APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11023

[Filed May 21, 2019]

PAUL ANTHONY VALDERAS,
Plaintiff - Appellant

v.

CITY OF LUBBOCK, a political subdivision; BILLY MITCHELL, individually and his official capacity,
Defendants - Appellees

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 5:17-CV-245

Before JOLLY, COSTA, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Paul Valderas appeals the district court's grant of summary judgment in favor of Officer Billy Mitchell dismissing Valderas's 42 U.S.C. § 1983 excessive force claim. Valderas contends that there were genuine issues of material fact regarding whether Officer Mitchell was reasonable in using deadly force. Valderas further contends that the district court abused its discretion by accepting Mitchell's motion to strike a significant portion of Valderas's summary judgment evidence. We conclude that Valderas has failed to present a genuine issue of material fact regarding his excessive force claim. We further conclude that the district court did not abuse its discretion in granting Officer Mitchell's motion to strike certain evidence and statements offered by Valderas in summary judgment proceedings. Consequently, we AFFIRM the judgment of the district court.

I.

This case arises out of the events surrounding the arrest of Paul Valderas on the night of January 26, 2017, pursuant to a felony arrest warrant issued for Valderas's violation of parole. It is undisputed that during the arrest, Valderas was shot three times (out of the five successive shots fired) by Officer Billy Mitchell, resulting in Valderas's partial paralysis.[1]

Leading up to this event, a Confidential Informant (CI) working with the Lubbock Police Department allegedly contacted Valderas about purchasing drugs

---

[1] A security camera from a neighboring residence capturing the encounter was produced as video evidence and is relied upon by both parties on appeal.

and agreed to meet Valderas at a residence. Later that night Valderas exited the residence to meet with the occupants of a car that had parked in front of the residence. The CI sat in the passenger seat.[2] Valderas was talking to the CI through the passenger window of the parked car when he saw a vehicle approaching at a high rate of speed with its bright lights on.

The vehicle in question transported an arrest team including Officer Mitchell, Sergeant Don Billingsley, and Investigator Daniel Merritt. They were planning to take Valderas into custody pursuant to an outstanding felony warrant for his arrest. The arrest team was notified that Valderas was considered armed and dangerous. The officers were also briefed that Valderas had recently evaded police in a motor vehicle, and that he had a violent and lengthy criminal history. The plan was to apprehend Valderas as he exited the residence.[3]

Valderas claims that he feared he would be ambushed and robbed, so he took the gun in his hand from his waistband as the car approached. All three officers testified that they saw Valderas pull a gun from his waistband. According to Valderas, as he was pulling his gun from his waistband, the CI told him

---

[2] In his deposition, Valderas also mentions an unidentified person in the backseat, passenger's side, wearing a hoodie.

[3] The Lubbock Police Department had been conducting surveillance of Valderas in connection with an ongoing narcotics investigation. A SWAT team was on standby if necessary to assist in the arrest.

that it was the police, so he threw the gun into the car.[4] Investigator Merritt yelled, "Gun!" Nearly simultaneously, Officer Mitchell exited the car, drew his weapon, and yelled, "Police!"[5] Officer Mitchell fired five shots at Valderas, striking him three times.

The entire incident, from the time that the police vehicle began approaching until Valderas was shot, did not last more than ten seconds. Officer Mitchell testified that he did not see Valderas discard the weapon before opening fire. The two other officers testified to the same. Investigator Merritt testified, however, that he later found the gun inside the car.

II.

Valderas filed this civil complaint against Officer Mitchell, officially and individually, and the City of Lubbock, alleging excessive force in violation of 42 U.S.C. § 1983.[6] Officer Mitchell moved for summary judgment on grounds of qualified immunity as to the claim against him in his individual capacity, asserting that his use of force was objectively reasonable because he reasonably believed that Valderas possessed a gun and was a threat to everyone present, including the two innocent bystanders in the car next to Valderas.

---

[4] Valderas also claims that he put his hands up and started running away. This testimony is flatly contradicted by the video evidence.

[5] All three officers on the arrest team were wearing their department issued tactical vests with "POLICE" in bold, white reflective letters.

[6] The City of Lubbock did not file a brief in this appeal.

Also apropos to this appeal, Officer Mitchell filed a motion before the district court, titled "Motion for Leave to File Reply Brief, Objections and Motion to Strike and Exclude Inadmissible Portions of Plaintiff's Summary Judgment Evidence and Unsupported Assertions." In his motion, Officer Mitchell (1) requested leave to file his reply brief; (2) objected to eleven of Valderas's exhibits filed in response to the motion for summary judgment as inadmissible and not competent summary judgment evidence; (3) objected to certain assertions by Valderas as unsupported; and (4) moved to strike based on each of these objections. In response, Valderas opposed the motion, arguing that the motion was not filed in compliance with Northern District of Texas Local Rule 7.1; that is, that Officer Mitchell's counsel allegedly failed to properly conference with Valderas's counsel prior to filing the motion—contrary to the recited certification of conference.

The district court granted Officer Mitchell's motion to strike, noting that Valderas failed to contest the arguments raised in the motion to strike, and it found, without further explanation, that each objection Mitchell raised was meritorious. In the same ruling, the district court concluded that Officer Mitchell was entitled to qualified immunity and granted his motion for summary judgment. Accordingly, the district court entered judgment dismissing the claims against Officer Mitchell.

III.

Valderas now appeals the district court's grant of summary judgment on the issue of qualified immunity.

Valderas argues that the use of deadly force is confined to the moment of the threat, which he contends ceased when Valderas threw the gun in the car. Valderas points to the allegedly "inconsistent" descriptions of the location of Valderas's gun in Officer Mitchell's sworn statement on January 29, 2017 and in his December 27, 2017 affidavit as evidence that Officer Mitchell knew that Valderas was no longer armed and that the threat had ceased. Valderas also emphasizes that Sgt. Billingsley confronted the same facts as Officer Mitchell but did not fire his weapon; and he argues that this restrained conduct establishes that Officer Mitchell acted unreasonably. Additionally, he says that all three bullets struck him in the back, supporting his contention that he was fleeing when the shots were fired. Lastly, Valderas challenges the district court's decision to strike certain evidence he submitted in opposition to Officer Mitchell's motion for summary judgment.

