Court of Appeals No. 18-35300

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANIZ WEST,
Plaintiff-Appellee,

v.

MATTHEW RICHARDSON, ALAN SEEVERS, and DOUG WINFIELD,
Defendant-Appellant,
And
CITY OF CALDWELL and CHIEF CHRIS ALLGOOD,
Defendants.

On Appeal from the United States District Court
for the District of Idaho
No. 1:16-cv-359-REB
The Honorable Ronald E. Bush
U.S. Magistrate Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The United States Supreme Court and this Ninth Circuit Court of Appeals have repeatedly held that for purposes of denying qualified immunity for a government official, the Lower Court cannot define clearly established law at a high level of generality. *Kisela v. Hughes*, __ U.S. __, __, 138 S.Ct. 1148, 1152-53 (2018); *White v. Pauly*, __ U.S. __, __, 137 S.Ct. 548, 551-52 (2017); *Mullenix v. Luna*, __ U.S. __, __, 136 S.Ct. 305, 308 (2015); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1035 (9th Cir. 2018); *Reese v. County of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018). This is "especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, [here reasonable search and seizure], will apply to the factual situation the officer confronts." *Kisela*, __ U.S. at __, 138 S.Ct. at 1152.

The Lower Court's decision to deny qualified immunity for Detective Matthew Richardson, Lieutenant Alan Seevers, and Sergeant Doug Winfield squarely conflicts with the decisions of the Supreme Court and this Ninth Circuit instructing courts not to define clearly established law at a high level of generality. The Lower Court denied qualified immunity for Richardson, finding that his conduct

in obtaining consent from West to search her home violated the following clearly established law: "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception (in this case, voluntary consent)." ER24. For Seevers and Winfield, the Lower Court denied qualified immunity finding that their conduct of creating and implementing a tactical plan to search West's home violated the following clearly established law: "a search or seizure may be invalid if carried out in an unreasonable fashion." ER25.

In both instances, the Lower Court defined clearly established law as generally and broadly as possible for a Fourth Amendment unreasonable search and seizure claim. As a result, the Lower Court's decisions on qualified immunity ignores the repeated admonitions of the Supreme Court and this Ninth Circuit requiring lower courts to define clearly established law with specificity, particularly in the context of a Fourth Amendment claim.

This appeal seeks to remedy the err of the Lower Court and requests that this Court apply the proper qualified immunity standard and grant qualified immunity on behalf of Richardson, Seevers, and Winfield.

JURISDICTIONAL STATEMENT

The Lower Court had original jurisdiction over West's claim pursuant to 28 U.S.C. §§ 1331 and 1343. On March 28, 2018, the Court entered its Memorandum

Decision and Order, finding that Richardson was not entitled to qualified immunity when he obtained consent to search West's home, and finding that Seevers and Winfield were not entitled to qualified immunity when they developed and enacted a tactical plan that conformed with commonly accepted police practices. ER24-25. The Court's Memorandum Decision and Order denying qualified immunity is a final order within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Richardson, Seevers, and Winfield timely filed their Notice of Appeal on April 17, 2018. ER95. Accordingly, the Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Lower Court erred in denying qualified immunity to Richardson for his conduct of obtaining consent from West, on the grounds that it was clearly established that "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception (in this case, voluntary consent)."

2. Whether the Lower Court erred in denying qualified immunity to Seevers and Winfield for their actions of creating and implementing a tactical plan to apprehend a felon, on the grounds that it was clearly established that "a search or seizure may be invalid if carried out in an unreasonable fashion."

STATEMENT OF THE CASE

The facts of this case are almost entirely undisputed. To the extent that any facts are disputed, this appeal construes such facts in the light most favorable to the Appellee, Shaniz West.

A. History of Shaniz West and Fabian Salinas

On August 11, 2014, law enforcement officers were dispatched to Shaniz West's home for the purpose of apprehending wanted felon Fabian Salinas. ER312. Salinas was the ex-boyfriend of West and the father of her three children. ER280, 282. Salinas was also a documented West Side Loma gang member who was wanted by multiple law enforcement agencies for multiple felony crimes. ER189. Salinas had felony arrest warrants for rioting, discharging a weapon, aggravated assault, and drug charges. ER238-42.

On August 4, 2014, a few days prior to police officers' search of West's home, Salinas and another gang member jumped a man and beat him up with a baseball bat for an alleged drug debt. ER222-23. Later that day, Salinas returned to the man's home and burglarized it, stealing several items. *Id*.

Around August 6, 2014, law enforcement officers from the Caldwell Police Department (including Appellant Matthew Richardson) identified Salinas driving a vehicle and attempted to initiate a traffic stop. ER222-24. Instead of pulling over,

Salinas led police officers on a high speed car chase through a residential neighborhood. ER222-24; ER231-32; ER312-13. At one point, Salinas turned his car around and sped head-on towards a patrol vehicle, forcing the patrol vehicle to swerve onto a residential sidewalk in order to avoid a collision. ER231-32; ER312-13. Eventually, Salinas abandoned his vehicle and escaped on foot. *Id*. Officers searched his vehicle and found drugs, drug paraphernalia, a drug ledger, and stolen property from the August 4 burglary. ER232-37.

Salinas was also a suspect in a theft of guns in which not all of the guns were recovered. ER196. Further, Law enforcement officers had information that Salinas was in possession of a .32 caliber pistol. ER183; ER325.

Given Salinas's extensive criminal history and violent behavior, law enforcement officers knew to use caution when attempting to apprehend Salinas. ER313.

B. Events Leading Up To The Search.

On August 1, 2014, Shaniz West leased a home located at 10674 Gossamer Street in Nampa, Idaho. ER422. When West moved into the rental home, she had two children and was pregnant with her third child. *Id.*

During the night and early morning hours of August 10-11, 2014, West heard knocking on the doors and windows of her rental home. ER177-79; ER286. On the

morning of August 11, 2014, West called the Caldwell Police Department ("CPD") to report the knocking sound she heard throughout the previous night. *Id.* Officer Troyer was dispatched to the house and West told Officer Troyer that the knocking may have been Fabian Salinas. *Id.* Crystal Vasquez (Fabian Salinas's sister), was at the home during this time and also suggested that the knocking might have been Salinas. *Id.* Officer Troyer informed West that Salinas had felony warrants for his arrest and that the police would patrol the area for him. *Id.*

During the afternoon of August 11, 2014, Salinas knocked on Shaniz West's front door and West let him inside her house. ER287. Salinas came to the house to collect his belongings that West was storing in her garage. *Id.* West showed him to the garage and provided him with some trash bags. *Id.* Based on Salinas's behavior, it appeared to West that Salinas was under the influence of drugs. ER289. West informed Salinas that she was leaving the house to register their son for school. ER287; ER290. At approximately 2:00 p.m., West left the house using the front door, while Salinas remained inside the house. ER290. Before leaving, West instructed Salinas to keep the back door unlocked. *Id.* She also instructed Salinas to engage the chain lock that was located at the top of the front door. *Id.*

