**Court of Appeals No. 18-35300**

**IN THE UNITED DISTRICT 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

# APPELLEE'S OPENING BRIEF

Vaughn Fisher, ISB No. 7624
Rebecca A. Rainey, ISB No. 7525
Jeremiah Hudson, ISB No. 8364
FISHER RAINEY HUDSON
950 W. Bannock Street, Ste. 630
Boise, ID 83702
Tel: (208) 345-7000
Fax: (208) 514-1900
Email: vaughn@frhtriallawyers.com;
rar@frhtriallawyers.com;
jeremiah@frhtriallawyers.com
*Attorneys for Plaintiff-Appellee*

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## SUMMARY OF ARGUMENT

Contrary to Appellants' Matthew Richardson's ("Richardson") contention, the District Court sufficiently defined the clearly established law that applied to Richardson when it held that "because the voluntariness of Plaintiff's consent involves disputed issues of fact, such that a constitutional deprivation *could have* occurred… And, if true, the legal contours of that alleged deprivation is so 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)." (ER 24)(emphasis in original).

The District Court applied the proper qualified immunity analysis that established that Richardson's conduct violated the clearly established law when it determined that viewing the facts in the light most favorable to Appellee Shaniz West ("West"), "the legal countours of [Richardson's] alleged deprivation is so clearly established that the 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)." *Id*.

Richardson erroneously asserts that West was required to find case law that notified Richardson that his actions led to West involuntarily consenting to have her home searched was clearly established law. Rather, given that the underlying

disputed facts regarding the voluntariness of West's consent are disputed, viewing the facts in the light most favorable to West, the Court must presume that West's consent was involuntary for the purpose of analyzing qualified immunity.

Lieutenant Alan Seevers ("Seevers") and Sergeant Doug Winfield ("Winfield") argue in error that the District Court's clearly established law is defined at an impermissible level of generality. Despite being the general statement that "It is well established that a search or seizure may be invalid if carried out in an unreasonable fashion," the court cites to a case that is factually similar to Seevers' and Winfield's situation, the Court Order establishes detailed facts regarding Seevers' Winfield's situation, and that a Fourth Amendment violation exists if the search is unreasonable is an obvious statement of clearly established law.

The District Court applied the proper qualified immunity analysis that established that Seevers' and Winfield's conduct violated a clearly established law by citing a factually similar case that put Seevers and Winfield on notice that the damage they caused to West's home was determined to be unreasonable, such violation of the fourth amendment would be a clearly established violation of the Fourth Amendment.

Seevers and Winfield erroneously asserts that West was required to find case law that notified Seevers and Winfield that their actions resulted in an unreasonable search was clearly established law. West pointed to case law addressing the issue of

reasonableness of searches. To the extent that those cases are no longer applicable, the Supreme Court in *Elder v. Holloway*, 114 S.Ct. 1019, 1023 (U.S. Idaho, 1994) has instructed the Court that it should use its "full knowledge of its own [and other relevant] precedents" when Plaintiff fails to find and cite to already existing case law.

## ARGUMENT

### I. THE LOWER COURT DID NOT ERR IN DENYING RICHARDSON'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO CONDUCT THE PROPER QUALIFIED IMMUNITY ANALYSIS

### A. Legal Standard

"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) (internal quotations omitted). The qualified immunity analysis is a two-step process, including 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. *Easley v. City of Riverside*, 890 F.3d 851, 856 (9th Cir. 2018). Courts are permitted to exercise discretion when deciding which of the two prongs should be addressed first. *Id*. (quoting *Pearson v. Callahan,* 555 U.S. 223, 236–42, 129 S.Ct. 808 (2009)). If genuine issues of material fact exist that prevent a determination of qualified

immunity at summary judgement, the case must proceed to trial. *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1160 (9th Cir. 2014) (quotations omitted).

In a Section 1983 claim, the plaintiff has the burden of establishing each element of her claim. *Pavo v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002). The first prong of the qualified immunity analysis asks whether the plaintiff alleged a valid constitutional violation. *Easley*, 890 F.3d at 856. Thus, under the first prong it is West's burden to prove that the facts, taken in the light most favorable to her own position, demonstrate that the officers' conduct violated her constitutional rights. *Sandoval*, 756 F.3d at 1160. If West meets this burden, the court conducts its analysis of the remaining prong.

