C.A. No. 17-56709

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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TIMOTHY STREM,

Plaintiff/Appellant,

v.

COUNTY OF SAN DIEGO, SAN DIEGO SHERIFFS DEPUTIES WILLIS (#9925) MYERS (#7284) and DOES 1-5,

Defendants/Appellees.

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On Appeal from the United States District Court
for the Southern District of California

Honorable Karen S. Crawford, Magistrate Judge Presiding by Consent
(DC No. CV-15-2120-KSC(JMA), Southern California, San Diego)

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# APPELLEES' BRIEF

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## STATUTES

## INTRODUCTION

San Diego County Sheriff's Deputies should not be stripped of their qualified immunity in this case because Appellant Strem fails to demonstrate that the officers violated one of his statutory or constitutional rights; and fails to demonstrate that such a right was clearly established at the time of the challenged conduct.

Deputies Vernon Willis and Peter Myers responded to a 911 call that the reporting party's patient, Timothy Strem, was suicidal. They arrived at Strem's house but their knocks went unanswered. Deputy Willis asked Dispatch if the reporting party was still on the phone with Strem and could have him come to the front door. Further knocks went unanswered. About three minutes later, Dispatch advised that the reporting party was no longer on the phone with Strem, and had reported that Strem said he had his gun out. The deputies immediately took cover. Deputy Myers heard a click consistent with that of a gun from inside the house. Moments later, Strem emerged, shirtless, holding a bloody rag in one hand and a phone in the other. Strem would not comply with the deputies orders. Deputy Willis approached and reached to take hold of Strem's hand, telling him he was being detained, but Strem resisted by pinning his arms to his side. Strem continued to resist efforts of both deputies to handcuff him, and the deputies pulled Strem to

the ground and cuffed his hands behind his back. Strem now claims that being handcuffed behind his back was excessive force.

The district court granted summary judgment to the County of San Diego, Deputy Willis and Deputy Myers on Strem's 42 U.S.C. § 1983 excessive force claim. The court found qualified immunity barred the claims consistent with the recent holdings in *S.B. v. Cnty. of San Diego*, 864 F.3d 1010 (9th Cir. 2017) (*S.B.*) and *White v. Pauly*, 137 S.Ct. 548 (2017) (*White*). Strem appeals.

The judgment in favor of the County, Deputy Willis and Deputy Myers should be affirmed. To strip Deputies Willis and Myers of their qualified immunity as law enforcement officers, Strem must show: 1) the officers violated one of his statutory or constitutional rights; and 2) the right was clearly established at the time of the challenged conduct. *White*, 137 S.Ct. 548. The clearly established law must be binding precedent established upon cases with particularized facts to those of this case. And the violation of the right must be so clear that it is beyond debate. This Circuit emphasized the importance of these exacting standards in *S.B.*, 864 F.3d 1010, the decision that prompted the district court's call for briefing on the issue.

Strem fails to identify a clearly established rule and cannot find a case where an officer under similar circumstances was found to have violated the Fourth Amendment. Instead he relies on hind-sight factual assertions and argues about

whether the use of force was objectively reasonable, whether there was a governmental interest in using force, and the significance of his damages; none of which is relevant to the issues on appeal. Quoting Ghandi and concluding that "there are just some things that are just common sense," Strem concedes he cannot point to clearly established law.

Qualified immunity applies. The judgment must be affirmed.

## JURISDICTIONAL STATEMENT

Appellate jurisdiction is proper under 28 U.S.C. § 1294(1). The judgment is final and appealable under 28 U.S.C. § 1291.

## ISSUES PRESENTED

In the context of a law enforcement response to a suicide threat with indications the suspect was armed, with indications of an injured party, where the suspect failed to obey commands, and where the suspect physically resisted attempts to be detained and handcuffed, Strem identifies three issues on appeal:

1. Whether Deputies Willis and Myer's conduct was actionable under the Fourth Amendment (the "first prong" of the qualified immunity analysis).

2. Whether, as the District Court ruled it was not, the law was "clearly established" at the time (the "second prong" of the qualified immunity analysis).

3. Whether disputed issues of material fact remained to be decided by a jury.

The first two issues are appropriate for this court to address because the district court concluded qualified immunity shielded the deputies as no case could be located in which officers acting under similar circumstances were found to have used excessive force. The third issue is properly disregarded because the district court did not rule on issues of material fact and assumed all of the facts presented in the light most favorable to Strem.

## STATEMENT OF FACTS

It is undisputed that on September 24, 2014, Strem was upset and agitated while on the phone with patient service representative Matthew Hollen. (2 Excerpts of Record ["ER"], 83, 289 (Undisputed Material Fact ["UMF"] 1); Supplemental Excerpts of Record ["SER"] 7-8.) "I remember him saying that he was very tired of it all, sick of being sick. And that he should just end it." (SER 7.) "And he – I believe he said, 'I have these pills and I have a gun and I can just end it now.'" (*Ibid*.) Observing Strem's changed emotional state, as compared to prior conversations, Hollen believed Strem was serious in intending to commit suicide. (SER 8-10; 2 ER 289 [UMF 2].)

Hollen's co-worker Tiffany Branam realized something was wrong as Hollen spoke with Strem. (SER 15-16.) Hollen asked Branam to call their supervisor, indicating Strem said he was going to kill himself. (*Ibid*.) Branam then called 911, relaying information from Hollen indicating Strem threatened to

commit suicide with his pills or his gun. (2 ER 178; SER 17.) The 911 call was placed at 9:57:58 a.m. (2 ER 199.)

At approximately 10:00 a.m., Sheriff's Deputies Willis and Myers were dispatched to Strem's address. (2 ER 122 [Willis pp. 12-30:1][1], 200.) Deputy Willis responded to the broadcast of the call and he reviewed preliminary text entries from Dispatch before arriving on scene. (2 ER 122-123 [Willis pp. 30:15-36:7].) Those entries indicated the reporting party advised Strem said he was going to take pills, but did not mention the type of pills, that it was unknown whether Strem had a history of suicide attempts, and that it was unknown whether Strem was drunk, high or if he had any weapons. (2 ER 122-123 [Willis pp. 30:15-33:5] and 199.) The radio dispatch and related text entries also indicated to Deputy Willis that someone was still on a land line speaking with Strem trying to calm him down, that Strem had not yet taken pills, had "calmed considerably," had stopped threatening and was lying down. (2 ER 123 [Willis pp. 34:7-35:18], 183, 199-200.) The preliminary dispatch information did not mention Branam's first indications that Strem also threatened to shoot himself. (Compare 2 ER 178-179 with 183, 199-200.)

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[1] Where condensed deposition transcripts were used with four pages of transcript per page, the deponent and internal page and line references will appear in brackets to aid the court.

At 10:02 a.m., Deputies Willis and Myers arrived on scene. (2 ER 104 [Myers p. 21:3-10], 123 [Willis p. 36:16-22] and 200.) They made contact with a male near the front of the main house and determined it was not Strem. (2 ER 104 [Myers pp. 22:14-24:17], 124 [Willis pp. 39:9-40:24].) This first contact was with Craig Duran, who asserted that he identified himself as Strem's son-in-law and pointed out a detached studio where Strem resided. (2 ER 88-89, 104 [Myers pp. 22:14-24:17], 124 [Willis pp. 39:9-40:24]. ) The only information deputies relayed to Duran was that they were looking for Strem in response to a radio call. (*Ibid.*) Limited information was provided because Duran's connection to Strem and Strem's condition was unverified at that time. (*Ibid*.)

The residence was located at the rear of the property. (2 ER 191.) It had a screened in front porch. (*Ibid*.) There was a door on the screened porch and then the front door to the residence. (2 ER 126 [Willis p. 48:19-25]; 156 [Strem p. 81:1-15].)

Deputies Willis and Myers briefly conferred as they proceeded toward Strem's residence. (2 ER 105-107 [Myers, pp. 25:3-26:11, 32:21-33:9], 125 [Willis pp. 42:10-43:3], and see 2 ER 89, 191.) Deputy Willis knocked on the screen door, announced their presence and requested Strem come out approximately five to seven times. (*Ibid*.) There was no answer. *Ibid*. Deputy

Myers could hear someone inside the house. (2 ER 105, 107 [Myers pp. 27:8-19, 33:6-13].)

According to Duran, when there was no answer, the deputies asked if Strem had a phone; Duran replied, "yes." (2 ER 89.) Duran was asked to call Strem and have him come outside. (*Ibid*.) Duran tried calling twice with no success. (*Ibid*.) The line was busy. (*Ibid*.) Around the same time, Deputy Willis radioed Dispatch to determine whether the reporting party was still talking with Strem and to have that person ask Strem to come outside. (2 ER 105 [Myers, pp. 25:23-27:7], 125-126 [Willis pp. 43:20-45:5, 45:21-46:5].) The Dispatch event log indicates the radio request occurred at 10:06:33 a.m. (2 ER 126 [Willis pp. 45:21-46:5], 200.) At 10:09:12 a.m., Deputy Willis pre-radioed Dispatch of potential contact with Strem because he heard someone inside the residence. (2 ER 126 [Willis p. 47:8-14], 200.)

When reporting party Branam was called back by Dispatch, she confirmed her office was no longer on the phone with Strem. (2 ER 182.) She described Strem as sounding manic and not normal for Strem. (*Ibid*.) She relayed the doctor's request that Strem be taken in "because he threatened suicide" and was "very unstable." (*Ibid*.) Branam again reported Strem said he had his gun out and was threatening to take pills and shoot himself. (*Ibid*.)

At 10:09:25 a.m., Dispatch told the deputies that on call-back, the reporting party advised Strem was no longer on the land line and that Strem stated he had his gun out. (2 ER 126 [Willis pp. 46:19-47:18], 184, 200.) The deputies took covered positions upon hearing the report Strem had his gun out. (2 ER 105-106 [Myers pp. 26:18-28:8, 30:8-23], 214.) Deputy Willis positioned himself behind the garage of the main building where he could observe the front of Strem's house. (2 ER 106 [Myers 30:16-23], 128 [Willis pp. 56:2-25], 191.) Deputy Myers took a position closer to the front of Strem's house and to the side of the front entrance. (*Ibid*.)

Deputy Willis observed what he perceived as Deputy Myers making verbal contact with Strem with Strem not coming out of the residence. Deputy Willis radioed dispatch advising the subject was refusing to come out and requested additional resources. (2 ER 127 [Willis pp. 50:23-51:19], 184-185, 200-201.) The Dispatch event log indicates this occurred at 10:09:41-42 a.m. (2 ER 201.) The Dispatch transcript showed additional units responding and Dispatch advising "11-45 [suicide] subject at 634 Galaxy Drive. He stated to the hospital that he had a gun out." (2 ER 184-185.)

Deputy Myers recalled that upon taking cover, the two deputies discussed the need for additional resources. (2 ER 107 [Myers, p. 34:1-9].) Deputy Myers then heard a very distinct "click which was what I recognized as part of a gun

making a noise." "It was very distinct, and it sounded like it was right on the other side of the wall from where I was standing." "I thought it was either a cylinder of a revolver clicking into the rest of the revolver or the hammer of the revolver clicking back or forward. (*Ibid*. [Myers, pp. 34:19-36:23].)

The Dispatch transcript and event log showed Deputy Myers requesting a K-9 unit at 10:10:55-56 a.m. (2 ER 185, 201.)

Deputy Myers heard the sound of movement from inside the residence, like "somebody walking on the other side of the door." (*Ibid.*) About 15 seconds later, Deputy Myers heard, but could not see, that someone opened the front door of the residence and walked onto the screened patio area. (2 ER 107-108 [Myers, pp. 36:23]. )

When Strem came out through the patio door, he was shirtless with pants on, a cordless phone in one hand, and a bloody napkin or rag in the other hand. (2 ER 129 [Willis pp. 58:22-59:18], 108 [Myers pp. 38:16-39:12]; 159-160 [Strem pp. 92:20-94:8].) While Deputy Willis did not see a weapon in Strem's hands, he did not know whether one might be concealed. (2 ER 129 [Willis pp. 59:4-15].) Deputy Myers observed that Strem was "significantly bigger" than him and he was concerned about, why Strem appeared to be bleeding, whether Strem was armed, would Strem attack, would Strem surrender, or would Strem try to commit suicide by cop. (2 ER 108-109, 113 [Myers pp. 38:16-39:11, 43:15-22, 58:17-59:21].)

It was undisputed that when Strem exited his house, the deputies had legal justification to take him into custody. (2 ER at 56 [Final Pretrial Order at 2:4-5].)

Deputy Willis ordered Strem to put the things in his hands down and turn around multiple times. (2 ER 108 [Myers p. 39:13-20], 129-130 [Willis pp. 60:16-62:14].) Strem did not comply. (*Ibid.*) Strem admitted he was initially surprised deputies were there and then he became aggravated. (2 ER at 165 [Strem pp. 114:23-115:10].) Deputy Myers observed Strem was upset and frustrated, "kind of flexing his muscles, using his whole body to yell at us." (2 ER 108-109 [Myers pp. 40:6-41:8]. )

Deputy Willis approached Strem with the intent of detaining him in handcuffs so that he could then investigate the situation and determine whether Strem was insane, wanted to hurt himself, or if it was something else. (2 ER 130 [Willis p. 64:4-9]. ) When Deputy Myers saw Deputy Willis approach Strem, he did the same also with the intent of securing Strem in handcuffs so they could do a pat down for any weapons and evaluate the situation. (2 ER 109 [Myers pp. 42:8-43:14].) Both deputies holstered their side arms by the time they reached Strem. (*Ibid.*)

When Deputy Willis said he was going to cuff Strem, Strem resisted. Deputy Willis described Strem as tensing his muscles with elbows to his sides and raised fists, a fighting stance, and cussed at them. (2 ER 130-131 [Willis pp.

64:10-66:17].) Deputy Myers observed Strem refuse to place his hands behind his back and that as the deputies took hold of his wrists, Strem became rigid and began to pull his arms up towards his chest. (2 ER 109 [Myers p. 44:2-25].) Strem admitted responding by saying, "I can't do that" and "my natural reaction was to put them by my sides" – "I put my hands as tight against my body as I could." (2 ER 160-161 [Strem pp. 97:14-22, 98:7-25].)[2] He could not remember if he raised his arms. (*Ibid*.)

Deputy Willis gave additional commands to stop resisting and when Strem continued to resist, Strem was taken to the ground, ending up on his back. (2 ER 131 [Willis pp. 66:9-68:20].) Strem continued to resist as deputies rolled him over and resisted until he was handcuffed. (2 ER 110-111 [Myers p. 45:10-19, 48:25-49:8], 131-132 [Willis pp. 68:13-69:5].)

The Dispatch transcript and event log showed Deputy Willis radioing Dispatch that Strem was detained by 10:12 a.m. (2 ER 185, 201.)

Following a pat down and consent search of the residence, the deputies found a loaded .38 caliber revolver in an open shoebox in Strem's bedroom. (2 ER 111-112 [Myers pp. 49:9-54:16], 294.) Strem was transported to the hospital for

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[2] Strem later modified this testimony, still admitting he stiffened his arms against his body, but asserted he did it because he knew he could not move his arms backwards and trying to prevent what "I knew I was going to occur …" (2 ER 87.)

evaluation on a 72-hour psychiatric hold under Cal. Welf. & Inst. Code § 5150. (2 ER 133 [Willis, pp. 74:11-76:10], 216, 294].)

It is undisputed that the altercation caused Strem pain, concern for his health, and minor injuries. But it is notable that Strem clearly concedes his injuries "were not lasting or permanent." (Doc. 94, at p. l; 2 ER 265, 269.)

## STATEMENT OF CASE

Strem's 42 U.S.C. § 1983 case with related state law claims was narrowed to his Second Cause of Action alleging excessive force and his Fifth Cause of Action for battery under California law. (2 ER 29, 31, 42.) The case was set to proceed to trial before Magistrate Judge Crawford, presiding by consent, at the end of May, 2017. (1 ER 1; 2 ER 41.)

After this court issued its decision in *S.B.* on May 12, 2017, the district court requested further briefing on the issue of qualified immunity, giving defendants permission to do so by "any permissible motion, including a summary judgment motion." (1 ER 2.) The district court vacated the trial. (*Ibid*.)

Complying with the court's directive, Deputies Willis, Myers and the County submitted their summary judgment motion. (2 ER 307 [Doc. 106].) The motion was supported by excerpts from the depositions of Hollen, reporting party Branam, the Dispatch Radio Transcript, and excerpts from the depositions of Deputy Willis, Deputy Myers, and Strem. (SER 3-4.)

After considering the moving, opposing, and reply papers, the district court granted summary judgment on Strem's remaining 42 U.S.C. § 1983 federal excessive force claim and declined jurisdiction over the remaining state law battery claim. (1 ER 4, 18.) Strem timely appealed the judgment. (2 ER 296-297.)

## STANDARDS OF REVIEW

The grant of summary judgment is reviewed de novo. *S. B.*, 864 F.3d at 1013. The facts are viewed in the light most favorable to Strem. *White*, 137 S. Ct. at 550. "Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers." *Ibid*., citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015).

## LEGAL DISCUSSION

### I

### DEPUTIES WILLIS AND MYERS ARE ENTITLED TO QUALIFIED IMMUNITY

Summary judgment in favor of Deputies Willis and Myers is properly affirmed based on the doctrine of qualified immunity. There was no clearly established right to be handcuffed in the front under the circumstances Deputies Willis and Myers faced – an unsecured, noncompliant, potentially suicidal man with indications a gun was concealed on his person or in the nearby residence, and indications the man or another victim had already been injured. Taking hold of Strem's wrists to control and effectuate handcuffing, taking him to the ground to

do so when he actively resisted, and cuffing him behind his back as a protective measure until he could be patted down was both objectively reasonable and the use of the least intrusive means of force. After all, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers' violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (*Graham*); and see *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). Qualified immunity applies here.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court recently addressed a qualified immunity defense in the context of a Fourth Amendment excessive force claim in *White*, 137 S. Ct. 548. Reversing the Tenth Circuit's denial of qualified immunity, the Supreme Court explained that "[i]n the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *Id*. at 551. "The Court has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *Ibid*. (internal citations and quotations omitted).

The Ninth Circuit followed *White* in *S.B. v. Cnty. of San Diego*, 864 F.3d at 1015. This Circuit specifically "acknowledge[d] the Supreme Court's recent frustration with failures to heed its holdings." *Ibid*. The *S.B.* Court stated; "[w]e hear the Supreme Court loud and clear." *Ibid*.

Before liability can be imposed on a law enforcement officer, a plaintiff must satisfy a showing of a two prong test. "Qualified immunity shields a police officer from suit under 42 U.S.C. § 1983, unless (1) the officer violated a statutory or constitutional right; and, (2) the right was clearly established at the time of the challenged conduct." *Thomas v. Dillard*, 818 F.3d 864, 874 (9th Cir. 2016), *as amended* (May 5, 2016) (citations omitted). This is not a sequential inquiry and "[c]ourts have discretion to decide the order in which to engage these two prongs." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (*Pearson*).

Strem's inquiry into whether Deputies Willis and Myers' use of force was reasonable is misguided. It is undisputed that when Strem exited his house, the deputies had legal justification to take him into custody. (1 ER 5 [citing to Doc. 76 at p. 1].) Under *Graham*, "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

A grab of the wrists to control and handcuff behind the back was an objectively reasonable and least intrusive means of force to detain a reportedly suicidal male who was noncompliant and potentially had a gun on his person or nearby. Strem admittedly reacted by, at a minimum, pinning his arms to his side – he could not recall whether he also bent his elbows and brought his hands up towards his chest. (2 ER 160-162 [Strem at pp. 95:23-98:10, 105:21-25].) This resistance made taking Strem to the ground and handcuffing behind his back an objectively reasonable, least intrusive means to gain compliance and prevent Strem from accessing a weapon, even presuming as true, that Strem mentioned recent surgery and requested handcuffing in the front due to physical limitations. See *Jackson*, 268 F.3d at 650, 652 (pushing kneeling, non-resistant suspect to the ground to handcuff behind the back was objectively reasonable even when suspect told officer of shoulder injury and requested handcuffing in front); *accord Calvi v. Knox County*, 470 F.3d 422, 425, 428 (1st Cir. 2006) (no constitutional excessive force as a matter of law when officer handcuffed an arrestee, reported to have been brandishing a knife, behind her back according to standard police practice for transport to lockup, even though officer was informed the suspect was "frail" and recently had elbow surgery); *Hunt v. Massi*, 773 F.3d 361, 364-365, 370 (1st Cir. 2014) (affirming qualified immunity to peace officers who handcuffed arrest warrant suspect behind his back even though there was no resistance and arrestee

advised officers of recent stomach surgery and showed deputies the scar; arrestee resisted after officers refused to honor request to handcuff in front); *cf. Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, at 3, 17-18 (10th Cir. 1997) (handcuffing of traffic offender behind back despite offender advising of shoulder injury and requesting cuffing in the front was objectively reasonable use of force precluding excessive force claim).

Qualified immunity also applies to the use of force in this case. Qualified immunity protections are not limited to lawful conduct; it establishes immunity recognizing that officers are often faced with making split second decisions, without complete facts – mistakes and misjudgments may occur. "It 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. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier v. Katz*, 533 U.S. 194, 205-206 (2001), overruled on other grounds in *Pearson*, 555 U.S. at 236.

> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to

> case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force," [cite] and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

*Ibid.*; *accord Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015); *S. B.*, 864 F.3d at 1015.

Thus, the Supreme Court has frequently stated that qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S.Ct. at 308. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson*, 555 U.S. at 231-232.

### A. Strem Fails To Identify Any Clearly Established Rule Particularized To The Facts Of This Case.

Strem must show the asserted constitutional right was clearly established at the time of the officers' alleged misconduct. 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 (1987). The clearly established law must be "particularized to the facts of the case" and cannot be defined "at a high level of generality." *White*, 137 S. Ct. at 552, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) and *Anderson*, 483 U. S. at 640; *cf. Mullenix*, 136 S. Ct. at 308 (the inquiry "must be undertaken in light of the specific context of the case, not as a broad

general proposition"). This does not require a case directly on point, but "existing precedent must have placed the statutory or constitutional questions beyond debate." *S.B.*, 864 F.3d at 1015, 1017 (acknowledging *White's* standard as "exacting"). A rule *suggested* by then-existing precedent is insufficient. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know." *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citation omitted).

In this case, Strem must establish there was precedent as of September 24, 2014, that put the deputies "on clear notice that using force in these particular circumstances would be excessive." *S.B.*, 864 F.3d at 1015. General excessive force principles do not by themselves create clearly established law. *Ibid*. Instead, Strem must "identify a case where an officer acting under similar circumstances as [Deputies Willis and Myers] was held to have violated the Fourth Amendment." *Id.* at 1015-1016.

Strem cites no case on point. If cases on point existed, he would cite and argue them.[3] It is telling, indeed, that Strem ignores this court's 2001 decision in

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[3] The district court expressly noted, "the Court, upon its own review, has not located a case that would have put defendants on clear notice that the alleged force used in this situation would be excessive." (1 ER 8-9.) While not binding under de novo review, the fact that the District Court, with the luxury of

*Jackson*, 268 F.3d at 650, 652, where it was concluded that an officer conducting an arrest for failure to disburse did not use excessive force in allegedly pushing a nonresisting suspect to the ground, kneeling on her back to handcuff her behind her back, and then aggressively pulling her up to a standing position even though the suspect voluntarily kneeled in submitting to arrest, informed the officer of preexisting back and shoulder injuries and requested cuffing in the front. The cases of *Calvi*, 470 F.3d at 425, 428, *Hunt*, 773 F.3d at 364-365, 370, and *Morreale*, 1997 U.S. App. LEXIS 12229, at 3, 17-18 discussed above also demonstrate that handcuffing a suspect behind his or her back consistent with standard police practices was not an unconstitutional excessive use of force even with requests to handcuff in front because of claimed medical conditions. The circumstances are more compelling here where Strem demonstrated noncompliance, was an individual previously reported as suicidal with a gun, and who deputies had not yet patted down. Strem presented an objective a danger to officers and others warranting cuffing behind his back.

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time to research the issue, was unable to find precedent giving clear notice demonstrates a peace officer in the field, facing a noncompliant potentially suicidal male, with visible blood, and the potential of a loaded gun on or near him, would not have been on clear notice that handcuffing him behind his back was clearly excessive force, even with unconfirmed assertions of medical conditions that might make cuffing hands behind the back painful.

Ignoring such adverse authority establishing there is no excessive force in handcuffing behind the back, Strem tries to compensate for the lack of precedent by asking this court to view the issues at a high level of abstract contrary to the dictates of *White* and *S.B.*, and by relying on dicta that "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear…" (Appellant's Opening Brief ["AOB"] at 38, quoting from *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).) Officers pulling down and handcuffing an agitated, non-compliant, suicidal, potentially armed suspect holding bloody napkin of unknown origin, who admits to tensing up in resistance to those efforts, is certainly not such an obvious case of unlawfulness. Rather, it was a clear case of reasonable use of force to detain Strem under the circumstances presented, even with Strem and his son-in-law's unconfirmed statements of frailty and preexisting injury. See *Jackson*, 268 F.3d at 650, 652. The cases Strem cites to argue otherwise are either too general to satisfy the exacting standard required by *White* and *S.B.*, or are easily distinguishable from the facts of this case.

### 1. The Claim That Disproportionate Force Constitutes Excessive Force Was Not A Clearly Established Rule Particularized To The Facts Of This Case.

Strem argues that "it is clearly established that where there is no need for force, any force used is unreasonable," but "where there is a need for force, the force must be reasonable in light of the circumstances." (AOB at 44.) However,

the question in this case is not whether officers are *generally* allowed to use force, but rather whether officers *acting under similar circumstances* were found to have used excessive force. When Strem argues for analogy to cases where no force was needed, he omits the critical factors - the similar circumstances, confronting Deputies Willis and Myers: an agitated, non-compliant suicidal individual, believed to be armed, who was holding a bloody napkin of unknown origin and pinning his arms to his sides so that they could not be secured by handcuffs. To negate qualified immunity, pursuant to *S.B.,* Strem must identify a case in which an officer acting under *similar circumstances* was held to have violated the Fourth Amendment. *S.B.*, 864 F.3d at 1015-1016; see also *Shafer v. Cnty. Of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (because plaintiff "failed to identify sufficiently specific constitutional precedents to alert [the deputy] that his particular conduct was unlawful, [the deputy] is entitled to qualified immunity.")

None of the cases cited by Strem meet the exacting standard required by *S.B.,* that the deputies had been on 'clear notice' that using the amount of force in their circumstances was unlawful. *Ibid.* Strem does not analogize the facts of this case to the cases he cites, many of which are nonbinding decisions from other circuits and some decided after the 2014 events of this case. None of the cases relied upon by Strem involve handcuffing an agitated, possibly violent suicidal suspect for safety reasons; none involve a concern that the suspect had a handgun

readily accessible; and none involve handcuffing under concerns that he or an unknown person had already been injured.[4]

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[4] Strem cites the following cases in support of his argument on disproportionate force:

- *Fogarty v. Gallegos*, 523 F.3d 1147, 1157, 1160 (10th Cir. 2008) (no probable cause to arrest protester for disturbing the peace; protester alleged that he was hit with a rifle-fired projectile as he peacefully played a drum, and offered no resistance to four to five officers who grabbed him and forcibly escorted him through a cloud of tear gas, flexing his wrist so far back for up to five minutes that it tore the tendon; no evidence of danger to police or others);
- *Perea v. Baca*, 817 F.3d 1198, 1201 (10th Cir. 2016) (welfare check of verbal altercation with no weapons reported; officers chased and pushed decedent off a bicycle, struggled with him, and tased him ten times in less than two minutes – tasing continued after decedent under control);
- *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1280 (10th Cir. 2007) (plaintiff returning a file to a courthouse clerk was put into an arm-bar by deputy, continued forward, and was tackled and repeatedly tased. After being handcuffed his head was repeatedly banged into the concrete);
- *Blankenhorn v. City of Orange*, 485 F.3d 463, 478 (9th Cir. 2007) (suspected of misdemeanor trespass with no evidence of threat to officer or public safety, plaintiff was gang-tackled, punched while on the ground and not resisting handcuffing, and put in hobble restraints which made it difficult to breathe);
- *Meredith v. Erath*, 342 F.3d 1057, 1061, 1063 (9th Cir. 2003) (resident who was not the subject of a search warrant for income tax evasion demanded to see the search warrant; agent grabbed resident, threw her to the ground, twisted her arm, handcuffed overtight causing pain for 30 minutes with no evidence of any danger to officers or others);
- *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) (concluding triable issues over whether force used to cuff plaintiff was reasonable where there were differing accounts over the distance officers were from plaintiff when they gave commands to not disposed of trash with possibly incriminating material and whether plaintiff hindered their efforts to retrieve it; qualified immunity not addressed);
- *Sharp v. Cnty. of Orange*, 871 F.3d 901, 907-908, 917 (9th Cir. 2017) (qualified immunity affirmed; officers executing an arrest warrant mistakenly

### 2. The Claim That Painful Application Of Handcuffs Constitutes Excessive Force Was Not A Clearly Established Rule Particularized To The Facts Of This Case.

Strem argues that it is "clearly established that the way handcuffs are applied can constitute excessive force." (AOB at 62.) However, framing the inquiry in such general terms misinterprets the 'exacting' nature of the applicable standard and overlooks the disparate facts of the cases he cites. *White* distinctly held, "clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015.

None of the cases relied upon by Strem involve handcuffing an agitated, possibly violent suicidal suspect for safety reasons; none involve a concern that the suspect had a handgun readily accessible; and none involve handcuffing under

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targeted the father, forcefully restraining and searching him, and after discovering their mistake kept him handcuffed in the patrol car while searching the house without a warrant – no specific precedent identified);

- *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110 (college student refused to drop water balloon; deputy aggressively grabbed him by the arm and pulled him toward the curb even though student did not resist; other deputies grabbed the other arm, while original deputy kicked student's feet out from under him, causing him to fall face first onto the pavement. The officers piled on top of him; student felt a knee go into his back and a boot push his head into the pavement as he was handcuffed; jury finding of excessive force upheld; qualified immunity granted).

concerns that he or an unknown person had already been injured.[5] The requirement that Strem identify cases with such similar circumstances is not an

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[5] Strem cites the following cases in support of his painful handcuffing argument, bear no similarity of fact to the case at hand:

- *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003)(plaintiff within building being searched for income tax evasion handcuffed after demanding to see the search warrant);
- *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989) (concluding triable issues over whether force used to cuff plaintiff was reasonable where there were differing accounts over the distance officers were from plaintiff when they gave commands to not disposed of trash with possibly incriminating material and whether plaintiff hindered their efforts to retrieve it; qualified immunity not addressed);
- *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993)(plaintiff 67 year old male with mobility issues from recent stroke detained on DUI suspicion; two field sobriety tests failed to confirm DUI; Plaintiff grew tired of taking the tests in the rain, returned and sat in his car answering further questions and offering to go to the station and voluntarily submit to sobriety tests; officer then "jerked" plaintiff out of his car and handcuffed him tight enough to cause pain and discoloration of wrists; officer refused to loosen cuffs; held cuffing causing pain and bruising lasting for weeks and failure to loosen cuffs was excessive force analogous to *Hansen v. Black, supra*);
- *Alexander v. Cnty. of L.A.*, 64 F.3d 1315, 1322-1323 (9th Cir. 1993) (plaintiff stopped in a high risk traffic stop on concerns of an armed robbery despite several discrepancies in description of car and suspects, and left handcuffed in a patrol car for 45-60 minutes until cleared by an eyewitness; held handcuffing and detention in car warranted under circumstances; denial of requests to loosen handcuffs even though plaintiff advised of medical condition and officer felt wrist was limp and mushy when cuffed – waiting until plaintiff's hands turned blue before adjusting cuffs constituted excessive force; injuries still visible nine months later);
- *Baldwin v. Placer Cty.*, 418 F.3d 966, 970 (9th Cir. 2005) (plaintiff dentist was arrested and handcuffed during a nighttime in home raid for growing marijuana; officer lied on the affidavit for the search warrant; excessive force

exercise in the abstract: these precise circumstances were the foundation for Deputy Willis and Myers' decision to handcuff Strem in the manner they chose. These circumstances indicated that they needed to act quickly to minimize the chance Strem could harm himself or others, to minimize his ability to access a weapon, and to expedite their assessment of his or a victim's injury. None of the cases cited by Strem meet the exacting standard required by *S.B.*, that the deputies were on 'clear notice' that handcuffing Strem under these circumstances was unlawful. *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015.

To the contrary, Ninth Circuit case law supports the conclusion that a suspect can be painfully handcuffed without constituting excessive force. In *Sinclair v. Akins*, the court found no precedent establishing that "tight handcuffs alone, without any physical manifestation of injury ..., where the initial handcuffing was justified, constituted excessive force." 2017 WL 2274968, at *2 (9th Cir. Unpub. May 24, 2017). The Ninth Circuit upheld the district court's grant of qualified immunity due to plaintiff's failure to identify sufficiently specific

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because no evidence of exigency justifying unannounced nighttime entry; no facts showing dentist or his wife presented a danger to officers or public);

- *Wall v. Cnty. of Orange*, 364 F.3d 1107, 1109-1111 (9th Cir. 2004) (verbal argument over car service and officers called; plaintiff approached officers seeking to make a complaint and told to leave twice. As plaintiff departed, he was followed by officer who then grabbed him, twisting his arm, cuffed him extremely tight and threw him headfirst into patrol car; held arrested without probable cause and factual disputes precluded summary judgment on whether force used was excessive).

precedent. *Ibid.* Similarly, in *Wyant v. City of Lynnwood,* this Circuit held that "there is no clearly established right to be free from painfree, non-injuring force used to effect an arrest." 2010 WL 128389, at *4 (W.D. Wash. 2010); *see also LaLonde v. Cnty. of Riverside,* 204 F.3d 947, 960 (9th Cir. 2000) (officer refusal to loosen tight handcuffs despite requests; fact-specific inquiry required to determine whether tight handcuffing may constitute excessive force). In *Injeyan v. City of Laguna Beach,* this Circuit found "no precedent placing the conclusion that [defendant's] alleged conduct under the particular circumstances he confronted was unreasonable beyond debate." *Injeyan v. City of Laguna Beach,* 645 F. App'x 577, 579 (9th Cir. Unpub. 2016) (forcibly lifting plaintiff's arms behind her back was not excessive force under the particular circumstances of the case). In *Redon v. Jordan*, a district court held that an officer responding to a suicidal individual who resisted arrest "used no more than the amount of force necessary under the circumstances" when he took plaintiff to the ground and handcuffed him. *Redon v. Jordan,* 2017 WL 1155342, at *7- 8 (S.D. Cal. Mar. 28, 2017) (basing its decision on the "nature of the call, plaintiffs deteriorating emotional state, and [p]laintiff's active resistance").

### 3. The Claim That The Failure To Accommodate An Unconfirmed Advisal Of A Pre-Existing Physical Condition Is Excessive Force Was Not A Clearly Established Rule Particularized To The Facts Of This Case.

Strem agrees that a police officer need not endanger himself by unduly crediting a suspect's claim of injury. (AOB at 52, fn 26, citing *Blanford v. Sacramento Cnty.*, 406 F.3d 1110 (9th Cir. 2005).) Yet he still argues that Deputies Willis and Myers should lose the protection of qualified immunity because "it is clearly established that a person's advisal to deputies of a pre-existing condition which would render handcuffing behind the back painful can make a seizure unreasonable." (AOB at 51.) The holding in *Jackson*, 268 F.3d at 650, 652 precludes any such conclusion.

That an agitated, non-compliant, suicidal individual suspected of threatening to use a gun, holding a bloody napkin suggesting someone may have already suffered injury, tells officers he has physical limitations does not make the officers' decision to secure him in handcuffs behind his back unlawful. Such an individual can still pose a threat to himself and others, even if he is handicapped, and an officer may properly use discretion to handcuff him behind his back. No clearly established rule was implicated when the deputies disregarded Strem's protests and handcuffed his hands behind his back.

Strem relies upon several non-binding cases outside this circuit, and none of the cases involve handcuffing a possibly suicidal suspect for safety reasons; none

involved a concern that the suspect had a handgun readily accessible; and none involved handcuffing a suspect under concerns that he or an unknown person may have already been injured.[6]

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[6] Strem cites the following cases in support of his argument that officers must accommodate a pre-existing condition:

- *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993) (plaintiff stopped for traffic infraction and arrested for driving on a suspended license; handcuffing despite indicated injury *may* be excessive where plaintiff posed no threat, no resistance);
- *Guite v. Wright*, 147 F.3d 747 (8th Cir. 1998) (plaintiff attempted to interfere when officers violated the law to enter his house and arrest of his son; despite having one arm in a sling his wrist was twisted and he was pinned against a door); questioned by *Caron v. Hester*, 2001 DNH 206 (2001) ("Reduced to its essence, then, the question presented is whether Caron had a clearly established right not to be handcuffed behind his back after he allegedly informed Hester of his shoulder injury. He did not."); *see also Minor v. City of Chesterfield*, 2007 U.S. Dist. LEXIS 39990 (E.D. Mo. 2007) (considering "the question for the Court is whether [the officer] was reasonable in handcuffing Plaintiff behind his back in light of Plaintiff's warning that he had back surgery" and finding it reasonable, granting qualified immunity);
- *Fisher v. Las Cruces*, 584 F.3d 888 (10th Cir 2009) (plaintiff was not suicidal and had accidentally shot himself in the stomach and in the bicep; after securing the gun officers insisted on handcuffing him behind the back although he was fully cooperative and despite his protests of pain); *compare to Wells v. Okla. ex rel. Dep't of Pub. Safety*, 1996 U.S. App. LEXIS 25529, at *9 (10th Cir. 1996)("the issue presented here--whether putting handcuffs on a potentially fragile arrestee without use of abnormal force is [] unlawful. Under the facts presented in this case, we conclude it is not.");
- Lines of research beyond the Ninth Circuit also lead to *Beckles v. City of N.Y.*, 492 F. App'x 181 (2d Cir. Unpub. 2012) ("We are aware of no case, and Beckles points to none, where a court held that ignoring an *un*cooperative suspect's claim of *invisible* injury (such that handcuffing could be harmful) made during the course of handcuffing constituted excessive force. As such, in these circumstances, it was not clearly established that the force used by the

Strem particularly relies on *Winterrowd*, where unique facts lead the Ninth Circuit to affirm the district court's denial of qualified immunity. *Winterrowd v. Nelson*. 480 F.3d 1181 (9th Cir. 2007). These facts are not comparable to those in our case. In *Winterrowd*, officers were performing a pat-down of plaintiff and did not have probable cause to arrest; there was no indication that plaintiff was currently armed or posed a safety threat; the officers applied greater force after plaintiff screamed in pain; and the officers admitted that they could have effectuated the pat-down without forcing plaintiffs arms behind plaintiff's back. *Id.* at 1181-1186.

Here, deputies were responding to a dispatch call about a suicidal suspect who reportedly had a gun and who then exited his house with a visibly bloody napkin. When Strem would not allow his hands to be placed behind his back, the deputies brought him to the ground to handcuff him. Both parties agreed that the deputies were legally justified to take Strem into custody. (1 ER 5 [citing to Doc. 76 at p. 1].) None of the cases cited by Strem meet the exacting standard required by *S.B.,* that the deputies had been on 'clear notice' that Strem's protest that he a non-visible physical infirmity made their attempts to handcuff him unlawful. *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015.

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defendant officers in arresting Beckles was excessive, and they are therefore entitled to qualified immunity on the excessive force claim").

### 4. Handcuffing A Potentially Suicidal Subject Behind His Back Who Reportedly Had Access To And Threatened To Use A Gun Was Not A Clearly Established Rule Of Excessive Force.

Strem argues that "it is clearly established that in dealing with suicidal or mentally ill subjects, the interest in using force is diminished." (AOB at 48.) The argument is at odds with his own recitation of the facts, where Strem maintains that he was not suicidal and had no mental illness. Even viewing the facts in the light most favorable to Strem, that he neither threatened to kill himself nor had thoughts of taking his life when talking on the phone (2 ER 82-83), Deputies Willis and Myers were responding to the reports that Strem *was* suicidal and threatened to use a gun, and they observed facts that tended to support those reports – noncompliant, agitated, holding a bloody napkin. Whether Strem was later determined by psychiatric medical personnel to have not been suicidal or mentally ill has no bearing on the split second decisions of Deputies Willis and Myers.

Throughout the rest of his brief Strem argues he did not pose a special danger, such as a suicidal person would have, and that he can be compared to cases with plaintiffs who were not suicidal. Yet in this section of his brief, he argues the deputies violated a clearly established law because they did not treat him as a suicidal suspect. This inconsistency underlines Strem's fundamental error throughout his brief that the multiple factors presented to the deputies that day (agitated, non-compliant, suicidal, potentially armed, with blood from unknown

source) cannot be parsed and addressed with individual rules. Strem must identify a rule particularized to the facts of this case that demonstrates the deputies were not authorized to use even the minimal force of handcuffing Strem behind his back. Strem cannot do so, and instead presents misleading hypotheticals and legal holdings based on different circumstances than those confronting the deputies in this case.

Nonetheless, considering Strem's argument that he should have been treated as a suicidal suspect even though he argues he presented no threat to himself or others, he relies on four cases with vastly different factual circumstances than the present case, except that they also involved a suicidal threat by a plaintiff.[7] None

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[7] Strem cites the following cases in support of his argument on suicidal plaintiffs:

- *Deorle v. Rutherford*, 272 F.3d 1272, 1275-1278 (9th Cir. 2001) (split panel decision) (suicidal drunk male; at least thirteen officers at the scene, some for up to forty minutes. Although the plaintiff wielded weapons at different times, he complied with officer demands to drop them. Plaintiff approached the defendant officer with an unloaded plastic bow and dropped it on command. When the unarmed plaintiff reached a distance predetermined by the officer, the officer fired a potentially lethal twelve-gauge lead beanbag shotgun round without warning, causing "multiple fractures to [plaintiffs] cranium, loss of [plaintiffs] left eye, and lead shot embedded in [plaintiffs] skull.");
- *Drummond v. City of Anaheim*, 343 F.3d 1052, 1054-1055, 1059 (9th Cir. 2003) (responding to reported concerns plaintiff might hurt himself "by darting out into traffic," with no reported weapons and no resistance; officers tackled plaintiff and "[o]nce on the ground, prone and handcuffed, Drummond did not resist the arresting officers. Nevertheless, two officers, at least one of whom was substantially larger than he was, pressed their weight against his torso and neck, crushing him against the ground. They did not remove this pressure

of Strem's arguments show that the deputies were on "clear notice" that the amount of force they used – handcuffing Strem behind his back despite requests to be handcuffed in front – when confronting Strem under this scenario was unlawful. *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015.

Summarizing the argument of this section: If the right was not clearly established, there is no need to consider the other prong and address if the right was violated. When engaging in the two inquiries of the qualified immunity analysis, the Ninth Circuit has held that "if the answer to either is 'no,' then the officers cannot be held liable for damages." *Glenn v. Washington Cnty.*, 673 F.3d 864, 870 (9th Cir. 2011) (citing *Pearson*, 555 U.S. at 236). If the asserted right(s) was/were not clearly established, the court does not need to address whether the asserted rights were violated. *Reichle v. Howards*, 566 U.S. 658 (2012) ("courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all") (citing *Pearson*, 555 U.S. at 227).

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despite Drummond's pleas for air, which should have alerted the officers to his serious respiratory distress"; caused unconsciousness and brain damage);

- *Glenn v. Washington Cnty.*, 673 F.3d 864 (9th Cir. 2011) (officers used deadly force to prevent suicidal individual from cutting himself with a pocket knife);
- *Hayes v. Cnty. of San Diego*, 736 F.3d 1223 (9th Cir. 2013) (officers used deadly force against a compliant suicidal individual holding a large knife).

### B. Appellant Claims Only A Generalized Violation Of A Constitutional Right.

Strem's constitutional contention is that he has a Fourth Amendment right to be free from unreasonable use of force.[8] This generalized proposition is insufficient to overcome Deputy Willis and Deputy Myers' immunity, as "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *City & County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765, 1776 (2015). Immunity applies unless existing precedent has placed the statutory or constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. at 741. Every reasonable official would have to understand that what he is doing violates that right. *Reichle*, 566 U.S. 658.

Strem fails to offer to the court exactly what constitutional or statutory right he alleges was violated. He argues that a mentally ill offender has additional protections over other suspects, without clarifying, and in contradiction of his

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[8] The Complaint alleges: "…Defendant officers violated, without any defense, Mr. STREM's clearly established constitutional right under the Fourth Amendment to the United States Constitution to be secure in his person from the use of unreasonable and excessive force, in that the force applied to arrest/detain Mr. STREM was in contravention of constitutional and statutory duty, was in excess of any force required to address the circumstances, was grossly out of proportion to any need for force, was not employed in good faith, and was intended and substantially certain to cause serious bodily injury. These rights were clearly established at the time." (2 ER 29.)

denials that he had any mental infirmity or had actually made a suicidal statement. He argues that the deputies were limited to a pat-down of his exterior clothing, despite conceding that custody was justified, and overlooking officer[9] and public safety considerations when officers are confronting an agitated, suicidal, reportedly armed individual holding a bloody object and not complying with commands. He argues of a statutory limitation on force against a suspect that does not pose a threat to others, again without clarifying, and again overlooking that officers were told he was a suicide threat, he was armed with a gun, and they had no idea if his bloody napkin indicated someone else was already injured or that he already harmed himself. He argues he had a right to warnings or less intrusive alternatives, without clarifying, and overlooking that the officers found him non-compliant with several verbal demands and that pulling a suspect to the ground is one of the least intrusive uses of force other than verbal commands, particularly where, by Strem's own admission, he resisted efforts to handcuff him through pinning his arms to his sides.

As with either prong, if a court makes this inquiry and finds that no constitutional right was violated under the alleged facts, the inquiry ends and

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[9] Appellant explains in his own brief: "Handcuffs may be justified during a detention if an officer reasonably believes a suspect is armed and dangerous or if 'restraints are necessary for some other legitimate purpose,' like officer safety." (AOB at 63), citing *Bennett v. City of Easpointe*, 410 F.3d 810, 837 (6th Cir. 2005).

Deputies Willis and Myers prevail. *Saucier*, 533 U.S. 194; *Glenn*, 673 F.3d at 870. Qualified immunity can be affirmed without consideration of the other prong. *Glenn*, 673 F.3d at 870.

## II

## STREM DOES NOT CHALLENGE SUMMARY JUDGMENT FOR THE COUNTY OF SAN DIEGO

Strem makes no claim of error in the grant of summary judgment for the County of San Diego in his 59 pages of briefing. Summary judgment to the County is properly affirmed on that ground alone. *Tri-Valley CAREs v. United States DOE*, 671 F.3d 1113, 1130 (9th Cir. 2012) ("Claims not made in an opening brief in a sufficient manner to put the opposing party on notice are deemed waived.")

There is no *respondeat superior* liability making a municipality liable for the wrongful actions of its peace officers. See *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978). Instead, a municipality may be held liable for the actions of a peace officer only when municipal "official policy" causes a constitutional violation. *Id*. at 694-695.

Here, Strem failed to "identify a municipal 'policy' or 'custom' that caused [his] injury." *Board of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell*, 436 U.S. at 694. "It is only when the 'execution of the government's policy or custom … inflicts the injury' that the municipality may be

held liable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Summary judgment for the County must be affirmed.

## CONCLUSION

For the reasons addressed above, the judgment in favor of Deputy Willis, Deputy Myers and the County of San Diego should be affirmed.

DATED: March 26, 2018

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached opening brief is double spaced, typed in Times New Roman proportionally spaced 14-point typeface, the typeface contains 13 characters per inch, and the brief contains 9,408 words of text.

DATED: March 26, 2018

THOMAS E. MONTGOMERY, County Counsel

By: s/ RONALD LENERT, Senior Deputy
Attorneys for Defendants/Appellees County of San Diego, Peter Myers and Vernon Willis
E-mail: ronald.lenert@sdcounty.ca.gov

## STATEMENT OF RELATED CASES

Counsel for Appellees County of San Diego, Deputy Vernon Willis and Deputy Myers is informed that there are no related appeals in the Ninth Circuit.

DATED: March 26, 2018

THOMAS E. MONTGOMERY, County Counsel

By: s/ RONALD LENERT, Senior Deputy
Attorneys for Defendants/Appellees County of San Diego, Peter Myers and Vernon Willis
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Timothy Strem v. County of San Diego, et al.;
Ninth Circuit Case No.: 17-56709

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following document(s): **Appellees' Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 26, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

By: s/ RONALD LENERT
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