No. _____

In The

Supreme Court of the United States

BRIAN PITZER,

Petitioner,

v.

RUSSELL TENORIO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has been denied qualified immunity by the Tenth Circuit majority and the District Court of New Mexico for his use of potentially deadly force against Respondent when Respondent, while armed with a knife, closed distance on Petitioner.

The questions presented for review are:

1) Whether Petitioner is entitled to qualified immunity where it is alleged that Petitioner violated Respondent's Fourth Amendment rights when Petitioner used potentially deadly force against Respondent as he held a knife to his side and made no hostile motions with the knife itself as he advanced towards Petitioner.

2) Whether the Tenth Circuit's decision in denying Petitioner qualified immunity concerning the reasonableness of the use of deadly force conflicts with the Eighth Circuit's decision set forth in *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir.2012).

3) Whether the Tenth Circuit's decision in denying Petitioner qualified immunity concerning the reasonableness of the use of deadly force conflicts with *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765 (2015); *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Graham v. Connor*, 490 U.S. 386 (1989); and *Bell v. Wolfish*, 441 U.S. 520 (1979).

PARTIES TO PROCEEDING

The only parties to this proceeding for Petition for Writ of Certiorari are Petitioner Brian Pitzer and Respondent Russell Tenorio.

Respondent has also filed suit against the City of Albuquerque, former Chief of Police Raymond Schultz, Officer Robert Liccione, and Detective Andrea Ortiz for claims arising out of the same events which took place on November 11, 2010. Counsel for Petitioner represents each of these defendants and has filed motions for summary judgment pursuant to Fed. R. Civ. P. 56 and motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) requesting judgment in their favor. These motions are currently pending decision before the United States District Court of New Mexico.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. 1) is reported at *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir.2015). The summary judgment opinion of the District Court for the District of New Mexico (App. 45) is not reported in the Federal Supplement.

BASIS OF SUPREME COURT JURISDICTION

The Tenth Circuit entered judgment on October 6, 2015. No petition for rehearing en banc was filed within 14 days of this judgment. Fed. R. App. P. 35(c), 40(a)(1). This Court's jurisdiction arises under 28 U.S.C. § 1254(1) and the collateral order doctrine allowing an interlocutory appeal from the denial of qualified immunity that rests upon purely legal grounds. *Johnson v. Jones*, 515 U.S. 304, 317 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. 42 U.S.C. § 1983:

> 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.

II. Fourth Amendment to the Constitution of the United States:

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

STATEMENT OF THE CASE

Respondent filed his complaint in the United States District Court of New Mexico on December 13, 2012 wherein he alleges that Petitioner used excessive force in violation of the Fourth and Fourteenth Amendments during a deadly force encounter which

occurred on November 11, 2010. Petitioner filed a motion for summary judgment in the United States District Court of New Mexico requesting a dismissal of Respondent's complaint against him on qualified immunity grounds. This motion was denied and Petitioner then appealed to the Tenth Circuit Court of Appeals. The appellate court's jurisdiction arose under 28 U.S.C. § 1291 and the collateral order doctrine allowing an interlocutory appeal from the denial of qualified immunity that rests upon purely legal grounds. *Johnson v. Jones*, 515 U.S. 304, 317 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). While this action was pending before the Tenth Circuit Court of Appeals, Respondent did not take issue with Petitioner's argument that the Fourth Amendment, and not the Fourteenth Amendment applies to this encounter.

The encounter at issue stems from a police response to a 911 call where it was initially reported that Mr. Tenorio (Respondent) was intoxicated and had a knife to his own throat and had vandalized windows at a residence located at 1417 Alamo in Albuquerque, NM. Officers Moore, Hernandez, Liccione, and Pitzer (Petitioner) were dispatched to the call. It was reported over the dispatch that Mr. Tenorio had been violent in the past and takes medication for seizures. The dispatch also relayed that other persons were inside of the residence which included the 911 caller (Hilda Valdez), the 911 caller's brother (Robert Torres), and Respondent's wife (Michaele Tenorio). The last information relayed to the officers was that Mr. Tenorio was still holding the

knife in his hand; was waving the knife around; and the caller's sister (Respondent's wife) and the 911 caller were in the living room while Mr. Tenorio and Robert Torres were in the kitchen. When the officers arrived in the vicinity, they were informed that the 911 caller would be standing outside of the residence waiting for officers. As Ms. Valdez saw the officers approaching she said in a panicked voice: "Please hurry! Please hurry! Oh, God. Oh God. Oh God." Officer Moore contacted Hilda Valdez outside the residence, and he noticed that she appeared to be afraid. While still visibly upset, Ms. Valdez told Officer Moore: "He's got a knife. He's been drinking" . . . "He's like thirty-seven, thirty-eight years old. Um, we tried to talk to him but he got mad 'cause we took his beer away from him." After speaking with Ms. Valdez, Officer Moore had all of the officers stack up to prepare to go inside of the residence. The officers' goal was to try to safely evacuate the family members, who were still inside the home, away from any threat and create distance between them and Mr. Tenorio. In the stack, Officer Pitzer was the lead officer so he was the designated lethal force coverage; Officer Moore was behind Officer Pitzer so he was a less lethal force option with a taser; Officer Liccione was third in the stack as a lethal force coverage, and Officer Hernandez was last in the stack with a less lethal force option with a bean bag shotgun. Officer Pitzer announced to other officers "I'm going lethal" to convey to them that he had lethal coverage. After doing so, he removed his firearm from his holster and held it in the low, ready position.

Officer Pitzer had his belt tape running which reveals that Officer Pitzer told Michaele Tenorio: "Ma'am, step out here. Let me see your hands, okay? Let me see your hands." Officer Pitzer entered the residence where he saw Michaele Tenorio and Mr. Tenorio behind her. Mr. Tenorio still had the knife in his possession. Mr. Tenorio claims that he was holding the knife loosely by his side. Michaele Tenorio can be heard telling Mr. Tenorio on the belt tape: "Russell, put that down." Per the belt tape, Officer Pitzer then said in succession: "Sir. Put the knife down! Put the knife down! Put the knife down! Put the knife down!" Mr. Tenorio did not put the knife down as instructed, but instead kept walking towards Officer Pitzer while carrying the knife at his side. As Mr. Tenorio kept advancing, Officer Pitzer felt as though he was going to get stabbed. Officer Pitzer was waiting for another officer to tase him. From where Officer Liccione was positioned, he saw that Mr. Tenorio had an object in his hand and he heard commands for Mr. Tenorio to drop the knife. Officer Liccione told Officer Moore to tase Mr. Tenorio. Mr. Tenorio was not tased right away because Officer Moore, who was armed with a taser, did not have a clear view by which to tase Mr. Tenorio. As Officer Pitzer waited for Mr. Tenorio to be tased, he continued to give him commands to put the knife down but Mr. Tenorio was way too close so Officer Pitzer fired a single shot in order to stop his actions. Mr. Tenorio alleges in his complaint: "at least one of the responding officers indicated that Mr. Tenorio had been approximately ten (10) feet away

from the officers when Defendant Pitzer fired his gun."

ARGUMENT

I. Whether Petitioner is entitled to qualified immunity where it is alleged that Petitioner violated Respondent's Fourth Amendment rights when Petitioner used potentially deadly force against Respondent as he held a knife to his side and made no hostile motions with the knife itself as he advanced towards Petitioner.

The issue of qualified immunity is an important federal question because it is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id.* at 2085. This Court noted in *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1774, n. 3 (2015):

> Because of the importance of qualified immunity "to society as a whole," *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct.

> 2727, 73 L.Ed.2d 396 (1982), the Court often corrects lower courts when they wrongly subject individual officers to liability. *See, e.g.*, *Carroll v. Carman*, 574 U.S. ___, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (*per curiam*); *Wood v. Moss*, 572 U.S. ___, 134 S.Ct. 2056, 188 L.Ed. 2d 1039 (2014); *Plumhoff v. Rickard*, 572 U.S. ___, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014); *Stanton v. Sims*, 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *Reichle v. Howards*, 566 U.S. ___, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012).

Petitioner's denial of qualified immunity in this case by the majority in the Tenth Circuit Court of Appeals and the District Court Judge raises an important federal question which has not been but should be resolved by this Court. The question at issue is whether a clearly established constitutional violation occurs when an officer utilizes potentially deadly force against a person who is not making any hostile motions with a knife or "charging" with the knife but is instead disobeying orders to drop the knife and is closing distance by walking towards the officer while holding the knife. This Court said in *Sheehan* that "the use of potentially deadly force was justified" as Sheehan, who had a knife, kept coming at the officers until she was "only a few feet from a cornered Officer Holder." *Sheehan*, 135 S.Ct. at 1775. However, this Court did not address and has not answered the question as to whether a person holding a knife must first make a provocative motion with the knife before an officer may utilize deadly force. It also has not

been addressed as to whether the clearly established law gives an officer fair warning that the use of deadly force is unreasonable when used against a person who is holding a knife and advancing on an officer but is not "charging" or making hostile motions with the knife.

II. Whether the Tenth Circuit's decision in denying Petitioner qualified immunity concerning the reasonableness of the use of deadly force conflicts with the Eighth Circuit's decision set forth in *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir.2012).

The Tenth Circuit's decision denying Petitioner qualified immunity for his use of potentially deadly force based upon a finding that Respondent took no hostile action towards officers is contrary to the Eighth Circuit's decision in *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir.2012). In *Morgan*, *supra*, after the officer was informed by decedent's girlfriend that decedent (Morgan) had a knife; Morgan attempted to conceal the knife in his hand. *Id*. at 496. The officer ordered Morgan to drop the knife. *Id*. Instead of complying with the officer's orders, Morgan stood up with the knife pointed downward and his arm at his side. *Id*. He then raised his right leg as if to take a step in the officer's direction. *Id*. As Morgan was 12 feet away, the officer fired one shot at Morgan which ultimately killed him. *Id*. at 497. Based upon these facts, the Eighth Circuit found the officer's use of deadly force to be objectively reasonable. *Id*. The Eighth Circuit arrived at this conclusion even when

viewing the evidence in the light most favorable to the Estate. The Estate argued that the evidence showed that Morgan lifted his foot as if to take a step in the general direction of Officer Cook, not that Morgan lunged at Cook. *Id*. This holding is contrary to the position of the Tenth Circuit where it held that Petitioner was not entitled to qualified immunity because it was clearly established that it is unreasonable for an officer to use deadly force against a suspect with a knife who was not making hostile motions with the knife.

III. Whether the Tenth Circuit's decision in denying Petitioner qualified immunity concerning the reasonableness of the use of deadly force conflicts with *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765 (2015); *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Graham v. Connor*, 490 U.S. 386 (1989); and *Bell v. Wolfish*, 441 U.S. 520 (1979).

