UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LOUREECE CLARK,

Plaintiff,

v.

THOMAS McGUIRE, et al.,

Defendants.

No. 2: 12-cv-2159 LKK KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants Sacramento County Sheriff's Deputies Griffiths and McGuire used excessive force against him in violation of the Fourth Amendment.

Pending before the court is defendants' summary judgment motion. (ECF No. 28.) Defendants argue that they did not use excessive force and that they are entitled to qualified immunity. After carefully reviewing the record, the undersigned recommends that defendants' motion be granted as to defendant Griffiths and denied as to defendant McGuire.

Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c).) "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 Advisory Committee Notes to 2010 Amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Consequently, if the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of such a factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material in support of its contention that such a dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return

a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

Plaintiff's Claims

This action is proceeding on the original verified complaint against defendants Sacramento County Deputy Sheriffs Griffiths and McGuire. (ECF No. 1.) Plaintiff alleges that on August 8, 2009, defendants shot him in the left foot even though he did not match the description of any suspect. Plaintiff alleges that he was an unarmed registered process server.

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Legal Standards

Fourth Amendment

A seizure is a "governmental termination of freedom of movement through means intentionally applied," Jensen v. City of Oxnard, 145 F.3d 1078, 1083 (9th Cir. 1998) (internal quotation marks and citation omitted), and occurs "whenever [an officer] restrains the individual's freedom to walk away." Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985). An intentional shooting by a police officer constitutes a seizure for purposes of the Fourth Amendment. Jensen, 145 F.3d at 1078.

"To determine if a Fourth Amendment violation has occurred, we must balance the extent of the intrusion in the individual's Fourth Amendment rights against the government's interests to determine whether the officer's conduct was objectively reasonable based on the totality of the circumstances. [Citation.]" Espinosa v. City and County of San Francisco, 598 F.3d 528, 537 (9th Cir.2010) (citing Graham v. Connor, 490 U.S. 386, 396–397 (1989)). "An objectively unreasonable use of force is constitutionally excessive and violates the Fourth Amendment's prohibition against unreasonable seizures." Torres v. City of Madera, 648 F.3d 1119, 1123–1124 (9th Cir. 2011).

A court analyzes the reasonableness of the force employed in police seizure according to the factors set forth by the Supreme Court in Graham. The Graham Court employed "a non-exhaustive list of factors" which include "(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 the suspect actively resists detention or attempts to escape." Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997) (citing Graham, 490 U.S. at 388).

In Tennessee v. Garner, 471 U.S. 1, 11 (1985), the Court held that the use of deadly force "to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Furthermore, the Court observed that "[i]t is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id.

Qualified Immunity

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In ruling upon the issue of qualified immunity, one inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the defendant's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part by Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

The other inquiry is whether the right was clearly established. Saucier, 533 U.S. at 201. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition...." Id. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 202 (citation omitted). In resolving these issues, the court must view the evidence in the light most favorable to plaintiff and resolve all material factual disputes in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

Factual Background

Defendants argue that they did not use excessive force against plaintiff in violation of the Fourth Amendment. In order to evaluate this argument, the undersigned sets forth the evidence in the record relevant to the circumstances leading to the use of force. Defendants' declarations submitted in support of the summary judgment motion address these circumstances. While plaintiff has submitted a lengthy opposition, the exhibits attached to his opposition largely address his conviction rather than the alleged excessive force. In other words, plaintiff's exhibits do not address the relevant circumstances leading to the shooting. Plaintiff's deposition transcript

contains testimony relevant to the shooting. Accordingly, the undersigned herein sets forth the relevant portions of defendants' declarations and plaintiff's deposition testimony.

