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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **STACEY BERBEREIA, individually and**
7 **on behalf of the ESTATE OF ALBERT**
8 **HANSON, JR., DANIEL HANSON, and**
9 **KIMBERLY NIZ,**

10 **Plaintiffs,**

11 **v.**

12 **COUNTY OF KINGS; DEPUTY**
13 **TAYLOR LOPES; DETECTIVE**
14 **MARIUS BARSTECEANU; DEPUTY**
15 **THOMAS OLSON; UNKNOWN LAW**
16 **ENFORCEMENT OFFICERS,**

17 **Defendants.**

1:16-CV-00363-LJO-SKO

ORDER DENYING MOTION FOR
RECONSIDERATION (ECF No. 43).

18 Before the Court for decision is a motion for reconsideration filed by Defendants County of
19 Kings, Deputy Taylor Lopes, Sergeant Marius “Chris” Barsteceanu, and Deputy Thomas Olson, ECF
20 No. 43, concerning the April 3, 2018 Memorandum Decision and Order granting in part and denying in
21 part Defendants’ motion for summary judgment. ECF No. 38. Specifically, Defendants ask the Court to
22 reconsider its determination that disputes of fact exist to preclude summary judgment on Plaintiffs’
23 fourth and fourteenth amendment claims. Having reviewed the motion and the record evidence cited
24 therein, the Court DENIES the motion.

25 In the interest of expedience, the Court incorporates by reference the facts described and
26 reasoning provided in its April 3, 2018 Order. *Id.* On reconsideration, Defendants first argue that the
27 Court overlooked certain aspects of the testimony of video forensic expert Michael Schott. In
28 particular, Mr. Schott testified that at 17 hours, 19 minutes, and 50.240 seconds into the video of the

1 incident recorded by the California Highway Patrol (“CHP”) airplane camera, the Decedent began to
2 elevate the barrel of his rifle and move it in a clockwise direction toward the rear of the Bronco, where
3 responding deputies were located. Plaintiff’s Ex. 15 (ECF No. 34-7), Depo. of Michael Schott at 28:11-
4 13. Mr. Schott testified that the “last traces” of the rifle moved clockwise out of the view of the CHP
5 camera at 17:19:51.720. In sum, Mr. Schott testified that the images “show the rifle rising toward the
6 seat – the seat toward the rear of the vehicle as [decedent is] turning to his right. Based on that alone, I
7 would classify it as an imminent threat because it gives the appearance consistent with him turning
8 toward the officers with the rifle.” *Id.* at 14:17-23. After this motion, the rifle goes out of camera view
9 and stays out of view for about 2.48 seconds. *Id.* at 11:22-12:7. During this time, Officer Manning
10 could not see what was happening through his view of the inside of the front seat of the vehicle from
11 above.

12 Defendants argue that during this 2.48-second span, there is nothing to refute their testimony
13 that the rifle was pointed toward the rear of the Bronco (at the officers). ECF No. 43 at 4. However,
14 Officer Manning’s testimony indicates that Plaintiff had turned back to face the front windshield by the
15 time the first shot penetrated the front windshield of the Bronco. Plaintiff’s Ex. 10 (ECF No. 34-7),
16 Depo. of Dusty Manning at 22:8-25 (“Yeah, that rifle came all the way basically pointing out towards
17 the windshield, and then that shot occurred.”). This, viewed in a light most favorable to Plaintiffs
18 coupled with the fact that there is no evidence that Decedent ever discharged his weapon, could support
19 a factual finding that Decedent was facing the front of the Bronco (or at least substantially so) at the
20 time the first shot was fired. Defendants argue that there is no evidence to indicate this was indeed the
21 first shot fired – suggesting that Deputies may have reacted earlier to their purported impression that
22 Decedent was pointing the rifle toward the back of the vehicle. ECF No. 43-1. But, the video evidence
23 circumstantially supports the factual proposition that the first bullet seen by Officer Manning exiting
24 the windshield of the vehicle was the first bullet fired, by virtue of the absence of any other visual
25 evidence of the timing of weapons firings or bullet strikes. Defendants have provided no evidence to
26 the contrary at this stage of the case, and certainly no undisputed evidence to the contrary.

27 Moreover, Decedent’s own body calls into question Defendants’ descriptions of what took place
28 during the 2.48 second period when Officer Manning could not see the rifle from the air. The autopsy

1 report shows numerous wounds to the back side of Decedent's body (his back, the back of his neck, and
2 the back of his head). *See* Plaintiff's Exhibit 2 (ECF No. 34-7) (Autopsy Report) (Bates #
3 BERBERIA030). Defendants make much of the fact that the autopsy report indicates "[t]he most
4 prominent wound consists of a blowout wound of the right face extending from the right forehead to
5 just below the right nose." Doc. 34-7 at 5. Defendants suggest that this, along with the scene
6 photographs, indicates Plaintiff was turned to the right when he was shot. *Id.* While neither party
7 presents expert testimony to help interpret the raw autopsy report (Plaintiff's Ex. 2), related narrative
8 contained within the Incident report (Plaintiff's Exhibit 1 (ECF No. 34-6), pp. 426-427), and the scene
9 photographs (Plaintiff's Exhibit 21 (ECF No. 34-8)), Defendants' interpretation is certainly not the only
10 facially reasonable one. Viewing the evidence in the light most favorable to Plaintiff, it seems equally if
11 not more likely that the "blowout" wound in Decedent's right forehead is an exit wound, which could
12 support Plaintiffs' position that all bullet entry wounds were to the back of Decedent's body. This is the
13 essence of a factual dispute that cannot be resolved on summary judgment.

14 Finally, Defendants argue that the Court committed clear error in connection with its ruling on
15 Plaintiffs' Fourteenth Amendment claim. The law on this issue is clear. Government conduct may
16 offend due process only when it "'shocks the conscience' and violates the 'decencies of civilized
17 conduct.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). A plaintiff may demonstrate that an
18 officer's conduct shocks the conscience by showing that the officer acted with either (1) deliberate
19 indifference, or (2) a purpose to harm the decedent for reasons unrelated to legitimate law enforcement
20 objectives. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The appropriate standard of
21 culpability in a given case turns on whether the officer had an opportunity for actual deliberation. *Id.* at
22 at 1138.

23 Where actual deliberation is practical, then an officer's "deliberate
24 indifference" may suffice to shock the conscience. On the other hand,
25 where a law enforcement officer makes a snap judgment because of an
26 escalating situation, his conduct may only be found to shock the
conscience if he acts with a purpose to harm unrelated to legitimate law
enforcement objectives.

27 *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013) (internal quotation omitted). "By its
28 nature, the determination of which situation [an officer] actually [finds] himself in is a question of fact

1 for the jury, so long as there is sufficient evidence to support both standards.” *Duenez v. City of*
2 *Manteca*, No. 2:11-cv-01820-LKK-AC, 2013 WL 6816375, at *14 (E.D. Cal. Dec. 23, 2013).

3 Here, again viewing the evidence in the light most favorable to Plaintiffs (i.e., that Decedent
4 never turned around and aimed the rifle at Defendants), a jury could find that Defendants never
5 encountered the type of emergency situation that would necessitate a snap judgment. Accordingly, the
6 Court is required on summary judgment to assume that the standard of culpability more favorable to
7 Plaintiffs (deliberate indifference) applied for purposes of resolving the motion for summary judgment.
8 “Deliberate indifference occurs when ‘the official acted or failed to act despite his knowledge of a
9 substantial risk of serious harm.’” *Solis v. Cty. of Los Angeles*, 514 F.3d 946, 957 (9th Cir. 2008)
10 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). If Plaintiffs’ facts are believed, a finder of fact
11 could conclude that the deliberate indifference standard is satisfied in this case.

12 Defendants’ motion for reconsideration is DENIED.

13
14 IT IS SO ORDERED.

15 Dated: April 17, 2018

/s/ Lawrence J. O’Neill
16 UNITED STATES CHIEF DISTRICT JUDGE