A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard, measuring the challenged police conduct from a reasonable officer's perspective under the totality of circumstances. *See Graham v. Connor*, 490 U.S. 386, 396-397 (1989); *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). "Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including

in situations that are more likely to require police officers to make difficult split-second judgments." *Missouri v. McNeely*, 133 S.Ct. 1552, 1564 (2013). Despite this, the Tenth Circuit has employed such a mechanical application in analyzing an officer's use of deadly force. In *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir.2008), the Tenth Circuit announced a set of "non-exclusive factors" which it derived from its previous decisions. *See id. (citing Walker v. City of Orem*, 451 F.3d 1139, 1159 (10th Cir.2006); *Jiron v. City of Lakewood*, 392 F.3d 410, 414-415 (10th Cir.2004); *Zuchel v. Spinharney*, 890 F.2d 273, 274 (10th Cir.1989) (*Zuchel I*)). In *Larsen*, the Tenth Circuit said that the set of the following "non-exclusive factors" should be considered in assessing the "degree of threat" facing an officer: (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect. *Estate of Larsen*, 511 F.3d at 1260. In rigidly and narrowly applying these "non-exclusive factors" to deny Petitioner qualified immunity, the majority, as noted by the dissent, narrowed a "robust totality-of-circumstances inquiry to two meager factors" when they found the use of deadly force to be unreasonable where Respondent had not charged at officers or made any hostile motions with the knife. (App. 17) "The test of reasonableness under the Fourth Amendment is not capable

of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and the Tenth Circuit majority's rigid and narrow application of the *Larsen* "non-exclusive factors" in denying Petitioner qualified immunity is contrary to this principle.

The majority's decision is also in conflict with this Court's finding in *Sheehan* wherein it is stated that the officers' use of potentially deadly force under the Fourth Amendment was justified when they shot Sheehan as she kept coming at the officers with a knife until she was "only a few feet from a cornered Officer Holder." *Sheehan*, 135 S.Ct. at 1775. In making this assessment, this Court did not state that Sheehan was required to make hostile motions with the knife before deadly force could be used.

Deadly force is justified under the Fourth Amendment if a reasonable officer faced with the same circumstances would have probable cause to believe that there was a threat of serious physical harm to themselves or to others. *See Garner*, 471 U.S. at 11. Officers are not required to be correct in their assessment of the danger presented by the situation; instead, all that is required is that their assessment be objectively reasonable. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Further, an officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131

S.Ct. at 2083. In denying Petitioner qualified immunity, the majority said its prior decisions of *Zuchel v. City & Cty. of Denver*, 997 F.2d 730, 735-737 (10th Cir.1993) (*Zuchel II*) and *Walker*, 451 F.3d at 1160 sets forth the clearly established law that resolves this case. (App. 11) However, as the dissent explained, the facts and circumstances outlined in these two decisions are considerably different than the circumstances faced by Petitioner. (App. 35-36) The dissent also points out: "By focusing exclusively on *Zuchel II*, the majority also disregards our cases presenting less immediate danger where we have affirmed summary-judgment grants of qualified immunity to other shooting officers." (App. 36) By way of example, the dissent states that an officer such as Petitioner could rely on the Tenth Circuit's decision in *Larsen* where the Court held that the officers' use of deadly force was objectively reasonable given that the facts of this case are more similar to the situation confronted by Petitioner. (App. 36) Despite the factual similarities, the dissent pointed out that the majority applied a "shrunken analytical framework" when it denied Petitioner qualified immunity and therefore deviated from its analysis in *Larsen* where it "applied a broad analytical framework and compiled a list of non-exclusive factors based, in part, on *Walker* and *Zuchel I*" and looked at far more facts than charging, stabbing, and slashing by the person armed with the knife. (App. 25) In light of this inconsistent approach and the factual dissimilarities between the present case and the *Zuchel* and *Walker* decisions, the Tenth Circuit precedent does not put the constitutional

question as to reasonableness of Petitioner's use of deadly force "beyond debate." Further, due to the factual dissimilarities between the present controversy and the *Zuchel* and *Walker* cases, the majority's statement that these decisions set forth the clearly established law is contrary to this Court's finding in *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) where this Court said:

> These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the "'hazy border between excessive and acceptable force.'" *Saucier v. Katz*, *supra,* at 206, 121 S.Ct. 2151. The cases by no means "clearly establish" that Brosseau's conduct violated the Fourth Amendment.

CONCLUSION

For all the reasons discussed herein, Petitioner Brian Pitzer respectfully requests that this Court grant his petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, and reverse the majority opinion of that Court in this case.

Respectfully submitted,

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Raymond D. Schultz, The City of Albuquerque;
Robert Liccione; Andrea Ortiz, Defendants.

No. 14-2114. | Oct. 6, 2015.

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Before TYMKOVICH, Chief Judge, HARTZ, and PHILLIPS, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

Albuquerque Police Officer Brian Pitzer shot Russell Tenorio when responding to an emergency call. Tenorio sued Pitzer in the United States District Court for the District of New Mexico under 42 U.S.C. § 1983, asserting that Pitzer violated his Fourth Amendment rights by using excessive force. The district

court denied Pitzer's motion for summary judgment, concluding that there was evidence that Pitzer violated clearly established law under two theories: (1) when Pitzer shot Tenorio he "did not have probable cause to believe that [Tenorio] presented a threat of serious physical harm to [Pitzer] or another person," Aplt.App. at 208, and (2) Pitzer and his fellow officers recklessly created the situation that resulted in the use of deadly force. Pitzer appeals. We have jurisdiction under 28 U.S.C. § 1291 and affirm the denial of summary judgment because the evidence would support a violation of clearly established law under the first theory. We therefore need not address the second theory,[1] and remand for further proceedings.

I. BACKGROUND

Although the district court denied summary judgment and has not entered a final judgment, "we have interlocutory jurisdiction over denials of qualified immunity at the summary judgment stage to the extent that they turn on an issue of law." *Romero v. Story*, 672 F.3d 880, 882 (10th Cir.2012) (brackets and internal quotation marks omitted). We reduce the question

[1] *See Aldaba v. Pickens*, 777 F.3d 1148, 1159 n. 2 (10th Cir.2015) (On review of denial of motion for summary judgment based on qualified immunity, once appellate court determined that initial use of force was excessive, it was unnecessary to determine on appeal "whether the officers' subsequent actions would likewise constitute excessive force.").

before us to one of law by accepting the district court's assessment of the facts, which was based on the parties' agreement on undisputed facts and the court's construing the remaining evidence in the light most favorable to Tenorio. *See id.* at 882-83. Indeed, on an interlocutory appeal from the denial of a summary-judgment motion based on qualified immunity, we are almost always barred from reviewing whether the district court erred in determining that an alleged fact was supported by sufficient evidence. *See id.* at 883; *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir.2010) (noting the exceptions).

The district court's opinion set forth the following facts: On November 11, 2010, at 7:56 p.m., a 911 operator received a call from Hilda Valdez, who told the operator, "I need someone to come over here right away." Aplt.App. at 204 (internal quotation marks omitted). Ms. Valdez reported that her sister-in-law's husband, later identified as Tenorio, was intoxicated and holding a knife to his own throat. She said that she was afraid that Tenorio would hurt himself or his wife Michaele. Officers Moore, Hernandez, and Liccione were dispatched in response to the call, and Pitzer also responded. The 911 operator relayed some of the information provided by Ms. Valdez to the Albuquerque Police Department dispatcher, who relayed the following information to the officers:

> Male [subject] Russell is [drunk] and [on scene]
>
> [Subject] has a knife to his own throat . . .

> [No injuries] at this time
>
> Male has [vandalized] windows in the [location] . . .
>
> Male has been violent in the past . . .
>
> Male takes meds for seizures . . .
>
> Male, [caller] and males wife Michelle [sic] are all [on scene] inside the [location]
>
> [Caller's] brother Bob Torres is also [on scene] . . .
>
> Offender is in the kitchen [with] the knife
>
> [Caller] is in the living room
>
> Male is still holding the knife in his hand
>
> Male is waving knife around . . .
>
> [Caller's] sister and [caller] are in the living room
>
> Offender and [caller's] brother are in the kitchen
>
> [Caller] is standing outside the [location] waiting for [officers] . . .

Id. at 73-74 (capitalization omitted) (items in brackets are spelled-out abbreviations or translations of police codes).

The officers, all in uniform, arrived on the scene in separate vehicles within eight minutes of the original call. They parked their vehicles a short distance from the residence. About a minute later they

approached Ms. Valdez, who was standing outside the house still speaking to the 911 operator. She appeared frightened. Pitzer had not received crisis-intervention training, but Moore and Liccione had. Moore told Ms. Valdez to end her 911 call. She told the officers: "He's got a knife. He's been drinking. . . . He's like thirty-seven, thirty-eight years old. Um, we tried to talk to him but he got mad 'cause we took his beer away from him." *Id.* at 205 (internal quotation marks omitted). Pitzer announced that he was "going lethal." *Id.* (internal quotation marks omitted). Without asking if there was a hostage or settling on a tactical plan, the officers lined up outside the front door to the residence. Pitzer was in the front with his handgun drawn. Moore was behind him, carrying a Taser, and Liccione was third, with his handgun drawn. Hernandez was behind the other officers, carrying a shotgun loaded with beanbag rounds, but was temporarily occupied in preventing Ms. Valdez from reentering the residence.

The front door was open. The living room's dimensions were about 14 feet by 16 feet, with the front door on one of the shorter walls. A lamp was on in the room. From his position outside the front door, Pitzer could see two doorways on the opposite wall. The one to his right, which led to the kitchen, was directly across from the front door. Part of the kitchen was obscured by the living-room wall. The officers did not hear raised voices or other sounds suggesting a disturbance. Without announcing his presence, Pitzer entered the living room, followed by Moore and

Liccione. Mrs. Tenorio moved into the area of the kitchen visible through the right doorway. Pitzer first said, "Ma'am," and then, "Please step out here. Let me see your hands, okay?" *Id.* at 206 (internal quotation marks omitted). At least one of the other officers understood "Please step out here" to be addressed to everyone in the kitchen.

As Mrs. Tenorio moved out of the kitchen, she said, "Russell, put that down." *Id.* She walked into the living room with her hands up and palms facing the officers. She was followed by Tenorio, who had a blank stare and was carrying a santoku-style kitchen knife with a three-and-a-quarter-inch blade. He was holding the knife loosely in his right hand, his arm hanging by his side, as he walked behind his wife. He was followed by a second man. Hernandez grabbed Mrs. Tenorio and took her outside. Tenorio walked forward into the living room at an "average speed." *Id.* at 207 (internal quotation marks omitted). Pitzer saw the knife and yelled, "Sir, put the knife down! Put the knife down, please! Put the knife down! Put the knife down!" *Id.* (internal quotation marks omitted). When Tenorio was about two and one-half steps into the living room, Pitzer shot him, Moore tased him, and he fell to the floor. The commands and the shooting lasted two or three seconds. The time between the first officer's arrival and the shooting was less than four minutes. Tenorio was hospitalized for two months as a result of his life-threatening injuries.