In his declaration, defendant McGuire states, in relevant part,

> 2. On August 8, 2009, I was working the north patrol shift with my partner, Deputy K. Griffiths. We were in a fully marked patrol car with overhead lights, and in fully marked sheriff's uniforms.
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> While in our patrol car traveling near Madison Avenue and College Oak in Sacramento, we received a radio call from Sacramento County Sheriff's Deputy Duke Lewis indicating that he had been waved down by a person who saw people climbing out of the car with masks and appeared possibly ready to commit a robbery. We radioed that we were right down the street, and started driving to that location at Hillsdale and Madison Avenue. Just as we were arriving at Hillsdale and Madison, someone frantically radioed that shots were fired and an officer was shot, possibly hit several times, just as we arrived at the scene. An officer on the scene pointed Deputy Griffiths and I towards the northeast corner of Hillsdale and Madison, where we searched the area around a motel complex and parking lot but saw nothing. As we were driving out of the complex, we received a follow up radio update stating that the suspect was running north and east, and was a light skinned black male with short hair, possibly six feet tall with a black shirt and black pants. We went northbound to try and cut off the suspect into a residential area just north of Hillsdale and Madison. As we went around the corner of a residential street, we saw a black male with short hair in corn rows about six feet tall with a white shirt and blue jean type shorts. As the description of the suspect was very close, we decided to stop him (Clark).
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> 3. In my experience, it is very common for people running from law enforcement to change their clothes. In fact, at the house where the suspect (Clark) was hiding, the homeowner stated that the suspect (Clark) had changed his clothes again, and was wearing a shirt that the homeowner had given him (Clark).
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> 4. Deputy Griffiths and I got out of the car and yelled to the suspect (Clark) to get on the ground and I pointed my gun at him. Clark looked back at us and started to put his hands up then turned away and began running, near the corner of Bishop and Chappell Way.
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> 5. The suspect (Clark) ran around the corner and continued running southbound on Chappell while Deputy Griffiths and I chased him. I radioed that we were in foot pursuit of a suspect and voiced his description. As the suspect (Clark) ran, I saw that he no longer had his shoes on, the shoes ended up being the type of shoes that nurses wear. The suspect (Clark) jumped over the backyard fence into a backyard, and we radioed the address of the house.
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> 6. Deputy Griffiths and I were approximately twenty or thirty feet behind him (Clark), but the suspect (Clark) jumped the fence really

fast. We tried to jump over it but could not get over the fence, so I put my shoulder into the fence to knock it down. It did not flatten completely, but low enough to see over the fence. I could see the suspect (Clark) jumping over the backyard fence into another yard as a big dog approached me and started to run at me, so Deputy Griffiths and I backed off. At that point, I did not see the suspect (Clark) anymore.

7. Multiple law enforcement officers set up a big perimeter, and waited for K-9 units to arrive to sniff Clark's shoes in order to track him.

8. About an hour later, Deputy Griffiths and I received updates that the suspect (Clark) was in backyards, and we reached several. Then a resident informed someone that there was a male inside his backyard shed. We evacuated the residents of the house. We had two Sacramento Police Department K-9 officers, Deputy Griffiths and myself, as well as a few CHP officers.

9. The K-9 officers started towards the backyard of the home, and Deputy Griffiths and I followed them to provide them with cover. As we were going to the side to go into the backyard, we heard a loud shot very close and I believed the suspect (Clark) was shooting at us. It sounded like a large caliber handgun coming from the backyard we were going into. We peeked around the corner of the house to get a view of the whole backyard, and I could see a tool shed in the southwest corner of the backyard and junk cluttered everywhere.

10. I saw the shed door flex, like someone was trying to kick it open, and then the door flew open and the subject (Clark) that I saw running from us earlier ran out of the door. He no longer had all of his corn rows, but it was clearly the same person we had chased earlier.

11. I saw the subject (Clark) flailing his arms out and it looked like he had something in his right hand and I thought it was a gun. The other officers and I were yelling to him (Clark) to get to the ground. He (Clark) took a quick look at us while he was flailing his arms and it appeared to me that he was positioning his hands as if to shoot at us. I fired one shot from my 40 caliber department-issued pistol. He (Clark) immediately turned away from us and jumped over the west fence behind him, and we ran to the fence. This all happened in just a few seconds. One K-9 and his dog got over the fence and the second dog got stuck so I lifted the dog over the fence. I do not know what they did after that. I ran to the fence line out to the front yard and took another position west to set up a perimeter from there. The Specialize Enforcement Detail (SED) arrived. Within probably an hour, I was told to come to the command post created at Hillsdale and Madison. At the command post, I saw the same subject (Clark) that had run from Deputy Griffiths and I, but I did not take him (Clark) into custody, had no physical contact with him (Clark), and did not approach him (Clark). I do not recall that I ever saw the suspect (Clark) again after that day.

