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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LANCE MCCLAIN; and JEANNE BARRAGAN, in each case individually and as successor in interest to Thomas McClain, deceased,

Plaintiffs,

vs.

CITY OF EUREKA; STEPHEN LINFOOT; and DOES 1-10, inclusive,

Defendants.

CASE NO. 3:15-CV-02070-WHO

[*Honorable William H. Orrick*]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: August 17, 2016
Time: 2:00 p.m.
Crtrm: 2. 17th Floor.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should deny Defendants' Motion for Summary Judgment ("Motion") with respect to the use of force against Thomas McClain ("Mr. McClain") by Officer Stephen Linfoot for several independent reasons. First, taking Plaintiffs' facts as true, Mr. McClain had his hands up and visible immediately prior to and at the time of the first shot, and did not make any sudden reaching movement for his waistband or for the replica gun. Second, even on Defendants' facts, the use of deadly force was excessive and unreasonable because Officer Linfoot never saw Mr. McClain touch the gun or remove it from his waistband, and even Defendants admit that Officer Linfoot could see Mr. McClain's hands and that he had nothing in his hands at the time of the first group of shots. In fact, the gun never came out of Mr. McClain's waistband. Third, the officers on scene simultaneously gave Mr. McClain conflicting commands, including, "put your hands up," "get down," and "get down on the ground." After the command, "put your hands up," the last commands heard by percipient witness Nichole Mottern and on the dash cam video are, "get down on the ground," "get down," "stop." The commands "get down on the ground" and "get down here" were issued two seconds prior to Mr. McClain allegedly lowering his hands. Fourth, Mr. McClain was displayed a pattern of compliance with the commands. Even if Mr. McClain did lower his hands immediately before he was shot, the reasonable inference is that Mr. McClain only lowered his hands in compliance with the commands, "get down on the ground," and "get down." Fifth, Mr. McClain never verbally threatened any of the officers or anyone in Officer Linfoot's presence. Sixth, Officer Linfoot was the only officer on scene who fired his weapon—Officer Linfoot overreacted, and an overreaction when shooting someone is excessive force.

The foregoing genuine disputes of material fact, including whether Officer Linfoot's use of force was excessive and unreasonable, preclude granting summary judgment at this stage as to Plaintiffs' claims for unreasonable detention and arrest under 42 U.S.C. §1983, excessive force under 42 U.S.C. §1983, interference with familial relations under the Fourteenth Amendment, false arrest/false imprisonment, battery (wrongful death), and negligence (wrongful death) under California law, and violation of California Code of Civil Procedure §52.1. These factual disputes also preclude Officer Linfoot's qualified immunity defense as to Plaintiffs' federal claims, and qualified immunity does not apply to Plaintiffs' claims arising under California law. Plaintiffs abandon their *Monell* claims and their claim for denial of medical care under 42 U.S.C. §1983. The key issue in this case is whether, taking into account the information known to Officer Linfoot at the time of the shooting, Mr. McClain objectively posed an immediate threat of death or serious bodily injury. Plaintiffs contend he did not. Defendants' Motion detracts from this key issue by relying on and referencing information that Officer Linfoot was completely unaware of at the time of the shooting.[1]

II. STATEMENT OF FACTS

A. Background of the Incident

At the time of this incident, Officer Linfoot was not responding to a "shots fired" call and had no information that anyone had been injured or that Mr. McClain had threatened anyone. (Linfoot Depo. at 35:22-36:3.) There was no crime observed or known to any of the officers on scene, including Officer Linfoot, i.e., no shouts for help, no assault in progress, no report of shots fired. (Clark Decl. at ¶ 7.) Rather, Officer Linfoot was on a "fishing expedition" merely to see how Mr. McClain

[1] Plaintiffs submit that the bulk of the moving party's facts are therefore irrelevant.

1 would react to Officer Linfoot driving by. (Linfoot Statement at page 6.) Other than
2 his own observation of the handle of what appeared to be (but was not) a real gun in
3 Mr. McClain's waistband while Mr. McClain was on his own property, Officer
4 Linfoot had no information that Mr. McClain had committed any crime. (Linfoot
5 Depo. at 35:16-24, 49:3-9; Stephens Depo. at 32:11-14.) Prior to this incident,
6 Officer Linfoot had never seen Mr. McClain and knew nothing about him. (Linfoot
7 Depo. at 13:12-16; Linfoot Statement at page 4.) Officer Linfoot did not form the
8 impression that Mr. McClain was under the influence of alcohol. (Linfoot Depo. at
9 36:4-8.) At the time of the shooting, the scene was well lit by the ambient light of
10 the house, overhead streetlights, spotlights from the patrol cars, and a flashlight.
11 (Linfoot Depo. at 13:17-25; Stephens Depo. at 18:9-18.) Nichole Mottern ("Ms.
12 Mottern") was outside of 1620 Allard B at the time of this incident and witnessed
13 the shooting. (Declaration of Nichole Mottern Decl. at ¶ 1.) At the time of this
14 incident, Officer Linfoot was trained regarding the use of force, including deadly
15 force. (Linfoot Depo. at 21:19-21.)