The district court analyzed Tenorio's first theory of liability – that Pitzer shot him when Pitzer lacked

probable cause to believe that Tenorio posed a threat of serious harm to anyone – under the four (nonexclusive) factors set forth in *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir.2008): "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." The court concluded that a jury could find the first factor to be neutral because even though Pitzer ordered Tenorio to drop his knife, "[a] reasonable jury could find that Defendant did not 'refuse' to drop the knife because he was not given sufficient time to comply." Mem. Op. & Order at 7, *Tenorio v. Pitzer*, Civ. No. 12-01295 MCA/KBM consolidated with Civ. No. 13-00574 MCA/KBM (D.N.M. May 28, 2014). It said that a jury could find that the second factor weighed against probable cause because it could find that Tenorio "was holding a small kitchen knife loosely by his thigh and that he made no threatening gestures toward anyone." *Id.* On the third factor, the court said that a jury could find that it weighed against probable cause because the jury could find that Tenorio, although walking toward Pitzer, was shot "before he was within striking distance of [Pitzer]." *Id.* at 8. And it said that a jury could also find that the fourth factor weighed against probable cause because the jury could reasonably find that the information provided to Pitzer "indicated that the only person that [Tenorio] was known to have threatened that night was himself, and that as

[Tenorio] walked into the living room he did not raise the knife from his side or make threatening gestures or comments toward anyone." *Id.*

II. DISCUSSION

A. Qualified Immunity

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation marks omitted). In the Fourth Amendment context, "[t]his inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at 244, 129 S.Ct. 808 (internal quotation marks omitted). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir.2013) (internal quotation marks omitted). We do not engage in "a scavenger hunt for prior cases with precisely the same facts" but examine "whether the law put officials on fair notice that the described conduct was unconstitutional." *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir.2010) (internal quotation marks omitted).

The plaintiff bears the burden of establishing both (1) that the defendant violated a constitutional right and (2) that the right had been clearly established by the time of the violation. *See Becker*, 709 F.3d at 1022. When, as here, the facts are not disputed (at least for the purposes of appeal), our review is de novo. *See Aldaba*, 777 F.3d at 1154.

B. Excessive-Force Claims

We review Fourth Amendment claims of excessive force under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene. *See Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "The reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir.1995) (footnote omitted). But "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865.

The Fourth Amendment permits an officer to use deadly force only if there is "probable cause to believe that there [is] a *threat of serious physical harm to* [*the*

officer] or to others." *Estate of Larsen*, 511 F.3d at 1260 (internal quotation marks omitted). "A reasonable officer need not await the glint of steel before taking self-protective action; by then, it is often too late to take safety precautions." *Id.* (ellipsis and internal quotation marks omitted). The four factors noted by the district court are quite significant. But they are only aids in making the ultimate determination, which is "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Id.* The belief need not be correct – in retrospect the force may seem unnecessary – as long as it is reasonable. *See id.*

C. Application to Officer Pitzer

One could argue that Pitzer appropriately used lethal force. The officers were responding to an emergency call for police assistance to protect against danger from a man who had been violent in the past and was waving a knife around in his home. The man was walking toward Pitzer in a moderate-sized room while still carrying the knife despite repeated orders to drop it.

But the district court ruled that the record supports some potential jury findings that would establish Tenorio's claim – in particular, that Tenorio "did not 'refuse' to drop the knife because he was not given sufficient time to comply" with Pitzer's order; that Tenorio made no hostile motions toward the officers but was merely "holding a small kitchen knife loosely

by his thigh and . . . made no threatening gestures toward anyone."; that Tenorio was shot "before he was within striking distance of [Pitzer]; and that, for all Pitzer knew, Tenorio had threatened only himself and was not acting or speaking hostilely at the time of the shooting. Mem. Op. and Order, *supra*, at 1163. As previously noted, we cannot second guess the district court's assessment of the evidence on this interlocutory appeal; and we are comfortable that the evidence, viewed in this light, suffices for Tenorio's claims.

In fact, our precedents compel this result. Our decision in *Zuchel v. City & County of Denver*, 997 F.2d 730, 735-37 (10th Cir.1993), as construed in *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir.2006), sets forth the clearly established law that resolves this case.

In *Zuchel* we reviewed the sufficiency of the evidence to support a jury verdict that Officer Frederick Spinharney had used excessive force against the plaintiffs' decedent, Leonard Zuchel. We set forth the following evidence, excluding "other evidence more favorable to the [defendant]." *Zuchel*, 997 F.2d at 737. The manager of a restaurant had called the police to complain that Zuchel had been creating a disturbance at the restaurant. *See id.* at 735. By the time Spinharney and Officer Teri Hays arrived at the restaurant, Zuchel had departed. *See id.* They found him around the corner, where he was engaged in "a heated exchange" with four teenagers on bicycles. *Id.* One shouted to the officers that Zuchel had a knife.

See id. According to one uninvolved observer, the officers walked up behind Zuchel; Spinharney told him to shut up; Zuchel turned with his hands up in the air and took "three wobbly steps" toward Spinharney, who was six to eight feet away; and Spinharney shot him. *Id.* at 736. A second uninvolved observer gave essentially the same account, except that she said that Spinharney was about ten feet from Zuchel when he first shouted; that she heard Spinharney tell Zuchel to "drop it"; and that Zuchel's left hand was pointing over his shoulder to the teenagers as he turned around and his right hand was by his side. *Id.* (internal quotation marks omitted). She added that he "was not charging the officer and made no slicing or stabbing motions toward him." *Id.* Officer Hays testified that as she and Spinharney approached Zuchel from behind, she hollered "Hey" and "he turned around in a normal fashion." *Id.* (internal quotation marks omitted). Then one of the teenagers said, "Watch out: he's got a knife." *Id.* (internal quotation marks omitted). She said that when the officers were about 15 feet from him, Spinharney told Zuchel to "Drop it. Drop it." Zuchel then "walk[ed] forward at a slow pace." *Id.* (internal quotation marks omitted). She moved toward Zuchel; as she did so, she saw nothing in his right hand but could not clearly see his left. *See id.* When Spinharney fired, Zuchel was right next to her and less than five feet from Spinharney. *See id.* The coroner testified that Zuchel's right arm was directly across his chest when he was shot, indicating that it was not "extended in a threatening manner." *Id.* No knife was found. *See id.*

We held that the evidence was sufficient for the jury to find that the "use of deadly force was not objectively reasonable under the circumstances." *Id.* We did not parse the evidence to say precisely what version the jury needed to believe to make that finding. It is possible, for example, that we thought it was necessary for the jury to disbelieve the testimony that Spinharney had told the plaintiff to drop his weapon. But the more natural reading of our opinion is that any discrepancies among the witnesses were irrelevant.

And that is how we construed *Zuchel* a few years later in *Walker*. We said that *Zuchel* "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." 451 F.3d at 1160.

Given the facts that we must accept on this appeal, that standard applies to this case. Tenorio was not charging Pitzer. He had merely taken three steps toward the officer, as had Zuchel. Unspeaking and with a blank stare on his face, he made no aggressive move toward any of the officers with his knife. He was no closer to the officers than Zuchel had been. The district court said that the jury could find that he was not "within striking distance" when he was shot and was only "holding a small kitchen knife loosely by his thigh." Mem. Op. & Order, *supra*, at 1163. Zuchel had also been ordered to "drop it." Unlike in *Zuchel*,

Tenorio actually had a knife. But given the warning by the teenager, the officer in *Zuchel* could have reasonably believed that Zuchel had one; and, as determined by the district court here, the jury could have found that Tenorio did not have enough time to obey Pitzer's order. Finally, Tenorio's behavior before the officers arrived was not more aggressive than what had been reported to Spinharney (it would have been reasonable for Spinharney to infer from the teenager's warning that Zuchel had brandished a knife during the heated exchange).

We recognize that we distinguished *Walker's* statement of the law in our opinion in *Estate of Larsen*, 511 F.3d 1255. But the distinction we made in that case was that the victim had made "hostile actions toward" the officer. *Id.* at 1263. We said that "[t]he undisputed facts here show that [the victim] ignored at least four police commands to drop his weapon and then turned and stepped toward the officer with a large knife raised in a provocative motion." *Id.* In contrast, the evidence in this case would support a finding that Tenorio took no hostile or provocative action toward the officers.

We conclude that the district court, given its unreviewable assessment of the evidence, did not err in denying the qualified-immunity motion for summary judgment. We note, however, that because our review is predicated on the district court's assessment of the evidence in the light most favorable to Tenorio, a contrary judgment may be permissible after a trial to a jury.

III. CONCLUSION

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

PHILLIPS, Circuit Judge, dissenting:

I would reverse the district court's denial of summary judgment for Officer Pitzer based upon qualified immunity. I see no violation of Russell Tenorio's constitutional rights, let alone one clearly established in our law.

A. *General Principles*

Qualified immunity "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). This "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Davis v. Scherer*,

468 U.S. 183, 196, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). Qualified immunity exists "to ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties.'" *Camreta v. Greene*, 563 U.S. 692, 131 S.Ct. 2020, 2030, 179 L.Ed.2d 1118 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

We evaluate Fourth Amendment excessive-force claims under an objective-reasonableness standard, measuring the challenged police conduct from a reasonable officer's perspective. *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). As the majority notes, "[t]he reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Maj. Op. at 1164 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir.1995) (footnote omitted)). And as the majority also recognizes, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Maj. Op. at 1164 (quoting *Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865).

B. ***The Majority's Analysis***

As I read the majority opinion, it refuses qualified immunity to any law-enforcement officer who shoots a knife-wielding suspect unless that person "charges" the officer and aggressively motions toward the officer with the knife. *See* Maj. Op. at 1165-66. The majority believes this result is compelled by this single sentence taken from *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir.2006):

> It was specifically established [in *Zuchel v. City & Cty. of Denver*, 997 F.2d 730, 735-36 (10th Cir.1993) (*Zuchel II*)] that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect.

I disagree with the majority that *Walker* so dramatically shrunk – or intended to shrink – our analytical framework applied in *Zuchel II* until now. Rather than narrowing a robust totality-of-circumstances inquiry to two meager factors, I believe *Walker* simply recognized the importance of those factors as part of evaluating qualified immunity. *See* 451 F.3d at 1159 (considering "the totality of the circumstances" under the Fourth Amendment objective-reasonableness standard). Although I certainly agree with the majority that these two facts were important ones considered in *Zuchel II*, I disagree that they rendered all other facts and factors meaningless. In assessing

danger to self and others, a reasonable officer and a reviewing court must account for far more than what's highlighted in the single sentence quoted from *Walker*. To determine if conduct is objectively reasonable, we consider all circumstances, not just two circumstances. *See Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir.2008) ("We assess objective reasonableness based on whether the totality of the circumstances justified the use of force, and pay careful attention to the facts and circumstances of the particular case.") (citation omitted). Nothing in *Walker* deprives Officer Pitzer of summary judgment based on qualified immunity. To see why, we need look no further than our cases on point.