IV.

We first address the standard of review. We review a grant of summary judgment de novo, applying the same standard as the district court. *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 244 (5th Cir. 2006)). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rogers v. Bromac Title Servs.*, 755 F.3d 347, 350 (5th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). There exists a genuine dispute of material fact "if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "We construe all facts and inferences in the light most favorable to the nonmoving party." *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005) (citing *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997)). But "[s]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012) (citing *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007)).

"Further, although courts view evidence in the light most favorable to the nonmoving party, they give greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016) (citing *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

A good-faith qualified immunity defense alters the usual summary judgment burden of proof. Although we view the evidence in the light most favorable to the nonmoving party, the plaintiff bears the burden of demonstrating that a defendant is not entitled to qualified immunity. *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (citing *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010)). "To negate a defense of

qualified immunity and avoid summary judgment, the plaintiff need not present 'absolute proof,' but must offer more than 'mere allegations.'" *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009) (quoting *Reese v. Anderson*, 926 F.2d 494, 499 (5th Cir. 1991)).

Discretionary matters, including the district court's application of local rules in disposing of motions, are reviewed under an abuse of discretion standard. *Victor F. v. Pasadena Indep. Sch. Dist.*, 793 F.2d 633, 635 (5th Cir. 1986).

V.

We now turn to address the substance of Valderas's claim. When evaluating a claim of qualified immunity "we engage in a two-part inquiry asking: first, whether taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right; and second, whether the right was clearly established." *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (internal quotation marks and citations omitted).[7] To overcome a claim of qualified immunity in an excessive force case, the plaintiff "must show '(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.'" *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (quoting *Ontiveros*, 564 F.3d at 382). Excessive force claims are "evaluated

[7] We may exercise our discretion in deciding which prong to address first. *See, e.g.*, *Cantrell v. City of Murphy*, 666 F.3d 911, 919 (5th Cir. 2012) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

for objective reasonableness based on the information the officers had when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001). "[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009). Recognizing that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *Graham v. Connor*, 490 U.S. 386, 397 (1989), the Supreme Court has warned against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Accordingly, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

"The use of deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) *(*quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)) (internal quotation marks omitted). Stated differently, "[a]n officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009) (citing *Ontiveros*, 564 F.3d at 382).

Applying the law to the facts of this case, we first note that Valderas admits to pulling a gun from his trousers. He argues, however, that the exercise of deadly force was no longer reasonable once he threw the gun into the vehicle and "turned to flee." Contrary to Valderas's assertions, the video footage does not show that he put his hands up, nor does it show that he was fleeing, when the shots were fired. *See Scott*, 550 U.S. at 380 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Instead, Valderas only can be seen leaning into the car—not discarding the gun.[8]

Given these facts, there is no genuine dispute but that Officer Mitchell's decision to use deadly force was reasonable under these circumstances. Our circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon.

---

[8] Valderas argues that Officer Mitchell's initial statement that Officer Mitchell saw Valderas's gun on the ground after Officer Mitchell approached the car creates a genuine issue of fact as to whether Officer Mitchell saw or should have seen Valderas discard the gun. We do not see any merit in this argument. First, it is not clear that Officer Mitchell's initial statement was inaccurate, as Investigator Merritt testified that, after the incident, he took the gun from the car and placed it on the ground. Second, the statements are not inherently inconsistent, as Officer Mitchell's second statement simply does not mention the location of the gun after the shooting. Third, to the extent that there is any inconsistency in Officer Mitchell's testimony, it has no bearing on the question of whether Officer Mitchell saw or should have seen Valderas discard the gun.

See, e.g., *Manis*, 585 F.3d at 844–45 (collecting cases and finding that the officer's use of deadly force was not excessive when undisputed evidence showed that suspect "in defiance of the officers' contrary orders, reached under the seat of his vehicle and appeared to retrieve an object that [the officer] reasonably believed to be a weapon"). It is immaterial whether a plaintiff was actually armed. *See Romero*, 888 F.3d at 178. Here, it is undisputed that Officer Mitchell saw Valderas intentionally brandish a firearm at the approaching officers. Although Valderas contends that he discarded the gun before he was shot, the events transpired in a matter of seconds, leaving Officer Mitchell with little time to realize that Valderas no longer possessed a gun before making the decision to open fire. Considering the totality of the facts and circumstances, a reasonable officer in Officer Mitchell's position would have reasonably perceived Valderas's actions to pose an imminent threat of serious harm at the time the shots were fired. *See Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 (5th Cir. 2016). It follows that it was not unreasonable for Officer Mitchell to use deadly force to protect himself and others. Officer Mitchell was not required to wait to confirm that Valderas intended to use the gun before shooting. *See Ramirez v. Knoulton*, 542 F.3d 124, 130 (5th Cir. 2008) ("The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." (quoting *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996))).

Consequently, we find that Officer Mitchell did not violate Valderas's Fourth Amendment rights.[9]

VI.

Valderas also argues that the district court abused its discretion when it granted Officer Mitchell's motion to strike certain exhibits and statements offered by Valderas in summary judgment proceedings because Officer Mitchell's counsel allegedly failed to comply with Northern District of Texas Local Rule 7.1.[10]

The local rule requires that a party, when filing a motion, certify that the parties conferred on the motion, explain when they conferred, which attorneys conferred, and why they could not reach an agreement.[11] Before filing the motion to strike at issue

---

[9] We are also unpersuaded by Valderas's argument that the fact that Sgt. Billingsley did not use deadly force establishes that Officer Mitchell's decision to use such force was unreasonable. Sgt. Billingsley was driving the vehicle, and he testified that Valderas was already collapsing by the time that he was able to exit. Officer Mitchell's decision to use deadly force does not become unreasonable simply because Sgt. Billingsley did not also use deadly force, especially given the differing positions of the two officers. Furthermore, Sgt. Billingsley testified that he too feared for his life and was expecting a gun fight.

[10] Valderas did not present arguments pertaining to the admissibility of the excluded evidence to the district court, nor does he make such arguments on appeal.

