961 F.3d 721
United States Court of Appeals, Fifth Circuit.

Maritza AMADOR, Individually and as Representative of the Estate of Gilbert Flores and as Next Friend of Minor R.M.F.; Vanessa Flores; Marisela Flores; Carmen Flores; Rogelio Flores, Plaintiffs-Appellees

v.

Officer Greg VASQUEZ, Individually and in his Official Capacity; Officer Robert Sanchez, Individually and in his Official Capacity, Defendants-Appellants

No. 17-51001
|
FILED June 3, 2020

Appeal from the United States District Court for the Western District of Texas

Attorneys and Law Firms

Matthew J. Kita, Dallas, TX, Robert Paul Wilson, Thomas J. Henry Injury Attorneys, San Antonio, TX, for Plaintiffs - Appellees.

Charles Straith Frigerio, Esq., Trial Attorney, Law Offices of Charles S. Frigerio, P.C., San Antonio, TX, for Defendants - Appellants.

Before HIGGINBOTHAM, GRAVES, and WILLETT, Circuit Judges.

ON PETITION FOR REHEARING

JAMES E. GRAVES, JR., Circuit Judge

Treating the petition for *en banc* rehearing as a petition for panel rehearing, we grant rehearing, withdraw our opinion dated March 11, 2020, and substitute the following opinion:

While responding to a domestic violence call, Bexar County Sheriff's Deputies Greg Vasquez and Robert Sanchez shot and killed knife-armed Gilbert Flores after a twelve-minute encounter that ended with Flores standing nearly thirty feet from the deputies, motionless, and with his hands in the air. Flores's wife and other surviving family members (collectively, the "Estate" or "Plaintiffs") brought a 42 U.S.C. § 1983 claim against the deputies, alleging that Vasquez and Sanchez violated Flores's Fourth Amendment right to be free from excessive force. The deputies moved for summary judgment based on qualified immunity. The district court denied the motion, finding that there were genuine issues of material fact. The deputies filed this interlocutory appeal. Because we agree with the district court that genuine issues of material fact exist, we lack jurisdiction to review this appeal. Accordingly, we DISMISS.

SUMMARY JUDGMENT EVIDENCE[1]

In 2015, after a domestic dispute between Flores and his wife at Flores's mother's home, Flores's mother called 9-1-1 for assistance. According to the 9-1-1 call transcript, Flores's mother told the dispatcher that Flores beat up his wife and had "gone crazy". Deputies Vasquez and Sanchez were dispatched to the residence in separate vehicles. While in route, dispatch advised Vasquez and Sanchez that Flores was upset, and that Flores wanted to commit "suicide by cop."[2] Vasquez was also informed that Flores had a knife.

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[1] These facts are gleaned from the record on appeal and the district court findings. *See Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000) ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness*.") (emphasis in original). The record contains an audiovisual recording of the encounter filmed by a bystander with a phone. The enhanced video may be accessed via the following internet link: http://www.ca5.uscourts.gov/opinions/pub/17/17-51001.mp4. We analyze the video evidence to determine whether it "utterly discredit[s]" the Estate's version of events such that "no reasonable jury could have believed [the Estate]." *See Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *see also Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("A court of appeals need not rely on [a] description of the facts where the record discredits that description but should instead consider the facts in light depicted by the videotape.") (citation and internal quotation marks omitted). We determine that the video does not utterly discredit the Estate's version of events or the district court's determinations regarding the genuineness of facts.

[2] Flores could be heard during the 9-1-1 call saying, "I got a knife and I'm going to suicide by cop, so bring a SWAT team, or uh uh uh or whoever is going to be ready to pull the trigger because I'm going to die today."

Twelve minutes elapsed between Vasquez's arrival and the officers' fatal shots at Flores.[3] During those twelve minutes, the deputies had a number of encounters with Flores, and ultimately deescalated the situation. It was only after Flores was standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds that the officers looked at each other and then decided to shoot Flores. The officers each fired a shot, and Flores fell to the ground. Viewing the facts in the light most favorable to the Estate, *Tolan v. Cotton*, 572 U.S. 650, 655–56, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014), we summarize the encounters.

Encounter #1

Vasquez arrived at the residence first, went into the house, and had an altercation with Flores who was holding a fixed blade Ozark Trail knife. Vasquez attempted to calm Flores and told him, "put the knife down, you're going to be alright." Flores began approaching Vasquez, and Vasquez retreated out of the residence.

Encounter #2

Not long after Vasquez retreated out-side, Flores exited the residence with the knife in hand and allegedly stabbed at Vasquez, striking Vasquez's protective

[3] Sanchez arrived one minute after Vasquez.

shield. During this altercation, Sanchez arrived. Flores then began retreating toward the house.

Encounter #3

As Flores retreated toward the house, Sanchez fired one shot at Flores and missed.

Encounter #4

Flores went back to the residence, retrieved two metal folding chairs, and came back outside. While still holding at least one of the folding chairs, Flores allegedly came at Vasquez with the knife. Vasquez blocked the knife with his protective shield and deployed his taser at Flores. The taser missed Flores and hit a chair in Flores's hand, and its wires became entangled with the chair. Vasquez then struck Flores with the taser gun and dropped it from his hand. Flores then went back toward the residence.

At some point around this time, a bystander began videotaping the encounter on a phone.

Encounter #5

For the first few minutes of the video, Flores, wearing only shorts and flip flops, and the officers, each holding a gun, talked and maintained distance from each other: Flores closer to the residence and the officers in or near the street. Around minute marker 4:20, Flores picked up the two metal chairs and walked toward the police officers in the street. The officers

retreated, walking backwards away from Flores. Flores picked up the deployed taser that Vasquez dropped, walked back to the lawn, dropped the chairs, and chucked the taser away from the officers. The officers continued to retreat, backing away from Flores.[4] *See* Video at 5:20–24.

Encounter #6

For over a minute, Flores talked and gestured at the officers from the lawn area, remaining some distance away from the officers. During this time, the officers were not in the video and when they reappeared, they were in the street beyond the neighbor's residence. Flores then jogged back toward the house, picked up the chairs on the lawn, and placed the chairs on the porch. Around the seven-minute mark, Flores trotted and walked toward the officers' unlocked patrol SUV, which had an AR-15 inside and keys in the ignition. While Flores was on the other side of the patrol SUV, he was out of view of the video recording. The officers, in view, jogged toward the vehicle and Vasquez pointed his gun at Flores. *See* Video at 7:10.

Flores walked away from the vehicle and toward the officers, talking and gesturing, then went back toward the vehicle. The officers advanced toward Flores. Flores was out of view of the camera until he again walked away from the vehicle. In full view of the video recording, Flores then stood in the driveway of the

[4] The officers contend that Flores attempted to activate the taser against them.

residence, some steps away from the SUV, and some distance from the officers. At 7:32, Flores moved the knife from his right hand to his left hand. Sanchez had his gun drawn. At 7:33, Flores stood stationary in the driveway.

Encounter #7

At 7:34, Flores was stationary in the driveway, approximately thirty feet from Vasquez, who was in the street with a protective shield and drawn gun. Sanchez was approximately thirty feet from Flores as well. Flores was closer to the SUV than he was to the officers. At 7:35, Flores, still stationary in the driveway, put both arms up in the air with his hands above his head and the knife in his palm and remained motionless. There was nothing behind the officers hindering their ability to retreat backwards. For about five seconds, Flores did not advance toward the officers, the vehicle, or the home.

Encounter #8

While Flores stood motionless with his hands in the air, Sanchez turned to look toward Vasquez. At about 7:37, Vasquez and Sanchez fatally shot Flores, who stood motionless in a surrender pose. Flores fell backward onto the pavement.

