No. _____

In The
Supreme Court of the United States

DARON WYATT,

Petitioner,

vs.

RAFAEL GONZALEZ, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's recognition in *Scott v. Harris*, 550 U.S. 372 (2007), *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and *Sykes v. United States*, 131 S. Ct. 2267 (2011) that flight in a moving vehicle inherently creates a risk of injury to the public and pursuing law enforcement officers, is an officer's use of deadly force reasonable as a matter of law, when employed against the driver of a fleeing vehicle in which the officer is an unwilling passenger?

2. When a police officer is an unwilling passenger in a vehicle driven by a suspect who was fleeing from a lawful arrest, for purposes of qualified immunity was it clearly established that the Fourth Amendment prohibited the officer from using deadly force to end the threat to his safety and that of the public?

3. Is the standard for granting summary judgment to a defendant in a case asserting claims for excessive force, particularly deadly force under the Fourth Amendment, more stringent than that set forth in Rule 56, Federal Rules of Civil Procedure?

4. In addition to the three-factor test set out in *Graham v. Connor*, 490 U.S. 386 (1989), must the reasonableness of a police officer's use of force under the Fourth Amendment be evaluated in light of less intrusive alternatives?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

- F.E.V., a minor, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, by and through her Guardian Ad Litem David Vasquez; Antoinette Sanchez, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, plaintiffs and appellants below, and respondents here.
- Daron Wyatt, defendant and appellee below, and petitioner here. The City of Anaheim and Matthew Ellis were defendants and appellees in the proceedings below, but the claims against them are no longer at issue.

There are no publicly held corporations involved in this proceeding.

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The Ninth Circuit's en banc opinion, the subject of this petition, was published at 747 F.3d 789 (9th Cir. 2014). (Appendix ("App.") 1-57.) The Ninth Circuit's order granting the petition for en banc review was published at 733 F.3d 979 (9th Cir. 2013). (App.58-59.) The Ninth Circuit's panel opinion was published at 715 F.3d 766 (9th Cir. 2013). (App.60-80.) The District Court's unpublished decision granting summary judgment is reproduced in the appendix to this petition. (App.81-100.)

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its en banc opinion on March 31, 2014. *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014). On June 24, 2014, the Honorable Anthony M. Kennedy extended the time for petitioner to file a petition for writ of certiorari to and including July 30, 2014. (Dkt. No. 13A781.) This Court has jurisdiction under 28 U.S.C. §1254(1) to review on writ of certiorari the Ninth Circuit's March 31, 2014 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983 which states:

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

Respondents allege that the petitioner violated decedent's rights under the Fourth Amendment to the United States Constitution, which reads as follows:

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

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STATEMENT OF THE CASE

The undisputed facts are based on citations to the record:

On September 25, 2009, at 2:00 a.m., Anaheim police officers Matthew Ellis and petitioner Daron Wyatt were en route to a call for service regarding a transient sleeping in the area of South Street and State College Boulevard. (App.3; Excerpts of Record ("ER") 221.) They were stopped, facing a red signal in the No. 2 westbound left turn lane of Lincoln Avenue at State College Boulevard. (ER221.) Another vehicle, later identified as a 1991 Mazda MPV with California license plate 5AYA838, was stopped in the No. 1 westbound left turn lane of Lincoln Avenue. (ER221.) The signal phased to green and during their southbound turn, the Mazda veered into their lane and Ellis was forced to brake aggressively to avoid a collision with the vehicle. (App.3; ER221, 48.) The Mazda turned into the gas station located at the southwest corner of Lincoln Avenue and State College Boulevard. (App.3; ER221.) Ellis and Wyatt continued to the call for service; however, they were unable to locate the transient. (App.3; ER222.)

They returned to the area of Lincoln Avenue and State College Boulevard (ER222) and saw the Mazda was still at the gas station where it had pulled in following the previous traffic violation. (App.3; ER222.) Ellis parked facing eastbound on Lincoln Avenue, west of the gas station so they could observe the Mazda. (ER223.) Ellis saw Gonzalez enter the Mazda

and drive southbound on State College Boulevard. (App.3; ER223.) The officers followed the Mazda, watching to see if any enforcement action was necessary such as citation for impaired driving. (ER223, 59, 62.) The Mazda turned west on Santa Ana Street and the officers followed. (ER223.)

Ellis observed the Mazda weaving within its traffic lane. (App.3, 35; ER223, 68.) At 2:11 a.m., Wyatt advised headquarters over his police radio of their intended traffic stop for the van's previous left-turn violation, and activated the patrol car's emergency lights to conduct the traffic stop. (App.3, 35; ER224.) The Mazda van continued westbound for 200 feet and subsequently made a wide northbound turn on Bond Street, driving left of center of the roadway, northbound in the southbound lane almost striking the opposing curb – an unsafe turn. (App.35; ER224, 71-72, 189.) Wyatt was looking inside the Mazda as it made its turn. (ER224.)

Gonzalez came to a stop along the east curb of Bond Street 25 feet from the corner. (App.35; ER224, 73.) As Wyatt approached Gonzalez along the passenger side of the Mazda van (App.4, 35; ER225, 75), he believed that Gonzalez was reaching back for something between the driver and passenger seats, causing him concern for his safety. (App.35; ER225, 75-76, 163.) Wyatt immediately drew his service weapon, pointed it at Gonzalez and gave him a warning: "If you reach down there again, I'm gonna shoot you." (App.4, 36; ER225, 77, 163.) Gonzalez clenched his fists in his lap and then looked back and forth between Ellis and

Wyatt. (ER77.) At that time, Gonzalez complied with Wyatt's commands to stop reaching toward the back of the van. (App.4; ER229, 127.)

Prior to arriving at the Mazda's driver's side door, Ellis heard Wyatt's warning: "If you reach down there again, I'll shoot you." (App.36; ER225, 163.) Ellis observed Gonzalez's right hand clinched into a fist holding a plastic baggy that he believed contained drugs. (App.36; ER165.) Ellis told Gonzalez to turn off the van and show his hands. (App.4, 36; ER166.) Gonzalez looked toward Ellis, toward Wyatt, and within the interior of the Mazda. (ER226.) Ellis tried to open the driver's side door; however, it was locked. (App.4, 36; ER226.) The driver's door window was opened approximately 6-8 inches, so Ellis reached through the opening with his right hand and tried unsuccessfully to pull up the door lock. (App.36; ER226.) Gonzalez reached downward with his left hand between the driver's seat and the door and Ellis observed a plastic bag protruding from Gonzalez's right fist that he believed contained drugs. (App.4, 36; ER226, 165.)

Because Gonzalez was not complying with the officers' commands, Wyatt holstered his weapon and unlocked the passenger door by reaching through the partially opened passenger door window. (App.4, 36; ER227, 84.)

Ellis reached inside the vehicle, through the partially opened driver's door window with his right arm. (ER227.) He also reached inside with his left

hand. (ER227.) Ellis was trying to gain control of Gonzalez's right arm from behind his head and also his left arm. (App.4; ER168-69.) Ellis believed Gonzalez was trying to swallow the drugs. (App.4; ER193.) During this incident, Ellis was telling Gonzalez to turn off the car and give him his hand; and to "show me your hands" and "open your hands." (App.4; ER227, 83, 98, 166.)

Wyatt ordered Gonzalez to open his hands and observed that Gonzalez had a clinched right fist and was reaching downward with his left hand between the driver's seat and driver's door. (App.4-5, 36; ER228, 82, 85-86.) As Gonzalez did not comply and Wyatt believed he was possibly holding a weapon (ER86), Wyatt reached inside the vehicle from the passenger side (App.36) and with a backhand motion, struck Gonzalez on the right elbow with his flashlight three times from the passenger side in an attempt to gain compliance, and told Gonzalez to open his hand. (App.4; ER228, 86-87.) Gonzalez then made a motion with his closed right hand towards his mouth. (App.4, 36; ER88-89, 95.) Contact took place between Ellis and Gonzalez. (ER228, 90.) Wyatt saw that Gonzalez appeared to be striking towards Ellis through the window and fighting with him. (ER91, 95, 132.)

Ellis reached in with his left hand and grabbed Gonzalez's left arm. (App.4; ER173.) Gonzalez did not respond to either Ellis or Wyatt's commands. (App.4; ER229.)

Wyatt backed out of the vehicle and requested assistance over the police radio by asking for a "Code-3 follow." (App.5, 36; ER229.) Wyatt ran around the rear of the Mazda van towards the driver's side to assist Ellis (App.36; ER229); however, upon observing Ellis's position, Wyatt determined he would be unable to assist from the driver's side of the Mazda. (App.5, 37; ER229). Wyatt returned to the Mazda's front passenger door. (App.5, 37; ER229.) Wyatt then entered the Mazda van by placing both knees on the front passenger seat and used his right hand to punch Gonzalez on the right side of the head and face. (App.5, 37; ER229.) Wyatt told Gonzalez to stop fighting with Ellis. (ER101, 104.)

Ellis then observed Gonzalez reach toward the van's steering column gear shift with his right hand. (App.5, 37; ER230.) Ellis believed Gonzalez was attempting to shift the Mazda van into drive, so Ellis then used his flashlight to hit Gonzalez in the back of the head twice in an attempt to stop him. (App.5, 37; ER230, 174-75.) Ellis saw the vehicle go into gear. (App.5; ER174-75.)

Wyatt tried to control Gonzalez's right arm, however, Gonzalez reached forward toward the gear shift and "slapped" it into drive, and "stomped down" on the gas pedal and violently accelerated north-bound. (App.5, 37; ER230, 104-05.)

Ellis feared he would be pulled forward with the Mazda van, so Ellis pulled himself out of the driver's door window, and struck Gonzalez on the head as he

withdrew. (App.5, 37; ER230.) Ellis was able to step away from the Mazda van prior to it proceeding forward. (App.37; ER231.) Ellis began to take his gun out but didn't have a safe shot so he ran back to their patrol car. (App.37; ER180, 196.)

Gonzalez accelerated rapidly as the van pulled away from the curb. (ER231, 105.) As the vehicle accelerated forward, the door on the passenger side slammed shut, trapping Wyatt inside the Mazda with Gonzalez. (App.5; ER232, 105.) Wyatt yelled at Gonzalez to stop; however, he did not comply. (App.5, 37; ER232.) Wyatt reached with his left hand and attempted to either turn off the ignition or shift the transmission into neutral or park (App.5, 37; ER232, 118); however, Gonzalez hit his hand away. (App.37-38; ER232, 139.) This occurred 2-3 times. (App.38; ER232.) Gonzalez quickly began reaching with his left hand, steering with the right hand, and alternate his hand position by reaching with his right hand and steering with his left hand. (ER232, 106-07.)

Ellis ran to his patrol unit and followed the Mazda. (ER233.) The van went through the intersection of Bond Street and Willow Street. (App.38; ER233.)

Wyatt yelled at Gonzalez to stop, but Gonzalez did not comply. (App.5, 38; ER234, 108.) Gonzalez was driving with Wyatt trapped inside the Mazda. (ER234, 105.) Wyatt was not seat belted. (ER234.) Wyatt believed the vehicle was a weapon and that he could be ejected from the car and seriously injured or killed. (ER112-13, 332.) He estimated the van was traveling

40 to 50 miles per hour down a residential street. (App.6; ER235, 119-20.) Wyatt estimated that within 10 seconds and after traveling forward approximately 50 feet, he withdrew his duty weapon with his right hand, leaned back to his right, extended his right arm out and shot Gonzalez on the right side of the head. (App.5-6, 38; ER235, 107, 109, 181.) Gonzalez went motionless and leaned toward the driver's door. (ER235.)

The van was moving so Wyatt grabbed the steering wheel with both hands. (App.38; ER235.) He steered the Mazda toward a white 1990 Mitsubishi truck, which was parked along the west curb, in an attempt to stop the van. (App.5, 38; ER235.) The collision with the truck caused Wyatt's handgun to fall out of his right hand. (App.38; ER235.) The Mazda van continued northbound 20 feet and subsequently stopped at the intersection of Bond Street and Elm Street, a block north of Willow. (App.5, 38; ER235, 117, 119-20.)

After the van stopped, Ellis, who had followed in his patrol car, observed a bag lying on the street beneath the van's open door. (App.38.) Detectives processing the scene later found a knife. (App.36 n.5, 38.)

PROCEDURAL BACKGROUND

Gonzalez's parents and daughter sued the officers and the City of Anaheim for violations of federal civil

rights. (App.6.) The City and the individual officers moved for summary judgment. (App.6.) The District Court granted the motion. (App.6, 81-100.) The District Court held that the force the officers used during their encounter with Gonzalez was reasonable. (App.6.) Only Gonzalez's mother and daughter appealed. (App.6.)

Summary judgment was affirmed. *Gonzalez v. City of Anaheim*, 715 F.3d 766 (9th Cir. 2013) (App.60-80). The majority held that minor inconsistencies in the officer's testimony did not create a disputed issue of material fact. *Gonzalez v. City of Anaheim*, 715 F.3d at 771-72 (App.47-48, 70-71). The Ninth Circuit granted en banc review. *Gonzalez v. City of Anaheim*, 733 F.3d 979 (9th Cir. 2013) (App.58-59).

The en banc majority reversed, 7-4. Writing for the majority, Judge Clifton concluded that a material issue of fact existed as to the speed of the vehicle at the time Wyatt shot Gonzalez. Wyatt testified that at the time he shot Gonzalez the van was traveling at approximately 50 miles per hour, and during the five to ten second period between the time that Gonzalez had stomped on the accelerator and the time Wyatt shot him, the van had gone approximately 50 feet. The majority held that the testimony was flatly inconsistent in that the vehicle could not have been traveling 50 miles per hour and traveled only 50 feet in five to ten seconds. If Wyatt was correct that the vehicle had traveled only 50 feet, then the speed could have been as low as 3 to 7 miles per hour at the time the

shot was fired. (App.9-10.) According to the majority, a jury

> could thus find that the minivan was not traveling at a high rate of speed and Wyatt did not reasonably perceive an immediate threat of death or serious bodily injury at the time he shot Gonzalez in the head.

(App.11-12.)

The en banc majority also concluded that a jury could have found that something less than deadly force could have addressed the threat posed by a possibly slowly moving vehicle:

> Wyatt had a police baton, pepper spray, and a taser. He could have used any of them, or he could have shot Gonzalez in a nonlethal area of the body to try to stop him from driving further. Instead, he used his gun and intentionally shot Gonzalez in the head. If the jury found that the car was moving slowly at the time, it could also find that other alternatives could have been used and that the use of deadly force was unreasonable.

(App.15.)

Finally, the majority found that a jury could conclude that Wyatt should have warned Gonzalez before he shot him:

> A rational jury may find, however, that if the car was moving at an average speed of 3 to 7 miles per hour, a warning was practicable

> and the failure to give one might weigh against reasonableness.

(*Id.*)

Chief Judge Kozinski and Judge Trott wrote separate dissenting opinions, in which all the dissenting judges joined. Both opinions noted that the majority opinion starkly departed from this Court's controlling authority and indeed, common sense. As Chief Judge Kozinski noted:

> It's undisputed that, at the time he fired the fatal shot, Officer Wyatt was trapped inside a moving vehicle driven by a man who had resisted the verbal commands, physical restraints, lethal threats and bodily force of two uniformed officers. How fast the van was moving and how far it had traveled are beside the point. What matters is that Officer Wyatt was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in Wyatt's situation would have acted any differently, and no reasonable jury will hold him liable. The only thing this remand will accomplish is to give plaintiffs a bludgeon with which to extort a hefty settlement. The Supreme Court should foil the plan with a swift *summary reversal*.

(App.56-57, emphasis added.)

Judge Trott similarly found that summary judgment was plainly warranted:

> Instead of cooperating with the police, Gonzalez stomped on his van's accelerator and fled from a traffic stop, igniting a dangerous chase. What makes this chase unusual is that Officer Wyatt was trapped in Gonzalez's van. After yelling at Gonzalez to stop and unsuccessfully trying to disable the vehicle, Officer Wyatt ended Gonzalez's violent attempt to escape by shooting him. As much as one might have wished for a different outcome, I conclude that Officer Wyatt's act in self-defense was objectively reasonable. Thus, I would affirm the district court.

(App.18.)

Judge Trott noted that the majority simply ignored the inherently dangerous nature of the situation given multiple acts of resistance by Gonzalez and his intention to flee the scene with Wyatt as an unwilling passenger:

> As Gonzalez "stomped" on the van's accelerator and attempted to flee, he struck Officer Wyatt's hands numerous times with his own, adding to his offenses – in a matter of seconds – the additional crimes of (1) battery against a peace officer in violation of CPC §§ 242, 243; (2) felonious false imprisonment of Officer Wyatt in violation of CPC §§ 236, 237; (3) felonious kidnaping of Officer Wyatt in violation of CPC § 207; and (4) flight from a pursuing officer (Officer Ellis) in violation of California Vehicle Code § 2800.1. It is beyond argument that had Officer Wyatt not stopped Gonzalez, Gonzalez would have accelerated

> his van and continued to attempt to escape with Officer Wyatt trapped inside the van, and with Officer Ellis – and probably others – in hot pursuit.

(App.40.)

As Judge Trott further observed, in both *Scott v. Harris*, 550 U.S. 372 (2007) and *Sykes v. United States,* 131 S. Ct. 2267 (2011), this Court had emphasized that vehicle flight from police pursuit was inherently dangerous, and here all the more so, given that Wyatt was in the fleeing vehicle itself. (App.40-44.) The speed of the vehicle was simply not material with respect to the danger posed to Wyatt and the public:

> What is material is that Gonzalez suddenly accelerated his van away from the traffic stop with Officer Wyatt trapped inside and traveled for a block before it crashed. Who cares how fast the van was going? Gonzalez's representatives admit that Gonzalez unexpectedly tried to flee without warning, and that when Officer Wyatt tried to stop him, Gonzalez physically fought him off. I do not comprehend how this constellation of facts fails to demonstrate a real threat of impending harm to Officer Wyatt, as well as to members of the public.

(App.45.)

