

For Dockets See [08-2098](#)

United States Court of Appeals, Fourth Circuit.  
Carol PETHTEL, Individually and in her capacity as  
Administratrix of the Estate of Thomas Samuel Peth-  
tel, Jr., Deceased, and as Guardian Ad Litem for T.B.,  
T.P., and T.S.P., III, Plaintiff - Appellant,

v.

WEST VIRGINIA STATE POLICE; David L.  
Lemmon, Colonel, Superintendent of the West Vir-  
ginia State Police; Gerald L. Menendez, Sergeant;  
Charles F. Trader, Sergeant; David B. Malcomb,  
Sergeant; Scot L. Goodnight, Sergeant; R. L. Mefford,  
Corporal; J. A. Simmons, Individually and in their  
capacity as members of the Special Response Team -  
Alpha Team of the West Virginia State Police; T. L.  
Phillips, Captain, State Police Commanding Officer in  
Ohio County, Defendants - Appellees.

No. **08-2098**.

March 31, 2009.

On Appeal from the United States District Court for  
the Northern District of West Virginia at Wheeling

Brief of Appellees

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#### I. STATEMENT OF THE ISSUE

Whether the district court erred in holding that none of the defendant West Virginia State Police officers used excessive force in their efforts to apprehend Thomas Pethtel (and that, therefore, neither the State nor any of the supervisors was liable) or in excluding Appellant's proffered expert witness.

#### II. STATEMENT OF THE CASE

Thomas Pethtel ("Pethtel") was a 6'3", 225-pound, convicted felon and drug dealer with a history of violence toward the police and others. Realizing that he was about to face yet another substantial federal prison sentence for again selling illegal drugs, "Pethtel cut off his electronic monitoring ankle-bracelet and escaped from federal custody. Once he fled, "Pethtel made it abundantly clear to everyone that he would not be taken alive.

While on the lam and under the influence of crack cocaine, "Pethtel acquired and began to carry a handgun. He commandeered a friend's home (where he fired the gun at least once). He became increasingly paranoid. He monitored the telephone calls of the residents of the home. He took those residents captive, only allowing them to leave one at a time by threatening to kill those who remained if the police arrived or if the resident who left did not return by a certain time. "Pethtel also told his captives that *when-not* if-the police caught up with him, he intended to kill everyone in the home and engage the police in a gun fight. One of the residents nonetheless managed to escape and call the police, advising them (1) of "Pethtel's whereabouts, his condition, and the general conditions in the home, (2) that "Pethtel had fired a gun and had asked her to purchase additional hollow-point bullets for the gun because he planned to "go down in a blaze of glory" when the police arrived, and (3) that she feared for her safety and for the safety

of “Pethtel's other captives if the police did not act quickly.

Appellees, West Virginia State Police troopers, responded swiftly, attempting to safely serve the federal warrant for “Pethtel's arrest and free the captives inside the home. But instead of surrendering, “Pethtel fled to a back room with a hostage. “Pethtel armed himself with what he intended the police to believe-and what the police did believe-was a knife at the throat of his hostage, and he threatened to kill her if the police did not leave. The police, of course, could not leave “Pethtel with a hostage who was screaming for the police to save her. Instead, when he attempted to escape through a hole in the wall of a room into which he had retreated with his hostage, the police shot him. The first shot was not lethal, but another officer shot “Pethtel a second time as “Pethtel continued to threaten the hostage, and “Pethtel died immediately as a result of that second shot.

Notwithstanding the fact that the officers' conduct in rescuing “Pethtel's hostage and preventing further harm was exemplary, Carol Pethtel, Thomas Pethtel's mother (his administratrix and the *guardian ad litem* of his children), sued those officers for violating “Pethtel's constitutional rights. The United States District Court for the Northern District of West Virginia appropriately granted the defendants' motion for summary judgment, holding that, “[w]hen viewed in the light most favorable to Pethtel, as the injured party, the facts reveal that none of the officers used excessive force in their efforts to apprehend Pethtel,” and that the supervisory and entity claims likewise failed.

### III. STATEMENT OF THE FACTS

Carol Pethtel states the facts in the light most favorable to her, and from *her after-the-fact* point of view. This perspective is only half right: As discussed below, analysis of a police officer's motion for summary judgment views the facts in the light most favorable to the non-movant, but from the perspective of a *reasonable officer on the scene*. It is, after all, the defendant police officer's on-scene response to the facts as he or she was dealt them that is being judged. From this proper perspective, then, the undisputed facts are as follows.

A. “Pethtel's background, as the police knew it beforehand.

Thomas Pethtel had a long history of arrests and had spent many years in prison for dealing drugs. According to George Schlosser-a lifelong friend who initially harbored “Pethtel while he was a fugitive, but who later became one of “Pethtel's captives-“Pethtel was a well-known user and seller of illegal drugs. (*See, e.g.*, J.A. at 598a-99a (testifying that “Pethtel smoked crack, and had a reputation for and had been arrested for selling it).)

According to “Pethtel's sister, Betty Jean Nice, selling illegal drugs was “how they made their money.” (J.A. at 231a.) “Pethtel's best friend and brother-in-law, Victor Rouse, noted that “Pethtel carried a lot of cash, even though he had no means of income other than drug dealing. (J.A. at 450a.) Schlosser also testified that “Pethtel had a history of violence and that he occasionally carried a gun. (J.A. at 599a.) Schlosser also recognized that “Pethtel's history of violence was especially directed toward law enforcement officers. (J.A. at 599a & 670a-72a (“If if I would have to say, I would say they [the police] probably were afraid of him.... Because he's a big guy. He was an intimidating guy.... He'd give [law enforcement] a hard time whenever he could.”))

B. “Pethtel is arrested-again-for drug dealing.

Unsurprisingly, “Pethtel was well known to members of the local drug task force. In 2004, a Wheeling Police Officer and Drug Task Force member arrested “Pethtel as he exited Bud's Club, a local nightclub well known as a place where illegal drugs could be purchased. (J.A. at 34a-36a (Cr. Comp., No. 5:04-CR-00017).) When the police attempted to arrest “Pethtel, he fought them, but was eventually taken into custody. (*Id.*) At the time of his arrest, the police removed twenty-three grams of crack and a knife from his person. (*Id.*) A subsequent search of “Pethtel's residence uncovered a .45-caliber handgun and some \$5,000 in cash.<sup>[FN1]</sup> (J.A. at 37a-38a (Mot. for Detention Hearing).)

FN1. As a drug-using, fugitive, convicted felon, “Pethtel's possession of a gun constituted a triple-violation of federal law, *see* [18 U.S.C. § 922\(g\)\(1\)](#), and of the terms of his release.

A grand jury indicted “Pethtel for violating, *inter alia*, [21 U.S.C. § 821](#), and the United States issued a war-

rant for his arrest; the drug task force eventually re-arrested “Pethtel, but only after he led police on a rooftop-to-rooftop chase. (J.A. at 37a-38a.) “Pethtel entered into an agreement to plead guilty and was convicted. (Compl. ¶¶ 13 & 14, J.A. at 16a.) Over the objections of the United States, “Pethtel (who faced a *de facto* life sentence due to his age relative to the volume of crack he had pleaded guilty to selling) was released to house arrest at his sister's home. (J.A. at 39a-41a (Order Denying Motion to Detain & Ordering Release on Electronic Monitoring at Def.'s Expense).)

C. “Pethtel escapes from federal custody.

Instead of complying with the terms of his release, however, “Pethtel cut off his electronic monitoring bracelet-telling his sister to put it in a mailbox-and fled. (*See* Compl. ¶ 16, J.A. at 17a; J.A. at 249a-50a.) “Pethtel was joined in his run from the police by his friend, Victor Rouse, who had also been on electronically-monitored house arrest but who had also cut off his monitoring bracelet. (J.A. at 267a-70a.) “Pethtel's family never turned him in, but the federal authorities nonetheless eventually learned that he had fled and issued yet another a warrant for his arrest.

While on the lam, “Pethtel and Rouse moved from safe haven to safe haven. Just before fleeing, “Pethtel secured a gun from a friend, Susan Gorab. (J.A. at 252a-53a.) As “Pethtel and Rouse moved around trying to avoid police detection, they were joined by various others, all of whom drank alcohol and smoked a large amount of crack cocaine. (*See, e.g.*, J.A. at 469a (describing smoking crack, provided for out of “Pethtel's large stash, at hotel during first night on lam); J.A. at 476a-77a (describing smoking crack second day on the lam while staying with an unknown female); J.A. at 484a (describing smoking crack the third day while at the home of an unknown couple); J.A. at 491a-92a & 539a-45a (describing smoking crack at Schlosser's house until “Pethtel ran out of crack and had to purchase more).)

