No. 22-35733

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEATH and VALERINE GARCIA,

Plaintiffs-Appellees

v.

ROBERT MIRABAL and MICHAEL HAWLEY, ET AL.,

Defendants-Appellants,

On Appeal from the United States District Court
For the Western District of Washington
Case No.: 2:20-cv-01318-TSZ

OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Ninth Circuit Cases

Other Circuits

U.S. Constitution

Statutes

I. INTRODUCTION

On September 17, 2017, Plaintiff Heath Garcia was on duty as a U.S. Naval employee when he heard that fellow naval employee, N.P., was threatening suicide at his home off base. Garcia went to N.P.'s house, went inside on more than one occasion, and attempted to talk N.P. into coming out and turning himself over to Island County Sheriff's Deputies, who were present in response to a 911 call. Between trips inside the house, Garcia spoke with the incident commander, Island County Sheriff's Lieutenant Michael Hawley. According to Garcia, Lieutenant Hawley told him he was not sure he was "going to let [Garcia] go back in the house" and that law enforcement was "probably just going to leave and let it ride itself out." 3-ER-384. Garcia told Lieutenant Hawley he could not "just take off and leave" and that he [Garcia] had to "stay around." 3-ER-385. Garcia told Lieutenant Hawley that if law enforcement left, he would go back in the home after they left. *Id.*

Garcia then re-entered the house in an effort to coax N.P. out. Unfortunately, as N.P. was leaving the house with Garcia to be transported to the hospital, N.P. accessed a shotgun. Though he did not raise it at any time or threaten to use it, Garcia inexplicably decided, on his own and without warning, to bear-hug N.P. and scream for help.

In response, Deputy Robert Mirabal rushed in and he, Garcia and N.P. went to the ground. In the ensuing struggle, N.P. fired several shots from Deputy

Mirabal's rifle, one of which struck Garcia in the foot, before another deputy shot and killed N.P.

Garcia brought the instant action against Island County, the incident commander Lieutenant Hawley, and Deputy Mirabal, under 42 U.S.C. § 1983, alleging violations of his rights under the Fourth and Fourteenth Amendments. Garcia also brought claims for negligence and intentional infliction of emotional distress under state law.

Island County and Defendants Hawley and Mirabal (Island County Defendants) moved for partial summary judgment, seeking dismissal of Garcia's Fourth Amendment claim for unreasonable seizure and his Fourteenth Amendment claim under the state-created danger doctrine. The district court denied the portion of the motion seeking qualified immunity for Mirabal and Hawley. The only issue on appeal is whether the district court erred in denying qualified immunity to Mirabal and Hawley. Because no established law put Mirabal or Hawley on notice that their actions were clearly unlawful, they were entitled to qualified immunity.

II. JURISDICTIONAL STATEMENT

Jurisdiction of the district court arose under 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1367. Jurisdiction of the Court of Appeals exists under 28 § U.S.C. 1291.

This Court has jurisdiction over interlocutory appeals of orders denying defenses of qualified immunity pursuant to 28 U.S.C. § 1291, where they raise issues of law. *Mitchell v. Forsyth,* 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985); *Jeffers v. Gomez,* 267 F.3d 895, 903 (9th Cir. 2001). *E.g., Brewster v. Bd. of Educ*., 149 F.3d 971, 976-77 (9th Cir. 1988) (allowing appeal where defendant asserted that "even on Plaintiff's version of the relevant disputed facts, no clearly established law indicated that 'what [they were] doing' violated the law") (alterations in original); *V-1 Oil Co. v. Smith*, 114 F.3d 854, 856 (9th Cir. 1997) (exercising jurisdiction "over an interlocutory appeal")

This appeal solely asks whether Mirabal and Hawley are entitled to qualified immunity under clearly established law under the plaintiff's version of the facts. Both Mirabal and Hawley argue that existing law did not put them on notice that allowing Garcia to voluntarily insert himself into law enforcement's efforts to get his friend and co-worker N. P. to seek mental health care would be clearly unlawful when the danger that proximately caused Garcia's injuries and damages was created by Garcia's own, unannounced decision to bear-hug an armed N.P. and call for help. Plaintiffs do not contend that Mirabal or Hawley were aware ahead of time that Mr. Garcia was going to bearhug N.P. and call for help. Plaintiffs do not contend that action was necessary for the safety of *Mr. Garcia* or anyone else. No state created danger case has put officers on notice that they can

violate a person's constitutional rights when that person knowingly and voluntarily puts himself or herself in danger without the foreknowledge or acquiescence of the officers.

