No. _____

In The
Supreme Court of the United States

DEPUTY JARRETT MORRIS, DEPUTY JOSEPH SCHMIDT and DEPUTY JEREMY ROGERS,

Petitioners,

v.

CAROL ANN GEORGE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

LISA A. ROTHSTEIN, ESQ.
Counsel of Record
COUNTY OF SANTA BARBARA
OFFICE OF COUNTY COUNSEL
DENNIS A. MARSHALL, County Counsel
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101
Telephone: (805) 568-2950
Facsimile: (805) 568-2983
Email: lrothst@co.santa-barbara.ca.us

Counsel for Petitioners Deputy Jarrett Morris, Deputy Joseph Schmidt and Deputy Jeremy Rogers

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court held that a defendant is entitled to immediate review of a District Court's denial of a claim for qualified immunity if the denial turned on a question of *law*. In *Scott v. Harris*, 550 U.S. 372 (2007), this Court held that an appellate court should reverse a District Court's denial of a qualified immunity claim even if it was based on a determination that there were questions of *fact*, if a review of the record as a whole reveals that the plaintiff's version of events is not believable and that the defendant's conduct was objectively reasonable. The questions presented are:

1. Was the Court of Appeals correct when it held that it was "categorically precluded" from reviewing the record as a whole to determine whether plaintiff's version of events, which the District Court held sufficient to defeat qualified immunity, was blatantly contradicted by the record such that no reasonable jury could believe it?

2. If the Court of Appeals was required to review the record as whole to determine whether plaintiff's version of events was blatantly contradicted by the record such that the defendant deputies were entitled to qualified immunity, is a video or audio recording (such as in *Scott*) the *only* evidence that is sufficient to overcome plaintiff's conflicting version of events?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

- Carol Ann George, plaintiff, appellee below, and respondent here.
- Deputy Jarrett Morris, Deputy Joseph Schmidt, Deputy Jeremy Rogers, defendants, appellants below, and petitioners here.

In addition, the County of Santa Barbara, Deputy Harry Hudley and Deputy Larry Hess were defendants in the underlying action and appellants below but are not parties to this petition.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Ninth Circuit's amended opinion, the subject of this petition, is for publication but does not yet have an official citation. (Appendix ("App.") 1-65.) The Ninth Circuit's initial opinion is published at 724 F.3d 1191 (9th Cir. 2013). The Ninth Circuit's order amending the opinion and the dissent, and denying the petition for rehearing was not published in the official reports. *George v. Morris*, 2013 U.S.App.LEXIS 19214 (9th Cir. 2013).

JURISDICTION

The Ninth Circuit initially filed its opinion on July 30, 2013. *George v. Morris,* 724 F.3d 1191 (9th Cir. 2013.) Appellants timely petitioned for panel rehearing and rehearing en banc. An amended opinion and amended dissent were filed on September 16, 2013, the same day on which the petition for rehearing and rehearing en banc were denied. (App. 1-65.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the Ninth Circuit's September 16, 2013 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent 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.

Respondent alleges that the petitioner deputies violated her husband's rights under the Fourth Amendment to the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Factual Background

Donald George had recently been diagnosed with brain cancer and was despondent over his prognosis. Early on the morning of March 6, 2009, Donald told his wife Carol,[1] "I don't want to live like this, I'm going to be a vegetable." (App. 29-30.) He asked Carol to leave the house but she refused to do so, because she was afraid that he would commit suicide. When later that morning she saw Donald take his keys from their nightstand and head downstairs, Carol was concerned and followed him. She saw him go to their truck, locate his pistol and load it with ammunition. (App. 4.) Aware of her husband's suicidal thoughts, Carol had hidden all the firearms but had not been able to find the gun in the truck. (App. 28-30.)

When Carol saw her husband retrieve and load his gun, she begged him to give her the gun, "yanking at him" and "screaming at the top of [her] lungs" but he was too strong and would not turn over the weapon.

[1] Carol George and Donald George are referred to by first name for the purpose of clarity.

(App. 30.) At that point, hysterical with fear, she "started panicking" and called 911. (App. 30.) The call went to the Ventura Office of the California Highway Patrol (CHP). Carol exclaimed to the dispatch officer, "My husband has a gun!" She was "hysterically screaming, indeed shrieking almost incomprehensively as loud as any human being could," crying, "no, no no!" (App. 29.) The 911 operator tried, but could not obtain a complete address as Carol was unable to provide it. The Ventura CHP contacted a Santa Barbara Sheriff's Department (SBSD) 911 dispatcher. (App. 4.) The Ventura dispatcher informed the SBSD that he had a female caller "screaming that her husband has a gun." (App. 26.) The SBSD was able to call Carol back and obtain her complete address. (App. 4.)

Santa Barbara County Sheriff's deputies were dispatched to the George's house and told they were responding to a domestic disturbance involving a firearm. Deputies Jarrett Morris and Jeremy Rogers arrived first, with Deputy Joseph Schmidt right behind – they met Carol in front of the house and she advised them that Donald was on the patio and still had a gun. (App. 5.)

The deputies established a perimeter around the house. They could not see Donald and took care to cover any potential escape routes and to provide themselves some cover. Deputy Schmidt lay down in ice plants at the bottom of a steep slope – from his position on the ground, he could see the back of the house, which had a second floor balcony. (App. 5.)

There is some dispute as to which deputy first spotted Donald emerging onto the balcony, but there is no dispute that when he emerged, he was carrying a gun and using a walking device. Deputy Schmidt identified himself and shouted at Donald to show his hands. Once he heard Deputy Schmidt yell, Deputy Rogers came from the front of the house to the rear. (App. 5.)

The pivotal events in this case occurred in the next few moments – indeed it was merely twelve seconds from when the deputies first saw Donald had a gun until shots were fired. (App. 6-7.) The only surviving eyewitnesses to these events, the deputies, have testified that after manipulating the back of the gun as if he was either cocking it or removing the safety, Donald said something like "no you won't" and then raised the gun and pointed it directly at Deputy Rogers. Fearing for Deputy Rogers' life, all three deputies then fired at Donald. (Excerpts of Record ["ER"] 878, 883, 889.) If in fact, Donald pointed his gun, there is no dispute that the deputies were entitled to shoot. (App. 18.) However, the District Court concluded that Carol had adduced adequate evidence to call this fact into question.[2]

---

[2] The District Court cited, and the Ninth Circuit relied upon the following additional evidence to support the qualified immunity denial. First, the District Court noted there was a dispute about who made the decision to set up a perimeter. (App. 70.) (Reliance on this dispute conflicts with the Ninth Circuit's confirmation that events prior to the shooting are irrelevant, at

(Continued on following page)

Carol's primary evidence was her own declaration submitted in support of summary judgment, stating that Donald was not strong enough to have raised the gun with both hands, as Deputy Rogers believed he had done. (App. 72.) Neither the District Court nor the Ninth Circuit were concerned that this conflicted with Carol's on-scene statement regarding her husband's activities that morning, including descending the stairs, retrieving and loading the gun and effectively resisting her efforts to "yank" it from him. (App. 29-30.)

When the shots were fired, Donald fell to the ground. Together the three deputies fired approximately nine shots. They then ran to assist Donald, applied first aid, and called an ambulance. He died two hours later at the hospital. (App. 7.)

Several months prior to his diagnosis, Donald had a conversation with a friend, who had been diagnosed with cancer. He told his friend that if he got cancer he would "get a gun, call the sheriff and have them shoot me." (App. 32-33.) While it was Carol that placed the call to law enforcement, the rest of the incident played out much as Donald had conceived.

App. 21 n. 14.) The second dispute concerned who saw Donald first and how he was holding his gun. (App. 71.) Third, the District Court noted a dispute regarding whether Deputy Schmidt could see Donald's gun when he ordered him to drop it. (App. 71.) The deputies assert that none of these purported disputes raise a triable issue.

B. Procedural Background

Carol filed her First Amended Complaint in the District Court on July 13, 2009. In addition to the petitioning parties here, she also sued the County of Santa Barbara and supervising deputies Harry Hudley and Larry Hess. (App. 7-8.) The County and the individual deputies moved for summary judgment on December 13, 2010. On June 24, 2011, the District Court entered an order granting in part and denying in part Defendants' motion for summary judgment. (App. 8.) The court dismissed Carol's claims of unreasonable seizure (of Carol), excessive force and supervisory liability against supervising deputies Hess and Hudley, and claims against the County of Santa Barbara under *Monell v. Dept. of Soc. Services*, 436 U.S. 658 (1978). (App. 8.)

The court denied deputies Morris, Rogers and Schmidt's assertion of qualified immunity. The Court found that the following disputed issues of material fact precluded a qualified immunity determination on summary judgment:

- Which deputy first decided to set up a perimeter;
- Who first saw Donald on the patio;
- In which hand Donald held the gun; and
- Whether the deputies reasonably felt Donald posed a threat – that is, whether or not he pointed his gun at Deputy Rogers. (App. 57-58; 70-73.)

On June 13, 2011 defendant deputies Morris, Roger and Schmidt filed their Ninth Circuit notice of appeal on the denial of qualified immunity. The deputies asserted that the disputed issues were not material, and that under *Scott v. Harris*, 550 U.S. 372 (2007), the Court was required to review the record as a whole. They further argued that Carol's declaration that her husband could not raise the gun with both hands (the only fact they conceded would be material if truly disputed), was clearly contradicted by her own statements on the morning of the shooting regarding what had occurred that day. When viewed as a whole, no reasonable jury could have believed that after all Donald had accomplished that morning, including physically resisting his wife's attempts to forcibly take the gun away from him, he was incapable of raising both arms to point a gun.[3]

The Ninth Circuit heard oral argument on February 7, 2013 and filed its initial Opinion on July 30, 2013, affirming the District Court's denial of summary judgment. The Court held that the District Court found there were questions of fact that precluded a determination that the deputies were entitled to qualified immunity and that it was therefore categorically precluded from considering the deputies' arguments. (App. 9-11.)

---

[3] In fact, it was only Deputy Rogers that specifically recalled that he raised both arms. (App. 72.)

Judge Trott filed a lengthy dissent agreeing with the deputies that the Court was required to review the evidence as a whole, and that reviewed as a whole, no reasonable fact-finder could believe Carol's version of events. (App. 23-65.) He set out the deputies' testimony and Carol's statement the day of the shooting. He explained why Carol's conflicting declaration was not credible and why her expert, Thomas Parker's, declaration was irrelevant and inadmissible. Judge Trott strongly supported the deputies' claim to qualified immunity under *Scott* and its progeny, including *Wilkinson v. Torres,* 610 F.3d 546 (9th Cir. 2010). (App. 65.)

On August 13, 2013, the three deputies filed a petition for panel rehearing and rehearing en banc. In addition to the larger legal issues, the deputies pointed out that factually, the amount of time that passed between when the deputies first saw Donald with a gun on the balcony and when they fired shots was a mere twelve seconds, while the majority's opinion stated that it was four minutes. (*George*, 724 F.3d at 1191, 1194.)

On September 16, 2013, the Ninth Circuit denied panel rehearing and rehearing en banc but concurrently issued an amended decision and dissent. Judge Trott was the only member of the panel to support rehearing. (App. 2-3.) The amended decision corrects the timing inaccuracy and notes that the time lapse between when the deputies first saw Donald with the gun and when shots were fired was twelve seconds. The dissent elaborates on this point, arguing that

it clearly illustrates the split-second nature of the events at issue and the time the deputies had to take action with life-and-death implications. (App. 55.) This, Judge Trott asserted, gave even more credence to the deputies' claim of qualified immunity. This timely petition followed.

REASONS TO GRANT THE PETITION

Review is necessary to correct a departure from this Court's precedent in *Scott,* and to maintain the protection that qualified immunity affords to peace officers who risk their lives to serve the public under the most perilous circumstances. The Ninth Circuit's decision, in direct conflict with *Scott v. Harris, categorically precludes* review when the District Court denies qualified immunity on the basis of a disputed issue of fact. Review is unavailable even if the plaintiff's evidence that the District Court relied upon is overtly flawed, as with the contradicting video evidence in *Scott*, or in this case, where plaintiff's own statements the day of the shooting are irreconcilable with her summary judgment declaration. The challenged decision is in conflict not only with this Court's precedent, but also with cases from every other circuit that has considered the question.

Review is further necessary to clarify a conflict between the circuits as to what type of evidence is necessary to establish the unreasonableness of the plaintiff's version as this Court found the video

accomplished in *Scott*. Was the Ninth Circuit in this case correct that only "video-type" evidence is adequate to defeat the plaintiff's version or, as the defendant officers argued, must the court consider any evidence that renders the plaintiff's version unbelievable?

We expect peace officers to intervene in the most dangerous situations, to place themselves directly in harm's way without hesitation. We shield them with qualified immunity to ensure that the fear of litigation will not give them reason to waver in fulfilling the duties and obligations that society relies on them to accept. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). But the Ninth Circuit's decision removes the qualified immunity shield whenever the District Court finds that there is a genuine issue regarding whether the use of force was objectively reasonable. The appellate court has no discretion to look past the finding at the evidence upon which the District Court relied.

If the officers must endure trial in these cases in order to benefit from qualified immunity, then the benefit of the immunity is substantially lost. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). In deadly force cases like this one, "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." *Graham v. Conner*, 490 U.S. 386, 396-97 (1989). When an officer acts reasonably in these circumstances, he or she is entitled to qualified immunity; immunity not only from liability but also from the

challenges inherent in standing trial. But trial will be the outcome facing the three Santa Barbara County Sheriff's deputies in this case and undoubtedly, many more if this decision stands.

The Ninth Circuit decision conflicts not only with this Court's decision in *Scott*, but with decisions of nearly all courts of appeals, including the Ninth Circuit. Set forth below are cases from nine circuits, in all of which the Courts, in spite of *Johnson*, undertake a review of a District Court's finding that a genuine dispute of fact precludes summary judgment for the defendants on their claim of qualified immunity. In each of these cases, appellate courts have stated that, as in *Scott*, if the record as a whole sufficiently discredits plaintiff's evidence, the appellate court must disregard it, and based on remaining evidence, determine whether the officer's actions were reasonable as a matter of law. If the Ninth Circuit panel had followed this existing law, it would have found that the deputies' use of deadly force was reasonable because, once blatantly contradicted evidence is disregarded, the remaining undisputed evidence showed that they only shot at Donald after he pointed his gun at Deputy Morris.

It is essential that this Court grant review and provide a definitive statement regarding how appellate courts should review District Court denials of qualified immunity based upon a determination that there is a disputed issue of material fact. Because of the conflict in authority with this Court and nearly all appellate courts, certiorari is necessary to

maintain uniformity and consistency on the scope of review of these cases, which profoundly impact peace officer protection from unwarranted litigation. Review is also essential because consistency and clarity of the rules governing interlocutory review of orders denying qualified immunity is a matter of exceptional national importance.

I. THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT IN *SCOTT V. HARRIS*

In *Scott*, 550 U.S. at 380, this Court reiterated the general principle that, when the party moving for summary judgment "has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the *record taken as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." (Citation omitted, emphasis added.) Accordingly, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment [based on qualified immunity]." *Id*.

Finding plaintiff's "version of events was so utterly discredited by the record that no reasonable jury could have believed him," this Court in *Scott* reversed the District Court's denial of qualified immunity.

Video evidence of the principle event in the case – a car chase – discredited plaintiff's testimony that he posed no serious risk to the public. This Court held that the court of appeals should not have relied on plaintiff's testimony, which the Court called a "visible fiction," to find that there was a factual issue sufficient to deny summary judgment. *Id*. at 380-81.

The Ninth Circuit in this case nevertheless stated that it could not consider the deputies' claim that the evidence supporting the District Court's determination was similarly unreliable when viewed with the record as a whole. (App. 9, 11.) Relying on *Johnson v. Jones*, 515 U.S. 304 (1995), the majority said that whether evidence creates a genuine issue is "categorically unreviewable on interlocutory appeal." (App. 9.) The Court determined that *Scott* did not intrude on the *Johnson* jurisdictional bar because "not a single Justice of the Supreme Court [in *Scott*] discussed the limits of the collateral order doctrine in qualified immunity cases." (App. 11.) Even if *Scott* did have application to the jurisdictional limitations set out in *Johnson* (which the Court denied), any such application would have to be rigidly limited to those cases involving similar video-type evidence that was at issue in *Scott*. Pointing out that this case involved no video evidence, the Ninth Circuit stated that even if there *were* video evidence like in *Scott*, it was precluded from reviewing it. (App. 12-13.) After *Scott*, this is not the law.

Scott, decided twelve years after *Johnson*, created an exception to the bar on reviewing questions of

"genuineness." *Scott* held that a plaintiff's alleged facts bind a court of appeals only "to the extent supportable by the record." *Scott*, 550 U.S. at 381 n. 8. If the appellate court finds that the "record as a whole" utterly discredits the plaintiff's story so that there is no genuine factual issue for a jury to decide – "the reasonableness of [the officer's] actions . . . is a pure question of law" for the court of appeals. *Id*.

The Ninth Circuit essentially disregarded this Court's direction in *Scott* to rely on the "record as a whole" when deciding whether a fact issue was "genuine." The Ninth Circuit stated that this level of review would require it to find that *Scott* implicitly overruled *Johnson*, a step the Court was unwilling to take. But it was not necessary for the Ninth Circuit to overrule *Johnson*, because *Johnson* and *Scott* are compatible. *Johnson* remains good law after *Scott*, generally preventing interlocutory review of a District Court's determination that fact questions are genuine. But here, like in *Scott* – where the record directly contradicts plaintiff's version of the material events – *Scott* directs the court of appeals to look past a plaintiff's unsupported claims and dismiss the case on interlocutory appeal.

