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,
Defendants-Appellants,
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' REPLY BRIEF

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I. ARGUMENT

West failed to identify clearly established law that would alert Richardson, Seevers, and Winfield that their specific conduct would violate a constitutional right.[1] Instead, West relied on general and broad statements of law that are incapable of clearly establishing the law based on the specific facts confronting Appellants. Further, West pointed to case law that is simply insufficient to meet her burden of identifying clearly established law. As a result, the Appellants are entitled to qualified immunity.

A. West Articulated an Incorrect Framework for Analyzing the Clearly Established Law Prong of Qualified Immunity.

West argues that Appellants "misconstrue[d] the substantial body of case law" by stating that the Lower Court defined clearly established law at a high level of generality. Appellee Br., p. 9. West argues that the correct inquiry is whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation the officer confronted. *Id*. at pp. 10-11. West seems to suggest that the only requirement to satisfy the clearly established law prong is for the court to set forth the facts of the case. *Id*. at p. 11. West suggests that after establishing the facts,

[1] West's briefing addressed both the first and second prongs of qualified immunity. For purposes of this appeal, Appellants are not contesting the Lower Court's analysis of the first prong of the qualified immunity analysis. Instead, Appellants are only contesting the second prong of qualified immunity, and more specifically, the manner in which the Lower Court defined clearly established law. As a result, Appellants will not address West's analysis of the first prong of qualified immunity.

the court can then deny qualified immunity, even if it defines the clearly established law at a high level of generality. *Id.*

West's argument ignores and 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. In the Supreme Court's most recent decision addressing qualified immunity, the Court again re-emphasized the proper inquiry: "This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *Kisela v. Hughes*, __ U.S. __, __, 138 S.Ct. 1148, 1152 (2018). "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." *Id.* The Supreme Court further stated that "the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Id.* at 1153.

Likewise, the Ninth Circuit has also instructed lower courts to define clearly established law with specificity. In *Sharp v. County of Orange*, 871 F.3d 901 (9th Cir. 2017), the Ninth Circuit stated "we examine whether the violative nature of *particular* conduct is clearly established by controlling precedent, not whether the conduct violates a general principle of law." *Id.* at 910 (emphasis in original)

(quotations omitted). The Ninth Circuit further explained: "Except in the rare case of an 'obvious' instance of constitutional misconduct (which is not presented here), Plaintiffs must *identify a case* where an officer acting under similar circumstances as defendants was held to have violated the Fourth Amendment." *Id.* at 911 (emphasis in original) (quotations omitted). This process requires the Plaintiff to "point to prior case law that articulates a constitutional rule specific enough to alert *these* deputies *in this case* that *their particular conduct* was unlawful." *Id.* (emphasis in original).

Thus, both the Supreme Court and the Ninth Circuit instruct lower courts to define clearly established law with the specificity necessary to alert officers that their particular conduct was unlawful. In all instances except for rare circumstances, this analysis requires the court to identify precedent case law that squarely governs the facts of the present case. Accordingly, West's suggestion that the lower courts can define clearly established law with high generality so long as the court sets forth the specific facts of the case is simply inaccurate. Such an attempt to define clearly established law would not provide notice to law enforcement officers that their specific conduct might violation a constitutional right.

Certainly, in obvious circumstances, West would not be required to identify a specific case that squarely governs the facts of the present case. However, these types of obvious cases are "rare" and are "an exception to the specific-case requirement."

Sharp, 871 F.3d at 911-12. Further, the "obviousness principle" is "especially problematic in the Fourth Amendment context" as such categorical statements are "particularly hard to make when officers encounter suspects every day in never-before-seen ways." *Id.* at 912. As a result, "the obviousness principle has real limits when it comes to the Fourth Amendment." *Id.*

Here, West is not arguing that this is an obvious case that would allow her to avoid identifying a case that squarely governs the facts presented to Richardson, Seevers, and Winfield. Accordingly, West is required to define clearly established law with specificity in order to alert Richardson, Seevers, and Winfield that their specific conduct in this case violated a constitutional right. To do so, West must identify prior case law that articulates such a constitutional rule with specificity.

B. West Failed to Define Clearly Established Law With the Specificity Required that Would Alert Richardson That His Conduct Violated a Constitutional Right.