The law similarly did not put Deputy Mirabal on notice that his split-second decision to respond to Garcia's call for help to try and get control of an armed individual were clearly unlawful. No case cited below addressed a situation in which an officer is requested to assist a person in an emergency, responds to that person's request, and is then accused of unreasonable seizure of that person due to the emergent nature of the response.

Appellants' notice of appeal was timely filed on September 15, 2022 pursuant to Fed. R. App. P. 3. 3-ER-426. The decision appealed from is a final decision on the identified defenses for purposes of interlocutory appeal.

III. ISSUES PRESENTED

A. Are Lieutenant Hawley and Deputy Mirabal entitled to qualified immunity from Garcia's § 1983 claim for deprivation of his 14th Amendment rights on a state-created danger theory when Garcia unexpectedly created the danger that led to his injury and no clearly established law put either officer on notice that their actions were unlawful?

B. Is Deputy Mirabal entitled to qualified immunity from Garcia's § 1983 claim for deprivation of his Fourth Amendment Right to be free from Unreasonable Seizure when Garcia made an emergency request for assistance after grabbing an armed man and Mirabal responded, with no intention to seize Garcia, and no clearly established law put him on notice that his actions would constitute a seizure of Garcia?

IV. STATEMENT OF THE CASE

On September 17, 2017, Plaintiff Heath Garcia learned that a fellow member of the Navy, N.P., was at home, was apparently suicidal, and that law enforcement had responded to his residence. 3-ER-420. Garcia decided to go to the scene "to offer assistance to the Island County law enforcement officers" who responded. *Id.* Upon arriving, Garcia spoke with law enforcement, explained that he knew N.P., and offered to assist. 3-ER-421.

Garcia alleges he was given law enforcement's permission to enter N.P.'s residence. *Id.* According to Garcia, he went to N.P.'s house "as a representative of the U.S. Navy" in a "nonofficial capacity . . . for information gathering for the commanding officer." 3-ER-373. Garcia testified it was his idea to enter the residence and speak with N.P. 3-ER-379.

Prior to entering N.P.'s residence, Garcia knew N.P. was "suicidal" and armed with "his long arm." 3-ER-375-376. Garcia also had training on "suicide intervention" and knew N.P. from the Navy. 3-ER-374; 377-378. After entering the house, Garcia spoke with N.P. 3-ER-380-381. N.P. was armed during their conversation with an M4 rifle. 3-ER-381-382. Following the conversation, Garcia went back outside N.P.'s residence and spoke with Island County Sheriff's Lieutenant Michael Hawley. 3-ER-383.

According to Garcia, Lieutenant Hawley told him he was not sure he was "going to let [Garcia] go back in the house" and that law enforcement was "probably just going to leave and let it ride itself out." 3-ER-384. Garcia told Lieutenant Hawley he could not "just take off and leave" and that he [Garcia] had to "stay around." 3-ER-385. Garcia told Lieutenant Hawley that if law enforcement left, he would go back in the home after they left. *Id.*

Garcia re-entered the residence to notify N.P. that additional naval personnel were en route and, when they arrived, he went outside and spoke with them. 3-ER-387. Garcia then re-entered N.P.'s house and explained that the flight surgeon and N.P.'s commander were present. 3-ER-388. Eventually, N.P. agreed to leave the house and be taken to the hospital. *Id.* Garcia alleges that Lt. Hawley told him that law enforcement would be pulled back off N.P.'s property and that he conveyed that to N.P. 2-ER-112.

As he was exiting the house with Garcia, N.P. retrieved a shotgun from behind the door, allegedly in response to hearing a "rustle in the bushes" near his door and began screaming obscenities at the deputies. 3-ER-389-390. Rather than simply disengage from the situation, Garcia affirmatively approached N.P. from the side and said his name and told him to "calm down." 3-ER-391. Garcia then saw N.P.'s "shoulders dropped, like – he was tense and then when I talked to him his shoulders dropped." *Id.* Garcia interpreted this motion to mean "that he [N.P.] was relaxed

and listening to me." *Id.* Then, without any warning to anyone, Garcia suddenly "bear-hugged" N.P. and asked for help. 3-ER-392. Garcia had not told any Island County personnel that he was going to bear-hug N.P. before he did it. 3-ER-393-394.

In response to Garcia's request for help, Deputy Mirabal slung his rifle onto his back, ran in, and tackled N.P. and Garcia to the ground. 3-ER-394. A struggle ensued, and four shots rang out. *Id.* Garcia extricated himself from the scrum and crawled away. 3-ER-394-395. One of the rounds had struck him in the foot. 3-ER 395. Garcia did not see who fired the round that struck him. 3-ER-396

Deputy Mirabal, however, reported that while he was on top of N.P. trying to subdue him, he "looked up and saw his hand out, his right hand out, and he had my rifle and was shooting it." 3-ER-403. No one has disputed this testimony, nor did anyone report seeing Deputy Mirabal fire his rifle. Another deputy approached and shot and killed N.P. 3-ER-422.

Garcia brought the present action against Island County, Lieutenant Hawley, and Deputy Mirabal, alleging their actions violated his rights under the Fourteenth Amendment via the State created danger doctrine and that Deputy Mirabal's actions constituted an unlawful seizure under the Fourth and Fourteenth Amendments. 3-ER 422-423. Garcia also brought claims for negligence and the tort of outrage under Washington law. 3-ER-423-424.

V. ARGUMENT

A. Standard of Review.

The Court reviews *de novo* the district court's determination regarding qualified immunity arising in summary judgment proceedings. *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir. 2001). This standard of review applies to all issues listed in Part III above.

Summary judgment is appropriate where no disputed issues of material fact exist. *Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1220 (9th Cir. 1995). The non-movant is entitled to have all inferences from the evidence drawn in its favor, provided the inferences are reasonable. *Id.*

"A reasonable inference is one which supports a viable legal theory, which by necessary implication cannot be supported by only threadbare conclusory statements instead of significant probative evidence." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1984) (quotations and citations omitted); see also *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987); and *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 808 (9th Cir. 2007).

"The district court must ... undertake some initial scrutiny of the inferences that could be reasonably drawn from the evidence." *Barnes*, 759 F.2d at 680. "[T]he object of this scrutiny is to determine whether there remains sufficient probative evidence which would permit a finding in favor of the opposing party

based on more than mere speculation, conjecture, or fantasy." *Id.* at 681. On interlocutory appeal, the Ninth Circuit does not have jurisdiction to resolve "a fact-related dispute about the pretrial record, namely whether or not the evidence in the pretrial record was sufficient to show a genuine issue for trial." *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir.2018) (quoting *Johnson v. Jones*, 515 U.S. 304, 307, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995)). But this Court does have "jurisdiction, construing the facts and drawing all inferences in favor of Plaintiffs, to decide whether the evidence demonstrates a violation by [Hawley and Mirabal], and whether such violation was in contravention of federal law that was clearly established at the time. *Pauluk v. Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016)

As shown herein, even when the facts are construed in the manner most favorable to the Plaintiff, they do not establish that Lieutenant Hawley or Deputy Mirabal committed a constitutional violation that was clearly established at the time.

B. The Qualified Immunity Analysis.

The analysis of Garcia's § 1983 claims against Lieutenant Hawley and Deputy Mirabal as individuals proceeds under the two-part inquiry of qualified immunity. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (noting that "officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses").

Qualified immunity shields officers in the performance of their duties from liability under § 1983 unless their conduct violates clearly established constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The "central purpose of affording public officials qualified immunity is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway*, 510 U.S. 540, 114 S. Ct. 1019 (1994). To that end, the "qualified immunity defense allows for mistaken judgments and protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534 (1991)). This accommodation for reasonable error exists because "officials should not err always on the side of caution because they fear being sued." *Id.* at 229. As long as an official could reasonably have thought his actions to be consistent with the rights he is alleged to have violated, he is entitled to immunity. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Entitlement to qualified immunity is a question of law. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).

In determining whether Lieutenant Hawley and Deputy Mirabal are entitled to qualified immunity, the Court looks to whether the alleged facts implicate violation of a constitutional right and whether the right was "clearly established" at the time.

Saucier, 533 U.S. at 201. The Court may consider those factors in any order it chooses. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

As to the "clearly established prong, "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 211 L. Ed. 2d 164, 142 S. Ct. 4, 7 (2021), *quoting White v. Pauly,* 580 U. S. ——, ——, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017).

This prong of the analysis demands that courts not "define clearly established law at too high a level of generality." *City of Tahlequah, Oklahoma v. Bond*, 211 L. Ed. 2d 170, 142 S. Ct. 9, 11 (2021). It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 590, 199 L.Ed.2d 453 (quoting *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001)). 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, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) (internal quotation marks omitted).

In *Rivas-Villegas,* the Court explained that "[n]either Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the Court of Appeals relied solely on its precedent in *LaLonde*

[*v. County of Riverside,* 204 F. 3d 947 (CA9 2000)]. Even assuming that Circuit precedent can clearly establish law for purposes of § 1983, *LaLonde* is materially distinguishable and thus does not govern the facts of this case." *Rivas-Villegas*, 142 S. Ct. at 8.

Like in *Rivas-Villegas*, in this case, neither Garcia nor the district court identified any Supreme Court case that addresses facts like the ones at issue here. As such, Hawley and Mirabal were entitled to qualified immunity from Garcia's § 1983 claims.

C. Hawley and Mirabal are entitled to qualified immunity from Garcia's § 1983 claim for deprivation of his 14th Amendment Due Process Rights under the state-created danger exception.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As the Court noted in *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 195, 109 S. Ct. 998, 103 L.Ed.2d 249 (1989):

> "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text."

The Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," *Davidson v. Cannon,* 474 U.S., 344, 348, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986); *see also Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L.Ed.2d 662 (1986) (holding that the intent of the Due Process Clause is "to secure the individual from the arbitrary exercise of the powers of government… and "to prevent governmental power from being 'used for purposes of oppression") (internal citations omitted). Its "purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *DeShaney*, *supra*, 489 U.S. at 196. Therefore, the government's "failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." *Id.* at 198. Put differently, "the Due Process Clause of the Fourteenth Amendment… as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202.

Subsequent to *DeShaney*, some circuits, including this Circuit, developed an exception to *DeShaney's* holding known as the "state-created danger" exception. This exception applies where the government affirmatively places an individual in danger by acting with deliberate indifference to [a] known or obvious danger in

subjecting the plaintiff to it, such conduct may rise to the level of a due process violation. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006). It has never been recognized by the U.S. Supreme Court. In fact, as the Court stated in *DeShaney,* "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney,* 489 U.S. at 200.[1]

While the various circuits have yet to construct a unified approach to the elements of the state-created danger doctrine or to its causation analysis,[2] in this Circuit, the state-created danger doctrine has been applied where there is 1) an affirmative act by government actors places the plaintiff in danger, and 2) the government acts with "deliberate indifference to [a] known or obvious danger" in subjecting the plaintiff to that danger. *Kennedy*, 439 F.3d at 1062.

Subsequent cases have refined the showing a plaintiff must make to prevail on a claim under the state-created danger doctrine. First, a plaintiff must show not

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[1] *DeShaney* hinted that the Constitution *might* support liability when a state has a duty that "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200, 109 S. Ct. 998.

[2] *Kennedy*, 439 F.3d at 1074 (Bybee, J. dissenting).

only that the defendant acted "affirmatively," but also that the affirmative conduct placed him in a "worse position than that in which he would have been had [the state] not acted at all." *Johnson v. City of Seattle*, 474 F.3d 634, 641 (9th Cir. 2007) (quoting *DeShaney*, 489 U.S. at 201). The affirmative act must have exposed the plaintiff to "an actual, particularized danger." *Kennedy*, 439 F.3d at 1067. And the resulting harm must have been foreseeable. *Lawrence v. United States*, 340 F.3d 952, 957 (9th Cir. 2003). Second, the state actor must also have acted with "deliberate indifference" to a "known or obvious danger." *Pauluk*, 836 F.3d at 1124–25 (internal citations omitted) "Deliberate indifference" requires a "culpable mental state" more than "gross negligence." *Id*.

Significant to this case, the state-created danger exception has not been applied to a case in which the plaintiff's independent actions created the danger that led to the injury for which damages are sought. *DeShaney* held that the Constitution does not require the government to protect citizens from privately created danger. "It may, however, demand protection if the state disables people from protecting themselves; having rendered someone helpless, the state must supply the sort of defenses that the person could have provided on his own." *Witkowski v. Milwaukee County*, 480 F.3d 511, 513 (7th Cir. 2007).

1. No 14th Amendment Violation was established under the state created danger exception.

To overcome qualified immunity, Garcia must therefore establish that Hawley and Mirabal engaged in "affirmative conduct" that placed him in danger and that the affirmative conduct placed him in a "worse position than that in which he would have been had [they] not acted at all." The affirmative act must have exposed the Garcia to "an actual, particularized danger," and the resulting harm must have been foreseeable. Garcia must also establish that each acted with "deliberate indifference" to a "known or obvious danger." 'Deliberate indifference" requires a showing that the defendant "knows that something is going to happen but ignores the risk and exposes the plaintiff to it." *L.W. v. Grubbs*, 92 F.3d, 894, 900 (9th Cir. 1996).

As to Lieutenant Hawley, the district court found that he created a danger to Garcia by telling him he would have his deputies pull back off N.P.'s property, "[but] they would still be in the area to respond if need be," allowing Garcia to convey that information to N.P., and then failing to instruct his deputies to pull back. 2-ER-112. However, the danger that led to Garcia's injury was not *created* until Garcia bear-hugged N.P. and called for help. It is undisputed that Garcia did not communicate his intention to do so prior to engaging in that reckless course of conduct. It is also undisputed that Garcia did not take this action because he felt *he* was in any danger. It is undisputed that N.P. never threatened Garcia *or anyone else* before Garcia grabbed him. Finally, it is undisputed that Garcia made the decision to grab N.P.

and call for help with full knowledge that law enforcement officers had not pulled back and that Garcia could have chosen to let law enforcement handle the situation at that point. 3-ER-391-392.

Neither Lieutenant Hawley nor Deputy Mirabal affirmatively acted to encourage Garcia to bear-hug N.P. Garcia argues he would not have walked N.P. outside if he had known law enforcement had not pulled back. 2-ER-112. However, Garcia was not placed in danger by the act of walking outside with N.P. It was not until he grabbed N.P., which was done after he became aware that law enforcement was still on the property, that the danger leading to his injury was created. Put another way, it was not Lieutenant Hawley's alleged act of leaving deputies on the property that placed Garcia in the danger that caused his injury.

Further, because neither Hawley nor Mirabal had any advance knowledge of Garcia's decision to bear-hug N.P. before he did it, there is no possible basis to claim that either was deliberately indifferent to the risks associated with the danger he created by doing so.

Regarding Deputy Mirabal, the district court identified the act of running in to help Garcia in response to Garcia's request and allegedly failing to set his safety on as the basis to deny qualified immunity. 1-ER-005. First, Deputy Mirabal has testified unequivocally that his safety was on before he responded to Garcia's call for help. 3-ER-401. No percipient witness has testified to the contrary, and therefore

no such inference can be drawn to the contrary. Second, Garcia failed to establish that if Mirabal had simply ignored his request, he would have been in a better position than he was in: bear-hugging a suicidal, intoxicated, armed individual. Third, Garcia failed to establish that Mirabal was deliberately indifferent to the risk to Garcia of rushing in to help when he was holding an armed individual and calling for help.

In sum, Garcia did not establish that either Hawley or Mirabal violated his constitutional rights under the state created danger exception. Qualified immunity should have therefore been granted.

2. No remotely similar case put Hawley on notice that his alleged acts were clearly unlawful.

The district court in this case described the general principles of the Ninth Circuit's formulation of the state created danger exception to *DeShaney* and 1-ER-03-04. It then denied qualified immunity to Mirabal and Hawley because of alleged factual disputes about the events at end of the encounter. However, neither Garcia nor the district court, identified a case that would have put Hawley or Mirabal on notice, even assuming the truth of Garcia's allegations about this portion of the encounter, that either officer was violating Garcia's Fourteenth Amendment Rights under the state-created danger exception. The Court noted that Garcia alleged Lieutenant Hawley told him he would "have his deputies pull back off N.P.'s property, [but] they would still be in the area to respond if need be" and that this

could be conveyed to N.P. and then Hawley allegedly failed to instruct his deputies to pull back. 2-ER-112.

Assuming the truth of this allegation, no case put Lieutenant Hawley on notice that doing so was clearly unlawful. *See Johnson v. City of Seattle*, 474 F.3d 634, 640 (9th Cir. 2007) (declining to impose liability under the state-created danger doctrine where plaintiffs voluntarily placed themselves in the midst of a crowd that became unruly and holding that plaintiffs failed to show that the City "enhanced the dangers the [plaintiffs] exposed themselves to" by choosing to enter the crowd.)

Garcia bore the burden below of identifying some precedent that "placed beyond debate the unconstitutionality of [Lieutenant Hawley's] actions, as [his] actions unfolded in the context of the specific case at hand." *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) (quoting *Taylor v. Barkes*, 575 U.S. 822, 825, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015)). Moreover, to deprive Lieutenant Hawley of qualified immunity, any such case law would have to be particularized to the facts of this case. *Anderson*, 483 U.S. at 640; *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009). Absent citation to such case law placing Lieutenant Hawley on notice that his actions were clearly unlawful, Lieutenant Hawley is entitled to qualified immunity. *Saucier*, 533 U.S. at 202.

Garcia attempted to analogize this case to *L.W. v. Grubbs*, *supra*. Plaintiff L.W. was a R.N. in a state jail. 92 F.3d at 895. She was "raped and terrorized" by

an inmate at the jail, Blehm, after the jail selected Blehm to work as a "cart boy" with L.W. alone in the jail. *Id.* The complaint alleged that (1) Blehm was not qualified to serve as a cart boy; (2) Blehm had an extraordinary history of unrepentant violence against women and girls; (3) Blehm was likely to assault a female if left alone with her; (4) L.W. would be alone with Blehm during her rounds; and (5) L.W. would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders. *L.W. v. Grubbs,* 974 F.2d 119, 120 (9th Cir. 1992) (first appeal)

Grubbs is not remotely analogous. In *Grubbs,* L.W. was unaware that she would be working alone with *any* inmates, let alone with an inmate with known, violent tendencies against women. There was no claim that L.W. chose to do so despite any knowledge. The defendants had the knowledge and took away L.W.'s ability to protect herself. As the Court noted, the defendants "independently created the opportunity for and facilitated Blehm's assault" on L.W. *Id.*, at 122.

By contrast, in this case, Garcia remained involved in the incident despite numerous opportunities to leave the scene or end his involvement, despite knowing full well that N.P. was armed, intoxicated and had made suicidal statements. Garcia also approached N.P. while N.P. was armed with a shotgun and, without warning or notice to anyone, bear-hugged him and screamed for help. He did this despite the fact that N.P. never once threatened Garcia with harm, and N.P. never posed a risk

to Garcia until Garcia unexpectedly and unnecessarily grabbed him. Moreover, Lieutenant Hawley did not know that Garcia was going to grab N.P. and call for help because Garcia never communicated his plan to anyone. Under such circumstances, *Grubbs* is not factually on-point enough to deprive Lieutenant Hawley of qualified immunity.

Garcia also cited *Pauluk v. Savage*, *supra,* 836 F.3d at 1118, a case involving alleged workplace exposure to toxic mold that killed an employee. In *Pauluk*, the Court held that the plaintiff's allegations could satisfy the elements of the state-created danger exception because the defendants affirmatively acted by transferring the plaintiff to a work location where they knew mold was present, and they were deliberately indifferent to the risk posed to the plaintiff by the mold. *Id.*, at 1125. Nevertheless, the Court held that the defendants were entitled to qualified immunity because no clearly established law put them "on notice" that their conduct was unlawful. *Id*., at 1126.

Here, Mr. Garcia chose to bear-hug N.P. when N.P. was not threatening to harm anyone at the time. If Garcia had not grabbed N.P., but instead had simply not acted at all, he would have avoided any injury. It was Garcia's act that created the danger that caused his injury, not Hawley's.

3. No remotely similar case put Deputy Mirabal on notice that his alleged acts were clearly unlawful for purposes of the state created danger exception.

The district court denied qualified immunity to Deputy Mirabal, suggesting there was a factual dispute about whether Mirabal set his safety before responding to Garcia's call for assistance. 1-ER-005. Putting aside Mirabal's undisputed testimony that he set the safety on before responding to Garcia's call for help, 3-ER-404, there remains no case identified by either Garcia or the district court that would have put Mirabal on notice that his alleged actions were clearly unlawful.

Neither *L.W., Pauluk*, nor any other case identified by Garcia or the Court bears a remote resemblance to the facts of this case. None provide the requisite notice to Mirabal that his alleged actions were clearly unlawful, even if he acted before setting his safety on – which he vehemently denies and no evidence contradicts.

D. Deputy Mirabal is Likewise Entitled to Qualified Immunity From Garcia's Unlawful Seizure Claim Under the Fourth Amendment

Ironically, while Deputy Mirabal tackled Garcia and N.P. in response to Garcia's cries for help, Garcia also argues that Mirabal's decision to do so constituted an unlawful seizure under the Fourth Amendment. *See,* U.S. Const. amend IV. 3-ER-423. But while tackling someone in an effort to rescue them from the armed person they have just grabbed might be a "seizure" as that term is used in common parlance, it does not constitute a seizure within the meaning of the Fourth Amendment. Nor was there any existing case law as of September 2017 that would

have placed Deputy Mirabal on notice that by responding to Garcia's cries for help and tackling both him and N.P., he would be effecting an unlawful seizure within the meaning of the Fourth Amendment. As such, Deputy Mirabal is entitled to qualified immunity.

1. Deputy Mirabal is entitled to qualified immunity for Garcia's Fourth Amendment Claim because he did not "seize" Garcia within the meaning of the Fourth Amendment and thus did not violate his constitutional rights.

Plaintiffs alleging that they have been unlawfully seized in violation of the Fourth Amendment must show that the challenged action was in fact a "seizure" and that the seizure was unreasonable. *Id*. *See also Fox v. Dist. of Columbia*, 923 F. Supp. 2d 302, 306 (D.C. Cir. 2013) (citing *Soldal v. Cook Cnty. Ill.*, 506 U.S. 56, 61-71, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992)).

Setting aside the novel question of whether a seizure can be "unreasonable" when it occurs as a result of the plaintiff's own urgent request, a "seizure" occurs within the meaning of the Fourth Amendment only when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). In this case, no rational, reasonable person in Garcia's position could have concluded that by tackling him and N.P. in response to Garcia's cries for help, Deputy Mirabal was attempting to prevent Garcia from leaving. Quite to the contrary, it is clear from the record that Garcia understood

Deputy Mirabal's intent was to *free* him from the dangerous situation into which he had placed himself. That is why Garcia made every effort to extricate himself from the scrum and crawl away, even to the point of doing so on a leg damaged by gunfire.

A seizure under the Fourth Amendment also requires an application of physical force to the body of a person *with intent to restrain them*. *Torres*, 141 S. Ct. at 1003 (emphasis added). *Torres*, is instructive. In that case, the Court analyzed a scenario in which police intentionally shot the plaintiff to stop her from fleeing and, despite striking her twice, she escaped immediate arrest. 141 S. Ct. at 991. The issue was whether someone can be seized for purposes of the Fourth Amendment if they are not taken into custody, but force was still applied with the intent to restrain them. *Id.*

The Court held that the plaintiff in *Torres* was "seized" through the application of force intentionally applied, i.e. being shot twice, done with the "the intent to restrain her movement." *Id.* The Court was careful to note however, that "every physical contact between a government employee and a member of the public" is not a "Fourth Amendment Seizure." *Id.*, 141 S.Ct. at 998. "Accidental force will not qualify." *Id.*, *citing, County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Nor will force *intentionally applied for some other purpose* satisfy this rule. In this opinion, we consider *only force used to apprehend.*" 141 S. Ct. at 998 (emphasis added).

In this case, the district court relied on *Villanueva v. California*, 986 F.3d 1158 (9th Cir. 2021), to deny Mirabal qualified immunity. In that case, police were attempting a traffic stop on a vehicle carrying a driver and a passenger. *Id.* At 1162. At some point, the vehicle stopped, and police opened fire on the vehicle, killing the driver and injuring the passenger. *Id.* at 1163. The Court upheld the denial of qualified immunity for the excessive force claim because it noted "[a]t the time of the incident, it was clearly established that when the Officers shot at the Silverado, both Villanueva, the driver, and Orozco, the passenger, were seized within the meaning of the Fourth Amendment." *Id.* at 1165. The Court in *Villanueva* noted that "in 2007 the Supreme Court held in *Brendlin* [*v. California*, 551 U.S. 249, 251, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007)] that when a traffic stop occurs the passenger is also seized, because 'during a traffic stop an officer seizes everyone in the vehicle, not just the driver.'" *Id.* Thus, whether the officers "subjectively intended to shoot" the passenger was not relevant because they intended to stop the vehicle and thus anyone in the vehicle is seized. *Villanueva*, 986 F.3d at 1167.

According to Garcia's declaration:

> I was afraid that he was about to shoot the police or they were about to shoot him, so I grabbed hold of him and pinned the shotgun to his side. I then called out for help. I expected an officer to come over to handcuff N.P. Instead, an officer ran at us and knocked both N.P. and myself to the ground. This officer was sitting on top of N.P., hitting him in the face, when a high-powered rifle started to go off and I was shot.

2-ER-116.

Villanueva, and the cases it cites, stand for the proposition that when police intentionally *stop a vehicle*, anyone in the vehicle is also seized under the Fourth Amendment. In other words, by intentionally *stopping a vehicle*, the settled law considers everyone inside the vehicle seized – known or unknown. Mirabal was not stopping a vehicle and its passengers. He was rushing in to help Garcia restrain N.P. at Garcia's urgent request. The context in which force applied and the objective purpose for which it is applied, matter. This is illustrated by other cases cited in *Villanueva.*

For example, in *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000), the Court considered whether a *hostage* in a vehicle that was shot at by police while trying to stop the vehicle was "seized" for purposes of the Fourth Amendment. The Court in *Childress* referenced *Landol–Rivera v. Cosme*, 906 F.2d 791 (1st Cir. 1990), in which a fast-food worker was taken hostage by an armed robber. In apprehending the robber, police shot the hostage with a bullet intended for his captor. *Id.* at 792. The First Circuit found that the police had not seized the fast-food worker, "reject[ing] the notion that the 'intention' requirement [from *Brower, infra*] is met by the deliberateness with which a given action is taken." *Id.* at 795. The court concluded that "[a] police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was

designed to govern." *Id*. *Childress* also cited *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2nd Cir. 1998) (holding that no seizure occurred when police officers wounded a hostage during pursuit of a fugitive), and *Rucker v. Harford County, Md*., 946 F.2d 278, 279 (4th Cir. 1991) (holding that no seizure occurred when officers wounded a bystander in an attempt to shoot the tires of a fugitive's car).

Applying these cases, *Childress* held that the "police officers in the instant case did not 'seize' plaintiffs within the meaning of the Fourth Amendment but rather made every effort to deliver them from unlawful abduction. The officers intended to restrain the minivan and the fugitives, not Mrs. Childress and Caitlyn. The injuries inflicted were the unfortunate but not unconstitutional 'accidental effects of otherwise lawful conduct.'" 210 F.3d at 1157. Thus, "no Fourth Amendment seizure occurred." *Id. See also, Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) ("A police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern.").

Villanueva should not be read to imply that the factual context in which a person is physically contacted by law enforcement should be ignored in determining whether a seizure of that person has occurred. That much is made clear by *Torres*: "Nor will force *intentionally applied for some other purpose* satisfy this rule. In this

opinion, we consider *only force used to apprehend.*" 141 S. Ct. at 998 (emphasis added).

Like the cases involving hostages injured by police who are trying to stop the hostage takers, Deputy Mirabal used force to assist Garcia and to restrain N.P. Even under Garcia's own description, he called for help after bear-hugging an armed individual and Mirabal answered the call. While Garcia was tackled or knocked to the ground in the process, objectively, there is no evidence or allegation that Mirabal did so to restrain or apprehend Garcia. Nor did it result in Garcia's restraint as he was able to move away while Mirabal struggled with N.P. Even construing the facts in a light most favorable to Garcia, Deputy Mirabal did not "seize" Garcia within the meaning of the Fourth Amendment because he did not apply force to Garcia *with the intent to restrain Garcia*. *See, Medeiros, supra*, 150 F.3d at 168 (holding that a hostage in a vehicle struck by a police officer's bullet is not seized under the Fourth Amendment"). Mirabal is entitled to qualified immunity on the Fourth Amendment claim because he did not seize Garcia by allegedly tackling him and N.P. in the course of responding to Garcia's call for help.

2. No existing case law in September 2017 placed Deputy Mirabal on notice that by tackling Garcia and N.P., he would violate Garcia's Fourth Amendment rights

Garcia's Fourth Amendment seizure claim fares no better under the second prong of the qualified immunity analysis. Unlike *Villanueva*, this case did not

involve a traffic stop in which established law held that anyone in the vehicle is seized at the time of the stop. That distinction is critical because "a seizure requires the use of force with intent to restrain, as opposed to force applied by accident or for some other purpose." *Torres*, 141 S. Ct. at 991. From this case, as well as the hostage cases described above, a reasonable officer could conclude that the objective context for the use of force matters: using force to *help rescue someone* calling for help to control an armed individual is different from using force to *stop someone's movement* in the course of a traffic stop in which they are a passenger in the stopped vehicle.

Neither the district court, nor Garcia cited any case finding a Fourth Amendment seizure under remotely similar facts to those present here. There was no existing case law squarely governing this situation would have informed Deputy Mirabal that by responding to Garcia's request for help with an armed individual and knocking Garcia to the ground in the process of trying to restrain N.P. that he would unlawfully seize Garcia. *See Mullenix v. Luna*, 136 S. Ct. 305, 309, 577 U.S. 7 (2015) (mandating an award of qualified immunity absent such controlling authority). Nor was there any "robust consensus of cases of persuasive authority" that would have "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). Indeed, under *Torres*, absent any intent to apprehend Garcia, Deputy Mirabal would

have been justified in believing that he was not seizing Garcia at all by knocking him to the ground along with N.P. his actual intended target. *See also Cnty. of Sacramento v. Lewis*, *supra,* 523 U.S. at 844 (citing *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) in explaining that Fourth Amendment seizures do "not occur whenever there is a governmentally caused termination of an individual's freedom of movement").

The most factually similar cases to this case are those involving hostages injured by police attempting to seize the hostage-takers. Those cases establish that a seizure did not take place here. *See, supra*, *Childress, Medeiros,* and *Landol-Rivera.* Thus, under the second prong of the analysis, Deputy Mirabal is entitled to qualified immunity because no case put him on notice that his actions, as alleged by Garcia, were clearly unlawful. *Anderson*, 483 U.S. at 640.

VI. CONCLUSION

For the foregoing reasons, the District Court's denial of qualified immunity for Lieutenant Hawley and Deputy Mirabal should be reversed.

RESPECTFULLY SUBMITTED this 17th day of January, 2023.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

/s/ John E. Justice_____
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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2, the County defendant appellees hereby certify that no other cases pending in this Court are deemed related.

Signature: /s/ John E. Justice

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023 I served 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. 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.

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