The Ninth Circuit in this case further stated that even if it were to allow "for the sake of argument," the possibility that *Scott* established an exception to *Johnson*, it would not apply to this case because there was "no videotape, audio recording, or similarly dispositive evidence." (App. 12-13.) This misconstrues the reach of *Scott*, which stated a general principle

not limited to that case's specific facts. If there is evidence in the record that eviscerates plaintiff's story, the court of appeals must grant qualified immunity. *Scott*, 550 U.S. at 380-81. The form that evidence takes is immaterial. The Supreme Court described the video in *Scott* as merely "an added wrinkle," not as a specific requirement for reversal. *Id.* at 378. The video was determinative not because it was a video, but because it "utterly discredited" plaintiff's version of what happened. *Id.* at 380-81.

The Ninth Circuit's decision to ignore, or at least to rigidly restrict *Scott* makes this case appropriate for review by this Court.

II. THE PANEL'S OPINION, CATEGORICALLY DENYING REVIEW BASED ON JURISDICTION, CONFLICTS WITH APPELLATE DECISIONS FROM NEARLY ALL CIRCUITS, INCLUDING THE NINTH

Certiorari is appropriate where the challenged decision is in conflict with decisions of other circuit courts on the same important matter. Supreme Court Rule 10(a). That is the case here. This opinion, holding that any decision by the District Court that the parties' evidence presents a genuine issue of material fact is categorically unreviewable on interlocutory appeal, creates a direct conflict with nearly all other circuits, including prior Ninth Circuit precedent in *Wilkinson,* 610 F.3d 546.

A. Sixth Circuit

The Sixth Circuit has dealt most extensively with the application of *Scott.* In *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009), police officer defendants shot and killed a teenage boy while conducting a protective sweep of his home. The boy's estate sued the officers who unsuccessfully asserted qualified immunity. The District Court held there was "a *factual* dispute about the nature of the threat posed . . . rendering it impossible to rule whether the officers' reaction was objectively reasonable." *Id.* at 904, emphasis added. The officers appealed and the appellate court held that "the District Court's characterization of the basis for its ruling does not necessarily dictate the availability of appellate review." *Id.* at 906.

The Sixth Circuit acknowledged the jurisdictional limitation imposed by *Johnson*[4] but explained that "the court is not obliged to, and indeed should not, rely on the nonmovant's version where it is 'so utterly discredited by the record' as to be rendered 'a visible fiction.'" *Chappell,* 585 F.3d at 906, citing *Scott,* 550 U.S. at 380-81. The Court held that the evidence upon which the lower court had denied summary judgment was incomplete because it failed to adequately consider all of the undisputed facts,

[4] The court actually cited *Leary v. Livingston County,* 528 F.3d 438, 447 (6th Cir. 2008), an appellate decision that echoes *Johnson*.

including non-video evidence that the boy had continued to move towards the officers when commanded to stop. *Chappell,* 585 F.3d at 911. The *Chappell* Court also commented on the District Court's assertion that the boy was holding the knife in an unthreatening manner, stating that this assumption,

> . . . represents the impermissible substitution of the district judge's own personal notions about what might have been . . . in a sanitized world of imagination quite unlike the dangerous and complex world where the detectives were required to make an instantaneous decision.

Id. at 912.

The Court reversed, holding the split-second decision to use deadly force in self-defense was not objectively unreasonable. *Id.* at 916. Other Sixth Circuit cases include *Moldowan v. City of Warren,* 578 F.3d 351 (6th Cir. 2009) [recognizing "an apparent exception" to the *Johnson* jurisdictional limitation as discussed by the dissent in this case (App. 46)]; *Coble v. City of White House,* 634 F.3d 865, 867-69 (6th Cir. 2010) [court considered audio tape but found it did not blatantly contradict] and *Austin v. Bedford Township Police Dept.,* 690 F.3d 490, 496 (6th Cir. 2012) [court considered soundless video but found no blatant contradiction].

B. Tenth Circuit

The Tenth Circuit conducted a similar analysis in *Lewis v. Tripp*, 604 F.3d 1221 (10th Cir. 2010), in which a chiropractor asserted state authorities (suspecting he was practicing without a license) had illegally searched his office. The defendants appealed the District Court's denial on summary judgment of their qualified immunity defense. After acknowledging the jurisdictional limitation of *Johnson*, the Court explained that the rule had "attracted some exceptions that we also must consider" including:

> When the 'version of events' the District Court holds a reasonable jury could credit is 'blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true.

Lewis, 604 F.3d at 1225-26.

The Court reversed after undertaking a *de novo* review of the facts. Another Tenth Circuit case, *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 757 (10th Cir. 2013), also references the *Scott* "exception" to *Johnson.*

C. Eleventh Circuit

The Eleventh Circuit has also considered *Scott* in conjunction with the question of jurisdiction. In *Pourmoghani-Esfahani v. Gee,* 625 F.3d 1313 (11th Cir. 2010), where plaintiff asserted both excessive force and deliberate indifference to medical care, the

District Court denied defendant's motion for summary judgment based on qualified immunity, finding that based on plaintiff's version of events, defendant had violated the constitution. *Id.* at 1313 n. 1. The appellate court affirmed as to the claim of excessive force but by reviewing plaintiff's story, modified where necessary by conflicting video evidence, the court determined defendant had not been deliberately indifferent. *Id.* at 1315, 1317-18. The court disagreed with plaintiff's assertion that it had no jurisdiction to review fact questions. *Id.* at 1313 n. 1. See also, *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) [acknowledging *Scott* and the appellate court's ability to "discard a party's account" when it is "inherently incredible and could not support reasonable inferences sufficient to create an issue of fact"].

D. Third Circuit

The Third Circuit considered *Scott*'s relationship to *Johnson* in *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3d Cir. 2007). After a discussion of *Johnson* and its imposition of jurisdictional limits (at 408-09), the Court considered *Johnson* in the context of *Scott*. Though it acknowledged that this Court had not discussed the limits of the collateral order doctrine in *Scott*, the Third Circuit held that *Scott* necessarily impacted those limits, reasoning:

> *Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over

> the District Court's [factual] determination. . . .

Id. at 413-14. The rule of *Scott*, the Court held,

> may represent the outer limits of the principle of *Johnson* [ ] – where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a Court of Appeals may say so, even on interlocutory review.

Id. at 414. While in *Blaylock*, the court held that defendant's evidence was inadequate to refute plaintiff's version of events, the court clearly accepted that it had jurisdiction to overrule the District Court's denial of summary judgment had the defendant's evidence been more compelling. The Sixth Circuit approved of the Third Circuit's approach in *Blaylock* stating it "represents a principled way to read *Johnson* and *Scott* together and to correct the rare blatant and demonstrable error without allowing *Scott* to swallow *Johnson.*" *Romo v. Largen*, 723 F.3d 670, 674 n. 3 (6th Cir. 2013).

E. Fourth Circuit

The Fourth Circuit has held that *Scott* "simply reinforces the unremarkable principle that at the summary judgment stage, facts must be viewed in a light most favorable to the nonmoving party when there is a *genuine* dispute as to those facts." *Witt v. W. Va. State Police Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011), emphasis in original, quotation marks

omitted. In *Witt*, the appellate court affirmed a District Court's denial of summary judgment. The court held that the dashboard video produced by defendant did not capture significant events and was not a basis to reverse the District Court's decision. *Id.* at 277. The court clarified that *Scott* did not alter the summary judgment standard but only clarified that there could be no *genuine* issue if one side's story was blatantly false. *Id.* at 276. While the Fourth Circuit did not reverse the District Court's decision, the court's analysis is consistent with *Scott* and contrary to how the lower court in this case proceeded. See also, *Iko v. Jones*, 535 F.3d 225, 230 (4th Cir. 2008) [deciding based on *Scott* to review District Court's fact determination in light of video evidence].

F. Second Circuit

In *Stansbury v. Wertman,* 721 F.3d 84 (2d Cir. 2013), a false arrest case, the court also considered a District Court denial of a qualified immunity claim based on a finding that genuine issues of fact precluded summary judgment. The Second Circuit held that the District Court's analysis was flawed because it "analyzed each piece of evidence in the case *seriatim* and in isolation" rather than properly reviewing the record "in its totality." *Id.* at 87. The plaintiff claimed that some of the documentation in the record was invalid or nonexistent but citing *Scott*, the appellate court held that these "assertions do not constitute a genuine dispute as to those facts." *Id.* at 90 n. 4, quotation marks omitted. The court concluded

that "ignoring frivolous allegations" [as permitted by *Scott*], the record established uncontroverted facts that provided probable cause for the subject arrest and required summary judgment for the defendant. *Stansbury*, 721 F.3d at 95. So, in *Stansbury*, the Second Circuit relied on *Scott* to disregard plaintiff's allegations that were unsupported by the record and as a result, reversed the District Court's summary judgment denial.

G. First Circuit

In *Campos v. Van Ness*, 711 F.3d 243 (1st Cir. 2013), the First Circuit considered a District Court's denial, with no written opinion, of qualified immunity. *Id.* at 244. The court noted the jurisdiction limitation on appeal but stated that "the Supreme Court had carved out an exception to that rule" for those occasions where the non-movant's version was "blatantly contradicted by the record such that no reasonable jury could believe it." *Id.* On those occasions, the court stated, it should not adopt that version of facts for purposes of ruling on a motion for summary judgment. *Id.* In the end, the court held that defendants' proffered evidence did not blatantly contradict the plaintiff's version. Accordingly, it upheld the District Court's decision.

H. Eighth Circuit

The Eighth Circuit followed *Scott* in *Wallingford v. Olson*, 592 F.3d 888 (8th Cir. 2010) when it reversed

the District Court's denial of summary judgment, holding that although the District Court found there was a factual dispute, in fact "the videotape conspicuously refutes and completely discredits *Wallingford*'s version of the material facts" and "demonstrates as a matter of law," that defendant's use of force was objectively reasonable. *Id.* at 893.

In *Thompson v. King,* 730 F.3d 742 (8th Cir. 2013), the District Court held there were genuine issues of material fact and therefore denied summary judgment to two officers asserting qualified immunity in a claim based on failure to provide medical care. *Id.* at 747. The appellate court reversed as to one of the officers, finding that the undisputed facts did not amount to a constitutional violation (*id.* at 748), and affirmed as to the other officer, after reviewing videotape and determining that it did not blatantly contradict the plaintiff's version of events. *Id.* at 747 n. 3. The Eighth Circuit therefore also views *Scott* as a means when appropriate to reverse a District Court's finding of a genuine issue of fact. See also, *Coker v. Arkansas State Police,* 734 F.3d 838 (8th Cir. 2013) [considering dash-camera evidence per *Scott* but finding no blatant contradiction with plaintiff's version].

I. Ninth Circuit

Finally, prior Ninth Circuit case law conflicts with this opinion. In *Wilkinson,* 610 F.3d at 550, a police shooting case, the court cited *Scott* for the

principle that "when the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion." The court went on to review the entire record and reverse the District Court's determination that there were genuine issues of fact. *Id.* at 551-53. The *Wilkinson* record included a statement by the shooting officer that was potentially inconsistent with the immediate threat that was the justification for the shooting. Additional evidence included a bystander witness statement that plaintiff thought created a triable issue.

But the Ninth Circuit found, "Plaintiff's sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson,* 610 F.3d at 551. Specifically, the court concluded that plaintiff's version omitted "the urgency of the situation," noting that the entire episode occurred in less than nine seconds. *Id. Wilkinson* did not involve any video evidence. Though in some sense conceding that the *Wilkinson* court appeared to employ *Scott* as an exception to *Johnson*'s jurisdictional rule under similar circumstances, the appellate court in this case asserted that *Wilkinson* was irrelevant and created no precedent because the *Wilkinson* court didn't expressly consider the *Johnson* jurisdiction question. (App. 14.) But jurisdiction is a necessary precondition to court action. If the *Wilkinson* court had no jurisdiction to review the District Court's denial of summary

judgment, then it was improper for the court to proceed. The assumption by the court below that the *Wilkinson* court acted without jurisdiction, while perhaps convenient, lacks appropriate deference to the earlier precedent.

The above analysis shows that most of the appellate courts have now had occasion to consider *Scott* and its impact on appellate review of District Court decisions denying summary judgment motions based on qualified immunity. Circuits that have considered the question have all held either explicitly or implicitly, that *Scott* creates an exception to the collateral order rule; and allows appellate courts to reverse a District Court's determination that summary judgment on qualified immunity grounds is improper because of the existence of a genuine issue of fact. Review is necessary here because the decision below is at odds with this consensus.

III. THE NINTH CIRCUIT PANEL'S ASSERTION THAT THE RULE IN *SCOTT* IS LIMITED TO CASES WITH A VIDEO RECORDING IS AN OVERLY NARROW INTERPRETATION OF THE CASE

The court below asserts first and foremost that regardless of the evidence offered, any determination by the District Court that a genuine issue of fact precludes summary judgment is categorically unreviewable. (App. 9.) The court goes on however, to state that even if it were to accept that *Scott* provides an

exception to the jurisdictional rule of *Johnson*, this case would *not* fit within that exception because "it points to no videotape, audio recording, or similarly dispositive evidence that 'blatantly contradicts' or 'utterly discredits' Carol's side of the story." (App. 12-13.) This narrow interpretation of *Scott* is a separate basis to grant certiorari because it is inconsistent with the decision itself, and is a source of disagreement between the appellate courts.

In *Scott,* this Court stated a general principle for how courts should consider summary judgment motions, particularly with respect to claims of qualified immunity:

> When opposing parties tell two different stories, one of which is blatantly contradicted *by the record*, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Scott, 550 U.S. at 380, emphasis added. In so summing up the rule, this Court did not mention video recordings specifically or any kind of recording, but referred simply to the *record*; if there is evidence in the record as a whole that eviscerates plaintiff's story, the court of appeals must grant qualified immunity. *Id.* at 380-81. This Court described the video in *Scott* as "an added wrinkle," not as a specific requirement for reversal. *Id.* at 378. The video was determinative not because it was a video, but because it "utterly discredited" plaintiff's version of what happened. *Id.* at 380-81. The rule of *Scott* is that if

the record, whatever it contains, is such that elements of the plaintiff's story are not reasonably believable, then the appellate court may disregard those aspects of the story and decide, based on what remains, whether qualified immunity applies. This has been the conclusion the appellate courts have reached in most subsequent decisions.

Few cases have expressly considered the question whether *Scott* is limited to video evidence. *Coble v. City of White House,* 634 F.3d 865 was decided after Sixth Circuit cases that arguably interpreted *Scott* as applying only to cases in which a video recording was part of the record. See *Hayden v. Green,* 640 F.3d 150, 152 (6th Cir. 2011) and *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007). Based in part on these precedents, the plaintiff in *Coble* contended that *Scott* was "limited to cases where the events were recorded on a videotape" but the court disagreed. "There is nothing in the *Scott* analysis that suggests that it should be restricted to cases involving videotapes." *Coble,* 634 F.3d at 868-69. The court concluded that the focus was not on the specific nature of videotape, but on "the record" and listed unpublished cases in which other circuits had considered non-video evidence, including medical records, an MRI and an autopsy report, in applying *Scott. Coble,* 634 F.3d at 869. Also from the Sixth Circuit, see *Moldowan,* 578 F.3d at 371 n. 3, where the court cites an unpublished decision for the proposition that contradictory deposition testimony is adequate to reverse a District Court's finding of disputed issues of material fact.

Wilkinson is another example of an appellate court considering non-video evidence to overturn a District Court's determination that there was a disputed issue of material fact. In that case, the evidence (which included no video) that established the blatant contradiction was the failure of the District Court to properly consider the "urgency of the situation." *Id.* at 552. The fact that the shooting officer had himself testified that the unarmed plaintiff "had stopped [driving]" before he fired the last two of six shots was not adequate to create a question of fact whether the officer had time to reevaluate the need for deadly force before firing the final shots. The evidence as a whole, in contrast to plaintiff's sanitized version of events, established that the officer had a reasonable belief that the decedent posed a deadly threat to himself and his fellow officer. *Id.* at 553.

While there are few cases in which the court expressly considers the question of what evidence can be used under *Scott*, several appellate courts have considered a variety of different kinds of evidence, though not surprisingly most often finding that it does meet the stringent standard of showing such blatant contradiction with plaintiff's version of events that no reasonable jury could believe it. These cases include *Stansbury,* 721 F.3d at 90 [holding that plaintiff's assertions that evidence was invalid were frivolous]; *Blaylock,* 504 F.3d at 414 [considering defendant's argument regarding the comparison of two photos but finding it insufficient to overturn District Court finding of genuine issue]; *Campos,* 711 F.3d at

244 [record included no video but the court considered defendant's argument that plaintiff's description of the shooting was "so discredited by the record that no reasonable jury could believe her"] and *Moldowan,* 578 F.3d at 370 n. 3, discussed above.

In sum, while a few cases focus on the precise nature of the evidence employed by this Court in *Scott*, most appellate courts have taken a broader view. In this case, the Ninth Circuit disregarded the defendants' argument in part at least, because the record did not include video-type evidence. (App. 13.) Review is necessary here to establish what kind of evidence can be cited for the purpose of showing a blatant contradiction in plaintiff's version of events. Petitioners assert that this Court's intention was not to limit the application of *Scott* only to those cases that benefit from live recordings of key events.

