No. 14-2035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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' SUPPLEMENTAL BRIEF REGARDING *WHITE v. PAULY*

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INTRODUCTORY STATEMENT

In *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), the United States Supreme Court found that Officer Ray White–one of the three Appellants in the present case–is entitled to qualified immunity because he "did not violate clearly established law" when he shot and killed Samuel Pauly on October 4, 2011. *White*, 137 S.Ct. at 551. In so ruling, the Supreme Court noted that "[t]his is not a case where it is obvious that there was a violation of clearly established law," under the unique set of facts and circumstances presented, "in light of White's late arrival on the scene." *See id.* at 552. The Court also found that "[n]o settled Fourth Amendment principle requires" an Officer in White's position "to second-guess the earlier steps already taken by his or her fellow officers" (i.e. Appellants Kevin Truesdale and Michael Mariscal) "in instances like the one White confronted here." *Id.*

On February 3, 2017, this Court ordered the parties to submit supplemental briefing addressing the impact of the Supreme Court's ruling on this appeal. For the reasons set forth herein and per the guidance of the Supreme Court, this Court should vacate the District Court's Memorandum Opinions and Orders denying the Officers' motions for summary judgment, and remand this matter with instructions to grant said motions on the grounds that Appellants are entitled to qualified immunity as to all of Appellees' Section 1983 claims.

ARGUMENT AND AUTHORITIES

I. The Paulys Cannot Identify Any "Clearly Established" Law that Squarely Governs the Facts of This Case

For purposes of qualified immunity, the relevant "clearly established law" must be

"particularized" to the facts of the case. *White v. Pauly*, *supra*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity...into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 639). As such, the burden is on the Paulys to identify a case where police officers acting under similar circumstances as Officers Truesdale, Mariscal and White were held to have violated the Fourth Amendment. *See id.*; *see also Carbajal v. City of Cheyenne*, __ F.3d __, 2017 U.S. App. LEXIS 2084, *8, *19-20 (10th Cir. Feb. 6, 2017) (slip op.); *Garcia v. Escalante*, 2017 WL 443610, *4 (10th Cir. Feb. 2, 2017) (unpublished) ("[p]laintiff must present controlling authority that 'squarely governs the case here,'...and that would have put 'beyond debate'...the question" presented in the case) (citations omitted); *Estate of Gray v. Dalton*, 2017 WL 564035, *2 (N.D. Miss. Feb. 10, 2017) (slip op). The Paulys did not do so before, and cannot do so now: none of the cases from this Circuit that the Paulys relied upon in response to the New Mexico State Police Officers' assertion of qualified immunity for the excessive force claims–either before the District Court, this Court or the United States Supreme Court–squarely govern the unique set of facts in this case.

In the District Court and in their June 16, 2014 Response Brief filed with this Court, the Paulys relied heavily upon *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir.1995), the latter of which was again cited in the Paulys' Supplemental Brief. Aple. Supp. Br. at 13. The Paulys also cited an unpublished

panel decision of this Court, *Hastings v. Barnes*, 252 F. App'x 197 (10th Cir. Oct. 18, 2007). *See* Resp. Br. at 24-26; Aplt. App'x at, e.g., 519-20, 533, 573-74, 582. None of these cases was sufficient to put any of the NMSP Officers on notice that their conduct would violate Samuel Pauly's clearly established constitutional rights on October 4, 2011.

In each of the three cases cited by the Paulys, the facts were markedly different from those which confronted Appellants. The cases cited by the Paulys each involved suicidal individuals who were shot and killed by police officers who had been summoned to their respective homes. In *Allen*, officers shot the decedent after they approached his car and tried to remove his gun which lay next to him inside the vehicle. *Allen*, 119 F.3d at 841. In *Hastings*, officers entered the suicidal decedent's house and shot him when he approached them with a Samurai sword. *Hastings*, 252 F. App'x at 199-200. 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 shot the decedent inside the house: while the officers asserted that the decedent lunged with his knife in a raised position, the plaintiffs claimed that the officers shot the decedent while he was standing with the knife at his side. *Id.* at 698.

