IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-2035

DANIEL T. PAULY, as Personal Representative of the ESTATE OF SAMUEL PAULY, and DANIEL B. PAULY, individually,

Plaintiffs - Appellees,

v.

RAY WHITE, MICHAEL MARISCAL, and KEVIN TRUESDALE,

Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HON. KENNETH J. GONZALES
DISTRICT COURT NO. 12-CV-1311 KG/WPL

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT IS REQUESTED

Mark D. Jarmie
Jarmie & Associates
P.O. Box 26416
Albuquerque, N.M. 87125-6416
(505) 243-6727
Fax: (505) 242-5777
mjarmie@jarmielaw.com

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REPLY TO APPELLEES' STATEMENT OF FACTS

In the "Facts" section of their Response Brief, the Appellees have done nothing more than copy and paste the purported "facts" from the summary judgment response that they filed in the District Court below. *See* Aplt. App'x at 549-58. In simply reprinting and relying upon the statement of facts from their summary judgment briefing, plaintiffs have strayed from what the *District Court* found to be the pertinent undisputed facts of this case. The scope of this qualified immunity/collateral order doctrine appeal does not concern "'which facts the parties might be able to prove, but rather, whether or not certain *given* facts show[] a violation of clearly established law'" (emphasis supplied). *Edison v. Owens*, 515 F.3d 1139, 1144 (10th Cir. 2008) (quoting *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (quotation omitted)). The NMSP Officers' appeal concerns whether or not "the conduct *which the District court deemed sufficiently supported for purposes of summary judgment*" meets the applicable legal standards for qualified immunity (emphasis supplied). *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). It is that set of facts explicitly found by the District Court, combined with those that it likely assumed, that form the "universe of facts" upon which this Court bases its legal review of whether Defendants are entitled to qualified immunity. *Fogarty v. Gallegos*, 523 F.3d 1147, 1153 (10th Cir. 2008).

This appeal challenges the District Court's legal interpretation of the facts that it found to be supported by the parties' submission. *See Stewart v. Donges*, 915 F.2d 572, 579 (10th Cir. 1990). As such, *all* parties to this appeal–not just the Defendant-Appellant NMSP Officers–are bound by the facts as set forth by the District Court. *Cf. Marrical v. Detroit News, Inc.*, 805 F.2d 169, 172 (6th Cir. 1986) ("[u]ndoubtedly, the parties are bound by the federal procedural rules governing appeals, including the strictures of the collateral order doctrine") (citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949)).

As was the case in the District Court, the Paulys' purported statement of "facts" is comprised of the arguments of and characterizations made by the Paulys' counsel, as opposed to actual admissible facts. *See generally* Aplt. App'x at 620-25, 637-43, 655-63. Notably, the Paulys' statement of facts glosses over the District Court's specific finding that decedent Samuel Pauly pointed a *loaded* handgun at Officer Ray White just after Daniel Pauly fired two shotgun blasts. Quite simply, Appellees cannot "throw[] facts against the courthouse wall simply to see what sticks" in response to Appellants' Opening Brief. *Cf. Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 830 (S.D. Ind. 2006).

For example, the Paulys attempt to dispute the Officers' characterization of the 911 call made by Sabrina Ireland and Augusta Arrellanes by claiming that the two

women were "pursuing" Daniel Pauly, and characterize the 911 callers as "the aggressors at times during the incident." Resp. Br. at 5 and 21. Notably, neither of the 911 complainants, nor any 911 dispatcher, was a Defendant or party in this lawsuit, and there is no allegation that any of the NMSP Officers directed the complainants to pursue Daniel Pauly.[1]

As previously noted, following the complainants' report of Daniel Pauly's road rage, the NMSP Officers decided that they should follow up and attempt to make contact with Daniel Pauly. Whether or not the Officers had probable cause to arrest Pauly at that point, as opposed to simply getting Pauly's side of the story, is not at issue in this case–as discussed in Appellants' Opening Brief and reiterated herein, the Officers had both the authority and the duty to investigate Daniel Pauly's disruption of public peace and safety. Indeed, Pauly's own expert admitted that the Officers should not have ignored the conduct of Daniel Pauly as reported by Ms. Ireland and Ms. Arrellanes. Aplt. App'x at 268 (80:24 to 81:3).[2] Thus, the Officers had a

[1] While not enumerated by the District Court among its findings, it is also notable that Daniel Pauly admitted *his* actions (stopping, leaving his vehicle and yelling at the complainants) contributed to "heighten[ing] the level of hostility…in the call." Aplt. App'x at 550, ¶ 9.

