth Haugen in the back as he attempted to flee from law enforcement authorities in his vehicle. *Brosseau*, 543 U.S. at 194. The day before the shooting, Officer Brosseau had received a report that Haugen had stolen tools from a former crime partner of his. *Id.* at 195. Officer Brosseau later learned that there was a felony no-bail warrant for Haugen’s arrest on drug and other offenses. *Id.* The next morning, Officer Brosseau heard a report that Haugen and his former crime partner were fighting in Haugen’s mother’s yard, and responded. *Id.* When she arrived, plaintiff fled on foot. After receiving a call that Haugen was in a neighbor’s yard, Officer

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<sup>6</sup> Significantly, Plaintiff has no expert witness to argue to the contrary. Indeed, his police practices expert, Donald Van Blaricom, has offered no opinions on the reasonableness of Deputy Freeman’s actions under federal constitutional standards. CP at 612.

Brosseau attempted to find him. *Id.* at 196. Haugen continued to flee on foot. However, as Officer Brosseau pursued him, he jumped into his mother's Jeep, closed and locked the door, and tried to start the engine. *Id.* Officer Brosseau believed he was running to the Jeep to retrieve a weapon. *Id.* Officer Brosseau pointed her gun at Haugen, repeatedly ordered him out of the vehicle, and hit the driver's side window with her handgun several times, eventually shattering the window. *Id.* The officer then hit the plaintiff in the head with her gun but Haugen succeeded in starting the Jeep and driving away. *Id.* As the plaintiff drove away, Officer Brosseau jumped back and to the left, and fired one shot through the rear of the windshield, hitting the plaintiff in the back. *Id.* at 196-97. Officer Brosseau later explained that she fired because she feared for the safety of the officers on foot who she believed were in the area, for the occupied vehicles in Haugen's path, and for the other citizens who might be in the area. *Id.* at 197.

The Supreme Court reviewed the 9th Circuit Court of Appeals' opinion, in which the Court had relied on the general principles set forth in *Graham* and *Garner* to hold that Officer Brosseau was not entitled to qualified immunity. The Supreme Court reversed the Circuit Court's opinion, explaining that each case alleging excessive force cases involve an area of law where each case depends very much on its facts, and that

while *Graham* and *Garner* provide general guidance, courts should look to those particularized facts to determine whether the actions in question are reasonable. *Id.* at 198-201. Mr. Gallegos' reliance on *Glenn v. Washington County*, \_\_ F.3d \_\_, 2011 WL 6760348 (9th Cir. Dec. 27, 2011),<sup>7</sup> does little more than support that general proposition.<sup>8</sup> Importantly, in *Brosseau*, the Supreme Court ultimately concluded that the officer's actions fell within the "hazy border between excessive and acceptable force" and therefore did not violate any "clearly established" Fourth Amendment standard. *Brosseau*, 543 U.S. at 201. As a result, the Court found the officer was entitled to qualified immunity from suit. *Id.*

The *Brosseau* case, along with numerous others, indicate that the actions taken by Deputy Freeman on the night of February 10th, were objectively reasonable, and therefore he had no reason to believe that his actions were in violation of Mr. Gallegos' constitutional rights. *See Pace v. Capobianco*, 283 F.3d 1275, 1281-82 (11th Cir. 2002) (holding that given the aggressive use by the plaintiff of his vehicle, the Court could not conclude that the officers violated the Fourth Amendment by using deadly

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<sup>7</sup> Mr. Gallegos cites to the *Glenn* opinion at 661 F.3d 460 (9th Cir. 2011). However, that opinion has been withdrawn because it was amended on denial of rehearing and rehearing *en banc*. *See* Appendix at A-2. As a courtesy to this Court, Deputy Freeman has included a copy of the Amended Opinion in his Appendix at A-3 to A-16.

<sup>8</sup> Likewise, *Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003), is not only unpersuasive, out of Circuit authority, its facts are so different from those in the instant matter, that the reasoning is not applicable to this case.

force); *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (finding as a matter of law that the officer justifiably fired at the fleeing vehicle to maintain lawful order); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that the officer “had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves” and therefore was entitled to qualified immunity); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (noting that “a car can be a deadly weapon,” holding the officer’s decision to stop the car from possibly injuring others was reasonable and finding that the officer was therefore entitled to qualified immunity).

Likewise, the Ninth Circuit Court of Appeals recently reversed a trial court’s denial of qualified immunity in a similar case. In *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), the Court granted qualified immunity to an officer who was standing in a slippery yard, with a minivan accelerating around him, and the driver of the van had refused to yield to direct commands to stop. *Wilkinson*, 610 F.3d at 551. The Court noted that witness accounts questioning whether the officer was in harm’s way could not support the denial of summary judgment:

Although Davis stated that Key immediately jumped back to his feet after falling, he also stated he was worried that Key would get run over, because Key was in shock after getting up. **More importantly, we must view the facts from Torres’ perspective at**

**the time he decided to fire. Even if Key was in fact out of harm's way by the time of the shooting and Key and Torres were in each other's line of sight before the shooting, the critical inquiry is what Torres perceived.**

*Wilkinson*, 610 F.3d at 551 (emphasis added).

In this case, as in *Wilkinson*, the critical inquiry is what Deputy Freeman perceived when he made the decision to shoot Plaintiff. Deputy Freeman's perception is presented clearly through the record before the Court. Of benefit is Ms. McKee's contemporaneous account via her 911 call as to the events she witnessed, which confirms the same actions by Plaintiff as recounted by Deputy Freeman.

When the applicable standard for alleged excessive violation under federal law is applied to these facts, that is, when the Court examines whether a reasonable officer under these circumstances would believe himself or others to face a threat of serious physical harm, there is no other conclusion but that Deputy Freeman acted reasonably. *See Wilkinson*, 610 F.3d at 554; *Billington*, 292 F.3d at 11884 (reiterating that the reasonableness inquiry is objective, without regard to the officer's good or bad motivations or intentions, and that reasonableness is judged from the perspective of a reasonable officer on the scene without 20/20 hindsight).

At the time Deputy Freeman shot Plaintiff, case law clearly established that law enforcement officers may shoot to kill when a suspect

presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons. *Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997). Because the circumstances of this case establish such immediate threat to himself and others, Deputy Freeman did not violate Plaintiff's Fourth Amendment rights and he is entitled to qualified immunity.

#### **D. State Law Negligence and Battery Claims**

Defendant Freeman now turns to Mr. Gallegos' state law claims for negligence and battery. For the reasons below, the dismissal of those claims should also be affirmed.

*1. Mr. Gallegos Failed To Raise any Legal Argument as to the State Law Claims on Appeal*

Just as with Deputy Freeman's summary judgment motion in the trial court, Mr. Gallegos completely fails to address his state law claims on appeal in any manner. For that reason alone, the dismissal of the claims should be affirmed. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035, *review denied*, 129 Wn.2d 1023 (1996) ("A summary judgment argument not pleaded or argued to the trial court cannot be raised for the first time on appeal."). Further, Mr. Gallegos is now precluded from raising any arguments with respect to his state law claims for the first time

in his reply.<sup>9</sup> *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that an issue raised and argued for the first time in a reply brief is too late to warrant consideration).