Crystal Vasquez was leaving West's home at the same time that Salinas arrived. ER287; ER289. After leaving West's home, Vasquez called Shaniz West's

grandmother, Deborah Garcia, and informed her that Fabian Salinas was inside West's home. ER244[1] at 1:30-1:40; ER306. Garcia was concerned and called 911 and reported that Salinas was at West's home. ER306-07. The information Garcia provided to dispatch was recorded in the dispatch call log. ER171. The dispatch call log recorded that Garcia provided the following information: (1) Salinas was at West's home and was possibly threatening her with a bb gun; (2), there were children in the house; (3) Salinas was inside the home even if West informed officers that he was not at the house; (4) Salinas was in possession of a bb gun; and (5) Salinas was on meth. ER185; ER171.

C. <u>Richardson's Limited Involvement.</u>

After Garcia called 911, dispatch placed the call onto CPD's call system and Detective Richardson, who was familiar with Salinas's prior criminal history, responded to the call. ER312-14. Probation and Parole Officer Oscar Arguello, who was employed by the Department of Corrections, rode in the patrol car with Detective Richardson to the scene. ER316. Officer Hemmert and Sergeant Hoadley from CPD also responded to the call. ER184-85.

[1] ER244 is an audio recording containing Richardson's phone call with Debra Garcia. This recording assists in establishing the undisputed facts regarding that phone call. Appellants have contemporaneously moved this Court for leave to transmit this exhibit to be included in the record. Citations to ER244 will refer to a time period in the audio recording that supports the articulated undisputed fact.

After arriving at West's home, Detective Richardson called Shaniz West's cell phone multiple times, but did not receive an answer. ER244 at 0:00-1:00; ER5; ER315-316. He then called Garcia (West's grandmother and the person who initially called 911) to gather more information. ER244 at 1:15-3:50. During that phone call, Richardson learned: (1) Garcia believed Fabian Salinas was inside West's home; (2) Salinas likely parked his car somewhere else; (3) he had a bb gun loaded; (4) he was "starting shit with Shaniz;" (5) he probably broke West's phone; and (6) Vasquez was at the house, but she left because Salinas arrived at the house. *Id.* After speaking with Garcia, Detective Richardson called Vasquez's phone, but the call went to voice mail. ER318; ER244 at 4:10-4:40. Richardson then knocked on West's door and called out for Salinas and West, but did not receive an answer. ER244 at 4:25-6:30.

Richardson called a different number for Vasquez and she answered the phone. ER245[2] at 11:09-13:40; ER319. Richardson spoke with Vasquez on the phone, and from this conversation, Richardson learned: (1) Vasquez physically saw Salinas inside West's home 20-30 minutes ago; (2) Salinas was in possession of a

[2] ER245 is an audio recording depicting Richardson's actions at the scene and includes his phone call with Crystal Vasquez and his conversations with West. This recording assists in establishing the undisputed facts regarding Richardson's conversations with Vasquez and West. Appellants have contemporaneously moved this Court for leave to transmit this exhibit to be included in the record. Citations to ER245 will refer to a time period in the audio recording that supports the articulated undisputed fact.

firearm that Vasquez believed was a bb gun; (3) he was waiving it around; (4) somebody dropped him off at the house and left; (5) and West was not answering Vasquez's phone calls. ER319-21; ER245 at 11:09-13:40. Vasquez also informed Richardson that Salinas was on drugs. ER181. After obtaining this information from Vasquez, the officers on the scene discussed whether they should enter West's home. ER245 at 13:40-14:06. Officer Hemmert stated that he heard a noise in the garage that sounded like somebody opening a crawl space. *Id.* at 13:47-13:57; ER321.

As the officers discussed the circumstances they were presented with, Sergeant Hoadley located West walking down the sidewalk toward the home. ER245 at 14:00-14:06; ER322. Sergeant Hoadley and Detective Richardson approached West to speak with her. Detective Richardson's audio recording recorded the conversation. ER245 at 14:15-16:00. The following conversation occurred:

Richardson:	What's your name?
West:	Shaniz West.
Richardson:	Where is Fabian at?
West:	He might be inside.
Richardson:	Is he inside?
West:	He might be.

Id. Based on the information in the call log, Richardson understood that West might not be telling him the truth about Salinas's location, which could be considered the

crime of harboring. ER171-72. With this understanding, Richardson informed West of the following:

Richardson:	Might or yes? Okay. Let me tell you this. He's got a felony warrant for his arrest; okay? If you harbor him, you're going to go to jail for felony harboring.
West:	What? If I'm armed?
Richardson:	If he's in there, and you're not telling us, you can get in trouble for that. Do you understand? Is he in there?
West:	[inaudible]
Richardson:	Okay. Do you have a key to the front door?
West:	He has the top lock locked.
Richardson (to dispatch):	21-101. Shaniz is advising he's inside.
. . . .	
Richardson:	So how certain are you that he's in there?
West:	[inaudible] . . . and I have a pit bull. She's very friendly.
Richardson:	Okay. I heard the dog. So you think for certain he's in there?
West:	[inaudible]
Richardson (To dispatch):	Okay. She's 100 percent positive he's in there.

ER245 at 14:15-16:00.

West felt threatened when Richardson informed her that she could get in trouble for harboring. ER124-25. West's mother had previously been arrested for harboring Salinas and other wanted felons in her home. ER124-125; ER299-301. As a result, West understood the seriousness of the crime of harboring. ER124. She did not actually know whether Salinas was still inside her house. ER125. However, she

informed Richardson that Salinas was inside her home. ER125; ER245 at 14:30-15:00; ER275. After informing Richardson that Salinas was inside the house, no other law enforcement officer made any statements to West indicating that she could be in trouble for her actions. ER275.

After speaking with West, Richardson walked away from West and spoke with the other officers on scene. ER245 at 16:00-16:30. The officers discussed the possibility of contacting SWAT for assistance. *Id.*

Richardson then approached West a second time and asked, "Shaniz, let me ask you this. Do we have permission to get inside your house and apprehend him?" ER245 at 16:47-17:10; ER272. In response to this question, West nodded her head "yes," and handed officers the key to her front door. ER272. By nodding her head "yes," and handing officers her key, West understood that she was giving police officers permission to enter her home. *Id.* She also understood that police would be entering her home for the purpose of apprehending Salinas. *Id.* West further understood that her front door was locked by a chain, and that the key she provided to the officers would not unlock the chain lock on her front door. *Id.* After West provided the officers with permission to enter her home, Richardson responded by stating, "Okay. You're doing the right thing. You know that, right?" *Id;* ER245 at 16:56-17:00.

West then asked an officer if she could go walk around. ER245 at 16:59-17:07. Richardson responded, "I prefer that you stay right here for the moment. Do you have someone right here that you know you can sit with?" *Id;* ER275-76. Richardson wanted West to stay nearby so "she could revoke consent at any time," but he did not specifically inform her of that fact. ER324. West understood that Richardson did not want her walking towards her home, and also understood that Richardson was not asking her to actually stay at the scene. ER130. In fact, Richardson advised her to stand in a certain area across the street from her house. *Id.*

Thereafter, Sergeant Hoadley asked West if she had anywhere to go or anyone that could pick her up. ER130. West called a friend and made arrangements to be picked up and taken to a friend's house. *Id.* West was not prevented from leaving the scene and going to her friend's house. *Id.*

At some point, Sergeant Hoadley, the ranking officer on the scene, called the Canyon County Prosecuting Attorney's Office and spoke with the on-call prosecutor. ER332. He informed the prosecutor of the facts, that West had consented, and that officers were entering the home for the purpose of arresting a person with a felony arrest warrant. *Id.* The prosecutor informed Hoadley that a search warrant was not needed if consent was obtained. *Id.*

D. The SWAT Team's Search of West's Home.

Hoadley then contacted SWAT Commander Alan Seevers and requested SWAT's assistance. ER183; ER330-31. The totality of the facts the officers were presented with caused Hoadley to contact SWAT. *Id.* These facts included: (1) Salinas was a wanted felon; (2) he was possibly armed with a firearm; (3) he was barricaded in a house; (4) he was not responding to police officers; (5) he was reportedly under the influence of drugs; and (6) there was a pit bull in the home. *Id.* Although West claimed that Salinas's firearm was a bb gun, Detective Richardson had previous information that Salinas also was in possession of a .32 caliber pistol. ER138; ER245 at 17:30-17:41; ER325. In fact, Salinas was a suspect in a theft of guns in which not all of the guns were recovered. ER196. Salinas's family members also reported that Salinas was suicidal. ER303-04.

At 3:12 p.m., Seevers notified SWAT Team Leader Doug Winfield that SWAT was being activated to respond to a barricaded subject inside a residence. ER199. Seevers told Winfield that Salinas's family was reporting that he was inside the home, that he had a firearm which was described as a bb gun, and that he was suicidal. ER338. Winfield contacted Hoadley to obtain more information. ER338-39. Hoadley told Winfield that Salinas had felony warrants for his arrest, that he was a suspect in the theft of guns in which all of the guns had not been returned, that he

was suicidal, that all indications were that he was inside the home, and that a pit bull was also inside the home. *Id.* Hoadley also informed Winfield that West provided consent to enter the home, and that the on-call prosecutor advised him that no search warrant was needed. ER339.

Thereafter, the members of the SWAT team met at the Caldwell Police Department. ER183. The team put their tactical gear on, created a tactical plan, and were briefed on the details of the tactical plan. ER343. Winfield created the tactical plan and wrote it on a white board. ER341. The tactical plan was designed to ensure the safety of police officers and the suspect. ER168. To ensure the safety of all involved, the plan was designed to get Salinas to come out of the house without requiring SWAT members to go inside the home. ER340. The first step of the plan was to contain the home and call out the person inside. ER340; ER168. If Salinas did not come out, the second step was to introduce gas into the home to try and force him out of the house. *Id*. This step required waiting for the gas to dissipate and go throughout the areas of the home where a person might be located. *Id.* If the gas did not compel Salinas out of the house, the third step would be to conduct a limited breach of the home. *Id.* This entailed entering through the point of entry, then holding, and continuing to call out. *Id.* The tactical plan identified the front door as the primary point of entry, and the back door as the secondary point of entry in the

event the front door was barricaded. *Id.* Seevers reviewed and approved the tactical plan developed by Winfield. ER350. After the SWAT team was briefed on the tactical plan, the team conducted dry runs at the police station to practice the plan. ER343.

The tactical plan developed by Winfield conformed with commonly accepted police practices. ER257-61. The tactical plan was designed to remove Salinas from the home in the safest manner possible. ER168.

Before the SWAT team arrived, police officers continued to provide containment at the house. ER338. During this time, one officer reported that he heard movement inside the home. ER330; ER340. This information was transmitted over the radio to the SWAT team. ER340. Further, Officer Arguello, employed by the Department of Corrections, heard the deadbolt of the front door latch while he was standing near the front door. ER183; ER330. This information was also relayed to the SWAT team. ER340.

The SWAT team arrived at West's home at 5:23 p.m. ER196; ER342-43. After arrival, the SWAT team made PA announcements requesting Salinas to come out of the house. ER343. This was unsuccessful. *Id.* At 5:42 p.m., the SWAT team

deployed gas into the home. ER199; ER246[3] at 2:27:20-2:32:30. Gas was deployed into the home by using a 12-gauge shotgun to shoot the gas through windows, and in one instance, the garage door since the garage had no windows to shoot through. ER343. The SWAT team then waited approximately one-and-one-half hours for the gas to spread throughout the home and to have an opportunity to work. ER196; ER344. While waiting, the SWAT team continued to call out for Salinas to exit the house. *Id.* Salinas did not exit the house. *Id.*

At 7:12 p.m., the SWAT team attempted to make entry into the home. ER196; ER199. The entry team used West's key to unlock the front door and the deadbolt, but the door still would not open. ER196; ER344. The entry team moved to the secondary entry point, which was the back door. ER344. The glass in the back door was already removed from deploying gas, so the entry team was able to make entry at the secondary entry point by reaching an arm through the broken glass at unlocking the door. ER196-97; ER344-45. After making entry, the team held and called out for Salinas. ER197; ER345. After receiving no response, the entry team

[3] ER246 is an audio recording from Canyon County dispatch and contains the radio dispatch transmission relating to the search of West's home on August 11, 2014. This audio recording establishes undisputed facts regarding the process and sequence of the search of West's home for Fabian Salinas. Appellants have contemporaneously moved this Court for leave to transmit this exhibit to be included in the record. Citations to ER246 will refer to a time period in the audio recording that supports the articulated undisputed fact.

continued to move into the house, hold, and then call out for Salinas. *Id.* Eventually, the team searched the entire house, but Salinas was not found. *Id*.

The SWAT team executed the tactical plan with precision and without any deviation from the plan. ER168. West's personal property sustained damage from the search, mainly from gas saturating her personal property. ER10; ER424. West also was unable to reside in the home until a disaster service company cleaned the gas from the home and made necessary repairs. *Id.* While West's home was being repaired, the City of Caldwell put West and her children in a hotel for three weeks, and then West stayed with her grandmother. ER11. West returned to her rental home in October 2014. ER424. The City of Caldwell paid West $900 for damage to her personal property. ER11.

E. Procedural History

On January 20, 2017, West filed an Amended Complaint against the City of Caldwell, the Caldwell Police Department, Former Chief Chris Allgood, Sergeant Doug Winfield, Lieutenant Alan Seevers, and Detective Matthew Richardson. ER419-430. West alleged three claims against the named-Defendants: (1) Fourth Amendment violation based on the search of her house; (2) Fourth Amendment violation based on the seizure of her house; and (3) conversion under State law. *Id.* West's Fourth Amendment allegations were based on the theories that: (1) West's

consent was not voluntary; and (2) if consent was voluntary, the search exceeded the scope of consent. ER425. On March 20, 2017, the parties stipulated to dismiss the conversion claim, leaving only the Fourth Amendment claims, which the Lower Court adopted. ER431.

1. Motions for Summary Judgment

On April 10, 2017, West filed a Motion for Summary Judgment, seeking judgment on her theory that law enforcement officers violated her Fourth Amendment rights when they exceeded the scope of consent by damaging West's personal property. ER431. West's motion for summary judgment sought to create a categorical rule stating that a search based on general consent is per se unconstitutional if the search results in property damage, because a person providing general consent does not provide consent to damage property. *See* ER16.

On May 1, 2017, Defendants filed a Cross Motion for Summary Judgment asserting, in part, that Richardson, Seevers, Winfield, and Chief Allgood were entitled to qualified immunity. ER431. Specifically, Richardson contended that there was no constitutional violation based on his conduct because he obtained voluntary consent from West. *See* ER23-26. Seevers and Winfield contended that there was no constitutional violation based on their conduct because their tactical plan conformed with commonly accepted police practices. *Id.* Chief Allgood contended that his

conduct did not violate any constitutional rights because he had no involvement in the case. *Id.* All individuals also asserted that even if constitutional violations were found, qualified immunity would still apply because the law was not clearly established that their actions violated West's rights. *Id.*

On May 22, 2017, West filed a response to Defendants' Cross Motion for Summary Judgment. ER100-118. In her response, West conceded that she did not plead and was not contesting the reasonableness of the tactical plan created by Seevers and Winfield. ER110-11. Instead, she was only alleging that Richardson coerced her consent, and that Seevers and Winfield exceeded the scope of her consent by damaging personal property and rendering the home uninhabitable. *Id.* West also conceded that there was no Ninth Circuit or Supreme Court precedent to support her theory that a search based on general consent that results in property damage is per se unconstitutional because no person would consent to the damage of property. ER102-04.

In regards to qualified immunity, West defined the clearly established law at an impermissible level of generality. ER111-13. For Richardson, she defined clearly established law as "coercing consent is a constitutional violation." ER111. For Seevers and Winfield, she defined clearly established law as "when officers are

conducting a search pursuant to consent, the search cannot exceed the scope of the consent that was provided." ER112.

2. Lower Court's Memorandum Decision and Order

On March 28, 2018, the Lower Court issued a Memorandum Decision and Order addressing both motions for summary judgment. ER1-32. The Lower Court denied West's motion for summary judgment, finding that West's scope of consent theory attempted to establish a categorical rule that had no precedential support. ER16. However, the Lower Court unilaterally changed West's allegation from a scope of consent theory to a reasonableness of the search theory. ER17-19. Although West did not plead that the search was unreasonable, and although West specifically conceded that she was not contesting the reasonableness of the search, the Lower Court nevertheless decided to allow her to bring such a claim. ER419-430; ER110-11; ER17-19.

The Lower Court granted in part and denied in part Defendants' motion for summary judgment. ER20-28. The Court granted summary judgment for the City finding that West failed to allege a *Monell* claim against the City of Caldwell. ER 26-28. The Court granted qualified immunity for Chief Allgood, finding that he had no involvement in the search of the house. ER25-26. The Court also granted qualified immunity for Seevers and Winfield regarding any claim that those

individuals were required to confirm that appropriate consent was obtained. ER24-25. Therefore, the Court dismissed the city, Chief Allgood, and aspects of West's claims against Seevers and Winfield. ER26-28. However, the Court denied qualified immunity for Richardson related to his conduct of obtaining consent from West. ER24. The Court also denied qualified immunity for Seevers and Winfield related to their conduct of creating and implementing a tactical plan to search West's home. ER25.

In regards to Richardson, the Lower Court found that a constitutional violation "*could have*" occurred based on these factors: (1) officers seized West's home; (2) Richardson asked West about Salinas's whereabouts, West was equivocal with her response, and Richardson informed her that she could get in trouble for harboring a felon; and (3) Richardson did not inform West of what the search might entail. ER24, 21 (emphasis in original). The Court defined the clearly established law as: "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception (in this case, voluntary consent)." ER24.

In regards to Seevers and Winfield, the Lower Court found that qualified immunity did not apply "where the reasonableness of the search itself is at issue." ER25. The Court did not determine whether a constitutional violation occurred, but

simply found that qualified immunity did not apply. *Id.* The Court appears to have defined the clearly established law as "a search or seizure may be invalid if carried out in an unreasonable fashion." *Id.*

Following the Court's Memorandum Decision and Order, the only remaining claims in the lawsuit are: (1) whether Richardson's conduct in obtaining consent amounted to a violation of West's Fourth Amendment rights; and (2) whether Seevers' and Winfield's development and implementation of a tactical plan to search West's home for Salinas amounted to a violation of West's Fourth Amendment rights. ER30-31.

Richardson, Seevers, and Winfield filed a Notice of Appeal on April 17, 2018. ER95.

After filing a Notice of Appeal, Appellants filed a Motion to Stay the Lower Court's proceedings until the resolution of the appeal. ER431. West objected to the motion and requested that the Lower Court proceed to trial against the only remaining Defendants: Richardson, Seevers, and Winfield. West then filed a Motion to Retain Jurisdiction and Certify Defendants' Appeal as Frivolous. *Id.* Appellants opposed the motion to retain jurisdiction, arguing that the Ninth Circuit has jurisdiction to consider an appeal addressing whether the Lower Court defined clearly established law at an impermissible level of generality. The Motion to Stay

and Motion to Retain Jurisdiction and Certify Defendants' Appeal as Frivolous are still pending with the Lower Court. *Id.* West refused to stipulate to a stay of the Ninth Circuit briefing schedule until the Lower Court ruled on the pending motions.

STANDARD OF REVIEW

A Lower Court's decision on qualified immunity is reviewed de novo. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th. Cir. 2004). This includes a Court's denial of a motion for summary judgment based on qualified immunity. *See Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). The type of immunity to which a public official is entitled to and whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation are questions of law. *See Mabe v. San Bernardino County, Dep't of Soc. Serv.*, 237 F.3d 1101, 1106-07 (9th Cir. 2001); *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

The Lower Court's decisions denying qualified immunity for Richardson, Seevers, and Winfield were erroneous. For all three Appellants, the Lower Court failed to conduct the proper qualified immunity analysis in regards to the second prong of qualified immunity. Specifically, the Lower Court defined clearly established law at an impermissible level of generality.

In regards to Richardson, the Lower Court found that Richardson's conduct violated the clearly established law that: "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception (in this case, voluntary consent)." ER24. This definition of clearly established law is too broad and general to provide any notice to Richardson that his specific conduct in obtaining consent from West violated a constitutional right. Further, the Lower Court failed to identify any precedential case law that squarely governed the facts presented in this case. Had the Lower Court defined clearly established law at a permissible level of specificity, the Lower Court would have found that no clearly established law and no precedential case law existed to provide Richardson with notice that his specific actions violated the constitution.

In regards to Seevers and Winfield, the Lower Court appears to have defined clearly established law as: "It is well established that a search or seizure may be invalid if carried out in an unreasonable fashion." ER25. Again, this definition of clearly established law lacks the specificity required to provide Seevers and Winfield with notice that their tactical plan and search violated the constitution. Had the Lower Court properly defined clearly established law, the Court would have concluded that no clearly established law or precedential case law existed to provide

Seevers and Winfield with notice that their tactical plan and search violated the constitution.

For these reasons, the Lower Court erred in denying qualified immunity because it defined clearly established law at an impermissible level of generality. Had clearly established law been defined with proper specificity, the Lower Court would have concluded that the law was not clearly established to provide Richardson, Seevers, and Winfield with notice that their specific actions violated constitutional rights. As a result, the Ninth Circuit should reverse the Lower Court's decision and grant qualified immunity on behalf of Richardson, Seevers, and Winfield.

ARGUMENT

I. THE LOWER COURT ERRED IN DENYING RICHARDSON'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO CONDUCT THE PROPER QUALIFIED IMMUNITY ANALYSIS.

A. Legal Standard

In a Section 1983 claim, the plaintiff carries the ultimate burden of establishing each element of her claim, including lack of consent. *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002). Further, under qualified immunity, the burden is on the plaintiff to prove both steps of the qualified immunity inquiry to establish that

the officials are not entitled to immunity from the action. *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018).

"Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *White v. Pauly*, __ U.S. __, __, 137 S.Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, __ U.S. __, __, 136 S.Ct. 305, 308 (2015)). The qualified immunity analysis is a two-step process: 1) whether a plaintiff alleges a valid constitutional violation, and 2) whether the right at issue was clearly established at the time of the alleged violation. *Torres v. City of Madera,* 648 F.3d 1119, 1123 (9th Cir. 2011). It is within the district court's discretion as to which one of the two steps should be addressed first within the applicable analysis. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If either step is insufficiently established, then summary judgment is appropriate for the defendant.

The first prong of the qualified immunity analysis asks whether a plaintiff alleged a valid constitutional violation. *Torres,* 648 F.3d at 1123. Under this prong, the burden is on West to prove that the facts, taken in the light most favorable to her own position, show that Richardson's conduct violated a constitutional right. *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018). If West cannot meet her burden, then Richardson is entitled to qualified immunity.

The second prong of the qualified immunity analysis asks whether the right at issue was clearly established at the time of the alleged violation. *Torres,* 648 F.3d at 1123. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, __ U.S. at __, 136 S.Ct. at 308 (quoting *Reichle v. Howards*, 566 U.S. 658, __, 132 S.Ct. 2088, 2093 (2012)). There does not need to be a case directly on point for a right to be clearly established, but "existing precedent must have placed the statutory or constitutional question beyond debate." *White*, __ U.S. at __, 137 S.Ct. at 551 (emphasis added). "In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id* (quoting *Mullenix*, __ U.S. at __, 136 S.Ct. at 308) (emphasis added).

"The dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Hernandez v. Mesa*, __ U.S. __, __, 137 S.Ct. 2003, 2007 (2017). "The qualified immunity analysis thus is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Id.* (citations and quotations omitted). "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Id.*

It has long been held that "clearly established law" should not be defined "at a high level of generality." *Id.* at 552. "[T]he clearly established law must be particularized to the facts of the case." *Id* (emphasis added). "Otherwise, 'plaintiffs 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.'" *Id* (quoting *Anderson v. Creighton*. 483 U.S. 635, 640 (1987)) (omission in original). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that 'it is sometimes difficult for an officer to determine how the relevant legal doctrine, [here unreasonable search and seizure], will apply to the factual situation the officer confronts.'" *Mullenix*, __ U.S. at __, 136 S.Ct. at 308 (quoting *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 2158 (2001)). Unless it is an "obvious case," the clearly established analysis requires the plaintiff to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. *White*, __ U.S. at __, 137 S.Ct. at 552.

Recently, the United States Supreme Court once again admonished lower courts not to define clearly established law at a high level of generality. *Kisela v. Hughes*, __ U.S. __, __, 138 S.Ct. 1148, 1152 (2018). In its opinion, the Supreme Court stated:

Although this Court's caselaw does not require a case directly on

> point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law. This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.
>
> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful.
>
> Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers. But the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case. Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela, __ U.S. at __, 138 S.Ct. at 1152-53 (citations and quotations omitted) (emphasis added).

Thus, the Supreme Court continued to reiterate the requirement to define clearly established law with such specificity to the facts of the case that any reasonable official in the defendant's shoes would have understood that his conduct was violating a constitutional right. *Id.,* __ U.S. at __, 138 S.Ct. at 1153.

B. West Failed To Meet Her Burden Of Proving That Richardson's Conduct Violated A Clearly Established Right.

The Ninth Circuit has jurisdiction to review the legal question of whether the facts, taken in the light most favorable to West, show that Richardson's conduct violated a clearly established constitutional right. *Kisela*, __ U.S. at __, 138 S.Ct. at 1150-51. West has the burden of establishing that Richardson's conduct violated a clearly established right. *Felarca,* 891 F.3d at 815. To meet her burden, West must define clearly established law with such specificity that any reasonable officer in Richardson's shoes would have understood that Richardson's conduct was violating a constitutional right. *Kisela*, __ U.S. at __, 138 S.Ct at 1153. West failed to meet her burden.

In her opposition to Richardson's motion for summary judgment, West defined the clearly established law as: "it is well settled that coercing consent is a constitutional violation." ER111. This statement of law is extremely broad and general and lacks any specificity to the facts Richardson was confronted with. Based

on this general statement of law, Richardson had no notice that when he asked West for permission to enter her home to apprehend Salinas, he may have been coercing consent.

Instead, West was required to define clearly established law with specificity and point to a case that "squarely governed" the specific conduct of Richardson. *Kisela*, __ U.S. at __, 138 S.Ct. at 1153. In other words, West needed to point to a case in which the Supreme Court or Ninth Circuit found that a police officer violated constitutional rights when: (1) officers were dispatched to a home based on reports that the resident was being threatened by a dangerous felon; (2) officers established a perimeter around the house; (3) officers asked the home owner to identify the location of the felon, and after obtaining equivocal responses, informed the homeowner of the crime of harboring a felon; and (4) officers asked the homeowner for permission to enter the house and apprehend the felon. West failed to identify any case that was remotely close to squarely governing the specific conduct at issue. *See* ER111.

West's failure to define clearly established law with specificity and her failure to identify a case that squarely governed the conduct at issue prohibits her from meeting her requisite burden. As a result, Richardson is entitled to qualified immunity.

C. The Lower Court Defined the Clearly Established Law at an Impermissible Level of Generality.

In regards to Richardson, the Lower Court defined the clearly established law as: "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception (in this case, voluntary consent)." ER25. The Lower Court's definition of clearly established law squarely conflicts with the requirement "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, __ U.S. __, __, 138 S.Ct. 1148, 1152 (2018). Although the Lower Court's statement of the law is accurate, it is not specific enough to the facts of this case to inform Richardson whether or not his actions would amount to a constitutional violation. As a result, the Lower Court's general statement of law does not meet the requirements of clearly established law.

The undisputed facts of this case in regards to Richardson's actions in obtaining consent are as follows. Five police officers arrived at West's home in response to a 911 call requesting immediate assistance to apprehend Fabian Salinas. ER184-85; ER312. Salinas was known to be a violent and dangerous gang member who just a few days previously had assaulted a police officer. ER189; ER238-242; ER222-32.

When police officers arrived at West's home, the officers established a perimeter around the house. ER ER338. After establishing a perimeter around the house, the officers located Shaniz West walking on the sidewalk towards the house. ER245 at 13:40-14:06. Richardson approached West and engaged in conversation. ER245 at 14:15-16:00. From the 911 dispatch call log, Richardson understood that West might not tell him the truth about Salinas's location. ER171-72. Richardson asked West where Salinas was located. ER245 at 14:15-16:00. West responded that he might be inside the house. *Id*. Richardson asked "Is he inside?" *Id*. West again responded that he might be. *Id*. Understanding that West might not be telling him the truth about Salinas's location, Richardson informed West that Salinas had warrants for his arrest and if he was inside her home and she did not inform police officers of that fact, she could get in trouble for harboring. *Id*. Upon hearing this, West felt threatened and believed that she might go to jail for harboring Salinas if she did not cooperate, particularly since her mother had previously been charged with harboring Salinas. ER124-25; ER299-301. West decided to cooperate and told Richardson that Salinas was inside the house. ER125; ER272; ER275; ER245 at 14:30-15:00.

A short time later, Richardson approached West a second time and asked: "Shaniz, let me ask you this. Do we have permission to get inside your house and

apprehend him?" ER272; ER245 at 16:47-17:10. In response to this question, West nodded her head "yes," and handed officers the key to her front door. ER272. By nodding her head "yes," and handing officers her key, West understood that she was giving police officers permission to enter her home. *Id*. She also understood that police would be entering her home for the purpose of apprehending Salinas. *Id*.

Under these circumstances, the Lower Court's definition of clearly established law is not specific to the particular undisputed facts of this case. The Lower Court defined the clearly established law as: "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception." ER24. This general statement of law is not specific to the facts of this present case. To be specific to the facts of the present case, the clearly established law must provide Richardson, or any reasonable officer, with legal guidance on whether an officer responding to a 911 call for assistance in apprehending a violent felon who was inside a home threatening a homeowner can: (1) establish a perimeter around the house; (2) approach and speak with the homeowner; (3) upon receiving information that the homeowner might not be truthful about the felon's location, inform the homeowner of potential criminal liability if the homeowner is not truthful to police; and (4) ask for permission to enter the home for the purpose of apprehending the felon.

Instead of defining clearly established law at a specific level, the Lower Court simply relied on a very general statement regarding the Fourth Amendment. Based on this general statement alone, Richardson had no notice that in responding to this 911 call, he could not assist in establishing a perimeter around the home, he could not approach West and inform her that if she was not honest about Salinas's location, she could get in trouble, and he could not ask for her permission to enter her home and arrest Salinas. The general statement of "a reasonable officer in the same situation would be aware of the consequences of a warrantless search absent a recognized exception" does not provide Richardson with any notice of the legal consequences of his specific actions. Indeed, no reasonably competent officer in Richardson's shoes would be able to conclude whether or not the specific conduct performed would result in a constitutional violation based on the Lower Court's definition of clearly established law.

Further, in Fourth Amendment cases where the inquiry is very fact based, the Lower Court was required to identify a precedential case that squarely governed the facts of the present case. The Lower Court failed to identify such a case. ER24.

In summary, the Lower Court was required to define the clearly established law in a more specific manner that would inform Richardson, and all reasonably competent officers, whether his actions would, beyond debate, result in a

constitutional violation. Generally, this requires a precedential case that squarely governs the facts of the present case. The Lower Court failed to follow the proper analysis for the second prong of qualified immunity.

D. The Proper Qualified Immunity Analysis Demonstrates That It Was Not Clearly Established That Richardson's Conduct Violated a Constitutional Right.

Had the Lower Court applied the proper analysis, the Lower Court would have concluded that Richardson was entitled to qualified immunity. The allegations against Richardson center on the legal issue of coerced consent, and specifically whether or not Richardson's conduct amounted to coercion. ER425; ER; 107-09; ER24.

In a civil case under Section 1983, the plaintiff carries the ultimate burden of establishing each element of her claim, including the lack of consent. *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002). In determining whether consent was given in a particular case, the Court must consider the totality of the circumstances. *Id.* "It is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary." *Id.* Particularly, Courts look at the following factors to determine if consent was voluntary: (1) whether the person consenting was in custody; (2) whether the officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the consenting person was

notified that she had a right not to consent; and (5) whether the consenting person had been told that a search warrant could be obtained. *Liberal v. Estrada*, 632 F.3d 1064, 1082 (9th Cir. 2011). The third factor–providing *Miranda* warnings–is not applicable if the consenting person is not under arrest. *U.S. v. Vongxay*, 594 F.3d 1111, 1120 (9th Cir. 2010). Additionally, regarding the fifth factor, an officer is not required to inform the consenting person that she has a right to refuse consent; doing so weighs in favor of consent, but the absence of it does not weigh against consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973); *Vongxay*, 594 F.3d at 1120 n.6. This list of factors is not exhaustive, and other relevant factors may be considered. *Id.*

Thus, the consent analysis is a fact intensive inquiry that looks at the totality of the circumstances. Like other Fourth Amendment claims requiring fact intensive inquiries, the clearly established analysis for a consent claim requires "existing precedent [that] squarely governs the specific facts at issue." *Kisela*, __ U.S. at __, 138 S.Ct. at 1152-53 (quotations omitted) (emphasis added). Accordingly, the proper inquiry in this case must identify a precedential case involving similar facts in which the Court holds that the officer's specific conduct resulted in coerced consent.

Appellants have been unable to find a precedential case that "squarely governs" the facts of this case. In other words, Appellants have been unable to find

a case where the Court held that the following factors amount to coerced consent: (1) officers responding to a 911 call established a perimeter around the home; (2) officers located the homeowner and informed her that her potential actions in being untruthful to them could be criminal; and (3) officers later asked for permission to enter the house and apprehend the felon. Such a holding, existing at the time of the search, is required in order to inform Richardson that his similar actions might result in a constitutional violation.

Importantly, West also failed to identify a precedential case that squarely governs the facts of this case. Whereas West has the burden to identify such a case, she has failed to defeat qualified immunity.

Based on the foregoing, a proper qualified immunity analysis reveals that Richardson's specific conduct did not violate a clearly established law. As a result, he is entitled to qualified immunity. Therefore, Richardson respectfully requests that this Ninth Circuit reverse the Lower Court's decision denying his motion for summary judgment and grant qualified immunity.

II. THE LOWER COURT ERRED IN DENYING SEEVER'S AND WINFIELD'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO CONDUCT THE PROPER QUALIFIED IMMUNITY ANALYSIS.

A. Legal Standard

The qualified immunity standard for Seevers and Winfield is identical to the standard articulated above in ¶ I.A.

B. West Failed To Meet Her Burden Of Proving That Seevers' and Winfield's Conduct Violated A Clearly Established Right.

The surviving claim against Seevers and Winfield is whether their specific conduct relating to the search of West's home resulted in a violation of West's Fourth Amendment rights. As discussed above, West has the burden of establishing that Seevers' and Winfield's conduct violated a clearly established right. *Felarca,* 891 F.3d at 815. West failed to meet her burden.

West never alleged that Seever's and Winfield's conduct in searching her home was unreasonable. ER112-13. As a result, West never argued that qualified immunity did not protect Seevers and Winfield for their conduct of creating and implementing the tactical plan that ultimately led to the damage of her property. *Id.* Instead, she argued that the search of her home exceeded the scope of her consent

on the sole basis that the search resulted in property damage. *Id.* The Lower Court properly recognized that such a claim had no precedential support. ER16.

Since West limited her claim to a theory asserting that a consensual search exceeds the scope of consent when the search results in property damage, she failed to articulate any clearly established law regarding the constitutionality of Seever's and Winfield's specific actions. ER112-13. She did not argue or provide any clearly established law in this regard, presumably because she chose not to pursue such a claim, but to only pursue a scope of consent claim.

For example, in her opposition to Seevers' and Winfield's motion for summary judgment, West defined the clearly established law in two ways: (1) "It is well established that when officers are conducting a search pursuant to consent, the search cannot exceed the scope of the consent that was provided;" and (2) "It is also well-settled that the scope of consent is that to which a reasonable person believes she is consenting, under a totality of the circumstances." ER112. For both statements of law, West cited to *Florida v. Jimeno*, 500 U.S. 248 (1991).[4] ER112.

[4] Significantly, *Florida v. Jimeno*, 500 U.S. 248 (1991) does not provide clearly established law for West's scope of consent cause of action because the Supreme Court in that case found that the officer did not commit a constitutional violation when he searched a paper bag based on general consent to search a vehicle. 500 U.S. at 251.

The manner in which West defined clearly established law is not only at an impermissible level of generality, but it also does not apply to the surviving claim against Seevers and Winfield. West can no longer proceed with a claim regarding whether Seevers' and Winfield's actions exceeded the scope of her general consent. ER16. Instead, she must show that Seevers' and Winfield's specific actions resulted in an unreasonable search.

West never attempted to articulate clearly established law in regards to whether Seevers' and Winfield's specific actions of developing and implementing a tactical plan to search her house resulted in an unreasonable search and seizure. She cited to no case law providing legal guidance on this issue. She pointed to no case law or legal authority stating that, in situations where a felon is potentially barricaded in a home, police officers cannot formulate a tactical plan to enter the home and apprehend the felon in the safest manner possible. Or that police officers cannot, as part of that tactical plan, deploy an irritant such as gas into the home.

Since West did not attempt to define clearly established law in regards to whether Seevers' and Winfield's specific actions of creating a tactical plan that involved deploying gas into the home would amount to a constitutional violation, she has failed to meet her burden of proof. She simply did not define clearly established law with specificity so as to provide Seevers and Winfield, or any

reasonable officer, with notice that their specific actions in developing and implementing a tactical plan to search West's home for Salinas would violate the constitution. Thus, Seevers and Winfield are entitled to qualified immunity.

C. The Lower Court Defined Clearly Established Law At An Impermissible Level Of Generality.

The Lower Court found that qualified immunity did not apply to Seevers' and Winfield's search of the home. ER25. In its analysis, the Lower Court appears to have defined the clearly established law as: "It is well-established that a search or seizure may be invalid if carried out in an unreasonable fashion." ER25.

The Lower Court's qualified immunity analysis was erroneous. The Court's analysis defined clearly established law at an impermissible level of generality. The Court's general and broad statement regarding the Fourth Amendment lacked the required specificity to provide Seevers and Winfield with notice that their specific actions would violate a constitutional right.

Seevers' and Winfield's specific actions involved the following, which are undisputed. Seevers, the Commander of the Swat Team, and Winfield, the Swat Team Leader, were both informed that the Swat team was being requested to assist with the arrest of a barricaded suspect. ER183; ER330-31. They were informed that

the tenant had consented to the search, and that the prosecutor's office had confirmed that a search warrant was not required. ER339.

Seevers and Winfield were also informed that the barricaded suspect had warrants for his arrest, was armed with a firearm described as a bb gun, was a suspect in a theft of guns in which not all of the guns were recovered, and was potentially suicidal. ER338-39. Seevers and Winfield also learned that a pit bull was inside the house. *Id*.

