Stephens v. N.J. State Police (In re Gibbons)

United States Court of Appeals for the Third Circuit

August 6, 2020, Decided

No. 18-1432

Reporter
969 F.3d 419 *; 2020 U.S. App. LEXIS 25548 **

In Re: Willie Gibbons; Arlane James; JRG, a minor, by his mother and legal guardian, Ikeya Crawford; and DKL and LMG, minors, by their mother and legal guard, Angel Stephens, v. New Jersey State Police, et al., Noah Bartelt, Appellant

Prior History: **[**1]** (D.C. Civil No. 1-13-cv-03530).

James v. N.J. State Police (In re Gibbons), 957 F.3d 165, 2020 U.S. App. LEXIS 12707 (3d Cir. N.J., Apr. 21, 2020)

Core Terms

gun, deadly, shooting, shot, arrived, drop, weapon, non-movant's, restraining, standoff, fatally, instinct, killing, noticed, urgency, walking, front, prong

Counsel: For ARLANE JAMES, In Re: WILLIE GIBBONS, J. R. G., a minor, by his mother and legal guardian, Ikeya Crawford, D. K. L., a minor, by his mother and legal guardian, Angel Stephens, L. M. G., a minor, by her mother and legal guardian, Angel Stephens, Plaintiffs - Appellees: Navarro W. Gray, Esq., Ronald C. Hunt, Esq., Hunt Hamlin & Ridley, Newark, NJ; Yvette C. Sterling, Esq., Burlington City, NJ.

For New Jersey State Police, State of New Jersey, Defendants: Vincent J. Rizzo Jr., Esq., Office of Attorney General of New Jersey, Richard J. Hughes Justice Complex, Trenton, NJ.

For NOAH BARTELT, State Trooper, Defendant - Appellant: Marvin L. Freeman, Esq., Office of Attorney General of New Jersey, Department of Law & Public Safety, Richard J. Hughes Complex, Trenton, NJ.

Judges: Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges. McKEE, Circuit Judge, with whom AMBRO, GREENAWAY, JR., KRAUSE, and RESTREPO, Circuit Judges, join, dissenting.

Opinion by: David J. Porter

Opinion

[*419] SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellees in the above-entitled case having been **[**2]** submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judges McKee, Ambro, Jordan, Greenaway, Jr., Krause and Restrepo would grant rehearing by the court en banc. Judge McKee files the attached dissenting opinion sur rehearing, which is joined by Judges Ambro, Greenaway, Jr., Krause and Restrepo.

BY THE COURT,

/s/ David J. Porter

Circuit Judge

Dated: August 6, 2020

Dissent by: McKEE

Dissent

OPINION SUR DENIAL OF REHEARING EN BANC

McKEE, *Circuit Judge*, with whom AMBRO, GREENAWAY, JR., KRAUSE, and RESTREPO, *Circuit Judge*s, join, dissenting.

Today, we deny the Petition for Rehearing in this case even though our Opinion squarely contradicts controlling precedent established by our decision in *Bennett v. Murphy*.[1] There, under circumstances substantively identical to those here, we held that "[if the victim] had stopped advancing and did not pose a threat to anyone but himself, **[**3]** the force used against him, i.e. deadly force, was objectively excessive[,]" and thus unreasonable.[2] *Bennett* has been the law of this Circuit for eighteen years. The victim here posed no greater threat than the victim in *Bennett*. Yet, now we hold that Trooper Noah Bartelt is entitled to qualified immunity as a matter of law. We reach that conclusion even though Willie Gibbons, the victim here, was pointing a gun at his own head when fatally shot by Bartelt. There has been no intervening change in the law in the eighteen years since we decided *Bennett*, and our Opinion here does not suggest otherwise.

We can take some solace in the fact that, absent a substantive distinction between **[*420]** the facts here and those in *Bennett*, the rules of this Circuit dictate that *Bennett* continues to control and the decision here is a nullity insofar as it purports to reach a holding that is contrary to our decision in *Bennett*.[3] A unanimous en banc court recently affirmed that "[w]e adhere strictly to that tradition."[4] Nevertheless, as six judges of this Court agree, institutionally it would be far better for us to grant this petition for rehearing so that we could resolve the tension between this Opinion and **[**4]** *Bennett* en banc.[5] I therefore must dissent from our failure to do so.

I. THE FACTS OF *BENNETT* AND *JAMES*

Assuming the truth of these allegations (as we must on summary judgment review),[6] the relevant circumstances surrounding the shooting of Willie Gibbons here, and David Bennett in *Bennett v. Murphy*, are indistinguishable.

A. *Bennett*

On the evening of January 4, 1994, Pennsylvania State Police responded to a domestic dispute call in Greenburg, Pennsylvania.[7] David Bennett, a 25-year-old volunteer firefighter, had told his girlfriend that he was going to kill himself after discovering her with

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[1] *274 F.3d 133 (3d Cir. 2002)*.

[2] *Id. at 136*.

[3] 3d Cir. I.O.P. 9.1 (2018) ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.").

[4] ***Joyce v. Maersk Line Ltd, 876 F.3d 502, 508 (3d Cir. 2017)*** (en banc) (quoting *In re Grossman's Inc., 607 F.3d 114, 117 (3d Cir. 2010)* (en banc)); *see also Pardini v. Allegheny Intermediate Unit, 524 F.3d 419, 426 (3d Cir. 2008)* ("[T]his Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents") (citation omitted); *Holland v. N.J. Dep't of Corr., 246 F.3d 267, 278 n.8 (3d Cir. 2001)* ("[T]o the extent that [a panel decision] is read to be inconsistent with earlier case law, the earlier case law . . . controls"); *O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 354 (3d Cir. 1981)* (citing Third Circuit Internal Operating Procedures to explain that "a panel of this court cannot overrule a prior panel precedent. . . . To the extent that [a later case] is inconsistent with [an earlier panel decision, the later decision] must be deemed without effect").

[5] *See* ***Fed. R. App. P. 35(a)(1)*** (explaining that en banc review was created to resolve such inconsistencies, in order to allow the legal community and the public to rely upon the "uniformity of the court's decisions").

[6] *Tolan v. Cotton, 572 U.S. 650, 657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*).

[7] *Bennett, 274 F.3d at 134*; *id. at 135 n.2*.

another man.[8] His girlfriend called 911.[9] When police arrived, they found Bennett standing in the courtyard outside of her apartment holding a shotgun pointed vertically at his own head. He repeated to the police that he wanted to kill himself.[10]

A standoff began, which lasted for over an hour. Finally, as police began to encircle Bennett, he became agitated and started walking towards the officers. When they ordered him to halt, he stopped moving. Four seconds later, a police sharpshooter, Francis Murphy, fatally shot Bennett. When **[**5]** Murphy opened fire, he was outside of the police cordon and approximately 80 feet away from Bennett.[11]

[*421] Bennett's estate brought a civil rights action under *42 U.S.C. § 1983* alleging police had used excessive force. The District Court denied the defendant officer's motion for summary judgment based on qualified immunity and the officer appealed. In affirming the denial of summary judgment and remanding for trial, we held: "[i]f, as the plaintiff's evidence suggested, David Bennett had stopped advancing and did not pose a threat *to anyone but himself*, the force used against him, i.e. deadly force, was objectively excessive."[12]

B. *James* (the current case)

In late May of 2011, Angel Stephens became concerned that her boyfriend, Willie Gibbons, had stopped taking his medication for schizophrenia. Stephens called the police after she and Gibbons had an argument.[13] However, when police arrived at their house, they could not initially identify who was the victim as the statements of Gibbons and Stephens conflicted.[14] Police told Stephens that she could not get a restraining order because "there was no fighting or nothing done," unless Gibbons had threatened her "with a knife or a gun."[15]

At that point, Stephens for the **[**6]** first time accused Gibbons of threatening her with a gun.[16] Police then questioned Gibbons, but he denied threatening Stephens.[17] Police searched Gibbons' truck for weapons before leaving the scene; they found none.[18] Thereafter, Stephens did obtain a restraining order from Municipal Court prohibiting Gibbons from possessing firearms or returning to the shared house.[19] The police escorted Gibbons back to the house to retrieve essential items and informed him that he would need to "request a police escort" to go there again.[20]

The next day, May 25, Gibbons returned to the police station to file a Citizen's Complaint based upon the events of the previous night. He alleged that police had harassed him.[21] Later that day, while working with his father, Gibbons discovered he had left a tool that he needed in the shared house. As previously instructed, Gibbons called to ask for a police escort in order to retrieve the tool. Trooper Michael Korejko answered the phone. Korejko knew that Gibbons had filed a complaint against the police.[22] When Gibbons explained that he needed to get his drill and other items from the house, Korejko declined to help, saying "we are pretty busy."[23] He now told Gibbons that **[**7]** he was not "allowed over there unless [he had] a court order from a judge to get those items."[24]

Gibbons then tried to call Stephens. When he could not get her on the phone, he went to the house to ask her

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[8] Torsten Ove, *Retrial Set for Trooper in Fatal Shooting*, PITT. POST-GAZETTE (Mar. 14, 2005), https://www.post-gazette.com/uncategorized/2005/03/14/Retrial-set-for-trooper-in-fatal-shooting/stories/200503140131 .

[9] *Id.*

[10] *Bennett v. Murphy, 127 F. Supp. 2d 689, 690 (W.D. Pa. 2000)*.

[11] *Id. at 690-91*.

[12] *Bennett, 274 F.3d at 136* (emphasis added).

[13] Plaintiffs-Appellees' (PA) App. 224-27.

[14] A72.

[15] PA192.

[16] *Id.*

[17] A72.

[18] A73. Later, Gibbons' mother also searched the truck because she feared that police would plant a gun on Gibbons. *See* PA200-01.

[19] A77-79.

[20] A73.

[21] PA419.

[22] A13.

[23] PA92.

[24] *Id.*

for the drill he needed.[25] Stephens was on the telephone with a friend when Gibbons arrived, and the friend took it upon himself **[*422]** to call the police.[26] Even though Stephens' friend only told police that "he's out there in front of her house," the dispatcher inexplicably told the officer who eventually responded that Gibbons had "showed up [at the house], with a handgun . . ."[27]

When Trooper Phillip Conza arrived at Stephens' house, he told Stephens he had heard that Gibbons had a gun.[28] Stephens did not express any concern for her safety.[29] Nevertheless, Conza suggested she come down to the police station.[30] As she drove to the station, Stephens passed Gibbons walking on the side of the road. She called the police to report that he was headed towards the police station, believing he was likely going there to turn himself in.[31] The dispatcher asked Stephens whether Gibbons had a gun and Stephens told the officer that she hadn't seen him holding one.[32] The dispatcher then asked whether she had seen **[**8]** a gun earlier and Stephens confirmed that she had.[33]

Hearing that a gun might be involved, Bartelt, who was on desk duty at the state police barracks, asked for permission to "head that way" in order to look for Gibbons.[34] Four officers in the area then converged on the sparsely populated stretch of road where Stephens had indicated she saw Gibbons. Trooper Daniel Hider was the first to arrive, and he saw someone matching Gibbons' description.[35] Rather than immediately confront him, Hider decided to continue driving and made an immediate right turn to loop back so he could get in front of Gibbons.[36]

Bartelt was only a few blocks away when he heard Hider report a sighting. Conza, who had spoken with Stephens earlier, was directly behind Bartelt in another car, and Korejko was moments behind the two of them.[37] The video camera in Bartelt's car was active, but as he proceeded towards Gibbons' location, Bartelt inexplicably manually disabled his camera.[38]

Driving northbound, Bartelt immediately identified Gibbons from across the street. Gibbons was also heading northbound on foot at "a normal" walking pace on the other side of the road.[39] Bartelt slowed and rolled down his window; Gibbons noticed **[**9]** him and said clearly, without shouting, "stay away from me."[40] Bartelt responded by driving his car across the double yellow line, directly towards Gibbons on the far side of the road. Gibbons repeated, "stay away from me,"[41] and Bartelt ignored him. Instead, he instructed Gibbons to "come over here."[42]

[*423] What happened next is disputed. Conza, who was approximately seven feet behind Bartelt,[43] stopped his car and jumped out. He saw Bartelt pointing his gun at a "male standing with one ar[m] up."[44] Conza was interrupted at this point when giving a subsequent report of the incident.[45] When he resumed, he became more vague, saying that even though "[i]t was still light" out,[46] he could only see one side of the suspect's body from his angle: "there is nothing on his right side, there is no

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[25] PA239.

[26] PA18-19.

[27] PA19-20.

[28] PA243.

[29] PA249.

[30] *Id.*

[31] PA250-51.

[32] PA22-23.

[33] PA251-53.

[34] PA281.

[35] A121.

[36] A126.

[37] PA295, A85.

[38] PA292. When asked to explain why he had turned the camera off, Bartelt merely stated: "[t]here's no requirement to have the camera on." *Id.* Yet, he conceded that it is required "during generic pedestrian contacts," PA290, and when pressed during his deposition whether one could describe his encounter with Gibbons, who was on foot, in such terms, Bartelt eventually admitted, "I guess you can call it that." PA291.

[39] PA300.

[40] PA295-96.

[41] PA297-98.

[42] PA298.

[43] A182.

[44] A266.

[45] *Id.*

[46] A182. Korejko agreed that it was still light out at the time of the shooting. A86.

gun, nothing that I see on his right side."[47] He stated that Bartelt yelled something "inarticulate-able."[48] "I don't know if he's responding to me or Willie[.]"[49] Without waiting for a response, Bartelt opened fire. Conza stated: "I observed the recoil in Officer Bartelt's [sic] at that point."[50]

Bartelt recalled the situation differently. According to him, it was dark. "There might've been a few house lights on **[**10]** here and there."[51] As he got out of his car, Bartelt saw that Gibbons was holding a gun in his left hand, "pointed towards his temple on his left side."[52] Bartelt immediately drew his own gun.[53] His first instinct was to open fire, but he noticed that Gibbons was standing in front of a house, "which is why I initially did not shoot right away."[54] But once he realized that there were no lights on in the house, he felt comfortable using his weapon. He yelled "drop it, drop it,"[55] and within a couple of seconds, while Gibbons "still had the gun to his head and he was just standing there facing me, looking right at me," Bartelt fired twice.[56] Gibbons collapsed, and Bartelt later said he knew Gibbons, "wasn't gonna move to get that gun again."[57]

A third version of events emerges from the deposition of the sole eye witness, who lived in a nearby house. When Joanne Leyman heard gunshots, she rushed to her window.[58] Outside, she saw a single officer and a single police car.[59] According to Leyman, Bartelt was there alone; Conza did not arrive until after the shooting had already occurred.[60] She reports that Bartelt walked up to Gibbons after shooting him and said "Willie, can you hear me?"[61]

What is undisputed **[**11]** is that the entire incident from police first seeing Gibbons to Bartelt fatally shooting him was over in "[s]econds."[62] By the time Hider swung **[*424]** back around and arrived at the scene, Gibbons was lying on the ground.[63] Shortly after midnight, Willie Gibbons was pronounced dead.[64]

It is impossible to effectively evaluate the credibility of these three differing accounts of the incident on the "dry record" before us.[65] Given these divergent stories, the District Court correctly concluded, "genuine issues of disputed fact prevent the Court from holding that Trooper Bartelt was reasonable in his belief that Gibbons posed a danger to him or someone else . . ."[66]

II. THE OPINION DISREGARDS OUR DECISION IN *BENNETT*

As the Opinion rightly notes, "[q]ualified immunity's second prong 'shields officials from civil liability so long as their conduct does not violate clearly established

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[47] A181.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] PA72.