[2] In contrast to the baseless assertions made by Appellees throughout their Response Brief with no citation whatsoever (e.g., that Officer White approached the Pauly house "surreptitiously," and even more egregious and wholly unfounded assertions that Officer White heard the other officers make threatening statements

legitimate public safety concern that mandated their investigation of Daniel Pauly, which necessarily included attempting to make contact with Pauly at his home. Moreover, the fact that nothing had been reported to any of the officers regarding Daniel Pauly's criminal history or any known propensity for danger did not obviate the Officers' need for caution based upon the conduct reported by the complainants (the need for caution was in fact later validated by Pauly's firing of a shotgun after the Officers came to his house). Moreover, plaintiffs' own purported expert admitted that it was reasonable for Officer Kevin Truesdale to take precautions as he approached an unknown situation, i.e. that it was proper for Officer Truesdale to approach quietly, find a safe place to be, and then announce his presence. Aplt. App'x at 272 (103:20 to 104:2).

Additionally, Appellees' repeated characterization of the Officers' approach to the house as being a "stealth" or "surreptitious" approach is nothing more than the argument of counsel and is not a statement of fact. Again, the District Court specifically found that the Officers approached the Pauly house cautiously in an attempt to ensure officer safety. *See* Aplt. App'x at 677, 696. Notably, there is no evidence showing that Officer White used profanities or made any threat prior to the

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and himself yelled threats at the Pauly brothers, *see* Resp. Br. at 33), Appellants will periodically cite additional relevant deposition testimony from the record herein.

use of force.

As they did in the District Court, Appellees characterize the guns that they used as "antiques." Resp. Br. at 2, 3, 11, 23, 43. This characterization, however, is not supported by the deposition passages cited in the portions of the Appendix cited by Appellees. Even at that, there is no dispute that Daniel Pauly, Jr. twice fired his "antique" shotgun, showing that it was in working order. Moreover, as the District Court noted, the "antique" handgun that Samuel Pauly pointed at Officer White was loaded, with a bullet having been discharged and an empty casing under the hammer. Aplt. App'x at 679-81, 698-99.

Notably, Appellees do nothing to dispute the District Court's finding that Officers White and Mariscal actually observed a male individual (later identified as Samuel Pauly) lower the top window pane of the front window of the Pauly house and aim a pistol directly at Officer White. Aplt. App'x at 681, 698-99. As the Paulys themselves allege, Officers White and Mariscal would clearly have been able to see what Samuel Pauly was doing. Resp. Br. at 11 ("the lights inside the home were on and the activities of Samuel and Daniel Pauly were clearly visible to the officers") (citing Aplt. App'x at 556, ¶ 48). In the portion of Officer White's deposition testimony cited by the Paulys in their summary judgment briefing from the District Court, their counsel recounts Officer White's testimony that the "person in the

window" (Samuel Pauly) stuck his hand and gun out the window, pointed the gun in White's direction and then fired a round. Only after Samuel Pauly fired at him did Officer White lose track of what Samuel was doing, because White was training the sights of his weapon on the man who had just pointed a gun and shot at him. Aplt. App'x at 144 (171:18 to 172:8). Even assuming the construction of the facts of this case whereby Officer Mariscal, and not Samuel Pauly, fired the third shot (after Daniel Pauly fired twice, but before Officer White fired his single shot), Officer White believed that Samuel Pauly posed an imminent threat of death or great bodily harm to both himself and Officer Mariscal, and that he had no other choice but to respond with deadly force. The undisputed and unrebuttable testimony is that both Officers White and Mariscal observed Samuel Pauly pointing a gun in Officer White's direction. As discussed herein and in Appellants' Opening Brief, if an assailant so much as points a gun at a police officer, the officer is authorized to respond with deadly force.

Ultimately, the evidence regarding plaintiffs' claims–as set forth by the District Court–is undisputed. Officers Kevin Truesdale and Michael Marsical sought to investigate a road rage incident. They approached the Paulys' residence, seeking to make contact with the "road rage" driver (Daniel Pauly). Meanwhile, Officer Ray White was ensuring that the driver involved in the road rage incident did not

endanger the public by driving again on I-25.

Just after joining the other Officers at the Pauly residence, Officer White heard one of the Pauly brothers threaten, "We have guns." Moments later, Officer Truesdale saw Daniel Pauly run to the back of the house. Officer Truesdale left his position of cover at the front of the house and ran around the side of the residence in order to ensure that Daniel did not go out the back door and flank him and his fellow officers. Officer White ran for cover and positioned himself behind a low rock wall that ran along the front of the house. Officer Mariscal took cover behind a truck parked in front of the Pauly house.

Immediately thereafter, Daniel Pauly fired two blasts from his shotgun, which Officer Truesdale believed were fired at him. Officer Truesdale dropped to the ground and tried to scramble for cover. At no time did he fire his weapon or attempt to do so. Officer White heard Daniel Pauly's shotgun blasts coming from the back of the house, and feared that Officer Truesdale had been shot. As Daniel Pauly fired his shotgun, Officers White and Mariscal saw Samuel Pauly lower the top pane of the front window, extend his arm parallel with the ground, and point a pistol at Officer White (which was, as the District Court noted, loaded). In fear for his life, and fearing for the life and safety of Officer Mariscal, Officer White fired his weapon. These are the facts of this case: in this short encounter, the Pauly Brothers were the

first to draw guns, the first to threaten the use of guns, and the first ones to actually *fire* any guns. Only after the rapid succession of 1) the Pauly Brothers yelling "We have guns," 2) Daniel Pauly firing two shotgun blasts near Officer Truesdale's position (which was out of the line of sight of Officers White and Mariscal), and 3) Samuel Pauly pointing a loaded handgun at Officer White, did Officer White fire his weapon and shoot Samuel Pauly in self defense. These are the facts as set forth by the District Court, these are the facts to which *all* parties of this case are bound, and these are the facts that Appellees cannot now run away from on appeal.

