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 OPENING BRIEF

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter because it arose under federal law, specifically 42 U.S.C. §1983. The case was originally filed in State Court (C20113438) on May 9, 2011. It was removed to District Court on June 22, 2011.

Under 28 U.S.C. §1291, the Court of Appeals has jurisdiction over "all final decisions of the district courts." Plaintiff's state law negligence claims were dismissed on May 8, 2012, and Plaintiff's remaining federal civil rights claims were dismissed in a final order granting Summary Judgment on December 20, 2013.

On January 13, 2014, Amy Hughes timely filed a *pro se* Notice of Appeal, as her previous trial counsel did not represent her on appeal. Current undersigned counsel did not represent Ms. Hughes in the District Court, and entered the case on appeal in 2014.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether summary judgment was proper when the facts below raised a genuine issue of material fact and law, such that a reasonable jury could return a verdict for Plaintiff.
2. Whether summary judgment for Defendant Kisela was proper, on grounds that his actions in shooting Plaintiff multiple times were objectively reasonable, in light of facts presented below that raised a genuine issue of material fact and law, and when the facts below established: (1) this was a classic case of unconstitutional "shoot first, ask questions later" conduct for university police who intervened in a welfare check call made to local Tucson police about a woman chopping a tree with a knife, and there was no report of any crime, no report of any assault or violence against a person nor any report that Plaintiff Amy Hughes' friend Ms. Chadwick was in danger, yet the officers immediately engaged in the use of deadly firearms and deadly force by drawing weapons without ever asking what was happening and Officer shot Ms. Hughes four times when she did not drop the knife as ordered.
3. Whether summary judgment for Defendant Kisela was proper, on grounds that his actions in shooting Plaintiff multiple times were objectively reasonable, in light of facts presented below that raised a genuine issue of material fact such that a reasonable jury could return a verdict for Plaintiff, and when (1) national law

enforcement standards for the use of force prohibit an officer from unnecessarily endangering innocent bystanders, and (2) by shooting Plaintiff with a chain-link fence directly between himself and Plaintiff Amy Hughes, with the bystander Ms. Chadwick – the person whom Defendant Kisela purportedly intended to save by shooting Plaintiff Amy Hughes – was standing just feet away from Plaintiff Hughes, a jury could find that Defendant Kisela's actions unreasonably endangered Ms. Chadwick, as well as himself and other people present, because of the unreasonable risk of bullets ricocheting off the chain-link fence.

4. Whether the District Court's judgment is erroneous as a matter of law because it cited and relying on a court ruling which was later reversed and remanded and has since been altered by this Court, impacting the legal analysis.

5. Whether the District Court erred as a matter of law by relying on Ms. Hughes' mental illness as improperly presented by Officer Kisela in his Renewed Motion for Summary Judgment to argue the objective reasonableness of the shooting, when such facts were not known by the officer at the time.

STATEMENT OF THE CASE

Plaintiff Amy Hughes filed a lawsuit against officer Kisela and others in Pima County Superior Court on May 9, 2011, and served Defendant Kisela on June 14, 2011.

On June 21, 2011, the case was removed to federal District Court. On July 8, 2011, Officer Kisela answered the complaint, and on the same day filed a Motion to Dismiss state law claims on grounds that the Notice of Claim was not properly delivered. The Motion was fully briefed, but discovery continued, and disclosures were made between August 11, 2011, and November 23, 2011. On January 12, 2012, Officer Kisela filed a Motion for Summary Judgment, asserting that judgment in his favor was proper under a Fourth Amendment standard of objective reasonableness and Qualified Immunity. Doc. 13 (EOR 345). A separate statement of facts and exhibits was lodged as Document 14 (EOR 270). Plaintiff Amy Hughes responded in opposition and objected to the exhibits provided on the grounds that they were inadmissible because the transcripts of interviews were not properly authenticated. Doc. 15. Officer Kisela responded to the objection by re-submitting some of the exhibits from Doc. 14 along with affidavits purporting to provide authentication.[1] On May 8, 2012 the Motion was granted as to the state law negligence claims. Doc. 20 (EOR 20). The District Court denied the Motion as to the civil rights claims on the grounds that the Complaint, taken as true, adequately

1 The duplicate exhibits submitted with Doc. 16 are not provided in the Excerpts because all of them (and more) were presented in Doc. 14. For ease of reference, Appellant Hughes has presented and will cite to the more comprehensive set of exhibits provided in in Doc. 14, as part of the Excerpts of Record. See EOR 270.

stated that,

> ...it should have been clear to any reasonable officer that, under circumstances alleged in the complaint, "firing at [Plaintiff] was objectively unreasonable." *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001).

EOR 26, lines 8-10.

On November 9, 2012, after additional discovery, Officer Kisela filed a Renewed Motion for Summary Judgment, rearguing Fourth Amendment and Qualified Immunity defenses. Doc. 32 (EOR 192). On November 27, 2012, Ms. Hughes filed a Motion to Strike and Request for Sanctions, arguing that Officer Kisela had improperly included details about Ms. Hughes' mental state that were not known to him at the time he shot Ms. Hughes, therefore not relevant to an analysis under the Fourth Amendment or Qualified Immunity, which considers only those facts available to the officer at the time force is used. Doc. 34 (EOR 180). On December 4, 2012, Officer Kisela replied to the Motion to Strike, stating that the facts about Ms. Hughes' mental condition were "useful contextual information" for the Court. Doc. 35, p.2, lines 16-17 (EOR 174).

On September 30, 2013, the Motion to Strike was denied, along with a statement that the issues would be heard at the hearing on the Motion for Summary Judgment. EOR 18, lines 18-20. On December 9, 2013, the hearing on the Motion for Summary Judgment was held, but there was no discussion of the issues and objections raised in Plaintiff's Motion to Strike. Doc. 49. On December 20, 2013, the Motion for Summary Judgment was granted as to all remaining claims. Docs. 50-51 (EOR 3, 15).

Officer Kisela prevailed below on summary judgment on the basis that his actions in shooting Ms. Hughes four times were "objectively reasonable in light of the facts and circumstances confronting the [officers]... from the perspective of a reasonable officer on the scene." EOR 12-13; EOR 199, lines 2-14 (citing *Graham v. Conner*, 490 U.S. 386, 387-396, 109 S.Ct. 1865, 1867-1872 (1989). Summary judgment was granted on the grounds that Officer Kisela' actions were justified under a Fourth Amendment standard of objective reasonableness as applied in *Graham v. Conner*, and *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007).

STATEMENT OF FACTS

On May 21, 2010, University of Arizona Police Officer Andrew Kisela (Defendant/Appellee), while monitoring Tucson Police Department radio, heard a call to "check welfare" (EOR 286, lines 342-46) of a female purportedly observed hacking at a tree with a knife. EOR 5, lines 8-11; EOR 195, lines 17-21. Officer Kisela was training Officer Garcia, who was driving the UAPD SUV, and decided to respond to the call. EOR 292. As they approached the area, they were stopped by the person who had made the report to TPD (EOR 195, lines 21-23). UAPD bicycle officer Lindsay Kunz was also in the area and heard a call over the radio and responded to Amy Hughes' home at 832 E. 7th Street in Tucson (EOR 327; EOR 5, lines 16-17), near the University of Arizona.

Everything which occurred next – including Appellee Officer Kisela shooting Plaintiff Amy Hughes four times – happened in under a minute (EOR 287, lines 374-5): Officer Kisela and Garcia got out of the SUV (EOR 281, line 142), and officer Kunz got off her bike, and the three University police officers were standing on the outside of the chain-link fence at Plaintiff Amy Hughes' home (EOR 281, lines 145-6; EOR 312-13; EOR 5, lines 20-21).

The police officers saw an older woman in a white shirt who was inside the fence when a second woman came out of the house with a kitchen knife in her hand, pointed *downward*. EOR 283, lines 184-194; EOR 322, line 110. The second woman walked back and forth in the yard, approaching and retreating from the older woman who was

standing next to the car in the driveway, inside the fence. EOR 281, lines 161-68; EOR 330. Officer Kisela was standing outside the fence, where the curb meets the street (EOR 228, lines 306-08) when he decided that Ms. Hughes posed a threat to Ms. Chadwick because of their close proximity to each other. EOR 281, lines 147-148.

The officers were not responding to any report of any crime, as there was no report of any attempted criminal assault or any reported crime of violence against any person, and no report that Plaintiff Amy Hughes' friend Ms. Chadwick was in any danger. The officers made no attempt to ascertain why Ms. Hughes was holding a knife in her own yard or whether Ms. Chadwick was in any danger. The officers asked no questions first.

Instead, Officer Kisela quickly drew his service weapon, got on the police radio, told dispatch he had someone at gunpoint, (EOR 289, lines 609-612), and then gave several commands to "drop the knife" in quick succession, (EOR 283, lines 206 - 215; EOR 65, lines 8-9). Officer Kisela decided that he did not have time to transition to his taser (EOR 197, lines 4-10; EOR 287, lines 392-400) and could not jump the fence (EOR 32, lines 5-10). Then, seeing the metal bar at the top of the chain-link fence was in his line of fire, he ducked down behind the chain link fence and fired at least 4 rounds (EOR 66, ¶16) in a matter of seconds (EOR 287, lines 374-5), with the chain-link fence still in the way (EOR 285-6). Kisela was concerned about other houses and people in the area, who might also be hit by a bullet if he missed. EOR 228.

The record does not show why Kisela felt the need to fire four times, rather than

once, to stop the perceived threat. Ms. Hughes immediately fell to the ground and started screaming. EOR 286, lines 325-6; EOR 227. Officer Kunz jumped the fence and handcuffed Ms. Hughes on orders from Kisela. EOR 329. EOR 254, lines 1-2; EOR 6, line 14. During the shooting, the bystander that Officer Kisela claimed he was trying to protect, Ms. Chadwick, was actually struck by an object, and there was damage done to the chain-link fence from the bullets fired by Officer Kisela. EOR 315; EOR 154-55; EOR 211, lines 559-579.

STANDARD OF REVIEW

A district court's grant of a motion for summary judgment is reviewed *de novo*. *Blanford v. Sacramento County,* 406 F.3d 1110, 1114 (9th Cir. 2005). The Court draws all reasonable inferences in favor of the non-moving party, and determines "whether the District Court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Galvin v. Hay,* 374 F.3d 739, 745 (9th Cir. 2004).

SUMMARY OF THE ARGUMENT

The District Court found that, because of Ms. Hughes' close proximity to Ms. Chadwick, it was objectively reasonable under the circumstances for Officer Kisela to shoot Ms. Hughes to stop her from possibly stabbing Ms. Chadwick with the knife. The record established that the shooting was unconstitutional, excessive and unreasonable under any circumstances, and was a classic example of "shoot first, ask questions later."

The District Court's ruling below was error for several reasons. First, there is a genuine dispute of material facts as to whether this "shoot first, ask questions later" conduct was unconstitutional excessive escalation and use of deadly force when the officers were intervening in a mere welfare call that was not reporting any crime of violence (indeed no crime reported at all) nor to any reported danger by Ms. Hughes to her own friend Ms. Chadwick as they stood on their private property. Second, the facts present in the record, when viewed in light of national standards for police use of force[2], could cause a reasonable jury to conclude that Kisela's actions were objectively unreasonable under the circumstances, making summary judgment improper.

Specifically:

(1) if Ms. Chadwick was close enough to Ms. Hughes to be struck with the knife, she was also close enough to be struck by a stray bullet;

(2) firing a gun through a metal, chain-link fence which is between the shooter

2 UAPD Policy 3.1 & The Commission on Accreditation for Law Enforcement Agencies ("CALEA") Standard 1.3 state: "Police officers will not unreasonably or unnecessarily endanger themselves or the public in applying this [use of force] policy."

and the target creates a risk of the bullets ricocheting off the metal bars, and hitting Ms. Chadwick, which appears to have occurred in this case.

