No.

In the Supreme Court of the United States

VIRGIL BREWER,

Petitioner,

v.

KRISTINA MYERS, individually, and as administrator of the Estate of Steven P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M. and K.J.M., minors,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented

While conducting a house-to-house search for a suspect who had threatened people in a bar with a shotgun after being thrown out of that bar for fighting, the suspect was found hiding in a shed behind a house. The suspect—not complying with commands to put his hands up and get on the ground and while shouting and being belligerent—advanced half the distance from the shed towards Petitioner Brewer who fired a beanbag round at the suspect, which caused the suspect's death. Before denying qualified immunity to an officer, this Court requires that existing precedent place the "constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). The questions presented are:

Question 1: Whether there is a clearly established right not to be shot with a less than lethal beanbag projectile at close range.

Question 2: Whether a court of appeals is free to ignore the facts shown in video and considered by the district court on a motion to dismiss.

Question 3: Whether the courts below addressed the issue of qualified immunity and clearly established law at too high a level of generality contrary to this Court's instruction in *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), *White v. Pauly*, 137 S.Ct. 548 (2017), and *Ashcroft v. al-Kidd*, 563 U.S. 731.

Parties to the Proceedings

Petitioner, Virgil "Dusty" Brewer, was defendant–appellant in the court below.

Respondent, Kristina Myers, was the plaintiff–appellee in the court below.

Lonnie Small, individually and in his official capacity as Sheriff of Barber County, Kansas, is not a party in this Court or in the Tenth Circuit but was a defendant in the district court below.

Corporate Disclosure Statement

There are no corporations involved in this proceeding.

List of Proceedings

United States District Court for the District of Kansas, Case No. 17-2682-CA-JPO, *Kristina Myers, individually, and as administrator of the Estate of Steven P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M. and K.J.M., minors, Plaintiff - Appellee, v. Virgil Brewer, individually and in his official capacity as Undersheriff of Barber County, Kansas, and Lonnie Small, individually and in his official capacity as Sheriff of Barber County, Kansas, Defendants*, Order Appealed from Filed July 27, 2018.

Tenth Circuit Court of Appeals, Appeal No. 18-3145, *Kristina MYERS, individually, and as administrator of the Estate of Steven P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M. and K.J.M., minors, Plaintiff - Appellee, v. Virgil Brewer, individually and in his official capacity as Undersheriff of Barber County, Kansas, Defendant - Appellant, and Lonnie Small, individually and in his of-*

ficial capacity as Sheriff of Barber County, Kansas, Defendant., Order and Judgment filed July 24, 2019, Petition for Rehearing and Rehearing En Banc denied August 22, 2019.

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Opinions Below

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 773 Fed.Appx. 1032 (10th Cir. July 24, 2019). The district court's memorandum and order (Pet. App. 10a–31a) is unpublished but is available at 2018 WL 3145401.

Jurisdiction

The judgment of the court of appeals was entered on July 24, 2019. A petition for rehearing was denied on August 22, 2019 (Pet. App. 32a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions Involved

Respondents claim Petitioner violated rights under the Fourth Amendment to the United States Constitution which provides: "The right of the people to be secure in their persons … against unreasonable searches and seizures shall not be violated."

This action was brought pursuant to 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … 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.

Statement of the Case

A. Factual Background

1. Facts Alleged in the Complaint and Facts Shown in Video which Blatantly Contradict the Allegations in the Complaint.

The district court drew the facts from the complaint and considered the video recordings referenced in, and central to, the complaint. Pet. App. 12a. The district court noted that it need not view the facts in the light most favorable to the non-moving party if non-moving party's version of the facts are plainly contradicted by video. *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Thus, to the extent the allegations in the complaint were blatantly contradicted by the videos, the district court considered the videos instead of the factual allegations in the complaint. *Id.* at 13a.

2. Facts Found by the District Court Based Upon the Facts Shown in Video.

Petitioner is the Undersheriff of Barber County, Kansas; Respondent, Kristina Myers, is the heir and personal representative of the estate of decedent, Steven Myers, and next friend to his heirs and minor children. Pet. App. 10a.

On October 6, 2017, Petitioner and other law enforcement officers responded to a 911 call reporting that Steven Myers was threatening people with a shotgun in the street in front of a bar in Sun City, Kansas. Pet. App. 13a. The caller said Myers was drunk and had been thrown out of the bar for fighting. *Id.* at 13a–14a. Petitioner Brewer and three other officers from Barber County responded but none were nearby. Myers left the area by the time the officers arrived. *Id.* at

14a. Unbeknownst to the officers, Myers had returned home, put away the shotgun, and had taken his dog for a walk. *Id*.

When officers arrived in Sun City, about forty-one minutes after the 911 call, they began searching house-to-house for Myers. *Id*. Eventually, Barber County Sheriff Lonnie Small spotted Myers hiding in a shed about fifteen feet behind a home. Sheriff Small, at the time, was in the back door of the house with a canine and shouted for Myers to come out of the shed. *Id*. at 14a. Sheriff Small immediately turned around and led the canine toward the front door and away from Myers. *Id*. Myers yelled back at Sheriff Small. *Id*. Petitioner Brewer and Deputy Mark Suchy began shouting at Myers to put his hands up and get on the ground. *Id*. Myers did not comply with either command. *Id*. 14a, 27a–28a.

The district court found the facts, from the complaint and video, showed Brewer had information that Myers was drunk and threatening people with a shotgun; that over forty minutes had lapsed before their arrival; Myers was no longer in the same spot; when Brewer encountered Myers, Myers did not obey the officers' directions, was yelling at the officers, and was moving closer to Petitioner Brewer in the doorway, and was being belligerent. *Id*. at 27a–28a.

After about eight seconds of yelling, Petitioner Brewer fired a beanbag round from his 12-gauge shotgun at Myers' chest from a distance of six to eight feet. *Id*. at 14a. A beanbag round is a small fabric pouch filled with lead pellets which is intended to be a less than lethal weapon. *Id*. When fired from less than ten feet at a subject's chest, the rounds still present risk of

serious injury or death. *Id*.

Myers went to his knees and collapsed. *Id*. at 15a. CPR was administered until coroner pronounced Myers' death. *Id*. at 15a–16a.

B. Procedural Background

1. Respondent sued Petitioner and Sheriff Lonnie Small under 42 U.S.C. § 1983 asserting they were responsible in their individual and official capacities for the death of Myers for excessive force in violation of the Fourth Amendment. Pet. App. 10a–11a.

Both Brewer and Small moved to dismiss. *Id*. at 11a–12a.

The district court dismissed the individual capacity § 1983 claim against Sheriff Small for a lack of participation in the use of force. *Id*. at 20a. The official capacity claims were dismissed for lack of jurisdiction under the Eleventh Amendment. *Id*. at 24a. The court also declined jurisdiction over any state law claims. *Id*. at 25a, 31a.

The district court denied qualified immunity to Petitioner Brewer, finding the "right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander" to be clearly established such that plaintiff has adequately alleged Brewer violated this right. *Id*. at 30a.

Petitioner Brewer appealed the denial of qualified immunity to the United States Court of Appeals for the Tenth Circuit.

2. The Tenth Circuit affirmed the denial of qualified immunity to Petitioner Brewer. The Tenth Circuit incorrectly stated the video does not clearly contradict

the allegations in the complaint, Pet. App. 5a, as the district court stated—the facts shown by the video blatantly contradicted the allegations in the complaint.

The Tenth Circuit credited the suggestion that Myers was not actively resisting arrest or attempting to evade arrest—despite the fact he was hiding in a shed behind another person's house and was not complying with officer commands to get on the ground and raise his hands. Pet. App. 14a.

The Tenth Circuit also credited the allegation in the complaint that Myers was shot with a beanbag round as he "stood in the yard, with empty hands at his sides" and "did not threaten the officers, brandish a weapon, or attempt to escape," Pet. App. 7a, despite the district court's determination from the video that Myers was shouting at the deputies, was being belligerent, did not comply with the commands to raise his hands and get on the ground, and was moving toward the house and closer to within just a few feet of Brewer standing in the doorway of the house. *Id.* at 14a, 27a–28a.

Moreover, the Tenth Circuit posited that Myers "had committed no crime," *id.* at 8a, despite the district court's conclusions from the video and audio that Myers had threatened people with a shotgun in the street in front of a bar after he had been thrown out of the bar for fighting and was not complying with the commands of the officers. *Id.* at 13a–14a, 27a–28a.

The Tenth Circuit noted Myers "possessed no weapon," *id.*, at 8a, despite the district court's conclusion that officers had been informed Myers was armed with a shotgun and did not know he had put the gun away in his home. *Id.* at 14a.

The Tenth Circuit said it was "clearly established that an officer uses excessive force when he executes a forceful takedown of a subject who at most was a misdemeanant, but otherwise posed no threat and did not resist arrest or flee." *Id*. at 8a (citing *Morris v. Noe*, 672 F.3d 1185, 1198 (10th Cir. 2012)). The court also said it was "clearly established that an officer uses excessive force when he shoots a subject who possessed a knife and took three steps toward the officer from a distance of some five to ten feet but otherwise made no threatening motion." *Id*. at 8a (citing *Tenorio v. Pitzer*, 802 F.3d 1160, 1165–66 (10th Cir. 2015) and *Zuchel v. City & County of Denver*, 997 F.2d 730, 735 (10th Cir. 1993)). Based on *Zuchel*, *Tenorio*, and *Morris* the Tenth Circuit concluded it was "clearly established that the use of force under the circumstances confronted by Undersheriff Brewer here was not objectively reasonable" and affirmed the denial of qualified immunity. *Id*. at 9a.

Reasons to Grant the Petition

Law enforcement officers, when dealing with offenders and calls for service, must assess issues of officer safety and the protection of the general public within the confines of the Fourth Amendment. This Court has long required courts to apply an objective test when assessing the reasonableness of a particular use of force and requires a court to carefully balance the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 395–96 (1989) (internal quotation marks omitted); *see also Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014). This test of reasonableness "is not capable of precise definition or mechanical

application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and no precise or "rigid preconditions" exist for determining when an officer's use of force is excessive and, therefore, unreasonable under the Fourth Amendment. *Scott v. Harris*, 550 U.S. 372, 382 (2007) .

It matters not whether a particular action constituted an application of "deadly" force because "all that matters" to address the constitutional question is whether the officer's "actions were reasonable." *Id*. at 383. Moreover, where the allegations in a complaint are blatantly contradicted by video referenced in the complaint and properly considered by the district on a motion to dismiss, an appeals court should not adopt the version of facts alleged in the complaint. *Id*. at 380; *see also* Fed.R.Civ.P. 10(c), and 5A Federal Practice & Procedure § 1327 (4th ed.).

A. Review is warranted because there is no clearly established "right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander." Existing precedent does not place the question of whether Petitioner acted unreasonably "beyond debate."

The Tenth Circuit's decision below diverges from its own jurisprudence, and that of this Court, and splits with other circuits' approach to analyzing the use of force by law enforcement officers.

In *Graham*, this Court held reasonableness is measured at the moment force is applied, and accounts for the fact that officers must make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Id*. at 396–97. The Tenth Circuit has

repeatedly noted this instruction from *Graham*. *See, e.g.*, *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017) *cert. denied*, 138 S.Ct. 2650 (2018); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008); *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004); *Archuleta v. McShan*, 897 F.2d 495, 500 (10th Cir. 1990).

The reasonableness of a particular use of force is judged in light of the surrounding facts and circumstances, including three factors set forth by this Court in *Graham*: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the individual actively resists arrest or attempts to evade arrest by flight. 490 U.S. at 396. *See also Pauly v. White*, 874 F.3d at 1215 ("we turn to the ubiquitous three factor test from *Graham*").

Review is warranted to determine whether Petitioner Brewer's conduct was unreasonable in light of clearly established precedent which places the question beyond debate. The "calculus of reasonableness," *Graham,* 490 U.S. at 396–97, under the Fourth Amendment will vary drastically when a court discounts the fact the encounter involves a person who has committed a serious crime, attempted to elude law enforcement by hiding in a shed, then ignored commands while belligerently approaching within just a few feet of the officer before the officer deployed a less than lethal beanbag round.

1. The Tenth Circuit ignored the facts shown by the video and considered by the district court, which blatantly contradicted the allegations in the complaint.

The district court viewed the facts as alleged in the complaint *except* where those facts were blatantly contradicted by the videos referenced in the complaint.

Resolution of questions of qualified immunity require that courts first resolve the threshold question of whether the facts alleged show the officer's conduct violated a constitutional right. *Scott v. Harris*, 550 U.S. at 377 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Only if the court finds the facts show a violation of a constitutional right does the court move to the next step to ask whether the right was clearly established in light of the specific context of the case. *Id*. Thus, the "first step in assessing the constitutionality of [an officer's] actions is to determine the relevant facts." *Id*. at 378.

On a motion to dismiss, the district court properly considered the videos referenced in a complaint that were clearly central to the complaint. Pet. App. 12a (citing *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384–85 (10th Cir. 1997)); *see also* Fed.R.Civ.P. 10(c) (a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes"), and 5A Federal Practice & Procedure § 1327 (4th ed.) ("when the plaintiff fails to introduce a pertinent document as part of her pleading, the defendant may be permitted to introduce the document as an exhibit to a motion attacking the sufficiency of the pleading if the plaintiff has referred to the item in the complaint and it is central to the affirmative case").

The district court further adhered to this Court's teaching in *Scott v. Harris* and did not credit the allegations in the complaint that were "plainly contradicted" by the video, and viewed the facts as shown in the videos instead of the allegations "blatantly contradicted" by the videos. *Id.* at 12a–13a (citing *Scott v. Harris*, 550 U.S. at 380).

> [A court] is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given the attached material, as long as the justice-seeking objectives of the federal rules are kept in mind. It appears to be well settled that when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the terms of the written instrument will control, particularly when it is the instrument being relied upon by the party who made it an exhibit.

5A Fed. Prac. & Proc. Civ. § 1327 (4th ed.) (citations omitted).

The Tenth Circuit erroneously credited only the allegations within the four corners of the complaint despite the fact the district court had found they were "blatantly contradicted" by the video and audio, which that court considered when addressing the motion to dismiss. The Tenth Circuit assumed *no* crime had been committed, *id.* at 6a, 8a, despite the fact Myers had

committed the offenses of aggravated assault and felony interference.[1] The Tenth Circuit further erroneously credited the allegations that Myers merely stood empty-handed and was not threatening the officers or attempting escape despite the fact Myers had hidden in a shed as officers were conducting a house-to-house search, emerged from the shed after being discovered, shouting at the officers, not complying with commands, being belligerent, and closing the distance with Brewer at the time he fired the beanbag round. *Id*. at 13a–14a, 27a–28a.

2. Under the first *Graham* factor, Myers' crimes were severe.

The first *Graham* factor, "the severity of the crime at issue," 490 U.S. at 396, weighs in favor of Brewer. Myers was reported to be intoxicated, got into a barfight, was evicted, after which he then returned armed with a shotgun and threatened people. At the time Myers was shot with the beanbag round, he was not complying with the commands given by Undersheriff Brewer and Deputy Suchy and had advanced half the distance from the shed to Brewer.

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[1] *See* Kan. Stat. Ann. § 21-5412 (aggravated assault), Kan. Stat. Ann. § 21-5904 (interference). Under Kan. Stat. Ann. § 21-5412 (b)(1) aggravated assault is knowingly placing another person in reasonable apprehension of immediate bodily harm, committed with a deadly weapon. It is a severity level 7, person felony. Kan. Stat. Ann. § 21-5412(e)(2).

Under Kan. Stat. Ann. § 21-5904(a)(3) and (b)(5) felony interference with law enforcement occurs from "obstructing, resisting or opposing any person … in the discharge of any official duty" and is a severity level 9, nonperson felony.

While the Tenth Circuit inexplicably stated Myers had committed *no* crime, the district court unaccountably described Myers' crimes as "not particularly severe." Pet. App. 27a. The facts found by the district court clearly showed Myers had threatened people with a shotgun in the street in front of a bar after he had been thrown out of the bar for fighting and, at the time Brewer discharged the beanbag round, was not complying with the commands of the officers. *Id*. at 13a–14a, 27a–28a.

Threatening people with a gun is a serious crime. *See, e.g.*, *McCoy v. Meyers*, 887 F.3d 1034, 1051 and n.21 (10th Cir. 2018) (pointing a gun at someone was a serious crime). Under Kansas law, Myers had committed the crimes of aggravated assault and felony interference. Kan. Stat. Ann. § 21-5412 (aggravated assault), Kan. Stat. Ann. § 21-5904 (interference).

3. Under the third *Graham* factor, Myers was actively resisting arrest.

The third *Graham* factor, "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," 490 U.S. at 396, also weighs in favor of Petitioner Brewer.

The district court determined the facts shown by the video "blatantly contradicted" the allegations in the complaint and Myers was shouting at the deputies, was being belligerent, did not comply with the commands to raise his hands and get on the ground, and was moving toward the house and closer to Brewer in the doorway of the house. Pet. App. at 14a, 27a–28a.

When addressing a qualified immunity defense, a court of appeals is not free to credit the non-moving

parties' allegations when they are blatantly contradicted by video that is authentic and properly considered. *Scott v. Harris*, 550 U.S. at 380. The Tenth Circuit, looking only to the four corners of the complaint, concluded Myers was not actively resisting arrest or attempting to evade arrest, and credited the allegation that he was shot as he "stood in the yard, with empty hands at his sides" while he "did not threaten the officers, brandish a weapon, or attempt to escape." Pet. App. 7a. The Tenth Circuit noted Myers "possessed no weapon," *id*., at 8a, despite the district court's conclusion that officer did not know Myers had put away the shotgun in his home. *Id*. at 14a.

Tenth Circuit precedent holds that an officer is not required to wait until a suspect is within reach to avert a perceived threat. *See Estate of Larsen*, 511 F.3d at 1260 ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then it is 'often … too late to take safety precautions.'" (quoting *People v. Morales*, 198 A.D.2d 129, 603 N.Y.S.2d 319, 320 (1993))); *see also Estate of Ceballos v. Husk*, 919 F.3d 1204, 1231 (10th Cir. 2019) (subject closing the distance between himself and officer Husk, shortening the window of time before he would be within striking distance of officer with a baseball bat; Tenth Circuit precedent did not require officer to wait until he was within reach of the baseball bat) (Bacharach, J., concurring in part and dissenting in part).

The facts identified by the district court from the video show Myers was, by all appearances, actively trying to evade and/or resist arrest. The district court determined from the video that Myers was shouting at the deputies, was being belligerent, did not comply with the commands to raise his hands and get on the

ground, and was moving toward the house and closed to within just a few feet of Brewer standing in the doorway of the house. *Id*. at 14a, 27a–28a.

4. The right identified by the district court is not clearly established and no existing precedent places the constitutional question beyond debate.

The constitutional rule identified by the district court below was not "beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). The district court, in fact, articulated a constitutional rule that has not been applied in *any* other case. Without citation to any authority, the district court said the right at issue "is the right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander." Pet. App. 30a.

Because "'police officers are often 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,' the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier v. Katz*, 533 U.S. 194, 205 (2001), *quoting Graham*, 490 U.S. at 397. The reasonableness standard does not require that officers employ the least intrusive or forceful alternative when confronting a threat. *See, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means"); *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001) ("the reasonableness standard

does not require that officers use 'alternative less intrusive means.'") (quoting *Lafayette*, 462 U.S. 647–48) (internal quotations omitted). Likewise, an officer that reasonably but mistakenly believes a suspect was likely to fight back "the officer would be justified in using more force than in fact was needed." *Saucier*, 533 U.S. at 205.

> A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." [*al-Kidd*, 563 U.S. at 741]. Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).
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> "We have repeatedly told courts ... not to define clearly established law at a high level of generality." *al–Kidd*, *supra*, at 742. The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *Ibid.* (emphasis added). 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) (*per curiam*) (quoting [*Saucier*, 533 U.S. at 201]).

Mullenix v. Luna, 136 S.Ct. 305, 308 (2015). *Mullenix* and other of this Court's recent cases make it clear

that the overgeneralization by the lower courts is impermissible in all but very obvious cases of excessive force. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1154 (2018). "[T]he clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S.Ct. 548, 552 (2017). The "clearly established" prong requires identification of a "a case where an officer acting under similar circumstances as [defendant] was held to have violated the Fourth Amendment." *Id.* "'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning" to officers, [citation omitted], but 'in the light of pre-existing law the unlawfulness must be apparent. [Citation omitted.]'" *Id.*

The Tenth Circuit opinion is premised upon the assumption that Undersheriff Brewer lacked probable cause to believe Myers had committed *any* crime, Pet. App. 6a, when Brewer had probable cause to believe Myers had committed the offense of aggravated assault. *Id.* at 13a, at 27a-28a. This premise is absolutely at odds with the facts as set forth in the district court's opinion. *Compare id.* at 6a ("[t]here was no crime at issue") with *id.* at 13a (911 call reported "Steven Myers was threatening people with a shotgun in the street in front of Buster's Bar in Sun City, Kansas. The caller indicated that Myers was drunk and had been thrown out of the bar for fighting."). In a footnote, the Tenth Circuit's opinion makes the contradictory statements that the "conclusion remains unchanged" even if it were to accept that Brewer believed Myers had committed aggravated assault. Slip op., at 6 n.4 (citing *Morris v. Noe*, 672 F.3d 1185, 1195 n.4 (10th Cir. 2012)). The *Morris* decision was premised upon the "facts the district court assumed, [that] Defendant did

not have probable cause to arrest Morris for *any* crime." 672 F.3d at 1195 (emphasis added). The calculus of reasonableness under the Fourth Amendment differs substantially when the analysis begins by assuming a lack of probable cause to believe the subject committed *any* crime.

The Tenth Circuit's decision below diverges dramatically from its own jurisprudence, and that of this Court, and splits from other circuits' approach to analyzing the use force by law enforcement officers.

Tenth Circuit precedent reveals use of even deadly force is reasonable and justified under the Fourth Amendment when a reasonable officer has cause to believe that there was a threat of serious physical harm to themselves or to others. *Estate of Larsen*, 511 F.3d at 1260. Officers need not wait for an assailant to shoot first or otherwise attempt to use a weapon before using force to address the perceived threat. *See, e.g.*, *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1317–18 (10th Cir. 2009) (officer justified in shooting armed suspect where suspect, at the moment the officer fired the fatal shot, was pointing the gun towards his own head and not towards the officer); *Estate of Larsen*, 511 F.3d at 1260 (officer justified in shooting man with knife raised even if man did not make stabbing or lunging motions towards him, as a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions'") (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)); *Wilson v. Meeks*, 52 F.3d 1547, 1553–54 (10th Cir. 1995) (use of deadly force reasonable where suspect aimed pistol in officer's direction but plaintiff argued suspect had not intended to threaten officer).

The Tenth Circuit previously held that "qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat." *Wilson v. Meeks*, 52 F.3d at 1553–54 (rejecting plaintiffs' contention that the way decedent was holding his gun suggested he intended to surrender: "the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life"). Cf. *Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best").

This is consistent with the law of other circuits. *See, e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc) ("where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force"). An officer's use of force is reasonable—meaning there is no constitutional violation—when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others. *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). *See also Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force.").

In *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), an officer pushed a young man to the ground that he suspected of illegally carrying a gun. The suspect eventually brandished a gun. The officer, still pinning the suspect to the ground, told him to drop the gun, and in response the suspect threw the gun over the officer's

shoulder. *Id.* at 763. Five seconds later, the officer fired two shots at the suspect, killing him. *Id.* at 764. Nonetheless, the Sixth Circuit affirmed the district court's decision to grant qualified immunity to the officer, holding that the officer's actions were not unreasonable.

Noting that the suspect initially had his finger on the trigger of a gun (posing a significant threat to the officer and others), the Sixth Circuit reasoned that "[w]hile [the officer]'s decision to shoot [the suspect] after he threw his weapon away may appear unreasonable in the 'sanitized world of our imagination,' [the officer] was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable. *Mullins*, 805 F.3d at 767 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996)). Based upon a host of cases from various circuits, the court concluded that "[w]hile hindsight reveals that [the suspect] was no longer a threat when he was shot," officers should not be denied qualified immunity "in situations where they are faced with a threat of severe injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Mullins*, 805 F.3d at 767–68 (collecting cases).

In *Quiles v. City of Tampa Police Dep't*, 596 Fed.Appx. 816 (11th Cir. 2015) (unpublished) (per curiam), the Eleventh Circuit held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of

deadly force was reasonable even though the suspect "was running away … when he was shot and had not threatened definitely the officers with a gun." *Quiles*, 596 Fed.Appx. at 819. In *Quiles*, the decedent actually had a gun pointed at two of the petitioner officers only moments after his brother had fired two shotgun blasts in the proximity of the third officer.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his sides. The victim had not brandished a firearm and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position—with [the victim] continuing toward him—to verify which version was true." *Loch*, 689 F.3d at 966–67.

In this case, the Tenth Circuit diverges from its prior cases that acknowledge "a right is clearly established when a precedent involves '*materially similar conduct'* or applies 'with *obvious clarity*' to the conduct at issue." *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017), *cert. denied*, 139 S.Ct. 5 (2018) (internal quotes and citations omitted) (emphasis in original). Again, in the present case, Myers had been armed and the officers did not know he was no longer armed. Moreover, Myers was intoxicated and was advancing on Brewer while shouting, being belligerent, and failing to comply with commands.

Conclusion

Myers committed a severe, felony offense by threatening bar patrons with a shotgun. A reasonable officer could, at a minimum, conclude the intoxicated Myers actively resisted arrest by hiding in a shed and failing to comply with the commands to put his hands up and get on the ground, shouting and being belligerent, and advancing from the shed to within mere feet of Brewer.

The "right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander" is not clearly established and no existing precedent places the constitutional question beyond debate.

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: November 19, 2019

Appendix

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Kristina MYERS, individually, and as administrator of the Estate of Steven P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M. and K.J.M., minors, Plaintiff - Appellee,

v.

Virgil BREWER, individually and in his official capacity as Undersheriff of Barber County, Kansas, Defendant - Appellant,

and

Lonnie Small, individually and in his official capacity as Sheriff of Barber County, Kansas, Defendant.

No. 18-3145

FILED July 24, 2019

Before BRISCOE, BALDOCK, and BACHARACH, Circuit Judges.

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Bobby R. Baldock, Circuit Judge

Virgil Brewer, Undersheriff of Barber County, Kansas, shot and killed Steven Myers with a beanbag round fired from a 12-gauge shotgun. After the shooting, Mr. Myers' wife, Kristina Myers, commenced this action in the district court, which dismissed or declined to exercise jurisdiction over most of her claims, though it refused to dismiss her excessive force claim under Fed. R. Civ. P. 12(b)(6) based on qualified immunity. Undersheriff Brewer appealed, and Ms. Myers moved to dismiss the appeal for lack of jurisdiction.[1] For the following reasons, we deny the motion to dismiss and affirm the denial of qualified immunity.

I

On October 6, 2017, at 6:26 pm, the Barber County Sheriff's office received a call indicating that Mr. Myers was in front of a bar with a shotgun.[2] Forty-one

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[1] Undersheriff Brewer asserts "[t]his ... is an appeal from a final judgment under Fed. R. Civ. P. 54(b), and this Court has jurisdiction under 28 U.S.C. § 1291." Aplt. Br. at 1. In fact, this is an interlocutory appeal from the denial of qualified immunity, and the district court docket sheet confirms that court never entered a Rule 54(b) certification. *See* Aplt. App., Vol. 1 at 1-6.

[2] Because this case was decided on a Rule 12(b)(6) motion, "we accept all well-pleaded factual allegations in the complaint as true," *Thomas v. Kaven*, 765 F.3d 1183, 1188 n.1 (10th Cir. 2014), and may consider audio and video recordings taken from the responding officers' body cameras, which are referenced in the complaint, *see Montoya v. Vigil*, 898 F.3d 1056, 1060 n.2 (10th Cir. 2018); *Brokers' Choice of Am., Inc. v. NBC*

minutes later, at 7:07 pm, several officers, including Undersheriff Brewer, Sheriff Lonnie Small, and Deputy Mark Suchy, arrived on scene. Mr. Myers had already gone home, put away his gun, and taken his dog for a walk, but officers began searching for him house-to-house. Sheriff Small entered one house with his K-9, followed by Undersheriff Brewer and Deputy Suchy. Sheriff Small reached the back door and spotted Mr. Myers in a backyard shed, approximately fifteen feet away. Sheriff Small shouted for Mr. Myers to come out of the shed as he turned and led the K-9 away, telling Undersheriff Brewer, "he's in the shed," Aplt. App., Vol. 1 at 10, para. 30. Sheriff Small pointed for Undersheriff Brewer to confront Mr. Myers, who, seconds later, emerged from the shed and stood in the backyard, unarmed.

Undersheriff Brewer and Deputy Suchy shouted to Mr. Myers, "Put your hands up!" and "Get on the ground!" *Id.* at 11, para. 33. Mr. Myers continued standing "in the yard, with empty hands at his sides." *Id.*, para. 34. After eight seconds, Undersheriff Brewer shot him in the chest with a beanbag round fired from a 12-gauge shotgun from a distance of approximately six to eight feet. Mr. Myers screamed, "Ow!," fell to his hands and knees, and then collapsed face down on the ground. *Id.*, para. 39. Undersheriff Brewer handcuffed him and rolled him over; his shirt was covered with blood, which began to pool on the ground. After some five and half minutes, Deputy Suchy commenced CPR. When the coroner arrived, he assessed the scene and said, "That's from a beanbag? Holy shit! I thought they weren't supposed to penetrate. Must've been pretty

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Universal, Inc., 861 F.3d 1081, 1103 & n.22 (10th Cir. 2017).

damn close, like six to eight feet maybe?" *Id.* at 12, para. 49. Deputy Suchy and another officer continued their efforts to resuscitate Mr. Myers, but they failed, and he was pronounced dead at the scene.

Ms. Myers brought this action on behalf of her husband's estate and their three minor children. She asserted claims against Sheriff Small and Undersheriff Brewer in their individual and official capacities for excessive force in violation of the Fourth Amendment (count one), "[s]urvival," *id.* at 14, (count two), conspiracy to use excessive force (count three), violation of the civil right to familial relationship (count four), and wrongful death under state law (count five). Undersheriff Brewer and Sheriff Small filed separate motions to dismiss under Rule 12(b)(6) based on qualified immunity. They also submitted recordings of the call and videos captured by the responding officers' dash and body cameras, including Deputy Suchy's body camera, which partially recorded the shooting.

The district court considered this material and dismissed all but the excessive force claim against Undersheriff Brewer, declining to exercise supplemental jurisdiction over the state law individual capacity claims. Those rulings are not before us. Regarding the excessive force claim against Undersheriff Brewer, the district court concluded that the video taken from Deputy Suchy's body camera did not clearly contradict the allegations in the complaint, which adequately alleged a constitutional violation. The court further concluded that the complaint adequately alleged a violation of clearly established law, and thus Undersheriff Brewer

was not entitled to qualified immunity at this stage of the proceedings. This appeal followed.[3]

II

We review de novo the district court's denial of a Rule 12(b)(6) motion to dismiss based on qualified immunity. *Prager v. LaFaver*, 180 F.3d 1185, 1190 (10th Cir. 1999). "A defendant may immediately appeal the denial of a 12(b)(6) motion based on qualified immunity to the extent that denial turns on an issue of law." *Id.* (citing *Behrens v. Pelletier*, 516 U.S. 299, 307, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)). We agree with the district court, as a matter of law, that the video here does not clearly contradict the allegations in the complaint, and we confine our analysis accordingly. "Although qualified immunity defenses are typically resolved at the summary judgment stage, district courts may grant motions to dismiss on the basis of qualified immunity." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). "Asserting a qualified immunity defense via a Rule 12(b)(6) motion, however, subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Id.* (internal quotation marks omitted). "At the motion to dismiss stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." *Id.* (brackets and internal quotation marks omitted). We evaluate "(1) whether the facts that a

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[3] Ms. Myers moved to dismiss the appeal, asserting the district court identified factual issues precluding qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 313-14, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). We deny the motion to dismiss because, as set out below, this appeal involves issues of law.

plaintiff has alleged make out a violation of a constitutional right, and (2) whether the right at issue was clearly established." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013) (internal quotation marks omitted).

"We review [Fourth Amendment] excessive force claims under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017) (internal quotation marks omitted), *cert. denied*, —— U.S. ——, 138 S. Ct. 2650, 201 L.Ed.2d 1063 (2018). We evaluate the totality of circumstances, "allow[ing] for the fact that police officers are often 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." *Plumhoff v. Rickard*, 572 U.S. 765, 774-75, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014) (brackets and internal quotation marks omitted). Our analysis "requires careful attention to the facts and circumstances of each particular case, including 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." *Pauly*, 874 F.3d at 1215 (emphasis and internal quotation marks omitted).

The circumstances here, as alleged in the complaint, are sufficient to indicate a Fourth Amendment violation. There was no crime at issue, and although the police received a call that Mr. Myers was in front of a bar with a shotgun, there are no allegations that he was prohibited from possessing a shotgun in public. Nor did he pose an immediate threat to the officers or anyone else—the officers did not arrive on scene for

some forty-one minutes, and there are no allegations that Mr. Myers threatened anyone in the interim.[4] Indeed, the complaint avers that he went home, put away his gun, and took his dog for a walk. When the officers later encountered Mr. Myers, they ordered him out of the backyard shed and, "[w]ithin a few seconds ... [he] was standing—unarmed—outside of the shed in the middle of the backyard." Aplt. App., Vol. 1 at 11, para. 32. Although he did not immediately comply with Undersheriff Brewer and Deputy Suchy's orders to put his hands up and get on the ground, Undersheriff Brewer fired the beanbag round "[a]fter a mere eight seconds of shouting inconsistent commands at [Mr.] Myers." *Id.*, para. 36. Yet there are no allegations that Mr. Myers was actively resisting arrest or attempting to evade arrest. Rather, the complaint alleges that he was shot as he "stood in the yard, with empty hands at his sides." *Id.*, para. 34. According to the complaint, he "did not threaten the officers, brandish a weapon, or attempt to escape." *Id.*, para. 35. These allegations state a constitutional violation and satisfy the first prong of the qualified immunity analysis.

We turn to whether the law was clearly established. The Supreme Court has repeatedly admonished "courts not to define clearly established law at a

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[4] Even if we must accept Undersheriff Brewer's assertion that he believed Mr. Myers had committed aggravated assault by threatening people with the shotgun in front of the bar, our conclusion remains unchanged because the allegations in light of the totality of circumstances remain sufficient to allege a constitutional violation. *See Morris v. Noe*, 672 F.3d 1185, 1195 n.4 (10th Cir. 2012).

high level of generality." *Mullenix v. Luna*, —— U.S. –––, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (ellipsis and internal quotation marks omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (internal quotation marks omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (internal quotation marks omitted). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Id.* (internal quotation marks omitted).

Undersheriff Brewer shot Mr. Myers from a distance of six to eight feet with a beanbag round fired from a 12-gauge shotgun. Although Mr. Myers had been in front of a bar with a shotgun some forty-one minutes earlier, when Undersheriff Brewer confronted him he had committed no crime, possessed no weapon, and immediately complied with the order to come out of the shed. He neither resisted arrest nor attempted to flee, though he did fail to put his hands up and get on the ground within the eight seconds of being ordered to do so before Undersheriff Brewer fired the beanbag. We have held it is clearly established that an officer uses excessive force when he executes a forceful takedown of a subject who at most was a misdemeanant, but otherwise posed no threat and did not resist arrest or flee. *See Morris*, 672 F.3d at 1198. We have also held it is clearly established that an officer uses excessive force when he shoots a subject who possessed a knife and took three steps toward the officer from a distance of some five to ten feet but otherwise made no threatening motion. *See Tenorio v. Pitzer*, 802 F.3d 1160, 1165-66 (10th Cir. 2015). Indeed, our decision in

Tenorio was predicated on *Zuchel v. City & County of Denver*, 997 F.2d 730, 735 (10th Cir. 1993), where a restaurant manager called the police because Zuchel had created a disturbance. By the time the police arrived, Zuchel had left and was found nearby in a "heated exchange" with several teenagers, one of whom shouted—incorrectly—that he had a knife. *Id.* Zuchel took "three wobbly steps toward" the officer, who was six to eight feet away, and the officer shot him. *Id.* at 736. We held this evidence was sufficient to support a jury finding that the officer's use of force was not objectively reasonable. *Id.* We think *Zuchel*, *Tenorio*, and *Morris* clearly established that the use of force under the circumstances confronted by Undersheriff Brewer here was not objectively reasonable. Accordingly, we affirm the denial of qualified immunity.

III

The motion to dismiss this appeal is denied, and the judgment of the district court is affirmed.

Appendix B

Kristina MYERS, et al., Plaintiffs,

v.

Virgil BREWER, et al., Defendants.

Case No. 17-2682

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Signed 06/27/2018

MEMORANDUM AND ORDER

CARLOS MURGUIA, United States District Judge

This case arises out of the death of Steven P. Myers. Mr. Myers was shot with a "beanbag round" from a 12-gauge shotgun at a distance of six to eight feet. At the time, Mr. Myers was not brandishing a weapon or attempting to escape. Defendant Virgil Brewer, Undersheriff of Barber County, Kansas, fired the beanbag round. Defendant Lonnie Small, Sheriff of Barber County, was present at the scene but withdrew with his K-9 just before the shooting. Mr. Myers died at the scene. The shooting, as well as the events leading up to the shooting, were captured on audio and/or video recording.

Plaintiff Kristina Myers, individually, as Administrator of the Estate of Steven P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M., and K.J.M., minors, claims that defendants Brewer and Small are responsible in both their individual and official capacities for the death of her husband. She brings the following claims: (1) Count I: § 1983 claim for excessive force in violation of the Fourth and Fourteenth Amendments (on behalf of the estate); (2) Count

II: § 1983 claim for survival (on behalf of the estate); (3) Count III: § 1983 claim for conspiracy to use excessive force (on behalf of the estate); (4) Count IV: § 1983 claim for violation of the civil right to familial relationship (on behalf of herself and the children); and (5) Count V: wrongful death under Kansas law (on behalf of herself and the children).

Defendants Brewer and Small each separately moved to dismiss plaintiff's complaint. In defendant Small's motion to dismiss (Doc. 10), defendant Small asks for dismissal on the following grounds:

(1) He is entitled to qualified immunity on the claims against him in his individual capacity because

(a) the complaint does not allege that he personally participated in the application of force;

(b) the allegations of conspiracy are insufficient; and

(c) no clearly established law suggests that defendant Small's conduct was plainly incompetent or in knowing violation of the law;

(2) There is no viable official capacity claim; and

(3) The state law claims are not viable because

(a) defendant Small has Eleventh Amendment immunity;

(b) the complaint does not allege that defendant Small used any force against Mr. Myers; and

(c) the court may decline supplemental jurisdiction.

Defendant Brewer moves for dismissal on similar grounds in Doc. 17:

(1) He is entitled to qualified immunity because his actions, in a tense and rapidly-evolving situation, did not violate any clearly established rights of plaintiff;

(2) There is not a valid official capacity claim against defendant Brewer;

(3) Plaintiff failed to plead any facts sufficient to establish a viable conspiracy claim; and

(4) The court should decline to exercise supplemental jurisdiction over the state law claims.

For the following reasons, the court grants defendant Small's motion and grants in part and denies in part defendant Brewer's motion.

I. Factual Background

The following facts are taken from plaintiff's complaint. The court has also considered the content of the video recordings submitted by defendants. The videos are referenced in the complaint and are central to the complaint. It is well-settled that on a motion to dismiss, the court may consider documents referenced in a complaint that are also central to the complaint. *See GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384–85 (10th Cir. 1997). It is further well-settled that when a non-moving party's version of the facts are plainly contradicted by video, the court need not view the facts in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (deciding, at summary judgment stage—not the motion to dismiss stage—that the content of a videotape recording controlled when it "blatantly contradicted" the plaintiff's version of the facts). The court

sees no difference between considering documents referenced in the complaint and considering video and audio referenced in the complaint. *But cf. McHenry v. City of Ottawa*, No. 16-3726-DDC, 2017 WL 4269903, at *4 (D. Kan. Sept. 26, 2017) (declining to consider video when the video was not incorporated by reference or central to the plaintiff's complaint). To the extent the allegations in plaintiff's complaint are "blatantly contradicted" by the videos, the court has considered the videos instead of the unsupported factual allegations.

Moreover, the videos are part of the public record in another court case. A court may take judicial notice of facts that are a matter of public record and of state court documents. *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006); *Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008). "[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (citations omitted). The court does so without converting a motion to dismiss into a motion for summary judgment. *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (citations omitted). With these standards in mind, the court now turns to the facts of the case.

On October 6, 2017 at 6:26 p.m., the Barber County Sheriff's Office received a 9-1-1 call, reporting that Steven Myers was threatening people with a shotgun in the street in front of Buster's Bar in Sun City, Kansas. The caller indicated that Mr. Myers was drunk and

had been thrown out of the bar for fighting. Four officers from Barber County responded: defendants Small and Brewer, as well as Deputies Suchy and Miller. The officers were not close, however, and by the time they arrived, Mr. Myers had left the area. In fact, Mr. Myers had returned home, put away the shotgun, and had taken his dog for a walk. But the officers were unaware of this fact.

When the officers arrived in Sun City at 7:07 p.m.—approximately forty-one minutes after the call—they began searching house-to-house for Mr. Myers. While searching, defendant Small remarked that, with a little luck, Mr. Myers would "just pass out and die."

Eventually, defendant Small spotted Mr. Myers in a shed in a home's backyard, about fifteen feet away. At the time, defendant Small was in the back door of the house with a K-9. Defendant Small shouted for Mr. Myers to come out of the shed, and then immediately turned around and led the K-9 toward the front door, away from Mr. Myers. Mr. Myers yelled back at defendant Small. Defendant Brewer and Deputy Suchy began shouting at Mr. Myers, telling him to put his hands up and get on the ground. Mr. Myers did not comply with either command. He was also apparently moving toward the house.

After about eight seconds of yelling, defendant Brewer fired his 12-gauge shotgun at Mr. Myers's chest from a distance of six to eight feet. Defendant Brewer fired a beanbag round, which is a small fabric pouch filled with lead pellets. When used appropriately, a beanbag round is intended to be a less-lethal weapon. But when fired from less than ten feet at a

subject's chest, the rounds still present risk of serious injury or death.

After being hit, Mr. Myers fell to his knees and collapsed face-down. When defendant Brewer fired the gun, defendant Small was exiting the front door of the home. He passed the home's occupant and commented that defendant Brewer had "beanbag rounded him. He didn't ... it wasn't lethal." Defendant Small then told another officer, "Shot him with a beanbag round. Hadn't shot anybody with it yet." After that, defendant Small disabled his body camera.

Defendant Brewer and Deputy Suchy remained with Mr. Myers. They handcuffed him and rolled him over so his face was up. Mr. Myers's shirt was covered in blood, and Deputy Suchy began performing CPR about five-and-a-half minutes after the gunshot. One of the officers called for EMS. Twenty-two minutes later, EMS arrived. They encouraged Deputy Suchy to continue his resuscitation efforts. EMS and law enforcement discussed the heavy odor of alcohol coming from Mr. Myers.

When the coroner arrived, he assessed the scene and said, "That's from a beanbag? Holy shit! I thought they weren't supposed to penetrate. Must've been pretty damn close, like six to eight feet maybe?" The coroner asked if Mr. Myers was inside the house. Deputy Suchy began to answer, but defendant Small interrupted and said, "Don't tell him everything but just that he got shot here." The coroner agreed, "I don't need to know all the facts." Defendant Small continued, "Right, because KBI don't want [the coroner] to know [everything.]" Defendant Small later told Deputy Suchy to disable his body camera, even though the

deputy remained on the scene for several more hours. The coroner called Mr. Myers's death at 8:08 p.m.

Plaintiff alleges that the Barber County Sheriff's Office "maintains no policy or procedures, and provides no training to its officers, for the appropriate use of beanbag shotgun rounds." (Doc. 1, at 7.)

II. Legal Standards

A. Standards for Dismissal under Rule 12(b)(6)

The court will grant a 12(b)(6) motion to dismiss only when the factual allegations fail to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the factual allegations need not be detailed, the claims must set forth entitlement to relief "through more than labels, conclusions and a formulaic recitation of the elements of a cause of action." *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *Id.* "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court construes any reasonable inferences from these facts in favor of the plaintiff. *Tal*, 453 F.3d at 1252.

B. Standards for Qualified Immunity on Individual Capacity Claims

Both defendants have asked the court to grant them qualified immunity on the § 1983 claims against

them in their individual capacities. For ease of reference, the court lays out the standards for evaluating qualified immunity here.

The doctrine of qualified immunity protects government officials who perform discretionary government functions from liability for civil damages and the obligation to defend the action. *See Johnson v. Fankell*, 520 U.S. 911, 914 (1997); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity is only applicable, however, if the official's conduct did not violate clearly established constitutional or statutory rights that would have been known by a reasonable government official. *See Harlow*, 457 U.S. at 818; *McFall v. Bednar*, 407 F.3d 1081, 1087 (10th Cir. 2005). "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) (citing *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011)). Moreover, the inquiry is not whether the general right to be free from excessive force is clearly established—because it is—the inquiry is whether plaintiff had a clearly established right under the particular facts of this case. *Long v. Fulmer*, 545 Fed.Appx. 757, 760 (10th Cir. 2013).

III. Discussion

A. Defendant Small's Motion to Dismiss

1. Individual Capacity Claims

As noted above, defendant Small asks that the court grant him qualified immunity on the claims against him in his individual capacity on three bases:

(1) defendant Small did not personally participate in the application of force; (2) defendant Small cannot be liable for conspiring; and (3) no clearly established law exists showing that defendant Small's conduct was plainly incompetent or in knowing violation of the law. The court addresses the first two of these arguments below, as it is unnecessary to reach the third argument.

a. Personal Participation

"Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (quoting *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997)). Liability under § 1983 cannot be based on supervisory status alone; there must be "an affirmative link ... between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Id.* (quoting *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997)); *see also Dodds v. Richardson*, No. 09–6157, 2010 WL 3064002, at *8–10 (10th Cir. Aug. 6, 2010) (reviewing standards for § 1983 supervisory liability in light of *Iqbal*; holding stricter burden on plaintiff still requires affirmative link; plaintiff must establish (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation); *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) (holding that a supervisor is not liable under § 1983 unless an "affirmative link" exists between the constitutional

deprivation and the supervisor's personal participation).

"For liability under section 1983, direct participation is not necessary. Any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1279 (10th Cir. 2008) (citing *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990)). In terms of causation, the "requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Id.* at 1279–80.

Plaintiff fails to adequately allege an affirmative link between defendant Brewer's actions and defendant Small. There is no allegation here that defendant Small created a policy or was responsible for a policy of shooting a less-lethal gun from close range. Defendant Small saw Mr. Myers, told defendant Brewer where he was, and the retreated to the front door with his dog. Defendant Small did not shoot the gun, and there is no allegation that he instructed defendant Brewer to do so or that defendant Brewer was restricted from acting without direction from defendant Small. None of defendant Small's actions caused defendant Brewer to shoot the beanbag round from the shotgun—much less to shoot it from a distance of six-to-eight feet. And there are no allegations that defendant Small had the required state of mind for a constitutional violation. To the contrary, the allegations are that defendant Small did not think the gunshot would result in a fatality, and that he was not concerned when he heard the shot fired.

For these reasons, the court determines that based on the allegations in plaintiff's complaint and the videos submitted to the extent that they contradict the complaint, plaintiff has not adequately alleged the personal participation of defendant Small. He therefore has not stated a constitutional violation by defendant Small, and defendant Small is entitled to qualified immunity in his individual capacity.

b. Conspiracy

To adequately allege a conspiracy, plaintiff must allege "a combination of two or more persons acting in concert and an allegation of a meeting of the minds, an agreement among the defendants or a general conspiratorial objective" to violate a constitutional right. *Brooks v. Gaenzle*, 614 F.3d 1213, 1227–28 (10th Cir. 2010). Conclusory allegations are insufficient. *Shimomura v. Carlson*, 811 F.3d 349, 359 (10th Cir. 2015).

Plaintiff claims that the following allegations support a conspiracy between defendants Small and Brewer:

- While walking to the house where [Mr. Myers] was located, Sheriff Small was recorded muttering to Undersheriff Brewer "A little luck and he'll just pass out and die." Doc. 1, ¶ 69.
- After Sheriff Small commanded Steven Myers to come out of the shed, rather than continue to command the situation, he ordered Brewer to come forward and confront [Mr. Myers] with the shotgun loaded with beanbag rounds. *Id.* ¶ 70.
- Sheriff Small was just exiting the front door when the gun blasted behind him. Without skipping a

beat or turning to look, Small told the homeowner on the front porch, "beanbag rounded him." *Id.* ¶ 71.

- Just after the shooting, Sheriff Small was recorded jovially telling another officer "Shot him with a beanbag round. Hadn't shot anybody with it yet." *Id.* ¶ 72.2
- As the Coroner asked questions at the scene, Sheriff Small instructed a deputy "Don't tell him everything." *Id.* ¶ 73.

(Doc. 24, at 10.)

These allegations do not identify when or how an agreement was formed, or what conspiratorial objective defendants Small and Brewer agreed to. The comment about Mr. Myers passing out and dying, while distasteful, suggests no agreement at all to use excessive force on Mr. Myers. And defendant Small's comments after the shooting indicate only that he knew a beanbag round had been used—not that he had agreed ahead of time to use the shotgun in such a manner as to result on the death of Mr. Myers. The court concludes that any suggestion of an agreement to use excessive force is conclusory. The allegations above demonstrate only the parallel conduct of law enforcement responding to a call. *See Canfield v. Douglas Cnty.*, 619 Fed.Appx. 774, 778 (10th Cir. 2015). The court dismisses the conspiracy claim.

2. Official Capacity Claims

Defendant Small moves to dismiss the claims against him in his official capacity on the basis of Eleventh Amendment immunity. The Eleventh Amendment provides immunity to unconsenting states and

those acting on their behalf from federal suits for money damages. U.S. Const. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). It does not, however, extend immunity to counties, municipalities, or other local government entities. *Steadfast Ins. Co. v. Agric. In. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (citation omitted). In determining whether a particular entity receives Eleventh Amendment immunity, the court considers whether the entity is an "arm of the state." *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977). *Steadfast* sets forth a four-factor test for this analysis: (1) How is the entity is characterized under state law? (2) What is the entity's degree of autonomy from the state? (3) Where does the entity get its operating funds? (4) Is the entity primarily concerned with state or local affairs? 507 F.3d at 1253. "If a state entity is more like a political subdivision—such as a county or city—than it is like an instrumentality of the state, that entity is not entitled to Eleventh Amendment immunity." *Id.*

The Tenth Circuit and a number of courts in the District of Kansas have held that Kansas sheriffs act on behalf of the state and are therefore immune from suit in federal court. *See Hunter v. Young*, 238 Fed.Appx. 336, 338 (10th Cir. 2007); *Broyles v. Marks*, No. 18-3030-SAC, 2018 WL 2321822, at *4 (D. Kan. May 22, 2018); *Self v. Cnty. of Greenwood*, No. 12-1317-JTM, 2013 WL 615652, at *2 (D. Kan. Feb. 19, 2013); *Brown v. Kochanowski*, No. 07-3062-SAC, 2012 WL 4127959, at *9 n.3 (D. Kan. Sept. 19, 2012), *aff'd* 513 Fed.Appx. 715 (10th Cir. 2013). But a few District of Kansas courts have found that sheriffs are not entitled to immunity in Kansas. *See, e.g., Trujillo v. City of Newton*, No. 12-2380-JAR, 2013 WL 535747, at *10

(D. Kan. Feb. 12, 2013); *Reyes v. Bd. of Cnty. Comm'rs of Sedgwick Cnty.*, No. 07-2193-KHV, 2008 WL 2704160, at *7–9 (D. Kan. July 3, 2008).

This court agrees with the analysis in those cases finding Kansas sheriffs immune under the Eleventh Amendment. First, the Kansas legislature created the office of the sheriff. Kan. Stat. Ann. § 19-801a. Sheriffs in Kansas are required—by statute—"to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner, may call to their aid such person or persons of their county as they may deem necessary." Kan. Stat. Ann. § 19-813. And the State of Kansas is responsible for prosecuting violations of Kansas law. *Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1164 (10th Cir. 2009) (holding that county attorneys act on behalf of the state, not the county, in Kansas). Second, the board of county commissioners in Kansas lacks authority to determine how a county sheriff chooses his employees or expends budgeted funds. *Bd. of Cnty. Comm'rs v. Nielander*, 62 P.3d 247, 251 (Kan. 2003). County sheriffs are not subject to local control. Rather,

> The sheriff is an independently elected officer whose office, duties, and authorities are established and delegated by the legislature. The sheriff is not a subordinate of the board of county commissioners and neither are the undersheriff or the sheriff's deputies and assistants. Rather, the sheriff is a state officer whose duties, powers, and obligations derive directly

> from the legislature and are coextensive with the county board.

Id.

The third and fourth factors are not significant. Even if the county funds the sheriff's operations and the sheriff has relatively limited geographical authority, these factors were the same for county attorneys in *Nielander*, and the Tenth Circuit still held that they were entitled to Eleventh Amendment immunity. 582 F.3d at 1164; *see also McMillian v. Monroe Cnty.*, 520 U.S. 781, 791 (1997) (recognizing that salary source and geographic limitations are not dispositive of whether an entity is an arm of the state). Based on these factors, as well as *Hunter v. Young* (albeit an unpublished opinion), the court determines that defendant Small is entitled to Eleventh Amendment immunity. The claims against him in his official capacity cannot be brought in federal court. They are dismissed without prejudice.

3. State Law Claims

Finally, defendant Small asks the court to dismiss the state law claims against him on three grounds: (1) he is entitled to Eleventh Amendment Immunity; (2) there is no allegation of force on the part of defendant Small; and (3) the court may decline to exercise supplemental jurisdiction over the state law claims. The court addresses only the first and third arguments below.

a. Eleventh Amendment Immunity

Because the court has determined that defendant Small is entitled to Eleventh Amendment immunity

for the federal claims against him in his official capacity, the state law claims against in him his official capacity are barred, as well. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121–22 (1984) ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment").

b. Supplemental Jurisdiction

It is unclear to the court whether plaintiff brings the state law claims against defendant Small in his official capacity or individual capacity or both. To the extent that plaintiff intended to sue defendant Small in his individual capacity for wrongful death, the court declines to exercise supplemental jurisdiction over that claim. Although there are federal claims remaining in the case, it would be ineffective and inefficient to split the wrongful death claims between state and federal court (assuming plaintiff elects to refile the official capacity claims in state court). A state court would not have the same Eleventh Amendment immunity issues with the official capacity wrongful death claims, and the court is dismissing these claims without prejudice. The concepts of federalism and comity support allowing a state court to hear plaintiff's lawsuit for violations of state wrongful death law—against defendant Small in all capacities. *See Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995). The court therefore declines to exercise supplemental jurisdiction over any state law claims against defendant Small in his individual capacity.

4. Count IV—§ 1983 Claim for Loss of Familial Relationship

As a final note, in a footnote, defendant Small sought dismissal of Count IV independently of any arguments about qualified immunity or Eleventh Amendment immunity. Count IV is essentially a federal version of the wrongful death claim. Wrongful death actions are not actionable under § 1983. *Tomme v. City of Topeka*, No. 89-2033-GTV, 1992 WL 81334, at *3 (D. Kan. Mar. 4, 1992). "[A] § 1983 claim must be based on the violation of plaintiff's personal rights and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990). Plaintiff did not respond to this argument, and the court determines that Count IV should be dismissed (as to defendant Brewer, as well).

B. Defendant Brewer's Motion to Dismiss

1. Individual Capacity Claims

a. Constitutional Violation

To be liable under § 1983, a defendant must engage in a deliberate deprivation of constitutional rights—not a negligent deprivation. *Woodward v. Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992); *Moore v. Bd. of Cnty. Comm'rs*, 470 F. Supp. 2d 1237, 1246 (D. Kan. 2007). Officers are afforded some "breathing room" to make reasonable mistakes while making quick decisions in "tense, uncertain and rapidly evolving situations." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The constitution requires reasonable means—not the least intrusive means. *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009); *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004). And officers may take protective action without waiting for the "glint of steel." *Estate of Larsen v. Murr*, 511 F.3d

1255, 1260 (10th Cir. 2008). An officer would be justified in using more force than necessary if he reasonably (but mistakenly) believed that a subject was likely to fight back. *Id.* In resolving an excessive force question in the context of qualified immunity on a motion to dismiss, courts consider and balance three factors: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to flee." *Long*, 545 Fed.Appx. at 760 (citing *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012), and *Graham*, 490 U.S. at 396).

Applying these factors to the facts of this case, the pleaded facts indicate that the crime was not particularly severe. The officers had information that Mr. Myers was drunk and threatening people with a shotgun. But they also knew that incident had happened over forty minutes before their arrival and that Mr. Myers was no longer in the same spot. These facts also implicate the second factor—whether Mr. Myers represented an immediate threat to the safety of anyone. Based on the information the officers had, at one point, Mr. Myers had likely represented an immediate threat. But again, a significant amount of time had passed before officers arrived on the scene. And third, whether Mr. Myers was actively resisting arrest or attempting to flee is debatable. He was not obeying the officers' directions, he was yelling at them, and it appears that he was moving closer to defendant Brewer in the doorway, but there is an issue of fact as to whether he was "resisting arrest" at the time of the shooting. *Cf. Dixon v. Richer*, 922 F.2d 1456, 1462 (10th Cir. 1991) (holding that swearing at officers could reasonably be perceived as resistance). The video

suggests that Mr. Myers was being belligerent, but the court cannot make out the entire scene or most of the words with confidence.

The parties spend considerable time debating over whether use of a shotgun to shoot beanbag pouches qualifies as "deadly force." "Deadly force includes force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm, including purposefully firing a firearm in the direction of another person." *King v. Hill*, 615 Fed.Appx. 470, 474 (10th Cir. 2015); *see also Tenorio v. Pitzer*, No. CV 12-01295 MCA/KBM, 2014 WL 11429062, at *4 (D.N.M. May 28, 2014), *aff'd*, 802 F.3d 1160 (10th Cir. 2015) ("Due to the limited space within the living room, the bean bag rounds were not a non-lethal option."). "Whether an officer acted reasonably in using deadly force is 'heavily fact dependent.' " *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (10th Cir. 2002) (quoting *Romero v. Bd. of Cnty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995)).

The court does not believe that the characterization of the type of force defendant Brewer used is a determining factor as to whether plaintiff has adequately alleged a constitutional violation. Regardless of whether defendant Brewer intended for the beanbag pouch to be deadly, the unfortunate fact is that it was. Independently of whether this constituted "deadly force," there is a question of whether it was excessive for the situation. The court determines that plaintiff has adequately alleged a constitutional violation.

b. Clearly Established

To show that a law is "clearly established," a plaintiff must identify pre-existing precedent that places

the "constitutional question beyond debate." *Yeasin v. Durham*, 719 Fed.Appx. 844, 850 (10th Cir. 2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). A plaintiff must identify "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (citation omitted). The relevant precedent need not be directly on point, but the plaintiff "must do more than cite case law announcing a legal rule 'at a high level of generality.' " *Yeasin*, 719 Fed.Appx. at 850. The precedent must be particularized to the facts of this case, *id.*, making it sufficiently clear such that every reasonable official would have known that the defendant's actions would violate the plaintiff's rights, *Reichle v. Howards*, 566 U.S. 658, 664 (2012). But the Tenth Circuit has counseled that "[w]e cannot find qualified immunity wherever we have a new fact pattern." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). *Casey* applied a "sliding scale" concept to evaluating whether a right is clearly established—the more egregious the conduct, the less specificity is required from prior case law. This sliding scale test has been called into question recently, *see McCoy v. Meyers*, 887 F.3d 1034, 1053 n.22 (10th Cir. 2018), but the Tenth Circuit has not yet decided that it conflicts with Supreme Court authority. If force is clearly unjustified based on the *Graham* factors, then the court may conclude that a right is clearly established, even in the absence of similar prior cases. *Morris v. Noe*, 672 F.3d 1185, 1197–98 (10th Cir. 2012).

The parties disagree over the definition of the right that must have been clearly established for defendant

Brewer to lose the protection of qualified immunity. Plaintiff urges the court to apply the general principle that "[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Defendant Brewer, on the other hand, argues that the right is an alleged right not to be shot with a beanbag gun when the suspect is advancing on the officer, yelling belligerently, and refusing to comply with directions. The court determines that the appropriate definition is somewhere between the two. It is the right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander. In this situation, the *Graham* factors indicate that the force was unjustified—even if there is not a Tenth Circuit case that has said that shooting a beanbag pouch out of a shotgun, at very close range, at a non-threatening suspect is unreasonable. In a similar situation, the Tenth Circuit cited an Eleventh Circuit case, *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (holding that "officers were not justified in using *any* force, and a reasonable officer thus would have recognized that the force was excessive" when the arrestees had not committed a serious crime, did not pose an immediate threat, and were not actively resisting arrest), for the principle that a reasonable officer would know based on his training that such force was not justified. *Morris*, 672 F.3d at 1198.

Taking plaintiff's allegations as true, the court determines that plaintiff has adequately alleged that defendant Brewer violated this clearly established right. The video does not present a clear contradiction to plaintiff's allegations on this issue. While it appears

that plaintiff moved forward from the shed, the court cannot make other determinations about the nature of his movement and what it reasonably conveyed to defendant Brewer. The court cannot make factual findings on the scene based on the video at this stage of the proceedings. Defendant Brewer is not entitled to qualified immunity at this time.

2. Official Capacity Claims

For the same reasons given above with respect to the claims against defendant Small in his official capacity, the official capacity claims against defendant Brewer are barred by the Eleventh Amendment.

3. State Law Claims

For the same reasons given above with respect to the state law claims against defendant Small, the court dismisses the state law claims against defendant Brewer without prejudice.

IT IS THEREFORE ORDERED that Sheriff Small's Motion to Dismiss (Doc. 10) is granted. Defendant Small is dismissed from the case.

IT IS FURTHER ORDERED that Virgil Brewer's Motion (Doc. 17) is granted in part and denied in part.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KRISTINA MYERS, individually, and as administrator of the Estate of Steve P. Myers, and as natural parent and legal guardian of K.D.M., C.F.M. and K.J.M., minors, Plaintiff - Appellee,

v.

VIRGIL BREWER, individually and in his official capacity as Undersheriff of Barber County, Kansas, Defendant - Appellant,

and

LONNIE SMALL, individually and in his official capacity as Sheriff of Barber County, Kansas, Defendant.

No. 18-3145

ORDER

FILED August 22, 2019

Before BRISCOE, BALDOCK, and BACHARACH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk