No. _____

In the Supreme Court of the United States

CITY OF LOS ANGELES, JULIO BENAVIDES, and MARIO FLORES,

Petitioners,

v.

ROBERT CONTRERAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment's reasonableness standard require that a suspect threaten a police officer with a weapon before the police officer can use deadly force to apprehend the suspect, or does *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) allow a police officer to use deadly force to prevent the suspect's escape if based on the totality of the circumstances, the officer has probable cause to believe the suspect poses a threat of serious physical harm to the officer or others, and where feasible some warning has been given?

2. Does *Tennessee v. Garner, supra,* 471 U.S. 1 defeat a police officer's entitlement to qualified immunity by providing fair and clear warning that it is unreasonable under the Fourth Amendment for a police officer to use deadly force to apprehend a fleeing suspect where the officer has probable cause to believe the suspect has just committed a crime involving the infliction or threatened infliction of serious physical harm, if after the shooting it is discovered the suspect was unarmed?

PARTIES TO THE PROCEEDING

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"[J]ust as officers are required to follow the law, so too are they entitled to be protected by it as they confront the daily challenges of their work responsibilities." *Gonzales v. City of Anaheim,* 747 F.3d 789, 800 (9th Cir. 2014)(Trott, dissenting). An officer should be able to "rely on the authoritative constitutional guidance the judiciary has provided for them as to what they may do when confronted by a suspect who poses an immediate threat to their safety and the safety of others." *Id.* Here, the Ninth Circuit's four-page unpublished memorandum affirming a $5.7 million dollar judgment against Los Angeles Police Department Officers Julio Benavides and Mario Flores on an excessive force claim and denying them qualified immunity is so contrary to judicial precedent that it utterly stripped these officers of the very protection the judicial precedent is supposed to provide.

Officer Benavides and Flores were trying to apprehend Robert Contreras who had seconds earlier committed a drive-by shooting – he had attempted to murder two people by firing a gun at them from a moving vehicle at 7:30 in the evening on a busy Los Angeles street. To avoid arrest, Contreras engaged the officers in a dangerous vehicle pursuit, pulled into the parking lot of a fast-food restaurant at a high rate of speed, and before the vehicle even came to a full stop, jumped from the vehicle and engaged them in a foot pursuit. As Contreras ran from the officers he kept reaching for "something" in his right front pants pocket, eventually took the "something" out of his pocket and ran with it in his hand. The officers believed the "something" Contreras was running with

was a gun. Contreras did not respond to Officer Benavides's repeated commands to "drop his gun" and "stop." Even after Officer Benavides shot at Contreras, he continued to flee. Contreras ducked out of sight in an alley. When the officers reached the mouth of the alley, Contreras was standing at the end of the alley facing towards a gate. Believing Contreras was still armed and dangerous, Benavides and Flores each fired two rounds at him, striking him four times. After the shooting the only thing they recovered from Contreras was a cell phone. Contreras survived the shooting but his injuries were serious.

In *Tennessee v. Garner, supra*, 471 U.S. 1, a case that required this Court to determine the constitutionality of the use of deadly force to prevent the escape of a suspected felon, the Court concluded that "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner, supra,* 471 U.S. at p. 3. A suspect is deemed to pose a serious threat of harm to the officer or others "if the suspect threatens the officer with a weapon *or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm . . .*" *Id.* at 11-12 (italics added). In this circumstance, *Tennessee v. Garner* instructs, "deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Ibid*.

Even if Contreras never threatened them with a weapon, Officer Benavides and Flores undoubtedly had probable cause to believe Contreras had just committed

a crime involving the infliction of serious physical harm and he was definitely attempting to evade arrest by flight. In the precious split-second they had to decide whether they should use deadly force to prevent his escape, they should have been able to rely on *Tennessee v. Garner* and its progeny; cases that make clear that a suspect does not have to threaten an officer with a weapon before an officer can use of deadly force.

In its four-page unpublished memorandum, the Ninth Circuit affirmed the judgment without attempting to carefully balance the "nature and quality of the intrusion" on Contreras's Fourth Amendment interests against "the countervailing governmental interests" in capturing a violent fleeing suspect. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The Ninth Circuit ignored the critical facts: Contreras had just attempted to murder two people by firing a gun at them from a moving vehicle and was fleeing the police. In direct contravention of this Court's repeated instruction that the facts must be viewed through the prism of a reasonable officer on the scene and not with the benefit of 20/20 hindsight vision (*Graham v. Connor,* 490 U.S. at 396), the panel determined "reasonableness" based on facts that the officers could not possibly have known until after the shooting was over — Contreras was unarmed, injured, and physically trapped. (App. A.)

Denying their assertion of qualified immunity, the panel erroneously concluded *Tennessee v. Garner, supra,* 471 U.S. 1, and the Ninth Circuit's opinion in *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997) provided the officers fair and clear warning that deadly force was unreasonable in the circumstances they

confronted. (App. A.) Nothing about either of these opinions provided these officers with sufficiently fair and clear notice that using deadly force to capture Contreras under the particularized circumstances they confronted would violate the Fourth Amendment. *Brosseau v. Haugen*, 543 U.S. 194, 19, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). If anything, these two opinions provided clear warning of what the officers *could* do – that under the particularized circumstances they confronted, apprehending Contreras with deadly force was reasonable under the Fourth Amendment.

The Ninth Circuit's memorandum cannot be reconciled with existing judicial precedent; *Tennessee v. Garner, supra,* 471 U.S. 1, and its progeny dictate a contrary conclusion. Judicial precedent holds that threatening a police officer with a weapon is not a prerequisite to the officer's right to use deadly force to apprehend a suspect, such as Contreras, who has just attempted to murder innocent people on a public street and is fleeing the police. "The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed." *Brousseau v. Hagen, supra,* 543 U.S. at 205. This did not happen here.

Officers Benavides and Flores are facing an astronomical judgment against them that is contrary to binding precedent. It is not just that the judgment is against the law. Even though it is unpublished and not binding precedent, practically speaking, it greatly effects their future conduct, and the future conduct of all Los Angeles Police Department officers. Officers Benavides and Flores are left in a state of legal limbo with regard to how they are expected to conduct

themselves to avoid violating the Constitution the next time they are attempting to seize a dangerous and violent fleeing suspect who refuses to surrender. The Los Angeles Police Department, responsible for training its officers and managing risk, likewise needs to able to rely on the authoritative constitutional guidance the judiciary has provided and be protected when it makes decisions regarding training of its officers and managing risk. This unpublished memorandum renders the protection of judicial precedent illusory. It is for this reason that Petitioners respectfully request this Court grant this Petition for Writ of Certiorari.

OPINIONS AND JUDGMENTS BELOW

On December 18, 2012, the United States District Court for the Central District of California entered an order denying Petitioners' renewed Motion for Judgment as a Matter of Law. The district court's order is reproduced in the Appendix to this Petition. (App. B.)

On February 20, 2015, the United States Court of Appeal for the Ninth Circuit issued an unpublished Memorandum affirming judgment against Petitioners and denying them qualified immunity on the excessive force claim. The unpublished Memorandum is reproduced in the Appendix to this Petition. (App. A.)

On April 16, 2015, the United States Court of Appeal for the Ninth Circuit issued an order denying Petitioners' Petition for Rehearing and Rehearing en banc. The Order is reproduced in the Appendix to this Petition. (App. D.)

JURISDICTION

The Ninth Circuit denied Petitioners Los Angeles Police Department Officers Julio Benavides and Mario Flores's Petition for Rehearing and Rehearing en banc on April 15, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 subdivision (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved is 42 U.S.C. section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Criminal Proceedings That Preceded the Civil Lawsuit

On September 3, 2005, Robert Contreras committed a drive-by shooting and fled the police. Los Angeles Police Department Officers Julio Benavides and Mario Flores used deadly force to apprehend Contreras; they shot him four times. Contreras's injuries were serious – he is a quadriplegic.

On September 8, 2005, Contreras was criminally charged with two counts of attempted murder (based on the drive-by shooting) and two counts of assault with a semiautomatic firearm against Officers Benavides and Flores. All of the charges were alleged to have been committed in furtherance of a street gang within the meaning of California Penal Code section 186.22. At the conclusion of the preliminary hearing, Contreras was held to answer on both of the attempted murder charges and the court found the evidence sufficiently established the attempted murders were committed within the meaning of California Penal Code section 186.22. However, because no gun was found on Contreras or in the vicinity, the evidence was

held to be insufficient to hold him to answer on the assault charges.

On October 6, 2008, Contreras was convicted of two counts of attempted murder based on his "no contest" plea. Contreras was sentenced on March 10, 2009.

The Civil Lawsuit Pursuant to 42 U.S.C. section 1983

On February 17, 2011, Contreras filed the instant lawsuit pursuant to 42 U.S.C. section 1983 alleging Officer Benavides and Officer Flores violated his Fourth Amendment rights by using unreasonable force to apprehend him after the drive-by-shooting. The case proceeded to jury trial and the jury found in Contreras's favor and awarded him $5.7 million dollars in damages. Other than the dispute over whether Contreras ever pointed a gun at the officers as he ran from them, the material facts were undisputed at trial.

The Civil Trial Evidence

On September 3, 2005, at approximately 7:30 in the evening, Officers Benavides and Flores were on patrol in a high crime neighborhood when they heard gunshots. The officers knew the neighborhood was plagued with gang-related crime and that two warring street gangs – the Crip gang and a gang known as "Florencia" – had recently been involved in several shootings and murders. Within seconds of hearing the gunshots, the officers saw a van speeding away from where the gunshots came from. Witnesses pointed at the van and told the officers the shots were coming from the same van the officers saw speeding away. The officers followed the van, radioed for back up, and as

soon as they knew back up units were *en route* they activated the lights and sirens on their patrol vehicle.

The van increased its speed and committed several traffic violations as it sped away. Suddenly, the driver of the van pulled into the parking lot of a Jack-in-the-Box fast food restaurant. The officers said Contreras was the driver. Contreras said he was a passenger. But the material fact that was not disputed is that Contreras was one of the suspects in the van. Contreras testified he was a passenger in the van and before it even came to a full stop he jumped from the van and ran away from the police as fast as he could.

Officers Benavides and Flores jumped from their patrol car and chased Contreras on foot. The officers said Contreras was holding a gun in his right hand as he ran. Contreras denied he had a gun during the foot pursuit. But the material fact that was not disputed was as he ran from the police, Contreras was repeatedly reaching for something in his right front pants pocket. Contreras was wearing baggy sweat pants and said he had his cell phone in his front pocket. As he ran, he said the cell phone kept inching its way out of his pocket and he kept reaching into to his pocket to prevent it from falling out. Unable to keep the phone in his pocket as he ran, Contreras said he pulled the phone out of his pocket and continued to run with it in his hand.

According to the officers, Officer Benavides repeatedly yelled to Contreras to "Stop, stop" and "drop the gun." The scene was loud – there was a helicopter circling above and there were sirens blaring in the background as additional police units arrived. Contreras said he never heard the officer's commands

to stop and drop his gun, but he also explained he could not hear any voices and could only hear the sounds of the helicopters and the sirens.

Officer Benavides said as he chased Contreras, he saw Contreras turn counterclockwise towards his left and point a gun at them. At this point, Officer Benavides fired what would be the first two rounds in a series of three volleys at Contreras. Officer Benavides did not believe he hit Contreras since Contreras continued to run at a fast pace. Officer Benavides said he shouted warnings at Contreras again, but when Contreras pivoted towards his left again, Benavides fired the second volley of two shots at him. Like the first volley, these shots also had no apparent effect as Contreras continued running. Unbeknownst to the officers, one of the rounds from the second volley hit Contreras in the ankle, but according to Contreras, he continued to skip away "real fast." Contreras said at the moment the second set of rounds was fired he was reaching into his pocket and grabbing for his cell phone.

Contreras ducked into an alley and out of sight of the officers. When the officers caught sight of him, he was standing at the end of the alley with his back towards the mouth of the alley, facing a closed gate. The officers had no way of knowing whether or not the gate was locked. Even Contreras admitted he had no idea whether the gate was locked as he stood there. Officer Benavides testified he shone his flashlight on Contreras and when Contreras turned counterclockwise in his direction, still holding what he perceived to be a gun, Benavides fired the third and final volley of two more rounds at him. Officer Flores

also said he saw Contreras turn in their direction and almost simultaneously fired two rounds at him.

Contreras denied he turned to face the officers as he stood at the end of the alley and denied that he had his cell phone in his hand when the final shots were fired. But Contreras never testified that he made any effort to surrender at this point. Contreras did not raise his arms in a classic surrender position, he did not place himself on the ground in a felony-prone position, or do anything that would have signaled to the officers he was willing to surrender. According to Contreras, his leg was hurting from the gunshot wound to his ankle and he was standing and facing away from the officers, in front of the gate, with both hands on his left knee.

The entire incident, from the moment Benavides and Flores heard the gunshots from the drive-by shooting until the last shot in the driveway, lasted approximately three minutes. Approximately 20 seconds elapsed from the time Benavides and Flores exited their patrol car until the last shot in the driveway was taken.

The Jury's Verdict

The jury returned a verdict finding that both officers had used excessive force. (App. C.) The jury awarded Contreras $5,725,000.00 dollars in damages. (App. B, page 6.)

The Post-trial Proceedings and Appeal

The district court denied the officers' renewed motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, subdivision (b) and concluded their use of force violated clearly established

law and they were not entitled to qualified immunity. (App. B.)

On February 20, 2015, in a four-page unpublished memorandum, the Ninth Circuit affirmed judgment for Contreras. (App. A.)

On April 15, 2015, the court denied Appellants' petition for panel rehearing and petition for rehearing *en banc*. (App. D.)

REASONS FOR GRANTING THE PETITION

I. The Court Should Review The Ninth Circuit's Erroneous View That Resolution Of A Dispute Of Fact Regarding Whether Contreras Threatened The Officers With A Gun In Contreras's Favor Is Necessarily Dispositive On The Question Of Whether The Officers' Use of Force Was Reasonable Under the Fourth Amendment.

The panel did not even attempt to apply the well-established standards a court must employ to determine whether a police officer's use of force was unreasonable under the Fourth Amendment. It erroneously concluded resolution of the dispute regarding whether or not Contreras pointed a gun at the officers in favor of Contreras rendered the use of force unreasonable under the Fourth Amendment: "Plaintiff introduced evidence that (1) he was shot in the back despite Defendants' claim that Plaintiff was facing them and threatening them with a gun and (2) no gun was recovered from the scene. Viewing the facts in the light most favorable to the verdict, sufficient evidence supports the jury's rejection of

Defendants' theories of self-defense and defense of others. [Citation.]" (App. A, pp. 3-4).[1]

A claim that law-enforcement officers used excessive force to affect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham v. Connor, supra*, 490 U.S. 386; *Tennessee v. Garner, supra*, 471 U.S. 1. In *Graham*, this Court held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks omitted). The inquiry requires analyzing the "totality of the circumstances." See *ibid*.

Factors relevant to assessing whether an officer's use of force was objectively reasonable include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396. Reasonableness is analyzed from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* A court must "allo[w] for the fact that police officers are often

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[1] The jury did not "reject" Defendants' theories of self-defense or defense of others. Common-law self-defense was not before the jury. The jury was properly instructed on the Fourth Amendment's "reasonableness" standards, not common-law self-defense or defense of others. The jury was asked to determine whether Plaintiff met his burden of proving the officers' use of force was "excessive" as defined by the jury instructions. (App. C, p. 29.)

forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 396-397.

In *Tennessee v. Garner, supra,* 471 U.S. at 11-12, this Court identified specific situations in which a fleeing felony suspect may be deemed to pose a threat of serious harm to the officers or others:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

In the instant case the Ninth Circuit did not even mention *Graham*, nor did it attempt the careful balancing test required by *Graham.* Narrowly focusing on the fact that Contreras was shot in the back and no gun was recovered, to the exclusion of all the facts these officers confronted – most notably that they were trying to apprehend someone who had just opened fire from a moving vehicle on a public street and was refusing to surrender – the panel erroneously concluded the force was unreasonable under the Fourth Amendment.

The panel would not even consider the material undisputed evidence that Contreras was fleeing the scene of a drive-by shooting based on the panel's erroneous belief that Petitioners had waived their ability to argue this critically important fact: "[T]he district court correctly declined to consider Defendants'

'fleeing felon' theory because they expressly waived it in their pretrial conference memorandum and argued it for the first time in a post-verdict motion." (App. A, p. 3.) But the district court found no such waiver at all. The district court's order denying Petitioners' post-verdict motions included an extensive discussion of the impact Contreras's status as a fleeing felon had on the reasonableness of the officers' use of force and of the two primary cases Petitioners relied on: *Tennessee v. Garner* and *Forrett v. Richardson*. (App. B, pp. 18-20.)

The panel's finding of a waiver of the so-called "fleeing felon" theory not only reflected a mistake of fact – there was no waiver – it also reflected a mistake of law. *Garner* does not establish a discrete "fleeing felon" theory to a deadly force claim. In fact, this Court has specifically foreclosed this erroneous view of the law: "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test [citation] to the use of a particular type of force in a particular situation." *Scott v. Harris*, 550 U.S. 372, 382, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Here, Petitioners repeatedly testified that Contreras's status as a fleeing felon was a critical and weighty factor in their decision to use deadly force to apprehend him. Application of the well-established "reasonableness" standards set forth in cornerstone cases like *Graham* and *Garner* demonstrates that the use of deadly force to apprehend Contreras was entirely reasonable under the Fourth Amendment.

Instead of viewing the totality of the circumstances from the officers' perspective, the Ninth Circuit zeroed

in on the fact "no gun was recovered from the scene," (App. A, p. 3) a fact only known with the benefit of the "20/20 vision of hindsight." *Graham, supra*, 490 U.S. at 393, 396. The panel's narrow focus is contrary to the law.

Tennessee v. Garner, supra, 471 U.S. at 11-12, clearly established that a suspect does not have to actually threaten an officer with a gun before an officer can reasonably view the suspect as a serious threat. Fourth Amendment standards allow for reasonable mistakes of fact: "The deference owed to officers facing suits for alleged excessive force is not different in qualitative respect from the probable cause inquiry in *Anderson* [*v. Creighton*], 483 U.S. 635[, 107 S. Ct. 3034, 97 L. Ed. 2d 523] (1987). Officers can have reasonable, but mistaken beliefs as to the facts establishing probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz,* 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id*. at 205.

In *Forrett v. Richardson,* 112 F.3d 416 (9th Cir. 1997), a case that virtually mirrored the facts in the instant case, the Ninth Circuit expressly recognized under *Garner* when an officer is trying to apprehend a violent fleeing suspect "it is not necessary that the suspect be armed or threaten the officer with a weapon" before deadly force may be used to prevent the suspect's escape. *Id.*, at 420. Forrett, like Contreras, committed a violent felony; fled the police to avoid

capture; refused to surrender even as the officers fired their weapons at him; claimed not to have heard the officers' commands to stop, but like Contreras was admittedly aware the police were attempting to capture him; and just like in this case, after Forrett was finally captured, the officers did not recover a gun either on Forrett or in the vicinity. *Forrett*, 112 F.3d at 418-419.

Accepting that Contreras never threatened the officers with a weapon, and was unarmed when the final shots were fired, the use of force fell within the bounds of the Fourth Amendment. The evidence was undisputed there was probable cause to believe that Contreras had just "committed a crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11-12.[2] The officers heard shots fired, saw a van that Contreras was in speeding away, and witnesses told the officers the shots were fired from the van that was speeding away. These facts – uncontested by Contreras – supplied the officers with more than probable cause to believe Contreras had just fired a gun from a moving vehicle on a public street in a densely populated urban area and was fleeing the police. From their on-scene perspective, Contreras posed a serious risk of harm – Contreras was undoubtedly using desperate measures to escape and

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[2] Contreras never claimed the officers lacked probable cause to believe he had just committed a crime involving the threatened infliction or infliction of serious bodily injury and thus effectively conceded the issue. Contreras's only claim was that the level of force used to apprehend was unreasonable under the Fourth Amendment. The district court's conclusion to the contrary was mistaken. (App. B, p. 19.)

in a split second Contreras could have easily turned and shot them or another innocent victim.

The panel also placed weight on the fact that because Contreras was "physically trapped" – Contreras had been shot in the ankle and he was standing in front of a locked gate – shooting him four times was excessive. (App. A, p. 4.) The Ninth Circuit considered Forrett's similar argument and rejected it. Forrett, "theorize[d] that his capture was inevitable because the police had cordoned off the neighborhood and surrounded him with officers on foot and in a helicopter. . . . [T]he defendants knew that one of their colleagues was stationed on the other side of the fence and that Forrett's capture was therefore imminent regardless of whether they shot him." *Forrett*, *supra,* 112 F.3d at 420. The court refused to view the facts with the 20/20 vision of hindsight: "Nothing in the record indicates that at the time of the shooting the defendants knew their colleague was on the other side of the fence, or that other officers had established a closed perimeter. Nor does the evidence show that the police had actually established an escape-proof cordon at the time Forrett was shot. *Id.*

Much like *Forrett*, if Contreras was "physically trapped" when the officers encountered him standing in front of the gate in the alley, Officer Benavides and Flores could only have known that with the 20/20 vision of hindsight. They had no reason to know Contreras had been shot in the ankle; the objective evidence suggested that the first two volleys of shots had missed, since by Contreras's own testimony, he continued to skip away "real fast." The officers could have reasonably viewed Contreras's stance with his

hands on either side of his left knee as him pausing to catch his breath, or even reaching for a gun in an ankle holster. There was nothing about his stance that would have reasonably suggested he was ready to surrender and everything about his conduct up to that point suggested the opposite. The officers also had no reason to know the gate was locked – even Contreras testified that as he stood in front of the gate, he had no idea whether it was locked or unlocked. The panel's characterization of Contreras as "physically trapped" is based on nothing more than impermissible 20/20 hindsight.

Forrett, entirely consistent with *Garner,* is by no means an outlier in the circuit courts. In *Thomas v. Hubbard*, 257 F.3d 896 (8th Cir. 2001), a police officer, after receiving a call of armed suspects fleeing from a robbery, chased the suspect into an alley. The police officer, believing that the suspect was reaching for a gun, shot the suspect in the back. The suspect, who was not armed, subsequently died from his wounds. The Eighth Circuit held that an officer is not constitutionally required to wait until he sets eyes upon a weapon before employing deadly force to protect himself against a fleeing felon who turns and moves as though to draw a gun. *Id*. at 900.

In *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011) the officer chased a suspected car thief into the woods. The suspect stood with his right hand concealed in his waistband. After being ordered to show his hands and freeze, the suspect suddenly pulled his right hand out of his waistband. The sudden movement prompted the officers to open fire, leading to the suspect's death. The officers fired for 10 solid seconds,

shooting a total of 39 rounds. Eighteen bullets hit the suspect, 11 of them from behind. The suspect was not clutching a weapon; he was holding a crack pipe. "At that point, the troopers were justified in opening fire. 'An officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun.' [Citation.] Waiting in such circumstances could well prove fatal. Police officers do not enter into a suicide pact when they take an oath to uphold the Constitution." *Id.* at 183.

In *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001) the arresting officer's use of deadly force to apprehend a fleeing suspect after a bank robbery was not unreasonable even though the bank teller reported the robber was unarmed, where the officer heard shots fired and saw the suspect flee from another officer, swerve into on-coming traffic and collide with officer's vehicle; and the officer did not know whether suspect was armed or not. See also *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002) [Police officer had probable cause to use deadly force on suspect; suspect was trying to escape officer, and his right hand was out of officer's sight when he rotated his shoulder, giving officer reason to believe he was in immediate threat of death or serious bodily harm]; *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987) [Per se rule that police officer may never employ deadly force unless attacked by a suspect possessing a deadly weapon would place a police officer in a dangerous and unreasonable situation, whether a particular seizure is reasonable is dependent on the "totality of the circumstances," and not simply on whether the suspect was actually armed]; *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1987)

[Officer's use of deadly force to apprehend fleeing bank robber reasonable under Fourth Amendment even though officer did not actually see gun in suspect's hand].

This case is no different. Whether Officer Benavides and Flores's use of deadly force was reasonable was dependent on the "totality of circumstances," and not simply on whether Contreras was actually armed when the final shots were fired in the alley. Application of the *Graham* factors should have compelled the conclusion that the use of deadly force was reasonable here. First, Officers Benavides and Flores were confronted with a serious crime – Contreras had just committed an extremely violent crime – he had fired a gun from a moving vehicle on a public street. Second, the officers reasonably believed he posed a threat to their safety and to the safety of others. It is immaterial that Contreras was unarmed because the officers only knew this with the benefit of 20-20 hindsight vision. Under *Garner* and its progeny, a suspect who commits a crime involving the infliction of serious bodily harm is deemed to pose a threat to an officer's safety and the safety of others – shooting innocent people on a public street, which is what Contreras did, certainly qualifies in spades. Third, Contreras was "actively resisting arrest" and attempting to evade arrest by flight. Although the infringement on Contreras's liberty interest is significant, the government's interest in capturing a dangerous and violent criminal like Contreras was undoubtedly more significant, tipping the balance in favor of a finding the use of deadly force was reasonable under the Fourth Amendment. Petitioners respectfully request this Court grant their Petition for

Writ of Certiorari to correct the Ninth Circuit's clearly erroneous conclusion to the contrary.

II. The Court Should Review The Ninth Circuit's Erroneous View That *Tennessee v. Garner* and/or *Forrett v. Richardson* Provided Sufficient Clear and Fair Notice Using Deadly Force to Apprehend Contreras under the Particularized Circumstance the Officers Confronted Would Violate the Fourth Amendment.

Garner and *Forrett* provided fair warning of what the officers *could do* in the difficult circumstances they confronted, but the Ninth Circuit erroneously concluded these two cases provided the officers with fair warning of what they *could not do*. This is plainly upside down. If the officers' use of deadly force was unreasonable under the Fourth Amendment, given the strong parallels between the facts in this case and facts in *Forrett v. Richardson, supra*, 112 F.3d 416, this case undoubtedly falls within the "hazy border between excessive and acceptable force" that should have entitled the officers to qualified immunity. *Brosseau, supra*, 543 U.S. at 198.

"[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Ashcroft v. al-Kidd*, 563 U.S. __, __, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149, 1159 (2011). "In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" *Plumkoff v. Rickard*, __ U.S. __, __, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014),

(quoting *Ashcroft, supra*, 131 S. Ct 2083). Liability is reserved for actions that only a "plainly incompetent" official would have considered lawful in light of existing precedent. *Ashcroft, supra*, 131 S. Ct 2083. The panel ignored these essential principles and erred in finding the law was clearly established here and denying Officers Benavides and Flores qualified immunity.

The panel states that *Tennessee v. Garner* clearly established "that shooting an unarmed, physically trapped suspect in the back four times is excessive force." (App. A, p. 4.) There is a critical difference between the facts in the instant case and the facts in *Garner* the panel did not appreciate. The reasonableness of the use of deadly force in Garner did not turn on whether Garner was unarmed. The use of force in *Garner* was unreasonable because the officer "had no articulable basis to think Garner was armed." *Garner*, 471 U.S. at 21. The officer "never attempted to justify his actions on any basis other than the need to prevent escape." *Id*. at 22. "[T]he fact that Garner was a suspected burglar could not, without regard to other circumstances, automatically justify the use of deadly force. [The officer] did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any danger to himself or others." *Id.*

Here, the officers only learned Contreras was unarmed with the benefit of 20/20 hindsight vision. *Graham*, 490 U.S. at 396. During the critical moments when they were forced to make their split-second decision about the amount of force necessary to apprehend Contreras, the officers undisputedly did have an articulable basis to reasonably believe Contreras was armed. Unlike Garner who was fleeing

a residential burglary (a property crime), Contreras was fleeing a violent crime, a drive-by shooting. On these critically different facts, this case falls squarely within the Court's explicit statement that:

> 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, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if where feasible, some warning has been given. *Garner, supra,* 471 U.S. at 11-12.

Garner did not provide "fair warning" that using deadly force to apprehend Contreras would violate the Fourth Amendment – the guidance provided by *Garner* is the opposite – using deadly force to apprehend Contreras is reasonable under the Fourth Amendment.

The panel also found "fair warning" sufficient to defeat qualified immunity in its own opinion in *Forrett v. Richardson, supra*, 112 F.3d 416. The panel stated: "Plaintiff's 20-second flight from the police is not like the one hour flight of the *armed* plaintiff [in *Forrett*]." (App. A, p. 4, italics added.) The panel was again mistaken about a critical and material fact: Mr. Forrett, just like Mr. Contreas, was *unarmed* during the foot pursuit. "The police found no guns, either on Forrett or in the vicinity where he was captured." *Forrett, supra*, 112 F.3d at 419. Just as *Garner* did not provide fair warning that using deadly force to capture

Contreras was unreasonable under the Fourth Amendment, neither did *Forrett*. *Forrett*, like *Garner*, provided fair warning of what the officers *could do* to capture Contreras.

The length of time Forrett managed to outrun the officer was not a factor the Court even mentioned when it determined the officer's use of deadly force to apprehend him was reasonable. Thus, *Forrett* did not give Officers Benavides and Flores fair warning before deadly force would be deemed "reasonable" under the Fourth Amendment that they needed to chase Contreras for another 57 minutes; nor have Petitioners located a single case supporting such a proposition.

Regardless of whether Contreras fled for a few minutes or for an hour, *Forrett* recognizes a fleeing suspect remains a significant risk to the safety of the officers and the public from the moment he begins his flight until he is apprehended. "The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force." *Forrett, supra*, 112 F.3d at 420. "The option must be reasonable in light of the community's strong interest in security and preventing further harm." *Id*. "From the vantage of an officer confronting a dangerous suspect, 'a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death.'" *Id*. at 421, quoting *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994); see also *Ford v. Childers, supra*, 855 F.2d 1271 [Use of deadly force to apprehend fleeing bank robber following short foot pursuit "reasonable" even though suspect not armed].

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, *supra*, 131 S. Ct. at 2083 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). If Officers Benavides and Flores violated the Fourth Amendment when they used deadly force to apprehend Contreras, their mistaken judgment that judicial precedent from cases like *Tennessee v. Garner* and *Forrett v. Richardson* allowed for deadly force, was "reasonable," not "plainly incompetent" and they are entitled to protection from civil liability damages under the qualified immunity doctrine.

CONCLUSION

Based on the foregoing, Petitioners respectfully request the Court grant their Petition.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 20, 2015]

No. 13-55100
D.C. No. 2:11-cv-01480-SVW-SH

ROBERT CONTRERAS,
Plaintiff - Appellee,

v.

CITY OF LOS ANGELES,
Defendant,

and

JULIO BENAVIDES; MARIO FLORES,
Defendants - Appellants.

No. 13-55692
D.C. No. 2:11-cv-01480-SVW-SH

ROBERT CONTRERAS,
Plaintiff - Appellee,

v.

CITY OF LOS ANGELES;

JULIO BENAVIDES; MARIO FLORES,)
Defendants - Appellants.)
_____)

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted February 9, 2015
Pasadena, California

Before: GRABER and WARDLAW, Circuit Judges, and SHEA,[**] Senior District Judge.

Plaintiff Robert Contreras sued Defendant LAPD Officers Julio Benavides and Mario Flores, under 42 U.S.C. § 1983, for using excessive force in violation of the Fourth Amendment. Defendants shot Plaintiff four times in the back, in the course of arresting him in connection with a drive-by shooting. A jury found in favor of Plaintiff and awarded him $5.725 million in damages. Defendants timely appeal from the district court's denial of their motions to dismiss and for judgment as a matter of law. Reviewing de novo, we affirm. See Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986) (per curiam) (stating the standard of review for a motion to dismiss); Acosta v. City of Costa Mesa, 718 F.3d 800, 828 (9th Cir. 2013) (per curiam) (stating

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable Edward F. Shea, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

the standard of review for a renewed motion for judgment as a matter of law).

1. The district court correctly denied Defendants' motion to dismiss this action as barred by the statute of limitations. Although Defendants raised the statute of limitations as one of nine affirmative defenses in their answer to the complaint, they did not include the statute of limitations as a defense that they would pursue in the pretrial order, and they argued for the first time that the statute of limitations barred this action in a post-liability-verdict motion. Defendants thus waived this defense. See United States v. First Nat'l Bank of Circle, 652 F.2d 882, 886 (9th Cir. 1981) (holding that, because the parties are bound by the pretrial order, a party may not advance a theory at trial if it is not included in the order or if it contradicts the terms of the order).

2. Similarly, the district court correctly declined to consider Defendants' "fleeing felon" theory because they expressly disclaimed that theory in their pretrial conference memorandum and argued it for the first time in a post-verdict motion. See Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc., 185 F.3d 978, 981 n.3 (9th Cir. 1999) (considering an argument raised for the first time in a Fed. R. Civ. P. 50 motion only because a challenge to federal subject matter jurisdiction is not waiveable).

3. Plaintiff introduced evidence that (1) he was shot in the back despite Defendants' claim that Plaintiff was facing them and threatening them with a gun and (2) no gun was recovered from the scene. Viewing the facts in the light most favorable to the verdict, sufficient evidence supports the jury's rejection of

Defendants' theories of self-defense and defense of others. See A.D. v. Cal. Highway Patrol, 712 F.3d 446, 457 (9th Cir.) (holding that "the jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict"), cert. denied, 134 S. Ct. 531 (2013).

4. Defendants are not entitled to qualified immunity because the law was clearly established that shooting an unarmed, physically trapped suspect in the back four times is excessive force. Tennessee v. Garner, 471 U.S. 1, 11 (1985). Plaintiff's 20-second flight from the police is not like the one-hour flight of the armed plaintiff in Forrett v. Richardson, 112 F.3d 416, 421 (9th Cir. 1997), superseded by rule on other grounds as stated in Chroma Lighting v. GTE Prods. Corp., 127 F.3d 1136 (9th Cir. 1997) (order). Moreover, Plaintiff introduced evidence that, although it was feasible to do so, Defendants did not warn Plaintiff before using deadly force, and the verdict demonstrates that the jury believed that evidence. See Garner, 471 U.S. at 11–12.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:11-CV-1480-SVW-SH

[Filed December 18, 2012]

Robert Contreras	)
	)
v.	)
	)
City of Los Angeles, et al.	)
	)

CIVIL MINUTES - GENERAL

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz
Deputy Clerk

N/A
Court Reporter / Recorder

_____
Tape No.

Attorneys Present for Plaintiffs:
N/A

Attorneys Present for Defendants:
N/A

Proceedings: IN CHAMBERS ORDER Re

_____ : _____
Initials of Preparer PMC

I. INTRODUCTION

On February 17, 2011, Plaintiff Robert Contreras ("Plaintiff") brought the instant action against Defendants City of Los Angeles and Los Angeles Police Department Officers Julio Benavides and Mario Flores ("Defendants"). (Dckt. 1). Plaintiff asserted two causes of action: one claim of excessive force in violation of the Fourth Amendment, and a claim for municipal liability under Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). Id. On August 22, 2011, the Court bifurcated the Monell claim, and on December 19, 2011, the Court bifurcated the liability and damages phases of Plaintiff's excessive force claim. A three-day jury trial was held on Plaintiff's excessive force claim: the jury found in favor of Plaintiff on February 2, 2012. (Dckt. 97). On September 21, 2012, after another three-day jury trial, the jury awarded Plaintiff $4.5 million for the present value of future costs of medical care and $1,225,000 for past and future physical pain. (Dkct. 193).

On October 19, 2012, Defendants brought the instant motion for judgment as a matter of law and a motion for a new trial. For the reasons put forward in this Order, the Court DENIES Defendants' motions.

II. JUDGMENT AS A MATTER OF LAW

A. Legal Standard

Rule 50(a) provides that a party may move for judgment as a matter of law "at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2).

If the court does not grant the motion before the case is submitted to the jury, the party who moved for the judgment may file a renewed motion for judgment as a matter of law not later than 28 days after the entry of judgment. Fed. R. Civ. P. 50(b); see also E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009) (same).

A court may grant the motion if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). "In entertaining a motion for judgment as a matter of law, the court may not make credibility determinations or weigh the evidence." Go Daddy, 581 F.3d at 961 (internal citations, quotation marks, and alterations omitted). Rather, "[b]ecause the district judge lacks the authority to resolve disputed issues of fact under those circumstances, judgment as a matter of law is appropriate only if no reasonable jury could find for a party on that claim. This necessarily means that the court must draw all reasonable evidentiary inferences in favor of the non-moving party." Ritchie v. United States, 451 F.3d 1019, 1022-1023 (9th Cir. 2006). See also Go Daddy, 581 F.3d at 961 (noting that on a Rule 50 motion, a court must view the evidence in the light most favorable to the nonmoving party ... and draw all reasonable inferences in that party's favor . . . . The test applied is whether the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.") (internal citations and quotation marks omitted); Graves v. City of Coeur D'Alene 339 F.3d 828, 838 (9th Cir. 2003) ("Judgment as a matter of law is proper if the evidence, viewed in the light most favorable to the

nonmoving party, permits only one reasonable conclusion.").

Defendants contend that they are entitled to judgment as a matter of law on two grounds. First, they contend that they are entitled to qualified immunity. Second, they argue that the jury's award of $1,225,000 for physical pain should be reduced to $1 because Plaintiff failed to introduce evidence that he actually had and would continue to experience pain as a result of the shooting giving rise to Plaintiff's claim.

B. Rule 50(b) Procedure

Plaintiff contends that Defendants' Rule 50(b) motion is procedurally improper because Defendants failed to specify that they would be moving for judgment as a matter of law on the grounds of qualified immunity before the case was submitted to the jury. "Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party may renew its motion under Rule 50(b)." Go Daddy, 581 F.3d at 961; see also Fed. R. Civ. P. 50 (same). A "Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion. Thus, a party cannot properly raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion." Go Daddy, 581 F.3d at 961 (internal citations and quotation marks omitted). However, Rule 50(b) may be "satisfied by an ambiguous or inartfully made motion under Rule 50(a)." Id. (internal citations and quotation marks omitted); see also Reeves v. Teuscher, 881 F.2d

1495, 1498 (9th Cir. 1989) ("Although courts construe strictly the requirement that a motion be made after a case-in-chief, they are generally more liberal about what suffices as a motion for a directed verdict after the close of all the evidence.")

After Plaintiff had presented all of his evidence during the liability phase of the trial, Defendants informed the Court that they were "reserve[ing] the right to make a full 50(a) . . . a motion for directed verdict." RT1 352:1-5. The Court responded "You've made it." RT1 352:6. Defendants satisfied Rule 50(a)'s "liberal" requirement by making a "full 50(a)" motion. See Reeves, 881 F.3d at 1498 (finding Rule 50(a) satisfied when one party "attempted to move for a directed verdict after all the evidence was in, the court interrupted and told them to renew their motion after the verdict" and they later did so).[1]

C. Qualified Immunity

Qualified immunity defenses are analyzed under the familiar two-step sequence articulated by the

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[1] However, the Court notes that by waiting until after trial to bring their motion for judgment as a matter of law on the grounds of qualified immunity, Defendants undermined part of the rationale of this defense. Both the Supreme Court and Ninth Circuit have repeatedly stressed that qualified immunity is "'an entitlement not to stand trial or face the other burdens of litigation,'" Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011) (quoting Saucier v. Katz, 533 U.S. 194, 200 (2001)), and that questions of qualified immunity should be resolved "'at the earliest possible stage in litigation.'" Torres, 648 F.3d at 1123 (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009)). In light of this well-established precedent, the Court finds Defendants' belated argument, at the very least, puzzling.

Supreme Court in Saucier v. Katz, 533 U.S. 194, 201 (2001). First, a court must decide whether the facts alleged or shown make out a violation of a constitutional right; if so, a court must then decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 232 (2009).

1. Factual Background

On the evening of September 3, 2005, Defendant Officers Benavides and Flores were on patrol in South Los Angeles. At about 7:30 p.m., the officers heard gunshots in the area and drove in their direction. RT1 53:24-54:5; 202:24-203:5.[2] The officers arrived at the intersection of 61st Street and Broadway, at which point they encountered a number of unidentified bystanders. The bystanders told them that the shots had come from a van that was pulling away from the area, headed southbound on Broadway. RT1 54:6-10, 114:15-17, 203:3-20. The officers began following the van and, after requesting backup, activated their overhead lights. RT1 55:10-13. The van continued to drive for approximately 20 to 30 seconds before pulling over into a parking lot of a Jack-In-The-Box at the intersection of Broadway and Florence Avenue. RT1 54:18-55:16.

As the van came to a stop, Plaintiff exited and began running eastbound on Florence. RT1 66:8-10, 67:20-24. Officer Benavides testified that Plaintiff was

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[2] RT1 refers to the Reporter's Transcript for the first phase of the trial (liability, Dckt. 151-154); RT2 refers to the Reporter's Transcript of the second phase of the trial (damages, Dckt. 213-215).

the only person he saw either in or exiting the van; Officer Flores and Plaintiff each testified that there were at least two other individuals in the van who also exited and ran. RT1 63:16-64:10, 175:17-23, 299:13. Benavides and Flores each testified that they saw a gun in Plaintiff's hand when he exited the van; Plaintiff testified that he did not have a gun in his hand, or anywhere else on his person, at any point during the incident. RT1 80:10-23, 210:15-16, 300:14-15.

Benavides and Flores began chasing Plaintiff down the sidewalk, running twenty to twenty-five yards behind him. RT1 72:23-73:3. After chasing Plaintiff for seven to eight seconds, Benavides fired two shots at Plaintiff; Plaintiff continued running eastbound on Florence, and several seconds later, Benavides fired two more shots at Plaintiff. RT1 68:1-8, 78:2-3. At least one of the four shots struck Plaintiff in the ankle. RT1 301:21-302:3.

At trial, Officers Benavides and Flores each testified that during the sidewalk chase, Plaintiff twice turned towards them and pointed a gun at them—once immediately before Officer Benavides' first two shots and once immediately before the second two shots. RT1 68:2-8, 212:15-25. Plaintiff testified that he did not point a gun at the officers while being chased, and that the only movement he made with his hands was to put his right hand in the pocket of his sweat pants in order to keep his cell phone from falling out. RT1 302:9-16. He further testified that, during the chase, he never removed the phone from his pocket, but instead held the phone in his pocket while running. RT1 328:14-18. At trial, the jury also heard testimony from another officer involved in the chase, Officer Savedra. Slightly

behind Officers Benavides and Flores, Officer Savedra was still in the parking lot when Benavides fired the first two shots. RT1 247:13-16. Savedra turned eastbound onto Florence, at which point Plaintiff, Benavides, and Flores each came into view. RT1 248:9-12. Savedra testified that he saw Benavides fire the second two shots at Plaintiff. RT1 252:7-10. He also testified that he did not see a gun in Plaintiff's hand as he was chasing Plaintiff, and that he did not see Plaintiff point a gun at the officers. RT1 251:17-19.

Benavides also testified that he said "drop the gun," and "stop, police" before firing both rounds of shots. RT1 78:7-79:2, 121:18-122:20. Flores and Savedra each testified that they did not recall hearing Benavides's commands before Benavides fired at Plaintiff during the chase. RT1 231:12-18, 252:11-13. Plaintiff testified that he did not hear any warnings before any of the shots were fired. RT1 305:1-3.

After being shot in the ankle, Plaintiff, unable to run, continued to skip away from the officers. RT1 302:25-303:2. As he skipped, he made a left turn into an open alleyway, disappearing from the officers' view for five or six seconds. RT1 303:1-5, RT1 128:22-129:2. After taking "three big skips" into the alley, Plaintiff came to a stop. RT1 303:4-8. Plaintiff testified that after coming to a stop, he leaned forward and put both hands on his knees, with his back facing the street. RT1 303:9-304:2. Plaintiff further testified that three seconds later, still hunched over and his back still to the street, he was hit by more gunshots in the back, and fell forward. RT1 304:5-305:9. He also testified that he did not hear any warnings prior to the shots being fired. RT1 305:1-3. Officers Benavides and Flores

each testified that upon reaching the alley's entrance, Plaintiff was facing them and pointed a gun at them. RT1 86:3-9, 191:1-7. Each testified that when they shot Plaintiff in the alley, they did so because Plaintiff was facing towards them and pointing his gun at them. RT1 95:21-96:6, 188:6-11. Detective Benavides testified that before firing shots in the alley, he again instructed Plaintiff to "drop the gun;" however, neither Plaintiff, nor Officer Flores, nor Officer Savedra recalled hearing any such instruction. RT1 80:14-18, 184:21-23, 253:8-16, 305:1-3.

After Plaintiff fell to the ground, Officers Benavides and Flores approached Plaintiff and began searching him. RT1 305:18-24. No gun was found on Plaintiff's person, and, despite an extensive search by the police after the incident was over, no gun was found in the surrounding area. RT1 98:7- 99:9, 100:10-15, 100:22-24, 103:20-104:23, 197:14-198:16, 287:16-289:15. Paramedics arrived and treated Plaintiff; according to the paramedic's report, all of Plaintiff's gunshot wounds were to the back of his body. RT1 284:2-8. Plaintiff was totally paralyzed from the waist down from the shooting. RT2 78:20-79:11.

The entire incident—from the moment Officers Benavides and Flores heard gunshots until the moment they fired at Plaintiff in the alley—took approximately three minutes. RT1 153:10-1514:7. Approximately twenty seconds elapsed from the time Officers Benavides and Flores exited their car until the last shot in the alley was taken. RT1 153:24-154:2. Although the sun was setting at the beginning of the incident, there was light throughout the entire chase. RT1 153:11-18, 176:11-13.

2. Constitutional Violation: Excessive Force

The sole constitutional question decided by the jury was whether the officers used excessive force when they shot Plaintiff, in violation of the Fourth Amendment. "All claims that law enforcement officers have used excessive force—deadly or otherwise—in the course of an arrest must be analyzed under the Fourth Amendment and its 'reasonableness' standard." Smith v. City of Hemet, 394 F.3d 689, 700 (9th Cir. 2005) (en banc) (citing Graham v. Connor, 490 U.S. 386, 397 (1989)); see also Scott v. Harris, 550 U.S. 372, 381 (2007) (same). "Determining whether a particular use of force is reasonable requires a fact-finder to balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" Boyd v. Benton County, 374 F.3d 773, 778-79 (9th Cir. 2004) (quoting Graham, 490 U.S. at 396). "Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom summary judgment or judgment as a matter of law should be granted sparingly in cases involving claims of excessive force." Gregory v. County of Maui, 523 F.3d 1103, 1106 (9th Cir. 2008) (internal citations, quotation marks, and alterations omitted).

The Supreme Court has articulated a "particularized version of the Fourth Amendment's objective reasonableness analysis for assessing the reasonableness of *deadly* force." Blanford v. Sacramento County, 406 F.3d 1110, 1115 (9th Cir. 2005) (emphasis added). In Tennessee v. Garner, 471 U.S. 1 (1985), the Supreme Court held that a police officer "may not use deadly force 'unless it is necessary

to prevent escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" Smith, 394 F.3d at 704 (quoting Garner, 471 U.S. at 3) (emphasis added). Thus, the use of deadly force "is reasonable *only* if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Long v. City & County of Honolulu, 511 F.3d 901, 906 (9th Cir. 2007) (internal citations and quotation marks omitted); see also Smith, 394 F.3d at 704 ("[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force."). By contrast, "[i]n deadly force cases, 'where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'" Espinosa v. City & County of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010) cert. denied, 132 S. Ct. 1089, 181 L. Ed. 2d 976 (U.S. 2012) (quoting Garner, 471 U.S. at 11-12).

At trial, the only justification for using deadly force offered by Defendants was their contention that Plaintiff pointed a gun at them on three occasions during the incident. Whether or not Plaintiff in fact threatened them with a weapon was, however, a contested factual issue that was properly left to the jury. The jury heard testimony from Officers Benavides and Flores that Plaintiff threatened them; however, Plaintiff offered a wealth of testimonial and physical evidence demonstrating that he had not. Not only did Plaintiff testify that he never pointed a gun at the officers during the incident, but he testified that he did not have a gun on his person at all. Plaintiff's

testimony was corroborated by the undisputed fact that no gun was found on Plaintiff after he was shot, and that no gun was found in the surrounding area despite a thorough search. Officer Savedra's testimony that he did not see a gun in Plaintiff's hands and did not see Plaintiff point a gun at the officers during the chase lent further credence to Plaintiff's version of the incident. Finally, the paramedic's report indicated that all of Plaintiff's gunshot wounds were to the back of his body, supporting Plaintiff's contention that while in the alley—where the crippling shots were fired—he was facing away from the officers rather than, as the officers testified, facing towards them and pointing a gun at them.[3]

In short, this case came down to a credibility determination—whether to believe the Plaintiff's version of the incident or the officers—and the jury believed the Plaintiff. This conclusion was amply supported, not only by Plaintiff's testimony and that of another officer, but by all of the available and relevant physical evidence. To find in Defendants' favor on a motion for judgment as a matter of law would require the Court not only to make a credibility determination—a function exclusively reserved to the jury—but would also require it to ignore substantial testimonial and physical evidence that supported the jury's conclusion. The jury reasonably found that Plaintiff did not have a weapon or threaten the officers

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[3] Moreover, Plaintiff introduced evidence to undermine the officers' credibility, including statements from their depositions that contradicted some of their testimony at trial. Indeed, as the record discloses, Officers Benavides and Flores themselves had different recollection of the events.

with it during the incident; and therefore, as a matter of law, the use of deadly force was unreasonable. See Espinosa v. City & County of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010) cert. denied, 132 S. Ct. 1089 (U.S. 2012) (affirming the district court's denial of summary judgment on the grounds of qualified immunity when officers shot a suspect multiple times at close range after the suspect said to the officers "Kill me or I'll kill you," and had "something that looked like a gun" in his hand because the suspect "had not brandished a weapon, spoken of a weapon, . . . threatened to use a weapon [and] *in fact, did not have a weapon*") (emphasis added); Curnow By & Through Curnow v. Ridgecrest Police, 952 F.2d 321, 324 (9th Cir. 1991) (affirming the district court's denial of summary judgment where officers used unreasonable force when shooting a plaintiff who had a gun in his hand but was facing away and was not pointing it at the officers); see also Haugen v. Brosseau, 351 F.3d 372, 383 (9th Cir. 2003) cert. granted, judgment vacated on other grounds 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) ("Under Ninth Circuit precedent, the mere presence of a weapon does not justify the use of deadly force, let alone the *potential* presence of a weapon."). Cf. Billington v. Smith, 292 F.3d 1177, 1185 (9th Cir. 2002) (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun); Reynolds v. County of San Diego, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer); Scott v. Henrich, 39 F.3d 912, 914-15 (9th Cir. 1994) (suggesting that the use of deadly force is objectively reasonable where a suspect points a gun at officers);

Garcia v. United States, 826 F.2d 806, 812 (9th Cir. 1987) (holding that deadly force was reasonable where the plaintiff attacked a border patrol agent with a rock and stick).

Defendants offer, for the first time in this motion, one other argument in support of their contention that the officers' use of force. According to Defendants, even if Plaintiff did not point a gun at the officers, their use of deadly force was reasonable under the Ninth Circuit's decision in Forrett v. Richardson, 112 F.3d 416, overruled on other grounds as stated in Chroma Lighting v. GTE Products Corp., 127 F.3d 1136 (9th Cir. 1997). In Forrett, the Ninth Circuit held that the use of deadly force was reasonable because the officers had "'probable cause to believe that [the Section 1983 plaintiff] ha[d] *committed a crime* involving the infliction or threatened infliction of serious physical harm'" and that "'some warning had been given.'" Id. at 420 (quoting Garner, 472 U.S. at 11-12) (emphasis added). The plaintiff had committed a violent residential burglary in which he tied up three victims and shot two of them. 112 F.3d at 418. After fleeing the house, one of the victims untied himself and called the police, detailing the crime and informing them that the plaintiff had "several firearms" with him. Id. During the subsequent chase, the police shot Forrett; however, at no point during the chase did Forrett shoot at the officers. Id. No guns were found on Forett, nor were any found in the vicinity of the chase. Id. In his subsequent excessive force Section 1983 action, the plaintiff conceded that the officers had probable cause to believe that he had committed a crime "involving the infliction of serious harm." Id. at 420. Moreover, the plaintiff conceded that the defendant officers had

warned him before shooting. Based on these concession, the Ninth Circuit found the use of deadly force reasonable. Id.

Plaintiff's case is easily distinguished from Forrett. Unlike the plaintiff in Forrett, Plaintiff has not conceded either that Officers Benavides and Flores had probable cause to believe that Plaintiff had committed a crime involving the infliction of serious harm, nor that he heard warnings before the officers fired. Indeed, the only evidence introduced at trial that Plaintiff might have committed a crime the night of the incident was Officers Benavides and Flores's testimony that they had heard gunshots and were told by unidentified pedestrians that the shots came from the van that Plaintiff *and two other individuals* later exited. Even assuming this testimony to be true, Officers Benavides and Flores— unlike the officers in Forrett—had no specific information that Plaintiff possessed a gun or that he had shot and wounded a person at any point that evening. Furthermore, unlike the plaintiff in Forrett, Plaintiff introduced evidence that while it was feasible for them to do so, Officers Benavides and Flores failed to warn him before shooting—specifically, the testimony of Plaintiff and Officers Flores and Savedra that they did not hear any warnings before the shots were fired. Defendants' argument that they are entitled to qualified immunity merely because they heard shots in the area, were told by unidentified bystanders that shots came from the van, and Plaintiff later ran from them is not supported by Forrett or any other case. See Figueroa v. Gates, 207 F. Supp. 2d 1085, 1092 (C.D. Cal. 2002) (holding that the defendants could not rely on Forrett where the defendant officers shot two suspects in the back after

they had been *advised that the suspects were armed with guns* and one officer declared that he saw the decedent "raise his hand and point a dark object at the officers," and noting that "[c]ourts have repeatedly held that excessive force defendants are not entitled to qualified immunity in cases where decedents did not have weapons on their persons, brandish weapons, or threaten to use them—*even if the officers believed the decedents were armed*") (emphasis added); see also Harris v. Roderick, 126 F.3d 1189, 1203 (9th Cir. 1997) (finding that shooting the plaintiff was not objectively reasonable where he had "made no aggressive move of any kind"); Curnow, 952 F.2d at 325 (finding that the defendants were not entitled to qualified immunity where, in one witness' version of the shooting, "Curnow did not point the gun at the officers and apparently was not facing them when they shot him the first time").

3. Clearly Established

The second step of the Saucier analysis looks to whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. In making this determination, a court "must inquire whether the officer was reasonable in his belief that his conduct did not violate the Constitution." Wilkins v. City of Oakland, 350 F.3d 949, 955 (9th Cir. 2003). The purpose of the immunity inquiry is "'to acknowledge that reasonable mistakes can be made as to the *legal constraints* on particular police conduct. 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.'" Torres v. City of Madera, 648 F.3d 1119, 1127 (9th Cir. 2011)

cert. denied, 132 S. Ct. 1032, 181 L. Ed. 2d 739 (U.S. 2012) (quoting Saucier, 533 U.S. at 205).

"Under the second step, to attach liability the contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. This framework means that the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Mueller v. Auker, 576 F.3d 979, 993 (9th Cir. 2009) (internal citations, quotation marks, and alteration omitted). "This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (internal citations and quotation marks omitted). However, in order to find that the law was clearly established, a court "need not find a prior case with identical, or even 'materially similar' facts." Kennedy v. City of Ridgefield, 439 F.3d 1055, 1065 (9th Cir. 2006) (internal citations and quotation marks omitted). Rather, a court's task is "to determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." Id. (internal citations and quotation marks omitted).

Defendants do not seriously dispute that it was clearly established by the time of the shooting on September 3, 2005 that it was a constitutional violation to shoot a fleeing suspect who did not possess or threaten the officers with a weapon. Indeed, this was the very question the Supreme Court addressed in Garner, finding in 1985 a police officer "may not use deadly force 'unless it is necessary to prevent escape *and* the officer has probable cause to believe that the

suspect poses a significant threat of death or serious physical injury to the officer or others.'" Smith, 394 F.3d at 704 (quoting Garner, 471 U.S. at 3) (emphasis added). The Ninth Circuit has repeatedly denied qualified immunity in similar cases. See Harris v. Roderick, 126 F.3d 1189, 1203 (9th Cir.1997) (finding that shooting the plaintiff was not objectively reasonable where he was "running back to a cabin where he is temporarily staying and who makes no threatening movement of any kind, even though the suspect had engaged in a shoot-out with law enforcement officers on the previous day."); Curnow, 952 F.2d at 324 (affirming the district court's grant of summary judgment that officers used unreasonable force when shooting a plaintiff who had a gun in his hand but was facing away and was not pointing it at the officers in 1986); see also Figueroa , 207 F. Supp. 2d at 1093 (denying summary judgment on the grounds of qualified immunity in 2002 where the defendant officers had been *advised that the two suspects were armed with guns* and one officer declared that he saw the decedent "raise his hand and point a dark object at the officers").

Moreover, the City's own policies undermine Defendants' argument that the officers are entitled to qualified immunity. See Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003) (noting that a department's "training materials are relevant . . . to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable."). Officer Benavides testified that based on his training, he "would not shoot" someone who was "running away from [him], following a situation like this, where you heard shots, you're not sure exactly

who did the shooting, but you believe that the van is somehow involved, and you see someone running away from you . . . with a gun in their hand and they're not turned towards you in anyway way." RT1 61:15-62:10.

Thus, because the jury reasonably found that the officers violated Plaintiff's Fourth Amendment rights, and because it was clearly established that shooting Plaintiff under these circumstances was a constitutional violation at the time of the shooting, Defendants' motion for a judgment as a matter of law on the grounds of qualified immunity is DENIED.

D. Plaintiff's Physical Pain Damages

Defendants argue that, as a matter of law, the Court should reduce the jury's award of $1,225,000 in physical pain damages to $1 because Plaintiff "did not put forth in his case-in-chief any evidence of his subjective pain, disfigurement, or disability." Defendants' motion is denied for two reasons. First, their motion is procedurally incorrect: if the court, "after viewing the evidence concerning damages in a light most favorable to the prevailing party, determines that the damages award is excessive," its recourse is limited either to granting a motion for a new trial or denying the motion "conditional upon the prevailing party accepting a remittitur." Fenner v. Dependable Trucking Co., Inc., 716 F.2d 598, 603 (9th Cir. 1983). Plaintiff has not consented to remittitur, and thus the only potential remedy—were the Court to find the damages excessive—would be to order a new trial.

Moreover, Plaintiff introduced substantial evidence at trial to support the jury's award. Both Plaintiff's and Defendants' experts testified that Plaintiff was

completely paralyzed from the waist down, RT2 78:20-23, 79:9-11, and that he has suffered and will continue to suffer from neuropathic pain and frequent painful spasms. RT2 81:24-25, 82:1-85:25, 335:1-337:25, 350:23-351:22. Plaintiff also testified that he has suffered pain "daily" and "hourly" since the date of the shooting. RT2 400:1-13. As damages for physical pain "are difficult to translate into monetary loss," it is "up to the trier of fact to resolve." Sanchez v. United States, 803 F. Supp. 2d 1066, 1073 (C.D. Cal. 2011) (internal citations and quotation marks omitted); see also Matlock v. Greyhound Lines, Inc., No. 2:04-CV-0051-KJD-GWF, 2010 WL 3171262, at *3 (D. Nev. Aug. 10, 2010) ("[A] determination of damages for pain and suffering is wholly subjective, and by nature falls squarely within the province of the jury.") (internal citations and quotation marks omitted). Based on the evidence presented, the jury reasonably awarded Plaintiff $1,225,000 in damages for past and future pain. See Sanchez, 803 F. Supp. 2d at 1073 (awarding plaintiff $3,000,000 for future pain and suffering when an accident "severely limited [plaintiff's] communicative abilities" and "limited [her] ambulatory movement").

III. MOTION FOR A NEW TRIAL

Alternatively, Defendants contend that they are entitled to a new trial on the basis of alleged evidentiary errors. However, the Court considered each of the contentions raised in Defendants' motion at great length—either in a pre-trial order or during a hearing outside the presence of a jury or both— before issuing its rulings. Specifically:

- The Court limited Defendants' expert Dr. Kris Mohandie testimony to his general opinions regarding the psychological phenomenon of "lag time" after an evidentiary hearing, and explained its reasoning in two written orders (Dckt. 72, 73, 177);

- The Court limited the testimony of Defendants' police practices expert Sgt. Katapodis after holding a lengthy hearing outside the presence of the jury (RT1 9:4-25:06);

- The Court excluded evidence of Plaintiff's prior criminal history and contacts with law enforcement, except that it allowed Defendants to introduce evidence that Plaintiff was convicted of a felony for impeachment purposes under Federal Rule of Evidence 609, and explained its reasoning in a written order (Dckt. 72);

- The Court excluded the testimony of Vincent Dispaltro, Plaintiff's former cellmate, who allegedly told police officers in April of 2007 that Plaintiff had told him that the night of the incident, Plaintiff had a gun in his hand during the chase and threw the gun away as hard as he could just before he entered the alley where he was shot. The Court held an evidentiary issue during which Dispaltro testified under oath that he did not remember Plaintiff telling him either that Plaintiff had a gun the night of the incident or that he threw the gun away before entering the alley (RT1 337:13-343:21), and thus excluded his testimony because Dispaltro lacked personal knowledge that the alleged statement had

actually been made under Federal Rule of Evidence 901, and excluded the recorded interview itself as hearsay that did not fall within an exemption or exception under Federal Rule of Evidence 802;

- The Court excluded four unintelligible audio clips of a police interview of Edward De La Cruz, who was in the van with Plaintiff at the beginning of the incident. Defendants argued that De La Cruz could be heard on the recordings saying that Plaintiff exited the van with a gun in his hand; however, the Court listened to the clip six times, on the record, with both parties present, and concluded that no intelligible portion included a statement that Plaintiff exited the van with a gun in his hand. Moreover, the Court excluded the clips only after holding an evidentiary hearing at which De La Cruz swore under oath that he did *not* see Plaintiff with a gun in his hand as Plaintiff exited the van, and that the recorded statement was actually a confession by De La Cruz that *he* had a gun in *his* hands upon exiting the vehicle (RT1 394:21-397:8);

- The Court allowed the admission of two photographs, exhibits 6-10 and 6-11, that depicted LAPD investigators standing in the alley where Plaintiff was shot was relevant and not unfairly prejudicial to Defendants after hearing argument from both sides (RT1 234:8-235:16);

- The Court excluded evidence of Plaintiff's medical history while he was in prison because

the evidence was offered as proof that Plaintiff failed to mitigate his damages because Defendants had failed to plead mitigation as an affirmative defense, and thus the defense was waived, see 999 v. C.I.T. Corp., 776 F.2d 866, 871 n.2 (9th Cir. 1985), after an extensive hearing on the matter (RT2 13:8-22:13);

- The Court admitted a portion of Plaintiff's life care planner Liz Holakiewiecz's report into evidence as proof of the cost of Plaintiff's future medical care. RT2 161:13-21. The documents admitted into evidence were ten pages of charts and bullet points of the prices of Plaintiff's medical care, and Defendants misstate the record when they argue that the entire report, including the unidentified "narrative" portions were introduced at trial;[4]
- The Court excluded evidence of Plaintiff's criminal history, drug use and alleged gang affiliation, which Defendants contended was relevant to Plaintiff's life expectancy, and

[4] After the jury began deliberating, the Defendants identified one portion of the report admitted to the jury they found objectionable. Page seven of the report included a statement that two doctors who had seen Plaintiff "agree[d] on the need for 24-hour care," which Plaintiffs objected was hearsay. Defendants made no such objection when the report was admitted to the jury; moreover, the statement was used in the report for the fact that it was said—that in making her calculations, the life-care expert relied on the requirement of 24-hour care—rather than for the truth of the matter asserted. RT2 505:19-508:13. Moreover, the jury heard substantial testimony as to whether or not 24 hour care would be required from medical experts. See RT2 150:5-10.

explained its reasoning in a written order (Dckt. 177).

Defendants make no new arguments as to why these rulings were incorrect; thus the motion for a new trial is DENIED.[5]

IV. CONCLUSION

For the reasons put forward in this order, the Court DENIES Defendants' motion for judgment as a matter of law and DENIES their motion for a new trial. After the jury returned a verdict in the liability phase, the Court entered judgment but stayed the execution of judgment, pending resolution of the post-trial motions. The Court also gave Plaintiff a continuance to move for attorney's fees until after the post-trial motion was resolved. Having resolved these motions in Plaintiff's favor, the Court hereby LIFTS THE STAY AND ALLOWS FOR EXECUTION ON THE JUDGMENT entered pursuant to the jury's verdict on September 21, 2012. Plaintiff shall have twenty one (21) days from the date of this Order to move for attorney's fees.

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[5] Moreover, an erroneous evidentiary ruling may serve as a basis for a new trial only if it "substantially prejudiced" a party. See Ruvalcaba v. City of Los Angeles, 64 F.3d 1323, 1328 (9th Cir. 1995). In other words the movant must demonstrate that, "more probably than not," the evidentiary error "tainted the verdict." Harper v. City of Los Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008). Plaintiff has failed to meet this threshold by failing to identify any evidentiary errors.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV11-1480 SVW (SHx)

[Filed February 3, 2012]

ROBERT CONTRERAS)
Plaintiff,)
)
vs.)
)
CITY OF LOS ANGELES, et al.,)
Defendants.)
)

VERDICT FORM
REDACTED

We, the Jury, in the above-entitled case, answer the questions submitted to us as follows:

1. Do you find that defendant Julio Benavides used excessive force, as defined by the jury instructions, against plaintiff Robert Contreras on September 3, 2005?

   Yes ✓ No ___

2. Do you find that defendant Mario Flores used excessive force, as defined by the jury instructions, against plaintiff Robert Contreras on September 3, 2005?

Yes ✓ No ___

Date: February 2, 2012

REDACTED AS TO FOREPERSON'S NAME
JURY FOREPERSON

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 15, 2015]

No. 13-55100
D.C. No. 2:11-cv-01480-SVW-SH
Central District of California, Los Angeles

ROBERT CONTRERAS,
Plaintiff - Appellee,

v.

CITY OF LOS ANGELES,
Defendant,

and

JULIO BENAVIDES and
MARIO FLORES,
Defendants - Appellants.

No. 13-55692
D.C. No. 2:11-cv-01480-SVW-SH
Central District of California, Los Angeles

ROBERT CONTRERAS,
Plaintiff - Appellee,

v.

CITY OF LOS ANGELES; JULIO BENAVIDES; and MARIO FLORES., Defendants - Appellants.	)

Before: GRABER and WARDLAW, Circuit Judges, and SHEA,* Senior District Judge.

The panel has voted to deny Appellants' petition for panel rehearing. Judges Graber and Wardlaw have voted to deny Appellants' petition for rehearing en banc, and Judge Shea has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and petition for rehearing en banc are DENIED.

* The Honorable Edward F. Shea, Senior United States District Judge for the Eastern District of Washington, sitting by designation.