Judge Trott observed that the standard the majority would impose on police officers was not simply unsupportable, but nonsensical:

> They impose a new duty on police officers: when you are in a zone of immediate danger involving a moving vehicle in which you are being kidnaped, you must calculate the speed of the vehicle as you try to turn off the ignition and to disengage the gearshift. Then, you must refrain from using deadly force until the vehicle speeds up to a point where a crash will surely threaten your life (or have the presence of mind to try something else). At that point, the use of deadly force too late will not only disable the driver, but probably you, too. And let us not forget, the majority thinks it would be nice if you would give one more warning before you shoot.

(App.46-47.)

Worse yet, Judge Trott opined, was the detrimental impact such theoretical, ivory tower second guessing would have on police officer safety:

> The unmistakable message that comes from this case will cause officers inappropriately to hesitate in the face of danger in a confrontation with a combative suspect who refuses to obey lawful commands and warnings. The result in turn will endanger both the police and the public at large as officers worry that they may (this case) or may not (*Wilkinson* [*v. Torres*, 610 F.3d 546 (9th Cir. 2010)]) end up in court for years.

(App.55.)

REASONS WHY CERTIORARI IS WARRANTED

Seven times in the last decade, this Court has reversed the Ninth Circuit's denial of qualified immunity.[1] As the four dissenting judges from the en banc panel noted, this case amply warrants bringing that total to eight.

Review is warranted because the en banc decision grossly departs from this Court's repeated admonition that an officer's use of force under rapidly evolving, tense circumstances cannot be analyzed with 20/20 hindsight, and this Court's recognition in *Scott v. Harris*, and more recently in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), that suspects fleeing police in a vehicle pose a particular hazard to the public and to law enforcement officers themselves, justifying the use of deadly force, as well as the Court's recognition in *Sykes v. United States*, that vehicular flight from law enforcement officers, even at a low speed, constitutes "violent" conduct since it inherently poses a risk to the public and pursuing officers. It is also fundamentally inconsistent with the Court's holding in *Plumhoff* and *Scott*, that the issue of reasonable force is not, in all cases, to be left to the jury, but rather

[1] *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 378 (2009); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012) (per curiam); *Stanton v. Sims*, 134 S. Ct. 3, 5-7 (2013) (per curiam); *Wood v. Moss*, 134 S. Ct. 2056, 2067-70 (2014).

where the undisputed evidence makes it clear that the force was reasonable, courts can, and must, resolve the issue in favor of the defendant.

At the time petitioner Wyatt shot Gonzalez, the latter had, based upon the undisputed evidence, committed at least five offenses, including battery, false imprisonment and attempted kidnaping of a peace officer. He had slapped away Wyatt's hand to keep him from turning off the engine, and stomped on the gas to flee. The en banc majority's conclusion that notwithstanding this, a jury could find that the force used was unreasonable because the vehicle was "only" traveling at 3 to 7 miles per hour and somehow did not pose a serious risk to the officer's safety or that of the public, is untenable. As an unsecured (and unwilling) passenger in a moving vehicle driven by a suspect who had already evinced a disregard for complying with authority, Wyatt was in a particularly precarious position. Even at 3 to 7 miles per hour, he was subject to a plain risk of serious injury, whether by Gonzalez simply slamming on the brakes – thus hurling the officer into the dashboard, steering wheel or windshield – or turning the wheel violently flinging Wyatt about the passenger compartment. No decision by this Court required Wyatt to wait until one of those things happened before shooting Gonzalez in defense of himself and the public.

Review is also necessary, because in finding a genuine issue of material fact the en banc panel invoked two principles of Ninth Circuit excessive force jurisprudence, namely, that summary judgment

must be granted "sparingly" in excessive force cases, and that the availability of less intrusive levels of force must be factored into the *Graham* analysis. Both principles are in conflict with the decisions of this Court, as well as the decisions of other circuits.

Finally, at the very least, petitioner is entitled to qualified immunity based upon the complete absence of clearly established law defining the ability of police officers to use deadly force in preventing themselves from being kidnaped as passengers in a fleeing vehicle.

Traffic stops are a routine, yet inherently dangerous fact of daily life for law enforcement officers throughout the country, posing a risk not simply to the officers, but to the public at large when a suspect, as here, elects to flee in a vehicle. It is essential that this Court set down clear guidelines for future cases so that police officers will not have to make split-second decisions vital to the safety of the public and to themselves, with the specter of civil liability based on after-the-fact second-guessing hanging over their heads.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S EN BANC OPINION DIRECTLY CONFLICTS WITH THIS COURT'S OPINIONS IN *PLUMHOFF V. RICKARD* AND *SCOTT V. HARRIS* HOLDING THAT WHERE THE UNDISPUTED EVIDENCE ESTABLISHES THAT A FLEEING VEHICLE POSES A DANGER TO THE PUBLIC OR LAW ENFORCEMENT OFFICERS, USE OF DEADLY FORCE TO TERMINATE THE PURSUIT IS REASONABLE AS A MATTER OF LAW.

A. *Scott v. Harris*, *Plumhoff v. Rickard* And *Sykes v. United States* Make It Clear That Suspects Fleeing Lawful Pursuit In A Vehicle Pose A Danger To The Public And To Law Enforcement, Justifying The Use Of Deadly Force.

The en banc majority reversed summary judgment for petitioner, based on the conclusion that there was a material issue of fact as to whether the vehicle was traveling 3 to 7 miles per hour, or 50 miles per hour. The majority held that a reasonable jury could conclude that if the vehicle were traveling at the slower rate of speed, Officer Wyatt would have had a reasonable opportunity to use less intrusive means of force to stop Gonzalez, or possibly give him a warning before using deadly force. (App.11-12, 15.)

As the dissenting judges observed, the en banc majority opinion is flatly inconsistent with this Court's case law concerning use of force in general, and use of

deadly force to terminate a vehicle pursuit in particular. The majority opinion cannot be reconciled with this Court's decision in *Graham v. Connor*, nor its decisions in *Plumhoff v. Rickard*, *Scott v. Harris*, or *Sykes v. United States*. The Ninth Circuit's egregious departure from the controlling authority of this Court amply warrants summary reversal, or at the very least, plenary review.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court set out the specific factors to be considered in determining whether use of force is reasonable under the Fourth Amendment. Emphasizing that an officer's conduct should not be viewed with the benefit of 20/20 hindsight, the Court held that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397. Thus, in assessing whether use of force was reasonable, a court must look at the "totality of circumstances," including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396.

As the dissenting judges in the en banc panel noted, here, the actions of Gonzalez amply warranted Wyatt's use of deadly force. As Judge Trott observed, at the time Gonzalez was shot, he had already committed multiple serious crimes, starting with failure

to obey a police officer, and culminating in outright battery and attempted kidnaping of a law enforcement officer. He had repeatedly refused commands to turn off the vehicle engine, including active physical resistance, despite the fact that he'd already been struck with a flashlight several times. When Wyatt found himself in a suddenly moving vehicle and attempted to turn off the engine, Gonzalez repeatedly struck his hand and stomped on the accelerator, attempting to flee.

At that point, both the general public and Wyatt were in danger. As the en banc dissenters noted, at the time the shooting occurred, this Court had already clearly declared that officers could use deadly force to terminate a vehicle pursuit because of the clear danger that fleeing vehicles posed to the general public and to law enforcement officers. In *Scott v. Harris*, 550 U.S. 372 (2007), the Court held that where undisputed evidence – there, a videotape – established that deadly force was necessary to halt a fleeing vehicle, a court could determine that the officer's use of force was reasonable as a matter of law under the Fourth Amendment. As the Court observed, car chases place "police officers and innocent bystanders alike at great risk of serious injury." *Id*. at 380.

Just this last term, this Court reaffirmed that principle in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). As in *Scott*, the defendant police officers' actions were recorded on video, and the Court held that given the danger posed to both the police officers and the general public by the fleeing vehicle in that

case, the officers' use of deadly force was reasonable as a matter of law under the Fourth Amendment. *Id*. at 2021-22.

Turning a blind eye to *Scott*, the en banc majority concluded that here it was for a jury to determine whether the fleeing vehicle posed a danger to the public or to the defendant police officers, based upon the notion that if the vehicle was "only" going 3 to 7 miles per hour, there would be relatively little danger posed to either and hence no occasion to use deadly force. (App.11-12.) The en banc majority's reasoning does not withstand scrutiny.

As a threshold matter, the majority's conclusion that a vehicle fleeing at low speed does not pose a general danger to the public is flatly contrary to this court's decision in *Sykes v. United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the question was whether fleeing law enforcement officers in a vehicle, even at low speed, constituted a violent felony so as to enhance the criminal penalty for a felon who possessed a firearm at the time the crime occurred. The Court noted that in determining whether a particular felony was a "violent" felony for purposes of the enhancement, the Court was required to look at the general parameters of the crime as defined under the applicable law (in that case Indiana law) and not to the conduct of the suspect in the particular case. *Id*. at 2272. Thus, although the defendant there had admittedly engaged in a highly dangerous flight from law enforcement in a vehicle, since the state statute at issue made it a felony to flee officers even at low speed,

the question before the court was whether even a low speed pursuit could be deemed "violent." *Id*. A "violent crime" was defined as an "offence that 'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" *Id*. at 2273.

The Court had no difficulty in concluding that any flight in a vehicle displayed a lack of concern for the safety of the public:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. *Even if the criminal attempting to elude capture drives without going at full speed* or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarity is a beginning point in establishing that vehicle flight presents a serious potential risk of physical injury to another.

Id. at 2273 (emphasis added).

As the Court succinctly put it, "[s]erious and substantial risks are an inherent part of vehicle flight." *Id*. at 2276.

B. Regardless Of Whether The Vehicle Was Moving At 3 Miles Per Hour, 7 Miles Per Hour, Or 50 Miles Per Hour, It Posed A Substantial Risk Of Severe Injury To Officer Wyatt, An Unsecured Passenger In The Front Seat.

It is clear that whether the vehicle was fleeing at 50 miles per hour or 3 to 7 miles per hour, it posed a "serious and substantial risk" of injury to Wyatt, an unsecured and unwilling passenger in the front seat. The en banc majority opinion implies that if the vehicle were moving a "mere" 3 to 7 miles per hour that somehow it would not present a risk of serious injury to Wyatt. Yet, this is nonsensical. At relatively low speeds, an unsecured passenger plainly runs the risk of being severely injured in numerous ways. Even at 3 miles per hour, a sudden application of the brakes would hurl Wyatt against the dashboard, steering wheel or windshield, risking severe injury. One need only conduct a similar experiment in their own driveway – secured by a seatbelt for safety – slowly pulling out and then slamming on the brakes, to feel the substantial jolt an unsecured passenger would experience. The premise that low speeds cannot produce substantial injuries to an unsecured passenger is flatly untrue. Indeed, the mantra that passengers who are not wearing seatbelts can be severely injured even in

low speed collisions is ubiquitous in the auto safety community.[2]

In addition, even at low speeds, had Gonzalez abruptly turned the wheel, Wyatt, unsecured in the seat, could have been hurled almost anywhere within the driver compartment, again subjecting him to the risk of serious injury.

The very notion that a jury could somehow rationally evaluate the risk of injury posed to Wyatt for purposes of determining whether he could reasonably fear serious injury that would justify use of deadly force, is unsupportable. As noted, personal experience tells us that even at low speeds an unsecured passenger runs the risk of substantial injury in the event of sudden action taken by a driver, whether by abruptly stopping or by sharply turning the wheel. Indeed, whatever speed the vehicle was going at the time Wyatt shot Gonzalez, it was sufficient to

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[2] *See*, Virginia Tech News ("A sudden stop at even low speed – under 10 mph – can fling a driver or passenger painfully forward"), http://www.vtnews.vt.edu/articles/2013/03/032613-vtti-seatbelts.html (last visited July 25, 2014); Teen Driver Ed ("Deaths of motor vehicle occupants have occurred at speeds as low as 12 mph, about the speed you might drive in a supermarket parking lot"), http://www.teendrivered.net/2011/06/seatbelt-statistics (last visited July 25, 2014).

In fact, a popular tool for educating the motoring public about the need to wear seatbelts even at slow speeds, replicates the impact of a 5 to 7 mile an hour collision, allowing an occupant seated securely in a sled to experience the pounding impact resulting from a collision at such speeds, http://www.seatbelt convincer.com/home1 (last visited July 25, 2014).

ultimately produce a collision so severe that it knocked Wyatt's gun from his hand. (App.38.) How is one to say that 3 miles per hour is too low a speed to justify use of deadly force, or 7 miles per hour, or 8 or 9 or 10, ad infinitum? It is absurd to suggest that a trier of fact can evaluate the use of force under the split second circumstances experienced by Wyatt, somehow making a determination based upon some unknown continuum of speed. Compounding this absurdity is, as Judge Trott noted in his dissenting opinion, the very idea that Wyatt, or any other officer faced with similar circumstances, should be required to essentially keep one eye on the speedometer while simultaneously attempting to subdue a suspect and protect himself and the general public. (App.50.) As Judge Trott noted:

> Officer Wyatt wasn't looking out the van's window as Gonzalez drove away, calculating elapsed time, distance covered, and integrals. Officer Wyatt was yelling at Gonzalez to stop. He was looking at the ignition and the gearshift as he tried physically to stop the van and prevent Gonzalez's attempt to escape. Moreover, it was dark outside. I defy anyone under these circumstances to have the presence of mind and the ability to calculate the speed of a moving vehicle. Without exterior visual cues, it is next to impossible. The majority makes the mistake of failing to place themselves in Gonzalez's van and in Officer Wyatt's shoes, engaging instead in a classroom exercise in determining speed from time and distance.

(App.50.)

C. The Ninth Circuit's Requirement That The Availability Of Less Intrusive Levels Of Force Must Be Factored Into The *Graham* Inquiry Is Contrary To The Decisions Of This Court, Conflicts With Decisions Of The Seventh And Eighth Circuits, And Effectively Precludes Summary Judgment In Deadly Force Cases.

The en banc majority held that it is ultimately up to a jury to determine whether the purported availability of less intrusive means to halt Gonzalez rendered Wyatt's use of force unreasonable. (App.8, 15, citing *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (en banc).) As Judge Trott noted, the majority, consistent with Ninth Circuit precedent, pays lip service to this Court's repeated admonition that the Fourth Amendment does not require officers to use the least intrusive means to accomplish a particular task, so long as their actions are ultimately reasonable. (App.50-53.) However, by holding that the availability of less intrusive means must be considered in evaluating whether the underlying use of force was reasonable, the Ninth Circuit has effectively nullified that principle and particularly in the context of use of deadly force, virtually guaranteed that every case must go to a jury.

The Ninth Circuit's rule that the availability of less intrusive alternatives must be included as one of the *Graham* factors in evaluating the use of force, stems from Judge Reinhardt's opinion in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) where he seized

upon this Court's statement in *Graham* that use of force must be evaluated under a totality of circumstances, and that the specific *Graham* factors were not exclusive. Noting that other circuits had included other factors in the *Graham* analysis, he opined that it was proper to include the availability of less intrusive means of force in determining whether the officer's use of a particular type of force was reasonable under the circumstances. *Id*. at 1440 n.5.

The Ninth Circuit has embraced what is effectively a tautology concerning the availability of less intrusive levels of force in evaluating use of force under the Fourth Amendment. Namely, that while the Fourth Amendment does not require an officer to use the less intrusive alternative, nonetheless the availability of lesser levels of force must be evaluated in determining whether the officer acted reasonably. *See*, *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) ("In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider"); *Glenn v. Washington County*, 673 F.3d 864, 876 (9th Cir. 2011) ("Officers 'need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.' . . . However, 'police are "required to consider [w]hat other tactics if any were available,"' and if there were 'clear, reasonable and less intrusive alternatives' to the force employed, that 'militate[s] against finding [the] use of force reasonable'"); *Bryan v. MacPherson*, 630 F.3d 805,

831 n.15 (9th Cir. 2010) ("We do not challenge the settled principle that police officers need not employ the 'least intrusive' degree of force possible. We merely recognize the equally settled principle that officers must *consider* less intrusive methods of effecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis") (citation omitted).

The mischief lies in the fact that it makes no sense to state that an officer is not required to use the less intrusive means of force, while at the same time evaluating the reasonableness of the force employed in light of the availability of less intrusive alternatives. Requiring consideration of less intrusive means necessarily implies that such lesser means should have been employed.

The Seventh and Eighth Circuits have rejected consideration of less intrusive means in evaluating the reasonableness of force under the Fourth Amendment. In *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) the court noted: "The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable." *Id*. at 1149 (citing *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)). It rejected the contention that prior case law – *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992) – suggested that the availability of less intrusive levels of force had to be factored into the reasonableness inquiry:

"[D]id we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives? The answer is no." 19 F.3d at 1149.

In *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) the Eighth Circuit similarly held that less intrusive alternatives were irrelevant to the use of force inquiry:

> The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively "reasonable" under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.

Id. at 649.

The Ninth Circuit's rule has a particularly pernicious impact in deadly force cases because in such cases there will virtually always be some lesser type of force available to the officer. This case is a prime example, with the en banc majority speculating that a jury could somehow properly find that within the close quarters of the front seat of the fleeing vehicle Wyatt could have, and in the ultimate second guess, should have, possibly drawn and swung his baton, pepper sprayed Gonzalez (notwithstanding his own close proximity to the spray), or drawn his Taser and contemplated whether pressing it against Gonzalez in

touch mode might subdue him, or if he could pull back far enough to deploy the Taser in dart mode.[3] Even more preposterously, a jury should be allowed to speculate whether Wyatt should have tried to merely wound Gonzales by shooting him in the leg, arm or foot, and hope that stopped the struggle for control of the vehicle. (App.15.)

The Ninth Circuit's requirement that the availability of less intrusive means of force must be factored into the *Graham* inquiry, is contrary to the decisions of this Court, conflicts with the decisions of the Seventh and Eighth Circuits and improperly forecloses summary judgment in deadly force cases.