IV. FAILING TO CONSIDER THE RECORD AS A WHOLE UNDERCUTS THE PROTECTIVE PURPOSE OF QUALIFIED IMMUNITY

Qualified immunity exists "because officials should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (citation omitted). Qualified immunity recognizes that "holding officials liable for reasonable mistakes might unnecessarily paralyze their ability to make difficult decisions in challenging situations." *Mueller v. Auker*, 576 F.3d 979, 993 (9th Cir. 2009). This Court has emphasized that cases should be dismissed on qualified

immunity grounds "at the earliest possible stage in litigation," *Hunter,* 502 U.S. at 227, because the defense is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. Since it is "an immunity from suit . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* And because an order denying qualified immunity would be "effectively unreviewable," it is immediately appealable even though it is interlocutory. *Scott*, 550 U.S. at 376 n. 2.

In deadly force cases, courts are required as part of the qualified immunity analysis, to examine the balance of the record to determine whether other circumstantial evidence "would tend to discredit the police officer's story." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). The decision below holds, citing only to two pre-*Scott* opinions from the Fifth and Seventh Circuits,[5] that because this inquiry "concerns genuineness . . . we may not decide at this interlocutory stage if the district court properly performed it." (App. 11.)

The majority mischaracterizes both the District Court examination in deadly force cases required by *Scott v. Henrich*, and the effect of that examination on the scope of review on interlocutory appeal. *Scott v. Henrich* requires the District Court to evaluate not

[5] *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc) and *Abdullahi v. City of Madison*, 423 F.3d 763, 772 n. 8 (7th Cir. 2005).

just whether there is evidence that is inconsistent with the officer's version of the incident; but also whether that evidence is sufficient to "convince a rational factfinder that the officer acted unreasonably." *Id.* at 915. In other words, the inconsistency must be substantive – it must make a difference. Since this is a judgment of materiality, not just genuineness, it is necessarily reviewable on interlocutory appeal. *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

Moreover, this superficial approach to appellate review undermines the protective purpose of qualified immunity. Whenever a peace officer is the only remaining witness, all factual questions identified by the District Court would be unreviewable by the appellate court. Even if the totality of the record demonstrates that the evidence offered by the plaintiff and relied on by the District Court is incredible, the appellate court would lack jurisdiction to do anything about it.

This Court has long attempted to avoid rules that "inevitably induce tentativeness by officers, and thus deter the police from protecting the public and themselves." *Scott v. Henrich,* 39 F.3d at 915. Yet, that would be the impact if this decision stands. Cases in which qualified immunity would otherwise have protected peace officers from the burdens of litigation would continue through trial – forcing them to needlessly endure the resulting personal, emotional, professional, and financial costs. The lesson for a peace officer faced with the split-second, life or death choice

whether to use deadly force would be to think twice; to hesitate; perhaps to retreat. Choosing deadly force could mean years of litigation – potentially grounded on demonstrably baseless charges – without any pre-trial appellate recourse. Even if a trial or post-trial appeal ultimately vindicated the peace officer, the goal of the defense would already be "effectively lost." *Mitchell*, 472 U.S. at 526-27. This case is an example of the negative consequences if this misguided rule remains the law of this Court.

The majority acknowledged that when "an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." (App. 18, citing *Long v. City & County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007).) It refused, however, to credit the deputies' testimony that Donald pointed a gun at Deputy Rogers, because the District Court had found that there was a genuine issue regarding the accuracy of that testimony. (App. 18.) According to the panel, the District Court found a triable issue based on: (1) supposed inconsistencies in the deputies' testimony; (2) opinions from plaintiff's expert; and (3) "medical evidence." (App. 6 n. 3, 11.) The panel did not describe any of this evidence or how it created a triable issue, apparently because it believed that it had no jurisdiction to review the District Court's reasoning. (App. 11.)

As the dissent was not laboring under this misapprehension, it reviewed this evidence in detail, demonstrating that the deputies' description of the

incident was internally consistent in all material respects and that other evidence in the record corroborated it. (App. 25-34.) See *Scott v. Henrich*, 39 F.3d at 915 (court is to review record "to determine whether the officer's story is internally consistent and consistent with other known facts"). Any inconsistencies in their testimony were immaterial. (App. 57-58.) Since the deputies argued the lack of materiality on appeal, and the court had jurisdiction to review materiality under *Behrens*, 516 U.S. at 312-13, the majority could have and should have excluded this evidence from its analysis. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment").

The dissent also explained how none of the plaintiff's expert's opinions were admissible. (App. 35-36; 59-62.) The majority evaded this inconvenience based on the lack of an objection under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Op. 13 n. 10. No *Daubert* motion was necessary, though, because the District Court sustained the deputies' objections to all of the expert's opinions regarding what Donald actually did while he was on the balcony before the shooting. (ER 22, 413, 425-44.) The majority should also have declined to consider the expert's opinions.

Turning to the "medical evidence," the District Court did point to a discrepancy between a medical record and Deputy Morris' initial memory of which

hand Donald was holding the gun in when he walked onto the balcony. (ER 5.) Yet, whether Donald started with the gun in his right or left hand is immaterial. It is undisputed he carried a loaded gun. (App. 6.)

The lower court's reference to "medical evidence" seems to have also included Carol's declaration in which she claims that Donald was incapable of pointing his gun at Deputy Rogers. But her statement to the Sheriff's Department four hours after the incident, describing Donald's actions that very morning, was nearly as persuasive as a video showing him pointing the gun. She described Donald: (1) walking unassisted (with a walker) from the upstairs to the downstairs of their home and outside to a car; (2) unlocking and opening the trunk; (3) pulling out a handgun; (4) retrieving a clip of bullets; (5) inserting the clip into the gun; (6) resisting her attempts at "yanking" and pulling "pretty strong" the gun away from him; and (7) walking back into the house with the gun. (App. 29-31.) This indisputable evidence guts the claim that Donald could not have raised and pointed the gun at Deputy Rogers. Under *Scott* and *Wilkinson,* the majority should not have relied on this blatant fiction.

The remaining evidence demonstrates that the deputies faced a classic "tense, uncertain, and rapidly evolving" situation, requiring them to literally make a split-second life or death decision. *Graham v. Conner*, 490 U.S. at 397. Viewing "the facts [from the Deputies'] perspective at the time [they] decided to fire," *Wilkinson,* 610 F.3d at 551, there is no question

that, after repeated warnings over just twelve seconds, Donald pointed a gun at Deputy Rogers. The law did not require the deputies to wait before neutralizing that threat. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

CONCLUSION

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

Respectfully submitted,

LISA A. ROTHSTEIN, ESQ.
Counsel of Record
COUNTY OF SANTA BARBARA
OFFICE OF COUNTY COUNSEL
DENNIS A. MARSHALL, County Counsel
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101
Telephone: (805) 568-2950
Facsimile: (805) 568-2983
Email: lrothst@co.santa-barbara.ca.us

Counsel for Petitioners Deputy Jarrett Morris, Deputy Joseph Schmidt and Deputy Jeremy Rogers

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL ANN GEORGE, *Plaintiff-Appellee*, v. DEPUTY JARRETT MORRIS; DEPUTY JOSEPH SCHMIDT; DEPUTY JEREMY ROGERS, *Defendants-Appellants.* THE COUNTY OF SANTA BARBARA; DEPUTY HARRY HUDLEY; DEPUTY LARRY HESS, *Defendants.*	No. 11-55956 D.C. No. 2:09-cv-02258-CBM-AGR
CAROL ANN GEORGE, *Plaintiff-Appellant*, v. JARRETT MORRIS; JOSEPH SCHMIDT; JEREMY ROGERS, *Defendants-Appellees.* and THE COUNTY OF SANTA BARBARA; HARRY HUDLEY; LARRY HESS, *Defendants.*	No. 11-56020 D.C. No. 2:09-cv-02258-CBM-AGR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Senior District Judge, Presiding

Argued and Submitted
February 7, 2013 – Pasadena, California

Filed July 30, 2013
Amended September 16, 2013

Before: Diarmuid F. O'Scannlain, Stephen S. Trott, and Richard R. Clifton, Circuit Judges.

Opinion by Judge O'Scannlain;
Concurrence and Dissent by Judge Trott

COUNSEL

Michael Maury Youngdahl, County of Santa Barbara, CA, argued the cause for the defendants-appellants/cross-appellees. Kelly Duncan Scott, Deputy County Counsel, filed the briefs. With her on the briefs was Dennis A. Marshall, County Counsel.

Stephen K. Dunkle, Sanger Swysen & Dunkle, Santa Barbara, CA, argued the cause and filed the briefs for the plaintiff-appellee/cross-appellant. With him on the briefs were Robert M. Sanger and Catherine J. Swysen, Sanger Swysen & Dunkle, Santa Barbara, CA.

ORDER

The opinion and dissent filed in this case on July 30, 2013, and reported at ___ F.3d ___, 2013 WL 3889157, are hereby amended. An amended opinion

and an amended dissent are filed concurrently with this order.

With these amendments, Judges O'Scannlain and Clifton have voted to deny the petition for rehearing. Judge Trott has voted to grant the petition for rehearing. Judges O'Scannlain and Clifton have voted to deny the petition for rehearing en banc. Judge Trott has recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**. No subsequent petitions for rehearing and rehearing en banc may be filed.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a reasonable jury could determine that three sheriff's deputies violated the Constitution when they fatally shot an armed homeowner on his patio.

I

A

At half past five, on the morning of March 6, 2009, Carol George awoke. Her husband Donald

needed food.[1] Donald had a terminal case of brain cancer and, as a result of his chemotherapy, ate frequently to manage headaches. His wife brought him a snack and then, not having slept well, returned to bed. Shortly after, George took the keys to the couple's truck from the night stand and went downstairs. Concerned for his well-being, Carol followed him. She witnessed him retrieve his pistol from the truck and load it with ammunition.

Carol called 911. Because she used her cell phone, the call went to the Ventura California Highway Patrol. On the audio recording in evidence, she can be heard exclaiming "No!" and "My husband has a gun!" The highway patrol dispatcher could only determine that she lived somewhere in Santa Barbara. Her husband wanted her to hang up, so she did. The dispatcher then contacted a Santa Barbara County 911 operator who called Carol back and obtained her complete address.

Deputies were dispatched to the residence for a domestic disturbance involving a firearm. Santa Barbara Sheriff's Deputies Jarrett Morris and Jeremy Rogers responded first. Carol met them at the front door. She asked them to be quiet and not to

---

[1] We adopt Carol's "version of the facts," as she is the non movant. *Scott v. Harris,* 550 U.S. 372, 378 (2007). Part II of our opinion explains why we cannot agree with our dissenting colleague that we are at liberty to prefer the deputies' version in this interlocutory appeal.

scare her husband, while also advising that he was on the patio with his gun.

The deputies decided to establish a perimeter around the house. They crossed the driveway toward a gate on the east side of the property. Morris was in the lead, with Schmidt and Rogers following. They carried two AR-15 rifles in addition to their service revolvers. Unable to spot Donald, and concerned that he might use a door on the west side of the house to exit, Rogers turned back to cover that side. Morris tried to assume a position out of sight and Schmidt lay down in ice plants at the bottom of a steep slope near the southeast corner of the house. From his position on the ground, Schmidt could see the back of the house, which had an outdoor balcony on the second floor with a patio.

The district court concluded there was a dispute as to which officer made contact with Donald first. Morris said that Schmidt had – announcing "I see the suspect" on the radio – while Schmidt claimed that it was Morris who initially saw Donald. According to an uncontroverted police-dispatch log, at 8:08 a.m., Donald opened the door to the balcony. Once he appeared in view of the deputies, Schmidt identified himself as law enforcement and instructed Donald to show him his hands. Hearing yelling, Rogers left his post out front and headed into the backyard.

Dispatch was told that Donald had a firearm in his left hand. Morris testified to seeing Donald "carrying [a] silver colored pistol in his left hand, while

holding" what he described "as a walker or a buggy."[2] Rogers stated that when George came into view, he was holding a gun with the barrel pointing down. Carol does not dispute that Donald exited onto the balcony with his walker and holding his firearm. However, the district court concluded that Carol's evidence, which included an expert witness's report,[3] called into question whether Donald ever manipulated the gun, or pointed it directly at deputies.[4] Twelve

---

[2] A silver Walther pistol was recovered from Donald after the incident.

[3] Although various medical opinions of his were stricken by the district court, Thomas R. Parker (a former FBI agent and California police officer) provided an expert report. It gave perspective on how the deputies' accounts compared with typical police behavior and contained opinions about how the physical layout of the property may have influenced the deputies' and Donald's on-the-scene perceptions.

[4] Morris offers a vivid account of Donald's final moments that we *cannot* credit because the district court found it to be genuinely disputed. *See infra* Part II. According to him, although Donald initially had the pistol braced against his walker, soon after, Donald reached for what Morris thought was its safety and grasped the gun with both hands. Then in Morris's words:

> [Donald] made the final motion at the rear of the pistol and I said to myself . . . if he raises that gun any higher he's going to be aiming at [Schmidt] and . . . I gotta [sic] take that shot and . . . at that moment as he's raising, he doesn't get higher th[a]n the wall he immediately turns straight east and raises it and is now pointing it directly at me and I had nowhere to go. I'm, I'm crouched down and I'm, I remember seeing the, the black hole actually looking down the barrel as it's pointed right at me and that was when, that was when I fired my first shot.

seconds after the deputies broadcast that Donald had a firearm, the dispatch log records "shots fired." Donald fell to the ground, and Rogers continued to shoot. Together the three deputies fired approximately nine shots. They then ran to assist him, applied first aid, and called an ambulance. Donald died two hours later at the hospital following surgery and admission to the intensive care unit.

B

Carol sued a year later under 42 U.S.C. § 1983 asserting two constitutional claims.[5] Against Morris, Schmidt, and Rogers she claimed a violation of her late husband's right to be free from excessive force under the Fourth Amendment, as incorporated.[6] In a claim chiefly implicating Deputy Harry Hudley, Carol asserted that her own Fourth Amendment right against unreasonable seizure was violated when

[5] She also raised a variety of state-law causes of action. Because it is undisputed "that resolution of the federal constitutional claims would necessarily dictate the resolution of the state law claims," we do not address them separately.

[6] "A claim under 42 U.S.C. § 1983 survives the decedent if the claim accrued before the decedent's death, and if state law authorizes a survival action." *Tatum v. City & Cnty. of San Francisco,* 441 F.3d 1090, 1093 n.2 (9th Cir. 2006) (citing 42 U.S.C. § 1988(a)). Carol's complaint alleges that she is the personal representative of her husband's estate in full compliance with California law. She therefore may litigate his Fourth Amendment claim. *See id.*; Cal. Civ. Proc. Code §§ 377.30, 377.32.

Hudley kept her from the crime scene in the shooting's aftermath and when she was briefly stopped from visiting Donald in the hospital. The deputies and their supervisors moved for summary judgment invoking qualified immunity, mainly arguing that neither Donald's nor Carol's constitutional rights had been violated.

After an evidentiary hearing, the district court concluded that based on the admissible evidence, "whether Mr. George presented a threat to the safety of the deputies is a material fact that is genuinely in dispute."[7] This meant a constitutional violation could be proven and the court denied qualified immunity on that basis. Concluding that the deputies had not argued for its application, the court did not address the second prong of qualified immunity – the clearly established inquiry. That asks whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lacey v. Maricopa Cnty.,* 693 F.3d 896, 915 (9th Cir. 2012) (en banc). As to Carol's seizure claim, the district court decided there was no constitutional violation and, in the alternative, that "the right at issue was not clearly established." It therefore granted summary judgment to Hudley and the other deputies.

---

[7] Like the dissent, in the context of the district court's preceding analysis, we understand this statement for what it is: a determination that the facts about how Donald and the deputies had behaved prior to the shooting were contested. *See* Dissent at 33.

Morris, Rogers, and Schmidt timely appeal the denial of summary judgment. Carol timely cross appeals, seeking review of the district court's grant of summary judgment to the deputies on her unreasonable seizure claim.

II

Because Morris, Rogers, and Schmidt challenge the denial of qualified immunity we have jurisdiction over the denial of summary judgment, an interlocutory decision not normally appealable. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). However, the scope of our review over the appeal is circumscribed. *See Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1059-60 (9th Cir. 2006). Any decision by the district court "that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal." *Eng v. Cooley,* 552 F.3d 1062, 1067 (9th Cir. 2009). Stated differently, "we may not consider questions of eviden[tiary] sufficiency, i.e., which facts a party may, or may not, be able to prove at trial." *CarePartners, LLC v. Lashway,* 545 F.3d 867, 875 (9th Cir. 2008) (internal quotation marks omitted).

Noting that we do have authority to consider the materiality of a fact, *Behrens v. Pelletier,* 516 U.S. 299, 312-13 (1996), – the issue of whether disputed facts "might affect the outcome of the suit under the governing law" – the deputies argue that Carol's disputed facts are ancillary, and therefore immaterial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In that respect, they claim that a review of the district court's "reasoning establishes that rather than delineating *actual material disputed* facts, [the court] commingled a group of insignificant discrepancies in statements" in order to conclude that a dispute existed about what had transpired during Donald's final minutes. Although couched in the language of materiality, their argument actually goes to the sufficiency of George's evidence. At bottom, their contention is that Carol could not "prove at trial" that Donald did not turn and point his gun at deputies. *Johnson v. Jones,* 515 U.S. 304, 313 (1995).

In cases where the best (and usually only) witness who could offer direct testimony for the plaintiff about what happened before a shooting has died, our precedent permits the decedent's version of events to be constructed circumstantially from competent expert and physical evidence, as well as from inconsistencies in the testimony of law enforcement. *See Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994); *Santos v. Gates,* 287 F.3d 846, 852 (9th Cir. 2002) ("Nowhere in our cases have we held that police misconduct may be proved only through direct evidence.").[8] The district court applied this principle. It

[8] Other circuits emulate this approach. *See, e.g., Lamont v. New Jersey,* 637 F.3d 177, 181-82 (3d Cir. 2011); *Abdullahi v. City of Madison,* 423 F.3d 763, 772 & n.8 (7th Cir. 2005) (describing the role of a police practices expert and explaining the centrality of inferences "when the plaintiff's sole eyewitness is dead").

parsed the deputies' testimony for inconsistencies, found that medical evidence (and Carol's declaration) called into question whether Donald was physically capable of wielding the gun as deputies described, and found parts of Carol's expert's testimony probative. There were genuine disputes of fact such that a reasonable jury could "disbelieve the officers' testimony" and rely on record evidence to conclude that Donald had not ignored commands to drop the gun, or taken other threatening measures such as pointing the weapon at deputies.

Because this inquiry, under *Scott v. Henrich* and its progeny, concerns genuineness – namely "the question whether there is enough evidence in the record for a jury to conclude that certain facts are true" – we may not decide at this interlocutory stage if the district court properly performed it. *Kinney v. Weaver,* 367 F.3d 337, 347 (5th Cir. 2004) (en banc); *see Abdullahi v. City of Madison,* 423 F.3d 763, 772 n.8 (7th Cir. 2005) (discussing the Ninth Circuit's approach). The dissent, however, would have us effectively cast off the interlocutory-review framework. Dissent at 41-46. It tells us we may do so under the banner of *Scott v. Harris,* a case in which not a single Justice of the Supreme Court "discussed the limits of the collateral order doctrine in qualified immunity cases" or even cited the Court's prior authorities on the subject. *Blaylock v. City of Philadelphia,* 504 F.3d 405, 413-14 (3d Cir. 2007) ("[n]either the majority nor the dissent in *Scott* cited *Johnson* or *Behrens*").

In *Johnson,* a unanimous Supreme Court told us these interlocutory appeals involving qualified immunity (1) would be suited to our comparative expertise as appellate judges, centering on "abstract issues of law," as opposed to "the existence, or nonexistence, of a triable issue of fact" and (2) would spare us from pouring over "affidavits, depositions, and other discovery materials." *Johnson,* 515 U.S. at 316-17. If we could exercise the same plenary review as the district judge below, or if we were jurors called upon to weigh the evidence, the arguments of our able colleague in dissent might persuade us. Yet, his scrutinizing of the record cannot be squared with the *Johnson* paradigm.[9] Even accepting for the sake of argument,

[9] Our conclusion that the *Johnson* principle still applies today is by no means idiosyncratic. In the years since *Scott v. Harris* (a 2007 decision), we have consistently held that our court lacks the power to reassess facts on interlocutory review. The 2009 *Eng* decision could not be clearer about what our circuit's law prescribes, *see* Dissent at 43, and there are many other precedents to the same effect. *See, e.g., Karl v. City of Mountlake Terrace,* 678 F.3d 1062, 1067-68 (9th Cir. 2012) (explaining that "[u]nder the collateral order doctrine[,]. . . . [w]here there are disputed issues of material fact, our review is limited to whether the defendant would be entitled to qualified immunity as a matter of law"); *Conner v. Heiman,* 672 F.3d 1126, 1130 n.1 (9th Cir. 2012) (explaining that under *Johnson* it is only when the "disputes involve what inferences properly may be drawn from . . . historical facts that are not in dispute" that an interlocutory appeal will lie (alteration in original) (internal quotation marks omitted)); *Alston v. Read,* 663 F.3d 1094, 1098 (9th Cir. 2011) (jurisdiction existed because appellants were "not contesting the district court's conclusion that genuine issues of fact exist for trial" but instead were "appealing the purely legal

(Continued on following page)

though, that *Scott v. Harris* is meant to establish an exception to the rules for interlocutory review, the dissent does not fit within that case's terms either. It points to no videotape, audio recording, or similarly dispositive evidence that "blatantly contradict[s]" or "utterly discredit[s]" Carol's side of the story. *Scott,* 550 U.S. at 380.[10]

Our decision not to assume *Scott v. Harris* implicitly abrogated a line of precedent also accords with the Supreme Court's later guidance. In a more recent section 1983 case, the Court reaffirmed that "immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the

---

issue of whether they violated Alston's clearly established federal rights").

[10] After reciting the summary judgment standard, the *Scott v. Harris* Court explained "[t]here is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals." 550 U.S. at 378. While the dissent frames a bystander's recollection as that sort of smoking gun, all it might establish is that a warning was uttered. Dissent at 52. Still crucial (and unknown) is how Donald responded.

Our colleague in dissent also contends that none of the opinions of the police practices expert are admissible. *See* Dissent at 58-59. We will not join issue on this point because the deputies expressly disclaim an evidentiary challenge to Parker's opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

appeal presents a 'purely legal issue.'" *Ortiz v. Jordan,* 131 S. Ct. 884, 891 (2011); *see also id.* at 893 (explaining that "[c]ases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law" (citing *Behrens* and *Johnson*)).[11]

Thus, in this appeal, we are confined to the question of "whether the defendant[s] would be

---

[11] Unlike the dissent we are not convinced that *Wilkinson v. Torres,* 610 F.3d 546, 550 (9th Cir. 2010) is necessarily to the contrary, for there we confirmed that "[o]ur jurisdiction to review an interlocutory appeal of a denial of qualified immunity . . . is limited exclusively to questions of law." The panel chiefly "looked past the district court's conclusion," Dissent at 43, with respect to the legal significance to be assigned plaintiff's facts. *See, e.g., Wilkinson,* 610 F.3d at 552 ("While perhaps true as far as it goes, [plaintiff's] version omits the urgency of the situation."). Admittedly, though, other parts of the opinion do read as though the appeal arose from the *grant* of summary judgment. *See id.* at 553.

Although *Wilkinson* cited *Scott v. Harris* in service of that approach, its author (Judge Tashima) has taken the position that *Wilkinson* did not "address[ ] the jurisdictional defect that . . . [fact-related] issues potentially raise under *Johnson.*" *Conatser v. N. Las Vegas Police Dep't,* 445 F. App'x 932, 933 (9th Cir. 2011) (per curiam) (a panel including Judge Tashima dismissed for lack of appellate jurisdiction officer-defendants' claim that "the evidence cannot support the inference that [the decedent] never attacked them"). We agree that this is the fairest reading of *Wilkinson.* And, because "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions," that case does not dictate how this appeal ought to be resolved. *Proctor v. Vishay Intertech., Inc.,* 584 F.3d 1208, 1226 (9th Cir. 2009).

entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." *Karl v. City of Mountlake Terrace,* 678 F.3d 1062, 1068 (9th Cir. 2012).

III

The deputies' appeal touches on two questions of qualified immunity. First, the deputies claim the shooting did not violate the Constitution. Second, they assert that even if Donald's Fourth Amendment rights were violated, they did not violate law clearly established at the time they acted.

A

Usually we can start with the second prong of qualified immunity if we think it advantageous. *See Pearson v. Callahan,* 555 U.S. 223, 236 (2009). Here, though, we are not satisfied that the deputies have adequately pursued that argument. As Carol observes, the district court concluded that the deputies had not "argue[d] that the constitutional right was clearly established at the time of the alleged misconduct." Our review of the record reveals that while they made passing references to this defense, they did not develop it in their briefing below. At an oral hearing on the motion for summary judgment, they made absolutely no reference to prong two either. "Although no bright line rule exists to determine whether a matter [has] been properly raised below, an

issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted).

We need not definitely decide, however, whether they waived the argument at the district court. On appeal, the deputies have not advanced an argument as to why the law is not clearly established that takes the facts in the light most favorable to Carol. *See Adams v. Speers,* 473 F.3d 989, 991 (9th Cir. 2007) ("The exception to the normal rule prohibiting an appeal before a trial works only if the appellant concedes the facts and seeks judgment on the law."). We will not "do an appellant's work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support." *W. Radio Servs. Co. v. Qwest Corp.,* 678 F.3d 970, 979 (9th Cir. 2012).

Although the deputies' "briefs lapse into disputing [Carol's] version of the facts" as to the threshold constitutional violation as well, we discern enough of a distinct legal claim to entertain that first-prong qualified immunity contention. *Adams,* 473 F.3d at 990.[12]

---

[12] Our decision on the clearly established issue does not prevent the deputies from appropriately raising the second prong of qualified immunity at a subsequent stage in the litigation, such as in a Rule 50 motion for judgment as a matter

(Continued on following page)

B

As to whether the deputies violated the Fourth Amendment, two Supreme Court decisions chart the general terrain. *Graham v. Connor,* 490 U.S. 386 (1989), defines the excessive force inquiry, while *Tennessee v. Garner,* 471 U.S. 1 (1985), offers some guidance tailored to the application of deadly force.

"*Graham* sets out a non-exhaustive list of factors for evaluating [on-the-scene] reasonability: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape." *Maxwell v. Cnty. of San Diego,* 697 F.3d 941, 951 (9th Cir. 2012). In *Garner,* the Supreme Court considered (1) the immediacy of the threat, (2) whether force was necessary to safeguard officers or the public, and (3) whether officers administered a warning, assuming it was practicable. *See Scott v. Harris,* 550 U.S. 372, 381-82 (2007). Yet, "there are no per se rules in the Fourth Amendment excessive force context." *Mattos v. Agarano,* 661 F.3d 433, 441 (9th Cir. 2011) (en banc).[13]

---

of law. *See Tortu v. Las Vegas Metro. Police Dep't,* 556 F.3d 1075, 1080-81 (9th Cir. 2009); *Ortiz,* 131 S. Ct. at 889.

[13] *See Bryan v. MacPherson,* 630 F.3d 805, 826 (9th Cir. 2010) (courts must "examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*") (internal quotation marks omitted), *and Harris,* 550 U.S. at 382 ("*Garner* did not establish a magical on/off switch that triggers rigid

(Continued on following page)

The district court applied the *Graham* factors and found that the first and third unmistakably weighed in Carol's favor. "It is undisputed that Mr. George had not committed a crime, and that he was not actively resisting arrest or attempting to evade arrest by flight." The deputies do not challenge these conclusions on appeal. They correctly observe, however, that the "'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of the officers or others.'" *Bryan v. MacPherson,* 630 F.3d 805, 826 (9th Cir. 2010). As to this third key factor, while the deputies certainly aver feeling threatened before they shot George, such a statement "is not enough; there must be objective factors to justify such a concern." *Id.* When an individual points his gun "in the officers' direction," the Constitution undoubtedly entitles the officer to respond with deadly force. *Long v. City & Cnty. of Honolulu,* 511 F.3d 901, 906 (9th Cir. 2007). In *Scott,* we likewise recognized that officers firing their weapons at a defendant who "held a 'long gun' and pointed it at them" had not been constitutionally excessive. 39 F.3d at 914.

Taking the facts as we must regard them, that specific circumstance is not present in this case. In *Glenn v. Washington County,* we found that in a 911 scenario without flight or an alleged crime, the officers' decision to shoot an individual holding a pocket

---

preconditions whenever an officer's actions constitute 'deadly force.'").

knife, "which he did not brandish at anyone," violated the Constitution. 673 F.3d 864, 873-78 (9th Cir. 2011). Reviewing *Long* and *Scott,* we explained that the fact that the "suspect was armed with a deadly weapon" does *not* render the officers' response per se reasonable under the Fourth Amendment. *Id.* at 872-73; *see also Harris v. Roderick,* 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.").

This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed – or reasonably suspected of being armed – a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. On this interlocutory appeal, though, we can neither credit the deputies' testimony that Donald turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given that version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive. Contrary to the dissent's charge, we are clear-eyed about the potentially volatile and dangerous situation these deputies confronted. Yet, we cannot say they assuredly stayed within constitutional bounds without knowing "[w]hat happened at the rear of the George residence during the time Mr. George walked out into the open

on his patio and the fatal shot." Dissent at 40. That is, indeed, "the core issue in this case." *Id.*

The deputies argue that the reasonableness of their actions is enhanced because they were told to expect a domestic disturbance. Sitting en banc, this court recently identified this circumstance as a "'specific factor [ ]' relevant to the totality of the[ ] circumstances." *Mattos,* 661 F.3d at 450. Domestic violence situations are "particularly dangerous" because "more officers are killed or injured on domestic violence calls than on any other type of call." *Id.* At the same time, we explained in *Mattos* that the legitimate escalation of an officer's "concern[ ] about his or her safety" is less salient "when the domestic dispute is seemingly over by the time the officers begin their investigation." *Id.* Years before that we had held – in another en banc decision – that a husband's criminal abuse of his spouse "provide[d] little, if any, basis for the officers' use of physical force" because when law enforcement "arrived [the husband] was standing on his porch alone and separated from his wife." *Smith v. City of Hemet,* 394 F.3d 689, 703 (9th Cir. 2005) (en banc). That distinguishing feature from *Smith* and *Mattos* is present here. Carol was unscathed and not in jeopardy when deputies arrived. Donald was not in the vicinity; instead he was said to be on the couple's rear patio.

Today's holding should be unsurprising. If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a

reasonable jury could determine that they violated the Fourth Amendment. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson,* 555 U.S. at 227.[14]

[14] Carol advances another argument about the unconstitutionality of the shooting which necessarily fails and should be excluded at trial. Specifically, she faults the deputies for (1) not gathering intelligence from her before heading to the backyard, (2) bringing assault rifles, and (3) failing to "set up a non-confrontational, 'soft' perimeter around the house." Although at one time Ninth Circuit law did permit these kind of considerations to inform the subsequent excessive force inquiry, "[w]e have since placed important limitations" on that line of argument. *Billington v. Smith,* 292 F.3d 1177,1188 (9th Cir. 2002); *see also Espinosa v. City & Cnty. of San. Francisco,* 598 F.3d 528, 547-49 (9th Cir. 2010) (Wu, J., dissenting) (detailing how our law has receded).

In *Billington,* we explained that intervening caselaw, since *Alexander v. City & Cnty. of San Francisco,* 29 F.3d 1355, 1366-67 (9th Cir. 1994), "prevent[s] a plaintiff from avoiding summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." 292 F.3d at 1189. Then, harmonizing *Alexander* "with the Supreme Court's admonition in *Graham,*" we explained that a plaintiff cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.* at 1190. At most, Carol's cited failings amount to negligence. Only when "an officer intentionally or recklessly provokes a violent response, and [when] the provocation is an independent constitutional violation" will that conduct color the subsequent excessive force inquiry. *Id.* Moreover, her proposed alternative measures are plagued with the sort of hindsight bias the Supreme Court has forbidden. *See id.* at 1191.

IV

Owing to the obligation to be satisfied of our jurisdiction, we asked the parties to address at oral argument whether Carol's cross appeal had been well taken. Her counsel conceded it had not. In contrast to the situation in which an officer denied immunity finds himself, Carol will not lose any right by having appellate review of her unreasonable seizure claim deferred until final judgment. *See LaTrieste Rest. & Cabaret, Inc. v. Vill. of Port Chester,* 96 F.3d 598, 599 (2d Cir. 1996) (per curiam).[15]

We therefore lack appellate jurisdiction over Carol's cross appeal in its entirety.

V

For the foregoing reasons, the cross appeal is **DISMISSED** for lack of jurisdiction. We also conclude that the facts, as we must regard them, show

---

[15] "All circuits that have considered whether the collateral order doctrine confers appellate jurisdiction over appeals arising from a grant of partial summary judgment based on qualified immunity have universally held that such a judgment is not immediately appealable." *Id.* (collecting cases). Pendent appellate jurisdiction might be exercised over non-reviewable interlocutory decisions that raise issues "inextricably intertwined" with matters properly appealed. *Cunningham v. Gates,* 229 F.3d 1271, 1284 (9th Cir. 2000). But as Carol's counsel rightly appreciated, the claim that deputies unconstitutionally seized Carol involves different facts and legal standards from those germane to whether deputies used excessive force when they shot Donald. *See id.* at 1285.

that Santa Barbara Sheriff's Deputies Morris, Rogers and Schmidt could be found to have violated the Fourth Amendment's prohibition on excessive force. They are therefore not entitled to qualified immunity on that basis.

AFFIRMED IN PART, DISMISSED IN PART. The parties shall bear their own costs on appeal.

TROTT, Circuit Judge, Concurring in small part and Disagreeing in large part:

Mrs. George has been through a painful set of circumstances, and she deserves not to be subjected to these facts again and again. Nevertheless, with the advice of counsel, she has chosen to sue the deputies who responded to her emergency call, and they, too, are entitled to fair and proper treatment under the law. To render these deputies subject to this misguided lawsuit misapprehends the hazardous situation in which they found themselves, and it devalues case law on the dangers of domestic disputes such as the failed physical attempt by Mrs. George to disarm her angry and dangerous husband.

Moreover, the majority opinion misperceives an important aspect of the doctrine of qualified immunity as explained by the Supreme Court in *Scott v. Harris,* 550 U.S. 372 (2007), an aspect since embraced by the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits – not to mention our own. The Court's holding in *Scott v. Harris* and the principle

upon which it rests ensures that government officials will not be required to defend themselves in court if it appears to an appellate court from the record taken as a whole that the plaintiff has no case, and therefore as a matter "*of law,*" *id.* at 381 n.8 (emphasis added), the lawsuit cannot survive summary judgment. Thus, the majority opinion inadvertently dilutes an essential public interest the doctrine protects: the ability of government officials to perform their responsibilities without paralyzing fear of inappropriate personal lawsuits and potential civil liability.