PROCEDURAL HISTORY

The Estate sued the county and the officers under § 1983 for excessive force. The county and the officers moved for summary judgment. The officers argued that they were entitled to qualified immunity. The district court granted the county's motion and denied the officers' motion. In denying the officers' request for qualified immunity, the district court determined there were genuine issues of material fact, and construing the facts in favor of Plaintiffs, the deputies' use of deadly force was objectively unreasonable. The district court found that the deputies' use of deadly force was unreasonable because Flores, "who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender." The officers now appeal.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over appeals from a district court's final decision. 28 U.S.C. § 1291. "Ordinarily, [this court does] not have jurisdiction to review a denial of a summary judgment motion because such a decision is not final within the meaning of 28 U.S.C. § 1291." *Perniciaro v. Lea*, 901 F.3d 241, 250 (5th Cir. 2018) (citation and internal quotation marks omitted). "However, the 'denial of qualified immunity on a motion for summary judgment is immediately appealable if it is based on a conclusion of law.'" *Id.* (quoting *Palmer v. Johnson*, 193 F.3d 346, 350 (5th Cir. 1999)). "We have no jurisdiction to hear an interlocutory

appeal, however, when a district court's denial of qualified immunity rests on the basis that genuine issues of material fact exist." *Michalik v. Hermann*, 422 F.3d 252, 257 (5th Cir. 2005).

"Because of this case's posture . . . review is limited to determining whether the factual disputes that the district court identified are material to the application of qualified immunity." *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018) (emphasis omitted); *see also Mitchell v. Mills*, 895 F.3d 365, 369 (5th Cir. 2018) (concluding that the court's "review is limited to evaluating only the legal significance of the undisputed facts").

This court accepts "plaintiff's version of the facts as true and [reviews the facts] through the lens of qualified immunity." *Samples*, 900 F.3d at 660. "If the defendant would still be entitled to qualified immunity under this view of the facts, then any disputed fact issues are not material, the district court's denial of summary judgment was improper, and [this court] must reverse; otherwise, the disputed factual issues are material and [this court] lack[s] jurisdiction over the appeal." *Lytle v. Bexar County.*, 560 F.3d 404, 409 (5th Cir. 2009). Put another way, "[i]f a factual dispute must be resolved to make the qualified immunity determination, that fact issue is material and we lack jurisdiction over the appeal." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009).

The court reviews materiality and legal conclusions *de novo. Hampton v. Oktibbeha Cty. Sheriff Dep't*,

480 F.3d 358, 364 (5th Cir. 2007). The "scope of clearly established law and the objective reasonableness of those acts of the defendant that the district court found the plaintiff could prove at trial are legal issues we review *de novo*." *Thompson v. Upshur County.*, 245 F.3d 447, 456 (5th Cir. 2001).

DISCUSSION

"Qualified immunity shields from liability 'all but the plainly incompetent or those who knowingly violate the law.'" *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). "In determining whether an officer is entitled to qualified immunity, courts engage in a two-step inquiry." *Id.* "The first asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]'" *Tolan*, 572 U.S. at 655–56, 134 S.Ct. 1861 (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). The second "asks whether the right in question was 'clearly established' at the time of the violation." *Id.* at 656, 134 S.Ct. 1861 (citing *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

I. The Officers Violated Flores's Fourth Amendment Right

The first question in the qualified immunity analysis is whether Officers Vasquez and Sanchez violated

Flores's Fourth Amendment right to be free from excessive force.[5] *See Romero*, 888 F.3d at 176. When the facts here are taken in the light most favorable to Plaintiffs, the answer is yes.

"The use of deadly force violates the Fourth Amendment unless 'the officer[s] [have] probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer[s] or to others.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). To prevail on an excessive force claim, plaintiffs must show that the force employed was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on the facts and circumstances of each particular case." *Darden*, 880 F.3d at 728 (citation and internal quotation marks omitted). "In making this determination, a court should consider the totality of the circumstances, 'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* at 728–29 (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). "The 'reasonableness' of a particular use of force must be judged

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[5] Because it is alleged that the officers acted in unison, we need not separately address the qualified immunity analysis for each officer. *See Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th Cir.), *cert. denied sub nom. City of Fort Worth v. Darden*, ___ U.S. ___, 139 S. Ct. 69, 202 L.Ed.2d 23 (2018).

from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 729 (citation and internal quotation marks omitted). "The 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." *Id.* (citation and internal quotation marks omitted). However, "[t]he question is one of objective reasonableness, not subjective intent, and an officer's conduct must be judged in light of the circumstances confronting him, without the benefit of hindsight." *Manis*, 585 F.3d at 843 (citation and internal quotation marks omitted).

