No. _____

In The
Supreme Court of the United States

RAY WHITE, MICHAEL MARISCAL,
and KEVIN TRUESDALE,

Petitioners,

v.

DANIEL T. PAULY, as Personal
Representative of the ESTATE OF SAMUEL PAULY,
and DANIEL B. PAULY, individually,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three New Mexico State Police Officers investigating a "road rage" incident went to the suspect's house on the evening of October 4, 2011. The first two officers arrived and attempted to contact the suspect. As the third officer arrived on scene, someone inside the house shouted "We have guns," and the road rage suspect fired two shotgun blasts at the rear of the house, near one of the officers. The suspect's brother pointed a handgun in the direction of the third officer from the house's front window. The third officer fired his duty weapon, killing the suspect's brother. The questions presented are:

1. Did the Tenth Circuit's panel opinion improperly deny qualified immunity to the officers by considering the validity of the use of force from the perspective of the suspects rather than from the perspective of a reasonable police officer on the scene?

2. Did the panel opinion consider clearly established law at too high a level of generality rather than giving particularized consideration to the facts and circumstances of this case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Tenth Circuit, whose judgment is sought to be reviewed, are:

- Daniel T. Pauly, as Personal Representative of the Estate of Samuel Pauly, and Daniel B. Pauly, individually, plaintiffs, appellees below, and respondents here.
- New Mexico State Police Officers Ray White, Michael Mariscal and Kevin Truesdale, defendants, appellants below, and petitioners here.

The State of New Mexico Department of Public Safety ("NMDPS"), former NMDPS Secretary Gorden E. Eden, Jr., and former New Mexico State Police Chief Robert Shilling were defendants in the underlying action; Secretary Eden and Chief Shilling were dismissed with prejudice from the lawsuit prior to this appeal being taken and NMDPS was not a party on appeal. Consequently, they are not parties to this petition.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ray White, Kevin Truesdale and Michael Mariscal respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel opinion and dissent of the Court of Appeals for the Tenth Circuit is reported at 814 F.3d 1301 and is reprinted in the Appendix hereto, pp. 1-66.

The opinion and dissents of the Court of Appeals for the Tenth Circuit denying rehearing and rehearing *en banc* is reported at 817 F.3d 715 and is reprinted in the Appendix hereto, pp. 116-25.

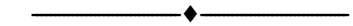
The memorandum opinion of the United States District Court for the District of New Mexico denying the motion for summary judgment and qualified immunity filed by Petitioner Ray White has not been reported. It is reprinted in the Appendix hereto, pp. 67-89.

The memorandum opinion of the United States District Court for the District of New Mexico denying the motion for summary judgment and qualified immunity filed by Petitioners Michael Mariscal and Kevin Truesdale has not been reported. It is reprinted in the Appendix hereto, pp. 90-115.

JURISDICTION

The Tenth Circuit had appellate jurisdiction because the district court's orders denying Petitioners' motions for summary judgment were "final decisions" within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985).

An equally divided Tenth Circuit denied *en banc* review on April 11, 2016. The author of one of the dissenting opinions openly invited this Court to review this case and "clarify the governing law." Accordingly, Petitioners filed this timely petition for writ of certiorari on July 11, 2016. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 petitioners violated their rights under the United States Constitution's Fourth Amendment, which states:

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

STATEMENT OF THE CASE

On the evening of October 4, 2011, Daniel Pauly became involved in a road rage incident with a car driven by two women on the interstate highway going north from Santa Fe, N.M. App. 4. One of the women called 911 and reported a "drunk driver" who was swerving and turning his lights on and off. *Id.* Pauly stopped at the highway's Glorieta, N.M. exit, as did the female drivers. *Id.* Pauly confronted the women at the

exit and one of the women claimed Pauly was "throwing up gang signs." *See id.*

Pauly then drove a short distance to a house that he rented with his brother, Samuel Pauly. App. 4. The house is located in a rural wooded area on a hill behind another house. *Id.*

A New Mexico State Police dispatcher contacted Officer Kevin Truesdale regarding the 911 call received from the young women. App. 4. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two women about the incident. *Id*. Officers Raymond White and Michael Mariscal were en route to provide Officer Truesdale with back-up assistance. *Id.* The women informed Officer Truesdale about Daniel Pauly's reckless and dangerous driving. *Id.*; App. 73. The women also described Pauly's vehicle as a gray Toyota pickup truck and provided a license plate number. App. 4-5. The dispatcher informed Officer Truesdale that the Toyota was registered to an address on Firehouse Road near the Glorieta off-ramp. App. 5.

Officers Mariscal and White joined Officer Truesdale at the Glorieta off-ramp. App. 5. Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Pauly's version of the incident. *Id.*; App. 73. The officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address, while Officer White should

stay at the off-ramp to prevent Daniel Pauly from circling back and re-entering the Interstate. *See id.*

Officers Truesdale and Mariscal drove a short distance down Firehouse Road and parked their vehicles in front of the main house. App. 5. Both vehicles had their headlights on, and one vehicle had its takedown lights on. *Id.* As the officers got out of their vehicles, they did not see Daniel Pauly's truck at the main house. *Id.*

Officers Truesdale and Mariscal did see a porch light and lights on in another house behind the main house. App. 5. They decided to walk up to the second house, which was the Pauly residence, to see if Daniel's truck was there. *Id.* The officers approached the house cautiously in an attempt to ensure officer safety. App. 6. They used their flashlights periodically until they got close to the front of the house, when Officer Truesdale turned his flashlight on. *Id.* The officers observed Daniel's truck in front of the house and saw two males moving back and forth through the front window. App. 75. They radioed Officer White to notify him they had located the truck, and Officer White left the Interstate off-ramp to join the other officers. *See id.*

Back at the house, the Paulys noticed the flashlights outside, and called out "Who are you?" and "What do you want?" App. 6. The officers responded, "Open the door, State Police, open the door." *See id.* Although Officers Truesdale and Mariscal did not intend to go inside the house, in an attempt to get the brothers to come out and talk with them, one of the officers also

said "Come out or we're coming in." *See* App. 75-76; 76 n.5.

Samuel Pauly retrieved a shotgun and a box of shells for Daniel, and procured a loaded handgun for himself. App. 7. Samuel then went back to the front room, and Daniel went to the back of the house. *Id.* Observing Daniel run towards the back of the house, Officer Truesdale headed to the far back corner of the house. *Id.* Officer Mariscal stayed in front of the house, where he was then joined by Officer White, who had not been present at the Pauly house until this point. *See id.*

Moments after Officer White arrived, from inside the house, one of the Pauly brothers yelled out "We have guns." *Id*. Upon hearing that threat, Officer White took cover behind a short stone wall located fifty feet from the front of the house and drew his duty weapon; Officer White's head and arms remained fully exposed as he kneeled behind the wall. *See id.*; App. 57 n.5. Officer Mariscal took cover behind a Ford pickup truck. App. 7.

Seconds after one of the brothers yelled "We have guns," Daniel Pauly stepped out of the back of the house and fired off both barrels from his shotgun. App. 8. Having heard the two shotgun blasts adjacent to Officer Truesdale's position at the back of the house, Officer White thought that Officer Truesdale had been shot. *See id.*; App. 54 n.1.

Just after hearing Daniel Pauly's shotgun blasts, Officers White and Mariscal saw Samuel Pauly open

the front window and hold his arm out with a handgun, pointing the handgun towards Officer White. App. 8. The District Court found that Officer Mariscal then shot towards Samuel Pauly, missing him. App. 79. Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly, killing him. App. 8. At no time did Officer Truesdale fire, attempt to fire, or utilize any force at all against either of the Pauly brothers.

Petitioners moved the District Court for summary judgment and qualified immunity, arguing that the use of force against Samuel Pauly was objectively reasonable under the tense, uncertain and rapidly-evolving circumstances presented on the night of October 4, 2011. Specifically, Petitioners argued that Officer White's use of deadly force to defend himself was reasonable where, *inter alia*: (1) moments after Officer White arrived on scene, one of the men inside the house suddenly yelled out "We have guns"; (2) seconds later, someone inside the house fired two shotgun blasts near Officer Truesdale's position at the back of the house; (3) given Officer Truesdale's location in relation to the gunshots, Officer White believed Officer Truesdale had just been shot; and (4) a man then aimed a handgun directly at Officer White out the front window of the house.

United States District Judge Kenneth Gonzalez denied Petitioners' summary judgment motions in February of 2014. The District Court found that the record contained disputes of material fact regarding whether Officers Truesdale and Mariscal's conduct prior to the

shooting of Samuel Pauly was reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly. These purported disputes included whether or not (1) the Officers adequately identified themselves; (2) the Pauly brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before firing. App. 83-84. The District Court ruled that a reasonable jury could then find that, under the totality of the circumstances, the Officers' conduct was "immediately connected" to Samuel Pauly arming himself and pointing a handgun at Officer White, and the Officers' conduct reflected "wanton or obdurate disregard or complete indifference" to the risk of an occupant of the house being subject to deadly force in the course of protecting his house and property against threatening and unknown persons. App. 85.

Relying upon the facts as found by the District Court, Petitioners appealed to the Tenth Circuit under the collateral order doctrine. On appeal, a divided Tenth Circuit panel affirmed the District Court. Purporting to "tak[e] the facts as the district court determined them in the light most favorable to plaintiff estate," the panel majority surmised that this case involved

> an officer outside someone's home in the dark of night with no probable cause to arrest anyone and behind the cover of a wall 50 feet away from a possible threat, with no warning shot a man pointing his gun out of his well-lighted window at an unknown person in his

> yard while the man's brother fired protective shots in the air from behind the house.

App. 48. The panel found that "a reasonable jury could find that Officer White was not in immediate fear for his safety or the safety of others." *Id.*

Tenth Circuit Judge Nancy Moritz issued a compelling dissent. *See generally* App. 49-66. Judge Moritz found that, "[e]ven under plaintiffs' version of the facts . . . Officer White's use of deadly force was unquestionably justified." App. 54. Judge Moritz also disagreed with the majority's ultimate conclusion that a reasonable officer in Officer White's position should have understood, based on clearly established law, that (1) he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force; and (2) he was required, under the circumstances, to warn Samuel Pauly to drop his weapon. App. 61-62 (quotation omitted). Ultimately, Judge Moritz concluded that "Officer White did what any objectively reasonable officer in his position would do – respond in kind to the immediate threat of deadly force." App. 65. As such, Judge Moritz concluded that all three Officers were entitled to qualified immunity. *Id.*

Petitioners then sought both rehearing and *en banc* review in the Tenth Circuit. Petitioners' request for panel rehearing was denied. By an equally divided vote of all Tenth Circuit judges who are in regular active service, Petitioners' request for rehearing *en banc* was also denied. As she did with the original panel opinion, Judge Moritz issued a dissent from the denial

of rehearing, noting that the majority opinion flouted the Tenth Circuit's prior "admonitions against second-guessing officers' split-second judgments and defining clearly established law at a high level of generality . . . first by finding Officer White's use of deadly force objectively unreasonable, and second by finding his actions violated clearly established law." App. 125. Judge Harris Hartz joined in Judge Moritz's dissent. App. 123-24.

BASIS FOR FEDERAL JURISDICTION

Respondents filed their complaint in New Mexico state district court. Petitioners, along with all defendants, removed the case to the United States District Court for the District of New Mexico based upon federal question jurisdiction, 28 U.S.C. § 1331. The petitioners sought qualified immunity and summary judgment. The respondents filed a cross-motion for summary judgment. The district court denied petitioners' motions and denied respondents' motion. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit; the Tenth Circuit exercised jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT PANEL'S OPINION CONTRAVENES LONG-STANDING JURISPRUDENCE FROM THIS COURT AND THE CIRCUIT COURTS BY ASSESSING THE USE OF FORCE NOT FROM THE PERSPECTIVE OF A REASONABLE POLICE OFFICER ON THE SCENE, BUT FROM THE PERSPECTIVE OF THE PERSON ASSAULTING THE OFFICER.

Police officers confronted by armed assailants must assess issues of officer safety and the protection of the general public within the confines of the Fourth Amendment. This Court has long required courts to apply an objective reasonableness test when considering whether officers used excessive force, which requires that a court carefully balance the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *See generally Graham v. Connor*, 490 U.S. 386, 395-96 (1989) (internal quotation marks omitted); *see also Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014); *accord Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006). Such a test "is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and no precise or "rigid preconditions" exist for determining when an officer's use of deadly force is excessive. *See Scott v. Harris*, 550 U.S. 372, 382 (2007).

When determining reasonableness in the use of excessive force context a court considers, among other factors: (1) the severity of the suspected crime; (2) whether the suspect posed an immediate threat to the safety of officers; and (3) the suspect's degree of resistance. *See*, *e.g.*, *Graham*, 490 U.S. at 396; *Fogarty v. Gallegos*, 523 F.3d 1147, 1160 (10th Cir. 2008); *see also McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009) ("[i]n determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate.").

It is well settled that excessive force evaluations and judgments of officer decisions regarding safety in the field should not be evaluated from the perspective of judges sitting in the comfort and peace of their chambers with 20/20 hindsight, but rather from the perspective of the officer in the field. *See generally Saucier v. Katz*, 533 U.S. 194, 209 (2001). The use of force is to be "assessed from the perspective of a reasonable officer on the scene making a split-second judgment under tense, uncertain, and rapidly evolving circumstances without the advantage of 20/20 hindsight." *See Burgess v. Fischer*, 735 F.3d 462, 473 (6th Cir. 2013); *accord Graham*, 490 U.S. at 396. This Court has cautioned judges against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*,

132 S.Ct. 987, 991-92 (2012). The Court must consider only the facts known to the officer "when the conduct occurred." *Saucier*, 533 U.S. at 207.

This Court recently reiterated that, under 42 U.S.C. § 1983, the plaintiff must show that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2470 (2015). This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time. *Id.* (citing *Graham*, *supra*, 490 U.S. at 396). Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. *Kingsley*, 135 S.Ct. at 2473 (citing *Graham*, 490 U.S. at 396). Of course, this list of factors is not exclusive, and merely illustrates the types of objective circumstances potentially relevant to a determination of excessive force. *Kingsley*, 135 S.Ct. at 2473. While much of *Kingsley*'s holding pertains only to due-process issues that arise in the context of operating a detention facility, the aspects cited here would apply to excessive-force claims against police officers regardless of whether the purported violation occurred during an arrest or during pretrial detention. *See*, *e.g.*,

Ondo v. City of Cleveland, 795 F.3d 597, 610 n.5 (6th Cir. 2015).

Against the well-established legal backdrop set forth above, the Tenth Circuit took precisely the opposite view of the law. Instead of examining the incident underlying this case from the perspective of a reasonable officer on the scene, the Tenth Circuit panel took the opposite tack, viewing the facts from the perspective of Daniel and Samuel Pauly. In so doing, the Tenth Circuit ignored this Court's well-established legal guidance and its own precedent. Its failure to follow established precedent is reversible error.

The Tenth Circuit's panel opinion specifically focused on issues such as whether the Pauly brothers could hear the Officers identify themselves as State Police officers, and whether the Pauly brothers could see the Officers considering the ambient light and other light sources. The panel's opinion also focused on the brothers' fear that the Officers were in fact assailants from the road rage incident, notwithstanding the Officers' clear and unmistakable identification of themselves as "State Police." In doing so, the panel opinion requires officers to determine what their assailants perceive before responding to a threat, a burden that has never been imposed upon police officers by this Court.

Viewed consistently with this Court's precedent, Officer White's use of force on Samuel Pauly was plainly and unequivocally reasonable. Officer White was confronted with one man pointing a gun at him

after another man had just fired two shotgun blasts which he believed had hit his partner and after someone in the house had yelled "We have guns." Despite these uncontroverted facts, the panel opinion appears to read into this Court's existing case law the requirement that police officers must witness or perceive that someone (such as a fellow officer or member of the public) was actually hit by the suspect's shot, not just that they were shot at. App. 8 n.3; *see also* App. 33-34. Rather than asking whether Officer White made a reasonable decision, the Tenth Circuit asked whether he made the *right* decision based upon information he did not have.

Instead of considering the significance of those threats to a reasonable officer on the scene, the panel below labored to downplay the risk presented by the Pauly brothers: "Because it was objectively reasonable under the circumstances about which the officers were aware that the brothers might believe the officers were intruders, a reasonable jury could find that it was foreseeable the brothers would arm themselves in defense of their home as permitted by New Mexico state law." App. 24; *see also* App. 48.

The panel's rationalization of the Paulys' actions is misguided for several reasons. First, whether or not the Paulys actually feared that the Officers were "intruders" is irrelevant; they had already threatened the Officers by shouting "We have guns" and by firing two shotgun blasts. Of course, under clearly established precedent (including that of the Tenth Circuit), once Samuel Pauly visibly aimed a handgun towards Officer

White during the encounter, Officers White and Mariscal did not have the luxury of waiting to see if Samuel Pauly would actually fire upon Officer White; the Officers had to take the potential threat seriously. *See*, *e.g.*, *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force."); *cf. Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best"). Indeed, in *Scott*, an officer's use of potentially lethal force was deemed objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians *who might have been present*, to other civilian motorists, *and to the officers involved*" (emphasis supplied). *Scott*, 550 U.S. at 384. The panel's opinion is quite clearly inconsistent with the wealth of authority supporting the reasonableness of Petitioners' actions when confronted by Samuel Pauly pointing a gun in their direction.

A. THE TENTH CIRCUIT DECISION STANDS IN OPPOSITION TO ITS OWN AND OTHER CIRCUITS' LONG-STANDING PRECEDENT ESTABLISHING THAT A POLICE OFFICER IS ENTITLED TO QUALIFIED IMMUNITY WHERE, WHILE REASONABLY FEARING FOR HIS SAFETY AND THE SAFETY OF OTHERS, THE OFFICER USES DEADLY FORCE IN RESPONSE TO AN APPARENT THREAT

This case warrants review because, under clearly established case law from this Court and from across the Circuit Courts, the actions of Officers Ray White, Michael Mariscal and Kevin Truesdale were reasonable under the circumstances. The Tenth Circuit's denial of qualified immunity stands in contrast to this Court's precedent, the Tenth Circuit's own precedent, and the precedent of other circuits.

Under the Tenth Circuit's own precedent, deadly force is "justified under the Fourth Amendment if a reasonable officer in Defendants' position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others" (emphasis omitted). *Larsen*, *supra*, 511 F.3d at 1260. Police officers may use deadly force to stop an assailant before the assailant fires a shot or otherwise attempts to use a weapon. *See*, *e.g.*, *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1317-18 (10th Cir. 2009) (officer justified in shooting armed suspect where suspect was moving a gun up and down and had previously aimed the

weapon at officers, even where, at the moment the officer fired the fatal shot, the suspect was pointing the gun towards his own head and not towards the officer); *Larsen*, 511 F.3d at 1260 (officer justified in shooting man with knife raised even if man did not make stabbing or lunging motions towards him, as a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions' ") (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)); *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995) (use of deadly force reasonable where suspect aimed pistol in officer's direction).

This is consistent with the law of other circuits. *See*, *e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (*en banc*) ("where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force"). "An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). When deadly force is used, "the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis." *Cole v. Carson*, 802 F.3d 752, 758 (5th Cir. 2015). The panel opinion below not only diverges immensely from the Tenth Circuit's own jurisprudence, it also creates a split with other circuits' approach to analyzing the use of deadly force by police officers.

In *Estate of Larsen v. Murr*, *supra*, the Tenth Circuit affirmed the grant of qualified immunity to two officers who shot and killed a knife-wielding man who had called 911 threatening to "kill someone or himself." *Larsen*, 511 F.3d at 1258. Standing at a distance of twenty feet from the officers, Larsen lifted the knife above shoulder-level and pointed it toward them. *Id.* at 1258, 1260-61. After commanding him to drop the knife, one of the officers fired twice at Larsen, killing him. *Id.* at 1258-59. Notably, even where Larsen stood twenty feet from the officers when he took his first step, the officers were outside and had the ability to safely retreat to avoid any need to use deadly force, no other people were at risk, and where Larsen would have to negotiate steps, hedges, and other obstacles before reaching the officers, the Tenth Circuit found that the officers were entitled to qualified immunity. *See generally id.* at 1262-64.