2. *Deputy Freeman Is Entitled to State Law Qualified Immunity on State Law Claims*

Should the Court consider Mr. Gallegos' claims on appeal, Deputy Freeman is entitled to qualified immunity on these claims as well. Under Washington law, a police officer enjoys qualified immunity "when the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably." *Guffey v. State*, 103 Wn.2d 144, 152, 690 P.2d 1163 (1984), *impliedly overruled on other grounds* by *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). If a court determines that an officer's actions were reasonable, that officer is entitled state law qualified immunity. *See McKinney v. City of Tukwila*, 103 Wn. App. 391, 409, 13 P.3d 631 (2000). The three requirements for state law qualified immunity are met in this case.

First, Washington state law enforcement officers in general act under statutory authority to enforce the state criminal laws. *See* RCW 10.93.070. Deputy Freeman was a commissioned Deputy Sheriff with the

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<sup>9</sup> Although Mr. Gallegos stated in his Notice of Appeal that he would be seeking review of the Order dismissing his state law claims against Whatcom County, he has failed to assign any error to the entry of that Order or raise the issue in any form in his opening brief.

Whatcom County Sheriff's Office at the time of the shooting, and therefore had such statutory authority. Deputy Freeman was performing that statutory duty on the night of February 10, 2005. Second, as discussed above, Deputy Freeman acted in accordance with standard department procedures and pursuant to direction provided to him by his superior officer. Finally, for the reasons above, Deputy Freeman acted reasonably under the circumstances. Examined from the perspective of the officer at the scene, the outcome of the rapidly unfolding investigation was uncertain, and Deputy Freeman was justified in being concerned for his safety and those around him. *See McKinney*, 103 Wn. App. at 391; *see also* RCW 9A.16.020(1); *State v. Hughes*, 106 Wn.2d 176, 192, 721 P.2d 902 (1986) (noting that the use of force is lawful whenever necessarily used by police officers in the performance of their legal duty).

As discussed above, Deputy Freeman used lethal force on the night of February 10, 2005, when he was left with no other option to protect himself and those around him. Courts have found such use of force reasonable in similar circumstances. As a result, he is entitled to state law qualified immunity on Mr. Gallegos' state law claims of negligence and battery, and summary judgment in his favor is appropriate.

### 3. *Mr. Gallegos Cannot Establish Breach of Duty of Care*

For the same reasons that Deputy Freeman is entitled to qualified immunity under state law, Mr. Gallegos' negligence claim must fail. "The threshold determination in any negligence action is whether the defendant owed a duty of care to the plaintiff." *Johnson v. State*, 68 Wn. App. 294, 296, 841 P.2d 1254 (1992) (citations omitted). In addition, a negligence action also requires a plaintiff to demonstrate a breach of that duty, resulting injury, and that the breach was the proximate cause of that injury. *Niece v. Elmview Group Home*, 79 Wn. App. 660, 668, 904 P.2d 784 (1995) (citations omitted). "The existence of a duty is a question of law, while foreseeability and policy considerations determine the extent of that duty." *Id.*

Other than the bare allegations in his complaint, Mr. Gallegos has offered no additional support for his claim that Deputy Freeman breached a duty of care owed to him. As already discussed above, Deputy Freeman's actions on the night of February 10, 2005 were reasonable and lawful. As a result, Mr. Gallegos cannot establish any breach of the duty of care owed to him, and he fails to establish that Deputy Freeman acted negligently.

4. *Deputy Freeman's Contact with Mr. Gallegos Was Lawful*

“A battery is ‘a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that a contact is imminent.’” *McKinney*, 103 Wn. App. at 408-09 (citations omitted). As an initial matter, once a court determines that an officer’s use of force was reasonable, a battery claim fails because the touching was lawful. *Id.* at 409.

Further, self defense is an affirmative defense to an allegation of battery. *See* RCW 9A.16.020(3); *see also generally* *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 975 P.2d 1029 (1999). “To establish self-defense, a person must establish that a reasonably cautious and prudent person in his situation would use similar force.” *McBride*, 95 Wn. App. at 40 (citations omitted). “He also must show that he reasonably believed he was in danger of bodily harm.” *Id.*

The law of self-defense is the law of self-preservation. It applies in civil, as well as in criminal, cases. When attacked, one has the right to defend himself, to resist force with force, to the extent of what appeared to be the apparent danger to the one attacked. . . . If he believed in good faith and on reasonable grounds that there was actual danger of great bodily harm and acted as a reasonable and ordinarily cautious and prudent man would have acted under the circumstances as they then appeared

to the one assaulted, he was justified in defending himself.

*Robison v. La Forge*, 175 Wn. 384, 387-88, 27 P.2d 585 (1933) (citations omitted).

As evidenced by the facts discussed above, Deputy Freeman used lethal force only when confronted with an accelerating vehicle driving straight towards him. He first drew his weapon and ordered the vehicle to stop. When Mr. Gallegos did not obey the order, Deputy Freeman, fearing for his own safety and for those near him, used the force necessary to stop Mr. Gallegos. Accordingly, he is entitled to rely on the doctrine of self-defense, and summary dismissal of his claims was appropriate.

#### IV. CONCLUSION

Deputy Freeman does not disagree that there are factual disputes in this matter. However, such disputes are immaterial because the record created contemporaneously with the events in question demonstrates that Deputy Freeman acted reasonably under the circumstances in which he found himself. Consistent with the cases cited in this brief, Defendant Freeman is entitled to qualified immunity under federal and state law, and all of the claims against him should be dismissed.

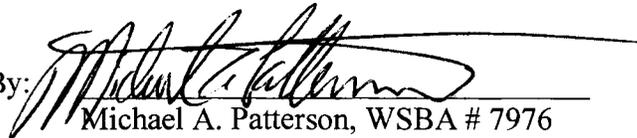
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RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

PATTERSON BUCHANAN FOBES  
LEITCH & KALZER, INC., P.S.

By:

A handwritten signature in black ink, appearing to read "Michael A. Patterson", is written over a horizontal line.

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# **APPENDIX**

661 F.3d 460, 11 Cal. Daily Op. Serv. 13,691, 2011 Daily Journal D.A.R. 16,198  
**Withdrawn for N.R.S. bound volume**  
**(Cite as: 661 F.3d 460)**



United States Court of Appeals,  
Ninth Circuit.  
Hope GLENN, as the personal representative of the  
Estate of Lukus Glenn, Plaintiff–Appellant,  
v.  
WASHINGTON COUNTY; Mikhail Gerba, an  
individual; Tim Mateski, an individual, Defendants–  
Appellees.

No. 10–35636.  
Argued and Submitted June 6, 2011.  
Filed Nov. 4, 2011.

