UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GABRIEL NAPIER by and through his guardian ad litem, LILLY QUIROZ ,

Plaintiff,

v.

SAN DIEGO COUNTY, a government entity; SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, a department of San Diego County; WILLIAM GORE, an individual; BRANDON BOISSERANC, an individual; NICHOLAS DANZA, an individual; and DYLAN NAPIER, an individual ,

Defendant.

Case No.: 15cv581-CAB-KSC

AMENDED ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Doc. No. 50]

On October 12, 2016, Defendants filed a motion for summary judgment. [Doc. No. 50.] On November 9, 2016, Plaintiff filed an opposition to the motion. [Doc. No. 55.] On November 16, 2016, Defendants filed a reply to the opposition. [Doc. No. 56.] On January 4, 2016, a hearing was held with regard to the motion. Estevan R. Lucero, Esq. appeared on behalf of Plaintiff. David Brodie, Esq. and Christina Vilaseca, Esq. appeared on behalf of Defendants. Initially, this Court denied the motion for summary

judgment as to all claims. [Doc. No. 69.] On May 12, 2017, this Court issued an order to show cause regarding whether Defendants should be granted qualified immunity in light of a recent Ninth Circuit decision. [Doc. No. 101.] On June 2, 2017, Plaintiff filed a response to the OSC. [Doc. No. 103.] On June 16, 2017, Defendants filed a reply to Plaintiff's response. [Doc. No. 104.] On July 17, 2017, this Court vacated its previous order regarding Defendants' motion for summary judgment. [Doc. No. 105.] This order now replaces the original summary judgment order. For the reasons set forth below, the motion for summary judgment as to the Fourth Amendment claim is **GRANTED** on the basis of qualified immunity, and **DENIED** as to the state law claim for battery.

STATEMENT OF FACTS

On January 31, 2014, five San Diego County Sheriff's deputies in the Gang Enforcement Team went to a Vista apartment complex in order to arrest Michael Napier. (Deposition of Brandon Boisseranc ("Boisseranc Depo."), Exhibit 2, at page 93, lines 2-4; 99:19-22; 109:17-23; 116-117; 139:16-19, ; Deposition of Michael Astorga ("Astorga Depo."), Exhibit 4, at 37-38; 40; 113-114; 153; Deposition of Jarett Moyette ("Moyette Depo."), Exhibit 3, at 14, 23, 38; Deposition of Bogar Ortiz ("Ortiz Depo."), Exhibit 5, at 51-52; 109:20-24.) Napier had an outstanding felony warrant for his arrest from a drug-related conviction (Health and Safety Code section 11377(a) – possession of methamphetamine). (Deposition of Nicholas Danza ("Danza Depo."), Exhibit 1, at 156-158; Boisseranc Depo. at 77-78.) He was also on probation, the terms of which subjected Napier to warrantless searches by law enforcement at any time, with or without cause. (Exhibit 12, COSD 1730.)[1]

On that day, Napier was working on his bike in his father's garage. (Peacock Decl., Exh. 1 [Denfeld Depo.] at pp. 22:06-24:01.) Contemporaneously, four plainclothes San Diego Sheriff's Deputies were conducting a surveillance operation, which they

[1] Defendant's request for judicial notice as to this document is granted pursuant to Fed. R. Evid. 201.

completed when they arrested an individual for purchasing narcotics. (Peacock Decl., Exh. 2 [Danza Depo.] at 136:23-137:9, 141:14-20, 152:10-20, 154:4-8.) The deputies convened in a grocery store parking lot to plot their next operation. (Peacock Decl., Exh. 2 [Danza Depo.] at 154:23-155:13.) One of the deputies raised a Special Bulletin, known as a Be On the Lookout ("BOL"), which suggested that Napier was a suspect in the theft of some personal property from a garage. (Peacock Decl., Exh. 3 [COSD 165]; Exh. 2 [Danza Depo.] at 156:4-6-156:17-19, 158: 1-5) The BOL also indicated that Napier had an outstanding felony warrant for drug possession. (Peacock Decl., Exh. 3 [COSD 165]; Exh. 2 [Danza Depo.] at 157:2-11, 246:21-24.)

