USCA No. 17-56709

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY STREM,

Plaintiff-Appellant

v.

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

Defendants-Respondents.

United States District Court
Southern District of California
USDC No. 15-CV-2120-KSC (JMA)
Honorable Karen S. Crawford, Magistrate-Judge Presiding by Consent

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

Statement of the Case

I. Nature of the Case

A. Basis for Subject Matter Jurisdiction in the District Court

This appeal is from the judgment entered in the U.S. District Court for the Southern District of California, the Honorable Karen S. Crawford, Magistrate-Judge Presiding by Consent. The District Court had original jurisdiction pursuant to 28 U.S.C. § 1331, § 1343(4), § 167 and 42 U.S.C. § 1983. Consent to a Magistrate-Judge was entered pursuant to 28 U.S.C. § 636(c) and FRCP, rule 73.

The Judgment followed a grant of Summary Judgment on Respondents' motion, entered on October 25, 2017[1]. Fed. R. Civ. P., rule 56 (CR 117; ER 3).[2]

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[1] The ruling was published at *Strem v. Cnty. of San Diego*, 2017 WL 4861985, (S.D. Cal. Oct. 25, 2017). see Excerpt of Record ("ER") at 3. The Court declined to continue to exercise supplemental jurisdiction over the sole state law claim and dismissed it without prejudice. ER 16–17. Because review is de novo, the District Court's decision will not be analyzed.

[2] "CR" is the Clerk's Record; "ER" is the Excerpt of Record. The is no Reporter's Transcript as the DIstrict Court did not conduct a hearing on the Summary Judgment Motion.

B. Basis for Jurisdiction in the Court of Appeals

This Court has jurisdiction under 28 U.S.C. § 1294(1).

C. The Judgment is Appealable

A judgment in a civil action is subject to appeal. 28 U.S.C. § 1291.

D. The Notice of Appeal Was Timely Filed

Judgment was entered November 8, 2017. The Notice of Appeal was filed November 9, 2017. Fed. R. Civ. P., rule 58; Fed. R. App. P. 4(a)(1)(A). (CR 119; ER 297).

II. Introduction and Summary of Issues

TIMOTHY STREM ("STREM") sued San Diego Sheriff's Deputies VERNON WILLIS, PETER MYERS and their employer, the COUNTY OF SAN DIEGO ("Respondents") for violating his civil rights.

This excessive force case stems from an incident outside STREM's home in Vista, California, on September 24, 2014 between 10 and 10:46 a.m. STREM, then a 62 year old man, alleged Respondents were not only told, but observed corroborating evidence, that he was disabled, and nevertheless pulled him to the ground and forcibly handcuffed him behind his back in a painful, prolonged manner. He was not resisting and was willing to go into a waiting ambulance in handcuffs. Their sole

justification is they were told he was suicidal and "had his gun out" and was resisting efforts to go into custody. Only wearing pajama bottoms, no weapon was plainly visible on or about his person.

Respondents asserted that it is a novel, untested legal concept for 2 Deputy Sheriffs to engage in this conduct.

This appeal presents 3 (related) issues:

First, whether Respondents' conduct was actionable under the Fourth Amendment (the "first prong" of the qualified immunity analysis).

Second, whether, as the District Court ruled, the law was not "clearly established" (the "second prong" of the qualified immunity analysis). [3]

Third, whether disputed issues of material fact remained to be decided by a jury which would render summary judgment inappropriate on either ground.

In this case, Qualified Immunity was/is not warranted because (1) viewing the facts in the light most favorable to Appellant, the conduct is actionable and (2) the law was either clearly established or the illegality of the conduct is obvious. *Hughes v. Kisela*, 862 F.3d 775, 783 (9th Cir. 2016).

[3] The DIstrict Court never reached the first prong of the qualified immunity analysis; its decision was based entirely upon its conclusion that the applicable law was not "clearly established" at the time of the events. This appeal will analyze both prongs.

III. Proceedings and Disposition in the District Court

On or about March 20, 2015, STREM filed a claim with the County of San Diego. Cal. Gov't Code § 905, § 905.2, 945.4. (ER 1.) The claim was denied. § 912.4.

The Complaint was filed on September 22, 2015. (CR 1; ER 23). Respondents answered on October 22, 2015. (CR 6 ER 34). A Scheduling Order was issued on February 5, 2016 and amended on April 6, 2016. (CR 14, 17).

Consent to a Magistrate-Judge was filed on November 22, 2016 (CR 26; ER 41). A joint motion to dismiss the arrest based claims with prejudice was granted on February 17, 2017. (CR 31-32; ER 42).

Following the decision in *White v. Pauly*, 137 S.Ct. 548 (2017) Respondent's counsel indicated his intent to file a Summary Judgment Motion. After further discussion, counsel abandoned this intent. [4]

On May 8, 2017, a Pretrial Conference Order was entered. (CR 43; ER 55). Trial was scheduled to commence on May 30, 2017. (CR 38). The parties filed motions in limine, witness and exhibit lists, proposed voir dire, and proposed jury instructions. (CR 45-66, 74-8086-100).

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[4] It was agreed upon by another attorney who had temporarily assumed responsibility for the Respondents that (1) the parties would consent to a Magistrate-Judge for trial; (2) Appellant would dismiss his arrest-based claims, and (3) Respondents would forego the filing of a Motion for Summary Judgment, which was due by December 30, 2016. (CR 35; ER 35, 44).

On May 19, 2017, the District Court, sua sponte, issued an order directing briefing (by way of a summary judgment motion) on qualified immunity in light of *S.B., a minor v. Cnty. of San Diego*, 864 F.3d 1010 (9th Cir. 2017) It vacated the trial date, which was only 11 days away. (CR 102; ER 1). The District Court did not address or reinstate the arrest based claims or withdraw the Consent.

On June 15, 2017, Respondents filed their Motion for Summary Judgment. (CR 106; ER 76). An Opposition and Reply were thereafter filed on July 13 and July 21, 2017. (CR 107-108; ER 78-295).

After supplemental briefing, on October 25, 2017, the Court granted summary judgment in favor of Respondents without oral argument. (CR 117; ER 3). On November 8, 2017, Judgment was entered. (CR 118; ER 296).

A notice of appeal was filed on November 9, 2017. (CR 119; ER 297)

IV. Statement of Facts.

TIMOTHY STREM was a pipefitter his whole life. In 2004, the Social Security Administration certified that his "degenerative disc disease of the cervical and lumbar spine" (first diagnosed in April 2001) rendered him "severely disabled." Also noted was "anxiety, spinal pain and immobility, limited range of motion (including lumbar spine and right shoulder abduction and flexion), cervical discogenic disease with some atrophy of the right arm, right shoulder rotator cuff impingement

syndrome, torticollis of the neck and atrial fibrillation and a noticeable implanted pacemaker/defibrillator." Strem Dec. @ 1:19-2:7, fn 1; Exhibit 39.[5]He also suffers from osteoarthritis in his shoulders, diagnosed well before this incident. He sees a number of physicians, including Dr. Brunst, his general practitioner. Strem Dec. @ 2:8-12[6].

Prior to September 24, 2014, STREM, age 62, was frustrated with the lack of progress in diagnosing why he was coughing up blood.[7] On September 24, at 9:58 am, he called his cardiologist Dr. Ahern and, while complaining to a staff assistant named Matthew Hollen, said something to the effect "Its like I have to hold a gun to my head to get these records." This remark was intended to be sarcastic. Strem Dec. @ 2:19-23.

Matthew told Tiffany Branam, a young secretary, and at about 9:57, she called 911, and stated "Hi. I'm calling from a medical facility, a doctor's office in San Diego, we have a patient on the phone that's

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[5] Exhibits bear their designated trial exhibit number. Consequently, there may be gaps. All the exhibits are sequentially set forth in the Excerpt of Record.

[6] Due to his poor health, a Motion to Expedite the Hearing on this Appeal pursuant to Ninth Circuit Rule 27-12 may be filed.

[7] He eventually learned it was due to a sinus infection, which was successfully treated. Strem Dec. @ 2:16-18, fn. 2

threatening to take pills and shoot himself. . . .[8]: She also related that he (1) was calming down; (2) never tried to kill himself before; (3) may have been drinking; (4) was "laying down, calming down. He's still agitated though. But he's not threatening"; (5) he wanted to hurt himself becasue "he's been having some frustration in getting appointments with specialists. He's been coughing up blood and there were some urgent referrals in, I think he's just frustrated at getting help or getting calls back. I'm not really sure; (6) repeated that he's not threatening anymore; and (7) They didn't think he said anything about seeing deputies. She concluded by informing dispatch that "the doctor is talking to him about what he's upset about right now." Exhibits 1a, 19-20.