[11] The relevant section of Northern District of Texas Local Rule 7.1 reads as follows:

> a. Conference - Before filing a motion, an attorney for the moving party must confer with an attorney for each party

here, Officer Mitchell's counsel emailed Valderas's counsel, explained the motion, and asked Valderas's counsel if Valderas opposed the motion. Valderas's counsel expressed confusion about certain aspects of the motion, insisted that a telephone conference was required under the local rules, and stated that he could not "advise [his] client and gain approval to oppose or not oppose your motion" without such a telephone conference. Officer Mitchell's counsel replied with additional details about the motion and explained that she did not believe that a telephone conference was necessary. Valderas's counsel responded by again insisting that a telephone conference was "more appropriate."

---

affected by the requested relief to determine whether the motion is opposed. Conferences are not required for motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, motions for new trial, or when a conference is not possible.

b. Certificate of Conference.

1. Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed.

2. If a motion is opposed, the certificate must state that a conference was held, indicate the date of conference and the identities of the attorneys conferring, and explain why agreement could not be reached.

3. If a conference was not held, the certificate must explain why it was not possible to confer, in which event the motion will be presumed to be opposed.

Officer Mitchell's counsel did not respond. Instead, Officer Mitchell filed the motion with the district court. The motion contained a certificate noting the email exchange and explaining that Officer Mitchell was unsure if Valderas opposed the motion. Valderas subsequently opposed the motion solely by arguing that it violated the local rule. The district court granted the motion after summarily noting that it was "meritorious."

Valderas cites to only one decision explicating the meaning of the local rule in question and implies that the decision establishes that a telephone conversation is necessary to satisfy the conference requirement. The decision explicitly notes, however, that the conference requirement can be met through a written conferral. *See Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 290 (N.D. Tex. 1988) (en banc) (per curiam). Valderas has provided no authority to suggest that Officer Mitchell's counsel did anything improper by declining to confer over the telephone. To the point, we see no basis for finding that the district court abused its discretion by accepting Officer Mitchell's motion to strike.[12]

VII.

Accordingly, we hold that Officer Mitchell did not violate Valderas's Fourth Amendment rights when he used deadly force against Valderas. We further hold that the district court did not abuse its discretion by

---

[12] Even if we considered the evidence that the district court excluded, however, our qualified immunity determination would remain the same.

granting Officer Mitchell's motion to strike. The judgment of the district court is thus

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

Civil Action No. 5:17-CV-245-C

[Filed July 2, 2018]

PAUL VALDERAS,
Plaintiff,

v.

THE CITY OF LUBBOCK, a political subdivision, and OFFICER BILLY MITCHELL, individually and officially, of the Lubbock Police Department,
Defendants.

ORDER

On this date, the Court considered:

(1) Defendant Officer Billy Mitchell's, In His Individual Capacity, Motion for Summary Judgment Based on the Defense of Qualified Immunity, filed January 1, 2018;

(2) Plaintiff's Response in Opposition, filed January 22, 2018;

(3) Defendant Officer Billy Mitchell's Motion for Leave to File Reply Brief, Objections and

Motion to Strike and Exclude Inadmissible Portions of Plaintiff's Summary Judgment Evidence and Unsupported Assertions, filed February 5, 2018;[1] and

(4) Plaintiff's Response in Opposition to Defendant's Motion for Leave to File Reply Brief, Objections and Motion to Strike and Exclude Inadmissible Portions of Plaintiff's Summary Judgment Evidence and Unsupported Assertions, filed February 6, 2018.

I.

BACKGROUND

Plaintiff brings allegations of excessive force against the Defendants, claiming that unnecessary and unreasonable force was used when arresting him. Plaintiff brings claims for alleged violations of his civil rights guaranteed by the Fourth Amendment to the United States Constitution when he was shot by Defendant Mitchell while being arrested on an outstanding warrant. Specific to the pending Motion, which is the subject of this Order, are Plaintiff's claims brought against Defendant Officer Billy Mitchell in his individual capacity pursuant to 42 U.S.C. § 1983 for the alleged use of excessive force.

The facts are not generally in dispute up to the point of the shooting. Even at the point of shooting,

---

[1] The Court **GRANTS** the Motion for Leave to File Reply and the attached proposed Reply is deemed filed.

Plaintiff freely admits that he pulled a gun from his waistband when the three officers pulled up in their vehicle to arrest him on an outstanding warrant. He further admits that he held the gun in his hand. What Plaintiff does dispute is whether he was a threat to the officers and/or public at the time he was shot and whether he still had the gun in his hand at that point. Plaintiff contends that he had already dropped/thrown the weapon and was attempting to turn and run away from the officers when he was shot.[2] Plaintiff argues that justification for the use of deadly force no longer existed when Officer Mitchell pulled the trigger and shot him because he had already dropped/thrown the gun into the passenger side window of the vehicle that he was standing next to when the officers arrived.

The officers tell a different story. Each states in their respective statements and/or affidavits, along with deposition testimony, that Plaintiff was very much a threat and each of them feared for their lives at the time they noted he possessed a gun after he had pulled it from his waistband. The officers state that the events were in rapid motion and once the gun was observed, each took action to guard their safety and the safety of the vehicle occupants in the vehicle next to Plaintiff. Specifically, Defendant Mitchell contends that his actions were objectively reasonable under the circumstances confronting him at the time of the shooting. Mitchell further states that he never saw

---

[2] Plaintiff, at times in his deposition testimony, alleges that he "dropped" the gun; at other times he states that he had "thrown" the gun into the passenger window of the vehicle he was standing next to at the time of the shooting.

Plaintiff drop/throw the weapon and believed Plaintiff was indeed a serious deadly threat at the time he fired upon him.

Plaintiff brings no claims for deprivation of medical care and the summary judgment evidence indicates that Plaintiff was provided medical attention at the scene and then taken for medical care.

II.

STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. An actual controversy of fact exists only where both parties have submitted evidence of contradictory facts. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999). The contradictory facts must be relevant, because disputed fact issues which are irrelevant and unnecessary will not be considered by the court when ruling on a summary judgment. *Anderson*, 477 U.S. at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255. Once the moving party has initially shown "that there

is an absence of evidence to support the nonmoving party's case," the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* The pleadings are not summary judgment evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Giles v. General Elec. Co.*, 245 F.3d 474, 493 (5th Cir. 2001) (quoting *Celotex*, 477 U.S. at 324). Absent a showing that there is a genuine issue for trial, a properly supported motion for summary judgment should be granted. *See Eversley v. MBank Dallas*, 843 F.2d 172, 173-74 (5th Cir. 1988); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1022-23 (5th Cir. 1995).