D. The Ninth Circuit's Rule That Summary Judgment Must Be Granted Sparingly In Excessive Force Cases Has De Facto Created A Higher Standard For Summary Judgment In Such Cases, Contrary To F.R.C.P. Rule 56, The Decisions Of this Court, And A Decision Of The Third Circuit.

In inviting a jury to speculate, long after the fact, about what Officer Wyatt should have done in the

[3] A Taser is deployed in "touch mode" by pressing it against a suspect, and activation "causes temporary, localized pain." *Brooks v. City of Seattle*, 599 F.3d 1018, 1026 (9th Cir. 2010), *aff'd in part & rev'd in part on reh'g en banc*, 661 F.3d 433 (9th Cir. 2011). In "dart mode" Taser "darts are shot at the suspect from some distance" and "can cause neuro-muscular incapacitation." *Id*.

cramped confines of the moving vehicle with a suspect who had already physically resisted the officers and was attempting to kidnap him, the en banc majority invoked and reaffirmed the Ninth Circuit's rule that defendants' motions for summary judgment in excessive force cases are subject to heightened scrutiny by the courts. Specifically, that summary judgment must be granted "sparingly in excessive force cases" and that the "principle applies with particular force where the only witness other than the officers was killed during the encounter." (App.10, citing *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011).)

The genesis of this rule was a practical interpretation of the basic rules governing summary judgment, namely, that in a deadly force case where the motion is based solely on the testimony of surviving officers, a court cannot simply accept the testimony at face value. Rather, the court must review the testimony in light of all of the evidence, including circumstantial evidence, that might create a material issue of fact. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). In *Smith v. City of Hemet*, 394 F.3d 689, the principle that summary judgment must be granted "sparingly" in excessive force cases was explained as a function of the nature of such cases, which are generally subject to numerous factual disputes about what actually happened. *Id*. at 701.

However, as the en banc decision here illustrates, the principle is being applied to deny summary judgment to a police officer where it is not so much a question of conflicting facts, but rather the legal

significance of such facts. As the dissenting judges noted, even assuming the van was only moving 3 to 7 miles per hour, under the governing law Wyatt's use of force was reasonable. In contrast, the en banc majority, citing the principle that summary judgment must be granted "sparingly" in excessive force cases because the ultimate issue is generally one of fact for the jury, concludes it is up to the jury to determine whether use of deadly force in the context of even a low speed vehicle flight constitutes excessive force. Thus, the principle is being employed as an end run around this Court's express admonition in *Scott v. Harris* that where the basic facts underlying the use of force are undisputed, the reasonableness of the force under the Fourth Amendment is an issue of law for a court, and courts cannot abdicate this responsibility by simply declaring that the use of force in a given instance must ultimately be evaluated by a jury using some ex post facto view of the facts and general notions of "reasonableness." 550 U.S. at 381 n.8.

Moreover, Rule 56, Federal Rules of Civil Procedure, contains no heightened standard for summary judgment in excessive force cases and indeed this Court has expressly held that section 1983 claims are not subject to heightened standards under the federal rules. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). As the Third Circuit recognized in *Lamont v. New Jersey*, 637 F.3d 177, 182 (3d Cir. 2011), while courts must carefully scrutinize evidence in deadly force cases, "[t]his is not to say that the summary

judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases."

The Ninth Circuit's special rule for excessive force cases spawns the very sort of "flyspecking" of evidence displayed in the en banc opinion declaring a fact to be a "material" fact that is ultimately not material at all, i.e., the actual speed of the vehicle, the availability of lesser means of force, or finding a "discrepancy" in Wyatt's testimony based upon his having provided what could only be an inherently imprecise estimate of distance traveled or actual speed, given his attention was, to say the least, focused on more pressing matters such as preventing Gonzalez from kidnaping him and doing further harm.

E. The Court Should Grant Review And Summarily Reverse Based On The Ninth Circuit's Departure From *Sykes*, *Scott*, And *Plumhoff*; Alternatively, The Court Should Grant Plenary Review To Address Application Of Those Decisions To An Officer's Actions To Terminate Flight Of A Vehicle In Which The Officer Is An Unwilling Passenger, And To Resolve The Circuit Conflict Concerning Consideration Of Less Intrusive Levels Of Force As Part Of The *Graham* Inquiry, As Well As Repudiate The Ninth Circuit's Heightened Standard For Summary Judgment In Excessive Force Cases.

In *Sykes*, this Court made it clear that flight from lawful authority in a vehicle inherently poses a risk of significant harm and indeed is a "violent" crime. In *Plumhoff* and *Scott*, this Court made it clear that officers – in those cases officers outside of a fleeing vehicle – may use deadly force to terminate a pursuit, based upon the inherent danger posed to the public and the officers themselves. It simply cannot be that an officer in closer proximity to a vehicle, indeed, sitting unsecured in a passenger seat of a fleeing vehicle, is somehow more constrained in use of deadly force than the officers in *Scott* and *Plumhoff*.

As in *Scott* and *Plumhoff*, here the undisputed evidence demonstrated that Wyatt's use of deadly force was fully justified and reasonable under the Fourth Amendment. Wyatt was confronting an individual

who had repeatedly refused to obey proper commands, and engaged in highly dangerous conduct, including physically fighting with the officers, and eventually putting the car in gear and stomping on the accelerator with Wyatt as an unwilling and unsecured passenger. Whether moving at 3 miles per hour, 7 miles per hour, 10 miles per hour, or 50 miles per hour, the vehicle posed a substantial risk of serious injury to Wyatt, amply justifying the use of deadly force. There is simply no issue left for the jury to second-guess. The Ninth Circuit was not free to disregard the controlling authority of this Court and it should have affirmed judgment for petitioner. It should now be summarily directed to do so.

At the very least, plenary review is warranted to clarify the guidelines for use of force by police officers in the most precarious, and closest proximity to a fleeing vehicle – unsecured in the passenger compartment – and to address the conflict between the Ninth Circuit and other circuits concerning consideration of less intrusive alternatives as part of the *Graham* factors, as well as repudiate the Ninth Circuit's application of a higher standard for summary judgment in excessive force cases.

II. AT THE VERY LEAST, PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THERE WAS NO CLEARLY ESTABLISHED LAW CONCERNING THE LEVEL OF FORCE THAT MAY BE USED AGAINST A DRIVER BY A POLICE OFFICER WHO IS AN UNWILLING, UNSECURED PASSENGER IN A VEHICLE FLEEING LAWFUL AUTHORITY.

As Judge Trott noted in his dissent, petitioner moved for summary judgment based only on the "first prong" of the qualified immunity standard. (App.18-19.) Wyatt moved for summary judgment on the basis that the undisputed evidence demonstrated that no constitutional violation had occurred at all, as opposed to contending that even assuming the existence of a constitutional violation, an officer would not have reason to know that his conduct was unlawful given the absence of "clearly established law" putting him on notice that his actions under the particular circumstances would fall below constitutional standards. This is because, as noted above, if one were to survey the legal landscape, the only remotely analogous authority would have been *Scott*, which plainly dictated that Wyatt's conduct fully complied with the Constitution.

Yet, here, as in *Plumhoff*, even assuming there is somehow a genuine issue of fact as to whether the use of deadly force violated the Fourth Amendment, there is little question that given the absence of clearly established law concerning the use of deadly force

by police officers to terminate a vehicular pursuit in which an officer was himself an unwilling, unsecured passenger, mandates qualified immunity for petitioner.[4]

A police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer[ ] possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). This Court has admonished that to be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Id*. at 640. In other words, "existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Qualified immunity "protects 'all but the

[4] In *Plumhoff*, the circuit court had rejected qualified immunity for the defendant police officers, finding that there was a material issue of fact as to whether the use of deadly force was reasonable under the Fourth Amendment. 134 S. Ct. at 2018. As noted, this Court held that the undisputed evidence established that the force was reasonable under the Fourth Amendment. However, the Court also addressed the "clearly established law" prong of qualified immunity and held that even assuming a constitutional violation had occurred, the officers would have been entitled to qualified immunity given the absence of case law setting the parameters of lawful police conduct in the context of terminating vehicle pursuits. *Id*. at 2022-24.

plainly incompetent or those who knowingly violate the law.'" *al-Kidd*, 131 S. Ct. at 2085.

In holding that there was a genuine issue of material fact as to whether officer Wyatt's use of deadly force was reasonable under the Fourth Amendment, the en banc majority cites not a single case involving a police officer being held captive in a fleeing vehicle. This is not surprising, as research has not disclosed any analogous cases. In fact, neither the en banc majority, nor plaintiffs have ever cited any case with even remotely similar facts. It is manifest that the en banc majority is essentially creating new law in addressing – and doing so erroneously – the parameters of a police officer's use of deadly force against a driver who is attempting to kidnap an unsecured, unwilling passenger officer in a fleeing vehicle. Given the complete absence of clearly established law governing the actions of police officers under the circumstances, petitioner is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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747 F.3d 789
United States Court of Appeals,
Ninth Circuit.

Rafael GONZALEZ, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, Plaintiff,
and
F.E.V., a minor, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, by and through her Guardian Ad Litem David Vasquez; Antoinette Sanchez, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, Plaintiffs-Appellants,
v.
CITY OF ANAHEIM, Daron Wyatt, and Matthew Ellis, Defendants-Appellees.

No. 11-56360. | Argued and Submitted En Banc Dec. 11, 2013. | Filed March 31, 2014.

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Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding.

Before: ALEX KOZINSKI, Chief Judge, and STEPHEN S. TROTT, BARRY G. SILVERMAN, SUSAN P. GRABER, M. MARGARET McKEOWN, RONALD M. GOULD, MARSHA S. BERZON, RICHARD C. TALLMAN, RICHARD R. CLIFTON, CARLOS T. BEA, and MORGAN CHRISTEN, Circuit Judges.

Opinion

OPINION

CLIFTON, Circuit Judge:

Adolph Anthony Sanchez Gonzalez was shot and killed during an encounter with two Anaheim police officers. His successors brought an action seeking damages under 42 U.S.C. § 1983. The district court entered summary judgment in favor of defendants.

Because Gonzalez is dead, the police officers are the only witnesses able to testify as to the events that led to Gonzalez's death. In such a circumstance, we must carefully examine the evidence in the record to determine whether the officers' testimony is internally consistent and consistent with other known facts. After conducting such a review, we conclude that a significant inconsistency in the officers' testimony was sufficient to present a genuine dispute of material fact. Based on the current record, summary judgment on the plaintiffs' claim for deadly excessive force was inappropriate. We reverse and remand that claim for further proceedings.

In addition to the excessive force claim brought on behalf of Gonzalez, the plaintiffs also brought

claims in their own right for the denial of a familial relationship. The district court granted summary judgment for defendants as to those claims as well. As to that portion of the judgment, we affirm.

I. Background

As noted above, the only testimony concerning the events that led to Gonzalez's death came from the two police officers involved in the incident, Anaheim Police Department Officers Daron Wyatt and Matthew Ellis. They testified that they first noticed Gonzalez when they were responding in their patrol car to an unrelated call at about 2 a.m. on September 25, 2009. A Mazda minivan cut them off as they were making a turn. The minivan turned into a gas station, and the officers continued on their way.

A few minutes later, the officers returned to the area where they had been cut off and noticed that the minivan was still at the gas station. Gonzalez got in the car and began driving southbound. The officers followed him. They observed the minivan weaving within its traffic lane. Although weaving within a lane was not a traffic violation, as Ellis later acknowledged, the officers decided to make a traffic stop and pulled Gonzalez over.

At that time, the officers did not recognize the driver from any prior contacts. They did not have any information that the minivan had been stolen or had outstanding warrants or citations. They had no information that the driver had previously committed

any crime, had any prior contact with law enforcement, or had any involvement with weapons. At no point during the entire incident did either officer ever see a weapon in the minivan.

The officers exited their vehicle and approached the minivan from both sides. Ellis approached from the driver's side, and Wyatt approached from the passenger side. Wyatt drew his gun. Wyatt thought he saw Gonzalez reach for something between the driver and passenger seats and warned Gonzalez that if he reached down again, Wyatt would shoot. Gonzalez at that point complied and held his fists in his lap.

The officers told Gonzalez to turn off the vehicle and open his hands, which he held clenched. Ellis tried to open the driver's side door, but it was locked. The officers reached through the minivan's open windows and opened the driver and passenger side doors. Ellis saw Gonzalez pull his hand out of a bag located between the two front seats. Ellis observed a plastic bag in Gonzalez's right fist. Ellis told Gonzalez to turn off the vehicle and give him his hands. Gonzalez did not respond to that command.

Wyatt reached into the car, struck Gonzalez's elbow three times with a flashlight, and told Gonzalez to open his hand. Gonzalez then raised his hand up to his mouth, as if to swallow what he was holding. Ellis grabbed Gonzalez. Wyatt testified that he thought Ellis was trying to apply a carotid restraint, but Ellis testified that he was only trying to gain control of Gonzalez's hands. Wyatt also observed that Gonzalez

had a clenched fist and was reaching downward with his left hand. Wyatt called for assistance on his police radio. Wyatt went around to the driver's side to try to help Ellis restrain Gonzalez, but was not able to do so.

Wyatt went back to the passenger side, entered the minivan, and began punching Gonzalez in the head. Ellis observed Gonzalez reaching for the minivan's gear shift with his right hand. Ellis thought Gonzalez was attempting to shift the car into drive so Ellis used his flashlight to hit Gonzalez on the back of the head to try to stop him.

Despite the officers' efforts, Gonzalez managed to shift the minivan into drive, and the minivan began moving. Ellis withdrew from the vehicle as it began moving and struck Gonzalez in the head as he did so. The front passenger door closed behind Wyatt, who remained in the vehicle.

Ellis stated that Gonzalez "stomp[ed]" on the accelerator. Wyatt said that Gonzalez "floored the accelerator" and that the vehicle "violently accelerated."

Wyatt yelled at Gonzalez to stop the car, but he kept going. Gonzalez swatted Wyatt's hand away as he tried to turn off the ignition or shift the transmission to neutral or park. Unable to stop or gain control of the car, Wyatt drew his weapon and shot Gonzalez in the head, killing him. He shot from a distance of less than six inches. The minivan hit a parked car and came to a stop.

Wyatt testified that he fired the shot less than ten seconds after the car started moving, and it could have been less than five seconds. He estimated that the car moved approximately 50 feet in that time and was going 50 miles per hour at the time of the shot.

Gonzalez's father sued the officers and the City of Anaheim under 42 U.S.C. § 1983. He brought claims as his son's successor for excessive force in violation of the Fourth Amendment and on behalf of himself for denial of a familial relationship in violation of the Fourteenth Amendment. Gonzalez's mother and daughter filed a similar action that also raised various state law claims. The district court consolidated the actions.

The defendants moved for summary judgment, and the district court granted the motion. The district court held that the force the officers used during their encounter with Gonzalez was reasonable and that their conduct did not violate the Fourteenth Amendment. Having disposed of the federal claims, the district court declined to exercise supplemental jurisdiction over the remaining state law claims. Gonzalez's mother and daughter appeal the district court's grant of summary judgment.

II. Discussion

We review a district court's grant of summary judgment de novo to determine whether there are any genuine disputes of material fact and whether the moving party is entitled to judgment as a matter of

law. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir.2011). We view the evidence in the light most favorable to the nonmoving party. *Id.*

A. Fourth Amendment Claim

Gonzalez's representatives argue that genuine disputes of material fact preclude summary judgment on their claim that the officers used unreasonable deadly force against Gonzalez. We agree.

"An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir.1994) (emphasis omitted) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Factors relevant to assessing whether an officer's use of force was objectively reasonable include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The immediacy of the threat posed by the suspect is the most important factor. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (en banc). These factors are not exclusive, and we consider the totality of the circumstances. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.2010).

In general, we have recognized that an officer must give a warning before using deadly force "whenever practicable." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir.1997) (citing *Garner*, 471 U.S. at 11-12). Also relevant to reasonableness are the "alternative methods of capturing or subduing a suspect" available to the officers. *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir.2005) (en banc).

We take the perspective of an officer on the scene without the benefit of 20/20 hindsight and consider 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.

The key issue in this case is whether a reasonable jury would necessarily find that Wyatt perceived an immediate threat of death or serious physical injury at the time he shot Gonzalez in the head.[1]

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[1] The primary dissenting opinion, by Judge Trott, suggests, at 24, that the question at summary judgment of whether a law enforcement officer's actions were objectively reasonable is a question of law, not a question of fact for the jury, citing *Scott v. Harris*, 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). But as that footnote in *Scott* makes clear, that does not change the standard to be applied to the question presented by this case. The footnote as a whole states:

> Justice STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." At the summary judgment stage, however,

(Continued on following page)

That requires us to consider exactly what was happening when the shot was fired.

As described above, Ellis testified that Gonzalez "stomp[ed]" on the accelerator, and Wyatt said that Gonzalez "floored" it. Wyatt specifically testified that the minivan "violently accelerated." But that is not entirely consistent with Wyatt's other testimony. His story was that the minivan moved 50 feet in five to ten seconds but was going 50 miles per hour when he shot.

That combination of facts appears to be physically impossible. There are three pieces to this puzzle: the speed of the minivan at the time of the shot, the distance it traveled, and the time that elapsed. These pieces don't fit together. As plaintiffs argued to the district court, a vehicle that traveled 50 feet in ten seconds would have an average speed of only 3.4 miles per hour. If the time period is cut to five

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once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of Scott's actions – or, in Justice STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force" – is a pure question of law.

Id. (citations omitted) (emphasis in original). The dispute in this case concerns the relevant set of facts, in particular whether the minivan had violently accelerated and was moving at a high rate of speed. That remains a question of fact for the jury, as to which we must draw all inferences in favor of the nonmoving party at the summary judgment stage.

seconds, the average speed increases only to 6.8 miles per hour. Even accepting that the minivan would be gaining speed while accelerating, an average speed of 3 to 7 miles per hour appears inconsistent with Wyatt's testimony as to the speed of the vehicle and with the testimony of both Wyatt and Ellis that Gonzalez floored or stomped down on the gas.