Similarly, in *Wilson v. Meeks*, the Tenth Circuit found that the officer was entitled to qualified immunity, reasoning that the confrontation leading to the fatal shooting "transpired in less than a minute," the plaintiffs failed to produce evidence to rebut the officer's assertion that the decedent aimed a handgun at the officer, and "[a]ny police officer in [the officer's] position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction." *Wilson*, 52 F.3d at 1549, 1554. As was the officer in *Wilson*, Officer White was in danger of being shot: the uncontroverted evidence was that

White knelt behind a rock wall, resting his arms on top of it as he pointed his gun in the direction of the Pauly house while his head and arms remained fully exposed. *See* App. 43; *see also* App. 57 n.5. As in *Wilson*, any reasonable officer in the position of either Officer White or Mariscal would reasonably assume his life to be in danger when confronted with a man pointing a handgun out a window in the officer's direction (especially within the context of another man having just yelled "We have guns" and firing off both barrels of a 12 gauge shotgun near the location of the third officer).

In *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), an officer pushed a young man to the ground that he suspected of illegally carrying a gun. The suspect eventually brandished a gun. The officer, still pinning the suspect to the ground, told him to drop the gun, and in response the suspect threw the gun over the officer's shoulder. *Id.* at 763. Five seconds later, the officer fired two shots at the suspect, killing him. *Id.* at 764. Nonetheless, the Sixth Circuit affirmed the district court's decision to grant qualified immunity to the officer, holding that the officer's actions were not unreasonable. Noting that the suspect initially had his finger on the trigger of a gun (posing a significant threat to the officer and others), the Sixth Circuit reasoned that "[w]hile [the officer]'s decision to shoot [the suspect] after he threw his weapon away may appear unreasonable in the 'sanitized world of our imagination,' [the officer] was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable."

Mullins, 805 F.3d at 767 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996)). Based upon a host of cases from various circuits, the Court concluded that "[w]hile hindsight reveals that [the suspect] was no longer a threat when he was shot," officers should not be denied qualified immunity "in situations where they are faced with a threat of severe injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Mullins*, 805 F.3d at 767-68 (collecting cases).

Similarly, in *Quiles v. City of Tampa Police Dep't*, 596 F. App'x 816 (11th Cir. Jan. 5, 2015) (unpublished) (per curiam), the Eleventh Circuit held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of deadly force was reasonable even though the suspect "was running away . . . when he was shot and had not threatened definitely the officers with a gun." *Quiles*, 596 F. App'x at 819. Here, the decedent actually had a gun pointed at two of the Petitioner Officers, only moments after his brother had fired two shotgun blasts in the proximity of the third.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his

sides. The victim had not brandished a firearm and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position – with [the victim] continuing toward him – to verify which version was true." *Loch*, 689 F.3d at 966-67. Again, in the present case, the decedent was in fact armed, and had his gun aimed at Officer White.

Strikingly, the Majority opinion acknowledged that "this case presents a unique set of facts and circumstances, particularly in the case of Officer White who arrived late on the scene and heard only 'We have guns,' . . . before taking cover behind a stone wall fifty feet away from the Pauly's residence." App. 31. However, the Majority repeatedly refers to Daniel Pauly's two shotgun blasts as "warning shots" or "protective shots," *see* App. 7-8, 48, and notes that the Pauly brothers subjectively believed that the Officers might have been "intruders related to the prior road rage altercation." App. 6. Neither of these purported facts – that the Pauly brothers surmised that the officers were intruders notwithstanding the officers being in uniform and having loudly identified themselves as State Police officers, or that the two shotgun blasts fired near Officer Truesdale were mere "warning shots" could have been readily apparent to Officer White when he arrived on the scene.

The Tenth Circuit's panel opinion consequently requires police officers to divine exactly what suspects

are thinking when the suspects are threatening or firing upon them, despite the Tenth Circuit having previously held that "qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat." *Wilson v. Meeks*, *supra*, 52 F.3d at 1553-54 (rejecting plaintiffs' contention that the way decedent was holding his gun suggested he intended to surrender: "the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life"); *see also Bell v. City of East Cleveland*, 125 F.3d 855, 1997 WL 640116, *3 (6th Cir. Oct. 14, 1997) (unpublished) ("In determining whether the use of deadly force was justified, the relevant consideration 'is whether a reasonable officer in [Defendants]' shoes would have feared for his life, not what was in the mind of [the decedent] when he turned around with the gun in his hand."). The panel opinion directly contravenes this Court's mandate that the facts must be viewed from the vantage point of a reasonable police officer on the scene, and that only the manifest intentions of the suspect are to be considered.

Contrary to the panel opinion's assertion regarding Samuel Pauly's manifest intentions being "somewhat neutral," App. 36, the Paulys' manifest intentions to an objectively reasonable officer in Officer White's position were both plain – and plainly hostile – from the time White arrived at the scene. The Paulys' intentions as manifested consisted in threatening "We have

guns," followed moments later by two shotgun blasts adjacent to Officer Truesdale at the back of the house, which Officer White believed were fired at Truesdale, and Samuel Pauly aiming his handgun directly towards Officer White from the front window. The Paulys' manifest intentions were not "somewhat neutral." A reasonable police officer would have believed the Paulys' actions to have been objectively hostile.

The Tenth Circuit's panel opinion violates its own and this Court's precedent – that the scene must be viewed from the perspective of the officer based on facts known to the officer – by failing to consider the facts from Petitioners' perspective. Instead, with the benefit of 20/20 hindsight, the panel judged Petitioners' conduct to be unreasonable based on facts not available to them, i.e., that the Paulys were afraid and only intended to fire "warning" or "protective" shots at the suspected "intruders." As noted above, Officer White fired shots only seconds after seeing Samuel Pauly point a gun in his direction, and without knowing any of what had transpired prior to his arrival. "Within a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed." *Untalan v. City of Lorain*, 430 F.3d 312, 315 (6th Cir. 2005).

The panel opinion repeatedly emphasized two facts in order to arrive at its conclusion that Officer White did not have probable cause to believe Samuel Pauly posed an immediate threat: one, that Officer White was positioned fifty feet away when he fired, and

two, that Officer White fired from a position of some cover. *See*, *e.g.*, App. 31, 33, 34, 36, 42, 45, 48, 53-55. However, with regard to distance, there is no clearly established law – and indeed, Petitioners are unaware of any published case law which suggests – that a distance of fifty feet is in any way relevant when the suspect is armed with a firearm as opposed to a knife or similar weapon. From the perspective of a reasonable officer, an assailant fifty feet away and armed with a gun is far more threatening than one twenty feet away and armed with a knife. *See Larsen*, *supra*, 511 F.3d at 1258, 1260-61.

With regard to cover, the Tenth Circuit has previously "suggested that an officer's failure to take cover is 'at issue only insofar as it [bears] upon whether the officer's life [is] truly in danger.'" *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (quoting *Wilson*, 52 F.3d at 1554). Here, the fact that Officer White ran to the nearest available cover simply suggests that his life was "truly in danger," and, in fact, forms part of the totality of circumstances confirming the immediacy of the threat. Officer White's split-second decision to seek cover from threatening suspects should not be held against him when evaluating the reasonableness of his subsequent use of force, and again, Appellants are unaware of any prior case law which does so. Had Officer White failed to seek cover, that fact would surely be asserted to show he exaggerated the nature of the threat, lending credence to the Dissent's astute observation that the Majority's reasoning on this point "seems the epitome of 'second guessing.'" App. 58.

Finally, Appellants note that it is undisputed that the upper portion of Officer White's body (and particularly, his head) remained exposed throughout this encounter – this is an uncontroverted fact, and does not require that any particular reasonable inference be drawn in favor of the non-movant. *See* App. 42-43; *see also* App. 57 n.5. As such, the panel's emphasis on Officer White's cover is misplaced and inconsistent with prior opinions from both this Court and the Circuit Courts.

B. THE OFFICERS' FAILURE TO PROVIDE ANOTHER WARNING TO THE PAULY BROTHERS PRIOR TO DEFENDING THEMSELVES IS INSUFFICIENT TO DENY QUALIFIED IMMUNITY

The District Court and the Tenth Circuit identified as an issue of disputed material fact whether it was feasible for Officer White to have warned Samuel Pauly before shooting him. App. 39-40, 83-84. The panel opinion also faulted Officer White for failing to order Samuel Pauly to drop his pistol in the four to five seconds White had to process the threat and respond. App. 38-39, 49. This Court has cautioned that, in excessive force situations, a warning need only be given "*where feasible*" (emphasis supplied). *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *see also Thomson v. Salt Lake Cnty.*, *supra*, 584 F.3d at 1321 (rejecting plaintiff's argument that unleashing police dog without a warning created the need to use deadly force and concluding "[a] warning is not invariably required even

before the use of deadly force"); *Wilson*, *supra*, 52 F.3d at 1554 (rejecting plaintiffs' argument that the defendant officer "must verbally warn a suspect before using lethal force").

Officers facing armed assailants "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Kingsley*, *supra*, 135 S.Ct. at 2474 (quoting *Graham*, 490 U.S. at 397); *cf. Pasco v. Knoblauch*, 566 F.3d 572, 580 (5th Cir. 2009) ("it would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase"). Given the extremely short interval between the Paulys' objectively threatening actions and White's use of force, a warning was not clearly mandated. Not only was giving a warning not feasible, even if it had been feasible, Officer White's failure to give such a warning under the stressful, rapidly evolving circumstances he faced (in a matter of seconds Daniel Pauly firing off both barrels of his shotgun and Samuel Pauly aiming a handgun directly at him) would not rise to the level of recklessness, nor would it render his use of force unconstitutional.

II. THE PANEL OPINION IMPROPERLY DENIES QUALIFIED IMMUNITY BY ASSESSING THE OFFICERS' CONDUCT AT A HIGHLY GENERALIZED LEVEL

The Tenth Circuit's panel opinion also fails to heed numerous admonitions from this Court about defining

"clearly established" constitutional rights too generally. This Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. *See*, *e.g*., *Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015); *Carroll v. Carman*, 135 S.Ct. 348, 350-52 (2014) (per curiam); *Lane v. Franks*, 134 S.Ct. 2369, 2383 (2014); *Wood v. Moss*, 134 S.Ct. 2056, 2070 (2014); *Plumhoff v. Rickard*, *supra*, 134 S.Ct. at 2023-24; *Stanton v. Sims*, 134 S.Ct. 3, 7 (2013). Because of the importance of qualified immunity "to society as a whole," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), this Court often corrects lower courts when they wrongly subject individual officers to liability. *See City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 n.3 (2015) (collecting cases); *see also Wesby v. Dist. of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) ("in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals") (collecting cases), *petition for cert. filed* June 8, 2016; *cf. Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016) ("th[is] Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law").

Strikingly, the panel below gave scant consideration to this Court's recent opinion in *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam), a deadly force case,

simply concluding that *Mullenix* was distinguishable "because there were clearly other cases on point there that had rejected the argument used to form the basis of the Fifth Circuit's decision." App. 46-47. In *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), the Tenth Circuit affirmed the denial of qualified immunity to police officers in an excessive force case. However, in *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), this Court vacated the Tenth Circuit's opinion and remanded the case for further consideration in light of *Mullenix*. *See also Middaugh v. City of Three Rivers*, 2015 WL 6457994 (6th Cir. Oct. 26, 2015) (unpublished) (affirming denial of qualified immunity to police officers in due process/wrongful seizure case), *vacated and remanded*, *Piper v. Middaugh*, No. 15-964 (June 6, 2016) (slip op.). Over the past several months, this Court has signaled that *Mullenix* should be applied broadly to Section 1983 claims made against police officers. The panel below applied this Court's opinion too narrowly, warranting review and reversal.

This Court's recent precedent has generally expanded the qualified immunity defense, beginning with *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), where this Court reformulated the qualified immunity standard to require "*every* 'reasonable official . . . [to] understand that what he is doing violates that right.'" *Ashcroft*, 131 S.Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Qualified immunity now protects "all but the plainly incompetent or those who knowingly violate the law."

Mullenix, 136 S.Ct. at 308. Absent from this Court's recent statements of qualified immunity law is any reference to the plaintiff's countervailing interests in vindicating constitutional rights and compensation for constitutional injury, which this Court previously recognized in *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 813-14.

An officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Kingsley v. Hendrickson*, *supra*, 135 S.Ct. at 2474 (quoting *Saucier v. Katz*, *supra*, 533 U.S. at 202). The plaintiff's burden to rebut a showing of qualified immunity is a demanding standard. *See Kingsley*, 135 S.Ct. at 2474-75; *see also Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). It is one which can only be met by assessing the specific evidence and context of the case, and not by taking refuge in lofty principles wholly divorced from the realities actually confronted by police officers.

The correct inquiry is "whether the violative nature of *particular conduct* is clearly established" (emphasis supplied). *Ashcroft v. al-Kidd*, *supra*, 131 S.Ct. at 2084. "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Id.* at 2083; *see also Mullenix*, 136 S.Ct. at 308; *Stanton*, *supra*, 134 S.Ct. at 5. To find the existence of a clearly established right, the court must "conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent,

would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right." *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 639 (3d Cir. 2015).

This Court has repeatedly warned the lower courts not to analyze clearly established law at too high a level of generality. *See Mullenix*, 136 S.Ct. at 311; *see also City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1775-76 (2015); *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999); *Anderson v. Creighton*, *supra*, 483 U.S. at 639. In all Section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S.Ct. at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (a plaintiff cannot rely on "general, conclusory allegations" or "broad legal truisms" to show that a right is clearly established) (quotations omitted). Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012); *see also Spady*, 800 F.3d at 638 (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context").

In the present case, the panel opinion stated that "all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and

its 'reasonableness' standard." App. 15 (quoting *Graham v. Connor*, *supra*, 490 U.S. at 396). The panel also noted that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." App. 28 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks omitted)). Relying on, *inter alia*, *Graham*, the panel concluded that "a reasonable officer in Officer White's position should have understood, based on clearly established law, that . . . he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force." App. 48-49.

The Tenth Circuit thus defined the right at issue as simply the Fourth Amendment right to be free from the excessive use of force absent a threat or danger. This formulation lacks the required level of specificity and does not address the question that needs to be answered in this context because it does not describe the specific situation that the officers confronted. *See Estep v. Mackey*, 2016 WL 574029, *3 (3d Cir. Feb. 12, 2016) (unpublished) (citing *Mullenix*, 136 S.Ct. at 309). Indeed, a prior Tenth Circuit panel criticized this type of generic formulation of the law, noting that "[w]hile this general principle is correct, it still begs the question of what constitutes a sufficient threat." *Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009). If qualified immunity depends on the application of general principles, an officer's individual liability will likely hinge on an arbitrary choice among various general

propositions. In this case, for instance, the court could have found clear support for the Officers' use of force in the general standard of *Tennessee v. Garner*: "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. The actions of the Pauly brothers gave Officer White probable cause to believe that he and Officers Mariscal and Truesdale faced a risk of serious injury or death.

The Tenth Circuit panel fell back on general principles in holding that an officer may not use deadly force unless he or she faces the immediate threat of physical harm. Contrary to what the panel found, *see* App. 28-29, even *Graham v. Connor* is itself cast at a high level of generality and therefore cannot provide clear notice in most cases. *See*, *e.g.*, *Brosseau*, *supra*, 543 U.S. at 199 (holding that the court of appeals erred when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*"). As the panel below acknowledged, this case presents a unique set of facts and circumstances; as in *Brosseau*, "[t]he present case is far from the obvious one" that can be decided upon generalities. *See id.* Consequently, the panel's reliance on *Graham* to define the clearly established law governing this case directly contravenes this Court's warnings. *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft v. al-Kidd*, *supra*, 131 S.Ct. at 2084).

By contrast, other Circuits have become far more precise in their definition of clearly established rights

at issue in particular cases. *See*, *e.g.*, *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and nonviolent resistance to a lawful seizure") (citing *Hagans v. Franklin Cnty. Sheriff's Office*, *supra*, 695 F.3d at 509 ("[d]efined at the appropriate level of generality – a reasonably particularized one – the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force")).

Contrary to what was suggested by the Tenth Circuit panel below, the law was not clearly established that Officer White could not use deadly force in the circumstances actually confronting him. *See Estate of Armstrong*, 810 F.3d at 908 (citing *Mullenix*, 136 S.Ct. at 308; *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012)). Officer White, as well as the other Officers, had the right to rely on this Court's guidance as well as the Tenth Circuit's prior published opinions in *Larsen*, *Wilson* and *Thomson*, among others. Each of those opinions held that police officers were entitled to qualified immunity under similar circumstances as faced by the Officers when confronted by an armed Samuel Pauly. Given the long-standing state of the law, it is impossible for the plaintiff estate to show any excessive-force claim was clearly established as a matter of law.

In sum, the Tenth Circuit's decision below ignores this Court's clear dictates. The Tenth Circuit denied qualified immunity despite the wealth of clearly established Fourth Amendment excessive force jurisprudence by this Court and the Circuit Courts. For every police officer on the street, the clear articulation of governing law makes this a matter of exceptional importance such that review and reversal is necessary.

CONCLUSION

The Tenth Circuit's majority decision in this case muddies decades' worth of clearly-established jurisprudence on qualified immunity in Fourth Amendment excessive force cases. As astutely noted by Judge Nancy Moritz in her opinion dissenting from the denial of Petitioners' request for rehearing *en banc*, the panel's opinion

> requires an officer who has taken some form of cover to hesitate and call out a warning before using deadly force – even as a suspect points a gun directly at that officer, even as a second suspect is loose and has fired shots near a second officer, and even as a third officer has already shot and missed the suspect pointing the gun at the first officer.

App. 125. "The majority's fundamentally flawed decision doesn't just violate existing precedent; it creates new precedent with potentially deadly ramifications for law enforcement officers in" the Tenth Circuit. *Id.*

Moreover, as Judge Harris Hartz correctly recognized, there is no

> clearly established law that suggests, much less requires, that an officer in that circumstance who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall, hoping that no one will be aiming in his direction when he decides to look around or move.

App. 124. Judge Hartz openly invited this Court to review this case and "clarify the governing law." *Id.*; *cf. Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 496-97 (6th Cir. 2015) (McKeague, J., dissenting) (lamenting that copyright law with respect to garment design "is a mess" such that "either Congress or the Supreme Court (or both) must" provide the lower courts with "much-needed clarification" on the matter), *cert. granted*, *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866 (May 2, 2016).

This Court should accept Judge Hartz's invitation to clarify the law governing the proper application of qualified immunity and reaffirm the clearly established principle that a police officer may use force – even deadly force – in response to a reasonably perceived threat.

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DANIEL T. PAULY, as personal representative of the estate of Samuel Pauly, deceased; DANIEL B. PAULY, Plaintiffs-Appellees, v. RAY WHITE; MICHAEL MARIS-CAL; KEVIN TRUESDALE, Defendants-Appellants, and STATE OF NEW MEXICO, DEPARTMENT OF PUBLIC SAFETY, Defendant.	No. 14-2035

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:12-CV-01311-KG-WPL)

(Filed Feb. 9, 2016)

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Lee R. Hunt of Lee Hunt Law, LLC, Santa Fe, New Mexico (Daniel J. O'Friel and Pierre Levy of O'Friel and Levy, P.C., with him on the brief), for Plaintiffs-Appellees.

Before **PHILLIPS**, **SEYMOUR**, and **MORITZ**, Circuit Judges.

SEYMOUR, Circuit Judge.

On a dark and rainy night in October 2011, Samuel Pauly was shot to death through the window of his rural New Mexico home by one of three state police officers investigating an earlier road rage incident on Interstate 25 involving his brother. On behalf of Samuel Pauly's estate, his father filed a civil rights action against the three officers, the State of New Mexico Department of Public Safety, and two state officials, claiming defendants violated his son's Fourth Amendment right against the use of excessive force.[1] The officers moved for summary judgment, asserting qualified immunity. The district court denied their motions, and they appeal. We affirm.

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[1] The father also asserted state law claims for negligent training (Count Two), wrongful death under the New Mexico Tort Claims Act (Count Three), and violation of New Mexico Constitution, art. II, § 10 (Count Four). Samuel Pauly's brother, Daniel Pauly, asserted a claim for loss of consortium (Count Five). The parties stipulated to dismissal of Count Two. Only the excessive force claim is at issue in this appeal.

I

Background

In reviewing an interlocutory appeal from the denial of qualified immunity, "we 'take, as given, the facts that the district court assumed when it denied summary judgment.'" *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012) (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). To be sure, "[w]e may review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right, but we may not consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove." *Id.* (internal quotation marks omitted). When we recite the facts of the case, "we view the evidence in the light most favorable to the non-moving party." *Weigel v. Broad*, 544 F.3d 1143, 1147 (10th Cir. 2008) (internal quotation marks omitted). Accordingly, the following facts are taken directly from the material facts section in the district court orders denying qualified immunity,[2] where the court noted that its "recitation of material facts and reasonable references reflect the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in the motions for summary judgment." Aplt. App. at 693.

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[2] The district court's recitation of the facts is identical in the order denying qualified immunity to Officers Mariscal and Truesdale and the separate order denying qualified immunity to Officer White. We therefore cite primarily to the latter order when setting out the facts.

A. Facts

The incidents underlying this action started the evening of October 4, 2011, when Daniel Pauly became involved in a road rage incident with two females on the interstate highway going north from Santa Fe, New Mexico. One of the women called 911 to report a "drunk driver," claiming the driver was "swerving all crazy" and turning his lights off and on. *Id.* at 694. The women then started to follow Daniel on Interstate 25, apparently tailgating him.

Daniel pulled his truck over at the Glorieta exit, as did the female driver of the car. Daniel felt threatened by the women and asked them why they were following him with their bright lights on. During this confrontation one of the women claimed Daniel was "throwing up gang signs." *Id.* He then left the off-ramp and drove a short distance to the house where he lived with his brother, Samuel. The house is located in a rural wooded area on a hill behind another house.

At some point between 9:00 and 10:00 p.m., a state police dispatcher notified Officer Truesdale about the 911 call. Officer Truesdale proceeded to the Glorieta off-ramp to speak to the women about the incident. Daniel had already left when Officer Truesdale arrived on scene. Officers Mariscal and White were also on their way to the off-ramp to assist Officer Truesdale. The women told Officer Truesdale that Daniel was driving recklessly. They described his vehicle as a gray Toyota pickup truck and provided dispatch with his

license plate number. Dispatch notified Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road near the Glorieta off-ramp.

The women then went on their way, and at that point "any threat to [them] was over." *Id.* at 676. Officers White and Mariscal arrived to join Officer Truesdale. The officers all agreed that there was not enough evidence or probable cause to arrest Daniel, and that no exigent circumstances existed at the time. Nevertheless, the officers decided to try and speak with Daniel to get his side of the story, "to make sure nothing else happened," and to find out if he was intoxicated. *Id.* at 677. Officers Truesdale and Mariscal decided they should take separate patrol units to the Firehouse Road address in Glorieta to see if they could locate Daniel's pickup truck. Officer White stayed at the off-ramp in case Daniel returned. Although it was dark and raining by that time, none of the officers were wearing raincoats.

Officers Mariscal and Truesdale proceeded to the Firehouse Road address and parked along the road in front of the main house. Both vehicles had their headlights on and one vehicle had its takedown lights on, but neither vehicle had activated its flashing lights. The officers did not see Daniel's truck at the main house but behind it they noticed a second house with its lights and porch lights on. They decided to approach the second house in an attempt to locate Daniel's pickup truck. As they walked towards that house, the officers did not activate their security lights.

To maintain officer safety, Officers Mariscal and Truesdale approached the second house in a manner such that neither brother knew the officers were at the property. The officers did not use their flashlights at first, and then only used them intermittently. Officer Truesdale turned on his flashlight as he got closer to the front door of the brothers' house. Through the front windows, the officers could see two males moving inside the house. When they located Daniel's Toyota pickup truck, they contacted Officer White to so advise him. Officer White then left to join them.

At roughly 11:00 p.m., the brothers could see "through the front window two blue LED flashlights, five or seven feet apart, coming towards the house." *Id.* at 678. Daniel could not tell who was holding the flashlight approaching the house because of the dark and the rain but he feared it could be intruders related to the prior road rage altercation. "[I]t did not enter Daniel Pauly's mind that the figures could have been police officers." *Id.* The brothers hollered several times, "Who are you?" and, "What do you want?" *Id.* In response, the officers laughed and said: "Hey, (expletive), we got you surrounded. Come out or we're coming in." *Id.* Officer Truesdale also shouted once, "Open the door, State Police, open the door," while Officer Mariscal stated, "Open the door, open the door." *Id.* at 678-79. Daniel did not hear anyone say "State Police" until after the entire altercation was over. *Id.*

Fearing for their lives and the safety of their dogs, the brothers decided to call the police to report the

unknown intruders. Before Daniel could call 911, however, he heard someone yell: "We're coming in. We're coming in." *Id.* at 679. Believing that an invasion of their home was imminent, Samuel retrieved a loaded handgun for himself as well as a shotgun and ammunition for Daniel. Daniel told his brother he would fire some warning shots while Samuel went back to the front of the house. One of the brothers then hollered, "We have guns." *Id.* at 679. The officers saw an individual run to the back of the house, so Officer Truesdale proceeded to position himself towards the rear of the house. He then shouted, "Open the door, come outside." *Id.*

While Officers Truesdale and Mariscal were attempting to get the brothers to come outside, Officer White arrived at the Firehouse Road address and approached the house in the back, using his flashlight periodically. He saw individuals moving inside the house and arrived just as one of the brothers said: "We have guns." *Id.* at 680. Officer White testified in his deposition that when he heard this statement he immediately drew his weapon and took cover behind a stone wall fifty feet away from the front of the brothers' house. *Id.* at 221; *see also id.* at 680. Officer Mariscal also took cover behind a pickup truck, while Officer Truesdale remained in his position at the back of the house.

Because of the prior threatening statements made by Officer Truesdale and Mariscal, Daniel did not feel comfortable stepping out of the front door to fire warning shots. But a few seconds after the officers heard,

"We have guns," *id.* at 680, Daniel stepped partially out of the back door and fired two warning shots while screaming loudly to scare anyone off. Officer White thought Officer Truesdale had been shot after hearing the two shotgun blasts.[3] A few seconds after Daniel fired the warning shots, Officer Mariscal and White noticed Samuel open the front window and point a handgun in Officer White's direction. Officer Mariscal testified he immediately shot at Samuel but missed. "Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel" from his covered position fifty feet away. *Id.* at 681. The entire incident took less than five minutes.

B. Procedural History

Plaintiff Daniel T. Pauly, as the personal representative of the Estate of Samuel Pauly, filed suit against Officers Mariscal, Truesdale, and White, the State of New Mexico Department of Public Safety (NMDPS), and two state officials. He alleged an excessive force claim under 42 U.S.C. § 1983 and several state law claims. Plaintiffs seek compensatory damages, punitive damages, pre- and post-judgment interest, and costs and attorneys' fees on their federal and state law claims. Relevant here is plaintiff estate's

[3] Officer White testified in his deposition that after he heard the shots at the back of the house, "I believed Officer Truesdale had been shot at that point, being that I believed he was at the rear of the residence." Aplt. App. at 223, White dep. at 137. He also admitted, however, that "I did not hear anything that would suggest a person had been hit." *Id.*, White dep. at 139.

§ 1983 claim against all three officers for violating Samuel Pauly's Fourth Amendment right to be free from excessive force.

All three officers moved for summary judgment and raised the defense of qualified immunity with respect to the § 1983 excessive force claim. Defendants analyzed the excessive force claim by reviewing the actions of each deputy individually, not their actions as a whole. They all argued they were entitled to qualified immunity because plaintiff estate could not show Samuel's claimed Fourth Amendment rights were clearly established or violated, and in any event their actions were objectively reasonable.

Specifically, Officer White asserted that when Samuel pointed the gun in his direction, any police officer would have reasonably assumed his life was in danger whether or not Samuel intended to fire, and deadly force was therefore justified under the totality of the circumstances. He contended it was not feasible for him to warn Samuel to drop his weapon.

Officer Truesdale argued it was undisputed that he did not fire his weapon at Samuel Pauly and therefore he could only be liable if his pre-seizure conduct "created the need for deadly force in this incident through his own reckless, deliberate conduct" that "was immediately connected to Officer White's use of force in self-defense." Aplt. App. at 359. He then argued that his actions leading up to the use of force were reasonable and that even if he made mistakes in how he approached the house, none of his conduct preceding

the use of force by Officer White was reckless or deliberate. He further claimed his actions were not the but for or proximate cause of Samuel's death because the brothers' own actions were "independent and unexpected intervening events" amounting to a superseding cause of death that defeated any liability on his part. *Id.* at 363-64.

Officer Mariscal argued that when he saw Samuel point the gun at Officer White, "he was clearly justified in using deadly force in defense of Officer White's life." *Id.* at 392-93. Like Officer Truesdale, Officer Mariscal contended that his actions leading up to the use of force were not reckless or deliberate, and that his preseizure conduct was not the but for or proximate cause of Samuel's death.

The district court issued two orders, denying summary judgment on all claims. In its first order, the court denied Officer White qualified immunity, concluding that "the record contains genuine disputes of material fact regarding whether the officers' conduct prior to the shooting of Samuel Pauly was at the very least reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly." *Id.* at 684. Based on the record, the court also determined that

> it is disputed whether (1) the Officers adequately identified themselves, either verbally or by using a flashlight; (2) the brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before shooting him.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes.

Id. at 684-85. The court made virtually the same determinations in its separate order denying qualified immunity to Officers Truesdale and Mariscal. *Id.* at 703-04.

All officers appeal the denial of their qualified immunity.

II

Jurisdiction

We have jurisdiction under 28 U.S.C. § 1291 to review "all final decisions of the district courts of the United States." Generally, "[o]rders denying summary judgment are . . . not appealable final orders for purposes of 28 U.S.C. § 1291." *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). "The denial of qualified immunity to a public official, however, is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law." *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013); *accord Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). Appealable matters thus involve "disputes about the substance and clarity of pre-existing law," not about "what occurred, or why an action was taken or omitted." *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011).

Accordingly, under our limited jurisdiction we may review "'(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation.'" *Roosevelt-Hennix*, 717 F.3d at 753 (*quoting Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1266-67 (10th Cir. 2013)). "Ordinarily speaking, it is only these latter two questions – and not questions about what facts a jury might reasonably find – that we may consider in appeals from the denial of qualified immunity at summary judgment." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010).

In contrast, we have no interlocutory jurisdiction to review "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 320 (1995). "[T]he Supreme Court [has] indicated that, at the summary judgment stage at least, it is generally the district court's exclusive job to determine which *facts* a jury could reasonably find from the evidence presented to it by the litigants." *Lewis*, 604 F.3d at 1225 (citing *Jones*, 515 U.S. at 313). Thus, "if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated that we usually must take them as true – and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law." *Id.*; *see also Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) ("Our interlocutory jurisdiction is limited to legal questions drawn from facts that are deemed undisputed for appellate purposes.").

To the extent the officers raise only issues of law in their appeals, we have jurisdiction.

III

Applicable Law

A. Section 1983 and Qualified Immunity

Title "42 U.S.C. § 1983 allows an injured person to seek damages against an individual who has violated his or her federal rights while acting under color of state law." *Cillo v. City of Greenwood Village*, 739 F.3d 451, 459 (10th Cir. 2013). "Individual defendants named in a § 1983 action may raise a defense of qualified immunity," *id.*, which "protects 'government officials performing discretionary functions' and shields them from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196, 1199 (10th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "If the plaintiff[s] satisfy[ ] this two-part test, 'the defendant bears the usual burden of a party moving for summary judgment to show that there are no genuine issues of material fact and that he or she is

entitled to judgment as a matter of law.'" *Trask v. Franco*, 446 F.3d 1036, 1043 (10th Cir. 2006) (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004)).

B. Excessive Force

"We review Fourth Amendment claims of excessive force under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene." *Tenorio v. Pitzer*, 802 F.3d 1160, 1162 (10th Cir. 2015) (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* (quoting *Graham*, 490 U.S. at 396-97). In *Graham*, 490 U.S. at 396, the Supreme Court held "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."

In an excessive force case such as this, we ask "'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'" *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1313 (10th Cir. 2009) (quoting *Graham*, 490 U.S. at

397). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interest at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted); *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) ("[W]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))). Indeed, this balancing test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

"In determining whether an officer's use of force was excessive, many [of our] cases have focused solely on the three factors specifically described in *Graham*." *Id.* (citing *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007)). "However, these three factors were not intended to be exclusive, and the circumstances of a particular case may require the consideration of additional factors." *Id.* When confronted with whether the use of deadly force was reasonable, we have held that "an officer's use of that force is reasonable only 'if a reasonable officer in Defendants' position would have had probable cause to believe that there

was a threat of serious physical harm to themselves or others.'"[4] *Thomson*, 584 F.3d at 1313 (quoting *Estate of Larsen*, 511 F.3d at 1260); *accord Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2007) ("In other words, '[a]n officer's use of deadly force in self-defense is not constitutionally unreasonable.'" (quoting *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 703-04 (10th Cir. 1995))). Moreover,

> In assessing the degree of threat the suspect poses to the officers, we consider factors that include, but are not limited to: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect."

Thomson, 584 F.3d at 1314-15 (quoting *Estate of Larsen*, 511 F.3d at 1260).

In addition, we have held that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own

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[4] "Deadly force is 'force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposefully firing a firearm in the direction of another person . . . constitutes deadly force.'" *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (quoting *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987)).

'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' " *Jiron*, 392 F.3d at 415 (quoting *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995)). To be sure, we "consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force." *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (quoting *Romero*, 60 F.3d at 705 n.5); *c.f., Tennessee v. Garner*, 471 U.S. 1, 8 (1985) ("[I]t is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."). "Mere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983." *Sevier*, 60 F.3d at 699 & n.7.

We recognize that "officers are sometimes 'forced to make split-second judgments' in uncertain and dangerous circumstances," and "[w]hat may later appear to be unnecessary when reviewed from the comfort of a judge's chambers may nonetheless be reasonable under the circumstances presented to the officer at the time." *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005) (quoting *Graham*, 490 U.S. at 395, 396-97). Ultimately, however, "the inquiry is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Estate of Larsen*, 511 F.3d at 1260.

IV

Discussion

"Although we frequently conduct separate qualified immunity analyses for different defendants, we have not always done so at the summary judgment stage of excessive force cases." *Estate of Booker v. Gomez*, 745 F.3d 405, 421 (10th Cir. 2014). Indeed, when appropriate we will consider the officers' conduct in the aggregate. *See, e.g.*, *Lundstrom v. Romero*, 616 F.3d 1108, 1126-27 (10th Cir. 2010); *Fisher v. City of Las Cruces*, 584 F.3d 888, 895-902 (10th Cir. 2009); *York v. City of Las Cruces*, 523 F.3d 1205, 1210-11 (10th Cir. 2008); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). However, we have also analyzed the conduct of each officer individually in excessive force cases at the summary judgment stage. *See, e.g.*, *Casey*, 509 F.3d at 1282-87; *Walker v. City of Orem*, 451 F.3d 1139, 1159-61 (10th Cir. 2006); *Currier v. Doran*, 242 F.3d 905, 919-25 (10th Cir. 2001).

The facts and circumstances of the present case warrant analyzing the conduct of Officer White separately from the other officers, while considering the conduct of Officer Mariscal and Truesdale in the aggregate. Accordingly, we will follow the district court in analyzing the reasonableness of Officers Truesdale's and Mariscal's actions together in one section, and then the conduct of Officer White in a separate section.

A Officers Mariscal and Truesdale

Officers Mariscal and Truesdale argue on appeal that even viewing the facts found by the district court in the light most favorable to plaintiffs and accepting them as true, the officers' actions were objectively reasonable under the circumstances. Specifically, Officer Mariscal argues a reasonable officer in his position would have believed Officer White's life was in danger, and thus his use of force was objectively reasonable. Officer Truesdale contends that since he was at the rear of the house when Officer White shot Samuel Pauly, his use of force is not even at issue. Both Officers claim they cannot be held liable for Officer White's objectively reasonable use of force because neither officers' pre-seizure conduct was reckless nor the proximate cause of Samuel Pauly's death.

1. Pre-seizure conduct and proximate cause

"Section 1983 imposes liability on a government official who 'subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights.'" *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012) (quoting 42 U.S.C. § 1983). We have stated accordingly that "[a]nyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Trask*, 446 F.3d at 1046. "'The requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights.'" *Id.* (quoting

Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990)). To be sure, "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Martinez*, 697 F.3d at 1255.

In other words, Officers Mariscal and Truesdale may be held liable if their conduct immediately preceding the shooting was the but-for cause of Samuel Pauly's death, and if Samuel Pauly's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability. "Foreseeable intervening forces are within the scope of the original risk, and . . . will not supercede the defendant's responsibility." *Trask*, 446 F.3d at 1047 (internal quotation marks omitted). Both officers claim they cannot be the proximate cause of Samuel Pauly's death, even assuming their pre-seizure conduct was negligent or reckless, because "neither officer could have foreseen that the two males inside the residence would suddenly threaten them and open fire," and "[u]nder the circumstances, the brothers' wholly disproportionate and unexpected response constituted superseding events that relieved" the officers from liability. Aplt. Br. at 55. We are not persuaded.

Here, taking the facts and reasonable inferences the district court determined, the brothers were in their home when Officers Truesdale and Mariscal approached it at night when it was raining and made threatening comments about intruding into the home to get the brothers. The Supreme Court has long recognized – and continues to recognize – the individual's

constitutional right to use arms to protect his home. *See District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (striking down a District of Columbia statute prohibiting the possession of handguns in the home). The Court stated:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.* Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family . . . would fail constitutional muster.

Heller, 554 U.S. at 628-29 (emphasis added) (footnote, citation, and quotation marks omitted).

In *State v. Boyett*, 144 N.M. 184, 185 P.3d 355, 358-59 (2008), the Supreme Court of New Mexico reiterated that the "[d]efense of habitation has long been recognized in New Mexico," and that "[i]t gives a person the right to use lethal force against an intruder when such force is necessary to prevent the commission of a felony in his or her home." The court explained that "[t]he defense is grounded in the theory that '[t]he home is one of the most important institutions of the state, and has ever been regarded as a place where a

person has a right to stand his [or her] ground and repel, force by force, to the extent necessary for its protection.'" *Id.* at 359 (second and third alteration in original) (quoting *State v. Couch*, 193 P.2d 405, 409, (1946)). Accordingly, "in every purported defense of habitation, the use of deadly force is justified only if the defendant reasonably believed that the commission of a felony in his or her home was immediately at hand and that it was necessary to kill the intruder to prevent the occurrence." *Id.* (citations omitted).

Significantly, the court in *Boyett* recognized it had "never held that entry into the defendant's home is a prerequisite for the defense. On the contrary, the seminal New Mexico case on defense of habitation was clear that, in certain circumstances, it may justify an occupant's use of lethal force against an intruder who is outside the home." *Id.* (citing *State v. Bailey*, 198 P. 529, 534 (N.M. 1921)). Relying on *Bailey*, the court explained that the "defense of habitation justifies killing an intruder who is assaulting the defendant's home with the intent of reaching its occupants and committing a felony against them" precisely because "[p]rotecting a defendant's right to prevent forced entry necessitates that the defense apply when an intruder is outside the home but endeavoring to enter it." *Id.*

The defense is relevant here because, as the district court determined, it is disputed whether the officers "adequately identified themselves" and whether the brothers could see the officers outside the lighted house "considering the ambient light and other light

sources." Aplt. App. at 703. The district court correctly pointed out that "[t]he outcome of these factual disputes is material to whether the brothers knew that State Police Officers were outside their house prior to Officer White shooting Samuel Pauly." *Id.* Because it was objectively reasonable under the circumstances about which the officers were aware that the brothers might believe the officers were intruders, a reasonable jury could find that it was foreseeable the brothers would arm themselves in defense of their home as permitted by New Mexico state law. *Boyett*, 185 P.3d at 358-59. Thus, Samuel Pauly's act of pointing a gun out the window in defense of his home would not be an intervening act superseding the liability of the officers.

Our opinion in *Trask v. Franco*, 446 F.3d 1036, is particularly instructive. There, state probation officers visited the residence of Carly Bliss and Dale Trask for a routine probation field inspection of Ms. Bliss. *Id.* at 1039. The officers believed Ms. Bliss was still on probation, but her probation had actually been discharged one month earlier. *Id.* Nobody answered the probation officers' knock on the door, but the officers could see movement in the house and believed, based on a previous statement Ms. Bliss had made to one of the officers about her abusive relationship with Mr. Trask, that she was afraid to open the door because of him. *Id.* at 1040. The probation officers therefore requested police assistance to provide support during the inspection. When a New Mexico State Police officer and a sheriff's deputy arrived, Mr. Trask eventually opened the front door. *Id.* He was wearing at least two knives in sheaths

on his belt. *Id.* A lengthy search of the residence ensued, and the state police officer arrested Mr. Trask. *Id.* Both Ms. Bliss and Mr. Trask brought a § 1983 action against the probation officers, among others, with Mr. Trask asserting claims for unlawful detention and arrest. *Id.* at 1040-41. The district court granted summary judgment to the probation officers on Mr. Trask's unlawful detention and arrest claims, finding no affirmative link between the alleged constitutional deprivations by the state police officer and the probation officers' duty to control him. *Id.* at 1041.