[52] *Id.*

[53] PA73.

[54] PA75.

[55] PA74.

[56] PA75.

[57] PA79.

[58] PA345.

[59] PA347-48.

[60] PA348.

[61] *Id.*

[62] A164. Only 74 seconds elapsed between Hider's initial report that he had observed a potential suspect and the call for an ambulance, which did not occur until after Bartelt had already shot Gibbons. A101, PA375. In those 74 seconds, Bartelt had to drive to the location Hider had identified, speak with Gibbons, close the distance between them, emerge from his car, and finally open fire. After which, Conza, Hider, and Korejko all had to arrive and handcuff Gibbons; finally, Conza called for medical assistance. PA375. We can thus surmise that the actual confrontation must have been exceedingly brief.

[63] PA111.

[64] A270.

[65] *United States v. Friedland, 83 F.3d 1531, 1546 (3d Cir. 1996)* ("[O]ur review of a dry record, of necessity, cannot be as comprehensive as the review of the judge who watched and heard the issues being played out.") (Rosenn, J., concurring and dissenting).

[66] *Gibbons v. New Jersey State Police, CV 13-3530, 2017 U.S. Dist. LEXIS 210292, 2017 WL 11504779, at *8 (D.N.J. Dec. 20, 2017)*.

statutory or constitutional rights of which a reasonable person would have known.'"[67] For a right to be clearly established, it "means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful."[68] Instead **[**12]** of demanding the impossible—an exact repetition of two situations with different actors separated by time and place—this "clearly established" prong asks a legal question focused on notice: would a reasonable officer objectively understand that his or her action was unconstitutional?[69] "[E]xisting precedent must have placed the statutory or constitutional question beyond debate."[70] Such is the case here.

A. *Bennett* clearly establishes the law here

Admittedly, these two situations are not completely the same. If the law allowed us to disregard *Bennett* because the circumstances surrounding Gibbons' killing were not *absolutely identical* to those surrounding Bennett's, I would accept the denial of rehearing en banc. However, total congruence of two different incidents has never been required, nor could it be.[71] Such a rule would institute absolute, not qualified, immunity.

Instead, the Supreme Court has instructed that the precise "action in question" need not have "previously been held unlawful."[72] And we have reiterated this standard: "although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law **[**13]** is clearly established, they are **[*425]** not necessary to such a finding."[73] Simply put, the law "do[es] not require a case directly on point . . ." with no variation whatsoever.[74] What it does demand is that the unconstitutional nature of the present conduct "follow immediately" from the prior case's holding.[75]

Bennett readily satisfies that requirement. As I've noted, we held there that if the victim "did not pose a threat to anyone but himself . . . deadly force, was objectively excessive."[76] Viewed at summary judgment in a light favorable to the non-movant, Gibbons posed a threat to no one but himself. It thus "follow[s] immediately" that Bartelt's use of deadly force violated clearly established law.

B. Applying *Bennett* to *James*

In *Bennett*, based on the view of the facts set forth in Part I.A above, Officer Murphy was not shielded by qualified immunity. As recounted above, we held: "[i]f, as the plaintiff's evidence suggested, David Bennett had stopped advancing and did not pose a threat *to anyone but himself*, the force used against him, i.e. deadly force, was objectively excessive."[77] We reached that conclusion even though Bennett was armed with a shotgun, he was visibly agitated, **[**14]** and he had advanced threateningly on the officers. Nevertheless, based upon the facts—viewed in the light most favorable to the plaintiff—we determined that, as a matter of law, an individual who is manifesting only self-harm *cannot* be a sufficient threat to warrant deadly force.

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[67] *James v. New Jersey State Police, 957 F.3d 165, 169 (3d Cir. 2020)* (quoting *Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)* (internal quotation marks omitted)).

[68] *Id.* (quoting *District of Columbia v. Wesby, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018)* (internal quotation marks and citation omitted)).

[69] *Id.*

[70] *Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)*.

[71] Given the limitless randomness created by the vagaries of life, no two incidents will ever be the exact reflection of one another. *See also id.* ("We do not require a case directly on point").

[72] *Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)* (internal quotation marks and citation omitted).

[73] *Mirabella v. Villard, 853 F.3d 641, 648 (3d Cir. 2017)* (quotation omitted); *see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)* ("The same is true of cases with 'materially similar' facts."). And even if this were not so and a case with materially, or even fundamentally, similar facts were required, *Bennett* is certainly "fundamentally" similar.

[74] *Ashcroft, 563 U.S. at 741* (Scalia, J.).

[75] *Mullenix, 136 S. Ct. at 309* (quoting *Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*).

[76] *Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002)*.

[77] *Id.* (emphasis added).

It is axiomatic that qualified immunity does not protect officers "who knowingly violate the law."[78] After *Bennett*, any officer who used deadly force against an individual who "did not pose a threat to anyone but himself" knowingly violated the law of this Circuit and could appropriately be held accountable for that violation.

Obviously, *Bennett* does not apply if an individual threatening self-harm also poses a risk to others.[79] Just as the circumstances in *Bennett* (construed in the plaintiff's favor) compelled the conclusion that a reasonable officer could not have believed **[*426]** that David Bennett posed a threat to anyone but himself, the circumstances here, viewed in a light favorable to Gibbons, compel the conclusion that Willie Gibbons only posed a threat to himself. When asked whether Gibbons had threatened him "in any way," Bartelt responded unequivocally: "No."[80] Thus, when he opened fire, Bartelt violated clearly **[**15]** established law.

C. Reviewing the disputed facts in the record

A wrinkle in its analysis prevented the Opinion from readily arriving at that obvious conclusion. Our jurisdiction on interlocutory appeal extends "only 'to the extent that it turns on an issue of law.'"[81] This means we only "possess jurisdiction to review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right[.]"[82] When the District Court identifies a set of facts, that legal analysis can readily proceed. But when it fails to do so, we must "undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[83] We have established a supervisory rule that requires "at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues."[84] We very recently reiterated this rule's significance, as "we are hard pressed to carry out our assigned function when district courts fail to specify the set of facts they assumed."[85] As we have repeatedly stressed, failure to follow **[**16]** the rule is grounds for remand.[86]

Here, the District Court concluded that "genuine issues of disputed fact prevent[ed]" it from awarding qualified immunity.[87] However, as the Opinion points out, the District Court "did not identify these disputed facts."[88] That may well be because it believed that the factual disputes on this record were obvious and did not require

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[78] *White v. Pauly, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017)* (citation omitted).

[79] This principle was well-established by the time of our decision in *Bennett*. In *Rhodes*, the Sixth Circuit offered qualified immunity to an officer who shot and killed a man advancing with a machete. *Rhodes v. McDannel, 945 F.2d 117, 118 (6th Cir. 1991)* (per curiam). Similarly, in *Sigman*, the Fourth Circuit awarded qualified immunity where a suicidal man was shot after rushing a crowd of police officers armed with a kitchen knife, shouting "I want to die." *Sigman v. Town of Chapel Hill, 161 F.3d 782, 785 (4th Cir. 1998)*. In *Montoute*, the Eleventh Circuit granted qualified immunity to an officer who shot a man who was running away and had only ever pointed his gun into the air because the man had fired a warning shot near a large crowd and posed a risk to that public gathering. *Montoute v. Carr, 114 F.3d 181, 182-83 (11th Cir. 1997)*. We distinguished these situations from non-threatening suicidal ones in a later iteration of *Bennett. Bennett ex rel. Est. of Bennett v. Murphy, 120 Fed. Appx. 914, 919 (3d Cir. 2005)*.