Further, "[i]t is well-established that '[t]he excessive force inquiry is confined to whether the [officers or other persons were] in danger at the moment of the threat that resulted in the [officers' use of deadly force].'" *Rockwell v. Brown*, 664 F.3d 985, 992–93 (5th Cir. 2011) (quoting *Bazan ex rel. Bazan v. Hidalgo County.*, 246 F.3d 481, 493 (5th Cir. 2001)) (emphasis omitted). So, the focus of the inquiry should be on "the act that led [the officer] to discharge his weapon[.]" *Manis*, 585 F.3d at 845.

Applying that framework, the district court found three genuine disputes of material fact that barred qualified immunity because resolving those facts in Plaintiffs' favor led the court to conclude that shooting Flores was objectively unreasonable. The district court found the relevant, genuine disputes of material fact

to be: (1) "whether Flores did open the door or did look inside to see the keys in the ignition or see the weapon that was inside the SUV"; (2) whether Flores tried to activate the taser against the officers; and (3) what occurred in the moments before the deputies shot Flores.

Considering the totality of the circumstances, focusing on the act that led the officers to discharge their weapons, and without reviewing the district court's decision that genuine factual disputes exist, *see Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004), we conclude that the genuine issues of material fact identified by the district court are material, and this case should proceed to trial.

Relying on their version of the facts, yet purportedly relying on the video, the officers argue that they reasonably believed that Flores posed a threat of serious harm to the officers or to others.[6] According to the officers, Flores "opened the front passenger door of the Tahoe Patrol vehicle of Deputy Vasquez, [sic] said vehicle had the keys in the ignition and an AR-15 inside the vehicle." They further contend that Flores "picked up Deputy Vasquez' [sic] taser from the street and attempted to activate it against Deputy [sic] Vasquez and Sanchez but was unsuccessful." Most significantly, the officers assert that "Deputies Vasquez and Sanchez were in imminent fear of death or serious bodily injury by the actions of Gilbert Flores ***at the time of the***

[6] The officers present different "scenarios" that would have justified them using "deadly force." We refuse to speculate on whether it would have been reasonable to kill Flores in those scenarios, which are not before this court.

fatal shots." (emphasis added). However, Plaintiffs assert that at the time Flores was shot, Flores was not next to the patrol car, Flores had "raised both of his hands directly above his head with the knife 'palmed' in his left hand" and "raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members of [sic] neighbors were outside or in the vicinity."

Collectively, these factual disputes are material to resolving whether the officers reasonably believed that Flores posed a threat of serious harm at the time of the shooting. Construing the facts in Plaintiffs' favor, the district court found that a "reasonable officer would have concluded that Flores, who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender." We agree.

Flores had a knife, not a gun; was several feet away from the officers, the house, and the vehicle; had his hands in the air in a surrender position; and stood stationary in the officers' line of sight. Under these facts taken in the light most favorable to Plaintiffs, we conclude that the district court correctly identified material factual disputes as to whether the officers violated Flores's Fourth Amendment rights. Accordingly, we must address the second question of the analysis.

II. Flores's Fourth Amendment Right Was Clearly Established

The second question in the qualified immunity analysis is whether clearly established law prohibited the officers from shooting Flores in these circumstances. *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500, 503, 202 L.Ed.2d 455 (2019). Again, the answer is yes.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). We cannot "'define clearly established law at a high level of generality,'" *id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)), especially in "the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts,'" *id.* (quoting *Katz*, 533 U.S. at 205, 121 S.Ct. 2151). "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153, 200 L.Ed.2d 449 (2018) (per curiam). "An officer 'cannot be said to have violated a clearly established

right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Id.* (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–79, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014)). We do "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 1152 (citation and internal quotation marks omitted).

"[T]he salient question . . . is whether the state of the law in [2015] gave [the officers] fair warning that their alleged treatment of [Flores] was unconstitutional." *Hope*, 536 U.S. at 741, 122 S.Ct. 2508. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning" to officers. *Id.* In fact, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* "[T]here can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances[.]" *Emmons*, 139 S. Ct. at 504 (citation and internal quotation marks omitted).

