No. 14-15059

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMY HUGHES
Plaintiff-Appellant

v.

ANDREW KISELA
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona

The Honorable Judge Frank R. Zapata
USDC Case No. 4:11-cv-00366-FRZ

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUMMARY OF REPLY ARGUMENT

First, as he did below, Kisela continues to improperly argue numerous facts not known to him when he shot Ms. Hughes to justify the shooting, facts which have no bearing on the objective facts known to him and other officers at the time.

Second, Kisela is wrong that Ms. Hughes has raised – but purportedly waived – new issues by discussing the proximity of the bystander and the police conduct of dangerously shooting through a chain link fence towards the bystander as facts supporting the conclusion of an unreasonable unconstitutional use of deadly force. The proximity of the bystander Chadwick has always been an issue in this case, a fact extensively argued below by Kisela and the state. Kisela cannot now claim that the proximity of the bystander to Hughes may only be viewed as a shield for Kisela in terms of alleged danger to the bystander, but not as a sword in terms of unreasonably dangerous police conduct in determining the objective reasonableness of the shooting due to her proximity. Moreover, the excessive nature *and the dangerousness* of the use of force by shooting through the fence was presented in Hughes' controverting evidence below, specifically controverting Officer Kisela's claim that the force was justified and reasonable.

Third, this Court may consider an officer's dangerous conduct which endangers a bystander in the objective reasonableness analysis of whether the

shooting was reasonable under the circumstances. Finally, it has long been clearly established law that the mere possession of a weapon cannot justify the use of deadly force when there is no crime and immediate danger to an officer or others.

ARGUMENT

I. APPELLANT AMY HUGHES COMMITTED NO CRIME.

As much as Kisela would like to make it appear as though Ms. Hughes was committing a crime when he shot her, the fact is she simply was not. The cases cited by Kisela in his defense involve scenarios where the Plaintiff was actively fleeing and/or attempting to assault the officers who shot them. Ms. Hughes was doing none of those things. She was *at her own home on private property*, speaking with a friend while holding what Chadwick described to be a large "kitchen knife". (EOR 108, line 9; EOR 199, line 32.)

The officers – including Kisela – admitted that it was not a crime to possess a knife or carry one in her front yard, and that they had no reasonable belief that the report made to police or the act of coming out of her house with a knife was a crime. (EOR 113, ll. 18-24, EOR 114, lines 1-11 (Garcia); EOR 124, lines 18-26, and EOR 125, lines 1-11 (Kunz); EOR 140, lines 1-21 (Kisela).)

If that is a crime, then anyone who gets in a dispute while carrying a firearm in this gun-friendly state, would also be committing a crime, justifying sudden,

forceful intervention, because, as Mr. Kisela[1] knows, a gun can be drawn and fired in one second. *Graham v. Connor,* 490 U. S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Under *Graham v. Connor,* the analysis involves a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U. S. 386, 396 (1989). The intrusion on one's Fourth Amendment interests is greatest when the force used is deadly, and when one is in one's own home, yet Officer Kisela still argues that Ms. Hughes' actions and inactions in those few seconds were sufficient, without further investigation, to forfeit those interests, as well as potentially her life. *Deorle v. Rutherford*, 272 F.3d 1272, 1279-80 (9th Cir. 2001) ("Nature and Quality of Intrusion" measured by quantum of force used. Lead-shot filled, cloth bag fired from a shotgun was lethal enough to trigger necessity for "strong governmental interest" to be shown.) Here, there is no question that the quantum

1 On appeal Appellant Hughes has previously referred to Mr. Kisela as Officer Kisela throughout during the current proceedings, but it has come to Appellant's attention that Mr. Kisela can no longer be currently referred to as a police officer because he has been permanently banned from being a police officer pursuant to an unrelated matter in which he agreed to surrender his law enforcement certificate. See http://tucson.com/news/local/crime/former-university-of-arizona-police-corporal-surrenders-his-state-license/article_a5e8f3fa-45f8-551e-b1cb-eb06131ac45b.html For accuracy, Ms. Hughes will refer to him as Mr. Kisela or Kisela when referring to arguments he currently makes, but as Officer Kisela when referring to his past conduct.

of force used was the maximum - deadly.