We explained that the probation officers could be held liable if they were the proximate cause of the harm but that "a superseding cause, as we traditionally understand it in tort law, relieves a defendant of liability." *Id.* at 1046. Thus, the question was "[w]hether Mr. Trask's appearance with knives was a superseding act that limited the probation officers' liability," and that depended "upon what the probation officers reasonably foresaw when they first called for backup." *Id.* at 1046-47. The court held "the record on appeal leaves too much unanswered, and it is premature without more evidence to discern what the probation officers reasonably foresaw when they called for backup." *Id.* at 1047. Significantly, we explained:

> [T]he reasonable foreseeability of [an intervening act's occurrence] is a factor in determining whether the intervening act relieves the actor from liability for his antecedent [wrongful act], and under the undisputed facts there is room for reasonable difference of

> opinion as to whether such act was [wrongful] or foreseeable, the question should be left for the jury.

Id. (second, third, and fourth alteration in original).

Similarly, fact questions remain at a minimum as to whether the officers here could reasonably foresee that the brothers would defend their home with deadly force based on the prior circumstances that night and the officers' conduct in shouting "we got you surrounded. Come out or we're coming in."[5] Thus, because disputed facts remain concerning whether the officers properly identified themselves and whether the brothers knew Officers Mariscal and Truesdale were intruders or state police, summary judgment is not appropriate.

2. Clearly established law

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Casey*, 509 F.3d at 1283-84 (quoting *Saucier*).

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[5] In *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997), the Seventh Circuit explained that its "jurisprudence interpreting the Fourth Amendment has long recognized that police encounters at a person's dwelling in the middle of the night are especially intrusive," and that "when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling must be examined with the greatest of caution."

"For a right to be clearly established there must be Tenth Circuit or Supreme Court precedent close enough on point to make the unlawfulness of the officers' actions apparent." *Mascorro v. Billings*, 656 F.3d 1198, 1208 (10th Cir. 2011); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (internal quotation marks omitted). The Supreme Court recently reaffirmed these principles, noting: "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 741). Indeed, "the dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" *id.* (quoting *al-Kidd*, 563 U.S. at 742) (emphasis added), and "[t]he inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition,'" *id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

"The plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity." *Weigel*, 544 F.3d at 1153 (quoting *Cruz v. City of Laramie*, 239 F.3d 1183, 1187 (10th Cir. 2001)). "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope*, 536 U.S. at 741 (internal quotation marks omitted). Consequently, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* "The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Casey*, 509 F.3d at 1284 (internal quotations and citations omitted).

This Circuit has adopted a sliding scale to determine when law is clearly established. *Id.* "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Id.* "Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." *Id.*

Since at least 2006, it has been clearly established in this circuit that the requisite causal connection for establishing a Section 1983 violation "is satisfied if the

defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Trask*, 446 F.3d at 1046 (alteration in original) (quoting *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990)). Likewise, it has been clearly established since 2006 that for an officer to be liable under Section 1983, the officer's conduct must be both a but-for and proximate cause of the plaintiff's constitutional harm. *Id.* Accepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White.

B. Officer White

1. Reasonableness of Officer White's Conduct

As with Officers Mariscal and Truesdale, our analysis of Officer White's qualified immunity claim focuses on whether his actions were "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Thomson*, 584 F.3d at 1313 (quoting *Graham*, 490 U.S. at 397). Officer White's use of deadly force "must be judged from the perspective of a reasonable officer 'on the scene,' who is 'often forced to make split-second judgments . . . about the amount

of force that is necessary in a particular situation.'" *Allen*, 119 F.3d at 840 (quoting *Graham*, 490 U.S. at 396-97).

An officer's pre-seizure conduct can be part of the reasonableness inquiry, but *only* if the officer's *own* "reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Jiron*, 392 F.3d at 415 (quoting *Sevier*, 60 F.3d at 699). Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to "Come out or we're coming in." Aplt. App. at 678. Almost immediately upon Officer White's arrival, one of the brothers shouted "We have guns." The alleged reckless conduct of Officers Mariscal and Truesdale prior to this point cannot be attributed to Officer White, and accordingly, our analysis focuses only on the reasonableness of his own conduct.

"The Fourth Amendment permits an officer to use deadly force only if there is 'probable cause to believe that there [is] a *threat of serious physical harm to [the officer]* or to others.'" *Tenorio*, 802 F.3d at 1164 (quoting *Estate of Larsen*, 511 F.3d at 1260). In assessing "the degree of threat" the officer faces, "we consider a number of non-exclusive factors" that include: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." *Estate of Larsen*,

511 F.3d at 1260. But these four factors "are only aids in making the ultimate determination, which is 'whether from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force.'" *Tenorio*, 802 F.3d at 1164 (quoting *Estate of Larsen*, 511 F.3d at 1260). And ultimately, "[t]he primary focus of our inquiry . . . remains on whether the officer was in danger at the exact moment of the threat of force." *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (citing *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995)).[6]

We recognize, as the dissent does, that this case presents a unique set of facts and circumstances, particularly in the case of Officer White who arrived late on the scene and heard only "We have guns," Aplt. App. at 680, before taking cover behind a stone wall fifty feet away from the Pauly's residence. Therefore, in accordance with the Supreme Court's instruction that we review the reasonableness of Officer White's actions by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *Scott*, 550 U.S. at 383 (quoting

[6] We have also considered situations in which plaintiffs have alleged that an officer, *by failing to take cover*, created the exigency requiring use of force. *See Medina*, 252 F.3d at 1132; *Quezada v. Cty. of Bernalillo*, 944 F.2d 710, 717 (10th Cir. 1991). We concluded that officers are *not required* to take cover when they are faced with a deadly threat. Here, however, Officers White and Mariscal did take cover, before they were faced with any imminent harm.

Place, 462 U.S. at 703), we will analyze his conduct by weighing the three non-exclusive factors articulated in *Graham*, 490 U.S. at 396, as well as the four factors listed in *Estate of Larsen*, 511 F.3d at 1260, in order to determine whether a constitutional violation occurred.

Because "[t]he test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," we must pay "careful attention to the facts and circumstances" of this particular case when assessing the reasonableness of Officer White's conduct. *Graham*, 490 U.S. at 396. Because "there is no easy-to-apply legal test for whether an officer's use of deadly force is excessive[ ] . . . , we must 'slosh our way through the fact-bound morass of reasonableness.' " *Cordova v. Aragon*, 569 F.3d 1183, 1188 (10th Cir. 2009) (quoting *Scott*, 550 U.S. at 383).

The first factor from *Graham*, "the severity of the crime at issue," 490 U.S. at 396, weighs in favor of plaintiff estate. The district court found that once police arrived at the Glorieta off-ramp in response to a call concerning road rage, "the Officers did not believe any exigent circumstances existed," and that they "did not have enough evidence or probable cause to make an arrest." Aplt. App. at 677. It is thus unclear from the record what, if any, crime was committed during the road rage incident. At best, the incident might be

viewed as a minor crime such as reckless driving or driving while intoxicated.[7]

At first glance, one could argue that the second factor from *Graham*, "whether the suspect poses an immediate threat to the safety of the officers or others," 490 U.S. at 396, weighs in favor of Officer White. But, as the district court determined, "Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon." Aplt. App. at 680. Moreover, the undisputed facts in the record show that Officer White was behind cover fifty feet away *before* Samuel Pauly even opened the window. *Id.* at 680-81. Although the district court found that Samuel "held his arm out with a hand gun, pointing it at Officer White," *id.* at 681, it also concluded there was a fact issue as to whether Samuel actually fired the gun, *id.* nn. 8, 9. Finally, although Officer White claims he thought Officer Truesdale was shot by the two shotgun blasts he heard from behind the house, he admitted in his deposition that "I did not hear anything that would suggest [Officer Truesdale] had been hit." *Id.* at 223.

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[7] Under New Mexico law, reckless driving and driving while intoxicated (first offense) are misdemeanor offenses. *State v. Trevizo*, 257 P.3d 978, 982 (Ct. App. 2011) (citing N.M. Stat. Ann. § 66-8-113(B) (1978) (reckless driving); § 66-8-102(E) (DWI)) (holding that one-year statute of limitations for petty misdemeanors applied to the defendant's DWI and reckless driving charges).

Significantly, "the law is clear that [Officer White's] belief must be reasonable." *Attocknie v. Smith*, 798 F.3d 1252, 1257 (10th Cir. 2015) (*petition for cert. filed* Dec. 22, 2015). While the dissent concedes that an Officer's subjective belief is irrelevant, it posits that "Officer White's uncontroverted subjective belief is objectively reasonable." Dissent at 5 n.1. But "the Fourth Amendment tolerates only reasonable mistakes, and those mistakes-whether of fact or of law-must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved." *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014). In our view, there is at a minimum at least a fact question for the jury as to whether it was objectively reasonable for Officer White to immediately assume that one of his fellow officers was shot after hearing two shots from the back of the house but nothing more to indicate that anyone had been hit. *Cf. Attocknie*, 798 F.3d at 1257 (affirming denial of qualified immunity to officer and rejecting claim officer saw suspect run into a house, noting "that a jury might reasonably refuse to credit his belief as reasonable" because a jury "could well find that [the officer] is not telling the truth about seeing someone running, or at least that he was not reasonable in inferring that the person he saw was [the suspect], especially given other evidence that [the suspect] was not seen by anyone else at the time and was not found there after the shooting").

Because Officers White and Mariscal were behind cover some distance away in the dark before Samuel even opened the window and there is a fact issue as to

whether Samuel fired his weapon, for purpose of analysis on summary judgment Samuel Pauly did not "pose an *immediate* threat to the safety of the officers or others." *Graham*, 490 U.S. at 396 (emphasis added).

The third *Graham* factor, "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," 490 U.S. at 396, also weighs in favor of plaintiff estate. As the district court determined, after the officers arrived on scene, spoke with the women about the incident, and then allowed the women to leave the Glorieta off-ramp, "any threat to the females was over." Aplt. App. at 676. More importantly, the court recognized that "the Officers did not believe any exigent circumstances existed," and that at that point, they "*did not have enough evidence or probable cause to make an arrest.*" *Id.* (emphasis added). Thus, when the officers, including White, went to the brothers' residence, they were not there to make an arrest as no grounds existed to do so. This is especially true for Samuel Pauly, who had been in his home playing video games before Daniel arrived that night. Accordingly, the brothers could not have been "attempting to evade arrest by flight," *Graham*, 490 U.S. at 396. This factor supports plaintiff estate.

Because Officer White fired the fatal shot, we turn to the four factors set out in *Estate of Larsen*, 511 F.3d at 1260, to assess the "degree of threat" he faced. The first factor, "whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands," *id.*, clearly supports plaintiff estate. For purposes of qualified immunity, the district court

determined that Officer White did not identify himself or order Samuel Pauly to drop his weapon. The second factor, "whether any hostile motions were made with the weapon towards the officers," *id.*, weighs in favor of Officer White because the district court found that Samuel Pauly pointed a handgun at Officer White, or at least in his direction. The third factor, "the distance separating the officers and the suspect," *id.*, clearly supports plaintiff estate because Officer White was at least 50 feet away behind cover when he fired the fatal shot.

We consider the fourth factor, "the manifest intentions of the suspect," *id.*, to be somewhat neutral. The district court determined "a reasonable jury could find" that "it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously," and "that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms." Aplt. App. at 685. Under the circumstances here, such defense would be permissible under New Mexico state law. *See also Boyett*, 185 P.3d at 358-59. This conclusion comports with what the Supreme Court made clear in *Heller*, 554 U.S. at 628-29, that citizens have the inherent right to use weapons to defend their home against intruders.

Moreover, and importantly, the district court found a genuine fact issue remains as to whether Samuel Pauly even fired his weapon. Although Officers White

and Mariscal claim that Samuel fired the handgun, the district court noted

> A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. No bullet casing was recovered from the handgun, so there is no forensic proof that Samuel Pauly fired the handgun that night.

Id. at 681 n.8. Significantly, "Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun," and the district court found that "Officer Mariscal was missing one cartridge from his magazine." *Id.* at 681 n.9 Thus, the court concluded: "since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Officer White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White." *Id.* At most, from Officer White's perspective, the manifest intention of Samuel Pauly was unclear at the time Samuel pointed his weapon out of the window of his home.

Officer White stated in his deposition that when he was kneeling behind the rock wall, he saw Samuel Pauly shoot a "silver gun" directly towards his face. Aplt. App. at 223-24, White dep. at 137-44 ("I observed the male, with his right hand, extend his hand in a parallel position to the ground, pointing the gun toward my direction . . . [and] I observed the muzzle flash, and I heard the bang of the gun."). Nevertheless, "[b]ased

on the physical evidence, a jury could reasonably decide to reject [Officer White's] testimony." *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (holding fact issue precluded summary judgment on excessive force claim against officer). Indeed, "[c]onsidering the physical evidence together with the inconsistencies in the officer's testimony, a jury will have to make credibility judgments, and credibility determinations should not be made on summary judgment." *Id.* Moreover, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). As the Ninth Circuit noted in *Scott*, 39 F.3d at 915, "the court may not simply accept what may be a self-serving account by the police officer." Rather, "[i]t 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.* In any event, this factor highlights the district court's ultimate conclusion that genuine fact issues remain for the jury with respect to this issue.

Because our analysis "requires careful attention to the facts and circumstances of each case," *Graham*, 490 U.S. at 386, we note that factors one and three, as set out in *Estate of Larsen* and reiterated in *Tenorio*, are particularly relevant here: "(1) whether the officers ordered the suspect to drop his weapon," and "(3) the

distance separating the officers and the suspect." *Estate of Larsen*, 511 F.3d at 1260; *Tenorio*, 802 F.3d at 1163. The undisputed facts establish that neither Officer White nor Officer Mariscal ordered the suspect to drop his weapon. In excessive force cases, "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and *if where feasible*, some warning has been given." *Garner*, 471 U.S. at 11-12 (emphasis added); *Thomson*, 584 F.3d at 1321 (citing *Garner). See also Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (fact issue as to whether warning was feasible before deadly shot fired).

Plaintiffs' expert witness, Glenn A. Walp, testified that in his professional opinion it was feasible for Officer White to give the suspect a warning during the five-second interval between when Samuel aimed the gun and Officer White fired his weapon, and that the officer's failure to do so was unreasonable.[8] Aplt. App.

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[8] The dissent criticizes our use of Mr. Walp's testimony, noting that "we've previously discounted the use of expert testimony to undermine the reasonableness of an officer's on-scene judgment and we should do the same here," citing *Thomson*, 584 F.3d at 1320-21, and *Saucier*, 533 U.S. at 194 n.6. Dissent at 9. In essence, the dissent views our use of the expert testimony as the type of second guessing and 20/20 hindsight the Supreme Court has instructed is not appropriate when reviewing the reasonableness of an officer's conduct. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight."). However, we mention his testimony only because it supports the district court's determination that a reasonable jury could conclude it was feasible for Officer White to warn Samuel Pauly before shooting him, especially where he was behind cover before Samuel opened the window. A

at 289. *See also id.* at 286, Walp dep. at 180 ("[B]etween the time when he saw the pointing of the weapon and what we will use for the sake of argument here today, five seconds, I feel that there was an extensive amount of time to at least yell something to the effect . . . of 'State Police, drop your weapon.'"). In this connection, we note that in *Tenorio*, within "*two or three seconds*" the officer "yelled, 'Sir, put the knife down! Put the knife down, please! Put the knife down!'" before he shot the decedent. 802 F.3d at 1163.

Moreover, as the circumstances in *Tenorio* show, the immediacy of the danger to the police officer is important:

> One could argue that [Officer] Pitzer appropriately used lethal force. The officers were responding to an emergency call for police assistance to protect against danger from a man who had been violent in the past and was waving a knife around in his home. The man was walking toward Pitzer in a moderate-sized room while still carrying the knife despite repeated orders to drop it.
>
> *But the district court ruled that the record supports some potential jury findings that*

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jury may accept this testimony, but it may not. But Mr. Walp's testimony highlights why a reasonable jury might conclude it was feasible. In any event, we have not found a bright line rule precluding us from mentioning expert testimony in the record on a subject on which the district court found genuine fact disputes remain. *See* Aplt. App. at 684-85 ("For example, it is disputed whether . . . it was feasible for Officer White to warn Samuel Pauly before shooting him.").

> *would establish Tenorio's claim – in particular, that Tenorio "did not 'refuse' to drop the knife because he was not given sufficient time to comply' with Pitzer's orde*r; that Tenorio made no hostile motions toward the officers but was merely "holding a small kitchen knife loosely by his thigh and . . . made no threatening gestures toward anyone."; *that Tenorio was shot "before he was within striking distance of [Pitzer]. . . ."*

Id. at 1164-65 (emphasis added). Here, not only was Officer White fifty feet away from Samuel Pauly, Officer White was sequestered behind a rock wall and Samuel was aiming his gun through the open window of a lighted house toward a target obscured by the dark and rain.[9]

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[9] We disagree with the dissent's characterization of Officer White's position when he took cover as behind a "partial rock wall." Dissent at 7 n.4, 8. By implying that Officer White was not in a protected position when Samuel Pauly pointed the gun in his direction, the dissent does not read the evidence in the light most favorable to plaintiff estate and fails to rely on the district court's determination of the evidence. The dissent ignores the "fundamental principle" that in reviewing the denial of a summary judgment motion based on qualified immunity, "reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (reversing grant of summary judgment to Officer and holding the "court below credited evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion"); *accord Weigel*, 544 F.3d at 1147 ("In reciting the facts of this case, we view the evidence in the light most favorable to the nonmoving party."). The dissent clearly reads the evidence concerning the cover of his position in the light most favorable to Officer White and impermissibly draws inferences in his favor.

As Officer White described it when he was asked to explain what he did after he heard "We have guns," he said he ran and took cover behind a rock wall *before* Samuel opened the window and stuck his gun out.

> Q. And, I'm sorry, I think you just said this, but the position that you took, you know, you ran down on the other side of the rock wall. Tell me again. Were you standing? Were you crouched? What position were you in?
>
> A. I was kneeling.
>
> Q. So you're kneeling, one knee up and one knee down?
>
> A. Both knees down.
>
> Q. So both of your knees were on the ground, and where – were you looking towards the residence?
>
> A. I was.
>
> * * *
>
> Q. So you kneeled down, both knees on the ground and looking over the top of the rock wall. Is that right?
>
> A. Correct.
>
> Q Did you have your duty weapon drawn?
>
> A. I did.
>
> * * *
>
> Q. *Nobody was in the window at that point? Is that correct?*

A. *That's correct.*

Q. *Was the window up?*

A. *As in closed? It was closed.*

Q. Yes. So the window – both windows were closed at the point that you run down to the position in Exhibit 2?

A. Correct.

Q. *You have your weapon drawn. Where is it pointing at that time?*

A. *It's pointing in the direction of the house.*

Q. *Was it resting on the wall?*

A. *It was.*

Aplt. App. at 222 (emphasis added). Officer White's own description of his position at the time Samuel Pauly opened the window and pointed his gun out clearly supports the district court's description of him as "behind a stone wall located 50 feet from the front of the house." *Id.* at 680.

Officer White relies on our decision in *Wilson*, 52 F.3d at 1549, for the proposition that use of deadly force is reasonable where someone aims a gun at an officer. The facts there were entirely different. Officer Meeks was out in the open when he confronted Wilson, whom a witness described as "extremely drunk." *Id.* Officer Meeks suspected Wilson of holding a gun concealed behind his leg and ordered him to show his hand. Wilson did not comply, and the officer repeated his demand. When Wilson brought his gun forward and

Officer Meeks heard the sound of the handgun being cocked, he shot Wilson. *Id.* at 1553. It is clear from the facts in *Wilson* that Officer Meeks was in close range of the pointed gun and that an objectively reasonable police officer would have believed his life was in immediate danger. Similarly, in *Estate of Larsen*, 511 F.3d at 1258, "Larsen was within 7 to 12 feet" from the officers when he raised his knife, ignored the officer's warning to "Drop the knife or I'll shoot," and took a step "toward the officer." *See also Thomson*, 584 F.3d at 1318 ("The time frame during which all of this happened was very short; from the time when Mr. Thomson came into view of the police until the time he was shot, possibly as few as ten seconds had elapsed. During that time, Mr. Thomson was repeatedly told to put down his weapon. . . .").