ARGUMENT

A. Officer White's Immediately Connected Pre-Seizure Conduct Was Reasonable

The Tenth Circuit permits limited review of pre-seizure conduct as part of the Fourth Amendment inquiry, but only of conduct that is "'*immediately connected*' to the suspect's threat of force." *Romero v. Bd. of Cnty. Comm'rs of Cnty. of Lake, State of Colo.*, 60 F.3d 702, 705 n.5 (10th Cir. 1995) (emphasis supplied) (quoting *Bella v. Chamberlain*, 24 F.3d 1251, 1256 n. 7 (10th Cir.1994), *cert. denied*, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995)).[3] Additionally, an officer can only be liable for his *own* pre-seizure conduct, and that conduct must rise to the level of recklessness as opposed to mere negligence. *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004); *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001). Recklessness is defined as "wanton or obdurate disregard or complete indifference to risk." *Medina v. City and*

[3] Circumscribing the scope of pre-seizure review is essential: "The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing." *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir.1996) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)).

Cnty. Of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992), *overruled on other grounds by Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012). Notwithstanding this Court's allowance for limited review of pre-seizure conduct, "[t]he primary focus of [the Fourth Amendment reasonableness] inquiry...remains on whether the officer was in danger at the exact moment of the threat of force." *Cram*, 252 F.3d at 1132.

Throughout their Response Brief, Appellees repeatedly attempt to conflate Officer White and Officer White's conduct with that of the other officers. Appellees assert, for example, that the "police officers decided to approach the home surreptitiously and intentionally conceal their identities", Resp. Br. at 22, and that the "officers approached the house surreptitiously, intentionally concealing their identity...and shouted coercive and profane threats." Resp. Br. at 30. Appellants acknowledge that in construing the evidence in the light most favorable to plaintiffs, the District Court determined that a jury could find that Officers Mariscal and Truesdale used a hostile tone and made threatening statements. However, that is not the case with Officer White, who arrived on scene moments before hearing Daniel Pauly say "We have guns."

Officer White can only be liable for his *own* pre-seizure conduct "immediately connected" to the use of force, not any other officer's conduct. *See Romero*, *Jiron* and *Cram*, *supra*. When Officer White arrived at the upper residence his knowledge

of what was happening was extremely limited. He knew: (1) that the suspect vehicle was parked at the upper residence because the other officers had notified him of this fact while he was waiting at the freeway overpass (and thus that the suspect might be inside the house); (2) upon arriving at the front of the residence he recognized that the occupants of the residence had not and were not coming outside to talk; and (3) he knew that there were at least two males inside the residence because he could see them through the front window of the house. Aplt. App'x at 213 (depo 99:1-7), 219-20 (depo 123:17-23, 125:18 to 126:18), 676-78, 680.

At that point, one of the males inside the house suddenly yelled "We have guns", and Officer White appropriately sought cover behind a low wall at the front of the house. *See* Aplt. App'x at 680. Seconds later there were two blasts from a large caliber weapon adjacent to the location where he knew Officer Truesdale had gone around the side of the house; Officer White believed his partner had been shot. *See id.* Given the threat of "We have guns", and the location of the shotgun blasts, such a belief was unquestionably reasonable. At that moment, Officer White saw Samuel Pauly pointing a handgun out the front window towards him. *Id.* at 681. Officer White aimed his weapon and fired a single shot at what he perceived to be an imminent threat. *See id.* That is the full and complete extent of Officer White's

conduct that is immediately connected to the use of force in this case.[4]

There is absolutely nothing in Officer White's pre-seizure conduct that can be construed as negligent, let alone reckless. His actions were sensible and justifiably taken in response to the threat that unexpectedly materialized just moments after he arrived at the Pauly residence. Officer White did nothing to create his need to use deadly force or to precipitate a confrontation; rather, he responded consistent with his training to what he reasonably believed to be an imminent threat to both himself and Officer Mariscal. As this Court stated in *Romero*, "[a]n officer's use of deadly force in self-defense is *not constitutionally unreasonable*." *Romero*, *supra*, 60 F.3d at 704 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)) (emphasis supplied); *see also Dickerson*, *supra*, 101 F.3d at 1161 (where a suspect "threatens an officer with a weapon, deadly force is authorized in self-defense"); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir.1995) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989) (deadly force is justified under the Fourth Amendment "if a reasonable officer...would

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[4] Appellees brazenly assert that Officer White yelled threats at the Pauly brothers. Resp. Br. at 33. There is absolutely no evidence in the record to support this assertion. There is similarly no evidence in the record that supports the Paulys' assertion that Officer White attempted to approach the house surreptitiously. In fact, Officer White testified that when he began walking up the dirt road beside the lower residence, he heard the other officers loudly announcing"State Police" at the upper residence, was alarmed that the other officers were not already talking with the suspect, and so he jogged up in the direction of the voices. *See generally* Aplt. App'x at 216-17.

have had probable cause to believe that there was a threat of serious physical harm to themselves or to others."). Under the circumstances, Officer White had more than enough probable cause to believe that Samuel Pauly posed a threat of serious physical harm and clearly acted in self defense.