The governmental interest is measured by three factors: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others .. . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight. *Deorle* at 1280.

Here, the governmental interest fails on two of the three, and the third depends entirely on assumptions made by Officer Kisela. 1) *There was no crime*. Similar to the facts in *Deorle*,

> The character of the offense is often an important consideration in determining whether the use of force was justified... In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior.

Deorle at 1280.

2) Officer Kisela made assumptions about the situation which pre-empted any rational assessment of the *actual* level of the threat to "others". In *Deorle*, the Court said,

> A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury... A thorough review of the record reveals that the facts are sufficiently unclear as to what [the officer] believed or feared -- reasonable or not -- that the determination must be made by a trier of fact, and not, as the dissent does, by portraying the facts in the light most favorable to the moving party."

Deorle at 1281 (internal citations omitted).

3) Standing still with a "thousand mile stare" in one's own front yard is neither fleeing, nor resisting arrest. Therefore, under the *Graham* balancing test, the use of force was unreasonable.

Kisela disingenuously claims that "Hughes enjoyed no constitutional right to **appear** to threaten another person with a deadly weapon without experiencing abrupt and forceful intervention by the police." (Ans. Br. p.28 [emphasis added].) Ms. Hughes has argued the right to be free from excessive deadly force when merely possessing a knife in her own front yard, committing no crime. Moreover, it is not a crime to *appear* to threaten someone, particularly when "appearances" can be deceiving and require the observer to make assumptions. The law does not sanction a "shoot first, ask questions later" approach.

Similarly, as in *Deorle*, courts have shown a trend of finding that officers *should* take the time to assess the situation before using deadly force, or risk the consequences in a civil action. *Deorle* at 1282-3.

"The threat posed is the most significant *Graham* factor." *Brooks v. City of Seattle*, 599 F.3d 1018, 1028 (9th Cir. 2010). In this case, there was no reported threatened crime to Ms. Chadwick. Instead, Ms. Hughes committed no crime at all. The police were not responding to any crime scene report that a person was being

assaulted. Yet, in just seconds from the point of viewing Ms. Hughes walking with a knife toward Ms. Chadwick, the University officers did not even identify themselves as police officers (a basic police step), and instead immediately resorted to drawing and pointing deadly weapons while demanding that Ms. Hughes drop the knife. (EOR 280-281, 304, 330.)

With absolutely no evidence Ms. Hughes even heard such commands, and instead, evidence suggesting she did not even register their presence (EOR 280, 323, 328), Kisela fired multiple shots within a matter of seconds, dangerously firing through a chain fence at Ms. Hughes as a purported criminal suspect, as she stood on her own property mere feet from the bystander he unreasonably attempted to protect and who was apparently hit with a fragment. (EOR 110, 211.) The totality of the circumstances, both disputed and undisputed facts, demonstrates the unreasonable and unconstitutional use of excessive deadly force in this case.

II. OFFICER KISELA CONTINUES TO ARGUE USING FACTS NOT KNOWN TO HIM OR OTHER OFFICERS AT THE TIME HE SHOT MS. HUGHES, IN ORDER TO JUSTIFY THE SHOOTING.

In Kisela's Answering Brief, he properly observes, "The central issue in this appeal is whether Corporal Kisela's use of force was objectively reasonable **based on his knowledge of the facts at the time**." (Ans. Br. p.7 [emphasis added].)

However, the first full two and a half pages of his "Statement of Facts" are improperly chock full of facts that he did not know when he shot Ms. Hughes.[2]

In a shockingly misleading fashion, Kisela describes the welfare check report about Hughes as "screaming and crying very loud" and holding a long knife like a butcher's knife and looking like she was "about to stab herself" or "do something crazy," directly asserting to this Court, "*That is the context of the call to which Kisela and Garcia were responding.*" (Ans. Br. at 2, citing EOR 317; italics added.) But those reports were obtained after the shooting. (See EOR 317.)

2 None of the following was known to Officer Kisela before the shooting: "Chadwick stated that she was initially unaware of the officers' presence because she was "'focusing on [Hughes] and her knife.'" With knife in hand, Hughes was demanding that Chadwick give her $20 that Chadwick owed her and accusing Chadwick of having called the police. **In her recorded statement to police on the night of the incident**, Chadwick stated that she felt threatened when Hughes "brought the knife outside... and said, 'You called the police. You called the police, didn't you?'" She stated that she did feel threatened, but thought that it was a threat that she could handle. She stated that she was closely watching Hughes's face and body language during the encounter, which she described as "distorted," "emotional," and "angry." Chadwick would later assert that she had never felt threatened by Hughes during the entire incident. Chadwick handed Hughes a twenty-dollar bill and then tried to move away, "'trying to keep some distance between us.'" Despite the officers' presence, Hughes continued to move closer to Chadwick with the knife in her hand, moving to within striking distance. Chadwick stated that Hughes may have been waving the knife around or switching it from one hand to the other. She stated that Hughes "'was holding [the knife] down mostly, but she did raise it up.'" Chadwick did not always know where the knife was, and did not know where it was when the shots were fired. She stated that Hughes somehow got in front of her with the knife, that she "'was not putting the knife down,'" and that "'she was very close to me.'"" (Ans. Br. pp.3-4 [emphasis added and internal citations omitted].)

Not until the second half of page 4 and page 5 are statements of fact presented that *were* known to the officers on the scene. Beginning again on page 6 of the Answering Brief, however, starting with "Hughes's injuries were not life-threatening", Kisela again states more facts that he did not know before he shot her. At the time, Officer Kisela certainly could not have known that shooting Ms. Hughes four times would not kill her.

Indeed, she was shot multiple times. (EOR 166, l. 26; EOR 343.) She sustained severe, painful and permanent injuries requiring medical care, treatment, and hospitalization, and causing severe emotional distress. (EOR 361, ll. 17-19.)

Kisela then argues that all of the unknown facts that he spent so much time repeating, are irrelevant and were properly disregarded by the District Court. (Ans. Br. p.14.) Even while arguing that those facts were not considered, Kisela repeats them in detail. *Id.* If these facts are irrelevant, and were disregarded, why continue to repeat them, if not in hope that they will continue to prejudice the proceedings?

At the same time that Mr. Kisela pours over the details of Ms. Hughes' mental illness, he then claims "There is no evidence that Corporal Kisela could have discerned that Hughes was bipolar or emotionally disturbed." (Ans. Br. p.19.)

However, this contradicts the description in his own statement of facts on

appeal, where Kisela describes the behavior of Ms. Hughes as "erratic", and "crazy". It is disingenuous of Mr. Kisela to continue to claim both that he observed Ms. Hughes acting strangely enough to justify shooting her four times, but not strangely enough to put him on notice that she might be emotionally disturbed. Ms. Hughes' point is that Officer Kisela did not take the time to find out at the time. He made unreasonable and nearly fatal incorrect assumptions and then, in a split second, created a situation where there was none. He was called to a check-welfare and he turned it into a crime scene. This is precisely the message that was sent in *Sheehan II*: police should not create problems, particularly when they are responding to a report that there is a person in need of help, not a report of a crime. *Sheehan v. City of S.F,* 743 F.3d 1211 (9th Cir. 2014).

Significantly, the record shows that when Officer Kisela heard the welfare check call, he concluded it would be a good idea to take his trainee to encounter a situation involving "*an armed suspect*", because the report was in the university officers' "playing boundary...." and his trainee Officer Garcia had not yet dealt with an armed suspect contact yet. (EOR 295; italics added.) Undeniably, Officer Kisela already had wrongfully concluded that Ms. Hughes was an armed criminal *suspect*, without any objective evidence, rather than the *subject* of a welfare check who was reported to be acting erratically toward a tree with a kitchen knife.

Kisela later said he feared a lethal theat to his and the officers' lives, saying she could charged them with the knife, despite being on the other side of an insurmountable 5 foot chain fence and locked gate. (EOR 288, 286, 294, 313, 328.)

Kisela on appeal also refers to the Court's statement: "even considering [Hughes's] emotional state, it does not appear that the use of force by Defendant was objectively unreasonable 'in light of all the relevant circumstances.'" Kisela claims that this shows that the district court merely considered alternative scenarios and found the use of force reasonable under either. (Ans. Br. p.20.) This misstates the problem with prohibited information being used in a determination of reasonableness of use of force. The standard for summary judgment is not "even if", it is "taken in the light most favorable to the non-moving party".

This Court takes the undisputed facts as true and considers disputed facts in the light most favorable to Hughes. *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 745 (9th Cir. 2010). Here, when asked the "million dollar question" why the others did not shoot, Officer Kunz suggested said he was not in a position but also that he did not perceive a threat that he had to stop and could not see a threat. (EOR 325, ll. 155-160.) Officer Garcia wanted to continue to try lesser methods and believed there was still time to use less than deadly force like verbal commands, and deadly force was not the "first" option that jumped to

his mind. (EOR 120, ll. 2-7, 26; EOR 120, line 1.) These facts alone create a dispute ostensibly compelling a denial of summary judgment.

Additionally, the district court did not clarify *how* Ms. Hughes' emotional state was considered. There was no discussion of whether Officer Kisela knew or should have known that Ms. Hughes' emotional state was out of the ordinary, and should have been considered before using deadly force against her. It is clear from the language of the District Court's Order, that the District Court was construing the fact of "Hughes' emotional state" in Officer Kisela's benefit, which was to consider improper hindsight information, and make summary judgment improper.

III. BECAUSE THE REASONABLENESS OF THE SHOOTING UNDER ALL OF THE FACTS, AND THE "PROXIMITY" OF CHADWICK, HAVE ALWAYS BEEN ISSUES IN THE CASE, MS. HUGHES MAY PROPERLY ARGUE THAT DANGEROUS POLICE CONDUCT BY SHOOTING MULTIPLE TIMES THROUGH A FENCE AND THE FACT OF HER PROXIMITY TO MS. CHADWICK, IS ALSO EVIDENCE OF UNREASONABLE USE OF FORCE.

Kisela contends that Appellant Hughes has waived the ability to argue that the proximity of Ms. Chadwick, as an endangered bystander, shows that the shooting was objectively unreasonable under the facts, and in light of UAPD policies to avoid endangering bystanders, as well as the fact that Kisela did not have a clear shot and instead, dangerously fired multiple times through a chain link fence.

The reasonableness of the shooting under all of the factual circumstances has always been at issue in the case, and the "proximity" of the bystander Ms. Chadwick was also litigated below in terms of the danger Kisela *assumed* was posed by Ms. Hughes. The issue of the dangerousness of the shooting, especially through a chain link fence, was also presented in the evidence and controverting statements presented by Ms. Hughes, who presented an expert/investigator report on the dangerousness of the shooting. Under these circumstances, Ms. Hughes may properly argue that the dangerous police conduct – by Kisela recklessly shooting multiple times through a fence, endangering Ms. Chadwick due to her proximity to Ms. Hughes, and that Chadwick was apparently struck by a fragment during the shooting – is all evidence of unreasonable use of deadly force.

The relevant facts appear in the record, or are obvious from the situation. The dispute below – as on appeal – is whether, as a matter of law, Officer Kisela acted reasonably under the circumstances. Mr. Kisela contends that his actions were reasonable because of Ms. Chadwick's proximity to Ms. Hughes. However, Ms. Hughes contends that Officer Kisela's actions were *unreasonable* when he shot her, *also* because of Ms. Chadwick's proximity to Ms. Hughes, and the presence of a chain link metal fence between Officer Kisela and Ms. Hughes, which created an unreasonable danger to Ms. Chadwick and any other innocent bystanders.

Below, Ms. Hughes presented the report of her investigator/expert James Stoner for consideration to the District Court, and the report specifically gave the following opinion:

> **The act of shooting through the cyclone fence indicates a serious lack [of] common sense** due to the fact that a hollow point round is designed to expand when it comes in contact with the torso of a person. Also, it will fragment as it strikes a fixed object such as bone. **In this case it appears that one round did hit the cyclone fence and as indicate[d] in the discovery photos and I personally viewed the damage to the fence.** The force of the round at approximately 1000 ft. a second could have fragmented and hit not only the person it was intended for but anyone within close proximity including the officer firing the weapon.
>
> It is my contention that firing the weapon through a cyclone fence could have had very serious consequences. A .40 cal round is not only traveling a[t] approximately 1000 ft. per second but due to the rifling in the barrel it is spinning at a high rate of speed which can cause its intended direction or fragments to take a different direction.

EOR 154-55 (emphasis added).

Thus, the facts and the reasonableness of shooting through the fence was in dispute, even if not spelled out in detail in the brief. It was referred to and incorporated in Ms. Hughe'sseparate statement of disputed facts, in that Ms. Hughes argued that she "disputes that given the facts and circumstances known to Corporal Kisela at the time, his use of force was reasonable and justified …," and she referred to her expert's report. (EOR 102, lines 25-26, and EOR 103, at line 1.)

The expert/investigator Mr. Stoner reviewed the facts, including the "locations" of "Mrs. Chadwick and Ms. Hughes ... prior to and during the shooting incident." (EOR 154.) Based on the location and presence of the fence, and after reviewing police reports and interviews and viewing the scene, he concluded that not only was the force excessive, it was used in a dangerous manner. (EOR 154-155.)

Furthermore, Ms. Hughes' counsel *did* discuss the issue of "proximity" below, asking the court, "Is the use of force reasonable when you have a woman in close proximity to her good friend, five or six feet and doesn't drop it when commanded?" (EOR 47, lines 9-12), and also noted that the only facts Officer Kisela saw was that Hughes was "close" to Chadwick and had a knife and had been reported to be acting erratically previously. (EOR 50, lines 3-7.) Appellant Hughes' counsel argued this was not enough to justify the use of deadly force. (Id.)

Thus, although Ms. Hughes' former counsel below may not have specifically elaborated about these particular factual points (endangering of Chadwick or shooting through a fence as further evidence of unreasonableness), this was likely due to counsel's argument that the record on its face ostensibly should compel the District Court to deny summary judgment, and also because his argument that the use of force was excessive from the start "showing up at the fence" and drawing weapons. (EOR 52, lines 24-25.) Ms. Hughes has always argued that the shooting

was unreasonable under all of the circumstances that day. Additional elaboration about shooting through the fence or the proximity of the bystander merely argues *how* unreasonable the conduct was. All of the factual issues are subsumed in the question about the objective unreasonableness of the use of deadly force that day. Therefore this is not a new legal theory of recovery, but merely additional discussion and argument regarding the factual circumstances of the record established below.

Even if this were considered to be a new issue, the fact remains that while appellate courts generally will not consider an issue raised for the first time on appeal, the Court has the power and discretion to do so. *Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir. 1991). The Court may exercise that discretion when: (1) the issue presented is purely a legal issue that is not dependent on the factual record developed by the parties, or the pertinent record has been fully developed already (*U.S. v. Winslow,* 962 F.2d 845, 849 (9th Cir. 1992); (2) the issue was raised for the first time on appeal because of a change in the law; or (3) review is necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process. *U.S. v. Clack,* 957 F.2d 659, 661 (9th Cir. 1992).

An issue is first raised on appeal if it was neither argued nor passed upon by the District Court. The issue may have been argued in a slightly different manner

in the District Court and still be preserved for appeal. *U.S. v. Verdugo-Urquidez,* 939 F.2d 1341, 1344 n.2 (9th Cir. 1991) (finding that defendant did raise the issue below even if it was not raised in precisely the same manner as framed on appeal); *Jordan v. Clark,* 847 F.2d 1368 (9th Cir. 1988) (issue was not clearly framed at trial as a separate theory of recovery, but Court of Appeals could decide the issue on appeal since the District Court fully developed the factual record). If the District Court necessarily ruled on the issue, the Court of Appeals may consider the issue even if it was not argued below. *U.S. v. Williams,* 504 U.S. 36, 112 S. Ct. 1735, 1738-39, 118 L.Ed.2d 352 (1992)

> A party who has not raised an issue below "is precluded from raising it for the first time on appeal." *Schwimmer v. Sony Corp. of America*, 637 F.2d 41, 49 (2d Cir. 1980). Arguments made on appeal need not be identical to those made below, however, if the elements of the claim were set forth and additional findings of fact are not required. *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976); *Maynard v. General Electric Co.*, 486 F.2d 538, 539 (4th Cir. 1973). Therefore when a party raises new contentions that involve only questions of law, an appellate court may consider the new issues. *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693-94 (9th Cir. 1980); *Foster v. United States*, 329 F.2d 717, 718 (2d Cir. 1964). See also *North American Leisure Corp. v. A & B Duplicators, Ltd.*, 468 F.2d 695, 699 (2d Cir. 1972). That is the situation here.

Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F. 2d 513, 515 (2nd Cir. 1982).

Here, the factual record was fully developed so that the relevant facts were

preserved for the record. Ms. Hughes seeks review under a legal theory that has been properly litigated below, and that uses facts presented below, but merely argues them in a new way, similar to *Verdugo-Urquidez,* and *Jordan.*

The Court may decline to consider a new issue that involves fact questions if the other party had no opportunity to present evidence, (*Pacific Express, Inc. v. United Airlines, Inc.,* 959 F.2d 814, 819 (9th Cir. 1992); *Hansen v. Morgan,* 582 F.2d 1214 (9th Cir. 1978) or might have litigated the case differently had it known of the existence of the issue, (*Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985). Here, much of these facts were actually introduced in the trial court by the other party – Mr. Kisela – therefore he not only knew of the facts, but had ample opportunity to develop the facts and litigate accordingly. Indeed, a party may waive an objection to the inadequacy of the factual record to consider a newly raised issue by simply arguing the merits of the issue. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.,* 890 F.2d 139, 145 (9th Cir. 1989).

Indeed, the shoe is on the other foot, because Kisela arguably waived any objection to review here by arguing below that his actions were consistent with national law enforcement use of force standards. Those standards include a prohibition against unnecessarily endangering bystanders when using deadly force, which would tend to show that his actions were not reasonable.

IV. THIS COURT MAY CONSIDER THE OFFICER'S ENDANGERING A BYSTANDER IN THE OBJECTIVE REASONABLENESS ANALYSIS.

Kisela argues that Ms. Hughes may not raise any issue about the danger posed to Ms. Chadwick because he claims that Hughes is improperly trying to assert Ms. Chadwick's Fourth Amendment rights vicariously. (Ans. Br. p.24.) This is a misleading mis-description of Ms. Hughes' argument on appeal, and a straw-man argument. Ms. Chadwick is not a party in this case.

In support of this argument, Kisela cites *Plumhoff v. Rickard*, 134 S. Ct. 2012, 572 U.S. __, 188 L. Ed. 2d 1056 (2014), decided in May of this year. The issue in that fleeing-motorist case was when police can use force to terminate a chase of a fleeing motorist. There, Rickard's outrageously reckless driving, lasting more than five minutes, exceeded 100 miles per hour, and included passing more than two dozen other motorists, as well as a collision and resumed efforts to escape as his car bumper was flush with that of police vehicles as he spun the wheels trying to escape. *Plumhoff*, 134 S.Ct. at 2021. The conduct posed a grave public safety risk. (*Id.*) Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would pose a threat to others on the road. *Plumhoff*, 134 S.Ct. at 2022. During the shooting, the passenger in Rickard's car was also killed.

Here, Hughes was not fleeing, and was certainly not driving. The officers

observed no risk to anyone other than their *assumed* risk to Chadwick. Hughes was on her own private property behind a locked gate and chain link fence, and was not going to escape and endanger the general public. In fact, *no crime was committed*. No one was reported to be in danger. Officer Kisela *witnessed no violence* before he began shooting without talking to the person he believed to be in danger. Shooting through the fence placed her at greater danger, further evidence that the use of deadly force was objectively unreasonable.

Even Officer Garcia admitted that the University officers' police training concerning dangerous threats to third parties was very limited. (EOR 314.)

Kisela is trying to have it both ways when he argues the Court *can* consider Ms. Chadwick's proximity to say the shooting was *reasonable* because she was in danger from Hughes, but the Court *cannot* consider Ms. Chadwick's proximity to say the shooting was *unreasonable* because she was in danger from Kisela.

Plumhoff does not state a rule of law that bystanders cannot be considered in the reasonableness analysis. This Court is requested to take judicial notice of the briefing and argument in *Plumhoff*.[3] The presence of bystanders was not even the

3This Court is respectfully requested to take judicial notice of the oral argument transcript and briefs in *Plumhoff*. *United States v. Wilson*, 631 F. 2d 118, n. 1 (9th Cir. 1980) (appellate court may take judicial notice of records in other cases), citing Fed.R.Evid. 201(b)(2), and *Kasey v. Molybdenum Corporation of America*, 336 F. 2d 560, 563 (9th Cir. 1964) (judicial notice of records in other cases); see *Rodriguez v. Disner*, 688 F. 3d 645, n. 11(9th Cir. 2012) (judicial notice of briefs); *Native Village of Point Hope v. Salazar*, 680 F. 3d 1123, fn. 6 (9th Cir. 2012)

central issue in that case.

The issue was briefly noted at oral argument. This exchange occurred:

> JUSTICE SCALIA: The danger is he is going to be going 100 miles an hour, okay, that the chase up to now has been the way your client's chase was, in which he endangered a lot of other people, forced cars off the road, and so forth. That's – that's the – that's the hypothetical. Okay. That person is about to drive away and continue that kind of public endangering behavior. Can the policeman shoot or not.
>
> MR. SMITH: You could not as he is driving away because **now you're endangering you're actually endangering the people that you say you're trying to protect.**
>
> JUSTICE SCALIA: No, no. There's nobody around, just just him.
>
> MR. SMITH: If there is nobody around
>
> JUSTICE SCALIA: There is nobody around. Can can they shoot at him to stop him from endangering the public again?

Plumhoff, Tr. Oral Argument, pp. 42-43 (emphasis added).

Here, Officer Kisela claimed he was trying save Ms. Chadwick from imminent harm. When the *protection of the bystander is the point* of the use of force, then the risk of death posed to that bystander is absolutely relevant to an analysis of reasonableness of the conduct in the first place.

There was further discussion of this point at oral argument in *Plumhoff*:

(judicial notice of appellate briefs). The merits' briefs and *amici* briefs filed in the case are available at: http://www.americanbar.org/publications/preview_home/12-1117.html and the transcript of the argument before the Supreme Court is available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1117_f2ag.pdf – readily available for this Court's review.

> MR. SMITH:... There is no case that says specifically if there is a passenger there don't use a weapon. But virtually every case talks about the – the impact of using lethal force to do it or not to do it when relative to innocents, third parties. It is just **that is an obvious part of the judgment that should be made, is that you don't endanger those other than the suspect**, and you don't shoot or use deadly force on the suspect if it is going to endanger others.

Plumhoff, Tr. of Oral Argument, pp.49-50 (emphasis added).

The United States as *Amici* in *Plumhoff* even conceded there is little case law on bystanders.[4] Insofar as Kisela claims that the *Plumhoff* decision stands for a new rule that police conduct that endangers bystanders can never be considered in the calculus of deciding whether excessive force was used under the circumstances, this is simply wrong. If this were the law, it would restrict the Court from the requirement to consider all the factual circumstances in evaluating reasonableness.

The evidence of all of the circumstances show unreasonably dangerous conduct of shooting multiple times through a chain link fence aimed at a person just feet from the bystander whom Officer Kisela was ostensibly trying to protect.

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4 "The passenger did not make Mr. Rickard less dangerous. However, I know of no legal framework as of 2004… The circuits go various ways. The Sixth Circuit has vacillated on the issue of whether there's a Fourth Amendment claim of an un of an unintentional unreasonable seizure..." *Plumhoff,* Tr. Oral Arg. pp.13-15.

V. LAW WAS CLEARLY ESTABLISHED THAT POLICE MAY NOT USE EXCESSIVE DEADLY FORCE JUST BECAUSE A PERSON HAS A KNIFE, WHEN THERE IS NO A CRIME BEING COMMITTED.

Kisela, citing the Opening Brief, argues Ms. Hughes may not rely on cases decided after the shooting to establish that the law was clearly established. (Ans. Br. p.32.) Again, Kisela is responding to arguments he *wishes* were made, but not to the arguments *actually made*. As the Opening Brief demonstrates, the cases were not raised to discuss the "clearly established" law prong of qualified immunity analysis– they are similar factual cases finding *triable issues of fact*, that were sent to a jury where the police acted in an objectively unreasonable manner, as similar to this case as possible. (Ans. Brief at pp. 13-22.) Because the law is against him, Kisela instead creates straw-man arguments to knock down, when that was not the context of the argument presented by Ms. Hughes.

It has long been clearly established law that the mere possession of a weapon cannot justify the use of deadly force when there is no crime and immediate danger to the officer or others.

> "[T]he mere fact that a suspect possesses a weapon does not justify deadly force." *Haugen v. Brosseau*, 351 F.3d 372, 381 (9th Cir.2003) (citing *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir.1997)) (holding, in the Ruby Ridge civil case, that the FBI's directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males); *Curnow [v. Ridgecrest Police]*, 952 F.2d [321, 324–25 (9th Cir. 1991)] (holding that deadly force was unreasonable where the suspect

> possessed a gun but was not pointing it at the officers and was not facing the officers when they shot). Accordingly, Hayes's unexpected possession of the knife alone—particularly when he had committed no crime and was confronted inside his own home—was not sufficient reason for the officers to employ deadly force.

Hayes v. County of San Diego, 638 F.3d 688, 698 (9th Cir. 2011)

In any event, to the extent that Appellant Hughes has presented numerous factually similar cases, even insofar as Appellee Kisela seeks to argue the qualified immunity issue on appeal, those cases merely affirm the pre-existing clearly established law. These cases are relevant because they show that the law was already so clearly established that there are numerous, factually similar cases applying the law where the courts denied summary judgment and sent the case to a jury trial. The events of those cases happened either before, or within a year after the shooting of Ms. Hughes: *Martinez v. City of Avondale,* No. CV-12-1837-PHX-LOA, 2014 WL 178144 (D. Ariz., Jan. 6, 2014) (shooting 10/28/2011); *Hayes v. Cnty. of San Diego*, 736 F.3d 1223 (9th Cir., 2013) (shooting 09/17/2006); *Roberts v. City of Omaha*, 723 F.3d 966 (8th Cir. 2013) (shooting 01/11/2010); *Steward v. City of Prairie Vill.,* 904 F. Supp. 2d 1143 (D. Kan. 2012) (shooting 03/21/2011).

In any case, the relevant inquiry is whether the law was clearly established, such that any reasonable officer would know that their actions violated the Plaintiff's rights. The right to be free from being unreasonably shot when one is

merely holding a knife and not committing a crime is clearly established law.

Furthermore, not only was the law clearly established, Kisela's unreasonable conduct violated Ms. Hughes Constitutional rights and he engaged in using excessive deadly force that on its face was excessive and unreasonably dangerous by shooting multiple times through a chain link fence and under the circumstances when an innocent bystander was endangered, and even struck with apparent shrapnel or a fragment. Officer Kisela's conduct was not only excessive, but unreasonably dangerous. The District Court judge below described this case as "legally a very difficult case quite frankly …." (EOR 59, lines 21-22.) The reason is obvious from the record. A jury should get to make the final decision.

CONCLUSION

This case should be remanded to district court, and summary judgment vacated because the facts presented show a genuine issue of material fact as to whether Officer Kisela's actions in shooting Ms. Hughes were reasonable under the circumstances.

DATED: November 21, 2014 Respectfully submitted,

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14-15059

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of F.R.A.P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 5,640 words, not including the cover, table of contents and authorities and certifications. I relied on my word processor to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Vince Rabago
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14-15059

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, a copy of the foregoing APPELLANT'S REPLY BRIEF was served via CM/ECF or email on the following:

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