The dissent claims that "in endeavoring to affix liability on" Officer White, we stretch to distinguish *Wilson*, arguing that the threat to Officer White was "even more immediately compelling than those faced by the shooting officer in *Wilson*." Dissent at 7. This is so, the dissent contends, because Officer White was not "fully protected" when he took cover behind a stone wall but rather "was kneeling in a vulnerable position behind a short rock wall – a wall that at most provided partial cover from the armed suspect pointing a gun at him and potentially no cover from the second armed suspect whose exact location outside was unknown." Dissent at 7 n.5. But as we have already noted, the dissent's claim completely ignores the long standing rule that we must view the evidence in the light most

favorable to plaintiff estate, and that "reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 134 S. Ct. at 1868. Instead, the dissent assumes facts in the light most favorable to Officer White. The dissent's reliance on *Wilson* is accordingly flawed.

Based on the record in the present case, viewed in plaintiff estate's favor, we agree with the district court that a jury could find a reasonable officer in Officer White's position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning. As a result, the jury could conclude Officer White's use of deadly force against Samuel Pauly was not objectively reasonable and violated the Fourth Amendment.

2. Clearly Established

Having held that the evidence is sufficient to establish an excessive force claim, we turn to whether the law was clearly established at the time of the violation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 207; *Casey*, 509 F.3d at 1283-84.

Graham, 490 U.S. at 396, and its Tenth Circuit progeny, including our 1997 decision in Allen, clearly established that the reasonableness of an officer's use

of force depends, in part, on "whether the officer[] [was] in danger at the precise moment that [he] used force." *Allen*, 119 F.3d at 840 (quoting *Sevier*, 60 F.3d at 699). In addition, since 1985 and the Supreme Court's decision in *Garner*, it has been clearly established that "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and *if where feasible*, some warning has been given. 471 U.S. at 11-12 (emphasis added); *see also Vaughan*, 343 F.3d at 1331 (fact issue as to whether warning was feasible before deadly shot fired).

The dissent argues that by relying on *Graham* and *Allen*, we violate the Supreme Court's instruction not to define clearly established law too generally. Dissent at 11. It is true that in *Mullenix*, the Court stated that it has "repeatedly told courts . . . not to define clearly established law at a high level of generality." 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). But the central question, the Court noted, is "whether the violative nature of *particular* conduct is clearly established." *Id.* (quoting *al-Kidd*, 563 U.S. at 742). In reversing the Fifth Circuit's clearly established law analysis "that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others," the Court explained that it had "previously considered – and rejected – almost that exact formulation of the qualified immunity question . . . [i]n *Brosseau* [*v. Haugen*, 543 U.S. 194 (2004)]." *Id.* at 308-09 (internal citation and quotation marks omitted). *Mullenix* is thus distinguishable from this case

because there were clearly other cases on point there that had rejected the argument used to form the basis of the Fifth Circuit's decision.

Notably, in *Brosseau*, 543 U.S. at 199, a case decided in 2004, the Court reversed the Ninth Circuit's denial of qualified immunity, holding that using the "general" test for excessive force cases from *Garner*, 471 U.S. at 85, was "mistaken." The Court explained that the Ninth Circuit erred in finding "fair warning in the general tests set out in *Graham* and *Garner,*" because "*Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality." *Id.* at 199. Rather, the Court explained that the relevant inquiry was whether it was clearly established the officer's conduct was prohibited by the Fourth Amendment in the specific "situation [Brosseau] confronted." *Id.* at 199-200. Most significantly, the Court cited *Hope*, 536 U.S. at 738, for the proposition that "of course, in an obvious case, [the *Garner* and *Graham*] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199. Nothing in *Mullinex* overruled *Hope* on this point.

Building on the Court's decision in *Hope*, our decision in *Casey* decided almost three years after *Brosseau*, explained that "[t]he *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." 509 F.3d at 1284, (internal quotation marks

omitted). We explained that "[w]e therefore adopted a sliding scale to determine when law is clearly established, *id.*, stating that "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Id.* (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)).

Taking the facts as the district court determined them in the light most favorable to plaintiff estate, we are presented with this situation: an officer outside someone's home in the dark of night with no probable cause to arrest anyone and behind the cover of a wall 50 feet away from a possible threat, with no warning shot a man pointing his gun out of his well-lighted window at an unknown person in his yard while the man's brother fired protective shots in the air from behind the house. Given his cover, the distance from the window, and the darkness, a reasonable jury could find that Officer White was not in immediate fear for his safety or the safety of others. Any objectively reasonable officer in this position would well know that a homeowner has the right to protect his home against intruders and that the officer has no right to immediately use deadly force in these circumstances. Based on our sliding scale test established in *Casey*, 509 F.3d at 1284, we do not agree with the dissent that more specificity is required to put an objectively reasonable officer on fair notice.

Accordingly, accepting as true plaintiff estate's version of the facts, a reasonable officer in Officer White's position should have understood, based on

clearly established law, that (1) he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force and (2) he was required, under the circumstances here, to warn Mr. Pauly to drop his weapon.

V

Conclusion

We AFFIRM the district court's denial of summary judgment.

MORITZ, Circuit Judge, dissenting:

Undeniably, Samuel Pauly's tragic shooting should never have occurred. So at first glance, it's hard to find fault with the majority's lengthy and compelling discussion of Officers Mariscal's and Truesdale's questionable actions leading up to the tragedy. But the majority's preliminary focus on those two officers, though effectively placed, is legally misplaced. That's because neither Officer Mariscal nor Officer Truesdale shot Samuel Pauly. Instead, Officer White fired the bullet that killed Samuel Pauly. In some cases, this might be the proverbial distinction without a difference. But that is decidedly not the case here because, as the majority recognizes, Officer White came late to the scene and can't be held responsible for the acts of Officers Truesdale and Mariscal.

The majority nevertheless finds that even considering Officer White's actions separately, a reasonable jury could conclude he used excessive force in shooting Samuel Pauly. But, in reaching that conclusion, the majority impermissibly second-guesses Officer White's split-second decision to use deadly force in self-defense. I would find that under the unique circumstances of this case, Officer White clearly did not use excessive force in shooting Samuel Pauly; thus, no constitutional violation occurred. And if no constitutional violation occurred, the law won't permit us to pin liability on those officers who perhaps should bear responsibility: Truesdale and Mariscal. Instead, all three officers are entitled to immunity.

I also disagree with the majority's conclusion that the plaintiffs' facts, accepted as true, establish that Officer White's use of deadly force violated clearly established law. To arrive at this determination, the majority mistakenly defines clearly established law at a high level of generality, engaging in exactly the type of review our Supreme Court has consistently cautioned against. As the Court recently reiterated, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011)).

Because I would conclude Officer White's use of deadly force was objectively reasonable and didn't violate clearly established law governing the use of deadly force, I would reverse and remand with directions

to grant summary judgment in favor of all three defendants.

DISCUSSION

The doctrine of qualified immunity insulates law enforcement officers from civil liability for the use of excessive force – even deadly force – unless their actions violate clearly established statutory or constitutional rights. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). "For a right to be clearly established there must be Tenth Circuit or Supreme Court precedent close enough on point to make the unlawfulness of the officers' actions apparent." *Mascorro v. Billings*, 656 F.3d 1198, 1208 (10th Cir. 2011). This does not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 131 S. Ct. at 2083). "When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Barkes*, 135 S. Ct. at 2044 (alteration in original) (quoting *al-Kidd*, 131 S. Ct. at 2085).

When a defendant asserts qualified immunity at the summary judgment stage, the burden shifts to the plaintiff to demonstrate (1) the defendant violated a constitutional right and (2) the contours of that right were "clearly established" at the time of the violation. *Thomas v. Durastanti*, 607 F.3d 655, 662 (10th Cir. 2010). If the plaintiff doesn't satisfy " '[t]his heavy two-part burden . . . the defendants are entitled to qualified

immunity.'" *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877-78 (10th Cir. 2014) (quoting *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001)), *cert. denied sub nom. Malcom v. Felders*, 135 S. Ct. 975 (2015).

I. Officer White is entitled to qualified immunity because his actions were objectively reasonable under the circumstances.

Because the plaintiffs allege Officer White violated Samuel Pauly's Fourth Amendment right to be free from excessive force, they must demonstrate that White's use of deadly force was objectively unreasonable. *See Havens v. Johnson*, 783 F.3d 776, 781 (10th Cir. 2015). As the majority acknowledges, an officer's use of deadly force is objectively reasonable if a reasonable officer confronted with the same circumstances would have had probable cause to believe that he or she faced an immediate threat of serious physical harm. *Tennessee v. Garner*, 471 U.S. 1, 111 (1985); *Thomas*, 607 F.3d at 664, 670.

We generally consider several non-exclusive factors in assessing the degree of threat a suspect poses to the officer, including "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1314-15 (10th Cir. 2009) (quoting *Estate of Larsen ex rel.*

Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008)).

These factors, while significant, only assist us in making the ultimate determination, which is "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (quoting *Estate of Larsen*, 511 F.3d at 1260). Moreover, in the qualified immunity context, an officer's on-scene judgment regarding the level of force that is necessary "need not be correct – in retrospect the force may seem unnecessary – as long as it is reasonable." *Id.*

Viewing the plaintiffs' factual allegations as true and considering the totality of the circumstances known to Officer White from the perspective of an objectively reasonable officer in White's position, I would conclude the plaintiffs haven't demonstrated a Fourth Amendment violation.

When Officer White arrived at the Paulys' house, he saw Officer Mariscal in the front yard and he heard Officer Truesdale's voice near the back of the house. He saw people moving inside the house. Within seconds of his arrival, Officer White heard one of the Pauly brothers yell, "We have guns." Aplt. App. 680. Officer White took cover behind a stone wall about 50 feet from the front of the house. Officer Mariscal took cover behind a nearby truck. Both officers drew their weapons. A few seconds later, Officer White heard two gunshots fired near Officer Truesdale's location at the rear of the

house. Officer White believed that Truesdale had been shot.[1] Within seconds of hearing those two shots, Officer White saw Samuel Pauly lower the front window, hold his arm out, and point a handgun directly at White. Four or five seconds later, Officer White fired his weapon, shooting and killing Samuel Pauly.

Even under plaintiffs' version of the facts, these material facts are uncontroverted. And given these facts, Officer White's use of deadly force was unquestionably justified. But the majority concludes that "a jury could find a reasonable officer in Officer White's position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning." Maj. Op. 43.

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[1] The majority implies that Officer White's belief on this point was less than credible because he also testified in his deposition that he "did not hear anything that would suggest a person had been hit." Maj. Op. 7-8, n.3 & 32. In doing so, the majority overlooks two points. First, the district court's order demonstrates that Officer White's belief on this point was uncontroverted. *See* Aplt. App. 680 ("Having heard two rifle shots, Officer White believed that Officer Truesdale had been shot."). Second, even if the majority doubts the reasonableness of Officer White's subjective belief as to whether Officer Truesdale had been shot, the question before us is whether a reasonable officer having heard two gunshots near the location of his or her fellow officer – an officer who is out of sight in the dark – would have had an objective basis for sharing White's belief. In my view, Officer White's uncontroverted subjective belief is objectively reasonable.

In reaching this conclusion, the majority purports to separately consider the three *Graham*[2] factors and the four non-exclusive *Thomson* factors, but ultimately cherry-picks two *Thomson* factors it finds "particularly relevant" to Officer White's on-scene threat assessment: the distance separating Samuel Pauly and White, and White's failure to warn Samuel before shooting him. Maj. Op. 37. However, the majority's analysis of these two factors is flawed.[3]

Focusing on the distance between Samuel Pauly and Officer White, the majority speculates that a reasonable officer in White's position wouldn't have perceived an immediate threat of physical harm because (1) White was 50 feet away from Samuel; (2) White was "sequestered" behind the rock wall; and (3) Samuel's view of White may have been obscured by the darkness and the rain. Maj. Op. 39-42.

I don't disagree that an officer's distance from the suspect and the existence of cover are important considerations in assessing whether the officer's use of deadly force was objectively reasonable.[4] But the

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[2] *Graham v. Connor*, 490 U.S. 386 (1989).

[3] The majority's seven-factor approach seemingly overlooks that the four *Thomson* factors merely flesh out the second *Graham* factor – i.e., whether the officer faced an immediate threat from the suspect.

[4] The majority also suggests a reasonable officer would have taken comfort in the knowledge that Samuel Pauly "aim[ed] his gun through the open window of a lighted house toward a target obscured by the dark and rain." Maj. Op. 39. This suggestion warrants little discussion. Even though a reasonable officer would

majority brushes aside this court's precedent in determining that these factors undermine the reasonableness of Officer White's actions in this case.

Our precedent with the most analogous facts – *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001) – is also the most compelling. There, as here, the family of a man shot and killed by a police officer sought civil damages under § 1983. We found the officer entitled to qualified immunity, reasoning that the confrontation leading to the fatal shooting "transpired in less than a minute," the plaintiffs failed to produce evidence to rebut the officer's assertion that the decedent aimed a handgun at the officer, and "[a]ny police officer in [the officer's] position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum

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know Samuel Pauly was looking into the darkness, we can't expect a reasonable officer to know whether that darkness impaired Samuel's ability to find a target. *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001) ("Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat."). The majority's determination that the fourth *Thomson* factor is "neutral" similarly suggests that a reasonable jury could find a reasonable officer in Officer White's position would have known what the Paulys were thinking – namely, that the Paulys believed they were protecting their home from unknown intruders. Maj. Op. 34-35. Yet the fourth factor requires consideration only of the "manifest" intentions of the suspect. In this case, Samuel Pauly manifested his intentions quite clearly and this factor, far from being neutral, weighs in favor of Officer White's decision to shoot.

revolver pointed in his general direction." *Id.* at 1549, 1554.

Despite these similar circumstances, the majority stretches to distinguish *Wilson*, pointing out that the shooting officer in that case was exposed rather than "sequestered" behind a rock wall. Maj. Op. 39, 41-42.[5] Yet in endeavoring to affix liability on the shooting officer here, the majority ignores circumstances that unquestionably rendered the threat to Officer White even more immediately compelling than those faced by the shooting officer in *Wilson*.

Here, Officer White was confronted with one man pointing a gun in his direction and another man who he reasonably believed was somewhere outside and had just shot White's fellow officer. Notwithstanding these exceedingly fluid and highly threatening circumstances, the majority suggests that a reasonable officer in Officer White's position should essentially have called a time out while he contemplated the most prudent course of action. And during that time out, the

[5] The majority's characterization of Officer White's position as "sequestered" behind the stone wall inaccurately implies that he viewed the scene from a fully protected vantage point. It's true that Officer White testified in deposition that he took cover behind a stone wall 50 feet from the house. But Officer White further explained that he knelt behind the wall and rested his arms on top of it as he pointed his gun in the general direction of the house and that his head and arms remained fully exposed. White Depo., Doc. 84-3, at 4. Thus, far from being "sequestered," Officer White was kneeling in a vulnerable position behind a short rock wall – a wall that at most provided partial cover from the armed suspect pointing a gun at him and potentially no cover from the second armed suspect whose exact location outside was unknown.

majority presumes Officer White – or a reasonable officer in his shoes – would have discounted the threats posed by an armed suspect pointing a handgun in his direction and a second armed suspect in close proximity as non-immediate threats because the officer was himself behind a partial rock wall and the suspect who was pointing a gun at him was 50 feet away.[6]

In my view, no objectively reasonable officer in Officer White's circumstances and with White's knowledge of these circumstances could have been expected to hold his fire. And to suggest he should have done so because of his less than fully protected position some 50 feet away seems the epitome of "second-guessing." Yet the majority's speculation doesn't stop there. Piggybacking off of its judgment that Officer White faced no immediate threat given his "protected" position, the majority further decrees that a reasonable officer in White's position would have shouted a warning before using deadly force.

As the majority acknowledges, a warning need only be given "*where feasible.*" *Garner*, 471 U.S. at 11-12 (emphasis added); *see also Thomson*, 584 F.3d at 1321 (rejecting plaintiff's argument that unleashing police dog without a warning created the need to use

[6] Moreover, the majority's suggestion that the 50-foot distance between Samuel Pauly and Officer White somehow weighs in favor of the plaintiffs here is mystifying. Not surprisingly, the majority offers no authority suggesting that the "distance" factor has any relevance in circumstances where an officer is confronted with a suspect pointing a gun directly at him. Nor am I aware of any such authority.

deadly force and concluding "[a] warning is not invariably required even before the use of deadly force . . . "). In concluding such a warning was feasible here, the majority primarily relies on the professional opinion of the plaintiffs' expert witness, Glenn A. Walp, who testified in a deposition, "I feel that there was an extensive amount of time to at least yell something to the effect . . . of 'State Police, drop your weapon.' " Maj. Op. 37-38.[7]

With all due respect to Mr. Walp, we've previously discounted the use of expert testimony to undermine the reasonableness of an officer's on-scene judgment and we should do the same here. *See Thomson*, 584 F.3d at 1320-21 (rejecting plaintiffs' reliance on expert testimony that release of attack dog was "inadvisable," reiterating the need to avoid 20/20 hindsight, and concluding, "We cannot now consider whether other actions would have been more appropriate or, indeed, optimal"). *See also Saucier v. Katz*, 533 U.S. 194, 216, n.6 (2001) (Ginsburg, J., concurring in judgment) ("[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though plaintiff has an expert and a plausible claim that the situation could better have been handled differently."

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[7] The district court determined, based on Officer White's testimony, that White shot Samuel Pauly "[f]our to five seconds after Samuel Pauly pointed his handgun at Officer White." Aplt. App. 681. As the majority acknowledges, Mr. Walp assumed "for the sake of argument" during his deposition that the five-second interval was accurate. Maj. Op. 38.

(quoting *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994))).[8]

I would find Mr. Walp's speculation about what other actions Officer White could've or should've taken before shooting Samuel Pauly immaterial to the question of whether what he *actually* did was objectively reasonable. *See Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("The Constitution, however, requires only that the seizure be objectively reasonable, not that the officer pursue the most prudent course of conduct as judged by 20/20 hindsight vision."). And I would view *Garner*'s general proposition that a warning be given where feasible as yet another reminder of our paramount duty to judge "[t]he 'reasonableness' of a particular use of force . . . 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. The majority's contrary view ignores our Supreme Court's directive to consider, in the "calculus of reasonableness," the fact that police officers often are required to make split-second judgments – in "tense, uncertain, and rapidly evolving" circumstances –

[8] Comparing the circumstances of *Tenorio*, the majority appears to suggest that Officer White had plenty of time to shout a warning before shooting Samuel Pauly. Maj. Op. 38-39. But *Tenorio*'s markedly different circumstances simply don't permit this comparison. *See Tenorio*, 802 F.3d at 1164-65 (officer shot man who held a small kitchen knife but made no hostile motions toward the officer). Here, the majority explicitly recognizes that Samuel Pauly made a hostile motion toward Officer White by pointing a gun at him. Maj. Op. 34.

"about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Simply stated, I am unwilling to view Officer White's actions through the improper lens of hindsight from the comfort of my chambers. *See Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005) ("What may later appear to be unnecessary when reviewed from the comfort of a judge's chambers may nonetheless be reasonable under the circumstances presented to the officer at the time." (citing *Graham*, 490 U.S. at 396)). Instead, I would conclude the plaintiffs have not met their heavy burden to demonstrate a constitutional violation. And while I share the majority's concern about the actions of the non-shooting officers prior to Officer White's arrival, those actions shouldn't factor into our analysis of whether White's use of force was reasonable under the unique circumstances of this case.

II. Even if Officer White's actions were objectively unreasonable, White is entitled to qualified immunity because the law was not clearly established that he could not use deadly force in the circumstances confronting him.

Even accepting the majority's conclusion that Officer White's use of deadly force was objectively unreasonable, I disagree with the majority's ultimate conclusion that "a reasonable officer in Officer White's

position should have understood, based on clearly established law, that (1) he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force and (2) he was required, under the circumstances, to warn [Samuel] Pauly to drop his weapon." Maj. Op. 46-47.

To support its first point, the majority relies on *Graham* and *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), for the general proposition that an officer may not use deadly force unless he or she faces the immediate threat of physical harm. But the majority's reliance on these cases to define the clearly established law governing this case directly contravenes the Supreme Court's warnings against "defin[ing] clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 131 S. Ct. at 2084). The Court has repeatedly cautioned "that *Garner* and *Graham*, which are 'cast at a high level of generality,' " offer little guidance in determining the reasonableness of an officer's actions in a particular case. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

The Court recently and strongly reaffirmed this principle in *Mullenix*. There, the Court reversed a Fifth Circuit decision denying qualified immunity based on that Circuit's conclusion that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment." *Mullenix*, 136 S. Ct. at 308 (quoting *Luna v. Mullenix*, 773 F.3d 712, 725 (5th Cir. 2014), *rev'd* 136 S. Ct. 305 (2015)). The Court explained that

"[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2084). And, in concluding that the shooting officer in *Mullenix* was entitled to qualified immunity, the Court explicitly noted that "none of [its] precedents 'squarely govern[ed]' the facts" confronted by that officer. *Id.* at 310.