[80] A160. Defendants concede that Gibbons did nothing Bartelt could have considered a threat other than holding a gun to his own head. A268.

[81] *Davenport v. Borough of Homestead, 870 F.3d 273, 278 (3d Cir. 2017)* (quoting *Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*).

[82] *Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 986 (3d Cir. 2014)* (quoting *Ziccardi v. City of Phila., 288 F.3d 57, 61 (3d Cir. 2002)*).

[83] *Johnson v. Jones, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)*.

[84] *Forbes v. Twp. of Lower Merion, 313 F.3d 144, 149 (3d Cir. 2002)* (Alito, J.).

[85] *Williams v. City of York, 18-3682, 2020 U.S. App. LEXIS 23318, 2020 WL 4249437, at *4 (3d Cir. July 24, 2020)* (Hardiman, J.) (quotation omitted).

[86] *Blaylock v. City of Philadelphia, 504 F.3d 405, 410 (3d Cir. 2007)* (collecting instances of remand for failure to follow the *Forbes* rule).

[87] *Gibbons, 2017 U.S. Dist. LEXIS 210292, 2017 WL 11504779, at *8*.

[88] *James, 957 F.3d at 168*.

elaboration. Nonetheless, this violates our supervisory rule. Thus, remand (not reversal) is required for the District Court to address that deficiency in the first instance.[89]

[*427] In choosing to instead undertake a "cumbersome review" of the record on its own, the Opinion ignores both the District Court's finding that there were material disputed facts and the Supreme Court's instruction to "determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."[90] The Opinion professes to accept the "conclusion that 'genuine issues of disputed fact' exist[],"[91] but when it actually "proceed[s] to qualified immunity's second prong,"[92] that awareness falls **[**17]** away.

Determining the purely legal question of whether the law was clearly established "from the perspective of a reasonable officer,"[93] does not absolve us from viewing the underlying material facts in a light favorable to Gibbons. Without a clear conception of what happened, we cannot answer the legal question of whether clearly established law applies to the given circumstances. In forming its view of these events, without the benefit of the District Court elucidating the disputed facts, the Opinion was bound to examine the record itself and to view the disputed facts—which were not obscure, Appellees' brief repeatedly highlighted several of them[94]—in a light favorable to Gibbons.

Moreover, more than once, this Court has advised that "a court ruling on summary judgment in a deadly-force case" must be careful "to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'"[95] The Supreme Court has likewise emphasized "the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."[96]

Instead, the **[**18]** Opinion improperly resolves multiple disputed issues of material fact in Bartelt's favor when determining if clearly established law applies.[97] For

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[89] The Opinion identifies the District Court's failure and "reiterate[s] that *Forbes*'s supervisory rule remains in effect." *957 F.3d at 169 n.4*. But it provides no explanation for its own failure to remand in accordance with the rule, other than a bare cite to a concurring opinion which proposed to exempt from *Forbes* "narrow legal claims that are capable of resolution without the need to closely examine the nuances of the District Court's fact-finding." *E. D. v. Sharkey, 928 F.3d 299, 310 (3d Cir. 2019)* (Smith, C.J., concurring). However, the complex disputes here do not fit within that exception. *See, e.g.*, A182 (Conza says, "I don't remember it being dark. It was still light"), A86 (Korejko agrees), PA72 (Bartelt claims "[i]t was dark"), A181 (Conza says Bartelt's shouting was "inarticulate-able"), PA74 (Bartelt claims he issued clear commands). Another rare exception to the *Forbes* rule occurs when disputed evidence is "blatantly contradicted by the record." *Blaylock, 504 F.3d at 413* (quoting *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*). *We have no such evidence here, in part because Bartelt purposefully deactivated his video camera*. PA292.

[90] *Johnson, 515 U.S. at 319*. This comports with our general rule requiring de novo review of the entire record when reversing a denial of summary judgment. *Est. of Arrington v. Michael, 738 F.3d 599, 604 (3d Cir. 2013)*; *see also United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)* (per curiam) (examining de novo and reversing a grant of summary judgment because the underlying record did not accord with the District Court's finding of fact).

[91] *James, 957 F.3d at 168*.

[92] *Id. at 168-69*.

[93] *Id. at 169* (citing *White v. Pauly, 137 S. Ct. 548, 550, 196 L. Ed. 2d 463 (2017)*).

[94] Appellees' Br. at 8 (noting that Conza's version of events "differs from the account provided by Bartelt"), 21 (citing where the record "directly contradict[s]" the officers' testimony). The Plaintiffs' dispute many more facts in the record. *See* A235 (disputing whether Bartelt ordered Gibbons to drop his gun, whether Gibbons understood and refused, whether Bartelt considered Gibbons a threat, whether Bartelt was afraid, and whether the other officers arrived on the scene in time to witness the incident).

[95] *Lamont v. New Jersey, 637 F.3d 177, 181-82 (3d Cir. 2011)* (quoting *Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999)*).

[96] *Tolan v. Cotton, 572 U.S. 650, 657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)*.

[97] *City of Escondido v. Emmons, 139 S. Ct. 500, 501, 202 L. Ed. 2d 455 (2019)* (viewing the record "in the light most favorable to the plaintiff."). This is an especially serious flaw when, as here, we have only one side of the story. *See Lamont, 637 F.3d at 181-82* (describing the cautious, skeptical approach such circumstances necessitate). A "court may not simply accept what may be a selfserving [sic] account by the officer. It must also look at the circumstantial evidence that, if

example: whether Gibbons' right arm was raised in **[*428]** surrender or at his side (ignored by the Opinion), whether it was light or dark when Bartelt shot Gibbons (ignored), whether Bartelt told Gibbons to drop his gun or spoke unintelligibly (Opinion repeatedly assumes Bartelt gave the order[98]), whether Bartelt even gave Gibbons a chance to comply with any command he may have given or opened fire immediately after issuing such command (Opinion repeatedly assumes Gibbons chose not to comply[99]), and most importantly, whether Gibbons threatened Bartelt in any way (ignored).[100] The Opinion implicitly or explicitly resolves each of these inferences against Gibbons when determining whether clearly established law governs this case.

But it does not stop there: Bartelt never stated that Gibbons threatened him or anyone other than himself.[101] In fact, Bartelt admits Gibbons made no threat.[102] Here, there is no factual dispute. So the Opinion simply invents one and then resolves it in favor of Bartelt.[103] That is not merely wrong, it is indefensible.

[*429] If we instead properly view each of the uncertainties in Gibbons' favor, a jury could readily conclude that a reasonable officer would have recognized the impermissibility of unleashing deadly force upon an individual who had displayed no sign whatsoever that he intended to harm anyone but himself. That places this case squarely within *Bennett*'s ambit, and the holding there clearly established the law in this situation.

D. The Opinion's three distinctions between *James* and *Bennett*

Faced with on-point precedent, the Opinion first improperly views the facts here in a light favorable to Bartelt, and then claims *Bennett* is distinguishable based upon those skewed facts. This approach is directly contrary to our scope of review on summary judgment.[104] Further, each purported distinction

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believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999)* (quotation omitted). Yet even without the benefit of Gibbons' testimony, the two officers' own versions of events are inconsistent.