"Deadly force cases pose a particularly difficult problem . . . because the officer defendant is often the only surviving eyewitness." *Henrich*, 39 F.3d at 915. This is one of those difficult cases. Gonzalez cannot testify because he is dead, and no other witnesses saw the incident. In such cases, we "must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify." *Id.* Accordingly, we carefully examine "all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, . . . to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.* We must also examine "circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Id.* We have held that summary judgment should be granted sparingly in excessive force cases. *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir.2011). This principle applies with particular force where the only witness other than the officers was killed during the encounter.

Based on the record before us, a jury could believe Wyatt's testimony that the minivan traveled

about 50 feet before the shot was fired and that less than five or ten seconds passed between the time the vehicle started moving and the time Wyatt fired the shot. *See Long v. Johnson*, 736 F.3d 891, 896 (9th Cir.2013) (explaining that "we must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts" (internal quotation marks and brackets omitted)).

Although it was argued that the actual distance traveled by the minivan by the time the shot was fired was substantially greater than 50 feet, defendants did not submit evidence to that effect. There was plenty of time after the episode took place to check how far the minivan traveled. It seems likely that there would have been an incident report that would have included descriptions and precise measurements taken afterwards, but defendants did not offer anything like that into evidence. Based on the record, a rational jury was not required to assume that the distance traveled was greater than Wyatt's estimate. Moreover, as it is our obligation to view the evidence in the light most favorable to the nonmoving parties at summary judgment, we cannot simply dismiss the internal contradictions in Wyatt's testimony. *Johnson*, 658 F.3d at 960.

A reasonable jury could accept at face value Wyatt's statements that the car moved approximately 50 feet in about five to ten seconds before he shot Gonzalez. It could thus find that the minivan was not traveling at a high rate of speed and Wyatt did not

reasonably perceive an immediate threat of death or serious bodily injury at the time he shot Gonzalez in the head.

The primary dissenting opinion, by Judge Trott, suggests, at 47, that because the plaintiffs did not dispute that Gonzalez "stomp[ed]" down on the gas pedal, summary judgment must be affirmed. But it was the speed of the minivan, not whether Gonzalez stomped on the gas pedal, that was the key disputed material fact.

The premise of the primary dissent is that the officer acted in response to an immediate threat to his safety or the safety of others. We do not disagree with most of what the primary dissent says.[2] But the existence of an immediate threat to safety in this case is based on the sudden acceleration and speed of the van. Gonzalez's action could not have presented a threat sufficient to justify the use of deadly force

[2] We disagree with the view in the separate dissent by Chief Judge Kozinski, at 54, that any "sane officer" would have shot Gonzalez in the head, no matter "[h]ow fast the van was moving." The defendants have not tried to make that argument, and we are not compelled by either logic or existing precedent to accept that proposition. As explained below, if the jury found, as it could, that Officer Wyatt was in the passenger seat of a slowly rolling vehicle, it could conclude that he did not face an immediate threat to safety sufficient to justify the immediate use of deadly force. Our decision simply identifies a disputed issue of material fact. If, as Chief Judge Kozinski's dissent bemoans, that gives plaintiffs "a bludgeon with which to extort a hefty settlement," *id.*, it will only be because the defendants are concerned that a jury might not view the evidence as the dissent does.

unless it caused the car to move in a way that immediately threatened the safety of the officers or the public. The defendants did not argue that such a threat was posed if the minivan was actually going only 3 to 7 miles per hour. They argued that "[t]he undisputed evidence is that decedent was speeding down the street going approximately 40 to 50 MPH with Officer Wyatt trapped inside the van." If that were true, we agree that summary judgment in favor of defendants would be appropriate, as the primary dissenting opinion contends. There was a genuine dispute about that fact, however, based on Wyatt's own testimony. This case is about the standard for summary judgment, not whether law enforcement officers face danger and are permitted to use deadly force when faced with an immediate threat to safety.

A jury that found that the minivan was moving slowly could reasonably infer that Gonzalez did not stomp on the accelerator, or that he let off the accelerator even if he stomped down at first, or that a mechanical failure prevented the car from reaching dangerous speeds. Regardless of whether they disputed the use of the word "stomp," the plaintiffs explicitly argued to the district court and to us that the minivan was not going very fast, based on Wyatt's own testimony, and thus that Wyatt did not face an immediate threat of death or serious bodily injury. On this record, the "stomping" does not preclude a triable issue on Wyatt's use of deadly force.

Our decision in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir.2010), a case that also involved an

accelerating minivan, does not require the conclusion that the use of deadly force against Gonzalez was reasonable as a matter of law. In *Wilkinson*, we did not hold that the threat of sudden acceleration always justifies the use of deadly force. Instead, we emphasized the importance of considering all the facts in excessive force cases. *Id.* at 551. The officer in *Wilkinson* was standing near a minivan that was trying to accelerate. *Id.* The minivan's wheels were spinning and throwing up mud because the driver was attempting to accelerate in a slippery area. *Id.* The officer thought his partner may have already been run over by the minivan once and was lying or standing in the mud nearby, possibly disoriented, at risk of being hit again. *Id.* The officer shot the driver. *Id.* The plaintiffs argued that the vehicle was moving too slowly to endanger the officers. *Id.* We decided that, even so, the car "could have gained traction at any time, resulting in a sudden acceleration in speed," while the officer believed his partner to be vulnerable. *Id.* at 552. Given these facts, we concluded that there was no genuine dispute of material fact as to whether the officer's use of deadly force was reasonable.

Here, Wyatt was not on foot next to a vehicle that might run him over at any moment should it have accelerated, and he did not express concern that his partner was vulnerable to being run over. The defendants presented no evidence of anyone else in danger. Instead, Wyatt was inside a car that might have been slowly rolling forward. *Wilkinson* does not answer the

question in this case. Based on the current record, a jury could find that Wyatt did not act reasonably.

Similarly, a jury could find that Wyatt reasonably perceived a threat, but not one that justified the immediate use of deadly force. As noted above, the jury may consider the availability of other methods to subdue a suspect. Wyatt had a police baton, pepper spray, and a taser. He could have used any of them, or he could have shot Gonzalez in a nonlethal area of the body to try to stop him from driving further. Instead, he used his gun and intentionally shot Gonzalez in the head. If the jury found that the car was moving slowly at the time, it could also find that other alternatives could have been used and that the use of deadly force was unreasonable. *See Smith*, 394 F.3d at 703.

A jury could also find that Wyatt failed to give a warning before he shot Gonzalez in the head. The absence of a warning does not necessarily mean that Wyatt's use of deadly force was unreasonable. *See Scott*, 550 U.S. at 383 (explaining that there is no "easy-to-apply-legal test" in excessive force cases). A rational jury may find, however, that if the car was moving at an average speed of 3 to 7 miles per hour, a warning was practicable and the failure to give one might weigh against reasonableness. *See Deorle v. Rutherford*, 272 F.3d 1272, 1283-84 (9th Cir.2001).

We do not hold that a reasonable jury must find in favor of the plaintiffs on this record, only that it could. The jury could also reasonably find, to the

contrary, that the minivan was moving dangerously fast and that Wyatt reasonably perceived an immediate threat to his safety sufficient to support the use of deadly force. Other factors identified in *Graham* would support a verdict in favor of the defendants here, as well. By the time Wyatt pulled the trigger, the crimes at issue were relatively severe and Gonzalez was plainly resisting arrest or attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396. But based on the record before us, we cannot say that a verdict in favor of the defendants on the claim for excessive force is the only conclusion that a reasonable jury could reach.[3]

B. Fourteenth Amendment Claim

The plaintiffs also assert on their own behalf, as Gonzalez's relatives, that they have been deprived of a familial relationship with Gonzalez in violation of their Fourteenth Amendment right to substantive

[3] The constitutional standard for using force less than deadly force is lower. *See Gregory v. County of Maui*, 523 F.3d 1103, 1106-07 (9th Cir.2008) (holding that "officers had substantial grounds for believing that some degree of force was necessary" where suspect was possibly under the influence of drugs, acting bizarrely, trespassing, and refusing repeated commands to drop a pen). Because it is undisputed that Gonzalez did not respond to the officers' directions before any force was applied, appeared to be trying to swallow potential evidence, and began driving away, the defendants were entitled to summary judgment on the uses of force leading up to the gunshot, such as striking Gonzalez with a flashlight or hitting him in the head as he shifted the minivan into gear.

due process. Such a claim requires the plaintiffs to prove that the officers' use of force "shock[ed] the conscience." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008). Based on the record, a reasonable jury could not so find. Where, as here, the officers did not have time to deliberate, a use of force shocks the conscience only if the officers had a "purpose to harm" the decedent for reasons unrelated to legitimate law enforcement objectives. *Id.* The plaintiffs produced no evidence that the officers had any ulterior motives for using force against Gonzalez, and the district court properly granted summary judgment on this claim. *See Karam v. City of Burbank*, 352 F.3d 1188, 1194 (9th Cir.2003) (explaining that "speculation as to . . . improper motive does not rise to the level of evidence sufficient to survive summary judgment").

III. Conclusion

For the foregoing reasons, the district court's grant of summary judgment as to the Fourth Amendment excessive deadly force claim is reversed and remanded. The district court's grant of summary judgment as to the Fourteenth Amendment claim and the non-deadly force portion of the Fourth Amendment claim is affirmed.

Each party shall bear its own costs.

AFFIRMED IN PART AND REVERSED IN PART; REMANDED.

TROTT, Circuit Judge, with whom KOZINSKI, Chief Judge, and TALLMAN and BEA, Circuit Judges, join dissenting in part and concurring in part:

Instead of cooperating with the police, Gonzalez stomped on his van's accelerator and fled from a traffic stop, igniting a dangerous chase. What makes this chase unusual is that Officer Wyatt was trapped in Gonzalez's van. After yelling at Gonzalez to stop and unsuccessfully trying to disable the vehicle, Officer Wyatt ended Gonzalez's violent attempt to escape by shooting him. As much as one might have wished for a different outcome, I conclude that Officer Wyatt's act in self-defense was objectively reasonable. Thus, I would affirm the district court.

I

The issue here is different from our usual two-part fare in Fourth Amendment excessive force litigation. Officers Wyatt and Ellis do not request qualified immunity under prong two of the *Saucier v. Katz,*[1] *Pearson v. Callahan*[2] test on the ground that what they did had not been clearly established to be a violation of the excessive force prohibition of the Fourth Amendment. When questioned during oral argument why his clients were not asking for qualified immunity, counsel pointed out that the summary

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[1] 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

[2] 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

judgment threshold issue under either approach – which we call "prong one" in judicial short form – is the same, i.e., whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If not, the question of immunity becomes moot. *See Pearson*, 555 U.S. at 236, ("In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that . . . the relevant facts do not make out a constitutional violation at all.").

Focusing on prong one, these officers maintain that the law covering their actions was established twenty five years ago; and pursuant to that established law, what they did shortly after midnight on September 25, 2009, was objectively reasonable and therefore constitutional. The Supreme Court law they relied on as to their encounter with Gonzalez is this: when faced with a suspect who is resisting arrest and attempting to evade apprehension by flight from serious crimes under circumstances that pose an immediate threat to their safety or the safety of others, police officers may use deadly force to protect themselves and the public at large.

This case perforce is not just about how officers handle criminal suspects, but also what the judiciary has consistently said is constitutionally permissible when those suspects endanger peace officers' lives or safety. Accordingly, the ramifications of our decision radiate far beyond this particular lawsuit.

II

Every day of the year, law enforcement officers leave their homes to police, protect, and serve their communities. Unlike most employees in the workforce, peace officers carry firearms because their occupation requires them on occasion to confront people who have no respect either for the officers or for the law. Chief Judge Kozinski put it well in *Mattos v. Agarano* when he said,

> By asking police to serve and protect us, we citizens agree to comply with their instructions and cooperate with their investigations. Unfortunately, not all of us hold up our end of the bargain. As a result, officers face an ever-present risk that routine police work will suddenly become dangerous.

661 F.3d 433, 453 (9th Cir.2011) (en banc) (Kozinski, C.J., concurring in part and dissenting in part).

This case inexorably requires us to answer two related questions involving officer safety on the job. First, to what extent are those officers entitled to protect themselves during dangerous situations so they may return home as healthy as before? Second, can they, or can they not, rely on the authoritative constitutional guidance the judiciary has provided for them as to what they may do when confronted by a suspect who poses an immediate threat to their safety and the safety of others?

III

The men and women who become officers of the law have been selected by their agencies according to demanding criteria of suitability for their profession. Many officers have degrees from colleges and universities in law enforcement. Police departments in California – including the Anaheim Police Department – almost uniformly require that a candidate graduate from a police academy approved by the State Commission know as POST, which stands for Peace Officer Standards and Training.[3] Once employed, officers receive in-service and special training from their departments.

What are they taught in the classroom and in POST academies? What the law is, and how to enforce it. Peace officers' primary sources of information and guidance are not only the Constitution and the statutes passed by the legislative branch, but more importantly in connection with the resolution of this controversy, case law. Because the principles in our Constitution, such as the Fourth Amendment's prohibition against unreasonable seizures, appear in broad abstract terms, justices and judges use published opinions – case law – to provide police departments and individual officers with more specific guidance, such as the general rule that the use of excessive force to make an arrest is an unreasonable seizure, and is therefore actionable in civil court pursuant to

[3] *See* Cal.Penal Code §§ 13500, 13510.

42 U.S.C. § 1983. Just as I am certain that no law student graduates without taking a course in contracts, I am equally certain that all police officers have been instructed as to the acceptable use of deadly force.

The core of their curriculum is the Supreme Court's constitutional guidance in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), which law enforcement regards as orthodox scripture. Those cases provide fair warning of what police cannot do, but also what they can. And, just as officers are required to follow the law, so too are they entitled to be protected by it as they confront the daily challenges of their work responsibilities. Precisely what we have said and what we have held about the vulnerable circumstances Officer Wyatt found himself in are central to understanding the reasonableness of Officer Wyatt's use of deadly force and his exercise of his right of self-defense. Therefore, I choose not to paraphrase or summarize our opinions, but to quote from them at length.

IV

What have we, the federal judiciary, said about how officers may react to facts and circumstances such as those encountered by Officers Daron Wyatt and Matthew Ellis when they stopped Adolph Anthony Sanchez Gonzalez on September 25, 2009?

In *Tennessee v. Garner* and *Graham v. Connor*, the Supreme Court ruled that an officer may use deadly force in self-defense or in the defense of others if

> (1) confronted with a serious crime,
>
> (2) the suspect poses an immediate threat to the safety of the officer or the safety of others, and
>
> (3) the suspect is actively resisting arrest or attempting to evade arrest by flight.

Garner, 471 U.S. at 11-12; *Graham*, 490 U.S. at 396. Of these three factors, the most important is number two: the immediacy of the threat posed by the suspect. *Mattos*, 661 F.3d at 441.

The operative word in the second factor is "threat." The word "threat" denotes an *indication* of *impending* danger or harm. The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury. This distinction becomes crucial when, without warning, a criminal suspect begins to use force to resist an officer in the discharge of the officer's sworn responsibilities.

In this connection, the Supreme Court has admonished us in the trial and appellate courts (1) to evaluate the reasonableness of an officer-in-the-field's response "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight," *Graham*, 490 U.S. at 396, and (2) to make "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving," *id.* at 397. The Court added that the test is not whether "in the peace of a judge's chambers" it seems that what officers did in the field was unnecessary. *Id.* at 396. And in *Ryburn v. Huff*, the Court warned that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." 565 U.S. at ___, 132 S.Ct. 987, 991-92, 181 L.Ed.2d 966 (2012) (per curiam).

The threshold question at the summary judgment stage of whether or not an officer's actions were objectively reasonable under the Fourth Amendment is "a pure question of law," not a question of fact reserved for a jury. *Scott v. Harris*, 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Included in this "pure question of law" is whether a suspect's actions have risen to a level warranting deadly force. *Id.* In handing down this ruling, the *Scott* Court explicitly rejected Justice Stevens's dissenting view that the objective reasonableness of an officer's actions should always be a question for the jury. *Id.* The status of this threshold issue as "a pure question of law" makes it all the more important that what we say about it can be relied upon by those who must act accordingly in the field. Fair warning is sine qua non of a rule when it applies to officers who must react quickly in tense situations.

V

A.

Did Gonzalez Pose "an Immediate Threat" to the Safety of the Officers and to Others?

Because this case arises from a stop at 2:00 a.m. of a van being driven erratically, I begin with the Supreme Court's longstanding recognition of the perils of the "traffic stop." This common event has attendant personal-safety hazards that peace officers face thousands of times a day throughout our country and about which they receive basic training. In summary, an officer must presume that a traffic stop, such as the one we evaluate here, is dangerous until he is satisfied of his safety.

The lead case in this area is *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the seminal "stop-and-frisk" decision that presented the Court with "serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances." *Id.* at 4. In holding that the circumstances of Terry's detention justified an officer's "invasion of Terry's personal security by searching him for weapons," *id.* at 23, the Court embraced the stark realities of the street to explain its holding.

> We are now concerned with more than the governmental interest in investigating crime; in addition, *there is the more immediate interest of the police officer* in taking steps to

> assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. *Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.* Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.
>
> In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 23-24 (emphasis added).

The Court's footnote twenty-one is equally enlightening.

> Fifty-seven law enforcement officers were killed in the line of duty in this

> country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform Crime Reports for the United States – 1966, at 45-48, 152 and Table 51. The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. *See e.g.*, President's Commission of Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239-243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

Id. at 24 n. 21.

Next, we come to *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam).

> We think it *too plain for argument* that the State's proffered justification – the safety of the officer – is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary

> risks in the performance of their duties." *And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.* "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings – A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93 (1963)." We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."

Id. at 110 (emphasis added) (citations omitted).

Now to 1983, and to *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

> In *Adams v. Williams*, 407 U.S. 143 [92 S.Ct. 1921, 32 L.Ed.2d 612] (1972), we held that the police, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip. Again, our decision rested in part on our view of the danger presented to police officers in "traffic stop" and automobile situations.

> Finally, we have also expressly recognized that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed. . . .
>
> Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that *roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect.*

Id. at 1048-49 (emphasis added) (footnote and citations omitted).