Let's make one thing clear. The outcome of the rapidly evolving events on March 6, 2008, was not a success. Why? Because Mr. George died, and the best result of interventions like this is to resolve them with no loss of life or other injury. No reasonable law enforcement agency or deputy could disagree with this assessment. On the other hand, fortunately neither the first responders nor anyone else was harmed.

I

With all respect to my colleagues, I disagree with their and the district court's conclusion that Mr. George did not pose an immediate threat "to the safety of the officers" called to the scene by his distraught and terrified wife in a 9-1-1 emergency call, or an immediate threat to the safety "of others." *Bryan v. Mac Pherson,* 630 F.3d 805, 826 (9th Cir.

2010). This factor is central to this case because, in the calculus of whether or not the force used by police to respond to a hazardous tactical situation was unreasonable and excessive, it is the "most important." *Id.* We must get this right before we go any further.[1]

II

I begin with undisputed facts.

This tragic series of events began at 7:44 a.m. on Thursday, March 6, 2008, when Mrs. George, the decedent's wife, placed a 9-1-1 emergency call which was received by the Ventura Branch of the California Highway Patrol ("CHP"). A recording of the call indicates that Mrs. George was hysterically screaming, indeed shrieking almost incomprehensively as loud as any human being could. Repeatedly she is heard amidst the background din of the call yelling, not "exclaiming" but yelling, at the top of her lungs. She says, "No, No, No" and "My husband has a gun!" The 911 operator attempts unsuccessfully to calm her down. A male voice – most certainly her husband's – can be heard in the background saying, "nothing," to which she says "okay." A moment of calm during which she said she was in Santa Barbara is interrupted by more sudden blood curdling screaming and shrieking, "No, No, No, Stop it.", and the phone on

[1] I do agree with my colleagues' disposition of Mrs. George's cross appeal.

Mrs. George's end went dead. This is indisputable *evidence* that a serious domestic dispute was in progress, a heated quarrel between a desperate wife and a defiant husband over a firearm.

The Ventura CHP dispatch operator then immediately called Santa Barbara Sheriff's emergency and advised that dispatch operator of Mrs. George's call. Santa Barbara was told that Ventura CHP had received a call from a woman in Santa Barbara "screaming that her husband has a gun." Ventura CHP also advised that the operator was unable to get a complete address. Santa Barbara said, "Okay we'll give her a call."

The following conversation then occurred between the CHP 9-1-1 dispatcher and the Santa Barbara 9-1-1 dispatcher:

> Sheriff' Dispatcher ("S.D."): 9-1-1 emergency.
>
> CHP Dispatcher ("CHP"): I had a caller that was a female caller. The only thing I have is the number [number omitted].
>
> S.D.: 805-[number omitted]
>
> CHP: [number omitted]. And I got three – the first three of her address is [address omitted], and she says she's in Santa Barbara. She's screaming that her husband has a gun.
>
> S.D.: Okay, but you don't have an address?
>
> CHP: No.

S.D.: And where are you calling from?

CHP: From Ventura CHP.

S.D.: Ventura CHP, okay. I don't know, okay, I guess, was she actually in Santa Barbara City?

CHP: It's showing off of Cathedral Oaks.

S.D.: Okay, all right, we'll give her a call.

The Santa Barbara dispatcher operator then called Mrs. George. Throughout this call, Mrs. George is breathing very heavily and periodically talking to a man in the background, presumably her husband. She is anything but calm and collected. The dispatcher described her as sounding "scared."

S.D.: Hi, this is the Sheriff's Department. Where are you?

Male voice: It's fine, everything is fine.

S.D.: Ma'am, where are you?

Mrs. George: I'm at home. He said everything is fine.

S.D.: What is your address?

Mrs. George: I gave it to you earlier.

S.D.: What's your address ma'am, what's your address?

Mrs. George: He said everything is fine.

S.D.: Okay, well, tell me your address.

Male voice: (unintelligible)

Mrs. George: (Apparently addressing her husband) I'm not talking. (Responding to the dispatcher's question) [street address and name omitted] is my address.

S.D.: [address omitted]?

Mrs. George: Yes. He wants to talk.

At this point, the dispatcher indicated in her deposition that she thought Mr. George had hung up the phone. The dispatcher called back:

Mrs. George: Hello.

S.D.: Hi ma'am, it's the Sheriff's Department.

Mrs. George: Yeah?

S.D.: We have help on the way, can you talk?

Mrs. George: Yes, he's outside right now. He says he won't do anything. He has cancer and he just pulled a gun out. I thought all of them were hidden. He has one, and he says he won't do anything but he just wants to have the – I don't know. If somebody comes, please don't have fire engines.

S.D.: No, we are sending Sheriff's Department out.

Mrs. George: All right. I'll talk to someone at the front door.

S.D.: Ma'am, what is your name?

Mrs. George: Carol George

S.D.: Carol George?

Mrs. George: Yes I've got to go back inside.

S.D.: If you need anything else, let me know, okay?

Mrs. George: Thank you.

At 7:51 a.m., Sheriff's deputies were sent to the location, arriving at 7:56 a.m., just 12 minutes after Mrs. George's first 9-1-1 call. They had been advised by dispatch (1) of a domestic violence incident in progress ("415 D"), (2) that a firearm was involved, (3) that Mr. George had hung up the phone during the 9-1-1 calls, (4) that Mr. George had cancer, (5) that Mr. George was the person with the firearm, and (6) that he had registered firearms in his residence. This constellation of facts and circumstances amounted to "probable cause to believe that [Mr. George] pose[d] a significant threat of death or serious physical injury to the officers or others." *Tennessee v. Garner,* 471 U.S. 1, 3 (1985). For all the deputies knew, Mrs. George herself was in harms way.

Here, I elaborate on what went on in the George household immediately before the first 9-1-1 call. These facts come from Mrs. George's own words recorded by the Sheriff's Department roughly only four hours after the incident, i.e., "Carol's version." Maj. Op. at 5, n.1. After his brain surgery, Mr. George became an angry man.

[H]e kept on saying I don't want to live like this, I don't want to live like this, I'm going

to be a vegetable. He was angry to the point where we locked the guns that were in the house. . . . So there's a closet that has a lock on it . . . , there was one handgun in the bed stand, which I took out, because for a few weeks he could not go up stairs so, I made sure that was locked in the closet as well and I had the key, but we told him Jamie had the key. . . . And so last night, when he went to bed he was furious because he couldn't go to the bathroom. . . . Very, very angry, and he goes I'm not going to live like this. And then this morning I saw that he had gotten this drawer, in the bed stand had a nail through it and so nobody else, that's also where we kept the jewelry and stuff, you know, because nobody could get to it. I noticed it was open. So I got scared and he was very angry and wanted me to leave, he wanted me to leave the house. . . . So finally he went downstairs and I followed him, and he said he wanted me to leave, he wanted me to leave in my car and I knew someplace in the trunk there was a gun hidden, but I had looked for it a couple of days ago and I could not find it, I don't know where it was, and *somehow he got the keys to the car this morning, opened the trunk, pulled out the gun and I am yanking at him and am screaming at the top of my lungs and I started panicking and I called 9-1-1. And he got furious that I called 9-1-1 and he said "if you don't stop it, I will use this gun.*" I said "no, just put it down." So finally he says, well lets go in the house. So I walk in the house and he's carrying this

> loaded gun now. . . . Yeah, I know it was loaded. . . .

(Emphasis added).

When questioned about her knowledge that the gun was loaded, Mrs. George said, "Yeah, he had stuck a pin in it, *I saw him do that.*" (Emphasis added). When asked what she meant by "pin," she said, "That clip, something . . . yeah, *I saw him do that because it wasn't loaded in the car,* and I saw him pull it out from a different place and he stuck it in, and I said 'just give it to me, no.' *And I started trying to pull him, pretty strong, I couldn't do it.*" (Emphasis added). When Mr. George's gun was recovered, it was loaded with hollow-point bullets.

Parenthetically, Mrs. George's attorney now claims that Mr. George was so impaired by his condition that he was not physically able to point his gun at Deputy Rogers. During oral argument, counsel said, "In particular, Deputy Rogers says that [Mr. George] lifted it up standing with two hands standing and pointing it at him. Mrs. George's statement was that he was physically incapable of doing that at that time. . . . The manner in which he was pointing at the officer being directly contradicted by what his wife. . . ." These factual assertions and claims by counsel are irreconcilable with Mrs. George's detailed description just four hours after the shooting of her husband's behavior that morning. He was ambulatory, obdurate, "pretty strong" enough to resist his wife's "yanking" attempt to stop him, threatening to

use his gun, and dexterous enough to load a clip into an automatic pistol – an action that takes two hands to accomplish. Moreover, she was not a witness to the shooting. Months later, now in litigation, and even though she *saw* her husband load a clip into his firearm on the morning of the shooting, she declares "under penalty of perjury" that he "was unable to stand on his own without holding his walker and hold a gun with both hands in front of him." It will be quite interesting on cross-examination when she is asked to demonstrate for the jury how her husband loaded the clip into his gun. This situation is a close cousin to our "sham affidavit" rule that a "party cannot create an issue of fact by an affidavit contradicting . . . prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.,* 952 F.2d 262, 266 (9th Cir. 1991). As we said in *Kennedy,* "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* (alteration & internal quotation marks omitted). After *Scott v. Harris,* this common sense rule takes on added significance.

In addition, we have the testimony of Mr. George's friend, Lawrence Kaehn. Mr. Kaehn, a cancer survivor, and Mr. George frequently discussed Mr. Kaehn's cancer treatment. On one occasion before Mr. George fell ill, he said, "Well, I know what I would do if I came down with cancer. I would get a

gun, call the sheriff and have them shoot me." Mr. Kaehn, having considered becoming a sheriff at one time, was "appalled." He said, "It wouldn't be very fair to the sheriff." Mr. George then "gazed off," "stared for a while," and changed the subject. Unfortunately, "suicide by cop" is a well-documented, terrible phenomenon always present when law enforcement responds to a "man with a gun" call.

On top of all of this, Mrs. George's cry for help was accurately conveyed by the dispatcher to the deputies as one involving armed domestic violence. *That* is what the deputies were told, and, according to Mrs. George's own words, *that* is what it was. I repeat, he had threatened to use the gun and struggled physically with his wife over its possession. These 9-1-1 calls are a textbook case of what local law enforcement confronts when receiving such a 9-1-1 request for help. In this respect, "we must view the facts [from the deputies'] perspective at the time [they] decided to fire." *Wilkinson v. Torres,* 610 F.3d 546, 551 (9th Cir. 2010).

In *Mattos v. Agarano,* 661 F.3d 433 (9th Cir. 2011) (en banc), in connection with our discussion of the appropriateness of force in that case, we had much to say about what law enforcement faces when it responds to a 9-1-1 domestic dispute call. We did so in consideration of "the additional 'specific factors' relevant to the totality of [the relevant] circumstances." *Id.* at 450 (quoting *Bryan,* 630 F.3d at 826). We said,

> We have observed that "[t]he volatility of situations involving domestic violence" makes them particularly dangerous. *United States v. Martinez,* 406 F.3d 1160, 1164 (9th Cir. 2005). "When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. *Indeed, more officers are killed or injured on domestic violence calls than on any other type of call.*" *Id.* (internal quotation marks and citation omitted). We have also "recognized that the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy." *United States v. Black,* 482 F.3d 1035, 1040 (9th Cir. 2007) (internal quotation marks omitted).

Mattos, 661 F.3d at 450 (emphasis added).

III

Against this grim backdrop, the majority says, as did the district court, that when he was on the balcony (1) Mr. George had not committed a crime, (2) he was not actually resisting arrest or trying to flee, (3) the domestic disturbance was over, and (4) thus, Mr. George did not pose an immediate threat to the safety of the officers or to others that would have justified the use of force. With all respect, to portray this incident in this fashion is to expose the irrelevance of the "missing factors" to these events and a

misunderstanding of domestic disputes, especially those involving firearms.[2] If the majority opinion's inert view of the events at the George residence is correct, should the officers have simply left the scene? After all, Mr. George had not committed a crime, his wife was supposedly safe, he was not resisting arrest or attempting to flee, and he was entitled by the Second Amendment to have a loaded gun on his own property. This reasoning is illogical, as is George's purported expert's, Thomas Parker, statement in his declaration that the deputies "apparently did not take into account the fact that under California law, it is no crime to keep or carry a firearm in one's own home

[2] The Eleventh Circuit in *Harris v. Coweta County,* 433 F.3d 807 (11th Cir. 2005), made the same analytical mistake in its run-up to the Supreme Court, focusing not on the facts and circumstances of the case before it, but on phantom facts and circumstances that were not relevant. I quote from its opinion. "[T]aking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.* at 815-16. The court continued to highlight similar irrelevancies in a footnote, saying, "accepting Harris' version of events, Harris did not attempt to ram, run over, side-swipe, or swerve into any of the officers. . . ." *Id.* at 816 n.11. Not one of these irrelevant observations deterred the Supreme Court from its holding granting immunity to the officers who rammed Harris's car in order to stop him.

or on one's property as long as it is not fired and no one is threatened." In elaboration on this irrelevancy, Parker, instead of discussing the actual incident, said,

> In this incident, there was no evidence that Mr. George had broken any laws prior to the arrival of the deputies arrival [sic] on scene, nor that he had threatened anyone. . . . To my knowledge, and from my years of law enforcement experience, I know that there is no state or Federal law in California prohibiting an individual from possessing or carrying a non-fully automatic firearm in their [sic] own house or on their [sic] own property, absent any illegal discharge of same or threat to harm an individual. Neither existed in this case.

Mr. Parker appears in his sanitized version of these events not to be familiar with California Penal Code Section 246.3 which makes it a crime for any person willfully to discharge a firearm in a grossly negligent manner which could result in injury or death to a person. *People v. Leslie,* 54 Cal. Rptr. 2d 545 (Cal. Ct. App. 1996) describes this crime as a "serious felony." Section 417 of the Penal Code makes it a crime to draw or to exhibit a firearm in a threatening manner. Finally, the City of Santa Barbara Municipal Code (S.B.M.C.) makes it unlawful to discharge any firearm of any description in that city. S.B.M.C. Ch. 9.34.020. To the extent that the abstract legal landscape of this incident is minimally material, *these* are the laws that applied to Mr. George's actual and intended behavior that morning.

More about Parker and his declarations later.

Mr. George had terminal brain cancer and was clearly suicidal. He had armed himself with a loaded gun, he was not thinking clearly, he was threatening to use it; and his wife, who had tried unsuccessfully to disarm him, was terrified. She did not call Mr. George's doctor, his pastor, her neighbor, or his friend Mr. Kaehn – she called law enforcement. She knew what a dangerous situation she had on her hands, as we plainly did in *Mattos,* but we waive it off as not dangerous? Minutes later, a residential neighborhood was the scene of gunfire and a dead body. *This situation could not be "safe" for anyone until Mr. George no longer had a loaded gun.* Mrs. George certainly understood this, even though Mr. Parker does not. So do the friends and families of officers killed or injured responding to this category of 9-1-1 calls. Contrary to my colleagues' view, this dispute was not "seemingly over" when the deputies arrived; and she was clearly still in jeopardy with an armed, suicidal, defiant, and angry husband in the house.

Like the Eleventh Circuit in *Harris v. Coweta County,* my colleagues place undue emphasis on the absence of the circumstances specifically identified in *Graham,* even though we have clearly labeled them non-exhaustive: "These factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham.*'" *Bryan,* 630 F.3d at 826 (quoting *Franklin v. Foxworth,* 31 F.3d 873, 876 (9th Cir.

1994)). We must understand this situation for what it was, *not for what it was not.* A plaintiff's "sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson,* 610 F.3d at 551. I suppose pursuant to the irrelevant and immaterial idea in the abstract that Mr. George's possession of the gun was lawful and that he had not committed a crime, we could say the same about John Hinkley before he shot President Reagan, Jared Loughner before he gunned down United States District Judge John Roll and United States Representative Gabrielle Giffords, Adam Lanza before the Sandy Hook massacre, and James Holmes before the Aurora Colorado slaughter. Mr. George certainly wasn't in their category, but *armed* people who are combative, furious, angry, and mentally unstable – whatever the reason – are dangerous, period. When we send law enforcement out to cope with them, it is wrong to proclaim that the personnel doing so are not in danger. And, as the United States Supreme Court said in *Graham,* we must consider that these deputies were responding and reacting to "tense, uncertain, and rapidly evolving" situation requiring them to make split second decisions involving – in this case – life and death. *Graham v. Connor,* 490 U.S. 386, 397 (1989); *Bryan,* 630 F.3d at 818 (Tallman dissenting from denial of reh'g en banc). Mrs. George tried unsuccessfully to disarm her husband. What might have happened had she tried again? Moreover, once Mr. George started firing his weapon outside his home, no telling where the bullets might have gone. I note with some irony

that we continue to search nationally for ways to keep firearms out of the hands of mentally unstable persons.

Regrettably, our federal courts have had extensive experience with domestic disputes involving angry and quarreling spouses, and we have written many opinions on this subject – including *Mattos v. Agarano* – on which law enforcement personnel are entitled to rely. Here is an example of what we have said.

1. *United States v. Martinez,* 406 F.3d 1160, 1164 (9th Cir 2005) (emphasis supplied).

