No._____

In The
Supreme Court of the United States

MONTYE BENJAMIN, as Administratrix of the Estate of JAYVIS LEDELL BENJAMIN,
Petitioner,
v.

LYNN THOMAS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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APPENDIX FOR
PETITION FOR WRIT OF CERTIORARI

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August 8, 2019

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10204

D.C. Docket No. 1:16-cv-01632-WSD

MONTYE BENJAMIN,
as Administratrix of the Estate of her son,
Jayvis Ledell Benjamin, and on her own behalf,

Plaintiff - Appellant,

versus

LYNN THOMAS,
individually,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 13, 2019)

Before MARTIN, JILL PRYOR and JULIE CARNES, Circuit Judges.

PER CURIAM:

This appeal arises out of the tragic fatal shooting of the appellant Montye Benjamin's 20-year-old son, Jayvis Benjamin, by Lynn Thomas, a police officer in the Avondale Estates Police Department.[1] Benjamin filed a lawsuit under 42 U.S.C. § 1983, alleging among other things a claim for excessive force against Thomas. Thomas moved for summary judgment on the excessive force claim, arguing that he was entitled to qualified immunity. The district court agreed with Thomas and granted his motion.

Benjamin contends on appeal that genuine disputes of material fact exist that should have precluded the district court's entry of summary judgment. To establish these disputes, Benjamin relies on affidavits from her son Steven and herself. These affidavits describe a dash camera video that differs in material respects from the dash camera footage Thomas attached to his summary judgment motion. Because these affidavits are inadmissible and irreducible to admissible form, however, we may not consider them on summary judgment. Viewing the evidence that we may properly consider in the light most favorable to Benjamin, we conclude that Thomas is entitled to qualified immunity and therefore affirm the district court.

[1] Thomas was a sergeant when the fatal shooting occurred; he is now Chief of the Avondale Estates Police Department. Thomas was not the only defendant named in the complaint, but he is the only defendant who is party to this appeal.

I. BACKGROUND

A. Facts

We discuss here only those facts that are properly supported in the record.

As Thomas in his patrol car entered an intersection near a residential part of Avondale Estates, Georgia, a Ford Mustang ran a red light and zoomed by. Thomas pursued and soon discovered that the Mustang had skidded across a front yard and crashed into another vehicle sitting in a driveway. Thomas parked his patrol car about thirty feet away from the Mustang and walked toward it. As Thomas approached the Mustang, he repeatedly instructed the driver, Jayvis, to remain inside. Jayvis banged on the car door, attempting to force it open. Thomas reached into the driver's side window, which had been blown out in the crash, to try to contain Jayvis. Jayvis nevertheless exited the Mustang through the window as Thomas stepped backwards.

Once Jayvis exited the vehicle, he began to approach Thomas. Eyewitnesses described Jayvis as taller, larger, and younger than Thomas. According to dash camera footage obtained from Thomas's patrol car and eyewitness testimony, Thomas retreated as Jayvis continued to advance. Thomas repeatedly instructed Jayvis to stop, get down, and get back in the car, but the dash camera video shows that Jayvis failed to comply with any of these orders. Instead, Jayvis kept coming toward Thomas, swinging his arms and shouting, "[Y']a[]ll see what he's doing to

me?" Doc. 27-5 at 3 ¶ 6.[2] Jayvis then struck Thomas. The evidence is in dispute as to what happened after Jayvis struck Thomas: some witnesses testified that Thomas tripped over nearby bushes, others testified that Thomas fell to the ground, and others testified that Thomas remained crouching or standing. We accept for summary judgment purposes the version of the facts most favorable to Benjamin, that Thomas remained standing after being struck. Thomas then pointed his gun at Jayvis and fired a single, fatal gunshot. The distance between Jayvis and Thomas when Thomas fired the fatal shot is also disputed, but when viewed in the light most favorable to Benjamin, the evidence indicates that Jayvis was roughly six feet away from Thomas.

B. Procedural History

As relevant to this appeal, Benjamin, as Administratrix of Jayvis's Estate and on her own behalf, sued Thomas under 42 U.S.C. § 1983, alleging that Thomas violated Jayvis's Fourth Amendment right to be free from the use of excessive force. At the close of discovery, Thomas moved for summary judgment on the ground that he was entitled to qualified immunity. The district court agreed, granted Thomas's summary judgment motion, and dismissed the action.

This is Benjamin's appeal.

[2] "Doc. #" refers to the numbered entries on the district court's docket.

II. STANDARD OF REVIEW

We review a district court's order granting summary judgment *de novo*, applying the same legal standards as the district court. *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015). To prevail on summary judgment, the movant must show " 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1312 (11th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). "If the movant meets its evidentiary burden, the burden shifts to the nonmoving party to establish—with evidence beyond the pleadings—that a genuine dispute material to each of its claims for relief exists." *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 692 (11th Cir. 2014). On summary judgment, we "view the evidence and the inferences from that evidence in the light most favorable to the nonmovant." *Id.*

III. DISCUSSION

Benjamin contends on appeal that genuine disputes of material fact exist that should have precluded the district court's entry of summary judgment. She further contends that when we construe the disputed facts in her favor, as we must on summary judgment, Thomas is not entitled to qualified immunity. We address each of these contentions in turn.

A. The Benjamins' Affidavits Create No Genuine Dispute of Material Fact.

Benjamin argues that at least two material facts remain in dispute. First, she contends that the evidence is in dispute as to whether Jayvis was walking toward or away from Thomas after Jayvis exited the Mustang. Second, Benjamin contends that it is disputed whether, in the moments preceding the fatal gunshot, Thomas pushed Jayvis, who then attempted to move past Thomas. Thomas responds that no genuine dispute of material fact exists because the evidence on which Benjamin relies to create such a dispute is precluded by the best evidence rule. We agree with Thomas.

As evidentiary support for the factual disputes she raises, Benjamin relies on affidavits from herself and her son, Steven. In these affidavits, the Benjamins provided accounts of the moments immediately preceding the fatal shooting. Neither Benjamin nor Steven was present at the scene of the shooting. Rather, the Benjamins testified in their affidavits that the district attorney's office showed them a dash camera video before and during a grand jury proceeding against Thomas that differed in key respects from a dash camera video later provided to their attorney. Specifically, the Benjamins testified that they believe the dash camera video was edited sometime after the grand jury proceeding. But Benjamin has neither identified an individual responsible for altering the footage nor located

a version of the dash camera footage that portrays the events preceding the shooting as the Benjamins described in their affidavits.

The Benjamins' accounts of the events preceding the fatal shooting are inadmissible under Federal Rule of Evidence 1002 (the "best evidence rule"). The best evidence rule provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. As the Ninth Circuit has stated, the best evidence rule thus applies "when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself—particularly when the witness was not privy to the events those contents describe." *United States v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004); *see also Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994) ("Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains facts that are also testified to by a witness." (internal quotation marks and citation omitted)).

Under an exception to this general rule, articulated in Rule 1004, "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if . . . all the originals are lost or destroyed, and not by the proponent acting in bad faith; [or] an original cannot be obtained by any available

judicial process." Fed. R. Evid. 1004(a)-(b). The best evidence rule therefore requires "the proponent [to] produce the original . . . or explain its absence." *Bennett*, 363 F.3d at 953. Here, Benjamin has done neither. She has neither introduced the purportedly unaltered video into evidence nor explained its absence such that her testimony about its contents could be admitted under either Rule 1002 or 1004.

It is true that evidence does not have to be in admissible form to be considered at the summary judgment stage. But "[o]n motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form." *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005). As an example, we may consider on summary judgment evidence in the form of inadmissible hearsay when the declarant is available to testify at trial directly about the matter at issue. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012). We nevertheless have cautioned that "[t]he possibility that unknown witnesses will emerge to provide testimony . . . is insufficient to establish that [a] hearsay statement could be reduced to admissible evidence at trial," especially "when the hearsay statement is rebutted by evidence that can be reduced to admissible form." *Id.* at 1294.

Here, the record contains no indication that the Benjamins' accounts of the events preceding the fatal shooting are reducible to admissible form. The unedited

video the Benjamins testified they have seen that supports their accounts is missing from the record. The record contains no indication that this unedited video is available anywhere. The Benjamins have not identified any individual with personal knowledge that the video in the record has been edited such that the accounts in their affidavits could be admitted under Rule 1004. The record also identifies no person who could supply eyewitness testimony regarding the events preceding the shooting that would corroborate the Benjamins' accounts of the video they describe in their affidavits. Because the accounts in the Benjamins' affidavits are inadmissible and irreducible to admissible form at trial, we may not consider them on summary judgment. Put differently, in viewing the evidence in Benjamin's favor, we may not rely on the facts as described in the Benjamins' affidavits.

B. Thomas Is Entitled to Qualified Immunity.

We next consider whether, based on the facts construed in the light most favorable to Benjamin, Thomas is entitled to qualified immunity. A government official who raises qualified immunity as an affirmative defense "bears the initial burden of showing he was acting within his discretionary authority." *Glasscox v. Argo*, 903 F.3d 1207, 1213 (11th Cir. 2018) (internal quotation marks omitted).

When, as here, the official makes this showing,[3] the burden shifts to the plaintiff to show that "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004).

We begin with the first step in the qualified immunity inquiry—whether Thomas violated Jayvis's constitutional rights. The Fourth Amendment prohibits the government from violating an individual's right "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Under well-settled precedent, "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). To determine whether an officer's use of deadly force was constitutionally excessive, "a court must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand." *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (internal quotation marks omitted).

As the Supreme Court instructed in *Graham v. Connor*, 490 U.S. 386 (1989), the task of "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment

[3] Neither party contends that Thomas has failed to carry his burden of showing that he was acting within his discretionary authority when he shot Jayvis.

interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks omitted). In balancing the individual and the governmental interests, we "must evaluate a number of factors, 'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer[] or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' " *Lee*, 284 F.3d at 1197-98 (quoting *Graham*, 490 U.S. at 396).

Viewing the facts in the light most favorable to Benjamin, we conclude that Thomas's actions were reasonable under the rapidly evolving circumstances he faced. Considering the *Graham* factors out of turn, the second factor, whether Jayvis posed an immediate threat to Thomas's safety, weighs strongly in Thomas's favor. After Thomas discovered Jayvis's crashed vehicle, Thomas approached the car and directed Jayvis to remain inside. Instead of remaining in the car as directed, Jayvis climbed out of the vehicle's window and began to advance toward Thomas. Thomas repeatedly instructed Jayvis to stop, get down, and get back in the car. But Jayvis did not comply. Instead, he continued advancing toward Thomas while yelling and waving his arms and then struck Thomas. How close Jayvis was to Thomas when Thomas fired the fatal shot is a matter of dispute, but the evidence, when viewed in Benjamin's favor, indicates that Jayvis was roughly six feet away from Thomas. Jayvis's distance from Thomas does not disturb our

conclusion that Thomas reasonably believed that Jayvis posed an immediate threat to his safety.

The third *Graham* factor, whether Jayvis was resisting or attempting to evade arrest, also weighs in Thomas's favor. Jayvis repeatedly disregarded Thomas's commands to remain in the car, to stop advancing toward him, to get on the ground, and to get back in the car. Thomas had probable cause to arrest Jayvis after witnessing his reckless driving; we thus conclude that Jayvis's conduct in disobeying Thomas's commands amounted to resisting arrest.[4] No admissible evidence shows that Jayvis ceased resisting before he was shot.

Because the second and third *Graham* factors strongly indicate that Thomas's conduct was constitutionally reasonable under the circumstances, we need not reach the first one. *See Scott v. Harris*, 550 U.S. 372, 383 (2007) ("[A]ll that matters [to determine whether a use of force was excessive] is whether [the officer's] actions were reasonable."); *Garner*, 471 U.S. at 11 ("Where the officer

[4] The Supreme Court has stated that one "common definition" of "resisting arrest" is "intentionally preventing a peace officer from effecting a lawful arrest." *Heck v. Humphrey*, 512 U.S. 477, 486 n.6 (1994) (emphasis omitted). Under Georgia law, "[a] person commits the offense of obstruction of an officer when he knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties." *Lebis v. State*, 808 S.E.2d 724, 734 (Ga. 2017); *see also* O.C.G.A. § 16-10-24. We conclude that Jayvis's conduct amounted to resisting an officer under either definition. *See Lebis*, 808 S.E.2d at 734-35 (concluding that a person obstructed a police officer when the person "deliberately and intentionally disobeyed [an officer's] lawful requests" to "put away her cell phone, stop walking toward [the officer], and show [the officer] her hands" and "actively approached [the officer] to the extent that [another] officer was required to take [the person] to the ground").

has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

The facts of this case are undeniably tragic, and our hearts are heavy for the Benjamin family. But we must conclude that Thomas acted reasonably in using deadly force based on the uncontradicted evidence that Jayvis posed an immediate threat to Thomas's safety. In reaching this decision, we are mindful that "[t]he calculus of reasonableness 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 396-97. Because Thomas's conduct was not unreasonable under the circumstances, he did not violate the Fourth Amendment and therefore is entitled to qualified immunity.[5]

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's order granting Thomas summary judgment.

AFFIRMED.

[5] Given our conclusion that no constitutional right was violated here, we do not discuss whether any such right was clearly established.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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March 13, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10204-GG
Case Style: Montye Benjamin v. Lynn Thomas
District Court Docket No: 1:16-cv-01632-WSD

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joe Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix of the Estate of her Son JAYVIS LEDELL BENJAMIN, and on her own behalf, **Plaintiff,** **v.** **LYNN THOMAS, individually,** **Defendant.**	**1:16-cv-1632-WSD**

OPINION AND ORDER

This matter is before the Court on Defendant Lynn Thomas's ("Defendant") Motion for Summary Judgment [27].

I. BACKGROUND

A. Facts

On January 18, 2013, Defendant, a police officer with the Avondale Estates Police Department, was driving back to police headquarters following an alleged shoplifting incident at a Rite-Aid in Avondale Estates.[1] (SUMF ¶ 1; R-SUMF ¶ 1).