By contrast, in the present case, there is no evidence that Samuel Pauly was suicidal, and none of the three NMSP Officers entered the Paulys' house before Samuel Pauly was shot. There is also no dispute that 1) one of the Paulys yelled "We have guns" from inside the house, 2) Daniel Pauly fired two blasts from a shotgun near Officer Truesdale's position,

and 3) Samuel Pauly pointed a gun at Officer White. Aplt. App'x at 684-85. Neither *Allen*, *Sevier* nor *Hastings* could have put any of the Officers on notice that their conduct in October of 2011 was unlawful. *Cf. Jackson v. City of Wichita*, 2017 WL 106838, *14 (D. Kan. Jan. 11, 2017) (slip op.) ("[f]ar from clarifying the issue, excessive force cases which involve suspects with knives reveal a 'hazy legal backdrop' against which defendants acted").

The Paulys also argued that other cases help to buttress their claim that the Fourth Amendment objective reasonableness standard "is 'clearly established' in the context of § 1983 actions" involving claims of excessive force. Resp. Br. at 50. Those cases are unhelpful to the Paulys. In addition to *Allen* and *Sevier*, the Paulys cited *Gross v. Pirtle*, 245 F.3d 1151, 1158 (10th Cir. 2001)). In *Gross*, the plaintiff alleged that a Sheriff's Deputy "kicked him 'very hard' in his foot, resulting in a bone spur injury" during the course of an arrest. *Gross*, 245 F.3d at 1154. While transparently not analogous on its facts, and consequently unhelpful in establishing the duties that Appellants herein might have had to the Paulys, the reasoning in *Gross* is also unhelpful to the Paulys. In *Gross,* this Court reversed the District Court's denial of qualified immunity on the excessive force claim relying on *Graham v. Connor*, 490 U.S. 386 (1989). *See Gross*, 243 F.3d at 1158; *see also* Resp. Br. at 50. Of course, as the Supreme Court later ruled, *Graham* does not create clearly established law outside "an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *see also Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014) (emphasizing that *Graham* and *Tennessee v. Garner*, 471 U.S. 1 (1985), "are 'cast at a high level of generality'"); *White v. Pauly*,

supra, 137 S.Ct. at 552. As such, *Gross* could not have provided the "clearly established" law needed for the Paulys to overcome the NMSP Officers' qualified immunity defense.

Nor does *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994) "squarely govern" the present case. In *Bella*, the plaintiff–a helicopter pilot–alleged that he was kidnaped at gunpoint and forced to help inmates escape from a penitentiary. *Bella*, 24 F.3d at 1253. One of the officers in pursuit fired three rounds from a semiautomatic weapon, one of which struck the fleeing helicopter. *Id.* This Court concluded that the shots fired by the officer that struck the plaintiff's helicopter did not result in a "seizure"–while the shots constituted an assertion of authority, they did not cause the plaintiff to submit nor did they otherwise succeed in stopping him. *Id.* at 1256. The plaintiff in *Bella* was, of course, not in his house, did not point a gun in the direction of any officer and was not killed. *Bella* thus cannot provide any clearly established law that would govern the facts of the present case. Additionally, *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006), also previously cited by the Paulys, *see* Resp. Br. at 35, and cited again in their Supplemental Brief, was not an excessive force case at all–it was an unreasonable search, unlawful detention and unlawful arrest case, and as discussed *infra*, does not squarely govern the present excessive force case.

Finally, the Paulys' reliance on *Martinez v. Carson*, 697 F.3d 1252 (10th Cir. 2012), *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013), *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014) and *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015)–before this Court, *see* Resp. Br. at 31, 35, 51, and the Supreme Court–is wholly misplaced. Each of these cases

was decided *after* the events of the present case, and thus could not have provided the Officers with any clear notice that their actions were unconstitutional. While later-decided cases may demonstrate the *absence* of clearly established law (as was the case with *Mullenix v. Luna*, 136 S.Ct. 305 (2015)), later-decided cases cannot provide clear notice that particular conduct is unlawful. *See*, *e.g.*, *Plumhoff*, *supra*, 134 S.Ct. at 2023 (citing *Brosseau*, *supra*, 543 U.S. at 200 n.4, to demonstrate the absence of clearly established law in 1999, but noting "[w]e did not consider later decided cases because they 'could not have given fair notice to [the officer]'"); *cf. Medeiros v. O'Connell*, 955 F.Supp. 21, 22 (D. Conn. 1997) (in 1995, "the Second Circuit held that a due process right to be free from excessive force was not clearly established in January 1991. No subsequent developments in the law served to clarify the existence of that right before January 1993, when the events at issue in this case occurred"). These later-decided cases cannot provide the required clearly established law.