Third, the District Court's ruling was erroneous because it ostensibly relied on, and failed to strike defense-proffered facts about mental health circumstances in relation to the objective reasonableness of the shooting when they should have been stricken – specifically any and all facts not known to Officer Kisela at the time he made the decision to shoot Ms. Hughes. The Court legally erred in that the Court appears to have relied on these improper facts by failing to strike them from the record, and the court cited and repeated these improper and irrelevant facts in the Order granting summary judgment.

Finally, the District Court's judgment is erroneously based, at least in part, on case law of *Sheehan v. City and County of San Francisco*, 2011 WL 1748419 ("Sheehan 2011"), which was subsequently reversed and remanded by this Court in *Sheehan,* Slip Opinion at p.4, (9th Cir. 2014) Case No.: 11-16401 (emphasis added), which concluded that the Ninth Circuit vacated summary judgment and remanded the case for further proceedings because there was a triable issue of fact as to whether the officer failed to accommodate Ms. Sheehan's known mental illness, thus mandating reversal of the judgment as a matter of law.

ARGUMENT

I. THERE IS A DISPUTE OF MATERIAL FACT CONCERNING THE OFFICER'S EXCESSIVE, UNREASONABLE "SHOOT FIRST, ASK QUESTIONS LATER" CONDUCT WHEN OFFICERS WERE NOT RESPONDING TO A REPORT OF ANY CRIME OR CRIME OF VIOLENCE AGAINST ANOTHER PERSON

The officer's "shoot first, ask questions later" conduct was unconstitutional excessive escalation and use of deadly force when the officers were intervening in a mere welfare call of another agency that was not reporting any crime of violence (indeed no crime reported at all) nor any reported danger by Ms. Hughes to her own friend Ms. Chadwick as they stood on the private property of Ms. Hughes.

There is a genuine issue of fact as to whether Amy Hughes was threatening and did pose an immediate threat to any third party. This was not a 911 call for an emergency situation. Significantly, no crime of violence to another, much less any crime at all, was reported beforehand as part of the call or in speaking with the caller. The police officers knew that Ms. Hughes did not make any verbal threat of harm toward others, as such was never reported or observed. No officer indicated that Amy Hughes was expressing anger toward others or otherwise expressing a motive or intent to harm others.

As in the cases cited below, the officers responded to a call and observed a person with a knife. They observed a person holding a knife, stumbling, non-responsive to officers, and not otherwise appearing to be intending physical harm to officers or others. At a minimum, Officer Kisela or the other officers had a duty to inquire to ascertain the

context of the situation between the two women. Instead, Officer Kisela chose to shoot first and ask questions later. A jury could find that Officer Kisela's conduct violated Ms. Hughes' constitutional rights.

The case most factually on point is *Munoz v. City of Union City*, 16 Cal. Rptr. 3d 521, 120 Cal.App.4th 1077 (Cal. App. 2004), reversed on other grounds. In *Munoz*, a jury found an unreasonable use of force where an officer negligently handled a crisis situation involving an intoxicated, hallucinating woman armed with a knife, holding the officer partially liable for her death after he used lethal force to prevent her from stabbing her family members. *Munoz*, 120 Cal.App.4th at 1083-93, 16 Cal.Rptr.3d 521. In *Munoz*, the California Court of Appeal "upheld the finding of liability against [the officer] for unreasonable use of force." *Munoz v. City of Union City*, 55 Cal.Rptr.3d 393, 148 Cal.App.4th 173 (Cal. App., 2007) ("Munoz II").

In *Hayes v. County of San Diego*, 736 F.3d 1223, 1231 (9th Cir. 2013), this Court recently cited the *Munoz* case while holding that "reasonable jurors could conclude that the deputies' use of deadly force was not objectively reasonable," noting that use of excessive force claims under California law were analyzed under the same federal standard of objective reasonableness used in Fourth Amendment cases. The Court is to pay "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or

attempting to evade arrest by flight." *Id.* The Court also considers, under the totality of the circumstances, "the 'quantum of force' used, *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir.2007), the availability of less severe alternatives, *id*. at 1054, and the suspect's mental and emotional state [citation omitted]" while allowing for the fact that officers are "often" called to make split-second judgments in circumstances "that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*, quoting *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865.

Here, the officers did not respond to a call about a tense situation, there was absolutely *no serious crime – or any crime - reported in the call*, there was no evidence of a dangerous criminal suspect attempting to flee. This left the sole remaining factor, which was an unjustified and unreasonable rush to judgment that Ms. Hughes posed an immediate threat to Ms. Chadwick, despite no evidence that she had an aggressive look in her eyes, and no cries for help from Ms. Chadwick. It was not objectively reasonable.

The mere fact that a suspect possesses a weapon does not justify deadly force. *See, e.g., 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). In short,

there was simply no probable cause to believe that Ms. Hughes was committing a crime that threatened physical injury, and their orders to drop the knife came as they were already using deadly force since their weapons were drawn on Ms. Hughes, and thus any lack of response simply did not establish probable cause that a deadly crime was already in progress; the deadly force tail cannot wag the dog of probable cause.

Furthermore, officers are required to be trained on deadly force judgment and decision making ("DFJDM" or generally referred to as deadly force/firearm training).[3] DFJDM is a skill set that builds on the basic constructs of: marksmanship, decision making, situational awareness, stimuli relevance, and general cognitive functioning (all of which also require engagement and marshaling cognitive resources, i.e., workload). *See* Johnson, Robin R., et al. "Identifying psychophysiological indices of expert vs. novice performance in deadly force judgment and decision making." Frontiers in Human Neuroscience 8 (July 2014): 512 (study conducted with "...high fidelity deadly force judgment and decision-making simulators of the type commonly used in law

3 There is a clearly established duty of municipalities for failure to train on "when to shoot," including judgment and decisional training regarding use of deadly force, which is why agencies train officers on deadly force judgment and decision making. See generally *City of Canton v Harris*, 489 U.S. 378 (1989), *Popow v. City of Margate*, 476 F.Supp. 1237 (Dist. N.J. 1979), *Zuchel v. Denver*, 997 F.2d 730 (10th Cir. 1993); see generally, "Training Liability in the Use of Deadly Force," City of Griffen legal mem, http://www.cityofgriffin.com/Portals/1/Documents/Police/Tng%20liability%20in%20the%20use%20of%20deadly%20force.pdf; *Police Chief Magazine* (Oct. 2004), at p. 134 (suggested reading list on Police Use of Force, listing judgment and decision making readings, etc.), available online at http://www.policechiefmagazine.org/magazine/issues/102004/PDFS/Page134_useoforce.pdf

enforcement training (AIS PRISim®, Seattle, WA)."

In the case at hand, direct and circumstantial evidence indicates that officers made the less-than-five-second decision to employ deadly force and used deadly force when Amy Hughes posed no threat to them or to Sharon Chadwick, and they violated basic principles of situational awareness, stimuli relevance, and decision making.

In this case, Sharon Chadwick's Affidavit, and paragraph 13, 16, and 20 in particular (EOR 110-11) establishes circumstantial evidence that indicated the use of deadly force against Amy Hughes may have been unreasonable because she did not objectively pose a threat. See, e.g., *Roberts v. City of Omaha*, 723 F. 3d 966 (8th Cir. 2013) (Pulling away from Officer Ricker, Roberts reached under a pillow and drew a silver kitchen knife, which he swung at Officer Ricker; denial of summary judgment based upon finding some evidence suggested "Officer Martinec continued to fire shots at [Roberts] after he was subdued and no longer posed a threat").

Ms. Chadwick affirms that she "could not believe how quickly Amy had been shot. From the time that I saw the officers at my fence with their guns drawn to the time shots were fired, no more than five seconds passed." EOR 110, ¶ 13. "No one asked me if anything was wrong, or if I needed any help, or if I was threatened by Amy before she was shot." Id, at ¶ 16. "I was never threatened by Amy, and Amy never acted in a threatening manner." EOR 111.

Ms. Chadwick's direct observations and the circumstantial evidence indicate that

officers with situational awareness and stimuli relevance would have perceived that (1) Amy Hughes was not verbally threatening anyone, (2) Amy Hughes was not demonstrating by facial expression that she was a threat to anyone, (3) Amy Hughes was not holding or moving the knife in a threatening manner toward anyone, (4) Sharon Chadwick was an immediately available source of information for gaining situational awareness, (5) Sharon Chadwick was alert and capable of responding to officer instructions to immediately proceed away from Ms. Hughes for officer questioning, and (6) Amy Hughes stood confused and not threatening at the moment she was shot.

In *Roberts*, the facts were as follows:

> When Roberts refused Officer Martinec's request to come upstairs, the officers went into the basement. Officer Martinec drew his firearm, and the other officers carried drawn tasers. When the officers entered the basement, Roberts was lying on his bed in a curtained-off section of the basement. As the officers approached the bed, Officer Martinec told Roberts to get his hands up. Officer Martinec twice told Roberts to lie down on the floor and put his arms to the side. Roberts sat up with his knees on the bed and put his hands up. Roberts did not lie down. Roberts was calm and coherent. Officer Martinec admits he and Officer Ricker were within two to four feet of Roberts when Officer Martinec gave this order, and that Roberts would have had to lie down "[o]n the open spot in between [Officer Martinec] and Officer Ricker" and would be "[w]ithin a foot" of each officer. Officer Jones did not understand whether Officer Martinec intended for Roberts to lie down on the floor or on the bed.
>
> Officer Ricker proceeded to secure Roberts, moving to the foot of Roberts' bed and grabbing Roberts by the left arm. Officer Martinec moved to holster his weapon, preparing to help Officer Ricker secure Roberts. Pulling away from Officer Ricker, Roberts reached under a pillow and drew a silver kitchen knife, which he swung at Officer Ricker. Officer Martinec pulled his weapon and fired six rounds, hitting Roberts in multiple places.

> Roberts has minimal memory of the shooting, but he contests the officers' version of events. And some of Roberts' objections to the officers' narrative are not wholly devoid of evidentiary support. Roberts highlights that a mere six minutes elapsed between the time Officers Martinec and Ricker notified dispatch they had arrived at Roberts' house and the time they called for an ambulance after the shooting. Roberts notes Mrs. Roberts and Roberts' brother Zachary stated in affidavits they did not hear the officers speak to Roberts when the officers were in the basement. Mrs. Roberts and Zachary claimed they heard gunshots within "[t]en to twenty seconds" after the officers entered the basement. Roberts stresses that Mrs. Roberts and Zachary stated "[t]he gunshots were fired in two separate groups of two or three." The district court accepted Roberts' factual position for the purposes of summary judgment, finding some evidence suggested "Officer Martinec continued to fire shots at [Roberts] after he was subdued and no longer posed a threat," and circumstantial evidence indicated "use of deadly force against [Roberts] may have been unreasonable."

Roberts, 723 F. 3d at 970.

In *Roberts*, the Eighth Circuit affirmed the district court's denial of qualified immunity and denial of summary judgment to Officer Martinec on Fourth Amendment excessive force claim.

As in *Roberts*, the district court here should have denied summary judgment, finding that the evidence suggested the officers fired at Amy Hughes when she did not pose a threat, and "use of deadly force against [her] may have been unreasonable."

In the case of *Estate of Saldana v. Weitzel*, 912 F.Supp. 413 (E.D. Wis. 1996), the defendant police officer was not entitled to summary judgment in an action under 42 U.S.C. § 1983 brought by the estate of an intoxicated person who was shot and killed by the officer while brandishing a knife and refusing police orders to drop the weapon,

because issues of fact existed as to whether the subject lunged at or otherwise physically attempted to attack the officer who shot him. In *Stewart v. City of Prairie Village, Kan.*, 904 F. Supp. 2d 1143 (D. Kan. 2012), a police officer's use of deadly force against a mentally-ill woman during a barricade situation was deemed excessive under the Fourth Amendment. Although the woman in *Stewart* actively resisted arrest and declared her desire to commit suicide by cop, the woman did not threaten the officers with a knife before she was shot, as officers had contended, and the fact that one of three successively-fired bullets entered the woman's back, allowed for reasonable inference that woman was not even facing officers when she was shot and killed.

The unpublished Arizona district court case *Martinez v. City of Avondale*, Not Reported in F.Supp.2d, 2014 WL 178144 (D.Ariz. 2014), is illustrative of somewhat similar facts where summary judgment was denied, as should have been done here. Although not precedent, citation of unpublished opinion is allowed under Circuit Rule 36-3.

In *Martinez*,

> The parties agree that the decedent was holding two kitchen knives when Officer Sapp arrived at the Martinez residence and encountered the decedent outside the residence on the public street, but they disagree on what the decedent did immediately thereafter until the shooting. According to Plaintiffs, the decedent walked around a pickup truck parked in the street, "moving really slow" and "dragging his feet," in the general direction of Officer Sapp's patrol car stopped across from the parked truck... As Officer Sapp exited his vehicle, he drew his firearm from its holster, and moved south on 117th Drive, into the middle of the street away from his patrol car... Officer Sapp and eyewitnesses report varying distances between Officer Sapp and the decedent, ranging from 10 to 30 feet, at

the time of the shooting... In addition to Gregory Martinez, Sr., and possibly Mrs. Martinez, Officer Sapp twice shouted at the decedent to drop the knives, but he never dropped the knives to the ground before he was shot... Officer Sapp also yelled "show me your hands," and the decedent puts his hands up with the knives in them. He was not holding the knives in a combative manner nor was he charging or advancing upon Officer Sapp when he was shot. Witnesses indicate the decedent was holding the knives in the air over his head, with the tips pointed upward, and then he lowered them to his waist... A few seconds later, while the decedent was not moving at all, Officer Sapp shot the decedent twice... Gregory Martinez, Jr. was transported by helicopter to St. Joseph's Hospital, where he was pronounced dead....

After considering the parties' briefings, statements of facts, written arguments of counsel, admissible evidence, and viewing the facts, as the Court must, in the light most favorable to the non-moving parties, the Court will deny the Motion as to Count 4. The Court concludes that there are genuine disputes of material fact that require jury resolution.

*3 "Whether the use of deadly force is reasonable is highly fact-specific... but the inquiry is an objective one[.]" *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir.2010) (quoting, inter alia, *Graham v. Connor*, 490 U.S. 386, 397 (1989) (internal quotation marks omitted); see also *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005) (en Banc) ("Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment... in excessive force cases should be granted sparingly.").

The Court finds Plaintiffs have made a sufficient factual showing to create a question of fact whether Officer Sapp's use of deadly force was unreasonable under the circumstances. See, e.g., *Hayes v. County of San Diego*, 736 F.3d 1223, 1232–1233 (9th Cir.2013) (Among the *Graham* factors to consider, "[t]he central issue is whether it was objectively reasonable under the circumstances for the deputies to believe that [the decedent] posed an immediate threat to their safety, warranting the immediate use of deadly force, rather than less severe alternatives —such as an order to stop, an order to drop the knife, or a warning that deadly force would be used if [the decedent] came any closer to the deputies.") (footnote omitted) (citing, inter alia, *Graham*, 490 U.S. at 396–397; *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir.1997) ("Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, ...") (emphasis added); *Smith*, 394 F.3d at 702 (noting that the second

> factor under *Graham*—whether the suspect poses an immediate threat to the safety of the officers or others—is the "most important") (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.1994)).

Martinez at pp. 2-5 (some internal citations omitted).

In this case, the officer's use of deadly force against Ms. Hughes was similarly excessive under Fourth Amendment. She was similarly holding a knife and non-compliant: that doesn't mean she must be shot multiple times in less than a minute without any attempt at inquiry into what is occurring. And, when the facts presented by Ms. Chadwick are considered, a reasonable jury could conclude the force was unconstitutionally excessive and unduly escalated to deadly force without considering or attempting any non-lethal option.

Moreover, as in *Estate of Saldana v. Weitzel*, even if the officer viewed Hughes moving towards Ms. Chadwick, there were no facts known to him that she posed any actual threat, since the officers were not responding to any crime or threatened criminal act against Ms. Chadwick or any person. Significantly, the officers made no effort to ask questions first to even determine whether a threat existed, and there is a dispute of fact as to whether Ms. Hughes lunged at anyone or physically attempted to attack Ms. Chadwick or anyone else.

Furthermore, as noted in oral argument below, even officer Kisela's fellow officers did not confirm or corroborate various claims that officer Kisela made where he asserted without corroboration that Ms. Hughes was visibly crying, or where they did not agree

with Kisela's claims about where the knife was, the number of times the officers said drop the knife, all of which are significant in the overall examination of objective reasonableness in this case. (EOR 18-19, 24.) These evidentiary contradictions alone provided genuine dispute material issues of fact. The judgment should be reversed for a trial on the unreasonable and unconstitutional use of deadly force used in this case.

II. IT IS OBJECTIVELY UNREASONABLE TO FIRE A GUN IN DEFENSE OF A BYSTANDER WHERE THAT SAME BYSTANDER IS CLOSE ENOUGH TO THE TARGET TO BE IN DANGER FROM THE GUNFIRE.

If the standard is "objective reasonableness under the circumstances," then the presence of innocent bystanders is part of the circumstances to be considered. Although the District Court cited the close proximity of Ms. Chadwick to Ms. Hughes as a fact tending to show that Officer Kisela acted reasonably in shooting Ms. Hughes, this fact also shows that his actions may be deemed *unreasonable* in light of national law enforcement standards for use of deadly force while innocent bystanders are in close proximity. Officer Kisela himself expressed concern for "other houses and people in the area". EOR 228. Yet, his actions expressed reckless disregard for Ms. Chadwick.

Officer Kisela's expert claimed that Kisela's "actions complied with the University of Arizona Police Department Policy 3.1 and met the standard of care.," and "UAPD Policy 3.1, use of Force is consistent with nationally recognized standards and best practices as required by CALEA [Commission on Accreditation for Law Enforcement Agencies] standards." EOR 233 & 238.

However, UAPD Policy 3.1 and CALEA Standard 1.3 actually says: **"Police officers will not unreasonably or unnecessarily endanger themselves or the public in applying this [use of force] policy."** (emphasis added). By including the statements by his expert, Officer Kisela put national law enforcement standards at issue in this case. The fact that the undisputed national police standards contradict Officer Kisela's expert's opinion creates a genuine dispute over whether Officer Kisela's actions were reasonable under the circumstances.

Additionally, the cases cited by Kisela below all involved situations where no one else was close enough to be endangered by the officers' actions. In *Gregory v. County of Maui*, 523 F.3d 1103 (9th Cir., 2008), the use of force occurred after a man threatened a friend with a pen. The friend was outside the residence when police entered, grabbed Mr. Gregory, and wrestled him to the ground where he then died of a heart attack.

Kisela cited *Blanford* below for the argument that use of deadly force was proper "against mentally-ill persons who appeared to pose a threat of death or injury to others." EOR 256, line 23 (citing *Blanford v. Sacramento County,* 406 F.3d 1110 (Fed. 9th Cir., 2005)). However, in *Blanford*, the mentally-ill person who was shot was carrying a sword, and was about to enter a private residence. There was no mention made of bystanders who could have been struck in that situation. The officer in *Blanford* had a clear shot, which was not the case here.

III. IT IS OBJECTIVELY UNREASONABLE TO FIRE A GUN IN PURPORTED DEFENSE OF A BYSTANDER WHERE THAT SAME BYSTANDER IS CLOSE

ENOUGH TO THE TARGET TO BE IN DANGER FROM THE GUNFIRE, AND WHERE THERE IS A CHAIN-LINK FENCE BETWEEN THE SHOOTER AND THE TARGET AND BYSTANDER.

Officer Kisela was aware that, when firing a gun at a target with a chain-link fence directly in the way, some percentage of the bullets will strike the metal fencing, fragmenting and ricocheting in unpredictable ways. EOR 228 ("He said he made a split-second decision to shoot low through the fence to avoid hitting the top rail... he did not want to miss because there were other houses and people in the area"). In this case, there was an extreme danger of striking Ms. Chadwick, who was, according to Officer Kisela himself, within arm's reach of his target, Ms. Hughes.

Ms. Hughes' investigator 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).

In his interview with Detective Carroll, Officer Kisela said:

> Um, the chain-link fence was between me and both females. Um, the top bar of the fence was right literally across the lady's with – the lady with the knife – literally right across her breasts. Um, as she walked and I was also moving laterally... I went under – I knelt down and I fired so I fired through the fence instead of going over it or where my line of sight the – the – the steel crossbar was right in my line of sight. So I kind of knelt down as I moved and – and – and **fired through the fence.**

EOR 285-86 (emphasis added). Ms. Hughes raised the issue in her Statement of Controverted Facts: "Shooting a gun through a chain-link fence was much more reckless than using a taser." EOR 102, line 22.

Indeed, Officer Kisela's expert himself noted, "**Officer Garcia said he was concerned about firing his gun through the chain-link fence because he thought the fence might deflect the round and hit Ms. Chadwick**." EOR 230.

Evidence was presented that at least one bullet *did* hit the fence and that something struck Ms. Chadwick. EOR 315; EOR 211, lines 559-579. In addition to Ms. Hughes' investigator witnessing damage to the fence (EOR 154-55), Officer Garcia stated, "Once [Amy Hughes] was secured I – I went to the, uh, to the other woman and made sure she was okay; made sure she wasn't hit." EOR 308.

> KB: Did you observe any wounds or cuts or abrasions on her, on her person, her face, her arms, anything like that?
> AG: I didn't see anything. I did ask her if she was hurt. She said that she felt something on her leg. Ah, and we had meds look at her. I, I don't know if they found anything on her or not...

EOR 315.

This Court articulated the basis for the "objective reasonableness" standard in

Sheehan:

> Fundamentally at issue is the constitutional balance between a person's right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but **in a way that does not turn the intended beneficiary into a victim** or a criminal.

Sheehan, Slip Opinion at p.4, (9th Cir. 2014) Case No.: 11-16401 (emphasis added).

Here, Officer Kisela claims to have fired his gun in an effort to render emergency assistance to Ms. Chadwick, but there was no emergency reported or objectively extant, and he could very easily have turned her into a dead bystander instead. Therefore, as in *Sheehan*, there is a triable issue of fact here, where a jury could find that Officer Kisela's actions were objectively unreasonable under the circumstances, because he did not strike the proper balance between Ms. Hughes' right to be left alone at her own home on her own property, and efforts to render assistance to Ms. Chadwick. This high-risk shooting behavior in relation to the purported victim Officer Kisela was supposedly trying to save, further highlights the overall reckless disregard and unreasonableness of officer Kisela's behavior in deciding to shoot first and ask questions later.

IV. IT WAS REVERSIBLE ERROR FOR THE COURT TO CONSIDER FACTS IN THE ANALYSIS OF OBJECTIVE REASONABLENESS, WHICH WERE NOT AVAILABLE TO OFFICER KISELA AT THE TIME HE SHOT MS. HUGHES.

In his defense, Officer Kisela repeatedly stated facts that were not known to him at

the time he shot Ms. Hughes[4], and even asserted facts that were not true[5]. However, the law in police-use-of-force cases calls for an analysis of *objective* reasonableness, and any facts not known by the officer at the time should not give any weight to whether his actions were reasonable. *Graham*. Ms. Hughes filed a Motion to Strike all such improper evidence, but the Motion was denied, with instructions that the issue would be discussed at the hearing on the motion for summary judgment. EOR 18, lines 18-20. At the hearing, the Court reiterated the prohibition on hindsight information, and briefly referred to the fact that Officer Kisela had brought up such information in his pleadings, but did not hear any argument as to whether that information should have been stricken, and did not rule on the issue. EOR 34 – 37.

The District Court thus erroneously allowed Officer Kisela to have the benefit of both, conflicting arguments: the Court allowed him, on the one hand, to present hindsight information about Ms. Hughes and Ms. Chadwick – information that he claimed he did not have at the time of the shooting – to bolster his argument that his actions were objectively reasonable, *and* the Court allowed him, on the other, to claim the benefit that "the 'reasonableness' of a particular use of force must be judged from the

4 See generally EOR 180-86 (Plaintiff's Motion to Strike & for Sanctions); See also fn.6 below; EOR 254-55; EOR 348, lines 3-10 ("Through its subsequent investigation, UAPD was able to piece together the story that led up to the shooting...," "Hughes demanded $20 that Chadwick owed her. Chadwick told Hughes that her money was in her car."); EOR 174, lines 20-23 ("the fact is that Hughes has a history of threatening Sharon Chadwick with the knife, has admitted to law enforcement that she believes she is a threat to others, and had threatened to kill Chadwick's dog with the knife just before the incident occurred.")

5 EOR 233 - "A diabetic reaction explains why the criminal behavior occurred..."

perspective of a reasonable officer on the scene, *rather than with the 20/20 vision of hindsight*.". EOR 13, lines 1-3. (emphasis in original).

Below, Officer Kisela asserted and made statements about Ms. Hughes' mental health history only when arguing that his actions were reasonable in hindsight,[6] due to facts which he then claims not to have known at the time he shot her[7]. This is exactly the type of hindsight information which is strictly prohibited in an analysis of *objective* reasonableness, yet it was allowed to taint the summary judgment process in District Court. Further, in his Motions for Summary Judgment, Officer Kisela cites almost exclusively to cases which discuss situations where officers used deadly force against mentally ill persons.[8]

6 EOR 348, lines 4-7 ("On the day in question, Chadwick had received a telephone call from Hughes' boyfriend, Randall Elias, informing her that Hughes was threatening to kill one of Chadwick's dogs. When Chadwick got to her house, she found Hughes in her bedroom, crying and holding a large knife over her dog."); EOR 259, lines 7-8 ("Given Hughes' admittedly unstable bipolar condition and history of violent threats..."); EOR 71, lines 11-14 ("Thus, while the Ninth Circuit has said that a Plaintiff's mentally unstable condition may be considered as a factor in the *Graham* analysis, in this case the fact that Hughes is bi-polar..."); EOR 194-96 (RFAs 1-9, 18-22, 24-25, & 28 request information not known to Kisela), EOR 23-32 (describes interviews with Amy Hughes, Sharon Chadwick, & Randy Elias about events before police arrived), p.46 (talks about dealing with a person in a mental health crisis), EOR 246 (one page of interview with Randy Elias about events before police arrived); EOR 68, lines 8-10 ("...in those cases, where a mentally ill person appeared to present an imminent risk of serious injury or death, the use of deadly force was held to be objectively reasonable.")

7 EOR 260, lines 24-26 ("In this case, although Hughes may argue that her bi-polar condition was "obvious," there is no actual evidence that Corporal Kisela should have discerned that Hughes was bi-polar or "emotionally disturbed."); EOR 71, lines 9-11 ("The officers could not know if she was mentally disturbed rather than simply choosing to ignore the officers or on drugs.")

8 EOR 349-50 ("the use of deadly force is sometimes properly employed against

Officer Kisela asserted below that, even if he did know, it would not alter the analysis. EOR 261, lines 1-9. However, if he did know, or should have known from her behavior, that Ms. Hughes may have been mentally ill or disabled, then the proper analysis would be for the Court to consider that factor in determining whether deadly force was appropriate, or whether alternative, less dangerous means of resolving the situation should have been used:

> In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. See *Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill... recluse who had threatened to shoot anybody who entered"). Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, **we emphasize that where it is or should be**

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mentally-ill persons engaged in violent behavior" citing *Blanford,* 406 F.3d at 1112); EOR 350, lines 18-23 ("*See e.g., Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1106-1007 (9th Cir. 2008) (the use of force on a man who 'acted in a bizarre manner throughout the confrontation,' armed with a pen, was reasonable even though the use of force resulted in death); *Reynolds v. Cnty. of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer)"); EOR 354, lines 4-7 ("Courts have found that a person with a mental-health disturbance is just as capable of inflicting harm as anyone else, and it is not unreasonable or excessive for an officer to employ an appropriate level of force." citing *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir. 1999)); EOR 256, lines 22-23 ("Courts have repeatedly found the use of deadly force was properly employed against mentally-ill persons who appeared to pose a threat of death or injury to others" citing *Blanford*); EOR 257, lines 9-10 ("a California court found that the police officers who shot a mentally ill woman wielding a knife acted reasonably" citing *Sheehan*, 2011 WL 1748419 at *10).

> **apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.**

Deorle v. Rutherford, 272 F.3d 1272, 1282-3 (9th Cir., 2001) (emphasis added).

While Kisela's argument that he did not have time to transition to his taser, let alone seek counseling for Ms. Hughes would – in any other case –- not be without any merit, those assertions would be relevant in a case where deadly force and escalation to deadly force are justified in the first place, which was not the case here. Moreover, the clear implications of *Deorle* are that we as a society do not want to respond to mental health crises in the same way that we respond to clearly criminal acts, and that where it is or should be obvious that a person is acting irrationally, the first response should differ in quality to that for a bank robbery, for example. This should be particularly true in the case here, where the purported motivation is to protect a person, but that person is standing in the range of fire and/or ricochet.

Welfare check

There is much discussion about the factor of "the severity of the crime" when determining the reasonableness of the use of force under *Deorle*, but this is not the usual police use of force case where you have a fleeing bank robber, or other, articulable crime that is being, or has been committed. The call that came in over the radio was for a welfare check. EOR 286, lines 342-46; EOR 295. At best, the scene that presented Kisela was one of two women in their own front yard, having a discussion. Kisela

assumed that a dangerous crime was in progress, and those assumptions created the situation where he felt reasonable in shooting Ms. Hughes. He shot first, and asked questions later.

In the opinion granting summary judgment, the District Court briefly discussed the factor of whether mental illness or disability was apparent to Officer Kisela at the time, however, instead of considering whether alternatives were available other than deadly force, the Court appears to have accepted, and based its decision at least in part on the prohibited hindsight information:

> Under the analysis of *Graham*, even considering Plaintiff's emotional state, it does not appear that the force used by Defendant was objectively unreasonable "in light of *all* the relevant circumstances." *Smith*, 394 F.3d at 701 (citation omitted).

EOR 13, lines 23-25.

In *Graham*, as here, the officer almost fatally misapprehended the situation because he attributed malice to what was, in fact, a physiological problem. In *Graham*, a diabetic man was trying to buy orange juice to counteract an insulin injection. 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). A friend drove Graham to a convenience store, but when he went inside, there was a long line at the counter, so he turned around and walked out again, asking to be driven to a friend's house. An officer became suspicious that Graham had robbed the store, and stopped the car. All attempts by Graham and his friend to explain the situation were ignored. Graham got out of the car, ran around it twice and then passed out on the sidewalk briefly. The friend continued to plead with the

officers to give Graham some sugar, but the officers insisted Graham was drunk, not diabetic, and proceeded to handcuff him and assault him, resulting in a broken foot, cuts, bruises, and persistent ringing in his ears. *Graham*, 490 U.S. at 388-90.

Similar to Officer Kisela here, the officers in *Graham* made unwarranted assumptions about the circumstances, and immediately resorted to force without properly assessing the situation. If the officer in *Graham* had been allowed to present hindsight information, he may have shown that Mr. Graham had a history of drunken violence, and had just robbed a convenience store the week before to bolster the perception that his actions had been reasonable. Likewise here, as odd as Ms. Hughes' behavior may have appeared on its face to Officer Kisela, that fact alone could have prompted him to inquire whether Ms. Chadwick even needed defending, or whether she was capable of resolving the situation on her own, as it turns out – in hindsight – that she had done many times before, and likely would have done again, were it not for Officer Kisela's violent intervention. While officers are entitled to immunity when their actions are objectively reasonable under the circumstances, the issue of whether the circumstances were properly assessed is a question of fact that should be considered by the trier of fact at trial.

Significantly, the District Court below also cited and relied on *Sheehan v. City and County of San Francisco,* 2011 WL 1748419 ("*Sheehan* 2011"), a case on which Officer Kisela heavily argued below. That case has since been remanded to District Court. *See*

Sheehan v. City of S.F. (9th Cir., 2014), Slip Opinion, February 21, 2014, Case No.: 11-16401 ("*Sheehan* 2014").

The Ninth Circuit vacated summary judgment and remanded the case for further proceedings because there was a triable issue of fact as to whether the officer failed to accommodate Ms. Sheehan's known mental illness, thereby contributing to the circumstances which led to the use of deadly force. In *Sheehan,* a woman known to be mentally-ill was alone in her house, wielding a knife when the officers arrived. *Id.* at p.8. Sheehan advanced on the officers, threatening to kill them. *Id.* at p.11. The officers retreated back into the hallway for their safety, and called for backup, but instead of waiting, they drew their weapons and forced their way back in the house. *Id.* at p.12. The officers sprayed her with pepper spray, but it had no effect on her forward movement. *Id.* at p.13. Officer Holder was standing with her back to the wall, and Sheehan was within striking distance of her with the knife, when she made the decision to shoot. *Sheehan* 2011, at p.4. The Ninth Circuit held that Title II of the ADA applies to arrests and on the facts presented, there was a triable issue whether the officers failed to reasonably accommodate plaintiff's disability when they forced their way back into her room without taking her mental illness into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness.

Here, the District Court's reliance on the prior ruling in *Sheehan 2011* is cause for

reversal as a matter of law, as it is no longer binding precedent, and Officer Kisela's actions in this case should similarly be reviewed, either without the improper evidence of mental illness that was allowed to taint the District Court's judgment on the factor of objective reasonableness, or, if such evidence is considered at all, it should be in the context of whether a reasonable officer would have known that Ms. Hughes was suffering from mental illness or disability, and thus should have followed police protocols for such circumstances instead of resorting to deadly force as the first option without asking questions.

In this case, the trial court incorrectly relied on such evidence as proffered by Officer Kisela in relation to determining the objectiveness of Kisela's conduct. The judgment should be reversed for a trial on the merits.

V. LAW ON APPEAL.

Whether an officer's actions were reasonable is traditionally a question of fact for the jury. *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir.1986); Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1179 (1991). A defendant can only win on summary judgment if, after resolving all factual disputes in favor of the plaintiff, the District Court concludes that the officer's use of force was objectively reasonable under the circumstances.

In *Drummond ex rel. Drummond v. City of Anaheim*, the Court explained why these inferences are properly questions for the jury in excessive force cases:

> A Fourth Amendment claim of excessive force is analyzed under the framework set forth by the Supreme Court in *Graham v. Connor*. That analysis requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. Determining whether a police officer's use of force was reasonable or excessive therefore "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force. **Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly. This is because police misconduct cases almost always turn on a jury's credibility determinations.**

Drummond, 343 F.3d 1052, 1056 (9th Cir., 2003) (internal citations omitted) (emphasis added).

Here, the facts were not disputed, but were inferred by the District Court in favor of the defendant: (1) the fact that Ms. Chadwick was less than five feet away from Ms. Hughes when Officer Kisela opened fire was not disputed, but was cited by the District Court as the main factor in finding Officer Kisela's actions reasonable, whereas if the inference were made in favor of the Plaintiff, the proximity should have been a factor weighing ***against*** a finding of reasonableness because of the risk of harm to Ms. Chadwick; (2) the fact that there was a five-foot high chain-link fence between the shooter and target was cited by Officer Kisela as the reason why he could not use his Taser, however the same fact, if construed in favor of the Plaintiff, would tend to show that Officer Kisela was aware, as was Officer Garcia, of the probability that anything

fired through the fence might also strike the fence, and therefore he knew that shooting through the fence was objectively unreasonable. Additionally, facts that should not have been considered at all – Ms. Hughes' immediate and prior history – were allowed to taint the finding of summary judgment.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument would aid in resolution of the issues on appeal.

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: August 7, 2014 Respectfully submitted,

s/Vince Rabago, Esq.
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STATEMENT OF RELATED CASES

Appellant is unaware of any related cases as defined in Ninth Circuit R. 28-2.6.

CERTIFICATE OF COMPLIANCE

As required by F.R.A.P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,034 words. 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

Vince Rabago, Esq.

14-15059

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2014, a copy of the foregoing APPELLANT'S OPENING BRIEF was served via CM/ECF or email on the following:

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