At the outset, it is important to recognize that this court has decided two *Zuchel* appeals, the first contesting the district court's denial of summary judgment on qualified-immunity grounds to the shooting officer, *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir.1989) (*Zuchel I*), and the second contesting the sufficiency of the evidence after a $300,000 jury verdict against the city and county of Denver, *Zuchel II*, 997 F.2d at 730. Unfortunately, the majority ignores *Zuchel I*, where we affirmed the district court's denial of summary judgment to the shooting officer based on qualified immunity. We did so after acknowledging that the officer would easily be entitled to immunity if we considered only his evidence. 890 F.2d at 275. But because the record contained sufficient evidence (if a trier of fact believed it) to support a finding that the officer's conduct was not objectively

reasonable, we affirmed the district court's denial of summary judgment and remanded the case. *Id.* at 275-76; *see also King v. Hill*, ___ Fed.Appx. ___, ___-___, 2015 WL 3875551, at *5-6 (10th Cir. June 24, 2015) (unpublished) (affirming denial of summary judgment for qualified immunity to deputy in shooting after considering the facts in the light most favorable to the plaintiff and giving plaintiff all reasonable inferences). The plaintiffs then settled the claim against the shooting officer and went to trial on the claim against Denver. *Zuchel II*, 997 F.2d at 733. In evaluating the appropriateness of summary judgment on Officer Pitzer's claim of qualified immunity, we should focus on the reasons this court denied it to the shooting officer in *Zuchel I*:

> Other testimony and evidence contained in the summary judgment record casts doubt on the objective reasonableness of Spinharney's use of deadly force. At least one witness estimated Zuchel's distance from Spinharney to be 10-12 feet at the time the shots were fired. This same witness testified that Zuchel was neither charging Spinharney nor stabbing at him, but instead was shot after Zuchel stopped and was trying to "explain what was going on." Another witness indicated that Zuchel was clearly not close enough to stab Spinharney. Spinharney's partner, Officer Rathburn, testified that she could not see any weapon in Zuchel's hand. One witness claims to have heard Spinharney tell Zuchel to "shut up or you're going to die." Other witnesses heard no

> warning by the officers. At least one witness testified Spinharney fired the four shots "[a]s fast as he could pull the trigger."

890 F.2d at 275 (citations omitted). Importantly, we can see from this that more was involved in our denying Officer Spinharney summary judgment for qualified immunity than Zuchel's not charging him or making slashing or stabbing motions.

In *Zuchel II*, the plaintiffs (Zuchel's parents) proceeded to trial on a municipal-liability claim against Denver based on its deliberate indifference in inadequately training its officers. 997 F.2d at 733-35. To prevail, the plaintiffs needed to prove (among other things) that Officer Spinharney exceeded constitutional limitations in the use of deadly force. *Id.* at 734. Ultimately, a jury found in the plaintiffs' favor. *Id.* at 733. On appeal, Denver contended that insufficient evidence supported the verdict. *Id.* Accordingly, this court in *Zuchel II* considered a similar issue as in *Zuchel I*: whether plaintiffs had presented sufficient evidence, together with favorable inferences, to sustain the decision made in the district court (whether on summary judgment or jury verdict). We reviewed de novo the district court's denial of Denver's post-verdict motion, and in doing so acknowledged that "[w]e must view the evidence in the light most favorable to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence." *Id.* at 734 (citations omitted).

With this in mind, the court in *Zuchel II* reviewed the trial evidence. It recounted testimony from eyewitnesses, including those whose deposition testimony we relied on in affirming the district court's denial of summary judgment. *Id.* at 735-36. For instance, in *Zuchel I*, we noted that Jeffrey Purvis had testified in his deposition that Zuchel was clearly not close enough to stab Spinharney and that he heard Spinharney tell Zuchel to "shut up, or you're going to die." 890 F.2d at 275. At trial, Purvis testified consistently. *Zuchel II*, 997 F.2d at 735-36. In *Zuchel I*, we also relied on deposition testimony of Deborah Seme, who had estimated the distance between the two men at shooting at about 10 to 12 feet, said that Zuchel was trying to "explain what was going on," and said that Officer Spinharney fired four shots "[a]s fast as he could pull the trigger." 890 F.2d at 275. At trial, Seme testified consistently, although estimating the two men's original distance at 10 feet with Zuchel's taking three steps before Officer Spinharney fired shots. *Zuchel II*, 997 F.2d at 736. Finally, in *Zuchel I*, we cited Officer Rathburn's testimony that she had seen no weapon in Zuchel's hand. 890 F.2d at 275. At trial, she gave more complete testimony, some favoring the plaintiffs' claims, including that she and Officer Rathburn were about 15 feet from Zuchel, that she was surprised to hear gunshots because she did not expect Officer Spinharney to shoot, and that she was "right next to Mr. Zuchel when he was shot because she was intending to "grab him in some fashion or try to get him physically under some

control until my partner could, you know, assist me." *Zuchel II*, 997 F.2d at 736 (citation omitted).

With similar evidence supporting the plaintiffs on summary judgment and at trial, I am unsurprised we affirmed the jury verdict just as we had affirmed the earlier denial of summary judgment. Rather than explaining our two affirmances as resulting from our giving the plaintiffs the benefit of disputed facts and the inferences from the evidence, the majority unwarrantedly speculates that the *Zuchel II* court might have "thought it was necessary for the jury to disbelieve the testimony that [the shooting officer] had told the plaintiff to drop his weapon." Maj. Op. at 1165. I see nothing in *Zuchel I* or *II* suggesting that the officer's command to "drop it" was ever even disputed. Moreover, in view of our de novo review in *Zuchel I* and *II*, I cannot fathom the majority's conclusion that "the more natural reading of our opinion is that any discrepancies among the witnesses were irrelevant." Maj. Op. at 1165. In addition to all else, *Zuchel II* itself defeats this interpretation. As adequate support for the jury's excessive-force finding, we relied on the coroner's testimony about Zuchel's arm position when shot (arm across chest) "*along with the evidence recited above. . . .*" *Zuchel II*, 997 F.2d at 736 (emphasis added). If the bulk of the

recited evidence was irrelevant, this would be a strange way for the *Zuchel II* court to say so.[1]

In addition, if the majority is correct that the only relevant facts in our case are whether Tenorio charged the officers and slashed or stabbed with his knife, I would have expected to see that minority-of-circumstances approach applied in later cases involving an officer's fatal shooting of a knife-wielding man. But in *Estate of Larsen*, 511 F.3d at 1260, which we decided three years after *Walker*, the court did just the opposite. There, applying an objective-reasonableness standard, the court again applied a broad analytical framework and compiled a list of non-exclusive factors based, in part, on *Walker* and *Zuchel I*: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions

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[1] *See King*, ___ Fed.Appx. at ___, 2015 WL 3875551, at *7 (noting that the court in *Zuchel I* affirmed a denial of summary judgment on qualified-immunity grounds to the shooting officer because of "conflicting testimony in [*Zuchel I*] concerning what provoked the shooting"); *Zia Trust Co. v. Montoya*, 597 F.3d 1150, 1154-55 (10th Cir.2010) (affirming denial of qualified immunity to the shooting officer at summary-judgment stage despite his own favorable testimony because "reading the record in the light most favorable to plaintiffs, it is not clear that [the decedent] manifested an intent to harm Officer Montoya or anyone else at the scene"); *Sevier v. City of Lawrence*, 60 F.3d 695, 700 (10th Cir.1995) (affirming denial of summary judgment on qualified-immunity grounds to shooting officer in part based on disputed evidence about whether shooting victim had lunged at officer with a knife).

were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260 (citing *Walker*, 451 F.3d at 1159; *Jiron v. City of Lakewood*, 392 F.3d 410, 414-15 (10th Cir.2004); *Zuchel I*, 890 F.2d at 274). In doing so, the court looked at far more facts than charging, stabbing, and slashing to determine whether the officer had shown probable cause of serious physical harm to himself or others.

Even under the majority's shrunken analytical framework, I still cannot understand its bases for denying qualified immunity in this case. Although the majority apparently contends that Tenorio was not "charging" the officers, Maj. Op. at 1166, I fail to see the difference between "charging" the officers and advancing toward them with a knife without pausing or breaking stride. I suspect that officers would much prefer a "charging" suspect from twenty feet away to a "non-charging" Tenorio advancing on them in a sixteen-foot room with a difficult retreat.[2] In this situation, we need to recognize the immediacy of the life-threatening danger to the officers. As I understand the majority's new approach, Tenorio was free

[2] Although the majority relies on *Walker's* characterization of *Zuchel* as requiring "charging," I note that in *Walker* the court said that David Walker "was not *advancing* on anyone with the small knife" and that "David was not *advancing* on him and had not threatened him in any way. . . ." 451 F.3d at 1160 (emphasis added). I do not think the majority denies that Tenorio was "advancing" on Officer Pitzer before being shot.

to get right up to the officers so long as he did not "charge" them while making stabbing or slashing motions with the knife. This ill-conceived approach ignores how quickly a knife-wielding man can thrust a knife and kill or grievously wound an officer or a bystander. It also fails to recognize the danger to the officers and Tenorio's family had Tenorio gotten close enough to wrestle Officer Pitzer for his gun. Guns can fire in melees – accidentally or otherwise. The majority's let's-hope-nothing-bad-happens approach leaves officers at grave risk, one we have not previously required them to take. *See Estate of Larsen*, 511 F.3d at 1260 (noting that a reasonable officer need not await the "glint of steel" before taking self-protective action, which, by then, is often too late).

In short, I believe the majority has derailed our qualified-immunity analysis from its previously sensible course, and rerouted it away from Supreme Court and Tenth Circuit precedent. Its quick knockout punch to qualified immunity absent charging, slashing, and stabbing precludes officers from firing shots even when a knife-wielding man gets within, or extremely close to, stabbing range so long as he gets there by walking (not charging) and has positioned his knife for a quick thrust (without the fanfare of menacingly waving it before striking).

C. *The District Court's Analysis*

Before explaining why I believe the district court erred in denying summary judgment for qualified

immunity, I pause to review the facts that the district court found. In its order denying summary judgment, the district court found facts and adopted transcripts that provide additional undisputed facts:

> • On November 11, 2010, at 7:56 p.m., Hilda Valdez, Tenorio's sister-in-law, called 911, saying, "I need someone to come over here right away." She said that Tenorio was intoxicated and holding a knife to his throat. She expressed fear that he would hurt himself or his wife. She advised that he had broken some windows and was saying that he was going to slice his throat. She again said that "I'm afraid he's gonna hurt his wife." Later, she repeated that he was threatening to kill himself and expressed fear that he might "do bodily harm" to his wife. She said he was waving around a very sharp knife. The dispatcher tried to calm her, telling her to take a deep breath. Ms. Valdez said, "Please hurry! Please hurry! Oh, god. Oh, god. Oh, god." Right before the officers arrived, Ms. Valdez said, "I'm outside and she's yelling." Appellant's App. at 65-66, 71, 204.
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> • The 911 operator relayed this information to the police dispatcher, who broadcast that Ms. Valdez had called about her brother-in-law Tenorio's placing a knife to his throat. The dispatcher further advised the officers that Tenorio "has been violent in the past" (a mistaken characterization) and "takes meds for seizures." Additionally, the dispatcher advised that Tenorio was in the kitchen "[waving] the knife around" but that no injuries

had been reported. Finally, the dispatcher advised that Tenorio's wife and Valdez were in the living room, and that Tenorio and his brother were in the kitchen. Appellant's App. at 73-74, 204-05.

- At about 8:03, the officers arrived and parked down the street. Within a minute or so, the officers spoke to Ms. Valdez, who clearly appeared frightened. On Pitzer's belt recorder, Ms. Valdez is heard saying, "He's got a knife. He's been drinking. . . . " Appellant's App. at 205.