The second prong of the qualified immunity analysis asks whether the right at issue was clearly established at the time of the alleged violation. *Easley*, 890 F.3d at 856. Whether a right is clearly established, for the purposes of determining whether an officer is entitled to qualified immunity turns on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001). "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." *Hernandez v. Mesa*, __ U.S. __, __, 137 S.Ct. 2003, 2007

(2017) (citing *White*, 580 U.S. __, __, 137 S.Ct. at 550. (2017). For a right to be clearly established, the Court's "case law does not require a case directly on point," but "existing precedent must have placed the statutory or constitutional question beyond debate." *White*, __ U.S. __, __, 137 S.Ct. at 551.

For the purpose of qualified immunity, although not requiring a case directly on point, clearly established case law "should not be defined at a high level of generality." *Id*. at 552 (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074 (2011)). "General statements of the law are not inherently incapable of giving fair and clear warning to officers." *Id*. at 552 (internal quotations omitted). However, expect in obvious cases, the court should conduct its "clearly established" analysis with caselaw in which officers were acting under similar circumstances. *Id*.

**B. To Determine Whether West Alleges A Valid Constitutional Violation, The Jury Must Establish The Facts Relevant To The Issue Of Voluntary Consent.**

Under the first prong it is West's burden to prove that the facts, taken in the light most favorable to her own position, demonstrate that the officers' conduct violated her constitutional rights. *Sandoval*, 756 F.3d at 1160. In §1983 actions, issues of voluntary consent are decided by jury. *See Larez v. Holcomb*, 16 F.3d 1513, 1517 (9th Cir. 1994); *Pavao v. Pagay*, 307 F.3d 915, 921 (9th Cir. 2002). Further, "[v]oluntariness is a question of fact to be determined from all the surrounding circumstances." *U.S. v. Al-Azzawy*, 784 F.2d 890, 895 (9th Cir.

1985) (citing *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir.1985)).

The Ninth Circuit has held that "summary judgment in favor of moving defendants is inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits." *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017); (quoting *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997)). In *Morales v. City of Delano*, the Eastern District of California sets forth why the jury must determine reasonableness prior to the court's determining the issue of qualified immunity:

> The jury is to make its determination whether the entry was reasonable or unreasonable under all the facts. The jury is also to make special findings of fact with regard to what the Officers knew or reasonably should have known at the time of their entry. If the jury finds the Officers' entry was unreasonable, Defendants are to submit the issue of qualified immunity to the court for its determination under the facts as found by the jury.

*Morales v. City of Delano*, 2012 WL 996503, at *9 (E.D. Cal. 2012). See also *Bonivert v. City of Clarkston*, 883 F.3d 865, 880 (9th Cir. 2018).

Here, there are genuine issues of material fact regarding whether West—when handing her keys over to a patrol officer and agreeing that police could "get inside and apprehend [Salinas]"—was the result of free and voluntary consent or submission to authority. The determination of whether consent to a search was granted voluntarily or whether it "was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the

circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* at 229. Such an intensive inquiry should be undertaken because "[t]he existence of consent to a search is not lightly to be inferred." *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir.1979). This is because, "judicial concern to protect the sanctity of the home is so elevated that free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority" *Maker v. City of Tillamook, Ore.,* 2007 WL 2688230 *3 (citing *U.S. v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990).

A significant factor for the jury in determining whether West's consent was voluntary is that when she returned home from registering her child at school, police officers had effectively seized her home. A seizure of a person occurs "when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen…" *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968)). A seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Lavan v. City of L.A.*, 693 F.3d 1022, 1030-33 (9th Cir. 2012). To determine whether a seizure of an individual has occurred, "the crucial test is

whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (1991).

The Ninth Circuit has established five factors in determining whether a person who is approached by police officers at her residence would believe that she were free to ignore the police presence and go about her business including: "1) the number of officers involved; 2) whether the officers' weapons were displayed; 3) whether the encounter occurred in a public or non-public setting; 4) whether the officers' officious or authoritative manner would imply that compliance would be compelled; and 5) whether the officers advised the detainee of his right to terminate the encounter." *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 494-496 (9th Cir. 1994).

On summary judgment, West alleged that the police officers had effectively seized West's home when she returned from registering her child at school. SER 2. The house was surrounded by five uniformed officers. SER 2. They had established a perimeter. *See* ER 5. Richardson and Sergeant Hoadley stopped West on the street and engaged her in a conversation about Salinas. SER 3. During that conversation, Officer Richardson twice ignored that West said Salinas "might" be in the home and informed her that if Salinas was in the home and she did not tell them, she would go to jail. SER 3. At no time did Richardson inform West that she was "free to go about

her business," or allowed to "refuse consent." No reasonable person would have thought she was free to go about her business and enter her own home when her home was under police control.

Whether West's cooperation was voluntary consent or a mere submission to the presence and authority of police officers is a question of fact that requires the jury to weigh the totality of the circumstances. West contends that she did not voluntarily consent. Richardson contends that West voluntarily consented.[1] In its order, the District Court correctly denied qualified immunity "because the voluntariness of Plaintiff's consent involves disputed issues of fact, such that a constitutional deprivation *could have* occurred" (ER 24)(emphasis in original).

**C. Richardson's Conduct Violated A Clearly Established Right**

i. The Lower Court Did Not Define The Clearly Established Law at An Impermissible Level Of Generality.

Richardson's argument that the District Court defined the clearly established law with a "high level of generality" misconstrues the substantial body of case law on the topic. Richardson cites to case law where Appellate Courts overturned denials of qualified immunity in cases where the Lower Court attempts to assert a broad

[1] Despite Richardson's attempt to identify voluntary consent as a legal issue for the purpose of this appeal, the fact remains that in Defendants' Statement of Facts (SER 58), filed with his summary judgment pleading, Richardson disputed the fact that "West felt 'threatened' solely because of Richardson's questions."

statement of law rather than asserting that the law should be viewed through the prism of facts the defendant was facing at the time she was expected to appropriately interpret how the law applied to her situation. *See e.g. Mullenix v. Luna*, 136 S.Ct. 305, 308–09 (U.S. 2015) (Stating that "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'" is at an impermissibly high level of generality.) *Haugen v. Brosseau,* 339 F.3d 857, 873 (C.A.9 2003), *Brosseau,* 543 U.S. 194, 199, 125 S.Ct. 596 (holding that the statement "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" is impermissibly general.) *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, (1987), (The lower court impermissibly denied qualified immunity by asserting the highly general clearly established "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." The Supreme Court found that statement was highly general and that the actual question at issue was whether "the circumstances with which Anderson was confronted ... constitute[d] probable cause and exigent circumstances.")

In interpreting the Supreme Court's *Brosseau* opinion, the Court in Mullenix found that "[t]he correct inquiry … was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she]

confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Mullenix v. Luna*, 136 S.Ct. 305, 308–09 (U.S.,2015) (*quoting Brosseau,* at 199–200, 125 S.Ct. 596.)

Contrary to Defendant's assertion that the District Court's decision defined the clearly established law with a "high level of generality," the District Court set forth fact-intensive details pertaining to the actions of Richardson (*See* ER 2-11 "General Background") before denying qualified immunity to Richardson:

> because the voluntariness of Plaintiff's consent involves disputed issues of fact, such that a constitutional deprivation *could have* occurred… And, if true, the legal contours of that alleged deprivation is so 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).

ER 24 (emphasis in original). The District Court makes clear that it considered the facts of Richardson's situation in denying qualified immunity. *See* ER 2-7 ("General Background").

Accordingly, the District Court did not define the clearly established law at an impermissible level of generality.

ii. The Court Applied the Proper Qualified Immunity Analysis That Established That Richardson's Conduct Violated A Clearly Established Law

Richardson argues that the District Court did not point to, nor is there any

"existing precedent [that] squarely governs the specific facts at issue," and accordingly, the right is not clearly established. Appellants' Opening Brief p. 37 (*citing Kisela v Hughes*, ___ U.S. at ___, 138 S.Ct. 1148, 1152-53(2018)) (emphasis in original). Richardson argues that a coerced consent case that squarely governs the case at hand would include the following facts: "(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." Appellants' Opening Brief p. 37-38.

While Richardson attempts to frame the issue of voluntary consent as a legal issue, he fails to see that the facts underlying voluntariness of West's consent must be decided by the jury. Until a jury determines the facts relevant to voluntariness, the issue of voluntariness should be viewed in a light favorable to West. In *Calabretta v. Floyd*, 189 F.3d 808, (9th Cir. 1999), the Ninth circuit addressed the issue of whether a social worker and police officer were entitled to qualified immunity after coercing consent into Plaintiff's home to investigate child abuse. *Id*. The parties disagreed about whether consent was coerced, and "Appellants concede[d] that for purposes of appeal, the entry must be treated as made without consent." *Id*. at 811. The Ninth Circuit stated that:

> The principle that government officials cannot coerce entry into people's houses without a search warrant or

> applicability of an established exception to the requirement of a search warrant is so well established that any reasonable officer would know it.

*Id*. at 813. In *Calabretta*, Appellants, like Richardson here, claimed "qualified immunity on the ground that there is no clearly established principle to the contrary." *Id*. The Ninth Circuit rejected Appellants claim of qualified immunity and stated:

> In our circuit, a reasonable official would have known that the law barred this entry. Any government official can be held to know that their office does not give them an unrestricted right to enter peoples' homes at will.

*Id*. Accordingly, like in Calabretta, it was clearly established that an officer in Richardson's situation "could not coerce entry into people's houses without a search warrant or applicability of an established exception to the requirement of a search warrant." *Id*. According to the Ninth Circuit, that law "is so well established that any reasonable officer would know it." *Id*.

Similarly, in this case the District Court determined that the clearly established law that applied was that "the voluntariness of Plaintiff's consent involves disputed issues of fact, such that a constitutional deprivation *could have* occurred. And, if true, the legal contours of that alleged deprivation is so 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.)" ER 24.

Viewing the evidence in light most favorable to West, including the disputed

facts underlying the issue of whether West voluntary consented to the search, for the purposes of qualified immunity the Court must assume that the evidence shows that West did not voluntarily consent. *See Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017).

Alternatively, it is well established that "consent obtained under threat of subjecting appellant to such an arrest cannot be said to be voluntary." *U.S. v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980); *see also U.S. v. Darling*, 2010 WL 2802564, at *3 (N.D. Cal. 2010). Here, the evidence viewed in a light most favorably to West establishes that West agreed to let officers search her home as a direct result of Richardson's threat to arrest her for felony harboring. SER 4.

iii. West Met Her Burden of Proving Richardson's Conduct Violated A Clearly Established Right.

Richardson also argues that "West was required to define clearly established law with specificity and point to a case that 'squarely governed' the specific conduct of Richardson" and her failure to do so "prohibits her from meeting her requisite burden."[2] *See* Appellants' Opening Brief p. 31.

[2] To the extent that Appellants argue that West cannot use case law that she did not assert in her Summary Judgment briefing, The Supreme Court determined in *Elder v. Holloway* when it reversed and remanded summary judgment on qualified immunity and stated: "This case presents the question whether an appellate court, reviewing a judgment according public officials qualified immunity from a damages suit charging violation of a federal right, must disregard relevant legal authority not presented to, or considered by, the court of first instance. We hold

Richardson contends that West was required to define "clearly established law" by pointing to Supreme Court or Ninth Circuit case law that involve (1) officers who were dispatched to a home based on reports that the resident was being threatened by a dangerous felon; (2) an officer establishing a perimeter around the house; (3) an officer who 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) an officer who asked the homeowner for permission to enter the house and apprehend the felon. *See* Appellants' Opening Brief p. 31. Richardson fails to recognize that the facts viewed in a light most favorable to West show that Richardson threatened West with arrest, not merely "informed" her of the crime of harboring a felon. Further, to the extent that West gave equivocal responses to Richardson about Salinas' location, it is undisputed that those equivocal responses were true, and should have been apparent considering that Richardson witnessed West approach her house after registering her child for school—meaning she had not been home to unequivocally know whether Salinas was there. *See* ER 5-7.

Given that the Court must presume facts in a light most favorable to West—that the evidence shows that her consent resulted from being threatened with arrest

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that appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court." *Elder v. Holloway*, 510 U.S. 510, 511–12, 114 S.Ct. 1019, 1021, (1994).

by Richardson and that she did not voluntarily consent to have her home searched—the clearly established principal that an officer in Richardson's situation "cannot coerce entry into people's houses without a search warrant or applicability of an established exception to the requirement of a search warrant is so well established that any reasonable officer would know it." *See Calabretta*, 189 F.3d at 813.

## II. THE LOWER COURT DID NOT ERR 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 same qualified immunity standard set forth in I.A., above, applies to Seevers and Winfield.

### B. To Determine Whether West Alleges A Valid Constitutional Violation, The Jury Must Establish The Facts Relevant To The Issue Of Reasonableness of Winfield's and Seevers' Conduct.

As stated above, West must prove that facts exist, which, when taken in the light most favorable to her own position, demonstrate that the officers' conduct violated her constitutional rights. *Sandoval*, 756 F.3d at 1160.

The Ninth Circuit has established that "[b]ecause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." *Chew v. Gates*, 27 F.3d 1432, 1440–41 (9th Cir. 1994)(*citing Barlow v. Ground,* 943 F.2d 1132, 1135 (9th Cir.1991), *cert.*

*denied,* 505 U.S. 1206, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992); *White by White v. Pierce County,* 797 F.2d 812, 816 (9th Cir.1986)). The Ninth Circuit has held that "that attempting to decide excessive force cases at summary judgment requires courts to 'slosh our way through the factbound morass of 'reasonableness,'' with predictably messy results." *Bonivert v. City of Clarkston*, 883 F.3d 865, 880 (9th Cir. 2018)(citing *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). Similarly, as the District Court concluded that the reasonableness of Seevers' and Winfield's actions in searching West's home was an issue to be determined by the jury, and therefore qualified immunity could not be granted at this stage in the proceedings. ER 25.

Here, West alleges that Seevers' and Winfield's actions were unreasonable and unnecessarily destructive when they deployed tear gas canisters through her windows, glass door, and garage door. ER 9-10, ¶¶16-17. Even assuming that West voluntarily consented to have her home searched, she was never informed that Seevers and Winfield might destroy her home. ER 7-8 ¶ 13. As a result of Seevers' and Winfield's actions, West's and her children's personal belongings were saturated with tear gas, debris from the walls and ceilings, as well as broken glass littered West's home. ER 10, ¶19. Additionally, Salinas was never in West's home when her house was destroyed by Seevers and Winfield. ER 10 ¶18.

Seevers and Winfield, on the other hand, allege that their actions were

reasonable and necessarily destructive. The District Court appropriately determined that "whether Plaintiff has alleged a proper constitutional violation in the first instance to support her underlying Fourth Amendment claims remains unanswered," and that "the constellation of facts informing either of these questions is for the fact-finder to resolve. ER 23; (citing *Hagar*, 2012 WL 827068 at *3).

In Defendants' Brief in Response to Plaintiff's Motion for Summary Judgment and Defendants' Brief in Support of Cross-Motion for Summary Judgment, argue that "[c]ontrary to West's allegations, the undisputed facts demonstrate that: …(2) the manner of the search was reasonable based on the facts and circumstances presented to the officers; and (3) the damage to West's home was not unnecessarily destructive." SER 22. West argued on her summary judgment pleadings that even if it were determined that West voluntarily consented to search her home, Seevers and Winfield exceeded the scope of her consent when they destroyed her home. While the District Court did not agree with West's scope of consent analysis, the fact remains that the crux of West's argument is that the amount of damage Seevers and Winfield caused to her home was unreasonable and unnecessary. As the District Court stated, determining whether Seevers' and Winfield's conduct was unreasonable is undeniably a question of fact for the jury.

**C. <u>Seevers' and Winfield's Conduct Violated A Clearly Established Right</u>**

i. The Lower Court Did Not Define Clearly Established Law At An Impermissible Level Of Generality It Is Obvious That A Search Conducted In An Unreasonable Manner Violates The Fourth Amendment.

Seevers and Winfield argue that the District Court's definition of clearly established law is defined at an impermissible level of generality. The court 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." *See* Appellants' Opening Brief, p. 42 (quoting ER 25).