Eventually, this roaming party imposed on Schlosser, “Pethtel's life-long friend, for a place to hide out. (Compl. ¶ 17, J.A. at 17a; J.A. at 269a-70a; J.A. at 576a-78a.) Schlosser let them stay with him even though he knew that “Pethtel was wanted. (*Id.*) The house's residents described “Pethtel as not sleeping, “sweating” a lot, and becoming increasingly agitated and paranoid that the police would come to get him:

Q How was Tom Pethtel acting when you picked him up or when he came to your house?

A He was acting kind of strange, but, I mean, it was like he was really hyped up, you know. Hyped up.

Q What do you mean by “hyped up”?

A I mean, just-I don't know, kind of-I don't know. He seemed nervous. I don't know.

Q Did he seem paranoid?

A Yeah.

Q I saw where you had given a statement earlier. You thought he had been up for several days and that he was sweating and that he was pacing and he was constantly looking out the window and he was concerned that somebody was coming to get him? ... Is that fair?

A Yeah, I could say that-I don't know whether somebody was coming to get him, but he acted paranoid, though, you're right about that. And then, you know, now that I recall, I don't think he did have a whole bunch of sleep.

A Yeah, he was using drugs, there is no question. And I think he was smoking crack all the time up there, too, you know.

Q The longer he was there, did he get more and more paranoid?

A He, like I say-yeah, I would say that's a fair statement.

(J.A. at 580a-82a & 594a; *see also* J.A. at 481a-82a (discussing several nights of crack induced sleeplessness).) Schlosser described “Pethtel as a man at the end of his rope. (J.A. at 591a.)

During his drug-induced, sleepless paranoia, “Pethtel rarely let his gun leave his side. (J.A. at 327a-28a.) Although “Pethtel tried to explain that the discharge was accidental, during an altercation with Randi Scott inside the Schlosser home, “Pethtel fired the gun. (*Id.*) (“Most of the time it was in his pocket, but he would

pull it out and he even-he even-well, he shot it in the house the one time. But he-Randi and him were fighting constantly. His paranoia, he was going to the windows. She would keep trying to leave. He would go outside-like she would try to run off, and he would go outside and drag her back in the house by her hair. And he had the gun to her. At one point in the kitchen, he said-I was in my room. I just kept staying in my room as much as I could away from them. I could hear her screaming, 'Go ahead and shoot me, go ahead and shoot me.' And then all of a sudden the gun went off, and I just thought I was going to die. I don't know .... (''); *see also* J.A. at 329a.)

D. "Pethtel vows to provoke the police into killing him.

According to his own sister, Thomas Pethtel was well aware of the fact that he was facing re-arrest for his escape and another certain and lengthy stay in federal prison. (J.A. at 248a-49a.) He also made it clear that under no circumstances would he be captured alive:

Q Did he tell you all that he was facing a long time in jail?

A Yes. I mean, during the course of a few days, yeah, a lot of things he told us. That he was going to spend the rest of his life in jail, pretty much, and that he wasn't going to do that.... He didn't want to go back to jail and he wasn't going.

Q He expressed to you that he didn't have any interest in letting the police take him back to jail?

A Exactly.

(J.A. at 319a-20a.)

In fact, "Pethtel made it clear that he would fight-to his death if necessary-taking as many police officers with him as possible:

A .... I remember him saying before that he wasn't going back alive. You know, he didn't say specifically if they come to the house. He kind of said it, like in a general way, before he would go to prison, back to prison, that he wouldn't go back alive.

Q And-and he had told you that, If the police try to

come get me again to take me back to prison, I'm not going. Somebody is going to die. It's either going to be me or it's going to be the police?

A He had-he had said that before.

(J.A. at 591a-92a & 687a; *see also* J.A. at 693a-95a ("He kept saying stuff like, I'm never going back there. Whatever it takes and I'm not-I'm not going back to prison. You know, if anybody comes here, I'm killing-I will-I'm going to kill 'em. You know what I mean? And, I mean, it just made me scared and I didn't want to ask him any questions, because I was afraid to-what he would do."))<sup>[FN2]</sup>

FN2. For example, knowing that he intended to provoke a gunfight with the police, "Pethtel asked his best friend, Rouse, to leave the house for his safety-although he continued to hold the other occupants of the home captive. (J.A. at 273a-75a.)

E. One of "Pethtel's captives escapes and contacts the police.

Patricia Grinage-one of the people whom "Pethtel was holding at the Schlosser home-was able to convince "Pethtel to let her briefly leave the house.

Instead of returning, however, Grinage fled to a friend, who in turn called the police. Grinage conveyed to the police that she had been the hostage of a wanted, drugged, madman and that her roommate was in immediate danger. (J.A. at 330a-32a & 336a-40a.) She also explained to Defendants that "Pethtel was armed and had fired a gun. (J.A. at 344a-45a.) She advised the officers that the occupants of the home were physically being held against their will. (J.A. at 327a-28a.) She told the officers of "Pethtel's paranoia and of his threats to go out "in a blaze of glory" should the police try to capture him. (J.A. at 353a.) She also discussed how "Pethtel had planned for an eventual shootout with police by asking her to purchase hollow-point bullets for him. (J.A. at 398a-99a.)

A review of Grinage's testimony, in her own words, shows the gravity of the situation *as she conveyed it to the police*:

Q And so when you got [to the state police detachment], what did you tell the state police?

A Like they were asking me questions. Did he have a gun. I told them, Yes. I told them about the day before, I believe it was, that he wanted me to go to the Outdoor Store and purchase bullets for his gun, and I refused to do it. I told them what he had said about he wasn't going out-he wasn't going back to jail and he wasn't going by himself if he had to die. They asked me to draw a map of the house. I drew the map of the house.

Q Did you tell them that he had fired the gun?

A Yes.

Q Did you tell them that he was acting very paranoid?

A Yes.

Q Did you tell them that he wouldn't let you and George leave at the same time?

A Yes.

Q Did you tell them that you were fearful for George's safety if you didn't show back up?

A Yes.

Q When you went to the police, did you fear for George's safety?

A Yeah....

Q ["Pethtel] expressed that to you, that he was afraid the police were going to come, didn't he?

A Yes.

Q And he told you that if the police came, they weren't going to capture him, didn't he?

A Yes.

Q Do you remember exactly what he said in that regard?

A He said that if he was going, he was going out-it

was-he was going to die. He would have a shootout and he would take a few with him is pretty much what he said.

Q Do you remember exactly the phrases that he used?

A It's been a long time. He just told us that he-George and I both were there. He told us both that he is not going to go back to prison. He will die first and he'll take a few with him, pretty much.

Q And when he said that, did you believe him? Did he seem serious?

A Yeah.

Q Did that scare you?

A Yeah.

Q And that ["Pethtel] had said something to you to the effect that when the police come or if the police come, I'm going to shoot-have a shootout here?

A Yes.

Q ["Pethtel] had expressed to you that there was no way the police were going to take him and if they came, he was going to kill the police and he was going to kill you and he was going to kill Randi and that he was going to be killed himself?

A Yes.

Q And that scared you to death, didn't it?

A Yes.

Q And it caused you fear for not only yourself, but it also caused you fear for your roommate, George?

A Yes.

Q And that's why you went to the police?

A Yes.

(J.A. at 339a-40a, 344a, 325a-26a, 345a & 353a-54a.)

F. The State Police's planned response to the situation created by Thomas Pethtel.

Based on the high risk and imminent danger expressed by Grinage, the local detachment of the West Virginia State Police contacted Trooper Malcomb, the leader of the State Police's Special Response Team (SRT) in the area. (J.A. at 907a-08a.)<sup>[FN3]</sup>

FN3. It is undisputed that Appellee Captain T.L. Phillips was only obliquely involved in the incident by telephone and was not on the scene at any point before "Pethtel was shot. Appellee Colonel David L. Lemmon, the West Virginia State Police superintendent, was not involved in the incident at all.

Malcomb culled information from several law enforcement sources regarding "Pethtel's background and the details of the situation. (J.A. at 915a-16a.) U.S. Marshals and the local drug task force told Appellees about "Pethtel's record as a convicted felon and that "Pethtel had "been in and out of prison his whole life, a multi-convicted felon." (J.A. at 917a; J.A. at 1750a (officers knew that "Pethtel had previously been in prison).)

The local officers told Appellees about "Pethtel's large size, his violent nature, and that he was occasionally armed. (See J.A. at 918a, 922a (testifying about "Pethtel fighting police and arrest and criminal history) & 923a (testifying that "Pethtel was "just a violent person" who "pretty much assured us that he would not come peacefully"); J.A. at 1749a-51a (same); J.A. at 1259a (same, adding that he knew "Pethtel had vowed not to go back alive).)

The officers also told Appellees about "Pethtel's then-current legal situation, that "Pethtel "got arrested and convicted for selling crack, and he was looking at a 20 to 30 year sentence, and that's minimum mandatory, so he's going to pull 20 or 30 years." (J.A. at 917a-18a; see also J.A. at 918a (same), 921a (knew about warrants), 922a (same) & 957a-58a ("Yeah. But what I believe, he definitely had a gun, and he's definitely wanted, and he's definitely a violent man, so that much is confirmed."); J.A. at 1260a (Menendez knew about warrants, violation of house arrest).)

In addition to gathering information about "Pethtel's current legal situation, the SRT also gathered intelli-

gence regarding the information conveyed by Grinage. They learned that "Pethtel was armed and had fired a gun during an argument. (J.A. at 925a.) They learned about "Pethtel's statements regarding what would happen if the police tried to capture him. "Pethtel's drug induced paranoia was also explained. (See, e.g., J.A. at 928a.) And, of course, the team was also apprised of the hostage situation. (J.A. at 908a, 913a & 956a; see also J.A. at 1678a (understood deployment would be to hostage situation) & 1682a-1683a (understood that occupants of house were all in danger); J.A. at 1479a-50a (understood "if the police came to [] the house, that Mr. Pethtel was going to kill everyone in the house and kill all of the police officers that he could"); J.A. at 1259a (same).)

Carol Pethtel asserts on appeal that the Appellee Corporal Mefford's presence in the house without his canine "specifically supported the efforts of the team to trap and kill Pethtel without the use of alternative less lethal means." (Appellant's Br. at 39.) But this assertion is patently false and unsupported by a shred of record evidence. As the sole evidence on point makes clear, the SRT *did* consider-but ultimately rejected (for hostage, suspect, and officer safety reasons)-deploying not only a K9 unit,<sup>[FN4]</sup> but also gas,<sup>[FN5]</sup> a hostage negotiator,<sup>[FN6]</sup> and even, as the situation unfolded, hand-to-hand combat with "Pethtel in an effort to avoid harm to him.<sup>[FN7]</sup> But they ultimately concluded that "Pethtel's violent history, current condition, and expressed desire to die before returning to jail mandated attempting to take him by surprise. (See J.A. at 1257a.)

FN4. (See, e.g., J.A. at 1658a-49a (discussing why deployment of K-9 would have been dangerous under circumstances).)

FN5. (See, e.g., J.A. at 1677a-78a (discussing why use of gas was ruled out).)

FN6. (See, e.g., J.A. at 949a-50a (discussing why use of negotiator was ruled out) & 1008a (same); J.A. at 1262a (discussing why element of surprise was essential) & 1045a-46a.)

FN7. (See, e.g., J.A. at 1714a (Trader testifying that he knew "Pethtel had knife, that he had seen it, that he still had in his mind that "Pethtel had pistol, that hostage was between

him and “Pethtel, who was holding knife, and discussing why he ruled out hand-to-hand combat.)

Sergeant Malcomb testified that in “99.9%” of such circumstances, the suspect is caught off guard and nobody is injured. (J.A. at 939a-40a.) Sadly, Thomas Pethtel did everything he could to guarantee that the events of July 2004 would be one of those 0.1%.

G. “Pethtel's violent response to the State Police's attempt to surprise him, separate him from his hostages, and capture him without incident.

Under the circumstances, the SRT members decided to approach the rear of the Schlosser residence (J.A. at 965a), whereupon they immediately encountered what appeared to be a booby trap (*see, e.g.*, J.A. at 1684a-85a; J.A. at 1276a.) The team members eventually made their entry and announced their intentions. At that point, they quickly encountered Mr. Schlosser, who wisely complied, put up no resistance, and was immediately separated from “Pethtel and secured without further incident.

Schlosser told the officers that “Pethtel was present and that he was armed, which information the officers passed among themselves. (J.A. at 1278a-7 81a (“I asked the guy, I said, is there anybody else here? Yeah. There's two of them. Do they have any weapons? Yes. They have a gun. He told me that. I announced that, that he says they have a gun.”).)

Carol Pethtel attempts to make much of the fact that the police found a gun shortly after initial entry was made-as if somehow the police should have then checked “gun” off of their list of things about Thomas Pethtel known to be deadly. She claims that at that point, “Pethtel had no other weapons and was unarmed during the entire course of events.” (Appellant's Br. at 5.) But even if this argument turned out to be true, it suffers from the same defect as the rest of her brief, viewing the facts from the perspective of what we know *now*, instead of what the officers knew *then*. And it could only make sense in a world where there was just one gun. In reality, though, people with one gun commonly have two-or more-guns, and the officers were *required* to believe that “Pethtel was *more*, not less, dangerous once they confirmed the earlier reports that “Pethtel was armed:

[T]he recovery of a firearm ... did not substantially

reduce the peril of bodily harm. We think it unreasonable to believe that the recovery of one gun should convince the officers that Whitney would not have access to another one .... The law does not require the officers to engage in a game of Russian roulette with a dangerous man.

[United States v. Whitney, 633 F.2d 902, 911 \(9th Cir. 1980\).](#)

As the police cleared the rest of the house, the scene was expectedly chaotic. In addition to the occupants' yelling and the police shouting orders, “flash-bang” distraction devices were being deployed, which in turn set off the house's fire alarm. A dog became entangled in a telephone cord and was barking loudly. (*See, e.g.*, J.A. at 1278a-81a.)

A few seconds later, the team finally encountered “Pethtel, who was standing on a hot water heater trying to knock an escape hole through the wall. (*See, e.g.*, J.A. at 1300a-02a (Menendez testifying about encountering “Pethtel and attempting to get him to give up).) As the SRT was about to remove Scott from the scene, however, “Pethtel-who was trying to climb through the hole above the hot water heater-suddenly changed tactics. He jumped out of the closet into the master bedroom, grabbed Scott, held something to her throat, and retreated to the bathroom, all along threatening to kill her. (J.A. at 1693a & 95a.) In the bathroom, “Pethtel continued shouting additional threats at Scott and the officers. Malcomb went to the closed door of the bathroom and tried to calm “Pethtel down and encourage him to give up without further violence. From the washroom, Sergeant Menendez observed the situation and described the scene:

There was water spraying and fire alarms and all going off. That dog was barking. Lieutenant Malcomb-I could distinctly hear Lieutenant Malcomb telling him, just put her down, buddy. Just put her down. Give it up. He was just screaming, [“]F you. I'm going to kill her. I'm going to kill myself. [“]

I could distinctly hear David Malcomb saying, come on, buddy. Just give it up. Just give it up. And the guy saying-the guy, Mr. Pethtel, was screaming-and there's a woman screaming, too. And he's screaming over the top of her, [“]I'll kill her. I'll kill her. [“]

(J.A. at 1281a-82a.)

“Pethtel occasionally would open the bathroom door and scream his threats toward Sergeants Malcomb and Trader, who were just on the other side of it. “Pethtel also tried to escape by kicking a hole in the bathroom wall, whereupon he knocked a washing machine on the other side of the hole out of his way and tried to drag his hostage through the hole. (J.A. at 1278a-86a.)

Menendez took very seriously “Pethtel's threats that “Pethtel intended to kill Ms. Scott, and Menendez determined that without his intervention, “Pethtel would do just that. Because “Pethtel refused to give up and posed an immediate danger to the hostage, the residents, and the officers, Sergeant Menendez shot “Pethtel once. (*Id.*) It is undisputed that Sergeant Menendez's shot was not fatal, but only grazed “Pethtel's nose and then struck his left arm.

