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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FRANCES GALLARDO,	)	Case No. CV 18-09835 DDP (AFMx)
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER GRANTING DEFENDANTS' MOTION</b>
	)	<b>FOR SUMMARY JUDGMENT</b>
COUNTY OF SAN LUIS OBISPO,	)	
ET AL.,	)	
	)	[Dkt. 29]
Defendants.	)	

On January 9, 2017, San Luis Obispo (SLO) County Senior Deputy Sheriff Gregory Roach responded to a trespassing call involving Decedent Josue Gallardo ("Gallardo"), who was reported to be driving a gray Cadillac sedan. (Declaration of Gregory Roach ¶¶ 16, 18.) Although Gallardo had left the scene by the time Roach arrived, Roach did encounter a gray Cadillac sedan nearby, and determined that the car was registered as a rental. (Id. ¶ 23.) Roach also learned that Gallardo had an outstanding arrest warrant for a misdemeanor domestic battery charge, was violating a restraining order, was currently on probation for domestic battery, and had consented to search as a condition of probation. (Id. ¶ 21.)

1           Approximately two weeks later, in the early morning hours of  
2 January 24, 2017, Roach and Deputy Sheriff Jonathan Calvert  
3 ("Calvert") were on patrol on Highway 101 when they observed a gray  
4 Cadillac sedan that appeared to be the same vehicle Roach had  
5 observed two weeks prior. (Roach Decl. ¶ 25.) Roach ran the plates  
6 and confirmed that the car was a rental, identified the driver as  
7 Gallardo, then instructed Calvert to pull Gallardo over because  
8 Gallardo had an arrest warrant and had consented to probation  
9 searches. (Id. ¶¶ 26-28.) According to Calvert, Gallardo appeared  
10 agitated, "and was potentially a methamphetamine user."  
11 (Declaration of Jonathan Calvert ¶ 19.)

12           Once Gallardo pulled over, Calvert exited his police car and  
13 approached the driver's side of Gallardo's vehicle with his firearm  
14 drawn. (Exhibit H in Support of MSJ ("Video").) After radioing in  
15 the incident, Roach then exited the police car and walked towards  
16 the passenger side of Gallardo's vehicle, also with gun drawn.  
17 (Id.) Calvert ordered Gallardo to show his hands. (Id.) Gallardo  
18 first asked, "Why?" before then complying with Calvert's repeated  
19 command. (Id.) Gallardo then said, "Shoot me, I don't care," to  
20 which Calvert responded, "I don't want to shoot you, I don't know  
21 you." (Id.) Gallardo then complied with Calvert's instruction to  
22 turn off the car.

23           Calvert then said, "Because of the way you're acting, I want  
24 you to get out of the car and lay on the ground right now." (Id.)  
25 A brief colloquy ensued. Although the entirety of the conversation  
26 is not audible, Calvert later stated that Gallardo again asked  
27 Calvert to shoot him. (Calvert Decl. ¶ 28.) Calvert responded, "I  
28 don't want to shoot you," and holstered his weapon. (Video.) By

1 this point, Roach had approached the passenger side and was looking  
2 at Gallardo through the passenger-side window with a flashlight.

3 (Id.)

4 After further protest from Gallardo, Calvert again drew his  
5 firearm and asked whether Gallardo had a gun. (Id.) Gallardo  
6 responded, "A gun?" Calvert asked the question again, then  
7 instructed Gallardo to show his hands. (Id.) Gallardo did not  
8 comply, and Calvert began to back away from the driver's side door  
9 toward the rear of the vehicle. (Id.) Approximately five seconds  
10 after Calvert instructed Gallardo to show his hands, the brake  
11 lights activated and the driver's side door began to open. (Id.)

12 According to Roach, Gallardo was moving his hand furtively  
13 toward his right pants pocket as he conversed with Calvert. (Roach  
14 Decl. ¶ 33.) Roach saw Gallardo quickly pull a handgun out of his  
15 pants pocket in a gripped firing position and move the gun to his  
16 left toward Calvert. (Id. ¶ 34.) Roach immediately fired several  
17 rounds into the car at Gallardo while moving backward away from the  
18 car. (Id. ¶ 38; video.) At that point, Calvert also fired his  
19 weapon into the car toward Gallardo. (Calvert Decl. ¶ 32; video.)

20 After backup units and medical personnel arrived, Roach and  
21 Calvert again approached the vehicle. Both observed a handgun on  
22 Gallardo's lap. (Calvert Decl. ¶ 39; Roach Decl. ¶ 44.) No  
23 photographs of the gun were taken, however, before Roach removed  
24 the gun from the vehicle.<sup>1</sup> (Exhibit I in support of motion ("SLO  
25 video")). Roach then confirmed that Gallardo was not breathing and  
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27  
28 <sup>1</sup> The weapon was a BB-gun replica of a Walther PPK.  
(Declaration of James Voge ¶ 18.)

1 had no pulse. (Roach Decl. ¶ 44.) Medical personnel pronounced  
2 Gallardo dead at the scene. (Id.)

3 Investigators later discovered that Gallardo had recently  
4 purchased the gun found in the vehicle, had posted images to social  
5 media of himself holding the gun to his head, made statements to  
6 numerous people indicating an intent to commit suicide, was seen  
7 listening to a police scanner shortly before the encounter with  
8 Calvet and Roach, and left a suicide note in the trunk of the  
9 vehicle. (Declaration of James Voge.) Investigators also  
10 discovered alcohol and cocaine in Gallardo's blood. (Id.)

11 Gallardo's widow and successor in interest, Plaintiff Frances  
12 Gallardo, filed the instant suit alleging several civil rights  
13 claims against Calvert, Roach, SLO County, the SLO County Sheriff's  
14 Department, and the SLO County Sheriff, in his official capacity.  
15 Defendants now move for summary judgment on all claims against  
16 them.<sup>2</sup>

## 17 **II. Legal Standard**

18 Summary judgment is appropriate where the pleadings,  
19 depositions, answers to interrogatories, and admissions on file,  
20 together with the affidavits, if any, show "that there is no  
21 genuine dispute as to any material fact and the movant is entitled  
22 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party  
23 seeking summary judgment bears the initial burden of informing the  
24 court of the basis for its motion and of identifying those portions

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26 <sup>2</sup> Plaintiff's eighth cause of action is alleged only against  
27 Doe Defendants, and Defendants do not address that claim.  
28 Plaintiff has also indicated that she will dismiss her Third Claim  
for Denial of Medical Care and all Monell claims. At oral  
argument, Plaintiff expressed an intention to dismiss the eighth  
cause of action as well.

1 of the pleadings and discovery responses that demonstrate the  
2 absence of a genuine issue of material fact. See Celotex Corp. v.  
3 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from  
4 the evidence must be drawn in favor of the nonmoving party. See  
5 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). If the  
6 moving party does not bear the burden of proof at trial, it is  
7 entitled to summary judgment if it can demonstrate that "there is  
8 an absence of evidence to support the nonmoving party's case."  
9 Celotex, 477 U.S. at 323.

10       Once the moving party meets its burden, the burden shifts to  
11 the nonmoving party opposing the motion, who must "set forth  
12 specific facts showing that there is a genuine issue for trial."  
13 Anderson, 477 U.S. at 256. Summary judgment is warranted if a  
14 party "fails to make a showing sufficient to establish the  
15 existence of an element essential to that party's case, and on  
16 which that party will bear the burden of proof at trial." Celotex,  
17 477 U.S. at 322. A genuine issue exists if "the evidence is such  
18 that a reasonable jury could return a verdict for the nonmoving  
19 party," and material facts are those "that might affect the outcome  
20 of the suit under the governing law." Anderson, 477 U.S. at 248.  
21 There is no genuine issue of fact "[w]here the record taken as a  
22 whole could not lead a rational trier of fact to find for the  
23 nonmoving party." Matsushita Elec. Indus. Co. v. Zenith Radio  
24 Corp., 475 U.S. 574, 587 (1986).

25       It is not the court's task "to scour the record in search of a  
26 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,  
27 1278 (9th Cir. 1996). Counsel have an obligation to lay out their  
28 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d

1 1026, 1031 (9th Cir. 2001). The court “need not examine the entire  
2 file for evidence establishing a genuine issue of fact, where the  
3 evidence is not set forth in the opposition papers with adequate  
4 references so that it could conveniently be found.” Id.

5 **III. Discussion**

6 A. Excessive Force

7 Many of Plaintiff’s claims are premised on the contention that  
8 Roach and Calvert’s use of deadly force against Gallardo was  
9 unreasonable and excessive. In Fourth Amendment excessive force  
10 cases, the question is whether police officers’ actions are  
11 objectively reasonable given the totality of the circumstances.  
12 Bryan v. MacPherson, 630 F.3d 805, 823 (9th Cir. 2010). The  
13 officers’ underlying intent and motivations are not pertinent.  
14 Graham v. Connor, 490 U.S. 386, 396–97 (1989). Whether a use of  
15 force was reasonable will depend on the facts of the particular  
16 case, including, but not limited to, (1) whether the suspect posed  
17 an immediate threat to anyone, (2) whether the suspect resisted or  
18 attempted to evade arrest, and (3) the severity of the crime at  
19 issue. Id. at 396. Of these, the most important factor is whether  
20 the suspect posed an immediate threat to anyone’s safety. Mattos  
21 v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011) (en banc). Only  
22 information known to the officers at the time the conduct occurred  
23 is relevant. Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539,  
24 1546–47 (2017); Glenn v. Washington Cty., 673 F.3d 864, 873 n.8  
25 (9th Cir. 2011). The use of deadly force is only reasonable if a  
26 suspect “poses a significant threat of death or serious physical  
27 injury to the officer or others.” Gonzalez v. City of Anaheim, 747  
28 F.3d 789, 793 (9th Cir. 2014) (emphasis added) (internal quotation

1 omitted). Although “the mere fact that a suspect possesses a  
2 weapon does not justify deadly force,” “where a suspect threatens  
3 an officer with a weapon such as a gun or a knife, the officer is  
4 justified in using deadly force.” Hayes v. County of San Diego,  
5 736 F.3d 1223, 1233 (9th Cir. 2013) (internal alteration omitted);  
6 Smith v. City of Hemet, 394 F.3d 689, 704 (9th Cir. 2005); see also  
7 Cruz v. City of Anaheim, 765 F.3d 1076, 1078 (9th Cir. 2014) (“It  
8 would be unquestionably reasonable for police to shoot a suspect .  
9 . . if he reaches for a gun in his waistband.”)

10 The central question in the instant case, therefore, is  
11 whether a rational trier of fact could conclude that Gallardo,  
12 contrary to Roach’s version of events, did not draw a gun on  
13 Calvert. Having reviewed the evidence submitted by the parties,  
14 the court concludes that no reasonable factfinder could reach such  
15 a conclusion.

16 “[S]ummary judgment should be granted sparingly in excessive  
17 force cases,” especially “where the only witness other than the  
18 officers was killed during the encounter.” Gonzalez v. City of  
19 Anaheim, 747 F.3d 789, 795 (9th Cir. 2014) In deadly force cases,  
20 the Decedent is, of course, not able to contradict the shooting  
21 officers’ account of events. Accordingly, this Court must  
22 carefully examine all evidence in the record, including  
23 circumstantial evidence that might discredit the officers’ story,  
24 “to determine whether the officer’s story is internally consistent  
25 and consistent with other known facts.” Id. (quoting Scott v.  
26 Henrich, 39 F.3d 912, 915 (9th Cir. 1994); Cruz, 765 F.3d at 1079-  
27 80. In this case, however, the record includes video of the entire  
28 incident. Although the video is not conclusive as to certain

1 questions, such as whether Gallardo indeed had a gun in his pocket  
2 or on his lap, the video is consistent with Roach and Calvert's  
3 version of events. Nor do there appear to be any material  
4 inconsistencies between the two deputies' stories.<sup>3</sup>

5 Plaintiff nevertheless contends that there is a genuine  
6 dispute of fact, primarily because Plaintiff's expert, Dr. Jesse  
7 Wobrock, conducted a "biomechanical analysis" indicating that  
8 Gallardo was not reaching for a gun in his pocket or pointing a gun  
9 at anyone. (Wobrock report at 8-9.) Dr. Wobrock's "analysis,"  
10 however, appears to consist solely of a reconstruction of bullet  
11 trajectories.<sup>4</sup> There does not appear to be any methodology linking  
12 Dr. Wobrock's trajectory analysis to the relevant conclusions,  
13 including an opinion that the right front pocket "would be a very  
14 unusual spot to keep a gun" and that Gallardo was attempting to  
15 comply with Calvert's orders. Indeed, all of Dr. Wobrock's  
16 conclusions appear to be premised on the fact that all but one of  
17 the shots that hit Gallardo did so from the rear. That fact,  
18 however, is in no way inconsistent with Calvert and Roach's  
19 descriptions or with the video, which shows both deputies firing as  
20 they retreat away from Gallardo's vehicle. Dr. Wobrock's opinion  
21 is not admissible, let alone sufficient to create a triable issue

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23 <sup>3</sup> Although Calvert did testify at his deposition that the  
24 windows of the car were hard to see through from five to seven feet  
25 away, that testimony is not inconsistent with Roach's statement  
26 that he was able to see Gallardo through the passenger side window  
27 at close range with a flashlight. Video evidence confirms that  
28 Roach was shining a flashlight into the vehicle from close range.

29 <sup>4</sup> Wobrock's analysis does not include any opinion about the  
30 sequence of bullet impacts. Wobrock does opine, however, that one  
31 shot to the front of Gallardo's leg likely occurred after previous  
32 shots, as Gallardo involuntarily turned his body toward the  
33 passenger side.



1 of fact. See Fed. R. Evidence 702; Daubert v. Merrell Dow  
2 Pharmaceuticals, Inc., 509 U.S. 579, 589 n.7, 595 (1993).

3 Nor, contrary to Plaintiff's argument, is this case comparable  
4 to Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001). There,  
5 over a dozen officers responded to a situation involving a  
6 disturbed suspect who was obviously suicidal. Deorle, 272 F.3d at  
7 1280. The shooting officer observed the suspect for up to ten  
8 minutes, before eventually firing when the suspect advanced, at a  
9 steady gait, with a bottle or can in hand. Id. at 1281. Those  
10 circumstances differ greatly from those here, where the evidence  
11 indicates that Gallardo drew a seemingly lethal weapon at close  
12 range and without warning. Furthermore, although Plaintiff's  
13 comparison appears to be rooted in officers' knowledge of a  
14 suspect's disturbed mental state, Plaintiff has cited no admissible  
15 evidence that Roach knew that Gallardo was suicidal, pointing only  
16 to a letter from the SLO County District Attorney stating that  
17 Gallardo had expressed suicidal desires to Roach in November of  
18 2016.<sup>5</sup>

19 Plaintiff's only other argument appears to be that the lack of  
20 photographic evidence of the gun in Gallardo's lap calls into  
21 question Calvert and Roach's statement that the gun was, in fact,  
22 recovered from Gallardo's lap. The plentiful evidence of  
23 Gallardo's history with the gun, however, precludes any genuine  
24 dispute as to whether deputies planted the weapon. Furthermore, to  
25 the extent Plaintiff suggests that Defendants may have, contrary to

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27 <sup>5</sup> Roach states in his reply declaration that the District  
28 Attorney's letter appears to mistakenly assume that statements made  
to Roach's partner at the time were made to Roach as well. (Roach  
reply dec. ¶¶ 3-8.)

1 their version of events, recovered the weapon from some other  
2 location in the vehicle, video evidence does not support  
3 Plaintiff's theory. The post-shooting video shows Roach again  
4 approaching Gallardo's vehicle, opening the door, reaching quickly  
5 into the driver's area of the vehicle with his left hand, and then  
6 recovering and removing the gun almost immediately, within  
7 approximately two seconds. (SLO video.) Roach's left shoulder  
8 remains outside the vehicle, as does his head, which remains above  
9 the roofline of the vehicle. (Id.) The video evidence is,  
10 therefore, entirely consistent with Roach's declaration. No  
11 reasonable trier of fact could rely upon the absence of photographs  
12 of the gun in Gallardo's lap to conclude that Gallardo did not draw  
13 a gun on Calvert.<sup>6</sup>

14 Although defendants in deadly force cases must meet a high bar  
15 to obtain summary judgment, there is no triable issue here as to  
16 whether Calvert and Roach's use of deadly force was objectively  
17 reasonable. Accordingly, Defendants are entitled to summary  
18 judgment on all excessive force-based claims.

19 B. Reasonable Suspicion for the Traffic Stop

20 Gallardo's Second Cause of Action alleges that Calvert and  
21 Roach unreasonably detained Gallardo when they pulled him over.  
22 There is no dispute, however, that there was an outstanding warrant  
23 for Gallardo's arrest, and that Roach was made aware of that  
24 warrant two weeks prior, when he responded to the January 7  
25 trespassing call involving Gallardo. Plaintiff glosses over this

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27 <sup>6</sup> Plaintiff also points to deputy instructions not to take  
28 pictures as evidence of some kind of conspiracy or cover up. Those  
instructions were given, however, after the gun was recovered.  
(Exhibit E in opposition to motion at 12-13.)



1 **IV. Conclusion**

2 In all but the most compelling cases, decisions of liability  
3 in civil rights cases involving deadly force should rightly be left  
4 to juries. To do otherwise erodes the confidence of the public in  
5 the integrity of the courts and in the continued viability of the  
6 Civil Rights Act. This case, however, is one of those few  
7 compelling cases that cannot go forward. That does not make it any  
8 less a tragedy. A man lost his life, and the officers involved  
9 will forever have to live with the knowledge that they took a life.  
10 The officers were confronted with an impossible situation. In  
11 hindsight, did they act perfectly? No. A man died. In such  
12 situations there will always be room for after-the-fact criticisms.  
13 But there can be no dispute that Defendants acted reasonably under  
14 the circumstances, within the bounds of the law. Therefore, for  
15 the reasons stated above, Defendants' Motion for Summary Judgment  
16 is GRANTED.

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19 IT IS SO ORDERED.  
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21  
22 Dated: August 5, 2020  
23

  
DEAN D. PREGERSON  
United States District Judge

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27 <sup>7</sup>(...continued)  
28 Gallardo over, the court need not address Plaintiff's arguments  
regarding Gallardo's probation search condition and reasonable  
suspicion.