UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY STREM,	)	USCA No. 17-56709
	)	USDC No. 15-cv-2120-KSC (JMA)
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
COUNTY OF SAN DIEGO, SAN	)	
DIEGO SHERIFFS DEPUTIES	)	
WILLIS, (#9925) MYERS (#7284)	)	
and DOES 1-5,	)	
	)	
Defendants-Respondents.	)	
________________________________	)	

Appeal from the United States District Court
for the Southern District of California
Honorable Karen S. Crawford, Magistrate-Judge Presiding by Consent

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. There is a Problem with the Way Respondents' State the Facts

Respondents' factual recitations throughout their brief fail to abide by the requirement that "The court must draw all reasonable inferences in favor of the nonmoving party. The court is obligated to construe the record in the light most favorable to that party." *Sharp v. Cty. of Orange,* 871 F.3d 901, 909 (9th Cir. 2017).

Instead, their recitation of the facts (both in the Statement of Facts and throughout the brief) assumes the Deputies' version of events, is the truth[1]. See for instance, page 20, where they describe "an agitated, non-compliant, suicidal, potentially armed suspect holding bloody napkin of unknown origin, who admits to tensing up in resistance to those efforts . . .[2]" On page 26, they describe "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[3], and to expedite their assessment of his or a victim's injury." On page 28, they

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1/ Such a posture would be acceptable if they were defending a jury verdict in their favor.

2/ omitting his explanation why.

3/ They fail to admit that he made no furtive gestures or efforts to retreat to his home. Further, the only visible bulge was inside his chest cavity.

assert that they were facing an "agitated, non-compliant, suicidal individual suspected of threatening to use a gun, holding a bloody napkin suggesting someone may have already suffered injury[4]." Other similar examples can be found on pages 10-11, 22[5], 24, 28 and 31.

STREM and Duran testified to an opposite version of facts and argued that contrary evidence available to the Deputies negated their concerns. Thus, the assertions of fact which, directly or indirectly, contradict Mr. STREM's evidence must be disregarded and the case decided in accordance with the appropriate summary judgment standard. *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017)(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.")

2. Respondents' Factual Assertions Are Troubling for a Second Reason.

4/ a particularly troubling procedurally improper assertion because it is directed at a key argument: that 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. AOB @ 51.

5/ another improper assertion because it is directed at another key argument: that it was well established law that "when no force is reasonable, any force is reasonable." AOB @ 44.

When it comes identifying to the facts upon which they based their actions, Respondents ignore *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474 (2015), which holds that the officers are obligated to consider facts which "could have been known." This includes information in the possession of other officers under the "collective knowledge" doctrine, an argument also ignored in their brief. See AOB @ footnote 23.

Instead, they ask the Court to allow them the benefit of what should be called "selective ignorance," where law enforcement is free to ignore inconvenient or contrary facts brought to their attention. The law says otherwise. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 924 (9th Cir. 2012)(en banc).

In this case, the Deputies analysis ignores that Ms. Branam initially related to dispatch that Mr. STREM (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 because "he's been having some frustration in getting appointments with specialists. He's been coughing up blood[6] 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)

6/ obliterating the argument that the Deputies has reason to be concerned about an unexplained injury. Myers also remembers STREM talking about coughing up blood. Myers Depo @ 41:21-25

repeated that he's not threatening anymore; and (7) that "the doctor is talking to him about what he's upset about right now."

They also ignore that when dispatch called back and spoke to Ms. Branam, asking if she was still on the phone with him, Ms. Branam related that "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." The Deputies fail to explain how they factored in this knowable fact, instead professing that they believed he was refusing to communicate.[7]

Their analysis ignores (1) what Craig Duran told them[8]; (2) the clearly visible disabled placard; and (3) Mr. STREM's actual physical condition when he presented himself, particularly including a visible bulge in his chest and a

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7/ ARB @ 8. Willis testified that he considered it a positive fact that a doctor was involved. E.R. Vol II @ 127 (page 50), lines 20-22.

8/ They did not did not ask any questions about STREM's physical or mental state, whether he owned a gun, or had he ever threatened suicide. They failed to acknowledge at the scene Duran's specific warning that Mr. STREM had a heart condition/pacemaker and asked them not to use a TASER. They never denied that Mr. Duran made these statements. Instead, they claim they could not provide information because "Duran's connection to Strem and Strem's condition was unverified at that time." They never asked! They failed to ask basic questions and conducted NO investigation into any of the information which had been presented to them. In other words, they claim that they should benefit from their own wilful ignorance.

significant scar down the middle of his torso. E.R. Vol II @ 197.