The entire call lasted 21.35 minutes. STREM ended that call to speak with Dr. Brunst, whom he called at 10:09. Strem Dec. @ 3, footnotes 3-4.

At approximately 10 am, Respondents were dispatched pursuant to Cal. Welf. & Inst. Code § 5150. Exhibits 19-20. They were told they were needed "to cover 1145[9] at 634 Galaxy Drive . . . . RP is advising received a phone call from a patient that he was going to take pills and

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[8] She believes she was clear she was relaying information provided by Matthew to whom all the statements were made. Branum Depo at 17:23-18:20; 19:11; 22:12-14; 43:21-23; 49:19-50:6; Hollen Depo at 42:6-18.

[9] the code for suicidal

1145, his name is Timothy Strem. They have another person on landline with the subject trying to calm him down. He hasn't taken any pills at this time. . . . they're advising he stopped making threats and is lying down." Exhibit 1c. Nothing was said about a gun. Concurrently, entries were made into a police computer system (CAD), which Willis remembered reading before making contact, Myers did not. Exhibits 19-20. Willis Depo @ 36:4-14; Myers Depo @ 20:15-16.

Respondents reported "on scene" at 10:02. Exhibits 19-20. They contacted Craig Duran, STREM's son-in-law, who resided in the main house. He said STREM resided in the detached studio apartment in the rear, which has a screened porch and an inner wooden door. Exhibit 7; Willis Depo @ 39:21-23. Myers did not ask any questions about STREM's physical or mental state, whether he owned a gun, or had he ever threatened suicide. Duran concluded they were there for a welfare check. Duran specifically told them STREM had a heart condition/ pacemaker and asked them not to use a TASER. They did not acknowledge him. Duran Dec. @ 1:19-2:8. Willis Depo @ 40:13-15; Myers Depo @ 23:4-24:17.

Parked in the driveway, in its usual spot, was STREM's car with its disabled placards clearly visible. Strem Dec. @ 3:8-11; Duran Dec. @ 2:9-15; Exhibits 3a-b, 5–6.[10] Respondents had to maneuver around this

[10] The Deputies "did not remember" seeing Mr. Strem's car. Willis Depo at 22:19-21; Myers Depo at 19:18-21.

car. They called out and knocked on the outer screen door. Since STREM was on the telephone with the doctor (as dispatch knew), he did not immediately respond. Strem Dec. @ 3:12-13; Willis Depo @ 49:21-50:22. Respondents asked Mr. Duran to call him, but the calls went to voicemail. Duran Dec. @ 2:16-23, fn. 2

After about 5 minutes, at 10:06:32, Respondents contacted Dispatch and asked that they call the doctor's office to have STREM come to the door. Exhibit 1c @ 2:6-7; Exhibits 19-20. They never asked Dispatch to determine what type of doctor's office was calling (podiatrist or psychiatrist) or to ask the office for specific health information.

While they waited, Myers spoke to Duran again, who said STREM seemed OK the past few days. Duran Dec. @ 3:1-3. Craig also told Myers that STREM has a gun but was incapable of holding it. Duran Dec. @ 2:21-23.

Dispatch called back and spoke to Tiffany, asking if she was still on the phone with him. Tiffany related that (1) the doctor just hung up with him, he said another doctor's office, he hung up on him because another doctor's office was calling; (2) Yeah, he's there, he sounds manic. Yeah he doesn't sound, he's not normal. Not normal for him; (3) that he did say he had his gun out **by the way**. (emphasis added); and (4) he said he was threatening to take pills and shoot himself and had a gun. Exhibit 1b.

At 10:09:25 Dispatch radioed that "they're no longer on landlines, subject hung and he did state he had his gun out[11]. Exhibit 1c @ 2:16-17; Exhibits 19-20. Respondents took cover positions. Willlis Depo @ 56:23-57:2.

Myers tried to get STREM's attention through the screen door. He could hear movement inside but did not talk to STREM. Myers Depo @ 27:16-22; 34:10-12; 36:14-15. STREM heard noise outside and said he would be out in a minute. He put on his pajama bottoms and exited in a minute or two, still on the telephone with Dr. Brunst. Strem Dec. @ 3:13-16; Strem Depo @ 77, 82-85. About 7 minutes had passed since Respondents had arrived. Exhibits 19-20.

STREM was shirtless, in bare feet and wearing only pajama bottoms. He had a visible scar and lump in his chest where his pacemaker/ defibrillator is implanted. Strem Dec. @ 17:4-6; Exhibit 12. His pockets were turned out. Exhibit 13. Both Respondents saw he was holding a phone in one hand and a bloody napkin in the other. Neither saw a gun. Willis Depo @ 58:24-59:3; Myers Depo @ 38:18-22.

Both Respondents had their guns out, and STREM remembers Myers hand shaking as he pointed his gun at him, making him quite fearful. Strem Depo @ 89:5-90:19; 93:18-19; Strem Dec. @ 4:2-3, fn. 7. Neither

[11] Willis testified he was told ""Yes, he is still on the land line with him and he's threatening to take pills and he's got a loaded gun that he said he said he was going to put to his head." Willis Depo @ 43:25-44:5.

Respondent asked him if he owned a gun or was armed. He was told to drop the phone, and he tossed it in Craig's direction. Strem Dec. @ 4:7-8

Respondents immediately moved in to handcuff him. STREM tried to tell them of his shoulder injuries and heart condition but they ignored him. He was clear he was willing to be handcuffed and go with them, but not in pain. Strem Depo @ 97-98, 109; Strem Dec. @ 4:11-5:14; Duran Dec. @ 3:13-16.

> A I put my hands in front of me. And I asked them, "Can you put them like this in front of me?" . . .
>
> A Well, they -- apparently they took the cuffs out because I knew that they were -- what they wanted to do was put them behind my back is what they wanted to do. I said, "My shoulders don't move like that." The first thing I told them, in fact, after I walked outside and I said, "What are you doing here?" I said, "I have a defibrillator and a pacemaker right here, and I've had open-heart surgery. So please do not put the cuffs behind my back because my shoulders do not move like that." . . .
>
> Strem Depo @ 94-100; 102-103; 109; Strem Dec. @ 4:15-5:14.

Myers remembers STREM also talking about coughing up blood. Myers Depo @ 41:21-25.

They immediately employed a forceful takedown maneuver and pulled him to the ground, where Willis fell on top of him. Exhibit 24a @ 3:5-9; 10:9-14. Willis just "wanted to get this over with." Exhibit 24a @ 11:7. STREM did not try to run away. Myers Depo @ 42:19-21.

According to STREM, there were no warnings. "It happened real fast." Strem Depo @ 121:20; Willis Depo @ 67:9. STREM testified "had they just talked to me without throwing me to the ground and hurting me, they would have quickly realized I was just upset and nothing more. That isn't a crime as far as I know" Strem Depo @ 104:24-105:15; 121:20 and correction thereto.

He was forcibly handcuffed behind his back and searched. No weapons were found. When asked, he said that he had a gun in his bedroom closet, and Myers located a small .38 caliber revolver. Strem Depo @ 122:4-15; Strem Dec. @ 5:20-22; Myers Depo @ 52-54. The scene secure, at 10:12 Respondents radioed Dispatch there was a "detention with the use of force." Exhibits 19-20 and 3a @ 3:14-15

The takedown and handcuffing caused severe pain. Strem Depo @ 109:7–11; 116:14–19. He worried it had loosened one of the leads to his defibrillator, placing him at risk of a fatal heart attack. (It had not.) He described his physical and mental injuries in an Interrogatory response. Strem Dec. @ 6:22–7:1; Exhibit 501; Strem Depo @ 138:1–10; 139:2–10.