In their Response Brief, Appellees emphasize two Tenth Circuit cases in support of their danger creation theory, *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) and *Sevier v. City of Lawrence*, *supra*. *See* Resp. Br. at 24-26. However, factual disputes regarding the shootings in both *Allen* and *Sevier* played a large role in this Court determining that summary judgment was inappropriate in those cases. In *Allen*, officers shot and killed a man, known to be suicidal, after they approached his car and tried to remove his gun which lay next to him inside the vehicle. There were eyewitnesses to the incident and factual disputes as to whether one of the officers "ran 'screaming'" up to the car, shouting at the decedent to exit the vehicle, or whether the officer approached the car cautiously and tried talking the decedent into handing over his gun. *Allen*, *supra*, 119 F.3d at 841. The Court concluded that the officers' actions were"immediately connected" to the decedent's threat of force, and given the disputed facts regarding those actions, that summary judgment could not be awarded. *Id.*

In *Sevier*, the plaintiffs phoned police to request assistance with their son, who

had twice before tried to commit suicide, and whom they found in his room with a butcher knife on his lap. *Sevier*, 60 F.3d at 697. The officers asserted that after they arrived at the residence, the decedent lunged with his knife in a raised position, while the plaintiffs claimed that the officers shot the decedent while he was standing with the knife at his side. *Id.* at 698. This Court found the factual dispute as to how the shooting occurred to be "highly material." *Id.* at 700-01 (finding also relevant "whether the officers precipitated the use of deadly force by their own actions during the course of the encounter *immediately prior* to the shooting") (emphasis supplied).

By contrast, in the present case, the material relevant facts occurring immediately prior to Officer White's use of force consisted of one of the Pauly brothers yelling "We have guns", Daniel Pauly firing two shotgun blasts adjacent to Officer Truesdale's position, and Samuel Pauly pointing a gun at Officer White. These events took place in a matter of seconds. Ultimately, as the District Court found, Samuel Pauly pointed a loaded pistol at Officer White, and Officer White fired a single round in response to the threat. Focusing on Officer White's conduct immediately connected to the shooting, as this Court must, the only reasonable inference that can be drawn from the facts of the instant case is that when Pauly pointed his gun at White, and White fired, White was acting in self-defense. *See Romero*, 60 F.3d at 704 ("officer's use of deadly force in self-defense is not

constitutionally unreasonable"); *see also Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (officer justified in shooting man with knife raised even if man did not make stabbing or lunging motions towards him, as a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions'").

B. There Is No Liability Absent a Constitutional Violation

None of the officers, including Officers Mariscal and Truesdale, can be liable under Section 1983 unless Samuel Pauly's constitutional rights were violated. *See* 42 U.S.C. § 1983 (defendant must subject or cause a citizen to be subjected to a constitutional deprivation); *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006) (defendant must "set in motion a series of events that the [defendant] knew or reasonably should have known would cause others to *deprive the plaintiff of his constitutional rights*.") (emphasis supplied); *Zakrzewski v. Fox*, 87 F.3d 1011, 1015 (8th Cir. 1996) ("[a]bsent a constitutional deprivation [the plaintiff's] § 1983 claim against each defendant necessarily fails.").

In this lawsuit, Appellees have made just one Section 1983 claim, for excessive force in violation of the Fourth Amendment. However, it is undisputed that Officer Mariscal did not shoot Samuel Pauly, and that Officer Truesdale neither used nor attempted to use any force whatsoever throughout this entire encounter. Appellees'

excessive force claim therefore rises or falls with Officer White's use of deadly force on Samuel Pauly, which, as addressed in Section A, *infra*, of this Reply Brief, was both reasonable and justified. Since Officer White's use of force was reasonable, Samuel Pauly's constitutional rights were not violated, which is the *sine qua non* of any Section 1983 action against *any* of the Defendant officers. Consequently, even assuming *arguendo* that Officers Mariscal or Truesdale engaged in some reckless pre-seizure conduct, neither officer "set in motion" a series of events which caused Samuel Pauly to be deprived of his Fourth Amendment rights.[5]

C. The Law Regarding Liability of Officers Who Do Not Use Deadly Force Is Not Clearly Established

Officers are entitled to qualified immunity if the right they purportedly violated was not clearly established at the time. *See Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) (citation and internal quotation marks omitted). If the law does not "put the officer on notice that