> The Michigan Supreme Court appeared to believe that it was not reasonable for the officers to fear that Long could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile. This reasoning is mistaken in several respects. During any investigative detention, the suspect is "in the control" of the officers in the sense that he "may be briefly detained against his will. . . ." Just as a *Terry* suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a *Terry* suspect in Long's position break away from police control and retrieve a weapon from his automobile. In addition, if the

> suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. Or as here, the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons. In any event, we stress that a *Terry* investigation, such as the one that occurred here, *involves a police investigation "at close range," when the officer remains particularly vulnerable in part because a full custodial arrest has not been effected, and the officer must make a "quick decision as to how to protect himself and others from possible danger. . . . " In such circumstances, we have not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved in a Terry encounter.*

Id. at 1051-52 (emphasis added) (footnote and citations omitted).

In *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), Chief Justice Rehnquist elaborated one of the main reasons the Court has extended constitutional protection to officers conducting traffic stops, a reason with pungent applicability to our case.

> It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, *but from the fact that evidence of a more serious crime might be uncovered during the stop.* And the motivation of a passenger to employ violence to prevent apprehension of

> such a crime is every bit as great as that of the driver.

Id. at 414 (emphasis added).

As authority for this holding as to not just the driver but also a passenger, the Court relied on its opinion in *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), which highlighted the danger to police searching for narcotics.

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the *kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.* The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Wilson, 519 U.S. at 414 (quoting *Summers*, 452 U.S. at 702-03) (emphasis added).

To support its observations, the Court updated the grim statistics about traffic stops taken from the FBI's Uniform Crime Reports (1994). "[I]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops." *Wilson*, 519 U.S. at 416. In 2011, Chief Judge Kozinski observed that "[i]n the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed – the vast majority while performing routine law enforcement tasks like conducting traffic stops and responding to domestic

disturbance calls." *Mattos*, 661 F.3d at 453 (Kozinski, C.J., concurring in part and dissenting in part).

Writing in 2009 for a unanimous Court, Justice Ginsburg reaffirmed the Court's unyielding view that traffic stops are "especially fraught with danger to police officers." *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) (quoting *Long*, 463 U.S. at 1047). Yet again, she recognized that: "'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized, . . . if the officers routinely exercise unquestioned command of the situation.'" *Id.* (brackets in original) (quoting *Wilson*, 519 U.S. at 414). In *Brendlin v. California*, Justice Souter called the principle of unquestioned police command, a reflection of "a societal expectation." 551 U.S. 249, 258, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). We recognized the need for unquestioned obedience to lawful commands during a car stop in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1325-28 (9th Cir.1995).

Relying on *Mimms*, the Sixth Circuit has acknowledged another safety concern arising from of a traffic stop where, as here, the officers have reason to believe that the driver is under the influence of a mind-altering substance.

> While safety considerations are always relevant, they have even greater salience here, as Ford had grounds to suspect that Everett was intoxicated. *See Marvin v. City of Taylor*, 509 F.3d 234, 246 (6th Cir.2007) (noting that "[d]runk persons are generally

> unpredictable," such that extra police precautions may be justified in confronting an intoxicated suspect).

United States v. Everett, 601 F.3d 484, 495 (6th Cir.2010).[4] We made similar observations in *Gregory v. County of Maui*, where we held that the possibility that a suspect was under the influence of drugs justified the use of "some degree of force" to confront him. 523 F.3d 1103, 1106 (9th Cir.2008).

Gonzalez's representatives accept as "undisputed" the officers' reason for stopping the decedent: erratic and unsafe driving. Gonzalez had earlier made an illegal left turn in front of them, almost causing a collision with their police car. Later, the officers saw him driving on the wrong side of the street and then weaving within the van's lane as they attempted to make the stop. Added to these observations at 2:00 a.m. was their knowledge learned from the mobile data terminal in their patrol car that Gonzalez's van had been involved in a prior narcotics stop.

The California Supreme Court understood the ramifications of erratic driving, such as Gonzalez exhibited, when it published its opinion in *People v. Wells*, 38 Cal.4th 1078, 45 Cal.Rptr.3d 8, 136 P.3d 810 (2006). That court held that it was reasonable to stop a motorist on no more than an anonymous

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[4] "Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson*, 555 U.S. at 244-45.

uncorroborated phoned-in tip that she was "weaving all over the roadway" – even though the officers who stopped her had not seen anything to validate the caller's information. *Id.* at 811-12. The court believed the stop was "reasonable" because of the grave danger to public safety posed by drunken drivers. *Id.* at 813. The court likened an impaired driver to a "'bomb,' and a mobile one at that." *Id.* at 815 (citation omitted). The court continued: "Police officers undoubtedly would be severely criticized for failing to stop and investigate a reported drunk driver if an accident subsequently occurred. . . . [T]he public rightfully expects a police officer to inquire into such circumstances." *Id.* (internal quotation marks and citations omitted). The same can be said for Officers Ellis and Wyatt when they decided to pull Gonzalez over at a time of night notorious for a ubiquity of drunk drivers.

B.

The Undisputed Facts Leading Up to the Use of Deadly Force.

We come to the undisputed material facts. These facts come almost verbatim from "Plaintiff's Separate Statement of Disputed and Additional Undisputed Material Facts in Opposition of Defendant's Motion for Summary Judgment" filed in the district court on June 20, 2011. Gonzalez's acceptance of these facts as "undisputed" ensures that they represent a view of the case understood in the light most favorable to his interests. Because they are not contested, these facts

are more than just "evidence": they are the givens from which we begin our analysis.

The majority correctly points out that when the only remaining witnesses are the officers, we must look with great care at their testimony, but I have obviated this concern by using only those facts that the plaintiffs have accepted as "undisputed." These facts establish beyond any doubt that when Officer Wyatt shot Gonzalez, (1) he and his partner were confronted with multiple serious crimes, and (2) Gonzalez was actively fleeing to evade arrest.

I present the material facts in two segments. First, those immediately leading up to Officer Wyatt's use of deadly force; and second, those that in a matter of seconds placed Officer Wyatt in immediate peril and caused the shooting.

1.

As the officers followed Gonzalez's van, Ellis observed it weaving within its traffic lane. At 2:11 a.m., Wyatt advised headquarters over his police radio of their intended traffic stop for the van's previous left-turn violation, and he activated their patrol car's emergency lights. The van continued westbound and subsequently made a wide northbound turn on Bond Street, driving left of center of the roadway, northbound in the southbound lane. Gonzalez came to a stop along the east curb of Bond Street. As Wyatt approached Gonzalez in the van, and in response to a sudden movement by the driver on his approach,

Wyatt immediately drew his service weapon, pointed it at Gonzalez, and gave him a warning: "If you reach down there again, I'm gonna shoot you." Ellis heard Wyatt's warning. Ellis observed Gonzalez's right hand clenched into a fist and it appeared he was holding something.[5] Ellis told Gonzalez to turn off the van and show his hands. Gonzalez did not comply. The van's engine remained running. Ellis tried to open the driver's door. However, it was locked. The driver's window was open approximately six to eight inches. Ellis reached through the opening with his right hand and tried unsuccessfully to unlock the door by pulling up the lock. On the other side of the car, Wyatt holstered his weapon and unlocked the passenger door by reaching through the partially opened passenger door window. Both officers then used physical force in an attempt to control an uncooperative Gonzalez. During this process, Gonzalez reached downward with his left hand between the driver's seat and the door, as he simultaneously raised his right hand up toward his mouth. Ellis observed a plastic bag protruding from Gonzalez's right fist. Suspecting the ba[g] might contain narcotics, Wyatt commanded Gonzalez to open his hands. Wyatt also observed that Gonzalez had a clenched right fist and was reaching downward with his left hand. Wyatt, who had reached into the vehicle from the passenger side, radioed for backup assistance. Wyatt ran around the rear of the van to the driver's side to assist Ellis who was grappling

[5] Detectives later recovered a knife at the scene.

with Gonzalez through the window. When Wyatt found he was unable to help from the driver's side, he returned to the passenger's door. Wyatt then entered the van on the passenger side and punched Gonzalez in the head in an attempt to subdue him. Ellis then observed Gonzalez reach toward the van's gear shift. He believed Gonzalez was trying to shift the van into drive, so he struck Gonzalez with his flashlight in an attempt to stop him. Gonzalez did not comply.

2.

Now, we arrive at the undisputed events that placed Officer Wyatt in danger and precipitated the shooting. These events occurred in as little as five and at most in ten seconds, and they address what the majority concedes is "the most important" *Graham* factor: the immediacy of the *threat. Mattos*, 661 F.3d at 441.

Wyatt tried to control Gonzalez's right arm, however, Gonzalez reached forward toward the gear shift and slapped it into drive and "stomped down" on the gas pedal. Fearing he would be pulled forward with the van, Ellis pulled himself out of the driver's door window, hitting Gonzalez on the head as he withdrew. Ellis stepped back as the van moved forward. He ran to his patrol car to chase after the van. Still in the van, Wyatt yelled at Gonzalez to stop. Gonzalez did not comply. Wyatt reached with his left hand and attempted to turn off the ignition or shift the transmission into neutral or park. Gonzalez hit

his hand away. This sequence occurred two to three times. With Gonzalez driving and Wyatt in the van on the passenger side, the van went through the cross-street intersection of Bond Street and Willow Street. Wyatt yelled at Gonzalez to stop, but Gonzalez did not comply. Wyatt unholstered his weapon and shot Gonzalez in the head, killing him. Wyatt grabbed the steering wheel with both hands. In an attempt to stop the van, he steered it into a parked truck. The collision with the truck dislodged Wyatt's gun from his right hand. The van continued to roll after the collision, stopping finally at the intersection of Bond Street and Elm Street, a block from Willow Street. After the van stopped, Ellis, who had followed in his patrol car, observed a bag lying on the street beneath the van's open passenger door. A knife was also found later when detectives processed the scene.

C.

The Legal Consequences of Gonzalez's Behavior

Now, let's translate the undisputed facts into their legal consequences, a step *Garner* and *Graham* require to determine whether the officers were "confronted with a serious crime."

When Officer Ellis and Officer Wyatt walked up to Gonzalez's van, they entered a zone of personal

danger.[6] In that zone, the Supreme Court has approved of requiring Gonzalez to turn off his vehicle, of removing him from the van,[7] of patting him down for weapons, and of taking command of the situation.[8]

Gonzalez's uncooperative, suspicious, and menacing behavior when first approached by the uniformed officers gave them reason to believe he had in his possession either a weapon or contraband – or both. Officer Wyatt then *warned* Gonzalez, as contemplated by *Garner*, that if he "reached down there again he would be shot." Gonzalez did not obey this warning, and he did not turn off the car's engine or unlock its doors.

By now, Gonzalez's recalcitrant behavior violated California Penal Code ("CPC") § 148, resisting, delaying, or obstructing a peace officer in the discharge or attempt to discharge his duties. Then, Gonzalez attempted to eat a plastic baggie, giving Officer Ellis and Officer Wyatt probable cause to believe he was in possession of an illegal substance – another crime – and destroying evidence. This set of facts is precisely what the Court had in mind in *Michigan v. Summers*, when it discussed a narcotics suspect's willingness to use violence in an attempt to avoid apprehension. *See* 452 U.S. at 702-03.

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[6] *See Terry*, 392 U.S. at 23-24; *Mimms*, 434 U.S. at 110-11; *Long*, 463 U.S. at 1046-47.

[7] *Mimms*, 434 U.S. at 111 & n. 6.

[8] *Johnson*, 555 U.S. at 330; *Brendlin*, 551 U.S. at 258.

As Gonzalez "stomped" on the van's accelerator and attempted to flee, he struck Officer Wyatt's hands numerous times with his own, adding to his offenses – in a matter of seconds – the additional crimes of (1) battery against a peace officer in violation of CPC §§ 242, 243; (2) felonious false imprisonment of Officer Wyatt in violation of CPC §§ 236, 237; (3) felonious kidnaping of Officer Wyatt in violation of CPC § 207; and (4) flight from a pursuing officer (Officer Ellis) in violation of California Vehicle Code § 2800.1. It is beyond argument that had Officer Wyatt not stopped Gonzalez, Gonzalez would have accelerated his van and continued to attempt to escape with Officer Wyatt trapped inside the van, and with Officer Ellis – and probably others – in hot pursuit.

D.

Now we come to an aspect of this case the majority does not discuss: Gonzalez's choice to flee in his vehicle from the scene – with Officer Ellis in pursuit. Gonzalez's dangerous choice weighs heavily on whether or not Officer Wyatt faced an immediate indication of impending danger while trapped in Gonzalez's van.

In *Scott v. Harris* the Supreme Court published its take on the hazards of a motorist engaged in public-endangering flight. As Justice Scalia expressed the question in that case, "Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?" 550

U.S. at 374. The Court's answer? Yes. Why? Because car chases place "police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380. By comparison, continued the Court, unlike the flight of the young, slight, unarmed burglary suspect who was on foot in *Garner*, Harris's "flight itself (by means of a speeding automobile) . . . posed the threat of 'serious physical harm . . . to others.'" *Id.* at 382 n. 9. "It was [Harris], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Deputy] Scott confronted." *Id.* at 384.

The Court deemed it "appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability." *Id.; see also Mattos*, 661 F.3d at 445 (a defiant suspect "bears some responsibility for the escalation" of an incident resulting in the use of force). The culpable person here was Gonzalez.

Sykes v. United States, ___ U.S. ___, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), is even more on point than *Scott v. Harris* regarding the potential for injury caused by a motorist fleeing to avoid apprehension. In Sykes, the motorist fled after an officer had ordered him to stop. The question for the Court was whether Sykes's flight was "violent."

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern

for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. *Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others.* A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarity is a beginning point in establishing that vehicle flight presents a serious potential risk of physical injury to another.

Another consideration is a comparison to the crime of burglary. Burglary is dangerous because it can end in confrontation leading to violence. The same is true of vehicle flight, but to an even greater degree. *The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase.* The felon's conduct gives the officer reason to believe that the defendant has something more serious than a traffic violation to hide. In Sykes' case, officers pursued a man with two prior violent felony convictions and marijuana in his possession. In other cases officers may discover more about the violent potential of

the fleeing suspect by running a check on the license plate or by recognizing the fugitive as a convicted felon.

Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended. *Scott v. Harris* rejected the possibility that police could eliminate the danger from a vehicle flight by giving up the chase because the perpetrator "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." And once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury.

Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more certain risk as a categorical matter than burglary. It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. *As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the*

> *perpetrator has all the more reason to seek to avoid capture.*
>
> Unlike burglaries, vehicle flights from an officer by definitional necessity occur when police are present, are flights in defiance of their instructions, and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another.

Id. at 2273-74 (emphasis added) (citations omitted).

E.

In summary starting with the three *Graham* factors, I conclude that the facts in the record compel one conclusion, and only one conclusion a jury could reach: Officer Wyatt's use of deadly force to stop Gonzalez's behavior was objectively reasonable. First, Officer Wyatt was "confronted with a serious crime," indeed multiple crimes. Second, Gonzalez posed "an immediate threat" to Officer Wyatt's safety and to the safety of others. Third, Gonzalez was "actively resisting arrest" and attempting to evade arrest by flight. I cannot envision any scenario wherein this case might survive a motion for judgment as a matter of law pursuant to Rule 50(a)(B).

VI

A.

The "factual dispute" my colleagues in the majority see as "material" is the speed Gonzalez was driving when Officer Wyatt shot him. Because the only summary judgment disputes that matter are those that are "material," I disagree.[9] The actual or the estimated speed of the van at the moment of the shooting is not material. Neither is the "average speed" of an accelerating vehicle in flight from the police. What is material is that Gonzalez suddenly accelerated his van away from the traffic stop with Officer Wyatt trapped inside and traveled for a block before it crashed. Who cares how fast the van was going? Gonzalez's representatives admit that Gonzalez unexpectedly tried to flee without warning, and that when Officer Wyatt tried to stop him, Gonzalez physically fought him off. I do not comprehend how this constellation of facts fails to demonstrate a real threat of impending harm to Officer Wyatt, as well as to members of the public.

The majority's discussion of speed cannot be squared with Justice Kennedy's declaration in *Sykes* that "[e]ven if the criminal attempting to elude capture drives without going at full speed . . . , he creates the possibility that police will . . . use force to bring

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[9] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (only issues of "*material* fact" can defeat a motion for summary judgment) (emphasis added).

him within their custody. A perpetrator's indifference to these collateral consequences has violent – *even lethal* – potential for others." 131 S.Ct. at 2273 (emphasis added). Gonzalez certainly posed a direct threat to Officer Wyatt when he chose to flee.

In an unconvincing attempt to make this dispute over speed "material," the majority unwittingly engages in exactly the type of rear-view-mirror micro-analysis the Supreme Court has told us to eschew. The majority has converted Officer Wyatt's precarious ten-second episode in Gonzalez's van into an ex post facto exercise in calculus, the world of the derivative and the integral.[10] They impose a new duty on police

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[10] Professor Michael Starbird of the University of Texas at Austin demonstrates how calculus can be used to determine the velocity of a moving vehicle. POST might want to include this exercise in its officer training programs.

> If we think of function $v\ (t)$ as measuring the velocity of a moving car at each time t, then the integral is a number that is equal to the distance traveled, because the integral is obtained by dividing the time from a to b into small increments and approximating the distance traveled by assuming that the car went at a steady speed during each of those small increments of time. By taking increasingly smaller increments of time, approximations converge to a single answer, the integral. This sounds complicated, but the naturality of it is the topic of Lecture 3. The integral is also equal to the area under the graph of $v(t)$ and above the t-axis. The integral is related to the derivative (as an inverse procedure) via the Fundamental Theorem of Calculus.

Michael Starbird, *Change and Motion: Calculus Made Clear* 10 (The Great Courses 2d ed.2006).

officers: when you are in a zone of immediate danger involving a moving vehicle in which you are being kidnaped, you must calculate the speed of the vehicle as you try to turn off the ignition and to disengage the gearshift. Then, you must refrain from using deadly force until the vehicle speeds up to a point where a crash will surely threaten your life (or have the presence of mind to try something else). At that point, the use of deadly force too late will not only disable the driver, but probably you, too. And let us not forget, the majority thinks it would be nice if you would give one more warning before you shoot.