III.

DISCUSSION

Qualified Immunity

The doctrine of qualified immunity serves to shield a government official from civil liability for damages based upon the performance of discretionary functions if the official's acts were objectively reasonable in light of then clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity should be the norm and, as the Supreme Court has stated, protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

To support a claim of qualified immunity, a defendant official must plead qualified immunity and demonstrate that he is a governmental official whose position involves the exercise of discretion. *Thompson v. Upshur County, Tex.*, 245 F.3d 447, 456-457 (5th Cir. 2001) (quoting *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992)). The burden then shifts to the plaintiff to rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law. *Id.* Thus, the defendant is not required to demonstrate that he did not violate the clearly established rights of the plaintiff. *Id.*

Once properly pleaded, the court must make a threshold determination whether the plaintiff has alleged the deprivation of a constitutional right which was clearly established at the time of the alleged violation. *Kipps v. Caillier*, 197 F.3d 765, 768 (1999)

(citing *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir.1999)); *see also Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985). Following this threshold inquiry, the Court must then determine whether the defendant official's conduct was objectively reasonable in light of the clearly established constitutional right allegedly violated. *See Hare v. City of Corinth, Miss.*, 135 F.3d 320, 325 (5th Cir. 1998) (citing *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997)).

A defendant's acts are held to be objectively reasonable unless all reasonable officials, acting under the circumstances presented to the defendant, would have then known that the defendant's conduct violated the Constitution or federal statute. *Anderson v. Creighton*, 483 U.S. at 640. The circumstances presented to the defendant include the facts known to the defendant at the time of the action. *Id.* at 641. However, the subjective state of the defendant's mind has no bearing on whether the defendant is entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. at 641; *Thompson*, 245 F.3d at 456.

Analysis

A. Motion to Strike

As stated above, Defendant Mitchell filed a Motion for Leave to File Reply and Motion to Strike. The Court has ruled, above, that leave is granted and the Reply is deemed filed and fully considered. As to the Motion to Strike, the Court notes that Plaintiff's response thereto does not actually contest the grounds for which Defendant Mitchell objects to certain exhibits and assertions relied upon by Plaintiff in Plaintiff's

Response to Defendant Mitchell's Motion for Summary Judgment on the Issue of Qualified Immunity. Many of the exhibits are objected to as not properly authenticated or consisting of hearsay, and the assertions by Plaintiff are objected to as improper summary judgment evidence in that they are nothing more than speculative and conclusory.[3] Rather than contest the individual points raised in Defendant's Motion to Strike, Plaintiff simply asks that the Motion to Strike be denied for failure to confer in good faith prior to filing.[4] The Court finds that the Motion to Strike is meritorious as to each objection raised therein and it is therefore **GRANTED** in it entirety. As such, the various exhibits and unsupported assertions to which Defendant has objected and requested be stricken are hereby **STRICKEN** for the reasons argued by Defendant Mitchell in his objections and in the Motion to Strike.

---

[3] Defendant Mitchell also objects to the reliance of Plaintiff's reliance on the report of an expert witness because the report was not produced in response to discovery requests and the opinions are inadmissable legal conclusions.

[4] The Court notes that the Certificate of Conference included with said motion indicated that counsel for Plaintiff responded to Defendant regarding the motion but failed to indicate whether he was opposed at that time without further review and information. Plaintiff's counsel was provided a list of the exhibits Defendant intended to challenge as inadmissible and informed that Defendant also intended to seek to exclude Plaintiff's conclusory and speculative assertions in his affidavit. Thus, Defendant filed the motion and corresponding certificate under the assumption that it was opposed. *See* L.R. 7.1(b).

B. Motion for Summary Judgment on the Issue of Qualified Immunity

Defendant Mitchell seeks summary judgment on Plaintiff's 42 U.S.C. § 1983 claim of excessive force in his individual capacity. Defendant contends that summary judgment is appropriate because no genuine issue of material fact precludes him from being entitled to the affirmative defense of qualified immunity. Additionally, he contends that his actions were objectively reasonable under the circumstances confronting him at the time.

As to the specific alleged constitutional violation at issue in this case, the familiar "reasonableness" standard governs claims for excessive use of force during an arrest. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). The elements of an excessive force claim under the reasonableness standard are (1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the excessiveness of which was objectively unreasonable. *See Hudson v. McMillian*, 503 U.S. 1, 9 (1992). The test of reasonableness under the Fourth Amendment 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. The reasonableness of the use of force is judged from the perspective of a reasonable officer at the scene rather than with the 20/20 vision of hindsight. *Id.* In other words, " [e]xcessive force claims . . . are evaluated

for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001). In determining objective reasonableness, a court must balance the amount of force used against the need for that force. *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996). The "calculus of reasonableness" a court uses to make that determination "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-99. "[T]he need for force determines how much force is constitutionally permissible." *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). Although "[o]bjective reasonableness is a matter of law for the courts to decide, not a matter for the jury, . . . underlying historical facts may be in dispute that are material to the reasonableness determination." *Williams v. Bramer,* 180 F.3d 699, 703 (5th Cir. 1999).

Plaintiff's main contention is that Mitchell's statements differ as to whether he knew Plaintiff was still armed or did not know if Plaintiff was still armed when he shot Plaintiff. Plaintiff contends that this issue creates a genuine issue of material fact. Specifically, Plaintiff argues that Mitchell's actions were not objectively reasonable in the amount of force he used, which resulted in Plaintiff's partial paralysis. Plaintiff also argues that genuine issues of material fact exist because Mitchell's story differs as to whether Mitchell recalled seeing the weapon on the ground after

the shooting or whether it was in the vehicle where Plaintiff claims to have dropped it.

The Court will quote the relevant portions of Defendant Mitchell's two statements. The first is from Officer Mitchell's report and is dated January 29, 2017:

> As we stopped, Mr. Valderas stood up, looked at us, and raised the right side of his shirt with his right hand. Because of the illumination from the headlights, I could immediately see that he was possessing a firearm. At this point he turned his body slightly into a bladed stance. Still in the same motion of raising his shirt, he grabbed the firearm and removed it from his waistline. I became immediately fearful he would use the pistol to cause serious bodily injury or death to myself or the other officers in the vehicle. We all immediately began advising he had a gun. Through my training and experience I know it is very dangerous to be involved in a fire fight while in a vehicle. I exited the vehicle as quickly as possible and, being cognizant of the innocent citizens in the car next to Mr. Valderas, I stepped to the right side of the vehicle I was in. I drew my department issued firearm from its holster as I yelled "POLICE!" Mr. Valderas continued displaying the pistol. I was very afraid that Mr. Valderas was going to attempt to use deadly force against myself or one of the other Officers in an attempt to escape custody. I fired multiple times at Mr. Valderas' upper torso. I observed him crouch down and yell in pain. He

> then fell to the ground. . . . I observed the pistol, which he was holding, on the ground near him.

Def.'s App. 8, Officer Report dated Jan. 29, 2017.

The second is from Defendant Mitchell's Affidavit and is dated December 27, 2017—approximately 11 months after the first statement recorded in the officer's report:

> Our vehicle stopped just in front of the passenger car and Mr. Valderas stood up, looked at us, and raised the right side of his shirt with this right hand. I could immediately see that Mr. Valderas was possessing a firearm because of the illumination from our headlights. Mr. Valderas turned his body slightly toward the vehicle in a shooting stance, raised his shirt, and grabbed and removed the firearm from his waistline. I immediately became fearful he would use the pistol to cause serious bodily injury or death to myself or the other officers in the vehicle.
>
> Through my training and experience I know it is very dangerous to be involved in a fire fight while in a vehicle. I exited the vehicle as quickly as possible, while being cognizant of the two innocent passengers in the car next to Mr. Valderas. I stepped to the right side of the vehicle I was in and drew my department issued firearm from its holster as I yelled 'Police!.' I did not ever see Mr. Valderas drop the weapon.
>
> I was afraid Mr. Valderas was going to attempt to use deadly force against myself or one of the

> other officers in an attempt to escape custody. I fired multiple times at Mr. Valderas' upper torso. I observed him crouch down and fall to the ground.

Def. App. 3, Affidavit of Officer Billy Mitchell dated Dec. 27, 2017.

The Court finds that the two statements do not create a genuine issue of material fact because in both statements Defendant Mitchell states that he saw Plaintiff pull a gun from his waistband and believed that Plaintiff was still armed when he shot him. Nothing in either statement differs on Mitchell 's good-faith belief that Plaintiff was still armed and that Mitchell had not seen Plaintiff drop the weapon before he fired. The fact that Mitchell states in the first statement that he observed the gun on the ground after the shooting, but does not include that language in the second statement, is not relevant to the issue of what happened up to the point of Mitchell pulling the trigger and shooting Valderas.[5] "An issue is material if its

[5] Moreover, one of the other officers (Officer Merritt) states that he removed the gun from inside the vehicle where Plaintiff had thrown/dropped it and placed the gun on the ground immediately after the shooting. Thus, it is not controverted that the gun was indeed on the ground after the shooting and the deposition testimony of the other officers maintains that the gun was indeed on the ground at the time Mitchell held cover on Plaintiff and when aid was being administered to Plaintiff. Def.'s App. 527-28 ("I saw a silver firearm sitting on the female's lap. I obviously picked it up, placed it away from Valderas, away from them on the pavement."; *id.* at 362 ("Q. Was that weapon that you saw on the ground near Mr. Valderas? A. It was in close–. . . ."); *id.* at 530 ("A. It's on the pavement beside the blue car.").

resolution could affect the outcome of the action." *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405,409 (5th Cir. 2002). Any disputed fact issues are not material if, even according to a plaintiff's version, the violation does not implicate clearly established law. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 739 (5th Cir. 2000). A court may grant a summary judgment motion regardless of whether immaterial facts are in dispute. *Rally's, Inc. v. Int'l Shortstop, Inc.*, 939 F.2d 1257, 1264 (5th Cir. 1991).

Plaintiff testified in his deposition, and argues in his Response, that he threw the gun into the passenger window of the vehicle he was standing next to and then turned and ran away from the cops. Def.'s App. 275. However, when questioned further as to how far he had run away before being shot, Plaintiff clarifies that he had really only proceeded "just enough to turn" and that "while I was turning the first bullet grazed me in my side and I remember after that just hitting the floor." (Id. at lines 14-17. Plaintiff also testified that the officers never announced that they were police. However, the video evidence directly refutes this testimony by Plaintiff because the officers can easily and distinctly be heard announcing that they were police.[6] Moreover, Plaintiff seems to center his

---

[6] In addition, Plaintiff admits that the passenger in the vehicle he was standing next to informed him that the officers were police. There is no genuine or material issue of fact because Plaintiff not only knew they were police officers at that point, but contends that it is the reason he attempted to throw/drop the gun from his hand into the vehicle. Finally, the video reveals officers yelling, "He's got a gun, police!" Def.'s App. 464 ("A. It looks like he's facing our vehicle. Q. Did he -- do you hear anything being said at seven

contention of having disarmed on the fact that he knew the officers were police and that is why he allegedly dropped/threw the gun into the passenger side of the vehicle that he had been standing next to when the officers pulled up to arrest him.

Thus, Plaintiff has freely admitted to pulling the gun, holding and displaying it in his hand, and throwing/dropping it as he began turning to run.[7] The fact that Defendant Mitchell may have viewed the physical act of Plaintiff moving his arm and hand (while holding the weapon) in an effort to throw it into the vehicle as a threatening motion can not be said to be objectively unreasonable under the circumstances. When Plaintiff's counsel questioned one of the officers that was in the vehicle with Mitchell, he specifically asked, "And that fashion is that [Valderas] just lifted the gun up . . . the fashion that you're talking about?" Def.'s App. 392. The officer responded, "The fashion is that it came up, and I got a full view of the handgun."