They disregard that Deputy Willis told IA that Mr. STREM did not have a gun in his hand or his waistband. E.R. Vol II @ 219, lines 12-15. Further, his pockets were turned out at the time he exited the house, and were still turned out at the hospital when he was photographed. E.R. Vol II @ 84, fn. 6.

The assertion that Deputy Myers heard a very distinct "click which was what I recognized as part of a gun making a noise" is patently unbelievable when you consider that (1) he never told Deputy Willis of this potentially dangerous fact or (2) he failed to write this in his report or tell the IA investigator about it. ARB @ 8-9

3. What About The Sheriff's Department's Policy?

Law enforcement policy is particularly important in assessing the reasonableness of an officers' actions. *Wilson v. Layne*, 526 U.S. 603 (1999) (relying in part on officers' actual or constructive awareness of policies or training.) Nevertheless, Respondents fail to acknowledge or address their own department's policy.

San Diego Sheriff's Department Policy 25 (Prisoner Transportation) (ER Vol. II @ 250) 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 either acknowledge or 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 @ 171.

4. Mr. STREM Voluntarily Agreed to Go with the Police upon Their Request. He Did Not Concede There Was Probable Cause.

Respondents rely heavily upon the assertion that "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].)(ARB @ 15). However, this is because STREM voluntarily agreed to go with the police upon their request. He did not concede there was probable cause. "He was clear he was willing to be handcuffed and go with them, but not in pain." AOB @ 28, fn. 17.

Further, even if probable cause existed, it was not to "arrest", as Mr. STREM had committed no crime. See AOB @28-29. Deputy Willis is aware that when someone is seized under § 5150 "I'm not technically arresting them but they are detained and not free to go. . . . technically they would be under arrest but not

criminally speaking." E.R. Vol II @ 119 (page 17), lines 5-9.

5. *Respondents Pick and Choose Which Supreme Court Doctrine They Want to Follow.*

Respondents give great weight to the Supreme Court's command that "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that 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." *Kisela v. Hughes*, 584 U.S.___, 2018 U.S. LEXIS 2066 (2018) at *5 (citing *Mullenix v. Luna*, 577 U. S. ___, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam))

They then proceed in a series of footnotes to nitpick the multitudes of cases upon which Plaintiff relied. Taken to its logical conclusion, such an analysis would require the adoption of a tabula rasa, where no case is precedent unless *every single fact* unfolds exactly the same way, in exactly the same order, at the same rate, with the same intensity. Where do courts draw the line? Is a case distinguishable because the officer in the cited case was right handed but the defendant-officer is left handed?

6. *Respondents Pick and Choose Which Supreme Court Doctrine They Want to*

Follow. (Part 2)

On the other hand, they give mere lip service to the equally important command that "Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Kisela* at *5 (citation omitted)

"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)[9]; 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.")

Plaintiff's cited authorities meet this exacting standard.

The cases on which Respondents' rely are distinguishable. *Sinclair v. Akins,* 2017 WL 2274968, at *2 (9th Cir. Unpub. May 24, 2017) is not applicable because this case does not involve "tight handcuffs" per se. Mr. STREM has not contended his injuries were caused by the tightness of the handcuffs" nor conceded that the

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9/ affirming a denial of qualified immunity.

initial use of handcuffs was appropriate.

Nor is *Injeyan v. City of Laguna Beach*, 645 F. App'x 577, 579 (9th Cir. Unpub. 2016) applicable. That case dealt with "a handcuffing during the execution of a search warrant, where a seemingly dangerous chemical was involved and prompt action was required to protect public (and the officers') safety, and where the arrestee did not display any signs of pain during the handcuffing." Here, Respondents admit Mr. STREM was in pain. ARB @ 12. Everything else is different - a crime was being investigated and public safety was at issue.

Wyant v. City of Lynnwood, 2010 WL 128389, at *4 (W.D. Wash. 2010) is inapplicable because that case did not involve "painfree, non-injuring force" whereas it was conceded that this one did[10].

Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001) does not support Respondents' position because in that case, the plaintiff's own testimony supported the district court's that the "officers were greatly outnumbered and trying to maintain control of the situation" and that "Jackson's family and friends

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[10/] Further *Wyant*, like *Redon v. Jordan*, 2017 WL 1155342 (S.D. Cal. Mar. 28, 2017) are of no utility because citing them violates *S.B.*'s directive not to rely upon them: "District court decisions — unlike those from the courts of appeals — do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." 864 F.3d at 1016.

had physically or verbally threatened any of the Bremerton police officers or in any other manner breached the peace. . . ."

Their attempt to distinguish *Winterrowd v. Nelson*, 480 F.3d 1181 (9th Cir. 2007) is unusual. As they describe the case, officers were performing a pat-down of plaintiff[11] and did not have probable cause to arrest[12]; there was no indication that plaintiff was currently armed or posed a safety threat[13]; the officers applied greater force after plaintiff screamed in pain[14]; and the officers admitted that they could have effectuated the pat-down without forcing plaintiffs arms behind

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11/ which they *never* attempted here. "Incident to a valid investigatory stop, an officer may, consistent with the Fourth Amendment, "conduct a brief pat-down (or frisk) of an individual when the officer reasonably believes that 'the persons with whom he is dealing may be armed and presently dangerous.'" *Sialoi v. City of San Diego*, 823 F.3d 1223, 1236 (9th Cir. 2016) Such a patdown is limited to "exterior clothing." *United States v. Johnson*, 581 F.3d 994, 999 (9th Cir. 2009)

In this case, that would be Mr. STREM's pajama bottoms. Why did the officers in *Winterrowd* not skip the patdown and proceed to immediately handcuff Winterrowd if, as Respondent's argue, such a course of action would be constitutional? Perhaps because those officers realized that such conduct was unconstitutional.

12/ nor did they here.

13/ That was disputed. At a minimum, his manner of presentation and appearance belayed that contention completely.

14/ a circumstance admittedly lacking here, although Respondents certainly took no action to alleviate the source of the pain until the handcuffs were removed.

plaintiff's back[15].

7. *Respondents Pick and Choose Which Supreme Court Doctrine They Want to Follow. (Part 3)*

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 because "existing precedent must have placed the statutory or constitutional question beyond debate." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Respondents' analysis nullifies the concepts of reasonableness" or "fair notice" that the officer acted unconstitutionally. *Brosseau v. Haugen*, 543 U. S. 194, 198 (2004) (per curiam) Taken once more to its logical conclusion, Respondents ask this Court to conclude that officers must read every detail of every published (or citable but unpublished) opinion before they can be held to answer for their conduct. This is not the law, nor is it what the Supreme Court has

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15/ A concession Respondents were never willing to make. Such an inquiry from the Court might be helpful at oral argument. Instead, they relied upon their imagined "mandatory handcuffing behind the back" policy.

directed be the focus of the analysis. What is required is "reasonable" and "fair" notice, which these officer had in spades.

8. The Supreme Court's Frustration with Certain Decisions of this Court Is of No Import Here.

Although the Supreme Court recently reiterated its displeasure with this Court's analysis of qualified immunity in certain cases, see *Kisela v. Hughes*, 2018 U.S. LEXIS 2066 (2018), nothing in *Kisela* changed the applicable legal rules as decided in *Dist. of Columbia v. Wesby*, 138 S.Ct. 577 (2018)[16] (AOB @ 36).

Rather, the Supreme Court's took issue with this Court's reliance upon *Deorle v. Rutherford* and *Glenn v. Washington County*. In *Deorle* "the differences between that case and the case before us leap from the pages." *Glenn* was decided "after the shooting at issue here."

By contrast, the facts of both those cases, each decided prior to the events at issue here, support a denial of qualified immunity, as Mr. STREM described n his Opening Brief.

9. Mr. STREM Does Not Seek a Finding of Monell Liability.

Respondents argue that no basis for *Monell* liability was established. This was not an issue in the case. The COUNTY was only a Defendant in the dismissed

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[16] Nor is *Kisela* remotely factually analogous to this case.

state law claims, which, for the reasons argued in the Opening Brief, should be reinstated. AOB @ 58.

10. Last, but not least, this Court has essentially decided this case already.

In *Orr v. Brame*, 2018 U.S. App. LEXIS 6094 (9th Cir. Mar. 12, 2018)[17], on the morning of August 3, 2013, Officer Brame pulled Mr. Orr over because he suspected him of driving under the influence of drugs or alcohol. Mr. Orr was a 76-year-old man with slurred speech and difficulties balancing, resulting from a brain stem stroke he suffered in 2006.

His disabilities caused him to fail several sobriety tests. However, Officer Plumb arrived at the scene with a breathalyzer. Mr. Orr blew a 0.0, indicating he had not been drinking. He testified that he repeatedly told the officers he had suffered from a stroke which affected his balance. (The officers insisted at trial that plaintiff used the word "neurological condition") The officers nevertheless determined that Mr. Orr must be under the influence of drugs and decided to arrest him. Although Mr. Orr was initially cooperative, he refused to be handcuffed. In an attempt to handcuff Mr. Orr, the officers grabbed him from either side, Plumb punched Mr. Orr in his stomach, and the officers took him to the ground. Officer Brame then took him to the CHP office for further evaluation. When it was

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[17] Citable pursuant to FRAP 32.1(a).

determined he was not under the influence of drugs, he was instead booked for resisting arrest in violation of Penal Code § 148.

This Court held that the district court did not err in denying Officer Brame's motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), as the facts at trial established that he used excessive force when arresting plaintiff.

The court concluded that a punch which caused a 76-year old disabled man to crumple to the ground was clearly not justified where he posed no immediate threat to the officers or anyone else and the suspected crime, driving under the influence of drugs, was nonviolent and based on a minor driving infraction.

Here, Mr. STREM posed no immediate threat to the Deputies or anyone else and was not suspected of committing any crime.

Further, the Court rejected a claim of qualified immunity because, as Mr. STREM similarly argued in his Opening Brief:

> “It was clearly established at the time that "gang-tackling without first attempting a less violent means of arresting a relatively calm . . . suspect [of a non-violent offense]—especially one who had been cooperative in the past and was at the moment not actively resisting arrest—was a violation of that person's Fourth Amendment rights." *Blankenhorn*, 485 F.3d at 481. The same conduct preceded by a punch obviously would have been no less a Fourth Amendment violation. We agree with the district court's analysis, which relied primarily on *Winterrowd v. Nelson*, 480 F.3d 1181 (9th Cir. 2007), and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003). Rather than addressing these cases, Plumb instead relies on cases that involved lesser force used by

officers in far more dangerous situations." *Orr v. Brame* 2018 U.S. App. LEXIS 6094, at *6.

Mr. STREM relied upon each of these three cases, and more. Rather than addressing these cases, Respondents also rely on cases that involved lesser force used by officers in far more dangerous situations.

CONCLUSION

Food for thought can be found in the statements of District Judge Samuel B. Kent in *Barlow v. Owens*, 400 F.Supp.2d 980 (S.D.Tex. 2005). Relying upon *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), he stated:

> However, the Court wants to note that judicial sanction searches and seizures based entirely on a perceived need for strict law enforcement, rather than on constitutional principles, is the first step down the slippery slope to a police state . . . Precedent is often created by cases in which police have had to deal with obnoxious and genuinely criminal citizens, but by deciding these cases without reference to the broader picture of a generally law-abiding populace deserving of constitutional protection creates an environment in which real abuse can occur.

Id. at 984-985.

This case presents such a "broader picture of a generally law-abiding populace deserving of constitutional protection" subject to "an environment in which real abuse can occur." The Deputies knew what they were doing was wrong.

Based upon the foregoing, this Court should reverse the judgment and remand the case for trial.

Respectfully submitted,

Dated: April 16, 2018

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief is proportionately spaced, has a typeface of 14 points or more and, according to the word processing program used to prepare it, contains 3507 words.

Executed under penalty of perjury on April 16, 2018 at San Diego, California.

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

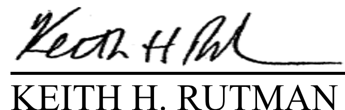
UNITED STATES COURT OF APPEALS

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.	)	USCA No. 17-56709 USDC No. 15-cv-2120-KSC (JMA) 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 April 16, 2018, I electronically filed the instant **APPELLANT'S REPLY 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 April 16, 2018 at San Diego, California.



KEITH H. RUTMAN