- No officer asked if Tenorio had taken hostages, and the district court found that Officer Pitzer, lacking any crisis-intervention training, "immediately" announced "going lethal."[3] Then, without announcing their presence as police officers, the officers lined up and entered the home through the open front door. Although Officer Moore was in charge, Officer Pitzer was first in line, followed by Officer Moore with a Taser, Officer Liccione with a handgun drawn, and Officer Hernandez with a shotgun loaded with beanbag rounds. Appellant's App. at 205-06.

- The home's doorway sits directly across from the kitchen door through a furnished

[3] The district court did not find that this had any particular meaning. In reviewing the record, I see that it is simply a way the police communicate to each other which officer will proceed first carrying a lethal weapon as opposed to Tasers or beanbag rounds.

living room measuring 16 by 14 feet. When the officers entered, a lamp was on. The officers heard no raised voices or other sounds suggesting a disturbance. When Officer Pitzer saw Mrs. Tenorio through the kitchen doorway, he called out to her, "Ma'am, please step out here. Let me see your hands, okay?" As she came forward into the living room, she said to someone behind her, "Russell, put that down." She entered the living room with her hands up and her palms facing the officers. Behind her came Tenorio with a "blank stare," carrying a santoku-style kitchen knife with a 3 ¼ inch sheepsfoot blade. Tenorio's brother-in-law followed him into the living room. Officer Hernandez "hustle[d] [Mrs. Tenorio] out the front door." Appellant's App. at 206-07.

- Tenorio walked forward into the living room at an "average" speed. Officer Pitzer saw the knife and yelled, "Sir, put the knife down! Put the knife down, please! Put the knife down! Put the knife down!" After Tenorio continued about two-and-a half-steps into the living room, Officer Pitzer fired his gun. At the same time, Officer Moore fired his Taser, also striking Tenorio. The shooting occurred less than four minutes after the officers arrived. Appellant's App. at 207.

1. *Probable Cause to Believe Tenorio Presented a Threat of Serious Physical Harm to Others*

The district court correctly identified the *Estate of Larsen* factors as useful in determining whether Officer Pitzer was entitled to qualified immunity. Acknowledging that the four *Larsen* factors were "non-exclusive," the district court acknowledged that the factors seek to measure the danger presented by a knife-wielding person who is confronting officers. The district court considered the second factor as bearing on Tenorio's ability to harm others, and the other three factors as bearing on his intention to do so. I disagree with this approach. In my view, the distance between the officers and the knife-wielding Tenorio bears more than any other fact on Tenorio's ability to harm the officers.

Addressing the first factor (whether the officer ordered the suspect to drop his weapon and whether the suspect complied), the district court acknowledged that Officer Pitzer had "ordered [Tenorio] to drop the knife prior to shooting [him]" and that Tenorio had kept hold of the knife. Appellant's App. at 208. That is a bland account of a tense scene. As stated earlier in its opinion, an alarmed Officer Pitzer yelled the "drop-it" command four times in rapid succession. But the district court found this fact was "offset by evidence that [Officer Pitzer] shot [Tenorio] within two or three seconds of the first command to drop the knife." *Id.* This, it concluded, was insufficient time to comply with the commands. Accordingly,

the district court determined that a reasonable jury could find this factor neutral in determining probable cause of a danger of serious physical harm.

I disagree. Simply put, based on the district court's findings, Tenorio had time to comply. Had Tenorio not advanced toward the officers, or had he even stopped after beginning to do so, the officers could have given him more time to drop the knife. He, more than anyone, controlled the time Officer Pitzer could safely let pass before shooting. Tenorio's actions, and his actions alone, created the emergency requiring Officer Pitzer to protect himself, his fellow officers, and Tenorio's family. The district court nowhere says how much more time Officer Pitzer needed to give Tenorio to drop his knife (and whether Tenorio could have stabbed him or others before that time elapsed). Nor does the district court recognize any of the times Tenorio's family had tried to get him to put down the knife, including Mrs. Tenorio's saying to him, "Russell, put that down," as she entered the living room. Appellant's App. at 206. Tenorio had plenty of time to put the knife down, but Officer Pitzer had very little time to avoid a stabbing.[4]

Addressing the second factor (whether the suspect made any hostile motions with the knife), the

[4] In my view, the district court erred in either assuming that Tenorio's knife did not endanger the officers unless he had time to drop it (an action that would take little to no time at all) or that their safety was secondary to his having time to drop it.

district court said that Tenorio "was holding a small kitchen knife loosely by his thigh and that he made no threatening gestures toward anyone." Appellant's App. at 208. Thus, it found that a reasonable jury could find this factor weighs against probable cause of danger. Again, I disagree. This factor seems inapplicable to this situation. Here, the immediate danger from Tenorio existed whether or not he gestured threateningly with the knife. Once Tenorio had gotten dangerously close to the officers, his previously not having waved the knife threateningly loses much of its significance. *See Estate of Morgan v. Cook*, 686 F.3d 494, 497-98 (8th Cir.2012) (holding that officer had cause to believe that a suspect posed an imminent threat to officer when the suspect – who was 12 feet away – held a knife in his hand and tried to conceal it, and when the officer ordered him to drop it, he instead moved toward the officer).

Addressing the third factor (the distance between Tenorio and the officers when Officer Pitzer shot) the district court concluded that even this factor weighed against probable cause of serious physical harm. In my judgment, Officer Pitzer is entitled to summary judgment on qualified immunity based on this ground alone. Simply put, when Officer Pitzer fired his gun, he and others were endangered by Tenorio and his knife. Because so much depends on where Tenorio and Officer Pitzer were in the living room, I think any proper analysis needs to address that head-on. Here, we know that the four officers entered through the open front doorway into a furnished living room 16

feet long (toward the kitchen) and 14 feet wide. Officer Pitzer was first in the doorway. I cannot tell from the record where the furniture was in the room. I do know that once inside three officers must have situated themselves so that Officer Hernandez could grab Mrs. Tenorio and "hustle[ ] her out the front door." Appellant's App. at 207.

Because everyone agrees that Officer Pitzer was inside the living room, it is fair to say that his chest was at least two feet into the living room. Next, I note that the district court found that Tenorio had taken two-and-a-half steps[5] into the living room at an "average speed" toward Officer Pitzer as he yelled four times for Tenorio to drop the knife. *Id.* Because no one can stop mid-stride, this is the same as three steps. Even small steps at an average speed would stretch at least two feet each, so by the district court's findings Tenorio conservatively was at least six feet into the room. Finally, by raising and extending his arm, it's a fair estimate that Tenorio could have extended the point of the knife two feet in front of his body. Where does all that leave us? Even if Tenorio had stopped as he completed his third step – hardly a good gamble for officers concerned for their lives – quickly lifting his arm would in a split second have put the knife within six feet of Officer Pitzer's chest, and even closer to his arms, which were extended

[5] In his deposition, Tenorio said that he "took a couple – a few steps from the doorway into the living room" and later described it as "two and a half steps." Appellant's App. at 79-80.

pointing his gun.[6] I cannot comprehend how that dire situation would not amount to probable cause of harm.

And, finally, addressing the fourth factor (the suspect's manifest intentions), the district court concluded that this factor did not support probable cause of harm because Officer Pitzer knew only that Tenorio had threatened himself and that Tenorio "did not raise the knife from his side or make threatening gestures or comments toward anyone." Appellant's App. at 209. Again, this cannot be the standard. Even if Tenorio – clutching a knife he refused to drop even before the 911 call – had advanced toward the officers in the living room while grinning widely and thanking them profusely for helping his family, the officers would have been foolish to let him get too close. Unlike the district court, I think that in these circumstances Officer Pitzer was fully justified in believing Tenorio's advancing toward him with the knife showed a manifest intention to harm others. In evaluating Tenorio's actions, Officer Pitzer could also consider that, minutes earlier, Tenorio had been waving a knife and holding it to his throat, sufficiently frightening Ms. Valdez to call 911. The officers had also learned from the dispatcher that Tenorio had a violent history (although the dispatcher was mistaken). The officers also arrived to see a "clearly frightened" Ms. Valdez standing outside. Appellant's

[6] This account fully credits and relies upon the facts that the district court found.

App. at 205. How much more danger is required to create probable cause of harm? Neither the majority nor the district court tells us.

Relying on a string-cite of cases and a mere recitation of the *Estate of Larsen* factors, the district court further concluded that Officer Pitzer should have known that his acts violated clearly established law. *See Plumhoff v. Rickard*, ___ U.S. ___, 134 S.Ct. 2012, 2023, 188 L.Ed.2d 1056 (2014). Under this second prong, "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). "In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" *Id.* (quoting *Ashcroft*, 131 S.Ct. at 2080). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir.2012) (citation omitted). Even so, our circuit uses a "sliding scale" system in which "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir.2004).

The majority contends that *Zuchel II*, as construed in *Walker*, not only compels a conclusion of excessive force here but also "sets forth the clearly established law that resolves this case." Maj. Op. at 1165. For the reasons I have already mentioned, I believe that Tenorio did not provide comparable favorable evidence to what the plaintiffs offered in *Zuchel II*, rendering that case no help to him in showing clearly established law. We must remember that the *Zuchel II* plaintiffs could rely on strong facts that would establish excessive force, including these:

- Police had responded to Zuchel's relatively minor public disturbance at a fast-food restaurant rather than to a family member's frantic 911 call;
- One eyewitness testified that Zuchel had been 6 to 8 feet from the shooting officer when shot, stating his view that "they were so far apart, . . . there was no one in danger at that time";
- Before being shot, Zuchel had taken three wobbly steps toward Officer Spinharney and was trying to explain what was going on in his argument with the teen bicyclists[7];
- While Zuchel pointed backwards at them with his left hand, the other officer saw that

[7] As we reported in *Zuchel I*, one of the same eyewitnesses earlier said that Zuchel "was shot *after Zuchel stopped* and was trying to 'explain what was going on.'" 890 F.2d at 275 (emphasis added).

> Zuchel had nothing in his right hand and was surprised to hear the shot because she was right next to Zuchel, getting ready to subdue him;
>
> - Zuchel obviously had no knife visible because he was not carrying one (leaving a fact question whether the shooting officer might have seen that he was unarmed); and
>
> - When the shooting officer first approached Zuchel from behind with gun drawn he announced his presence by telling that Zuchel that "you better shut up, or you're going to die."

Zuchel II, 997 F.2d at 735-36. Obviously, Tenorio alleges no such things. Because Tenorio's case is so much different from *Zuchel II*, I see no basis for our concluding that it is "beyond debate" that *Zuchel I* or II provided Officer Pitzer clear notice that his conduct amounted to excessive force.