[1] The facts in this section are taken from the following statements of fact submitted in accordance with Local Civil Rule 56.1: Defendant's Statement of Undisputed Material Facts [27.2] ("SUMF"), Plaintiff's Response to Defendant's SUMF [31.1] ("R- SUMF"), Plaintiff's Statement of Additional Material Facts

Defendant was traveling on Covington Highway. (SUMF ¶ 2; R-SUMF ¶ 2). When Defendant reached the intersection of Covington Highway and Kensington Road, he stopped at a traffic light in the left-hand turn lane to turn left onto Kensington Road. (Id.). Defendant waited for the traffic light to turn green. (Id.). When it did, Defendant entered the intersection slowly in preparation to turn left onto Kensington Road. (Id.).

As Defendant and a car coming in the opposite direction entered the intersection, Jayvis Ledell Benjamin ("Mr. Benjamin"), traveling on Kensington Road in a gray Mustang convertible, drove through the intersection of Kensington Road and Covington Highway—speeding through the narrow space between Defendant's car and the car coming from the opposite direction. (Dash Cam Video [27.4] ("Vid.") at 00:16-00.21; Thomas Aff. [27.3] ¶¶ 7-8). Mr. Benjamin entered

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[31.1] ("SAMF"), and Defendant's Response to Plaintiff's SAMF [35] ("R-SAMF"). The Court did not consider Defendant's Supplement to the SUMF [34.1], or its accompanying affidavits [34.2] and [34.3], attached as exhibits to his Reply Brief in Support of Motion for Summary Judgment [34], because these submissions violated Local Civil Rule 56.1(A) and (B)(2), ND Ga.

In those instances where a party disputes a factual assertion contained in one of the statements of fact, the Court also considers the specific exhibits cited in support of the assertion. See LR 56.1(B)(3), NDGa (providing that the court deems a party's SOMF citation as supportive of the asserted fact "unless the respondent specifically informs the court to the contrary in the response").

the intersection by running a red light.[2] Defendant activated his emergency lights and siren, turned left onto Kensington Road, and followed Mr. Benjamin. (SUMF ¶ 7; R-SUMF ¶ 7; Vid. at 00:21; Thomas Aff. ¶ 9). Although the exact rate of speed that Mr. Benjamin was traveling is in dispute, it is clear from the Dash Cam Video, and Defendant's affidavit, that Mr. Benjamin was traveling at a high rate of speed and that Mr. Benjamin's travel through the intersection was reckless. (SUMF ¶¶ 7-10; Vid. at 00:16-00:51; Thomas Aff. ¶ 9). By the time Defendant began following Mr. Benjamin, Mr. Benjamin was already far ahead of Defendant, and almost out of sight. (Id).

Defendant traveled on Kensington Road pursuing Mr. Benjamin. Approximately thirty seconds after the pursuit began, Defendant saw the Mustang Mr. Benjamin was driving. (SUMF ¶ 11; R-SUMF ¶ 11; Vid. at 00:21-00:58). Mr. Benjamin had skidded the car across the lawn of a home and into the driveway of the adjacent home, where he crashed into a vehicle parked in the driveway. (SUMF ¶12; Vid. at 00:58-1:05). Defendant stopped his vehicle on the left side of Kensington Road, approximately thirty feet from the wrecked gray Mustang convertible. (SUMF ¶ 13; R-SUMF ¶ 13). Mr. Benjamin was sitting in the car.

[2] The red light facing Mr. Benjamin is not shown in the Dash Cam Video, but the Dash Cam Video does show the light facing Defendant turning green—allowing Defendant to enter the intersection. The necessary inference is that the light for traveling west on Kensington Road was red.

(Id.). Defendant immediately exited his police vehicle and commanded Mr. Benjamin to: "Stay in the car. Do not get out of the car!" (SUMF ¶ 14; R-SUMF ¶ 14). Defendant instructed Mr. Benjamin repeatedly in a very loud voice to "stay in the car." (Id.). Defendant repeated this command as he approached Mr. Benjamin in the Mustang. (SUMF ¶ 15; R-SUMF ¶ 15).

When Defendant made it to Mr. Benjamin's car, and because Mr. Benjamin appeared to be proceeding to get out of the vehicle despite Defendant's instructions not to do so, Defendant "reached in through the open window and tried to push [Mr. Benjamin] back into the car with [his] hands to keep him in the car and contain him." (Thomas Aff. ¶ 15; R-SUMF ¶ 18). Mr. Benjamin hit Defendant on his left side and tried to wrap his arms around Defendant's waist. (Vid. at 01:23; R. Froedge Aff. [27.6] ¶ 4). Despite Defendant's repeated commands to stay in the car, Mr. Benjamin stood up in the driver's seat and quickly climbed out of the driver's window. (SUMF ¶ 21; R-SUMF ¶ 21). Defendant continued to tell Mr. Benjamin to "stay in the car" and "get back in the car." (SUMF ¶ 22; R-SUMF ¶ 22). As Mr. Benjamin exited through the driver's side window, Defendant took several steps backwards. (Vid. at 01:23-1:27). Defendant continued retreating as Mr. Benjamin advanced with Defendant's weapon now drawn and pointed toward Mr. Benjamin. (SUMF ¶ 25; R-SUMF ¶ 25). Mr. Benjamin continued to come

toward Defendant. (SUMF ¶ 27; R-SUMF ¶ 27; P. Froedge Aff. [27.5] ¶ 6; R. Froedge Aff. [27.6] ¶¶ 6, 9; Heath Aff. [27.7] ¶ 6; Houpt Aff. [27.8] ¶ 4; Kingsbury Aff. [27.9] ¶ 10; Maddox Aff. [27.10] ¶ 5; Zuschin Aff. [27.11] ¶ 5; Fulcher [27.12] ¶ 5). Mr. Benjamin, waiving his hand in the air, called out to the numerous bystanders, "Y'all see what he's trying to do to me." (SUMF ¶ 28; R-SUMF ¶ 28; Vid. at 01:31).

Defendant told Mr. Benjamin to "Stop! Get down!" (SUMF ¶ 29; R-SUMF ¶ 29; Vid. at 01:25-01:34). Mr. Benjamin continued to approach Defendant in an aggressive manner.[3] (SUMF ¶ 27; R-SUMF ¶ 27; P. Froedge Aff. [27.5] ¶ 6; R. Froedge Aff. [27.6] ¶¶ 6, 9; Heath Aff. [27.7] ¶ 6; Houpt Aff. [27.8] ¶ 4; Kingsbury Aff. [27.9] ¶ 10; Maddox Aff. [27.10] ¶ 5; Zuschin Aff. [27.11] ¶ 5; Fulcher [27.12] ¶ 5). Defendant continued his retreat from Mr. Benjamin and, at some point, reached a point where further retreat was not possible. (SUMF ¶ 31; R-SUMF ¶ 31; Thomas Aff. ¶¶ 21-23; P. Froedge Aff. ¶¶ 7-8; R. Froedge Aff. ¶ 7; Heath Aff. ¶¶ 7-8; Houpt Aff. ¶¶ 6-7; Maddox Aff. ¶ 8; Zuschin Aff. ¶¶ 7-8;

[3] Plaintiff in her Response to the Statement of Undisputed Material Facts disputes the manner in which Mr. Benjamin approached Defendant upon exiting the vehicle. Plaintiff points out that some of the witnesses in their initial reports to the authorities stated Mr. Benjamin was "walking fast" or "walking slowly" toward Defendant. Whether this is actually true is immaterial—the fact is that Mr. Benjamin continued to approach Defendant despite continued commands to halt.

Fulcher ¶ 7).[4] Mr. Benjamin swung his arms at Defendant.[5] (Id.). Mr. Benjamin stood over Defendant and reached toward him or scuffled with him. (Id.). Defendant fired a single shot at Mr. Benjamin and Mr. Benjamin fell to the ground. (Id.). Defendant radioed for Emergency Medical Services. (SUMF ¶ 34; R-SUMF ¶ 34; Thomas Aff. ¶ 23). Mr. Benjamin later died from the gunshot wound. (SUMF ¶ 35; R-SUMF ¶ 35). The Dash Cam Video showing Mr. Benjamin and Officer Thomas supports the affidavit testimony of those who saw the incident and shooting.[6]

B. Procedural History

On May 20, 2016, Plaintiff Montye Benjamin, as Administratrix of the Estate of her son, Mr. Benjamin, and on her own behalf, ("Plaintiff") filed her Complaint [1] against Defendant, individually and in his official capacity, and former Defendants Thomas Gillis, in his official capacity, Gary L. Broden, Chief of Police, Avondale Estate Police Department, in his official capacity, and the City of Avondale Estates. Plaintiff's Complaint initially included the following claims:

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[4] One witness, Jean Kingsbury, states that she did not see this part of the incident because she "turned for a few seconds to search for [her] cell phone." (Kingsbury Aff. ¶ 11).

[5] Mr. Benjamin may have struck Defendant but the Court considers only his movement toward Defendant, including after Defendant had drawn his gun.

[6] Plaintiff's statement of the facts in the Response is inconsistent with the eye witness accounts and the video.

(1) Count One: claims under 42 U.S.C. § 1983 for excessive force in violation of the Fourth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution, (Compl. ¶¶ 52-55); (2) Count Two: state law claims for negligent hiring, training, and retention of employment services, (Compl. ¶¶ 56-61); (3) Count Three: wrongful death, (Compl. ¶¶ 62-64); and (4) Count Four: violation of the Georgia State Constitution, Art. I § 1 (Compl. ¶¶ 65-72). Plaintiff seeks compensatory and punitive damages and attorney's fees. (Compl. Prayer for Relief).

On June 29, 2016, Defendant and former Defendants filed their Motion to Dismiss for Failure to State a Claim [12] ("Motion to Dismiss") arguing that Georgia's two-year statute of limitations on tort claims barred Plaintiff's § 1983, negligent hiring and retention, and wrongful death claims ([12.1] at 2). They further argued that Plaintiff's § 1983, wrongful death, and Georgia Constitution claims failed to state a claim upon which relief could be granted. (Id.). Finally, they argued that sovereign immunity barred Plaintiff's claims against the City, and that qualified immunity barred claims against Defendant. (Id. at 8). On September 27, 2016, the Court granted in part and denied in part the Motion to Dismiss. ([19] at 19). The Court granted the Motion to Dismiss Plaintiff's remaining claims, but denied the Motion to Dismiss Plaintiff's § 1983 claim

against Defendant. (Id.).

On April 10, 2017, Defendant filed his Motion for Summary Judgment (the "Motion"), together with his Statement of Material Facts ("SUMF"). On April 28, 2017, Plaintiff filed her Response in Opposition to Defendant's Motion for Summary Judgment [31] ("Response"), together with her Statement of Additional Material Facts ("SAMF"). On May 12, 2017, Defendant filed his Response to Plaintiff's Statement of Additional Facts [35] ("Defendant's Response to SAMF"). The same day, Defendant filed his Reply and submitted a supplement to the SUMF [34] ("Supp. SUMF").

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; see also Dukes v. Deaton, 852 F.3d 1035, 1041 (11th Cir. 2017). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Cantrell v. White, 178 F. Supp. 3d 1308, 1313 (N.D. Ga. 2016). The party seeking summary judgment bears the burden of demonstrating the absence of a

genuine dispute as to any material fact. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). Once the moving party has met this burden, the nonmoving party must demonstrate that summary judgment is inappropriate by designating specific facts showing a genuine issue for trial. Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999). The nonmoving party "need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings." Id.

"At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 380 (2007). Where the record tells two different stories, one blatantly contradicted by the evidence, the court is not required to adopt that version of the facts when ruling on summary judgment. Id. "[C]redibility determinations, the weighing of evidence, and drawing of inferences from the facts are the function of the jury . . . ." Graham, 193 F.3d at 1282. "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. The party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no

genuine issue for trial.'" Scott, 550 U.S. at 380 (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A party is entitled to summary judgment if "the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (quotations omitted).

In the context of a qualified immunity determination, "at the summary judgment stage, . . . once [the court] ha[s] determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [the officers'] actions . . . is a pure question of law." Penley v. Eslinger, 605 F.3d 843, 849 (11th Cir. 2010) (internal quotations omitted).

B. Analysis

Section 1983 "provides a cause of action against '[e]very person who, under color of any statute of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Wyatt v. Cole, 504 U.S. 158, 161 (1992) (alterations in original) (quoting 42 U.S.C. § 1983). Qualified immunity "offers complete protection for government officials sued in their individual

capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation . . . ." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002).

To be entitled for qualified immunity, a government official "bears the initial burden of showing he was acting within his discretionary authority." Valderrama v. Rousseau, 780 F.3d 1108, 1112 (11th Cir. 2015) (internal quotation marks omitted). "[D]iscretionary authority [ ] include[s] all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994). The Court must "assess whether [the acts] are of a type that fell within the employee's job responsibilities." Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004). "[T]he inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act." Id. at 1266. The Court finds that Defendant was engaged in a discretionary function when he

encountered Plaintiff on January 18, 2013.[7] The actions that Defendant took were within the scope of his authority. Having made this showing, the burden shifts to Plaintiff to show that Defendant is not entitled to qualified immunity. Holloman, 370 F.3d at 1264. "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." Id. at 1264.

Plaintiff asserts Defendant's conduct, ultimately culminating in the fatal shooting of Mr. Benjamin, constituted excessive force in violation of Mr. Benjamin's Fourth Amendment rights.[8] In the Eleventh Circuit, a claim of excessive force is evaluated under the Fourth Amendment's "objective reasonableness" standard. Salvato v. Miley, 790 F.3d 1286, 1293 (11th Cir. 2015).

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[7] Plaintiff does not argue that Defendant was not acting within his responsibilities as a police officer and within the scope of his authority.

[8] To the extent Plaintiff asserts her constitutional claim under the Eighth or Thirteenth Amendments, the facts here do not show a violation of the rights protected under those amendments. To the extent Plaintiff raises her constitutional claim under the Fourteenth Amendment, the Court considers this claim under its Fourth Amendment analysis. The Supreme Court has unequivocally stated that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard,' rather than under a 'substantive due process' approach." Graham v. Connor, 490 U.S. 386, 394 (1989); Cantrell v. White, 178 F. Supp. 3d 1308, 1314 n.39 (N.D. Ga. 2016).