The District Court, in its qualified immunity analysis, referenced its prior section addressing the reasonableness of the search and set forth the factually similar case of *Hagar v. Rodbell* to assert the general proposition that "While the at-issue search is not *per se* unreasonable owing to her consent, a Fourth Amendment violation still exists if the search itself is unreasonable. ER 17. In *Hagar*, in serving a search warrant on a residence that was believed to contain several dangerous firearms, the SWAT team dismantled at least one security camera, used a ram to breach and enter the residence, and several "flash bangs" were used causing damage to the carpets and ceilings during the search. See *Hagar v. Rodbell*, 2012 WL 827068 at 1-3.

What Seevers and Winfield fail to acknowledge is that the District Court stated that "[w]hether the actions contributing to this reality were objectively reasonable in light of the circumstances confronting the involved officers that day is

a disputed question of fact, incapable of resolution as a matter of law at this procedural stage of the litigation." (ER 19).[5] The District Court acknowledged that "Defendants make an impressive effort at arguing that the manner in which the search was conducted was reasonable and not unnecessarily destructive," but also acknowledged "the fact remains that, following the search/seizure, the Residence was rendered uninhabitable." (ER 19). The District Court also stated that the fact that police exceeded Plaintiff's scope of her cooperation "challenges the reasonableness of the contemporaneous search." (ER 19, n. 8).

Further, the District Court set forth detailed facts pertaining to Seevers' and Winfield's involvement in the destruction of West's house. *See* ER 7-10, ¶¶12-18. Despite the fact that the Court did not lay out the formula defining the clearly established law as it applies to Seevers and Winfield, the Court analyzed the facts confronting Seevers' and Winfield's situation and applied it to the similar fact pattern in *Hagar*. 2012 WL 827068. Further it is obvious that "[a] Fourth Amendment violation still exists if the search itself is unreasonable." ER 17. *See White*, __ U.S. __, __, 137 S.Ct. at 552. ("General statements of the law are not inherently incapable of giving fair and clear warning to officers.")

[5] The Court conducted an in-depth analysis regarding the reasonableness of the search and seizure in addressing Plaintiff's Summary Judgment Motion. See *Id*. at 13-19.

For the reasons set forth above, this Court should uphold the District Court's determination that the issue of whether reasonableness regarding Seevers and Winfield's conduct needs to be decided by a jury.

ii. The Court Applied The Proper Qualified Immunity Analysis That Established That Seevers' And Winfield's Conduct Violated A Clearly Established Law.

The District Court cited to *Hagar v. Rodbell* in its Order to establish that issues of fact for a jury prevents the Court from determining whether the officer's search or seizure was carried out in an unreasonable fashion, thereby violating the Fourth Amendment. *See* ER 17-19. Viewing the facts in the light most favorable to West, and thereby assuming that Seevers and Winfield were unreasonable in destroying West's home, the Court can determine whether the conduct of Seevers and Winfield violated clearly established law. *See San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 976 (9th Cir. 2005)("Viewing the facts in the light most favorable to the [Plaintiffs], the seizures were unreasonable, in violation of the Fourth Amendment.") Assuming the facts establish that the destruction of West's home was unreasonable, the Court need only look to *Liston v. County of Riverside* to clearly establish that the unnecessary destruction of property while conducting a search is unconstitutional. *Liston*, 120 F.3d at 979. In *Liston*, Defendants destroyed Plaintiffs' fence, dug up their back yard, and dumped out

garbage and removed items from drawers and closets without cleaning up afterwards. *Id*. at 979.

While the Ninth Circuit held in *Liston* that two officers who "remained outside the house in the front yard at all times, ignorant of the facts learned by the officers inside the house" and were entitled to summary judgment on qualified immunity (*see Id*.), the other officers were not entitled to such a ruling:

> Recognizing, as we must, that the moments immediately following the officers' forcible entry were difficult and tense, we, nevertheless, are unable to conclude as a matter of law that the force used upon the Listons from the time of the initial entry into their house until the time of the officers' departure was reasonable, or that reasonable officers could have concluded that their acts during this entire period comported with the Fourth Amendment. It is for the finder of fact to determine the reasonableness of the force used in this case, and that can be done only upon a fully developed record.

*Liston*, 120 F.3d at 977. In this case, as in *Liston*, there are issues of fact that must be determined by a jury in order for the Court to make a determination of whether the damage alleged by West is unreasonable. *See also Hagar v. Rodbell*, 2012 WL 827068 (D. Ariz. 2012).

Similarly, in *Mena v. City of Simi Valley*, the Ninth Circuit held that "Defendants appear to have damaged Plaintiffs' property in a way that was 'not reasonably necessary to execute the search warrant,'" and, since a reasonable officer would have known that such conduct was unlawful, Defendants were not entitled to

qualified immunity. *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (C.A.9 (Cal.),2000)(quoting *U.S. v. Becker*, 929 F.2d 442, 446 (C.A.9 (Or.),1991)).

For the same reasons as set forth in Section II.B., above, neither the District Court, West, nor Seevers or Winfield know which operable facts the jury is going to use in determining whether Seevers' and Winfield's conduct was reasonable. The District Court states in its order that "with all this in mind, whether Plaintiff has alleged a proper constitutional violation in the first instance to support her underlying Fourth Amendment claims remains unanswered." ER 23. Without a determination of the relevant facts by the jury, the Court does not know which facts are relevant to determine whether the law was clearly established.

iii. West Did Not Fail To Meet Her Burden Of Proving That Seevers' and Winfield's Conduct Violated A Clearly Established Right.

Seevers and Winfield argue that "West can no longer proceed with a claim regarding whether Seevers' and Winfield's actions exceeded the scope of her general consent. ER 16. Instead, she must show that Seevers' and Winfield's specific actions resulted in an unreasonable search." Appellants' Opening Brief p. 41. Seevers and Winfield argue that since West did not "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." *Id*. Seevers and Winfield take issue that West "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" are premature. *See* Appellants' Opening Brief p. 41.

The District Court did not rule in favor of West regarding her argument that officers exceeded the scope of her consent by destroying her home, the District Court acknowledged that West's contention that "the reasonableness of the tactical plan is not at issue in this lawsuit" and accordingly, its execution was not "unnecessarily destructive." The District Court went on to say that "[a]t first blush, this acknowledgment would seem to doom [West's] claims in light of the Court's consideration of her Motion for Summary Judgment here. This tension is slackened, however, when understanding that Plaintiff's argument that the police exceeded the scope of her cooperation—while perhaps misplaced in the context of her arguments as a matter of law—nonetheless challenges the reasonableness of their contemporaneous search." ER 19 (citing ER 110-111).

In her summary judgment reply, West pointed to case law that established the issue of reasonableness of the damage caused by officers in her attempt to establish that Defendants violated West's Fourth Amendment rights by exceeding the scope

of her consent. *See* ER 102-103.[6] To the extent that the cases West cited are not considered clearly established law in light of the District Court's dismissal of West's scope of consent argument, the Supreme Court held that "[a] court engaging in review of a qualified immunity judgment should … use its 'full knowledge of its own [and other relevant] precedents'" rather than granting summary judgment for Defendants when Plaintiff fails to find and cite to the already existing case that would have appropriately notified the Defendant of the clearly established law. *Elder v. Holloway*, 114 S.Ct. 1019, 1023, 510 U.S. 510, 516(U.S.Idaho,1994)(citing *Davis v. Scherer,* 468 U.S. 183, 192, n. 9, 104 S.Ct., at 3018, n. 9).

## CONCLUSION

For the foregoing reasons, the decision of the District Court to deny summary judgment for Richardson, Seevers, and Winfield should be affirmed.

DATED this 26th day of September 2018.

*/s/ Jeremiah Hudson*
Jeremiah M. Hudson
Attorneys for Plaintiff-Appellee

[6] West cited to the following cases to support her argument: *See, e.g., United States v. Ferrer-Montoya*, 483 F.3d 565, 568 (8th Cir. 2007) (officer's interpretation of consent reasonable where officer opened compartment inside vehicle in a "minimally intrusive manner" and "did no damage … in the process"); *U.S. v. Snow*, 44 F.3d 133, 135 (2d Cir. 1995) (allowing search of duffel bag inside vehicle in part because "no damage to the bags was required to gain access").

## STATEMENT OF RELATED CASES

Appellee is unaware of any known related cases pending in this Circuit.

DATED this 26th day of September 2018.

*/s/ Jeremiah Hudson*
Jeremiah M. Hudson
Attorneys for Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of September, 2018, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Jeremiah Hudson*
Jeremiah Hudson-Of the Firm
Attorney for Plaintiff-Appellee