[98] *See, e.g., James, 957 F.3d at 166* ("Willie Gibbons, a suspect who refused to drop his gun when Trooper Bartelt ordered him to do so"), *168* ("Trooper Bartelt . . . twice told Gibbons to drop his weapon . . ."), *171* ("Gibbons ignored Trooper Bartelt's orders to drop his gun . . ."), *172* ("Gibbons ignored Trooper Bartelt's orders to drop his gun . . .").

[99] *James, 957 F.3d at 168* ("Gibbons did not comply with the commands"), *172* (referring to "noncompliant Gibbons.").

[100] A reasonable jury reaching the merits could readily find each of those facts in favor of Plaintiffs on this record. A jury could also consider the fact that Gibbons had filed a complaint against police officers for harassing him earlier the same day, and repeatedly pleaded for Bartelt to "stay away from me." PA295-96. Of course, we cannot know exactly what actually happened the night Gibbons was shot. And I in no way suggest that the prior complaint for police harassment instilled some degree of callousness or hostility towards Gibbons. Yet, we have no way of predicting how a jury would interpret Bartelt's admission that he turned his video camera off en route to meet Gibbons even though that would have been the kind of pedestrian encounter that required him to have it on. We certainly cannot prognosticate how a jury may factor that complaint into its deliberations. Jurors are, after all, free to consider any evidence that they deem relevant. That is another reason why a grant of summary judgment at this stage is so very wrong.

[101] Defendants have conceded as much, admitting that Gibbons made no threats against Bartelt or anyone else. A268.

[102] A160. The Opinion simply ignores the fact that there is no factual dispute whether Gibbons was threatening anyone but himself. While Bartelt later claimed to have been subjectively afraid, A170, he first admitted that Gibbons made no objective threat. A160. Bartelt's "subjective beliefs . . . are irrelevant," as we must conduct this analysis solely from the perspective of an objective officer. *Anderson, 483 U.S. at 641*. It is thus impossible to conclude that the Opinion is consistent with our scope of review at summary judgment because that crucial fact of the threat posed is actually undisputed. That should have been enough to affirm the District Court's denial of summary judgment by itself. Given the clear legal pronouncement of *Bennett* ***[**19]*** , this may be why the District Court did not think it necessary to recite the factual disputes before denying qualified immunity (an omission which nonetheless violated our *Forbes* supervisory rule).

[103] *James, 957 F.3d at 172* ("Trooper Bartelt . . . could reasonably conclude that Gibbons posed a threat to others.").

[104] *Tolan, 572 U.S. at 651* (remanding where "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'") (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S.*

crumples under scrutiny.

1. *Knowledge*

The Opinion suggests that Bartelt knew more about Gibbons than Officer Murphy knew about David Bennett.[105] It highlights three facts in particular: (1) "Gibbons had violated a restraining order," (2) "Gibbons was reportedly mentally ill and may not have been taking his medication," and (3), "Gibbons was carrying and earlier that evening had brandished a firearm."[106] It infers **[**20]** that a reasonable officer would "perceive that Gibbons presented an increased risk of harm" as a result.[107]

To begin with, it is hardly self-evident that knowing more about a suspect would lead an officer to perceive a greater threat. In fact, the exact same argument could be made in reverse. That is, Officer Murphy could have perceived a greater threat from David Bennett because he knew nothing of Bennett's history or motivation. For all Murphy knew, Bennett could have had a history of violent and assaultive behavior or a vendetta against the police. We are, after all, at the summary judgment stage. Bartelt is free to convince a jury that his knowledge of the decedent informed the reasonableness of his actions. That is not for us to determine. It is simply not relevant here and the Opinion does not explain why it is. Rather, it merely states that Bartelt knew three facts about Gibbons, none of which materially distinguish *Bennett*.

First, there is no reason here to conclude that violating a restraining order would entitle an officer to use lethal force. David Bennett presumably also violated the law during the standoff with police (*e.g.*, by resisting arrest). But that was not relevant **[**21]** to the threat he posed to officers on the scene. Police frequently respond to allegations that someone has violated the law. Clearly, they are not thereby permitted to automatically resort to lethal force. Moreover, it is uncontested that Bartelt did not know the terms of the restraining order that Gibbons had violated.[108] Thus, Bartelt's knowledge that Gibbons had violated a restraining order is irrelevant, and the Opinion does not attempt to explain why it is relevant. Rather, it simply states that this factor is different than the circumstances in *Bennett*. It may be, but that **[*430]** does not meaningfully distinguish the two sets of circumstances.

Second, the Opinion does not explain the relevance of knowing that Gibbons may not have taken his medications and may have been mentally ill. Those circumstances are simply offered as another *ipse dixit* to establish a material distinction. To the extent that it is a material consideration, it counsels against opening fire on Gibbons rather than supporting that response. Both the Ninth and Tenth Circuit Courts of Appeals have found:

> Even when an emotionally disturbed individual is acting out and inviting officers to use deadly force, the governmental **[**22]** interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.[109]

Here, of course, the mentally ill individual was not "inviting officers to use deadly force." Rather, Gibbons was pleading to be given space and threatening only himself as Bartelt drove his car towards him. Nonetheless, the Opinion appears to suggest these circumstances would have been different if Gibbons had either not been mentally ill or had taken his medications. That is as troubling as it is irrelevant and incorrect. Further, it would have been apparent to the nearby officers that David Bennett was also suffering from a mental health crisis. Someone who is mentally stable does not usually point a shotgun at his own head in front of police. Thus, that is no basis to distinguish this case. To be sure, if there were any factual basis to conclude Gibbons' illness played some part in the confrontation, it would be a relevant factor. But on this record, the fact that Gibbons may have been off his medications counseled a compassionate response, not unleashing deadly force. Concluding **[**23]** otherwise is distasteful and, moreover, draws an unfair distinction to *Bennett*, where the victim's mental health status was undiagnosed, unduly favoring Bartelt at summary judgment.

242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[105] *James, 957 F.3d at 172*.

[106] *Id.*

[107] *Id.*

[108] PA288.

[109] ***Glenn v. Washington County, 673 F.3d 864, 876 (9th Cir. 2011)*** (internal quotation omitted); *see also* ***Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010)*** ("[I]f Officer MacPherson believed [the plaintiff] was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means.").

Finally, the Opinion purports to distinguish *Bennett* based on the fact that "Gibbons was carrying and earlier that evening had brandished a firearm."[110] Of course, it is obvious that David Bennett was also carrying a firearm, which he also brandished. This attempted distinction is purely puzzling.

2. *Control*

The Opinion stresses that whereas Officer Murphy was eighty yards from David Bennett, Bartelt was approximately fifteen yards away from Gibbons. Of course, that is because Bartelt drove his car toward Gibbons and then stopped at that distance. Moreover, distance is merely one of the factors the Supreme Court has considered.[111] The Opinion reasons that the distance matters because in *Bennett*, Officer Murphy could "rely on closer officers to give commands . . . and evaluate his compliance."[112] Here, "Trooper Bartelt *was* the closest officer to Gibbons."[113] Yet this, too, could be argued in reverse. An officer **[*431]** who fired from a distance could perhaps be given greater latitude because s/he could more easily mistakenly conclude **[**24]** the victim's weapon was pointed at someone other than the victim, or not even be sufficiently sure of where the victim was pointing it to confidently refrain from shooting. Again, the Opinion simply states a difference without explaining why it is a material distinction.

The Opinion also characterizes Gibbons as uncooperative, noting that David Bennett was "comparatively compliant" by contrast.[114] This is just plain wrong given our standard of review. The Opinion describes Gibbons as "a suspect who refused to drop his gun when Bartelt ordered him to do so."[115] There is a dispute about what Bartelt said as well as whether whatever he said was audible or intelligible to Gibbons.[116] The District Court failed to specify whether that was one of the disputed facts it "assumed."[117] Even assuming arguendo that Gibbons did hear a command to drop the gun, it is not clear that Bartelt gave him time to comply. Assuming even further that Gibbons had time to comply, it remains undisputed that Gibbons never pointed the gun anywhere but at his own head. Thus, *Bennett* clearly established the governing law here.

The Opinion seeks to avoid that result by refusing to view the facts in a light favorable **[**25]** to Gibbons. Bennett actually advanced towards officers while armed, after engaging in an extended stand-off with police.[118] By contrast, Gibbons did not advance on Bartelt. Rather, Bartelt advanced on him when Gibbons asked him to "stay away from me."[119] Describing Bennett as compliant compared with Gibbons is simply incorrect.

3. *Chronology*

The Opinion also attempts to distinguish Bartelt's killing of Gibbons from Officer Murphy's killing of Bennett because Bartelt had much less time to reflect than Murphy had when he shot Bennett. This is perhaps the weakest part of the Opinion's attempt to raise a distinction between the two cases. It is both legally unpersuasive and relies on a terribly cruel irony. Under this view, Bartelt had "mere seconds to assess the potential danger"[120] whereas the standoff in *Bennett* lasted close to an hour. The Opinion notes that the Supreme Court has "stressed the importance of this kind of temporal difference when conducting the clearly established inquiry" in *Kisela v. Hughes*.[121]

However, time was an important factor in *Kisela* because the victim was threatening a bystander with a large knife and that bystander was within reach of the

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[110] *James, 957 F.3d at 172*.

[111] *Kisela v. Hughes, 138 S. Ct. 1148, 1154, 200 L. Ed. 2d 449 (2018)*. The discussion at nn. 122-23 below, distinguishing *Kisela*'s rationale for weighing such factors, applies with equal force here as well.

[112] *James, 957 F.3d at 172*.

[113] *Id.* (emphasis in original).

[114] *Id.*

[115] *Id. at 166, 168, 171, 172* (repeatedly discussing Gibbons' purported failure to drop his weapon on command).

[116] Conza was approximately seven feet behind Bartelt, less than half the distance between Bartelt and Gibbons. A182. Conza did not hear Bartelt order Gibbons to drop the gun. He says Bartelt was "screaming" and that the words were "inarticulate-able [sic]." A180-81.

[117] *Johnson, 515 U.S. at 319*.

[118] *Bennett, 127 F. Supp. 2d at 690-91*.

[119] PA295.

[120] *957 F.3d at 172* (quoting *Kisela, 138 S. Ct. at 1153*).

[121] *Id.*

victim when police opened fire. **[**26]** [122] Such an immediate threat to others is a prime example of a situation where police must act reflexively. **[*432]** But as the Court of Appeals for the Fifth Circuit concluded en banc last year, the reason the Supreme Court stressed the temporal difference in the face of that imminent threat is inapplicable where, as here, there is no imminent threat.[123] As in *Bennett*, this victim was only threatening himself. In addition, the only reason there was no hour-long standoff here (and the cruel irony of relying on timing as a distinguishing factor) is that Bartelt opened fire on Gibbons almost immediately after confronting him. And he confessed that his instinct was to shoot even sooner.[124]

Police cannot immediately open fire on someone who poses no threat to others and then seek refuge in qualified immunity by claiming there was no time to assess the situation.[125] The urgency here was of Bartelt's own making.[126] Had he withheld fire this situation may well have also developed into the kind of standoff that is ostensibly so material to our holding in *Bennett*. The irony is exacerbated by Bartelt's taped post-shooting incident report, which, inexplicably, the Opinion **[**27]** totally ignores.

There, Bartelt stated that the scene was dark, "[t]here might've been a few house lights on here and there."[127] As he left his car, Bartelt said he perceived that Gibbons was holding a gun in his left hand, "pointed towards his temple on his left side."[128] Bartelt immediately drew his gun.[129] According to Bartelt's own account, *his first instinct was to open fire*, but he noticed that Gibbons was standing in front of a residential house, "which is why I initially did not shoot right away."[130] He said that he only fired once he realized that there were no lights on in the house and no car in the driveway because he then felt comfortable using his weapon. Gibbons "still had the gun to his head and he was just standing there facing me, looking right at me," when Bartelt shot him twice.[131]

Thus, according to Bartelt's own report, he had time to realize that there was a nearby house and someone might be injured if he fired his gun, then look more closely and process the fact that there were no lights on in the house, no car in the driveway and conclude no one was home, before opening fire on Gibbons. According to Bartelt's own description of the incident, this was not an immediate **[**28]** reflexive action to defend himself from Gibbons or to prevent Gibbons from harming fellow officers or anyone else. Rather, according to Bartelt, he opened fire after processing all of the above and seeing that Gibbons held a gun "pointed towards his temple on his left side."[132] Only then, despite conceding **[*433]** that Gibbons had not threatened him,[133] did Bartelt act on his initial impulse, which was to fatally open fire.

This is a far cry from the numerous situations where officers feel instinctively compelled to use deadly force to prevent someone from harming an officer or bystander, thereby justifying the protective umbrella of qualified immunity. In such urgent situations, qualified immunity is appropriate even if the officer's instant perception of the situation was inaccurate. Officer Bartelt's own undisputed account—if accepted by a fact finder—establishes that he did not act as instantly or instinctively as the Opinion attempts to suggest.[134]

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[122] *138 S. Ct. at 1153* ("Hughes had moved to within a few feet of [the bystander]; and she failed to acknowledge at least two commands to drop the knife.").

[123] *Cole v. Carson, 935 F.3d 444, 455 (5th Cir. 2019)* (en banc), *as revised* (Aug. 21, 2019) (concluding that the presence of the bystander, "heightened the risk of immediate harm to another . . . "), *cert. denied sub nom.* ***Hunter v. Cole, 207 L. Ed. 2d 1051, 2020 WL 3146695 (U.S. 2020)***.

[124] PA75.

[125] Such an argument is akin to the "legal definition of chutzpah," a defendant who kills his/her parents and then pleads for mercy as an orphan. *Harbor Ins. Co. v. Schnabel Found. Co., Inc., 946 F.2d 930, 937 n.5, 292 U.S. App. D.C. 56 (D.C. Cir. 1991)*.

[126] The *Kisela* dissent made a similar observation. *138 S. Ct. at 1160* (Sotomayor, J., dissenting). But there, unlike here, the police felt they had to act rapidly to protect a vulnerable bystander who appeared to be in imminent danger from a knife-wielding assailant. *Id. at 1153*.

[127] PA72.

[128] *Id.*

[129] PA73.

[130] PA75.

[131] *Id.*

[132] PA72.

[133] A160.

[134] Reasonable jurors could also conclude that this testimony—suggesting that Bartelt carefully surveyed the

Thus, to the extent the Opinion seizes upon urgency as one of the factors that distinguish this case from *Bennett*, it is just wrong. According to Bartelt's own testimony, the specter of urgency painted by the Opinion simply did not exist given our standard **[**29]** of review here. Moreover, to the extent an interpretation of the facts suggests that an urgency did exist, it was a circumstance of Bartelt's own making. There was no accompanying justification of imminent harm, which was the crucial foundation of the Court's reasoning in *Kisela*. The Opinion's three-part attempt to differentiate the facts here from those in *Bennett* is as inaccurate as it is unpersuasive.

E. Misplaced reliance on other precedent

Finally, the Opinion is misguided to the extent that it suggests our decision in *Lamont v. New Jersey* supports its reasoning.[135] There, police chased a suspect through woods at night. When they finally cornered him, he yanked something out of his waistband and police opened fire, believing it was a gun.[136] The *Lamont* Court held that response was reasonable.[137] The Opinion here concludes that the confrontation with Gibbons was therefore justified because although the suspect in *Lamont* ultimately did not have a gun (although officers reasonably believed that he did), Gibbons actually did have a gun. Simply put, that non sequitur defies logic.

The fact that the suspect in *Lamont* was perceived to pose a threat to others without a gun says nothing about whether **[**30]** Gibbons posed a threat to others with one. In fact, unlike the *Lamont* suspect, who fled through the dark woods and suddenly pulled something from his waistband in response to an order not to move, Gibbons made no sudden moves. He was pointing the gun only at himself, not at the officers, and had been walking down the street, not fleeing from arrest or resisting in any way. In *Lamont*, unlike here, the police unquestionably had justification to fire. The Opinion's reliance on *Lamont* is unhelpful.

The Opinion also quotes our statement in *Lamont* that "[p]olice officers do not enter into a suicide pact when they take an oath to uphold the Constitution."[138] No rational **[*434]** person could disagree. However, neither do police thereby obtain a license to *unreasonably* use force, let alone deadly force. This is even a basic tenet of official New Jersey State Police policy. That Policy forbids shooting someone (such as Gibbons) who is threatening only himself. The Policy states: "Deadly force shall not be used against persons whose conduct is injurious only to themselves."[139] As I have reiterated, we are among those courts that hold it is unreasonable to shoot someone who only threatens harm to him/herself. **[**31]** Invoking the concept of a "suicide pact" to justify deadly force and qualified immunity here may add a rhetorical flourish to the Opinion, but it is seriously misplaced and misleading given the record before us.

Finally, despite the fact that the use of deadly force in *Lamont* was justified, it should be remembered that we nevertheless ultimately did not grant qualified immunity in that case. We declined to do so because it was disputed whether officers continued firing after the decedent no longer reasonably posed a threat.[140]

III. THE OPINION IGNORES SUPREME COURT PRECEDENT

The Opinion's reliance upon disputed facts also contravenes on-point Supreme Court precedent for qualified immunity cases on review from denial of summary judgment. The Opinion looks to what it terms, "[t]he closest factually analogous Supreme Court precedent, *Kisela v. Hughes*."[141] As I have already

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area, observed a house, but inferred no one was home before firing—was self-serving testimony offered to establish that he exercised reasonable care before shooting. That is true even though it tends to undermine his immunity claim because it shows that there was more opportunity for observation and deliberation than Bartelt's rapid fire suggests. Thus, reasonable jurors might well conclude that this testimony negates Bartelt's entitlement to qualified immunity, just as the District Court held.

[135] *637 F.3d 177 (3d Cir. 2011)*.

[136] *Id. at 183*.

[137] *Id.*

[138] *James, 957 F.3d at 173 n.6* (quoting *Lamont, 637 F.3d at 183*).

[139] PA428.

[140] *637 F.3d at 185* ("[T]he dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.").

[141] *James, 957 F.3d at 170*.

explained, *Kisela* is distinguishable since the police there needed to act quickly because Amy Hughes was holding a large knife within reach of an innocent bystander. By contrast, Willie Gibbons did not threaten anyone but himself and Bartelt has never said that he did.[142] Because the Opinion erroneously views the facts in a light **[**32]** favorable to Bartelt, the "closest factually analogous Supreme Court precedent" is not *Kisela*, but *Tolan v. Cotton*,[143] which the Opinion fails to even mention as part of its summary judgment analysis. *Tolan*, like *Kisela*, was decided after Bartelt shot Gibbons and therefore could not have informed Bartelt about the reasonableness of his actions. Nevertheless, it is directly relevant to the legal analysis here insofar as it instructs how factual disputes must be analyzed under the clearly established prong of a qualified immunity inquiry.

In *Tolan*, as here, the parties disputed several aspects of a police confrontation resulting in a fatal shooting. Like here, the disputed facts included whether there was enough light to see clearly.[144] The Court of Appeals for the Fifth Circuit granted qualified immunity on the grounds that it was possible for an officer to have "reasonably and objectively believed that [the victim] posed an immediate, significant threat of **[*435]** substantial injury to him."[145] The Supreme Court reversed because, "the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion."[146] That **[**33]** is precisely what our Opinion does here, despite the Supreme Court unanimously rejecting such an approach.[147]

The Fifth Circuit's careful en banc decision in *Cole v. Carson*[148] amplifies the relevance of *Tolan*. There, officers pursued a suicidal young man, Ryan Cole, and fatally shot him while he pressed a gun to his own head.[149] As here, it was disputed whether the officers warned the victim before opening fire, and, if so, whether they gave him an opportunity to comply.[150] The circumstances are not identical; Ryan Cole survived and his suit subsequently alleged that the officers conspired to lie about the threat he posed in order to justify having shot him.[151] A panel of the Fifth Circuit initially denied qualified immunity, but the Supreme Court summarily reversed and remanded for reconsideration in light of *Mullenix v. Luna*.[152] On remand, the panel reaffirmed its earlier decision, and the Fifth Circuit granted rehearing before the full court. The en banc court explicitly followed *Tolan*'s requirement that disputed facts be viewed in the non-movant's favor,[153] and found from that perspective:

> Ryan was holding his handgun pointed to his own head, where it remained. [He] never pointed a weapon at the **[**34]** Officers, and never made a threatening or provocative gesture towards [the] Officers. [The officers] had the time and opportunity to give a warning for Ryan to disarm himself. However, the officers provided no warning . . . that granted Ryan a sufficient time to respond, such that Ryan was not given an opportunity to disarm

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[142] A160 (conceding that Gibbons never issued any sort of threat).

[143] *572 U.S. at 657* ("In holding that [the victim's] actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to [the officer] with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party[.]") (quoting *Anderson, 477 U.S. at 249*).

[144] *Id. at 657-58* (contrasting the officer's testimony that the area "was fairly dark" with the victim's attestation that "he was not in darkness.") (internal quotation marks and citations omitted).

[145] *Id. at 655* (quoting *Tolan v. Cotton, 538 Fed. Appx. 374, 377 (5th Cir. 2013)*).

[146] *Id. at 659*.

[147] *See id. at 662* (Alito, J., concurring in the judgment) ("I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.").

[148] *935 F.3d 444 (5th Cir. 2019)* (en banc).

[149] *Id. at 448-49*.

[150] *Id. at 455* ("[A] reasonable jury could find that [the victim] made no threatening or provocative gesture to the officers and posed no immediate threat to them. . . . [It] could find [the officers] opened fire upon [the victim] without warning.").

[151] *Id. at 448-50*.

[152] *Id. at 447*; ***Hunter v. Cole, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016)*** (vacating and remanding for reconsideration).

[153] *935 F.3d at 456 n.72* (citing *Tolan, 572 U.S. at 660*).

himself before he was shot.[154]

Viewed in that light, the en banc court affirmed the denial of qualified immunity. The court explained: "[w]e conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in . . . the record as to the [plaintiffs'] excessive-force claim."[155] While Gibbons' death leaves us reliant on the officers' recounting of events, there are many similarities between *Cole* and *James*. In both cases, *Tolan* requires that the facts be viewed in the non-movant's favor. As noted before, the Opinion entirely ignores *Tolan*; it also ignores *Cole*. Under *Tolan*, we must view the facts in Gibbons' favor; when we do so, *Bennett* clearly governs this case.

[*436] IV. *Bennett* is Not an Outlier

I realize that, given the controlling precedent of *Bennett*, precedents from other Circuits are not relevant to our qualified immunity analysis. **[**35]** Nevertheless, before concluding, I think it helpful to note that every Circuit Court of Appeals that has addressed this issue in a precedential opinion, and there are ten of them,[156] has held that it is a *clear violation* of the Constitution to shoot someone who is only threatening self-harm. [157]

This holds particular force and urgency when police confront individuals suffering a mental health crisis. The Court of Appeals for the First Circuit observed, "federal courts have afforded a special solicitude to suicidal individuals in lethal force cases when those individuals have resisted police commands to drop weapons but pose no real security risk to anyone other than themselves."[158] Here, of course, the Opinion points to Gibbons' failure to drop his gun even though it is not even certain that Gibbons resisted a command to drop his weapon.

The Opinion dismisses several of these cases by other Circuit Courts of Appeals **[*437]** as either too vague, or too recent,[159] to have formed a "robust consensus of cases of persuasive authority in the Courts of

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[154] *Id. at 449* (quotations omitted).

[155] *Id. at 447*.

[156] Every circuit except the Second and D.C. Circuits has issued a precedential opinion on this subject. *Cf. Chamberlain Est. of Chamberlain v. City of White Plains, 960 F.3d 100, 103, 110-13 (2d Cir. 2020)* (denying qualified immunity on excessive force and other claims when police fatally shot a mentally ill but not suicidal man in his own apartment after he begged them to leave him alone).

[157] *Cole v. Carson, 935 F.3d 444 (5th Cir. 2019)* (en banc) (denying qualified immunity at summary judgment for officers who shot a suicidal man as he held a gun to his own head because the facts viewed in plaintiffs' favor showed he was no threat to anyone but himself), *cert. denied sub nom.* ***Hunter v. Cole, 207 L. Ed. 2d 1051, 2020 WL 3146695 (U.S. 2020)***; *Partridge v. City of Benton, Arkansas, 929 F.3d 562, 567 (8th Cir. 2019)* (declining to permit qualified immunity for officers who shot a 17-year-old with a gun pressed to his own head when he allegedly started moving it, finding "no reasonable officer could conclude [the victim] posed an immediate threat of serious physical harm."); *McKenney v. Mangino, 873 F.3d 75, 79 (1st Cir. 2017)* (emphasizing that "[n]one of the officers had warned [the suicidal individual] that they would use deadly force if he refused to drop his weapon."); *Weinmann v. McClone, 787 F.3d 444, 446-47 (7th Cir. 2015)* (affirming a denial of qualified immunity where an officer shot a suicidal man who was holding a gun to his own head); *Cooper v. Sheehan, 735 F.3d 153, 159-60 (4th Cir. 2013)* (rejecting a claim to qualified immunity by officers who opened fire at a man who was holding a gun but not aiming it at them); ***Glenn v. Washington Cty., 673 F.3d 864, 873-74 (9th Cir. 2011)*** (declining to award qualified immunity where officers gunned down a suicidal young man who had a knife and had threatened to "kill everybody" because the officers needlessly opened fire); *Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006)* (reversing a grant of qualified immunity where police "acted precipitously in shooting [a suicidal individual whom they believed to be holding a gun], who posed a danger only to himself . . . . [the victim] did not pose an immediate threat to the safety of the officers or others. He had made no threats and was not advancing on anyone . . ."); *Mercado v. City of Orlando, 407 F.3d 1152, 1157-61 (11th Cir. 2005)* (finding officers who found a man holding a knife to his own chest, "should not be afforded the protection of qualified immunity" when they fired within seconds and without warning); *Sova v. City of Mt. Pleasant, 142 F.3d 898, 903 (6th Cir. 1998)* (remanding a qualified immunity grant to two officers who shot and killed a man who had stabbed himself with a knife and who they believed had a gun, "[b]ecause the District Court failed to view the evidence about how the shooting happened in the plaintiffs' favor and overlooked contentious factual disputes concerning the officers' actions . . ."); *Cf. Rogers v. King, 885 F.3d 1118, 1120, 1122 (8th Cir. 2018)* (finding qualified immunity proper where police officers encountered a suicidal woman with a gun to her head and did not shoot her initially but then opened fire once she started waiving the gun around and eventually pointed it in the officers' direction).

[158] *McKenney, 873 F.3d at 82*.

[159] *James, 957 F.3d at 173*.

Appeals."[160] Even if the Opinion is correct that the uniform conclusion already reached by several other Circuit Courts of Appeals at **[**36]** the time Bartelt shot Gibbons had failed to establish a clear right, it offers no principled reason for departing from our own binding precedent. As I have explained, the Opinion's efforts to explain why *Bennett* does not control either rely upon differences that yield no distinction or are just plain wrong in describing relevant "facts."[161]

V. CONCLUSION

To summarize: *Bennett* controls this analysis and failing to grant the Petition for Rehearing is a serious mistake.[162] There will always be differences between two events featuring different participants, separated by time and place. The Supreme Court has never required a prior case that is absolutely identical to the circumstances surrounding a plaintiff's claim, nor could it. No such case will ever exist and requiring one tacitly transforms qualified immunity into absolute immunity.

What is required is notice. Controlling precedent that is based upon circumstances sufficiently similar (when analyzed at an appropriate level of generality) to inform a reasonable officer that his/her conduct violates clearly established law.[163] *Bennett* is exactly such a case. To reiterate once again our unqualified pronouncement there, if **[**37]** the victim "did not pose a threat to anyone but himself, the force used against him, i.e. deadly force, was objectively excessive."[164]

For the reasons I have explained, *Bennett* remains the law of this Circuit even after the denial of this Petition for Rehearing. However, institutionally, en banc reconsideration of the Opinion is certainly preferable to relying on the operation of I.O.P. 9.1 to prevent an officer from subsequently attempting to claim that our law on this issue is not clearly established. It is, and it will remain so after today.

While remaining appreciative and cognizant of the risks that law enforcement officers face daily, we must nevertheless take care not to transform the shield of qualified immunity into a sword that licenses unreasonable force. I therefore must respectfully dissent from my colleagues' decision to deny the petition for rehearing in this case. I do not reach that conclusion lightly. This is only the second time in 26 years on our Court that I have thought it necessary to draft an opinion dissenting from a denial of rehearing. But, in Justice Frankfurter's words: "justice must satisfy the appearance of justice."[165] **[*438]** Given our controlling law here, that appearance **[**38]** is sorely lacking if we grant Trooper Bartelt immunity as a matter of law.

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[160] *Id. at 170* (citing *Bland v. City of Newark, 900 F.3d 77, 84 (3d Cir. 2018)*).

[161] *See, e.g.*, the Opinion describing David Bennett as "comparatively compliant," *957 F.3d at 172*; incorrectly distinguishing *Bennett* based on the purported difference that "Gibbons was carrying and earlier that evening had brandished a firearm," *id.*; repeatedly adopting a view unduly favorable to Officer Bartelt when it takes as true the disputed facts that Gibbons was ordered to drop his weapon, was given time to respond, and failed to comply. *Id. at 166, 168, 171-72*.

[162] At minimum, we should comply with the *Forbes* supervisory rule and remand the case to the District Court for it to spell out the disputed material facts. *Forbes, 313 F.3d at 149*. That rule exists so that we will not decide a weighty question such as this—whether our precedent created clearly established law in a given scenario—without clarity in the record as to the disputed facts.

[163] *See Kisela, 138 S. Ct at 1152* (cautioning against defining "clearly established law at a high level of generality.").

[164] *Bennett, 274 F.3d at 136*.

[165] *Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)*.