II. *Aldaba v. Pickens* Provides Strong Guidance on How This Court Should Address the Remaining Issues in This Case

In *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), the Supreme Court vacated a judgment of this Court, *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), and remanded "for further consideration in light of" *Mullenix v. Luna*. This Court then reversed its prior decision denying qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016). Following remand from the Supreme Court, this Court held "that the three law-enforcement officers are entitled to qualified immunity because they did not violate clearly established law." *Aldaba*, 844 F.3d at 871. This Court did "not decide whether they acted with excessive

force," but still "reverse[d] the district court's judgment and remand[ed] with instructions to grant summary judgment in favor of the three law-enforcement officers." *Id.*

In *Aldaba*, this Court noted that, in *Mullenix v. Luna*, the Supreme Court "rejected the Fifth Circuit's analysis applying Trooper Mullenix's acts against a general legal rule—that is, 'a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others'"—to meet the requirement of clearly established law. *Aldaba*, 844 F.3d at 873-74. The Supreme Court instead instructed courts to "look[]to see if any case would make it clear to every reasonable official that Trooper Mullenix's actions would amount to excessive force in violation of the Fourth Amendment" but there "found no case doing so." *Id.* at 874 (citing *Mullenix*, 136 S.Ct. at 310). In light of *Mullenix*, this Court applied the facts of *Aldaba* "against existing precedent to see whether every reasonable official would have known that those facts would 'beyond debate' establish excessive force." *Aldaba*, 844 F.3d at 874. This Court found that it had erred in its prior opinion "by relying on excessive-force cases markedly different from this one." *Id.* at 876. In its prior opinion, this Court relied on its "sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity" and "relied on several cases resolving excessive-force claims." *Id.* However, "none of those cases remotely involved a situation" as that presented in the *Aldaba* case: "three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment." *Id.*

As in *Aldaba*, the cases relied upon by the Paulys "differ too much from this one, so reading them would not apprise every objectively reasonable officer" that their actions would amount to excessive force. *Aldaba*, 844 F.3d at 877. None of the cases cited by the Paulys would have advised "every reasonable official" that their actions would amount to excessive force under the Fourth Amendment. *See id.* Indeed, the cases cited by the Paulys are not even close. The Paulys cannot and do not point to a single case where police officers in the position of Officers Truesdale, Mariscal and White (in particular), in similar circumstances, violated the Fourth Amendment. Put another way, there is not a similar case in this Circuit where police officers–having just 1) heard home occupants threaten they were armed, 2) heard the home's occupants fire two shotgun blasts towards the general area where an officer was known to be, and 3) seen one of the home's occupants point a gun at them–violated the Fourth Amendment by shooting and hitting/killing the home's occupant(s). On the "clearly established" prong alone, the three Officers are entitled to qualified immunity on all Section 1983 claims in this case. *See Garcia v. Escalante*, *supra*, 2017 WL 443610, *6; *see also Henderson v. City of Woodbury*, 2017 WL 539577, *6 (D. Minn. Feb. 9, 2017) (slip op.) ("the Court is aware of no authority requiring officers, reasonably believing they are in imminent danger, to delay their response pending a suspect's potential compliance"). Because there is no clearly established case law squarely governing the facts of this case, all three Officers are entitled to qualified immunity on the Paulys' Section 1983 claims.

III. The Paulys Should Not Be Allowed to Raise New Theories on Appeal That Were Never Raised in the District Court

While it definitively ruled that Officer White is entitled to qualified immunity for having shot Samuel Pauly, the Supreme Court also took note of an alternative argument made by the Paulys–for the first time–in their certiorari response brief: namely, that

> Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force.

White v. Pauly, *supra*, 137 S.Ct. at 552; *see also id.* at 553 (Ginsburg, J., concurring). The Supreme Court "expresse[d] no position on this potential alternative ground for affirmance, as it appear[ed] that neither the District Court nor the Court of Appeals panel addressed it, and "also expresse[d] no opinion on the question whether this ground was properly preserved." *Id.* at 552-53. Finally, the Supreme Court declined to state whether or not Officers Truesdale and Mariscal are entitled to qualified immunity, instead remanding the issue to this honorable Court. *See id.* at 553.