He did not want to be handcuffed behind his back but did not resist. Strem Dec. @ 7:5–7; Exhibit 502. Rather, he " put my hands as tight against my body as I could, . . ." "Because I knew I could not move my arms backward as they wanted, I stiffened them against my body to brace for and hopefully prevent the pain I knew was going to occur . . ." Strem Dec. @ 7:8–10; Depo @ 98: 24–25

Willis has been a Sheriff's Deputy since April 2009. (Willis Depo at 6-7). He had attended a one day PERT[12] class at the academy. He estimated STREM was probably in his 50s or 60s; stood about 5'7"-5'8", and weighed about 170 pounds. Willis is 42 years old, 6'5" and weighs 260, not counting his 20–25 pounds of equipment. He tries to regularly exercise and lift weights. Willis Depo @ 69:12-70:7

Willis observed STREM was shirtless and not holding a gun, but rather a telephone. Willis Depo @ 58:24-59:10. He told Internal Affairs he did not see a gun in his waistband. He never said, wrote or testified he saw any sort of suspicious bulge suggesting he had a weapon hidden under his shorts or pants or whatever." Exhibit 24 @ 3:5-8; 6:12-15.

Willis wrote "I used both my hands and pulled Strem down to the ground by his wrists. Strem fell to the ground on his back. Deputy Myers and I rolled Strem over to his belly. I then placed my left knee on the back of Strem's head in an attempt to hold him on the ground as he struggled." Exhibit 22; Willis Depo @ 66:25–67:11. He did not see how Myers assisted. Willis Depo @ 66:25-67; Strem Dec. @ 5:23-26.

Myers became a Sheriff's Deputy in February 2008, and was assigned to the jails. He switched to patrol in February 2013. He attended a 1 day PERT class in 2013. He knows if a subject is mentally ill, that fact has to be considered when determining whether and how to use force. Myers Depo @ 7; 12:16-20. Myers is also aware that just

[12] "Psychiatric Emergency Response Team"

because someone has a gun is not an authorization to use force. Myers Depo @ 27:23–30:7. Myers, who is 5'9" and weighs 150 pounds plus 25 pounds of equipment, assisted Willis. Myers Depo @49:19–20.

Myers testified because of his vantage point he could not see if STREM had any weapon on his person, but did see he was holding a phone and a napkin[13]. Respondents started walking towards STREM, who made no attempt to run away. Myers Depo @ 49:19-20. STREM went down on his back, and Willis fell down on top of him, "kind of on his side." Strem Depo @ 118:12-13. Myers was asked if he got pulled down to the ground also or did he let go, and answered "A little bit of both." Myers Depo @ 48.; Exhibit 28a @ 9:10-23; 10:7-10. He "pulled" STREM's hands behind his back. Exhibit 28a @ 13:5-6. Myers believed that absent the cuffing, STREM would have used his firearm. Myers Depo @ 58:17-24.

Willis testified that when responding to a § 5150 call "for the most part the subject will go in handcuffs before -- until I know going what's going on. There's always exceptions, but if there's any type of

[13] As to his claim that he heard a "click" which he recognized as the sound of a "gun making a noise" Myers Depo @ 34–35, his report, which was represented to IA as "accurate" made no such claim. Nor did he ever advise Deputy Willis of this rather critical observation. see Exhibits 27, 28a.

noncompliance or even in the text of the call, something that states that there's a safety issue I would place them in handcuffs and then do an investigation." Willis Depo @ at 8–9[14]

San Diego Sheriff's Department Policy 25 (Prisoner Transportation) states that "With no unusual circumstances present, i.e., handicapped prisoners, Deputies shall keep prisoners handcuffed with their hands behind their backs. . . . The use of restraining devices may not be necessary on all handicapped prisoners. An example would be the arrestee that is a paraplegic. This type of arrestee would not need leg restraints." The sheriff does not define "handicapped" in its policy. Exhibit 35. There was no attempt by Willis to comply with this policy. "Q. Are handcuffs always required to be behind -- is someone always required to be handcuffed behind their back? A. Yes." Willis Depo @ 17.[15]

The paramedics arrived at 10:16 am and found STREM sitting in a chair and handcuffed. He was in mild "distress." He was described to them by the Deputies as "psychotic and a danger to himself." They noted "associated moderate symptoms of manic behavior," that he was

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[14] Willis is aware that when someone is seized under Cal. Welf. & Inst. Code § 5150 "I'm not technically arresting them but they are detained and not free to go. At some point we're going to transport them. So if you're moving somebody and they're not afraid to go technically they would be under arrest but not criminally speaking." Willis Depo @ 17.

[15] Myers believes differently. Myers Depo @ 14:7–15:24

"agitated" and that he had been placed in handcuffs for transport. They described "traumatic signs of left elbow abrasions and a traumatic injury to the left great toe, including abrasions." Exhibit 51.

Asked if, while handcuffing STREM, he heard him cry out in pain, Willis said "I heard him screaming and cussing at us the whole time. I don't recall him crying out in pain." "He may have" said something that his shoulder had popped out of its socket or something like that. Willis Depo @ 69:2-9; Exhibit 24a @ 12:1-3. In the radio broadcast (Exhibit 3[16]), you can hear STREM crying out in pain in the background.

Notwithstanding the attempted intervention of Dr. Brunst, who was listening on an open phone line (Exhibit 2; Duran Dec. @ 3:23–25), Willis directed paramedics to take STREM to Tri-City Hospital, and followed them there. Willis Depo @ 54:4–11. They arrived at 10:35 am. Photographs taken there by Willis show STREM was still handcuffed behind his back. Exhibit 10; 51; Strem Dec. @ 6:16–21; Strem Depo @ 142:15–19

He was examined by 2 doctors and a Psychologist. One Xanax helped him. His treatment included a cranial CT scan, which was required due to the fact that he was a heart patient, was taking blood thinners, and had experienced a traumatic event where he was taken to the ground. He was told he was at risk for intra-cranial bleeding. Strem Dec. @ 6:8–15.

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[16] This Exhibit will be transmitted to the Court upon request.

Willis prepared a § 5150 intake report at approximately 10:46 and left sometime thereafter, which is approximately when the handcuffs came off. STREM was discharged around 3:06 pm. Exhibit 23; Strem Dec. @ 6:16–18; Willis Depo @ 74:15–76:10.

STREM incurred $3,747 in medical bills from Tri-City and $1,141 from the Vista Fire Department. Strem Dec. @ 7:2-4; Exhibits 37–38.

Argument

I. Summary Judgment was not Warranted in this Case

A. Standard of Review

The grant of a motion for summary judgment, and specifically the decision that an officer is entitled to qualified immunity, is/are subject to de novo review. *Glenn v. Washington Cnty.*, 673 F.3d 864, 870 (9th Cir. 2011).

"Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" Fed. R. Civ. P., rule 56; *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009).

The court must draw all reasonable inferences in favor of the non-moving party. The court is obligated to construe the record in the light

most favorable to that party. *Hughes v. Kisela*, 841 F.3d 1081, 1084 (9th Cir. 2016); *Liston v. Cnty. of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997)(same standard applies in analyzing qualified immunity).

Police officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." Courts have discretion to decide which prong of the analysis to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A decision in the defendant's favor on either prong establishes qualified immunity, even without consideration of the other prong. *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 986 (9th Cir. 2011).

While qualified immunity is to be determined at the earliest possible point in the litigation, summary judgment in favor of officers is "inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits." *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017); *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014)(Because the inquiry is "inherently fact specific, the determination . . . should only be taken from the jury in rare cases."); *Wall v. Cnty. of Orange*, 364 F.3d 1107, 1111 (9th Cir. 2004)(Factual matters concerning

the reasonableness of a Fourth Amendment claim generally are jury questions. Thus, there was no probable cause if plaintiff's version were accepted).

B. The Elements of a § 1983 Claim.

A plaintiff must establish by a preponderance of the evidence that a defendant: (1) performed an act or acts which operated to deprive him of one or more of his Federal Constitutional rights; (2) acted under color of law; and (3) was the legal cause of damages. *Wood v. Strickland*, 420 U.S. 308 (1985). Proof of specific intent to deprive one of constitutional rights is not required. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992).

It is a question of fact as to what force a reasonable officer would have used which controls, not his state of mind. Evil intentions will not establish a constitutional violation if the force used was objectively reasonable, nor will good faith protect an officer who used unreasonable force. *Graham v. Connor*, 490 U.S. 386 (1989).

Liability is predicated on 'integral participation,' meaning that each officer's individual actions need not rise to the level of a constitutional violation. *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (assistance in handcuffing which is instrumental in gaining

control over a suspect qualifies.) As such, each Respondent is as responsible as the other even if it was one of them who took most, or more, of the objectionable actions.