The deputies knew Napier was a documented member of a criminal street gang called the Vista Home Boys, and that his gang nickname was "Bullet." (Danza Depo. at 168-69; Boisseranc Depo. at 83-84; Astorga Depo. at 135; Exhibit 14, Danza Response to Interrogatory No. 17; Exhibit 13, Boisseranc Response to Interrogatory No. 17.) The deputies also knew Napier had possessed firearms in the past (Moyette Depo. at 72-73), and had seen a photograph on Facebook showing him holding a machine gun. (Boisseranc Depo. at 122; Astorga Depo. at 106-107; 135; Moyette Depo. at 43; 47-48; Danza Response to Interrogatory No. 17; Boisseranc Response to Interrogatory No. 17.) They knew he had been arrested and convicted for drug use and drug possession, as well as several other convictions. (Moyette Depo. at 45:2-13; Danza Response to Interrogatory No. 17; Boisseranc Response to Interrogatory No. 17.) They also knew that Napier had recently posted on his Facebook page that he planned to move out of California soon. (Boisseranc Depo. at 77-78; Astorga Depo. at 106-107; 137.)

Deputy Danza had previously arrested Napier for possession of a BB gun. (Peacock Decl., Exh. 2 [Danza Depo.] at 161:2-161:18, 162:16-25.) Danza did not consider that specific incident to make Napier violent. (*Id*.) Deputy Boisseranc had previously interacted with Napier to discuss Napier's activities while Napier was working as a sign twirler. (Peacock Decl., Exh. 6 [Boisseranc Depo.] at 78:22-80:22, 85:4-88:10.) Boisseranc acknowledged that when he approached Napier on that day he did not feel

there was any reason to draw his weapon for safety. (*Id*.) Deputy Astorga claims that during the parking lot briefing the deputies discussed Napier's past history with guns and prior offenses. (Peacock Decl., Exh. 4 [Astorga Depo.] at 105:11 – 107:18.) When Deputy Ortiz gave a statement to a homicide detective, however, he stated that during this parking lot briefing no concerns were raised about taking extra caution with Napier. (Peacock Decl., Exh. 5 [01/31/2014 Deputy Ortiz Interview page 17-19].)

The BOL made known to the deputies was posted on January 29, 2014, and stated there was an active warrant for Napier's arrest (the methamphetamine possession charge), and that he was wanted for questioning for a burglary incident. (Danza Depo. at 156-158; 173-174; Moyette Depo. at 39; Ortiz Depo. at 108.) The BOL also indicated Napier may be staying at his parents' apartment complex at 2000 S. Melrose Place in Vista, and that he may be spending time at a garage in the complex (garage #31, which belonged to his father). (Danza Depo. at 180-181; Astorga Depo. at 115:8-11.)

The deputies drove to the apartment complex, and two deputies parked near the garage. One of them, Michael Astorga, saw a woman drive up to the garage, and then saw Napier come out of the garage and put a box in the woman's trunk. (Danza Depo. at 194; Boisseranc Depo. at 119; Astorga Depo. at 116:2-25; 117:1-22;119:11-23; 161-162; Moyette Depo. at 50:13-16; Ortiz Depo. at 112-114.) From his vantage point, Astorga positively identified Napier to the other deputies who were listening on their radios. (Danza Depo. at 194-195; Boisseranc Depo. at 92; Astorga Depo. at 143.)

Four of the deputies approached the garage on foot, while Astorga stayed in his vehicle, coordinating the approach via his radio and watching the scene. (Boisseranc Depo. at 116-117; Astorga Depo. at 122.) It was early evening, and it was dark outside. (Astorga Depo. at 120:14-24; 138:14-23.) The deputies who approached the garage were Brandon Boisseranc, Nicholas Danza, Jarrett Moyette, and Bogar Ortiz. Moyette and Ortiz were in uniform; Boisseranc and Danza were in plainclothes. (Moyette Depo. at 52:1-10; Danza Depo. at 135-137; 183; Boisseranc Depo. at 93-94; Astorga Depo. at 118, 142; Ortiz Depo. at 90:12-18.) All four deputies had their green Sheriff's Department

tactical vests on over their clothes. The vest has a cloth Sheriff's badge on the front, and "Sheriff's Department" is printed in large block letters on the back. (Danza Depo. at 207:18-22; Boisseranc Depo. at 117-118; Astorga Depo. at 142:13-22; Ortiz Depo. at 115:5-7.) Meanwhile, Napier was working on his bicycle in the garage. (Peacock Decl. Exh. 2 [Danza Depo.] at 231:16-20; Peacock Decl., Exh. 5 [01/31/2014 Deputy Ortiz Interview page 25-26]; and Peacock Decl., Exh. 7 [02/13/2014 Adela Myers Interview page 2].)

All four deputies approached the garage with their guns drawn. (Astorga Depo. at 126-127; Danza Depo. at 245:13-16; Boisseranc Depo. at 117-118; Moyette Depo. at 83:14-20; Ortiz Depo. at 138:8-12.) The garage was partially opened, and the deputies could see that there was a light on inside. Their plan was to push the garage fully open while announcing themselves as Sheriff's deputies, and then place Napier under arrest. (Danza Depo. at 181:15-24; 202-204; 207:23-25; 215:21-25; Boisseranc Depo. at 99-102; 117-118; Astorga Depo. at 143:2-9; 156:10-19; Moyette Depo. at 68-69.)

The four deputies approached the garage, and Deputy Danza reached down and pulled up hard on the garage door. But it only moved up several inches and then stopped, making a loud grinding noise. The garage was now open 3-4 feet, and the four deputies quickly crouched down under the garage door with their weapons drawn, and they could see Napier inside, standing five to six feet away from them. (Danza Depo. at 205-206; 215:7-13; 226:11-12; Astorga Depo. at 130-131; Moyette Depo. at 53:15-18; 59-60; Ortiz Depo. at 140:9-15.) The deputies did not anticipate that the garage would not open. (Peacock Decl. Exh. 6 [Boisseranc Depo.] at 121:3-21.)

The deputies had begun yelling loudly, "Sheriff's Department!", "Show me your hands!", and "Put your hands up!" (Danza Depo. at 204:21-25; 215:21-25; Boisseranc Depo. at 122-123; Astorga Depo. at 132:3-24; Moyette Depo. at 53:13-21; 61:15-19; Ortiz Depo. at 116:19-22; 129-130.) Danza claims he announced that he was with the Sheriff's Department and yelled at Napier to raise his hands. (Id.) Boisseranc then began yelling at the same time, demanding that Napier show him his hands. (Peacock Decl.,

Exh. 6 [Boisseranc Depo.] at 122:25 – 123:13.) Boisseranc acknowledged that everyone was yelling and there was a lot of noise, and he himself could only make out what he was saying. (Id.)Facing the garage, Deputy Danza was on the left, Deputy Boisseranc was to his right, and Deputy Moyette was to the far right. Deputy Ortiz crouched behind deputies Boisseranc and Danza. (Danza Depo. at 206:9-15; Boisseranc Depo. at 107:11-19; Astorga Depo. at 127-130; Ortiz Depo. at 115-116.)

Napier appeared to be holding a bicycle tire; he dropped the tire, looked surprised, and made several noises (deputies remember him saying "Oh fuck" or "Oh shit" several times). Although at first he started to raise his hands, he then dropped them and appeared to be patting his stomach and waist area as if he was looking for something. The deputies continued yelling at him to show them his hands, their voices getting louder as Napier continued patting his waist area instead of lifting his hands. The deputies saw he was wearing a dark jacket or sweatshirt. (Danza Depo. at 216-217; 220-221; Boisseranc Depo. at 123-126; Moyette Depo. at 57:16-19; 64:19-24; Ortiz Depo. at 117:1-5; 130:10-15.)

Moyette acknowledges that Napier had no "escape route" from the garage. (Moyette Depo. at 69: 21-22.) Moyette also testified that, when Napier was patting his pockets or was putting his hands in his pockets, Moyette did not shoot him at that point because he could see Napier's hands and did not feel threatened by him. (Moyette Depo. at 91: 2-10.) Moyette just thought Napier was "acting strange." (Moyette Depo. at 91: 10-11.)

Boisseranc claims that Napier never put up his hands. (Peacock Decl., Exh. 6 [Boisseranc Depo.] at 124:5-7.) Danza, however, admitted that initially Napier put up his hands. (Peacock Decl., Exh. 2 [Danza Depo.] at 216:1-10.) Danza explained that, as the cross-yelling continued, Napier would lift his arms up, then drop them; then when Danza would yell again, Napier would then lift them up. (Peacock Decl., Exh. 2 [Danza Depo.] at 219:2-13, 221:4-6.) Danza claims that Napier put his hand in a pocket, but he acknowledges he is not sure if it was a pocket or a waistband. (Peacock Decl., Exh. 2

[Danza Depo.] at 222:18-25, 223:1-5.) Danza did not say anything to Napier in response to this action; instead, he opened fire and began shooting Napier. (*Id.*) At the same time, Boisseranc opened fire on Napier. (Peacock Decl., Exh. 6 [Boisseranc Depo.] at 124:23 – 125:17. 127:20 – 128:5.) Boisseranc acknowledged that he was scared of the situation when he opened fire. (Peacock Decl., Exh. 6 [Boisseranc Depo.] at 126:12-128:10, 128:11-130:16, 130:17-131:24.) He emptied his clip at Napier and began screaming to his other deputies for another clip of ammunition, even though in retrospect he actually had more clips on him. (*Id.*)

Napier fell, and the deputies pulled him out of the garage, patted him down to make sure he was not armed (he was not), and began giving CPR. They immediately called an ambulance, but Napier died at the scene. (Danza Depo. at 234:18-19; 230:8-18; 239:1-10; 241-242; Boisseranc Depo. at 137:3-10; Astorga Depo. at 161-162; Moyette Depo. at 65-66; 110-111; Ortiz Depo. at 141:1-17.)

Danza admitted that he never saw Napier with a weapon in the garage. (Peacock Decl., Exh. 2 [Danza Depo.] at 224:9-10.) Danza never warned Napier that Danza would shoot Napier if Napier did not obey his commands. (Peacock Decl., Exh. 2 [Danza Decl.] at 245:17-24.) Boisseranc also did not warn Napier that he would shoot Napier if he failed to obey his commands (See Peacock Decl., Exh. 6 [Boisseranc Depo.] at 124:23-125:14, 127:19-25.)

A ballistics expert examined the evidence from the shooting and determined that Napier's left hand had been by his waistband at the time of the shooting. (Deposition of Lance Martini ("Martini Depo."), Exhibit 8, at 21:15-25:25.) Laboratory tests of Napier's blood were positive for methamphetamines at such a high level that an expert toxicologist determined Napier had ingested an amount of methamphetamine consistent with causing information processing problems and aggressive behavior. (Deposition of Dr. Richard Geller ("Dr. Geller Depo."), Exhibit 7, at 32:13-36:20.)

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DISCUSSION

A. Legal Standard.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). It is the moving party's burden to show there is no factual issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, the burden shifts to the non-moving party to show there is a genuine issue for trial. *Id*. at 331.

The Court considers the record as a whole and draws all reasonable inferences in the light most favorable to the non-moving party. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.2000). The Court does not make credibility determinations or weigh conflicting evidence. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Rather, the Court determines whether the record "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251–52.

B. Analysis.

Michael Napier's son Gabriel Napier[2] brings this action against Defendants County of San Diego, Sheriff William D. Gore, and Sheriff's deputies Brandon Boisseranc and Nicholas Danza. Plaintiff has three remaining causes of action, one federal claim brought pursuant to 42 U.S.C. section 1983 ("section 1983") (excessive force in violation of the Fourth Amendment) and a state law claim for battery/wrongful death).

1. Section 1983.

Defendants move for summary judgment on the grounds that Officers Boisseranc and Danza did not use excessive force in attempting to stop Napier from reaching for

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[2] Michael Napier also had another son, Dylan Napier, who is named as a defendant in this case. At the hearing, counsel for Plaintiff and counsel for Defendants confirmed that neither had had any contact with Dylan and had no information as to his whereabouts. Therefore, Dylan Napier's potential claim is deemed abandoned and he is **HEREBY DISMISSED** from this action.

something near his waist and defending themselves, and further that they have qualified immunity from liability. [Doc. No. 50-1 at 12-20.] Under the Fourth Amendment, law enforcement may use "objectively reasonable" force to carry out seizures, and objective reasonableness is determined by an assessment of the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). Because this inquiry is inherently fact specific, the "determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury in rare cases." *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d 1185, 1205–06 (9th Cir.2000), judgment vacated on other grounds, 534 U.S. 801 (2001); see also *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir.2011) (summary judgment "in excessive force cases should be granted sparingly"); *Liston v. County of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir.1997) (finding that excessive force is "ordinarily a question of fact for the jury"); *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir.1994) ("[W]hether a particular use of force was reasonable is rarely determinable as a matter of law.").

In the deadly force context, courts are not permitted to "simply accept what may be a self-serving account by the police officer." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994). "Because the person most likely to rebut the officers' version of events-the one killed-can't testify, '[t]he judge must carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts.' " *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir.2014) (quoting *Scott*, 39 F.3d at 915). Where the officer's story would justify his use of deadly force, the proper inquiry is whether any reasonable jury could find it more likely than not that the officer's story is false. See *id*.

"An officer using deadly force is entitled to qualified immunity, unless the law was clearly established that the use of force violated the Fourth Amendment." *Wilkinson v.*

Torres, 610 F.3d 546, 550 (9th Cir.2010) (citing *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). Qualified immunity involves a two-part inquiry: first, "whether the facts that a plaintiff has alleged ... or shown ... make out a violation of a constitutional right," and second, "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194 (2001)).

a. Violation of the Fourth Amendment

Could any reasonable jury find it more likely than not that Napier did not create a substantial risk of serious harm to the officers? Defendants' motion for summary judgment relies on the testimony of the four officers to support their claim that in response to their commands to show or raise his hands Napier instead reached down toward his waist thereby putting them a fear for their safety. Plaintiff has submitted evidence that could give a reasonable jury pause in reaching that determination.

"The strength of the government's interest in the force used is evaluated by examining three primary factors: (1) 'whether the suspect poses an immediate threat to the safety of the officers or others,' (2) 'the severity of the crime at issue,' and (3) 'whether he is actively resisting arrest or attempting to evade arrest by flight.'" *S.B. v. County of San Diego*, --- F.3d --- (2017), 2017 WL 1959984, *4 (9th Cir., May 12, 2017), quoting *Graham*, 490 U.S. at 396. These factors, however, are not exclusive. *S.B.*, 2017 WL 1959984 at *4, *citing Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.2010). We "examine the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.' " *S.B.*, 2017 WL 1959984 at *4 (internal citations omitted). Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. *Id.* (citations omitted).

In looking at the first factor, whether the suspect poses an immediate threat to the safety of the officer or others, Plaintiff provided evidence that, while Napier had a

criminal history, it was primarily for drug offenses, not for any violent crimes. (Moyette Depo. at 45:2-13.) Several of the deputies had previous encounters with Napier and did not feel threatened during those encounters. (Danza Depo. at 161:2 – 161:18, 162:16 – 25; Boisseranc Depo. at 78:22 – 80:22, 85: 4 – 88:10.) Plaintiff's evidence contradicts a conclusion that Napier was known to the Defendants to be dangerous or that they expected Napier to be armed. In addition, Plaintiff offers that Napier in fact made no deliberate threatening gesture, supported by the fact that he had no weapon or contraband on him that would explain him reaching for his waist or pocket. (Danza Depo. at 224:9-10, 234: 18 – 19, 230: 8 – 18, 239: 1-10, 241 – 241.) Finally, at least one of the deputies on the scene (Moyette) did not shoot when Napier put his hands near his waist because he did not feel threatened; he just thought Napier was acting strange. (Moyette Depo. at 91: 10-11.)

As to the second factor, the severity of the crime at issue, Defendants were there to arrest Napier for possession of methamphetamine (Danza Depo. at 156-158), which is not a violent crime.

As to the third factor, whether Napier was actively resisting arrest or attempting to evade arrest by flight, Plaintiff points to evidence that the garage door not opening as anticipated obstructed the Defendants' tactical plan and caught the officers by surprise contributing to the confusion. (Boisseranc Depo. at 121:3-21.) In addition, the officers giving slightly different commands (Boisseranc Depo. at 122:25 – 123: 13) could account for Napier's hesitation in response to their commands. Finally, Plaintiff was in a garage surrounded by officers and had no escape route (Moyette Depo. at 69: 21 – 22), thus making it unlikely he was trying to escape.

As to the other relevant *Graham* factors, there is evidence that proper warnings were not given, in that there were slightly conflicting warnings given at the same time. (Boisseranc Depo. at 122:25 – 123: 13.) Moreover, the deputies did not specifically warn Napier they were going to shoot him before shooting him. (Danza Depo. 245:17-24; Boisseranc Depo. 124:23 – 125:14, 127:19-25.) Finally, there is some evidence that the

officers may have known Napier was not going to be entirely coherent, as they were there to arrest him for possession of methamphetamine. (Danza Depo. at 156 – 158.) Thus, a reasonable jury could conclude that Napier did not pose a risk of serious harm to the officers to justify the use of deadly force.

At this stage, the Court does not weigh the evidence or resolve issues of credibility. *Anderson*, 477 U.S. at 255. If a jury believes Plaintiff's evidence and rejects Defendants' evidence, it could find that events did not unfold as the officers testified. In light of the circumstantial evidence and drawing all reasonable inferences in favor of the nonmoving party, a jury could find that Defendants' use of deadly force was not objectively reasonable, and therefore violated Napier's Fourth Amendment right against excessive force.

b. Clearly Established Right.

Under the second prong of the qualified immunity test, the Court must decide if the alleged violation of Napier's Fourth Amendment right against excessive force "was clearly established at the time of the officer's alleged misconduct." *C.V. by and through Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016)(citations omitted). If not, the officer receives qualified immunity. To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 308 (2015) (per curiam) (*quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Further, the clearly established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," especially in the Fourth Amendment context, where "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id*. (citations and

internal quotation marks omitted). Put another way, only the "plainly incompetent" officer will not enjoy qualified immunity. *Id*. (citation omitted).

Before this court can impose liability on Defendants, it must identify precedent as of January 31, 2014—the day of the shooting—that put Defendants "on clear notice that using deadly force in these particular circumstances would be excessive." *S.B. v. County of San Diego ("S.B.")*, --- F.3d --- (2017), 2017 WL 1959984, at *6. "General excessive force principles, as set forth in *Graham* and *Garner*, are 'not inherently incapable of giving fair and clear warning to officers,' but they "do not by themselves create clearly established law outside an obvious case.'" *Id*. at 552 (citations and internal quotation marks omitted). Instead, we must "identify a case where an officer acting under similar circumstances as [Defendants] was held to have violated the Fourth Amendment." *Id*.

Plaintiff argues that specific case precedent is not required because this is an "obvious case" of a Fourth Amendment violation for which the general excessive force principles set forth in *Graham* and *Garner* provide clear notice to the Defendants. [Doc. No. 103 at 16 – 19.] According to Plaintiff, using deadly force on an individual who is unarmed and "standing with his hands in the air" is an "obvious" Fourth Amendment violation. *Id*. However, there is no admissible evidence before this Court that Napier "was standing with his hands in the air" at the time of the shooting. In the original opposition to Defendants' motion for summary judgment, Plaintiff did not present any evidence, nor make any argument, that Napier was standing with his hands in the air. [*See generally* Doc. No. 55.] Thus, any such evidence is untimely.

However, even if it was timely, it is inadmissible speculation. In response to the OSC, Plaintiff cites to photographic and physical evidence of the location of certain bullet holes in the body [Doc. No. 103 at 6] and then argues that such evidence shows Napier's hands were in the air at the time he was shot based upon the perceived projectory of the bullets [Doc. No. 103 at 19]. However, Plaintiff does not provide any expert testimony to analyze the physical evidence and provide a foundation for this opinion. *See* FRE 202-703*; Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

579, 591 (1993). Counsel's mere speculation that the physical evidence shows Napier was "standing with his hands were in the air" is inadmissible. As a result, the Court does not consider this evidence. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002)("A trial court can only consider admissible evidence in ruling on a motion for summary judgment.") The only admissible expert evidence before the Court is that Napier's hand was near his waistband when he was shot. [Martini Depo., Ex. 8, at 21:15-25:25.] Thus, this was not an "obvious" Fourth Amendment violation.

Nevertheless, as set forth above, based upon the admissible evidence that was timely provided in opposition to the motion for summary judgment, and assuming Napier's hand was near his waistband when he was shot, a reasonable jury could find that a Fourth Amendment violation occurred. Therefore, pursuant to *SB*, Plaintiff must identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment in order to avoid a granting of qualified immunity. 2017 WL 1959984, at *6.

Plaintiff cites to the following cases as providing "clear notice" to the deputies: *Torres v. City of Madera ("Torres")*, 648 F.3d 1119 (9th Cir. 2011); *Harris v. Roderick ("Harris")*, 126 F.3d 1189 (9th Cir. 1997); *Sheehan v. City & County of San Francisco ("Sheehan")*, 743 F.3d 1211 (9th Cir. 2014); and *Deorle v. Rutherford ("Deorle")*, 272 F.3d 1272 (9th Cir. 2001). None of these cases, however, meet the "exacting standard" required by *SB* to provide the deputies with the "clear notice" that using the amount of force they did was unlawful. 2017 WL 1959984, at *6. For example, *Torres* involved an officer who, while trying to deploy her taser on a man who was handcuffed in a police car, mistakenly drew her firearm and shot and killed the man. 648 F.3d at 1121. Here, Napier was not handcuffed, may not have been complying with instructions to raise his hands, and one of his hands was near his waist at the time he was shot. Thus, *Torres* is not sufficiently similar to provide the deputies with "clear notice." *S.B.*, 2017 WL 1959984, at *6.

The same is true of *Harris*, which involved a shootout with U.S. Marshals in Ruby Ridge, Idaho in 1992. Marshals came onto private property to serve an arrest warrant, and they shot and killed a dog. 126 F.3d at 1192-113. Then a 14-year-old boy shot at them, and they fired on the boy as he ran away, killing him. *Id.* at 1193. Here, Napier was an adult and had a criminal record (albeit not necessarily a violent one). Moreover, Napier was not running away from the officers. Rather, he was facing them, may not have been complying with their instructions, and had his hand near his waist when he was shot. Therefore, *Harris* is also not sufficiently similar to provide the deputies with "clear notice." *S.B.*, 2017 WL 1959984, at *6.

Next, Plaintiff cites to *Sheehan*, 743 F.3d 1211 (9th Cir. 2014). However, *Sheehan* was reversed by the U.S. Supreme Court, and the deputies in that case were ultimately granted qualified immunity. *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1174-1177(2015). Moreover, *Sheehan* involved police trying to remove a mentally ill woman from her group home in order to place her in a psychiatric facility on an involuntary commitment. When the officers entered her room, she grabbed a knife and threatened the officers, who retreated to the hallway. They called back-up and reentered; when she threatened them with the knife again, they shot her with their firearms. 135 S.Ct. at 1769-1771. Here, there was no issue of reentry, as all of the events transpired on the initial entry. Moreover, while Napier was a known drug user, he was not known to be mentally ill. Therefore, *Sheehan* is also not sufficiently similar to provide the deputies with "clear notice." *S.B*, 2017 WL 1959984, at *6.[3]

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[3]Plaintiff also argues that the deputies acted contrary to their training when they decided to enter the garage after the door would not fully open, thus contributing to the chaotic situation that ensued. [Doc. No. 103 at 10-11.] However, even if an officer acts contrary to his training, that does not itself negate qualified immunity where it would otherwise be warranted. *Sheehan*, 135 S.Ct. 1765, 1777 (2015). "Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoid[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'" *Id.* (internal citations omitted).

Finally, in *Deorle*, officers confronted a drunk, suicidal man who was upset at being diagnosed with hepatitis. 272 F.3d at 1275-1278. The man followed several instructions that the officers gave him (including throwing away three potential weapons), and was observed at close proximity by officers on his property for 5-10 minutes before he was shot with a lead-filled beanbag round. *Id.* Here, Napier was only observed for a few seconds, may not have been complying with instructions to raise his hands, and had one hand near his waist when he was shot. Thus, *Deorle* is also not sufficiently similar to provide the deputies with "clear notice." *S.B.*, 2017 WL 1959984, at *6.

For the reasons set forth above, the cases cited by Plaintiff do not provide "clear notice" to the deputies under the "exacting standards" required by *White*. *S.B.*, 2017 WL 1959984, at *6. Therefore, the motion for summary judgment as to the Fourth Amendment claim is **GRANTED** on the grounds of qualified immunity.

2. State law Battery/Wrongful Death.

Defendants also move for summary judgment on Plaintiff's state law claim of battery and wrongful death.[4] Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force. See *Edson v. City of Anaheim*, 63 Cal.App.4th 1269 (1998); see also *Saman v. Robbins*, 173 F.3d 1150, 1157 n. 6 (9th Cir.1999) ("A prima facie case for battery is not established under California law unless the plaintiff proves that an officer used unreasonable force against him to make a lawful arrest or detention."). California law regards "Section 1983 ... as the federal counterpart of state battery or wrongful death actions." *Yount v. City of Sacramento*, 43 Cal.4th 885, 902 (2008) ("[W]e cannot think of

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[4] Defendants acknowledge that qualified immunity does not extend to Plaintiff's state law claim. [Doc. No. 104 at 8.] *See C.V. by and through Villegas v. City of Anaheim*, 823 F.3d 1252, 1257 (9th Cir. 2016); *Johnson v. Bay Area Rapid Transit Dist*., 724 F.3d 1159, 1171 (9th Cir. 2013); *see also Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) ("California law is clear that the doctrine of qualified governmental immunity is a federal doctrine that does not extend to state tort claims against government employees" (citations, alterations, and internal quotation marks omitted)).

a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct...."); *Susag v. City of Lake Forest*, 94 Cal.App.4th 1401, 1412–13 (2002) ("[I]t appears unsound to distinguish between section 1983 and state law claims arising from the same alleged misconduct.")

Because this Court has already determined that a jury could find that Defendants' use of deadly force was not reasonable, his battery/wrongful death claim is also viable. See *Nelson v. City of Davis*, 709 F.Supp.2d 978, 992 (E.D.Cal.2010), aff'd, 685 F.3d 867 (9th Cir.2012) ("Because the same standards apply to both state law assault and battery and [s]ection 1983 claims premised on constitutionally prohibited excessive force, the fact that Plaintiff's 1983 claims under the Fourth Amendment survive summary judgment also mandates that the assault and battery claims similarly survive.") A genuine dispute of material fact remains as to whether Officers Boisseranc and Danza used unreasonable force. Therefore, Defendants' motion for summary judgment as to the wrongful death/battery claim is **DENIED**.[5]

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment as to the Fourth Amendment claim is granted on the grounds of qualified immunity. Defendant's motion for summary judgment as to the wrongful death/battery claim is **DENIED**.

A status conference shall be held on **July 26, 2017** at **10:00 a.m.** in Courtroom 4-C

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[5] Plaintiff has always proceeded on an excessive force/battery theory and did not purport to bring a negligence claim until he submitted proposed jury instructions. [*See* Doc. Nos. 95 and 96.] However, as this Court previously noted, it does not appear that Plaintiff has pled a negligence claim nor complied with administrative procedures. [Doc. No. 97 at 2.] *See Jacovez v. United Merch. Corp.*, 9 Cal.App.4th 88, 105 (1992)("In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence."); *Nelson v. State of California*, 139 Cal.App.3d 72, 79 (1982)("If a plaintiff relies on more than one theory of recovery against [government defendants], each cause of action must have been reflected in a timely claim.") Therefore, at this time, Plaintiff's only viable state law claim is wrongful death based upon a battery.

to discuss further proceedings.

IT IS SO ORDERED.

Dated: July 17, 2017

Hon. Cathy Ann Bencivengo
United States District Judge