> 12. We had been in an earlier foot pursuit with the subject (Clark). When we started toward the backyard where he (Clark) was located, I heard a loud gunshot sound very close, and I believed the suspect (Clark) was shooting at us. The subject (Clark) busted out of the shed, and it looked like he (Clark) had something in his right hand that I thought was a gun. At the time Clark was exiting the tool shed that day, I saw him (Clark) flailing his arms, and it appeared to me that he (Clark) was positioning his hands as if to shoot at us. I believed that Clark was the subject who had shot one officer, and was likely to shoot us (officers) as well. It also appeared to me that he (Clark) had been doing everything he could to get away that day and he needed to be stopped or he would injure someone else and perhaps kill them.

(ECF No. 28-2 at 56-59.)

At his deposition, plaintiff testified that on August 8, 2009, he was walking down the street working as a process server. (Deposition Transcript at 13-14.) Plaintiff wanted to see if a resident was at home so he could serve a summons, although he could not recall the address. (Id. at 14.) Plaintiff ran from the officers after they said "Freeze or I'll shoot," and he saw them pointing a gun at him. (Id. at 13.) Plaintiff wore black shorts and a white tank top. (Id. at 17.) When he ran away, plaintiff met a man named Mr. Bridges. (Id.) Plaintiff asked Mr. Bridges for a shirt because he was bleeding. (Id. at 18-19.) Mr. Bridges gave plaintiff a short sleeve plaid shirt. (Id. at 19, 34.)

At his deposition, plaintiff testified that when he left the shed he screamed with his hands in the air, "I'm unarmed." (Id. at 24.) Plaintiff then ran toward the fence. (Id.) Plaintiff heard a voice say, "Freeze or I'll shoot." (Id. at 30.) Plaintiff was shot as he hopped over the fence. (Id.) Plaintiff testified that the bullet grazed his left foot. (Id. at 50.)

Plaintiff testified that he took out the braids from his hair, while he was in the shed, so that he "didn't fit a description in this case." (Id. at 33, 36.)

In his verified complaint, plaintiff alleges that defendant McGuire "shot me from the back and never saw my face." (ECF No. 1 at 3.)

Forrett v. Richardson

As noted by defendants in their summary judgment motion, the facts in this case are similar to those in Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997), overruled on other grounds by Chroma Lighting v. GTE Prods. Corp., 127 F.3d 1136 (9th Cir. 1997), a case

involving the use of deadly force against a fleeing suspect. Forrett committed a violent residential burglary. Forrett, 112 F.3d at 418. Forrett shot two of the burglary victims then fled the scene in a truck. Id. One of the victims was able to call the police and describe Forrett's appearance, including the truck he fled in. Id. Officers investigating the call found the truck but neither Forrett nor the weapons were inside. Id.

A few minutes later, a police officer saw Forrett walking in a nearby residential neighborhood. Id. Because Forrett matched the description of the suspect, the officer confronted Forrett. Id. Forrett fled into the residential area on foot. Id. The officer chased Forrett until he ran out of view because he was worried that Forrett was armed. Id. The officer waited for support. Id. When support arrived, the officers renewed the chase. Id.

Forrett eluded capture for almost an hour by running across yards and streets and jumping fences. Id. Forrett hid in a wooden shed for a few minutes, where he removed a layer of clothing in an attempt to change his appearance. Id. The officers chased Forrett into a yard bounded by a fence. Id. Forrett paused in the yard to look around. Id. The officers approached to within 20-30 feet and shouted to Forrett to stop and surrender. Id. At trial, Forrett testified that at this point he was aware that the police were after him, that he was trying to get away and that he heard the officers shouting, though he could not discern what they were saying. Id.

As Forrett hesitated, two officers fired shots at him but did not hit him. Id. Forrett ignored the shots and began climbing a fence. Id. Forrett fell into the adjacent yard. Id. The officers then fired through the fence. Id. Two bullets hit Forrett as he got up to run away. Id.

The police found no guns either on Forrett or in the vicinity when he was captured. Id.