[5] Appellants raised this argument in their Opening Brief, yet Appellees did not contest this argument anywhere in their Response Brief, and have cited no contrary authority to refute this axiomatic principle of Section 1983 jurisprudence.

his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Even assuming *arguendo* that Officer White's use of force was unreasonable, Officers Mariscal and Truesdale are still entitled to qualified immunity since the law regarding liability of officers who do not personally shoot a suspect (or in the case of Officer Truesdale, do not use any force at all) is not clearly established. Appellees cite *Stewart v. City of Prairie Vill., Kan*., 904 F.Supp.2d 1143 (D.Kan. 2012) and *Strachan v. City of Federal Heights*, 837 F.Supp. 1086 (D. Colo. 1993), *see* Resp. Br. at 36-37, but do not cite any binding Tenth Circuit precedent which has held police officers liable under such circumstances. Indeed, the Paulys acknowledge that "the Tenth Circuit does not appear to have addressed a case involving use of deadly force after police officers surreptitiously approach a home...without identifying themselves." Resp. Br. at 26. The few cases Appellees cite from other circuits certainly do not represent a clearly established weight of authority sufficient to meet the second prong of the qualified immunity analysis for Officers Mariscal and Truesdale. As such, these officers are entitled to qualified immunity.

D. The Federal Courts Reject "Team Effort Liability"

In their Response brief, the Paulys argue that, "[w]hile Officers Mariscal and Officer Truesdale did not fire fatal shots, they were active participants in the reckless

and deliberate conduct that was objectively unreasonable and precipitated the use of deadly force by Officer White." Resp. Br. at 37. However, the federal courts have repeatedly rejected this type of "team effort liability" in excessive force cases. *See, e.g.*, *Chulman v. Wright*, 76 F.3d 292, 295 (9th Cir.1996); *Wilson v. Morgan*, 477 F.3d 326, 337 (6th Cir.2007); *Landis v. Galaraneau*, 2010 WL 4483371, *5-6 (E.D. Mich. Nov. 1, 2010) (unpublished). Nonetheless, Appellees cite to *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557 (1st Cir. 1989), for the proposition that participating officers can be liable in excessive force cases even though their actions did not directly cause the plaintiff's injuries. However, the First Circuit has expressly noted that *Cartagena* does not "stand for the proposition that an officer's participation in a group operation, without more, is sufficient grounds for imputing liability for constitutional injuries arising out of that effort." *Eldredge v. Town of Falmouth*, 662 F.3d 100, 105-06 (1st Cir. 2011) (rejecting "team effort" theory advanced by plaintiff); *see also Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1244 (10th Cir. 2003); *Gorio v. Block*, 972 F.2d 1339, n.2 (9th Cir. Aug. 5, 1992) (unpublished table decision).

Similarly, *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014) is of no import to this case, given its egregious facts. In *Booker*, five police deputies jointly restrained the decedent with excessive force for nearly three full minutes. *Booker*,

745 F.3d at 413-14. One deputy applied a "carotid hold" on the decedent, two handcuffed the decedent (one while applying pressure to the decedent's back), another used a set of "Orcutt Police Nunchakus" on the decedent, and yet another used a TASER on the decedent. *Id.* at 422. Under these unique facts, this Court properly found that all of the deputies "actively participated in a coordinated use of force" on the decedent, that they "engaged in a group effort," and that if excessive force occurred, all of the deputies contributed to it. *Id.* This Court has, however, subsequently limited the application of *Booker*: in *Tooley v. Young*, __ F. App'x. __, 2014 WL 1259599 (10th Cir. Mar. 28, 2014) (unpublished), this Court reiterated that the excessive force inquiry "must be defendant specific except when 'all Defendants actively and jointly participated in the use of force' or the facts support 'a failure-to-intervene theory.'" *Tooley*, 2014 WL 1259599, at *3 (quoting *Booker*, 745 F.3d at 422). As was the case in *Tooley*, neither of these exceptions apply in the instant case: it is undisputed that Officer White was the *only* officer to have actually used any force upon Samuel Pauly (by virtue of the fact that his was the lone bullet to strike the decedent). Under the facts assumed by the District Court, only Officer Mariscal fired one other shot in response to Samuel Pauly pointing a loaded handgun at Officer White; that shot did not strike Pauly. This is not a case where the three NMSP Officers were jointly and actively shooting at the Paulys for several minutes

akin to the force applied by the deputies in *Booker*. Indeed, the exchange of gunfire in this case lasted mere seconds, and again, was precipitated by the Paulys having threatened the Officers, firing a shotgun near them and pointing a weapon at them.

Finally, the Paulys' reliance on *Grandstaff v. Borger*, 767 F.2d 161 (5th Cir. 1985) is equally misplaced. In that case, a group of police officers opened fire on a man they mistook for a fugitive. The evidence reflected repeated acts of abuse leading to the man's death, and further, several police officers proved evasive and contradictory in their testimony. *Grandstaff*, 767 F.2d at 166 n. 1. Because of the extreme nature of the facts at issue in that case, *Grandstaff* "has not enjoyed wide application" within the Fifth Circuit. *See*, *e.g.*, *Snyder v. Trepagnier*, 142 F.3d 791, 797 (5th Cir.1998). Indeed, the Fifth Circuit has subsequently limited *Grandstaff*'s application to "extreme factual situations" analogous to those presented in that particular case. *Id.* at 798 (quoting *Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir.1986)); *see also Barkley v. Dillard Dep't Stores, Inc.*, 277 F. App'x. 406 (5th Cir. May 02, 2008) (unpublished). In sum, Appellees rely upon a handful of cases representing the most extreme and egregious end of the excessive force spectrum from across the federal circuits. None of these cases are sufficiently analogous to the present case to overcome the qualified immunity to which the NMSP Officers are entitled.

F. The Officers Had a Duty to Investigate Daniel Pauly

As discussed in Appellants' Opening Brief, the NMSP Officers had both the right and the duty to investigate Daniel Pauly's road rage; part of that investigation entailed the Officers' attempt to make contact with Pauly himself. This Court has recognized three types of citizen-police encounters: (1) consensual encounters, which do not implicate the Fourth Amendment; (2) investigative detentions, which must be justified by reasonable, articulable and individualized suspicion, and (3) arrests. *See, e.g.*, *United States v. White*, 584 F.3d 935, 944-45 (10th Cir.2009). What starts out as a consensual encounter may evolve into an investigative detention, and, of course, a detention may evolve into an arrest. *See id.* There are no "hard-and-fast rules" regarding the reasonableness of force used during investigatory encounters, and cases from this Court have eschewed establishing any bright-line standards for permissible conduct. *See United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir.1993). A law enforcement officer, faced with the possibility of danger, has a right to take reasonable steps to protect himself during such an encounter, regardless of whether probable cause to arrest exists. *See id.*; *see also Rucker v. Hampton*, 49 F. App'x 806, 810 (10th Cir. Oct. 18, 2002) (unpublished).

In *Rucker*, a state trooper observed a motorist crossing the center line of a highway. The officer followed the motorist to a residence–while the officer

attempted to conduct a traffic stop, the motorist fled into the residence. *Rucker*, 49 F. App'x at 807. The officer followed the suspect into the house and put him in a headlock. *Id.* After the officer released him, the suspect shouted to his wife, "[g]o get it, go get it, go get it," and then the wife went down a hallway. *Id.* Fearing that the wife was going to get a firearm, the trooper drew his weapon. *Id.* This Court found that the trooper's conduct and his display of a weapon, even according to the plaintiffs' version of the incident, was objectively reasonable. *Id.* at 809. This Court noted that the case involved a traffic stop unexpectedly gone awry because the suspect evaded the officer's investigatory stop and fled into an unknown residence, that the suspect did not submit to the officer's display of force, and that the officer perceived a threat to his safety from the bystanding family. *Id.* at 810. Similarly, the present case involves the investigation of a road rage incident gone awry, where the suspect (Daniel Pauly) left the scene to his residence, did not submit to any attempts by the NMSP Officers to make contact with him, and where Officer White reasonably perceived a threat to his safety from Daniel Pauly's brother, Samuel.

As was the case in *Rucker*, the NMSP Officers are entitled to qualified immunity. *See Rucker*, 49 F. App'x at 810. Because the existence of excessive force is a fact-specific inquiry, this Court has adopted a sliding scale for analyzing whether or not a right is clearly established such that it would be clear to a reasonable officer

that his conduct was unlawful in the situation he confronted. *See Morris v. Noe*, *supra*, 672 F.3d at 1196. 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. *Id.* (quotations omitted). As discussed throughout Appellants' Opening Brief and this Reply Brief, Officer Ray White was the only Officer who fired any fatal shots at Samuel Pauly. Under the circumstances presented to him, Officer White reasonably believed that he and/or his fellow Officers were in danger–not only was his conduct justified, it was certainly not egregious in light of prevailing constitutional principles.

The Paulys cite *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) as a "seminal case" in which a police officer entered a dark hallway at a private residence in the early morning hours without identifying himself; the officer later shot and killed one of the house's residents. However, the more egregious facts of *Yates* are far too dissimilar from the facts of the present case, particularly given that none of the NMSP Officers actually *entered* (or attempted to enter) the Pauly house, and because the Pauly brothers (unlike the decedent in *Yates*) were armed with loaded guns that they either used in the presence of, or pointed at, the NMSP Officers. *See also Estate of Hojna v. City of Roseville*, 2007 WL 2335003, *5-6 (E.D. Mich. Aug. 16, 2007) (unpublished) (finding *Yates* inapposite because decedent created the threat

of harm by, *inter alia*, advancing towards police officers in a menacing fashion with a weapon). In fact, the Sixth Circuit later minimized its own ruling in *Yates*, noting that "the *Yates* ruling was driven by two obviously conflicting versions of the facts," and that the *Yates* Court's "comment about the unreasonableness of the officer's conduct" was dictum and "a 'thing said in passing.'" *Chappell v. City of Cleveland*, 585 F.3d 901, 914-15 (6th Cir. 2009). Finding *Yates* to be distinguishable on its facts, the Sixth Circuit noted that, even assuming the officers in *Chappell* had not effectively identified themselves and that the decedent still failed to recognize them as such even as they stood in his bedroom with flashlights and handguns trained on him, the decedent chose to continue advancing toward the officers with a knife held high until he reached a point within five to seven feet of them before they fired in self-defense. *Id.* at 915-16; *see also Wilson v. City of Lafayette*, 2010 WL 1380253 (D. Colo. Mar. 31, 2010) (unpublished) (granting summary judgment to officers who, without identifying themselves, approached criminal suspect, leading to pursuit and confrontation where officer deployed TASER and killed suspect), *aff'd*, 510 F. App'x 775 (10th Cir. Feb. 13, 2013) (unpublished); *Carnaby v. City of Houston*, 2009 WL 7806964, *2-3 (S.D. Tex. Oct. 28, 2009) (unpublished) (rejecting *Yates*).

Chappell, *supra*, is particularly relevant to the facts of the present case. In *Chappell*, detectives conducting a protective sweep inside the decedent's residence

claimed that they identified themselves several times as "Cleveland Police" using a "command voice." *Chappell*, 585 F.3d at 913. However, three witnesses, including other officers, testified that they did not hear the detectives announce "Cleveland Police." The district court concluded that this "discrepancy" created a genuine dispute of material fact, reasoning that the detectives' failure to identify themselves as they cleared the interior of a dark house could potentially justify a jury finding the detectives' eventual use of deadly force objectively unreasonable. *Id*. The Sixth Circuit disagreed, noting that the "three witnesses' failure to hear the 'Cleveland Police' announcements does not refute the detectives' testimony that they in fact made several such announcements; it establishes only that the witnesses didn't hear the announcements. In other words, the discrepancy doesn't actually raise a *genuine* dispute of fact." *Id*. at 914 (emphasis in original).[6]

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[6] In another blatantly false assertion, the Paulys state that "[d]espite hearing the brothers' requests to know who was outside their home, the officers did not identify themselves." Resp. Br. at 42. This is flatly contradicted by the District Court's findings of fact and by the available audio evidence, wherein one of the officers is clearly recorded announcing "State Police"–a fact to which the Paulys admitted in the District Court. *See* Aplt. App'x at 53, ¶ 39; *id.* at 678 (citing *id.* at 299 (depo 185:22 to 186:11); Truesdale COBAN recording). Appellees' claim is even more extraordinary given that Appellees themselves acknowledge earlier in their Response Brief that "[a]pproximately ninety seconds before shots were fired, Officer Truesdale identified himself once at the front of the house." Resp. Br. at 35. Of course, the audio in question is not a complete recording of the encounter, and all three officers testified that they announced "State Police" numerous times at the front of the house. Aplt. App'x at 216-17 (depo 112:1-6, 113:6-17), 252

G. The Pauly Brothers Were Not Entitled to Use Deadly Force Under New Mexico Law

Bizarrely, Appellees also claim that, "[u]nder applicable New Mexico law, NMSA §§ 30–2–7A and 7B, the Pauly brothers were entitled to defend their home with deadly force and their decision to do so cannot be a superseding cause" of Samuel Pauly's death. Resp. Br. at 47-48. The Paulys' reliance upon those sections of the New Mexico criminal code, however, is entirely misplaced. Under New Mexico's criminal jury instruction on this subject, UJI 14-5171 NMRA, a killing is in self defense if 1) there was an appearance of immediate danger of death or great bodily harm, 2) the criminal defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm, and 3) a reasonable person in the same circumstances would have acted as the defendant did. Strikingly, New Mexico "looks with disdain on situations in which the Defendant was the aggressor or instigator."

(depo 261:8-12, 262:5-12, 263:12-20), 317 (depo 151:15 to 152:11).

Notwithstanding, the District Court below–like the district court in *Chappell*–found a genuine dispute of material fact as to whether the NMSP Officers "provided inadequate police identification" based solely on Daniel Pauly's testimony that he did not *hear* the officers' pronouncements. Aplt. App'x at 685-86. The District Court then reasoned (again, like the district court in *Chappell*) that a jury could potentially find that the officers' failure to sufficiently identify themselves constituted reckless conduct that caused Officer White's subsequent use of force. As the Sixth Circuit noted on appeal, however, the fact that someone else did not hear officers announce their presence does not raise a *genuine* dispute as to whether they in fact did so. *Chappell*, 585 F.3d at 914.

See State v. Emmons, 2007-NMCA-082, ¶¶ 11-12, 141 N.M. 875 (finding that there was no appearance of immediate danger or death before defendant drew his gun on repo men) (citing *State v. Abeyta*, 1995-NMSC-051, ¶ 14, 120 N.M. 233, 239 ("the claim of self-defense may fail if the defendant was the aggressor or the instigator of the conflict")); *see also* UJI 14-5191 NMRA.

In the present case, Daniel and Samuel Pauly clearly were the aggressors in multiple respects: first, based upon Daniel Pauly's road rage and instigation to which he admits, *see* Aplt. App'x at 550, ¶ 9, and second, based upon the brothers' decision to arm up, yell "We have guns," fire off two barrels of a shotgun in the NMSP Officers' presence and point a loaded handgun at Officer White. There was no appearance of immediate danger or death to the Paulys–indeed, as the Appellees admit, no one had attempted to enter the Pauly residence, and the Paulys could not see who was outside, leaving Daniel Pauly to speculate that the persons outside the house "were intruders possibly related to the road rage incident." Aplt. App'x at 678. A reasonable person in the same circumstances would not have acted as the Paulys did. The Pauly brothers' actions–unjustified under either state or federal law–were indeed the superseding cause of Officer White's split-second decision to fire at Samuel Pauly.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

Ultimately, "this case presents the classic situation in which a plaintiff's own actions in reaction to a legitimate law enforcement encounter result in escalating volatility and danger justifying the subsequent actions of the law enforcement officers involved." *Latta v. Keryte*, 118 F.3d 693, 698 (10th Cir.1997); *Rucker*, *supra*, 49 F. App'x at 810. The amount of force used by Officer White was reasonable under the circumstances. The Pauly brothers themselves, not the NMSP Officers, created the tense, hostile and rapidly evolving situation that called for the use of force. Because the facts set forth by the District Court are insufficient to show a constitutional violation, the NMSP Officers are entitled to qualified immunity.

WHEREFORE, Defendant-Appellants Ray White, Michael Mariscal, and Kevin Truesdale respectfully request that this honorable Court vacate the Memorandum Opinions and Orders denying their motions for summary judgment, and that this Court remand this matter with instructions to grant Appellants' motions on the grounds that Appellants are entitled to qualified immunity.

Appellants respectfully request oral argument as the issues raised in this brief address important issues of federal law and the argument of counsel may materially assist the Court in determination of this Appeal.

Respectfully submitted,

/s/ Mark D. Jarmie
Mark D. Jarmie
Matthew D. Bullock
Jarmie & Associates
P.O. Box 26416
Albuquerque, NM 87125-6416
(505) 243-6727
Fax: (505) 242-5777
mjarmie@jarmielaw.com

/s/ Mark D. Jarmie, for:
Mark D. Standridge
Jarmie & Associates
P.O. Box 344
Las Cruces, N.M. 88004
(575) 526-3338
Fax: (575) 526-6791
mstandridge@jarmielaw.com

Attorneys for Defendant-Appellants Ray White, Michael Mariscal and Kevin Truesdale

BRIEF FORMAT CERTIFICATION

Pursuant to FED. R. APP. 32 (a)(7)(C)(I), I hereby certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more and contains 6,985 words, including footnotes (computed using Corel Word Perfect X6 word counting system) in compliance with the requirement in FED. R. APP. P. 32(a)(7)(B)(ii) that the brief not exceed half of the type volume specified in Rule 32(a)(7)(B)(i).

Dated this 17th day of July, 2014.

/s/Mark D. Jarmie
Mark D. Jarmie
Jarmie & Associates
Attorneys for Defendant-Appellants Ray White, Michael Mariscal and Kevin Truesdale

CERTIFICATION OF DIGITAL SUBMISSION

I HEREBY CERTIFY that one copy of the foregoing Reply Brief was submitted in Digital Form via this Court's CM/ECF filing system, and that seven (7) hard copies of this Reply Brief were sent via FedEx to Elisabeth A. Shumaker, Clerk, United States Court of Appeals for the Tenth Circuit Byron White U.S. Courthouse 1823 Stout Street Denver, CO 80257, on the 17th day of July, 2014.

I ALSO CERTIFY that all required privacy redactions have been made and, with the exception of those redactions, if any, the copy of this document submitted to the Court in Digital Form is an exact copy of the written document filed with the Clerk.

I ALSO CERTIFY that the Digital Form of the foregoing Reply Brief has been scanned for viruses with scanning program AVG Internet Security 2013, last updated on this 17th day of July, 2014, and that according to the program, this Brief is free of viruses.

/s/Mark D. Jarmie
Mark D. Jarmie
Jarmie & Associates
Attorneys for Defendant-Appellants Ray White, Michael Mariscal and Kevin Truesdale

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was served via U.S. Mail and e-mail upon the following counsel of record on this 17th day of July, 2014.

Lee R. Hunt
Lee Hunt Law, LLC
1640 Old Pecos Trail, Suite D
Santa Fe, NM 87505

Daniel J. O'Friel
Pierre Levy
O'Friel and Levy, P.C.
644 Don Gaspar Avenue
Santa Fe, NM 87505

/s/Mark D. Jarmie
Mark D. Jarmie
Jarmie & Associates
Attorneys for Defendant-Appellants Ray White, Michael Mariscal and Kevin Truesdale