In determining whether the use of force was "objectively reasonable," a court is required to carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests[ ] against the countervailing governmental interests at stake under the facts of the particular case." Id. (internal quotation marks omitted). "To satisfy the objective reasonableness standard imposed by the Fourth Amendment, [Defendant] must establish that the countervailing government interest was great." Id. at 850. "[A]nalysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether [Plaintiffs] posed an immediate threat to [Defendants] or others; and (3) whether [Plaintiffs] actively resisted arrest." Id. at 850-51. "A mechanical application of these factors, however, is not appropriate. Instead, we must be careful to evaluate the reasonableness of an officer's conduct on a case-by-case basis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (internal quotation marks and citations omitted).

Here, the evidence includes an undisputed Dash Cam Video account of most of the events leading up to the single shot fired by Defendant. Taking all the record evidence in the light most favorable to Plaintiff, these factors lead to the conclusion that Defendant did not violate Mr. Benjamin's Fourth Amendment rights because Defendant used objectively reasonable force to respond to Mr.

Benjamin's conduct and the risk he presented. The Dash Cam Video depiction alone shows the reasonableness of Defendant's conduct. It is supported by eight eye witnesses who confirm what the Dash Cam Video shows. Regarding the first factor, which looks to the severity of the crime at issue, Mr. Benjamin engaged in dangerous conduct and committed a number of offenses that endangered others. The Dash Cam Video, witness statements, and Defendant's affidavit show that Mr. Benjamin's wrongful conduct was severe and in reckless disregard of the safety of others. Mr. Benjamin ran a red light, drove through a heavily traveled intersection, and nearly collided with cars in the intersection, by driving against the red light facing him. Mr. Benjamin then recklessly drove at a high rate of speed through a single-family residential neighborhood to elude a police officer, ultimately left the paved roadway, and drove onto the front yard of a home colliding into a car parked in the driveway of an adjacent home.[9] Defendant shouted repeatedly for Mr. Benjamin to stay in the car as he approached and got to the car. The Dash Cam Video shows Mr. Benjamin grabbing Defendant around the waist when Defendant

[9] Considering the rate of speed of Defendant's pursuit, the evidence shows that Mr. Benjamin also ran two stop signs. If Mr. Benjamin had stopped at the stop signs, Defendant would have caught up to him.

got to the car and trying to keep Mr. Benjamin seated in the vehicle. (Vid. at 01:20-01:25).[10] The first factor weighs heavily in favor of Defendant.

The second factor—whether Plaintiff posed an immediate threat—also weighs heavily in favor of Defendant. Mr. Benjamin wrecked his vehicle by crashing into a car in the driveway of a home. He failed repeatedly to yield to Defendant's commands, ultimately ignoring them completely. He aggressively approached Defendant. (SUMF ¶ 27; R-SUMF ¶ 27; P. Froedge Aff. [27.5] ¶ 6; R. Froedge Aff. [27.6] ¶¶ 6, 9; Heath Aff. [27.7] ¶ 6; Houpt Aff. [27.8] ¶ 4; Kingsbury Aff. [27.9] ¶ 10; Maddox Aff. [27.10] ¶ 5; Zuschin Aff. [27.11] ¶ 5; Fulcher [27.12] ¶ 5). Numerous witnesses viewing the incident from their homes testify to Defendant's belligerent and aggressive behavior, failure to comply with Defendant's warnings, and his pursuit of Defendant. (Id.). Mr. Benjamin's actions would lead a reasonable officer under the circumstances to believe that Mr. Benjamin posed an immediate physical threat, including because of his position and Mr. Benjamin's conduct when Defendant fired his single shot. This

[10] Defendant testifies in his declaration that he did not unholster his weapon until after Mr. Benjamin exited the vehicle. (Thomas Aff. ¶¶ 14, 17). The Dash Cam Video is not entirely clear on this point, but the fact of whether Defendant unholstered his weapon before or after Mr. Benjamin exited the vehicle does not change the Court's conclusion here.

conclusion is compelled by the Dash Cam Video, the testimony of Defendant, and the testimony of the eight eye witnesses.

The third factor—whether Mr. Benjamin actively resisted arrest—is plainly evident from the Dash Cam Video and the testimony of the eye witnesses. It is undisputed that Mr. Benjamin failed repeatedly to comply with any of Defendant's commands. Mr. Benjamin physically contacted Defendant and approached Defendant aggressively until Defendant was unable to further retreat from Mr. Benjamin's advances. A reasonable officer would have believed Mr. Benjamin was purposefully and actively resisting arrest.

Turning to the amount of force used, Defendant's shooting of Mr. Benjamin was justified. It was an act of last resort. This is not a case where the plaintiff was "retreating, apparently unarmed, and outside of striking distance." See, e.g., Perez v. Suszcynski, 809 F.3d 1213,1217 (11th Cir. 2016) (holding that an officer was not entitled to qualified immunity when the officer shot the decedent in the back while the decedent was "compliant and prostrate on his stomach, with his hands behind his back," and another officer had already thrown the decedent's gun out of reach); Salvato v. Miley, 790 F.3d 1286, 1293-94 (11th Cir. 2015); Edwards v. Shanley, 666 F.3d 1289, 1296 (11th Cir. 2012) (stating that it was "[c]ritical" to the court's holding of excessive force that the officer "*increased* the force applied

at the same time the threat presented by [the suspect] *decreased*," and the suspect was "laying [sic] prone with his hands exposed and begging to surrender"). Here, the record shows, based on the totality of the evidence, including the Dash Cam Video, the testimony of the eye witnesses, and Defendant's testimony, that Mr. Benjamin pursued Defendant in an aggressive manner despite Defendant's commands for him to halt. (SUMF ¶ 27; R-SUMF ¶ 27; P. Froedge Aff. [27.5] ¶ 6; R. Froedge Aff. [27.6] ¶¶ 6, 9; Heath Aff. [27.7] ¶ 6; Houpt Aff. [27.8] ¶ 4; Kingsbury Aff. [27.9] ¶ 10; Maddox Aff. [27.10] ¶ 5; Zuschin Aff. [27.11] ¶ 5; Fulcher [27.12] ¶ 5). There is testimony that Mr. Benjamin physically accosted Defendant. (Id.). Despite these warnings and efforts by Defendant to get Mr. Benjamin to stop and to defuse the event, Mr. Benjamin continued to advance against Defendant until the Defendant ultimately found himself positioned on the ground with Mr. Benjamin standing over him. (Thomas Aff. ¶ 22; P. Froedge, ¶ 8; R. Froedge ¶¶ 7-8; Heath ¶¶ 7-8; Houpt ¶¶ 7-8; Maddox ¶ 8; Zuschin ¶¶ 8-9; Fulcher ¶ 7). Only then did Defendant fire his weapon, and did so only once. (Id.). There is no alternative evidence, facts, or testimony, suggesting that Mr. Benjamin was retreating from Defendant or outside of striking distance.[11] Defendant restrained his response until he was unable to do so.

[11] Plaintiff attempts to cast doubt on the events taking place after Defendant

The Court finds that these factors all weigh substantially in favor of Defendant. Viewing the facts in the light most favorable to Plaintiff, Defendant's use of force was, under the circumstances of this case, objectively reasonable and he is entitled to qualified immunity on Plaintiff's Section 1983 claim.[12] No reasonable juror, on these undisputed facts in this record, would find for Plaintiff in this action. Scott v. Harris, 550 U.S. at 380. The Court finds that no reasonable juror could conclude, on the record here, that a genuine issue of material fact exists regarding whether Defendant acted in an objectively reasonable manner in this instance, and therefore the Court grants Defendant's Motion for Summary Judgment.

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and Mr. Benjamin disappear from the view of Defendant's Dash Cam. The audio, however, makes clear that a struggle ensued for the approximate seven seconds of off-camera time before Defendant shot Mr. Benjamin. (Vid. at 01:30-01:37). The sworn statements of eight eye witnesses and Defendant corroborate the events, and Plaintiff's claim that Mr. Benjamin was retreating from Defendant is simply without merit or substantiating facts.

[12] Because Plaintiff's Section 1983 claim fails, her request for attorney's fees under 42 U.S.C. §1988 also fails, because Plaintiff is not a "prevailing party" under Section 1988. See 42 U.S.C. § 1988 ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in a Section 1983 action).

III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [27] is **GRANTED**.

IT IS FURTHER ORDERED that this action is **DISMISSED**.

SO ORDERED this 19th day of December, 2017.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 11, 2019

Clerk - Northern District of Georgia
Richard B. Russell Bldg & US Courthouse
2211 UNITED STATES COURTHOUSE
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STE 2211
ATLANTA, GA 30303-3309

Appeal Number: 18-10204-GG
Case Style: Montye Benjamin v. Lynn Thomas
District Court Docket No: 1:16-cv-01632-WSD

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-10204

District Court Docket No.
1:16-cv-01632-WSD

MONTYE BENJAMIN,
and on her own behalf as administratrix for the
estate of her Son Jayvis Ledell Benjamin,

Plaintiff - Appellant,

versus

LYNN THOMAS,
individually,

Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 13, 2019
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix of the Estate of her Son JAYVIS LEDELL BENJAMIN, and on her own behalf, Plaintiff, vs. LYNN THOMAS, individually, Defendant.	CIVIL ACTION FILE NO. 1:16-cv-1632-WSD

J U D G M E N T

This action having come before the court, Honorable William S. Duffey, Jr., United States District Judge, for consideration of the Defendant's Motion for Summary Judgment and the Court having granted said motion, it is

Ordered and Adjudged that the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 20th day of December, 2017.

JAMES N. HATTEN
CLERK OF COURT

By: s/Jill Ayers
Deputy Clerk

Prepared and Entered
in the Clerk's Office
December 20, 2017
James N. Hatten
Clerk of Court

By: s/Jill Ayers
Deputy Clerk

United States Constitution, Amendment 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. § 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.

Rule 56, Federal Rules of Civil Procedure

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment 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. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her Son JAYVIS LEDELL BENJAMIN, and on her own behalf,	)	
Plaintiff,	)	**Case No.**
v.	)	**1:16-CV-1632**
LYNN THOMAS, individually,	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Lynn Thomas, by and through the undersigned counsel, and hereby files this Motion for Summary Judgment pursuant to F.R.C.P. 56. Defendant shows the Court that he is entitled to official immunity, and therefore, the claims against him should be dismissed. Defendant Thomas did not violate Mr. Benjamin's constitutional rights under the Fourth Amendment, because Defendant Thomas' use of force was objectively reasonable under the precedents established by the United States Supreme Court and the 11th Circuit Court of Appeals. In support of his Motion for Summary Judgment, Defendant Thomas relies upon his Statement of Undisputed Material Facts and evidence attached thereto, his Arguments and Citation of Authority set forth in his Brief in Support of this Motion, and all

pleadings of record in this case.

Respectfully submitted this 10th day of April, 2017.

WILSON, MORTON & DOWNS, LLC

By: /s/ Keri P. Ware
Robert E. Wilson
State Bar No. 768950
Stephen G. Quinn
State Bar No. 153012
Keri P. Ware
State Bar No. 737751
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RULE 5.1 CERTIFICATION

Counsel signing this pleading hereby certifies that it complies with the type size and margins required by Rule 5.1 of the Local Rules of Practice of this Court.

WILSON, MORTON & DOWNS, LLC

By: /s/ Keri P. Ware
Keri P. Ware
State Bar No. 737751

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **MOTION FOR SUMMARY JUDGMENT** upon the following via CM/ECF electronic service:

Adam M. Hames, Esq.
The Hames Law Firm, LLC
511 East Paces Ferry Road, NE
Atlanta, Georgia 30305
adam@amh-law.com
Attorney for Plaintiff

Patrick Michael Megaro, Esq.
Halscott Megaro, P.A.
33 E. Robinson Street, Suite 220
Orlando, Florida 32801
pmegaro@halscottmegaro.com
Attorney for Plaintiff

Dated this 10th day of April, 2017.

WILSON, MORTON & DOWNS, LLC

By: /s/ Keri P. Ware
Keri P. Ware
State Bar No. 737751

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her Son JAYVIS LEDELL BENJAMIN, and on her own behalf,	)	
Plaintiff,	)	**Case No.**
v.	)	**1:16-CV-1632**
LYNN THOMAS, individually,	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Lynn Thomas ("Sgt. Thomas"), by and through the undersigned counsel, and hereby files this Brief in Support of his Motion for Summary Judgment.

INTRODUCTION AND SUMMARY OF FACTS[1]

This case arises out of the January 18, 2013, justified shooting death of Jayvis Benjamin by Avondale Estates Police Officer Lynn Thomas. While driving a stolen Mustang, Benjamin barreled through a red light at an extreme rate of speed, raced down a residential street and crashed the vehicle. (Statement of Material Facts

[1] Defendant Thomas relies upon his Statement of Material Facts and evidence attached thereto, which have been filed simultaneously herewith. The facts are summarized herein for the Court's convenience.

"SOMF," ¶¶ 3-12). When Sgt. Thomas caught up to him and approached the wrecked car, Benjamin reached through his car window and attempted to grab the officer's weapon (SOMF, ¶ 20). He then ignored Sgt. Thomas' commands to remain in the car. (Id. at ¶¶ 14-16, 21-22). Instead, he jumped out of the vehicle and charged Sgt. Thomas. (Id. at ¶¶ 23-27). Sgt. Thomas attempted to retreat, and commanded Benjamin to stop his approach, but Benjamin continued to advance, attacking Sgt. Thomas and knocking him to the ground. (Id. at ¶¶ 29-31). Ultimately, Sgt. Thomas was left with no choice except to use his service revolver by firing a single shot in self-defense. (Id. at ¶¶ 31-34).

Plaintiff filed this suit contending that Sgt. Thomas used excessive force and thereby violated Benjamin's constitutional rights. However, because Defendant Thomas' actions were reasonable under the circumstances, no constitutional violation occurred and Defendant Thomas is entitled to qualified immunity.

ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgments Standard

Summary judgment should be granted where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c)(2). The District Court should view all the evidence and make any "reasonable inferences that might be drawn therefrom in the light most

favorable to the non-moving party." Rine v. Imagitis, Inc. 590 F. 3d 1215, 1222 (11th Cir. 2009). The requirement to view the facts in the non-moving party's favor only extends to genuine disputes over material facts. Penley v. Eslinger, 605 F. 3d 843 (11th Cir. 2010). "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 (2007).