Forrett filed a civil rights action in district court alleging that the shooting violated his Fourth Amendment rights. Under the Fourth Amendment, police may use only such force as objectively reasonable under the circumstances. Graham v. Connor, 490 U.S. 386, 397 (1989). To prevent the escape of a felony suspect, a police officer may use deadly force only when it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or others. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

In Forrett, The Ninth Circuit first found that Forrett posed a risk of serious harm. The Ninth Circuit noted that the suspect need not be armed or pose an immediate threat to the officers or others at the time of the shooting. 112 F.3d at 420. The Ninth Circuit noted that the Supreme Court in Garner identified specific situations in which a fleeing felony suspect may be deemed to pose a threat of serious harm to the officer or others:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id., quoting Garner, 471 U.S. at 11–12.

"Under this test, it is not necessary that the suspect be armed or threaten the officer with a weapon." Id. "Whenever there is probable cause to believe that the suspect has committed a crime involving the infliction of threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, if some warning has been given, where feasible." Id.

Forrett conceded that the officers had probable cause to believe that he committed a crime involving the infliction of harm. Id. For this reason, the Ninth Circuit found that the officer defendants had probable cause to believe that Forrett posed a serious threat of harm to them or others. Id. Forrett also testified that he was consciously trying to evade arrest and that he knew the police were chasing him. Id. The evidence demonstrated that Forrett was trying to escape and that the defendants warned him before using deadly force. Id.

The Ninth Circuit then considered the remaining issue under Garner of whether the use of deadly force was necessary to prevent Forrett from escaping. Id. The inquiry is a factual one: "'Did a reasonable non-deadly alternative exist for apprehending the suspect?'" Id., quoting Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989).

The Ninth Circuit rejected Forrett's argument that a less drastic alternative would have been to wait and capture him by less deadly means. Id. "The defendants' decision to use deadly force 'must be judged from the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of hindsight.'" Id., quoting Graham, 490 U.S. at 396. "Nothing in the record indicates that at the time of the shooting the defendants knew that their colleague was on the other side of the fence, or that other officers had established a closed perimeter." Id. "Nor does the evidence show that the police had actually established an escape-proof cordon at the time Forrett was shot." (Id.)

The Ninth Circuit noted that the Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force. Id., citing Plakas v. Drinski, 19 F.3d 1143, 1148 (7th Cir. 1994.) "The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm." Id.

"The timing of a suspect's capture, and the opportunities for violence the suspect may have before capture, are therefore crucial to the reasonable necessity inquiry." Id. at 420-21.

> It is undisputed that Forrett used every desperate means at his disposal to elude capture for almost an hour of hot pursuit. He vaulted fences, hid in a shed, and removed easily identifiable clothing. He ignored the defendants' repeated shouts. He ran to the fence while the defendants fired more than eight shots at him. Despite the volley of bullets, he did not surrender and instead began climbing the fence. The defendants fired several more shots at him, and still he kept fleeing. The only objectively reasonable conclusion to be drawn from this evidence is that if the defendants had not shot him, he would have continued taking whatever measures were necessary to avoid capture.
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> The defendants therefore had probable cause to believe that Forrett was willing to use violent means to achieve his ends. See Menuel v. City of Atlanta, 25 F.3d 990, 995 (11th Cir. 1994) (from the vantage of an officer confronting a dangerous suspect, "a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death"). The defendants knew that he was fleeing through a residential area where many of the neighborhood's residents and schoolchildren were in the vicinity. They also had probable cause to believe that he had recently invaded a home, tied up its occupants, shot one of them, and fled the scene by taking one occupant's truck, guns and ammunition. Adding these facts to his demonstrated willingness to take desperate measures, the defendants rightly concluded that it was highly possible that he would seize an opportunity to take an innocent bystander hostage. See Kinney, 950 F.2d at 465–66 (use of deadly force against escaping prisoners necessary to prevent opportunity to take hostages). The use of deadly force was objectively reasonable under these circumstances.
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> For the foregoing reasons, the only reasonable conclusion that could be drawn from the evidence when construed in the light most

> favorable to plaintiff was that the officers did not violate plaintiff's Fourth Amendment rights.

Id. at 421.