> The volatility of situations involving domestic violence make them particularly well-suited for an application of the emergency doctrine. When officers respond to a domestic abuse call, they understand that "violence may be lurking and explode with little warning." *Fletcher v. Clinton,* 196 F.3d 41, 50 (1st Cir. 1999). *Indeed, "more officers are killed or injured on domestic violence calls than on any other type of call." Hearings before Senate Judiciary Committee,* 1994 WL 530624 (F.D.C.H.) (Sept. 13, 1994) (statement on behalf of National Task Force on Domestic Violence).

2. *United States v. Brooks,* 367 F.3d 1128, 1137 (9th Cir. 2004).

> Brooks contends that even if there were probable cause and exigent circumstances to justify Perez's warrantless entry, once Perez

> heard from Bengis that she was unharmed, the exigency dissipated and Perez, by staying to question longer, violated Brooks's Fourth Amendment rights. . . .
>
> We disagree. In Perez's experience, as he testified in the district court, it was "very common" for victims of domestic abuse initially to deny that they had been assaulted. This view could be credited by the district court. We, too, agree that a victim of domestic violence may deny an assault, especially when an abuser is present. Perez's decision to stay and ask more questions was a reasonable police procedure. A potential victim in Bengis's situation with justification may fear that by complaining to police, he or she might expose himself or herself to likely future harm at the hands of a hostile aggressor who may remain unrestrained by the law.

3. *Tierney v. Davidson,* 133 F.3d 189, 198 (2nd Cir. 1998) (emphasis added).

> Indeed, it may have been a *dereliction of duty* for Davidson to have left the premises without ensuring that any danger had passed. *See Barone,* 330 F.2d at 545. And Davidson could not tell that the danger had passed unless he found the other participant in the dispute. *See State v. Raines,* 55 Wash.App. 459, 778 P.2d 538, 542-43 (1989) ("[T]he fact that the occupants appeared to be unharmed when the officers entered did not guarantee that the disturbance had cooled to the point where their continued

> safety was assured. Until they had an opportunity to observe [the boyfriend] and talk to him, they had no knowledge of his condition and state of mind.").

4. *Fletcher v. Town of Clinton,* 196 F.3d 41, 50-51 (1st Cir. 1999).

> The balanced choice the officers must make is protected by qualified immunity. . . . Such immunity is given not only for the protection of the officers, but also to protect victims of crime. In the domestic violence context, immunity is given so that officers will not have strong incentives to do nothing when they believe a domestic abuse victim is in danger. Permitting suit against officers who have acted reasonably when there is reason to fear would create exactly the wrong incentives. Indeed, if the officers had done nothing, and Fletcher had been injured, they would have faced the threat of suit. In either event, their choice would be protected if it was objectively reasonable in light of clearly settled law.

5. *Fletcher v. Town of Clinton,* 196 F.3d 41, 52 (1st Cir. 1999).

> In domestic violence situations, officers may reasonably consider whether the victim is acting out of fear or intimidation, or out of some desire to protect the abuser, both common syndromes. *See United States v. Bartelho,* 71 F.3d 436, 438 (1st Cir. 1995) (noting that officers are often trained not to

> take the statements of abuse victims at face value, but instead to consider whether the victims are acting out of fear). Indeed, one commentator has estimated that domestic violence victims are uncooperative in eighty to ninety percent of attempted criminal prosecutions against their batterers.

IV

I turn to what is the core issue in this case: What happened at the rear of the George residence during the time Mr. George walked out into the open on his patio and the fatal shot fired by Deputy Rogers? Did they gun down a sick man who did not even know they were there? Or, did they fire only when he pointed a gun at one of them? *Scott v. Harris* requires that we examine what the *evidence* shows, not raw speculation and guesswork, but the *evidence.* Has Mrs. George tendered a case sufficient to survive summary judgment or to support a verdict in her favor? Or, does her case fail before trial as a matter of law for want of evidence?

A.

Before I tackle this question, however, let's put in proper analytical focus the "facts" we must view in the light most favorable to the nonmoving party. Here, notwithstanding my colleagues belief to the contrary, the Supreme Court has told us that we are *not* automatically bound on interlocutory appeal by a district court's statement that a genuine dispute of

material facts exists such as to require a trial. In *Scott v. Harris,* the Court said,

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record *taken as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'

550 U.S. at 380 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)) (footnote & alteration omitted) (emphasis added).

The Court continued:

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. When opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment [on a question of qualified immunity].

Id. (internal quotation marks & citations omitted) (emphasis in original). In its opinion, the Court once again noted the importance of resolving qualified immunity issues as soon as possible, because "it is effectively lost if a case is erroneously permitted to go

to trial." *Id.* at 376 n.2 (internal quotation mark omitted). In *Scott v. Harris,* the Court looked at the "record taken as a whole," *id.* at 380, and it overrode the district court's and the Eleventh Circuit's explicit conclusions that a genuine dispute of material facts precluded the denial of summary judgment for the defendant officers. *Id.* at 380-81. The Eleventh Circuit said, "We reject the defendant's argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury." *Harris v. Coweta County,* 433 F.3d at 815. The Court dismissed Justice Stevens's dissenting view that the issue of unreasonable and therefore excessive force was "best reserved for a jury," and that the Court was "usurping the jury's factfinding function." In answer to his concerns, the Court said,

> At the summary judgment stage, . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record,* the reasonableness of [the officer's] actions . . . is a pure question of law.

Id. at 381 n.8 (citation omitted) (emphasis in original).

Three years after *Scott v. Harris,* we followed this jurisdictional and legal guidance in *Wilkinson* where we looked past the district court's conclusion that summary judgment was inappropriate because of the

perceived existence of "disputed issues of material facts." *Wilkinson,* 610 F.3d at 548.

B.

Some observations about my colleagues concerns arising from their understanding of *Johnson v. Jones,* 515 U.S. 304 (1995). In this respect, Judge O'Scannlain writes, "Any decision by the district court 'that the parties' evidence presents genuine issues of material fact is *categorically unreviewable* on interlocutory appeal.'" Maj. Op. at p. 10 (quoting *Eng v. Cooley,* 552 F.3d 1062, 1067 (9th Cir. 2009)) (emphasis added). This categorical understanding might have been correct before *Scott v. Harris,* but it is no longer.

First, the Court decided *Johnson* in 1995, *Scott v. Harris* in 2007. In deciding *Scott v. Harris,* the Court no doubt was aware of *Johnson,* but my colleagues are correct, it was not mentioned. Thus, I read the two cases not as in conflict, as the Supreme Court surely understood, but plainly compatible. Noting clearly that Jones did offer sufficient information to support a verdict in his favor, 505 U.S. at 307-08, *Johnson* held that we will not on interlocutory appeal revisit that issue, *id.* at 313. *Scott v. Harris,* on the other hand simply says, *but* if after examining the "record as a whole" it becomes clear to *an appellate court* that the plaintiff has *no* case sufficient to survive Rule 50(c), the unique preemptive purpose of qualified immunity prevails, and the case shall be

dismissed now, not later. 550 U.S. at 380. I repeat what the Court said in *Scott v. Harris* about the plaintiff's alleged facts: they must be "supportable by the record." 550 U.S. at 381 n.8 (emphasis omitted). In our case, the complaint's allegations find *no* factual support in the record. Accordingly, as defined by *Scott v. Harris,* the record taken as a whole issue is a *quintessential issue of law,* not just of disputed facts.

I do not stand alone in my understanding of *Scott v. Harris.* To begin with, we have the *Wilkinson* opinion in our own circuit. Furthermore, other circuits have weighed in on this issue. The Third Circuit described *Scott* as marking "the outer limit of the principle of *Johnson v. Jones* – where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review." *Blaylock v. City of Philadelphia,* 504 F.3d 405, 414 (3rd Cir. 2007). The Sixth and Tenth Circuits view *Scott* as an exception to *Johnson*'s jurisdictional limitation. In *Moldowan v. City of Warren,* 578 F.3d 351 (6th Cir. 2009), the Sixth Circuit described *Scott v. Harris* as recognizing "an apparent exception to [*Johnson*'s] jurisdictional limitation when its considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts." *Id.* at 370. The court then said, "In trying to reconcile *Scott* with the Supreme Court's edict in *Johnson,* this [c]ourt has concluded that where 'the trial court's determination that a fact is subject to reasonable

dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal.'" *Id.* (quoting *Blaylock, supra*); *Lewis v. Tripp,* 604 F.3d 1221, 1225-26 (10th Cir. 2010) ("[W]hen the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own de novo view of which facts a reasonable jury could accept as true." (quoting *Scott,* 550 U.S. at 380)). Both circuits have relied on their understanding of *Scott v. Harris* in thorough, unpublished opinions. *Rodriguez v. City of Cleveland,* 439 F. App'x 433, 456-57 (6th Cir. 2011); *Blackwell v. Strain,* 496 F. App'x 836, 845-47 (10th Cir. 2012). In each case, the circuits granted qualified immunity to the defendants on appeal notwithstanding the district courts' statements regarding the existence of genuine disputes of material fact.

The Fourth, Eighth, and Eleventh Circuits view *Scott* as simply "reinforc[ing] the unremarkable principle that at the summary judgment stage, facts must be viewed in a light most favorable the nonmoving party when there is a *genuine* dispute as to those facts." *Witt v. W. Va. State Police, Troop 2,* 633 F.3d 272, 277 (4th Cir. 2011) (internal quotation marks omitted); *Wallingford v. Olson,* 592 F.3d 888, 892 (8th Cir. 2010) ("Although we view the facts and any reasonable inferences in the light most favorable to [the plaintiff], we cannot ignore evidence which clearly contradicts [the plaintiff's] allegations." (citation omitted)); *Morton v. Kirkwood,* 707 F.3d 1276, 1284-85 (11th Cir. 2013) (recognizing that a

circuit court may "discard [ ] a party's account when the account is inherently incredible and could not support reasonable inferences sufficient to create an issue of fact," but holding that the defendants evidence did not completely discredit the plaintiff's version of events (internal quotation marks omitted)).

Furthermore, *Scott v. Harris*'s rule does not apply only to situations where a videotape demolishes a plaintiff's case. Although some of the cases I refer to did benefit from a videotape, *Scott v. Harris* clearly did not create a videotape-specific rule. Instead, it established a *principle* to be applied where it is applicable. The whole record there made that principle applicable *as a matter of law,* as I believe it does here – as a matter of law. The Court referred to the videotape as "an added wrinkle," not as a prerequisite to the application of the articulated principle. 550 U.S. at 378. *Wilkinson* did not rely on a videotape either, but we followed *Scott v. Harris* nevertheless. 610 F.3d at 549-51.

In summary, *Johnson* remains viable, but only where the case involves a genuine issue of material fact, not when it does not.

C.

I return to the case at hand. Noting that not a single percipient witness contradicts this evidence, I start with Deputy Rogers's description of this event:

We decided to set up a perimeter around the house to contain the threat of the man with the gun. I took the "1-2" corner of the house which covers the front door and east side of the house, Deputy Schmidt took position in the "2-3" corner of the house, and Deputy Morris covered the "3-4" corner of the house.

While holding my position I asked Deputy Hudley to determine if there are any exits on the west side of the property. Deputy Hudley advised that there is a door on the west side, and he agreed to cover that portion of the house.

At approximately 8:11:17 a.m. I heard Deputy Schmidt try to contact me over the radio and then I heard him broadcast that he saw a door opening. At this time I decided to leave my position at the "1-2" corner to assist Deputies Schmidt and Morris. I walked down the northeast corner of the house towards the backyard, and there I saw the suspect with a gun in his hand and pushing a walker or buggy walk out of a door onto a patio. I immediately crouched down behind a tree with no foliage.

At approximately 8:11:51 a.m. I heard Deputy Schmidt broadcast over the radio that the subject (Donald George) was on the back patio with a firearm in his left hand.

I heard Deputy Schmidt shouting commands to the suspect, such as, "Drop the

> gun," "Show me your hands," and "Sheriff's Department."
>
> I observed the suspect manipulating the rear portion of the gun as if to rack a round or remove the safety while Deputy Schmidt was still shouting commands. The suspect held the gun down towards the yard and began to scan the backyard. I also heard the suspect talking, and what appeared to be in response to Deputy Schmidt's orders. He said, "No" a few times and something that sounded like, "No you won't."
>
> The suspect then turned east toward me, raised his gun and pointed it directly at me. I saw the barrel of his gun pointed at me, and fearing for my safety I fired my weapon at him.
>
> The suspect did not fall down after my first shot and the barrel of his gun was still pointed at me. Still fearing for my safety I fired my weapon five times until I no longer perceived the threat of serious bodily harm or death.

Deputy Rogers's first-person description of his use of a firearm is corroborated by Deputy Schmidt:

> Deputies Morris and Rogers told me that Mrs. George reported her husband was last seen on the back patio with a firearm. The three of us walked down the driveway and through a side gate that led to the backyard.

We decided to set up a perimeter around the house to contain the threat of the man with the gun. Deputy Rogers took the "1-2" corner of the house which covered the front door and east side of the house, I took position in the "2-3" corner of the house, and Deputy Morris covered the "3-4" corner of the house.

Once I arrived at the "2-3" corner in the backyard I stayed in position, gathering information and broadcasting my observations over the radio. I stayed in this position for approximately seven minutes when at 8:11:17 a.m. I saw the door to the patio open, and then at 8:11:51 a.m. the suspect came out on the patio with a firearm in his left hand. I immediately broadcast this information over the radio.

I saw Deputy Rogers take position to the east of the patio about 10-12 feet from where the suspect stood, and Deputy Morris moved his position closer to my west side.

I began to shout commands to the suspect, such as: "Sheriff's Department," "Show me your hands," and "Drop the gun."

At this time the suspect held the gun down towards the yard, and he appeared to be scanning the backyard looking for the direction of my voice.

I saw the suspect manipulate the gun with his right hand in what appeared to me

a move to take off the safety on his gun. I heard the suspect say, "No you won't."

I then saw the suspect lift his gun and point it directly at Deputy Rogers. Fearing for the safety of Deputy Rogers I shot at the suspect.

After firing two shots I saw the suspect fall to the ground. I immediately began to run towards the patio. I heard one more shot. When I got closer to the patio I saw the suspect lying on the ground with his gun lying on the center of his chest.

Next, I turn to Deputy Morris:

Once I arrived at the "3-4" corner in the backyard I stayed in position, gathering information and broadcasting my observations over radio. I stayed in this position for approximately seven minutes until Deputy Schmidt announced (over the radio) at 8:11:51 a.m. that he saw the suspect on the back patio with a firearm in his left hand.

Once I heard Deputy Schmidt's report, I moved closer to the patio to aid Deputy Schmidt. I positioned myself to the west of Deputy Schmidt. From that position I was able to see the suspect with the gun in his hand, and he appeared to be pushing a buggy or a bicycle.

I saw Deputy Rogers take a position to the east of the patio where the suspect stood.

> At this time the suspect held the gun down towards the yard, and I heard Deputy Schmidt shouting commands to him, such as, "Drop the gun," "Show me your hands," and "Sheriff's Department." The suspect appeared to be scanning the backyard looking for the direction of Deputy Schmidt's voice.
>
> I then saw the suspect lift his gun, turn eastward, and point his gun directly at Deputy Rogers. Fearing for the safety of Deputy Rogers I fired at the suspect.

Lawrence Hess was Schmidt's, Rogers's, and Morris's supervisor. He heard the initial dispatch call to the George residence and arrived shortly after his deputies. This is his input:

> I arrived at [address omitted] at approximately 8:06:51. I parked my vehicle on San Antonio Creek Road, north of Via Gennita. I walked down Via Gennita and I found Deputy Hudley talking with a woman, Carol George, behind his patrol vehicle. Deputy Hudley told me Mrs. George was the reporting party, that her husband was depressed, recently had brain surgery to remove a tumor, and that she had secured all of the firearms that she could find in the home because of his depression. Mrs. George explained that her husband had been frustrated, angry and argued with her that morning. He produced a handgun and she called 9-1-1 for help.
>
> I used Deputy Hudley's cell phone to call the George's house telephone. Mr. George did

> not answer but an answering machine activated. I repeatedly called out to Mr. George over the telephone and into the answering machine to come to the phone in an attempt to open dialogue with him. Mr. George did not answer.
>
> During this attempted phone call I heard one of the deputies in the backyard shouting commands, such as "Drop it" and "Put it down." I next heard several gun shots.
>
> Shortly thereafter I heard radio transmissions advising "Shots fired" and "Suspect down" with medical assistance requested. I quickly walked to the backyard and instructed Deputy Hudley to stay with Mrs. George.

In addition to the deputies' declarations, we have bystander citizen information from Karla MacDuff corroborating their description of the sequence of events and the deputies' warnings before the shooting started. MacDuff was a guest and a friend of the Georges who was living in the lower apartment level of the house. According to MacDuff, she was awakened at approximately 7:45 a.m. that morning by someone excitedly shouting "Drop the gun." She heard this command two times. After these commands, then she heard "quite a few gunshots." There is nothing relevant in the record that challenges her information.

The unchallenged department log of real-time radio broadcasts from the deputies in the field reveal

how quickly these events unfolded. At 8:04:22 a.m. (Deputy Schmidt), the log reports " . . . no visual on the subject." At 8:08:04 a.m. (Deputy Morris), "Subj on the second floor to the rear of residence just opened the door to balcnoy (sic) no vosual (sic)." 8:11:51 a.m. (Deputy Schmidt), "Subj with a firearm in left hand." Twelve seconds later, at 8:12:03 a.m. (Deputy Schmidt), "Shots fired." Thirteen seconds later at 8:12:16 a.m. (Deputy Rogers), "Subj down." These radio broadcasts and this timeline corroborate the deputies' version of the events. The elapsed time from Mr. George's appearance on the balcony to "shots fired" was a mere twelve seconds. Twelve seconds is roughly fifteen normal heartbeats. That is how precipitously this encounter transpired.

Finally, Deputy Rogers's shot that hit Mr. George entered into the front of his body and emerged through the rear. This evidence indicates that Mr. George had turned to face Deputy Rogers – who was stationed to the left side of Mr. George when he walked onto the patio. I note that the photographs in the record are consistent with the deputies' descriptions of their locations at the time of the shooting.

Was Mr. George suicidal? Was he planning that morning to use his gun? Mrs. George thought so. Pam Plesons, her friend and neighbor, recounts this conversation with her on the morning immediately after the shooting:

> A. . . . So as a result of his stroke he was incontinent that night and apparently

woke up very depressed, and Carol told me that he asked her to leave the house, and she said that she did not want to leave him alone and she was afraid for him because she thought that he might commit suicide. And she told me that she didn't believe there were any guns in the house, but apparently he had gone to the truck in the driveway and there was a gun in the glove compartment of the truck, and that he had come back in the house with it.

Q. Okay. Did Carol tell you that she was concerned about Don was suicidal?

A. She told me that one of the doctors they were working with had warned her that he thought he might become suicidal or was suicidal and to make sure that anything that was of danger to him in the house was removed.

Q. Did Carol tell you that she had locked up or she had thought she locked up all the guns?

A. Uh-huh, that's why she didn't think that there was anything that he could get to.

Q. Did Carol tell you why she thought Don asked her to leave that morning?

A. He said that he just wanted to go out and sit on the back patio and enjoy the morning. She said that she felt that he was going to commit suicide.

V

Against the combined force of this compelling evidence, the district court concluded nevertheless that the defendant's motion must fail. On what did the district court rely? (1) A textbook example of a self-serving declaration from Mr. George's wife who did not see the shooting, a declaration prepared during litigation which is impeached by her own words, (2) disputed facts that are not material, and (3) a demonstrably flawed report from an ex-FBI Agent full of irrelevant inadmissible speculation.

The fatal problems with Mrs. George's manufactured declaration have been discussed in Part II of this opinion. Thus, let's examine the district court's "disputed facts."

Here the court cited to differences between the deputies' memories as to who "made the decision to set up a perimeter around the house." Remembering that this entire event took only a few minutes and that it was fluid and rapidly evolving, *who* set up the perimeter is utterly immaterial. No one disputes that the deputies set up a perimeter. *Who* gave the order is of no moment. Moreover, the record and the deputies' declarations previously quoted reveal that *two* perimeters were established, the first when Morris and Rogers arrived, and the second when Schmidt arrived, saw Mr. George emerge on the patio, and the deputies then moved and surrounded the rear of the house. I repeat, the perimeter changed when Mr. George appeared on the patio.

The next "disputed fact" seized upon by the district court was who saw Mr. George first and how he was holding the gun. Again, the deputies were not together, and who saw him first and how he was holding the gun is inconsequential. To quote the district court, "Deputy Morris stated that it was Deputy Schmidt who first made contact with Mr. George. However, Deputy Schmidt stated that Deputy Morris was the first one to see Mr. George." Under these kaleidoscopic circumstances, *who* saw Mr. George first is immaterial to the question of whether the deputies' use of force was reasonable or excessive. So is how he was holding the gun *when he emerged on the patio.* Everyone, everyone agrees he was carrying a loaded gun in his hands.

In summary, these "disputed facts" add nothing to the plaintiff's case. To give them probative weight violates a central principle of summary judgment law: "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Next, we get to whether Mr. George provoked the shooting because instead of dropping his gun as commanded, he pointed it at Deputy Rogers. Here, the district court relied on an opinion, purported to be an expert opinion, offered after the fact by Thomas Parker. Parker says he did not believe Deputy Schmidt could see Mr. George and therefore Deputy

Schmidt could not tell whether or not Mr. George had a gun. Again, Mr. George *did* have a gun, and second, it is news to me that a witness can testify as an expert that from point A, he doesn't believe someone can be fully seen from point B. This isn't "expert testimony." And here, it is no more than rank and inadmissible result-oriented speculation. Did Parker simply disregard Karla McDuff's statements that she heard the deputies shouting "drop the gun!"?

Mr. Parker's opinion on the key issue of whether Mr. George pointed his gun in Deputy Roger's direction is no better. Parker's report makes no mention of the violent struggle the Georges had over the gun before the deputies arrived. Parker incompletely describes Mr. George as handicapped with a right side and arm that were "extremely weak."

Moreover, Parker claims a special ability to read body language and to divine who is "lying" and who is not. He claims by virtue of his education, training, knowledge, and experience that he is aware of a "truism of the law enforcement profession that law enforcement officers lie . . . [in an attempt] to justify inappropriate, unethical, and illegal actions taken by them." Fortunately for all of us, we resolve cases and controversies with evidence, not self-aggrandizing "truisms." His offerings as to whether a witness is telling the truth will not be admissible as expert – or even lay – opinion. His report is rife with rank guesswork.

Parker goes on to opine that Mr. George probably could not have coherently said what the deputies say he said because he had aphasia. Was not Mr. Parker aware of the pre 9-1-1 conversation between husband and wife? Mr. George's voice can be heard clearly on the 9-1-1 call recording, which Parker claims he listened to when preparing his declaration. Or of Mrs. George's description of his responses to her pleas? Now, Parker is a speech pathology expert in aphasia. Undaunted, he goes in to guess that Mr. George "had no idea whatsoever that the deputies were in his yard or issuing commands to him." I assume this is part of the "evidence" the district court struck from the record when the court concluded that Parker was not a qualified "medical expert."

More fundamentally, however, Parker's report – which is a classic example of Monday morning quarterbacking – is of restricted value in this setting. His report suffers most of the problems identified by us in *Reynolds v. County of San Diego,* 84 F.3d 1162 (9th Cir. 1996), *overruled in part on other grounds by Acri v. Varian Assoc., Inc.,* 114 F.3d 999 (9th Cir. 1997) (en banc). There, we said, "The fact that an expert disagrees with an officer's actions does not render the officer's actions unreasonable. The inquiry is not 'whether another reasonable or more reasonable interpretation of events can be constructed . . . after the fact.' Rather, the issue is whether a reasonable officer could have believed that his conduct was justified." *Id.* at 1170 (quoting *Hunter v. Bryant,* 502 U.S. 224, 228 (1991)). *Id.* We also said, "The fact that

[the expert] disagrees with the steps [taken by the deputy] is not enough to *create* a genuine issue of material fact regarding the reasonableness of [the deputy's] conduct." *Id.; see also Tennessee v. Garner,* 471 U.S. at 20 (warning against "inappropriate second-guessing of police officers' split-second decisions").

Parker also paints a naive picture of domestic calm in the George residence when the officers arrived, leaving out why Mrs. George called 9-1-1, focusing instead to the exclusion of everything else in her statements that "everything is fine," and that "he won't do anything." Probably Parker is unaware of our jurisprudence regarding domestic trouble in connection with police intervention. This might be because the F.B.I. where he was employed for most of his career does not respond to local 9-1-1 calls involving this challenging problem, where danger always lurks and where frightened spouses cannot always be expected to give a reliable picture of what had happened to provoke the call.

In summary, Mr. Parker cannot be allowed as an "expert" to surmise or speculate or opine (1) that the deputies are lying, (2) that he doesn't believe Mr. George knew the deputies were in his backyard or that he could hear the deputies commands, (3) that Mr. George could not have uttered any coherent words in response to the deputies commands, and (4) that Deputy Schmidt could not see a gun in Mr. George's hands when Deputy Schmidt was yelling at him on the patio. What is left of Mr. Parker's report

that is relevant or material to the issues of excessive force? Nothing. There is no such thing as an expert on these issues short of medically-trained personnel familiar with Mr. George's senses. Apparently Mr. George was coherent and responsive – if not rational – in his conversations with his wife, but Mr. Parker appears to believe that capacity evaporated when he walked onto his patio.

VI

Simply put, there is no competent admissible direct or circumstantial evidence in this record to prove or even to suggest under rigorous *Scott v. Henrich*[3] review that Mr. George did not point his gun at Deputy Rogers before he was shot. The disputes cited by the district court are not material, and the remainder of the plaintiff's evidence is demonstrably not competent either to resolve the ultimate issue of excessive force or the deputies' credibility.

What we are inexorably left with is a situation (1) where the deputies had incontrovertible cause to believe Mr. George posed "a threat of serious physical harm, either to the officer[s] or to others," (2) where he had threatened them with a weapon, and (3) where he had been given a warning to drop the gun. *Tennessee v. Garner,* 471 U.S. at 11-12.

---

[3] *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994); *Santos v. Gates,* 287 F.3d 846, 852 (9th Cir. 2002).

These are life and death encounters. Focusing on inconsequential details out of context distorts the totality of the facts and leads one to errant conclusions. No reasonable factfinder could conclude on this record that the disputed use of force was unreasonable or excessive. A jury verdict in favor of the plaintiff could not survive Rule 50(a). The plaintiff's theory that the deputies simply gunned down a harmless man is nothing more than groundless conjecture. The plaintiff's evidence in this case examined "as a whole" is no better than the plaintiff's evidence in *Scott v. Harris* or in *Wilkinson v. Torres.* Her case is not "supportable by the record." *Scott v. Harris,* 550 U.S. at 381 n.8 (emphasis omitted); *Anderson,* 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.") This is not just a case where something like a videotape demolishes the plaintiff's factual allegations, it is a situation where the plaintiff has no case at all, because, among other deficiencies, her own words spoken just four hours after the shooting undercut what her lawsuit now claims. Her statement in the main was the compelling evidentiary equivalent of the videotape in *Scott v. Harris. Coble v. City of White House, Tenn.,* 634 F.3d 865, 869 (6th Cir. 2011) ("The *Scott* opinion does not focus on the characteristics of a videotape, but on 'the record.' ").

VII

Why does all of this matter? It matters because the doctrine of qualified immunity requires the judiciary to refrain from inappropriately intruding into and interfering with the assigned responsibilities of the executive branch of government. The Supreme Court has repeatedly stressed this concern and determined it to be so substantial that qualified immunity is not just a "mere defense to liability," but an "*immunity from suit.*" *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) (emphasis in original). Fleshing out this defense, the Court has called it "an entitlement not to stand trial or face the other burdens of litigation. . . ." *Id.* Moreover, the Court also emphasized that the immunity "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526-27. It is for this reason that a district court's denial of qualified immunity is *immediately* appealable. *Id.* This reasoning distinguishes denials of normal interlocutory decisions which are not immediately appealable, and this interlocutory decision which is.

The Supreme Court's rationale for this doctrine finds it roots in the Court's recognition that a rule to the contrary would have significant and undesirable costs "to society as a whole." *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982).

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being

> sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949)) (brackets in original).

This doctrine is not of recent vintage. In an article cited in a footnote by the Court in *Harlow,* 457 U.S. at 814 n.22, we discover that

> the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down 40 wooden houses, or to removing the furniture, & c, belong to the Lawyers of Temple, then on the Circuit, for fear he should be answerable for tresspass; and in consequence of this conduct half that great city was burnt.

Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281 (quoting *Respublica v. Sparhawk*, 1 DALL. 357, 363 (PA. Sup. Ct. 1788)). *Scott v. Harris* follows inexorably from the preemptive purpose of the doctrine and wisely calibrates *Johnson v. Jones* accordingly.

Thus, we must remand with instructions to grant the motion for summary judgment based on qualified immunity and enter judgment for the defendants. Mr. Kaehn had it right: To do otherwise is not fair to the sheriffs.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROL ANN GEORGE PLAINTIFF, V. COUNTY OF SANTA BARBARA, ET AL., DEFENDANTS.	No. CV 09-2258 CBM (AGRx) ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Jun. 24, 2011)

The matter before the Court is Defendants' Motion for Summary Judgment. [Doc. No. 20.]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and § 1367.

BACKGROUND

Plaintiff filed suit in April 2009 against the County of Santa Barbara ("the County"), and Deputies Jarrett Morris, Jeremy Rogers, Harry Hudley, and Larry Hess of the Santa Barbara Sheriff's Department ("the individual Defendants"). Plaintiff alleges that the individual Defendants employed excessive force, in violation of the Fourth and Fourteenth Amendments, when they allegedly fired upon and killed her husband, Donald George. Plaintiff also alleges that the individual Defendants unreasonably

seized her, in violation of the Fourth and Fourteenth Amendments, when they allegedly prevented her from leaving her neighbor's home and she therefore was unable to accompany her husband to the hospital. Plaintiff also asserts state law claims on behalf of her husband and herself, and seeks to hold the County liable under *Monell v. Dep't of Social Services.* Defendants moved for summary judgment on all claims.

LEGAL STANDARD

Summary judgment is proper when the moving party has shown an entitlement to judgment as a matter of law and there is an absence of genuine issues of material fact. Fed.R.Civ.P. 56(c)(2). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of establishing the basis for its motion. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). When a defendant moves for summary judgment on an issue on which the plaintiff bears the burden of proof at trial, the defendant satisfies his burden at the summary judgment

stage by "pointing out to the district court [] that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *Anderson,* 477 U.S. at 250.

DISCUSSION

I. Excessive Force Claim Against the Individual Defendants

Plaintiff's first cause of action asserts a violation of the Fourth Amendment, as applied to the states under the Fourteenth Amendment, for excessive force against Mr. George. Defendants argue that: (1) the force used by Defendants Rogers, Schmidt, and Morris against Mr. George was not excessive; (2) Defendants Rogers, Schmidt, and Morris are entitled to qualified immunity, and (3) Plaintiff has not submitted any evidence that Defendants Hudley and Hess used any force against Mr. George. (Defs' Memo at 8:6-24.)

A. Excessive Force

Claims of excessive force under the Fourth Amendment are analyzed under an objectively reasonable standard. *Espinosa v. City and Cnty. of San Francisco,* 598 F.3d 528, 537 (9th Cir. 2010) (citation omitted). "The reasonableness of a particular use of force must be judged from the perspective of a

reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396 (1989) (internal quotation marks and citation omitted). To do so, a court must pay "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Courts must also consider the amount of force used, the availability of less severe alternatives, and the suspect's mental and emotional state. *Davis v. City of Las Vegas,* 478 F.3d 1048, 1054 (9th Cir. 2007); *Deorle v. Rutherford,* 272 F.3d 1272, 1282 (9th Cir. 2001). All determinations of unreasonable force, however, "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97.

It is undisputed that Mr. George had not committed a crime, and that he was not actively resisting arrest or attempting to evade arrest by flight. Defendants argue, however, that the undisputed facts show that Mr. George posed an immediate threat to the deputies' safety, thus rendering their use of

deadly force objectively reasonable.[1] (Defs' Memo at 9:6-23.) Plaintiff argues that there are genuine issues of material fact as to whether Mr. George posed an immediate threat to any of the deputies' safety.

The undisputed facts indicate that when the deputies arrived at the scene, Plaintiff told them that Mr. George was on the patio and had a gun. (Morris Decl. at ¶ 5; Rogers Decl. at ¶ 5.) In response, the deputies established a perimeter around Mr. George's residence. (Schmidt Decl. at ¶¶ 6-7; Rogers Decl. at ¶¶ 8, 12; Morris Decl. at ¶¶ 7, 11.)

However, the evidence indicates that a number of disputed facts are present. Deputy Morris stated that he and Deputy Rogers made the decision to set up a perimeter around the house. (Ex. P, Morris Depo. at

[1] Defendants also argue that the force used by deputies was reasonable because George intended to commit suicide by cop. (Defs' Memo at 9-10.) Defendants argue that suicide by cop is a situation in which an individual engages in behavior which poses an apparent risk of serious injury or death with the intent to precipitate the use of deadly force by law enforcement against them. (Mohandie Decl at ¶ 17.) However, assuming that evidence of suicidal thoughts and feeling are relevant to this claim, the analysis of whether the deputies employed excessive force remains the same – whether it was reasonable for the officer to employ the deadly force. Furthermore, *Graham* instructs that a court, in analyzing a claim for excessive force, can only consider the circumstances of which the defendants were aware when they employed deadly force. *Graham,* 490 U.S. at 396. There is no evidence that the deputies were aware of Mr. George's mental state at the time they employed the force.

4:7-9.[2]) However, Deputy Schmidt, who arrived later at the George residence, stated that it was him who decided to set up a perimeter, and he told Deputies Morris and Rogers where he wanted them to be positioned. (Ex. W, Schmidt Depo. at 6:11-13; Ex. H, Schmidt Interview at 15:21-25; 16:1-4.) Deputy Rogers stated that he and the other deputies decided together who was going to assume each post. (Ex. X, Rogers Depo. at 9:7-9.)

The deputies also gave conflicting testimony as to who saw Mr. George first and how Mr. George allegedly was holding the gun. Deputy Morris stated that it was Deputy Schmidt who first made contact with Mr. George. (Ex. I, Morris Interview at 15:23-25.) However, Deputy Schmidt stated that Deputy Morris was the first one to see Mr. George (Ex. H, Schmidt Interview at 18:19-21.)