---

seconds? . . . A. Yeah . . . A. That "he's got a gun, police."). At any rate, "regardless of what transpired up until the shooting itself, [Plaintiff's] movements gave the officers reason to believe, at that moment, that there was a threat of physical harm." *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992); *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (any contributing negligence by an officer in creating a situation where the danger of mistake would exist is insufficient for finding of liability under the law).

[7] Plaintiff testified in his deposition that he intentionally pulled out the gun to let whoever was in the vehicle pulling up to him know that he was armed because he was expecting that he was about to "get jumped, shot or something, you know." Def.'s App. 277-78.

Id. Plaintiff's own testimony indicates that all of these actions and the first shot happened in a rapid, almost instantaneous, succession. Def.'s App. 291 ("Q. -- and the shots were fired at the same time? A. Yes, sir."); *id.* at 275 ("You know, I throw [sic] the gun in the car, turn my back. . . . [w]hile I was turning, the first bullet grazed my in the side. . . .").[8]

Of importance in this case is the fact that a video, and corresponding audio, recording was made by a video-surveillance camera located near the scene. Such video evidence is properly considered as part of the record by a court in ruling on a motion for summary judgment. *Colston v. Barnhard*, 130 F.3d 96, 98 (5th Cir. 1997). Likewise, the audio, when available, is generally clear. As the Supreme Court has aptly stated, when a recorded videotape depicts certain evidence, it can be relied upon by the courts in a summary judgment setting, even if a plaintiff's affidavit and version differ. *Scott v. Harris*, 127 S. Ct. 1769, 1775 (2007). The Supreme Court states, "[w]e are happy to allow the videotape to speak for itself." *Id.* The Supreme Court further notes that, in contrast to a plaintiff's version, "[t]he videotape tells quite a different story." *Id.* "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for

---

[8] The deposition testimony of Officer Billingsley (testimony given while viewing the video and being questioned by Plaintiff's counsel) also supports that the movements and the first shot occurred almost at the same instant.

purposes of ruling on a motion for summary judgment." *Id.* at 1776.

Importantly, the video evidence clearly shows that Plaintiff had not run from the officers and was not shot while running away, as he now attempts to argue.[9] Moreover, the video does not clearly show him disarming himself in such a manner as to objectively remove any threat the officers might have perceived. At any rate, the evidence does not support Plaintiff's version that he was clearly no longer a threat and than any reasonable officer would have recognized such under the circumstances as they presented at the time.

As stated above, "[f]actors to consider in determining whether the force was 'objectively reasonable' include 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." *Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016). Even if the officer's "actions may not have been as restrained as we would like to expect from model police conduct," qualified immunity protects officers from the sometimes hazy border between excessive and acceptable force. *Id.* at 315 (quoting *Saucier v. Katz*, 533 U.S. 194, 2016 (2001)).

It is undisputed by any controverting evidence that (1) Plaintiff had previously fled a police pursuit a few

---

[9] When pressed in his deposition as to whether his back was completely to Defendant Mitchell when he was shot, Plaintiff clarified (after first attempting to state that his back was totally facing Mitchell) that "I was in turning motion, yes."

days earlier, endangering himself, the officer, and the public at large; (2) Plaintiff was known to be a member a violent gang and had an extensive criminal history; (3) Plaintiff was known to often be armed with a weapon; (4) an outstanding warrant existed for Plaintiff's arrest; (5) a plan was formulated to attempt to arrest Plaintiff and prevent him becoming mobile and again endangering others in another high-speed chase; (6) Plaintiff intentionally raised his shirt and pulled the gun in an effort to show the persons in the vehicle pulling up to him that he was armed; (7) the officers all noted that Plaintiff had a gun and feared for their safety; (8) each of the three officers began evasive positioning to remove themselves from the interior of the car and prevent the possibility of being shot in the vehicle; (9) Plaintiff was informed by the passenger in the vehicle he was standing next to that the officers were police; (10) the video and testimony indicates that the officers can be heard yelling "gun" and "police" immediately prior to the shooting of Plaintiff by Mitchell; (11) other than Plaintiff's conclusory and speculative statement (which is improper summary judgment evidence) that the officers saw him disarm, there is no evidence that any of the officers believed Plaintiff was unarmed when Defendant Mitchell fired his weapon; (12) Plaintiff's own conduct of intentionally pulling his gun caused the officers to have a clear and present danger of severe bodily harm and/or death; and (13) according to Plaintiff's own deposition testimony, Defendant Mitchell discharged his weapon at almost the same instant Plaintiff threw the gun and was only beginning to turn to attempt to flee.

As the circumstances faced by an officer claiming the affirmative defense of qualified immunity are highly relevant, these undisputed facts and circumstances in the moments that preceded Defendant Mitchell's shooting of Plaintiff must be kept in mind when analyzing Plaintiff's claims against Defendant Mitchell's assertion of qualified immunity. The "inquiry focuses . . . on the specific circumstances of the incident—could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force?" *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 383 n.1 (5th Cir. 2009). Based upon Plaintiff's conduct and actions, it cannot be said that all reasonable officers under similar circumstances would have believed that the use of deadly force was unwarranted or that it was certain that Plaintiff no longer not possessed the weapon at the point he was shot. Furthermore, the United States Court of Appeals for the Fifth Circuit has repeatedly stated that "the focus of the inquiry is 'the act that led [the officer] to discharge his weapon.'" *Reyes v. Bridgwater*, 362 F. App'x. 403, 406 (5th Cir. Jan. 22, 2010) (quoting *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009)). Here, Plaintiff has testified that he pulled his gun when the officers pulled up, causing them to have a reasonable fear for their safety and lives. Even in cases in which it was later discovered that a weapon did not exist, qualified immunity still applies. *See Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991) (no excessive force in instance where suspect repeatedly refused to keep hands raised and appeared to be reaching for an object). Here, Plaintiff clearly pulled a gun when the police arrived.

Use of deadly force is presumptively reasonable when an officer has reason to believe the suspect poses a threat of serious harm to the officer or to others. *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). As such, it cannot be said to have been clearly unreasonable for Defendant Mitchell to make a split-second decision to shoot or that shooting was clearly excessive under the circumstances. *See, e.g.*, *Ramirez v. Knoulton*, 542 F.3d 124, 128, 131 (5th Cir. 2008) (involving a suspect who repeatedly refused officer's commands within several yards from the officer and moved his hands in what the Fifth Circuit believed "could reasonably be interpreted as a threatening gesture"). Plaintiff intentionally pulled his gun and no controverting evidence exists (beyond Plaintiff's speculative, conclusory, self-serving statement to the contrary) indicating that Defendant Mitchell was aware Plaintiff was attempting to disarm, or had in fact disarmed, at the instant Mitchell shot. Plaintiff has failed to carry his burden to overcome Defendant Mitchell's affirmative defense of qualified immunity. Qualified immunity recognizes that at times officers must "make split-second judgments" while reacting to a "tense, uncertain, and rapidly evolving" scene. *Carroll v. Ellington*, 800 F.3d 154, 173-74 (5th Cir. 2015). That is exactly what Defendant Mitchell did in this instance.

IV.

CONCLUSION

Based on the above discussion and the arguments contained in Defendant Mitchell's Motion and Reply, Defendant Officer Billy Mitchell's Motion for Summary

Judgment on the issue of qualified immunity is **GRANTED.**

SO ORDERED this 2nd day of July, 2018.

/s/ Sam R. Cummings
SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

Case No.

[Filed October 25, 2017]

PAUL VALDERAS,
Plaintiff,

v.

THE CITY OF LUBBOCK, a political subdivision, and OFFICER BILLY MITCHELL, individually and officially, of the Lubbock Police Department,
Defendants.

JURY DEMAND

Attorneys Appearing for Plaintiff

Daniel A. Dailey *(Admitted)*
IL-SBN: 6312616
David L. McBride. (*pending pro hac vice)*
LA-SBN:35901
Tatiauna J. Holland (*pending pro hac vice)*
TX-SBN: 24090519

Kingdom Litigators, Inc.
A Public Interest Law Firm
100 Crescent Court Ste. 700
Dallas, TX 75201
Office: (214) 422-9350
Fax: (469)736-0022
www.KingdomLitigators.com

NOW COMES, Plaintiff, PAUL VALDERAS, ("Plaintiff") by and through undersigned counsel, against the CITY OF LUBBOCK, a political subdivision, and DEFENDANT BILLY MITCHELL, individually and his official capacity, (Defendant Mitchell) (collectively "Defendants") and each of them in the alternative, states the following:

INTRODUCTION

The national hysteria surrounding police-involved shootings has placed an enormous pressure on honest cops to support dishonest cops and endure nationwide criticisms for one dishonest officer's conduct. Despite this reality, in the Lubbock Police Department, a few honest men and women refused to support Officer Billy Mitchell's (Mitchell) justification statement for shooting Paul Valderas (Mr. Valderas) in the back three times. Those honest cops must be acknowledged and protected against fraternal police and public pressures which often cause officers to corroborate police reports for the interests of their departments.

On January 26, 2017, Officer Mitchell shot Mr. Valderas three times in the back although Mr. Valderas was unarmed and not a threat. After Mr.

Valderas fell to the ground, Mitchell stated, ***I*** [Mitchell] ***approached…*** ***"I observed the pistol, he*** [Valderas] ***was holding, on the ground near him***."

Surveillance video from a nearby home later emerged. The audio and video showed Mitchell did not properly identify himself as a police officer. When Mr. Valderas realized Mitchell was a cop, Mr. Valderas *very clearly* disarmed himself by placing the gun in a nearby vehicle—inaccessible to his person. Yet, Mitchell still shot and continued shooting without giving a single command. Mitchell even shot as Mr. Valderas was falling, helplessly, to the ground. Mr. Valderas is now permanently paralyzed from the chest down.

It is apparent Mitchell knew the shooting was unjustified, so he lied. But more importantly, Mitchell's fellow officers did not support his lie. By holding Mitchell accountable, we protect, validate, and encourage honest police, like Mitchell's fellow officers, to continue resisting the fraternal pressure to place departmental interests over truth.

JURISDICTION

1. Federal jurisdiction is proper pursuant to 28 U.S.C. §1331 and 42 U.S.C. §1983.

2. Venue in the Northern District of Texas-Lubbock Division is proper pursuant to 28 U.S.C. §1391 as the police-involved shooting occurred within this district and all Defendants reside within this district.

PARTIES

3. The Plaintiff, PAUL VALDERAS, is a U.S. citizen, a resident of Lubbock, Texas, and father of five minor children.

4. The Defendant, CITY OF LUBBOCK, is a political subdivision of the State of Texas and operates and controls the Lubbock Police Department.

5. The Defendant, Billy Mitchell, is a sworn police officer in the Lubbock Police Department. Upon information and belief, Defendant Mitchell resides within this federal district.

FACTS

6. The Defendant, CITY OF LUBBOCK, employed Defendant Officer Billy Mitchell (hereinafter "Defendant Mitchell") as a sworn police officer in the Lubbock Police Department (LPD), and assigned him to different divisions, which included narcotics and gang unit.

7. An officer in the LPD narcotics unit contacted a Confidential Informant (CI) to coerce the Plaintiff to take possession of a firearm on January 23, 2017.

8. On January 26, 2017, the Plaintiff stood outside of the CI's vehicle when an ordinary Chevy Tahoe approached. Defendant Mitchell exited the Chevy Tahoe but did not identify himself as police. He immediately drew his weapon and shot at the Plaintiff five times only yelling 'police' over his fire.

9. The entire interaction between the Plaintiff and Defendant Mitchell, including the shooting, was

captured on surveillance video. The Plaintiff by reference incorporates the video as Exhibit A.

10. According to the video, on January 26, 2017, a random Chevy Tahoe approached the Plaintiff as he stood on the street talking to the CI, who sat in the passenger's seat. The Chevy Tahoe stopped abruptly and appeared as an ambush. This, understandably, caused the driver and the Plaintiff to fear for their lives.

11. The CI told the Plaintiff that the individuals in the random Chevy Tahoe were police, although Defendant Mitchell did not make any verbal commands or identify himself. The Plaintiff immediately discarded the gun through the passenger window and away from Plaintiff's person to surrender. Suddenly and without warning, but after the weapon was clearly discarded, Defendant Mitchell shot at the Plaintiff.

12. Still, Defendant Mitchell never issued any verbal commands. Unarmed and in fear for his life, the Plaintiff sought safety because Defendant Mitchell continued to shoot.

13. Unarmed, the Plaintiff reactively ducked to avoid Defendant Mitchell's bullets. Defendant Mitchell did not stop shooting. The Plaintiff ran for safety away from Defendant Mitchell with both hands partially raised exposing the Plaintiff's back, but Defendant Mitchell did not stop shooting.

14. Defendant Mitchell discharged his weapon a total of five times. Three of the five bullets struck the Plaintiff in the back which caused instant paralysis. ***The fourth bullet struck Plaintiff, while his hands***

were raised, directly in the middle of Plaintiff's back which caused him to fall. The fifth bullet struck the Plaintiff as his knees were on the ground and his upper body 'collapsing'.

15. Defendant Mitchell submitted his written police report on February 1, 2017— approximately four days after the incident.

16. Unaware of the surveillance video, Defendant Mitchell stated that after he fired, "he and [another officer] approached the passenger side of the vehicle [as another officer] covered the citizens in the car, and *I observed the pistol, which* [Plaintiff] *was holding, on the ground near him."* The audio of the video directly contradicted this statement.

17. Unaware of the video surveillance, Defendant Mitchell stated, "*he exited his vehicle…drew his weapon as he yelled 'Police,' but the Plaintiff continued to display a weapon."*

18. The visual images of the surveillance video contradicted Defendant Mitchell's statement. Defendant Mitchell never identified himself as a police officer, until he fired his weapon. According to the surveillance video, when Defendant Mitchell first shot, Plaintiff had already discarded his weapon from his person, did not display a weapon, and his hands were visible.

19. Neither Defendant Mitchell or his colleagues alleged that the Plaintiff pointed a weapon or any object at any officer or individual. Likewise, the surveillance video confirmed that the Plaintiff did not point a weapon at any officer or individual.

20. Three bullets struck the Plaintiff in the back. As a result, the Plaintiff is now paralyzed from the chest down for the remainder of his natural life.

42 U.S.C. § 1983 - EXCESSIVE FORCE in Violation of the Fourth and Fourteenth Amendments to the United States Constitution - (v. Defendant Mitchell, officially and individually)

21. At all times alleged herein, Defendant Mitchell was a sworn police officer employed with the Defendant City of Lubbock and acting under color of law when Defendant Mitchell shot the unarmed Plaintiff.

22. The Defendant City of Lubbock remains responsible because it authorized, approved and controlled the conduct of Defendant Mitchell.

23. The Defendant City of Lubbock, by and through the LPD, attempted to create a dangerous situation when LPD officer(s) entrapped the Plaintiff into taking possession of a stolen weapon, upon information and belief.

24. At all relevant times alleged herein, no citizen, officer, or bystander was in imminent fear for their life or in fear of receiving serious bodily injury caused by the Plaintiff.

25. At all relevant times, the Plaintiff possessed the right from excessive force and all rights granted under the U.S. Constitution, including the right not to be entrapped to commit a crime.

26. Defendant Mitchell used objectively unreasonable force when the Plaintiff did not pose an imminent threat of death or serious bodily injury to Defendant Mitchell, or any other person during the relevant time alleged herein.

27. Neither of the two officers present with Defendant Mitchell fired because it was not reasonable or justified under the circumstances, and no reasonable police officer would have discharged their firearm especially when the Plaintiff's hands were visible, and he was unarmed.

28. As alleged herein, Defendant Mitchell did not need to fire the first two, off-target, bullets at the Plaintiff when Plaintiff did not point a weapon at any police officer or individual.

29. As alleged herein, Defendant Mitchell did not need to fire the third bullet while Plaintiff was turned away from Defendant Mitchell, exposing the unarmed Plaintiff's back to Defendant Mitchell and Defendant Mitchell's fellow officers.

30. As alleged herein, Defendant Mitchell did not need to fire the fourth bullet striking the unarmed Plaintiff in the middle of his back as the Plaintiff was completely turned away from the Defendant and Defendant's fellow two officers.

31. As alleged herein, Defendant Mitchell did not need to fire the fifth bullet as the unarmed Plaintiff was falling to the ground.

32. Every shot fired by Defendant Mitchell was excessive and an unreasonable use of force according to

the need of effectuating an arrest on an unarmed citizen. There was nothing Plaintiff could do to avoid Defendant Mitchell's fire.

33. The Plaintiff collapsed to the ground as a direct cause of Defendant Mitchell's bullet which struck the Plaintiff in the spinal cord causing instant paralysis.

34. Defendant Mitchell's fellow officers never fired their weapons because there was no immediate threat of death or serious bodily harm.

35. The force used by Defendant Mitchell was inappropriate, unwarranted and unjustified to arrest the Plaintiff.

36. In fact, Defendant Mitchell acted in extreme and reckless disregard for his fellow officers, innocent bystanders, and the civilians in the vehicle who were in the line of off-target fire from Defendant Mitchell.

37. Defendant Mitchell knew his conduct was unlawful and excessive, so he made false statements in his police report to justify his actions.

38. The conduct of Defendant Mitchell constituted excessive force in violation of the Fourth Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment to the United States Constitution.

39. As a direct and proximate cause of Defendants use of excessive force, in shooting Plaintiff three times in the back, the Plaintiff suffered severe and permanent physical and emotional injuries.

WHEREFORE, Plaintiff prays for compensatory damages, punitive damages, attorney's fees, and costs pursuant to 42 U.S.C. 1988, and all relief this court deems reasonable and just.

Submitted: October 25, 2017

Signed: /s/ Daniel A. Dailey
Daniel A. Dailey, Esq.
Kingdom Litigators, Inc.
A Public Interest Law Firm
100 Crescent Court Ste. 700
Dallas, TX 75201
Office: (214) 422-9350
Fax: (469)736-0022
Email: ddailey@kingdomlitigators.com
IL-SBN: 6312616
NDTX Admission: 1/23/17

APPENDIX D

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.