Based on these facts, Winfield created a tactical plan designed to ensure the safety of police officers and the suspect. ER168. To ensure the safety of all involved, the plan was designed to get Salinas to come out of the house without requiring SWAT members to go inside the home. ER340. The first step of the plan was to contain the home and call for Salinas to exit the house. ER340; ER168. The second step was to introduce gas into the home to try and force him out of the house. (*Id*.) The third step was to conduct a limited breach of the home. *Id*. Going inside the home was the last priority. ER168. Winfield did not want his officers to enter the house because he knew they had time on their side and did not need to rush in to save anyone. ER 257. Seevers reviewed and approved the tactical plan developed by Winfield. ER350.

The tactical plan developed by Winfield and approved by Seevers conformed with commonly accepted police practices. ER258. Contemporary police training for both patrol and tactical operations stress slowing things down, taking extra time, and trying to wait the person out—unless the person is an "active shooter" situation *Id.* Officers and suspects have been unnecessarily injured or killed because police entered a building and pressed forward, forcing a deadly confrontation. *Id.* If the suspect does not exit the house voluntarily, one of the first options in contemporary police training would include introducing an irritant inside the house to force surrender. ER259. The most typical way to introduce an irritant into the house is to break a window with either hand-thrown grenades, 12 gauge rounds, or larger rounds. *Id.* The irritant must be introduced to various areas of the house or the suspect will simply move to a different location within the house containing clean air. *Id.* All the tactics employed by CPD not only conformed with contemporary police training, but also conformed with contemporary police philosophy about avoiding deadly confrontations and ensuring officers are as safe as they can practically be when searching for someone who is hiding. ER260.

West provided no expert report to rebut the fact that the tactical plan conformed with contemporary police training and philosophy. She provided no

evidence or argument to dispute this fact. Thus, it is undisputed that the tactical plan conformed with contemporary police training and philosophy.

The SWAT team executed the tactical plan with precision and made no deviations from the plan. ER168. First, the SWAT team made PA announcements requesting Salinas to come out of the house. ER343. This was unsuccessful. *Id*. Next, the SWAT team deployed gas into the home. ER199; ER246 at 2:27:20-2:32:30. The SWAT team then waited approximately one-and-one-half hours for the gas to spread throughout the home and to have an opportunity to work. ER343. While waiting, the SWAT team continued to call out for Salinas to exit the house. *Id*. Salinas did not exit the house. *Id*.

Lastly, the SWAT team made entry into the home. ER196-97; ER199; ER344-45. After making entry, the team held and called out for Salinas. ER197; ER345. After receiving no response, the entry team continued to move into the house, hold, and then call out for Salinas. *Id*. Eventually, the team searched the entire house, but Salinas was not found. *Id*.

The above facts are undisputed. West did not contest any facts relating to the search as she conceded that the reasonableness of the search was not at issue. ER110-11.

Based on Seever's and Winfield's actions described above, the Lower Court was required to define and identify clearly established law that would provide notice to Seevers and Winfield that their actions were unconstitutional. In other words, the Lower Court was required to identify a precedential case that would provide notice to Seevers and Winfield that their actions of attempting to apprehend a barricaded and dangerous felon by implementing a tactical plan that conformed with contemporary police tactics and philosophy and was designed to ensure the safety of officers and the felon, would result in a constitutional violation. The Lower Court failed to identify any precedential case law holding that a search conforming with contemporary police tactics and philosophy is unreasonable solely based on the fact that the search caused property damage. Instead, the Court simply articulated a broad and general statement of law, which has no specificity to the facts of the present case.

The broad and general manner in which the Lower Court defined clearly established law is impermissible. The Court failed to identify any case law or established law that squarely governed the facts of the case. As a result, the Court erred in denying qualified immunity for Seevers and Winfield.

D. The Proper Qualified Immunity Analysis Demonstrates That It Was Not Clearly Established That Seevers' and Winfield's Conduct Violated a Constitutional Right.

Had the Lower Court applied the proper analysis, the Lower Court would have concluded that Seevers and Winfield were entitled to qualified immunity. First, West conceded that no Supreme Court or Ninth Circuit precedent existed that held that a consent search resulting in damage was per se unconstitutional. ER102. This concession alone is grounds to grant qualified immunity for Seevers and Winfield, as West has the burden to establish that her legal theory was clearly established. Further, the Lower Court acknowledged that West's attempt to create a per se rule lacked any precedential support. ER16.

Appellants' search of precedential case law has not resulted in any Supreme Court or Ninth Circuit cases that have held that a consensual search is unconstitutional solely based on the fact that the search caused property damage. Contrarily, both the Supreme Court and Ninth Circuit have found that officers conducting a search on occasion must damage property in order to perform their duties. *Dalia v. U.S.*, 441 U.S. 238, 258 (1979); *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997). In recognizing that property damage occasionally occurs during a search, the Ninth Circuit has created a standard for determining if property damage during a search results in a constitutional violation. The standard

used by the Ninth Circuit states, "only unnecessarily destructive behavior, beyond that necessary to execute a warrant [or in this case, consent search] effectively, violates the Fourth Amendment." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000). Thus, West's attempt to create a categorical rule stating that any consent search that results in damage to property violates the constitution is simply contrary to Supreme Court and Ninth Circuit precedent existing at the time of the search.[5]

Further, appellants' search of precedential case law also has not resulted in any Supreme Court or Ninth Circuit cases that have held that the specific tactics used by Seevers and Winfield—calling out for Salinas to exit the house, deploying gas, then entering the house while calling out for Salinas—resulted in an unreasonable search. Appellants have found no precedent holding that the use of gas in a home during a consent search is unreasonable.

Based on the foregoing, there has been no precedential case law identified that clearly establishes that Seevers' and Winfield's specific actions violated a

[5] Further, both the federal and state knock and announce laws suggest that property damage may be permitted in conducting a search under some circumstances. Under federal law, an officer may "break open any outer or inner door or window of a house, or any part of a house, or any thing therein" to execute a search warrant if the officer is refused admittance. 18 U.S.C. §3109. Idaho state law mirrors the federal knock and announce law. *See* Idaho Code §§ 19-611, 19-4409. Thus, it is reasonable for an officer to believe that it is permissible to damage property in some circumstances when effectuated an arrest or executing a search.

constitutional right. As a result, Seevers and Winfield are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the decision of the Lower Court to deny summary judgment for Richardson, Seevers, and Winfield should be reversed, and Richardson, Seevers, and Winfield should be entitled to qualified immunity.

DATED this 27th day of August, 2017.

s/ Bruce J. Castleton
BRUCE J. CASTLETON, Of the Firm
Attorneys for Appellants

STATEMENT OF RELATED CASES

Appellants are unaware of any known related cases pending in this Circuit.

DATED this 27th day of August, 2018.

s/ Bruce J. Castleton
BRUCE J. CASTLETON, Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 27th day of August, 2018.

s/ Bruce J. Castleton
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