**Editor's Note:** The opinion of the United States Court of Appeals, Ninth Circuit, in *Glenn v. Washington County*, published in the advance sheet at this citation, 661 F.3d 460, was withdrawn from the bound volume because it was amended on denial of rehearing and rehearing en banc. For amended opinion, see [2011 WL 6760348](#).

C.A.9 (Or.),2011.  
Glenn v. Washington County  
661 F.3d 460, 11 Cal. Daily Op. Serv. 13,691, 2011  
Daily Journal D.A.R. 16,198

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(Cite as: 2011 WL 6760348 (C.A.9 (Or.)))

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Only the Westlaw citation is currently available.

United States Court of Appeals,  
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Hope GLENN, as the personal representative of the  
Estate of Lukus Glenn, Plaintiff--Appellant,  
v.  
WASHINGTON COUNTY; Mikhail Gerba, an  
individual; Tim Mateski, an individual, Defendants--  
Appellees.

No. 10-35636.  
Argued and Submitted June 6, 2011.  
Opinion Filed Nov. 4, 2011.  
Amended Dec. 27, 2011.

Michael A. Cox (argued) and Lawrence K. Peterson,  
Law Office of Michael Cox, Tualatin, OR, for the  
plaintiff-appellant.

William G. Blair (argued), William G. Blair, PC,  
Beaverton, OR, for the defendants-appellees.

Appeal from the United States District Court for the  
District of Oregon, Michael W. Mosman, District  
Judge, Presiding. D.C. No. 3:08-cv-00950-MO.

Before RAYMOND C. FISHER, RONALD M.  
GOULD and RICHARD A. PAEZ, Circuit Judges.

ORDER AND AMENDED OPINION  
FISHER, Circuit Judge:

**ORDER**

\*1 The panel acknowledges the amended table of  
contents in Appellees' corrected petition for  
rehearing, filed November 21, 2011. Appellees'  
motion for leave to file a corrected petition for  
rehearing is **DENIED**.

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.

Appellees' petition for rehearing and petition for  
rehearing en banc, filed November 18, 2011, is  
**DENIED**.

The changes to the amended opinion filed  
concurrently with this order are non-substantive.  
Therefore, no further petitions for rehearing will be  
considered.

**OPINION**

Eighteen-year-old Lukus Glenn was shot and  
killed in his driveway by Washington County police  
officers. His mother had called 911 for help with her  
distraught and intoxicated son after Lukus began  
threatening to kill himself with a pocketknife and  
breaking household property. Within four minutes of  
their arrival, officers had shot Lukus with a "less-  
lethal" beanbag shotgun, and had fatally shot him  
eight times with their service weapons. Lukus'  
mother filed suit against the officers and Washington  
County alleging a state law wrongful death claim and  
a 42 U.S.C. § 1983 claim for excessive force under  
the Fourth Amendment. The district court granted  
summary judgment to the defendants after  
concluding there was no constitutional violation. We  
reverse and remand for trial.

**BACKGROUND**<sup>FN1</sup>

<sup>FN1</sup> Because the plaintiff appeals the entry  
of summary judgment in the defendants'  
favor, to the extent there are factual  
disputes, the facts are presented in the light  
most favorable to the plaintiff. See Anderson  
v. Liberty Lobby, Inc., 477 U.S. 242, 255  
(1986).

On September 15, 2006, Lukus Glenn left his  
home to attend a Tigard High School football game  
with his girlfriend. He had graduated from Tigard  
High a few months before and was living with his  
parents, Hope and Brad Glenn, and his grandmother.  
Lukus had no history of violence or criminal activity.  
He returned home at 3:00 a .m., agitated, intoxicated

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and intent on driving his motorcycle. His parents told him he could not take the motorcycle, and to their surprise Lukus became angry. He began to damage household property, including windows and the front door, and the windows of cars parked in the driveway. His parents had never seen Lukus drunk before, and believed they needed help to calm him down. They first called his friends, Tony Morales and David Lucas, who came over to the Glenn home. Lukus' friends were unable to calm him down, however, and his parents became alarmed when he held a pocketknife to his neck and threatened to kill himself.<sup>FN2</sup>

FN2. The pocketknife had a three-inch blade and hooked tip.

Frightened that Lukus would harm himself, Hope called 911 believing that “the police would have the expertise and experience to deal with an emotionally distraught teenager.” The transcript of the 911 call states that Hope told the dispatcher her son was “out of control, busting our windows, and has a knife and is threatening us.”<sup>FN3</sup> Hope clarified that the knife was “just a pocket knife” and that Lukus had not hurt anyone, and said he was “just really, really intoxicated.” When the dispatcher asked if everyone could move away from Lukus, Hope said “well, yeah,” but explained that they were “just trying to talk to him right now.” She said Lukus was “threatening the knife to his neck and he keeps saying he's gonna kill himself if the cops come,” and “he's not leaving until the cops shoot him and kill him.”

FN3. Hope says that she misspoke, and that Lukus never actually threatened anyone but himself. She also contends that the 911 transcript in the record is only a rough transcription, contains inaccuracies and does not fully convey a sense of the scene.

\*2 Hope asked if paramedics could be sent to the house, remarking that Lukus was “so suicidal right now.” She explained that she thought he had attempted suicide once before and had been “really

depressed,” but that “[h]e's always been a good athlete and a good kid.” In response to the dispatcher's questions, Hope said Lukus was born in 1988, was about 5'11" and had a thin build. She explained that he had damaged their windows and front door. She also said the family owned hunting rifles, but they were locked up and Lukus could not get to them.

The 911 dispatcher informed the Washington County Sheriff's Department that officers were needed at the Glenn home for a domestic disturbance involving a “fight with a weapon.” Dispatch advised that “Caller has a son. Has a knife ... It's a pocket knife. Glenn Lucas [sic] born in '88.... Caller is advising he is probably going to kill himself if you show up.” Officers were informed that there was no “premise history” and that Lukus was suicidal and “very intoxicated.” Dispatch relayed that Lukus had broken a window and was out in the driveway. Officers were also told there were hunting rifles inside the house, but Lukus could not get to them. An officer can then be heard asking whether the Glens could lock the doors since he “[doesn't] want [the son ] going inside if there are guns in there,” and dispatch responded that Lukus had “busted through the front door.” A staging area for responding officers was established a short distance from the Glenn home.<sup>FN4</sup>

FN4. Written information on the officers' mobile data terminals similarly stated “son has a knife, broke a veh[icle] window, [it] is a pocketknife, sig[nal] II w[ith] tones, son is Glenn, Lukus, [born] 042288, ... says he is not leaving till cops kill him, ... hunting rifles in the house, he can't get to ... friends are standing w/ him ... [history] of su[icide] attempts.”

Deputy Mikhail Gerba was not on duty with the Washington County Sheriff's Department that night, but was working on a special assignment for the Oregon Department of Transportation performing traffic control for a construction project. He heard the dispatch, however, and responded. For some

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unknown reason, he skipped the staging area and went directly to the Glenn home, where he was the first officer to arrive on the scene at 3:11 a.m. Gerba initially encountered David Lucas and, pointing his gun at David, ordered him to “[g]et on the fucking ground.” David did as ordered and told Gerba that Lukus was “over there by the garage; we have him calmed down.”

Gerba proceeded up the driveway and positioned himself eight to twelve feet from Lukus, who was standing by the garage near his parents and Tony Morales. Gerba had a completely unobstructed view of Lukus, who could be seen clearly under the garage light. Lukus was not in a physical altercation with anyone, nor was he threatening anyone with the pocketknife or in any other way, and no one was trying to get away from him. He was, however, holding the pocketknife to his own neck.

Gerba held his .40 caliber Glock semiautomatic pistol in “ready position, aimed at Lukus.” From the moment he arrived, Gerba “only scream[ed] commands loudly at Lukus” such as “drop the knife or I’m going to kill you.” As the district court recognized, Lukus may not have heard or understood these commands because he was intoxicated and many people were yelling at once. Gerba “did not attempt to cajol[e] or otherwise persuade Lukus to drop the knife voluntarily.” Numerous witnesses described Gerba’s behavior as “angry, frenzied, amped and jumpy,” and noted that they were “shocked by how [he] approached this situation.” Within a minute of Gerba’s arrival, Hope began “begging the 911 operator, ‘Don’t let him shoot him. Please don’t let him shoot him .... [T]hey’re gonna shoot him.’ “ The dispatcher tried to reassure her that the police were “gonna try and talk to him,” but Hope said “I shouldn’t have called but I was so scared,” “they’re gonna kill him.”

\*3 Washington County Deputy Timothy Mateski was the next officer to reach the scene, approximately one minute after Gerba’s arrival. Mateski had initially headed toward the staging area, but rushed to the

Glenn home when he heard from dispatch that Gerba had gone directly there. En route he asked whether Hope and Brad could leave the house, and was advised that dispatch was checking. He never received a response, and did not follow up. Upon arrival, Mateski took a position six to twelve feet from Lukus, where he had a completely unobstructed view of Lukus. Like Gerba, “Mateski drew his gun and began screaming commands as soon as he arrived, including expletives and orders like ‘drop the knife or you’re going to die’ “ and “drop the fucking knife.” Numerous witnesses described Mateski as “frantic and excited and only pursu [ing] a course of screaming commands at Luke.” Tony Morales “implore[d] the officers to ‘calm down’ and t[old] them that Luke [wa]s only threatening to hurt himself.” The officers ordered Morales to crawl behind them and ordered Hope and Brad to go into the house and close the door, which officers knew was broken and could not be locked. Everyone complied. Lukus’ grandmother, who lived in a residence between the main house and garage, opened her door to come talk to Lukus. The officers ordered her back inside her home, and she complied. All of the people “in and around the house could have easily walked away from the scene to a spot behind the officers or even to the street behind without having to pass any closer to Luke than [they] already had been.” Instead, they did as the officers instructed them to do. Having ordered the Glens to go into their home, the officers could have positioned themselves between Lukus and the front door to the home without having to get any closer to Lukus, but they chose to stand elsewhere.

At about 3:14 a.m., Corporal Musser advised Mateski and Gerba that back-up was en route. Sergeant Wilkinson radioed that the officers on the scene should “remember your tactical breathing, and if you have leathal [sic] cover a taser may be an option if you have enough distance. Just tactical breathe, control the situation.” Neither Mateski nor Gerba was carrying a taser or a beanbag gun. Shortly after these dispatch messages, however, Officer Andrew Pastore of the City of Tigard Police Department arrived with a beanbag shotgun and a

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taser. Gerba and Mateski apparently were not aware that Pastore had a taser, and did not ask.

Mateski immediately ordered Pastore to “beanbag him.” Pastore yelled “beanbag, beanbag” and opened fire on Lukus. Pastore shot all six of the shotgun's beanbag rounds. Gerba recalled that, “when [Lukus] got hit, I remember ... he kind of cowered up against the garage and he kind of looked like, kind of like, did I just get hit with something?” The officers' brief acknowledges that Lukus “appeared surprised, confused, and possibly in pain.” Numerous witnesses observed that, “[w]hile being struck by beanbag rounds, Luke put his hands down, grabbed his pants and began to move away from the beanbag fire toward the alcove between the house and garage ... in the most obvious line of retreat from the fire.” Mateski and Gerba stated in their declarations that they had independently determined that if Lukus made a move toward the house with his parents inside, they would use deadly force.<sup>FN5</sup>

<sup>FN5</sup>. The district court determined that “Lukus could not have headed in the direction of the alcove without also heading in the direction of his parents' front door.” Glenn argues that it is possible Lukus did not make any volitional movement at all, but rather was “moved by ... the onslaught of beanbag fire.”

\*4 After Lukus took one or two steps, Gerba and Mateski began firing their semiautomatic weapons at him. They fired eleven shots, eight of which struck Lukus in the back, chest, stomach, shoulder and legs. The remaining three bullets struck his grandmother's residence. All the lethal fire occurred before the last beanbag round was fired, and less than four minutes after the first officer arrived on the scene. Seconds before he was fired upon, Lukus “pled [,] ‘Tell them to stop screaming at me’ “ and “why are you yelling?” Lukus bled out and died on his grandmother's porch shortly after he was shot.

In April 2007, Washington County Sheriff Rob

Gordon released to the public an Administrative Review of the Lukus Glenn shooting. The review concluded that “[n]o policies were violated during this critical incident,” and that the “WCSO deputies involved in this incident performed as trained, followed established policies, and acted in a professional manner.”

In August 2008, Hope Glenn filed a complaint against the defendants in her capacity as personal representative of Lukus' estate.<sup>FN6</sup> The complaint included an Oregon state law wrongful death claim and a 42 U.S.C. § 1983 claim for excessive force. The defendants moved for summary judgment, which the district court granted in June 2010. The court, acknowledging the tragedy of Lukus' death, nonetheless felt it had to conclude “that the officers' use of force did not violate Lukus Glenn's Fourth Amendment rights,” and therefore that the defendants were entitled to qualified immunity. The district court issued an amended opinion granting the defendants' motion for summary judgment on all claims. This timely appeal followed.

<sup>FN6</sup>. Pastore and the City of Tigard were voluntarily dismissed as defendants on May 18, 2010. The remaining defendants are Mateski, Gerba and Washington County.

## DISCUSSION

### I.

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's decision to grant summary judgment de novo, considering all facts in dispute in the light most favorable to the nonmoving party. See Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir.2000). “Summary judgment is appropriate only ‘if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.’ “ Stoot v. City of Everett, 582 F.3d 910, 918 (9th Cir.2009) (quoting Fed.R.Civ.P. 56(c)).

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The de novo standard also applies to our review of the defendant officers' entitlement to qualified immunity as a matter of law. See Mena, 226 F.3d at 1036.

## II.

In evaluating a grant of qualified immunity, we ask two questions: (1) whether, taking the facts in the light most favorable to the nonmoving party, the officers' conduct violated a constitutional right, and (2) whether the right was clearly established at the time of the alleged misconduct. See Saucier v. Katz, 533 U.S. 194, 200–01 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2009). Either question may be addressed first, and if the answer to either is “no,” then the officers cannot be held liable for damages. See Pearson, 555 U.S. at 236. In this case, the district court focused on whether the officers' use of force violated Lukus' Fourth Amendment rights, and held that it did not. Glenn argues on appeal that the district court erred in granting summary judgment on that basis. We agree that genuine issues of fact remain, and accordingly reverse. We further conclude that resolution of these issues is critical to a proper determination of the officers' entitlement to qualified immunity. We express no opinion as to the second part of the qualified immunity analysis and remand that issue to the district court for resolution after the material factual disputes have been determined by the jury.<sup>FN7</sup>

<sup>FN7</sup>. See, e.g., Espinosa v. City & Cnty. of S.F., 598 F.3d 528, 532 (9th Cir.2010) (affirming a denial of summary judgment on qualified immunity grounds because “there are genuine issues of fact regarding whether the officers violated [the plaintiffs] Fourth Amendment rights [, which] are also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions”); Santos v. Gates, 287 F.3d 846, 855 n.12 (9th Cir.2002) (finding it premature to decide the qualified immunity issue “because whether the officers may be said to have made a

‘reasonable mistake’ of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom”).

## A.

\*5 In evaluating a Fourth Amendment claim of excessive force, courts 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 (1989). This inquiry “requires a careful balancing of ‘the nature and quality of the intrusion on the individual's Fourth Amendment interests’ against the countervailing governmental interests at stake.” Id. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” Id. at 396–97. Reasonableness therefore must be judged from the perspective of a reasonable officer on the scene, “rather than with the 20/20 vision of hindsight.” Id. at 396 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

“Our analysis involves three steps. First, we must assess the severity of the intrusion on the individual's Fourth Amendment rights by evaluating ‘the type and amount of force inflicted.’” Espinosa, 598 F.3d at 537 (quoting Miller v. Clark Cnty., 340 F.3d 959, 964 (9th Cir.2003)). “[E]ven where some force is justified, the amount actually used may be excessive.” Santos, 287 F.3d at 853. Second, we evaluate the government's interest in the use of force. Graham, 490 U.S. at 396. Finally, “we balance the gravity of the intrusion on the individual against the government's need for that intrusion.” Miller, 340 F.3d at 964.

“Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment

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or judgment as a matter of law in excessive force cases should be granted sparingly.” *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005) (en banc) (alteration in original) (internal quotation marks omitted); see also *Espinosa*, 598 F.3d at 537 (“[T]his court has often held that in police misconduct cases, summary judgment should only be granted ‘sparingly’ because such cases often turn on credibility determinations by a jury.”). We hold that there remain questions of fact regarding the reasonableness of the officers’ actions that preclude summary judgment.

1.

First we consider the quantum of force used when officers shot Lukus with the beanbag shotgun. A beanbag shotgun is “a twelve-gauge shotgun loaded with ... ‘beanbag’ round[s],” which consist of “lead shot contained in a cloth sack.” *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir.2001). It is “intended to induce compliance by causing sudden, debilitating, localized pain, similar to a hard punch or baton strike.” “Although bean bag guns are not designed to cause serious injury or death, a bean bag gun is considered a ‘less-lethal’ weapon, as opposed to a non-lethal weapon, because the bean bags can cause serious injury or death” “if they hit a relatively sensitive area of the body, such as [the] eyes, throat, temple or groin.” In *Deorle*, we observed that the euphemism “beanbag” “grossly underrates the dangerousness of this projectile,” which “can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet.” *Id.* at 1279 & n.13. Indeed, the plaintiff in *Deorle* suffered multiple cranial fractures and the loss of an eye as a result of being shot with a beanbag gun from approximately 30 feet away. See *id.* at 1277–78 & n.11. In light of this weapon’s dangerous capabilities, “[s]uch force, though less than deadly, ... is permissible only when a strong governmental interest compels the employment of such force.” *Id.* at 1280.

2.

\*6 The strength of the government’s interest in the force used is evaluated by examining three

primary factors: (1) “whether the suspect poses an immediate threat to the safety of the officers or others,” (2) “the severity of the crime at issue,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. These factors, however, are not exclusive. See *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.2010). We “examine the totality of the circumstances and consider ‘whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.’” *Id.* (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir.1994)). Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. See, e.g., *Bryan*, 630 F.3d at 831; *Deorle*, 272 F.3d at 1282–83.

The “most important” factor is whether the individual posed an “immediate threat to the safety of the officers or others.” See, e.g., *Bryan*, 630 F.3d at 826 (internal quotation marks omitted). The district court held that the officers “were justified in using less-than-lethal force to prevent[Lukus] suicide.” The case the court cited in support of that proposition, however, does not involve a § 1983 claim, but rather addresses the constitutionality of a statute prohibiting assisted suicide. See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.1996) (en banc), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997). Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent Lukus from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this

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one the “solution” could be worse than the problem. On the facts presented here, viewed favorably to the plaintiff, the officers' use of force was not undisputably reasonable.

The district court also held that the officers were justified in shooting Lukus with the beanbag gun because he posed an immediate threat to officers and bystanders. In coming to this conclusion, the district court relied primarily on Lukus' possession of a knife. Although there is no question this is an important consideration, it too is not dispositive. Rather, courts must consider “the totality of the facts and circumstances in the particular case”; otherwise, that a person was armed would always end the inquiry. Blanford v. Sacramento Cnty., 406 F.3d 1110, 1115 (9th Cir.2005). The district court mischaracterized our case law as establishing that “when a suspect was armed with a deadly weapon, ... the officers' use of force [was reasonable] as a matter of law—even when the suspect ‘had not committed a significant crime or threatened anyone’ and no identifiable bystanders were present.” In each of the cases the district court cited—Blanford, 406 F.3d at 1115–19, Long v. City & County of Honolulu, 511 F.3d 901, 906 (9th Cir.2007), and Scott v. Henrich, 39 F.3d 912, 914–15 (9th Cir.1994)—we engaged in a context-specific analysis rather than resting our holding on the single fact that the suspect was armed.

\*7 Further, in each of those cases, the suspect had a more dangerous weapon than Lukus and wielded it in a more threatening manner. In Blanford, for example, the suspect was armed with a 2–1/2 foot sword, and when officers ordered him to put it down, he instead “raised his sword and growled.” 406 F.3d at 1116. In Long, the suspect, who officers knew had already shot two people, carried a .22 caliber rifle and, just before being fired upon by officers, raised his rifle to chest level and shouted “I told you fuckers to get the fuck back. Have some of this.” 511 F.3d at 904–05. And in Scott, the suspect “held a ‘long gun’ and pointed it at” officers. 39 F.3d at 914. Lukus, by contrast, had a pocketknife with a three-inch blade, which he did not brandish at anyone, but rather held

to his own neck.

Here, although Lukus did not respond to officers' orders to put the knife down during the approximately three minutes that elapsed before he was shot with the beanbag gun, a number of other circumstances weigh against deeming him “an immediate threat to the safety of the officers or others.” Graham, 490 U.S. at 396. By all accounts Lukus was suicidal on the night in question and the threats of violence known to the responding officers focused on harming himself rather than other people. Although Hope told the 911 operator that Lukus “was threatening to kill everybody” and might “run at the cops with a knife,” the district court correctly recognized it must be assumed on summary judgment that the officers on the scene did not know of such statements.<sup>FN8</sup> They had, however, been informed that Lukus was intoxicated and emotionally disturbed, and that he was the teenage son of the homeowners rather than an intruder or criminal. They also knew there was no history of 911 calls to the Glenn home, Lukus was not wanted for any crime and he was not in possession of any guns.

<sup>FN8</sup>. We disagree with the district court's suggestion that, even though we must assume the officers did not know of these statements, they provide “uncontroverted evidence demonstrat[ing] that the officers' safety concerns were not at odds with information provided to law enforcement.” We cannot consider evidence of which the officers were unaware—the prohibition against evaluating officers' actions “with the 20/20 vision of hindsight” cuts both ways. Graham, 490 U.S. at 396.

When Officer Gerba arrived on scene, Lukus was standing outside his home talking with his parents and friends, all of whom stood near him. He was “not in a physical altercation with anyone,” “[h]e was not threatening anyone with the knife,” and “[n]o one [wa]s trying to get away from” him. The only person with any injury was Lukus himself, whose

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hand was bleeding. Both Mateski and Gerba had unobstructed views of Lukus and stood with their weapons aimed at him.

From the moment they arrived, although Lukus 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. Smith, 394 F.3d at 703. Tony Morales asked officers to “calm down,” telling them that Lukus was “only threatening to hurt himself.” Furthermore, at the officers' direction, Hope and Brad went inside their home and Morales and David Lucas moved behind the officers, so a jury could conclude that no one was close enough to Lukus to be harmed by him before police could intervene.

\*8 Accordingly, a jury could conclude that at the time Pastore arrived with the beanbag gun approximately three minutes into the encounter, there was little reason to believe Lukus could have done any immediate harm to anyone. Lukus stood in the driveway several feet from the officers (who could have moved farther away at any time, had they wanted to), with guns trained on him, while his friends stood behind the officers and his parents and grandmother were in their homes. By all accounts, Lukus stayed in the same position from the moment officers arrived and showed no signs of attempting to move until after he was fired upon. At the time the officers elected to shoot Lukus with the beanbag rounds, only two things about the situation had changed from the time of their arrival: (1) the four people who previously had been standing near Lukus had moved away from him to locations either behind the officers or inside the house, arguably decreasing the threat Lukus posed, and correspondingly the need for force; and (2) the beanbag shotgun had arrived. No new action by Lukus precipitated the use of less-lethal force. Viewing the evidence in the light most favorable to the plaintiff, even though Lukus remained in possession of the pocketknife, a jury could conclude that at the moment the officers shot him with the beanbag gun there was little evidence that he posed an “immediate threat” to anybody.

Graham, 490 U.S. at 396.

The “character of the offense” committed by the suspect is also “often an important consideration in determining whether the use of force was justified.” Deorle, 272 F.3d at 1280. Viewing the facts in the light most favorable to the plaintiff, the “crime at issue” in this case was not “sever [e]” by any measure. Graham, 490 U.S. at 396. Indeed, Lukus' family did not call the police to report a crime at all, but rather to seek help for their emotionally disturbed son. See Deorle, 272 F.3d at 1280–81 (noting that officers were called “not to arrest him, but to investigate his peculiar behavior[as] Deorle was clearly a deeply troubled, emotionally disturbed individual”). Neither the district court nor the defendants have identified any crime that Lukus committed.<sup>FN9</sup>

<sup>FN9</sup> We recognize that the defendants could argue at trial that Lukus threatened his family, or that Lukus obstructed the officers by refusing to follow their orders, and thereby violated the law. These are disputed facts, however, which we must resolve in the plaintiff's favor. There is evidence from which a jury could conclude that Lukus never threatened anyone but himself, and that Lukus could not hear or understand the officers' commands.

We do not diminish the importance of crimes such as those Lukus might be argued to have committed, but we have previously concluded that similar offenses were not “severe” within the meaning of the Graham analysis. See Davis v. City of Las Vegas, 478 F.3d 1048, 1055 (9th Cir.2007) (noting that trespassing and obstructing a police officer were not severe crimes); Smith, 394 F.3d at 702 (concluding that a suspect was not “particularly dangerous” and his crimes were not “especially egregious” where police were called because he was “

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‘hitting [his wife] and/or was physical with her’ ”); Deorle, 272 F.3d at 1277, 1281–82 (noting that “the crime being committed, if any, was minor” where the suspect was charged with obstructing the police in the performance of their duties after brandishing a hatchet and crossbow at police officers and threatening to “kick [their] ass”).

Next, we consider whether Lukus was “actively resisting arrest or attempting to evade arrest by flight.” Graham, 490 U.S. at 396. No one contends that Lukus tried to flee before officers shot him with the beanbag gun. Whether Lukus was “actively resisting arrest” is more complicated.

Significantly, “he did not attack the officers” or anyone else, nor did he threaten to do so at any point while officers were on the scene. Smith, 394 F.3d at 703. Rather, he stayed in the same position from the time officers arrived and took no threatening actions (other than noncompliance with shouted orders). However, he remained in possession of the pocketknife despite officers' commands to put it down. As the district court recognized, though, it is not clear Lukus heard or understood those orders.

\*9 In Deorle, the plaintiff “brandish[ed ] a hatchet” and a crossbow and was verbally abusive to officers, threatening to “kick [their] ass.” 272 F.3d at 1276–77. He also continually roamed about his property despite officers' orders. *Id.* Nonetheless, we did not consider this sufficient active resistance to warrant use of the beanbag shotgun. *Id.* at 1282–85. Rather, we noted that “the crime being committed, if any, was minor.” *Id.* at 1282. Similarly, in Smith, 394 F.3d at 703, we held that the plaintiff's refusal to obey officers' commands to remove his hands from his pockets to show police whether he was armed, as well as his entry into his home despite officers' orders and his brief physical resistance were “not ... particularly bellicose.” Smith is similar to this case in that the crux of the resistance was the refusal to follow officers' commands, rather than actively

attacking or threatening officers or others. Lukus, however, had a pocketknife, whereas police ultimately determined that Smith was unarmed. We take note of Washington County's own guidelines in considering how this distinction should affect our analysis. *See, e.g., id.* at 701–02 (discussing the “Hemet Police Department's use of force policy” in analyzing the Graham factors).

Washington County's use of force continuum identifies five levels of resistance, ranging from least to most resistant: verbal, static, active, ominous and lethal. Applying Washington County's definitions to the facts viewed in the light most favorable to Glenn, Lukus falls under the “static” resistance category, where the suspect “refuses to comply with commands ... [and] has a weapon but does not threaten to use it.” According to Washington County guidelines, officers can employ various types of force in response to static resistance, including takedown methods, electrical stun devices and pepper spray. Use of less-than-lethal munitions, however, is unauthorized unless a suspect exhibits “ominous” or “active” resistance, which entails “pull [ing] away from a deputy's grasp, attempt[ing] to escape, resist[ing] or counter[ing] physical control,” or “demonstrat[ing] the willingness to engage in combat by verbal challenges, threats, aggressive behavior, or assault.” Accordingly, when viewing the facts in the light most favorable to the plaintiff, the defendants' own guidelines would characterize Lukus' conduct as less than active resistance, not warranting use of a beanbag shotgun.

Another circumstance relevant to our analysis is whether the officers were or should have been aware that Lukus was emotionally disturbed. *See Deorle*, 272 F.3d at 1283. Viewing the facts in the required light, it is clear that, as the district court recognized, Lukus was obviously “emotionally disturbed, a factor to which the officers should have assigned greater weight.” Dispatch informed officers that Lukus (1) was suicidal and very intoxicated, (2) had a history of suicide attempts, and (3) was the son of the caller rather than a criminal intruder. This information was

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confirmed when officers arrived and found Lukus holding a knife to his own neck and threatening to harm himself, rather than brandishing it at his parents or friends, who were standing nearby. Indeed, at least one person on the scene explicitly told officers that Lukus was “only threatening to hurt himself.” “Even when an emotionally disturbed individual is ‘acting out’ and inviting officers to use deadly force,” “the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.” *Id.* This was the situation officers confronted in this case.

\*10 We also consider whether officers gave a warning before employing the force. See *Bryan*, 630 F.3d at 831; *Deorle*, 272 F.3d at 1272. “Appropriate warnings comport with actual police practice” and “such warnings should be given, when feasible, if the use of force may result in serious injury.” *Deorle*, 272 F.3d at 1284. In this case, more than once Gerba and Mateski yelled warnings like “drop the fucking knife or I’m going to kill you,” but, as the district court noted, “Lukus may not have heard or understood these warnings” because he was intoxicated and there were other people yelling. Further, these warnings were given before Pastore arrived with the beanbag shotgun. It appears that the only warning given immediately before the beanbag shotgun was fired was when Pastore yelled “beanbag, beanbag.” Possibly, Lukus did not know what this statement meant, or perhaps even what a beanbag shotgun was. The officers concede that after being hit with the beanbag rounds Lukus “appeared surprised, confused, and possibly in pain,” and Lukus may even have thought he was being shot at with live lethal rounds given the officers’ previous threats of deadly force. Confusion regarding whether his life was in immediate danger may have led Lukus to seek cover rather than surrender.

Finally, we consider whether there were less intrusive means of force that might have been used before officers resorted to the beanbag shotgun.

Officers “need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.” *Henrich*, 39 F.3d at 915. However, “police are ‘required to consider[w]hat other tactics if any were available,’ “ and if there were “clear, reasonable and less intrusive alternatives” to the force employed, that “militate[s] against finding [the ] use of force reasonable.” *Bryan*, 630 F.3d at 831 (quoting *Headwaters Forest Def. v. Cnty. of Humboldt*, 240 F.3d 1185, 1204 (9th Cir.2000)); see also *Smith*, 395 F.3d at 703 (considering “alternative techniques available for subduing him that presented a lesser threat of death or serious injury”).

Glenn identifies various less intrusive options that she argues were available to the officers. She suggests that rather than immediately drawing their weapons and shouting commands and expletives at Lukus, which predictably escalated the situation instead of bringing it closer to peaceful resolution, officers could have attempted the tactics of “persuasion” or “questioning.” These tactics appear on the Washington County use of force continuum, and the 911 dispatcher assured Hope that the officers would “try and talk to [Lukus].” Glenn also argues that the officers also could have “use[d] time as a tool,” given that they knew backup officers were en route and that the situation appeared static. Instead, officers shot Lukus with numerous beanbag rounds approximately three minutes into the encounter, and had shot him to death within four minutes of their arrival.

\*11 We have made clear that the “desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.” *Deorle*, 272 F.3d at 1281. We also recognized in *Deorle* that 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. See *id.* at 1282. This is because when

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dealing with a disturbed individual, “increasing the use of force may ... exacerbate the situation,” unlike when dealing with a criminal, where increased force is more likely to “bring[ ] a dangerous situation to a swift end.” *Id.* at 1283. The facts of this case, viewed in the light most favorable to the plaintiff, bear this out: Lukus did not respond positively to the officers' forceful tactics, and just before officers fired the beanbag gun, Lukus “pled: ‘Tell them to stop screaming at me,’ “ and “why are you yelling?”

In support of her arguments, Glenn offers the statements of an expert witness, a former Bellevue, Washington Chief of Police with a law enforcement career spanning more than 50 years. It was his “considered professional opinion that the [defendants] escalated a static situation into an unnecessary and avoidable shooting.” We have held en banc that “[a] rational jury could rely upon such [expert] evidence in assessing whether the officers' use of force was unreasonable.” *Smith*, 394 F.3d at 703 (reversing district court's grant of qualified immunity).

In the expert's opinion, the “fundamental rules for approaching” a situation like the one the officers faced are: “1) Slow it down, 2) Do not increase the subject's level of anxiety or excitement, 3) Attempt to develop rapport, 4) Time is on the side of the police.” The expert pointed out that Sergeant Wilkinson had specifically advised the responding officers to “[r]emember your tactical breathing,” and “control the situation”—advice Wilkinson explained was meant to “help [the officers] control themselves if possible while dealing with a stressful situation.” Instead, “[w]ith no attempt at establishing any dialogue whatsoever,” “[t]he shooters began loudly and continuously yelling at the decedent.” “3 minutes and 49 seconds later, Officer Pastore began firing 6 impact projectiles at him,” and “[a]fter only 9 more seconds and before all of the impact projectiles had been fired, the shooters began rapidly firing a total of 11 shots.” In the expert's opinion, “[t]he rapidity of the time sequence is particularly illustrative of th[e] too hasty and escalating approach to a person in

crisis.”

Finally, Glenn argues that the officers should have used a taser before employing the beanbag shotgun. Washington County considers electrical stun devices to be lesser force than less-lethal munitions. Sergeant Wilkinson suggested over dispatch that “a taser may be an option if you have enough distance,” and Tony Morales also suggested that the officers try tasing Lukus. Plaintiff's expert opined that the taser “was the ideal less-lethal option to temporarily disable the decedent, at approximately 15 feet away, and take him into custody.” He came to this conclusion because beanbag shotgun rounds “are generally inaccurate, rely solely on pain for compliance that will also motivate the target to escape and do not have a high degree of reliability,” whereas the taser “actually immobilizes the target, is accurate out to 21 feet and has a high degree of reliability.”

\*12 Neither Gerba nor Mateski had a taser on the night in question, but Pastore did. It appears Gerba and Mateski did not know that, and never asked. The district court cited several reasons the defendants offered for their decision to use a beanbag shotgun rather than a taser, such as that Lukus' position and distance relative to the officers would have made firing the taser difficult. But there was conflicting evidence on these points, so on summary judgment we must assume that a taser would have been a feasible option. Although a jury could ultimately disagree that the officers were in optimal taser range or that use of a taser was otherwise feasible or preferable, these are disputed questions of fact.<sup>FN10</sup>

FN10. We do not suggest that it would have necessarily been reasonable for the officers to use a taser here. “[W]hether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental

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interests at stake.” Graham, 490 U.S. at 396 (internal quotation marks omitted). This is a fact-specific inquiry, and reasonableness is determined based on the totality of the circumstances. The reasonableness of the use of a taser here would depend on a balancing of the *Graham* factors. See Mattos v. Agarano, 661 F.3d 433, 2011 WL 4908374, at \*7–\*16 (9th Cir. Oct. 17, 2011) (en banc) (applying the *Graham* factors and concluding that use of a taser was unreasonable under the circumstances). We need not conduct such an analysis at this stage, because regardless of whether the force used would have been upheld as reasonable, it was a less intrusive alternative to the beanbag shotgun.

We do not suggest that the officers were required to attempt any of the various purportedly less intrusive alternatives to the beanbag shotgun. As we have explained, it is well settled that officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct. See Henrich, 39 F.3d at 915. The available lesser alternatives are, however, relevant to ascertaining that reasonable range of conduct. See Bryan, 630 F.3d at 831. Accordingly, the availability of those alternatives is one factor we consider in the *Graham* calculus.

### 3.

Balancing these various considerations, we hold that the district court erred in granting summary judgment on the constitutionality of the officers' use of force. We recognize that the officers have offered evidence that could support a verdict in their favor. A jury could view the facts as the district court did, and likewise reach the conclusion that the officers' use of force was reasonable. But on summary judgment, the district court is not permitted to act as a factfinder. The circumstances of this case can be viewed in various ways, and a jury should have the opportunity to assess the reasonableness of the force used after hearing all the evidence. See Smith, 394 F.3d at 701

(noting that “ ‘summary judgment ... in excessive force cases should be granted sparingly’ “ because such cases “ ‘nearly always’ “ involve disputed facts); see also Espinosa, 598 F.3d at 537. Because the disputed facts and inferences could support a verdict for either party, we are compelled to reverse the district court's entry of summary judgment.

### B.

As the district court recognized, “the officers' decision to employ the beanbag gun is critical to the resolution of” the reasonableness of the lethal force as well “[b]ecause the use of less-lethal force precipitated the use of deadly force.” Before Lukus was shot with the beanbag shotgun, he had not moved from the position he was in at the time officers arrived, and showed no signs of attempting to do so. He moved only after being struck by the beanbag rounds, which have sufficient force to “knock[ ] [someone ] off his feet.” Deorle, 272 F.3d at 1279. Lukus' movement in reaction to the beanbag fire—which a jury could conclude was a predictable consequence of using the beanbag shotgun—prompted the officers' lethal force.

\*13 “[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.” Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir.2002); see also Espinosa, 598 F.3d at 548 (“[E]ven though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.”). Because there is a triable issue of whether shooting Lukus with the beanbag shotgun was itself excessive force, under *Billington* there is also a question regarding the subsequent use of deadly force. Even assuming, as the district court concluded, that deadly force was a reasonable response to Lukus' movement toward the house, a jury could find that the beanbag shots provoked Lukus' movement and thereby precipitated the use of lethal force. If jurors conclude that the

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provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation, the officers “may be held liable for [their] otherwise defensive use of deadly force.” Billington, 292 F.3d at 1189.

Even if the jury determines that the use of “less-lethal” force was justifiable, however, the question still remains whether escalating so quickly to deadly force was warranted. The critical issue is whether Lukus posed an immediate safety risk to others. “In deadly force cases, ‘[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.’” Espinosa, 598 F.3d at 537 (quoting Garner, 471 U.S. at 11–12).

Even before the final beanbag round was fired, the officers began firing a total of 11 shots at Lukus, eight of which struck him, causing him to bleed to death on his grandmother's porch within minutes. The officers argue they were justified in resorting to deadly force because Lukus had begun to move toward the house where his parents were located, and the officers knew the front door had a broken lock. Thus, they reasonably feared that he could have attacked his parents with the knife so they shot Lukus to protect his family.

Glenn counters that Lukus was not running toward the front door to attack his family, but instead took one or two steps seeking cover from the beanbag rounds by moving in the most obvious line of retreat, and was shot without warning. Glenn contends that Lukus may not even have taken an intentional step but instead was “moved by ... the onslaught of beanbag fire.” Glenn further argues that the officers' professed concern for Hope and Brad's safety was unreasonable given that Lukus had up to that point not attempted to attack anyone, and had been threatening suicide rather than exhibiting any inclination to harm his family. Moreover, had the officers been so concerned with the Glenns' safety, Glenn argues, they could easily have positioned Hope

and Brad behind the officers, as they did with Tony Morales and David Lucas, rather than ordering them into the house with its broken door. Alternatively, the officers could have positioned themselves between Lukus and the front door.

\*14 As with the use of beanbags, there are material questions of fact about Lukus' and the officers' actions that preclude a conclusion that the officers' rapid resort to deadly force was reasonable as a matter of law. Again, the disputed facts and inferences could support a verdict for either party, and the jury must resolve these factual disputes. Accordingly, we reverse the district court's summary judgment on the use of lethal force.

### III.

Glenn also appeals the dismissal of her claim against Washington County under Monell v. Department of Social Services, 436 U.S. 658 (1978). “Pursuant to 42 U.S.C. § 1983, a local government may be liable for constitutional torts committed by its officials according to municipal policy, practice, or custom.” Weiner v. San Diego Cnty., 210 F.3d 1025, 1028 (9th Cir.2000) (citing Monell, 436 U.S. at 690–91). Alternatively, “the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.” Gillette v. Delmore, 979 F.2d 1342, 1346–47 (9th Cir.1992) (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)). The district court's dismissal of Glenn's Monell claim was based entirely on the erroneous entry of summary judgment in the defendants' favor on the excessive force question. Accordingly, we remand to the district court for consideration of whether Glenn's Monell claim can properly be resolved on summary judgment even if the constitutional violation question cannot.

We also reverse and remand for reconsideration of whether Glenn's state law wrongful death claim could properly be resolved on summary judgment. The district court appears to have assumed that Oregon law and § 1983 are coextensive, and rejected Glenn's state law claims “[i]n light of [its] decision



**CERTIFICATE OF SERVICE**

I, Dawn M. Ochoa, hereby certify that on the date below I caused the foregoing **Respondent Jeremy Freeman's Response Brief and the Appendix Thereto** to be served upon each and every attorney of record as noted below:

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Attorney for Respondent-Defendant Whatcom County

I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on March 2, 2012.

  
\_\_\_\_\_  
Dawn M. Ochoa  
Paralegal/Legal Assistant to Sarah S. Mack