In her appellee brief, West continued to identify clearly established law at an impermissible level of generality. In regards to Richardson, West defined the clearly established law in two ways:

- An officer "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." Appellee Br., p. 13.

- "[C]onsent obtained under the threat of subjecting appellant to such an arrest cannot be said to be voluntary." Appellee Br., p. 14

As discussed more fully below, both of West's attempts at defining clearly established law fail to meet the specificity standards enunciated by the Supreme Court.

Further, the case law cited by West also does not identify clearly established law that would sufficiently alert Richardson that his specific conduct violated a constitutional right. The case law cited by West includes:

- *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999);
- *U.S. v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980); and
- *U.S. v. Darling*, No. CR-09-0627 EMC2010, WL 2802564 (N.D. Cal. July 14, 2010).

As discussed more fully below, the three cases cited by West are so significantly different in facts and law from the present case, that the cases cannot create clearly established law for this specific situation.

1. The General Statement of Law that "A Search Must be Performed Pursuant to a Warrant or An Exception to the Warrant Requirement" is Insufficient to Define Clearly Established Law in Richardson's Situation.

West first attempts to define clearly established law by stating that "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.'" (Appellee Br., p. 13.) This manner of defining clearly established law is nearly identical to the Lower Court's definition of clearly established law in this case. Below, the Lower Court defined 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.

Thus, both the Lower Court and West allege that the general and broad statement of law regarding the need to obtain a search warrant or have an applicable exception to the warrant requirement in order to search a home is sufficient to provide notice to Richardson that his specific conduct violated West's constitutional rights. This argument conflicts with the precedent established by the United States Supreme Court and must fail.

Importantly, this broad and general statement of law is not specific to Richardson's situation. "Specificity is especially important in the Fourth Amendment context," and therefore, "officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, __ U.S. at __, 138 S.Ct. at 1152.

Here, Richardson never entered West's house, or otherwise performed a search of West's home. Appellant Br., pp. 7-12. His involvement was solely limited

to obtaining consent from West, then informing his superior, Sergeant Hoadley, that consent was obtained. ER245 at 16:47-17:10; ER 272. Hoadley then made the decision to contact the on-call prosecutor who stated that no search warrant was required. ER332. Hoadley relayed all information to the SWAT team, who made the decision to conduct the search based on consent. ER183; ER330-31.

Therefore, as applied to Richardson, the general statement of law that "a search must be conducted pursuant to a warrant or an exception to the warrant requirement" has no applicability to the specific conduct that Richardson engaged in. Richardson's specific conduct was limited to speaking with and obtaining consent from West. He never entered the home to perform a search. As a result, the clearly established law applicable to Richardson must provide controlling guidance on how a law enforcement officer in a similar situation can legally obtain consent to search. West's, and the Lower Court's, definition of clearly established law focuses on law relating to the actual search of the house, rather than on law relating to Richardson's manner of obtaining consent. By focusing on law relating to the search of the house, West's proposed clearly established law fails to provide Richardson with notice or legal precedent that his actions of obtaining consent may have violated West's constitutional rights. In other words, the clearly established law does not "squarely govern the specific facts at issue." *Kisela*, __ U.S. at __, 138 S.Ct. at 1152

a. *Calabretta v. Floyd* Does Not Create Clearly Established Law To Alert Richardson That His Specific Conduct Violated a Constitutional Right.

As part of her obligation to identify prior precedent case law that would alert Richardson that his specific conduct violated a constitutional right, West cites to *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999). A careful review of the *Calabretta* decision demonstrates that the decision cannot create clearly established law for Richardson's specific conduct because: (1) *Calabretta* did not involve an issue relating to voluntary consent; and (2) the factual differences between *Calabretta* and the instant case "leap from the page." *Kisela*, __ U.S. at __, 138 S.Ct. at 1152

In *Calabretta*, the Department of Social Services obtained information from an anonymous source stating that she heard a child scream "No Daddy, no" at a nearby house, and then on a separate occasion, she heard a child from the same house scream "No, no, no." 189 F.3d at 810. The anonymous caller also stated that the occupants of the home were extremely religious and home-schooled their children. *Id.* Four days after receiving the anonymous tip, a social worker from the Department went to the home to investigate. *Id.* The mother answered the door and refused to let the social work enter the house. *Id.* at 810-11. However, the social worker saw the children through the door and noted that they "were easily seen and they did not appear to be abused/neglected." *Id.* at 811.

Ten days later, the social worker returned to the house with a police officer. *Id.* She informed the police officer that she needed assistance gaining access to the home so she could interview the children, but she did not tell the officer about the specific allegations. *Id*. They knocked on the door and the mother, without opening the door, informed them that she was not comfortable letting them in her home without her husband present. *Id*. The police officer believed that exigent circumstances were present. *Id*. It was disputed whether the officer informed the mother that he would force his way into the home if she did not admit them. *Id*. It is unclear whether the mother opened the door, or whether the officer forced his way into the home. *Id*. In any event, the social worker and officer gained entry into the home and proceeded to interview the children and investigate the allegations. *Id*.

The mother sued the social worker and police officer for damages, declaratory relief, and an injunction under 42 U.S.C. § 1983. *Id*. at 812. The social work and police officer moved for summary judgment on the grounds of qualified immunity, which the district court denied. *Id*. The social worker and police officer appealed. *Id*.

On appeal, the social worker and police officer conceded that, for purposes of the appeal, they did not have consent to enter the home. *Id*. Instead, they argued that their entry into the home was justified because "an administrative search to protect the welfare of children does not carry these requirements [special exigency or a

search warrant], and the social worker was doing just what she was supposed to do under state administrative regulations." *Id*. They requested that the court adopt a principle that "a search warrant is not required for home investigatory visits by social workers." *Id*. at 813. Further, they argued that the law was not clearly established that a social worker could not conduct a home investigatory visit without a search warrant. *Id*.

In conducting its analysis, the Ninth Circuit first noted that the case presented no emergency or exigency of any kind. *Id*. Therefore, the Ninth Circuit's inquiry centered on whether in "the absence of emergency, a reasonable official would understand that they could not enter the home without consent or a search warrant." *Id*. The Ninth Circuit concluded that a reasonable official would have known that this particular entry was barred. *Id*. The Ninth Circuit pointed to *White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986), to determine that the law was clearly established. The *White* case involved a child welfare investigation in which the Ninth Circuit found that "it was settled constitutional law that, absent exigent circumstances, police could not enter a dwelling without a warrant even under statutory authority where probable cause existed." *Calabretta*, 189 F.3d at 813. Therefore, the Ninth Circuit in *Calabretta* concluded that the social worker's and police officer's argument that "a search warrant is not required for home investigatory visits by social workers is simply not the law." *Id*. Instead, the law was

clearly established that there was no child welfare exception to normal search and seizure law. *Id*. at 813-814.

In the present case, West alleges that the *Calabretta* decision creates clearly established law that an official cannot coerce entry into a home without a search warrant or an exception to the warrant requirement. (Appellee Br., p. 13.) Although the *Calabretta* decision does reiterate this broad statement of law, the facts and holding in *Calabretta* simply do not apply to the present case.

First, *Calabretta* did not discuss consent or coerced consent in any manner. *Calabretta*, 189 F.3d at 812. Instead, the social worker and police officer conceded that consent was not applicable and instead argued that a child welfare exception to the warrant requirement existed to permit their entry. *Id*. Thus, the entire analysis lacked any discussion on whether consent was obtained, or whether consent was voluntary or coerced.

Here, the sole issue regarding Richardson is whether the consent he obtained was coerced or voluntary. This inquiry looks at Richardson's specific conduct to determine if the consent he obtained was voluntary. The decision in *Calabretta* has no impact or influence over this analysis at all. It was never address or discussed in *Calabretta*. Therefore, the *Calabretta* decision is incapable of creating clearly established law for the situation Richardson was confronted with. The *Calabretta*

decision does not inform Richardson that his specific conduct may have violated a constitutional right.

Second, *Calabretta* is factually distinguishable from the instant case. *Calabretta* involved a child welfare scenario in which no emergency was present and no consent was obtained. Here, Richardson responded to a potential emergency situation where Salinas was allegedly threatening West with a firearm in her home. ER312-14; ER319-21; ER244 at 1:15-3:50; ER245 at 11:09-13:40. After arriving at the home, he located West and asked for Salinas's location. ER245 at 14:15-16:00. During this conversation, in which the purpose was to locate the threat, Richardson informed West that she could get in trouble if Salinas was in her home and she lied to police officers about that fact. *Id*. West then informed Richardson that Salinas was inside her home. *Id*. Later, Richardson asked for consent to enter the home to apprehend Salinas, and West provided such consent. ER245 at 16:47-17:10.

Based on the foregoing, the facts of *Calabretta* are so distinguishable from the facts of the instant case that the *Calabretta* decision cannot create clearly established law for Richardson's particular conduct. The differences between the cases simply "leap from the page."

2. The Statement of Law that "Consent Obtained Under Threat of Subjecting Appellant to Such an Arrest Cannot be Said to be Voluntary" is Insufficient to Define Clearly Established Law in Richardson's Situation.

As an alternative theory, West alleges that it is clearly established that "consent obtained under the threat of subjecting appellant to such an arrest cannot be said to be voluntary." Appellee Br., p. 14. West argues that West consented to the search of her home as a "direct result of Richardson's threat to arrest her for felony harboring." Appellee Br., p. 14. To support this definition of clearly established law, West points to two cases: (1) *U.S. v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980); and (2) *U.S. v. Darling*, No. CR-09-0627 EMC2010, WL 2802564 (N.D. Cal. July 14, 2010). Both of these cases are distinguishable and insufficient to identify and define clearly established law in this particular case.

a. The Factual and Legal Differences Between the Present Case and *U.S. v. Ocheltree* "Leap From the Page," and Therefore *Ocheltree* Cannot Create Cleary Established.

In *Ocheltree*, the defendant arrived on a flight at the airport in San Diego and aroused suspicions of the Drug Enforcement Administration. 622 F.2d at 993. The defendant returned to the airport the next day, purchased flight tickets, checked two suitcases, and carried a briefcase as a carryon bag. *Id*. The defendant was stopped by a police officer. *Id*. The officer advised that he was conducting a narcotics investigation and asked the defendant if he would go to the officer's office for a talk.

Id. Defendant consented. *Id*. Once in the office, the officer asked the defendant if he had any narcotics, which the defendant denied. *Id*. The officer asked if he could search the briefcase. *Id*. The officer informed the defendant that he was under no obligation to permit the search. *Id*. However, if permission were denied, the officer would attempt to get a search warrant (even though the officer lacked probable cause to obtain such a search warrant). *Id*. The defendant consented to the search, and the search revealed narcotics paraphernalia in the briefcase. *Id*. The defendant was detained while the officer obtained a warrant to search his suitcase. *Id*. The search of the suitcase disclosed contraband. *Id*.

The defendant moved to suppress the evidence found in the suitcase, claiming that the evidence was fruit of an unlawful search. *Id*. The district court denied the motion to suppress. *Id*. The defendant appealed. *Id*.

On appeal, the Ninth Circuit found that the search of the briefcase was not voluntary. *Id*. at 994. The Ninth Circuit stated that when the officer informed the defendant that if consent was not forthcoming he would attempt to secure a search warrant, there was a clear implication that the defendant would be retained in custody until the warrant was obtained. *Id*. As a result, the defendant knew that if he did not consent, he would not be permitted to board his plane and leave the jurisdiction of the officer. *Id*. The Ninth Circuit found that, at the time the officer threatened to detain the defendant until a warrant was obtained, the officer did not

have probable cause to detain the defendant. *Id*. The Ninth Circuit also cited to *Dunaway v. New York*, 442 U.S. 200 (1979), to establish that a custodial detention on less than probable cause constitutes an unlawful seizure of a person. *Id*. at 993.

Based on the foregoing, the Ninth Circuit found that the threat to the defendant amounted to a threat to arrest the defendant on less than probable cause, which is unlawful under *Dunaway*, unless the defendant consented to the search. *Id*. at 994. Therefore, the consent was not voluntary and the evidence found in the suitcase should have been suppressed. *Id*.

Based on the Ninth Circuit's *Ocheltree* decision, West appears to argue that it was clearly established law that threatening a person with any type of arrest if the person refused to consent cannot be considered voluntary consent. Appellee Br., p. 14. West seems to suggest that *Ocheltree* created a bright line rule stating that the presence of a threat to arrest, standing alone, requires a finding of involuntary consent. *Id*. This is not a correct view of the *Ocheltree* decision.

First, the *Ocheltree* decision is distinguishable from the instance case. In *Ocheltree*, the threat of arrest was specifically attached to whether the suspect consented to the search. 622 F.2d at 993-94. If the suspect did not consent to the search, he would be subject to a *Dunaway* arrest. *Id*. Here, Richardson's alleged threat of arrest was not attached to whether West consented to a search of her home.

Instead, it was predicated on whether or not she would be truthful to police regarding Salinas's location. ER245 at 14:15-16:00. This is a key and material difference.

Further, in *Ocheltree*, the officer threatened to subject the suspect to arrest without legal justification. 622 F.2d at 993-94. The officer lacked probable cause to detain the suspect, yet threatened to do so anyway. *Id.* Here, Richardson had a legal and valid basis to inform West that her actions could subject her to arrest. Richardson understood that Salinas had felony warrants for his arrest. ER245 at 14:15-16:00. Two witnesses, including a first-hand witness, had informed Richardson that Salinas was inside West's home. ER244 at 1:15-3:50; ER245 at 11:09-13:40. Richardson was also informed that West might not be truthful about Salinas's location, which could be considered the crime of harboring. ER171-72. Based on this information, Richardson had legal justification for informing West that she could be arrested if she was untruthful about Salinas's location. Accordingly, Richardson's alleged threat cannot be considered a threat to subject a person to an unlawful or illegal arrest, such as the *Dunaway* arrest in the *Ocheltree* decision.

The foregoing distinguishing factors are significant. *Ocheltree* involved a threat specifically attached to whether or not the suspect consented, and involved a threat that had no legal justification. Here, Richardson's alleged threat was specifically attached to whether or not West was truthful to him about Salinas's location, and the threat to arrest was legally justified based on the information

Richardson possessed. These distinguishing factors are so extreme and significant that the *Ocheltree* decision cannot be determined to create clearly established law in Richardson's specific situation. The *Ocheltree* decision does nothing to inform Richardson that his particular conduct based on the specific facts confronting him would amount to a constitutional violation. Again, the differences in these two cases simply "leap from the page."

Second, the Supreme Court has repeatedly stated that bright line rules or categorical rules should not be used in the Fourth Amendment analysis. *U.S. v. Banks*, 540 U.S. 31, 35-36 (2003). Although the *Ocheltree* case held that the threat of a *Dunaway* arrest in that particular circumstance rendered a consent to search involuntary, it does not stand for the bright line proposition that all threats to arrest render consent involuntary.

In fact, years after the *Ocheltree* case was decided, the Ninth Circuit issued its decision in *U.S. v. Patayan Soriano*, 361 F.3d 494 (9th Cir. 2004). In that case, police officers and agents from the United States Postal and Inspection Service went to a hotel without a warrant to investigate a mail theft scheme. *Id*. at 500. Officers and agents found the girlfriend of the suspect in the hotel's lobby and asked her for consent to search the hotel room. *Id*. The agent informed her that she could refuse consent, but that if she did, he would obtain a search warrant. *Id*. The girlfriend stated repeatedly that she did not know what to do and that she was concerned about her

two children who were in the hotel room with the suspect. *Id*. At this point, an officer told the girlfriend that if she did not consent, she might be arrested and her children would be placed in custody with social services. *Id*. The postal agent interrupted the officer and stated that her children would only be removed if she were arrested and that they did not have any reason to arrest her. *Id*. Eventually, the girlfriend consented to the search. *Id*. The search disclosed evidence that lead to the arrest of the suspect. *Id*.

The suspect moved to suppress the evidence found during the search claiming that the consent of the girlfriend was invalid because of threats and intimidation. *Id*. at 501. During the suppression hearing, the girlfriend testified that she was scared and only gave consent because she wanted to prevent her children from going to a social worker. *Id*. The district court concluded that her consent was voluntary. *Id*.

On appeal, the Ninth Circuit first considered the fact that an officer threatened the girlfriend that her children might be taken away. *Id*. The Ninth Circuit found that the district court did not commit clear error by finding that the threat did not render consent involuntary. *Id*. The Ninth Circuit pointed to the fact that after the threat was issued, the agent clarified that the children would only be taken away if the girlfriend was arrested, and since she was not a suspect, it was unlikely that she would be arrested. *Id*. at 503. Therefore, it was not error to conclude that the threat had been abated by the time the girlfriend actually provided consent. *Id*.

Following this analysis, the Ninth Circuit then continued to analyze the customary five factors for determining if consent was voluntary. *Id*. at 503-507. Based on all relevant factors, the Ninth Circuit concluded that the district court properly denied the motion to suppress. *Id*. at 507.

Thus, even if the *Ocheltree* decision applied to the present case, the *Ocheltree* decision does not create a bright-line rule stating that a threat to arrest renders a consent to search as involuntary. Instead, as discussed in *Patayan Soriano*, a threat to arrest does not automatically render a consent involuntary, but is simply a factor to be considered along with the customary five factors for determining voluntariness of consent. And, when the threat to arrest is abated before a person provides consent, the significance of such a factor is reduced.

Here, the alleged threat occurred when Richardson informed West that Salinas had felony warrants for his arrest and that she could get in trouble for harboring a felon if he was in her home and she was untruthful to police about that fact. ER245 at 14:15-16:00. After learning of this, West informed officers that Salinas was inside her home. *Id*. Since the threat to West was that she could be arrested for being untruthful about Salinas's location, such a threat was abated when West cooperated and informed police that Salinas was located inside her house. After she cooperated, she was no longer subject to the alleged threat. After that point, no law enforcement officer threatened West in any manner. ER275.

Once the threat was abated, Richardson approached West a second time and asked for consent to enter the house to apprehend Salinas, and West provided such consent. ER245 at 16:47-17:10. At this point, West was no longer under any threat of arrest.

Based on the foregoing, it is clear that the *Ocheltree* decision does not create clearly established law for Richardson's specific conduct. To the extent that the *Ocheltree* decision creates any clearly established law, such clearly established law is only applicable to situations where an officer threatens a person with a *Dunaway* arrest, and such arrest is specifically attached to the person's refusal to consent to a search. That is not the situation in the present case. Here, the alleged threat to arrest was specifically attached to whether or not West was truthful about the location of Salinas. The threat had no connection to the issue of consent. Further, the facts of the *Ocheltree* decision are so different than the present case, that the *Ocheltree* decision is simply incapable of providing Richardson with notice that his specific conduct might violation a constitutional right. Thus, the *Ocheltree* decision does not support a finding that Richardson violated clearly established law.

b. *U.S. v. Darling* Cannot Create Clearly Established Law for This Particular Case Because it is Not a Supreme Court or Ninth Circuit Decision.

West also points to *U.S. v. Darling*, 2010 WL 2802564, No. CR-09-0627 EMC (N.D. Cal. July 14, 2010), to support her definition of clearly established law

that "consent obtained under threat of subjecting appellant to such an arrest cannot be said to be voluntary." Appellee Br., p. 14. However, the *Darling* decision cannot create clearly established law for Richardson's specific situation. First, the *Darling* decision is an unpublished decision from the Northern District of California. *See Darling*, 2010 WL 2802564. Clearly established law must be derived from controlling precedent of the Supreme Court or the Ninth Circuit, or otherwise be embraced by a consensus of courts outside the relevant jurisdiction. *Sharp v. County of Orange*, 871 F.3d 901, 911 (9th Cir. 2017). The purpose of requiring precedential case law from the Supreme Court or Ninth Circuit is to ensure that the defendant officers have proper notice that their specific actions might violate a constitutional right. *Id*. An unpublished district court case from the Northern District of California is insufficient to provide Richardson with notice that his specific conduct in Idaho might violate the constitution. Accordingly, the *Darling* decision cannot create clearly established law in this situation.

Second, the *Darling* decision cannot create clearly established law for the same reasons discussed above relating to the *Ocheltree* decision. Like the *Ocheltree* decision, the *Darling* decision only applies in cases where the officer makes a threat of arrest—without legal justification—that is specifically attached to the decision of whether or not to consent to a search. *Darling*, 2010 WL 2802564 at *1-4. The present case lacks such a situation.

C. West Failed to Define Clearly Established Law With the Specificity Required that Would Alert Seevers and Winfield That Their Conduct Violated a Constitutional Right.

West appears to define clearly established law in regards to Seevers and Winfield in two ways:

- "It is well-established that a search or seizure may be invalid if carried out in an unreasonable fashion." Appellee Br., pp. 19-20.
- "[T]he unnecessary destruction of property while conducting a search is unconstitutional." Appellee Br., pp. 21-23.

As discussed more fully below, both of West's attempts at defining clearly established law fail to meet the specificity standards enunciated by the Supreme Court.

Further, the case law cited by West also does not identify clearly established law that would sufficiently alert Seevers and Winfield that their specific conduct violated a constitutional right. The case law cited by West includes:

- *Hagar v. Rodbell*, No. CV10-2748-PHX-DGC, 2012 WL 827068 (D. Arizona March 12, 2012);
- *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997); and
- *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000).

As discussed more fully below, the three cases cited by West are so significantly different in facts and law from the present case, that the cases cannot create clearly established law for this specific situation.

1. West's Definition of Clearly Established Law Is Insufficient to Provide Seevers and Winfield with Notice that their Specific Conduct Might Violation a Constitutional Right.

Both of West's identified statements of law are too broad and general to create clearly established law for the specific situation confronting Seevers and Winfield. The first statement of law—It is well-established that a search or seizure may be invalid if carried out in an unreasonable fashion—is nearly identical to the manner in which the Lower Court defined clearly established law. *See* ER25. The Supreme Court has already rejected this definition of clearly established law: "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Further, West's second definition of clearly established law—the unnecessary destruction of property while conducting a search is unconstitutional—likewise is too general and broad to inform Seevers and Winfield that their specific conduct may violate a constitutional right. The broad statement that a search cannot result in unnecessary damage does very little to inform Seevers and Winfield whether deploying gas into a home containing a violent and threatening suspect amounts to

a constitutional violation. Instead, precedential case law that squarely governs the specific facts Seevers and Winfield confronted is required to identify clearly established law.

2. The Case Law Cited By West Is Insufficient to Create Clearly Established Law.

West cites to three cases that she seems to allege create clearly established law. For the following reasons, these three cases fail to create clearly established law for the specific facts confronting Seevers and Winfield.

a. *Hagar v. Rodbell* is Not Precedential Case Law and is Distinguishable from the Present Case.

The Lower Court defined clearly established law for Seevers' and Winfield's specific situation as: "It is well-established that a search and seizure may be invalid if carried out in an unreasonable fashion." ER25. West seems to argue that this broad and general statement of the law is sufficient to define clearly established law in Seevers' and Winfield's specific situation because the Lower Court cited to *Hagar v. Rodbell*, No. CV10-2748-PHX-DGC, 2012 WL 827068 (D. Arizona March 12, 2012), in a different part of the Lower Court's decision. Appellee Br., p. 21. Even if the Lower Court intended to use the *Hagar* decision to define clearly established law, such reliance on *Hagar* is insufficient.

First, the *Hagar* decision is an unreported district court decision from the District of Arizona. As discussed more fully above, this type of decision is

insufficient to create clearly established law that the specific conduct of Seevers and Winfield in Idaho might violate a constitutional right. *See Sharp*, 871 F.3d at 911.

Second, the court in *Hagar* found that "It is not clear that the alleged damage rises to the level of a constitutional violation because officers executing a search warrant occasionally 'must damage property to perform their duty.'" *Hagar*, 2012 WL 827068 at *3 (emphasis added) (quoting *Dalia v. United States*, 441 U.S. 238, 258 (1979)). Since the *Hagar* court found that it was "not clear" that the officers violated a constitutional right by damaging property during the search, such a decision cannot stand for the opposite proposition—that Seevers and Winfield should have known that damage occurring during a search would always amount to a constitutional violation. Thus, the *Hagar* decision cannot create clearly established law.

b. *Liston v. County of Riverside* Cannot Create Clearly Established Law Because it is Distinguishable from the Present Case.

West alleges that *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997), clearly establishes that "the unnecessary destruction of property while conducting a search is unconstitutional." Appellee Br., p. 21. In *Liston*, police officers raided a home for the purpose of apprehending a drug manufacturing suspect and searching for evidence relating to such criminal activity. *Liston*, 120 F.3d at 968. Unbeknown to the officers, the suspect had sold the home to a family days before the raid. *Id*.

After knocking and announcing, the officers broke down the front door with a battering ram, tackled and injured the father in the house, ransacked the home and yard, destroyed property, and detained the family for approximately one and one-half hour. *Id*. Shortly after the officers entered the house, the officers learned that the suspect had sold the house to the family and no longer owned or resided at the house. *Id*. at 969-72. Nonetheless, the officers continued to search the home for approximately one and one-half hours. *Id*. The search resulted in a broken door, broken fence, holes in the backyard, and garbage and personal property littered throughout the house. *Id*.

The family sought damages for excessive force, unreasonable detention, and destruction of property. *Id*. at 976-79. The Ninth Circuit found that the officers were not entitled to qualified immunity for the excessive force and unlawful detention claims.[2] *Id*. However, for the destruction of property claim, the Ninth Circuit stated: "As an initial matter, it is not clear that these actions rise to the level of a constitutional violation, as officers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Id*. at 979 (emphasis added) (quoting *Dalia*, 441 U.S. at 258). The Ninth Circuit found that "[u]ntil the officers

[2] West's brief quotes the excessive force portion of the Ninth Circuit's analysis and attempts to apply the analysis to the present case. Appellee Br., p. 22. However, West has not alleged an excessive force claim in the present case, therefore the analysis does not apply.

learned that they were in the wrong house, the officers could have reasonably believed, under these precedents, that the way they conducted the search was lawful. As a result, they would be entitled to qualified immunity." *Id*. (emphasis added). But, the Ninth Circuit found that the officers would not be entitled to qualified immunity for damage that the officers caused to the house after the officers learned that the house no longer belonged to the suspect. *Id*. Therefore, the Ninth Circuit remanded to the district court to determine if any damage occurred after the officers learned that they were in the wrong house. *Id*.

The *Liston* decision does not create clearly established law that damage to property during a search violates a constitutional right. Instead, *Liston* stands for the proposition that police officers who intentionally damage property after knowing that they were in the wrong home violate the Fourth Amendment. *Id*. That is not the situation in the present case. Here, there is no evidence that Seevers and Winfield caused any property damage after learning that Salinas was not inside the home. Instead, their specific conduct of creating a tactical plan and then implementing the plan by (1) calling out for Salinas to exit the home; (2) deploying gas into the home to coerce him out; and (3) entering the home to look for him, all occurred prior to discovering that Salinas was not actually inside the home. As a result, *Liston* does not provide notice to Seevers and Winfield that their specific actions in the present

case would amount to a constitutional violation. To the contrary, *Liston* strongly suggests that these officers are entitled to qualified immunity here.

c. *Mena v. City of Simi Valley* Cannot Create Clearly Established Law Because it is Distinguishable from the Present Case.

West also cites to *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000), to support her proposed clearly established law that "the unnecessary destruction of property while conducting a search is unconstitutional." Appellee Br., p. 22. In *Mena*, police officers searched a home pursuant to a search warrant, and while doing so, intentionally broke down several doors. *Mena*, 226 F.3d at 1041. Two of the doors were unlocked and opened, yet the officers broke the doors. *Id*. Additionally, one officer kicked another open door saying, "I like to destroy these kind of materials, it's cool." *Id*. The Ninth Circuit found that this conduct was not reasonably necessary to execute the search warrant. *Id*.

The differences between the *Mena* decision and the present case are significant. In the present case, there is no allegation that Seevers and Winfield intentionally damaged property because they liked to destroy such materials or thought it was "cool." There is not a single fact or allegation to support a conclusion that Seevers and Winfield created and implemented the tactical plan because they liked to damage homes or thought it would be "cool" to deploy gas into a home. Instead, the relevant inquiry in the present case is whether Seevers and Winfield

were justified in creating and implementing a tactical plan that used gas in a situation where a potentially armed and threatening suspect was barricaded in a home. The holding in *Mena* does not providing any precedential notice to Seevers and Winfield regarding the specific facts that they were confronted with. Accordingly, *Mena* cannot create clearly established law for the instant case.

II. CONCLUSION

The law was not clearly established that Richardson's specific conduct of informing West of potential criminal liability, and then later calmly asking for consent to search her home, would amount to a constitutional violation. Further, the law was not clearly established that Seevers and Winfield's specific conduct of creating and implementing a tactical plan that used gas in a situation where a potentially armed and threatening suspect was barricaded in a home would result in a constitutional violation. Accordingly, Richardson, Seevers, and Winfield are entitled to qualified immunity, and the Lower Court erred in denying immunity to them.

DATED this 17th day of October, 2018.

s/ Landon S. Brown
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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 the 17th day of October, 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 17th day of October, 2018.

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