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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ESTATE OF STEPHEN
CUNNINGHAM, PHIL
CUNNINGHAM,

Plaintiffs,

v.

CITY OF TACOMA, JIMMY WELSH,
PATRICK PATTERSON, OFFICERS
JOHN OR JANE DOE 1-5,

Defendants.

CASE NO. 3:16-CV-05835-DWC

ORDER ON DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 9. Currently before the Court is Defendants City of Tacoma, Jimmy Welsh, and Patrick Patterson’s Motion for Summary Judgment (“Motion”). Dkt. 18.

The Court concludes Plaintiffs, the Estate of Stephen Cunningham and Phil Cunningham, have failed to rebut Defendants’ summary judgment showing. Accordingly, the Court grants the

1 Motion. Additionally, the Court dismisses the Doe defendants due to Plaintiffs' failure to
2 prosecute. Accordingly, this case is closed.

3 **I. BACKGROUND**

4 Plaintiffs bring this civil action under 42 U.S.C. § 1983 challenging the actions of
5 Defendants City of Tacoma, Welsh, and Patterson during a police-involved shooting. *See* Dkt. 1-
6 1. Plaintiffs allege Defendants City of Tacoma and Welsh, a police officer with the Tacoma
7 Police Department, violated Stephen Cunningham's ("Stephen") constitutional rights when
8 Defendant Welsh shot and killed Stephen. *Id.* Plaintiffs also contend Defendants City of Tacoma
9 and Patterson violated Phil Cunningham's ("Phil") constitutional rights when Defendant
10 Patterson searched Phil's home without a warrant. *Id.*

11 Defendants filed the Motion with supporting evidence on January 1, 2018. Dkt. 18-23.
12 Plaintiffs filed a Response with supporting evidence on February 5, 2018. Dkt. 27-35.
13 Defendants filed a Reply and two additional affidavits on February 9, 2018. Dkt. 36-38. The
14 parties did not request oral argument. *See* Dkt. 18, 27. Regardless, the Court has reviewed the
15 record and independently determined oral argument is not necessary in this case.

16 **II. STANDARD OF REVIEW**

17 Summary judgment is proper only if the pleadings, discovery, and disclosure materials on
18 file, and any affidavits, show that there is no genuine dispute as to any material fact and that the
19 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
20 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
21 showing on an essential element of a claim in the case on which the nonmoving party has the
22 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of
23 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for
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1 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
2 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
3 metaphysical doubt”); *see also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
4 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
5 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby,*
6 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
7 626, 630 (9th Cir. 1987).

8 III. EVIDENCE

9 The relevant evidence shows Defendant Welsh, a police officer with the Tacoma Police
10 Department, was on patrol on the evening of May 10, 2015. *See* Dkt. 20, Welsh Dec., ¶¶ 2-3.
11 Defendant Welsh was a “single officer,” meaning he was the only officer in his patrol car. *See*
12 Dkt. 20, p. 13. At approximately 10:00 p.m., Defendant Welsh and non-party Officer Angela
13 Hayes, a police officer with the Tacoma Police Department who was driving a separate patrol
14 car, were dispatched to investigate a noise complaint in the area of 3424 South Proctor Street,
15 Tacoma, Washington. *Id.*; Dkt. 20, Welsh Dec., ¶ 4. The officers responded to the complainant’s
16 location and spoke with Angela Sprinkle, the complainant. Dkt. 20, Welsh Dec., ¶ 5; Dkt. 31,
17 Sprinkle Dec., ¶¶ 2-5; Dkt. 20, p. 13. Defendant Welsh stated he could hear the music from
18 inside Ms. Sprinkle’s home and the officers advised Ms. Sprinkle that they would make contact
19 with the neighbor and ask the neighbor to turn the music down. Dkt. 20, Welsh Dec., ¶ 5; Dkt.
20 20, p. 13.

21 Defendant Welsh and Officer Hayes “walked to the house that was playing music.” Dkt.
22 20, Welsh Dec., ¶ 6. At the time Defendant Welsh initially made contact at the residence, it was
23 a very simple call to request the music be turned down. Dkt. 20, p. 15; Dkt. 23, pp. 19-20. “The
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1 house was a duplex and the music was coming from the unit at the back of the house [, (Unit
2 B)].” *Id.* The officers “entered through a pedestrian gate and walked down a long walkway to
3 reach the door of the unit playing music.” *Id.* There was a large picture window next to the front
4 door of Unit B. *Id.* at ¶ 7; Dkt. 21, Hayes Dec., ¶ 8. The officers could see the lights were on in
5 the home and on the back patio of the home. Dkt. 20, Welsh Dec., ¶ 7. The entire inside of the
6 house was visible; Officer Welsh could see the living room, a hallway going back to what
7 appeared to be the bedrooms, the kitchen, and part of the back patio. Dkt. 20, p. 14; *see also* Dkt.
8 21, Hayes Dec., ¶¶ 8-9.

9 At this point in the evening, the evidence is in dispute regarding the events which
10 transpired prior to Defendant Welsh shooting Plaintiff.

11 A. Defendants’ Evidence

12 Defendants’ evidence shows Defendant Welsh and Officer Hayes, who were both in
13 police uniform, stood in front of the large window next to the front door so the occupants could
14 see they were police officers and not be startled. Dkt. 20, Welsh Dec., ¶ 8; Dkt. 20, p. 13; Dkt.
15 21, p. 10. Defendant Welsh testified he knocked on the metal storm door frame and said
16 “Tacoma Police.” Dkt. 20, Welsh Dec., ¶ 8. Defendant Welsh did not hear anything immediately
17 after he knocked and announced the officers’ presence. *Id.* However, a few seconds later,
18 Stephen came into the living room, looked towards the back patio, and then made brief eye
19 contact with Defendant Welsh. *Id.* Defendant Welsh continued to knock on the door and, at one
20 point, announced, “Tacoma Police. You just need to turn down your music.” Dkt. 20, Welsh
21 Dec., ¶ 9. While Stephen appeared to react to the officers’ presence when he first entered the
22 living room, Defendant Welsh did not feel threatened. Dkt. 20, p. 15.

1 Officer Hayes testified that Stephen looked at the officers and Defendant Welsh knocked
2 and said “Tacoma Police” while Stephen was in the room. Dkt. 21, Hayes Dec., ¶ 9; Dkt. 20, p.
3 11. Stephen had a blank stare, or “thousand yard stare,” and did not acknowledge the officers.
4 Dkt. 21, Hayes Dec., ¶ 9. Officer Hayes stated that a “thousand yard stare” is usually associated
5 with “PCP, hallucinogens,” and, in her training, officers cannot negotiate with an individual
6 exhibiting a “thousand yard stare.” Dkt. 21, p. 15. Stephen then walked back towards the kitchen
7 and the sliding door that provided access to the back patio. Dkt. 21, Hayes Dec., ¶ 9; Dkt. 20,
8 Welsh Dec., ¶ 10; Dkt. 20, p. 15.

9 After Stephen walked away, both Defendant Welsh and Officer Hayes noticed “a firearm
10 sitting on the coffee table, with two magazines right next to it.” Dkt. 20, Welsh Dec., ¶ 10; Dkt.
11 21, Hayes Dec., ¶ 9. Defendant Welsh stated the gun appeared to be a Kimber 1911 with a dark
12 metallic finish; it was in a small holster, like a pressure holster. Dkt. 20, p. 15. Defendant Welsh
13 did not consider the mere presence of the firearm to be a threat. Dkt. 20, Welsh Dec., ¶ 10; Dkt.
14 20, p. 15.

15 Defendant Welsh knocked an additional time and Stephen turned back towards the living
16 room. Dkt. 21, Hayes Dec., ¶ 10. Defendant Welsh, who was standing at least partially in front of
17 the window, flashed his flashlight on himself briefly to show he was a police officer. Dkt. 20,
18 Welsh Dec., ¶ 11. Stephen looked at the officers again; he now looked frantic, angry, intense,
19 and crazed. *Id.*; Dkt. 20, p. 16. Stephen made a gesture and said something to the effect of “oh,
20 okay” or “oh, no, your (sic) gonna get it.” Dkt. 20, Welsh Dec., ¶ 11. Stephen picked up speed,
21 moving towards the gun. Dkt. 21, p. 12. He fixated on the gun and grabbed for it. Dkt. 20, Welsh
22 Dec., ¶ 11; Dkt. 21, Hayes Dec., ¶ 10. Defendant Welsh stated that he was “immensely fearful”
23 Stephen would begin shooting the officers through the door of the house. Dkt. 20, p. 17.

1 The officers were in a terrible tactical position. Dkt. 20, Welsh Dec., ¶ 12. The coffee
2 table, where the gun was located, was very close to the officers. *Id.* The officers could not retreat
3 the way they had come because it was a long walkway with no cover and they would have their
4 backs to Stephen. *Id.*; *see also* Dkt. 20, p. 16. Thus, when Stephen reached for the gun, both
5 Defendant Welsh and Officer Hayes ran to the west side of the house and into the backyard. Dkt.
6 20, Welsh Dec., ¶ 11; Dkt. 21, Hayes Dec., ¶ 11. There was no doubt in Officer Hayes’s mind
7 that the officers were in danger when they ran around the northwest corner of the house into the
8 backyard. Dkt. 28-2, p. 10 (Hayes Depo., p. 31).

9 Officer Hayes ran to take cover at the southwest corner of the house. Dkt. 28-2, p. 10
10 (Hayes Depo., p. 31). When Officer Hayes arrived at the southwest corner she engaged with a
11 male wearing a white shirt. Dkt. 21, Hayes Dec., ¶ 12. She directed him to stay where he was and
12 show her his hands. *Id.* Officer Hayes heard Stephen say, “I’m going to fucking kill you guys”
13 and the male in the white shirt ran into the house through the back patio door. *Id.*

14 After Defendant Welsh ran around the northwest corner of the house, he began walking
15 backwards towards the southwest corner of the house when he heard Stephen slam the front door
16 open and heard Officer Hayes contact someone from her location near the southwest corner of
17 the house. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, p. 17. Defendant Welsh did not know if the
18 individual Officer Hayes was engaged with was collaborating with Stephen or just someone in
19 the backyard. Dkt. 20, p. 18. When Defendant Welsh reached the southwest corner of the house,
20 he attempted to use as much of the corner of the house as he could to shield Officer Hayes from
21 Stephen. Dkt. 20, p. 18. Defendant Welsh saw Stephen peer around the northwest corner of the
22 house like he was looking for the officers with his gun out at “low ready.” Dkt. 20, Welsh Dec., ¶
23 13; Dkt. 20, p. 18. Defendant Welsh could see the gun in Stephen’s right hand. Dkt. 20, p. 18.

1 Defendant Welsh was repeatedly screaming, “Tacoma Police! Drop your gun!” Dkt. 20, Welsh
2 Dec., ¶ 13.

3 Defendant Welsh’s head was sticking out from behind the southwest corner of the house
4 and Stephen looked right at him. Dkt. 20, p. 18. Stephen disappeared around the northwest
5 corner of the house and said something like “I’m going to get you!” or “I’m going to fucking kill
6 you guys.” Dkt. 20, Welsh Dec., ¶ 13; Dkt. 21, Hayes Dec., ¶ 12. Stephen then came directly
7 around the northwest corner of the house with his gun raised and aimed at Defendant Welsh,
8 who believed Stephen was coming to shoot the officers. Dkt. 20, Welsh Dec., ¶ 13; *see also* Dkt.
9 20, pp. 18-19. Officer Hayes heard Defendant Welsh say “Drop your weapon. Drop your
10 weapon” and then heard Defendant Welsh fire his weapon several times. *Id.*

11 Defendant Welsh dropped his flashlight and fired four or five shots at Stephen. Dkt. 20,
12 Welsh Dec., ¶ 13; Dkt. 20, p. 18. He stopped for a “split second,” saw that Stephen was not
13 incapacitated, still holding his gun in his left hand three quarters of the way up, and facing the
14 officers. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, pp. 18-19. Defendant Welsh fired a second volley of
15 shots until Stephen fell to the ground. Dkt. 20, Welsh Dec., ¶ 13; Dkt. 20, pp. 18-19. Stephen’s
16 gun was “recovered with the safety off, in firing configuration with the hammer cocked and a
17 round in the chamber,” indicating Stephen was intent to fire the weapon. Dkt. 23, p. 26.

18 During the shooting, the officers were located near the southwest corner of the house and
19 were standing close enough that the casings from Defendant Welsh’s weapon hit Officer Hayes
20 on the shoulder. Dkt. 20, Welsh Dec., ¶ 21; Dkt. 21, Hayes Dec., ¶ 12; Dkt. 28-2, p. 13 (Hayes
21 Depo., p. 34); *see also* Dkt. 20, p. 17. Additionally, Defendants’ evidence shows Defendant
22 Welsh knocked and announced the officers probably four different times between the time the
23 officers arrived at the home and when Stephen grabbed his gun. Dkt. 20, Welsh Dec., ¶ 9. There
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1 is also evidence showing Andrew Blinn, one of Stephen’s roommates who was present that
2 evening, stated “he knew that Officer Hayes and Officer Welsh were police officers, and that he
3 didn’t know why [Stephen] didn’t also know this.” Dkt. 23, p. 24.

4 Defendants submitted an expert report stating that when Stephen armed “himself with a
5 semi-automatic pistol” and moved “aggressively towards the officers,” his actions constituted
6 attempted assault in the first degree. Dkt. 23, p. 22. Additionally, Stephen’s actions of moving
7 toward the officers and raising the weapon met the elements of attempted assault in the first
8 degree or attempted murder in the second degree. Dkt. 23, p. 24.

9 After the shooting occurred, Defendant Patterson, a police officer with the Tacoma Police
10 Department, contacted the occupants in the other half of the duplex, Unit A. Dkt. 22, Patterson
11 Dec., ¶¶ 2, 4. The occupants, Phil and Beverly Cunningham, are Stephen’s parents. *See id.* at ¶ 5.
12 Defendant Patterson initially asked the Cunninghams to move away from the wall shared with
13 Unit B for their safety. *Id.* There was a concern there were individuals still inside Unit B who
14 were not responding to the police. *Id.* at ¶ 4. Defendant Patterson was talking to the
15 Cunninghams through the open front door when he was directed to obtain information from them
16 about the occupants of Unit B. *Id.* at ¶ 6. Defendant Patterson does not recall if a sergeant or
17 another officer asked him to obtain information from the Cunninghams. *Id.* While speaking
18 through the open door, Mrs. Cunningham invited Defendant Patterson into the home. *Id.* at ¶ 7.
19 Defendant Patterson does not recall if he asked if he could come in or if she “just invited” him
20 inside; however, he does recall Mrs. Cunningham being concerned about leaving the door open
21 due to the cool air outside. *Id.* Defendant Patterson entered the home and the door was closed
22 behind him and remained closed while he was inside. *Id.*

1 The Cunninghams provided Defendant Patterson with information about the occupants of
2 Unit B, including the fact that there were other weapons inside Unit B, which led Tacoma Police
3 supervisors to direct SWAT to respond to the scene. *Id.* at ¶ 9; Dkt. 19, p. 75 (police had
4 evidence that there were numerous weapons and possibly an individual who suffered from PTSD
5 in the home). After Defendant Patterson learned that SWAT was being called, non-party
6 Sergeant Verone instructed Defendant Patterson to ask the Cunninghams to leave Unit A for
7 their safety. Dkt. 22, Patterson Dec., ¶ 10. Defendant Patterson instructed the Cunninghams to
8 dress warmly and escorted them from the residence. *Id.* Defendant Patterson later learned the
9 Cunninghams had cameras outside the residence and there was concern the feed could be seen
10 inside Unit B, allowing the occupants to see the police. *Id.* at ¶ 13. The Cunninghams informed
11 Defendant Patterson that the camera feed was only visible in Unit A. *Id.* The police did not re-
12 enter Unit A to check the camera feed. *Id.* Defendant Patterson did not re-enter Unit A, did not
13 search Unit A, and did not see the video feed or access the video cameras or equipment. *Id.* at ¶
14 16.

15 B. Plaintiffs' Evidence

16 Plaintiffs' evidence shows that on the evening of May 10, 2015, Stephen and Mr. Blinn
17 were sitting on the back patio of Unit B listening to music. *See* Dkt. 30, Blinn Dec., ¶¶ 2-3. They
18 went into the home through the back door and saw multiple flashlights moving on the outside of
19 the living room window. *Id.* at ¶¶ 8-9. Mr. Blinn saw at least two flashlights moving, but he
20 could not see how many individuals were outside the home. *Id.* at ¶¶ 10-11. Mr. Blinn never
21 heard anyone announce themselves. *Id.* at ¶ 12.¹ Stephen grabbed his pistol off the coffee table,
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23 ¹ The Court notes Mr. Blinn testified that neither he nor Stephen heard anyone announce themselves;
24 however, Mr. Blinn provides no evidence explaining how he knew what Stephen did or did not hear. *See* Dkt. 30,
Blinn Dec., ¶ 12. Therefore, the Court finds Mr. Blinn does not have knowledge of what Stephen heard.

1 opened the front door, and said, “Really? Who the fuck are you?” *Id.* at ¶¶ 13-14. “There was no
2 response from the individuals outside.” *Id.* at ¶ 14. Stephen then walked out the door and turned
3 left; Mr. Blinn followed him out. *Id.* at ¶ 15. As Mr. Blinn took his first step outside the door, he
4 heard approximately six gunshots and dove in the opposite direction. *Id.* at ¶ 16. Stephen was
5 laying twenty feet away from Mr. Blinn. *Id.* at ¶17. Mr. Blinn heard Stephen struggling for
6 breath, then silence, then more gunshots. *Id.* “After the last gunshot, [Mr. Blinn] heard police
7 yelling. Up until that point[, Mr. Blinn] didn’t know who was shooting at [himself and
8 Stephen.]” *Id.* Mr. Blinn testified that he never heard an order to drop the gun from the police,
9 who only identified themselves after they fired multiple shots at Stephen. *Id.* at ¶ 18.

10 After the shooting, Phil was standing at the door of his home and Defendant Patterson
11 forced Phil back into his home. Dkt. 28-1, p. 6 (Phil Depo., pp. 50-52). Defendant Patterson then
12 entered Phil’s home without being invited and without a warrant. *Id.* at p. 7 (Phil Depo., p. 53).
13 Defendant Patterson moved the Cunninghams to the back bedroom so they would be away from
14 the windows in the living room because there might be gunshots. *Id.* at p. 9 (Phil Depo., p. 63).
15 Defendant Patterson then told the Cunninghams they had to leave the home because it was going
16 to be searched by the police. *Id.* at p. 8 (Phil Depo., p. 59). Phil saw flash bulbs going off in his
17 bedroom at 3:30 a.m., so he knew the police were in his home taking pictures. *Id.* at p. 12 (Phil
18 Depo., pp. 86-87). Around 6:00 a.m., Phil and his wife were allowed to return to the home to get
19 medications. *Id.* at pp. 10-11 (Phil Depo., pp. 67, 73). No police were in the home at that time.
20 *Id.* at pp. 10 (Phil Depo., p. 67). The Cunninghams were allowed back in their home around
21 12:20 p.m. on May 11, 2015. *See id.* at p. 11 (Phil Depo., p. 75).

22 Plaintiffs also submitted declarations from five neighbors who lived near the scene of the
23 shooting. *See* Dkt. 29, Robinson Dec.; Dkt. 31, Sprinkle Dec.; Dkt. 32, Fivecodes Dec.; Dkt. 33,
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1 | Sears Dec.; Dkt. 34, Renich Dec.; Dkt. 35, Walter Dec. The neighbors all state that they heard
2 | the gunshots, but did not hear anyone identify themselves prior to the shooting. *See* Dkt. 29,
3 | Robinson Dec., ¶ 7; Dkt. 31, Sprinkle Dec., ¶ 7; Dkt. 32, Fivecodes Dec., ¶ 5; Dkt. 33, Sears
4 | Dec., ¶ 4; Dkt. 34, Renich Dec., ¶5; Dkt. 35, Walter Dec., ¶ 6.

5 | **IV. DISCUSSION**

6 | In the Motion, Defendants assert there is no genuine issue of material fact regarding: (1)
7 | Defendant City of Tacoma’s liability; (2) punitive damages; (3) Defendant Welsh’s use of deadly
8 | force; and (4) Defendant Patterson’s entry into Phil’s home. Dkt. 18.

9 | A. Defendant City of Tacoma and Punitive Damages

10 | Defendants assert Plaintiffs cannot establish excessive use of force or unlawful entry
11 | claims against Defendant City of Tacoma. *See* Dkt. 18, pp. 16-18, 23. Defendants also contend
12 | Plaintiffs have not established that there is a basis for punitive damages in this case. *Id.* at pp. 23-
13 | 24. In their Response to the Motion, Plaintiffs state they dismiss any claim against Defendant
14 | City of Tacoma “based on its policy, custom, failure to train, or ratification.” Dkt. 27, p. 19.
15 | Plaintiffs also concede there is no evidence showing punitive damages are appropriate in this
16 | case. *Id.* at p. 21. Based on Plaintiffs’ Response, the Court dismisses Defendant City of Tacoma
17 | and any claim for punitive damages.

18 | B. Use of Force

19 | Defendants assert the excessive force claim alleged against Defendant Welsh must be
20 | dismissed because Defendant Welsh’s use of deadly force was objectively reasonable. Dkt. 18.
21 | Further, even if Defendant Welsh’s actions were not objectively reasonable, he is entitled to
22 | qualified immunity. *Id.* “[G]overnment officials performing discretionary functions [are entitled
23 | to] a qualified immunity, shielding them from civil damages liability as long as their actions
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1 | could reasonably have been thought consistent with the rights they are alleged to have violated.”
2 | *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). “Qualified immunity
3 | balances two important interests—the need to hold public officials accountable when they
4 | exercise power irresponsibly and the need to shield officials from harassment, distraction, and
5 | liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231
6 | (2009). “In determining whether an officer is entitled to qualified immunity, we consider (1)
7 | whether there has been a violation of a constitutional right; and (2) whether that right was clearly
8 | established at the time of the officer’s alleged misconduct.” *Lal v. California*, 746 F.3d 1112,
9 | 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 232).

10 | 1. *Constitutional Violation*

11 | First, the Court must determine whether a constitutional violation occurred. Here,
12 | Plaintiffs allege Defendant Welsh violated Stephen’s Fourth Amendment rights when he failed to
13 | warn Stephen prior to using deadly force. Dkt. 1-1, 27.

14 | In the Ninth Circuit, courts “analyze all claims of excessive force that arise during or
15 | before arrest under the Fourth Amendment’s reasonableness standard[.]” *Coles v. Eagle*, 704
16 | F.3d 624, 627 (9th Cir. 2012) (citing *Graham v. Connor*, 490 U.S. 386 (1989)). “[T]he
17 | ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether
18 | the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances
19 | confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at
20 | 397.

21 | Factors for evaluating reasonableness include, but are not limited to: (1) the
22 | severity of the crime at issue; (2) whether the suspect posed an immediate threat
23 | to the safety of the officers or others; and (3) whether the suspect actively resisted
24 | arrest or attempted to escape. 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

1 force against was emotionally disturbed. Of all these factors, the most important
2 one is whether the suspect posed an immediate threat to the safety of the officers
or others.

3 *S.B. v. City of San Diego*, 864 F.3d 1010, 1013-14 (9th Cir. 2017) (internal citations and
4 quotations omitted).

5 The Ninth Circuit has “determine[d] that [] warnings should be given, when feasible, if
6 the use of force may result in serious injury, and that the giving of a warning or the failure to do
7 so is a factor to be considered[.]” *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001).

8 However, “where a suspect threatens an officer with a weapon such as a gun or a knife, the
9 officer is justified in using deadly force.” *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir.
10 2005). As the Ninth Circuit has summarized, “[l]aw enforcement officers may not shoot to kill
11 unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is
12 fleeing and his escape will result in a serious threat of injury to persons.” *Harris v. Roderick*, 126
13 F.3d 1189, 1201 (9th Cir. 1997).

14 “The ‘reasonableness’ of a particular use of force must be judged from the perspective of
15 a reasonable officer on the scene, rather than with 20/20 vision in hindsight.” *Id.* at 396 (citing
16 *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). “The calculus of reasonableness must embody
17 allowance for the fact that police officers are often forced to make split-second judgments—in
18 circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is
19 necessary in a particular situation.” *Graham*, 490 U.S. at 396-97.

20 In determining whether summary judgment is appropriate, the Court must consider all
21 facts in dispute in the light most favorable to Plaintiffs, the nonmoving party. *See Glenn v.*
22 *Washington County*, 673 F.3d 864, 870 (9th Cir. 2011). Here, the evidence viewed in the light
23 most favorable to Plaintiffs shows Stephen was sitting on the back patio of his home with Mr.
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1 Blinn. They walked into the house through the sliding glass door and saw flashlights shining
2 through the front window of the home, indicating there were people outside the front door.
3 Stephen grabbed his gun, opened the front door, and said, “Really, who the fuck are you?” While
4 Defendant Welsh said he was repeatedly saying, “Tacoma Police. Drop your gun,” Mr. Blinn
5 testified he did not hear a response. Stephen walked outside the door and was shot within a few
6 seconds.

7 In the few moments between when Stephen walked outside the front door of his home
8 and when he was shot by Defendant Welsh, the undisputed evidence shows Stephen peered
9 behind the northwest corner of his home with his gun at “low ready.” He went back behind the
10 northwest corner of the house and within a few seconds stepped out completely from behind the
11 house and started toward Defendant Welsh with his gun raised and pointed at Defendant Welsh.
12 During this time, Officer Hayes heard Stephen say, “I’m going to fucking kill you guys” and
13 both Defendant Welsh and Officer Hayes state Defendant Welsh yelled “Drop your weapon.”

14 In assessing the *Graham* balancing test, the Court finds that, first, the crime occurring
15 during the shooting was severe. At the time Defendant Welsh initially made contact at Unit B,
16 Defendant Welsh stated it was a very simple call to request the music be turned down. Dkt. 20, p.
17 15; Dkt. 23, pp. 19-20. However, once Stephen grabbed his weapon, pursued the officers, and
18 said, “I’m going to fucking kill you guys” or “I’m going to get you,” the severity of the crime
19 escalated. When Stephen armed “himself with a semi-automatic pistol” and moved “aggressively
20 towards the officers,” his actions constituted attempted assault in the first degree. Dkt. 23, p. 22.
21 Additionally, Stephen’s actions of moving toward the officers and raising and pointing the gun at
22 Defendant Welsh met the elements of attempted assault in the first degree or attempted murder in
23 the second degree. *See* Dkt. 23, p. 24. The Court finds the undisputed evidence shows that, at the
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1 time of the shooting, the crime at issue was severe. Thus, the first factor weighs in favor of
2 finding Defendant Welsh's actions were objectively reasonable.

3 Second, there is evidence showing Stephen presented an immediate threat to Defendant
4 Welsh and Officer Hayes. The Court notes that whether Stephen posed an "immediate threat to
5 the safety of the officers or others" is "the most important single element of the three specified
6 factors" of the *Graham* test. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). Here, the
7 evidence viewed in the light most favorable to Plaintiffs shows Stephen saw people outside his
8 living room by the front door. Stephen, looking frantic, angry, intense, and crazed, quickly
9 grabbed the gun off the coffee table near the front door. Defendant Welsh and Officer Hayes ran
10 from the front door of Unit B when they saw Stephen grab the gun because they feared they were
11 in immediate danger of being shot. The officers could not tactically retreat the way they had
12 come because it was a long walkway with no cover and they would have their backs to Stephen,
13 an armed individual. Thus, when Stephen reached for the gun, both Defendant Welsh and Officer
14 Hayes ran to the west side of the house and into the backyard. Defendant Welsh was immensely
15 fearful that Stephen would shoot the officers through the front door. Further, there was no doubt
16 in Officer Hayes's mind that the officers were in danger when they ran into the backyard.

17 Stephen walked out the front door, which is where the officers were located, and said,
18 "Really, who the fuck are you?" Defendant Welsh and Officer Hayes took cover near the
19 southwest corner of the house. Stephen peered around the northwest corner of the house towards
20 the officers with his gun at "low ready." Defendant Welsh was, at least, partially visible to
21 Stephen. Stephen stepped back behind the northwest corner of the house, out of Defendant
22 Welsh's view. He then completely stepped out from behind the northwest corner of the house
23 and started toward Defendant Welsh with his gun raised and pointed at Defendant Welsh. During
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1 this time, Officer Hayes heard Stephen say, “I’m going to fucking kill you guys” and Defendant
2 Welsh heard Stephen say “I’m going to get you.” Evidence also shows Stephen’s gun was
3 “recovered with the safety off, in firing configuration with the hammer cocked and a round in the
4 chamber,” indicating Stephen was intent to fire the weapon. Thus, the evidence, viewed in the
5 light most favorable to Plaintiffs, shows Stephen posed an immediate threat to Defendant Welsh
6 and Officer Hayes. This factor, the most important factor, weighs in favor of finding Defendant
7 Welsh’s actions were objectively reasonably.

8 Third, the evidence shows Defendant Welsh did not warn Stephen prior to using deadly
9 force. Plaintiff asserts that this case hinges on evidence showing Defendant Welsh failed to
10 identify himself or warn Stephen before he used deadly force. *See* Dkt. 27. Officers are only
11 required to give a warning “where feasible.” *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).
12 “Verbal warnings are not feasible when lives are in immediate danger and every second
13 matters.” *Estate of Martinez v. City of Federal Way*, 105 F. App’x 897, 899 (9th Cir. 2004).
14 However, when a suspect does not pose an immediate threat to the lives of officers or others, a
15 warning is feasible. *See Deorle*, 272 F.3d at 1284.

16 In this case, viewing the evidence in the light most favorable to Plaintiffs, Defendant
17 Welsh and Officer Hayes testified that Defendant Welsh identified himself as a police officer and
18 directed Stephen to drop his weapon.² Importantly, there is no evidence showing Defendant
19 Welsh provided any warning that he was going to use deadly force. However, it is undisputed
20 that the events unfolded very quickly from the moment Stephen grabbed the gun until Defendant
21 Welsh fired his weapon. Mr. Blinn testified it happened in a matter of seconds. At the time of the

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23 ² The Court does note the record contains conflicting information regarding whether Mr. Blinn was aware
24 Defendant Welsh and Officer Hayes were police officers. *See* Dkt. 23, p. 24; Dkt. 30, Blinn Dec. However, the
Court will view Mr. Blinn’s testimony in the light most favorable to Plaintiffs, which shows Mr. Blinn was not
aware Defendant Welsh and Officer Hayes were police officers until after the shooting.

1 shooting, Stephen had his gun raised, was moving towards the officers, and had stated he was
2 going to kill them or “get” them. The officers were trapped in the fenced-in backyard. Both
3 officers believed they were in imminent danger. Officer Welsh heard Officer Hayes engaged
4 with another individual in the backyard. The individual did not follow Officer Hayes commands,
5 and it was unclear to Defendant Welsh if this individual was collaborating with Stephen. The
6 undisputed evidence shows the situation escalated quickly, and Stephen’s actions, including
7 verbally threatening to kill the officers and walking towards the officers with his gun pointed at
8 them, created a situation that put the officers’ lives in immediate danger where every second
9 mattered.

10 The Court notes there is evidence showing Mr. Blinn and neighbors did not hear
11 Defendant Welsh identify himself as a police officer. Mr. Blinn’s testimony, viewed in the light
12 most favorable to Plaintiffs, shows that he did not hear the police identify themselves until after
13 the gunfire stopped. Furthermore, there is testimony from several neighbors stating they did not
14 hear anyone identify themselves prior to hearing gunshots. Significantly, there is no evidence
15 showing the neighbors were close enough to hear Defendant Welsh identify himself or were
16 listening for people to identify themselves until after they heard gunshots. Regardless, this
17 evidence is not dispositive of the issue of whether Defendant Welsh provided a warning prior to
18 using deadly force. As the undisputed evidence shows, Defendant Welsh could not have feasibly
19 provided a warning prior to using deadly force.

20 Plaintiffs argue that because Defendant Welsh testified he was able to repeatedly state,
21 “Drop your weapon,” it was feasible for him to warn Plaintiff that he would be using deadly
22 force. Dkt. 27, pp. 15-19. However, as stated above, the Ninth Circuit has held “[v]erbal
23 warnings are not feasible when lives are in immediate danger and every second matters.” *Estate*
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1 of *Martinez*, 105 F. App'x at 899. Here, the undisputed evidence shows Stephen was armed,
2 verbally threatened to kill the officers, and was moving towards the officers with a gun pointed
3 at Defendant Welsh, who was visible to Stephen. Regardless of whether there was literally
4 enough time for Defendant Welsh to warn Stephen that he would be using deadly force, the
5 evidence shows that it was not feasible, under the law, for Defendant Welsh to provide a verbal
6 warning prior to using deadly force in this case. Therefore, Plaintiffs' argument that Defendant
7 Welsh may have had enough time in terms of literal seconds to issue a verbal warning does not
8 overcome Defendants' summary judgment showing. Accordingly, the third factor weighs in
9 favor of finding Defendant Welsh's actions were objectively reasonable.

10 For the above stated reasons, and consistent with the *Graham* factors, the Court finds the
11 evidence, viewed in the light most favorable to Plaintiffs, shows Defendant Welsh's conduct was
12 objectively reasonable.

13 As the Court finds Defendant Welsh did not violate Stephen's Fourth Amendment rights,
14 Defendant Welsh is entitled to qualified immunity. *See Corrales v. Impastato*, 650 F. App'x 540
15 (9th Cir. 2016) (finding the officer, who did not issue a warning, did not violate the plaintiff's
16 Fourth Amendment rights when the evidence showed the plaintiff rushed toward the officer with
17 his hand positioned in a way that made the officer believe the plaintiff had a gun); *Penley v.*
18 *Eslinger*, 605 F.3d 843, 854 n. 6 (11th Cir. 2010) (holding that when an officer ordered an armed
19 man to "put down the gun," he did not issue a "warning" under *Garner*, but he was justified in
20 firing because "such a warning might easily have cost the officer his life").

21 2. *Clearly Established Law*

22 The Court has determined the undisputed evidence shows Defendant Welsh's actions did
23 not result in a violation of Stephen's Fourth Amendment rights. Therefore, there is no genuine
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1 issue of fact regarding the first prong of qualified immunity. As such, the Court need not
2 determine if the second prong of qualified immunity has been met. However, the Court also finds
3 there was no clearly established law at the time of the shooting that put Defendant Welsh on
4 notice that his actions violated Stephen’s rights.

5 Under the second prong of qualified immunity, the Court must determine “whether the
6 right at issue was clearly established such that a reasonable officer would have understood his
7 actions were unlawful.” *Hughes v. Kisela*, 841 F.3d 1081, 1088 (9th Cir. 2016). While the
8 Supreme Court’s case law “does not require a case directly on point for a right to be clearly
9 established, existing precedent must have placed the statutory or constitutional question beyond
10 debate.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citations omitted). “Clearly
11 established law” should not be defined at a high level of generality; it must be “particularized” to
12 the facts of the case. *See id.*; *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Anderson*, 483 U.S.
13 at 640. To determine “clearly established law,” the Court should first look to binding precedent.
14 *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013). “Absent binding precedent, [the
15 Court] look[s] to all available decisional law, including the law of other circuits and district
16 courts, to determine whether the right was clearly established.” *Osolinski v. Kane*, 92 F.3d 934,
17 936 (9th Cir. 1996); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994) (the Court should consider
18 all relevant precedents); *Dunn v. Castro*, 621 F.3d 1196, 1203 (9th Cir. 2010) (“In determining
19 whether a right is clearly established, we may also look to precedent from other circuits.”).

20 At the time of the shooting, on May 10, 2015, it was clearly established that “[l]aw
21 enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an
22 immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat
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24

1 of injury to persons.” *Harris*, 126 F.3d at 1201. Additionally, it was clearly established that
2 officers are only required to give a warning “where feasible.” *Garner*, 471 U.S. at 12.

3 Here, the situation resulting in Defendant Welsh’s use of force escalated quickly. At the
4 time of the shooting, Stephen verbally threatened to kill Defendant Welsh and Officer Hayes and
5 was walking toward the officers with his gun pointed at Defendant Welsh. Defendant Welsh and
6 Officer Hayes were trapped in a small fenced-in backyard without means to escape. The parties
7 do not cite to, nor does the Court find, any precedent establishing that Defendant Welsh’s
8 conduct under these circumstances was unreasonable “beyond debate.” *See City & County of San*
9 *Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 (2015). Therefore, Defendant Welsh is also entitled
10 to qualified immunity under the “clearly established” prong. *See Flores-Haro v. Slade*, 686
11 F. App’x 454, 456 (9th Cir. 2017) (finding officers were entitled to qualified immunity under the
12 second prong where officers shot the plaintiff multiple times after the plaintiff confronted the
13 shadowy figures he saw circling his home. The plaintiff was armed when he was shot, but
14 viewing the evidence in the light most favorable to him, he never pointed his gun at the officers
15 or fired it and the officers never issued a warning).³

16 3. Conclusion

17 Viewing the evidence in the light most favorable to Plaintiff, the undersigned finds there
18 are no genuine issues of material fact regarding whether Defendant Welsh’s use of deadly force
19 was excessive in violation of the Fourth Amendment. Further, even if Defendant Welsh’s
20 conduct was objectively unreasonable, there was no clearly established law at the time of
21 shooting that would have put Defendant Welsh on notice that his conduct violated Stephen’s

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23 ³ Factual findings regarding the lack of warning are detailed in the district court’s decision. *See Flores-*
24 *Haro v. Slade*, 160 F. Supp. 3d 1231, 1233 (D. Or. 2016) (“Plaintiffs contend the shooting was without warning, and
the officers never identified themselves.”).

1 right to be free from excessive force. Accordingly, the Court finds Plaintiffs have not overcome
2 Defendants’ summary judgment showing as to the excessive force claim alleged against
3 Defendant Welsh.

4 C. Warrantless Entry

5 Next, Plaintiffs allege Defendant Patterson unlawfully entered Phil’s home immediately
6 after the shooting. Dkt. 1-1. “It is a basic principle of Fourth Amendment law that searches and
7 seizures inside a home without a warrant are presumptively unreasonable.” *Brigham City, Utah*
8 *v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotations omitted, citations omitted). The warrant
9 requirement is, however, subject to exceptions. *Id.*; see *Flippo v. West Virginia*, 528 U.S. 11, 13
10 (1999); *Katz v. United States*, 389 U.S. 347, 357 (1967). “[W]arrants are generally required to
11 search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of
12 law enforcement so compelling that the warrantless search is objectively reasonable under the
13 Fourth Amendment.” *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

14 “[L]aw enforcement officers may enter a home without a warrant to render emergency
15 assistance to an injured occupant or to protect an occupant from imminent injury.” *Stuart*, 547
16 U.S. at 403; *Mincey*, 437 U.S. at 392; *Georgia v. Randolph*, 547 U.S. 103, 117 (2006). “Because
17 of law enforcement officers’ role as community caretakers, ‘[t]he emergency doctrine allows
18 [them] to enter and secure premises without a warrant when they are responding to a perceived
19 emergency.’” *United States v. McKee*, 157 F. Supp. 3d 879, 895 (D. Nev. 2016) (quoting *United*
20 *States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005)). For a warrantless search under the
21 emergency doctrine to be justified, the following factors must be met: “(1) The police must have
22 reasonable grounds to believe that there is an emergency at hand and an immediate need for their
23 assistance for the protection of life or property;” and (2) “There must be some reasonable basis,
24

1 approximating probable cause, to associate the emergency with the area or place to be searched.”
2 *Stafford*, 416 F.3d at 1073-74.⁴

3 First, the evidence viewed in the light most favorable to Plaintiffs shows Defendant
4 Patterson entered Phil’s home because Defendant Patterson believed there was an immediate
5 need to assist the Cunninghams for the protection of their life. Defendant Patterson entered Phil’s
6 home immediately after the shooting. The police were still attempting to secure residents inside
7 Unit B who were not complying with police commands. Defendant Patterson moved the
8 Cunninghams to the bedroom of their home because he was concerned there may be additional
9 gunshots, which could enter their living room. After the Cunninghams were in the bedroom with
10 Defendant Patterson, Defendant Patterson learned that SWAT was responding to the scene and
11 instructed the Cunninghams to leave Unit A because it needed to be searched. After Defendant
12 Patterson escorted the Cunninghams from Unit A, he did not re-enter the unit. The evidence,
13 viewed in the light most favorable to Plaintiffs, shows Defendant Patterson entered Phil’s home
14 in order to protect Phil from the immediate threat of additional gunshots while the police
15 attempted to secure the scene.

16 Second, there was a reasonable basis to associate the emergency with Phil’s home. The
17 evidence shows the shooting occurred outside Unit B and Unit B is attached to Phil’s home (Unit
18 A). Officers were attempting to secure a shooting scene. There were occupants in the Unit B who
19 were not responding to police commands and there was evidence of additional weapons in Unit
20 B. It was possible for bullets to travel through the living room window or wall of Phil’s home.
21 Therefore, there was a reasonable basis to associate the emergency with Phil’s home.

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24 ⁴ In *Stafford*, the Ninth Circuit also required inquiry into the motivation of the officer. *See id.* at 1073.
However, in *Brigham City*, the Supreme Court held the officer’s subjective motivation is irrelevant. 547 U.S. at 404.

1 Plaintiffs agree Defendant Patterson was “certainly within his Constitutional right to
2 clear” the Cunninghams from their home to protect them from the emergency. Dkt. 27, p. 20.
3 However, Plaintiffs assert Defendant Patterson had no reason to enter Phil’s home because the
4 emergency was not in their home; it was next door, in Unit B. *Id.* at pp. 20-21. Plaintiffs,
5 however, cite to no evidence to support this argument.

6 As previously discussed, the undisputed evidence shows, at the time Defendant Patterson
7 entered Phil’s home, there was an ongoing situation wherein, following a shooting, the occupants
8 of Unit B (the apartment attached to Phil’s home) were not complying with police commands.
9 There is no evidence showing it was unreasonable for Defendant Patterson to attempt to keep
10 Phil safe in his home before escorting him away from an active shooting situation. Therefore,
11 Plaintiffs have failed to overcome Defendants’ showing that an emergency situation created an
12 exception to the Fourth Amendment warrant requirements allowing Defendant Patterson to
13 lawfully enter Phil’s home.

14 The Court also notes Phil testified that he saw flashbulbs in his home around 3:30 a.m.
15 However, Phil did not testify that he saw Defendant Patterson in his home and there is no
16 evidence showing Defendant Patterson re-entered Phil’s home after he escorted the
17 Cunninghams from their home. Thus, the fact that Phil saw flashbulbs in his home around 3:30
18 a.m. does not create a genuine issue of material fact regarding whether Defendant Patterson
19 violated Phil’s Fourth Amendment rights.

20 In summation, considering the factors, the evidence viewed in the light most favorable to
21 Plaintiffs shows Defendant Patterson entered Phil’s home without a warrant under the emergency
22 exception doctrine. Therefore, there is no genuine issue of material fact regarding whether
23 Defendant Patterson violated Phil’s constitutional rights when he entered Phil’s home without a
24

1 warrant. *See United States v. Escalante*, 17 F. App'x 635, 636 (9th Cir. 2001) (finding the
2 emergency exception applied when gun shots had been reported by a neighbor outside of the
3 searched home). Accordingly, Plaintiffs have failed to overcome Defendants' summary judgment
4 showing regarding the claim alleged against Defendant Patterson.

5 D. Unserved Defendants

6 Plaintiffs bring claims against Officers John and Jane Doe 1-5. *See* Dkt. 1-1. The time for
7 serving the summonses and Complaint expired on December 29, 2016, 90 days after the
8 Complaint was filed in this Court, and no proof of service has been filed regarding the Doe
9 defendants. *See* Dkt. 1; Fed. R. Civ. P. 4(l), 4(m). Further, the Doe defendants have not been
10 identified and no attorney has entered an appearance on their behalf. Unless a plaintiff can show
11 good cause for his failure to serve, the court shall dismiss the action without prejudice as to that
12 defendant or shall extend the time for service. Fed. R. Civ. P. 4(m). Plaintiffs have not showed
13 good cause for the failure to serve or requested an extension of time to serve the Doe defendants.
14 Accordingly, the Doe defendants are dismissed from this case without prejudice.

15 V. **CONCLUSION**

16 The Court concludes the evidence, viewed in the light most favorable to Plaintiffs, shows
17 no genuine issues of material fact exist in this case. Therefore, Plaintiffs have not overcome
18 Defendants' summary judgment showing. Accordingly, Defendants' Motion for Summary
19 Judgment is granted, the Doe defendants are dismissed, and this case is closed.

20 Dated this 7th day of March, 2018.

21 

22 _____
23 David W. Christel
24 United States Magistrate Judge