Yet, in its attempt to lessen the impact of *Mullenix*, the majority seemingly adopts the rationale of the dissenting justice in *Mullenix* by suggesting that any reasonable officer in Officer White's position would have had "fair notice" from *Graham* that he couldn't use deadly force in the circumstances he confronted and that no case more specific than *Graham* is required. Maj. Op. 45-46. *See Mullenix*, 136 S. Ct. at 314 (Sotomayor, J., dissenting) (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) for the proposition that "the crux of the qualified immunity test is whether officers have 'fair notice' that they are acting unconstitutionally").

Notably, the *Mullenix* majority pointed out that the dissenting justice only repeated the Fifth Circuit's error in defining the qualified immunity inquiry at a high level of generality. *Mullenix*, 136 S. Ct. at 311. In doing so, the Court stated, "[W]hatever can be said of the wisdom of [the officer's] choice [to use deadly force], this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'" *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2074).

Likewise, the extant case law here doesn't place the conclusion that Officer White acted unreasonably

under the circumstances beyond debate. Significantly, the only "particular conduct" the majority suggests violated clearly established law is Officer White's failure to issue a warning before using deadly force.

But, like the cracked foundation underlying the majority's first point, the foundational support for its second point also shows signs of strain. As stated, "[a] warning is not invariably required even before the use of deadly force"; rather, an officer must issue a warning "where feasible." *Garner*, 471 U.S. at 11-12; *Thomson*, 584 F.3d at 1304. Such language hardly mandates a finding that a failure to warn in particular circumstances is clearly established. Nevertheless, the majority expects a reasonable officer to understand extant case law as clearly establishing that a warning is not only feasible, *but required*, when the officer (1) is faced with two armed suspects, one pointing a gun at the officer from inside a house; (2) is partially protected by a stone wall; (3) is separated from the most immediate threat by 50 feet; and (4) in hindsight, has at least 5 seconds to shout a warning before firing his own weapon.

Simply stated, neither *Garner* nor any of the cases properly interpreting it would have caused a reasonable officer in Officer White's position to understand that "he was required, under the circumstances here, to warn [Samuel] Pauly to drop his weapon." Maj. Op. 47. Because none of the cases cited by the majority are "close enough [to] on point to make the unlawfulness of [Officer White's] actions apparent," *Mascorro*, 656

F.3d at 1208, I would conclude Officer White is entitled to qualified immunity.

III. Officers Truesdale and Mariscal are entitled to qualified immunity because Officer White did not use excessive force.

Because I would conclude that Officer White didn't violate Samuel Pauly's Fourth Amendment right to be free from the use of excessive force, and, alternatively, didn't violate clearly established law governing the use of deadly force, I would also conclude that Officers Truesdale and Mariscal are entitled to qualified immunity. *See, e.g.*, *Hinkle v. City of Clarksburg, W. Va.*, 81 F.3d 416, 420-21 (4th Cir. 1996) (explaining jury's finding that shooting officer didn't use excessive force absolved non-shooting officers of liability); *McLenagan*, 27 F.3d at 1008 (explaining that even if non-shooting officer's action or failure to act contributed to use of force, issue of liability was mooted by finding that shooting officer didn't use constitutionally excessive force).

CONCLUSION

Officer White did what any objectively reasonable officer in his position would do – respond in kind to the immediate threat of deadly force. Because the plaintiffs fail to establish either that Officer White's use of deadly force was objectively unreasonable or that it violated clearly established law, I would reverse the district court's rulings and grant all three defendants'

motions for summary judgment on qualified immunity grounds with respect to the plaintiffs' § 1983 claim.

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

DANIEL T. PAULY, as Personal Representative of the ESTATE OF SAMUEL PAULY, deceased, and DANIEL B. PAULY, Individually,

Plaintiffs,

vs.

Civ. No. 12-1311 KG/WPL

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, RAY WHITE, MICHAEL MARISCAL, and KEVIN TRUESDALE,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Feb. 5, 2014)

This matter comes before the Court upon Defendant Raymond White's First Motion for Summary Judgment and Memorandum in Support Thereof (Motion for Summary Judgment), filed November 13, 2013. (Doc. 83). Defendant Raymond White (Officer White) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and on the New Mexico State Constitution claim. Officer White also raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to the Motion for Summary Judgment on December 23, 2013, and Officer White filed a

reply on January 24, 2014. (Docs. 111 and 132). Having reviewed the Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies the Motion for Summary Judgment for the following reasons.

A. The Second Amended Complaint for Damages for Deprivation of Civil Rights, Wrongful Death and Common Law Torts (Doc. 46)

This wrongful death lawsuit arises from an incident in which Officer White, a New Mexico State Police Officer, shot and killed Samuel Pauly at the house he shared with his brother, Plaintiff Daniel B. Pauly (Daniel Pauly). Daniel Pauly was at the house at the time of the shooting. In addition, Defendants Michael Mariscal and Kevin Truesdale, also New Mexico State Police Officers, were at the brothers' house when the shooting occurred.

Plaintiffs' lawsuit is based on Section 1983, the NMTCA, and the New Mexico State Constitution. In Count One, Plaintiffs bring a Section 1983 claim against Officers White, Truesdale, and Mariscal for allegedly violating Samuel Pauly's Fourth Amendment right to be free from excessive force.[1] In Count Three, Plaintiffs bring an NMTCA battery claim against Officers White, Truesdale, and Mariscal, and a corresponding NMTCA *respondeat superior* claim against Defendant State of New Mexico Department of Public Safety (NMDPS). In Count Four, Plaintiffs contend

[1] The parties stipulated to dismissing Count Two. (Doc. 117).

that the NMDPS violated article II, section 10 of the New Mexico State Constitution through Officers White, Truesdale, and Mariscal's alleged unreasonable seizure of Samuel Pauly. Finally, Plaintiffs bring a loss of consortium claim in Count Five.

B. Summary Judgment Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). The non-moving party may not

[2] Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

Summary judgment motions involving a qualified immunity defense are determined somewhat differently than other summary judgment motions. *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995). "When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000). This is a heavy burden for the plaintiff. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (citing *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)). First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the "right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). The Tenth Circuit Court of Appeals instructs that

> [i]f the plaintiff does not satisfy either portion of the two-pronged test, the Court must grant the defendant qualified immunity. If the plaintiff indeed demonstrates that the official violated a clearly established constitutional or statutory right, then the burden shifts back to the defendant, who must prove that "no genuine issues of material fact" exist and that the defendant "is entitled to judgment as a matter of law." In the end, therefore, the defendant

> still bears the normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense. When the record shows an unresolved dispute of historical fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be "properly denied."

Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002) (citations omitted).

C. Material Facts and Reasonable Inferences Viewed in the Light Most Favorable to Plaintiffs

In determining the material facts and reasonable inferences to be viewed in the light most favorable to Plaintiffs, the Court reviewed Officer White's Statement of Undisputed Material Facts, Plaintiffs' Additional Statement of Material Facts, the parties' responses to the statements of undisputed material facts, and the evidence of record. Unless otherwise noted, the following recitation of material facts and reasonable references reflects the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in this Motion for Summary Judgment.

On the evening of October 4, 2011, Daniel Pauly and two females became involved in a road rage incident on the interstate highway going north from Santa Fe, New Mexico towards Las Vegas, New Mexico. (Doc. 82-1) at 6 (depo. at 121). One of the females called 911

and reported a "drunk driver" who was "swerving all crazy" and turning his lights off and on. (Doc. 82-1) at 23. After Daniel Pauly passed the females, they apparently tailgated Daniel Pauly. (Doc. 82-1) at 5 (depo. at 117-120).

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id*. One of the females reported that Daniel Pauly was "throwing up gang signs" during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where his brother, Samuel Pauly, was playing a video game on the couch.[3] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

The New Mexico State Police dispatcher contacted Officer Truesdale between 9:00 p.m. and 10:00 p.m. that night regarding the 911 call from the females.

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[3] Defendants note that Samuel Pauly had smoked marijuana and drank half a beer that evening. (Doc. 87-1) at 2 (depo. at 101); (Doc. 87-1) at 5 (depo. at 148). Defendants also note that Daniel Pauly drank two beers at a club in Albuquerque and drank half a beer at the house. (Doc. 87-1) at 5-6 (depo. at 148-49). The Court will not consider this evidence in deciding the Motion for Summary Judgment because it is irrelevant to the issues now before the Court.

(Doc. 82-3) at 3. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two females after Daniel Pauly had driven to his house. *See id*. Officers White and Mariscal were *en route* to provide Officer Truesdale with back-up assistance. *Id*. The females informed Officer Truesdale about Daniel Pauly's alleged reckless and dangerous driving. *Id*. The females also described Daniel Pauly's vehicle as a gray Toyota pickup truck and gave dispatch a license plate number. *Id*. The dispatcher informed Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road, Glorieta, New Mexico. *Id*.

Once the two females went on their way, any threat to the females was over. (Doc. 82-2) at 5 (depo. at 208). Officers Mariscal and White subsequently joined Officer Truesdale at the Glorieta off-ramp. Although it was raining, the Officers were not wearing raincoats over their uniforms. (Doc. 82-1) at 13 (depo. at 179); (Doc. 84-3) at 4 (depo. at 134). It was also a dark night.[4] (Doc. 82-3) at 17 (depo. at 100).

Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Daniel Pauly's version of the incident. (Doc. 82-2) at 6 (depo. at 218). At that point, the Officers did not believe any exigent circumstances existed. *Id*. at 7 (depo. at 213); (Doc. 82-4)

[4] Officers White and Truesdale dispute this fact and claim that despite the rain the moon was out and they could see fairly well in the dark. (Doc. 84-2) at 5 (depo. at 117); (Doc. 85-2) at 4 (depo. at 227). Officers White and Truesdale do not describe how full the moon was that night.

at 9-10 (depo. at 20-21). The Officers also did not have enough evidence or probable cause to make an arrest. (Doc. 82-3) at 5); (Doc. 82-3) at 14 (depo. at 91).

The Officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address while Officer White should stay at the off-ramp in case Daniel Pauly came back that way. (Doc. 82-3) at 14 (depo. at 92). Officers Truesdale and Mariscal drove a short distance to the Firehouse Road address and parked their vehicles in front of the main house along the road. *See* (Doc. 82-4) at 11 (depo. at 109). The vehicles had their headlights on and one vehicle had takedown lights on; none of the vehicles had flashing lights on. (Doc. 82-4) at 11 (depo. at 109-10). Officers Truesdale and Mariscal did not see Daniel Pauly's pickup truck at the main house. *See* (Doc. 82-2) at 9 (depo. at 230).

Officers Truesdale and Mariscal, however, saw a porch light and lights on in another house behind the main house, so they decided to walk up to that second house, Daniel and Samuel Pauly's house, to see if Daniel Pauly's pickup truck was there. (Doc. 82-2) at 9 (depo. at 232); (Doc. 82-3) at 6. The Officers did not activate any security lights as they walked up to the brothers' house. (Doc. 82-3) at 18 (depo. at 115).

Officers Truesdale and Mariscal approached the brothers' house in such a way that the brothers did not know that the Officers were there. (Doc. 82-2) at 12 (depo. at 224). The Officers chose this kind of approach

in an attempt to maintain officer safety. *Id*. at 14 (depo. at 233). Officers Truesdale and Mariscal, therefore, did not initially use their flashlights and then used the flashlights periodically. *Id*. at 13 (depo. at 226); (Doc. 82-3) at 15 (depo. at 101). After Officer Truesdale got close to the front of the house and began approaching the front door, he turned his flashlight on. (Doc. 85-3) at 3 (depo. at 249-50, 252). The Officers could see through the front window two males moving back and forth in the house. (Doc. 88-3) at 1 (depo. at 152). As the Officers got closer to the second house, they also saw Daniel Pauly's pickup truck and advised Officer White that they located the pickup truck. (Doc. 82-5) at 12. Officer White then proceeded to the Firehouse Road address. *Id.*

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights, especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times, "Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come

out or we're coming in."[5] *Id*. at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone call out "State Police" until after Officer White shot Samuel Pauly.[6] (Doc. 82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

Daniel Pauly felt scared and that his life, his brother's life, and the lives of their dogs were being threatened by unknown people outside the house. (Doc. 82-1) at 16 (depo. at 205); (Doc. 82-1) at 17 (depo. at 222). The brothers then decided to call the police. (Doc. 82-1) at 17 (depo. at 222). Before they could do so, Daniel Pauly heard, "We're coming in. We're coming in." *Id*.

At that point, Samuel Pauly retrieved a shotgun and a box of shells for Daniel Pauly so that the brothers could get ready for a home invasion. *Id*. at 17 (depo.

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[5] The Officers did not actually intend to go inside; they were trying to get the brothers to come out of the house. (Doc. 82-4) at 2 (depo. at 162).

[6] The Officers dispute that Daniel Pauly did not know that State Police Officers were outside the house prior to Officer White shooting Samuel Pauly. The Officers claim that they shouted out "State Police" numerous times throughout the incident. *See, e.g.*, (Doc. 82-3) at 5-8. Officer Mariscal also claims that that [sic] he illuminated himself with a flashlight and that "the individuals" in the house shined flashlights in the direction of himself and Officer Truesdale. *Id.* at 7-8. However, Officer Truesdale, Officer White, and Daniel Pauly did not testify to seeing Officer Mariscal shine a flashlight on himself nor did Daniel Pauly testify to using a flashlight. *See* (Doc. 84-3) at 2 (depo. at 127).

at 222-23). Samuel Pauly also obtained a loaded handgun. (Doc. 82-3) at 4. Daniel Pauly then stated to Samuel Pauly that he was going to fire a couple of warning shots. (Doc. 82-1) at 17 (depo. at 223). Samuel Pauly went back to the front room. *Id.* Next, one of the brothers yelled out from inside of the house, "We have guns." (Doc. 85-4) at 2 (depo. 276). Officers Mariscal and Truesdale subsequently saw someone, presumably Daniel Pauly, run towards the back of the house. (Doc. 82-2) at 23 (depo. at 272). Officer Truesdale, therefore, went to the far back corner of the house to see what was happening on the other side of the house. *Id.* at 21 (depo. at 274). Officer Truesdale then stated, "Open the door, come outside." (Doc. 82-3) at 5.

While Officers Truesdale and Mariscal were trying to get the brothers to come out of the house and before one of the brothers yelled out, "We have guns," Officer White arrived at the Firehouse Road address and walked up towards the brothers' house, using his flashlight periodically. *Id.*; (Doc. 84-2) at 4 (depo. at 116). Officer White could also see two males walking in the front living room. (Doc. 82-4) at 12 (depo. at 123). In addition, Officer White heard a male from inside of the house say, "We have guns." (Doc. 82-3) at 6. When Officer White reached the front of the house, Officer Mariscal was still in the front of the house while Officer Truesdale was already at the rear of the brothers' house. (Doc. 82-3) at 5.

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer

Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 84-5) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard someone say that the brothers were surrounded and "come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[7] (Doc. 84-3) at 5 (depo. at 137).

Officers Mariscal and White then saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White.[8] (Doc. 82-4) at

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[7] Officer White claims that after he heard the first two shotgun blasts he yelled out, "State Police, hands up, hands up, hands up." (Doc. 82-5) at 13. Officer Mariscal's audio recording of the gunfire, however, does not include this statement. DVD: Mariscal, NMSP.

[8] Officers Mariscal and White assert that not only did Samuel Pauly point the handgun at Officer White, but that Samuel Pauly actually fired the handgun. (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171-72). A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. (Doc. 82-5) at 21. No bullet casing was recovered from the handgun, so there is no forensic proof that

3 (depo. at 185); (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171); (Doc. 88-4) at 3 (depo. at 193). Officer Mariscal then shot towards Samuel Pauly, but missed Samuel Pauly.[9] Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly. (Doc. 84-5) at 3 (depo. at 191). The entire incident, from the time Officers Truesdale and Mariscal arrived at the Firehouse Road address to the time of the shootings, took less than five minutes. (Doc. 113) at 28.

D. Discussion

Officer White argues that he is entitled to summary judgment on the Fourth Amendment excessive force claim because his use of force on Samuel Pauly was objectively reasonable under the totality of the circumstances. Officer White also argues that he is entitled to qualified immunity on the Fourth Amendment

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Samuel Pauly fired the handgun that night. *See id.* at 20. However, from Officer Truesdale's position, "[t]he first two shots were louder than the third, and the third shot was quieter then [sic] the fourth" indicating that the third shot came from the house, i.e., that Samuel Pauly fired that third shot. *Id*. at 17.

[9] Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun. (Doc. 82-4) at 6 (depo. at 210-211); (Doc. 82-5) at 15; (Doc. 88-4) at 3 (depo. at 195). Officer Mariscal normally carries a total of 16 cartridges in his duty weapon. (Doc. 82-4) at 5 (depo. at 130-31). After the shooting, Officer Mariscal was missing one cartridge from his magazine. (Doc. 82-5) at 19. Moreover, since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Office [sic] White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White.

excessive force claim. Next, Officer White argues that the undisputed facts show that he did not violate Samuel Pauly's rights under article II, section 10 of the New Mexico State Constitution nor did he commit a battery on Samuel Pauly. Finally, Officer White argues that the NMDPS cannot be held vicariously liable for the alleged battery he committed or for his alleged violation of the New Mexico State Constitution. Plaintiffs contend that these arguments have no merit.

1. Count One: the Section 1983 Fourth Amendment Excessive Force Claim

a. Whether Officer White is Entitled to Summary Judgment on Count One

Officer White argues first that he is entitled to summary judgment on Count One because the undisputed material facts show that his use of deadly force on Samuel Pauly was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine disputes of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that the Officers' conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore, assert that a reasonable jury could find that Officer White's objectively unreasonable use of deadly force violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus,

Plaintiffs contend that Officer White is not entitled to summary judgment on Count One.[10]

The issue in Fourth Amendment excessive force cases is whether, under the totality of the circumstances, an officer's use of force was objectively reasonable. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1313 (10th Cir. 2009). Reasonableness of the use of force is judged from the viewpoint of a reasonable officer at the scene of the incident and not from hindsight. *Id*. As always, courts "recognize that officer may have 'to make split-second judgments in uncertain and dangerous circumstances.'" *Id.* (quoting *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2004) (internal quotation marks omitted)).

If a use of force is deadly, as in this case, that force is reasonable "only 'if a reasonable officer in Defendant's position would have had probable cause to believe that there was a *threat of serious harm to themselves* or to others.'" *Id.* (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008)). To assess the degree of that threat of serious physical harm, the Court considers "factors that include, but are not limited to: '(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether

[10] Plaintiffs note that Officer White does not address their Fourth Amendment claim based on Officer White's alleged unreasonable seizure of Samuel Pauly prior to his shooting death. The Court, however, has determined that Plaintiffs have not pled a Fourth Amendment unreasonable seizure claim. *See* (Doc. 123).

any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.'" *Id*. at 1314-1315 (quoting *Estate of Larsen*, 511 F.3d at 1260). Another important factor is "'whether the officers were in danger at the precise moment that they used force.'" *Id*. at 1314 (quoting *Phillips v. James*, 422 F.3d 1075, 1083 (10th Cir. 2005) (internal quotation marks omitted)). Moreover, the "'reasonableness standard does not require that officers use alternative, less intrusive means' when confronted with a threat of serious bodily injury." *Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005) (quoting *Cram*, 252 F.3d at 1133) (internal quotations omitted)). Whether the events leading up to the use of deadly force were "tense, uncertain, and rapidly evolving" is also "extremely relevant" to the totality of the circumstances review. *Thomson*, 584 F.3d at 1318 (quoting *Phillips*, 422 F.3d at 1083-84) (internal quotation marks omitted). Additionally, "a reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed." *Id*. at 1315.

Reasonableness of an officer's use of deadly force further depends on "whether their 'own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' The conduct of the officers before a suspect threatens force is relevant only if it is 'immediately connected' to the threat of force." *Id*. at 1320 (citations omitted). Moreover, an officer's conduct prior to a suspect threatening force "is

only actionable if it rises to the level of recklessness" or deliberateness, i.e., the officer's actions cannot constitute mere negligence. *Id*. "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death' or grievous bodily injury." *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), *overruled on other grounds by Morris v. Noe*, 672 F.3d 1185, 1197 n. 5 (10th Cir. 2012) and *Williams v. City & County of Denver*, 99 F.3d 1009, 1014-1015 (10th Cir. 1996). In addition, if it was feasible for the officer to warn a suspect not to use force, the failure to issue such a warning could create an unreasonable need to use deadly force. *See Thomson*, 584 F.3d at 1321. Determining whether an officer's reckless or deliberate conduct unreasonably created a need to use force "is simply a specific application of the totality of the circumstances approach inherent in the Fourth Amendment's reasonableness standard." *Id.* at 1320 (internal quotation marks omitted) (citing *Cram*, 252 F.3d at 1132).

In this case, the Plaintiffs do not argue that Samuel Pauly did not make hostile motions with his weapon or that the events leading up to Officer White shooting Samuel Pauly were not "tense, uncertain, and rapidly evolving." Instead, Plaintiffs contend that the reckless or deliberate conduct of the Officers unreasonably created a need for Officer White to shoot Samuel Pauly. In fact, the record contains genuine disputes of material fact regarding whether the Officers' conduct

prior to the shooting of Samuel Pauly was at the very least reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) the Officers adequately identified themselves, either verbally or by using a flashlight; (2) the brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before shooting him.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a

couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. A reasonable jury could then find that under the totality of the above circumstances that (1) the Officers' conduct was "immediately connected" to Samuel Pauly arming himself and pointing a handgun at Officer White; and (2) the Officers' conduct reflected "wanton or obdurate disregard or complete indifference" to the risk of an occupant of the house being subject to deadly force in the course of protecting his house and property against threatening and unknown persons. A reasonable jury could, therefore, find that the Officers' reckless conduct unreasonably created the dangerous situation leading to Officer White's need to shoot Samuel Pauly. Consequently, a reasonable jury could find that Officer White's use of deadly force on Samuel Pauly was not objectively reasonable and violated the Fourth Amendment. Clearly, there are genuine issues of material fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

Officer White also argues that he is entitled to qualified immunity on Count One. To resolve the first part of the qualified immunity test, the Court must decide if the alleged facts, when viewed "in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right[.]"

Saucier v. Katz, 533 U.S. 194, 201 (2001) (citation omitted). As shown above, Plaintiffs have produced sufficient evidence to show that Officer White violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the first step in defeating qualified immunity.

To resolve the second part of the qualified immunity test, Plaintiffs must demonstrate that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

Since 1997, it has been clearly established in the Tenth Circuit "that an officer is responsible for his or her reckless conduct that precipitates the need to use force." *Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1193

(D.N.M. 2004) (citing *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997)). Accepting Plaintiffs' version of the facts, a reasonable person in Officer White's position would have understood that the reckless actions of the Officers, including his own reckless actions, unreasonably precipitated his need to shoot Samuel Pauly and, therefore, violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the second step in defeating qualified immunity.

Having met the test to defeat qualified immunity, the burden shifts back to Officer White to prove that there is no genuine issue of material fact that would defeat the qualified immunity defense. As discussed above, various genuine issues of material fact exist which concern whether the Officers' conduct prior to the shooting of Samuel Pauly was reckless and unreasonably created Officer White's need to shoot Samuel Pauly. Moreover, viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could determine that the actions of the Officers were reckless and that those actions unreasonably precipitated the need for Officer White to shoot Samuel Pauly. Having failed to carry his burden of proving that there are no genuine issues of material fact that would defeat his claim for qualified immunity, Officer White cannot claim that qualified immunity entitles him to summary judgment on Count One.

2. Count Four: the New Mexico State Constitution Claim[11]

Next, Officer White argues that he is entitled to summary judgment on the New Mexico State Constitution claim because the undisputed material facts show that his use of force on Samuel Pauly was objectively reasonable under the totality of the circumstances. Count Four, however, does not state an excessive force claim under the New Mexico State Constitution. Rather, Count Four states a New Mexico State Constitution claim for unreasonable seizure. Consequently, the Court cannot grant summary judgment on Count Four. *See Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1121 (10th Cir. 2005) ("Obviously, under Rule 56(a) a party cannot move for summary judgment on a nonexistent, non-pleaded claim.").

3. Count Three: the NMTCA Battery Claim

Officer White argues that he is entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that his use of force was reasonably necessary. In New Mexico, an officer "is entitled to use such force as was reasonably necessary under all the circumstances of the case." *Mead v. O'Connor*, 1959-NMSC-077 ¶ 4, 66 N.M. 170. Accordingly, a battery claim exists only if the officer

[11] The Court will discuss Count Four before addressing Count Three because that is the order in which Officer White discusses those Counts in the Motion for Summary Judgment.

used unlawful or unreasonable force. *Reynaga v. County of Bernalillo*, 1995 WL 503973 *2 (10th Cir.). Since there are genuine questions of material fact pertaining to whether Officer White used objectively reasonable force under the totality of the circumstances, the Court cannot grant summary judgment on Count Three.

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

Lastly, Officer White argues that since he is entitled to summary judgment on Counts Three and Four, the NMDPS cannot be vicariously liable under the doctrine of *respondeat superior* for his alleged actions in Counts Three and Four. Having already determined that Officer White is not entitled to summary judgment on Counts Three and Four, the *respondeat superior* claims against the NMDPS are, likewise, not subject to summary judgment.

IT IS ORDERED that Defendant Raymond White's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 83) is denied.

/s/ Kenneth Gonzales
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DANIEL T. PAULY, as Personal Representative of the ESTATE OF SAMUEL PAULY, deceased, and DANIEL B. PAULY, Individually,

Plaintiffs,

vs. Civ. No. 12-1311 KG/WPL

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, RAY WHITE, MICHAEL MARISCAL, and KEVIN TRUESDALE,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant Kevin Truesdale's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Truesdale's Motion for Summary Judgment), filed November 13, 2013. (Doc. 90). Defendant Kevin Truesdale (Officer Truesdale) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and the New Mexico State Constitution claim. In addition, Officer Truesdale raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to Officer Truesdale's Motion for Summary Judgment on

December 23, 2013, and Officer Truesdale filed a reply on January 24, 2014. (Docs. 113 and 128).

This matter also comes before the Court upon Defendant Michael Mariscal's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Mariscal's Motion for Summary Judgment), filed November 13, 2013. (Doc. 91). Like Officer Truesdale, Defendant Michael Mariscal (Officer Mariscal) moves for summary judgment on the Section 1983 claim, the NMTCA claim, and the New Mexico State Constitution claim. Moreover, Officer Mariscal raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to Officer Mariscal's Motion for Summary Judgment on December 23, 2013, and Officer Mariscal filed a reply on January 24, 2014. (Docs. 110 and 130).

Having reviewed Officer Truesdale's Motion for Summary Judgment, Officer Mariscal's Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies both motions for summary judgment for the following reasons.

A. The Second Amended Complaint for Damages for Deprivation of Civil Rights, Wrongful Death and Common Law Torts (Doc. 46)

This wrongful death lawsuit arises from an incident in which Defendant Ray White, a New Mexico State Police Officer, shot and killed Samuel Pauly at the house he shared with his brother, Plaintiff Daniel B. Pauly (Daniel Pauly). Daniel Pauly was at the

house at the time of the shooting. In addition, Officers Mariscal and Truesdale, also New Mexico State Police Officers, were at the brothers' house when the shooting occurred.

Plaintiffs' lawsuit is based on Section 1983, the NMTCA, and the New Mexico State Constitution. In Count One, Plaintiffs bring a Section 1983 claim against Officers White, Truesdale, and Mariscal for allegedly violating Samuel Pauly's Fourth Amendment right to be free from excessive force.[1] In Count Three, Plaintiffs bring an NMTCA battery claim against Officers White, Truesdale, and Mariscal, and a corresponding NMTCA *respondeat superior* claim against Defendant State of New Mexico Department of Public Safety (NMDPS). In Count Four, Plaintiffs contend that the NMDPS violated article II, section 10 of the New Mexico State Constitution through Officers White, Truesdale, and Mariscal's alleged unreasonable seizure of Samuel Pauly. Finally, Plaintiffs bring a loss of consortium claim in Count Five.

B. Summary Judgment Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] When applying this standard, the

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[1] The parties stipulated to dismissing Count Two. (Doc. 117).

[2] Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

Court examines the f actual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the nonmovant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996) (citation omitted). The non-moving party may not avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

Summary judgment motions involving a qualified immunity defense are determined somewhat differently than other summary judgment motions. *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995). "When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000). This is a heavy burden for the plaintiff. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (citing *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)). First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right.

Second, the plaintiff must show that the "right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). The Tenth Circuit Court of Appeals instructs that

> [i]f the plaintiff does not satisfy either portion of the two-pronged test, the Court must grant the defendant qualified immunity. If the plaintiff indeed demonstrates that the official violated a clearly established constitutional or statutory right, then the burden shifts back to the defendant, who must prove that "no genuine issues of material fact" exist and that the defendant "is entitled to judgment as a matter of law." In the end, therefore, the defendant still bears the normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense. When the record shows an unresolved dispute of historical fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be "properly denied."

Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002) (citations omitted).

C. Material Facts and Reasonable Inferences Viewed in the Light Most Favorable to Plaintiffs

In determining the material facts and reasonable inferences to be viewed in the light most favorable to Plaintiffs, the Court reviewed Officer Truesdale's

Statement of Undisputed Material Facts, Officer Mariscal's Statement of Undisputed Material Facts, Plaintiffs' Additional Statement of Material Facts,[3] the parties' responses to the statements of undisputed material facts, and the evidence of record. Unless otherwise noted, the following recitation of material facts and reasonable references reflects the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in the motions for summary judgment.

On the evening of October 4, 2011, Daniel Pauly and two females became involved in a road rage incident on the interstate highway going north from Santa Fe, New Mexico towards Las Vegas, New Mexico. (Doc. 82-1) at 6 (depo. at 121). One of the females called 911 and reported a "drunk driver" who was "swerving all crazy" and turning his Toyota pickup truck's lights off and on. (Doc. 82-1) at 23. After Daniel Pauly passed the females, they apparently tailgated Daniel Pauly. (Doc. 82-1) at 5 (depo. at 117-120).

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id.* One of the females reported that Daniel Pauly was "throwing up gang signs"

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[3] Plaintiffs' Additional Statement of Material Facts is found in Plaintiffs' Opposition to Defendant Raymond White's First Motion for Summary Judgment. (Doc. 111) at 14-25.

during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where his brother, Samuel Pauly, was playing a video game on the couch.[4] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

The New Mexico State Police dispatcher contacted Officer Truesdale between 9:00 p.m. and 10:00 p.m. that evening regarding the 911 call from the females. (Doc. 82-3) at 3. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two females after Daniel Pauly had driven to his house. *See id.* Officers White and Mariscal were *en route* to provide Officer Truesdale with back-up assistance. *Id.* The females informed Officer Truesdale about Daniel Pauly's alleged reckless and dangerous driving. *Id.* The females also described Daniel Pauly's vehicle as a gray Toyota pickup truck and gave dispatch a license plate number. *Id.* The dispatcher informed Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road, Glorieta, New Mexico. *Id.*

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[4] Officers Truesdale and Mariscal note that Samuel Pauly had smoked marijuana and drank half a beer that evening. (Doc. 87-1) at 2 (depo. at 101); (Doc. 87-1) at 5 (depo. at 148). Officers Truesdale and Mariscal also note that Daniel Pauly drank two beers at a club in Albuquerque and drank half a beer at the house. (Doc. 87-1) at 5-6 (depo. at 148-49). The Court will not consider this evidence in deciding the Motion for Summary Judgment because it is irrelevant to the issues now before the Court.

Once the two females went on their way, any threat to the females was over. (Doc. 82-2) at 5 (depo. at 208). Officers Mariscal and White subsequently joined Officer Truesdale at the Glorieta off-ramp. Although it was raining, the Officers were not wearing raincoats over their uniforms. (Doc. 82-1) at 13 (depo. at 179); (Doc. 84-3) at 4 (depo. at 134). It was also a dark night.[5] (Doc. 82-3) at 17 (depo. at 100).

Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Daniel Pauly's version of the incident. (Doc. 82-2) at 6 (depo. at 218). At that point, the Officers did not believe any exigent circumstances existed. *Id.* at 7 (depo. at 213); (Doc. 82-4) at 9-10 (depo. at 20-21). The Officers also did not have enough evidence or probable cause to make an arrest. (Doc. 82-3) at 5); (Doc. 82-3) at 14 (depo. at 91).

The Officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address while Officer White should stay at the off-ramp in case Daniel Pauly came back that way. (Doc. 82-3) at 14 (depo. at 92). Officers Truesdale and Mariscal drove a short distance to the Firehouse Road address and parked their vehicles in front of the main house along the road. *See* (Doc. 82-4)

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[5] Officers White and Truesdale dispute this fact and claim that, despite the rain, the moon was out and they could see fairly well in the dark. (Doc. 84-2) at 5 (depo. at 117); (Doc. 85-2) at 4 (depo. at 227). Officers White and Truesdale do not describe how full the moon was that night.

at 11 (depo. at 109). The vehicles had their headlights on and one vehicle had takedown lights on; none of the vehicles had flashing lights on. (Doc. 82-4) at 11 (depo. at 10910). Officers Truesdale and Mariscal did not see Daniel Pauly's pickup truck at the main house. *See* (Doc. 82-2) at 9 (depo. at 230).

Officers Truesdale and Mariscal, however, saw a porch light and lights on in another house behind the main house, so they decided to walk up to that second house, Daniel and Samuel Pauly's house, to see if Daniel Pauly's pickup truck was there. (Doc. 82-2) at 9 (depo. at 232); (Doc. 82-3) at 6. The Officers did not activate any security lights as they walked up to the brothers' house. (Doc. 82-3) at 18 (depo. at 115).

Officers Truesdale and Mariscal approached the brothers' house in such a way that the brothers did not know that the Officers were there. (Doc. 82-2) at 12 (depo. at 224). The Officers chose this kind of approach in an attempt to maintain officer safety. *Id.* at 14 (depo. at 233). Officers Truesdale and Mariscal, therefore, did not initially use their flashlights and then used the flashlights periodically. *Id.* at 13 (depo. at 226); (Doc. 82-3) at 15 (depo. at 101). After Officer Truesdale got close to the front of the house and began approaching the front door, he turned his flashlight on. (Doc. 85-3) at 3 (depo. at 249-50, 252). The Officers could see through the front window two males moving back and forth in the house. (Doc. 88-3) at 1 (depo. at 152). As the Officers got closer to the second house, they also saw Daniel Pauly's pickup truck and advised Officer White that they located the pickup truck. (Doc. 82-5) at 12.

Officer White then proceeded to the Firehouse Road address. *Id.*

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights, especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times, "Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come out or we're coming in."[6] *Id.* at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone call out "State Police" until after Officer White shot Samuel Pauly.[7] (Doc.

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[6] The Officers did not actually intend to go inside; they were trying to get the brothers to come out of the house. (Doc. 82-4) at 2 (depo. at 162).

[7] The Officers dispute that Daniel Pauly did not know that State Police Officers were outside the house until after Officer White shot Samuel Pauly. The Officers claim that they shouted out "State Police" numerous times throughout the incident. *See, e.g.*, (Doc. 82-3) at 5-8. Officer Mariscal also claims that that he

82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

Daniel Pauly felt scared and that his life, his brother's life, and the lives of their dogs were being threatened by unknown people outside the house. (Doc. 82-1) at 16 (depo. at 205); (Doc. 82-1) at 17 (depo. at 222). The brothers then decided to call the police. (Doc. 82-1) at 17 (depo. at 222). Before they could do so, Daniel Pauly heard, "We're coming in. We're coming in." *Id.*

At that point, Samuel Pauly retrieved a shotgun and box of shells for Daniel Pauly so that the brothers could get ready for a home invasion. *Id.* at 17 (depo. at 222-23). Samuel Pauly also obtained a loaded handgun. (Doc. 82-3) at 4. Daniel Pauly then stated to Samuel Pauly that he was going to fire a couple of warning shots. (Doc. 82-1) at 17 (depo. at 223). Samuel Pauly went back to the front room. *Id.* Next, one of the brothers yelled out from inside of the house, "We have guns." (Doc. 85-4) at 2 (depo. 276). Officers Mariscal and Truesdale subsequently saw someone, presumably Daniel Pauly, run towards the back of the house. (Doc. 82-2) at 23 (depo. at 272). Officer Truesdale, therefore, went to the far back corner of the house to see what

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illuminated himself with a flashlight and that "the individuals" in the house shined flashlights in the direction of himself and Officer Truesdale. *Id.* at 7-8. However, Officer Truesdale, Officer White, and Daniel Pauly did not testify to seeing Officer Mariscal shine a flashlight on himself nor did Daniel Pauly testify to using a flashlight. *See* (Doc. 84-3) at 2 (depo. at 127).

was happening on the other side of the house. *Id.* at 21 (depo. at 274). Officer Truesdale then stated, "Open the door, come outside." (Doc. 82-3) at 5.

While Officers Truesdale and Mariscal were trying to get the brothers to come out of the house and before one of the brothers yelled out, "We have guns," Officer White arrived at the Firehouse Road address and walked up towards the brothers' house, using his flashlight periodically. *Id.*; (Doc. 84-2) at 4 (depo. at 116). Officer White could also see two males walking in the front living room. (Doc. 82-4) at 12 (depo. at 123). In addition, Officer White heard a male from inside of the house say, "We have guns." (Doc. 82-3) at 6. When Officer White reached the front of the house, Officer Mariscal was still in the front of the house while Officer Truesdale was already at the rear of the brothers' house. (Doc. 82-3) at 5.

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 845) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard

someone say that the brothers were surrounded and "come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[8] (Doc. 84-3) at 5 (depo. at 137).

Officers Mariscal and White then saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White.[9] (Doc. 82-4) at 3 (depo. at 185); (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171); (Doc. 88-4) at 3 (depo. at 193). Officer Mariscal then shot towards Samuel Pauly, but missed Samuel Pauly.[10] Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer

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[8] Officer White claims that after he heard the first two shotgun blasts he yelled out, "State Police, hands up, hands up, hands up." (Doc. 82-5) at 13. Officer Mariscal's audio recording of the gunfire, however, does not include this statement. DVD: Mariscal, NMSP.

[9] Officers Mariscal and White assert that not only did Samuel Pauly point the handgun at Officer White, but that Samuel Pauly actually fired the handgun. (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171-72). A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. (Doc. 82-5) at 21. Investigators did not recovery [sic] a bullet from the handgun, so there is no forensic proof that Samuel Pauly fired the handgun that night. *See id.* at 20. However, from Officer Truesdale's position, "[t]he first two shots were louder than the third, and the third shot was quieter then [sic] the fourth" indicating that the third shot came from the house, i.e., that Samuel Pauly fired that third shot. *Id.* at 17.

[10] Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun. (Doc. 82-4) at 6 (depo. at 210-211); (Doc. 82-5) at 15; (Doc. 88-4) at 3 (depo. at 195). Officer Mariscal normally carries a total of 16 cartridges in

White shot Samuel Pauly. (Doc. 84-5) at 3 (depo. at 191). The entire incident, from the time Officers Truesdale and Mariscal arrived at the Firehouse Road address to the time of the shootings, took less than five minutes. (Doc. 113) at 28.

D. Discussion

Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the Fourth Amendment excessive force claim because their conduct was objectively reasonable under the totality of the circumstances. Officers Truesdale and Mariscal also argue that they are entitled to qualified immunity on the Fourth Amendment excessive force claim. Next, Officers Truesdale and Mariscal argue that the undisputed facts show that they did not violate Samuel Pauly's rights under article II, section 10 of the New Mexico State Constitution nor did they commit a battery on Samuel Pauly. Finally, Officers Truesdale and Mariscal argue that the NMDPS cannot be held vicariously liable for the alleged battery they committed or for their alleged violations of the New Mexico State Constitution. Plaintiffs contend that these arguments are without merit.

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his duty weapon. (Doc. 824) at 5 (depo. at 130-31). After the shooting, Officer Mariscal was missing one cartridge from his magazine. (Doc. 82-5) at 19. One could, therefore, infer from this evidence that Officer Mariscal fired one shot. Since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Officer White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White.

1. Count One: the Section 1983 Fourth Amendment Excessive Force Claim

a. Whether Officers Truesdale and Mariscal are Entitled to Summary Judgment on Count One

Officers Truesdale and Mariscal argue first that they are entitled to summary judgment on Count One because the undisputed material facts show that their conduct at Daniel and Samuel Pauly's house was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine issues of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that Officers Truesdale and Mariscal's conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore, assert that a reasonable jury could find that Officers Truesdale and Mariscal's objectively unreasonable conduct violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs contend that Officers Truesdale and Mariscal are not entitled to summary judgment on Count One.[11]

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[11] Plaintiffs note that Officers Truesdale and Mariscal do not address Plaintiffs' Fourth Amendment claim based on Officers Truesdale and Mariscal's alleged unreasonable seizure of Samuel Pauly prior to his shooting death. The Court, however, has determined that Plaintiffs have not pled a Fourth Amendment unreasonable seizure claim. *See* (Doc. 123).

The issue in Fourth Amendment excessive force cases is whether, under the totality of the circumstances, an officer's use of force was objectively reasonable. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1313 (10th Cir. 2009). Reasonableness of the use of force is judged from the viewpoint of a reasonable officer at the scene of the incident and not from hindsight. *Id.* As always, courts "recognize that officer may have 'to make split-second judgments in uncertain and dangerous circumstances.'" *Id.* (quoting *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2004) (internal quotation marks omitted)).

The objective reasonableness of officers' use of deadly force further depends on "whether their 'own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' The conduct of the officers before a suspect threatens force is relevant only if it is 'immediately connected' to the threat of force." *Id.* at 1320 (citations omitted). Moreover, an officer's conduct prior to a suspect threatening force "is only actionable if it rises to the level of recklessness" or deliberateness, i.e., the officer's actions cannot constitute mere negligence. *Id.* In addition, if it was feasible for the officer to warn a suspect not to use force, the failure to issue such a warning could create an unreasonable need to use deadly force. *Id.* at 1321. Determining whether an officer's reckless or deliberate conduct unreasonably created a need to use force "is simply a specific application of the totality of the circumstances approach inherent in the Fourth Amendment's reasonableness standard." *Id.* at 1320

(internal quotation marks omitted) (citing *Cram*, 252 F.3d at 1132).

This District Court has held that the reckless endangerment doctrine described above also applies to a non-shooting officer's conduct prior to the shooting death of a suspect by another officer. *See Diaz v. Salazar*, 924 F.Supp. 1088, 1097 (D.N.M. 1996). The Tenth Circuit Court of Appeals, however, has not applied the reckless endangerment doctrine to the conduct of non-shooting officers. Instead, in a 2013 decision, the Tenth Circuit focused on whether the non-shooting officer[12] "caused" the suspect to be deprived of his Fourth and Fourteenth Amendment rights when another officer shot and killed that suspect. *See James*, 511 Fed. Appx. at 746. The Tenth Circuit stated that "[t]he requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights.'" *Id.* (quoting *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006)). The Tenth Circuit further stated that to prevail on a Section 1983 claim, a plaintiff must show that the non-shooting officer's actions "were both the but-for and the proximate cause" of the suspect's death. *Id.* (citing *Trask*, 446 F.3d at 1046). However, if a superseding or intervening event, like the suspect's own actions, caused the suspect's death, then an officer cannot have proximately caused

[12] In that case, the "non-shooting" officer had fired at the suspect but missed hitting him. *James v. Chavez*, 511 Fed. Appx. 742, 745 (10th Cir. 2013).

the death and the officer is, thus, not liable for that death under Section 1983. *Id.* at 747 (citing *Trask*, 446 F.3d at 1046).

Although neither Plaintiffs nor Officers Truesdale and Mariscal directly analyze Officers Truesdale and Mariscal's actions under the above causation analysis, Plaintiffs' argument concerning the reckless endangerment doctrine raises causation issues similar to those which the Tenth Circuit addressed. Plaintiffs contend, in essence, that (1) Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause an Officer, like Officer White, to have a need to use deadly force on an occupant of the house, in this case, Samuel Pauly; and (2) Officers Truesdale and Mariscal's conduct was the but-for and proximate cause of Samuel Pauly's death. It is clearly undisputed that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. The evidence of record, however, contains genuine issues of material fact regarding whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) Officers Truesdale, Mariscal, and White adequately identified themselves, either verbally or by using a flashlight; and (2) the brothers could, nonetheless, see Officers Truesdale, Mariscal, and White considering the ambient light and other light sources. The outcome of these factual issues is material to whether

the brothers knew that State Police Officers were outside their house prior to Officer White shooting Samuel Pauly. If a jury finds that the brothers knew that State Police Officers were outside their house, but the brothers, nonetheless, armed themselves and Samuel Pauly pointed a handgun at Officer White, then a reasonable jury could find that the brothers' hostile actions were superseding or intervening causes of Samuel Pauly's death. In that scenario, Officers Truesdale and Mariscal could not be held liable for Samuel Pauly's death, i.e., Officers Truesdale and Mariscal could not have proximately caused Samuel Pauly's death. On the other hand, if a jury finds that the brothers did not know who was outside their house, then a reasonable jury could determine that Officer Truesdale and Officer Mariscal proximately caused Samuel Pauly's death by failing to adequately identify themselves as well as Officer White.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring Officers Truesdale, Mariscal, and White to go to Daniel Pauly's house at 11:00 p.m.; Officer Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; Officer Truesdale provided inadequate police identification by yelling out

"State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for Officer Truesdale, Mariscal, and White to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. Under these circumstances, a reasonable jury could find that Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause Officer White's need to shoot Samuel Pauly. Additionally, a reasonable jury could find that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. A reasonable jury could also find that Samuel Pauly's actions did not constitute a superseding cause of his death, i.e., that Samuel Pauly did not know that he was pointing a hand gun at a State Police Officer. Thus, a reasonable jury could find that Officers Truesdale and Mariscal's conduct proximately caused Samuel Pauly's death. In sum, a reasonable jury could find that Officers Truesdale and Mariscal's conduct caused Samuel Pauly to be deprived

of his Fourth Amendment right to be free from excessive force. Clearly, there are genuine issues of material fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

Officers Truesdale and Mariscal also argue that they are entitled to qualified immunity on Count One. To resolve the first part of the qualified immunity test, the Court must decide if the alleged facts, when viewed "in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citation omitted). As shown above, Plaintiffs have produced sufficient evidence to demonstrate that Officers Truesdale and Mariscal violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the first step in defeating qualified immunity.

To resolve the second part of the qualified immunity test, Plaintiffs must show that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615

(1999)). "[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

Since at least 2006, it has been clearly established in the Tenth Circuit that the requisite causal connection for establishing a Section 1983 violation "is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Trask*, 446 F.3d at 1046. It has also been clearly established, since at least 2006, that for an officer to be liable under Section 1983, the officer's conduct must be both a but-for and proximate cause of the plaintiff's constitutional harm, and that a superseding cause relieves an officer of Section 1983 liability. *Id.* Accepting Plaintiffs' version of the facts, a reasonable person in Officers Truesdale and Mariscal's positions would understand that his actions would set in motion a series of events which he reasonably should have known would create a dangerous situation that would cause Officer White's need to use deadly force on Samuel Pauly. Furthermore, such a reasonable person in Officers Truesdale and Mariscal's positions would understand that his actions were both the

but-for and proximate cause of Officer White's need to shoot Samuel Pauly. Accordingly, a reasonable person in Officers Truesdale and Mariscal's positions would understand that his actions violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs meet the second step in defeating qualified immunity.

Having met the test to defeat qualified immunity, the burden shifts back to Officers Truesdale and Mariscal to prove that there is no genuine issue of material fact that would defeat the qualified immunity defense. As discussed above, genuine issues of material fact exist which concern whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. Moreover, viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could determine that (1) Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause Officer White's need to shoot Samuel Pauly; and (2) Officers Truesdale and Mariscal's actions were the but-for and proximate cause of Officer White's need to shoot Samuel Pauly. Having failed to carry their burden of proving that there are no genuine issues of material fact that would defeat their qualified immunity defense, Officers Truesdale and Mariscal cannot claim that qualified immunity entitles them to summary judgment on Count One.

2. Count Four: the New Mexico State Constitution Claim[13]

Next, Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the New Mexico State Constitution claim because the undisputed material facts show that their conduct was objectively reasonable under the totality of the circumstances. Count Four, however, does not state an excessive force claim under the New Mexico State Constitution. Rather, Count Four states a New Mexico State Constitution claim for unreasonable seizure. Consequently, the Court cannot grant summary judgment on Count Four. *See Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1121 (10th Cir. 2005) ("Obviously, under Rule 56(a) a party cannot move for summary judgment on a nonexistent, non-pleaded claim.").

3. Count Three: the NMTCA Battery Claim

Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that their conduct was objectively reasonable under the totality of the circumstances. In New Mexico, a person commits the tort of battery by "causing an offensive touching. . . ." *Selmeczski v. N.M. Dept.*

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[13] The Court will discuss Count Four before addressing Count Three because that is the order in which Officers Truesdale and Mariscal discuss those Counts in their motions for summary judgment.

of Corrections, 2006-NMCA-024 ¶ 29, 139 N.M. 122. *See also Schear v. Board of County Com'rs of Bernalillo County*, 1984-NSC-079 ¶ 9, 101 N.M. 671 (under NMTCA, a law enforcement officer need not inflict tort to be liable for that tort; a law enforcement officer need only proximately cause the tort). Since there are genuine questions of material fact pertaining to whether Officers Truesdale and Mariscal's actions proximately caused Officer White to use deadly force on Samuel Pauly, the Court cannot grant summary judgment on Count Three.

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

Lastly, Officers Truesdale and Mariscal argue that since they are entitled to summary judgment on Counts Three and Four, the NMDPS cannot be vicariously liable under the doctrine of *respondeat superior* for their alleged actions in Counts Three and Four. Having already determined that Officers Truesdale and Mariscal are not entitled to summary judgment on Counts Three and Four, the *respondeat superior* claims against the NMDPS are, likewise, not subject to summary judgment.

IT IS ORDERED that:

1. Defendant Kevin Truesdale's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 90) is denied; and

2. Defendant Michael Mariscal's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 91) is denied.

/s/ Kenneth Gonzales
UNITED STATES
DISTRICT JUDGE

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL T. PAULY, as personal representative of the estate of Samuel Pauly, deceased; DANIEL B. PAULY, Plaintiffs-Appellees, v. RAY WHITE; MICHAEL MARISCAL; KEVIN TRUESDALE, Defendants-Appellants, and STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, Defendant.	No. 14-2035

ORDER

(Filed Apr. 11, 2016)

Before **TYMKOVICH**, Chief Judge, **KELLY**, **BRISCOE**, **LUCERO**, **HARTZ**, **GORSUCH**, **HOLMES**,

MATHESON, **BACHARACH**, **PHILLIPS**, **McHUGH** and **MORITZ**, Circuit Judges.

This matter is before the court on the appellants' *Petition for Rehearing and Rehearing En Banc*. We also have a response from the appellees.

Upon consideration, the request for panel rehearing is denied by a majority of the original panel members. Both the petition and response were also transmitted to all of the judges of the court who are in regular active service. Upon that submission, a poll was called. Via an equally divided vote, the poll did not carry. Consequently, the request for en banc consideration is also denied. *See* Fed. R. App. P. 35(a) (noting "[a] majority of the circuit judges who are in regular active service" may order en banc rehearing).

Chief Judge Tymkovich, as well as Judges Kelly, Hartz, Gorsuch, Holmes and Moritz would grant the en banc petition. Judge Phillips has filed a separate concurrence in support of the denial of en banc rehearing, which Judge Briscoe joins. Judge Hartz and Judge Moritz have written separately in dissent. Judge Gorsuch joins Judge Hartz' dissent, and Judges Kelly, Hartz, Gorsuch and Holmes join Judge Moritz' dissent.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

No. 14-2035, *Pauly v. White, et al.*

PHILLIPS, Circuit Judge, joined by **BRISCOE**, Circuit Judge, concurring in the denial of rehearing en banc.

I barely recognize the majority panel opinion when reading Judge Moritz's dissent from en banc denial (Dissent). And the reason, it turns out, is simple. Unlike the Dissent, the majority opinion credits the district court's findings and properly applies disputed evidence in favor of the plaintiffs. The Dissent and panel dissent cannot change the majority's holding by substituting its own facts after resolving the evidence in favor of the officers and against the plaintiffs. Here are some examples of how the Dissent does so:

- The Dissent fights the district court's finding that Officer White "took cover," App. at 680, doing its own fact finding (without basis) to reduce the cover to "some form of cover." I understand why it's important how much cover Officer White had when firing a fatal shot, but I don't understand challenging the district court's fact finding. *See Johnson v. Jones*, 515 U.S. 304, 319 (1995) (requiring the courts of appeals to "simply take, as given, the facts that the district court assumed when it denied summary judgment" when a defendant challenges the "purely legal" clearly-established-law prong).

- The Dissent claims that a "suspect" (suspect in what is unknown since the officers readily admit they had no probable cause to arrest anyone) "point[ed] a gun directly at that officer [Officer White]." Again, this gives the officers the benefit of disputed evidence. The district court found that from inside his lighted house Samuel Pauly may not have been able to see Officer White behind a stone wall 50 feet away on a dark, rainy night. App. at 685. The district court recounted the officers' account of Samuel's activity immediately before being killed, which had Samuel pointing a gun in Officer White's direction before being shot and killed. Samuel would have done so simply by pointing a gun out the front window – even if simply as a tactic to dissuade the intruders after they yelled, "Come out or we're coming in." App. at 678.

- The Dissent agrees that Officer Mariscal fired the third of four shots that night (the first two were Daniel Pauly's warning shots out the back of the house). Also from a covered position behind a truck about 50 feet from the home, Officer Mariscal fired at Samuel Pauly inside his home. Officer White fired the fourth shot, which killed Samuel Pauly. No one disputes that four shots were fired. Yet Officer White maintains that Samuel Pauly fired at him first, a claim the Dissent neither acknowledges nor adopts. App. at

145-47. In measuring the objective reasonableness of Officer White's use of deadly force, the jury will be free to consider this apparently false claim of self-defense. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1159 (10th Cir. 1992) (concluding that the jury alone assesses witnesses' credibility and determines the weight to give to their testimony).

- The Dissent characterizes Officer White's shooting as a "split second judgment[]." Officer Mariscal's belt recorder shows that a full five seconds passed between his missed third shot at Samuel Pauly and Officer White's fatal fourth shot. Mariscal Audio Recording at 0:09-0:20.

- The Dissent says that a second "suspect" was "loose and ha[d] fired shots near a second officer [Officer Truesdale]." In fact, it's undisputed that Daniel Pauly remained in the home throughout the encounter. And Daniel Pauly fired two shotgun warning blasts from the *back* of the house to warn the intruders after they'd yelled, "Come out or we're coming in." App. at 678. Nothing in the record supports the statement that Daniel Pauly "fired shots near a second officer" or that Daniel even ever saw Officer Truesdale somewhere near the back corner of the house when he fired the shotgun into a tree behind the house.

- The panel dissent shrouds Officer White in ignorance because he was the third officer to arrive at the Pauly's house. It says that "within seconds" of arriving, Officer White heard one of the Pauly brothers yell, "We have guns." *Pauly v. White*, ___ F.3d ___, 2016 WL 502830, at *23 (10th Cir. 2016) (Moritz, J., dissenting). But a police report after the incident says that Officer White heard "We have guns" within two-and-a-half minutes of arriving. App. at 118. And here, it's important to remember that when one of the Pauly brothers yelled, "We have guns," he was responding to the police's yelling, "Come out or we're coming in" (while insufficiently identifying themselves as police officers). App. at 678. Thus, it's an open question what Officer White heard that night, the sort of question a jury should resolve.

The Dissent exaggerates the reach of the majority opinion's holding. By the Dissent's telling, the majority opinion would deny qualified immunity to an officer imminently exposed to gunfire from a suspect pointing a gun directly at the officer – even when another dangerous suspect is on the loose nearby. Moreover, according to the Dissent, the majority's rule would apply whether this happened in broad daylight and from close range. The short answer is that the majority opinion says no such thing. The opinion is limited to its facts. And its facts properly considered are those stated

in the opinion, giving credit to the district court's findings and read in favor of the plaintiffs. If the facts were those stated in the Dissent and the panel dissent, this would be a very different case for our review.

Resolving the evidence in plaintiffs' favor – and not the officers' favor – leaves us with facts upon which a jury could reasonably find that Officer White killed Samuel Pauly for no good reason and while not endangered. Officer White himself testified that he couldn't say what Samuel Pauly was doing in the five seconds before Officer White's fatal shot. App. at 144. Officer White explained his failure to observe whether Samuel Pauly had lowered his gun by saying that he had been "aiming at center mass."[1] *Id*. Officer White concedes that he never warned Samuel Pauly to put down his

[1] In Judge Hartz's dissent, he describes Officer White as being "pinned down" while (as I understand it) Samuel Pauly pointed a firearm in his direction. In my view, that contains two mistaken assumptions dependent upon resolving fact disputes in the officers' favor. First, despite the district court's stated doubts, Judge Hartz's dissent assumes that Samuel Pauly could have seen Officer White behind a stone wall 50 feet away from his lighted living room as he looked into a dark, rainy night. Second, it assumes that Samuel Pauly was still pointing his firearm outside toward Officer White after being shot at by Officer Mariscal. Not even Officer White says that. As mentioned above, Officer White testified that he didn't know whether Samuel Pauly continued to point his gun outside after Officer Mariscal shot at him. App. at 144. On a separate point, Judge Hartz says that it's undisputed that a home occupant (Daniel Pauly) "fired two shots to ward off two of White's fellow officers." But Daniel Pauly certainly disputes that he knew the invaders threatening to illegally invade his home were police officers.

gun. Our cases have denied qualified immunity to officers who have shot with more urgent need to do so. *See, e.g.*, *Tenorio v. Pitzer*, 802 F.3d 1160, 1166 (10th Cir. 2015) (denying qualified immunity for an officer who shot and wounded a man armed with a knife who was approaching officers from across a living room while refusing to comply with their repeated orders to drop the knife), *pet. for cert. filed*, 84 U.S.L.W. 3355 (U.S. Dec. 16, 2015) (No. 15-795).

In short, I believe that it is "beyond debate" that an officer can't shoot and kill without good cause and while not endangered. Contrary to the Dissent's position, the majority doesn't define excessive force at "a high level of generality" by including within excessive force such an egregious situation (and, of course, it's up to the jury to decide what happened that night). *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). Borrowing some of the Dissent's final words, I'd say that granting officers qualified immunity here – when there's a genuine issue of material fact whether the killing was unjustified – would create a new precedent with potentially deadly ramifications for *citizens* in this circuit.

No. 14-2035, *Pauly v. White, et al.*

HARTZ, Circuit Judge, joined by **GORSUCH**, Circuit Judge, dissenting from the denial of rehearing en banc:

I join Judge Moritz's dissent. It is not disputed that shortly after Officer White approached the home,

an occupant fired two shots to ward off two of White's fellow officers. I am unaware of any clearly established law that suggests, much less requires, that an officer in that circumstance who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall, hoping that no one will be aiming in his direction when he decides to look around or move.[1] Perhaps the Supreme Court can clarify the governing law.

I express no view on whether White's fellow officers are entitled to qualified immunity on this record.

No. 14-2035, *Pauly v. White, et al.*

MORITZ, Circuit Judge, joined by **KELLY**, **HARTZ**, **GORSUCH**, and **HOLMES**, Circuit Judges, dissenting from the denial of rehearing en banc.

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[1] The Supreme Court has "stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (internal quotation marks omitted). And "in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event [a] mistaken belief was reasonable," *Saucier v. Katz*, 533 U.S. 194, 206 (2001), whether the error was "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact," *Pearson v. Callahan*, 505 U.S. 223, 231 (2009) (internal quotation marks omitted). The reasonable beliefs of the *victim* are, of course, not the issue.

With the issuance of the panel majority's opinion, the clearly established law in this circuit requires an officer who has taken some form of cover to hesitate and call out a warning before using deadly force – even as a suspect points a gun directly at that officer, even as a second suspect is loose and has fired shots near a second officer, and even as a third officer has already shot and missed the suspect pointing the gun at the first officer. The majority acknowledges the Court's admonitions against second-guessing officers' split-second judgments and defining clearly established law at a high level of generality. But then it flouts them, first by finding Officer White's use of deadly force objectively unreasonable, and second by finding his actions violated clearly established law. The majority's fundamentally flawed decision doesn't just violate existing precedent; it creates new precedent with potentially deadly ramifications for law enforcement officers in this circuit.