After Sergeant Menendez's shot, it is also undisputed that “Pethtel (along with his hostage, Scott, who was still physically under “Pethtel's control) withdrew out of the would-be escape hole, placing “Pethtel and Scott back in the bathroom. Sergeants Malcomb and Trader were still posted just outside of the closed door to the bathroom. “Pethtel then opened the door, continuing to use Scott as a human shield:

What he was doing-I stated earlier, as well, Lieutenant Malcomb was the one who engaged in conversation-I don't know whether it's engaged in conversation-giving instructions. He was going to the left, which would be my right, which would be the side Lieutenant Malcomb was on. He didn't pop to my side but the one time, the one time which I discharged.

He was-he was using her as a shield the entire time, staying behind her head.

(J.A. at 1725a-26a; *see also* J.A. at 987a-88a (Malcomb testifying that he ruled out that “Pethtel was bluffing for leverage because he was using Scott as a shield and that Malcomb believed “Pethtel “was going to kill that girl”); J.A. at 1025a (same).)

Prior to the lethal shot, “Pethtel left no doubt in any of the officers' minds that he intended to murder Randi Scott:

He'd open up that door and say, back the fuck off, or

I'm going to fucking cut her throat.... I'm going to cut her fucking throat. Back off. I'm going to kill her. I'm going to cut her fucking throat.... So I'm like, buddy, just let her go. You know, you're just a fugitive. Just let her go. You know, it's not that big of a deal right now. And I'm trying to minimize it.... And he'd be like, just back the fuck off. I'm going to fucking kill her. And the whole time, he's screaming, and he's got her by the throat.... She's screaming, please don't let him kill me. I mean, when I say screaming, bloody, just a major blood curdle. I mean, just bloody screaming just-I don't know how to-other than-I don't know how to describe it to you other than that. I mean, just horrible, horrible. She's screaming, please don't let him kill me. Oh my God, he's going to kill me ... Please don't let him kill me. And he's saying, I'm going to fucking cut her throat. Back off. I'm going to fucking cut her throat. And he slammed that bathroom door.... Okay. Then I hear her scream, oh my God, please don't kill me. You hear that inside. So you're like Jesus Christ, he's killing her. I mean, you just think, he's going to kill this girl.

(J.A. at 985a-87a.)

Sergeant Trader recalled the events in the tense few moments between Sergeant Menendez's non-fatal shot and Sergeant Trader's fatal shot:

It got dead silent for just a split second, and then the screaming commenced again. She's screaming. And he's, that's it. Tell my mother -

I heard, tell my mom I love her, early on, as well as, this is it. I'm going to fucking kill her. This is it. You've done it. I'm going to kill her.

.... He had her around the throat, saying he was going to fucking kill her. I was standing foot to foot, eye to eye with that man.

A [After the first shot, h]e said, that's it. Mother fuckers, I'm killing her. That's it. It's over.... You did-you did it now, something to that effect.

Q .... And did Mrs. Scott-did Randi Scott say anything?

A You're hurting me. Please help me. You're hurting me. She continually said that. Please let me go. You're

hurting me.

Q She was pleading for her life?

A Absolutely.

Q And that caused you to believe that she believed she was in trouble, right?

A Yes. And as I stated earlier, the same way he convinced me, she convinced me. She was in fear for her life. There's not a doubt in my mind.

Q Okay. And even after Mr. Pethtel was shot the first time, he didn't in any way give up?

A No.

Q And in fact, he seemed to become madder and screamed and made threats toward you and toward Randi Scott as well, even after the first shot?

A After the first shot, he escalated a behavior that I didn't feel could be escalated any, but he did.... He couldn't get any worse.... I figured it was-it was it right there. I was going to see that girl ... murdered.

(J.A. at 1708a, 1730a-31a & 1749a-53a.)

Malcomb also testified that "Pethtel refused his pleas and offers of assistance:

A We get the door open, and he's screaming, I'll kill her, I'll cut her throat.... We're back into-we're in the same shit again.

Q And when you open the door, what do you see?

A I see him holding the girl, you know, hand to throat. I'll kill her. I'll fucking kill her. Back off or I'll fucking kill her. I'm going to cut her throat.

Q All right. Could you see where he had been wounded at that point?

A Well, I could see he's bloody now, so I'm trying to tell him now, I'll get you some-buddy, we'll get you some medical help. Just let her go. We'll get you some help.

Q Can you imagine a more violent situation?

A No. I mean, you know, you can't throw anything more into the mix. You have guns. You have drugs. You have previous criminal history. I mean, nothing-there's nothing good in this whole scenario. I mean, it's just-there was nothing good, at all.

Q At the time that the fatal shot was taken by Trader, he was standing right beside you, right?

A Yes, sir.

Q And you believed that Mr. Pethtel was armed; did you not?

A Yes, sir.

Q And he had given you every verbal indication that he was armed, right?

A Yes, sir.

Q And Mrs. Scott had added to that, because she was-I think you described as a blood curdling scream-A

A She was begging for her life.

Q -screaming, begging for her life, indicating that she believed that Mr. Pethtel was armed or was going to kill her, right?

A Yes, sir.

Q And you knew even before you went in that Mr. Pethtel had a weapon?

A Yes, sir.

Q And you knew even before you went in all this information that we talked about before that indicated that he was violent, that he had been violent in the past, he was on crack, he was paranoid, he had already shot a gun in the house, and he was holding hostages; you knew all that?

A Yes, sir.

Q And based on all of that information and all the circumstances that were surrounding the situation at that time, you thought that he was capable, willing, and able to carry out his threat to kill Mrs. Scott?

A Yes, sir.

(J.A. at 1017a & 1050a-52a; *see also* J.A. at 1281a-87a & 1338a-49a.)

At no time did “Pethtel ever make any effort to give up. (See J.A. at 616a.) Fortunately for Ms. Scott, neither did the police give up saving her life. The team distracted “Pethtel for a moment, allowing Trooper Trader a shot, which he took, killing “Pethtel instantly. (J.A. at 1708a, 1715a & 1726a (“Q: Okay. At the point that you chose to take the shot, what is the specific threat you believed that Randi Scott was facing? A: The same threat that she was facing from the beginning, that he was going to kill her. Whether it’d be cut her throat, shoot her, break her neck, he was going to kill her.”).) The State Police shooting review board concluded that the shooting was justifiable. (See J.A. at 1746a-47a.)

The entire incident lasted a minute or so:

A I remember [Randi Scott] screaming and yelling. Yeah, I do remember hearing screaming. Yeah, I knew she had been screaming. There was all kind of screaming and yelling and noise, you know.

Q Did the inflexion [*sic*] of her voice, when she was screaming, did it sound to you like she was scared?

A Yeah... She was screaming loud and it was a very blood-curdling scream.

Q Uh-huh. She was clearly afraid?

A Yeah.

Q And the import of what you heard, whether you remember the exact words or not, is that the police were yelling for him to come on out. And he was yelling he wasn't going to do that, right?

A Some words to that effect, yeah.

Q Yeah. They were telling him to give up and he was telling them that ain't happening, right?

A Yeah, right.

Q Okay. And that was consistent with what he had told you in the past, if the-if they ever came back to get him to take him to jail-... he wasn't going down without a fight?

A Yes, that would be consistent.

Q How long did this conversation go on where the police were shouting for him to give up and he was shouting that that wasn't going to happen?

A It didn't go on very long.... It was maybe a minute, you know.

(J.A. at 611a-14a.)

#### IV. SUMMARY OF THE ARGUMENT

As correctly found and held by the district court, taking the evidence in the light most favorable to Carol Pethtel, under the totality of the circumstances faced by the Appellee police officers, they responded properly, using objectively reasonable force. They were, therefore, all entitled to judgment as a matter of law on the individual [§ 1983](#) claims, the supervisory and entity claims, and the state-law claims. The district court's exclusion of part of Carol Pethtel's proffered expert evidence was both proper and immaterial.

#### V. ARGUMENT

Carol Pethtel sued the on-scene officers, in their individual and official capacities, for federal and state constitutional claims of excessive force under [42 U.S.C. § 1983](#), and for wrongful death under West Virginia law.<sup>[FN8]</sup> She made supervisory liability claims against Captain Phillips and Colonel Lemmon. *See Shaw v. Stroud*, [13 F.3d 791 \(4th Cir. 1994\)](#). She sued the West Virginia State Police ostensibly under [Monell v. Dept. of Soc. Servs. of the City of New York](#), [436 U.S. 658 \(1978\)](#).<sup>[FN9]</sup>

FN8. As they did below, Appellee police of-

ficers assume *arguendo* that the state and federal constitutional analyses are sufficiently identical such that because the officers are entitled to judgment as a matter of law on the federal constitutional claims, the same is true of the state constitutional claims.

FN9. Throughout her brief, Appellant refers to the State Police (a department of the State of West Virginia whom she has sued both directly and by suing the troopers in their official capacities, see [Kentucky v. Graham](#), 473 U.S. 159 (1985)) as a “municipality.” This is incorrect, and the law is clear that a state is incapable of violating § 1983. See [Will v. Mich. Dept. of State Police](#), 491 U.S. 58 (1989). While Carol Pethtel also sued the officers in their individual capacities, see [Hafer v. Melo](#), 502 U.S. 21, 22-23 (1991) (individual capacity suits are permitted under § 1983), dismissal of her suits against the State must be affirmed.

#### A. The standard for summary judgment.

“ ‘At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a “genuine” dispute as to those facts.’ [[Scott v. Harris](#), 127 S. Ct. 1769, 1776 (2007)] (quoting FED. R. CIV.

P. 56(c)). Moreover, ‘the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.... Factual disputes that are irrelevant or unnecessary will not be counted.’ [[Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48 (1986) (emphasis in original)].” [[Cloaninger ex rel. Estate of Cloaninger v. McDevitt](#), 555 F.3d 324, 332 (4th Cir. 2009)]. This Court’s review of the district court’s granting of summary judgment is *de novo*. *Id.* at 330.

Because Carol Pethtel’s claims against the officers in their individual capacities implicate qualified immunity, the standard is altered:

[T]o deny summary judgment any time a material issue of fact remains ... could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. If the law

did not put the officer on notice that *his conduct* would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

[Saucier v. Katz](#), 533 U.S. 194, 202 (2001) (emphasis added) (internal quotation marks and citations omitted).

#### B. Analysis of qualified immunity.

Appellee police officers are entitled to qualified immunity because they did not use excessive force, and even if they were mistaken to believe “Pethtel’s threats that he was capable of murdering and that he intended to do so, their belief was objectively reasonable under the circumstances that they faced.

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” [[Pearson v. Callahan](#), 129 S. Ct. 808, 815 (2009)] (quoting [Harlow v. Fitzgerald](#), 457 U.S. 800, 818 (1982)). It protects “all but the plainly incompetent or those who knowingly violate the law.” [[Malley v. Briggs](#), 475 U.S. 335, 341 (1986)]. It protects police officers from “bad guesses in gray areas” and ensures that they are liable only “for transgressing bright lines.” [[Maciariello v. Sumner](#), 973 F.2d 295, 298 (4th Cir. 1992)]. As Justice Kennedy wrote in the passage cited in [Pearson](#):

The central question is whether someone in the officer’s position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment.

An officer might reach such a mistaken conclusion for several reasons. He may be unaware of existing law and how it should be applied. Alternatively, he may misunderstand important facts about [his conduct] and assess the legality of his conduct based on that misunderstanding. Finally, an officer may misunderstand elements of both the facts and the law. Our qualified immunity doctrine applies regardless of whether the officer’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.

[Groh v. Ramirez](#), 540 U.S. 551, 566-67 (2004) (Kennedy, J., dissenting) (citations omitted).

Since the doctrine requires only that police officers conduct themselves reasonably, “[t]he protection of

qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" [Pearson, 129 S. Ct. at 815](#) (citations omitted). Thus, regardless of the order or the formulation of the analysis, a police officer is entitled to qualified immunity if "a reasonable officer could have believed" that his conduct under the circumstances with which he was faced was lawful "in light of clearly established law and the information the ... officers possessed." [Anderson v. Creighton, 483 U.S. 635, 641 \(1987\)](#).

Because "officers on the beat are not often afforded the luxury of armchair reflection," [Elliott v. Leavitt, 99 F.3d 640, 642 \(4th Cir. 1996\)](#), courts are to recognize "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing ... warrants," [Maryland v. Garrison, 480 U.S. 79, 87 \(1987\)](#). Thus, "a mistaken understanding of the facts that is reasonable in the circumstances can render a seizure based on that understanding reasonable under the Fourth Amendment." [Milstead v. Kibler, 243 F.3d 157, 165 \(4th Cir. 2001\)](#).

The determination of whether, under the circumstances, a particular use of force constitutes a reasonable use of force is a pure question of law. *See, e.g., Scott v. Harris, 127 S. Ct. at 1776* ("At the summary judgment stage, ... once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of Scott's actions ... is a pure question of law.") (some alterations in *Scott*) (citations omitted).

Because the totality of the circumstances here so rarely tilts as glaringly against a plaintiff, it is appropriate to catalog what the police knew or had reasonably come to believe about "Pethtel by the time that the shots were fired. They knew:

- that Thomas Pethtel was a "big" and "intimidating guy"
- that "Pethtel had a criminal record as a multiply-convicted drug dealer
- that "Pethtel had a history of violence-especially toward the police
- that "Pethtel had-again-been arrested for and convicted of dealing illegal drugs
- that "Pethtel had escaped from federal custody and

was on the run

- that "Pethtel was facing a lengthy mandatory federal prison sentence
- that "Pethtel had been drinking alcohol, and that he had been smoking crack cocaine
- that "Pethtel had not slept for perhaps days, and that he was acting paranoid and "hyped up"
- that "Pethtel vowed not to be captured alive, and that he intended to murder as many police officers as possible in the process
- that "Pethtel had a house full of kidnapped captives, whom he had threatened to kill
- that "Pethtel was known to carry a gun, that he had in the past carried a gun, and that a large-caliber handgun had been found at "Pethtel's residence subsequent to a previous drug arrest
- that "Pethtel *actually had* at least one gun in the house
- that "Pethtel tried on at least one occasion to obtain hollow-points for that gun
- that "Pethtel had fired that gun inside a house

- that "Pethtel had rejected the officers' efforts to surrender peacefully
- that "Pethtel had retreated into another part of the house with an innocent hostage
- that "Pethtel had a knife to the hostage's throat, and that he was using her as a "human shield"
- that "Pethtel intended to murder the hostage by slitting her throat if the police tried to arrest him, and
- that the hostage was screaming pleas for the police to save her life.

C. Because Mefford, Simmons, and Goodnight used *no* force against "Pethtel, they could not have used *excessive* force.

It is helpful to analyze the defendant police officers' motions in two groups: those who did not discharge their weapons, and those who did (including Malcomb, who gave the team permission to use deadly force if appropriate).

1. Corporal Mefford used no force against "Pethtel.

Mefford did not physically harm "Pethtel. Mefford entered the home and cleared several unoccupied rooms. Once "Pethtel holed up in the bathroom with his hostage, Mefford exited the home to retrieve his canine so the canine could be used to apprehend "Pethtel if "Pethtel relinquished the hostage. (J.A. at

1122a.) But “Pethtel never relinquished the hostage, so Mefford was unable to use the canine. Instead, he stayed on standby in the room adjacent to where the activity in question occurred. (J.A. at 1126a-27a.)

Because Mefford used no force against “Pethtel, Mefford could not possibly have used excessive force. Therefore, the district court was correct in dismissing all claims against Mefford.

2. Trooper Simmons used no force against “Pethtel.

Simmons breached the rear door at the start of the team's entry. (J.A. at 1603a & 1606a.) In that role, Simmons was the last person through the door of the house and, thus, was in charge of securing the door. (J.A. at 1607a.) “Pethtel did not run toward that door, though. (J.A. at 1608a-09a.) Instead, he punched a hole through the wall above the hot water heater and tried to escape through it. (*Id.*) Simmons, who was on the other side of the hole, instructed “Pethtel to show his hands and surrender. (J.A. at 1608a-10a.) “Pethtel instead withdrew from the hole he had made, jumped out of the closet, grabbed Randi Scott (who was in the master bedroom pleading for the officers to help her) and retreated with his hostage to the bathroom. (J.A. at 1693a-95a.) From that point, Simmons never saw “Pethtel again. (J.A. at 1626a-27a.)<sup>[FN10]</sup>

FN10. Carol Pethtel makes the incredible argument that the evening's events all have their roots in the door breach, and since Simmons performed the door breach, without his participation nothing else would have happened. (*See* Appellant's Br. at 40 (“Notably, nobody would have been able to enter the residence in the first place, but for Simmons' conduct.”).) This argument is frivolous. First, it overlooks the distinction between but-for and legal, or proximate, causation. And second, it fails to satisfy even but-for causation by requiring us to suspend reality and believe that if Simmons had not breached the rear door, the other police officers would have simply given up and gone home.