What happened after the deputies established a perimeter is also in dispute. Deputy Schmidt declares that he ordered Mr. George to drop his gun after he saw it. (Schmidt Decl. at ¶ 7.) To dispute Defendants' account, Plaintiff submits a declaration from Thomas Parker, a former law enforcement agent of 30 years, including multiple years at the management level at the Federal Bureau of Investigations overseeing criminal investigations relating to use of force. Mr. Parker specializes in complex investigations consulting

---

[2] All references to letter exhibits were attached to Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

and serves as an expert witness on the use of deadly force. Mr. Parker signed a declaration opining on the use of force in this case, which he states was based on, *inter alia,* his review of documents such as interviews, depositions, and testimonies, and on multiple visits to the George residence. (Parker Decl. at ¶12.) In his declaration, Mr. Parker declares that, in his opinion, Deputy Schmidt could not see Mr. George (and therefore could not tell whether or not Mr. George had a gun), judging from the commands that Deputy Schmidt was transmitting over the radio and from the layout of the house. (Parker Decl. at ¶ 14.K.)

Plaintiff submits her own declaration, in which she declares that Mr. George's disability would preclude him from holding a gun with both hands. (Carol George Decl. at ¶ 9.) This declaration dispute Deputy Rogers' testimony in his deposition that he believed Mr. George was holding the gun with both hands. (Ex. 19, Rogers Depo. at 132-133.[3]) Finally, Plaintiff declares that her husband was right handed. (Carol George Decl. at ¶ 6.) There is evidence in the record indicating that Mr. George had weakness (hemiparesis) in the right side of his body. (Ex. N, Dr. Ponce Progress Note; Dr. Newman Progress Note.) Deputy Morris, in his initial interview taken after the shooting, stated that Mr. George had a gun in his right hand. (Ex. I, Morris Interview at 135.) During his deposition, Deputy Morris testified that the gun was

[3] All references to number exhibits were attached to Defendants' Motion for Summary Judgment.

in Mr. George's left hand. (Ex. P, Morris Depo. at 86:21.)

The deputies declare that they shot Mr. George after he pointed his gun at Deputy Rogers because they feared for Deputy Rogers' safety. (Schmidt Decl. at ¶¶ 10-12; Rogers Decl. at ¶¶ 13-14; Morris Decl. at ¶¶ 11-12.) Deputy Rogers further declares that Mr. George continued to point the weapon at him after he was on the ground, and therefore Deputy Rogers fired additional shots until the gun was no longer pointed at him. (Rodgers Decl. at ¶ 16.) It is undisputed that approximately nine shots were fired in total between the three deputies who shot Mr. George. (Ex. H, Schmidt Interview at 26:16; Ex. P, Morris Depo. at 93:17-94:24; Ex. J, Rogers Interview at 13:5-24.) Defendants also submit an expert declaration from Mr. Ryan, a policy practices consultant, who opines that the deadly force used by the deputies against Mr. George was consistent with generally accepted practices. (Ryan Decl. at ¶ 21.) However, Mr. Parker opines that Deputy Rogers took actions that could "create more risk for the officers." (Parker Decl. at ¶ 14.L.) Mr. Parker also declared that, judging from his experience, Deputy Rogers "could have removed himself from any potential danger." (*Id.* at ¶ 14.R.)

"[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford,* 272 F.3d at 1281. Based on the admissible evidence presented by the parties, the Court finds that whether Mr. George

presented a threat to the safety of the deputies is a material fact that is genuinely in dispute. In analyzing a summary judgment motion, "a district court has the responsibility to construe all facts in the light most favorable to the non-moving party." *Nelson v. City of Davis,* 571 F.3d 924, 928 (9th Cir. 2009). Construing the facts in the light most favorable to the Plaintiff, there are multiple instances of "contradictory . . . testimony [that is] sufficient to create a genuine issue of material fact," *Id.,* and a reasonable jury could disbelieve the officers' testimony and find for the Plaintiff. Because the Court cannot weigh the evidence or make credibility determinations at this stage, this dispute precludes a grant of summary judgment to Deputies Rogers, Morris, and Schmidt on Plaintiff's excessive force claim.[4]

B. Qualified Immunity

Defendants argue that they are entitled to qualified immunity because a reasonable officer would have believed that his actions were lawful. (Defs' Memo at 16.)

Whether a defendant is entitled to qualified immunity is an issue of law that should be decided by

[4] Defendants, in their brief, also argue that they are entitled to summary judgment on Plaintiff's claim that the deputies provoked the alleged Fourth Amendment violation. (Defs' Memo at 14-15.) However, there is no cause of action asserting a provocation claim in Plaintiff's Complaint.

the court. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). Government officials are entitled to immunity in their individual capacity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan,* 555 U.S. 223 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). "In considering a claim for qualified immunity, the court engages in a two-part inquiry: whether the facts shown 'make out a violation of a constitutional right,' and 'whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct.'" *Delia v. City of Rialto,* 621 F.3d 1069, 1074 (9th Cir. 2010) (quoting *Pearson,* 129 S. Ct. at 815-16). A court may address this two-part inquiry in either order – it must not decide the question of whether a constitutional violation took place first. *Pearson,* 555 U.S. at 818 (receding from *Saucier v. Katz*).

Defendants' argument in support of qualified immunity is that Plaintiff has not shown a constitutional violation. Defendants do not argue that the constitutional right was not clearly established at the time of the alleged misconduct. When there are triable issues of material fact as to whether an officer acted reasonably, and the issue of qualified immunity "cannot be separated from the merits of [the] case," the officer is not entitled to summary judgment based on qualified immunity. *Jackson v. McIntosh,* 90 F.3d 330, 332 (9th Cir. 1996).

C. Defendants Hudley and Hess

Defendants argue that Plaintiff does not present any evidence against Defendants Hudley and Hess and thus they should be dismissed from this and most other claims. (Defs' Memo at 11:22-24.) Plaintiff does not address this argument in her brief. During oral argument, Plaintiff's counsel argued that Defendants Hess and Hudley should be held responsible under a theory of supervisory liability.

A supervisor may be held individually liable pursuant to § 1983 for his culpable action or inaction, whether present or absent at the time of the incident. *Starr v. Baca,* 633 F.3d 1191, 1194 (9th Cir. 2011). "The supervisor's participation could include his own culpable action or inaction in the training, supervision, or control of his subordinates, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others." *Id.* at 1195 (citations omitted). A supervisor may also be liable if the official "knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Watkins v. City of Oakland,* 145 F.3d 1087, 1093 (9th Cir. 1998) (citation omitted).

The undisputed evidence in this case shows that Defendants Hess and Hudley arrived at the scene, some time after Deputies Schmidt, Morris, and Rogers. However, there is no evidence that they knew or should have known that deadly force would be

employed, or that their actions had a causal connection to the employment of deadly force. The Court thus finds that there is no evidence that would create a genuine issue of material fact as to whether Defendants Hudley and Hess could be held liable for the force employed by Deputy Schmidt, Morris, and Rogers.

II. Unreasonable Seizure Claim Against the Individual Defendants

Plaintiff's Second Cause of Action asserts a violation of her own constitutional right to be free from unreasonable seizure under the Fourth Amendment, as applied to the states by the Fourteenth Amendment.[5] Defendants argue that Plaintiff has not presented any evidence that would establish that any of the named Defendants "seized" Plaintiff.

Plaintiff argues that Defendants violated her rights when they kept her at her neighbor's house after Mr. George was taken to the hospital. Plaintiff submits evidence that Mr. George was shot at 8:12 a.m., underwent surgery at 9:16 a.m., and she was not able to arrive at the hospital until 10:15 or 10:30 a.m. (Ex. Q, Coroner Report; Ex. F, Plesons Depo. at 43:5-8) The undisputed evidence indicates that

[5] It is somewhat unclear form the Complaint whether Plaintiff's claim is one of unreasonable seizure or excessive force. However, at oral argument, Plaintiff's counsel clarified that the claim is one of unreasonable seizure.

Defendant Hudley asked Plaintiff's neighbor, Mrs. Plesons, if she could take Plaintiff to the Plesons' residence. (Ex. F, Plesons Depo. at 25-26.) It is undisputed that the George residence had become a crime scene. At some point, Mrs. Plesons asked if Plaintiff could go see her husband at the hospital, and a detective told her that she could not because she had to be interviewed. (*Id.* at 27:8-12.) About twenty minutes later, Mrs. Plesons insisted that Plaintiff should be able to leave, and at that point, a detective drove Plaintiff to the hospital. (*Id.*)

"Reasonableness is the touchstone of any seizure under the Fourth Amendment." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir. 2005). The undisputed evidence indicates that Plaintiff went to her neighbor's house at Defendant Hudley's suggestion. (Ex. F, Plesons Depo. at 24:18-19; 25:1-5.) There is evidence that, before Mr. George was taken to the hospital, Defendant Hudley told Plaintiff not to return to her home. (Ex. U, Hudley Depo. at 79:9-11.) However, it is undisputed that the George residence had become a crime scene. (Ryan Decl. at ¶¶ 28-31.) After Mr. George was taken to the hospital, Plaintiff asked to go to the hospital. (Ex. F, Plesons Depo. at 30:5-8.) The undisputed evidence indicates it was not Defendant Hudley who told Plaintiff she could not go to the hospital to see her husband, it was a detective, who Plaintiff does not identify, who was also at the neighbor's home. (*Id.* at 30:11-14.) This detective told her she could not leave the neighbor's house until she was

interviewed. (*Id.* at 30:9-14.) The neighbor insisted that Plaintiff be allowed to go see her husband. (*Id.* at 30:24-25.) Approximately twenty minutes after Mr. George was taken to the hospital, Plaintiff was driven by an officer to the hospital to see her husband. (*Id.* at 43:13-14.)

A seizure violates the Fourth Amendment if it is more intrusive than necessary. *Florida v. Royer,* 460 U.S. 491, 504 (1983). Assuming that there was a seizure in this case, it was necessary for Defendant Hudley to tell Plaintiff she could not go back to her home, as it had become a crime scene. There is no evidence that Defendant Hudley, or any other named Defendant, kept Plaintiff from going to the hospital. Therefore, there is no evidence creating a genuine dispute of material fact as to whether any named Defendant unreasonably seized Plaintiff, in violation of her Fourth Amendment rights.

Furthermore, Defendants are entitled to qualified immunity on this claim, as the right at issue was not clearly established at the time of the alleged misconduct. An official's conduct violates clearly established law when, at the time of the conduct, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2083 (2011) (quotation omitted). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Plaintiffs do not cite any authority, and the Court has found no

case, for the proposition that under similar circumstances to the ones present here, a reasonable officer would have understood that what he was doing violated the Fourth Amendment.

III. Monell Liability

a. Official Policy

Under *Monell v. Dep't of Social Services* and its progeny, a municipal entity can only be held liable under Section 1983 for unconstitutional acts that the municipality, as opposed to an employee, takes. 436 U.S. 658, 690-91 (1978). To prevail on a § 1983 claim against a municipal defendant, a plaintiff must prove (1) that he was "deprived of [his] constitutional rights by defendants and their employees acting under color of state law; (2) that the defendants have customs or policies which amount to deliberate indifference to . . . constitutional rights; and (3) that these policies [were] the moving force behind the constitutional violations." *Lee v. City of Los Angeles,* 250 F.3d 668, 681-82 (9th Cir. 2001) (internal quotations omitted). A municipal policy is the "moving force" behind a constitutional violation if it is the proximate cause of the constitutional injury. *Van Ort v. Estate of Stanewich,* 92 F.3d 831, 837 (9th Cir.1996).

To establish the existence of a policy or custom, a plaintiff must prove (1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a final policymaker.

Delia v. City of Rialto, 621 F.3d 1069, 1081-82 (9th Cir. 2010). Furthermore, a "suit against a municipal officer is equivalent to a suit against the entity." *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Depart.,* 533 F.3d 780, 799 (9th Cir. 2008) (citation omitted). Thus, a plaintiff must satisfy *Monell*'s requirements to hold a county or a county officer in his official capacity liable under § 1983.

Plaintiff first argues that the County's policy on use of patrol rifles, (number 432) is unconstitutional because it "leaves" the use of a patrol rifle up to the individual deputy and requires no supervisory approval. Policy Number 432 states that "Deputies may deploy the patrol rifle in any circumstance where the deputy can articulate a reasonable expectation that the rifle may be needed." (Parker Decl. at ¶ 14.Z.) Plaintiff submits the declaration of Mr. Parker, who declares that such a policy is "incomplete, ineffective, and lack[s] . . . real guidance for its deputies." (*Id.*) However, Plaintiff does not offer any evidence creating a genuine dispute as to whether this policy was "the moving force" behind the alleged constitutional violation. Plaintiff also does not offer any evidence to support its theory that the policy amounted to "deliberate indifference" of the right at issue.

Plaintiff also argues that the County's policy on use of force (number 300), is unconstitutional because it provides too much discretion to individual deputies on when to use force. That policy states, in part, that "deputies shall use only that amount of force that reasonably appears necessary, given the facts and

circumstances perceived by the deputy at the time of the event, to effectively bring an incident under control." (Parker Decl. at ¶ 14.BB.3.) Mr. Parker opines that the deputies did not comply with this policy when they deployed force on Mr. George. (*Id.* at ¶ 14.CC.) Because Plaintiff presents evidence that the actions taken by the deputies constituted a violation of the policy, there is no evidence that the policy itself led to the alleged constitutional violation. Therefore, there is no genuine dispute of material fact as to whether policy number 300 was the "moving force" behind the alleged constitutional violation.

Thus, Defendant County is entitled to summary judgment on this claim.

b. "Failure to Train"

Defendants also argue that Plaintiff has not submitted any evidence showing that the County is liable on a "failure to train" theory. (Defs' Memo at 19.) Plaintiff argues that the deputies received inadequate training, and she submits in support a declaration from an expert. In reply, Defendants argue that Plaintiff has not submitted any evidence of a training policy that amounts to "deliberate indifference," which is required for a "failure to train" claim against a county. *See City of Canton v. Harris,* 489 U.S. 378, 389 (1989).

Defendants submit the declaration of Lieutenant Liddi, who is a supervisor of the Santa Barbara Sheriff Office's Training Bureau. In his declaration,

Liddi details the types of training provided to deputies, and he states that Deputies Morris, Rogers and Schmidt all received training in the use of firearms, use of force, defensive tactics, and tactical communications, among other forms of training. (Liddi Decl. at ¶¶ 7-12.) Defendants also submit the declaration of John Ryan, an expert in police practices, who opines that "the training conducted by [the Santa Barbara Sheriff's Office] not only meets, but actually exceeds the training in these areas conducted by most law enforcement agencies in the United States." (Ryan Decl. at ¶ 33.)

In support of this claim, Plaintiff submits the Declaration of Thomas Parker. Mr. Parker declares that after reviewing the files of the three deputies who employed force, it is his opinion that they received "inadequate, ineffective, or little, if any, training in situations of this type." (Parker Decl. at ¶ 14.DD)[6] Mr. Parker also opines that the Sheriff's office "in this case acted intentionally and recklessly in their handling of the Donald George matter." (*Id.* at ¶ 14.GG.)

Plaintiff's evidence, which supports Plaintiff's argument that the deputies were inadequately trained, does not create a genuine dispute as to

[6] Defendants filed objections to Mr. Parker's declaration, and the Court has sustained some objections and overruled others. The evidence relied upon in this order is only the evidence to which there was no objection or which the Court overruled the objection.

whether the County had (1) a policy of failing to train that (2) was deliberately indifferent to the rights at issue. Thus, Defendant County is entitled to summary judgment on this claim.

IV. State Law Claims

In addition to the § 1983 causes of action, Plaintiff asserts a number of state law claims. Five causes of action arising under state law involve the allegations regarding the deputies' use of deadly force. One cause of action arising under state law involves the Plaintiff's allegations of unreasonable seizure.

The parties agreed at oral argument that the resolution of the federal constitutional claims would necessarily dictate the resolution of the state law claims. Because the Court finds a triable issue on whether the deputies employed excessive force, the state law claims relying on the same conduct cannot be resolved on summary judgment. Likewise, because the Court grants summary judgment to all individual Defendants on Plaintiff's unreasonable seizure claim, the Court grants summary judgment to all individual Defendants on Plaintiff's state law claim relying on the same conduct.

V. Punitive Damages

Defendants argue that, in the event that the Court does not dismiss all the claims against these defendants, the evidence cannot sustain a punitive

damage award because such an award requires that the individual defendants' behavior was driven by evil motive or intent, or involved a reckless or callous indifference to constitutional rights. *Smith v. Wade,* 461 U.S. 30, 56 (1983).[7] However, as discussed above, there exists a genuine dispute of material fact as to whether the deputies acted unreasonably, including a dispute as to the defendants' intent. (*See* Parker Decl. at ¶ GG ("it is clearly my conclusion and opinion that [Deputies Schmidt, Rogers, and Morris] . . . acted intentionally and recklessly. . . .") Likewise, punitive damages is an issue that cannot be resolved on summary judgment.

CONCLUSION

For the reasons provided above, Defendants' motion for summary judgment is GRANTED as to Defendant County of Santa Barbara on Plaintiff's Third Cause of Action (*Monell* claim) and all state law Causes of Action, Defendants Hudley and Hess on all Causes of Action in which they are included, and Defendants Schmidt, Morris, and Rogers on Plaintiff's Second (unreasonable seizure) and Eighth (false imprisonment) Causes of Action. Defendants' motion for summary judgment is DENIED as to Defendants Schmidt, Morris, and Rogers on Plaintiff's First

[7] For state intentional torts, punitive damages may be awarded when a defendant committed the tort with, *inter alia,* malice. Cal. Jury Instructions 7.94.

(excessive force), Fourth (assault and battery), Fifth (intentional infliction of emotional distress), Sixth (negligence), Seventh (negligent infliction of emotional distress), and Ninth (wrongful death) Causes of Action.

IT IS SO ORDERED.

DATED: June 24, 2011

By /s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE