UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY STREM, Plaintiff-Appellant, v. COUNTY OF SAN DIEGO, SAN DIEGO SHERIFFS DEPUTIES WILLIS, (#9925) MYERS (#7284) and DOES 1-5, Defendants-Respondents.	)	USCA No. 17-56709 USDC No. 15-cv-2120-KSC (JMA)

Appeal from the United States District Court
for the Southern District of California
Honorable Karen S. Crawford, Magistrate-Judge Presiding by Consent

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. There is a Problem with the Way Respondents' State the Facts

Respondents' factual recitations throughout their brief fail to abide by the requirement that "The court must draw all reasonable inferences in favor of the nonmoving party. The court is obligated to construe the record in the light most favorable to that party." *Sharp v. Cty. of Orange,* 871 F.3d 901, 909 (9th Cir. 2017).

Instead, their recitation of the facts (both in the Statement of Facts and throughout the brief) assumes the Deputies' version of events, is the truth[1]. See for instance, page 20, where they describe "an agitated, non-compliant, suicidal, potentially armed suspect holding bloody napkin of unknown origin, who admits to tensing up in resistance to those efforts . . .[2]" On page 26, they describe "These circumstances indicated that they needed to act quickly to minimize the chance Strem could harm himself or others, to minimize his ability to access a weapon[3], and to expedite their assessment of his or a victim's injury." On page 28, they

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[1/] Such a posture would be acceptable if they were defending a jury verdict in their favor.

[2/] omitting his explanation why.

[3/] They fail to admit that he made no furtive gestures or efforts to retreat to his home. Further, the only visible bulge was inside his chest cavity.

assert that they were facing an “agitated, non-compliant, suicidal individual suspected of threatening to u

repeated that he's not threatening anymore; and (7) that "the doctor is talking to him about what he's upset about right now."

They also ignore that when dispatch called back and spoke to Ms. Branam, asking if she was still on the phone with him, Ms. Branam related that "the doctor just hung up with him, he said another doctor's office, he hung up on him because another doctor's office was calling." The Deputies fail to explain how they factored in this knowable fact, instead professing that they believed he was refusing to communicate.[7]

Their analysis ignores (1) what Craig Duran told them[8]; (2) the clearly visible disabled placard; and (3) Mr. STREM's actual physical condition when he presented himself, particularly including a visible bulge in his chest and a

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[7] ARB @ 8. Willis testified that he considered it a positive fact that a doctor was involved. E.R. Vol II @ 127 (page 50), lines 20-22.

[8] They did not did not ask any questions about STREM's physical or mental state, whether he owned a gun, or had he ever threatened suicide. They failed to acknowledge at the scene Duran's specific warning that Mr. STREM had a heart condition/pacemaker and asked them not to use a TASER. They never denied that Mr. Duran made these statements. Instead, they claim they could not provide information because "Duran's connection to Strem and Strem's condition was unverified at that time." They never asked! They failed to ask basic questions and conducted NO investigation into any of the information which had been presented to them. In other words, they claim that they should benefit from their own wilful ignorance.

significant scar down the middle of his torso. E.R. Vol II @ 197.

They disregard that Deputy Willis told IA that Mr. STREM did not have a gun in his hand or his waistband. E.R. Vol II @ 219, lines 12-15. Further, his pockets were turned out at the time he exited the house, and were still turned out at the hospital when he was photographed. E.R. Vol II @ 84, fn. 6.

The assertion that Deputy Myers heard a very distinct "click which was what I recognized as part of a gun making a noise" is patently unbelievable when you consider that (1) he never told Deputy Willis of this potentially dangerous fact or (2) he failed to write this in his report or tell the IA investigator about it. ARB @ 8-9

3. What About The Sheriff's Department's Policy?

Law enforcement policy is particularly important in assessing the reasonableness of an officers' actions. *Wilson v. Layne*, 526 U.S. 603 (1999)

behind their backs. . . . The use of restraining devices may not be necessary on all handicapped prisoners. An example would be the arrestee that is a paraplegic. This type of arrestee would not need leg restraints." The sheriff does not define "handicapped" in its policy. Exhibit 35.

There was no attempt by Willis to either acknowledge or comply with this policy. "Q. Are handcuffs always required to be behind -- is someone always required to be handcuffed behind their back? A. Yes." Willis = ʊ f

criminally speaking." E.R. Vol II @ 119 (page 17), lines 5-9.

5. Respondents Pick and Choose Which Supreme Court Doctrine They Want to Follow.

Respondents give great weight to the Supreme Court's command that "[S]pecificity 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." *Kisela v. Hughes*, 584 U.S.___, 2018 U.S. LEXIS 2066 (2018) at *5 (citing *Mullenix v. Luna*, 577 U. S. ___, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam))

They then proceed in a series of footnotes to nitpick the multitudes of cases upon which Plaintiff relied. Taken to its logical conclusion, such an analysis would require the adoption of a tabula rasa, where no case is precedent unless *every single fact* unfolds exactly the same way, in exactly the same order, at the same rate, with the same intensity. Where do courts draw the line? Is a case distinguishable because the officer in the cited case was right handed but the defendant-officer is left handed?

6. *Respondents Pick and Choose Which Supreme Court Doctrine They Want to*

initial use of handcuffs was appropriate.

Nor is *Injeyan v. City of Laguna Beach*, 645 F. App'x 577, 579 (9th Cir. Unpub. 2016) applicable. That case dealt with "a handcuffing during the execution of a search warrant, where a seemingly dangerous chemical was involved and prompt action was required to protect public (and the officers') safety, and where the arrestee did not display any signs of pain during the handcuffing." Here, Respondents admit Mr. STREM was in pain. ARB @ 12. Everything else is different - a crime was being investigated and public safety was at issue.

had physically or verbally threatened any of the Bremerton police officers or in any other manner breached the peace. . . ."

Their attempt to distinguish *Winterrowd v. Nelson*, 480 F.3d 1181 (9th Cir. 2007) is unusual. As they describe the case, officers were performing a pat-down of plaintiff[11] and did not have probable cause to arrest[12]; there was no indication that plaintiff was currently armed or posed a safety threat[13]; the officers applied greater force after plaintiff screamed in pain[14]; and the officers admitted that they could have effectuated the pat-down without forcing plaintiffs arms behind

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11/ which they *never* attempted here. "Incident to a valid investigatory stop, an officer may, consistent with the Fourth Amendment, "conduct a brief pat-down (or frisk) of an individual when the officer reasonably believes that 'the persons with whom he is dealing may be armed and presently dangerous.'" *Sialoi v. City of San Diego*, 823 F.3d 1223, 1236 (9th Cir. 2016) Such a patdown is limited to "exterior clothing." *United States v. Johnson*, 581 F.3d 994, 999 (9th Cir. 2009)

In this case, that would be Mr. STREM's pajama bottoms. Why did the officers in *Winterrowd* not skip the patdown and proceed to immediately handcuff Winterrowd if, as Respondent's argue, such a course of action would be constitutional? Perhaps because those officers realized that such conduct was unconstitutional.

12/ nor did they here.

13/ That was disputed. At a minimum, his manner of presentation and appearance belayed that contention completely.

14/ a circumstance admittedly lacking here, although Respondents certainly took no action to alleviate the source of the pain until the handcuffs were removed.

directed be the focus of the analysis. What is required is "reasonable" and "fair" notice, which these officer had in spades.

8. The Supreme Court's Frustration with Certain Decisions of this Court Is of No Import Here.

Although the Supreme Court recently reiterated its displeasure with this Court's analysis of qualified immunity in certain cases, see *Kisela v. Hughes*, 2018 U.S. LEXIS 2066 (2018), nothing in *Kisela* changed the applicable legal rules as decided in *Dist. of Columbia v. Wesby*, 138 S.Ct. 577 (2018)[16] (AOB @ 36).

Rather, the Supreme Court's took issue with this Court's reliance upon *Deorle v. Rutherford* and *Glenn v. Washington County*. In *Deorle* "the differences between that case and the case before us leap from the pages." *Glenn* was decided "after the shooting at issue here."

By contrast, the facts of both those cases, each decided prior to the events at issue here, support a denial of qualified immunity, as Mr. STREM described n his Opening Brief.

9. Mr. STREM Does Not Seek a Finding of Monell Liability.

Respondents argue that no basis for *Monell* liability was established. This was not an issue in the case. The COUNTY was only a Defendant in the dismissed

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[16/] Nor is *Kisela* remotely factually analogous to this case.

state law claims, which, for the reasons argued in the Opening Brief, should be reinstated. AOB @ 58.

10. Last, but not least, this Court has essentially decided this case already.

In *Orr v. Brame*, 2018 U.S. App. LEXIS 6094 (9th Cir. Mar. 12, 2018)[17], on the morning of August 3, 2013, Officer Brame pulled Mr. Orr over because he suspected him of driving under the influence of drugs or alcohol. Mr. Orr was a 76-year-old man with slurred speech and difficulties balancing, resulting from a brain stem stroke he suffered in 2006.

His disabilities caused him to fail several sobriety tests. However, Officer Plumb arrived at the scene with a breathalyzer. Mr. Orr blew a 0.0, indicating he had not been drinking. He testified that he repeatedly told the officers he had suffered from a stroke which affected his balance. (The officers insisted at trial that plaintiff used the word "neurological condition") The officers nevertheless

determined he was not under the

> officers in far more dangerous situations." *Orr v. Brame* 2018 U.S. App. LEXIS 6094, at *6.

Mr. STREM relied upon each of these three cases, and more. Rather than addressing these cases, Respondents also rely on cases that involved lesser force used by officers in far more dangerous situations.

CONCLUSION

Food for thought can be found in the statements of District Judge Samuel B. Kent in *Barlow v. Owens*, 400 F.Supp.2d 980 (S.D.Tex. 2005). Relying upon *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), he stated:

> However, the Court wants to note that judicial sanction searches and seizures based entirely on a perceived need for strict law enforcement, rather than on constitutional principles, is the first step down the slippery slope to a police state . . . Precedent is often created by cases in which police have had to deal with obnoxious and genuinely criminal citizens, but by deciding these cases without reference to the broader picture of a generally law-abiding populace deserving of constitutional protection creates an environment in which real abuse can occur.
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> *Id.* at 984-985.

This case presents such a "broader picture of a generally law-abiding populace deserving of constitutional protection" subject to "an environment in which real abuse can occur." The Deputies knew what they were doing was wrong.

Based upon the foregoing, this C

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief is proportionately spaced, has a typeface of 14 points or more and, according to the word processing program used to prepare it, contains 3507 words.

Executed under penalty of perjury on April 16, 2018 at San Diego, California.

s/ Keith H. Rutman
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TIMOTHY STREM