Because Simmons used no force against “Pethtel, he could not possibly have used excessive force.

3. Sergeant Goodnight used no force against “Pethtel.

Goodnight was the first member of the team to enter the home. (J.A. at 805a.) He encountered George Schlosser, who surrendered. (*Id.*) While “Pethtel was on top of the hot water heater trying to escape, Goodnight went from the living room to the master bedroom, where the closet containing hot water heater was located. (J.A. at 819a-22a.) Goodnight and Trader momentarily had “Pethtel trapped in the closet and separated from Ms. Scott, but “Pethtel would not give up, and those officers did not feel that it was safe to go into the closet because “Pethtel was known to be armed. (J.A. at 823a-30a.)

As Scott advanced toward the officers to gain her freedom, “Pethtel darted out of the closet, grabbed her, positioned himself so that Scott was between him and the officers, and pulled her into the bathroom. (J.A. at 835a-38a.) At that point, Trader and Malcomb advanced toward the bathroom door, and Goodnight retreated to the kitchen. (J.A. at 841a-46a.) Goodnight heard Menendez's first shot and then heard Malcomb pleading with “Pethtel to give up and receive medical attention. (J.A. at 866a.) Goodnight was still in the kitchen when the fatal shot was fired. (J.A. at 869a.)

Because Sergeant Goodnight used no force against “Pethtel, he could not possibly have used excessive force.

D. Because an objectively reasonable police officer would have believed that “Pethtel posed an immediate and deadly threat to the lives of everyone around him until the moment of his death, Malcomb, Menendez, and Trader used reasonable force against “Pethtel.

1. Sergeant Malcomb used objectively reasonable force against Thomas Pethtel.

Malcomb advised the officers that they *could* shoot if necessary after “Pethtel made it clear that he had no intentions to give up but instead intended to kill his hostage. At that time (before the first shot), a reasonable officer would have concluded that “Pethtel was actively threatening Scott. As noted, the officers knew that “Pethtel had had one gun and were reasonable in their belief that he could still be armed with another. It is also important to note that Trader's decision to shoot was causally unconnected to any “permission” that Malcomb gave. (J.A. at 1717a (“He [Malcomb] didn't have to give that order. I would have shot Mr. Pethtel

to save her life had he given it or not.”.)

Given the totality of the circumstances, “Pethtel posed a serious and immediate threat to *everyone* in the house. Malcomb was therefore entitled to summary judgment on all claims against him.

2. Sergeant Menendez used objectively reasonable force in shooting “Pethtel.

Menendez shot “Pethtel first. Avoiding the temptation to continuously repeat them, Appellees simply note that at the time that Menendez fired that shot, the undisputed evidence establishes that the officers were aware of all of the facts catalogued, *supra*. Knowing this, Menendez observed “Pethtel attempt to escape through a wall:

I could hear Malcomb in there again, and I remember him saying, just put it down, put it down. [“Pethtel] is yelling, I’ll fucking kill her. I’ll kill her. And [Randi Scott] is screaming, God, you’re hurting me. Stuff like that.

(J.A. at 1282a.) This caused Menendez to think “stop him, somebody stop him” before he kills the hostage. (*Id.*) Menendez saw “Pethtel poke through the hole, dragging his hostage and holding what “Pethtel was claiming was a weapon to Scott’s throat, all the while threatening to kill her. Menendez explained:

[S]omebody needs to shoot him. He’s going to kill her, he’s going to kill her. Because she was screaming and pleading. He was yelling. It was just obvious that he was not giving up. I mean, he was like a caged animal.

(J.A. at 1283a.)

At that very point, an opportunity presented itself for Menendez to save Scott’s life and protect the other captives, his fellow officers, and himself. So Menendez took the opportunity and shot “Pethtel once. The parties do no dispute that that first shot was only a flesh wound that did not contribute to “Pethtel’s death.

A claim that a police officer used excessive force during an arrest is analyzed under the Fourth Amendment and its reasonableness standard. An officer’s actions are not excessive if they “are ‘objectively reasonable’ in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation.” *Graham v. Connor*,

490 U.S. 386, 397 (1989). Deadly force may be employed “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.” *Tennessee v. Garner*, 471 U.S. 1, 9, 11 (1985). “[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary ....” *Id.* at 11-12.

Courts must bear in mind that “officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving,” and those decisions should not be reviewed with the quiet reflection of 20/20 hindsight. *Graham*, 490 U.S. at 398. The determination of the reasonableness of the challenged actions “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Id.* at 396 (internal quotation marks omitted). Proper application of the test of reasonableness also “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.” *Graham*, 490 U.S. at 396. Ultimately, “the question is ‘whether the totality of the circumstances justify[es] a particular sort of ... seizure.’” *Id.*

One can hardly conjure up a more tense, rapidly evolving, or dangerous situation than the one faced by the officers. “Pethtel was drugged and drunk, he was armed, and he had been bragging about his intentions to kill the police and his hostages. As the circumstances required, the police had taken “Pethtel by surprise. But rather than giving up, “Pethtel took risks that not even a rational *criminal* would take. He quite literally-*tried* to run through two walls. He used a hostage as a human shield. He was shouting his intention to kill his hostage, who in turn, with a blood-curdling scream, was begging for someone to save her. All the while, the hot water heater that “Pethtel had damaged was spewing scalding hot water, the fire alarm was thundering, and George Schlosser’s dog was barking loudly.

And there is no dispute that at the time that Menendez fired, “Pethtel had committed a multitude of violent

crimes, was actively resisting arrest, and posed an immediate threat to Scott, the other captives in the house, Menendez, and Menendez's team. Less lethal methods had been attempted to secure "Pethtel and to save his hostage. But those methods had not had the slightest effect. "Pethtel left Menendez with no choice but to attempt to use deadly force. Menendez's actions were objectively reasonable and, thus, constitutional. Because Menendez did not violate "Pethtel's constitutional rights, he is entitled to summary judgment."<sup>[FN11]</sup>

FN11. See, e.g., [Carr v. Deeds](#), 453 F.3d 593, 601 (4th Cir. 2006) (holding that where person shot was subject of at least two valid warrants for his arrest, had told his mother "that he would take a bullet in the head before he would go to jail" and that he would "kill himself or anyone who tried to take him down including the police," was in possession of a gun and ammunition, and had been smoking marijuana, "we have no trouble concluding, as a matter of law, that a reasonable officer could have believed that Morgan posed a significant threat of serious physical harm to them, their fellow officers, and any others who might encounter him during his flight.").

3. Sergeant Trader used objectively reasonable force against Thomas Pethtel.

Carol Pethtel offers the following arguments to support her claim that Sergeant Trader used excessive force in firing the shot that killed Thomas Pethtel:

- there is some evidence that "Pethtel was deceitful when he told the police officers that he was holding a real knife, and instead maybe was holding a lighter, or drywall, or something else;
- there is some evidence that "Pethtel was not serious that he was really going to slit Scott's throat;
- there is some evidence that "Pethtel was not standing straight up at the time of the second shot, or perhaps even was sitting;
- there is some evidence that as little as ten or perhaps as many as sixty seconds elapsed between the first and second shots; and
- Ms. Scott stated in an unsworn statement that "Pethtel was not actively resisting at the time of the second shot.

But these red herrings are all nothing more than irre-

levant distractions that cannot *as a matter of law* alter the fact that the district court applied the correct analysis and reached the correct the result.

(a) The "it wasn't a real knife" argument.

Carol Pethtel argues that the police should have disbelieved her son's warning that he had a real knife at Scott's throat, but instead should have known that maybe it was a piece of drywall, or maybe it was a lighter, or maybe it was something else. (See, e.g., Appellant's Br. at 10 & 26-28.)

Appellant would have had the officers demand, "Thomas Pethtel, you'll have test that knife out for us on a piece of paper, or we're leaving." This argument is as ridiculous as it sounds. Whether "Pethtel was not holding a real knife is irrelevant to judging the officers' reasonable response, because he *said* he was, the officers had every reason to *believe* he was, and there was no way that they could have known otherwise.<sup>[FN12]</sup> See, e.g., [Elliott](#), 99 F.3d at 642-43 (discussing [Greenidge v. Ruffin](#), 927 F.2d 789 (4th Cir. 1991), and [Slattery v. Rizzo](#), 939 F.2d 213, 216 (4th Cir. 1991)); [McLenagan v. Karnes](#), 27 F.3d 1002, 1007 (4th Cir. 1994) ("[W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him."); cf. [Anderson v. Russell](#), 247 F.3d 125, 131 (4th Cir. 2001) ("This Circuit has consistently held that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action.").

FN12. (See, e.g., J.A. at 1018a (Malcomb believed "Pethtel was armed and was not bluffing).)

This case is indistinguishable from, and thus governed by, [Elliott](#), [Greenidge](#), and [Slattery](#).

(b) The "he was only bluffing" argument.

Carol Pethtel asserts that the police should not have believed Thomas Pethtel's repeated threats that he really was going to slit Randi Scott's throat. (See, e.g., Appellant's Br. at 6.)

First, even if the police had heard "Pethtel's "assurances" that he whispered to Scott, they were reasona-

bly entitled-indeed, reasonably required-to disregard them and believe his threats instead. And second, as Carol Pethtel acknowledges, it is undisputed that none of the officers heard “Pethtel’s whispers to Scott. (See J.A. at 2126a-27a.)

Appellant would again have had Sergeant Trader demand from “Pethtel, “Until you actually draw some of Randi Scott’s blood, I’m not convinced you’re really going to murder her.” Like the real-knife/fake-knife argument, though, this argument misses the point: The critical point, however, is precisely that Elliott was “threatening,” threatening the lives of Leavitt and Cheney. The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists.

As *Greenidge* and *Slattery* illustrate, the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect’s intent to cause them harm-the Constitution does not require that certitude precede the act of self protection.

[Elliott, 99 F.3d at 643-44](#); see also [Anderson v. Russell, 247 F.3d at 132](#) (“Russell ultimately was mistaken as to the nature and extent of the threat posed by Anderson, which resulted in a tragic consequence to Anderson.... Anderson’s actions unwittingly caused Russell to reasonably fear imminent and serious physical harm. Accordingly, we do not believe there is sufficient evidence to support the jury’s finding with respect to excessive force.”).

“Pethtel *threatened* to murder Scott in front of the police. He was armed. His situation was dire. Appellees will not repeat all of the undisputed facts that not just permitted but *required* the police to take “Pethtel’s threats seriously and respond in kind.

(c) The “standing up/sitting down” argument.

Carol Pethtel relies heavily on evidence, including a proffered expert, from which she asserts a jury might have found that Thomas Pethtel was not standing straight up or was perhaps even sitting at the time of his death. (See, e.g., Appellant’s Br. at 9-10 & 26-28.) She then hints that the Court should make the leap

from “sitting down” to “down” (as in “incapacitated”) (Appellant’s Br. at 30), and then all the way to “not a threat.”

But she has offered no basis to conclude that “sitting down” means “not a deadly threat.” Indeed, she admits that after the first shot, Scott might still have been as close to “Pethtel as *seated on his lap*-well within “Pethtel’s large arms’-and also a knife’s or gun’s-reach. (Appellant’s Br. at 24; see also J.A. at 1741a-42a (“Q: And that’s what you saw as the main threat at the time that you fired? A: Not just the gun. It could’ve been his bare hands. His threat was the way he was acting, holding her around the neck, threatening he’s going to kill her. I saw the knife. He was going to kill the girl. There’s no doubt in my mind. He totally convinced me he was going to kill that girl, and that’s why I did what I did. As big as he was, he could have snapped her neck in a second.”).)

As the district court properly held, the correct legal analysis looks to the *threat* presented by a person, not his posture. See, e.g., [Elliott, 99 F.3d at 642](#). Stance notwithstanding, Appellant offered no competent evidence that “Pethtel no longer constituted an immediate threat at the time of his death, in the face of a mountain of competent evidence that he did. (See, e.g., R. Scott Dep., J.A. at 2123a (testifying that “Pethtel never surrendered).) Under the totality of the circumstances, it would have been irresponsible for Trader *not* to have taken the opportunity to end “Pethtel’s reign of terror by whatever force was necessary-including deadly force. See, e.g., [Anderson v. Russell, 247 F.3d at 130](#).

(d) The “10 seconds/60 seconds” argument.

Appellant argues at length that since different witnesses testified that there were as few as ten or as many as sixty seconds between shots, “[t]ime existed for reflection.” (Appellant’s Br. at 13.) (See, e.g., *id.* at 8 & 22-34.) Based on perfect hindsight, she then asserts that “Menendez will have to explain ... why he did not use a less lethal means to subdue Pethtel such as striking him with his weapon, or otherwise when he was in such close proximity to Pethtel and held the advantage of surprise.” (Appellant’s Br. at 42.)

“But [i]t will nearly always be the case that witnesses ... differ over what occurred. That inevitable confusion, however, need not signify a difference of triable

fact. What matters is whether the officers acted reasonably upon the ports *available to them* and whether *they* undertook an objectively reasonable investigation with respect to that information in light of the exigent circumstances *they faced.*' " [Sigman v. Town of Chapel Hill](#), 161 F.3d 782, 787 (4th Cir. 1998) (citation omitted).

And in any event, this is precisely the kind of Monday-morning quarterbacking that qualified immunity prohibits:

Even if Wylder was not actually about to attack the officers, Handy and the other officers acted on their reasonable perception that Wylder was about to do so... The situation had escalated to the point that the officers believed the use of deadly force was necessary to prevent harm to themselves.

Gregory argues Handy's actions were unreasonable and he could have used a lesser degree of force. Notwithstanding the officers' use of pepper spray and batons, the "suggestion that the officers might have responded differently is exactly the type of judicial second look that the case law prohibits." [Elliott](#), 99 F.3d at 643. The district court properly declined to look back in hindsight to second-guess Handy's decision to use deadly force instead of a lesser degree of force.

[Gregory v. Zumult](#), 294 Fed. Appx. 792, 795 (4th Cir. Sept. 26, 2008).<sup>[FN13]</sup>

FN13. See also [Scott v. Henrich](#), 39 F.3d 912, 915 (9th Cir. 1994) ("[A]s the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts

in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.") (citations and parallel citations omitted).

If Menendez had first tried only "striking" Thomas Pethtel, as Appellant suggests he was required to do, then it is quite likely that *Sergeant Malcomb*, the team's leader, would be the one doing the explaining-explaining to Randi Scott's family why the police were unable to prevent "Pethtel from murdering her, and explaining to Trooper Menendez's family why he and his fellow officers were shot or stabbed to death in the line of duty. If an hour or a day had passed between the shots without "Pethtel surrendering, the outcome would be the same: In a reasonable officer's mind, "Pethtel still presented a threat sufficient to justify the use of deadly force to save Randi Scott's (and the officers' and other occupants') lives. Because the district court correctly rejected this suggestion and granted Sergeant Menendez summary judgment, that decision should be affirmed.

(e) The "he was moving/he wasn't moving" argument.

Carol Pethtel relies on a statement that Randi Scott made to the police that just after the first shot, "Pethtel "wasn't moving." (Appellant's Br. at 6 & 17.)

[Rule 56](#) does not allow this, instead requiring *admissible* evidence in opposition to a motion for summary judgment. See [Md. Highways Contractors Ass'n, Inc. v. State of Maryland](#), 933 F.2d 1246, 1251 (4th Cir. 1991) (evidence that "is inadmissible at trial[] cannot be considered on a motion for summary judgment"); accord [Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro](#), 64 F.3d 962, 967 (4th Cir. 1995). Appellant offers no argument that this out-of-court declaration is anything other than inadmissible hearsay, incompetent to oppose the police officers' motion, supported by *admissible* evidence to the contrary. (See, e.g., J.A. at 618a (testifying as to Scott's (understandably) excited utterance made immediately after the incident: "Q: But did you hear her talking to the police and telling the police that the police had saved her life? A: Yeah. Q: Okay. You heard her say that? A: Yeah."))

Appellant also relies on the fact that Scott testified that at the time of the second shot, she “blamed” the police “[b]ecause Tommy was dead and they shot him.” (*Id.*) Appellant quotes Scott's testimony when asked, “Did you believe it was necessary for them to fire the second shot?,” answering, “I didn't *then*. *Then*, no.” (*Id.* (emphasis added).) To the extent that Scott's laying of blame is relevant, the police officers point out that Appellant has conveniently omitted Scott's testimony, just a few lines earlier, explaining that since “then” Scott had a well-founded change of heart:

Q Okay. And after the second shot and after Mr. Pethtel was - was killed, you thanked Trooper Laing, did you not?

A Yes, I did.

Q You really thought that your life was in danger?

A Yes, I did.

Q And you still believe that here today, don't you?

A Yes, I do.

Q You don't believe the police wrongfully killed Mr. Pethtel, do you?

A No, I don't. In their minds I believe that they were doing what they were supposed to do.

(R. Scott Dep., J.A. at 2123a-24a (emphasis added).)

E. Appellant's “conspiracy” arguments are misplaced.

In her opposition to the police officers' motion for summary judgment below, and again here on appeal, Carol Pethtel addressed at length the elements of a [42 U.S.C. § 1985](#) conspiracy. (*See, e.g.*, Appellant's Br. at 36-37.) She then attempts to find evidence of a conspiracy. She claims that the police formulated a plan to kill Thomas Pethtel because he “promised cooperation with federal authorities which would include the naming of various highly placed individuals with whom he dealt” (*id.* at 4) as evidenced by a boilerplate cooperation clause in “Pethtel's (and every other drug dealer's) plea agreement. She even goes so far as to allege, offensively, that the knife that was later found next to “Pethtel “was placed there by someone in the police chain of command.” (*Id.* at 37-38.)

The first problem with Appellant's reliance on a “conspiracy theory” is that she did not plead conspiracy in her complaint. Indeed, Appellees were unable to even find the word “conspiracy” or any reference to [42 U.S.C. § 1985](#), the civil rights conspiracy provision, in the complaint. Nowhere in the

officers' motion for summary judgment was the issue addressed, and nowhere in the district court's order dismissing the case was the word even mentioned. Accordingly, the issue was not properly before the district court below, and it is not now properly before this Court on appeal.

Second, as Appellant acknowledges, there can be no conspiracy to violate [§ 1983](#) if, as demonstrated *supra*, there has been no underlying violation of [§ 1983](#) in the first instance. (*See* Appellant's Br. at 36-37 (civil rights conspiracy requires “that some overt act ... resulted in plaintiff's deprivation of a constitutional right”) (emphasis added).)

In any event, Appellant's attempt to conjure up a conspiratorial motive is irrelevant, because:

[t]he standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others.

[Elliott](#), 99 F.3d at 642 (citations omitted); [Clem v. Corbeau](#), 284 F.3d 543, 550 (4th Cir. 2002) (“We do not inquire into an officer's motives, intentions, or tendencies, and instead determine whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force.”).

F. The district court correctly granted summary judgment on the supervisory and entity liability claims because the supervised officers did not use excessive force.

Where an officer does not use excessive force, there can be no supervisory or entity liability for the use of excessive force. *See, e.g.*, [Sigman](#), 161 F.3d at 788 (“Because we conclude that Officer Riddle's actions were reasonable, we need not address in any great length the plaintiffs' federal claims against the [entity or supervisors] because ‘[i]n the absence of any underlying use of excessive force ..., liability cannot be placed on either the non-shooting officers, a supervisor, or the City.’ ”); [City of Los Angeles v. Heller](#), 475 U.S. 796, 799 (1986) (“If a person has suffered no constitutional injury at the hands of the individual

police officer, the fact that departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.”).

G. Carol Pethtel's state law claims fail for the same reason that her [§ 1983](#) claims do.

In *Bradshaw v. Soulsby*, the West Virginia Supreme Court noted that a beneficiary in a wrongful death action must show that a person has died and that the death was caused by a wrongful act of another. [210 W. Va. 682, 685, 558 S.E.2d 682, 686 \(2001\)](#). Because Carol Pethtel cannot establish *wrongful* conduct, her wrongful death claim fails.

The state police officers' conduct was reasonable; it was thus privileged, and, therefore, not “wrongful.” See, e.g., [Swann v. City of Richmond, 498 F. Supp. 2d 847, 874 \(E.D. Va. 2007\)](#) (officers who act reasonably do not act wrongfully). Accordingly, the officers are entitled to judgment as a matter of law on the wrongful death claims.

And unlike federal law, under West Virginia state law, if a state officer is entitled to qualified immunity, so is his or her employer. See [Clark v. Dunn, 195 W. Va. 272, 279, 465 S.E.2d 374, 381 \(1995\)](#). As set forth above, the individual officers did not violate a clearly established right of “Pethtel. Thus, pursuant to *Clark*, all of the Appellees are immune from Carol Pethtel's state law claims.

H. The district court's exclusion of Carol Pethtel's proffered expert was not an abuse of discretion.

The district court excluded Carol Pethtel's proffered expert's opinion as to blood spatter because she failed to disclose it within the time allowed. (J.A. at 2257a-58a.) Her argument is that the police officers were insufficiently prejudiced by her untimely disclosures. This Court reviews a district court's exclusion of an expert for abuse of discretion. [Carr, 453 F.3d at 601](#).

The officers first note that the district court's exclusion is immaterial because all the proffered expert would have testified to was whether Thomas Pethtel was seated or standing at the time of the second shot, and as demonstrated, that is irrelevant: even accepting that “Pethtel was seated does nothing to lessen the undis-

puted evidence that he still presented a dangerous threat to, at the very least, Randi Scott. In any event, the district court was well within its discretion to exclude the untimely expert disclosure. See [Carr, 453 F.3d at 605](#) (“If a litigant refuses to comply with the requirements of the rule, he does so at his peril.”).

## VI. CONCLUSION

West Virginia State Police troopers train for the worst and hope for the best. Thomas Pethtel dealt them the worst. When they entered Schlosser's house to arrest “Pethtel, the police officers knew that he was a “big” and “intimidating guy” who had a criminal record as a convicted drug dealer; that he had a history of violence-especially toward the police; that he had been arrested for and convicted of dealing illegal drugs and was facing a lengthy mandatory federal prison sentence, but had escaped from federal custody and was on the run; that he had taken over a house full of captives whom he had threatened to kill; that he had been drinking and smoking crack, had not slept for perhaps days, and was paranoid and “hyped up”; that he vowed not to be captured alive and intended to murder as many police officers as possible in the process; that he was capable of this because he was both known to carry a gun, had carried a gun, had a large-caliber handgun at his residence subsequent to a previous drug arrest, *actually had and fired* at least one gun in the house, and had tried on at least one occasion to obtain hollow-points for that gun.

After the police entered the residence, they were further faced with a man who rejected their efforts to have him surrender peacefully, and who had retreated into the house with an innocent, screaming hostage whom he was threatening to murder with what he claimed to be a knife that he was holding to her throat, and whom he was using as a “human shield.” Until the moment of his death, there is no admissible evidence from which a finder of fact could have believed that Thomas Pethtel did not present a grave and immediate threat to everyone in the house, and when the officers had a chance to end the ordeal, they took it. Their conduct was exemplary, and-dispositive of Carol Pethtel's appeal here-objectively reasonable.

“Pethtel's own friend, George Schlosser, described “Pethtel's death as a “self fulfilling prophecy.” (J.A. at 699a.) From the undisputed evidence, it is clear that Thomas Pethtel made a series of very poor choices

that inevitably led to his death. But those choices were *his*. “Pethtel was presented with multiple chances to turn himself in, free his hostage, and face the peace of a judge’s chambers. But *he* chose to refuse those opportunities. Instead, *he* vowed to “go down in a blaze of glory,” taking his hostages and any law enforcement officer who stood in his way with him. Luckily for “Pethtel’s hostages and the police officers, the police were able to stop him before he carried out his threats. This case presents every officer’s worst nightmare, and certainly no one is pleased that “Pethtel died as a result of *his* conduct. But *Thomas Pethtel’s* actions alone, not any alleged constitutional violation by the police, led to his demise.

Accordingly, Appellees respectfully request that the Order of the District Court for the Northern District of West Virginia be AFFIRMED.

Carol PETHTEL, Individually and in her capacity as Administratrix of the Estate of Thomas Samuel Pethtel, Jr., Deceased, and as Guardian Ad Litem for T.B., T.P., and T.S.P., III, Plaintiff - Appellant, v. WEST VIRGINIA STATE POLICE; David L. Lemmon, Colonel, Superintendent of the West Virginia State Police; Gerald L. Menendez, Sergeant; Charles F. Trader, Sergeant; David B. Malcomb, Sergeant; Scot L. Goodnight, Sergeant; R. L. Mefford, Corporal; J. A. 2009 WL 853963 (C.A.4 ) (Appellate Brief )

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