B. Legal Standard for Excessive Force Claims

This case involves an allegation of excessive force by Plaintiff and assertion of qualified immunity by Defendant. In this context, the threshold inquiry is whether Plaintiff has established that the officer's actions amount to a constitutional violation for excessive force. Plaintiff's excessive force claim should be analyzed under the "objective reasonableness" standard established by Graham v. Connor, 490 U.S. 386 (1989). This standard looks at "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting [the officer] without regard to [his] underlying intent or motivation." Id. at 397.

When applying the excessive force test adopted by the Supreme Court in Graham and the earlier case of Tennessee v. Garner, 471 U.S. 1 (1985), the 11th Circuit Court of Appeals instructs that:

> the use of deadly force is more likely reasonable if: the suspect poses an immediate threat of serious physical harm to officers or others; the

> suspect committed a crime involving the infliction or threatened infliction of serious harm, such that his being at large represents an inherent risk to the general public; and the officers either issued a warning or could not feasibly have done so before using deadly force.

Penley, 605 F.3d at 850. This third factor is also stated as whether the suspect "actively resisted arrest." Id. at 851. "A mechanical application of these factors is not appropriate…[courts] must be careful to evaluate the reasonableness of an officer's conduct on a case-by-case basis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 850.

C. Plaintiff Cannot Satisfy the Excessive Force Standard because Defendant's Use of Force was Objectively Reasonable

Under the undisputed facts of this case, all relevant factors discussed above weigh in favor of the objective reasonableness of Defendant Thomas' conduct and therefore support a finding that Benjamin's Fourth Amendment rights were not violated. Thus, Defendant Thomas is entitled to qualified immunity and his motion for summary judgment should be granted.

1. Benjamin Posed an Immediate Threat of Serious Physical Harm

The manner in which Mr. Benjamin operated his vehicle posed an immediate threat to Sgt. Thomas as well as every other motorist, pedestrian or bystander in the vicinity. When Sgt. Thomas first encountered Mr. Benjamin on January 18, 2013, Mr. Benjamin was operating a Ford Mustang vehicle that exploded through a red light at a dangerously excessive rate of speed headed into a densely populated

residential street. (SOMF, ¶ 5). Accordingly, Sgt. Thomas personally witnessed Mr. Benjamin commit the offense of reckless driving in a manner that placed him mere happenstance away from committing the offense of vehicular homicide. This is not a case in which a police officer stops a driver for having a tail light out and the situation escalates.

Once Mr. Benjamin crashed the vehicle into a residential front yard, he continued to conduct himself in a manner that posed an immediate physical threat to Sgt. Thomas and the numerous bystanders that began to gather at the scene of the accident. From the moment that Sgt. Thomas approached the Mustang, the driver reached out of his window and assaulted the officer, likely trying to grab his weapon. (Id. at ¶ 20). Then, despite numerous commands to remain in his vehicle, Benjamin disregarded those commands, climbed out of the vehicle and went after Sgt. Thomas, swinging his arms and shouting at the officer. (Id. at ¶¶ 14-27).

Mr. Benjamin then physically attacked Sgt. Thomas. Despite numerous, repeated and loud verbal warnings to "stop" and "get on the ground," Mr. Benjamin aggressively charged Sgt. Thomas and began punching at Sgt. Thomas. (Id. at ¶¶ 29-32). Sgt. Thomas retreated and continued to order Mr. Benjamin to yield until Sgt. Thomas backed up into some bushes and could not retreat any further. (Id. at ¶¶ 29-32). At this point, Mr. Benjamin swung his left hand and hit Sgt. Thomas with enough force to knock him to the ground. (Id. at ¶ 31). Sgt. Thomas only used

deadly force when Mr. Benjamin was coming down on top of him thereby placing Sgt. Thomas and the bystanders at extreme risk of immediate physical harm if Mr. Benjamin was able to capture Sgt. Thomas' service weapon. (Id. at ¶¶ 32-33, 36). The dash cam video from Sgt. Thomas' police vehicle demonstrates that Benjamin had already attempted to grab the weapon when Sgt. Thomas first approached Benjamin in his vehicle. (Id. at ¶ 20).

2. Benjamin Committed a Crime that Involved the Threatened Infliction of Serious Harm to the Public

It is also appropriate here to consider the "relative culpability" of Mr. Benjamin. Scott v. Harris, 550 U.S. 3721 381 (2007). As with the respondent in Scott v. Harris, Mr. Benjamin "intentionally placed himself and the public in danger by unlawfully engaging in reckless, high speed flight" and ignored repeated warnings from law enforcement. Id. Mr. Benjamin then compounded his own culpability by physically attacking Sgt. Thomas and knocking him to the ground. The U.S. Supreme Court and 11th Circuit precedents are clear that a law enforcement officer has every right to protect himself and the public from a suspect that recklessly places the public at risk, ignores warnings and physically attacks the officer. It is objectively reasonable to use deadly force in such a situation. Id. at 384-86; Oakes v. Anderson, 494 Fed. Appx. 35, 38-40 (11th Cir. 2012); Penley, 605 F.3d at 852-54.

3. Sgt. Thomas Issued Repeated Warnings Before Using Deadly Force

Sgt. Thomas gave Mr. Benjamin numerous clear warnings, which Mr. Benjamin refused to obey. Seven witnesses and the dash cam video confirm that Sgt. Thomas repeatedly warned Benjamin to stay in the car. (SOMF, ¶¶ 14, 38). After Benjamin disregarded these orders, Sgt. Thomas again warned him to "Get back in the car." (Id. at ¶¶ 22, 39). As Benjamin began advancing toward Sgt. Thomas, Sgt. Thomas again warned him: "Stop! Get down!" (Id. at ¶¶ 25, 39). It cannot be disputed that Mr. Benjamin actively resisted arrest by refusing to remain in his vehicle, refusing to comply with verbal commands and physically attacking Sgt. Thomas.

An officer is justified in using deadly force when he has probable cause to believe that his own life is in peril. Penley, 605 F.3d at 853. Every single aspect of Mr. Benjamin's conduct conveyed to Sgt. Thomas that Mr. Benjamin meant to harm or kill him. Mr. Benjamin had a notable advantage in size and strength over Sgt. Thomas and Mr. Benjamin placed Sgt. Thomas at reasonable apprehension that Benjamin would capture his weapon if Sgt. Thomas did not use it. Sgt. Thomas had no other option but to fire his weapon to subdue Mr. Benjamin.

Sgt. Thomas' conduct was objectively reasonable under the precedents of the 11th Circuit. For example, in Oakes v. Anderson, 494 F. Appx. 35 (11th Cir. 2012), officers responding to a call that the suspect was suicidal but had not committed any crime were found to be justified in shooting and killing the suspect where "for almost

30 seconds, the officers shouted for [the suspect] to show his hands, but he ignored their repeated commands." Oakes, 494 F. Appx. at 38. The officers believed that the suspect had a gun but they never actually saw a weapon until after shooting the suspect. Id. Nonetheless, the 11th Circuit determined that "it was reasonable for [the officer] to fire upon [the suspect] in defense of himself, his fellow officers, and bystanders." Id. at 40; see also, Carr v. Titangelo, 338 F. 3d 1259, 1264, 1275 (11th Cir. 2003). In this case, there is no need to second guess Sgt. Thomas' split second judgments in that, even with 20-20 hindsight, Sgt. Thomas did not misapprehend any aspect of the circumstances presented by Mr. Benjamin. Mr. Benjamin undisputedly drove recklessly, ignored commands and attacked Sgt. Thomas.

Plaintiff has failed to present any evidence that Sgt. Thomas' actions were unreasonable under the circumstances. Indeed, every single eyewitness, the dash cam video and Sgt. Thomas' testimony are consistent. The undisputed evidence demonstrates that Sgt. Thomas had no choice except to shoot Benjamin in self-defense. Plaintiff has therefore failed to establish a constitutional violation and Sgt. Thomas is entitled to qualified immunity.

CONCLUSION

For all the above and foregoing reasons, Defendant Thomas respectfully requests that the Court GRANT his Motion for Summary Judgment.

Respectfully submitted this 10th day of April, 2017.

WILSON, MORTON & DOWNS, LLC

By: /s/ Keri P. Ware
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RULE 5.1 CERTIFICATION

Counsel signing this pleading hereby certifies that it complies with the type size and margins required by Rule 5.1 of the Local Rules of Practice of this Court.

WILSON, MORTON & DOWNS, LLC

By: /s/ Keri P. Ware
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **ARGUMENT AND CITATION OF AUTHORITY** upon the following via CM/ECF electronic service:

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Dated this 10th day of April, 2017.

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By: /s/ Keri P. Ware
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her son JAYVIS LEDELL BENJAMIN, and on her own behalf,	)	**Case # 1:16-CV-1632**
Plaintiff,	)	
vs.	)	
LYNN THOMAS, individually, **Defendant.**	)	

PLAINTIFF'S RESPONSE AND INCORPORATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, **Montye Benjamin, as Administratrix of the Estate of her son Jayvis Ledell Benjamin, and on her own behalf**, by and through undersigned counsel, hereby submits her response and incorporated memorandum of law in opposition to Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56.

1. This is a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff's claims arise from her son's wrongful death on January 18, 2013. Plaintiff asserts that Defendant **Thomas** impermissibly used deadly force against **Jayvis Benjamin** in violation of the Fourth Amendment. Plaintiff seeks compensatory and punitive damages and an award of costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

2. Plaintiff commenced this action by filing a Complaint on May 12, 2016. On April 10, 2017, Defendant filed a motion for summary judgment. Plaintiff hereby opposes the Defendant's motion on the basis that, viewing the evidence in the light most favorable to Plaintiff, there exists genuine issues of material fact as to Defendant's claim regarding qualified immunity and therefore

the Defendant is not entitled to judgment as a matter of law. Resolution of the claims can only be determined by the trier of fact.

I. STATEMENT OF FACTS[1]

3. The key facts are unquestionably in dispute. On January 18, 2013, Defendant **Thomas** observed a Ford Mustang at or near 3113 Kensington Road. Defendant **Thomas** instructed **Benjamin** to remain in the car. **Benjamin** followed Defendant **Thomas'** orders and remained in the car. Defendant **Thomas** drew his firearm and approached the car where he pushed **Benjamin** while he sat in the driver seat. **Benjamin** exited the vehicle through the driver side window and stated, "Y'all see what he's trying to do to me?" While he walked in a backward direction, Defendant **Thomas'** firearm remained pointed at **Benjamin** who was of a comparable size to Defendant **Thomas**. **Benjamin** was not running towards Defendant **Thomas**, neither was he screaming at him, nor acting like he was going to tackle Defendant **Thomas**. Defendant **Thomas** regained control of the situation and **Benjamin** moved away from Defendant **Thomas**. Defendant **Thomas** did not give any warning that he was going to discharge his firearm. While **Benjamin** was 6 feet away from Defendant **Thomas,** and for reasons not made clear, Defendant **Thomas** fired a single gunshot fatally penetrating **Benjamin's** chest. The penetrating gunshot wound entered from the chest and traveled front to back, slightly left to right, and downward. As **Benjamin** is heard groaning, Defendant **Thomas** did not administer aid after shooting **Benjamin**.

4. Based upon the testimony and evidence in this record, the abovementioned facts and exhibits incorporated therein demonstrate that there exists a significant and material dispute of fact requiring resolution by the trier of fact.

[1] Plaintiff relies upon and incorporates by reference his 56.1 Statement of Material Facts and the exhibits attached thereto which have been filed with this motion and provides a brief summary of the facts herein for the Court's convenience.

II. ARGUMENT

A. Standard of Review for Summary Judgment

5. A party moving for summary judgment must establish that the undisputed facts entitle it to judgment as a matter of law. However, "[u]nder summary judgment, a conclusion may not be established as a matter of law unless 'no genuine issue as to any material fact' exists." Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1425 (11th Cir. 1990) (citing Fed. R. Civ. P. 56(c)). In fact, as the Eleventh Circuit has already firmly established that "summary judgment should not be granted **unless the facts are so crystalized** that nothing remains but questions of law. If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla., 402 F.3d 1092, 1120–21 (11th Cir. 2005) (emphasis added).

6. The United States Supreme Court has held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Thus, "evidence of the non-movant is to be believed" with all inferences being drawn in Plaintiff's favor. Id.

7. This Court may not even credit evidence favoring the moving party "unless that evidence is 'uncontradicted and unimpeached, at least to the extent that [the] evidence comes from disinterested witnesses.'" Kidd v. Mando Am. Corp., 731 F.3d 1196, 1205 (11th Cir. 2013) (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 151 (2000)).

8. Because virtually all of the material facts are sharply in dispute and the resolution thereof depends entirely upon a credibility determination to be made by the finder of fact, Defendant's motion for summary judgment must be denied.

B. Argument on the Merits

i. Whether Defendant's Use of Deadly Force Was Reasonable is A Factual Determination for the Trier of Fact, Thus Defendant is Not Entitled To Qualified Immunity

9. A two-prong test determines whether qualified immunity is appropriate. First, the court considers whether the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct violated the plaintiff's constitutional rights. Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003). Second, the court asks whether the plaintiff's rights were clearly established under the law. Gonzalez, 325 F.3d at 1234.

1. Defendant Thomas Violated Benjamin's Constitutional Right

10. A claim of excessive force is analyzed under the Fourth Amendment's objective reasonableness standard. See Oliver v. Fiorino, 586 F.3d 898, 905 (11th Cir.2009). "To determine whether the use of force is 'objectively reasonable,' we carefully balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing governmental interests at stake' under the facts of the particular case." Id. (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)). "More force is appropriate for a more serious offense and less force is appropriate for a less serious one." Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir.2002).

11. The Eleventh Circuit Court of Appeals has acknowledged deadly force is reasonable for the purposes of the Fourth Amendment when an officer: (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given

some warning about the possible use of deadly force, if feasible. McCullough v. Antolini, 559 F.3d 1201, 1206 (11th Cir. 2009); see also Graham, 490 U.S. at 396–97 (establishing the objective-reasonableness test for the use of excessive force); Robinson v. Arrugueta, 415 F.3d 1252, 1255 (11th Cir. 2005) (same).

12. In Salvato v. Miley, the Appellant was yelling and cussing at passing cars. 790 F.3d 1286, 1290 (11th Cir. 2015). The unarmed appellant wrestled two deputies while being handcuffed and they engaged in fisticuffs. Id. The appellant then broke free, stepped back, and rushed towards one of the deputies and hit him once again. Id. The appellant hit the other deputy in the head, knocked her down, and retreated once again. Id. One of the deputies then fatally shot the appellant in the abdomen without giving him any verbal warning. Id. The Court held that the deputy was not entitled to qualified immunity for her use of excessive force against the Appellant. Id. at 1293. In reviewing the facts in the light most favorable to the Appellant, the Court reasoned that the Appellant was retreating, apparently unarmed, and outside of striking distance. Id. It further reasoned that use of deadly force was clearly unreasonable despite the fact that the Appellant resisted arrest and struck the officers multiples times because there was no reason to believe that the Appellant was a danger to the public. Id. at 1294. Prior to shooting, the deputy did not give any warning, "though a jury could find that the distance between her and the appellant establishes that it was feasible for her to do so." Id. at 1293.

13. In Gilmere v. City of Atlanta, Georgia, the plaintiff was drinking heavily, had a near collision with a van, and got into an argument with the driver of the van. 774 F.2d 1495, 1496 (11th Cir. 1985) (en banc)(abrogated on other grounds). The driver called the police and stated that the plaintiff pulled a gun and threatened him. Id. Once the police arrived, the plaintiff attempted to flee and flailed his arms. Id. at 1497. A scuffle ensued and one of the officers shot the

plaintiff in the stomach and killed him. Id. The Court held that the use of deadly force was not justified. Id. at 1502. It reasoned that the events occurred at a sufficient distance from bystanders to establish that the plaintiff posed no threat. Id. The police had little reason to believe that the plaintiff was dangerous "given his small size, intoxicated state, and lack of a weapon." Id. "The unwarranted shooting which directly resulted from his efforts to escape the officers' further physical abuse, give grounds for relief under the Fourth Amendment." Id.

14. Construing the facts in Plaintiff's favor, **Benjamin** was roughly 6 feet away from Defendant **Thomas** when he fired a fatal gunshot. The distance between the two demonstrates that Defendant was not in imminent danger. Additionally, the facts indicate that **Benjamin** was moving away from Defendant **Thomas** when Defendant **Thomas** fired the fatal gunshot.

15. Defendant **Thomas** gave no warning about the possible use of deadly force when it was feasible to do so. Defendant **Thomas** had no reason to believe that **Benjamin** was armed or had attempted to obtain a weapon. Nonetheless, for reasons not made clear, Defendant **Thomas** shot **Benjamin** to death. The question this Court must answer is whether it was reasonable for Defendant **Thomas** to use deadly force against **Benjamin** under these circumstances. The record evidence demonstrates that it was not objectively reasonable.

16. The Supreme Court has specifically held that while an officer may use deadly force in self-defense if an individual poses an immediate threat of serious physical harm, "[a] police officer may not seize an unarmed, non-dangerous [person] by shooting him dead." Tennessee v. Garner, 471 U.S. 1, 11–12 (1985). Futhermore, "the nature and quality of the intrusion on the individual's Fourth Amendment interest" in not being killed outweighed "the countervailing governmental interest at stake." Oliver, 586 F.3d at 905. Thus, Defendant violated **Benjamin's** Fourth Amendment rights through his unreasonable use of deadly force.

2. Federal Law Clearly Established that Defendant Thomas' Actions Were Unreasonable

17. "Officials must have fair warning that their acts are unconstitutional, there need not be a case on all fours with materially identical facts, ... so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1277 (11th Cir.2004). Moreover, a "plaintiff can point to a broader, clearly established principle [that] should control the novel facts in [his] situation." Morton v. Kirkwood, 707 F.3d 1276, 1282 (11th Cir.2013).

18. One exception allows a court to find a clearly established constitutional violation when "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000).

19. Plaintiff asserts that Defendant **Thomas'** use of deadly force was clearly unreasonable under the record evidence. However, if this Court finds the record evidence unclear as to this fact, whether Defendant **Thomas**'s use of deadly force was reasonable remains an open question to be determined by a trier of fact. Thus, Defendant is not entitled to qualified immunity on Plaintiff's § 1983 claims related to the fatal shooting.

ii. A Genuine Dispute as to Material Facts Exist, and As such, Defendant is Not Entitled to Summary Judgment.

1. The Autopsy Performed on Jayvis Benjamin conclusively refutes the totality of the circumstances as purported in Defendant's statement of facts

20. Defendant **Thomas** asserts, through his own accounts and unreliable witness testimony, that the circumstances in which Jayvis **Benjamin** was shot were as follows:

> As I was falling backwards, Benjamin came down on me still swinging his fists. I could not move or defend myself. I knew there was going to be a fight, and I feared for my life. My left hand was

> on the ground, as I had put it behind me to brace my fall. I was at a severe disadvantage because I was on my back and Mr. Benjamin was standing over me. My gun was still in my right hand. I pointed the gun up at Benjamin and fired one shot at Benjamin's mid-section.

(Exhibit 3, p. 5).

21. An Autopsy performed on **Jayvis Benjamin** demonstrated that the penetrating gunshot wound of the chest is front to back, slightly left to right, and downward. (Exhibit 7, p. 5).

22. If Defendant **Thomas** was in fact laying on his back when he used the gun in his right hand to shoot upwards at **Benjamin**, the bullet could not have traveled from left to right and downward as opined by Dr. Gerald Gowitt in the Autopsy Report. Defendant would have this Court believe that either the Medical Examiner was incorrect in his findings, or this must be the same magic bullet that appeared at Parkland Hospital in Dallas. There is no physical evidence to support the Defendant's claim and the record evidence conclusively calls into question his version of the circumstances.

2. Defendant's evidence contradicts itself, creates an irreconcilable dispute, and as such, cannot prove undisputed statements of fact.

23. Defendant submitted eight (8) affidavits by individuals who allegedly witnessed the homicide on January 18, 2013. These affidavits are dated March and April of 2017. These same individuals gave oral statements to the Avondale Estates Police Department on January 18, 2013, the day of the incident. Many of the statements given by the witnesses on January 18, 2013 are inconsistent with the affidavits drafted in March and April of 2017. The evidence presented by Defendant contradicts itself and creates an irreconcilable dispute establishing that there is a genuine dispute as to the material facts in this case.

24. In the interview on January 18, 2013 Jean Kingsbury stated that Defendant **Thomas** was about 5-6 feet away from **Benjamin** when he fired a fatal shot. (Exhibit 5 at 7:27). In the

affidavit dated March 15, 2017, Ms. Kingsbury stated that Defendant **Thomas** was no more than 3 to 4 feet away from **Benjamin** when he fired a fatal shot. (Defendant's Exhibit 7, ¶ 11).

25. In the interview on January 18, 2013 Jennifer Houpt stated that Defendant **Thomas** was about 3-5 feet away from **Benjamin** when he fired a fatal shot. (Exhibit 15 at 7:40). In the affidavit dated March 30, 2017, Ms. Houpt stated that Defendant **Thomas** was no more than 3 feet away from **Benjamin** when he fired a fatal shot. (Defendant's Exhibit 6, ¶ 8). These statements are inconsistent.

26. In the interview on January 18, 2013 Brenda Fultcher stated that Defendant **Thomas** almost tripped over bushes. (Exhibit 10 at 1:56). In the affidavit dated March 16, 2017, Ms. Fultcher stated that Defendant **Thomas** tripped backwards over some bushes (Defendant's Exhibit 10 at ¶ 7). These statements are inconsistent.

27. In the interview with Jean Kingsbury, Ms. Kingsbury stated that "the officer was standing when he fired." (Exhibit 5 at 4:17). Furthermore, in the January 18, 2013 interview with Jennifer Houpt, Ms. Houpt stated that the Officer was on his knees when he shot him. (Exhibit 15 at 3:00). These statements are inconsistent.

28. In the interview with Brenda Fultcher she states that she saw **Benjamin** swing, but Defendant **Thomas** did not fall. (Exhibit 10 at 2:39). Ashley Heath states that Defendant **Thomas** fell backwards to the ground. (Defendant's Exhibit 5 at ¶ 8). In the interview with Jean Kingsbury she states that she did not see **Benjamin** swing at Defendant **Thomas**. (Exhibit 5 at 4:11). These statements are inconsistent.

29. The above inconsistencies conclusively demonstrate disputed material facts which require this Court to deny Defendant's Motion for Summary Judgment.

CONCLUSION

30. Plaintiff respectfully submits that the record evidence currently before this Court not only establishes that Defendant has no entitlement to judgment as a matter of law, but shows that Defendant has not, and cannot, negate any of the essential elements of Plaintiff's claims.

31. Drawing all inferences in favor of Plaintiff, Defendant **Thomas** acted in an objectively unreasonable manner under the circumstances, his response was disproportionate to the circumstances, and violated Plaintiff's Fourth Amendment right to be free from the excessive use of force. Based upon the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendants' motion for summary judgment in its entirety.

Dated: Orlando, Florida
April 28, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her son JAYVIS LEDEL BENJAMIN, and on her own behalf,	)	**Case # 1:16-CV-1632**
Plaintiff,	)	
vs.	)	
LYNN THOMAS, individually, **Defendant.**	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1 IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT LYNN THOMAS MOTION FOR SUMMARY JUDGMENT

Plaintiff **MONTYE BENJAMIN**, as administratrix of the estate of her son **JAYVIS BENJAMIN**, and on her own behalf, by and through undersigned counsel, hereby respectfully submit this Statement of Materials Facts Pursuant to Local Rule 56.1 in support of Plaintiff's Response to Defendant Lynn Thomas Motion For Summary Judgment.

I. RESPONSE TO DEFENDANT'S STATEMENT OF FACTS AND ISSUES FOR WHICH THERE IS A GENUINE DISPUTE

1. Defendant's statement in the corresponding paragraph 1 is undisputed.

2. Defendant's statement in the corresponding paragraph 2 is undisputed.

3. The statement in Paragraph 3 cannot be deemed an undisputed fact. Plaintiff disagrees with any statement that would imply that the gray mustang was "barreling" down the road at "an extremely fast speed" as this calls for speculation. Further, the record evidence clearly refutes the statement regarding the red light, as Plaintiff's citation does not support the statement regarding

the red light. The color of the light at the intersection for traffic traveling westbound cannot be seen. (Exhibit 1).

4. The statement in Paragraph 4 cannot be deemed an undisputed fact. Plaintiff objects on the ground that it calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the vehicle's speed as it cannot be determined by the record evidence.

5. The statement in Paragraph 5 cannot be deemed an undisputed fact. Plaintiff objects on the ground that it calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the population of the area as it cannot be determined by the record evidence.

6. The statement in Paragraph 6 cannot be deemed an undisputed fact. Plaintiff objects on the ground that it calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the likelihood of the car striking another object or person as it cannot be determined by the record evidence.

7. While it is undisputed that Defendant **Thomas** activated his emergency lights and siren and turned left, Plaintiff would object to the speed of the car as it calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the vehicle's speed as it cannot be determined by the record evidence.

8. The statement in Paragraph 8 cannot be deemed an undisputed fact. Plaintiff disagrees with any statement that would imply that the vehicle was traveling at a "high rate of speed" as this calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the vehicle's speed as it cannot be determined by the record evidence.

9. The statement in Paragraph 9 cannot be deemed an undisputed fact. By the time Defendant **Thomas** turned left onto Kensington Road, he had lost sight of the gray Mustang. (Exhibit 2, p. 7; Exhibit 1).

10. The statement in Paragraph 10 cannot be deemed an undisputed fact. Plaintiff disagrees with the statement that Defendant **Thomas** felt certain that "at such a fast speed, the car would wreck" as this calls for speculation. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply the vehicle's speed as it cannot be determined by the record evidence.

11. Defendant's statement in the corresponding paragraph 11 is undisputed.

12. The statement in Paragraph 12 cannot be deemed an undisputed fact. Plaintiff objects on the ground that this statement calls for speculation. Defendant's citations do not support the statement. Defendant **Thomas** did not observe the wreck. Further, the wreck was not recorded. (Exhibit 1).

13. Defendant's statement in the corresponding paragraph 13 is undisputed.

14. Defendant's statement in the corresponding paragraph 14 is undisputed.

15. Defendant's statement in the corresponding paragraph 15 is undisputed.

16. While Plaintiff does not dispute the statement that Defendant **Thomas** repeated commands, **Benjamin** did not attempt to exit the car until after he was pushed by Defendant **Thomas.** (Exhibit 1).

17. The statement in Paragraph 17 cannot be deemed an undisputed fact. Plaintiff objects on the ground that this statement calls for speculation. Defendant **Thomas** did not observe the wreck. (Exhibit 1).

18. The statement in Paragraph 18 cannot be deemed an undisputed fact. Plaintiff objects on the ground that Defendant's statement is a misstatement of evidence. Defendant **Thomas** pushed **Jayvis Benjamin** while he was in the driver seat of the car. (Exhibit 3 at ¶ 15; Exhibit 1).

19. The statement in Paragraph 19 cannot be deemed an undisputed fact. Plaintiff objects on the ground that the statement is prejudicial and immaterial. Notwithstanding Plaintiff's objection, Plaintiff disagrees with any statement that would imply that **Benjamin** had a "wild look in his eyes" as it cannot be determined by the record evidence. Moreover, the video contradicts this statement. (Exhibit 1).

20. The record evidence clearly shows a dispute as to Defendant's statement in corresponding paragraph 20. Defendant's citation does not support the Defendant's statement. Plaintiff also objects on the ground that the statement calls for speculation. (Exhibit 1).

21. While it is undisputed that **Benjamin** stood up in the driver's seat and began crawling out through the driver's window, the statement that **Benjamin** overpowered Defendant **Thomas** is disputed. Defendant **Thomas** began walking away with his firearm pointed at **Benjamin** as **Benjamin** was exiting the vehicle. (Exhibit 1).

22. Defendant's statement in the corresponding paragraph 22 is undisputed.

23. The statement in Paragraph 23 cannot be deemed an undisputed fact. Plaintiff disagrees with this statement and the record evidence clearly refutes Defendant's statement as Defendant's Dash Cam Video citation does not support the statement. Once **Benjamin** exited the vehicle head first, he caught himself, and stood up. He then walks away from the officer and addresses the bystanders. (Exhibit 1).

24. The statement in Paragraph 24 cannot be deemed an undisputed fact. **Jayvin Benjamin** is of a comparable size to Defendant **Thomas**. (Exhibit 4 at 2:37).

25. While it is undisputed that Defendant **Thomas** drew his gun and pointed it at **Benjamin**, Plaintiff disagrees with the statement that Defendant **Thomas** drew his gun at this point in time. Defendant **Thomas** drew his gun **prior to Benjamin's** exit from the car. (Exhibit 5 at 3:29; Exhibit 4 at 1:32; Exhibit 1).

26. The statement in Paragraph 26 cannot be deemed an undisputed fact. **Benjamin** walked away from Defendant **Thomas** once he exited the car and subsequently moved both away from Defendant **Thomas**, and out of sight of the Dash Cam, prior to the fatal gunshot. These facts contradict the statement in Paragraph 26. (Exhibit 8 at ¶ 19; Exhibit 9 at ¶ 8; Exhibit 1).

27. The statement in Paragraph 27 cannot be deemed an undisputed fact. On the date of the incident, Brenda Fultcher stated that **Jayvis Benjamin** was walking fast, but not running. (Exhibit 10 at 4:12). Jean Kingsbury stated that same day, that **Jayvis Benjamin** was walking, not running or acting like he was going to tackle Defendant **Thomas.** (Exhibit 5 at 4:06). In an interview taken mere hours after the event in question, Ashley Heath stated that **Jayvis Benjamin** was walking slow towards the officer. (Exhibit 4 at 3:00). At the same time, Roy Froedge stated that **Jayvis Benjamin** was not running towards Defendant **Thomas**. (Exhibit 6 at 2:58).

28. While it is undisputed that **Benjamin** stated, "Y'all see what he's trying to do to me," to the bystanders, it is disputed that **Benjamin** shouted anything to Defendant **Thomas**. Jean Kingsbury stated that **Benjamin** did not say a word. (Exhibit 5 at 8:51). The dashboard video indicates that **Benjamin** said nothing to Defendant **Thomas**. (Exhibit 1).

29. While it is undisputed that there was distance between **Benjamin** and Defendant **Thomas**, any statement that implies that Defendant **Thomas** was the only party attempting to maintain a distance is disputed. **Benjamin** walked away from Defendant **Thomas** once he exited

the car and subsequently moves away from Defendant **Thomas**, and out of view of the dashboard camera, prior to the fatal gunshot. (Exhibit 8 at ¶ 19; Exhibit 9 at ¶ 8; Exhibit 1).

30. The statement in Paragraph 30 cannot be deemed an undisputed fact. Plaintiff refutes any statement that would imply Defendant **Thomas** had backed up to the point stated in Defendant's corresponding paragraph 30. As the record evidence clearly demonstrates, Defendant **Thomas** remains off camera, and out of view of the dashboard camera, approximately 10 yards away from the Mustang. (Exhibit 1).

31. The statement in Paragraph 31 cannot be deemed an undisputed fact. Defendant's citations do not support the Defendant's statement. Plaintiff objects on the ground that the statement misquotes a witness. Further, Jean Kingsbury specifically stated that she did not witness **Benjamin** swing at the officer. (Exhibit 1; Exhibit 3 at ¶ 21; Exhibit 5 at 4:11).

32. The statement in Paragraph 32 cannot be deemed an undisputed fact. Plaintiff disagrees with any statement that implies that **Benjamin** was swinging his fists. Jean Kingsbury specifically stated that she did not witness **Benjamin** swing at the officer. (Exhibit 1; Exhibit 5 at 4:11).

33. While it is undisputed that **Benjamin** was shot by Defendant **Thomas**, Plaintiff disputes Defendant's statement in the corresponding paragraph 33 as to the totality of the circumstances surrounding the fatal shot. (Exhibit 1; Exhibit 4; Exhibit 5; Exhibit 6; Exhibit 7).

34. The statement in Paragraph 34 cannot be deemed an undisputed fact. Defendant **Thomas** could not have stood up after he shot **Benjamin** because Defendant **Thomas** was standing when he shot **Benjamin.** Witness Jean Kingsbury stated that Defendant Thomas was standing. A later autopsy of **Benjamin** revealed that the bullet traveled downward and from left to right. (Exhibit 5 at 4:17; Exhibit 7, p. 7).

35. Defendant's statement in the corresponding paragraph 35 is undisputed.

36. The statement in Paragraph 36 cannot be deemed an undisputed fact. Defendant's statement has failed to comply with the provisions set out in LR 56.1 B(1)(c). The statement is stated as an issue or legal conclusion. Plaintiff further relies on the record evidence which clearly refutes the totality of the circumstance as set forth by Defendant in corresponding paragraph 36.

37. The statement in Paragraph 37 cannot be deemed an undisputed fact. Plaintiff refutes any statement that implies all of the witnesses cited in Defendant's statement in the corresponding paragraph 37 actually witnessed the gunshot, and not just the events leading to or resulting from the fatal shot.

38. While Plaintiff does not dispute the statement that Defendant **Thomas** repeated commands, the remainder of the statement is in dispute. **Benjamin** did not attempt to exit the car until after he was pushed by Defendant **Thomas.** (Exhibit 1).

39. While it is undisputed that Defendant **Thomas** made several requests to **Benjamin** to stop, Plaintiff would dispute any statement that implied **Benjamin** both heard, and intentionally ignored, those requests. (Exhibit 8 at ¶ 19; Exhibit 9 at ¶ 8).

40. The statement in Paragraph 40 cannot be deemed an undisputed fact. Brenda Fultcher stated that **Jayvis Benjamin** was walking fast, but not running. (Exhibit 10 at 4:12). Jean Kingsbury stated that **Jayvis Benjamin** was walking, not running or acting like he was going to tackle Defendant **Thomas.** (Exhibit 5 at 4:06). Ashley Heath stated that **Jayvis Benjamin** was walking slow towards the officer. (Exhibit 4 at 3:00). Roy Froedge stated that **Jayvis Benjamin** was not running towards Defendant **Thomas**. (Exhibit 6 at 2:58).

41. The statement in Paragraph 41 cannot be deemed an undisputed fact. Plaintiff disagrees with any statement that implies that **Benjamin** engaged Defendant **Thomas** in a physical

altercation. Jean Kingsbury specifically stated that she did not witness **Benjamin** swing at the officer. (Exhibit 5 at 4:11).

42. The statement in Paragraph 42 cannot be deemed an undisputed fact. Plaintiff disagrees with any statement that implies that there was a "struggle." The witness cited in Defendant's corresponding paragraph 42 stated as much in an interview on the date of the incident. (Exhibit 1; Exhibit 5 at 4:11).

44. The statement in Paragraph 44 cannot be deemed an undisputed fact. Defendant's citation does not support Defendant's statement. Plaintiff asserts that Defendant brandished his gun while Plaintiff was exiting the vehicle. Defendant **Thomas** drew his gun prior to **Benjamin's** exit from the car. (Exhibit 5 at 3:29; Exhibit 4 at 1:32; Exhibit 1).

45. The statement in Paragraph 45 cannot be deemed an undisputed fact. Defendant's statement has failed to comply with the provisions set out in LR 56.1 B(1)(c). The statement is stated as an issue or legal conclusion. Plaintiff further contends that the record evidence clearly contradicts the statement in Defendant's corresponding paragraph 45. It is unclear from the video if and when Defendant draws his weapon, and several witnesses stated Defendant **Thomas** drew his weapon as he approached the vehicle. (Exhibit 5 at 3:29; Exhibit 4 at 1:32; Exhibit 1).

46. The statement in Paragraph 46 cannot be deemed an undisputed fact. Defendant's citation does not support Defendant's statement. The dashboard camera video is cropped in such a way that prevents Defendant from concluding that **Benjamin** ignored the commands after Plaintiff and Defendant moved out of view. Plaintiff further contends that the record evidence clearly contradicts Defendant's statements in corresponding paragraph 46. (Exhibit 1; Exhibit 8 at ¶ 19; Exhibit 9 at ¶ 8).

47. The statement in Paragraph 47 cannot be deemed an undisputed fact. Plaintiff objects to the admissibility of Defendant's statement pursuant to Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Defendant's citation does not establish that: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. Defendant's statement has failed to comply with the provisions set out in LR 56.1 as this statement is supported by inadmissible evidence.

48. The statement in Paragraph 48 cannot be deemed an undisputed fact. Defendant's statement has failed to comply with the provisions set out in LR 56.1 B(1)(c). The statement is stated as an issue or legal conclusion.

II. MATERIAL FACTS OMMITED FROM DEFENDANT'S STATEMENT

49. Defendant **Thomas** pulled over at or near 3113 Kensington Road where he observed a damaged Ford Mustang. (Exhibit 1).

50. Defendant **Thomas** does not call for an emergency medical technician. (Exhibit 1).

51. **Benjamin** does not exit the vehicle. (Exhibit 1).

52. Defendant Thomas exits his vehicle, draws a weapon, and walks quickly across the lawn towards the Ford Mustang. (Exhibit 5 at 3:29; Exhibit 4 at 1:32).

53. Defendant approaches **Benjamin** and pushes **Benjamin** while he was sitting in the driver's seat of the car per the officer's orders. (Exhibit 14 at 2:54; Exhibit 3 at ¶ 15).

54. **Benjamin** was unarmed. (Exhibit 1; Exhibit 15 at 2:48).

55. It appears that the driver's side door was damaged. (Exhibit 1)

56. **Benjamin** exited through the driver side window of the vehicle face-first. (Exhibit 1).

57. Defendant **Thomas** began walking backwards with his firearm aimed at **Benjamin**. (Exhibit 1).

58. **Benjamin** walks slightly towards the road and appears to address the bystanders. (Exhibit 1).

59. **Benjamin** raises his right and states to the bystanders, "Y'all see what he's doing to me?" (Exhibit 1).

60. **Benjamin's** left arm was at his side and visible. He is not seen reaching or lunging at Defendant **Thomas**. (Exhibit 1).

61. **Benjamin** was not running towards Defendant **Thomas**, neither was he screaming at him nor acting like he was going to tackle Defendant **Thomas**. (Exhibit 5 at 2:49; Exhibit 4 at 9:51).

62. Defendant **Thomas** and **Benjamin** moved to the left and outside the view of the dashboard camera. (Exhibit 1).

63. A single gunshot is heard roughly 3 seconds after Defendant **Thomas** and **Benjamin** move outside the view of the dashboard camera. (Exhibit 1).

64. Defendant **Thomas** did not warn **Benjamin** that he was going to discharge his firearm. (Exhibit 1; Exhibit 4 at 9:00).

65. **Benjamin** moved away from Defendant **Thomas** right before he was fatally shot. (Exhibit 8 at ¶ 19; Exhibit 9 at ¶ 8).

66. Defendant **Thomas** regained control of the situation and Defendant **Thomas** and **Benjamin** were separated prior to Defendant **Thomas** firing a fatal shot. (Exhibit 4 at 2:11, 8:11).

67. Defendant **Thomas** was roughly 6 feet away from Benjamin when he fired one fatal shot killing **Benjamin**. (Exhibit 5 at 7:27; Exhibit 4 at 7:03).

68. Defendant **Thomas** did not render aid to **Benjamin** who was heard moaning. (Exhibit 11 at 8:45; Exhibit 1; Exhibit 4 at 4:14).

69. After the fatal shooting, the dashboard camera continues running and Defendant **Thomas** and other law enforcement officers are heard discussing the incident. (Exhibit 1).

70. Defendant **Thomas** refers to **Benjamin** as a "son of a bitch." (Exhibit 1 at 14:41).

71. The manner of death was determined to be a homicide. (Exhibit 7, p. 10).

72. **Benjamin** suffered from a fatal gunshot wound. Id. at p. 4.

73. The projectile of the bullet went through **Benjamin's** left mid-chest at a point 17.5" below the vertex of his head and 4" to the left of his anterior midline. Id.

74. Soot, stippling, searing, and gunpowder residue were not associated with the wound which demonstrates a larger degree of distance between the parties than suggested by Defendant **Thomas**. Id.

75. The overall direction of the gunshot wound to the chest and abdomen is "front to back, **slightly left to right and downward**." Id. at 5. (Emphasis added).

76. Defendant **Thomas** was placed on administrative leave on January 18, 2013 following the homicide. (Exhibit 12).

77. Per psychological recommendation, Defendant **Thomas** was not requalified with his duty weapon upon instruction of a qualified firearms instructor until February 5, 2013, after the date of the homicide. Id. at ¶ 1.

78. Per psychological recommendation, Defendant **Thomas** completed a session of training involving judgmental shooting on February 5, 2013, after the date of the homicide. Id. at ¶ 2.

79. On April 30, 2015, Montye Benjamin and Steven Benjamin watched one version of the dashboard camera video recording of the incident. (Exhibit 8 at ¶ 6; Exhibit 9 at ¶ 12).

80. In March of 2017, Wright-Pugh and Steven Benjamin watched a 49:33-minute video supplied by Defendant's attorney which has several differences from the first video. (Exhibit 8 at ¶ 16; Exhibit 9 at ¶ 16).

81. The video of the shooting has been edited to obstruct what happened immediately before Defendant **Thomas** fatally shot **Benjamin.** (Exhibit 8 at ¶ 20; Exhibit 9 at ¶ 20).

82. Video # 1 had a wide screen format; the picture extended to the edge of the computer screen. Video # 2 has two large black bars on each side, constricting the picture. Part of the video image is cut off in Video # 2. (Exhibit 8 at ¶ 18; Exhibit 9 at ¶ 18, 19).

83. Third, Video # 1 was bright in color and very clear. Video # 2 is a lot darker and grainy with a significantly less sharp picture. (Exhibit 8 at ¶ 17; Exhibit 9 at ¶ 17).

84. In Video # 1, **Benjamin** was moving away from the police officer right before he was shot. In Video # 2, the entirety of **Benjamin's** direction of travel is not visible because the screen is cut off on both the left and right sides. (Exhibit 8 at ¶ 18, 19, 21; Exhibit 9 at ¶ 19, 21).

85. The 2015 March Term Grand Jury heard the evidence of the fatal officer-related shooting of Jayvis Benjamin docket #D0235807. The Grand Jury strongly recommended that the case move forward for indictment. (Exhibit 13, p. 6, ¶ 5). It was the only officer-related shooting that the Jury recommended for indictment. (Id.).

86. Despite that strong recommendation, no indictment has been filed against Defendant **Thomas** and he now the Chief of Police for the Avondale Estates Police Department.

Dated: April 28, 2017

Respectfully Submitted,

/s/ *Adam M. Hames*
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2017 a true and correct copy of the foregoing was served upon counsel for Defendants via CM/ECF:

Robert E. Wilson
Wilson, Morton, & Downs, LLC
125 Clairemont Avenue
Two Decatur TownCenter, Suite 420
Decatur, GA 30030

/s/ Adam M. Hames
Adam M. Hames, Esq.

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her son JAYVIS LEDEL BENJAMIN, and on her own behalf,	)	**Case # 1:16-CV-1632**
Plaintiff,	)	
vs.	)	
LYNN THOMAS, individually, **Defendant.**	)	

AFFIDAVIT OF MONTYE BENJAMIN

STATE OF GEORGIA)
)
COUNTY OF DeKalb)

MONTYE BENJAMIN, being duly sworn, deposes and states as follows under penalty of perjury:

1. I am the Plaintiff in this action, and the mother of my late son, Jayvis Ledel Benjamin. I make this affidavit in opposition to the Defendant's motion for summary judgment.

2. My son Jayvis was only 20 years old when he was killed by the Defendant. He was a enrolled at Georgia Perimeter College, majoring in mass communications, and worked at WrapCity Vinyl as a production worker. He also worked at Welcome Friends Baptist Church as an audio engineer and DW Services as a sound technician and production assistant.

3. On January 18, 2013, my son was killed for no reason by the Defendant. Jayvis was the sweetest, kindest young man with a bright future ahead of him. He volunteered at a local youth center and enjoyed the company of numerous friends and family members.

4. Jayvis had no violence or ill-will in him. He was the most peaceful young man, never fought with anyone, and rarely even argued with people.

5. After my son's death, the DeKalb County District Attorney claimed to be conducting an investigation, but it turned into a whitewash. After waiting approximately two years and three months for this "investigation" to conclude, I was contacted by the District Attorney's Office in late March or early April, 2015 to notify me that the case was going to be presented to a grand jury, and that I would be permitted to testify in the grand jury.

6. On or about April 28, 2015, I received a call from the Victim Advocate from the District Attorney's Office, who notified me that the case was being presented to a Grand Jury on April 30, 2015, and I would be given an opportunity to give a victim impact statement. I was told that there would be a total of 7 cases presented to the Grand Jury, all of which involved police shootings. On April 30, 2015, at 9:00 a.m., I went to the Grand Jury with my son Steven Benjamin and waited until almost 10:00 a.m. when we were called in. At this point, the Victim Advocate informed me that Officer Thomas had declined to appear.

7. Assistant District Attorney Golden was in the hearing room. Both Steven Benjamin and I entered the hearing room, and Assistant District Attorney Golden announced that she would be playing the video of the incident for the Grand Jury. There was a computer with a monitor with a video appeared to be loaded and ready to play. The monitor showed six different windows which appeared to be different angles and different views. However, only one video angle was played when the Assistant District Attorney clicked on one video.

8. The video that was shown was the same video described by my son Steven Benjamin at the first meeting with the Assistant District Attorney, with one exception – the point at which

Office Thomas began to give his explanation off-camera was omitted, and the video was stopped by Ms. Golden prior to that.

9. The Grand Jurors began to ask questions to the District Attorney about the video, and one juror asked for the video to be played again. The District Attorney responded that they could watch it at a later time, but the jurors demanded to see it again immediately. The District Attorney then played the same one angle two more times, but each additional time the video was stopped at an earlier point.

10. I gave my victim impact statement to the Grand Jury I saw the video of my son's shooting for the first time. There were six different windows which appeared to be different angles and different views. However, only one video angle was played. The Assistant District Attorney announced that she would be playing the video of the incident for the Grand Jury. There was a computer with a monitor with a video appeared to be loaded and ready to play. The monitor showed six different windows which appeared to be different angles and different views. However, only one video angle was played when the Assistant District Attorney clicked on one video.

11. The video that was shown was the same video described by my son Steven Benjamin at the first meeting with the District Attorney, with one exception – the point at which Office Thomas began to give his explanation off-camera was omitted, and the video was stopped by Ms. Golden prior to that.

12. The Grand Jurors began to ask questions to the District Attorney about the video, and one juror asked for the video to be played again. The District Attorney responded that they could watch it at a later time, but the jurors demanded to see it again immediately. The District Attorney

then played the same one angle two more times, but each additional time the video was stopped at an earlier point.

13. After I gave my testimony, I left the hearing room and was told that I would be notified within a few days when a decision was made. Later that day, I was contacted by the Victim Advocate, Tina Williamson, who informed me that the Grand Jury had recommended that the case be presented to a criminal grand jury for Indictment, and that I should expect to be contacted by the media, and to watch for a press conference from the District Attorney.

14. The District Attorney never presented the case to a criminal grand jury. Instead, on March 11, 2016, he notified me that he had decided on his own not to file charges against the Defendant.

15. After I received this news, I was crushed and disheartened. I knew that I could not rely upon the criminal justice system to obtain justice for my son, and had to seek justice through a civil suit. I felt as though the Defendant had gotten away with murder.

16. In March, 2017, I watched a 49:33 minute video supplied to me by Patrick Michael Megaro, Esq., which was supplied to him by the Defendant's attorney. That video (Video # 2) has several differences from the video viewed by my son, my daughter, and my sister at the District Attorney's Office and in the Grand Jury (Video # 1).

17. First, Video # 1 was a much higher quality, higher resolution than Video # 2, it is difficult to make out faces, expressions, and other details that were plainly visible on Video # 1.

18. Second, Video # 2 appears to be warped and skewed, as if someone had cropped one side of the video and had stretched the image. Video # 1 had a much wider angle of view – the entire video occupied the entire screen. Video # 2 appears to be cut off on both the left and right sides, and the view is restricted. As a result, Video # 2 shows substantially less of what occurs

between Jayvis and Officer Thomas on the left side of the screen immediately prior to the shooting.

19. On Video # 2, because the left side of the screen is cut off, what is not visible is the actions of Officer Thomas in placing his hands on Jayvis' body and pushing him. What is also not visible is Jayvis pulling away from Officer Thomas and attempting to walk past him. This is contrary to what Officer Thomas claimed, which is that Jayvis lunged toward him, not away from him.

20. I do not know what happened to the original video that my son Steven, my sister Penelope, and I saw, but I do know that the video supplied by the Defendant to my attorney is not the same video. It appears to be intentionally edited to remove the most important part immediately before the Defendant killed my son.

21. From what I saw on the video, there was absolutely no reason for the Defendant to shoot and kill my son. Jayvis was not even looking at the Defendant, and was walking away from him right before the Defendant pulled the trigger and ended Jayvis' life.

22. I am ready, willing and able to testify to the foregoing in court.

23. I pray that this Court denies the Defendant's motion and gives a grieving mother the chance to seek justice and do that which the District Attorney has refused and failed to do – allow a jury of ordinary citizens to view the evidence and decide whether the Defendant was justified or unjustified in killing my son.

GA D/L 056 747 830
EXP. 8-13-2020

Dated:

MONTYE BENJAMIN

Subscribed and sworn to before me this

20 day of April, 2017

TERI LYNN JACKSON NOTARY PUBLIC HENRY COUNTY, GA Exp. Mar. 02, 2019

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONTYE BENJAMIN, as Administratrix Of the Estate of her son JAYVIS LEDEL BENJAMIN, and on her own behalf,	)	**Case # 1:16-CV-1632**
Plaintiff,	)	
vs.	)	
LYNN THOMAS, individually, **Defendant.**	)	

AFFIDAVIT OF STEVEN BENJAMIN

STATE OF GEORGIA)
COUNTY OF DeKalb)

STEVEN BENJAMIN, being duly sworn, deposes and states as follows under penalty of perjury:

1. I am the brother of Jayvis Benjamin and the son of Montye Benjamin, the Plaintiff in this action. I make this affidavit in opposition to the Defendant's motion for summary judgment. I am over the age of 18 years and reside in Jonesboro, Georgia.

2. On January 18, 2013, my brother was shot and killed by the Defendant. My brother was unarmed when the Defendant killed him. My brother had no history of violence, and was a kind, gentle, and non-violent person.

3. After his death, there was an extended investigation by the Office of the District Attorney. My family and I waited for years while the District Attorney conducted an investigation.

4. Prior to April, 2015, the District Attorney announced that it would present the case to a civil grand jury. I later learned that five other cases involving police shootings would be presented to the civil grand jury as well.

5. My family members and I were invited to the District Attorney's Office to view the dashboard video recording of the incident involving my brother prior to the presentation of the case to the civil grand jury.

6. On or about April 16, 2015, my mother Montye Benjamin, my sister Stephanie Brown, my aunt Penelope Pugh, and I went to the Office of the District Attorney. There we met with Assistant District Attorney Golden, who was assigned to the investigation, and a detective who was assigned to the case as well. We were accompanied by the Victim Advocate. When we arrived at the District Attorney's Office, we were informed that we were going to be shown the dashboard camera of the incident involving Jayvis Benjamin, and we would be able to watch it as many times as we liked. My mother Montye Benjamin was not emotionally ready to watch the video, so she waited in the reception area while the rest of us went to a conference room to watch the video.

7. We went to the conference room and were seated, and a monitor displayed the video, which was on a flash drive and appeared to be a VLC video file. Assistant District Attorney Golden played the video on the computer. The time counter on the video appeared approximately 40 minutes or more. However, Ms. Golden only played the first 8:13 minutes (approximately) of the video for us.

8. The video we saw was the dashboard camera of Officer Lynn Thomas which starts with the officer stopped at traffic light when vehicle traveling in a perpendicular direction comes into view and passes in front of Thomas' car. Thomas' car then turns to follow the other vehicle, which

is visible in the camera view for a moment, then disappears. After a short period of time, Thomas' vehicle pull over onto a grassy area, and a Ford Mustang was on the grassy area which appeared to crash into a parked car. When Thomas' vehicle comes to a stop, Thomas jumped out of his car and immediately pointed his weapon at Jayvis Benjamin. Thomas is in the field of view of the dashboard camera. Also visible in the right-hand edge of the video is a white vehicle which is oncoming traffic. Thomas is approximately 5-10 feet away from the Mustang, which is still occupied by Jayvis Benjamin, who is in the driver's seat. The driver's side door appears to have damage. Thomas yells at Jayvis Benjamin to stay in the car, and Jayvis Benjamin exits the car from the driver's side window face-first, and catches himself and stands up. Thomas tells Jayvis to get back into the car, and starts to walk backward, and Jayvis walks away from Officer Thomas, looks around and appears to address several people, including the driver of the white car on the right hand side of the video, and says "Y'all see this shit?" and starts to walk past Office Thomas. At this point, Jayvis' right hands is raised over his head, and the other hand is at his side but clearly visible. At no point does Jayvis lunge at the officer, or attempt to reach into his pocket. Officer Thomas placed his free hand on Jayvis' torso, still pointing his firearm, an appear to give him a push, and Jayvis pulls away from Officer Thomas and tries to move away from him, trying to move past Officer Thomas. At this point both of them go to the left of the screen and go off camera. Approximately 1-2 seconds after both Jayvis and Lynn Thomas go off-camera, a single gunshot is heard. At this point, Officer Thomas is heard calling for backup on his radio, and Jayvis Benjamin is struggling to breathe. On the right hand side of the video, another police officer pulled up on the right hand side of Thomas' vehicle, and exists the vehicle. He is within the field of view of the camera, and appears to look around the scene. Paramedics arrive, but they are not visible on the video. Paramedics say they cannot get the ambulance through, and they are heard rendering

aid to Jayvis and talking to him. At approximately 7:53 minutes, Officer Thomas is heard speaking with what appears to be other officers, and begins to give his account of what occurred. Thomas is heard saying that Jayvis attacked him, and utters the word "Bang," and body movements are heard as if he were gesturing, but none of this is on camera.

9. As Thomas started giving his account, Ms. Golden shut the video off.

10. At this point, my sister, my aunt, and I began to ask questions to the Assistant District Attorney. Among the questions we asked were why the paramedics were unable to get through and render immediate aid, and also asked about the dashboard cameras for the other police cars. We were told the cameras were not always on, they had to be manually turned on. When we were told that, we asked why was Officer Thomas' camera turned on, but no one else's? We were not given an answer to that question.

11. We were permitted to watch the video a second time, but this time the Assistant District Attorney only permitted us to watch the first 5 minutes of the video. After the second viewing, the Assistant District Attorney asked us to leave because she had other matters to attend to. We were not give the opportunity to watch the video again or to ask any additional questions.

12. On April 30, 2015, I went with my mother to the Grand Jury. At approximately 10:00 a.m. we were called into the hearing room, where Assistant District Attorney Golden was waiting. When we entered, she announced that she would be playing the video of the incident for the Grand Jury. There was a computer with a monitor with a video appeared to be loaded and ready to play. The monitor showed six different windows which appeared to be different angles and different views. However, only one video angle was played when the Assistant District Attorney clicked on one video.

13. The video that was shown was the same video described at the first meeting with the District Attorney, with one exception – the point at which Office Thomas began to give his explanation off-camera was omitted, and the video was stopped by Ms. Golden prior to that.

14. The Grand Jurors began to ask questions to the District Attorney about the video, and one juror asked for the video to be played again. The District Attorney responded that they could watch it at a later time, but the jurors demanded to see it again immediately. The District Attorney then played the same one angle two more times, but each additional time the video was stopped at an earlier point. After my mother gave her testimony, we left the building.

15. The next time I saw a video depicting the shooting was when a portion of the video was played on the news in March, 2016. The video clip that was played on the news was only a few seconds long. The video clip on the news appeared to be heavily edited and was different from the video I had seen in the District Attorney's Office and the Grand Jury.