Defendant Griffiths

Defendants move for summary judgment as to defendant Griffiths on grounds that it is undisputed that he did not use any force against plaintiff. It is undisputed that defendant McGuire shot plaintiff, and not defendant Griffiths.

Because defendant Griffiths did not shoot plaintiff, defendant Griffiths should be granted summary judgment.[1]

Defendant McGuire

Risk of Serious Harm

The facts, taken in the light most favorable to plaintiff, demonstrate that plaintiff posed a risk of serious harm. Taking plaintiff's version of events, while he may not have posed a threat of harm to the officers at the time he was shot, i.e., he was running away from them and had his back to them, he largely met the description of a person involved in the shooting of a police officer.

According to the Sacramento County Sheriff's Department Report, attached as an exhibit to defendants' opposition, plaintiff was not identified as the actual shooter. (ECF No. 28-3 at 68-69.) Deputy Lewis voiced on the radio that he was waved down by a citizen at Madison and Hillsdale that two men with masks and guns were behind a building. (Id. at 68.) Lewis then voiced that he was shot and the shooter was a black male wearing a black shirt. (Id.) The suspect shot at Lewis five times. (Id. at 70.) Sergeant Harmon later saw two suspects matching the suspects' descriptions crossing the freeway going east on Madison Avenue. (Id. at 69.) These two men, Marcus Zapata and Jordan Latour, were taken into custody. (Id.)

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[1] The undersigned is aware of no theory of liability on which to find defendant Griffiths liable for the shooting. For example, because there is no evidence that defendant Griffiths was defendant McGuire's supervisor, there is no basis for a ratification theory of liability.

Law enforcement had information that there may have been four people involved and two were still at large in the residential neighborhood north of Lewis's shooting scene. (Id.) Apparently based on this report, defendants McGuire and Griffiths were dispatched to look for the man matching plaintiff's description.[2]

While the record is not clear as to whether defendants believed that plaintiff actually shot Officer Lewis, it is undisputed that they believed that plaintiff was involved in an incident involving the shooting of an officer. It is undisputed that plaintiff fled from the officers when they first tried to stop him and continued fleeing through a residential neighborhood. According to plaintiff, the officers warned him before firing at him. Applying the Ninth Circuit's reasoning in Forrett, the undersigned finds that defendants had probable cause to believe that plaintiff posed a risk of serious harm based on his involvement in a crime involving the infliction of serious physical harm.

The undersigned also observes that both defendants had also heard what sounded like a shotgun being fired from the backyard of the house containing the shed where plaintiff was hiding. While it was clear that plaintiff was not carrying a shotgun when he ran out of the shed, defendants thought that plaintiff had fired a shotgun at either himself or law enforcement. In his declaration, defendant Griffiths stated that it was not until plaintiff was apprehended that he discovered that the sound was a flash bang device being detonated by other law enforcement officers. (ECF No. 27-3 at 52.) Defendants' belief that plaintiff had fired a shotgun supported their reasonable belief that plaintiff posed a threat of serious harm as it demonstrated a possible willingness to use force to flee.

In finding that plaintiff posed a risk of serious harm, the undersigned has also considered plaintiff's claim that when he ran out of the shed, he put his hands in the air and screamed, "I'm unarmed." He then heard a voice say, "Freeze or I'll shoot." Plaintiff admits that he kept running and defendant McGuire fired. As noted in Forrett, it is not necessary that the suspect be armed or

[2] In their declarations, both defendants state that, after the shooting, they received reports that a "suspect," described as a black male about six feet tall with a dark shirt and shorts was running north from the area. (ECF No. 28-2 at 51, 57.) In his declaration, defendant Griffiths state that the description of the suspect also stated that he had cornrows. (Id. at 51.)

threaten the officer with a weapon in order for an officer to have probable cause to use deadly force. 112 F.3d at 420. If officers believe that the suspect committed a crime involving the infliction of serious harm, deadly force may be used to prevent escape if some warning has been given. Id.

Based on all of the circumstances described above, plaintiff's alleged statement that he was unarmed and his act of putting his hands in the air did not weaken defendants' reasonable belief that plaintiff posed a threat of serious harm based on his involvement in a crime involving the infliction of serious physical harm, i.e., the shooting of Officer Lewis.