Here, I agree with Judge O'Scannlain's discussion of this issue, as the author of the three judge panel majority opinion.

> Gonzalez's representatives . . . argue that Wyatt's testimony that the van traveled approximately fifty feet either contradicts his testimony that the events took "less than ten" and possibly "less than five seconds" or indicates that the van was traveling so slowly that it could not have been a threat.
>
> First, even assuming that the van was traveling relatively slowly, the threat of acceleration – and the threat to Wyatt's life – remained. . . . Thus, the van's *speed is not a material fact*, even if it were actually disputed. The dissent does not address this point.
>
> Second, the rough estimates of time taken and distance traveled stated in Wyatt's deposition were just that – rough estimates.

> Wyatt's story is "internally consistent" if we do not ascribe unfounded precision to his estimates. It would be surprising if an officer could recount precise quantitative details about an incident which took mere seconds over a year later. A minor inconsistency in officer testimony does not alone create a dispute of material fact.

Gonzalez v. City of Anaheim, 715 F.3d 766, 771-72 (9th Cir.2013) (footnote omitted).

Judge O'Scannlain's reference to the "threat of acceleration" came from our decision in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir.2010). In that case, an officer shot and killed the driver of a slow-moving minivan that the officer thought might run over his partner. The driver's representatives contended that the minivan posed no threat because it was moving too slowly to endanger the officers. We flatly rejected that argument, saying that the vehicle "could have gained traction at any time, resulting in a sudden acceleration in speed." *Id.* at 552.

Why did we acknowledge in *Wilkinson* that vehicles driven by fleeing criminals can suddenly accelerate only to brush aside this indisputable fact here? Moreover, we rebuked the plaintiff in *Wilkinson* for giving us a "sanitized version of the incident" because it omitted the "urgency of the situation." *Id.* at 551-52. When Officer Wyatt shot Gonzalez, his situation was every bit as urgent as Officer Torres's, if not more so. We held in *Wilkinson*, involving facts quite similar to this case, that Officer Torres "did not

violate a constitutional right." *Id.* at 551. The majority's claim of "no evidence of anyone else in danger" is technically true only because Officer Wyatt ended the chase before news helicopters had the opportunity to film Gonzalez as he raced around Southern California freeways. Now, stopping a chase before it gets completely out of control inures to Officer Wyatt's detriment.

B.

The majority also errs in suggesting that the speed-distance-time information would support a jury conclusion that "Gonzalez had not stomped down on the accelerator." What they overlook is that this issue is before us as a matter of summary judgment, and that Gonzalez's representatives do *not* dispute the fact that Gonzalez stomped down on the gas pedal. I quote again from the record. "Gonzalez reached forward toward the gear shift and 'slapped' the gear shift into a driving gear, and 'stomps down' on the gas pedal." Gonzalez's representatives objected only to what Officer Ellis was doing at this time, saying nothing about Gonzalez or Officer Wyatt. It is this simple. If Gonzalez's representatives accept for the purposes of summary judgment that Gonzalez stomped on the gas pedal, it is not for us to claim that he did not. Moreover, both officers said that when Gonzalez "floored" it, the van's tires squealed on the roadway. That sound is exactly what occurs when a vehicle is violently accelerated.

C.

Back to the question of the van's speed, Officer Wyatt wasn't looking out the van's window as Gonzalez drove away, calculating elapsed time, distance covered, and integrals. Officer Wyatt was yelling at Gonzalez to stop. He was looking at the ignition and the gearshift as he tried physically to stop the van and prevent Gonzalez's attempt to escape. Moreover, it was dark outside. I defy anyone under these circumstances to have the presence of mind and the ability to calculate the speed of a moving vehicle. Without exterior visual cues, it is next to impossible. The majority makes the mistake of failing to place themselves in Gonzalez's van and in Officer Wyatt's shoes, engaging instead in a classroom exercise in determining speed from time and distance. The majority's approach violates the rule that we are (1) to make allowance for the fact that officers are often forced to make split-second judgments in tense, uncertain, and rapidly evolving circumstances, and (2) to be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.

D.

Next, we get to the majority's should-have-shot-the-gun-out-of-his-hand suggestion, which comes from Hollywood westerns, certainly not from the streets of our cities. The Seventh Circuit has a clear-eyed take on the assertion that alternative methods short of

deadly force must be used to resolve a dangerous situation. In *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir.1994), Plakas's administrator argued that the defendant officer, instead of shooting Plakas, should have used a non-lethal cannister of CS Gas he carried on his belt, or used a canine unit on the scene to take Plakas down, or tried to isolate him while keeping a safe distance. The argument was that failing to use these available methods rendered unreasonable the use of deadly force. In rejecting this contention, the court said,

> There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.

Id. at 1148 (footnote omitted).

> It is true we consider the whole of the event as it appears to the officer involved, but we recognize that the decision to shoot can only be made after the briefest reflection, so brief that "reflection" is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he could run backwards? Our answer is, and has been no, because there is

> too little time for the officer to do so and too much opportunity to second-guess that officer.

Id. at 1149.

The majority says Officer Wyatt could have used a baton, pepper spray, or maybe a Taser. The record does not contain a shred of evidence that such methods would have been effective – to the contrary. To speculate that such methods would have safely ended the chase disregards the officers' escalating reasonable use of nonlethal force against Gonzalez, hitting him with their fists, trying to put him in a carotid hold, and striking him with a flashlight, but nothing worked.[11] Officer Wyatt warned him that he would be shot if he continued to display dangerous behavior, but even a threat of that magnitude did not register. Officer Wyatt ordered him to stop the van. Verbal commands and warnings had no effect. Under these circumstances, giving him another warning was neither feasible nor required, nor would it have caused Gonzalez to stop. He was determined, albeit foolishly, to try to escape. As we said in *Forrett v. Richardson*, 112 F.3d 416, 421 (9th Cir.1997), *superseded on other grounds as stated in Chroma Lighting v. GTE Prods. Corp.*, 127 F.3d 1136 (9th Cir.1997), another excessive force shooting case, "[t]he only objectively reasonable conclusion to be drawn from

[11] I do agree with the majority that this use of force was reasonable and that the district court's grant of summary judgment in favor of the officers on these theories and Gonzalez's due process claim was appropriate.

this evidence is that if [the officers] had not shot him, he would have continued taking whatever measures were necessary to avoid capture."

The Supreme Court said in *Michigan v. Long* that a vulnerable officer – which Officer Wyatt surely was – "must make a 'quick decision as to how to protect himself and others from possible danger. . . .' In *such circumstances, we have not required that officers adopt alternate means to ensure their safety*. . . ." 463 U.S. at 1052 (emphasis added) (citation omitted). We said the same thing in *Wilkinson*: "A reasonable use of deadly force encompasses a range of conduct, and *the availability of a less-intrusive alternative will not render conduct unreasonable.*" 610 F.3d at 551.

E.

Finally, the majority observes that the officers had no information that the driver had previously committed any crime, had any prior contact with law enforcement, had any involvement with weapons, or that the van might be stolen. All of this what-the-event-wasn't information is irrelevant because it is irreconcilable with what the Supreme Court has said about the inherent hazards of ordinary traffic stops and car chases. Read the Court's discussion in *Terry v. Ohio, Pennsylvania v. Mimms, Michigan v. Long, Maryland v. Wilson, Michigan v. Summers, Arizona v. Johnson, Scott v. Harris*, and *Sykes v. United States.* Moreover, when Gonzalez began to resist, to flee, and

to strike Officer Wyatt, everything the majority finds missing from their sterile scenario became irrelevant.

VII

Given the undisputed facts in the record, the officers' actions that led to the unfortunate death of Adolph Gonzalez fall squarely and objectively within the Supreme Court's description of a regrettable situation justifying the use of deadly force. My colleagues on the other side, "far removed from the scene and with the opportunity to dissect the elements of the situation," have failed to heed the Court's warning not to second guess from the peace, safety, and comfort of our chambers a split-second decision in the field, a decision Officer Wyatt made under extreme pressure in a perilous situation. *Ryburn*, 132 S.Ct. at 991. Their opinion, rendered "with the benefit of hindsight and calm deliberation," will become the subject of confusing law enforcement training and can only impede and endanger all law enforcement officers in the discharge of their sworn duties with respect to patrolling our streets and keeping the peace in our neighborhoods. *Id.* at 992.

The Sixth Circuit has taken to heart the Supreme Court's cautionary instructions about our task in these cases. After quoting *Garner*'s admonitory language, the Sixth Circuit said,

> This passage carries great weight in this case, since all parties agree that the events in question happened very quickly. *Thus,*

> *under Graham, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.*

Smith v. Freland, 954 F.2d 343, 347 (6th Cir.1992).

The unmistakable message that comes from this case will cause officers inappropriately to hesitate in the face of danger in a confrontation with a combative suspect who refuses to obey lawful commands and warnings. The result in turn will endanger both the police and the public at large as officers worry that they may (this case) or may not (*Wilkinson*) end up in court for years.

I end where I began, with the Supreme Court's message to both the police as well as to lawbreakers like Gonzalez.

> [W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs

> a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Scott, 550 U.S. at 385-86 (emphasis in original).

> 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.

Garner, 471 U.S. at 11 (emphasis added).

Chief Judge KOZINSKI, with whom Circuit Judges TROTT, TALLMAN and BEA join, dissenting:

It's undisputed that, at the time he fired the fatal shot, Officer Wyatt was trapped inside a moving vehicle driven by a man who had resisted the verbal commands, physical restraints, lethal threats and bodily force of two uniformed officers. How fast the van was moving and how far it had traveled are beside the point. What matters is that Officer Wyatt was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in Wyatt's situation would have acted any differently, and no reasonable jury will hold him

liable. The only thing this remand will accomplish is to give plaintiffs a bludgeon with which to extort a hefty settlement. The Supreme Court should foil the plan with a swift summary reversal.

733 F.3d 979
United States Court of Appeals,
Ninth Circuit.

Rafael GONZALEZ, individually and
as successor in interest to
Adolph Anthony Sanchez Gonzalez, Plaintiff,
and
F.E.V., a minor, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez, by and through her Guardian Ad Litem David Vasquez; Antoinette Sanchez, individually and as successor in interest to Adolph Anthony Sanchez Gonzalez,
Plaintiffs-Appellants,
v.
CITY OF ANAHEIM; Daron Wyatt;
Matthew Ellis, Defendants-Appellees.

No. 11-56360. | Oct. 28, 2013.

Attorneys and Law Firms

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D.C. No. 2:10-cv-04660-PA-SH.

Opinion

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge WATFORD did not participate in the deliberations or vote in this case.

715 F.3d 766
United States Court of Appeals,
Ninth Circuit.

Rafael GONZALEZ, individually and
as successor in interest to
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v.
CITY OF ANAHEIM; Daron Wyatt;
Matthew Ellis, Defendants-Appellees.

No. 11-56360. | Argued and Submitted Feb. 7, 2013. | Filed May 13, 2013.

Attorneys and Law Firms

Melanie T. Partow, Law Offices of Dale K. Galipo, Woodland Hills, CA, argued the cause and filed a brief for the Plaintiffs-Appellants. With her on the brief was Dale K. Galipo, Law Offices of Dale K. Galipo, Woodland Hills, CA.

Moses W. Johnson IV, Assistant City Attorney, Anaheim, CA, argued the cause and filed a brief for the Defendants-Appellees. With him on the brief was Cristina L. Talley, City Attorney, Anaheim, CA.

Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding. D.C. No. 2:10-cv-04660-PA-SH.

Before: DIARMUID F. O'SCANNLAIN, STEPHEN S. TROTT, and RICHARD R. CLIFTON, Circuit Judges.

Opinion

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether police officers used excessive force in a struggle that led to the death of a person suspected of possessing illegal drugs.

I

A

On September 25, 2009, at 2:00 AM in the morning, Officers Daron Wyatt and Matthew Ellis, members of the Anaheim Police Department, were responding to a routine call to check on a transient. While turning left at an intersection they were cut off by a van driven by Adolf Anthony Sanchez Gonzalez. Gonzalez made an illegal left turn in front of them and pulled into a gas station. The officers had to brake aggressively to avoid a collision, but they continued on their way to complete the call. Unable to locate the transient, the officers headed back the way they came only a minute or two later, and noticed that Gonzalez's van was still at the gas station.

Their suspicions raised by the near collision, the officers ran the van's plates through the mobile data terminal in their patrol car and discovered that the van had been involved in a prior narcotics stop. According to Wyatt's testimony, the officers decided to follow the van for a short way to see if any law enforcement action was necessary. A few blocks later, they noticed that the van was weaving within its lane and decided to pull it over.

After the officers turned on their lights, the van continued driving for about 200 feet before making a wide-sweeping turn to pull over. The officers pulled in behind the van and approached the vehicle from both sides; Ellis approached on the driver's side and Wyatt on the passenger's side. As Wyatt approached, he saw Gonzalez reach back with his right hand toward the area between the driver and the passenger seats. Wyatt drew his gun and yelled at Gonzalez, warning that if Gonzalez reached back again, he would shoot him.

Gonzalez clenched his hands tightly in his lap. Ellis told him to turn off the vehicle at least twice, but Gonzalez did not respond or comply. Ellis noticed that Gonzalez appeared to be concealing a plastic baggy in his right hand, which he believed could contain drugs. Both officers told Gonzalez to open his hands.

Gonzalez continued to ignore the officers' orders. The officers reached through Gonzalez's open windows to unlock the driver- and passenger-side doors.

Wyatt reached through the now-open door and struck Gonzalez on the arm with his flashlight three times.

At this point, Gonzalez moved his right hand toward his mouth, and his left hand toward the area between the seat and the door. Ellis believed Gonzalez was trying to swallow whatever was in his hand. According to Wyatt, Ellis – reaching through the driver-side window – attempted to apply a carotid restraint (or "sleeper hold")[1] on Gonzalez. Ellis claims that he was attempting only to gain control of Gonzalez's arms.

As Ellis struggled with Gonzalez, Wyatt radioed for assistance. Wyatt believed Gonzalez was attempting to strike Ellis, although Ellis himself testified that Gonzalez never attempted to hit him. Wyatt entered the van from the passenger side and, with both of his knees on the seat, began punching Gonzalez in the head and face.

Still struggling with the officers, Gonzalez tried to shift the van into gear by slapping the gearshift with his right hand. Ellis, in an attempt to stop Gonzalez from shifting the van into gear, hit him on the back of the head three times with his flashlight. Gonzalez nonetheless managed to put the car into

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[1] "A 'sleeper hold' occurs when a person wraps his forearm around the victim's neck with the center of the victim's neck in the crook of the person's arm. When performed correctly, the hold should cause the victim to temporarily lose consciousness." *United States v. Gray*, 692 F.3d 514, 517 n. 1 (6th Cir.2012).

drive and pulled away with Wyatt still in the passenger seat.

According to Wyatt, Gonzalez "floor[ed] the accelerator." Wyatt moved from his knees to a sitting position and yelled at Gonzalez to stop. Wyatt then attempted to knock the vehicle's gearshift out of gear, but Gonzalez slapped his hand away. Without giving another warning, Wyatt pulled out his gun and shot Gonzalez in the head. According to Wyatt, the van had traveled "approximately fifty feet" in "less than ten" and possibly "less than five" seconds. After the shot, the van hit a parked vehicle and came to a stop. Other officers then arrived and removed Gonzalez from the van, handcuffed him, and performed chest compressions. Gonzalez died shortly thereafter.

B

On June 23, 2010, Gonzalez's father sued the officers and the City of Anaheim under 42 U.S.C. § 1983 for violation of his Fourteenth Amendment right of familial association and of Gonzalez's Fourth Amendment right to be free from unreasonable and excessive force. On October 21, 2010, Gonzalez's daughter and successor-in-interest brought a separate suit raising similar federal claims and various state-law claims. The district court consolidated both actions.

The City of Anaheim and the officers moved for summary judgment. Gonzalez's representatives waived some of their constitutional claims, and the

district court granted summary judgment for the City and the officers on what remained. The contested constitutional claims alleged that (1) the officers used excessive force in violation of Gonzalez's Fourth Amendment rights and (2) that the officers' actions "shocked the conscience" and so violated the representatives' Fourteenth Amendment rights. The district court granted summary judgment and held that the force used throughout the encounter was reasonable and that the officers' conduct did not violate the Fourteenth Amendment. The district court declined to exercise supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1367(c)(3). Gonzalez's representatives appeal this grant of summary judgment.

II

A

Gonzalez's representatives allege that the officers applied excessive force at five instances during the encounter that led to Gonzalez's death: (1) Wyatt's use of his flashlight to hit Gonzalez on the arm; (2) Ellis's attempt to place Gonzalez in a carotid restraint;[2] (3) Wyatt's punches to Gonzalez's head and face while Ellis was attempting to restrain him; (4) Ellis's strikes to the back of Gonzalez's head with

[2] Whether a carotid restraint was used is a disputed fact. We must assume that one was attempted to resolve this summary judgment appeal.

the flashlight; and (5) Wyatt's close-range shot to Gonzalez's head.

Under the Fourth Amendment, police may use only such force as is "objectively reasonable in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (internal quotation marks omitted). To determine whether the use of force was reasonable, we balance the level of force used against the need for that force. *Graham* suggests three factors that courts should consider when evaluating the need for force: (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the officers or others, and (3) whether the suspect was actively resisting arrest. *Id.* at 396, 109 S.Ct. 1865. These factors, however, are not exclusive and we must consider the totality of the circumstances. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.2010). "[I]n the end we must . . . slosh our way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

1

Gonzalez's representatives first contend that the flashlight strikes to Gonzalez's arm constituted excessive force. That force was instigated by Gonzalez's refusal to obey several commands to open his hands and turn off the vehicle. Officers may use a reasonable level of force to gain compliance from a

resisting suspect who poses a minor threat. *See*, *e.g.*, *Padula v. Leimbach*, 656 F.3d 595, 603 (7th Cir.2011) (holding that officers reasonably used "'stern' but not 'severe'" baton strikes to control a noncompliant suspect); *Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1106-07 (9th Cir.2008) (force was not excessive when three officers tackled, pinned, and forcefully subdued an individual who was trespassing and refusing to comply with orders to drop his pen); *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir.1994) (upholding jury verdict in favor of officers; officers use of "pain compliance techniques" to arrest demonstrators was objectively reasonable). Striking Gonzalez in the arm was not excessive force given his stubborn refusal to follow the officers' commands.

2

Gonzalez's representatives next urge that Ellis's attempted carotid restraint, Wyatt's punches to Gonzalez's face, and Ellis's flashlight strikes to Gonzalez's head constituted excessive force. We apply the three *Graham* factors to evaluate the reasonableness of this force.

The first factor looks to the severity of the crime, and here it weighs in the officers' favor. The officers had reason to believe that Gonzalez possessed illegal drugs and was trying to destroy evidence. Generally this factor weighs in favor of the officers if they have "reason to believe" the suspect had committed a

"felony-grade offense." *See Coles v. Eagle*, 704 F.3d 624, 628-29 (9th Cir.2012).

The second *Graham* factor is the immediacy of the threat posed by Gonzalez to the officers or others. This is undoubtedly the most important factor. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (en banc). Here, both officers testified that they saw Gonzalez reach down with his left hand between the driver's side door and the seat. At that moment, a reasonable officer in their position could be concerned that Gonzalez was concealing a weapon in that area. Given Gonzalez's repeated refusal to obey the officers' orders and his multiple furtive reaches, the officers had reason to suspect danger. Then, when Gonzalez tried to shift the van into drive with an officer in the vehicle, the situation became substantially more dangerous, and the officers' justification for force increased commensurately. *See*, *e.g.*, *Scott*, 550 U.S. at 383-84, 127 S.Ct. 1769 (officers were justified in ramming a fleeing suspect in a vehicle that posed significant risk to the public; reasonableness inquiry weighs the threat posed by the suspect against the force used by the officers). Because of the possibility of a hidden weapon and the threat the running vehicle posed, the second *Graham* factor weighs in favor the officers.

Finally, the last *Graham* factor asks whether Gonzalez was "actively resisting arrest or attempting to evade arrest by flight." *Coles*, 704 F.3d at 629. Gonzalez engaged in active resistance both in his motions with his hands and by struggling with the

officers. *See Mattos*, 661 F.3d at 445 (suspect who refused to get out of her car and stiffened her body and clutched at her steering wheel to frustrate officers engaged in active resistance). Then, when Gonzalez attempted to put the van in drive, his active resistance became attempted flight. Like the other factors, this factor weighs in favor of the officers.

Because all three *Graham* factors support the officers, they were justified in applying significant force. Not only was Gonzalez acting strangely, but the officers had reason to believe he was committing and then attempting to conceal a drug offense. He continually ignored the officers' commands and resisted their attempts to physically restrain him. And when he attempted to drive away with an officer in the passenger seat, he made a volatile situation all the more dangerous.

3

Wyatt argues that, as an unbuckled passenger in a fast-moving vehicle driven by an escaping suspect, he had "probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *see also Scott*, 550 U.S. at 383, 127 S.Ct. 1769 (speeding vehicle poses "actual and imminent threat" to those around him, justifying force posing a "high likelihood of serious injury or death"); *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir.2010) (attempt to

accelerate a van within close quarters of two officers on foot justified the officer's choice to fire eleven shots at the driver). However, Gonzalez's representatives argue that Wyatt's story fails to hold together.

We must keep in mind that deadly force cases are particularly difficult to evaluate at summary judgment because "the officer defendant is . . . the only surviving eyewitness." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994). Here, as in *Scott* and other cases, the only accounts of the events that led to Gonzalez's death come from the testimonies of the two officers who survived the encounter. In such cases, a court should ensure that the officer's story is "internally consistent and consistent with other known facts" to avoid simply accepting a self-serving statement by an officer. *Id.*

Gonzalez's representatives and the dissent argue that Wyatt's testimony that the van traveled approximately fifty feet either contradicts his testimony that the events took "less than ten" and possibly "less than five seconds" or indicates that the van was traveling so slowly that it could not have been a threat.[3]

First, even assuming that the van was traveling relatively slowly, the threat of acceleration – and the threat to Wyatt's life – remained. *Wilkinson*, 610 F.3d at 552 (deadly force was objectively reasonable even

[3] As Gonzalez's representatives repeatedly observe in their brief, a vehicle that travels 50 feet in 10 seconds would have an average speed of 3.4 miles per hour.

though "the vehicle was moving at a slow rate of speed," "it could have gained traction at any time, resulting in a sudden acceleration. . . ."). Thus, the van's speed is not a material fact, even if it were actually disputed. The dissent does not address this point.

Second, the rough estimates of time taken and distance traveled stated in Wyatt's deposition were just that – rough estimates. Wyatt's story is "internally consistent" if we do not ascribe unfounded precision to his estimates. It would be surprising if an officer could recount precise quantitative details about an incident which took mere seconds over a year later. A minor inconsistency in officer testimony does not alone create a dispute of material fact. *See Gregory*, 523 F.3d at 1107-08 ("[E]ven were the officers' accounts of the confrontation incredible, there is no medical or circumstantial evidence that could support the conclusion that the use of force by the officers was excessive."); *Reynolds v. Cnty. of San Diego*, 84 F.3d 1162, 1169-70 (9th Cir.1996) ("Illuminating a potential minor inconsistency . . . is insufficient to raise a genuine issue of material fact regarding the reasonability of the use of force . . . "), *overruled on other grounds by Acri v. Varian Assocs., Inc.*, 114 F.3d 999 (9th Cir.1997).

Third, one rough estimate divided by another does not provide meaningful evidence on the speed of the van. We cannot weigh the evidence, but we must look at the record as a whole. Wyatt also testified that, after Gonzalez managed to put the van into

drive, he "floor[ed] the accelerator and violently accelerated northbound." This acceleration was fast enough to slam the door shut, trapping Wyatt in the vehicle. Wyatt further testified that when he shot Gonzalez, the van was going about "50 miles per hour." Ellis confirmed this account of events in his deposition and stated in an interview conducted the day after the incident that Gonzalez "stomped down" on the gas pedal, causing the vehicle to accelerate so rapidly that the tires squealed. The most that a rational trier of fact could conclude from this record is that Wyatt is bad at estimating – hardly a reason to send this case to trial. *Harris*, 550 U.S. at 380, 127 S.Ct. 1769 ("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.'") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

The record taken as a whole does not support any inferences other than essentially what the officers claim: Wyatt was an unbuckled passenger in a rapidly accelerating van with an escaping and noncompliant suspect. Gonzalez's flight could have killed or seriously injured Wyatt. This was not a case where Wyatt had time to deliberate and consider the most measured response; he testified that he tried to knock the vehicle's gearshift out of gear and that he yelled at Gonzalez to stop. When these methods failed, further hesitation may have been fatal. Given the speed with which these events occurred, Wyatt was

objectively reasonable in resorting to deadly force. *Wilkinson*, 610 F.3d at 553 (holding as objectively reasonable officer's decision to shoot the driver of a van which was accelerating in close quarters with two officers; "absolute certainty of harm need not precede an act of self-protection").

In the alternative, Gonzalez's representatives argue that the shooting was provoked by the officers' prior conduct. As a result, they claim we should hold the shooting unreasonable. However, we have held that in order for an officer's conduct to render an otherwise reasonable response unreasonable, the prior conduct must itself be an independent constitutional violation. *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir.2002). Because the officers' prior conduct never amounted to a constitutional violation, the shooting was not unreasonable as a result.

B

Gonzalez's representatives also allege that the officers' conduct violated their due process right to familial association. This substantive due process claim requires that they show that the officers' conduct "shock[ed] the conscience." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008). Because the officers had no time to deliberate, the representatives must show that the officers had a "purpose to harm" Gonzalez for reasons unrelated to legitimate law enforcement objectives. *Id.*; *see also Wilkinson*, 610 F.3d at 554.

The representatives present no evidence to suggest that the officers, at any point, had a purpose "to cause harm unrelated to the legitimate object of arrest" or self-protection. *Porter*, 546 F.3d at 1140. At each stage of the encounter, the officers were forced to make split-second decisions. As explained above, the force that they used was not excessive or disproportionate to the quickly escalating situation. Nothing in the officers' behavior suggests that there were ulterior motives at work.

III

For the foregoing reasons, Gonzalez's representatives do not show any triable issues of fact that the officers violated Gonzalez's constitutional rights.

AFFIRMED.

CLIFTON, Circuit Judge, dissenting:

"Deadly force cases pose a particularly difficult problem," we have observed, "because the officer defendant is often the only surviving eyewitness." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994). This is one of those cases. Rafael Gonzalez is dead and cannot speak for himself.

That does not mean that the court can or should speak for him, but it does mean that we must examine the evidence presented by the defendants with a critical eye. As we held in *Scott*, "the court may not

simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably." *Id.*

There is a glaring inconsistency in the story told by the police officers here. The main thrust of their testimony might be correct, and it might be the case that their use of deadly force was justified, but we are reviewing a summary judgment and we cannot properly conclude that there is no genuine issue of material fact as to what led to the fatal shooting. As a result, I respectfully dissent.

The inconsistency concerns what happened during the few seconds right before Gonzalez was shot in the head. According to the evidence submitted by defendants, Gonzalez was in the driver's seat of the van. Officer Matthew Ellis approached the van from the driver's side, and Officer Daron Wyatt approached it from the passenger's side. A struggle ensued. Wyatt entered the van from the passenger side and began punching Gonzalez in the head and face. Gonzalez put the car into gear and started driving away, with Wyatt in the van. Wyatt pulled out his gun and shot Gonzalez in the head.

The majority opinion concludes, "[t]he record taken as a whole does not support any inferences other than essentially what the officers claim: Wyatt was an unbuckled passenger in a rapidly accelerating

van with an escaping and noncompliant suspect." Majority op. at 772. If that is what happened, then I agree that Officer Wyatt acted reasonably in resorting to deadly force. But it is simply not so clear that the events happened that way. Indeed, the story as told by the officers appears to me to be physically impossible.

There are three pieces to this puzzle: the speed of the vehicle, the distance it traveled, and the time that elapsed. Those pieces don't fit together.

The speed of the van is the most important piece. It was that speed that the majority opinion primarily relies upon to conclude that it was reasonable for Wyatt to shoot Gonzalez in the head. Wyatt testified that Gonzalez "floor[ed] the accelerator and violently accelerated northbound." He estimated that the van was going about 50 miles per hour when he shot Gonzalez. Ellis told a similar story, saying that Gonzalez "stomped down" on the gas pedal, causing the van's tires to squeal.

But that description simply cannot be squared with Wyatt's testimony about time and distance. Wyatt estimated that less than ten seconds, and possibly less than five seconds, passed between the van moving forward and his firing of the fatal shot. He also testified that the van had traveled approximately fifty feet in that time. As plaintiffs have argued, and the majority opinion acknowledges, at 12 n.3, a vehicle that traveled fifty feet in ten seconds would have an average speed of only 3.4 miles per

hour. Nobody should mistake 3.4 miles per hour for 50. If the time period is cut to five seconds, the average speed only increases to 6.8 miles per hour. That is hard to mistake for 50 miles per hour, as well. An actual speed of 3 to 6 miles per hour is simply inconsistent with Wyatt's testimony as to the speed of the van.[1] It also appears inconsistent with the testimony of both Wyatt and Ellis that Gonzalez "floored" or "stomped down" on the gas.

The majority opinion attempts to shrug off this discrepancy by excusing Wyatt's estimates of time and distance as just "rough estimates." Majority op. at 771. That approach is wrong in two different ways.

First, the estimates could not have been that far off. The period of time that elapsed could not have been much shorter, given all that happened during that time according to the officers' testimony. Consider the description of those events provided in the majority opinion: "According to Wyatt, Gonzalez

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[1] A vehicle traveling 50 miles per hour covers more than 73 feet in a second. The van was accelerating, so it would take some time for it to reach the final speed, but that is another reason to question the account given by the officers. Powerful sport cars are known for going "0 to 60" mph in less than five or six seconds. Gonzalez was driving a 1991 Mazda MPV. The website "Zero to 60 Times" lists a time for a 1992 Mazda MPV to get to 60 mph as 11.2 seconds. *See* http://www.zeroto60times.com/Mazda-0-60-mph-Times.html (last visited April 11, 2013). And it would obviously have to travel a lot farther than fifty feet to get up to speed. The quarter mile time for that vehicle is listed by the same website as 18.1 seconds.

'floor[ed] the accelerator.' Wyatt moved from his knees to a sitting position and yelled at Gonzalez to stop. Wyatt then attempted to knock the vehicle's gearshift out of gear, but Gonzalez slapped his hand away. Without giving another warning, Wyatt pulled out his gun and shot Gonzalez in the head." *Id.* at 769. Events were moving rapidly, to be sure, but it is not obvious that all of that could have taken place in much less than five seconds. Nor can the estimate that the van traveled about fifty feet be blithely excused. There was plenty of time after the episode took place to check how far the van traveled. Defendants did not submit evidence that the actual distance was substantially greater than fifty feet. We cannot assume that it was.

Second, and more importantly, the majority opinion applies the wrong standard when it brushes off the "rough estimates" by emphasizing other parts of the officers' story. This is a summary judgment. It is for the jury to weigh the evidence, not us. A jury could conclude that the inconsistency does not impair the officers' credibility and that even if the estimates of speed, time, and distance were way off, the events were such that Officer Wyatt's life was endangered and his use of deadly force was justified. But a jury could also conclude, presented with this evidence, that the officers' testimony should not be believed. As we held in *Scott*, the court is supposed to "carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as

any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts." 39 F.3d at 915. In this case, the story told by the officers is not internally consistent. It is not our job to explain away the discrepancy.

It is especially not our job to explain away the discrepancy by making up an unsupported theory. The majority alternatively dismisses the van's speed as immaterial, arguing that even if the vehicle was "traveling relatively slowly," Wyatt's behavior was unquestionably justified. Majority op. at 771. But, as noted above, Wyatt not only estimated the speed of the van as 50 miles per hour, he testified that Gonzalez "floored the accelerator and the van violently accelerated." He did not testify that he acted because he feared that the van might speed up; he claimed that it was already speeding away. The majority opinion's effort to erase the inconsistency isn't consistent with the defendant's own testimony. And it ignores the possibility that the jury might conclude from the contradictory evidence that Wyatt's testimony was not to be believed.

If Wyatt was sitting in the passenger seat of a vehicle going 3 to 4 miles per hour when he whipped out his gun and, without warning, shot Gonzalez dead, a reasonable jury might conclude that his actions were unreasonable. The majority opinion tries to eliminate speed from its analysis, citing to *Wilkinson v. Torres*, 610 F.3d 546, 552 (9th Cir.2010). But in *Wilkinson*, we did not say that the threat of speed

always justified the use of deadly force; we emphasized the importance of considering all the facts in excessive force cases. *Id.* at 551. In *Wilkinson*, an officer thought his partner was standing in the mud, disoriented, next to a fleeing minivan. *Id.* The minivan was reeling, the driver was attempting to accelerate. *Id.* The officer shot the driver multiple times. *Id.* The plaintiffs argued that the vehicle was moving too slowly to endanger the officers. *Id.* We decided that even so, "it could have gained traction at any time, resulting in a sudden acceleration in speed," while the officer believed his partner to be standing nearby. *Id.* at 552. Given these facts, we decided that deadly force was justified. Here, Wyatt was not on foot next to a vehicle that might run him over at any moment should it have accelerated. He was inside the car – a car that might have been slowly rolling forward. *Wilkinson* does not answer whether Wyatt behaved reasonably. A jury should.

I respectfully dissent.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 10-1608 PA (SHx) Date July 11, 2011
CV 10-4660 PA (SHx)

Title F.E.V., et al. v. City of Anaheim, et al.
Gonzalez, et al. v. City of Anaheim, et al.

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Paul Songco	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS

Before the Court is a Motion for Summary Judgment filed by defendants City of Anaheim and Officers Daron Wyatt and Matthew Ellis ("Defendants") (Docket No. 32). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for July 11, 2011, is vacated, and the matter taken off calendar.

I. Factual Background

On September 25, 2009, at approximately 2 a.m., Defendant Officers Ellis and Wyatt were en route to a service call regarding a sleeping transient. While the Defendant Officers were waiting at a red light to turn left, a Mazda MPV van stopped in the left turn lane next to them. When the signal turned green and the Defendant Officers were turning left, the Mazda veered into their lane, causing Officer Ellis to brake aggressively to avoid a collision. The Mazda then turned into a gas station at the corner. The Defendant Officers continued to their service call regarding the transient, but were unable to locate him.

Subsequently, the Officers returned to the same intersection in an attempt to locate the Mazda, and found the van at the same gas station where it had stopped earlier. The Officers parked on the street so they could observe the Mazda. Officer Ellis saw a male enter the Mazda and drive away. The Officers then followed the Mazda to see if any law enforcement action would be necessary, and observed the van weaving within its own traffic lane.

At 2:11 a.m., Officer Wyatt advised over the police radio that he and Officer Ellis intended to make a traffic stop, and activated the patrol unit's emergency lights. The Mazda then made a right turn onto another street, where it drove to the left of the center of the roadway, and eventually stopped at the curb. As the van was turning, Officer Wyatt saw the driver reaching down towards the right side of the

driver's seat and leaning over with his right hand extended, as if he was picking something up. When Officer Wyatt got out of the police vehicle and approached the Mazda van, the driver was still in the same position, but also looking over his left shoulder as if waiting for Officer Ellis to approach the vehicle. Officer Wyatt then drew his gun, pointed it at the driver, and said, "if you reach down there again I'm gonna shoot you." When Officer Ellis approached the driver's side of the vehicle, he saw that the driver's right hand was clenched into a fist and appeared to be holding something in a plastic bag. Officer Ellis told the driver to turn off the vehicle and show his hands. Both Defendant Officers could see the driver's hands in his lap area, but he still had not opened his right fist. Officer Wyatt then reached through the partially open window on the passenger side of the van and unlocked the passenger side door. He again told the driver to open his hand. When the driver still did not comply, Officer Wyatt reached inside the vehicle and struck the driver with his flashlight three times across the right elbow or tricep, using a backhand motion. The driver then raised his right fist toward his mouth and moved his left hand in the area between the door and the seat.

Officer Ellis tried to open the driver's door, but it was locked, so he reached through the window on the driver's side to unlock the door. Officer Ellis asserts that he then reached through the window and inside the vehicle, reaching around the back of the driver's head with his right arm, while attempting to control

the driver's right hand. Officer Wyatt testified in his deposition that he believed Officer Ellis was applying a carotid restraint on the driver. Officer Wyatt then backed out of the vehicle and requested assistance over the police radio, Officer Ellis told the driver to turn off the engine and give him his hand. The driver did not respond to either of the Officers' commands and tried to push the Officers away. Officer Wyatt did not see the driver's hands make contact with Officer Ellis while he was being held in a head restraint. However, Officer Wyatt believed the driver was trying to strike Officer Ellis. Officer Wyatt then entered the van, putting both knees on the passenger seat, and punched the driver five to six times on his head and face.

While Officer Ellis was restraining the driver, the driver reached toward the van's steering column gear shift. Officer Ellis believed the driver was attempting to shift the van into a driving gear, so he struck the driver on the back of the head with his flashlight. Nevertheless, the driver managed to reach forward toward the gear shift, "slap" it into a driving gear, and step on the gas pedal. Because Officer Ellis feared that he would be pulled forward with the van, he pulled himself out of the driver's side window and struck the driver as he was withdrawing from the vehicle.

Officer Wyatt, who was still in the van with the driver, yelled at the driver to stop. The driver did not comply. Officer Wyatt then tried to knock the gear shift into neutral or park two to three times, but the

driver batted his hand away each time. The driver drove while alternating his hands between the steering wheel and the areas on the side of his seat; he did not have both hands on the steering wheel at the same time. Officer Wyatt yelled at the driver to stop, but the driver did not comply. Officer Wyatt then drew his gun and fatally shot the driver in the head. The van had traveled approximately 50 feet in the span of 10 seconds, which is equivalent to less than 5 miles per hour.

On June 23, 2010, plaintiff Rafael Gonzalez, the decedent's natural father, brought a suit against Defendants under 42 U.S.C. § 1983 for violation of his Fourteenth Amendment right of familial association and violation of the decedent's Fourth Amendment right to be free from unreasonable seizures and the use of unreasonable and excessive force.

On October 21, 2010, the decedent's natural mother, Antoinette Sanchez, and the decedent's natural-born daughter and successor-in-interest, F.E.V., brought a separate suit against Defendants. The operative complaint alleges: (1) section 1983 claims for unreasonable search and seizure; (2) a section 1983 claim for deprivation of Fourteenth Amendment rights; (3) municipal liability for unconstitutional custom, practice, or policy; (4) false arrest/false imprisonment; (5) battery; (6) negligence; and (7) violation of the Bane Act. The only claims asserted by Plaintiff Sanchez are those under 28 U.S.C. § 1983 for deprivation of Fourteenth Amendment rights, and the corresponding municipal liability claim.

On December 20, 2010, the Court held a scheduling conference at which counsel for the parties to each of these actions agreed that they should be consolidated. Now, Defendants are moving for summary judgment on all claims, arguing that Officers Wyatt and Ellis acted reasonably under the circumstances and therefore did not violate Plaintiffs' or the decedent's constitutional rights. Plaintiffs have indicated that they are not pursuing "their *Monell*, Unlawful Detention and Arrest (and corollary state law False Arrest), and Denial of Medical Care claims." (Opposition at 20.) "Plaintiffs also concede that the decedent's minor daughter has proper standing to bring survival claims for violations of the decedent's Fourth Amendment rights and for wrongful death damages and that the decedent's parents have proper standing to pursue their interference with familial relations claim for violations of their own Fourteenth Amendment rights." *Id.*

Plaintiff Gonzalez did not file a separate Opposition to Defendants' Motion for Summary Judgment. In the Separate Statement of Disputed and Additional Undisputed Facts filed by Plaintiffs F.E.V. and Antoinette Sanchez, there is a footnote stating that "[a]ll plaintiffs from both consolidated cases . . . file a single opposition . . . jointly and severally." (Separate Statement at 1.) However, Plaintiff Gonzalez did not file a separate Notice of Joinder or otherwise give formal notification to the Court that he was joining in the arguments made by the other Plaintiffs. Pursuant to Local Rule 7-12, "[t]he failure to file any required

paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion." However, consistent with *Marshall v. Gates,* 44 F.3d 722 (9th Cir. 1995), the Court will not grant a motion for summary judgment due to the non-moving party's failure to file an opposition. *Id.* at 725 ("[W]e have held that a motion for summary judgment cannot be granted simply because the opposing party violated a local rule.") (citing *Henry v. Gill Industries, Inc.,* 983 F.2d 943, 950 (9th Cir.1993)). Instead, the Court will conduct an analysis of the record to determine if any material disputed facts exist. *Id.*

For the reasons set forth below, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' section 1983 claims, and declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims.

II. Standard on Summary Judgment

Summary judgment is proper where "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." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the

district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986); *see also Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S. Ct. at 2552. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S. Ct. at 2554.

As required on a motion for summary judgment, the facts are construed "in the light most favorable to the party opposing the motion." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However, the nonmoving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed. R. Civ. P. 56(e)(2) (nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial"). A "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v.*

City & County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252, 106 S. Ct. at 2510, 2512). Otherwise, summary judgment shall be entered.

III. Analysis

A. 42 U.S.C. § 1983 Claims

Section 1983 establishes a right of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. Section 1983 does not itself create substantive rights, but instead provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan,* 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694 n.3, 61 L. Ed. 2d 433 (1979). To state a § 1983 claim, a plaintiff must show (1) a deprivation of a constitutional or federal statutory right; and (2) that the defendant acted under color of state law. *See West v. Atkins,* 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40 (1988).

1. Excessive Force

A violation of the Fourth Amendment first requires that the officers, by means of physical force or show of authority, in some way restrained the liberty of a citizen resulting in a "seizure." *Graham v. Connor,* 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 1871 n.10, 104 L. Ed. 2d 443 (1989). If the plaintiff was seized, then it must be determined whether, after balancing the nature and quality of the intrusion on

the individual's Fourth Amendment interests against the countervailing governmental interests at stake, the exercise of force was reasonable. *Id.* at 396, 109 S. Ct. at 1871. The "reasonableness" of the degree of force employed must be judged objectively from the perspective of an officer on the scene, rather than with the 20/20 vision of hindsight, and must account for the fact that police officers are often forced to make split-second decisions in tense situations. *Id.* at 396-97, 109 S. Ct. at 1872. Moreover, the test is highly fact-specific and must take into account the totality of the circumstances confronted by the officers, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396, 109 S. Ct. at 1872; *Miller v. Clark County,* 340 F.3d 959, 964 (9th Cir. 2003) ("Our analysis proceeds in three steps. First, we assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted. Second, we assess the importance of the government interests at stake by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Third, we balance the gravity of the intrusion on the individual against the government's need for that intrusion to determine whether it was constitutionally reasonable." (citations omitted)). Though "reasonableness traditionally is a question of fact for

the jury," summary judgment is proper in an excessive force case "if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Scott v. Heinrich,* 39 F.3d 912, 915 (9th Cir. 1992).

Here, Plaintiffs contend that several of the actions taken by Officers Wyatt and Ellis constituted excessive force in violation of the decedent's constitutional rights. Specifically, Plaintiffs contend that the Officers acted unreasonably when: (1) Officer Wyatt used his flashlight to hit the decedent on the arm; (2) Officer Ellis placed the decedent in a carotid restraint; (3) Officer Wyatt punched the decedent on the head and face while he was being restrained by Officer Ellis; (4) Officer Ellis used his flashlight to hit the decedent on the back of the head while he was restraining the decedent; and (5) Officer Wyatt fatally shot the decedent in the head.

Striking a suspect to make an arrest does not necessarily constitute excessive force. *Blankenhorn v. City of Orange,* 485 F.3d 463, 477 (9th Cir. 2007) (citing *Graham v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 1871-72, 104 L. Ed. 2d 443 (1989)). Further, where an officer has probable cause to believe that a 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. *Garner,* 471 U.S. at 11. The test in all cases is whether the force used was "'objectively reasonable in light of the facts and circumstances

confronting' the arresting officers." *Blankenhorn,* 485 F.3d at 477 (quoting *Graham,* 490 U.S. at 397, 109 S. Ct. at 1872).

The use of force may also be reasonable where a suspect refuses to open his fists, even where he already has his hands behind his back, *See, e.g., Slama v. City of Madera,* 2010 U.S. Dist. LEXIS 49820 at *12-13 (finding use of leg sweep did not constitute excessive force even where suspect had hands behind his back, because he was disobeying commands to open fisted hands, his body was tense, and he was overly nervous). The possibility that a suspect is armed is an important consideration in determining whether the suspect posed an immediate threat to the safety of others. *See, e.g., Miller v. Clark County,* 340 F.3d 959, 964-65 (9th Cir. 2003) (finding officers had reason to believe suspect was armed when he possessed large knife earlier, ignored officers' commands to halt, and was hiding in woods); *Saman v. Robbins,* 173 F.3d 1150, 1156 (9th Cir. 1999) (finding officer's kicking of suspect reasonable where he encountered suspect at scene of police shooting, did not know if suspect was armed, and suspect began to comply with commands to get down on the ground, but then suddenly jumped to his feet).

Here, Officer Wyatt did not use excessive force when he struck the decedent's arm with a flashlight in an attempt to get the decedent to open his right hand. Both Officers Ellis and Wyatt tried multiple times to gain the decedent's compliance without the use of force. They ordered the decedent several times

to open his hand, but each time, the decedent refused to comply with their orders, keeping his fist clenched. Given the decedent's consistent failure to comply with the Officers' orders, Officer Wyatt had legitimate concerns that the decedent might have either a weapon or contraband in his fist. As such, it was reasonable for him to use some level of force to gain compliance from the decedent.

The parties dispute whether Officer Ellis used a carotid restraint on the decedent or merely tried to restrain him by holding down both of his arms. However, even assuming that Officer Ellis used a carotid restraint on the decedent, such use of force was reasonable under the circumstances. As an initial matter, it is undisputed that Officer Ellis' use of a carotid restraint did not actually lead to the decedent's death. Therefore, even if a carotid restraint is designed to render a person temporarily unconscious, as Plaintiffs contend, Officer Ellis' attempted use of the restraint by reaching his arms through the open window of the vehicle was not effective. Further, the use of the restraint was reasonable, given that the decedent continued reaching with his left hand in the area between the driver's seat and the door panel. Because the decedent was not complying with orders to show both hands, and was instead reaching in the area between the seat and the door panel, it was reasonable for Officer Ellis to believe that the decedent might have been reaching for a weapon and that the decedent posed an immediate threat to the Officer's safety. Thus, under the circumstances, even

assuming that Officer Ellis placed the decedent in a carotid restraint, such use of force was not unreasonable.

While Officer Ellis was restraining the decedent, Officer Wyatt hit the decedent on the face and head five to six times. Plaintiffs contend that the decedent was unarmed at the time and had not previously been assaultive or combative toward either officer. However, Plaintiffs have not shown that there is a genuine issue of fact as to Officer Wyatt's belief that the decedent was trying to hit Officer Ellis. Even if Officer Wyatt never actually saw the decedent successfully strike Officer Ellis, as Plaintiffs contend, his belief that the decedent was trying to do so justified his use of force to prevent harm to Officer Ellis. Further, because the decedent was not only trying to swing at Officer Ellis with his right hand, but was also continually reaching between the driver's seat and the door panel with his left hand, Officer Wyatt had a legitimate concern that the decedent might be reaching for a weapon, and that Officer Ellis' safety was threatened.

Officer Ellis' use of a flashlight to strike the decedent in the head was likewise reasonable under the circumstances. While Officer Ellis was restraining the decedent, the decedent reached toward the vehicle's gear shift. Thus, it was reasonable for Officer Ellis to believe that the decedent was attempting to shift the van into a driving gear, thereby turning the vehicle into a dangerous weapon. In attempting to move the van while he was engaged with the Officers,

the decedent was not only resisting, but also trying to flee from the Officers. A strike to decedent's head constituted a reasonable use of force by Officer Ellis, not only to protect himself and Officer Wyatt from being injured by the decedent's use of the vehicle, but also to prevent the decedent's escape.

Once the decedent successfully slapped the vehicle into gear and starting moving forward, it was also reasonable for Officer Wyatt to perceive a substantial risk that the decedent would seriously injure or kill him by suddenly accelerating the van or crashing it into another car or object. Although Plaintiffs point out that the decedent did not run any stop signs and that there were no other vehicles or pedestrians on the street, these facts do not establish a genuine issue of material fact. Once the decedent successfully shifted the van into a driving gear, a reasonable officer could infer a substantial possibility that his life was in danger. Further, the decedent's constant reaching for an object on the side of the driver's seat indicated that he might have a weapon in the car. Although Officer Wyatt never saw what appeared to be a gun on the decedent's person, the decedent's reaching on the sides of his seat throughout the course of his interaction with the Officers was sufficient to raise the reasonable belief that he posed an immediate threat to Officer Wyatt's safety. Thus, even considering the facts in the light most favorable to Plaintiffs, the Court finds that Officer Wyatt acted reasonably under the circumstances when he shot the decedent in the head after ordering the decedent to

stop the car and trying to stop the car himself several times.

Plaintiffs argue that because the Officers acted recklessly and negligently before the shooting, a reasonable fact finder could conclude that they provoked the deadly force situation and should therefore be liable. However, the Ninth Circuit has held that "the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself." *Billington v. Smith,* 292 F.3d 1177, 1190 (9th Cir. 2002) (finding that even if detective defendant should have waited or taken other precautions before approaching suspect, none of these errors could be deemed "intentional or reckless, much less unconstitutional, provocations that caused [the suspect] to attack him"). "Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation." *Id.* As discussed above, none of the Officers' actions prior to the shooting constituted an independent Fourth Amendment violation. As such, Plaintiffs' argument is not persuasive.

2. Substantive Due Process Violation

Plaintiffs also contend that the decedent's due process rights and their own right to be free from unwarranted interference with their familial relationships with the decedent were violated because the

Officers' actions "shock the conscience" and were unrelated to legitimate law enforcement objectives.

Official conduct that "shocks the conscience" is cognizable as a due process violation. *County of Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Conduct may "shock the conscience" where a plaintiff shows that an officer acted with a "purpose to harm" someone for reasons unrelated to legitimate law enforcement objectives. *Porter v. Osborn,* 546 F.3d 1131, 1137 (9th Cir. 2008). However, the Ninth Circuit has declined to find due process violations where officers are forced to make "split-second decisions about how best to apprehend the fleeing suspect in a manner that will minimize risk to their own safety and the safety of the general public." *See id.* at 1139.

Here, Officers Wyatt and Ellis were forced to make a series of "split-second decisions" during the course of their interactions with Gonzales. The Officers were in an emergency situation which required immediate reaction and did not permit time for any deliberation. Based on the record before the Court, it appears that the Officers' use of force was purely reactive; there is no indication that either Officer acted with an intent to harm or kill the decedent, or had any motive other than a desire to do their jobs. Although Plaintiffs argue that the decedent was not armed and never said anything to the Officers, Plaintiffs have not presented any evidence that the Officers acted for purposes other than legitimate law enforcement and simply wanted to punish or harass

the decedent. The decedent did not have to be armed or say anything to the Officers to render the Officers' actions reasonable. The evidence shows that the decedent engaged in multiple actions that posed a perceived or an imminent threat to the Officers' safety, including the use of the vehicle as a potential weapon and the frequent reaching on the sides of his seat despite the Officers' orders to the contrary. Accordingly, summary judgment is granted as to the substantive due process claims.

B. State Law Claims

Defendants also move for summary judgment on Plaintiffs' state law claims for battery, negligence, and violation of the Bane Act.

This court has supplemental jurisdiction over any claim that forms "part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). "[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding[ ], then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The court may, in its discretion, decline to exercise supplemental jurisdiction if the federal claim has been dismissed. 28 U.S.C. § 1367(c); *see also Gibbs,* 383 U.S. at 726, 86 S.Ct. 1130 ("if the federal claims are dismissed before trial,

even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); *accord Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n.7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) ("in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to extend jurisdiction over the remaining state-law claims").

The only federal claims in this action are those brought pursuant to 42 U.S.C. § 1983. The Court is granting summary judgment in favor of Defendants on all of those claims, and there is nothing unusual about this case that would warrant exercise of supplemental jurisdiction over Plaintiffs' remaining state law claims. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(c)(3).

Conclusion

For the foregoing reasons, Defendants' Motion is granted as to Plaintiffs' claims under 42 U.S.C. § 1983. Because Plaintiffs have expressly stated that they are not "pursuing" their *Monell* claim, their section1983 claims for unlawful detention and denial of medical care, or their claim for false arrest, summary judgment is also granted in favor of Defendants on those claims. Plaintiffs' general objections to the declarations of Officers Wyatt and Ellis as "sham declarations" and on the basis of relevance are overruled as

moot, given that the Court did not rely on the statements made in those declarations. Moreover, Plaintiffs did not provide any explanation or argument in support of the objections, so the bases for them are unclear.

The Court declines to exercise supplemental jurisdiction over Plaintiffs' claims for battery, negligence, and violation of the Bane Act because the Court has granted summary judgment as to all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). The Court therefore dismisses Plaintiffs' state law claims without prejudice. *See* 28 U.S.C. § 1367(d). The Court will enter a Judgment consistent with this order.

IT IS SO ORDERED.