ALANA W. ROBINSON
Acting United States Attorney
DIANNE M. SCHWEINER
Assistant U.S. Attorney
Cal. State Bar No. 188013
ERNEST CORDERO, JR.
Assistant U.S. Attorney
State of California Bar No. 131865
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 546-7654
Facsimile: (619) 546-7751
Email: dianne.schweiner@usdoj.gov

Attorneys for Defendants
Dorian Diaz and Michael Fisher

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARIA DEL SOCORRO QUINTERO PEREZ, BRIANDA ARACELY YAÑEZ QUINTERO, CAMELIA ITZAYANA YAÑEZ QUINTERO, and J.Y., a minor,

Plaintiffs,

vs.

DORIAN DIAZ, *et al.*,

Defendants.

Case No.: 13cv1417-WQH (BGS)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT DORIAN DIAZ'S MOTION FOR SUMMARY JUDGMENT

DATE: May 8, 2017
CTRM: 14B (Annex)
JUDGE: Hon. William Q. Hayes

Defendant Dorian Diaz submits the following Reply Memorandum of Points and Authorities in support of his motion for summary judgment based on qualified immunity. For the convenience of the Court, Defendant has simultaneously submitted a Reply Separate Statement of Facts, which lists Defendant's moving facts and evidence, Plaintiffs' opposition evidence, and the reasons why Defendant's moving facts are still undisputed. (See ECF 182-1).

I.

PLAINTIFFS HAVE CONCEDED THAT YAÑEZ'S WIFE AND CHILDREN HAVE NO CLAIMS IN THIS LAWSUIT

Plaintiffs' statement in their opposition brief that they are not pursuing any individual claims on behalf of Yañez's wife or children is perplexing in light of their Fourth Amended Complaint ("FAC") and other pleadings filed in this case. Specifically their FAC lists Maria Del Socorro Quintero Perez, Brianda Aracely Yañez Quintero, Camelia Itzayana Yañez Quintero, and J.Y., a minor as "Plaintiffs" under the "Parties" Section (ECF 165, p. 1, line 19 - p. 2, line 3). They clearly state that "Plaintiff Maria Del Socorro Quintero Perez...brings this action *in her individual capacity*" (ECF 165, p. 1, lines 22-23). The caption of their FAC also lists these four individuals as Plaintiffs, without reference to the decedent's Estate. And, the FAC requests an award of "money damages to Plaintiffs" (ECF 165, ¶¶ 143, 151), without using the singular and without limiting that request to the damages available to a decedent's Estate in a *Bivens* action.

Plaintiffs were not ignorant of their claimed status of suing in their individual capacities before filing their opposition to the current motion. Earlier versions of the Complaint included only three of the family members as Plaintiffs. But in December 2015, counsel filed a motion to add an additional Plaintiff, stating "Plaintiff Maria Del Socorro Quintero Perez has a third child who is currently 14 years old (minor J.Y.), and *Plaintiffs would like to add him as a party Plaintiff to this lawsuit*.... adding minor J.Y. as a Plaintiff *to all causes of action for which his siblings are Plaintiffs*....Plaintiffs' counsel will petition the Court for an order appointing a Guardian ad Litem to represent minor J.Y." (ECF 104). Plaintiffs also propounded Requests for Admissions to Agent Diaz specifically asking him to "admit that Plaintiffs Maria Del Socorro Quintero Perez, Brianda Aracely Yañez Quintero, Camelia Itzayana Yañez Quintero, and J.Y. suffered some amount of harm as a result of your shooting of decedent." (ECF 153-1, p. 2).[1]

[1] Plaintiffs' reference to *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987) is likewise puzzling, as the *Smith* case has been overruled and involved a claim against state actors under § 1983 and the Fourteenth Amendment. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, fn. 1 (9th Cir. 1999); *see also Andrade v. City of Burlingame*, 847 F. Supp. 760, 765, fn. 8 (N.D. Cal. 1994) (holding "cases cited by plaintiffs that pre-date *Graham*

It is not surprising that Yañez's wife and children have abandoned their claims as they cannot state viable constitutional claims. They do not live in the United States, have never travelled to the United States and have no contacts with this country. In light of their clarification, Defendant requests the Court formally dismiss these Plaintiffs from this action entirely, with prejudice, in order to make the record clear as to who is a party.

II.

PLAINTIFFS HAVE FAILED TO CITE TO ANY CLEARLY ESTABLISHED LAW IN 2011 THAT SUGGESTS YANEZ HAD A FOURTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION

A. PLAINTIFFS DO NOT CITE TO ANY CLEARLY ESTABLISHED LAW

In opposition to Defendant's argument that the law was not clearly established in June 2011 that Yañez had Fourth Amendment constitutional rights, Plaintiffs cite only to *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620 (5th Cir. 2006) for the proposition that "aliens stopped at the border have a constitutional right to be free from false imprisonment and use of excessive force." But as already explained in Defendant's moving brief, that non-binding case is completely distinguishable because at the time of *Martinez-Aguero*'s altercation with the Border Patrol, she was physically present within U.S. territory at the Port of Entry, she possessed a valid border crossing card, and she had legally entered the United States on a monthly basis to take her aunt to the Social Security office in Texas. *Id*. at 621. Based on those facts, the Fifth Circuit determined that *Martinez-Aguero* had substantial connections with the United States because she had acquiesced in the U.S.

---

are thus of limited utility....For instance, plaintiffs cite to *Smith v. City of Fontana*...in which the Ninth Circuit held that an estate could allege violations of a decedent's fourteenth amendment rights for excessive force by officers attempting to detain the decedent....In doing so, the Ninth Circuit relied upon the substantive due process test .. . . That reasoning was expressly disapproved by the Supreme Court in *Graham*. *See Graham*, 490 U.S. at 392-93."). While it may be true that in a state court proceeding "parents and children may assert Fourteenth Amendment substantive due process claims if they are deprived of their liberty interest in the companionship and society of their child or parent through official conduct," in contrast "Fourth Amendment [*Bivens*] claims must be brought appropriately by a decedent's estate." *Smith v. Pierce Cnty.*, 2016 U.S. Dist. LEXIS 153627, *8 (W.D. Wash. Nov. 4, 2016). Similarly, Plaintiffs' reference to California Code of Civil Procedure § 377.30 has no bearing here as that state statute would only be applicable in the event Plaintiffs had filed an FTCA wrongful death action against the United States, which they did not.

system of immigration and had undertaken voluntary acceptance of societal obligations in this country. *Id*. at 625. In contrast here, Plaintiffs have alleged no such connections with respect to Yañez. Yañez was not "*stopped* at the border" as many other Mexican nationals are while crossing through the Ports of Entry. Rather, it is undisputed that Yañez entered the United States illegally by crawling through a hole in the primary border fence nowhere near a Port of Entry, then retreated back into Mexico a couple minutes later. What followed was his assault on federal agents from south of the border fence. He was not "stopped" at a Port of Entry and these circumstances do not satisfy the Supreme Court's substantial connections test.

B. THE SHOOTING OF YAÑEZ ITSELF DOES NOT CREATE PRIOR SUBSTANTIAL CONNECTIONS

Furthermore, whether a "seizure" of Yañez occurred within the United States at the time he was shot is irrelevant to the question of whether Yañez had Fourth Amendment constitutional rights in the first place, which would implicate the search and seizure provisions of the Fourth Amendment. Plaintiffs have put the cart before the horse in arguing Agent Diaz's act of shooting Yañez "constitutes the substantial connection." But this Court must first decide whether the law was clearly established that Yañez was even *covered* under the Fourth Amendment, before it can analyze whether a seizure occurred, or whether that seizure was reasonable under the circumstances. And, the Supreme Court already ruled in *Verdugo-Urquidez* that the alien's presence on United States soil during the time of the alleged seizure did not satisfy the substantial connections requirement because "even though he was brought and held here against his will . . . this sort of presence -- lawful but involuntary -- is not of the sort to indicate any substantial connection with our country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

C. AGENT DIAZ'S UNDERSTANDING REGARDING THE LOCATION OF YAÑEZ IS RELEVANT TO THE REASONABLE OFFICER'S BELIEFS

Plaintiffs next contend "Agent Diaz's personal beliefs regarding the location of the international border are irrelevant," but those beliefs go to the heart of what the reasonable

officer in Agent Diaz's position would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is clearly established only where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (*quoting Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Defendant put forth not only Agent Diaz's testimony regarding his belief that the territory south of the border fence was Mexican land, but that of supervisor Villareal who confirmed that he too, as well as other Border Patrol agents in the San Diego sector, all believed the primary border fence near Stewart's Grate constituted the international border between the two countries. (Villareal Decl., ¶¶ 4, 5, 7; Diaz Decl., ¶¶ 4-6). Therefore, a reasonable officer in Agent Diaz's shoes would have believed that Yañez was not in United States territory when he was assaulting federal agents.

D. WHETHER YAÑEZ HAD PREVIOUS SUBSTANTIAL CONNECTIONS WITH THE U.S. MUST BE DECIDED BY THE COURT, NOT THE JURY

Plaintiffs then argue that "a reasonable juror could conclude that Diaz's decision to end Yañez's life is the type of substantial connection giving rise to Fourth Amendment protection." (Oppo, p. 7:8-10). But Plaintiffs miss the point of qualified immunity. The doctrine requires that ***the law*** be clearly established that the constitutional provision at issue applies to the plaintiff in the first place. Qualified immunity is a decision the Court must make, not a jury. In *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. 1991), the Supreme Court rejected the Ninth Circuit's assertion that summary judgment on qualified immunity is proper "only if there is only one reasonable conclusion a jury could reach." *Id.* at 536-37. The Supreme Court stated the Ninth Circuit's reasoning was flawed for two reasons:

> "First, it routinely places the question of immunity in the hands of the jury. **Immunity ordinarily should be decided by the court long before trial.** [Citations omitted]. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."

Id. at 536-37 (emphasis added).

Agent Diaz set forth undisputed facts in his Separate Statement establishing that: (a) Yañez had no prior substantial connections to the United States, (b) on the day of the incident Yañez entered the United States illegally prior to retreating back into Mexico, (c) Agent Diaz reasonably believed Yañez to be a Mexican citizen with no substantial connections to this country, and (d) Agent Diaz reasonably believed Yañez was on Mexican territory south of the border fence when he was shot and killed. Plaintiffs have not raised one triable issue of fact disputing those realities. (*See* Reply SSUF Nos. 1, 108, 109, 110, 129, 130, and 131 filed concurrently herewith, and highlighted in blue).

Therefore, Plaintiffs cannot avoid summary judgment as to Defendant's *Verdugo-Urquidez* argument by erroneously arguing "the facts are in dispute" because (a) the facts are not in dispute on this point since Plaintiffs have offered no evidence of any prior significant connections, and (b) Defendant's *Verdugo-Urquidez* argument is a *legal* argument demonstrating that the law was not clearly established in this context. There are no disputed facts on this issue, and it is not for a jury to decide whether established law prior to June 2011 made it clear to Agent Diaz that an alien, south of the primary border fence which other agents also reasonably believed was Mexican land, had rights under the U.S. Constitution. To give a jury that role would eviscerate the doctrine of qualified immunity which is designed to shield government agents from the burdens of trial when they are immune from suit.

E. *BOUMEDIENE* DOES NOT SUPPORT A FINDING OF FOURTH AMENDMENT RIGHTS TO ALIENS SOUTH OF THE BORDER FENCE

Plaintiffs "concede that *Verdugo-Urquidez* sets forth one test for determining whether the Fourth Amendment applies to a non-citizen, namely the substantial connections test." (Oppo, p. 6:20-22). Yet, they argue another test also applies to the application of extraterritorial constitutional rights, namely the three-part test articulated in *Boumediene v. Bush*, 553 U.S. 723 (2008). But the *Boumediene* decision is limited to habeas rights under the Suspension Clause and had nothing to do with the Fourth Amendment. And, even if the Court in this case were to apply *Boumediene's* three-factor

test, those factors weigh in favor of rejecting Fourth Amendment protection for Yañez. First, it is undisputed that Yañez and his family were citizens of Mexico, not the United States, and that Yañez had entered the United States illegally prior to retreating back into Mexico. (FAC, ¶ 1, 27; Ex. C, Quintero Depo, 63:1-20). Therefore, the citizenship and status of Yañez and his family weigh against Fourth Amendment protection.

Second, the nature of the site where Yañez was shot consists of a dirt shoulder adjacent to Mexico's Highway 1, south of the primary border fence separating Mexico from the United States. (Ex. R, Reese Report). While Mexican nationals can travel that area and frequently do, Border Patrol agents cannot because they consider the area south of the metal corrugated fence as Mexican territory, and they are forbidden from entering Mexico with their firearms. (Villareal Decl., ¶ 6; Diaz Decl., ¶ 6). The area in which Yañez was shot south of Panel 472 is not patrolled by Border Patrol agents, but rather it was the Mexican police who came to the scene, secured the area, and subsequently took Yañez's body to the Mexican morgue. Border Patrol agents had no ability to retrieve Yañez's body in that area, or take him to a morgue in San Diego, or perform any sort of autopsy. For these reasons, the nature of the site in question south of Panel 472 weighs against extending Fourth Amendment protection to Yañez.

Third, there are many practical obstacles inherent to granting Fourth Amendment protection to Yañez's Estate. The Department of Homeland Security and its components, including CBP, have been charged by Congress with a primary mission of preventing terrorist attacks within the United States and securing the border. *See* 6 U.S.C. §§ 111, 202. In the present case, it was Mexican authorities who took control of the scene just south of Panel 472, it was the Mexican authorities who took statements from Yañez's wife and girlfriend, and it was the Mexican Medical Examiners who took possession of Yañez's body and conducted the autopsy and toxicology testing. Neither Agent Diaz, nor the United States, have the ability to (a) interview or depose any witnesses there may have been south of the border, (b) interview or depose the Medical Examiner who conducted the autopsy, (c) interview or depose any friends or relatives of the plaintiffs residing in Mexico, (d)

subpoena the relevant documents from the Mexican Attorney General's investigation; (e) subpoena the relevant documents from the Medical Examiner; (f) subpoena any records relating to Yañez's income or employment; (g) subpoena any records relating to his family's alleged damages, whether income-related or school-related; and (h) subpoena any records relating to the illegal activities and/or possible felonies committed by both Yañez and Murietta in Mexico prior to this incident. The undisputed evidence in this case clearly demonstrates that Yañez and Murietta were circumventing Border Patrol's efforts to secure the border, yet many practical obstacles preclude the government from obtaining the relevant evidence in the case. To extend Fourth Amendment protection to Yañez under these circumstances would mean any alien located south of Panel 472 could claim excessive force by a federal agent, yet neither that agent nor the federal government could obtain any evidence supporting or denying the claim due to their inability to access the relevant information in the foreign country in which the plaintiff resides. For these reasons, even the three-factor functional approach articulated in *Boumediene* weighs against extending Fourth Amendment rights to Yañez under the circumstances of this case.

III.

MURIETTA'S CONTRADICTORY TESTIMONY FAILS TO RAISE A MATERIAL ISSUE OF FACT ON THE REASONABLENESS OF AGENT DIAZ'S USE OF FORCE

In their attempt to raise a triable issue as to the reasonableness of Agent Diaz's use of force, Plaintiffs submit the deposition testimony of Jose Ibarra Murietta (aka Martin Ortiz Castaneda) who has already pled guilty to his illegal entry and assault on Agent Nelson on June 21, 2011. Murietta's later deposition testimony from January 14, 2016 falls under the sham affidavit rule, and this Court is allowed to disregard his inconsistent testimony in connection with deciding this qualified immunity motion.

Under the "sham" affidavit rule, most often raised in the context of summary judgment motions, a witness cannot create an issue of fact by contradicting prior sworn testimony. *Russell v. Pac. Motor Trucking Co*., 2016 U.S. App. LEXIS 21570, *2-3 (9th Cir. 2016) (district court did not abuse its discretion in disregarding those portions of the

affidavit that directly contradicted former deposition testimony); *Shupe v. Bank of Am., N.A.*, 2016 U.S. App. LEXIS 21120, *3 (9th Cir. 2016); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005); *In re Conagra Foods, Inc.*, 90 F. Supp. 3d 919, 960 (C.D. Cal. Feb. 23, 2015); *Tourgeman v. Collins Fin. Services, Inc.*, 2010 WL 4817990 (S.D. Cal. Nov. 22, 2010). When faced with testimony which directly contradicts prior testimony, the Court must determine whether the new declaration is a sham, and whether the inconsistency between the prior sworn testimony and the new declaration is "clear and unambiguous." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009).

In addition to the sham affidavit rule, courts have held that inconsistent testimony in a civil action can be disregarded if it would invalidate a prior criminal conviction. *See Heck v. Humphrey*, 512 U.S. 477 (1994) (rejecting plaintiffs' §1983 claims when success on that claim would invalidate the plaintiff's prior criminal conviction); *Santa Barbara Capital Mgmt. v. Neilson*, 525 F.3d 805, 812-15 (9th Cir. 2008) (where witness previously pled guilty to fraud, the guilty plea and plea agreement were conclusive on summary judgment to establish his intent to defraud); *Progressive Northern Ins. v. McDonough*, 608 F.3d 388, 391(8th Cir. 2010) (holding later deposition testimony in a civil suit contradicting a prior guilty plea in a criminal case cannot create a genuine issue of material fact to survive a motion for summary judgment because allowing contradictory testimony "would undermine the core principles of both civil and criminal justice, most notably the valuable procedures of summary judgment and guilty pleas"); *City of St. Joseph v. Southwestern Bell Tel.*, 439 F.3d 468, 476 (8th Cir. 2006) (rejecting later contradictory testimony because "[I]f 'testimony under oath...can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment" and "[n]o party should be allowed to create 'issues of credibility' by contradicting his own previous testimony"); *Progressive Direct Ins. Co. v. Vace*k, 2012 U.S. Dist. LEXIS 121004, *11-12 (W.D. Tenn. Aug. 27, 2012) (holding prior guilty plea estopped litigant from contradicting her testimony to create a material issue of fact on summary judgment because "a party's

guilty plea is a judicial acceptance of fact" and "a guilty plea is as much a conviction as a conviction following a jury trial"); *Morgan v. Bill Vann Co.*, 2013 U.S. Dist. LEXIS 124230, *27 (S.D. Ala. Aug. 30, 2013) ("a genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the testimony is correct").

Defendants Diaz and Fisher have requested that this Court take judicial notice of Murietta's prior guilty plea, his prior admissions under oath in court, and the factual findings contained within his Sentencing Hearing. Admissions in a guilty-plea hearing, being judicial admissions, bind the witness in subsequent proceedings. *United States v. Evans*, 576 F.3d 766, 770 (7th Cir. 2009); *see also Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) ("Admissions-in a guilty plea, as elsewhere-are admissions; they bind a party; and the veracity safeguards surrounding a plea agreement that is accepted as the basis for a guilty plea and resulting conviction actually exceed those surrounding a deposition."). There can be no doubt that Murietta's deposition testimony given four years after Yañez's shooting directly contradicts his prior sworn testimony given in his Plea Hearing and his Sentencing Hearing before this same Court in connection with his criminal prosecution. The inconsistencies between the two occasions wherein he testified under oath are clear and unambiguous, and Murietta cannot admit under oath to assaulting Agent Nelson in 2012 and then completely change his story in 2016 in order to avoid Defendant's entitlement to qualified immunity. For these reasons, Defendant respectfully requests the Court determine that Murietta's conflicting deposition testimony is a sham that does not create a material issue of fact forcing this case to trial.

IV.

SPECULATION AFTER-THE-FACT BY PLAINTIFFS' EXPERTS FAILS TO RAISE A MATERIAL ISSUE OF FACT

Lastly, Plaintiffs refer to their experts' reports in opposition (Balash and Smith), relying on those experts' opinions that Agent Diaz's use of lethal force was unconstitutional. But case law is clear that an expert's after-the-fact opinion which

disagrees as to whether an officer's actions were reasonable does not avoid summary judgment on qualified immunity. *See Reynolds v. County of San Diego*, 858 F. Supp. 1064 (S.D. Cal 1994) (*modified on other grounds*, 84 F. 3d 1162 (9th Cir. 1996)). In *Reynolds*, the plaintiffs retained experts who contended a San Diego Sheriff "could have taken other actions in his confrontation with [the decedent]," and that "by talking softly to the suspect or waiting for a backup, [the officer] might have avoided putting himself in a situation where [the suspect] posed a serious threat of physical injury." *Id*. at 1072. The Ninth Circuit rejected those allegations holding:

> "this position ignores the Supreme Court's holding in *Hunter v. Bryant*, 112 S. Ct. at 536-37. There, the Court held that the fact that experts disagreed with the officer's actions did not render the officer's actions 'unreasonable.' Rather, the Court held the question is not "whether another reasonable, or more reasonable, interpretation of events can be constructed...after the fact....the fact that an expert disagrees with the officer's actions does not preclude a finding that the officer is entitled to immunity."

Reynolds, at 1072-73. Based on this Ninth Circuit authority, Plaintiffs' submission of expert reports containing irrelevant hearsay and inadmissible opinion testimony does not raise a triable issue of fact precluding summary judgment as to Agent Diaz. *Id*. *See also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict").

DATED: May 1, 2017

Respectfully submitted,

ALANA W. ROBINSON
Acting United States Attorney

s/ Dianne M. Schweiner
DIANNE M. SCHWEINER
Assistant United States Attorney
Attorneys for Defendants
Dorian Diaz and Michael Fisher