Necessity of Use of Deadly Force

The undersigned next considers whether the use of deadly force was necessary to prevent plaintiff from escaping. As in Forrett, plaintiff eluded capture for approximately one hour by climbing fences, hiding in a shed and changing his clothing. Plaintiff ignored defendants' order to stop when they first saw him and pointed a gun at him. Plaintiff ignored defendants a second time when they told him to stop after he left the shed.

The parties dispute what happened during the moments leading to the shooting after plaintiff left the shed. Defendants claim that plaintiff was shot because it looked like he was going to shoot at them. Plaintiff alleges that he was running away from defendants, with his back to them, when he was shot. The undersigned describes the relevant evidence herein.

According to defendant McGuire, he shot plaintiff after he left the shed because it looked like plaintiff was positioning his hands as if to shoot at the officers. (ECF No. 28-2 at 58-59.) In his declaration, defendant Griffith states that defendant McGuire shot plaintiff just before plaintiff reached the fence because plaintiff started to turn toward the officers. (Id. at 52.) Defendant Griffith describes the moments before the shooting:

> As the subject (Clark) ran out of the shed, he kind of bounced off the door as the door swung back, and I could not see his hands at that time. When he turned toward us, I recognized that this was the same individual that had run from Deputy McGuire and I earlier. I did not know what the subject (Clark) had in his hands, and when he turned towards the fence away from us, his hands were down by his waist. I thought more than likely he was reaching for a gun, so we started advancing towards him and the K-9 officers released their dogs. The subject (Clark) started to run towards the fence near

> the shed on the other side of the yard away from us. Just before he reached the fence, I saw him (Clark) start to turn toward us, which led me to believe that he was intending to have a gun battle with us since, in my experience, suspects typically continue running rather than stop to confront officers. Deputy McGuire, who was to my right and a couple of feet in front of me, fired one round from his sidearm in the subject's (Clark's) direction.

(ECF No. 28-2 at 52-53.)

Because this point is important, the undersigned herein repeats defendant McGuire's description of the moments before the shooting as follows:

> 10. I saw the shed door flex, like someone was trying to kick it open, and then the door flew open, and the subject (Clark) that I saw running from us earlier ran out of the door. He no longer had all of his corn rows, but it was clearly the same person we had chased earlier.
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> 11. I saw the subject (Clark) flailing his arms out and it looked like he had something in his right hand and I thought it was a gun. The other officers and I were yelling to him (Clark) to get on the ground. He (Clark) took a quick look at us while he was flailing his arms and it appeared to me that he was positioning his hands as if to shoot at us. I fired one shot from my 40 caliber department-issued pistol. He (Clark) immediately turned away from us and jumped over the west fence behind him, and we ran to the fence. This all happened in a few seconds.

(Id. at 58-59.)

According to plaintiff, defendant McGuire shot him while plaintiff had his back turned to him. (ECF No. 1 at 3.) At his deposition, plaintiff testified that he was shot as he hopped over the fence. (Plaintiff's deposition at 30.) In other words, plaintiff disputes that he turned toward the officers or made gestures that made it look like he was going to shoot the officers.

Taking the facts in the light most favorable to plaintiff, the undersigned cannot find that deadly force was necessary to prevent plaintiff from escaping. According to defendants, after plaintiff left the shed, defendants and the K-9 officers began following plaintiff. At that time, the K-9 officers released their dogs. According to defendants, defendant McGuire decided to shoot plaintiff only after it looked like plaintiff was going to shoot at them as plaintiff reached the fence. In other words, defendant McGuire used deadly force only when he believed that plaintiff's use of deadly force was imminent. Based on these circumstances, the undersigned reasonably infers that if plaintiff had kept running and jumped over the fence without making

threatening gestures, i.e., plaintiff's version of events, defendants would have continued their pursuit with the assistance of the K-9 officers and their dogs.

The undersigned acknowledges that the facts of this case relevant to consideration of whether deadly force was necessary are very similar to those in Forrett. However, in this case, defendants indicate that they would not have used deadly force had plaintiff not acted as though he were going for a gun. Unlike in Forrett, the K-9 officers and their dogs were present and actively pursuing plaintiff. Taking the facts in the light most favorable to plaintiff, allowing the K-9 officers and their dogs to apprehend plaintiff was a reasonable alternative to the use of deadly force.

The undersigned turns next to the second prong of the qualified immunity analysis, i.e., whether a reasonable officer would have known that shooting plaintiff violated plaintiff's Fourth Amendment rights. According to plaintiff, at the time of the shooting, he was running away and not threatening officers. Defendants' declarations suggest that they would not have shot plaintiff under these circumstances and because of the presence of the K-9 officers and their dogs. Taking the facts in the light most favorable to plaintiff, the undersigned finds that a reasonable officer would have known that the use of deadly force was not necessary under these circumstances. Accordingly, defendant McGuire is not entitled to qualified immunity as to this claim.

Plaintiff's Alleged Injury

Defendants state that "although lack of injury or harm to a fleeing suspect may not be dispositive under the Fourth Amendment analysis, plaintiff's alleged harm or lack thereof should certainly be noted." (ECF No. 28 at 24.)

A Fourth Amendment seizure occurs only when a fleeing person is physically touched by an officer or submits to an officer's show of authority. California v. Hodari D., 499 U.S. 621 (1991); Nelson v. City of Davis, 685 F.3d 867, 874 n.4 (9th Cir. 2012). "Attempted seizures of a person are beyond the scope of the Fourth Amendment," and are instead properly analyzed under the Due Process Clause of the Fourteenth Amendment. County of Sacramento v. Lewis, 523 U.S. 833, 845 & n.7 (1998).

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The Fourteenth Amendment's substantive due process clause protects against the arbitrary or oppressive exercise of government power. Id. at 845–46. "[T]he Due Process Clause is violated by executive action only when it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense." Id. at 845–47; see Lemire v. Cal. Dept. Of Corrections & Rehabilitation, 726 F.3d 1062, 1075 (9th Cir. 2013). The cognizable level of executive abuse of power is that which "shocks the conscience" or "violates the decencies of civilized conduct." Lewis, 523 U.S. at 846. Mere negligence or liability grounded in tort does not meet the standard for a substantive due process decision. Id. at 849. Where a law enforcement officer makes a "snap judgment because of an escalating situation, his conduct may be found to shock the conscience only if he acts with a purpose to harm unrelated to legitimate law enforcement objectives." Hayes v. County of San Diego, 736 F.3d 1223, 1230 (9th Cir. 2013) (citing Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010).

If plaintiff was not actually shot by Officer McGuire, no Fourth Amendment violation occurred because plaintiff continued fleeing. See Bradford v. Bracken County, 2012 WL 2178994 at *12 (E.D. Ken. 2012) (if an officers shoots at a fleeing suspect but misses, there can be no seizure unless the suspect consciously submits to the officer's show of authority). In that case, plaintiff's claim is evaluated under the Fourteenth Amendment's substantive due process clause.

Defendants have submitted evidence in support of their claim that plaintiff was not hit by the shot fired by defendant McGuire. However, plaintiff's statement that he was shot is sufficient to create a disputed material fact regarding this issue.

Federal Rule of Evidence 701 states that non-expert testimony is limited to statements "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." "Further, 'generally plaintiff must prove causation by expert medical testimony except where there is an obvious causal relationship-one where injuries are immediate and direct.'" Walker v. Contra Costa County, 2006 WL 3371438 at * 9 (N.D.Cal. 2006), quoting In re Baycol Products Litigation, 321 F.Supp.2d 1118, 1125

(D.Minn.2004) (citation omitted) (internal quotation omitted).

Plaintiff's testimony that he was shot is rationally based on his own perception. Because the alleged injuries were an immediate and direct result of being shot, plaintiff does not require a medical expert to prove that his injuries were caused by the shot.

For the reasons discussed above, the undersigned rejects defendants' suggestion that they are entitled to summary judgment because plaintiff's injuries were minimal or unproven.

Accordingly, IT IS HEREBY RECOMMENDED that defendants' summary judgment motion (ECF No. 28) be granted as to defendant Griffiths and denied as to defendant McGuire.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 2, 2014

Cl2159.sj

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE