Case No. 14-56824

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAKINA ORTEGA, individually, and as successor of interest of Victor Ortega deceased; TAMIA ORTEGA, a minor, by and through her guardian Shakina Ortega; JACOB ORTEGA, a minor by and through his guardian Shakina Ortega
Plaintiffs & Appellees,

versus

SAN DIEGO POLICE DEPARTMENT, a public entity, CITY OF SAN DIEGO, a public entity,
Defendants, and
JONATHAN MCCARTHY, an individual
Defendant & Appellant.

On Appeal from an ORDER of the
United States District Court for the Southern District of California
United States District Court No. 13cv00087

APPELLANT'S OPENING BRIEF

JAN I. GOLDSMITH, City Attorney
BRIAN K. CLINE, Deputy City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101
Tel: (619) 533 5800
bcline@sandiego.gov
Attorneys for Appellant
JONATHAN MCCARTHY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Officer Jonathan McCarthy ("McCarthy" or "Appellant") was wrongfully denied qualified immunity. As the basis for its decision, the district court incorrectly strung together a series of non-material minor inconsistencies in the statements McCarthy made after the incident.

Relying on *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), the district court incorrectly identified four areas of concern upon which it felt a jury might reasonably disbelieve McCarthy:

(1) McCarthy perceived Victor Ortega's ("Ortega") hands were 1-2 feet from the muzzle of his gun vs. Appellees' expert placing his hands 3 feet away;

(2) McCarthy testified Ortega never actually seized or "grabbed" his secondary revolver, but only briefly touched the revolver;

(3) The order of events in which McCarthy was able to cuff Ortega's left hand; and

(4) A neighbor perceived that Ortega's tone of voice, while yelling at McCarthy, indicated disbelief and compliance.

But, as stated in *Cruz*, and overlooked by the district court, any inconsistent statement must be internally inconsistent *and* inconsistent with other known facts—not so in this case. Furthermore, the inconsistent statements must be material. *Cruz v. City of Anaheim*, 765 F.3d 1076, 1080 (9th Cir. 2014). Minor inconsistencies in McCarthy's statements, as is the case here, do not rise to the level of constituting material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

McCarthy is entitled to qualified immunity because under the totality of the circumstances his actions were reasonable. Even viewed in the light most favorable to Appellees, McCarthy's statements amount to nothing more than non-material minor inconsistencies. And, the inconsistencies do not negate the fact that McCarthy had probable cause to believe he was in imminent serious physical harm and acted accordingly.

JURISDICTIONAL STATEMENT

(a) The basis for the district court's jurisdiction.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, since this was a cause of action brought under 42 U.S.C. § 1983. [ER 795]

(b) The basis for claiming that the order and judgment are appealable.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the final judgment and order of the district court. A district court's denial of qualified immunity on legal grounds is a final decision subject to interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985); *Act Up!/Portland v. Bag*ley, 988 F.2d 868, 870 (9th Cir. 1993).

The district court's determination that there is a factual dispute does not preclude appellate review where, as here, the decision hinges on legal errors as to whether the factual disputes (a) are *genuine* and (b) concern *material* facts. *See Scott v. Harris*, 550 U.S. 372, 378-80 (2007).

(c) The dates of judgment and of the filing of the appeal.

The order granting in part and denying in part Defendants' motion summary judgment was entered November 14, 2014. The Notice of Appeal was filed on November 19, 2014. The appeal is timely. 28 U.S.C. § 1292; Fed.R.App.P.4. [ER 1, 3]

STATEMENT OF ISSUES

1. Whether Appellant Jonathan McCarthy is entitled to qualified immunity for Appellees' claim of an alleged Fourth Amendment violation based on excessive force.

2. Whether Appellant Jonathan McCarthy is entitled to qualified immunity for Appellees' claim of an alleged Fourteenth Amendment violation based on excessive force.

STATEMENT OF CASE

Appellees filed the instant lawsuit on January 11, 2013, which was later amended as the First Amended Complaint (FAC). The suit named defendants, San Diego Police Officer Jonathan McCarthy (Appellant), the City of San Diego (the City), and the San Diego Police Department (SDPD). Appellees' FAC alleges six causes of action: (1) violation of civil rights under 42 U.S.C. § 1983; (2) discrimination and other violation of civil rights under Cal. Civ. Code § 51.7; (3) violation of civil rights under Cal. Civ. Code § 52.1; (4) assault and battery under Cal. Gov't Code § 815.2; (5) wrongful death; and (6) negligence. [ER 795-812]

Defendants filed their summary judgment motion on April 18, 2014, asserting that defendant Officer McCarthy was entitled to

qualified immunity as to the first cause of action under the Fourth and Fourteenth Amendment. The motion also addressed a *Monell* civil rights violation brought against the City and SDPD and state law causes of action two through six. [ER 759-794]

On May 5, 2014, Appellees filed a request for permission to exceed to exceed the page limit in opposition to Appellants' motion for summary judgment. [ER 817] On May 20, 2014, the Court denied Appellees' request for leave to file an over-length brief and rejected Appellees' previously filed over-length opposition. [ER 722-724] The Court set a new briefing schedule and informed all parties the matter would be taken under submission without oral argument permitted. [ER 722-724]

The District Court issued its Order granting in part and denying in part Defendants' summary judgment motion. On November 11, 2014, the court granted Defendants' motion with respect to Appellees' *Monell* claim. Appellees voluntarily dismissed their section 1983 claim against SDPD. Defendants' motion with respect to Cal. Civ. Code sections 51.7 and 52.1 and negligence was also granted. [ER 3-23]

The District Court denied the remaining portions of the Defendants' summary judgment motion. [ER 3-23]

STATEMENT OF FACTS

I. Domestic violence 9-1-1 call.

At approximately 7:38 a.m. on June 4, 2012, Appellee Shakina Ortega ("Shakina") dialed 9-1-1. She requested police and medical assistance after being attacked by her husband, Victor Ortega ("Ortega"), who kicked her and punched her in the face. [ER 577-578] Ortega left his wife with a large gash on the inside of her mouth and blood streaming down the front of her clothes. [ER 734-741]

The San Diego Police Department (SDPD) immediately put out an emergency call for possible felony domestic violence; "occurring now." The call warned officers that Ortega was six foot one inches, with a history of domestic violence and fleeing the scene. Officers Godfrey Maynard (Maynard) and Jonathan McCarthy (McCarthy) arrived at the crime scene within five minutes of Shakina's call. [ER 629-630]

II. Ortega fled the scene.

Shakina lived in an apartment part of a larger condominium community. The rear of each cluster of units opened up to carports

which shared a private driveway resembling a cul de sac. Each unit is separated by a narrow hallway running from the interior of the community out to the carports and shared driveway. [ER 632-633] The hallways are long and narrow; approximately thirty-two feet long and less than four feet wide. The entrance to each hallway is on the interior of the community and is faced with a wooden gate, which is latched from the inside. [ER 301-302]

As McCarthy approached the Ortega's home, he saw Shakina standing in front of her apartment. She pointed north to indicate the direction her husband fled after attacking her. [ER 584-585] McCarthy followed her directions in his patrol car; around the outside of the community. As he drove, McCarthy was able to look past the private driveways through the hallways into the interior of the community. [ER 607-608] Suddenly, he spotted Ortega walking out of a narrow hallway, towards his patrol car. [ER 726-727] McCarthy identified Ortega. [ER 376, 447, 630] Ortega was wearing a navy blue polyester jacket, black basketball style shorts and athletic shoes. McCarthy got out of his patrol car. He was dressed in full uniform and duty gear, including a back-up .38 caliber Smith and Wesson revolver stored in an ankle holster on his left leg. [ER 589, 728] Ortega saw

McCarthy and immediately turned and ran in the opposite direction. McCarthy shouted "Stop!" Ortega ignored McCarthy and continued running. McCarthy ran after him. At 7:46 a.m. Maynard broadcasted Ortega had "rabbitted," i.e. fled. [ER 629]

III. Ortega resisted arrest.

Ortega ran through the condo community as McCarthy chased him. McCarthy commanded Ortega to stop on multiple occasions. Ortega ignored McCarthy's commands and continued to lead McCarthy through the interior maze of the community. Ortega approached the entrance to one of the hallways. The wooden gate was at the east end of the hallway and the carport and private driveway to the west. Ortega entered the hallway, turned, and immediately slammed the gate closed in McCarthy's face. Without hesitating, McCarthy kicked the gate open and found Ortega on the other side, arms up and reaching for McCarthy. McCarthy quickly grabbed Ortega and tried to arrest him. McCarthy repeatedly commanded Ortega to "Get on the ground!" Ortega resisted and the two began to fight. [ER 589-590, 727]

IV. The fight.

Ortega grabbed McCarthy and began fighting back. Ortega yelled at McCarthy, "What are you doing?" "Get off me!" "I'm going to sue your ass!" As they fought, the two men violently slammed each other against the walls of the hallway. [ER 611-614] Ortega was struggling with McCarthy for control. The brawl took the two down the hallway, closer to the private driveway. Finally, McCarthy used his left leg to sweep Ortega's feet out from underneath him. They fell to the ground. McCarthy landed on top of Ortega. Ortega was on his chest with his arms tucked underneath, but kept throwing his elbows out so McCarthy could not gain control of his arms. McCarthy removed his Taser and threatened to deploy it if Ortega did not comply. This allowed McCarthy to gain control of Ortega's left hand. Next, McCarthy re-holstered his Taser freeing his right hand. McCarthy was able to momentarily gain control of Ortega's right arm. He pulled Ortega's hand and arm behind his back. Next, McCarthy applied pressure with his knee in the small of Ortega's back. This allowed McCarthy to hold both of Victor's hands with his left hand. McCarthy reached back with his right hand to retrieve his handcuffs.

McCarthy told Ortega not to move and removed the handcuffs from his duty belt. [ER 82-88, 591-595, 728]

After re-holstering the Taser but before temporarily gaining control of Ortega's right hand, McCarthy suddenly noticed his back-up revolver on the ground. The revolver was within Ortega's reach just to the right of his face. Ortega continued to shout, "I'm going to sue you!" [ER 592, 728] McCarthy quickly tried to handcuff Ortega, keeping his eyes glued on the unsecured revolver. But in the process of handcuffing the left hand, McCarthy lost control of Ortega's right. Ortega's sports jacket was making it difficult to easily close the clasp. The instant McCarthy lost control of Ortega's right hand, Ortega reached out with his right hand and grabbed for the revolver. McCarthy used his right hand to slap Ortega's right arm and hand away from the weapon. He was able to prevent Ortega from getting a grasp on the gun, but Ortega's right hand briefly made contact with the revolver. [ER 593-596] DNA analysis of the revolver was done as part of the investigation. The testing concluded McCarthy's, and another individual's DNA, was on the revolver. There was not enough DNA available to exclude Ortega as the source of that DNA. [ER 29-33, 151-153] The gun was still within reach of Ortega, so McCarthy got

off of Ortega and pushed the revolver about one foot farther away. [ER 81-103, 591-597] As a result of being slid across the concrete floor of the hallway, the side of the revolver was heavily scraped and scratched. [ER 40-46, 359, 365-371]

But in that split second, as he pushed the gun away, McCarthy lost control of Ortega. McCarthy was no longer on top of Ortega. He had fallen forward and to the side of Ortega. Fearing that Ortega wanted to grab the back-up revolver and use it on him and knowing that Ortega had already tried to reach for his back-up revolver once, McCarthy removed his primary duty weapon with his right hand, keeping it close to his hip. At this point the revolver was still loose on the ground in close proximity of Ortega. [ER 359, 596-598]

McCarthy gathered himself on at least one knee and began to pivot toward Ortega. As McCarthy turned to face him, he saw Ortega getting off of the ground with both hands reaching for the duty weapon at his hip. [ER 596-600] The two men were facing each other. Ortega was lunging toward McCarthy, flexed forward and bent at the waist. [ER 445-455, 729] Ortega's hands were out as McCarthy turned. McCarthy immediately feared that Ortega intended to grab his duty weapon and kill him. McCarthy fired two shots from his hip,

in rapid succession. It happened so quick, McCarthy did not have time to extend his primary duty weapon or get his left hand on the pistol grip. McCarthy had no time to give a warning command. [ER 596-600, 729] The first bullet entered Ortega's abdomen, the second his neck just to the left of the right side of Ortega's spinal column. [ER 445-455]

V. Eye-witness accounts of Marshall and Larue.

At the time of the incident, Mallory Marshall ("Marshall") and Nicholas Larue ("Larue") lived across the street from the private driveway attached to the hallway where the shooting occurred. From their apartment Marshall and Larue were able to see the fight between Ortega and McCarthy. [ER 311] Marshall described the fight as a "very physical confrontation in a small little breezeway." She saw McCarthy trying to pin Ortega against the ground, but he was having a hard time getting Ortega contained. [ER 396-403] Ortega kept trying to get up off the ground and resisting McCarthy's attempts at handcuffing him. [ER 754-758]

Larue was standing next to Marshall and made some of the same observations. Larue saw Ortega "wrestling" with McCarthy and noticed that Ortega was putting up a very good fight. He described

Ortega as "struggling" and "all over the place" during the fight. McCarthy unsuccessfully tried to keep Ortega's hands from moving all around, but it was easy for Ortega to move around and keep "flailing" his hands. At one point, Larue noticed McCarthy was able to briefly subdue Ortega's hands but then Ortega broke free. Overall, Laure emphasized, "it was a real back and forth fight." [ER 56-68, 754-758]

In the moments prior to the shooting, Larue noticed McCarthy slapping Ortega's hands away from something. As McCarthy was straddling Ortega, his feet were approximately at Ortega's mid-section. Ortega's hands were free, moving around, and at one point looked like they were grabbing and/or reaching for something specific near the area of McCarthy's ankle. At that point in the fight, Larue assumed Ortega was reaching for a weapon on or near McCarthy. He saw McCarthy's hands near Ortega's chest and shoulder area trying to contain Ortega's hands. Larue saw McCarthy trying to take Ortega's hands and put them back up towards Ortega's head. Larue saw McCarthy trying to subdue Ortega's arms, but he was never able to get Ortega's hands completely cuffed. From Larue's point of view it was obvious Ortega's hands were not where McCarthy wanted them

to be. Larue described Ortega struggling with McCarthy as if it was a "wrestling match." [ER 56-68, 754-758]

Marshal and Laure did not see the actual shooting. Larue looked away just long enough to shut the front door of their condo. As he closed the door, he made eye contact with Marshall. During that time neither he nor Marshall were looking out of the door or window of their apartment. Larue estimates they looked away no longer than two to five seconds before they heard the gun fire. Just prior to looking away, Larue noticed that Ortega's hands were still moving and McCarthy was still trying to stop Ortega's hands from moving. Larue saw Ortega actively wrestling with McCarthy in the few seconds prior to hearing the gun shots. [ER 56-68, 754-758]

VI. The fight as heard by Phillip and Ryan Owen.

Phillip and Ryan Owens ("Phillip" and "Ryan") are brothers who lived adjacent to the walkway where the fight occurred. Both brothers were able to hear sounds from the fight but neither were eye-witnesses. Phillip Owen was living in a small shed converted into living quarters adjacent to one wall of the hallway. While Phillip was inside the shed, he heard yelling and two people wrestling. Phillip remembers a loud thud against one of the walls, and then person (A)

angrily yelled "Are you kidding me? Come on. Come on!" and "I'm going to sue you." In response, person (B) yelled "Get down on the ground!" Then, person (A) angrily responded, "Get the fuck off me." After theses statements were made, the fight continued. Phillip heard a great deal of grunting and sounds associated with physical exertion. The next thing he heard was what sounded like handcuffs being pulled out. Phillip heard the sound of a chain jingling back and forth, not the "zipper sound" of handcuffs closing on a wrist. Then the two men continued to wrestle on the ground. Phillip testified that it sounded like someone was still trying to get the other under control. The wrestling continued for a few seconds, and then Phillip heard one or two footsteps. He estimated that the entire fight lasted 30 to 45 seconds. Immediately following the footsteps, Phillip heard two gun shots back to back. [ER 525-531]

Although he did not see the fight between McCarthy and Ortega, like his brother, Ryan heard nearly all of the fight. At the time of the fight, Ryan was in the condo adjacent to the hallway. The sliding door, facing his patio and the hallway, was open. Ryan had just left his bathroom when he heard yelling from the hallway area. He walked over to the sliding door and heard banging and bumping

noises on the wood fence adjacent to the hallway. Next he heard a voice, say two times, "I am going to sue you." Then the two continued to fight. It sounded like the fighting was moving down the hallway in a westerly direction, toward the carport. The next thing Ryan heard was what he believed to be the sound of handcuffs being taken out. After the sound of the metal on metal of handcuffs, Ryan heard more movement. Then he heard two gun shots back to back. [ER 539-545]

Jason Cristomo lived near the hallway where the fight occurred. On that morning, he was in his kitchen. Mr. Cristomo's television was on and loud. He remembers listening to the news and not paying much attention to the individuals yelling in the hallway. Mr. Cristomo's sliding door was open, which allowed him to hear noise from a fight, but he did not actually see any part of the fight. He heard a man yell "Get on the ground!" Another man responded twice with "Are you kidding me?" Next, he heard fighting. The fighting between the men lasted anywhere from one minute to a few minutes. The fight was loud enough, violent enough, and lasted long enough that it prompted Mr. Cristomo to call the police. But before he could get to the phone, Mr. Cristomo heard two or three gunshots. He did not see the fight that took place in between the yelling and the gunshots.

Almost two weeks after the incident, Mr. Cristomo remembered he thought the tone of voice of the man yelling "Are you kidding me?" was that of disbelief and compliance. [ER 340-342, 344-345]

Just prior to pulling the trigger, McCarthy estimated the distance between his body and that of Ortega's was probably two feet. After the shooting, when an investigating officer asked McCarthy to show him what he meant by two feet, McCarthy identified the width of the interview table as an example of two feet. The table was later measured to be forty two inches, or three and a half feet. McCarthy's perception of the distance from Ortega's hands to his duty weapon was "really close," probably about one foot to two feet. [ER 598, 729] At the time McCarthy fired his gun it was not outstretched in front of his face, but hugging his right hip, low and behind his field of vision. [ER 359, 376, 598]

VII. An extremely dangerous fast moving situation.

There was no visible gunpowder residue found on the body or clothing of Ortega. Medical examiner, Dr. Othon Mena ("Dr. Mena"), concluded that Ortega's hair and clothing may have prevented gunpowder residue from depositing on the skin surrounding the wounds. [ER 446-447] According to Appellees' expert, Brent Turvey

(Turvey), there would be no discernible gunpowder residue if the muzzle of McCarthy's gun was 3 to 4 feet from Ortega's body when the gun was fired. Therefore, it is likely McCarthy shot Ortega at a distance no closer than 3 feet. Turvey confirmed that trace evidence of gun powder residue would be detectible by chemical testing at a muzzle distance of 6 to 36 inches. [ER 432-433] Trace evidence of gunpowder residue particles were found on Ortega's hands. [ER 218]

Given the angle the bullets entered Ortega's body and the clothing he was wearing at the time, it is to be expected that visible gunpowder residue was not found on Ortega's body or clothing. Both bullets entered Ortega at shallow incident angles, on the order of forty-five degrees. At the point of contact, the bullet trajectory in relation to Ortega's body was approximately of forty-five degrees. Powder particles tend to bounce off surfaces at these acute angles. Furthermore, Ortega's jacket was one hundred percent polyester composition (as opposed to other fabrics such as cotton) which also reduces the retention of powder particles due to its slick nature. It is unlikely that visible gun powder residue would have been found on Ortega's body or clothing. [ER 375-377]

Appellant's expert witness, Lucian Haag ("Haag") confirmed the unlikelihood of finding visible gunpowder residue by testing McCarthy's gun and bullet cartridges. Haag also fired the bullets from McCarthy's gun at filter paper. At a standoff distance of 18 inches (between 1 and 2 feet) and a forty-five degree intercept angle virtually, no powder particles were retained on the filter paper. Moreover, at 36 inches and more favorable ninety degree intercept angle only one particle briefly stuck to the paper and then fell to the ground. [ER 375-394]

In addition to ballistics testing, Appellant's expert, Dr. William Lewinski ("Lewinski"), confirmed the rapidly evolving nature of the interaction. In a violent dynamic encounter the average person can cover 11 feet in 1 second. The average individual need only take 3 strides to cover 11 feet. When charging forward (like Ortega toward McCarthy), an average person can cover over 3 feet in 1/3 of a second. Ortega could have grabbed McCarthy's primary weapon from his hip in 1/3 of a second. [ER 105-109]

VIII. Emergency medical response.

After the shooting, McCarthy immediately approached Ortega. McCarthy did not yet know that the second bullet killed Ortega.

McCarthy put Ortega's right hand in the handcuffs, just in case Ortega was still a threat. Both of Ortega's hands were not placed in handcuffs until after he was shot. [ER 218, 600] After placing Ortega's right hand in handcuffs, McCarthy placed Ortega on his back. Ortega was not responding to McCarthy so he began chest compressions until he was relieved by department personnel. [ER 600]

After the shots were fired, Ryan opened his kitchen door to his carport. From this vantage point, Ryan could see another police officer approach McCarthy. Ryan believed this officer was McCarthy's partner. He overheard McCarthy tell the other officer that Ortega was reaching for something on the ground. [ER 540-541, 545]

When the San Diego Fire Department (SDFD) and paramedics arrived they found Ortega with both hands cuffed. Medical personnel dragged Ortega west, out of the hallway, to continue CPR. When they moved Ortega, they left two linear and continuous scrape marks in the concrete hallway. The scrap marks are consistent with handcuffs making contact with the concrete. [ER 300-305, 314-315, 447] After the medics moved Ortega, they removed the left handcuff, but kept the right cuff on his right wrist. Dr. Mena also noted that Ortega had

abrasions consistent with handcuffs on both wrists [ER 215, 301, 447] A lone witness, Cristomo, was questioned by SDPD, and conceded he was unable to see Ortega's upper body while it was still in the hallway. But, he confirmed that the medics did not remove the right handcuff from Ortega's right wrist after Ortega had been taken out of the hallway. Cristomo never saw Ortega's left wrist or hand. [ER 341, 344]

STANDARD OF REVIEW

This Court reviews *de novo* a challenge to the district court's denial of a motion for summary judgment based upon qualified immunity. *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003); *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000).

SUMMARY OF ARGUMENT

The district court applied an improper standard in deciding the question of qualified immunity.

The relevant inquiry in a constitutional excessive force claim is "whether the officers' [McCarthy's] actions were 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Graham v.*

Connor, 490 U.S. 386, 397 (1989). It is immaterial that another reasonable, or more reasonable, interpretation of events can be construed after the fact. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

The district court, however, applied not how a reasonable officer might act under the circumstances, but weighted what arguments might be made to a jury to persuade them to find in Appellees' favor. The district court abandoned the objectively reasonable officer standard and adopted an adversarial approach in favor of Appellees' position. The district court incorrectly relied on four areas of concern which it felt a jury might reasonably disbelieve McCarthy. [ER 3-23]

McCarthy is entitled to qualified immunity, because the facts relied on by the district court are not inconsistent. Furthermore, the relied upon perceived inconsistencies are immaterial to the question of whether McCarthy's actions were objectively reasonable, even taken in the light most favorable to Appellees.

ARGUMENT

The district court's ruling hinges on legal errors as to whether the factual disputes are (a) genuine and (b) concern material facts. *Scott v. Harris*, 550 U.S. 372, 378-80 (2007). The facts relied upon by

the district court are neither inconsistent with McCarthy's testimony, nor concern material facts.

The appropriate test is not whether there are any inconsistencies, but whether the alleged inconsistencies amount to disputed facts that "might affect the outcome of the suit under the governing law…" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence discrediting the police officer must convince a reasonable factfinder that the officer acted unreasonably, not the mere fact the officer made an inconsistent statement. *Scott v. Heinrich*, 39 F.3d 912, 915 (1994).

To be material under the 4th Amendment qualified immunity analysis, the inconsistent statement must contradict both prongs: (1) whether a reasonable officer in McCarthy's situation acted reasonably; and (2) whether a reasonable officer in McCarthy's situation believed that his conduct was lawful. *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

In this case, the district court comingled a group of insignificant discrepancies in witness statements to conclude a dispute existed about what transpired during Ortega's final seconds. The court relied on four perceived inconsistencies in the fact record: (1) the distance

from which Ortega was shot; (2) whether Ortega "grabbed" McCarthy's secondary weapon; (3) the order in which McCarthy attempted to handcuff Ortega; and (4) Ortega's tone of voice while he was resisting arrest. [ER 11-14]

I. 4th Amendment.

A. Ortega was a serious physical threat at 3 to 4 feet.

After the shooting, McCarthy was interviewed about why he decided to use deadly force. McCarthy told investigators Ortega was lunging for his primary weapon. Combined with Ortega's actions leading up to that moment, McCarthy believed he was in imminent serious physical danger. McCarthy estimated his distance from Ortega to be the width of the interview table, approximately 3 ½ feet. And, Ortega's hands were "really close," "probably" 1 to 2 feet away. [ER 598, 729]

The district court relied on plaintiff's expert witness, Brent Turvey, to contradict "McCarthy's stated basis for using deadly force." [ER 11] It was Turvey's opinion that Ortega's hands were no closer than 3 feet from McCarthy's pistol at the time he was shot, or, that Ortega was within 1 to 2 feet, but his arms were not extended out toward the muzzle of McCarthy's pistol. [ER 432-433]

1. Ortega's hands were as close as 3 feet from the muzzle of McCarthy's weapon--not inconsistent with McCarthy believing Ortega was a serious physical threat.

Turvey's opinions do not create a material factual dispute. Even if Ortega's hands were 3 feet away from the muzzle of McCarthy's weapon instead of 1-2 feet as McCarthy reasonably perceived at the time, which is not inconsistent with McCarthy having probable cause to believe Ortega was a serious physical threat at the time he fired the shots.

The distances provided by McCarthy were nothing more than rough estimates. Not long after the incident while still under the stress of the situation, McCarthy provided an estimate of his distance to Ortega. McCarthy's distance estimate was formulated at the moment he believed he was going to die. [ER 581-582, 598-601] The fact record is clear—McCarthy's estimated distance to Ortega was never intended to be a precise measurement. If taken as an estimate, McCarthy's story is internally consistent with other known facts. During McCarthy's after incident interview, he was asked about the distance between him and Ortega at the time of the shooting. McCarthy made clear he could only provide an estimate and he could

not give precise measurements. This was highlighted by interviewer, Sgt. Howie. During his interview, McCarthy estimated a 3 ½ foot wide table at 2 feet. It was McCarthy's belief that Ortega's hands were "really close," "probably about" 1 to 2 feet away. [ER 598, 729]

Further, there is nothing in the fact record that would suggest McCarthy's estimates were meant to be precise measurements. When asked to define his measurements, McCarthy consistently underestimated distance. It would be unrealistic, to hold McCarthy to precise measurements during a 2 to 5 second interaction, after a physically exhausting all out sprint, hand to hand combat, and life and death moment.

Officer McCarthy is allowed to make a mistake of fact when deciding whether to employ deadly force. *Pearson v. Callahan*, 555 U.S. 223, 230 (2009). Surely, McCarthy is afforded the same reasonable deference when estimating the distance of the suspect during a deadly encounter. McCarthy's reasonable mistake amounts to a difference of approximately 12 inches.

It is also important to note, the muzzle of McCarthy's gun was low and tucked back against his right hip. McCarthy was kneeling on one, possibly both knees. As he turned to face Ortega he spun around

with his head and described Ortega lunging forward. It is not inconsistent, or unreasonable, that the muzzle of his weapon was farther away from Ortega's hands than McCarthy's eye level. [ER 359, 376, 596-601]

Ortega's actions preceding the shooting satisfied all of the *Graham* factors. Ortega did not comply with McCarthy's verbal commands, assaulted McCarthy, tried to commandeer McCarthy's secondary firearm, and violently resisted arrest. [ER 589-590, 611-614, 629, 727] Two independent eye-witnesses saw virtually save the last 2 to 5 seconds. [ER 56-68, 311, 754-758] As they corroborate, had McCarthy hesitated just one instant, he would have been foolishly placing his life in Ortega's hands, hoping that Ortega decided to radically change his approach to the confrontation. Ortega could have closed the distance between the two of them in less than 1/3 of a second. [ER 105-109] It is an undisputed fact that McCarthy had no more than a few seconds to make the decision to use deadly force. Whether Ortega's hands were 1, 2 or 3 feet from the muzzle of McCarthy's muzzle does not change the fact—any hesitation by McCarthy would have left him vulnerable to serious or even fatal injury.

McCarthy's recall of events is internally consistent with other evidence presented regarding the incident. In this case, the difference between an estimated 2 feet and 3 feet does not negate McCarthy's probable cause to believe Ortega was a serious physical threat. At worst, all that McCarthy's mistaken estimate would lead a reasonable juror to believe is that McCarthy was estimating, as he said, when giving distances from Ortega.

In addition, the district court's recitation of the fact record was incomplete. Turvey's opinion that Ortega's hands were no closer than 3 feet is premised on the fact that no *visible* gun powder particles were found on Ortega's hands. Turvey conceded trace amounts of residue, or *non*-visible gun powder residue, ***were*** found on Ortega's hands. By Turvey's calculations, non-visible gun powder residue is found at a muzzle distance of 6 inches to 3 feet. [ER 432-433, 218]

It is undisputed that non-visible gun powder residue were found on Ortega's hands.[1] The existence of non-visible gun powder residue places Ortega's hands, according to Turvey, 6 inches to 36

[1] To be clear, Appellant is not disputing the fact record, but rather that the district court based its decision on incomplete facts. "The district court relied on an inference drawn, not from record evidence, but from lack of evidence." *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009)

inches from McCarthy's muzzle, which is entirely consistent with McCarthy's version.

Moreover, it is undisputed that under the circumstances of this shooting it is highly unlikely any *visible* gun powder residue would be found on Ortega's hands, body, or clothing even at a distance of 3 feet. Appellant's expert witness, Lucian Haag, tested the powder pattern of McCarthy's pistol. Haag determined even at 1 to 2 feet virtually no *visible* powder particles would be found. This corroborates McCarthy's account of the shooting as well. [ER 375-394]

2. Whether Ortega's hands were 1 ft., 2 ft., or 3 ft., from the muzzle of McCarthy's gun is an immaterial fact. Ortega was still a serious physical threat to McCarthy.

A minor inconsistency in officer testimony does not alone "raise a genuine issue of material fact regarding the reasonability of the use of force." *Reynolds v. County of San Diego*, 84 F.3d 1162, 1169-70 (9th Cir. 1996), *overruled on other grounds by Acri v. Varian Assocs., Inc.*, 114 F.3d 999 (9th Cir. 1997).

"[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit

under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The substantive law has been set forth by Supreme Court's two-part test for qualified immunity. "The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002), citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If a constitutional right would have been violated under the plaintiff's version of the facts, "the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

i. No constitutional violation—McCarthy had probable cause to believe he was in serious physical harm.

It was not unconstitutional for McCarthy to use deadly force to prevent escape where he had probable cause to believe that Ortega posed a threat of serious physical harm to himself. *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010), citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The threshold question is—did McCarthy have

probable cause to believe Ortega was a serious physical threat to his safety?

The fact the district court illuminated a potential minor inconsistency in McCarthy's version of events, with respect to the distance at which Ortega was shot, "does not raise a genuine issue of material fact regarding the reasonability of the use of force, ***particularly*** given the independent eyewitness testimony." *Reynolds*, 84 F.3d at 1169-70, citing *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) (Emphasis added).

Two independent eyewitnesses, Larue and Marashall, corroborate the violent fight between McCarthy and Ortega. Instead of running away from McCarthy toward the exit to the breezeway, Ortega chose to force the confrontation and engage McCarthy in a very physical and violent fight. Those third-party witnesses watched the two men fight their way down the hallway with Ortega resisting at every stage. Larue confirms Ortega was reaching for something and McCarthy had to hit Ortega's arm out of the way. The Owens' brothers and Jason Cristomo confirm hearing a violent fight between McCarthy and Ortega. All witnesses agreed the fight was very

physical and sounded extremely violent. [ER 340-342, 344-345, 525-531, 539-545]

With respect to the materiality of inconsistent statements, this case is strikingly similar to the *Reynolds v. County of San Diego* decision. In *Reynolds*, plaintiff's forensic expert noted inconsistencies in Officer Jackson's testimony. Officer Jackson testified he shot from 6 inches away, but plaintiff's expert determined Reynolds suffered a contact would indicating the gun was touching Reynolds, not six inches away as the office recalled.

The *Reynolds* court determined the distance at which Reynolds was shot was immaterial, because the material aspects of the officer's version of events were corroborated by two independent eye-witnesses. *Id.* at 1169. The same is true in this case. The material aspect of this case is the fight between McCarthy and Ortega. Ortega's behavior during the fight provided the basis for McCarthy's probable cause to believe Ortega was a serious physical threat. The fight, Ortega's resisting arrest and reaching for McCarthy's back-up weapon was corroborated by independent witnesses.

The case of *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002) provides further guidance on materiality. In *Billington*, witnesses

differed on the distance between Detective Smith and the suspect, Hennessey, at the time Hennessey was shot. Some stated the men were wrestling at the time the shot was fired, while others stated Detective Smith had pushed Hennessey a few feet away before firing.

The *Billington* court found this factual dispute immaterial and instead focused on the nature of the encounter between the officer and the suspect. Hennessey was "actively, violently, and successfully" resisting arrest. Hennessey "was trying to get the detective's gun, and he was getting the upper hand. *Billington*, 292 F.3d at 1185. The court determined that, "[u]nder the circumstances, a reasonable offer would perceive a substantial risk that Hennessey would seriously injure or kill him, either by beating and kicking him, or by taking his gun and shooting him with it…Maybe he could have hoped that Hennessey simply wanted to disarm him, not shot him, but that would have been a gamble." *Id.* at 1185.

In addition to violently resisting arrest and ignoring all of McCarthy's commands, Ortega repeatedly tried to gain control of McCarthy's back-up revolver which was loose on the ground next to his head. Ortega was successful at wrestling control away from McCarthy. In the 2 to 5 seconds Ortega wrestled off McCarthy, he

gathered himself from a prone position and lunged toward McCarthy. [ER 81-87, 445-455, 591-596, 725-729] It is undisputed that someone in Ortega's position can cover 3 feet in 1/3 of a second. [ER 105-109] All this occurred after an exhausting all out sprint through the housing complex and a violent wrestling match. [ER 589-590, 629, 725-729]

McCarthy was forced to identify, comprehend, and act on Ortega's movement in the blink of an eye. Maybe McCarthy could have hoped Ortega wanted to disarm him, not shoot him, but that would have been a potentially deadly gamble. But, as the *Billington* court aptly stated, "[o]ur hundred fifty seconds filled with hot pursuit followed by hand-to-hand combat is not comfortably ample period in which to consider and evaluate the prudence of alternative tactics." *Billington*, 292 F.3d at 1191.

Whether Ortega was, in fact, going for McCarthy's gun is irrelevant. Given the totality of the circumstances it was reasonable for McCarthy to *believe* Ortega was going for his gun. *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). And it is the officers' reasonable belief/perception of the circumstances at hand that is crucial to this analysis.

ii. Right was not clearly established—reasonable officers would differ on the level of force.

The district court determined the violation of Ortega's right would be obvious because a reasonable jury could find it more likely than not Ortega was, in fact, not "grabbing for" McCarthy's gun. But, under the circumstances, actually "grabbing for" McCarthy's primary weapon is not the only gesture that could have been perceived as threatening. [ER 10-11]

The second prong of the *Saucier* test clearly allows for McCarthy's mistaken belief as to the intent behind Ortega actions.[2,3] Qualified immunity will attach to McCarthy's conduct irrespective of whether McCarthy's error was a mistake of law or a mistake of fact, or

---

[2] "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 US 224, 229 (1991).

[3] In determining whether a right is clearly established, courts "may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent." *Prison Legal News v. Lehman*, 397 F.3d 692, 702 (9th Cir. 2005); *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002) (looking to "decisions of our sister Circuits, district courts, and state courts" in evaluating if law was clearly established).

a mistake based on mixed questions of law and fact. *Pearson*, 555 U.S. at 230.

Unlike the district court's ruling seems to suggest, McCarthy need not adopt a foolish approach of "take a chance and hope for the best." *Scott v. Harris*, 550 U.S. 372, 384 (2007). The Fourth Amendment does not require McCarthy to delay firing until Ortega actually takes his primary weapon and turns it on him. *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013). "As the Fourth Circuit noted in *Elliot*, 'the Fourth Amendment does not require omniscience,' and absolute certainty of harm need not precede an act of self-protection." W*ilkinson v. Torres*, 610 F.3d 546, 553 (9th Cir. 2010) (citing *Elliot v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996)).

Under the circumstances, only those facts known and information available to the officer at the time of his action are material. *Sherrod v. Berry*, 856 F.2d 802, 804 (7th Cir. 1988). Ortega's private thoughts are not as important as how his outward actions are perceived by a reasonable officer in McCarthy's position. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In this case, it is not material where Ortega's hands ended up. Ortega was rising up from the prone position just prior to the

shooting. [ER 445-455, 591-601, 725-729] He made a rapid body movement after having just reached for McCarthy's back-up revolver. Ortega was successful wrestling McCarthy off of him. His "getting up" body movement was sudden and unexpected. [ER 591-601, 725-729] Ortega's body position was that of someone lunging forward when he was shot. [ER 445-455, 591-596, 725-729] Ortega was advancing toward McCarthy when he was shot. [ER 361-362, 591-601, 725-729] Up to that point, Ortega had ignored all of McCarthy's commands. [ER 591-601, 725-729] The events unfolded in seconds. [ER 56-68, 754-758]

In this context, threatening gestures are not limited to Ortega's hands, in fact, reaching for McCarthy's primary weapon. They include "a furtive movement, harrowing gesture, or serious verbal threat." *George v. Morris,* 736 F.3d 829, 838 (2013). Under the totality of circumstances, a reasonable police officer, with McCarthy's training and personal knowledge of events immediately preceding the shooting, could conclude deadly force was appropriate.

The district court's error is very similar to the lower court's error in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010). In *Wilkinson*, plaintiff's version of events was "sanitized" and omitted

the "urgency of the situation." It was proven the entire episode unfolded rapidly, in less than nine seconds. *Id.* at 551-52.

Here, as in *Wilkinson*, it is undisputed the situation was extremely urgent and unfolded in seconds. Regardless of what Ortega's hands were, in fact, doing at that precise moment, it is reasonable to believe that in those 2 to 5 seconds McCarthy perceived Ortega to be a serious physical threat. At best, McCarthy misread Ortega's intention, given the speed at which the incident unfolded. Yet, qualified immunity protects McCarthy from liability for his mistaken belief. This is certainly not a situation where McCarthy was plainly incompetent.

There are numerous other cases demonstrating that what the suspects' hands are, in fact, doing at the moment he is shot is an immaterial fact. The precedent available to officers confirms the right is not clearly established given similar facts.

In *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995), Officer Meeks testified that suspect Wilson aimed a gun at him. Plaintiffs asserted Wilson held the gun in the surrender position. As in our case, the *Wilson* court focused on the second factor of *Graham*, whether Wilson aimed his gun at Meeks or whether he was

surrendering. The court determined whether Wilson was, in fact, surrendering or aiming his gun at Meeks is an immaterial fact. The correct inquiry does not delve into "Wilson's state of mind or intentions…Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant." *Wilson v. Meeks*, 52 F.3d at 1554-55.

Reese v. Anderson; the "threatening gesture" was not limited to whether suspect Crawford was, in fact, reaching for a gun, but whether his actions gave the appearance of reaching for a gun. Crawford's vehicle had just come to an abrupt stop after a high speed chase, stolen objects were tossed from the car during the chase, officer Anderson had his gun drawn and ordered Crawford to raise his hands, Crawford repeatedly defied Anderson's commands, Crawford's hands were out of sight of Anderson, and Crawford dipped his shoulder as if he was reaching further down into the car. "The sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm." *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991).

Anderson v. Russell; officer Russell believed a bulge in the waistband of Anderson was a gun. The bulge was a walkman radio.

Russell ordered Anderson to raise his hands and get down. Anderson initially complied with the order to raise his hands, but unexpectedly and without explanation, lowered his hands in an attempt to reach into his back left pocket to turn off the walkman radio. Russell shot Anderson three times.

There was conflicting testimony regarding the positioning of Anderson's hands and the speed at which he was lowering his hands at the time he was shot. Witnesses testified that Anderson was lowering his hands slowly and they were around head level when he was shot. Whereas Russell perceived Anderson's hands were moving fast and at waist level. Also, witnesses placed Anderson 20 to 30 feet away, but Russell placed him 10 feet away. The *Anderson* court determined these inconsistencies to be minor. In a rapidly evolving situation as is the case here, the perspective of the officer will rarely coincide with the witnesses not involved in the situation. *Anderson v. Russell*, 247 F.3d 125, 130-31 (4th Cir. 2001).

Given the totality of the circumstances, Ortega's actions would cause a reasonable police officer to conclude deadly force was an appropriate and legal response, or at the very least believe deadly force was appropriate. Therefore, McCarthy's use of deadly force in

self-defense is justified. *Baldridge v. City of Santa Rosa*, No. C 97-3047 SI, 1999 WL 66141 (N.D. Cal. Feb.9, 1999).

B. McCarthy consistently testified Ortega grabbed for but did not gain control of his back-up revolver.

The district court mistakenly misread McCarthy's statement to investigators as inconsistent with his declaration in support of Appellant's motion for summary judgment. The cited testimony is not inconsistent; in fact, the two statements are entirely consistent.

The district court quoted McCarthy's testimony from Sgt. Howie's investigation; "[D]id he ever grab it at all? – and Officer McCarthy responded definitively: No" versus McCarthy's declaration testimony; "The suspect used his free arm to grab for my back-up weapon. I immediately reached forward and blocked the suspect's hand. He was able to briefly touch the gun, but my action prevented him from getting a firm grasp." [ER 11] There is nothing inconsistent about the two statements. Both statements indicate Ortega was not able to actually seize the gun. Grabbing something indicates the object was suddenly and actually seized. To "grab for" means the act

of making a sudden, quick grasp or snatch, but does not indicate the object was actually seized.[4]

Moreover the district court mistakenly believed that the two statements were referring to the same gun. The statement taken from Sgt. Howie's interview is referring to McCarthy's primary weapon, his pistol. The statement the district court takes from McCarthy's declaration is referring to his back-up weapon, the revolver. Sgt. Howie's after incident interview ("AII") of McCarthy describes in greater detail what Ortega was doing with McCarthy's back-up weapon.

> Howie: Okay, so when he went to try and grab your revolver that came loose, you thought he wanted to grab it and use it on you?
>
> McCarthy: Correct.
>
> Howie: Okay, and you pushed the gun further away so he could not get to it?
>
> McCarthy: Correct, and I got off him.
>
> Howie: So then you got off and pull your revolver[5] (pistol) in case in that was his still his mindset I suppose?

---

[4] The definition of grab as defined by http://dictionary.reference.com/browse/grab?s=t.

[5] The interview transcript corrects revolver to pistol. The parenthetical was not added by the drafter of this brief.

McCarthy: That's correct.

Howie: But now he doesn't go for the revolver. He actually grabs at your gun?

McCarthy: He tries to, correct.

Howie: So he doesn't, did he ever grab it at all?

McCarthy: No.

[ER 598]

Compare the above testimony to the following from McCarthy's declaration:

- When on patrol I would carry a back-up firearm. My back-up weapon was a .38 caliber Smith & Wesson revolver, which was secured to my ankle with an ankle holster. I was carrying my back-up weapon in my ankle holster the day of the incident, ¶22.

- During the struggle, the suspect was able to get his right arm free of my grasp. The suspect used his free arm to grab for my back-up weapon. I immediately reached forward and blocked the suspect's hand. He was able to briefly touch the gun, but my action prevented him from getting a firm grasp, ¶24.

- At this point, I believed he went for my back-up weapon to use it on me, ¶25.

- I wanted to get my back-up weapon out of the suspect's reach. I tried to push it further away, but I had to release my hold, and get off, of the suspect. I was not standing. I was still in a kneeling and reaching type of stance when I pushed the gun further away, ¶26.

- At this point, my back-up weapon was loose and the suspect was free of my control. I removed my primary firearm from the holster and started rotating my body toward the suspect, ¶27.

- I believed the suspect was trying to take my primary firearm from me, ¶30.

- It was clear to me the suspect was fighting with me over control of my primary firearm. I believed the suspect was trying to take my primary service weapon and kill me, ¶32.

[ER 728-729]

McCarthy's testimony, as given to Sgt. Howie, is not inconsistent with his declaration in support of Appellant's motion for summary judgment.

C. Ortega reached for McCarthy's secondary weapon after McCarthy re-holstered his taser.

The district court also read an inconsistency into McCarthy's testimony regarding his struggle handcuffing Ortega. But the cited testimony was also incomplete and taken out of context.

During his after incident interview, McCarthy gave Sgt. Howie a general non specific overview of the events as Ortega reached for McCarthy's secondary weapon.

McCarthy: ...So he fell down and he went down on his chest, and he was not, letting his arms go behind his back. He was throwing

his elbows out so I was trying to control him. So at that point, I had my Taser out, and I was telling him, 'Stop moving, I'm going to tase you. Put your hands behind your back.' And I was able to get one hand back. And at the same time I somehow got his right hand back, but then I noticed that my back up weapon, the revolver, is laying on the cement. [ER 591-592]

Because this lone paragraph does not mention when McCarthy re-holstered his taser, the district court surmises McCarthy did not have enough hands to complete the action of getting both hands behind Ortega's back and hitting Ortega's hand away from the revolver. However, throughout the remainder of his interview, McCarthy gave a more precise timeline of events after the above general statement of what happened. In fact, the very next paragraph of McCarthy's narrative states "I put my Taser away and I told him not to move and I had both of his hands behind his back at this point;" "he was still struggling;" I was able to handcuff his left hand;" "And when I handcuffed his left hand, his right hand got free and he reached for the revolver." [ER 592]

Later on in his interview, Sgt. Howie asked McCarthy to recall a step by step sequence of events surrounding the taser, handcuffing of Ortega's left hand, and Ortega reaching for the back-up weapon.

Howie: And then your thought process was get him face down?

McCarthy: Get him face down and get him in handcuffs.

Howie: Okay.

McCarthy: But he wasn't complying so that's when I pulled my Taser out and I was thinking about using that maybe. But then I was able to grab his left arm and bring it back and put the Taser away and grab his right arm.

Howie: Okay, so no he's face down?

McCarthy: Um huh.

Howie: And you're able to forcibly move his left hand behind his back.

McCarthy: Um huh.

Howie: And now you grab his right hand or do you have your cuffs out now?

McCarthy: I don't have my cuffs out until both hands were behind his back.

Howie: Okay, so now you grab his right…

McCarthy: Um huh.

Howie: His right with, so you're holding his left hand with your left hand?

McCarthy: Correct…

Howie: Okay, so now you're getting his right hand behind his back. Okay, now once you get his right hand behind his back, what do you do?

McCarthy: I tell him not to move and that's when I pull my handcuffs out. And the whole time I'm looking at my revolver on the ground, hoping he hasn't seen it yet.

Howie: Right.

McCarthy: And that's when I put the handcuffs on his left hand first, and I was making, because he had a jacket on I was trying to make sure it clocked around. So I lost the grip on his right hand and that's when he reached out for the revolver, trying to grab it…

Howie: Right.

McCarthy: He smacked it and then I just kind of swatted his right and then I pushed the gun away, as I got myself off of him.

[ER 594-595]

The fact McCarthy did not specify the exact order of events when trying to give a general overview cannot alone support summary judgment where McCarthy repeatedly testified—in the next paragraph, and multiple times during the same interview—that he was able to grab Ortega's left arm with his left hand, put his taser

away, wrestle Ortega's right arm back with his right hand, and then Ortega reaches for the back-up weapon. *See Scott*, 550 U.S. at 380 ("Where the record *taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (Internal quotation marks omitted) (Emphasis added).

The district court's quoted paragraph from McCarthy's interview is ambiguous as to time and sequence because a literal reading, taken out of context, does not make sense – McCarthy gives a general description of the events before he gives a specific timeline. Therefore the testimony standing on its own is an insufficient basis for the denial of summary judgment. *Cf. Hart v. Parks*, 450 F.3d 1059, 1068 (9th Cir. 2006) (finding that a single arguable ambiguous statement did not raise a triable issue of fact). *Wilkinson v. Torres*, 610 F.3d 546, 553 (9th Cir. 2010).

McCarthy's testimony generally describing what happened is internally consistent with his specific "order of events" testimony later in the same interview. McCarthy's interview testimony is

consistent with his declaration in support of Appellant's motion for summary judgment.[6]

D. Ortega was violently resisting arrest.

The district court determined witness Cristomo's declaration suggests Ortega was not resisting arrest; Ortega was speaking "in a way that suggested non-violent compliance and disbelief." [ER 14] But again, the facts surrounding Cristomo's testimony are incomplete and taken out of context. This evidence cannot support a motion for summary judgment.

Because the material aspects of McCarhty's version of events were corroborated by all witnesses, Ortega's tone of voice is an immaterial fact. *Reynolds v. County of San Diego*, 84 F.3d at 1169.

---

[6] The district court points to the absence of taser testimony in McCarthy's declaration as conspicuous. McCarthy did not use his taser, nor was the taser was material to McCarthy's decision on use of deadly force. "[A] reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." W*ilkinson*, 610 F.3d at 551 (citing *Scott*, 39 F.3d at 915). In addition, the McCarthy gave a detailed step by step order of events including what he did with the taser during his after incident interview. To the extent the district court gathered some meaning from the lack of testimony in McCarthy's declaration the Court's are prohibited from engaging in theoretical speculation or relying on "an inference drawn, not from record evidence, but from a lack of evidence…" *Chappell*, 585 F.3d at 912 (citing *Graham*, 490 U.S. at 396-97). Also see *Boyd v. Baeppler*, 215 F.3d 594, 602 (6th Cir. 2000).

Cristomo's statement does not contradict the overwhelming and undisputed evidence Ortega was violently resisting arrest.

Although Cristomo gave his opinion regarding the tone of Ortega's voice when yelling he did not actually see any part of the fight. Cristomo admits he was in his kitchen with TV on at the time. The TV was loud, therefore he was not really paying attention to Ortega yelling in the breezeway. Cristomo never spoke to Ortega prior to the incident. It is undisputed, Cristomo heard the sounds of a very physical and violent fight ***after*** hearing Ortega yell "[a]re you kidding me?" Cristomo testified the fight lasted anywhere from one minute to a few minutes. Cristomo testified that the fight was so intense his first impulse was to call the police. [ER 340-342, 344-345]

Cristomo does not remember hearing Ortega angrily yell "Are you kidding me? Come on. Come on! I'm going to sue you. Get the fuck off me." Two eye-witnesses testified to the violent nature of the fight, in which Ortega was resisting arrest. And, that the fight lasted a few minutes. Two more witnesses, Ryan and Phillip Owen, testified hearing the sounds of a very violent and physical fight. Phillip was the closest witness to the fight. He described hearing Ortega angrily yell at McCarthy. [ER 56-68, 525-531, 539-545, 750-753, 755-758]

The evidence proves Ortega was violently resisting arrest in the seconds prior to the shots being fired. *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010). The fact that all witnesses did not notice Ortega angrily yelling at McCarthy "get the fuck off me," does not necessarily impugn the veracity of McCarthy's account. *Chappell v. Cleveland*, 585 F.3d 901 (6th Cir. 2009). The discrepancy does not create a genuine dispute of fact.

Even the district court acknowledged the irrelevance of what these witnesses heard Ortega yell at McCarthy.[7] "[T]he opposition discusses at length multiple witnesses' statements that decedent said "I'm going to sue you," just before the shooting,... and attempts to show that Defendant McCarthy and other police officers attempted to justify the shooting afterwards. It isn't clear what part, if any, this plays in demonstrating a triable issue of material fact as to liability, damages, or qualified immunity." [ER 723]

[7] Prior to filing the operative opposition to motion for summary judgment, Appellee filed an over-length opposition. The district court rejected the over-length brief and directed Appellee to file an amended opposition. The order regarding indicated that what witnesses heard Ortega say was immaterial and did not raise a triable issue of fact. [ER 723]

Cristomo's failure to hear Ortega yelling at McCarthy, "get the fuck off me" does not refute the Owen's brothers testimony or McCarthy's account. It only establishes Cristomo did not hear it. Admittedly, his TV was loud and he was not really paying attention until the fight started. Furthermore, the fight occurred after the statement he attributed to Ortega. Even if, Cristomo was correct regarding Ortega's tone of voice at the time it was made, the situation escalated after the statement was made. Certainly, the fight corroborated by all witnesses indicates non-compliance and resisting arrest.

Other circuits have taken note of similar immaterial inconsistencies of witnesses. "In a rapidly evolving scenario such as this one, a witness's account of the event will rarely, if ever, coincide perfectly with the officers' perceptions because the witness is typically viewing the event from a different angle than that of the officer. For that reason, minor discrepancies in testimony do not create a material issue of fact in excessive force claim, particularly when, as here, the witness views [hears/experiences] the event from a worse vantage point than that of the officers. *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001).

As in *Anderson*, the events prior to the shooting unfolded rapidly. Cristomo was did not even view the events as they unfolded. He admits that he was not paying particularly close attention, and heard the events unfold without the benefit of seeing anything. Not only was Cristomo's vantage point worse than the other witnesses and McCarthy, he had no vantage to observe the fight. At best, given his vantage point, Cristomo's opinion was only speculation.

E. The district court went beyond the guidelines of the *Cruz* decision, applying 20/20 hindsight to judge the credibility of McCarthy.

The evaluation of police actions is not made on the basis of how a situation appears to those who study if afterward, with the clarity of hindsight and the ability to ask, "What else might have been done?" Rather, the question asked is what reasonable action would a trained officer take in the midst of a critical situation, given the facts known then and the speed needed to avoid bodily injury? Craig Lally, *What police confront*, Los Angeles Times, March 5, 2015.

The *Cruz* decision recognized an exception to the 20/20 hindsight rule, because, in the deadly force context, the person most likely to rebut the officers' version of events cannot testify. The Court's rationale is found in Footnote 3:

> "In the usual case, we review the record "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Wilkinson v. Torres,* 610 F.3d 546, 551 (9th Cir.2010) (explaining that "the critical inquiry is what [the officer] perceived"). So the fact that Cruz did not have a gun on him normally wouldn't factor into the reasonableness analysis because the officers couldn't know what was (or wasn't) underneath Cruz's waistband. But, because the officers killed Cruz, we must examine whether the officers' accounts are "consistent with other known facts.""

Cruz v. City of Anaheim, 765 F.3d 1076, 1080 n.3 (9th Cir. 2014) (Internal citation omitted).

However, in this case the district court went beyond the guidelines of *Cruz*. The district court used 20/20 hindsight to bolster a hypothetical argument in Appellees' favor. The district court failed to find the officer's version was inconsistent with other known material facts. Instead it used 20/20 hindsight to speculate that a jury might simply find McCarthy lied. [ER 9] Appellees may not stave off summary judgment with the only hope that the jury might disbelieve witness testimony. *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001); *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996).

Under the district court's analysis as long as there is an inconsistent fact, no matter how irrelevant or immaterial, there can

be no qualified immunity. And, by stringing together a series of unrelated insignificant discrepancies the district court allowed a jury to speculate as to Ortega's movements in the seconds preceding the shooting. 20/20 hindsight is prohibited, even under the guise of examining all circumstantial evidence in the record.

The district court erred by relying on a group of immaterial inconsistencies at the summary judgment stage. Doing so will not defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Reynolds*, 84 F.3d at 1169-70 (citing *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir.), *cert. denied*, 506 U.S. 908 (1992)); *Anderson v. Russell*, 247 F.3d 125, 130-31 (4th Cir. 2001).

Rather than limiting its inquiry into whether McCarthy's version is consistent with other known facts, the district court allowed for a jury to speculate that McCarthy may have lied, even though Appellant presented credible explanations for Ortega's movements. Whether another reasonable, or more reasonable, interpretation of events can be construed after the fact, should be immaterial. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

Working backward with the benefit of 20/20 hindsight, the district court rejected consistent and material explanations allowing a jury to speculate as to Ortega's movements. With the benefit of 20/20 hindsight, the district court determined McCarthy was not credible.

The use of 20/20 hindsight is in direct conflict with long standing Supreme Court decisions. *Saucier v. Katz*, 533 U.S. 194, 205 (2001) and *Graham v. Connor*, 490 U.S. 386 (1989); Ninth Circuit case law, *Bryan v. McPherson*, 630 F.3d 805 (9th Cir. 2010) and *Long v. City and County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007); and every other Circuit Court in the Country, *Estate of Bennett v. Wainwright*, 548 F.3d 155, 175 (1st Cir. 2008); *Rasanen v. Doe*, 723 F.3d 325, 331 (2nd Cir. 2013); *Rivas v. City of Passaic*, 365 F.3d 186, 198 (3rd Cir. 2004), *Milstead v. Kibler*, 243 F.3d 157, 165 (4th Cir. 2001), *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009), *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009), *Deering v. Reich*, 183 F.3d 645, 650 (7th Cir. 1999), *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000), *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008), *Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009), *Wallace v. District*

of Columbia, 685 F. Supp. 2d 104, 110 (D.C. Dist. Ct. 2010).[8] Nor is it compatible with the longstanding approach to examination of police excessive force cases.

II. 14th Amendment.

Using the purpose to harm standard, as the district court did in this case, Appellees must show that McCarthy's purpose was "to cause harm unrelated to the legitimate object of arrest." *Porter v. Osborn*, 546 F.3d 1131, 1140 (9th Cir. 2008) (Citation and internal quotation marks omitted). It is undisputed McCarthy faced "an evolving set of circumstances" that unraveled in seconds, necessitating fast action. Therefore, Appellees must make a showing McCarthy acted with a "purpose to harm" Ortega. *Id.* at 1139.

Porter defines "non-legitimate conduct" when quoting from *Davis v. Township of Hillside*, 190 F.3d 167, 172 (3rd Cir. 1999) (McKee, J. concurring). "We agree with Jude McKee's concurring opinion in *Davis*, a Third Circuit police chase case, which reasons that where force against a suspect is meant only to 'teach a lesson' or to 'get even' then '*Lewis* would not shield the officers from liability even

[8] Use of 20/20 hindsight conflicts with the Fourth Amendment analysis "mandated" in previous case law.

though they were ultimately effectuating an arrest.' *Id.* *Lewis* contemplates such 'rare situations where the nature of an officer's deliberate physical contact is such that a reasonable factfinder would conclude the officer intended to harm, terrorize or kill.'" *Porter*, 546 F.3d at 1140.

Appellees produced no evidence that McCarthy had any ulterior motive for firing his weapon at Ortega. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 797-98 (9th Cir. 2014) (*en banc*) (affirming summary judgment on Fourteenth Amendment substantive due process claim arising from deadly force, even though genuine dispute regarding Fourth Amendment excessive force claim, because plaintiffs produced no evidence that the officers had any ulterior motives for using force); *Hayes v. County of San Diego*, 736 F.3d 1223, 1230-31 (9th Cir. 2013) (affirming summary judgment on Fourteenth Amendment substantive due process claim in deadly force case because there was no evidence that the deputies fired their weapons for any purpose other than self-defense).

The record before the district court was void of any notion that McCarthy intended, or in fact, inflicted gratuitous harm to Ortega. Rather, his initial goal was simply to arrest a fleeing suspected felon

who was unquestionably resisting arrest. However, as events unfolded, McCarthy reasonably perceived evidence of a life threatening event and acted accordingly. Two eye-witnesses, and multiple neighbors, confirm Ortega was violently resisting arrest in the seconds leading up to the shooting. It is uncontested in the fact record, McCarthy had to make the decision regarding deadly force is 2 to 5 seconds after an extremely violent fight. There is simply no evidence McCarthy intended to cause harm unrelated to a legitimate law enforcement purpose. [ER 56-68, 525-531, 539-545, 581-601, 725-729, 749-758]

CONCLUSION

For all of the above stated reasons, Appellant respectfully requests this Court reverse the District Court's Order finding the lack of qualified immunity.

April 30, 2015

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

s/

Brian K. Cline, Deputy City Attorney
Attorney for Appellant,
Jonathan McCarthy

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellant Jonathan McCarthy, informs the Court that there are no related cases.

April 30, 2015

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

s/

Brian K. Cline, Deputy City Attorney
Attorney for Appellant,
Jonathan McCarthy

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P.32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points, and contains 11,335 (including footnotes) as counted by Microsoft Word word processing software.

April 30, 2015

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney.

s/

Brian K. Cline, Deputy City Attorney
Attorney for Appellant,
Jonathan McCarthy

CERTIFICATE OF SERVICE

Shakina Ortega, et al. v. SDPD, et al.

Ninth Circuit case number: 14-56824

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2015.

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

Signed,

s/ Brian K. Cline

April 30, 2015