1. Serious or Permanent Injuries are not an Element.

The Fourth Amendment prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot. cf. *Schmerber v. California*, 384 U.S. 757 (1966). Instead,"the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Griego v. Cnty. of Maui*, 2017 U.S.Dist.LEXIS 4620, at *53–54 (D. Haw. 2017)(citing cases)

Thus, courts have held that physical injury is not an element of a § 1983 claim. *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013–14 (9th Cir. 2002)(pointing a gun and causing the suspect to "fear for [his] life" even it does not cause physical injury); *Meredith v. Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003) (lawful detention may be unreasonable if "unnecessarily painful, degrading, or prolonged"); *Tekle v. United States*, 511 F.3d 839, 846 (9th Cir. 2007)(excessive force where officers kept an eleven year old child handcuffed and pointed their weapons at him "even after it was apparent that he was a child and was not resisting them or attempting to flee"); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988)(we do not believe that a serious or permanent injury is a prerequisite to a claim under § 1983).

"The intrusion [on a person's liberty] may be substantial even though the injuries are minor." *Santos v. Gates*, 287 F.3d 846, 855 (9th Cir. 2002). The injuries STREM has described in his deposition, interrogatory responses and declaration are sufficient.

Although *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) suggests that medical records showing injury are necessary to succeed on a claim for excessive force, the aforementioned Ninth Circuit cases, which were decided after *Arpin*, say otherwise.

II. Taken in the Light Most Favorable to Appellant, the Force Used Was Objectively Unreasonable. Further, Disputed Issues of Material Fact Remain.

A. Introduction

The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

The interests protected by the Fourth Amendment are not confined to the right to be secure against physical harm; they include "liberty, property and privacy interests - a person's "sense of security" and individual dignity." *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), the Court held that an arrest made in an "extraordinary manner, unusually harmful to privacy or ... physical interests" is actionable. The Court stated:

> . . . As our citations in *Whren v. United States*, 517 U.S. 806, 818 (1996) make clear, the question whether a or seizure is "extraordinary" turns, above all else, on the manner in which the search or seizure is executed. . . . Atwater's arrest was surely "humiliating," as she says in her brief, but it was no more "harmful to . . . privacy or . . . physical interests" than the normal custodial arrest. . . . The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.
>
> Id. at 354–355.

However, a seizure reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Meredith v. Erath*, 342 F.3d at 1062.

This is because "once a seizure occurred, it continues throughout the time the arrestee is in the custody of the arresting officers . . . Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee give rise to a § 1983 claim." *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985)

Because the excessive force and false arrest inquiries are distinct, establishing one does not automatically establish, or preclude, the otehr. *Blankenhorn v. City of Orange*, 485 F.3d 463; *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004)

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 v. Connor*, 490 U.S. at 396. However, "where there is no need for force, any force used is constitutionally unreasonable." *Headwaters Forest Def. v. Cnty. of Humboldt*, 240 F.3d 1185 (9th Cir. 2000); *Lolli v. Cnty. of Orange*, 351 F.3d 410, 417 & n. 5 (9th Cir. 2003) (Headwaters remains good law); *Espinoza v. City & Cnty. of San Francisco*, 598 F.3d 528 (9th Cir. 2010).

"Even where some force is justified, the amount actually used may be excessive." *Santos v. Gates*, 287 F.3d at 853. "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." *Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2013).

Although "an officer can effect an arrest for even a minor infraction, [a] minor offense—at most—support[s] the use of minimal force." *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016); *Morris v. Noe*, 672 F.3d

1185, 1195 (10th Cir. 2012)(force should be reduced for a misdemeanor); *Fisher v. City of Las Cruces*, 584 F.3d 888, 895 (10th Cir. 2009)(petty misdemeanor weighs in favor of using minimal force).

A simple statement by an officer that he fears for his safety or the safety of others is not enough to justify a search or seizure; there must be objective factors to justify such a concern. *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001).

The Fourth Amendment permits law enforcement to use "objectively reasonable" force in light of the facts and circumstances confronting the officer. *Graham v. Connor*, 490 U.S. 386; In determining reasonableness, courts evaluate the "totality of [the] circumstances," *Missouri v. McNeely*, 133 S.Ct. 1552, 1559 (2013); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d at 1194-1195(calculus includes verbal exchanges with a subject).

In making this assessment, the Court considers: (1) "the severity of the intrusion . . . by evaluating the type and amount of force inflicted," (2) "the government's interest in the use of force," and (3) the balance between "the gravity of the intrusion on the individual" and "the government's need for that intrusion." *Lowry v. City of San Diego*, 858 F.3d 1248, 1256 (9th Cir. 2017)(en banc)("These factors . . . are not exclusive, however, and we examine the totality of the circumstances, considering other factors when appropriate.")

Evaluating the government's interest in the use of force requires consideration of at least three primary factors:

> "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."). . . . , "whether the suspect pose[d] an immediate threat to the safety of the officers or others," is "the most important single element of the three specified factors.") . . . The third factor, whether Lowry was resisting or attempting to evade arrest . . . can be important when an officer is facing a suspect and can observe whether that suspect is complying or resisting. . . . . Our cases suggest that where the suspect passively resists arrest, a lesser degree of force is justified compared to situations in which the suspect actively resists arrest.). . . . In assessing the City's interest in the use of force, other relevant factors we have identified include "whether proper warnings were given" and "the availability of less intrusive alternatives to the force employed."

Lowry, supra (citations omitted)

"The risk of harm posed by a particular use of force — not just the amount of harm actually caused in hindsight — is properly considered as part of the first Graham step." *Lowry v. City of San Diego*, 858 F.3d at 1261 (Thomas, C.J., dissenting)

In this case, material questions of fact, such as whether STREM was actively resisting, whether Respondents knew of should have known he was disabled, whether they reasonably believed he was armed at the time he presented himself, the severity of any threat he posed, the

adequacy of police warnings, and the potential for less intrusive means were plainly in dispute and precluded summary judgment. See, e.g., *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) ("it is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment.")

As will be shown, viewing the facts in the light most favorable to STREM, the force used was objectively unreasonable.

B. The Severity of the Intrusion on the Individual's Fourth Amendment Rights by Evaluating the Type and Amount of Force Inflicted and Risk of Harm.

STREM, then a 62 year old disabled man, was violently pulled to the ground by 2 Deputy Sheriffs, the much larger of whom fell on top of him, put a knee on his injured and twisted neck, and forcibly handcuffed him by pulling his arms behind his back in a painful and prolonged manner, leaving him like that for over a half hour. He was not actively resisting and was willing to go into a waiting ambulance in handcuffs in the front because his “shoulders dont work like that.”.

He has a bad back, bad shoulders, a bad neck which had 2 surgeries, a pacemaker/defibrillator, and was taking blood thinners. His

treatment included a CT scan to his head, which was required due to his heart condition as the force could have caused intra-cranial bleeding.

Further, STREM testified that prior to the application of force, Respondents pointed their firearms at him and Myers' hand was shaking. see *United States v. Alvarez*, 899 F.2d 833 (9th Cir. 1990)(If the police draw their guns it greatly increases the seriousness of a stop); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d at 1192-1193.

This factor is in dispute or favors STREM.

C. The Government's Interest in the Use of Force.

1. The Severity of the Crime at Issue.

"If the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force." *Marquez v. City of Phoenix*, 693 F.3d 1167, 1175 (9th Cir. 2012); *Drummond v. City of Anaheim*, 343 F.3d 1052; *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001); *Glenn v. Washington Cnty.*, 673 F.3d 864, 866 (9th Cir. 2011)("it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We

do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the "solution" could be worse than the problem.")

Here, no crime had been committed and STREM had not been, nor could he have been, arrested. A seizure conducted pursuant to § 5150 is a "detention" and not an "arrest," meaning the rights and powers and options of a police officer are more circumscribed.[17]Specifically, the search for weapons was limited to a patdown.

"Under the Lanterman–Petris–Short (LPS) Act, a person who is dangerous or gravely disabled due to a mental disorder may be *detained* for involuntary treatment. However, in accordance with the legislative purpose of preventing inappropriate, indefinite commitments of mentally disordered persons, such *detentions* are implemented incrementally. Further these involuntary placements can be terminated before the expiration of the commitment period. Thus, the LPS Act assures a person properly detained of an opportunity for early release. *Bragg v. Valdez*, 111 Cal.App.4th 421, 429 (2003)(emphasis added).

Under § 5150, an officer may "detain" any person if the officer determines probable cause exists to believe that the person detained is mentally disordered and is a danger to himself or herself." *Maag v.*

[17] STREM voluntarily agreed to go with the police upon their request and is therefore not litigating the validity of the detention, just its manner of execution. He does not concede there was probable cause.

Wessler, 960 F.2d 773, 775 (9th Cir. 1992)(seizure of suspected mentally ill person for psychiatric evaluation is "analogous to a criminal arrest and must therefore be supported by probable cause"); *Bias v. Moynihan*, 508 F.3d 1212, 1220 (9th Cir. 2007)("To justify *detention* under § 5150 . . . an officer must point to specific and articulable facts which, together with rational inferences from those facts, reasonably warrant his or her belief or suspicion.")(emphasis added)

There is a distinction between the nature of the seizure and the burden of proof necessary to meet it. See *Heater v. Southwood Psychiatric Ctr.*, 42 Cal.App.4th 1068, 1080 (1996)

While the standard is probable cause, the cases which discuss it all characterize the seizure as a detention. A detention provides the police only limited authority. For example, they may not transport a person to a police station and/or book a person into jail, set a bail for release, produce him or her before a judge within a prescribed time, ensure appointment of counsel, provide Miranda warnings before questions, or any of the other familiar consequences incident to an arrest.

Thus, Respondents were limited to a "patdown of the exterior clothing." *United States v. Johnson*, 581 F.3d 994, 999 (9th Cir. 2009). "Such a search . . . 'must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *United States v. Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006)

In this case, STREM was not suspected of any crime nor had he committed one. The Deputies were there to help him. Contrary to their claims, the evidence will prove to a medical certainty that he did not actually resist. He is simply incapable of putting his hands behind his back. He has no muscle tone which would enable him to physically resist the actions of two police officers. The need for force was at its nadir. This factor is in dispute or favors STREM.

2. Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others.

"A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle v. Rutherford*, 272 F.3d at 1280-1282

."The fact that the 'suspect was armed with a deadly weapon' does not render an officers' response per se reasonable . . . . If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *George v. Morris*, 724 F.3d 1191, 1200 (9th Cir. 2013)

A wide variety of factors supports a reasonable belief that an individual is presently armed and dangerous, including (1)observation of a visible bulge in an individual's clothing, *United States v. Alvarez*, 899 F.2d at 839; (2) sudden movements or repeated attempts to reach

for an object not immediately visible, see *United States v. Flippin*, 924 F.2d 163, 164-166 (9th Cir. 1991); and (3) the nature of the suspected crime, see *United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000). However, facts merely establishing that if an individual were armed he would be dangerous are insufficient if there was no reason to believe that the individual actually was armed. See *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022 (9th Cir. 2009)

Here, none of these factors were present. Although they were told he "had a gun", they saw none and in fact there was no place for him to hide one. When he exited, Respondents could see STREM was holding a phone and a bloody napkin, which dispatch knew was due to the fact that Ms. Branam said he had been coughing up blood. They did not hear a gunshot. Willis told Internal Affairs he did not see a handgun in STREM's waistband. There was no other place for him to conceal one, given how he was attired and because his pockets were turned out prior to his exit. They can point to no suspicious bulges in his pajama bottoms, no furtive gestures, no threats, nor any other fact that might reasonably believe lead them to believe that he was presently and personally armed when he exited his home.

This factor is in dispute or favors STREM.

3. Whether the Suspect Was Actively Resisting Arrest or Attempting to Evade Arrest by Flight[18].

When a suspect's only resistance is failure to comply with a police order, and that resistance is "not particularly bellicose," it is considered passive and does not weigh heavily in the government's favor. *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010); *People v. Quiroga*, 16 Cal.App.4th 961, 966 (1993)([I]t surely cannot be supposed that [Penal Code § 148] criminalizes a person's failure to respond with alacrity to police orders"); *Mackinney v. Nielsen*, 69 F.3d 1002, 1006 (9th Cir. 1995)(outright refusal to comply with police commands to stop writing on a sidewalk with chalk does not constitute obstruction under § 148).

In *Smith v. City of Hemet*, 394 F.3d at 703, the Court held plaintiff's refusal to obey officers' commands to remove his hands from his pockets to show whether he was armed, as well as his entry into his home despite officers' orders and his brief physical resistance were "not . . . particularly bellicose." and did not constitute active resistance.

In *Glenn v. Washington Cnty.*, 673 F.3d 864, the Court considered whether Lukus, who was mentally ill, was "actively resisting arrest," an issue the Court deemed "more complicated."

> Significantly, "he did not attack the officers" or anyone else, nor did he threaten to do so at any point while officers were on the scene. (Citation omitted) Rather, he stayed in the same position from the time officers arrived and took no

[18] There is no evidence or argument he was attempting to flee.

> threatening actions (other than noncompliance with shouted orders). However, he remained in possession of the pocketknife despite officers' commands to put it down. As the district court recognized, though, it is not clear Lukus heard or understood those orders. . . . *Smith* is similar to this case in that the crux of the resistance was the refusal to follow officers' commands, rather than actively attacking or threatening officers or others. . . . We take note of Washington County's own guidelines in considering how this distinction should affect our analysis. . . .

Id. at 876–7.

The Sheriffs Use of Force policy (Exhibit 34 at 43) states that "Active resistance refers to overt physical actions intended to prevent a deputy's control, but that does not attempt to harm the deputy." STREM admitted he did not want to be handcuffed behind his back, but was willing to be handcuffed in the front and explained why - to avoid the pain he knew was coming. He denied that he resisted any attempt to be handcuffed. He is simply incapable of putting his hands behind his back. He has no muscle tone which would enable him to physically resist the actions of two police officers.

As the Court stated in *Fisher v. City of Las Cruces*, 584 F.3d at 896 "A reasonable juror could conclude Plaintiff was not resisting arrest, but was only pleading to be handled and handcuffed in a fashion that did not exacerbate his injuries."

This factor is in dispute or favors STREM.

4. Whether Proper Warnings Were Given.

"Appropriate warnings comport with actual police practice" and "such warnings should be given, when feasible, if the use of force may result in serious injury." *Deorle v. Rutherford*, 272 F.3d at 1284. Mr. Strem stated, "it happened "real fast" and he denies receiving any warning before force was used. This claim is borne out by Mr. Duran's observations. This factor is in dispute or favors STREM.

5. The Availability of Less Intrusive Alternatives to the Force Employed.

Police officers must consider less intrusive methods of effecting the arrest and the presence of feasible alternatives is a factor to include in the Court's analysis. *Bryan v. MacPherson*, 630 F.3d at 831, fn. 15. This is especially true if the force presents a threat of death or serious injury[19]. *Smith v. City of Hemet*, 394 F.3d at 703.

When no immediate threat is posed and the police can use other means of patting down a suspect, they may not insist on doing so in a manner that will cause pain. *Winterrowd v. Nelson*, 480 F.3d 1181, 1186 (9th Cir. 2007). *Glenn v. Washington Cnty.*, 673 F.3d at 872 (dispute over availability of less intrusive options precluded summary judgment.)

[19] Here, a CT scan was medically required because a heart patient on blood thinners was been the victim of blunt force trauma to the head. This constitutes a threat of serious injury.

STREM told Respondents (1) he was a heart patient;[20] (2) had an injured shoulder; (3) why he could not and did not want to be handcuffed behind his back; (4) the (30 minute) handcuffing behind his back caused him pain. Given these circumstances, a reasonable jury could conclude Respondents should have considered less intrusive options other than pulling him down and handcuffing him behind his back, which is contemplated by policy. (Exhibit 35).

This factor is in dispute or favors STREM.

D. The Balance Between the Gravity of the Intrusion on the Individual and the Government's Need for That Intrusion

Respondents were there to help him. Taking the facts in the light most reasonable to STREM, Respondents knew he was an older disabled heart patient. All they focused on was that he was allegedly "suicidal" and were told "he had his gun out." They never saw any evidence to verify he was armed as he exited his home, simply trying to find out what was going on. Having been given information that he was physically incapable of complying, they nevertheless pulled him to the ground and forcibly handcuffed him behind his back in a painful manner for about a half hour.

[20] which Duran corroborated. Further, his surgical scar was clearly visible and the lump in his chest pronounced.

. In light of their stated reason for being there, to "help" STREM, Respondents had ZERO interest in in acting the way that they did. This factor is in dispute or favors STREM.