By focusing exclusively on *Zuchel II*, the majority also disregards our cases presenting less immediate danger where we have affirmed summary-judgment grants of qualified immunity to other shooting officers. In measuring whether his split-second decision to shoot amounted to excessive force under clearly established law, Officer Pitzer could rely on those cases, too. For example, in *Estate of Larsen*, 511 F.3d at 1258-59, we affirmed a grant of summary judgment on qualified-immunity grounds to two officers

who shot and killed a knife-wielding man. The man had earlier called 911 threatening to "kill someone or himself." *Id.* at 1258. As the officers approached Larsen's home, they saw him standing alone on his front porch, separated from the street by a small front yard, a three- or four-foot retaining wall, a six-step concrete walkway leading to the sidewalk with an iron rail down its middle, and shrubbery atop the retaining wall on one side of the stairs. *Id.* After seeing Larsen holding a large knife, the officers commanded him to put it down. *Id.* Standing at a distance of 20 feet from the officers,[8] Larsen lifted the knife above shoulder-level and pointed it toward them. *Id.* at 1258, 1260-61. After earlier commands to drop the knife, one officer warned Larsen to "[d]rop the knife or I'll shoot." *Id.* at 1258. Upon Larsen's taking one step toward him, the officer, on the sidewalk below, fired twice, striking Larsen in the chest and killing him. *Id.* at 1258-59.

On appeal, we said that the excessive-force claim "center[ed] on whether Larsen posed an immediate threat to the officers or the safety of others." *Id.* at

[8] As we routinely do in summary-judgment cases seeking qualified immunity, we construed the record in the light most favorable to the plaintiff, the non-moving party. 511 F.3d at 1259 (citation omitted). So even though the shooting officer estimated his distance from Larsen as 7 to 12 feet, that would not control, because other competing evidence must have supported the court's finding that "the distance between [Officer] Murr and Larsen at the time of the shooting, though disputed, was somewhere between 7 and 20 feet." *Id.* at 1260-61.

1260 (citing *Jiron*, 392 F.3d at 414). We noted that "[d]eadly force is justified under the Fourth Amendment if a reasonable officer in Defendants' position would have had probable cause to believe there was a *threat of serious physical harm to themselves* or to others." *Id.* (emphasis original) (quoting *Jiron*, 392 F.3d at 415 (citation omitted)). In addition, we said that "[i]ndeed, even '[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Then we recited and generally applied the factors based on *Zuchel I* and *Walker*, recognizing that "in the end the inquiry is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Id.* (citing *Sevier*, 60 F.3d at 699).

Thus, the court in *Estate of Larsen* applied the same four non-exclusive factors from *Zuchel I* and *Walker* as did the district court here. *Id.* (citing *Zuchel I*, 890 F.3d at 274; *Walker*, 451 F.3d at 1159). As "undisputed facts support[ing] the heightened immediacy of the threat they faced and the objective reasonableness of the use of deadly force [,]" the court relied on several facts also found in Tenorio's case: Larsen had already threatened violence against himself (and others although no one else was nearby); the officers responded to an emergency call late at night; the officers encountered a man armed with a knife;

the officers told Larsen to put down the knife but he did not comply; the second officer was also prepared to use force and positioned himself to do so; and Larsen took a step toward an officer. *Id.*

On the other hand, the court in *Estate of Larsen* mentioned some other facts bearing on danger to the officers not found in Tenorio's case: Larsen's knife had a blade longer than twelve inches; Larsen "held the high ground" from his elevated porch; and Larsen raised and pointed the knife toward the officers. *Id.* at 1258, 1260. While the facts of all cases will differ in some regards, I do not believe the lack of these three facts deprives Officer Pitzer of summary judgment on qualified immunity. Giving Larsen the benefit of disputed fact issues, we must assume that he stood 20 feet from the officers when he took his first step. Plus, we must remember that the officers were outside and had the ability to safely retreat to avoid any need to use deadly force. In *Estate of Larsen*, no other people were at risk. And, of course, Larsen had to negotiate steps, hedges, and other obstacles before reaching the sidewalk where the officers stood. Based on all the circumstances, I believe it clear that Officer Pitzer was far more at risk of immediate serious bodily harm than were the officers in *Estate of Larsen.* That being so, I cannot see how Officer Pitzer does not get summary judgment on qualified-immunity grounds when the officers in *Estate of Larsen* did. Even more basically, I cannot see how Tenorio can show any excessive-force claim was clearly established under law when the court in *Estate of Larsen*

found "the officer's use of force was objectively reasonable." *Id.* at 1261.

2. *Reckless and Unreasonable Creation of Dangerous Situation*

The district court found that Tenorio had presented evidence that "[t]he dispatcher had informed the officers shortly before they arrived that the two women inside Plaintiff's residence were in the living room, not in the kitchen, and when the officers arrived, Ms. Valdez was waiting in the driveway." Appellant's App. at 210. From this, the district court surmised that "[Officer Pitzer] and the other officers knew or should have known that they were not confronting a situation in which Plaintiff was holding persons inside against their will." *Id.* The district court noted that the officers "did not ask Ms. Valdez about the situation inside the house." *Id.* Apparently because the dispatcher did not relay Ms. Valdez's repeated concerns that Tenorio might injure his wife, the district court removed that fact from consideration. In addition, the district court criticized the officers for not "formulat[ing] a tactical plan prior to entering the residence." Appellant's App. at 212. Finally, the district court noted that the officers could tell by looking inside the home that upon entering that the small room and its furnishings would make it "difficult or impossible . . . to maneuver once they were inside." Appellant's App. at 211. Based on this evidence, the district court concluded that "a

reasonable jury could find that Defendant and the other officers acted recklessly by barging into the residence with deadly force deployed." Appellant's App. at 212.

In my view, the district court ignored the importance of the officers' impressions after interacting with a frantic and "clearly frightened" Ms. Valdez and after hearing that an intoxicated, window-breaking, man with a violent history[9] had been waving a knife around in the home with family members nearby. Those facts alone justified the officers' entrance into the home to separate the family members from the possible threat. They were well on their way to doing so when Tenorio entered the living room and headed for the officers.[10] For Officer Pitzer to avoid liability, the district court seems to require that the officers have "attempt[ed] to resolve the situation verbally (as for example by calling into the residence directing the occupants to come outside). . . ." Appellant's App. at 211. This runs counter to the rule that "[t]he 'reasonableness' of a particular use of force must be judged

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[9] Although the dispatcher was incorrect about Tenorio's having a violent history, the officers acted properly in treating it as so as they responded to the urgent call.

[10] The district court did not mention the undisputed testimony of Robert Torrez, Tenorio's brother-in-law, who testified that upon hearing sirens approaching he kept trying to get Tenorio to put the knife away, and when he heard the police were outside the house, he told Tenorio, " 'Russell, the police are here, you really need to put that down or it's not going to be good,' and he refused." Appellant's App. at 85.

from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. It also violates our own direction that "[w]e are not well-suited to act as a police supervisory board, making finely calibrated determinations of just what type of misbehavior justifies just what level of response." *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir.2009). Imagine the criticism had the officers adopted the district court's policing strategy and an hour later Tenorio either killed or wounded himself or a family member.

As its sole case supporting Tenorio's alternate theory that "[Officer Pitzer] and the other officers recklessly and unreasonably created a situation giving rise to Defendant's resort to deadly force," the district court cited to *Sevier*, 60 F.3d at 701 n. 10. In *Sevier*, a father called police for assistance after seeing his son – despondent about troubles with his girlfriend – "sitting on the edge of his bed with a knife in his hand resting on his lap." *Id.* at 697. Particularly worrisome were the son's two previous suicide attempts. *Id.* Upon picking the lock on the son's bedroom door with the father's help, two officers opened the door, saw the knife on the son's lap, and drew their guns. *Id.* at 698. After declaring that he had done nothing wrong, the son then rose and stood in his bedroom doorway holding the knife. *Id.* What happened next was disputed. The officers said the son lunged at them with the knife, and the parents denied this. *Id.* Both officers fired their guns at the son, hitting him six times and killing him. *Id.*

In addition to their excessive-force claim, the parents had a second claim that the officers "acted recklessly and unreasonably in the events surrounding the seizure and that this conduct immediately led to the shooting." *Id.* at 700. Because the district court summarily concluded that genuine issues of material fact remained, the *Sevier* court examined the record to "determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 319, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)). In one sentence, the court said that "the record reveals some evidence upon which a jury could conclude that Defendants acted recklessly by confronting [the son] in the manner that they did after knowing that he was armed and distraught over problems he was having with his girlfriend, and without gathering more information on the situation." *Id.* at 701 n. 10.

Sevier cannot support Tenorio's facts. Tenorio had frightened his family by his active resistance to putting the knife down and by his waving it around and holding it to his throat. Unlike the disputed lunging in Sevier, Tenorio's case involves a district court's finding that he entered the living room and walked directly toward the officers. While the police in Sevier had the luxury of time in which to involve others adept in dealing with similar situations, the officers called to Tenorio's house faced a more immediate challenge. As mentioned, they knew that Tenorio had scared Ms. Valdez to a degree that she

called 911 and then frantically waved them over when they arrived. They also knew that the dispatcher had told them that Tenorio was drunk; that he had held a knife to his throat that evening; that he had vandalized house windows that evening; that he had a violent history; that Tenorio's wife and brother-in-law were with him in the house; and that Tenorio was in the kitchen waving the knife around. These circumstances presented much more of an emergency than did those in Sevier. I cannot see how the officers acted recklessly here in trying to get the two family members away from the knife-wielding Tenorio. Once that was accomplished, had he let that happen, the officers might well then have been able to take the approach with Tenorio that the district court would mandate upon their arrival.[11]

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[11] In its closing sentence addressing this claim, the district court says that "[o]n this evidence a reasonable jury could find that Defendant and the other officers acted recklessly by barging into the residence with deadly force deployed." Appellant's App. at 212. The district court's own findings contradict "barging in." It found that Ms. Valdez called 911 to enlist the police's assistance in dealing with Tenorio, who was drunk, had held a knife to his throat, had vandalized windows soon before the call, and was waving the knife around in the kitchen. The front door was open. The district court certainly makes no findings that Ms. Valdez or anyone else protested when the police lined up and proceeded into the house.

D. ***Conclusion***

For these reasons, I would reverse the district court's denial of summary judgment for Officer Pitzer and remand with instructions to grant Officer Pitzer qualified immunity.

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

RUSSELL TENORIO,

Plaintiff,

vs.

BRIAN PITZER, RAYMOND D. SCHULTZ, and THE CITY OF ALBUQUERQUE,

Defendants.

Civ. No. 12-01295 MCA/KBM
Consolidated with
Civ. No. 13-00574 MCA/KBM

MEMORANDUM OPINION AND ORDER

(Filed May 28, 2014)

This case is before the Court upon Defendant Brian Pitzer's[1] *Opposed Motion for Summary Judgment on Qualified Immunity Grounds* [Doc. 64]. The Court has considered the written submissions of the parties, the record in this case and the applicable law, and is otherwise fully advised.

Summary Judgment Standards

Rule 56(a) of the Federal Rules of Civil Procedure provides that "[a] party may move for summary

[1] The Court has not considered this motion with respect to Officer Liccione, who was not a party to the suit against Defendant, Civ. No.12-1295, when Defendant filed his motion. The Court's denial of Defendant's motion is without prejudice to Officer Liccione.

judgment, identifying each claim . . . on which summary judgment is sought." As our Court of Appeals has succinctly stated:

> Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is "genuine" if a rational jury could find in favor of the nonmoving party on the evidence presented.

Adamson v. Multi Community Diversified Serv., Inc., 514 F.3d 1136, 1145 (10th Cir. 2008).