The Supreme Court was correct to express doubt as to whether or not the Paulys' alternative argument (which they now raise in their Supplemental Brief) was properly preserved: the Paulys did not make this argument anywhere in their principal Response Brief that they filed with this Court on June 16, 2014. Additionally, the Paulys did not argue at the District Court that Officer White, as the late-arriving officer, should have instituted any

"corrective action" in response to the allegedly deficient actions of Officers Mariscal and Truesdale. This Court can address an alternative ground for affirmance only when it has been "properly preserved below and raised on appeal and for which there is a sufficient record." *See Proctor & Gamble v. Haugen*, 222 F.3d 1262, 1273 (10th Cir. 2000) (citing *Tinkler v. United States*, 982 F.2d 1456, 1461 n.4 (10th Cir. 1992); *see also Marten v. Swain*, 601 F. App'x 446, 449 (7th Cir. Feb. 24, 2015) (unpublished) ("[w]e may affirm on any ground fairly supported by the record *if* the appellee preserved the argument below") (emphasis in original) (citing *Burns v. Orthotek, Inc. Emps.' Pension Plan & Trust*, 657 F.3d 571, 575 (7th Cir. 2011)). Because the Paulys did not properly preserve this argument below, they cannot rely upon this argument in the present appeal.

In the District Court, the Paulys did make an oblique reference to Officer White being "on the scene two minutes before the shooting." Aplt. App'x at 52 & 554 (citing *id.* at 117). The Paulys now argue that "the evidence in the record before the district court shows that Officer White was at the scene for several minutes before shots were fired." Aple. Supp. Br. at 4 (citing Aplt. App'x at 118).[1] The "evidence" on which the Paulys rely is the report of Kraig Bobnock, an agent with the NMSP Criminal Investigations Bureau who was assigned as the lead/case agent for the criminal investigation into this incident, s*ee* Aplt. App'x at 176,

[1] In the Supreme Court, the Paulys claimed that Officer White "arrived on the scene...more than three minutes before Daniel's shots were fired." *White*, 137 S.Ct. at 552. The Paulys *now* claim that "Officer White was on the scene for nearly four minutes prior to shots being fired." Aple. Supp. Br. at 5. As discussed *infra* at footnote 2, the Paulys are incorrect on both counts.

but who was not present during the underlying events. In his post-incident report, Agent Bobnock stated that "[a]t around 23:13 [11:13 p.m.]...Officer White proceeded towards" the location of Officers Mariscal and Truesdale, and that White was "on scene for approximately three minutes prior to shots being fired." Aplt. App'x at 117. The report does not note exactly what part of the "scene" Officer White was at for these three minutes, however, the recordings submitted to the District Court paint a clearer picture as to the actual facts.[2]

Even granting that the Paulys set forth Agent Bobnock's statements in the facts sections of their summary judgment briefs, without more, these statements are inadequate to present the issue of whether or not Officer White should have taken some sort of "corrective action" for this Court's consideration. *Cf. Apsley v. Boeing Co.*, 691 F.3d 1184, 1201 n.15

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[2] Officer Truesdale's COBAN recording indicates that Officer White arrives just before 11:17:00 at the "lower" residence located at the Paulys' address, and parks near the other officers' cars; the headlights from White's car and the shadow of him getting out are visible at this time on the recording. On Truesdale's COBAN recording, White is visible until 11:17:35, at which point White proceeds in the direction of the upper residence. Officer White testified that, as he walked towards the lower residence at the Paulys' address, he began hearing Officers Mariscal and Truesdale announcing "New Mexico State Police" from the rear of the property. Aplt. App'x at 179 (citing *id.* at 216-17). Once he stopped beside Officer Mariscal in the front yard of the upper residence at the Paulys' address, he (White) personally announced "State Police," and heard Officers Mariscal and Truesdale announce "State Police" approximately five times each. Aplt. App'x at 179 (citing *id.* at 219-20). In the available audio recording, the Officers' identification of "State Police" can be heard twice. *See Truesdale COBAN Recording* (approx. 11:18:00 to 11:18:20), putting White at the "upper" residence no earlier than approximately 11:18:00. Daniel Pauly's first shot was fired at 11:19:42, less than two minutes later. *See also* Aplt. App'x at 164. A copy of this recording was provided to this Court on the disc accompanying the hard copy of the Appendix, *see also* Aplt. Appx' at 411-12, and under *Scott v. Harris*, 550 U.S. 372, 380 (2007), the recordings control the factual assertions made in this case.

(10th Cir. 2012) (citing *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004) (plaintiff did not mention appellate issues anywhere in the argument section of his brief on appeal, thus the issues were waived–"[s]cattered statements" in litigant's briefing are not enough to preserve an issue for appeal (citations omitted)). In sum, the Paulys did not properly preserve their alternative theory of liability in the appeal of this case.

Even if the Paulys had properly preserved this issue, Officers White, Truesdale and Mariscal are entitled to qualified immunity on the Section 1983 claims made against each of them in this case. As both the Supreme Court and this Court have recently recognized, the burden is on a Section 1983 plaintiff to locate clearly established case law that squarely governs the particular facts of the case before the Court. Notably, of the five counts pleaded in their Complaint, *see generally* Aplt. App'x at 19-24, the Paulys made only one claim arising under Section 1983: excessive force against Samuel Pauly in violation of the Fourth Amendment. *See id.* at 19-20.[3] Despite what the Paulys later tried to claim,[4] they did not

[3] In Count IV of their Complaint, the Paulys also purported to state a claim under N.M. Const. art. II, § 10 related to Samuel Pauly's shooting death. Aplt. App'x at 23. However, the Paulys' separate state constitutional claim was unnecessary, and moreover, not cognizable under Section 1983, which is a vehicle for seeking redress for violations of federal (not state) law. *See*, *e.g.*, *Arndt v. Koby*, 309 F.3d 1247, 1255 (10th Cir. 2002); *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 855 n. 3 (9th Cir.2007) (citing *Campbell v. Burt*, 141 F.3d 927, 930 (9th Cir.1998). Similarly, the Paulys' claim for "Loss of Consortium"–Count V of their Complaint, *see* Aplt. App'x at 23-24–does not state a stand-alone claim under Section 1983. *See*, *e.g.*, *Berry v. City of Muskogee*, 900 F.2d 1489, 1504-1506 (10th Cir. 1990); *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000); *Winton v. Bd. of Comm'rs of Tulsa Cty.*, 88 F.Supp.2d 1247, 1254-56 (N.D.Okla. 2000).

[4] The Paulys filed their own *Motion for Partial Summary Judgment* (Doc. No. 82) seeking judgment on the purported "initial" seizure of Sam Pauly based upon allegedly

plead a "run-of-the-mill" Fourth Amendment unreasonable seizure claim–and even if they had, Samuel Pauly did not submit to any show of authority by the three NMSP Officers until Officer White fired the single shot striking him. As such, all three Officers are entitled to qualified immunity on the Section 1983 excessive force claims actually made against them.

IV. Neither Officer Mariscal nor Officer Truesdale "Seized" Samuel Pauly

As noted above, the Paulys pleaded only one claim under 42 U.S.C. § 1983: a violation of Samuel Pauly's "clearly established right under the Fourth Amendment of the Constitution to be free from the *excessive use of force* by law enforcement officers" (emphasis supplied). *See* Aplt. App'x at 19-20. As the Supreme Court astutely noted, this case does not present a "run-of-the-mill Fourth Amendment violation." *White v. Pauly*, *supra*, 137 S.Ct. at 552. Indeed, the Paulys could not bring any kind of excessive force claim against Officers Truesdale and Mariscal, as neither of these Officers shot and struck, or otherwise seized, Samuel Pauly on October 4, 2011.[5]

For purposes of the Fourth Amendment, a seizure occurs when the suspect submits to the police officer's assertion of authority. "A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without *actual submission*" (emphasis supplied). *Brendlin v. California*, 551 U.S. 249, 254 (2007). It is

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"coercive commands" given by Officers Truesdale and Marsical. *See* Aplt. App'x at 47-65. This "initial seizure" claim was not pleaded anywhere in the Paulys' Complaint. *See* Aplt. App'x at 426-29. The District Court denied the Paulys' Motion. *See id.* at 9.

[5] As the Paulys admitted in the District Court, "Daniel Pauly has not asserted a claim for unreasonable seizure in this case." Aplt. App'x at 60.

axiomatic that "[w]ithout a seizure, there can be no violation of the Fourth Amendment and therefore no liability for the individual Defendants." *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015), *cert. denied*, No.16-72 (Oct. 3, 2016). "Additionally, without a seizure, there can be no claim for excessive use of force in effectuating that seizure." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998). Where a suspect does not actually submit to the officer's assertion of authority, there is no seizure for purposes of the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 621 and n.2 (1991).

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a police man yelling "Stop, in the name of the law!" at a fleeing form that continues to flee.

Hodari D., 499 U.S. at 626-27. "[N]either usage nor common-law tradition makes an *attempted* seizure a seizure" (emphasis in original). *Hodari D.*, 499 U.S. at 626 n.2; *see also Brooks v. Gaenzle*, 614 F.3d 1213, 1221-22 (10th Cir. 2010) ("none of our holdings suggest the mere use of physical force or show of authority alone, without termination of movement or submission, constitutes a seizure").

In their Supplemental Brief, the Paulys claim that "Officer Mariscal's use of deadly force" (his alleged firing of a single shot that did not strike anyone) "constitutes excessive force even though Officer Mariscal did not fire the fatal round." Aple. Supp. Br. at 12. However, no seizure, or excessive force, can take place where an officer shot at the plaintiff and missed. *See*, *e.g.*, *Jones v. Norton*, 3 F.Supp.3d 1170, 1190 (D. Utah 2014), *aff'd*, 809

F.3d 564, *supra* ("Because Mr. Murray resisted Detective Norton's order and because Detective Norton's bullets missed the target (Mr. Murray), Detective Norton did not seize Mr. Murray at that point"); *James v. Chavez*, 830 F.Supp.2d 1208, 1242-44 (D.N.M. 2011), *aff'd*, 511 F. App'x 742 (10th Cir. Feb. 19, 2013) (unpublished) (seizure did not occur because the officer did not hit the plaintiff with his bullet and there was no evidence that the plaintiff had submitted to a show of authority); *Troupe v. Sarasota Cnty.*, 419 F.3d 1160, 1164-67 (11th Cir. 2005), *cert. denied*, 547 U.S. 1112 (2006) (Sheriff's Deputy shot at fleeing vehicle's tire but missed–that shot "was not the proximate cause of any injury to" the plaintiffs and was not a seizure); *McGrath v. Tavares*, 757 F.3d 20, 23-24 (1st Cir. 2014); *Lawson v. McNamara*, 438 F. App'x 113, 116 (3d Cir. July 21, 2011) (unpublished); *Estate of Rodgers ex rel. Rodgers v. Smith*, 188 F. App'x 175, 180-81 (4th Cir. June 26, 2006) (unpublished);[6] *see also* Aplt. App'x at 430-40.

In the present case, it is undisputed that Officer Truesdale did not fire any shots, and it is consequently beyond dispute that he did not seize either of the Pauly brothers. Even assuming Officer Mariscal fired the third shot (between Daniel Pauly's two shotgun blasts and Officer White's shot), he did not strike–and thus did not seize–Samuel Pauly in any way. As such, Mariscal could not have engaged in any "excessive force." The lone case cited by the Paulys in support of their argument–the unpublished, out-of-Circuit *Bray v. Cnty. of San Diego*, 19 F.3d 26 (9th Cir. Mar. 2, 1994) (table)–does not provide any clearly established

[6] On February 8, 2017, the undersigned filed a Brief, on behalf of a former NMSP Officer, that explores this issue further in *Farrell v. Montoya*, No. 16-2216.

authority applicable to the particular claims made in the present case.

Additionally, Samuel Pauly did not submit to any show of authority by any of the officers but instead pointed a handgun in Officer White's direction, prompting Officer White to fire at Samuel Pauly. The Supreme Court has already ruled that Officer White is entitled to qualified immunity for defending himself by shooting Samuel Pauly when Pauly turned his gun on Officer White. Officers Truesdale and Mariscal are also entitled to qualified immunity as neither of them actually violated Samuel Pauly's Fourth Amendment right to be free from excessive force.

V. *Trask v. Franco* Does Not Provide the "Particularized" Law Required for This Court to Deny the NMSP Officers Qualified Immunity

In their Supplemental Brief, the Paulys again argue that the pre-seizure conduct of Officers Mariscal and Truesdale was sufficiently egregious as to violate the provisions of the Fourth Amendment. *See generally* Aple. Supp. Br. at 9-15; Resp. Br. at 21-40. That argument must fail, as there is no clearly established law from *this* Circuit which provides that a cause of action lies when the allegedly improper actions of officers cause another officer to commit a constitutionally permissible act. Indeed, the Paulys admitted as much in their original Response Brief. *Id.* at 26 (admitting that, prior to the appeal of this case, this Court did "not appear to have addressed a case involving use of deadly force after police officers surreptitiously approach a home...without identifying themselves"). Again, because the Paulys cannot point to any case law that squarely governs the facts before this Court, they cannot meet their burden of overcoming qualified immunity.

Nonetheless, as they did before, the Paulys cite *Trask v. Franco*, *supra*, 446 F.3d at 1046, asserting that this case "provides that a governmental actor may be liable for the constitutional violations that another committed where the actor 'set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.'" Aple. Supp. Br. at 11. As noted above, *Trask* is not an excessive force case: instead, that case involved claims "of an unreasonable residential search" as well as "unlawful detention and arrest." *Trask*, 446 F.3d at 1039. An NMSP Officer handcuffed Trask while probation officers and a sheriff's deputy searched his residence, looking for his girlfriend (whom they mistakenly believed to be on probation). *Id.* at 1040. This Court's general statement regarding causation in constitutional tort cases–made, in *Trask*, against the backdrop of an unreasonable search and seizure claim–is not particularized to the facts of *this* case, and thus is inapposite.

The Supreme Court has ruled that Officer White is entitled to qualified immunity for his actions in this case. The Paulys assert that Officers Mariscal and Truesdale are still liable for Samuel Pauly's shooting death in this case, even though Officer White is not liable for having taken the shot that killed Pauly. In essence, the Paulys argue that liability may exist for actors who did not seize an assailant when no liability exists for the Officer who *did* seize the assailant (but did not violate clearly established law in so doing). As no Supreme Court case or case of this Circuit has ever so held, Officers Mariscal and Truesdale are entitled to qualified immunity. On the rare occasions where this Court has found the pre-seizure conduct

of the officers to be relevant at all to Fourth Amendment claims, this Court has limited its consideration to events immediately connected with the actual seizure, while "mere negligent actions precipitating a confrontation would not...be actionable." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004). To Appellants' knowledge, this Court has never held as actionable officers' actions which did not constitute a seizure but which later caused a lawful use of force. Thus, Officers Truesdale and Mariscal are entitled to qualified immunity.

The Paulys purport to fault this Court for basing its qualified immunity analysis "solely on its consideration of the events that transpired after the [Pauly] brothers said 'We have guns.'" Aplt. Supp. Br. at 6-7. On the contrary, that is *precisely* the starting point for the qualified immunity inquiry in this case. The most crucial event in this case occurred when the Pauly brothers escalated the situation by, in rapid succession, yelling "We have guns," running to back of the house, shooting two shotgun blasts and pointing a loaded handgun at Officer White. This ended with Officer White firing at Samuel Pauly, reasonably believing that he and the other Officers were being fired upon or were about to be fired upon. As the Supreme Court found, Officer White's single shot did not violate Samuel Pauly's clearly established rights. The Hon. Judge Nancy Moritz was patently correct when she noted that, because "no constitutional violation occurred," the law does not allow for Officers Truesdale and Mariscal to be held liable for excessive force. *Pauly v. White*, 814 F.3d 1060, 1084 (10th Cir. 2016) (Moritz, J., dissenting). Under the law *actually* applicable in this Circuit, "all three officers are entitled to immunity." *See id.*

CONCLUSION

WHEREFORE, Defendant-Appellants Ray White, Michael Mariscal, and Kevin Truesdale respectfully request that, consistent with the Supreme Court's opinion, this honorable Court vacate the District Court's 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 as to all of plaintiffs' claims under 42 U.S.C. § 1983 in this case.

Respectfully submitted,

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FORMAT CERTIFICATION

Pursuant to this Court's February 3, 2017 *Order*, I hereby certify that the foregoing Supplemental Brief is proportionally spaced, has a typeface of 13 points and is no more than 20 pages in length.

Dated this 23rd day of February, 2017

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CERTIFICATION OF DIGITAL SUBMISSION

I HEREBY CERTIFY that, on the 23rd day of February, 2017, one copy of the foregoing Supplemental Brief was submitted in Digital Form via this Court's CM/ECF filing system.

I ALSO CERTIFY that all no privacy redactions were required in the filing of this Supplemental Brief.

I ALSO CERTIFY that the foregoing Supplemental Brief has been scanned for viruses with scanning program AVG Internet Security 2016, last updated on this 23rd day of February, 2017, and that according to the program, this Brief is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Brief was served via electronic means upon the following counsel of record on this 23rd day of February, 2017:

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