16 **B. Standards on the Use of Deadly Force**

17 Officers are trained, and California Peace Officers Standards and Training
18 ("POST") instructs that deadly force is the highest level of force. (Clark Decl. at ¶
19 22; Cameron Depo. at 23:10-13.) Officers are trained, and POST instructs, that
20 deadly force can only be used as a last resort. (Clark Decl. at ¶ 23.) Officers are
21 trained, and POST instructs, that deadly force can only be used in the direst of
22 circumstances. (Clark Decl. at ¶ 24.) Officers are trained, and POST instructs, that
23 deadly force can only be used in an Immediate Defense of Life situation, or in
24 defense of immediate serious physical injury. (Clark Decl. at ¶ 25.) Officers are
25 trained, and POST instructs, that deadly force can only be used when all other
26 options have been exhausted and no other reasonable measures are available. (Clark
27 Decl. at ¶ 26.) Officers are trained, and POST instructs, that officers must show a
28

reverence for human life. (Clark Decl. at ¶ 27.) Officers are trained, and POST instructs, that a warning that deadly force is to be used must be given when feasible. (Clark Decl. at ¶ 29; Stephens Depo. at 15:7-15; Cameron Depo. at 23:21-23.) Officers are trained, and POST instructs, that the use of force is only justified on the basis of an "objectively reasonable" standard. In other words, per the POST requirements, officers are not justified in any use of force based upon "subjective" fear. (Clark Decl. at ¶ 30; Cameron Depo. at 24:9-11.) Officers are trained, and POST instructs, that officers must justify every shot they fire. (Clark Decl. at ¶ 31; Cameron Depo. at 23:17-20.) Officers are trained, and POST instructs, that an overreaction when shooting someone is excessive force. (Clark Decl. at ¶ 32; Cameron Depo. at 24:3-8.) Officers are trained, and POST instructs, that officers must be aware of their background when using deadly force. (Clark Decl. at ¶.)

C. The Reasonable Inference from Plaintiffs' Evidence is That Mr. McClain Posed No Threat of Death or Serious Bodily Injury at the Time that All Seven Shots Were Fired

a. Conflicting Commands Were Given Simultaneously

When Officer Linfoot arrived on scene, he heard Sergeant Stephens say, "put your hands up" and saw Mr. McClain with his hands in the air. (Linfoot Depo. at 15:24-16:10; Stephens Depo. at 20:5-6.) The officers on scene simultaneously gave Mr. McClain conflicting commands, including, "come down here," "get down," "get down here right now," "put your hands up," "get down on the ground," "don't move," and "stop." (Dash Cam Video at 00:30:16 - 00:30:28; Linfoot Depo. at 14:4-8, 48:20-49:2, 59:3-5; Stephens Depo at. 9:8-11; Mottern Decl. at ¶ 2; Jason Depo. at 12:23-13:4; Cameron Depo. at 9:13-21, 10:19-25; Clark Decl. at ¶¶ 11-12.) Compliance with one of the foregoing commands could require noncompliance with another. (Clark Decl. at ¶ 12.) For example, compliance with the command "get down" would require downward movement of one's hands in order to move to the

1 ground. (Clark Decl. at ¶12.) Also, compliance with the command, “get down here”
2 is contradictory to and would require noncompliance with the command “stop.”
3 (Clark Decl. at ¶ 12.) Officer Linfoot commanded Mr. McClain to put his hands in
4 the air. (Linfoot Depo. at 14:4-8.) Stephens commanded Mr. McClain to get down to
5 the sidewalk. (Stephens Depo. at 9:8-11; Linfoot Depo. at 14:17-15:2). Ms. Mottern
6 perceived the commands to be confusing and did not know what the officers wanted
7 her and Mr. McClain to do. (Mottern Decl. at ¶ 2.) After the command, “keep your
8 hands up” was given, the last final commands before the shooting heard on the dash
9 cam video are, “get down on the ground,” “get down,” “stop.” (Dash Cam Video at
10 00:30:26-28; Mottern Decl. at ¶ 4; Clark Decl. at ¶ 14.) Mr. McClain is commanded
11 to “get down on the ground” and “get down” two seconds before allegedly reaching
12 for his waistband. (Dash Cam Video at 00:30:26-28.)
13 Officers are trained not to give conflicting commands. (Clark Decl. at ¶ 8;
14 Cameron Depo. at 10:4-7.) Officers are trained that a command that is not
15 understood or is confusing is tantamount to no command given. (Clark Decl. at ¶ 9.)
16 Officers are trained that a command that does not include an opportunity to comply
17 is tantamount to no command. (Clark Decl. at ¶ 10.) Officer Linfoot testified that
18 based on his time on the job and common sense, giving conflicting commands can
19 be confusing for a suspect. (Linfoot Depo. at 52:22-53:1.) Officer Linfoot
20 recognizes that the command “put your hands up” conflicts with the command, “get
21 down.” (Linfoot Depo. at 53:3-13.) The correct command (as trained), that should
22 have been given is, “stop, put your hands up.” (Clark Decl. at ¶ 13.) Only after
23 compliance with the initial command, officers should have then commanded,
24 “Slowly move forward with your hands up, and stop when you are told to do so—or
25 I will shoot you.” (Clark Decl. at ¶ 13.)
26 b. Mr. McClain Complied with the Commands
27 Mr. McClain was generally cooperative and compliant. (Linfoot Depo. at
28 29:5-11; Mottern Decl. at ¶ 3.) Mr. McClain complied with the commands to put his

hands in the air. (Linfoot Depo. at 14:9-10, 29:5-7, 44:20-45:8; Mottern Decl. at ¶ 3.) When Mr. McClain raised his hands, Officer Linfoot could see that he had nothing in his hands. (Linfoot Depo. at 45:1-8; Stephens Depo. at 20:16-18; Mottern Decl. at ¶ 8.) Mr. McClain also complied with the command, "get down here"—from the time that Officer Linfoot first saw Mr. McClain up until the time that he shot him, Mr. McClain was calmly walking toward the sidewalk. (Linfoot Depo. at 15:13-20, 29:1-4; Mottern Decl. at ¶¶ 3, 8; Cameron Depo. at 11:1-15.) In compliance with the command, "get down here," Mr. McClain took small steps toward the sidewalk immediately before he was shot. (Mottern Decl. at ¶ 8.) Officer Linfoot understood that Mr. McClain would make his way down to the sidewalk or street so that he could then be commanded to get on the ground. (Linfoot Depo. at 29:17-25.) In fact, Mr. McClain had already been commanded to "get down." (Mottern Decl. at ¶ 4; Dash Cam Video at 00:30:18, 00:30:27-28.) According to Officer Linfoot, on two separate occasions prior to being shot, Mr. McClain lowered both hands momentarily and then raised them back up again, also demonstrating his compliance. (Linfoot Depo. at 29:8-11, 53:18-22, 54:3-9; Cameron Depo. at 11:16-12:11.)

c. It Is Disputed Whether Mr. McClain Ever Made a Reaching Movement for His Waistband or for the Gun

Officers are trained that the mere presence of a handgun does not in itself justify the use of lethal force by a police officer. (Clark Decl. at ¶ 34.) At no time did Officer Linfoot ever see Mr. McClain touch the gun. (Linfoot Depo. at 11:18-20, 47:14-22; Clark Decl. at ¶ 34.) At no time did Officer Linfoot ever see Mr. McClain remove the gun from his waistband. (Linfoot Depo. at 18:13-23, 46:12-14.) Officer Linfoot also never observed the gun come out of Mr. McClain's waistband. (Linfoot Depo. at 37:22-25.) Nothing in the evidence indicates that Mr. McClain's intent was to attack or injure Officer Linfoot or any other officer. (Clark Decl. at ¶ 37(a)(iii); Stephens Depo. at 23:6-11.)

Officer Linfoot was on scene for approximately 30 seconds before he shot at Mr. McClain. (Linfoot Depo. at 15:3-8.) Officer Linfoot fired seven shots at Mr. McClain without issuing a warning that he was prepared to use deadly force as required by P.O.S.T., even though it was feasible to give a warning. (Linfoot Depo. at 8:19-20, 10:22-24; Clark Decl. at ¶.) Officer Linfoot was taking cover behind a pole when he fired all of his shots. (Linfoot Depo. at 49:21-24.) Mr. McClain was not walking toward Officer Linfoot at the time of any the shots; rather, he was walking straight toward Allard Ave. (Jason Depo. at 23:6-24; Linfoot Depo. at 34:17-19.) Officer Linfoot could see both of Mr. McClain's hands at the time that he fired the first shot and also during the first group of shots. (Linfoot Depo. at 41:14-16, 42:1-15.)

On Plaintiffs' evidence, Mr. McClain had his hands up immediately prior to and at the time of the first shot and was not reaching for his waistband. (Mottern Decl. at ¶ 6.) According to Officer Linfoot, both of Mr. McClain's hands lowered equidistant immediately prior to the first shot; however, lowering both hands equidistant from one another is not consistent with reaching for a weapon. (Clark Decl. at ¶ 16.) Lowering both hands is, however, consistent with compliance with the command, "get down." (Clark Decl. at ¶ 15.) Defendants' police practices expert Don Cameron testified that if a suspect is told to "get down" without further specifics, the suspect may try to lower his hands to comply with the command to get down. (Cameron Depo. at 17:1-5, 28:9-29:1, 31:20-25.) Mr. Cameron also testified that if the officers wanted Mr. McClain to keep his hands up, they should *not* have commanded Mr. McClain to "get down" because they should have known that Mr. McClain may lower his hands in response to "get down." (Cameron Depo. at 34:2-23, 35:3-10.)

Officer Linfoot overreacted when he shot Mr. McClain, and an overreaction when shooting someone is excessive force. (Clark Decl. at ¶ 32.) Officer Linfoot is the officer on scene who fired his weapon. (Clark Decl. at ¶ 35; Linfoot Depo. at

12:16-18; Jason Depo. at 32:2-11.) Mr. McClain was shot in his own front yard. (Linfoot Depo. at 13:9-11, 32:13-14.)

d. Officer Linfoot Fired Shots As Mr. McClain Was Falling to the Ground and Also After Mr. McClain Was on the Ground

Officer Linfoot testified that he formed the impression that his first shot struck Mr. McClain; however, he continued to shoot, even though he never saw the gun leave Mr. McClain's waistband. (Linfoot Depo. at 37:12-25; Cameron Depo. at 37:9-11.) Officer Linfoot fired at Mr. McClain when Mr. McClain was falling to the ground. (Linfoot Depo. at 9:21-23; 10:16-18, 51:9-11, 56:12-14; Jason Depo. at 29:8-13; Stephens Depo. at 24:17-20.) Officer Linfoot also fired at Mr. McClain after Mr. McClain had already fallen to the ground. (Linfoot Depo. at 10:6-8, 50:23-51:7, 56:15-17.) Officer Linfoot failed to consider his background as trained and as required by POST, as shown by the fact that occupants of 1620 Allard B were outside of the residence behind Mr. McClain at the time of the shooting, and yet Officer Linfoot fired in that direction anyway. (Mottern Decl. at ¶¶ 33, 37(e).) In fact, at least one of Officer Linfoot's bullets impacted one of the residences in the background of the shooting. (Clark Decl. at ¶ 33, 37(e).)

D. The Physical and Forensic Evidence

Three of Officer Linfoot's shots struck Mr. McClain. (Jason Depo. at. 14:13-16.) There is no conclusive way to determine whether the first shot that Officer Linfoot fired struck Mr. McClain. (Jason Depo. at 20:12-21:7; Clark Decl. at ¶ 19.) After the first shot was fired, Mr. McClain's body recoiled in toward his midsection. (Jason Depo. at 50:19-51:2; Stephens Depo. at 24:10-16; Linfoot Depo. at 56:3-8.) If someone is being shot at and/or being struck by bullets, the body would naturally react by bringing the arms in toward the midsection, trying to protect itself. (Jason Depo. at 51:9-12; Clark Decl. at ¶ 20.) There is also no conclusive way of determining the order of the shots that struck Mr. McClain. (Clark Decl. at ¶ 18.)

Accordingly, there is no direct evidence that the shot to Mr. McClain's arm was the first shot that was fired or was the first shot that struck Mr. McClain. (Clark Decl. at ¶ 18.)

The trajectory of the shot that entered Mr. McClain's upper right arm and then entered his chest can be reproduced without placing Mr. McClain's hands at his waistband. (Jason Depo. at 26:1-27:15, 34:12-36:10; Clark Decl. at ¶ 21.) In other words, at the time the shot entered Mr. McClain's upper right arm and his upper right arm was pressed against his torso, Mr. McClain's lower right arm could have been in any number of positions, including down by his side or above the waistline. (Jason Depo. at 34:12-35:11, 46:6-47:9; Clark Decl. at ¶ 21.) The only thing the trajectory of that shot shows is the position of Mr. McClain's upper right arm relative to his right chest at the time one of the seven shots was sustained. (Jason Depo. at 35:12-36:11; Clark Decl. at ¶ 21.) The trajectory of the shot to the arm is not enough on its own to show the precise position of the right arm relative to the chest for any of the other shots, including the shots that missed Mr. McClain. (Jason Depo. at 36:3-11, 45:24-46:5.)

Mr. Cameron testified that if Mr. McClain's hands had been lowered to the chest level, or if his hands were lowered to the outside of the hip area, it would not be appropriate to shoot simply because the officers saw what they perceived to be a gun in Mr. McClain's waistband. (Cameron Depo. at 15:3-16.) Mr. Cameron also admitted that if Mr. McClain's hands did not go toward his waistband, there would have been no reason to shoot him. (Cameron Depo. at 38:19-39:13.)

E. Officer Linfoot's Use of Deadly Force was Excessive and Unreasonable

A reasonable officer would not have shot under the facts of this case. (Clark Decl. at ¶ 36.) The use of deadly force by Officer Linfoot against Mr. McClain on September 17, 2014 was excessive and unreasonable for several independent reasons. First, neither Officer Linfoot nor any of the officers on scene were in an

immediate defense of life situation because Mr. McClain did not pose an immediate threat of death or serious bodily injury as follows: Mr. McClain was not coming toward Officer Linfoot; Mr. McClain did not verbally threaten any officer; nothing in the evidence indicates that Mr. McClain's intent was to attack or injure Officer Linfoot or any other officer; by Plaintiffs' evidence, Mr. McClain did not make a sudden reaching movement for his waistband or for the gun; Officer Linfoot never saw Mr. McClain touch the gun; even if Mr. McClain did lower his hands, a reasonable inference can be drawn that he was moving down toward the ground as commanded by the officers; Officer Linfoot testified that he never saw the gun leave Mr. McClain's waistband, including during all seven shots; Officer Linfoot could see Mr. McClain's hands at the time of the first group of shots; Officer Linfoot was behind cover. (Clark Decl. at ¶ 37(a)).

Second, the evidence, including testimony by the officers witness Ms. Mottern, indicates that at the time of the shooting, Mr. McClain had his hands in the air as commanded and was calmly walking toward the sidewalk in response to the command "get down here." Third, shooting was not Officer Linfoot's "last resort" in the "direst of circumstances"; other reasonable measures were available to Officer Linfoot during this incident that included (but are not limited to) the following: (1) Officer Linfoot could have issued a specific warning to Mr. McClain that he would be shot or issued another command for Mr. McClain to put his hands back up, as the officers had done twice before the shooting after Mr. McClain's hands lowered slightly in response to the command, "get down"; or (2) Officer Linfoot could have given clearer commands, made sure that the commands being given were not conflicting, and could have allowed Mr. McClain time to comply with such commands; (3) Officer Linfoot could have remained behind cover and not shot. Fourth, Officer Linfoot's actions showed no reverence for human life, especially because he knew he was shooting in the direction of a residence and because he was shooting center mass at a person who, on Plaintiffs' facts, had his hands up and

visible. Fifth, Officer Linfoot failed to consider his background; at least one of Officer Linfoot's shots impacted one of the residences at 1620 Allard.

Sixth, Officer Linfoot's subjective fear is insufficient to justify his shots; there must be an objective circumstance or overt act apart from an officer's subjective fear to justify the use of deadly force. Seventh, Officer Linfoot is the only officer on scene who fired his weapon, indicating that Mr. McClain did not pose a threat. Eighth, Officer Linfoot was not responding to a serious crime; when Officer Linfoot responded to the residence, he had no information that Mr. McClain had any criminal history, and no information that any shots had been fired or that anyone was injured. Ninth, Officer Linfoot did not give Mr. McClain a specific warning that he was going to shoot him. Tenth, Mr. McClain did not verbally threaten Officer Linfoot, any other officer, or anyone in Officer Linfoot's presence. Eleventh, Officer Linfoot overreacted in this case, and an overreaction when shooting someone is excessive force. Twelfth, the mere presence of a handgun does not in itself justify the use of lethal force by a police officer. Thirteenth, an officer is required to justify every shot he fires; here, Officer Linfoot fired seven shots, including shots fired as Mr. McClain was falling to the ground and while Mr. McClain was on the ground. Officer Linfoot continued to shoot even though he knew he had already struck Mr. McClain and even though he never saw the gun leave the waistband. Officer Linfoot should not have shot at all in this case. Finally, Officer Linfoot was taking cover when he shot. (Clark Decl. at ¶ 37(b)-(m).)

III. LEGAL STANDARD

A. Legal Standard in Evaluating a Motion for Summary Judgment

On a motion for summary judgment, the Court must view the evidence in the light most favorable to non-moving party. Summary judgment cannot be granted where a genuine dispute exists as to "material facts." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could

return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). All reasonable inferences must be drawn in the opposing party's favor both where the underlying facts are undisputed *and* where they are in controversy. Even entirely circumstantial evidence is sufficient to create a triable issue of fact. *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992). The court's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *United States v. One Parcel of Real Prop.*, 904 F.2d 487, 491–92 (9th Cir. 1990). Further, Rule 56 must be construed "with due regard" for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Because the reasonableness inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom... summary judgment... should be granted sparingly" in excessive force cases. *Drummond v. City of Anaheim* 343 F.3d 1052, 1056 (9th Cir. 2003). Summary judgment is a drastic remedy and therefore trial courts should act "with caution" in granting summary judgment. *Anderson*, 477 U.S. at 255.

B. Legal Standard in Evaluating Claims for Excessive Force under the Fourth Amendment

"Fourth Amendment claims of excessive force are analyzed under an objective reasonableness standard." *Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (citing *Scott v. Harris*, 550 U.S. 372, 381 (2007)). When evaluating a claim of excessive force, the inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them. *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). "This inquiry requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests

against the countervailing governmental interest at stake." *Glenn*, 673 F.3d at 871 (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted). The inquiry is "highly fact-intensive" and involves "no *per se* rules." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011). Courts do "recognize that 'police officers are often forced to make split-second judgments . . ." *Id.* at 1124 (quoting *Graham*, 490 U.S. at 397). "Not all errors in perception or judgment, however, are reasonable," and while courts "do not judge the reasonableness of an officer's actions 'with the 20/20 vision of hindsight,' nor does the Constitution forgive an officer's every mistake." *Id.* (quoting *Graham*, 490 U.S. at 396).

IV. DISCUSSION

1. Defendants are Not Entitled to Summary Judgment as to Plaintiffs' Fourth Amendment Unreasonable Detention and Arrest Claim

Defendants argue that Mr. McClain violated Cal. Penal Code § 25400 by having what appeared to be a real gun concealed in his waistband. Mr. McClain was on his own property, in his front yard, at the time of that Officer Linfoot saw what appeared to be the handle a real gun sticking out of his waistband. Because the gun in Mr. McClain's waistband was only a replica gun, Mr. McClain was not violating Cal. Penal Code § 25400. Defendants also argue that Mr. McClain violated Cal. Penal Code § 20170. A person violates Cal. Penal Code § 20170 when he *exposes or displays* a replica firearm, including in his front yard. In this case, Officer Linfoot never saw Mr. McClain touch the gun and never saw the gun leave Mr. McClain's waistband; therefore, Mr. McClain was not violating Cal. Penal Code § 20170.

Plaintiffs concede that because Officer Linfoot did not know that the gun in Mr. McClain's waistband was a replica gun, Officer Linfoot may have had reasonable suspicion to briefly detain Mr. McClain for investigative purposes. However, even if Officer Linfoot's stop and detention of Mr. McClain were legal, the scope and manner was not: the Fourth Amendment imposes "limitations on both

the length of the detention and the manner in which it is carried out," *United States v. Holt,* 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc). While a brief investigative detention or *Terry* frisk may have been warranted, Officer Linfoot exceeded the scope and manner of the detention when he trained his gun on Mr. McClain for approximately 30 seconds while officers simultaneously shouted conflicting commands, and then shot at Mr. McClain seven times when, on Plaintiffs' facts, Mr. McClain was not reaching for his waistband and had his hands up, and, on both Plaintiffs' and Defendants' facts, Officer Linfoot could see both of Mr. McClain's hands. Mr. McClain was complying or attempting to comply with each of the commands during this entire incident. Had the commands been clear, rather than confusing and conflicting, Officer Linfoot could have detained Mr. McClain without shooting him and would have realized the gun was a replica gun. Accordingly, a triable issue of fact exists with respect to Plaintiffs' unreasonable detention and arrest claim.

2. Defendants are Not Entitled to Summary Judgment as to Plaintiffs' Fourth Amendment Excessive Force Claim because Officer Linfoot's Use of Deadly Force was Excessive and Unreasonable.

Viewing Plaintiffs' evidence and drawing all reasonable inferences therefrom in a light most favorable to Plaintiffs, no plausible argument can be made to support the use of deadly force by Officer Linfoot. Other than seeing the handle of what appeared to be a gun in Mr. McClain's waistband while Mr. McClain was in his own front yard with his hands up and visibly empty, Officer Linfoot had no information that any crime had been committed and no information that any shots had been fired or anyone had been injured. Mr. McClain never verbally threatened any of the officers or anyone in Officer Linfoot's presence. When Officer Linfoot arrived on scene, he heard an officer command Mr. McClain to put his hands up and observed Mr. McClain with his hands in the air. Mr. McClain was also complying with the command, "get down here" by slowly walking toward the sidewalk. Officer

Linfoot never observed Mr. McClain touch the gun and never observed the gun come out of Mr. McClain's waistband. Four officers were on scene, and yet only Officer Linfoot fired his weapon, indicating that Mr. McClain did not pose a threat. On Plaintiffs' facts, Mr. McClain had his hands up at the time of the shots, and Mr. McClain never made any sudden reaching movement for his waistband or for the gun. On both Plaintiffs' and Defendants' facts, Mr. McClain's hands were visible prior to and at the time of the first group of shots. Even if Mr. McClain did momentarily lower his hands, the reasonable inference is that he did so in response to the command, "get down," based on the fact that he was complying with the other commands and also because lowering both hands equidistant from one another is inconsistent with reaching for a weapon but is consistent with compliance with the command, "get down." Moreover, Mr. McClain had lowered his hands and then raised them again on two separate occasions during this incident, demonstrating compliance with the commands, "get down" and "put your hands up." If Officer Linfoot saw Mr. McClain's hands lower a third time, he should have commanded Mr. McClain to put his hands back up.

Therefore, applying the *Graham* analysis to the facts of this case yields a simple result: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so....A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner* 471 U.S. 1, 11-12 (1985); *Graham v. Connor*, 490 U.S. 386, 396 (1989). At trial, the jury will weigh the factors identified by the Supreme Court in *Graham*: "(1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape." *Espinosa*, 598 F.3d at 537. The three *Graham* factors are not exclusive, and the Ninth Circuit has identified other factors that may be relevant, including

whether the officer gave the suspect a warning before using deadly force . . ." *Id.*; *see also Glenn*, 673 F.3d at 872, 876.

As to the first *Graham* factor, it is undisputed that Officer Linfoot had no information that any shots had been fired, that anyone had been injured, or that any violent crime had been committed. As to the second *Graham* factor, a jury could easily conclude that the "immediate threat" factor weighs in Plaintiffs' favor. "A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001). An officer's "desire to resolve quickly a potentially dangerous situation" does not, on its own, justify the use of deadly force. *Id.* Here, the objective factors do not justify Officer Linfoot's *subjective* fear for his own safety. As stated above, at the time that Officer Linfoot shot and killed Mr. McClain, Officer Linfoot could see both of Mr. McClain's hands and could see that there was nothing in his hands. According to Ms. Mottern, Mr. McClain had his hands up at the time of the shots and never made any reaching movement toward his waistband prior to the shots. The trajectory of the shot that entered Mr. McClain's upper right arm and then entered his chest does not prove or disprove whether Mr. McClain had his hands up at the time of the shooting; this trajectory shows only the position of Mr. McClain's upper right arm relative to his right chest at the time of one of the shots. The trajectory does not have any bearing on the position of Mr. McClain's lower right arm or on his left arm at all—the same trajectory could be reproduced whether Mr. McClain's lower right arm were down by his side, out to his side, above the waistband, or below the waistband. Moreover, even though Officer Linfoot testified that he formed the impression that his first shot struck Mr. McClain, there is no conclusive way of showing whether the first shot that Officer Linfoot fired actually struck Mr. McClain. It is possible that Officer Linfoot missed on the first shot, and it would be the natural reaction of someone

who is being shot at to recoil inward, even if his hands were initially up.

Concerning the third factor, Mr. McClain was not resisting arrest; to the contrary, the evidence shows that he was complying with the officers' commands, including by having his hands up when Officer Linfoot first arrived on scene. Ms. Mottern observed Mr. McClain take small steps forward with his hands up when he was shot. Taking a step forward is consistent with complying with the commands "get down here" and "get down here right now," and it is reasonable to infer that Mr. McClain was complying with those commands and that those commands were given because Mr. McClain had generally been compliant. On two separate occasions prior to being shot, Mr. McClain momentarily lowered his hands and then brought them back up. Based on his pattern of compliance, it is a reasonable inference that each time Mr. McClain lowered his hands, he did so in response to the command, "get down," and then brought them up again in response to, "put your hands up." Even if Mr. McClain did lower his hands a third time immediately prior to being shot, a reasonable inference is that he did so in response to, "get down." Lowering both hands equidistant from one another is consistent with compliance with the command, "get down" and inconsistent with reaching for a gun.

Two other significant factors to consider are the availability of alternative methods to effectuate an arrest or overcome resistance, and the absence of a warning before resorting to the use of force. *Bryan v. MacPherson* 630 F.3d 805, 831 (9th Cir. 2010); *Deorle*, 272 F.3d at 1283-84. "[P]olice are 'required to consider what other tactics if any were available to effect the arrest.'" *Headwaters v. Cnty. of Humboldt*, 240 F.3d 1185, 1204 (9th Cir. 2000). Likewise, "whenever practicable, a warning must be given before deadly force is employed." *Harris v. Roderick,* 126 F.3d at 1201; *Bryan,* 630 F.3d at 831 (finding ample time to give that order or warning and no reason whatsoever not to do so); *Deorle*, 272 F.3d at 1285 (shooting unreasonable where there was "no warning of the imminent use of such a significant

degree of force"). It is undisputed that Officer Linfoot never gave Mr. McClain a warning that he was going to shoot him before the use of deadly force, even though it was feasible for him to do so, as shown by the fact that Officer Linfoot was on scene with his gun trained on Mr. McClain for 30 seconds, had time to issue commands, and was behind cover.

3. Fourteenth Amendment

"This circuit has recognized that parents have a Fourteenth Amendment liberty interest in the companionship and society of their children." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (citing *Curnow v. Ridgecrest, supra,* 952 F.2d at 325). "Official conduct that 'shocks the conscience' in depriving parents of that interest is cognizable as a violation of due process." *Wilkinson v. Torres*, *supra,* 610 F.3d at p. 554 (citing *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* at 1137 (quoting *Moreland v. Las Vegas Metro Police Dep't.*, 159 F.3d 375, 372 (9th Cir. 1998)). Where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct will shock the conscience only if he acts with a purpose to harm unrelated to legitimate law enforcement objectives. *Porter v. Osborn*, 546 F.3d at 1140.

Here, Officer Linfoot was on scene with his gun trained on Mr. McClain for approximately 30 seconds, such that he had time to deliberate. Whether this Court applies the "deliberate indifference" or "purpose to harm" standard, Plaintiffs satisfy both. As summarized above, it is unlawful for an officer to use deadly force to apprehend a person who has committed no crime and who poses no imminent threat of death or serious bodily harm to anyone. The evidence here shows that Officer Linfoot shot Mr. McClain with no warning, when he had not observed Mr. McClain commit any crime other than suspecting that Mr. McClain had a real (as opposed to replica) gun in his waistband on his own property, had not observed Mr. McClain

touch the gun, had not observed the gun come out of Mr. McClain's waistband, when Mr. McClain was trying to comply with the conflicting commands, and when Mr. McClain never verbally threatened any officer or anyone in Officer Linfoot's presence, a jury may likely conclude that Officer Linfoot acted with a purpose to harm unrelated to a legitimate law enforcement objective when he shot and killed Mr. McClain. *See F.C. v. County of Los Angeles*, 2010 WL 5157339 (C.D. Cal. Dec. 13, 2010).

Furthermore, it particularly "shocks the conscious" and shows "deliberate indifference" that Officer Linfoot formed the impression that his first shot struck Mr. McClain, and yet he continued to shoot, even though he never saw the gun leave the waistband and even though he could see Mr. McClain's hands for the first group of shots. Officer Linfoot fired shots while Mr. McClain was falling to the ground after Mr. McClain was already on the ground. Moreover, the recent Supreme Court case of *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (June 22, 2015) suggests that the "objective reasonableness" standard in *Graham* applies to excessive force Substantive Due Process cases as well. On the basis of that case, Plaintiffs contend that there are triable issues as to whether the substantive due process standard is satisfied for the same reasons that there are triable issues with respect to the Fourth Amendment excessive force standard.

4. Officer Linfoot is Not Entitled to Qualified Immunity

Officer Linfoot should not be granted qualified immunity for three reasons. First, taking Plaintiffs' facts as true, Mr. McClain had his hands up at the time of the shooting, and also at the time of the shooting, the law was clearly established that it is unconstitutional to shoot a person who has committed no serious crime and poses no immediate threat of death or serious bodily injury. *See Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) ("In excessive force cases, the inquiry [is] whether 'under the circumstances, a reasonable officer would have had fair notice that the

1 force employed was unlawful, and [whether] a mistake to the contrary would have
2 been unreasonable.'") (quoting *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060
3 (9th Cir. 2003)). There is no question that Officer Linfoot is not entitled to immunity
4 where the courts in this Circuit and others routinely deny qualified immunity to
5 officers faced with known felony suspects, known violent suspects, and suspects seen
6 holding a gun. In *Curnow by and Through Curnow v. Ridgecrest Police*, 952 F.2d
7 312, 325 (9th Cir. 1991), the court found that the defendants were not entitled to
8 qualified immunity where, in one witness' version of the shooting, "Curnow
9 [possessed a gun but] did not point the gun at the officers and apparently was not
10 facing them when they shot him the first time." *See also Ting v. U.S.*, 927 F.2d 1504,
11 1508-11 (9th Cir. 1991) (denying qualified immunity where a felony suspect had
12 dropped his gun); *Harris*, 126 F.3d at 1203 (denying qualified immunity where the
13 suspect had committed a violent crime in the immediate past); *Torres*, 648 F.3d at
14 1128; *Adams v. Speers*, 473 F.3d 989, 994 (9th Cir. 2007) (denying qualified
15 immunity where suspect's nondangerousness and officer's failure to warn before
16 shooting placed the case squarely "within the obvious"); *Brosseau v. Haugen* 543 U.S.
17 194, 197–99 (2004) (reaffirming the rule of Garner and explaining that it provides
18 sufficient "fair warning" of a constitutional violation in "obvious" cases). Plaintiffs
19 submit that the above cases are sufficient to put Officer Linfoot on notice that his
20 conduct in this case would violate the constitution. Even if these cases were not
21 sufficient, state officials are not entitled to qualified immunity simply because no case
22 with materially similar facts has held their conduct unconstitutional. *See Hope,* 536
23 U.S. at 739-41; *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004); *Deorle*,
24 272 F. 3d at 1286 ("When the defendant's conduct is so patently violative of the
25 constitutional right that reasonable officials would know without guidance from the
26 courts that the action was unconstitutional, closely analogous pre-existing case law is
27 not required to show that the law is clearly established.").
28

Second, disputed issues of material fact preclude granting qualified immunity on summary judgment. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Glenn v. Washington Cnty.*, 673 F.3d 864, 870, fn. 7 (9th Cir. 2011) (citing *Espinosa v. City & Cnty. of S.F.*, 598 F.3d 528, 532 (9th Cir. 2010); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 809 (9th Cir. 2003); *Knox v. Southwest Airlines*, 124 F.3d 1103, 1109 (9th Cir. 1997) (no qualified immunity where there are triable issues of fact). Because of the overwhelming number of disputed issues here, including whether Mr. McClain posed an immediate threat of death or serious bodily injury, whether the commands given were conflicting and confusing, and whether Mr. McClain ever reached for his waistband, granting qualified immunity at this stage would violate this well-established precedent. *See Brosseau v. Haugen*, 543 U.S. at 206 (Stevens, J., dissenting) (The reasonableness of an officer's belief "…is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law…"); *Anderson v. Creighton* 483 U.S. 635, 641 (1987).

Third, even if the shooting happened as described by Defendants, the shooting would still be excessive and unreasonable. In other words, even if Mr. McClain had lowered his hands immediately prior to or at the time of the first shot, the shooting still would not be justified because Officer Linfoot never saw Mr. McClain touch the gun or remove it from his waistband, and Officer Linfoot could see Mr. McClain's hands during the first group of shots. Moreover, even if Mr. McClain did lower his hands just before the shooting, the reasonable inference is that he did so in response to the command, "get down." Officer Linfoot's training is an important factor to consider in determining whether he should be entitled to qualified immunity. An objectively reasonable officer follows basic police officer training materials and guidelines and is on notice of the rights protected by those guidelines. An officer who makes a conscious decision to violate basic training guidelines should not be heard subsequently to claim to have made a reasonable mistake or to have reasonably believed his or her decision to be

1 lawful. *See Drummond*, 343 F.3d at 1062 ("training materials are relevant not only to
2 whether the force employed in this case was objectively unreasonable . . . but also to
3 whether reasonable officers would have been on *notice* that the force employed was
4 objectively unreasonable."). Here, Officer Linfoot violated POST standards and basic
5 police officer training. For the foregoing reasons, Officer Linfoot is not entitled to
6 qualified immunity.

7 **5. Defendants are Not Entitled to Summary Judgment on Plaintiffs'**
8 **State Law Claims**

9 a) There is a Triable Issue of Fact Relative to Plaintiffs' False
10 Arrest/False Imprisonment Claim

11 Plaintiffs are entitled to a jury trial on their claim for false arrest/false
12 imprisonment for the reasons discussed above in connection with Plaintiffs'
13 constitutional claim for unreasonable detention and arrest.

14 b) There is a Triable Issue of Fact Relative to Plaintiffs' Battery
15 (wrongful death) and Negligence (wrongful death) Claims

16 Plaintiffs are also entitled to a jury trial on their state law claims for battery
17 (wrongful death), negligence (wrongful death) for the reasons discussed above in
18 connection with Plaintiffs' constitutional claim for excessive force. Under California
19 law, battery and negligence claims arising out of excessive force by a peace officer are
20 evaluated by way of traditional Fourth Amendment analysis under *Graham*, *supra*.
21 *See Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1121, fn 6 (2004) ("Federal
22 civil rights claims of excessive force are the federal counterpart to state battery and
23 wrongful death claims; in both, the plaintiff must prove the unreasonableness of the
24 officer's conduct. Accordingly, federal cases are instructive."); *see also Hayes v.*
25 *County of San Diego*, 736 F. 3d 1223, 1232 (9th Cir. 2013); *Edson v. City of Anaheim*,
26 63 Cal. App. 4th 1269, 1274 (1998). As with a Fourth Amendment excessive force
27 claim, to prevail on a battery claim, Plaintiffs must demonstrate that Officer Linfoot's
28 use of force was objectively unreasonable under the circumstances confronting him.

As set forth above, because Officer Linfoot's use of deadly force in this case was patently unreasonable when analyzed pursuant to the *Graham* factors, Officer Linfoot's use of deadly force was not privileged, summary judgment is precluded on Plaintiffs' state law battery claim.

c) Officer Linfoot was Negligent in His Pre-shooting Conduct by Giving Conflicting Commands

The California Supreme Court has recently clarified that in the context of police shooting cases, the negligence analysis is even broader than typical Fourth Amendment analysis because state law specifically includes consideration of negligent "pre-shooting" tactics on the part of the shooting officer as part of the "totality of the circumstances" evaluation. In *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013), the California Supreme Court held that "[l]aw enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." *See also Grudt v. City of Los Angeles*, 2 Cal. 3d 575 (1970). Here, the material facts relevant to the "totality of the circumstances" show that Officer Linfoot's poor tactics, primarily giving conflicting commands against his training, ultimately caused Mr. McClain's unwarranted death. Officers are trained not to give conflicting commands and that a command that is not understood or is confusing is tantamount to no command given. Officer Linfoot testified that based on his time on the job and common sense, giving conflicting commands can be confusing for a suspect. Officer Linfoot recognizes that the command "put your hands up" conflicts with the command, "get down."

//

d) Officer Linfoot was negligent in his use of deadly force against Mr. McClain

As Plaintiffs' Fourth Amendment claim for excessive force does not fail, neither does Plaintiffs' negligence (wrongful death) claim. Given that Officer Linfoot knew nothing about Mr. McClain, had no information that any serious crime had been committed, Mr. McClain was cooperative and compliant, Mr. McClain never threatened any officer, Mr. McClain never kicked, punched or hit anyone, Mr. McClain (on Plaintiffs' facts) had his hands up at the time of the shooting and never reached for his waistband, Officer Linfoot never saw Mr. McClain touch the gun or remove it from his waistband, the facts show that Officer Linfoot was negligent in interpreting the situation to require shooting Mr. McClain. Officer Linfoot was also negligent in failing to avail himself of less-than-lethal alternative methods to take Mr. McClain into custody. *See Dillenbeck v. City of Los Angeles*, 69 Cal. 2d 472, 477-78 (1968); *Grudt*, 2 Cal. 3d at 588; *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703, 718-21 (2001); *Miller v. Kennedy* 196 Cal. App. 3d 141, 145 (1987); *Gibson v. City of Pasadena*, 83 Cal. App. 3d 651, 658 (1978).

Finally, Officer Linfoot's reckless disregard for public safety is also evidence of his negligence. Officer Linfoot placed Mr. McClain's housemates and other neighbors at great risk because his gunfire easily could have struck one or more of the witnesses who were on the porch at the time of the shooting. In fact, the photographic evidence shows that at least one of Officer Linfoot's shots did impact one of the residences at 1620 Allard Ave., demonstrating this risk.

e) Plaintiffs Can Establish a Bane Act Violation

"A successful claim for excessive force under the Fourth Amendment provides the basis for a successful claim under [the Bane Act]." *See Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105–06 (9th Cir. 2014) cert. denied sub nom. *City of Los Angeles, Cal. v. Chaudhry*, 135 S. Ct. 295 (2014) (citing *Cameron v. Craig*, 713 F.3d

1012, 1022 (9th Cir. 2013)). To make a claim under the Bane Act in a case of excessive force, Plaintiffs need not show coercion independent from the coercion inherent in the seizure or use of force. *See Boarman v. Cnty. of Sacramento*, 55 F. Supp. 3d 1271, 1287 (E.D. Cal. 2014); *Dillman v. Tuolumne County*, 2013 WL 1907379 (E.D. Cal. 2013) ("Where Fourth Amendment unreasonable seizure or excessive force claims are at issue, there is no need for a plaintiff to allege a showing of coercion independent from the coercion inherent in the seizure or use of force"). In this case, Plaintiffs have identified ample evidence of factual disputes as to the reasonableness of the officers' conduct and use of deadly force at the time of the incident. As Plaintiffs' Fourth Amendment claim for excessive force does not fail, neither does Plaintiffs' claim for violation of the Bane Act.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Honorable Court deny Defendants' motion with respect to each of Plaintiffs' claims (with the exception of Plaintiffs' *Monell* claims, and claim for denial of medical care, which they abandon).

DATED: July 27, 2016 LAW OFFICES OF DALE K. GALIPO

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