Legal Standards Applicable to a Dispositive Motion Based on Qualified Immunity

> Resolution of a dispositive motion based on qualified immunity involves a two pronged inquiry. "First, a court must decide whether the facts a plaintiff has alleged or shown make out a violation of a constitutional right." "Second, . . . the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." "With regard to this second [prong], the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful under the circumstances presented." A reviewing court may "exercise [its] sound discretion in

> deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." "Qualified immunity is applicable unless" the plaintiff can satisfy both prongs of the inquiry.

Herrera v. City of Albuquerque, 589 F.3d 1064, 1070 (10th Cir. 2009) (citations omitted).

Background

The Court has drawn the following facts from the record. The Court has taken as true those facts which the parties agree are undisputed. Wherever the facts are disputed and the evidence is in conflict, the Court has construed the evidence in the light most favorable to Plaintiff as the nonmovant. *Kaufman v. Higgs,* 697 F.3d 1297, 1300 (10th Cir. 2012) (quoting *Koch v. City of Del City,* 660 F.3d 1228, 1238 (10th Cir. 2011); *Thomson v. Salt Lake County,* 584 F.3d 1304, 1318 (10th Cir. 2009) ("In determining whether a plaintiff's constitutional rights were violated we ordinarily, as here, adopt plaintiff's version of the facts, insofar as it is supported by the record.").

On November 11, 2010, at 7:56 p.m., a 911 operator received a call from a woman who tells the operator "I need someone to come over here right away." A transcript of the conversation between the woman and the 911 operator is attached as Exhibit B to Defendant's Motion [Doc. 64-1]. The woman, subsequently identified as Hilda Valdez, reports that her

sister-in-law's husband, "Russell," is intoxicated and is holding a knife to his throat. Ms. Valdez explains that she is afraid that Russell will hurt himself or his wife.

The 911 operator relays information provided by Ms. Valdez to the APD dispatcher [Doc. 92-4 at 2]. The officers do not hear the conversation between Ms. Valdez and the 911 operator; the only information they receive is that relayed to them by the dispatcher [Doc. 92-4 at 2]. APD Officers Moore, Hernandez, Liccione are dispatched in response to the call; Defendant also responds [Doc. 92-3 at 2]. Each officer is driving a separate vehicle [Doc. 92-3 at 2]. The dispatcher relays to the responding officers the information set out in Exhibit C to Defendant's Motion [Doc. 64-2]. The officers are informed that there are no injuries reported; that the male subject is drunk, has a knife to his throat and has vandalized windows; that the subject has been violent in the past;[2] that the subject takes meds for seizures"; that the caller, the subject, the subject's wife and the subject's brother are also present inside the location; and, that the subject is in the kitchen waiving the knife around. At 8:03:44 p.m. the dispatcher informs the officers that the caller and her sister are in the living room. At

[2] This was in fact a misstatement by the 911 operator [Doc. 64-1 at 4]. But for purposes of assessing the reasonableness of Defendant's conduct, this misstatement cannot be held against Defendant, who did not overhear the actual conversation between the 911 operator and Ms. Valdez.

8:03:52 p.m. the dispatcher informs the officers that the "offender" and his brother are in the kitchen.

Defendant, Officer Moore, and Officer Hernandez arrive on scene between approximately 8:03 and 8:04 p.m. [Doc. 64-2 at 2]; Officer Liccione arrives at 8:04:38 p.m. [Doc. 64-2 at 2; Doc. 64-10 at 1] The officers do not have their emergency equipment engaged [Doc.92-3 at 3]. The officers park their vehicles a short distance down the street from Plaintiff's residence [Docs. 92-3 at 4; 92-9 at 2]. A minute or so later the officers approach Ms. Valdez, who is standing outside Plaintiff's residence still speaking to the 911 operator [Doc. 64-7 at 1]. Ms. Valdez clearly appears frightened [Doc. 92-4 at 3]. Officer Moore peremptorily orders Ms. Valdez to disconnect her 911 call [Doc. 64-7 at 1]. Defendant's belt recorder records[3] Ms. Valdez saying "He's got a knife. He's been drinking . . . He's like thirty-seven, thirty-eight years old. Um, we tried to talk to him but he got mad 'cause we took his beer away from him" [Doc. 64-7 at 1]. The officers do not ask Ms. Valdez if there is a hostage situation [Doc. 64-10 at 4]. Defendant, who has not received crisis intervention training [Doc.64-9 at 7], immediately announces "going lethal" [Doc. 64-7 at 1].

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[3] Inexplicably, neither party provided the Court with a copy of the the [sic] audio recording made by Defendant's belt recorder.

Without settling on a tactical plan [Docs. 64-10 at 1; 92-3 at 5-6], the officers assume an impromptu formation outside the front door to Plaintiff's residence [Doc. 92-5 at 4]. The officers are in uniform [Doc. 92-2 at 4]. Defendant is in front, with his handgun drawn. Officer Moore is behind Defendant, carrying a Taser. Officer Liccione is third, with his handgun drawn. [Doc. 92-9 at 2] Officer Hernandez is behind the other officers, carrying a shotgun loaded with beanbag rounds, but is temporarily occupied in preventing Ms. Valdez from reentering the residence [Doc. 92-7 at 2]. The front door is open [Doc. 92-5 at 4]. A lamp is on in the living room [Doc. 92-1 at 3]. The living room is about 14' by 16,' with the front door on one of the shorter walls [Doc. 92-8 at 1]. From his position outside the front door, Defendant sees two doorways on the opposite wall, one to his left, and another to his right, directly across from the front door. It is apparent that part of the kitchen area is to the left of the right doorway, behind the living room wall, and cannot be viewed from Defendant's position [Doc. 92-8 at 2]. The officers do not hear raised voices or other sounds suggesting a disturbance. Without announcing his presence [Doc. 92-10 at 3], Defendant enters the living room through the front door, followed by Officers Moore and Liccione. A woman moves into the area of the kitchen visible through the right doorway [Doc. 92-1 at 2]. Defendant calls out "Ma'am," followed by "Please step out here. Let me see your hands, okay?" [Doc. 64-7 at 2] At least one of Defendant's fellow officers understands the command "Please step out here" to be addressed to everyone in

the kitchen [Doc. 92-9 at 2; Doc. 92-10 at 2]. As the woman responds to Defendant's order, she says to someone in the kitchen, "Russell, put that down" [Doc. 64-7 at 2]. The woman walks through the doorway into the living room with her hands up and her palms facing the officers [Doc. 92-5 at 3], followed by a man with a blank stare [Doc. 92-9 at 2] who is carrying a santoku-style kitchen knife with a three-and-a-quarter-inch sheepsfoot blade [Doc. 64-4]. The man is holding the knife loosely in his right hand, his arm hanging by his side, as he walks forward behind the woman [Doc. 92-1 at 2, 3]. Behind the first man is a second man, who also is moving out of the kitchen into the living room [Doc. 92-1 at 3]. Officer Hernandez, who has entered the living room after the other officers, grabs the woman and hustles her out the front door [Doc. 92-10 at 2] as the man with the knife walks forward into the living room at an "average" speed [Docs. 92-2 at 4; 92-10 at 3]. Defendant sees the knife and yells "Sir, put the knife down! Put the knife down, please! Put the knife down! Put the knife down!" [Doc. 64-7 at 2] When the man with the knife is about two and one-half steps into the living room, Defendant shoots the man, and simultaneously Officer Moore tases the man, who falls to the floor [Docs. 64-3 at 6; 92-1 at 4]. The commands and the shooting are compressed into no more than two or three seconds [Docs. 64-9 at 7; 64-10 at 2; 92-3 at 8]. The period of time between the first officer's arrival at the scene and the shooting is less than four minutes [Doc. 64-2 at 2].

Discussion

Claims that police officers employed excessive force in effecting a seizure of a free citizen are analyzed under the standards set out in *Thomson,* 584 F.3d at 1313-1315, 1320. The Court has carefully reviewed and considered those standards in the course of deciding Defendant's motion. Applying those standards, the Court concludes that Plaintiff has come forward with evidence that would enable a reasonable jury to find a Fourth Amendment violation under two theories.

The first theory is that when Defendant shot Plaintiff, Defendant did not have probable cause to believe that Plaintiff presented a threat of serious physical harm to Defendant or another person. *Id.* at 1313. This theory implicates the (non-exclusive) *Larsen* factors.[4] *Id.* at 1314-15 (quoting *Estate of*

[4] The *Larsen* factors are: "'(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.'" *Zia Trust Co. v. Montoya,* 597 F.3d 1150, 1154 (10th Cir. 2010) (quoting *Estate of Larsen,* 511 F.3d at 1260). The Court understands the first, third and fourth *Larsen* factors as primarily bearing on a knife-wielding subject's apparent *intention* to harm the officer or another person, while the second *Larsen* factor addresses the subject's apparent *ability* to harm the officer or another person. Clearly, resort to deadly force is not objectively reasonable unless there are circumstances indicating to the officer that the subject has *both* the ability and the intention to harm.

Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008)). As to the first *Larsen* factor, there is no dispute that Defendant ordered Plaintiff to drop the knife prior to shooting Plaintiff. However, this fact is offset by evidence that Defendant shot Plaintiff within two or three seconds of the first command to drop the knife [Doc. 92-1 at 4]. A reasonable jury could find that Defendant did not "refuse" to drop the knife because he was not given sufficient time to comply. A jury could conclude that the first *Larsen* factor is neutral as to the existence of probable cause. As to the second *Larsen* factor, the evidence viewed in the light most favorable to Plaintiff supports a finding that Plaintiff was holding a small kitchen knife loosely by his thigh and that he made no threatening gestures toward anyone [Doc. 92-3 at 10]. A reasonable jury could find that the second *Larsen* factor weighs against the existence of probable cause. As to the third *Larsen* factor, the distance between Plaintiff and Defendant is established by the dimensions of the living room noted above, reduced by the distance that Defendant had moved into the living room and the two and a half steps that Plaintiff took into the living room [Doc. 92-2 at 3]. A jury could find that Plaintiff was shot as he was walking in Defendant's general direction,[5] but before he was within striking

[5] As noted above, the record contains evidence that Defendant was standing directly across the living room from the doorway to the kitchen. In view of Defendant's position relative to the doorway to the kitchen, Plaintiff necessarily would have moved in Defendant's general direction in complying with the

(Continued on following page)

distance of Defendant [Doc. 64-6 at 3 ("[H]e was *getting* close enough to us to where it would have been a threat if he had made that decision [to raise the knife].") (emphasis added)].[6] A reasonable jury could find that this third factor also weighs against the existence of probable cause. As to the fourth *Larsen* factor, a reasonable jury could find that the information available to Defendant indicated that the only person that Plaintiff was known to have threatened that night was himself, and that as Plaintiff walked into the living room he did not raise the knife from his side or make threatening gestures or comments toward anyone. A jury could find that the fourth *Larsen* factor weighs against the existence of probable cause. *See Murphy v. Bitsoih,* 320 F. Supp. 2d 1174, 1191-92, 1193 (D. N.M. 2004) (reviewing cases involving use of deadly force; observing that "the courts uniformly required more than the mere presence of a knife near an officer to justify the use of lethal force"). The Court concludes that the evidence gives rise to a genuine issue of material fact as to whether Defendant had probable cause to believe

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command to "please step out here," which as noted elsewhere, was understood by Officer Liccione to have been directed at everyone in the kitchen.