III. The Law was either "Clearly Established" or "Obvious" and Genuine Disputes of Material Fact Existed.

Resopondents must prove they are entitled to qualified immunity. *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005). However, STREM bears the burden of showing that the rights allegedly violated were "clearly established." *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017)(citations omitted).

This Court has recently acknowledged that qualified immunity may be denied in novel circumstances."Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Longoria v. Pinal Cnty.*, 873 F.3d 699, 709 (9th Cir. 2017)

In *Dist. of Columbia v. Wesby*, 138 S.Ct. 577 (2018), it's most recent decision on qualified immunity, the Supreme Court explained:

> . . . "Clearly established" means that, at the time of the officer's conduct, the was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." Id.

This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)(per curiam), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *Ashcroft v. al–Kidd*, 563 U.S. 731. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. (Citation omitted) Otherwise, the rule is not one that "every reasonable official" would know. (Citation omitted)

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well [*23] defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015)(per curiam). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." (Citation omitted) A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." (Citation omitted) . . .

We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." (Citation omitted) . . . Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth

> Amendment." *White v. Pauly*, 137 S.Ct. 548 (per curiam); While there does not have to be "a case directly on point,[21]" existing precedent must place the lawfulness of the particular arrest "beyond debate." al-Kidd, supra, at 741. Of course, there can be the rare "obvious case,[22]" where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)(per curiam). But "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. *Ibid*.
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> *Dist. of Columbia v. Wesby*, 138 S.Ct. at *21-24.

In a footnote, the court added:

> We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. See, e.g., *Reichle v. Howards*, 566 U.S. 658, 665–666 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law"). We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of

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[21] The Supreme Court has rejected any requirement that the facts of prior cases be "fundamentally" or "materially" similar. Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." The key question is not whether there is a case directly on point, but whether a reasonable officer would understand that his or her conduct was unlawful. *Kinney v. Weaver*, 367 F.3d 337, 349–50 (5th Cir. 2004) (en banc)(citing *Hope v. Pelzer*, 536 U.S. at 741).

[22] See e.g. *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997)("There has never been a § 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability . . . ."

> them. See *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, fn. 4 (2015). Instead, we address only how a reasonable official "could have interpreted" them. (Citation omitted).
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> *Dist. of Columbia v. Wesby*, 138 S.Ct. at * 24, fn. 8.

This Court has recently elaborated. "[I]n the absence of a precedential case with precisely the same facts as the case before us, [this Court] must compare the specific factors before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice that his actions were unlawful." *Hughes v. Kisela*, 2017 U.S. App. LEXIS 11465, at *5-6 (9th Cir. 2017)(Berzon, J. concurring in denial of rehearing and rehearing en banc). Therein, Judge Berzon stated:

> . . . The inverse of a "high level of generality" is not, as the dissent suggests, a previous case with facts identical those in the instant case — because, of course, no two cases are exactly alike. . . . "If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc). . . .
>
> . . . in the absence of a precedential case with precisely the same facts as the case before us, we must compare the specific factors before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice that his actions were unlawful. That framework is precisely the one the panel applied to Kisela's claim of qualified immunity. After conducting that inquiry, the panel concluded that this case is, given the

> pertinent precedents, squarely within — indeed, at the more egregious border of — the group of precedents in which excessive force was found. (*Mullenix v. Luna*, 136 S.Ct. 305, 309–10 (2015). . . .)
>
> Id. at *5-6; see also *Nichols v. City of San Jose*, 2017 U.S.Dist.LEXIS 59975, at *32–33 (N.D. Cal. Apr. 19, 2017)(declining to read *White* to require a plaintiff to identify a case directly on point for a right to be clearly established.")

Reasonableness is not a demanding standard. The "state of the law" is sufficiently clear if it gave "fair warning" to an officer that his conduct was unconstitutional. *A. D. v. State of Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013)

"To achieve that kind of notice, the prior precedent must be controlling—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017); cf. *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) ("In the absence of binding precedent clearly establishing the constitutional right, we look to whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts.")

"District court decisions — unlike those from the courts of appeals — do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *S.B., a minor v. Cnty. of San Diego*, 864 F.3d at 1016.

The qualified immunity analysis involves more than "a scavenger hunt for prior cases with precisely the same facts." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Perea v. Baca*, 817 F.3d at 1204.

Because the inquiry concerns the objective reasonableness of the officers' actions, the analysis is limited to "the facts that were *knowable*"[23] to the officers at the time. *White v. Pauly*, 137 S. Ct. at 551.

For purposes of qualified immunity a "reasonable officer" is a well-trained officer. *Malley v. Briggs*, 475 U.S. 335, 345–46 (1986); *Groh v. Ramirez*, 540 U.S. 551 (2004), *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Wilson v. Layne*, 526 U.S. 603 (relying in part on officers' actual or constructive awareness of policies or training.)

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[23] "or could have been known." *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474 (2015) This includes information in the possession of other officers under the "collective knowledge" doctrine. *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986); *United States v. Ramirez*, 473 F.3d 1026, 1032-1033 (9th Cir. 2007)(doctrine applies "regardless of whether [any] information was actually communicated to" the officer conducting the stop, search, or arrest at least "[w]hen there has been communication among agents"), as is the case here.

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Although policies and training materials are not dispositive, this Court may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable. *Drummond v. City of Anaheim*, 343 F.3d at 1059:

> As the Fifth Circuit stated, "it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998). See also *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) ("Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, . . . such regulations are germane to the reasonableness inquiry in an excessive force claim.")
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> *Id.*

See also *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002) (holding right clearly established in part through regional and state-wide police practice).

A. A Reasonable Jury Could Conclude the Deputies Knew Mr. Strem was Disabled.

When it comes to arrests, in establishing probable cause, officers have an "ongoing duty to make appropriate inquiries regarding the facts received or to further investigate if insufficient details are relayed. duty to investigate. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 924 (9th Cir.

2012) (en banc). "The officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest." *Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008). "Officers contemplating an arrest cannot 'disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists.'"*Womack v. City of Bellefontaine Neighbors*, 193 F.3d 1028, 1031 (8th Cir. 1999). "Officers should not be permitted to turn a blind eye to exculpatory information that is available to them, and instead support their actions on selected facts they chose to focus upon."*Kingsland v. City of Miami*, 382 F.3d 1220, 1229 (11th Cir. 2004).

Such principles logicvally apply to the qualified immunity analysis.

A reasonable jury could conclude that it was knowable to Respondents that STREM was disabled for several reasons. His DMV issued disabled placard was, prominently displayed in the windshield of his car. Respondents had to maneuver around this car. Mr. Duran and STREM specifically told them he had a heart condition and pacemaker. Mr. Duran asked them not to use a TASER for that reason. STREM tried to tell them about his shoulder immobility. They could have considered the way he walked toward them when he exited, the way his neck is twisted, the way he moves his arms, his deformed feet, or the visible lump in his chest where his pacemaker/defibrillator is

implanted. The jury could also conclude it would have been reasonable for them to ask dispatch while they were waiting to call the doctor's office and find out his exact medical condition. Dispatch also knew that he was calming down and speaking to the doctor on the telephone.

B. 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.

The "right to be free from application of non-trivial force for engaging in mere passive resistance" was clearly established prior to November 2014. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013); *Nelson v. City of Davis*, 685 F.3d 867 (9th. Cir. 2012)(mere passive resistance).

The use of disproportionate force upon an individual who has not committed a serious crime and poses no danger to herself or others constitutes excessive force. See *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008)(arrestee committed a petty misdemeanor, posed no threat to others, and did not resist arrest); *Perea v. Baca*, 817 F.3d at 1204; *Casey v. City of Fed. Heights*, 509 F.3d at 1281("conduct was not a severe crime – if it amounted to a crime at all."); *Blankenhorn v. City of Orange*, 485 F.3d at 478.

In *Meredith v. Erath*, 342 F.3d 1057, IRS agent Erath had a warrant to search a building for evidence of income tax violations. Ms. Bybee

was not the target, and she repeatedly demanded that Erath produce a search warrant. She alleged that, in response, Erath grabbed her, threw her to the floor, twisting her arms, placed her in handcuffs, refused to loosen them for 30 minutes despite complaints that they were too tight, and then left her in the handcuffs for several more hours. She did not "pose a safety risk and made no attempt to leave." The tax related crimes, "although felonies, are nonviolent offenses." Bybee "passively resisted" the handcuffing.

The Court denied qualified immunity because the law was clearly established: "The need for force, if any, was minimal at best. In these circumstances, it was objectively unreasonable . . . for Erath to grab Bybee by the arms, throw her to the ground, and twist her arms while handcuffing her. *Meredith v. Erath*, 342 F.3d at 1061-1063.

see also *Kopec v. Tate*, 361 F.3d 772, 777–78 (3d Cir. 2004); *Kostrzewa v. Troy*, 247 F.3d 633, 640–41 (6th Cir. 2001);*Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) ("[T]he officers used excess force on Hansen by unreasonably injuring her wrist and arm as they handcuffed her.").

Sharp v. Cty. of Orange, 871 F.3d 901 does not disrupt this longstanding principle. (Deputies had reason to believe they were authorized to apply the appropriate amount of force to arrest, handcuff and protect themselves from a wanted, actively-fleeing suspect prone to violence towards law enforcement.)

In *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110 the Court upheld the trial jury's finding that under the totality of the circumstances, the Deputies' conduct constituted excessive force. However, as to prong two, the Court held that an officer does not violate clearly established law when he "progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver to take an individual to the ground, when a misdemeanant refused to comply with the officer's orders" so long as he or she encounters "a challenging environment or an act of physical resistance or obstruction by the arrestee" and "has probable cause to arrest" the individual for committing a crime of violence[24].

In *Shafer*, hundreds to thousands of intoxicated UCSB students congregated on a public street. There was loud music playing, and students were yelling, screaming, and running around. Shortly after midnight, four students complained to deputies that they had just been hit with water balloons. This complaint caused Deputy Padilla concern, because water balloons had been a serious problem on that street and

[24] The jury rejected Shafer's contention that he was not resisting by virtue of its finding of probable cause to arrest under Cal. Penal Code § 148, thus rejecting his false arrest claim. This finding was given great weight by the panel is its assessment of the state of the law. *Shafer v. Cnty. of Santa Barbara*, 868 F.3d at 1116

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could cause injuries or start fights. The deputy then used a leg sweep maneuver to take down the plaintiff after he refused to comply with the officer's orders to drop the water balloons he was carrying.

By contrast, STREM was not suspected of committing any crime, He was never arrested, and did not present any threat to either Deputy. The polar opposite of a "challenging environment," this case involves one older, slow moving, disabled man bearing no obvious weapons. STREM disputed that he resisted or that warnings were given. Unlike Shafer, which had important jury findings, this case presents many disputed issues of material fact. Also, the nature of the force used here was very different.

First, STREM surrendered voluntarily. Even if there was "probable cause" to seize him, it was not probable cause to arrest for a crime; there is a critical difference. Second, Shafer complained only of a minor abrasion to his face and a bruise on his back. STREM has alleged more; namely, a half hour of painful behind the back handcuffing, and incurred significant medical bills. See *Hudson v. McMillan*, 503 U.S. 1, 9 (1992) ("pain, not injury is the barometer by which we measure claims of excessive force.")

Shafer relied upon many of the same cases STREM cites herein. The panel distinguished those "four cases with comparable degrees of force used by officers, but none of which involved a challenging environment or an act of physical resistance or obstruction by the arrestee." Neither

did STREM's takedown. Rather, a reasonable juror could conclude Plaintiff was only "pleading to be handled and handcuffed in a fashion that did not exacerbate his injuries." *Fisher v. City of Las Cruces*, 584 F.3d at 896

C. It is Clearly Established that In Dealing with Suicidal or Mentally Ill Subjects, the Interest in Using Force is Diminished.

A detainee's mental illness must be reflected in any assessment of the government's interest in the use of force. "Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Deorle v. Rutherford*, 272 F.3d at 1283

In *Drummond v. City of Anaheim*, 343 F.3d 1052 a neighbor called police because he feared plaintiff, who had a history of mental illness, would hurt himself by darting out into traffic. Four officers responded and found plaintiff unarmed, hallucinating, and in an agitated state. Before the ambulance arrived, one of the officers chose to restrain plaintiff by handcuffing him, knocking him to the ground, and placing

his knees on plaintiff's body, all without warning. Ultimately, the court denied qualified immunity and found that the officers had fair warning that the force they used was excessive.

> In this case, we recognize that some degree of physical restraint may have been necessary to prevent Drummond from injuring himself. . . . In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. . . . We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed.

Drummond v. City of Anaheim, 343 F.3d at 1057-1058. see also *Glenn v. Washington Cnty.*, 673 F.3d at 871–78; *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1227–28, 1233–35 (9th Cir. 2013)

D. It is Clearly Established that the Way Handcuffs are Applied can Constitute Excessive Force.

"By their very nature, handcuffs are "uncomfortable and unpleasant." *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 964 (9th Cir. 2000) (Trott, J., concurring in part, dissenting in part). However,

handcuffing "substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical Terry stop." *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).[25]

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 . *Bennett v. City of Easpointe*, 410 F.3d 810, 837 (6th Cir. 2005). However, their use must always be "justified by the totality of the circumstances." *Meredith v. Erath*, 342 F.3d at 1061

The Ninth Circuit has long recognized that "tight handcuffing can constitute excessive force" and requires that the matter go to a jury when the arrestee was either in visible pain, complained of pain, alerted the officer to pre-existing injuries, sustained severe injuries, was in handcuffs for a longer period of time, asked to have the handcuffs loosened or released, and/or alleged other forms of abusive conduct. *Hansen v. Black*, 885 F.2d at 645(witness saw officer being "rough and abusive" to the plaintiff while handcuffing her); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993)(officer jerked a 76 year-old man out of his car, pushed him against the car, handcuffed him, and then pushed him into the back of the patrol car with such force that the plaintiff fell over sideways); *Alexander v. Cnty. of Los Angeles*, 64 F.3d 1315,

[25] Here, STREM agreed to be handcuffed, so their per se use is not at issue. What is at issue is the manner in which they were applied.

1322-1323 (9th Cir. 1995)(dialysis patient informed the officers of his medical condition, was slammed against a car, had legs kicked apart, was carried and pushed into the back of a police car with his hands behind his back, and remained in tight handcuffs for forty-five minutes to an hour despite repeated requests to have the handcuffs loosened or removed); *Baldwin v. Placer Cnty.*, 418 F.3d 966 (9th Cir. 2005); *Wall v. Cnty. of Orange*, 364 F.3d 1107(officer tackled plaintiff from behind, twisted his right arm behind his back, forced him face down into a patrol car, handcuffed him tightly, and then left him in an 80 to 90 degree police car for twenty minutes.)

E. It Is Clearly Established That a Person's Advisal of a Pre-Existing Condition Which Would Render Handcuffing Behind the Back Painful Can Make a Seizure Unreasonable.

As the following cases make clear, an arrestee's pre-existing injuries or lack of threat, if known or objectively observable to the officer, would support an excessive force claim based upon their aggravation.

There is a general consensus among courts to have addressed the issue that otherwise reasonable force used in handcuffing a suspect may

be unreasonable when used against a suspect whom the officer knows to be injured, at least, as is the case here, when suspects either have visible injuries or are cooperating in their arrests.[26]

In *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993) a woman being arrested for a traffic violation asked not to have her arms handcuffed behind her back because of a prior injury. The Court held "An excessive use of force claim could be premised on [the officer's] handcuffing [the plaintiff] if he knew that she had an injured arm and if he believed that she posed no threat to him.").

In *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998) the Court permitted an excessive force claim where, despite a visible shoulder injury marked by the use of a sling, an officer grabbed plaintiff's wrist, pushed him, and held him against a door.

In *Winterrowd v. Nelson*, 480 F.3d 1181**,** the driver was pulled over because the troopers suspected his plates were invalid. They ordered him out of his vehicle and attempted to perform a routine pat-down. One trooper ordered him to put his hands behind his back. He explained

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[26] A police officer need not endanger himself by unduly crediting a suspect's mere claim of injury. Courts recognize that some suspects may feign injury in an attempt to hide weapons. But a statement that a suspect is physically unable to comply with a request does not, by itself, justify the use of force. *Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1115 (9th Cir. 2005). This principle is not in question here.

Rather, officers have an "ongoing duty to make appropriate inquiries regarding the facts received or to further investigate if insufficient details are relayed. *Lacey v. Maricopa Cnty.*, 693 F.3d at 92.

that he could not do so because he had a shoulder injury. The troopers forced him onto the hood of his car and one forced his arm up. When he screamed in pain, the trooper applied greater pressure, pumping his arm up and down. The court held that the troopers could not have concluded that the use of force was justified. "[A] verbal refusal to comply on grounds of physical impossibility does not justify the kind of manhandling that Winterrowd claims the officers inflicted on him.")

see also *Fisher v. City of Las Cruces*, 584 F.3d at 896 ("It is long established law of the Tenth Circuit and other circuits that a triable claim of excessive force exists where a jury could reasonably conclude that the officer handled a cooperating arrestee in a manner that the officer knew posed a serious risk of exacerbating the arrestee's injuries, which were themselves known to the officer"); *Littrell v. Franklin*, 388 F.3d 578, 585–86 (8th Cir. 2004); *Ferguson v. Hall*, 33 F.Supp.2d 608, 612 (E.D. Mich. 1999) (denying motion for summary judgment where officer ignored plaintiff's request for front handcuffing after plaintiff displayed "deformed" arm to officer); *Pritzker v. City of Hudson*, 26 F.Supp.2d 433, 444 (N.D.N.Y. 1998) (denying qualified immunity where cooperative arrestee advised officer of pre-existing injury prior to handcuffing).

In *Davis v. U.S.*, 854 F.3d 594 (9th Cir. 2017), a federal agent was properly denied qualified immunity as to a detainee's Fourth Amendment claims. The detainee, Ms. Davis, an elderly woman, alleged

that she was detained in a public parking lot for two hours, while she stood in urine-soaked pants, as the agent questioned her incident to a search about her possession of a paperweight that contained a small amount of lunar material. What happened to STREM is different but just as bad in its own way.

F. It is Clearly Established that Gang Tackling Can Be Actionable.

In *Blankenhorn v. City of Orange*, 485 F.3d at 478-479, the Plaintiff was arrested on suspicion of misdemeanor trespass. Officers gang tackled him, used hobble restraints, and punched him. After the charges were dismissed, he sued. This Court denied qualified immunity, holding that his rights were clearly established and a rational jury could find that the gang tackle was unreasonable for several reasons: (1) the severity of the alleged crime was minimal, (2) he did not pose a serious threat to the officers' or others' safety; (3) the pace of events could reasonably lead to the conclusion that the latitude Graham requires for split-second police judgments in "tense, uncertain, or rapidly evolving" situations was not warranted; and (4) he did not actively resist being handcuffed before he was gang-tackled. see also *Morris v. Noe*, 672 F.3d at 1192(two officers threw Morris to the ground

despite the fact Morris "presented no threat to officer safety and had not engaged in any suspicious activity." "Morris's right to be free from a forceful takedown was clearly established under Graham.")

STREM is no different than Mr. Blankenhorn or Mr Morris.

G. While It is Clearly Established that Pain Compliance Techniques May Be Utilized in Certain Circumstances. Those Circumstances Were Lacking in this Case.

The argument that pain compliance techniques do not constitute excessive force arise from situations involving volatile crowd situations or aggressive suspects, not an encounter with a single, disabled and passive, individual. See *Gregory v. Cnty. of Maui*, 523 F.3d at 1106–07 (suspect brandished a pen at officers, refused to put it down and resisted officer's efforts to grab his arm and move it so the pen was facing away); *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1096 (9th Cir. 2006) (officer used bar arm control hold to place handcuffs on an agitated suspect and to force the suspect to the ground when he resisted the officer's efforts to handcuff him);*Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir. 1990) (officer applied a finger-hold to control suspect while his friends scuffled with other officers and a crowd of sixty-to-seventy had gathered to watch).

In *Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994), officers used gradually increased pressure on protestors' arms and

wrists to force them to stand up and walk when more than 100 protestors engaged in concerted effort to invade private property and obstruct access to a medical facility, and they sued.

Both a district judge and a jury found that the San Diego Police Department's "pain compliance" policy was constitutional. Under the policy, officers were required "first to give [non-violent] protesters an opportunity to avoid arrest by leaving the premises after a verbal warning. The police were then to arrest those who refused to leave and give them another opportunity to move voluntarily. Finally, the police were to remove the remaining demonstrators with 'pain compliance techniques' involving the application of pain as necessary to coerce movement."

Unlike the police "nonchakus" evaluated in *Forrester*, the pain inflicted here was more intense and is neither localized, external, gradual, or within the victim's control. *Bryan v. MacPherson*, 630 F.3d at 824. Further, there were no warnings, STREM did not refuse to comply, and the pain was gratutious in that it was not used to copmpel any specific reaction

H. This Case is the Elusive Obvious Case

In *Shafer*, the Court noted that in "a sufficiently "obvious" case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents. ... The bar for finding such obviousness is

quite high." *Shafer v. Cnty. of Santa Barbara*, 868 F.3d at 1117, fn 3, STREM has asserted and met his burden of proving that this is such an obvious case.

Clearly established law abounds, and obvious cases do not arise only in the jurisdiction of Brigadoon[27]. Nor are these law enforcement officers enforcing the law in the Village of Potemkin[28].

See *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997)("There has never been a § 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability . . . ." (alteration in original)

There are some things that are just common sense. Police officers are trained from their first day in the academy how to escalate force, assuming force is even warranted. The conclusion that what happened to STREM is clearly unconstitutional stems from the fact that "no

[27] A popular romantic musical revolving around a fictional Scottish village of the same name that appears only once every hundred years. The story has achieved such fame that the term Brigadoon is often used to refer to any person or place that is seen only occasionally.

[28] Derived from the Russian, a Potemkin Village is any construction (literal or figurative) built solely to deceive others into thinking that a situation is better than it is. In this case, one might suppose that the common police motto "To Protect and Serve" was achieved.

officer of reasonable competence could have made the same choice in similar circumstances." *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d. Cir. 1994) cert. denied 115 S.Ct. 721 (1995).

If police officers cannot handle someone like STREM without hurting him, noone is safe.

IV. The State Civil Battery Claim Is Not Subject to a Qualified Immunity Defense.

To establish a battery claim against an officer in California, p party must meet the same standards as those under § 1983. Edson v. City of Anaheim, 63 Cal.App.4th 1269, 1272–73 (1998)

Appellant's state law claim is based upon the same facts as the § 1983 claims. In the District Court, the parties agreed that the two claims should be resolved identically. A finding of qualified immunity does not impact the remaining state claim "at all." *S.B.* at *17 fn. 7 (citing *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013)("[T]he doctrine of qualified immunity does not shield defendants from state law claims.")

Conclusion

The Declaration of Independence proclaims that "certain truths" are "self evident." In so proclaiming, the Founders recognized that

reasonable, enlightened women and men would operate with an mutual understanding that certain principles need no specific definition because they are the unspoken foundation of a civilized society.

Mahatma Ghandi said "A nation's greatness is measured by how it treats its weakest members."

President Jimmy Carter said "The measure of a society is found in how they treat their weakest and most helpless citizens."

It is these truths which are “self evident.” In September 2014 it was clearly established law that forcibly taking a non-resistant, frail, disabled and emotionally vulnerable elderly heart patient suspected of no crime, to the ground, and affixing handcuffs in a painful prolonged way violates the Fourth Amendment. Ample case law put Respondents on notice that their conduct was unlawful .The unconstitutionality of such behavior was “obvious.”

For the foregoing reasons, Mr. STREM requests that the Judgment of the District Court be reversed and the matter remanded for jury trial as soon as possible.

Respectfully submitted,

Dated: February 23, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
TIMOTHY STREM

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P., rule 32(a)(7)(C) and Ninth Circuit Rule, rule 32–1, this Opening Brief is proportionately spaced, has a typeface of 14 points or more and, according to the word processing program used to prepare it, contains **13,735** words.

Executed under penalty of perjury on February 23, 2018 at San Diego, California.

Respectfully submitted,

Dated: February 23, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
TIMOTHY STREM

CERTIFICATION OF RELATED CASES

In accordance with Ninth Circuit Rule 28–2.6, counsel for Appellant is unaware of any matters pending in this Court which might be deemed related to the issues presented in the instant appeal.

Respectfully submitted,

Dated: February 23, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
TIMOTHY STREM

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. My business address is 501 West Broadway Ste. 1650 San Diego, California 92101–3741. On February 23, 2018, I electronically filed the instant APPELLANT'S OPENING 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. 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.

Executed under penalty of perjury under the laws of the United States on February 23, 2018 at San Diego, California.

Respectfully submitted,

Dated: February 23, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
TIMOTHY STREM