16. In March, 2017, I watched a 49:33 minute video supplied to me by Patrick Michael Megaro, Esq., which was supplied to him by the Defendant's attorney. That video (Video # 2) has several differences from the video I saw at the District Attorney's Office and in the Grand Jury (Video # 1).

17. First, Video # 1 was a much higher quality, higher resolution than Video # 2, it is difficult to make out faces, expressions, and other details that were plainly visible on Video # 1.

18. Second, Video # 2 appears to be warped and skewed, as if someone had cropped one side of the video and had stretched the image. Video # 1 had a much wider angle of view – the entire video occupied the entire screen. Video # 2 appears to be cut off on both the left and right sides, and the view is restricted. As a result, Video # 2 shows substantially less of what occurs between Jayvis and Officer Thomas on the left side of the screen immediately prior to the shooting.

19. On Video # 2, because the left side of the screen is cut off, what is not visible is the actions of Officer Thomas in placing his hands on Jayvis' body and pushing him. What is also not visible is Jayvis pulling away from Officer Thomas and attempting to walk past him. This is contrary to what Officer Thomas claimed, which is that Jayvis lunged toward him, not away from him.

20. I do not know what happened to the original video that I saw, but I do know that the video supplied by the Defendant to my attorney is not the same video that I saw at the District Attorney's Office. It appears to be intentionally edited to remove the most important part immediately before the Defendant killed my brother.

21. From what I saw on the video, there was absolutely no reason for the Defendant to shoot and kill my brother. Jayvis was not even looking at the Defendant, and was walking away from him right before the Defendant pulled the trigger and ended Jayvis' life.

22. I am ready, willing and able to testify to the foregoing in court.

Dated:

STEVEN BENJAMIN

Subscribed and sworn to before me this

20th day of April, 2017

Notary Public

Notary Public, State of Georgia
My Commission Expires
1/26/2021

15CV1014

DEKALB COUNTY GRAND JURY PRESENTMENTS
MARCH - APRIL TERM, 2015

TO THE HONORABLE JUDGES:

COURTNEY L. JOHNSON
ASHA F. JACKSON
CLARENCE F. SEELIGER
GAIL C. FLAKE
GREGORY A. ADAMS
CYNTHIA J. BECKER
DANIEL M. COURSEY, JR.
LINDA W. HUNTER
MARK ANTHONY SCOTT
TANGELA BARRIE

Of the Superior Court of DeKalb County, Georgia, Stone Mountain Judicial Circuit
This Grand Jury, sworn in by the **Honorable Linda W. Hunter** in the DeKalb Superior Court on **March 3, 2015** respectfully submits the following presentments.

INDICTMENTS

This Grand Jury was presented with (368) cases during the **March-April 2015** term. Of these cases (366) True Bills and (2) No Bills were returned. An additional (187) cases proceeded by Accusation.

REQUEST FOR PUBLICATION

Pursuant to the O.C.G.A. § 15-12-80, we the presently constituted Grand Jury recommend to the **Honorable Linda W. Hunter** that these general presentments be published in whole in the County Legal Organ.

The jurors of the March – April 2015 session of the Grand Jury would like to recognize and thank the staff of the District Attorney's Office such as the ADAs, Investigators, Interns and other supporting staff that helped to prepare and present cases, as well as the law enforcement officers, for their continued service and dedication to the people of DeKalb County.

Orientation

The presentation that the ADA provided was informative and the general walk through of the judicial process was also helpful in understanding where our role is in the process. We feel that the ADA had learned from past information and suggestions from past Grand Juries and the orientation allowed us to get started quickly. We also appreciated the presentations on weapons, drugs and family violence to give us reference in many of the cases we saw over the term. However, the following are a few recommendations to improve the overall experience:

- We feel there still needs to be more clarification on probable cause along with examples of cases that may or may not have probable cause to eliminate some deliberations where people were focusing more on guilt or innocence.

- We would like for the 'preponderance of guilt' to be focused on as well so people understand what we should focus on in relation to probable cause.

- Provide additional information on what should or should not be considered in Grand Jury proceedings i.e. mental state, self-defense, basis of stops or searches.

- Provide more information on the forensic interviews for their children and the role – what they mean, where they take place and when are they conducted. More clarification on the system itself.

- It would be helpful if we were provided some level of understanding on the possible charges that could result from the indictments that we approve (e.g. length of prison sentence, etc.).

- Provide additional information on gangs and gang-related activity.

- Provide additional information on the purpose and job of the foreman and assistant foreman and the commitment of the role and that it is non-transferrable. We had an instance where both the foreman and assistant foreman were all out and the Grand Jury cannot get started without them, and no one can take their places at any point.

- Provide additional background on child-related incidents, including molestation and child abuse charges.

General Observations

Overall this has been an interesting experience and we all want to commend the work of the DA's office and all the witnesses and officers that come before us. Below are some suggestions that we want to provide:

- We encourage the DA's office to reach out to schools and educate the youth and the media about the risks of crime – such as the fact that using your finger in your jacket to commit a robbery is as egregious as using an actual weapon in the crime. We also make a suggestion that they educate the public on what to do when an officer pulls your vehicle over and that you must stay in your vehicle.

- Based on the case we saw that concerned abuse of the DeKalb County P card or Purchasing Card, we recommend that more scrutiny be paid to this process. The case we saw concerned the (years long) flagrant abuse of a P Card by an employee who was managed by a DeKalb County Commissioner who was found guilty of fiscal abuse. It is important that DeKalb County insure strict internal controls are in place for all expenditures to protect taxpayers from corruption.

- We suggest that the ADA present the actual reasoning for charges brought forth in each indictment. Often the charges are not apparent based on the case as it is presented to us. This may be because the ADA feels the charges on the indictment are 'stronger' than others we feel may better correlate to the case as we hear it. This can be accomplished by providing information if the evidence clearly points to other charges that are not included in the indictment, e.g. point to each count specifically so we understand what and why.

- We suggest that the Grand Jury introduce themselves to each other at the very beginning so we know names, etc. before getting started.

- We reiterate the previous points on the cold temperate of the room – we feel this should be addressed to keep us comfortable and save energy!

- We suggest that they print the printouts double-sided (on both sides) to save paper and promote sustainability.

- Provide information about potential rehabilitation programs and mental health screening that may happen during the process and how defendants may qualify and be placed in those services. There were jurors who were not comfortable indicting mentally ill defendants.

- The Grand Jury Summons letter should be sent certified mail. We were informed that the Sheriff's office will be sent to each individual's residence for those who do not show up for Grand Jury Duty. There is nothing that prevents someone from saying they did not receive the letter.

- We felt that the seasoned detectives did a better job telling the points of the indictment so we could understand it. We suggest that some of the newer officers

shadow some of the more experiences detectives so they can see how to present a full story of the charges in the indictment (maybe as part of the Police Academy).

- We should be able to nominate and swear in another Foreman if a Foreman and Assistant Foreman are both absent.

- We also liked it when officers and witnesses made the job fun. Although this is a serious process, people who come before us should bring a positive energy. We had a lot of great witnesses like Beth Suber and Sam Washington.

- We feel that, reiterating previous Presentments, this is still a large time commitment for ordinary citizens to understand the legal system but feel that two months is an acceptable time frame. We feel that as any more time would be excessive and any less would be too little to get a good flow. However, we felt that since we did not have full days there is lots of time wasted in the system.

- We would like to highlight the lack of consistency at the security desk at the front door. We know there were shootings at the courthouse a few years ago and we are putting our lives in their hands and therefore want them to be more consistent and pay attention to this important job.

- The past three Presentments listed that the microphone didn't work all the time – this is the same this time around. Turn the microphones off at the end of the day and the batteries will last and also have the ADAs encourage witnesses to speak up.

- We also suggest that officers insure their respect for the public during routine stops and interactions.

- There were a number of cases where indictments were sought for aggression against a police officer. It seems timely and imperative in order to prevent officer injury to provide extensive training on approaching agitated, unresponsive, mentally ill and

similar type suspects. We also encourage officers be trained in methods related to use of force options, including computer-simulated training like the kind we saw presented by the Meggitt company.

- We recommend that the next Grand Jury hear any outstanding officer-related shootings and that this become an ongoing task for future Grand Juries. We also recommend that use of force education be given to future Grand Juries prior to seeing these cases. We found the training we were given to be very helpful, including the computer-simulated training tool presentation.

- After listening to the officer-related shootings we believe that officer body cameras be standard issue.

- We suggest that officers should have additional training on approaching and working with mentally ill suspects. We know this has already been started and encourage this continue and be extended.

- We heard the evidence of the fatal officer-related shooting of Roderick Lorenzo Anderson docket #D0228454. Although we believe it is unfortunate that this case ended in a fatal shooting, we recommend that the DA not pursue an indictment against the officers involved in the shooting.

- We heard the evidence of the fatal officer-related shooting of Jayvis Benjamin docket #D0235807. We strongly recommend that this case move forward for indictment.

- We heard the evidence of the fatal officer-related shooting of Eric Devonn Roberts docket #D0234792. Although we believe it is unfortunate that this case ended in a fatal shooting, we recommend that the DA not pursue an indictment against the officer involved in the shooting.

- We heard the evidence of the fatal officer-related shooting of Sage Happ-Williams docket #D0228707. Although we believe it is unfortunate that this case ended in a fatal shooting, we recommend that the DA not pursue an indictment against the officer involved in the shooting.

- We heard the evidence of the fatal officer-related shooting of Elder Josue Alfaro-Zelaya docket #D0232439. Although we believe it is unfortunate that this case ended in a fatal shooting, we recommend that the DA not pursue an indictment against the officer involved in the shooting.

- We heard the evidence of the fatal officer-related shooting of Chris Lee docket #D0234153. Although we believe it is unfortunate that this case ended in a fatal shooting, we recommend that the DA not pursue an indictment against the officer involved in the shooting.

Jail Inspection

We visited the jail on March 12, 2015. The jail seemed very well organized, staffed, and clean. Presentations were on point and they answered all questions during our visit.

We suggest a better system is investigated to transport us to the jail. One of the jurors was injured and we are concerned that we are not insured against injury during this transport. Also, there were no seat belts on the jail bus.

The jail visit was very informative and interesting however, from an audit perspective, we did not feel this is a role for the Grand Jury. We understand that the inspection has been assigned to the Grand Jury owing to previous issues and deplorable conditions at the jail. We feel thankfully that the jail no longer suffers from these problems. We feel that this was not a real inspection but rather a tour or field trip. In the context of a field trip, though, this is a good trip for the Grand Jury to take to understand where people we indict may be sent following the indictment.

We encourage the jail inspection to be removed from the Grand Jury's role, and that a specific (educated) group be created to provide this important service. There are numerous jail-related facts that previous Grand Juries listed in their Presentment and which we do not want to include here, as the information can be gained by speaking with the head of the jail and the staff there.

Tax Commissioner Annual Report

As required by O.C.G.A. 48-5-161 that the tax commissioner, Claudia G. Lawson, submit her cashbook and execution docket to the Grand Jury. A summarized copy of this annual report for the year of 2014 is attached.

Conclusion

Each member of the Grand Jury has dedicated a significant amount of time over the last two months away from their normal daily lives to serve on the jury. Each of the 26 members has come to the table with a different perspective and likely a different view on the process. There is no doubt that each one of us has had an eye-opening experience that leaves us with a completely new outlook.

2014 Annual Report

as of December 31, 2014

Claudia G. Lawson

DeKalb County Tax Commissioner

Property Tax Statistics 2014

	Applied For Tax Year 2014	Total Digest Tax Year 2014
Basic Homesteads	8,360	118,839
Senior/Special	1,353	22,705

Property Tax Collection Rates

Tax Year 2014	96.79%
Tax Year 2013	99.29%
Tax Year 2012	99.59%
Tax Year 2011	99.67%
Tax Year 2010	99.72%
Tax Year 2009	99.81%
Tax Year 2008	99.82%
Liens issued for Tax Year 2013	12,696
Properties Sold at Tax Sale - 2014	558

Motor Vehicle Statistics 2014

Registrations Processed	515,529
Titles Processed	82,100
Sales Tax Transactions	219
Insurance Transactions	27,184

Collections Statistics 2014

Property Tax

Entity	Billed	Collected/Distributed	% Collected
County	$310,065,773	$298,950,123	96.42%
School	$374,412,514	$363,731,206	97.15%
State	$1,835,193	$1,785,619	97.30%
Cities	$77,442,228	$74,749,423	96.52%
Total	**$763,755,708**	**$739,216,372**	**96.79%**

Motor Vehicle	Collected/Distributed
County	$34,484,989
School	$37,829,824
State	$53,029,926
Cities	$11,225,291
Total	**$136,570,030**

Grand Total Collections/Distributions **$875,786,402**

Revised: 1/28/2015

AUSTIN K. DUDLEY, FOREMAN

NOREEN MCCLARTY, ASST. FOREMAN

ANNIE R. WASHINGTON, SECRETARY

MELISSA J. CHRISTOFF, ASST. SECRETARY

KATHY R. ADAMS
TRICIA APPELTON
TAMEKA L. BARNES
FELITA BOOKER
GEORGIA M. BROWN
LINDA S. COLVIN
ANTOINETTE COWELL
SHERIEF H. EISSA
DAVID G. HURST
STEPHANIE F. JAMES
LEAH C. JUNIRS
ANTHONY LOVE
KIMBERLEE K. MARTENS
BRONWEN A. MORGAN
BRUCE R. NEWTON
DEANNA S. REES
LINDA L. RENEGAR
BRYTEN RODDY
MOHAMMED S. SHAFIQ
INGER E. VANHOY
GERRARD S. WAITE
ALICE M. WHITLEY

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CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

ORDER

The within and forgoing presentments have been filed in open Court,

IT IS HEREBY ORDERED that said presentment be filed and published, as requested, in the County Legal Organ.

SO ORDERED this 30TH day of APRIL, 2015.

Linda W. Hunter

JUDGE LINDA W. HUNTER

DEKALB SUPERIOR COURT
STONE MOUNTAIN JUDICIAL CIRCUIT

ACKNOWLEDGED:

Robert James

ROBERT D. JAMES
DISTRICT ATTORNEY

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DEKALB COUNTY GA