[6] A reasonable jury could find that at the point that Defendant shot Plaintiff, Michaele Tenorio had been hustled out of the living room by Officer Hernandez, and was no longer in harm's way. Under this view of the facts, Defendant could not reasonably have viewed Plaintiff as a threat to Michaele Tenorio.

that Plaintiff presented a threat of serious physical injury to Defendant, his fellow officers, or the civilian occupants of Plaintiff's residence. *See Cavanaugh v. Woods Cross City,* 718 F.3d 1244, 1253-54 (10th Cir. 2013) ("And 'where there is a question of fact or "room for a difference of opinion" about the existence of probable cause, it is a proper question for a jury. . . .'"; "principles from probable cause cases are equally applicable to our excessive force cases").

Plaintiff's alternative theory of liability is that Defendant and the other officers recklessly and unreasonably created a situation giving rise to Defendant's resort to deadly force. The dispatcher had informed the officers shortly before they arrived that the two women inside Plaintiff's residence were in the living room, not the kitchen, and when the officers arrived, Ms. Valdez was waiting outside in the driveway. Thus, the record contains evidence that Defendant and the other officers knew or should have known that they were not confronting a situation in which Plaintiff was holding persons inside against their will. The officers knew that Ms. Valdez had been inside just a few minutes before [Doc. 64-2 at 2]. Yet, Defendant and the other officers did not ask Ms. Valdez about the situation inside the house.[7] *See*

[7] Ms. Valdez could have provided crucial information such as the facts that Plaintiff had not threatened or harmed anyone and that Plaintiff was not holding anyone hostage. Ms. Valdez could have corrected the erroneous information provided by the dispatcher that Plaintiff had been violent in the past.

Sevier v. City of Lawrence Kansas, 60 F.3d 695, 701 n.10 (10th Cir. 1995) (citing officers' failure to obtain more information about armed suicidal subject's condition as evidence of reckless conduct precipitating use of deadly force). There is no evidence that after they arrived, Defendant or the other officers heard loud voices or other sounds of a disturbance coming from inside the residence. Defendant and the other officers knew from the information transmitted by the dispatcher that no one had been injured, and that the only person the subject had threatened was himself. Yet, within a minute or two after arriving, Defendant and Officer Liccione had drawn their side arms, "going lethal." Although Officer Moore and Officer Liccione had received crisis intervention training, neither officer attempted to employ that training [Doc. 64-6 at 2; Doc. 64-10 at 4]. Defendant and the other officers did not attempt to resolve the situation verbally (as for example by calling into the residence directing the occupants to come outside), even though that was an option [Doc. 64-10 at 4]. *Cf. Myers v. Oklahoma County Bd. of County Comm'rs,* 151 F.3d 1313, 1320 (10th Cir. 1998) (emphasizing evidence that officers had spent hours trying to resolve situation through non-confrontational communication with subject). Since Defendant could see into the living room through the open front door [Doc. 64-9 at 3], he would have been aware that due to the small size of the room and the placement of furnishings it would be difficult or impossible for Defendant and the other officers to maneuver once they were inside. According to Officer Liccione, officers are trained to treat a

person armed with a knife as a lethal threat when the person is within 21 feet of the officer. *See Murphy,* 320 F. Supp. 2d at 1182; *but see Edged Weapon Defense: Is or was the 21-foot rule valid* (*Part 1*) (observing that contrary to common misunderstanding of the "21-foot rule," "[a] suspect with a knife within 21 feet of an officer is POTENTIALLY a deadly threat"), available online at http://www.policeone.com/edged-weapons/articles/102828-Edged-Weapon-Defense-Is-or-was-the-21-foot-rule-valid-Part1/ (last visited April 10, 2014). Given the dimensions of Plaintiff's living room, an entry into the living room greatly increased the chances that Plaintiff, if he were still holding a knife, would automatically be perceived as a lethal threat justifying the use of deadly force. Moreover, since a short distance between an officer and a subject translates into a short time to react, the decision to enter the confines of the living room necessarily limited Defendant's opportunity to communicate with Plaintiff prior to employing deadly force. Due to the limited space within the living room, the bean bag rounds were not a non-lethal option [Doc. 92-3 at 10]. Lastly, Defendant and his colleagues did not even attempt to formulate a tactical plan prior to entering the residence. On this evidence a reasonable jury could find that Defendant and the other officers acted recklessly by barging into the residence with deadly force deployed.

Having determined that there are genuine issues of material fact that if resolved in Plaintiff's favor would support a finding that Plaintiff was subjected

to excessive force in violation of his Fourth Amendment rights, the Court must decide if the law on which Defendant's liability turns was clearly established on November 11, 2010. Whether the law is clearly established in an excessive force case is evaluated under the standards set out in *Fancher v. Barrientos,* 723 F.3d 1191, 1201 (10th Cir. 2013) (quoting *Casey v. City of Federal Heights,* 509 F.3d 1278, 1284 (10th Cir. 2007)).

Zia Trust Co. v. Montoya, 597 F.3d 1150 (10th Cir. 2010); *Walker v. City of Orem,* 451 F.3d 1139 (10th Cir. 2006); *Zuchel v. City and County of Denver, Colo.,* 997 F.2d 730; *Sevier v. City of Lawrence, Kan.,* 60 F.3d 695, 700-701 (10th Cir. 1995); *Murphy v. Bitsoih,* 320 F. Supp. 2d 1174 (D. N.M. 2004); *Diaz v. Salazar,* 924 F. Supp.1088 (D.N.M. 1996) provided Defendant with sufficient notice of established Fourth Amendment limitations on his use of deadly force. In particular, the *Larsen* factors were well established in Tenth Circuit case law as of November 11, 2010. In view of these decisions, no reasonable officer could have believed that it was lawful to shoot Plaintiff, even though he was holding a small knife, when: (1) the officer was present in response to a 911 call concerning a subject threatening to harm himself, rather than a crime in progress (2) the officer knew or should have known that Plaintiff had not harmed anyone (3) the officer knew or should have known that Plaintiff was not holding anyone against his will (4) after arriving, the officer had not heard raised voices or other sounds of a disturbance (5) Plaintiff

was calmly walking forward out of the kitchen (6) Plaintiff was not told to halt (7) Plaintiff was not given a reasonable time to comply with the order to drop the knife (8) Plaintiff did not appear belligerent or agitated (9) Plaintiff was holding the knife loosely by his side and did not raise the knife or make any threatening gestures or remarks and (10) Plaintiff was not yet within striking range of the officer. Likewise, the principle that reckless conduct that unreasonably precipitates a use of deadly force violates the Fourth Amendment was well established. *Thomson,* 584 F.3d at 1320; *Allen v. Muskogee Okla.,* 119 F.3d 837, 840-41 (10th Cir. 1997); *Sevier,* 60 F.3d at 701; *see also Hastings v. Barnes,* 252 Fed. Appx. 197, 203 (10th Cir. 2007) (unpublished opinion)[8]; *Murphy,* 320 F. Supp. F.2d [sic] at 1193 (concluding that "[c]learly established law in the Circuit . . . holds that an officer is responsible for his or her reckless conduct that precipitates the need to use force."). Given that there was no report of injuries, no sounds of a disturbance, no reason to believe that the occupants were being

[8] As an unpublished opinion, *Hastings* is not by itself dispositive of the question of whether the law was clearly established; but its holding that the officers unreasonably precipitated the necessity of deadly force nevertheless may contribute to a conclusion as to whether the law was clearly established as of November 11, 2010. *Estate of Booker*, 745 F.3d 405 (10th. Cir. 2014). Apart from its holding as to the merits of the plaintiff's Fourth Amendment claim, *Hastings* is informative in that the panel that decided *Hastings* believed that the law it applied was clearly established as of *August 23, 2002*, the date of the incident at issue in *Hastings*.

held against their will, and no information suggesting that Plaintiff had threatened another person, no reasonable officer could have believed that it was appropriate to barge into Plaintiff's house with deadly force deployed without formulating a tactical plan taking into account known or readily available information, and without consulting Ms. Valdez, who had recently been inside. The present case is merely an example of the application of settled law to a new, but in no way unusual, set of facts. *See Estate of Booker,* 745 F.3d 405, 427 (10th Cir. 2014). ("In the Fourth Amendment context, we have said that 'because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity whenever we find a new fact pattern."). The law as it existed on November 11, 2010 gave Defendant fair notice of Fourth Amendment limitations on his use of deadly force.

The Court must address one last matter: Defendant's objection to Plaintiff's Exhibits Nos. 6 and 8 [Docs. 92-6 and 92-8]. Defendant argues that that [sic] these two exhibits, excerpts from Plaintiff's expert reports, "have not been presented in admissible form since this information is unsworn and has not otherwise been shown to be admissible" [Doc. 103 at 1]. Under the forward-looking language of Fed. [sic] Civ. P. Rule 56(c)(2) the current form of the evidence is not dispositive of whether it may be

considered in response to Defendant's motion. Since Plaintiff has identified experts, those experts presumably can be called at trial to testify to the opinions in their reports and the bases for those opinions. *Central Weber Water Improvement Dist. v. Ace Fire Underwriters Ins. Co.,* No. 1:12-CV-166 TS, 2014 WL 495152 *7 (D. Utah. Feb. 6, 2014). Sufficient authentication is provided by Defendant's concession that these exhibits are portions of Plaintiff's expert reports. Furthermore, pursuant to Fed. Evid. Rule 703, an expert may base his opinions on evidence that otherwise would be inadmissible. With one exception noted below, Defendant has not adequately explained why the evidence in Plaintiff's experts' reports "cannot be presented in a form that would be admissible in evidence." Defendant's objection is not well taken. Defendant, citing *Medina v. Cram,* 252 F.3d 1124, 1133 (10th Cir. 2001), objects to the opinion of Plaintiff's police procedures expert, Roger A. Clark, that "[n]one of the officers at the scene (including Officer Pitzer) followed the expected and required tactical protocols necessary for dealing with a mentally impaired, suicidal and possibly armed (with a knife) subject" [Doc. 92-6 at 2]. This is a facially proper objection, as it goes to the *content or substance* of Plaintiff's evidence, not merely its current form. *Johnson v. Weld County, Colo.,* 594 F.3d 1202, 1210 (10th Cir. 2010). At this point in time, the Court need not decide whether *Medina* requires the exclusion of Mr. Clark's opinions, *cf. Cavanaugh,* 718 F.3d at 1250 (endorsing use of police practices expert to "connect

the dots" on whether the circumstances facing defendant officer justified his use of force), because the Court is satisfied that with Mr. Clark's opinions set aside and given no weight the remaining evidence before the Court raises genuine issues of material fact precluding summary judgment on the defense of qualified immunity.

WHEREFORE, IT IS THEREFORE HEREBY IS [sic] **ORDERED** that Defendant Brian Pitzer's *Opposed Motion for Summary Judgment on Qualified Immunity Grounds* [Doc. 64] is **denied**.

So ordered this 28th day of May, 2014.

/s/ M. Christina Armijo
M. CHRISTINA ARMIJO
Chief United States
District Judge