"In the excessive force context, a constitutional violation is clearly established if no reasonable officer could believe the act was lawful." *Darden*, 880 F.3d at 727. "Our case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced." *Id.* at 731; *see Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (holding that it was objectively unreasonable for an officer to slam an arrestee's face into a vehicle when the arrestee "was

not resisting arrest or attempting to flee"); *Newman v. Guedry*, 703 F.3d 757, 760, 763 (5th Cir. 2012) (holding that it was objectively unreasonable for officers to tase an arrestee when the arrestee's "behavior did not rise to the level of 'active resistance,' " despite the arrestee's alleged noncompliance with orders).

Every reasonable officer would have understood that using deadly force on a man holding a knife, but standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds, would violate the Fourth Amendment. The officers argue that they were justified in using deadly force because Flores posed an immediate threat at several instances before their ultimate use of deadly force. However, "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of the force has ceased." *Lytle*, 560 F.3d at 413. To say otherwise would grant officers " 'an ongoing license to kill an otherwise unthreatening suspect' " who was threatening earlier. *Id.* (quoting *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999)).

In *Lytle*, taking the facts in the light most favorable to the plaintiff, we found that the officer could have "had sufficient time to perceive that any threat to him had passed by the time he fired[,]" which was "anywhere from three to ten seconds, perhaps even more" after the perceived threat, rather than "in near contemporaneity" with the perceived threat. 560 F.3d at 414 (citation and internal quotation marks omitted). Here, Vasquez and Sanchez had about five seconds to evaluate Flores, standing thirty feet away from them

with a knife and with his hands in the air, before shooting him. At the time of the shooting, Flores's right in this case was " 'sufficiently clear that every reasonable official would have understood that what [the officers did] violate[d] that right.' " *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle*, 566 U.S. at 664, 132 S.Ct. 2088).

We find that if a jury accepts Plaintiffs' version of the facts as true, particularly as to what occurred in the moments before the deputies shot Flores, the jury could conclude that the officers violated Flores's clearly established right to be free from excessive force. *See Cole v. Carson*, 935 F.3d 444, 447, *as revised* (5th Cir. Aug. 21, 2019) (en banc) ("We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to the . . . excessive-force claim."). Accordingly, there are factual disputes that must be resolved to make the qualified immunity determination, disputes that are material, and we lack jurisdiction over this interlocutory appeal. *See Manis*, 585 F.3d at 843.

CONCLUSION

Because there are genuine issues of material fact that preclude summary judgment, we lack jurisdiction to review this appeal and DISMISS.

952 F.3d 624
United States Court of Appeals, Fifth Circuit.

Maritza AMADOR, Individually and as Representative of The Estate of Gilbert **Flores** and as Next Friend of Minor R.M.F.; Vanessa **Flores**; Marisela **Flores**; Carmen **Flores**; Rogelio **Flores**, Plaintiffs – Appellees,

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Appeal from the United States District Court for the Western District of Texas, Robert L. Pitman, U.S. District Judge

Attorneys and Law Firms

Matthew J. Kita, Dallas, TX, Robert Paul Wilson, Thomas J. Henry Injury Attorneys, San Antonio, TX, for Plaintiff-Appellee.

Charles Straith Frigerio, Esq., Trial Attorney, Law Offices of Charles S. Frigerio, P.C., San Antonio, TX, for Defendant-Appellant.

Before HIGGINBOTHAM, GRAVES, and WILLETT, Circuit Judges.

Opinion

JAMES E. GRAVES, Circuit Judge:

While responding to a domestic violence call, Bexar County Sheriff's Deputies Greg Vasquez and Robert Sanchez shot and killed knife-armed Gilbert Flores after a twelve-minute encounter that ended with Flores standing nearly thirty feet from the deputies, motionless, and with his hands in the air. Flores's wife and other surviving family members (collectively, the "Estate" or "Plaintiffs") brought a 42 U.S.C. § 1983 claim against the deputies, alleging that Vasquez and Sanchez violated Flores's Fourth Amendment right to be free from excessive force. The deputies moved for summary judgment based on qualified immunity. The district court denied the motion, finding that there were genuine issues of material fact. The deputies filed this interlocutory appeal. Because we agree with the district court that genuine issues of material fact exist, we lack jurisdiction to review this appeal. Accordingly, we DISMISS.

SUMMARY JUDGMENT EVIDENCE[1]

In 2015, after a domestic dispute between Flores and his wife at Flores's mother's home, Flores's mother called 9-1-1 for assistance. According to the 9-1-1 call

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[1] These facts are gleaned from the record on appeal and the district court findings. *See Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000) ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness.*") (emphasis in original). The

transcript, Flores's mother told the dispatcher that Flores beat up his wife and had "gone crazy". Deputies Vasquez and Sanchez were dispatched to the residence in separate vehicles. While in route, dispatch advised Vasquez and Sanchez that Flores was upset, and that Flores wanted to commit "suicide by cop."[2] Vasquez was also informed that Flores had a knife.

Twelve minutes elapsed between Vasquez's arrival and the officers' fatal shots at Flores.[3] During those twelve minutes, the deputies had a number of encounters with Flores, and ultimately deescalated the situation. It was only after Flores was standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds that the officers

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record contains an audiovisual recording of the encounter filmed by a bystander with a phone. The enhanced video may be accessed via the following internet link: http://www.ca5.uscourts.gov/opinions/pub/17/17-51001.mp4. We analyze the video evidence to determine whether it "utterly discredit[s]" the Estate's version of events such that "no reasonable jury could have believed [the Estate]." *See Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *see also Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("A court of appeals need not rely on [a] description of the facts where the record discredits that description but should instead consider the facts in light depicted by the videotape.") (citation and internal quotation marks omitted). We determine that the video does not utterly discredit the Estate's version of events or the district court's determinations regarding the genuineness of facts.

[2] Flores could be heard during the 9-1-1 call saying, "I got a knife and I'm going to suicide by cop, so bring a SWAT team, or uh uh uh or whoever is going to be ready to pull the trigger because I'm going to die today."

[3] Sanchez arrived one minute after Vasquez.

looked at each other and then decided to shoot Flores. The officers each fired a shot, and Flores fell to the ground. Viewing the facts in the light most favorable to the Estate, *Tolan v. Cotton*, 572 U.S. 650, 655–56, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014), we summarize the encounters.

Encounter #1

Vasquez arrived at the residence first, went into the house, and had an altercation with Flores who was holding a fixed blade Ozark Trail knife. Vasquez attempted to calm Flores and told him, "put the knife down, you're going to be alright." Flores began approaching Vasquez, and Vasquez retreated out of the residence.

Encounter #2

Not long after Vasquez retreated out-side, Flores exited the residence with the knife in hand and allegedly stabbed at Vasquez, striking Vasquez's protective shield. During this altercation, Sanchez arrived. Flores then began retreating toward the house.

Encounter #3

As Flores retreated toward the house, Sanchez fired one shot at Flores and missed.

Encounter #4

Flores went back to the residence, retrieved two metal folding chairs, and came back outside. While still holding at least one of the folding chairs, Flores allegedly came at Vasquez with the knife. Vasquez blocked the knife with his protective shield and deployed his taser at Flores. The taser missed Flores and hit a chair in Flores's hand, and its wires became entangled with the chair. Vasquez then struck Flores with the taser gun and dropped it from his hand. Flores then went back toward the residence.

At some point around this time, a bystander began videotaping the encounter on a phone.

Encounter #5

For the first few minutes of the video, Flores, wearing only shorts and flip flops, and the officers, each holding a gun, talked and maintained distance from each other: Flores closer to the residence and the officers in or near the street. Around minute marker 4:20, Flores picked up the two metal chairs and walked toward the police officers in the street. The officers retreated, walking backwards away from Flores. Flores picked up the deployed taser that Vasquez dropped, walked back to the lawn, dropped the chairs, and chucked the taser away from the officers. The officers

continued to retreat, backing away from Flores.[4] *See* Video at 5:20–24.

Encounter #6

For over a minute, Flores talked and gestured at the officers from the lawn area, remaining some distance away from the officers. During this time, the officers were not in the video and when they reappeared, they were in the street beyond the neighbor's residence. Flores then jogged back toward the house, picked up the chairs on the lawn, and placed the chairs on the porch. Around the seven-minute mark, Flores trotted and walked toward the officers' unlocked patrol SUV, which had an AR-15 inside and keys in the ignition. While Flores was on the other side of the patrol SUV, he was out of view of the video recording. The officers, in view, jogged toward the vehicle and Vasquez pointed his gun at Flores. *See* Video at 7:10.

Flores walked away from the vehicle and toward the officers, talking and gesturing, then went back toward the vehicle. The officers advanced toward Flores. Flores was out of view of the camera until he again walked away from the vehicle. In full view of the video recording, Flores then stood in the driveway of the residence, some steps away from the SUV, and some distance from the officers. At 7:32, Flores moved the knife from his right hand to his left hand. Sanchez had his

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gun drawn. At 7:33, Flores stood stationary in the driveway.

Encounter #7

At 7:34, Flores was stationary in the driveway, approximately thirty feet from Vasquez, who was in the street with a protective shield and drawn gun. Sanchez was approximately thirty feet from Flores as well. Flores was closer to the SUV than he was to the officers. At 7:35, Flores, still stationary in the driveway, put both arms up in the air with his hands above his head and the knife in his palm and remained motionless. There was nothing behind the officers hindering their ability to retreat backwards. For about five seconds, Flores did not advance toward the officers, the vehicle, or the home.

Encounter #8

While Flores stood motionless with his hands in the air, Sanchez turned to look toward Vasquez. At about 7:37, Vasquez and Sanchez fatally shot Flores, who stood motionless in a surrender pose. Flores fell backward onto the pavement.

PROCEDURAL HISTORY

The Estate sued the county and the officers under § 1983 for excessive force. The county and the officers moved for summary judgment. The officers argued that they were entitled to qualified immunity. The district

court granted the county's motion and denied the officers' motion. In denying the officers' request for qualified immunity, the district court determined there were genuine issues of material fact, and construing the facts in favor of Plaintiffs, the deputies' use of deadly force was objectively unreasonable. The district court found that the deputies' use of deadly force was unreasonable because Flores, "who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender." The officers now appeal.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over appeals from a district court's final decision. 28 U.S.C. § 1291. "Ordinarily, [this court does] not have jurisdiction to review a denial of a summary judgment motion because such a decision is not final within the meaning of 28 U.S.C. § 1291." *Perniciaro v. Lea*, 901 F.3d 241, 250 (5th Cir. 2018) (citation and internal quotation marks omitted). "However, the 'denial of qualified immunity on a motion for summary judgment is immediately appealable if it is based on a conclusion of law.'" *Id.* (quoting *Palmer v. Johnson*, 193 F.3d 346, 350 (5th Cir. 1999)). "We have no jurisdiction to hear an interlocutory appeal, however, when a district court's denial of qualified immunity rests on the basis that genuine issues of material fact exist." *Michalik v. Hermann*, 422 F.3d 252, 257 (5th Cir. 2005).

"Because of this case's posture . . . review is limited to determining whether the factual disputes that the district court identified are material to the application of qualified immunity." *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018) (emphasis omitted); *see also Mitchell v. Mills*, 895 F.3d 365, 369 (5th Cir. 2018) (concluding that the court's "review is limited to evaluating only the legal significance of the undisputed facts").

This court accepts "plaintiff's version of the facts as true and [reviews the facts] through the lens of qualified immunity." *Samples*, 900 F.3d at 660. "If the defendant would still be entitled to qualified immunity under this view of the facts, then any disputed fact issues are not material, the district court's denial of summary judgment was improper, and [this court] must reverse; otherwise, the disputed factual issues are material and [this court] lack[s] jurisdiction over the appeal." *Lytle v. Bexar County.*, 560 F.3d 404, 409 (5th Cir. 2009). Put another way, "[i]f a factual dispute must be resolved to make the qualified immunity determination, that fact issue is material and we lack jurisdiction over the appeal." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009).

The court reviews materiality and legal conclusions *de novo. Hampton v. Oktibbeha Cty. Sheriff Dep't*, 480 F.3d 358, 364 (5th Cir. 2007). The "scope of clearly established law and the objective reasonableness of those acts of the defendant that the district court found the plaintiff could prove at trial are legal issues we

review *de novo*." *Thompson v. Upshur County.*, 245 F.3d 447, 456 (5th Cir. 2001).

DISCUSSION

"Qualified immunity shields from liability 'all but the plainly incompetent or those who knowingly violate the law.'" *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). "In determining whether an officer is entitled to qualified immunity, courts engage in a two-step inquiry." *Id.* "The first asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right [.]'" *Tolan*, 572 U.S. at 655–56, 134 S.Ct. 1861 (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). The second "asks whether the right in question was 'clearly established' at the time of the violation." *Id.* at 656, 134 S.Ct. 1861 (citing *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

I. The Officers Violated Flores's Fourth Amendment Right

The first question in the qualified immunity analysis is whether Officers Vasquez and Sanchez violated Flores's Fourth Amendment right to be free from excessive force.[5] *See Romero*, 888 F.3d at 176. When the

[5] Because it is alleged that the officers acted in unison, we need not separately address the qualified immunity analysis for

facts here are taken in the light most favorable to Plaintiffs, the answer is yes.

"The use of deadly force violates the Fourth Amendment unless 'the officer[s] [have] probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer[s] or to others.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). To prevail on an excessive force claim, plaintiffs must show that the force employed was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on the facts and circumstances of each particular case." *Darden*, 880 F.3d at 728 (citation and internal quotation marks omitted). "In making this determination, a court should consider the totality of the circumstances, 'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* at 728–29 (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 729 (citation and internal quotation marks omitted). "The calculus of reasonableness must embody

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each officer. *See Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th Cir.), *cert. denied sub nom. City of Fort Worth v. Darden*, ___ U.S. ___, 139 S. Ct. 69, 202 L.Ed.2d 23 (2018).

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." *Id.* (citation and internal quotation marks omitted). However, "[t]he question is one of objective reasonableness, not subjective intent, and an officer's conduct must be judged in light of the circumstances confronting him, without the benefit of hindsight." *Manis*, 585 F.3d at 843 (citation and internal quotation marks omitted).

Further, "[i]t is well-established that '[t]he excessive force inquiry is confined to whether the [officers or other persons were] in danger at the moment of the threat that resulted in the [officers' use of deadly force].'" *Rockwell v. Brown*, 664 F.3d 985, 992–93 (5th Cir. 2011) (quoting *Bazan ex rel. Bazan v. Hidalgo County.*, 246 F.3d 481, 493 (5th Cir. 2001)) (emphasis omitted). So, the focus of the inquiry should be on "the act that led [the officer] to discharge his weapon[.]" *Manis*, 585 F.3d at 845.

Applying that framework, the district court found three genuine disputes of material fact that barred qualified immunity because resolving those facts in Plaintiffs' favor led the court to conclude that shooting Flores was objectively unreasonable. The district court found the relevant, genuine disputes of material fact to be: (1) "whether Flores did open the door or did look inside to see the keys in the ignition or see the weapon that was inside the SUV"; (2) whether Flores tried to

activate the taser against the officers; and (3) what occurred in the moments before the deputies shot Flores.

Considering the totality of the circumstances, focusing on the act that led the officers to discharge their weapons, and without reviewing the district court's decision that genuine factual disputes exist, *see Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004), we conclude that the genuine issues of material fact identified by the district court are material, and this case should proceed to trial.

Relying on their version of the facts, yet purportedly relying on the video, the officers argue that they reasonably believed that Flores posed a threat of serious harm to the officers or to others.[6] According to the officers, Flores "opened the front passenger door of the Tahoe Patrol vehicle of Deputy Vasquez, [sic] said vehicle had the keys in the ignition and an AR-15 inside the vehicle." They further contend that Flores "picked up Deputy Vasquez' [sic] taser from the street and attempted to activate it against Deputy [sic] Vasquez and Sanchez but was unsuccessful." Most significantly, the officers assert that "Deputies Vasquez and Sanchez were in imminent fear of death or serious bodily injury by the actions of Gilbert Flores *at the time of the fatal shots.*" (emphasis added). However, Plaintiffs assert that at the time Flores was shot, Flores was not next to the patrol car, Flores had "raised both of his hands

[6] The officers present different "scenarios" that would have justified them using "deadly force." We refuse to speculate on whether it would have been reasonable to kill Flores in those scenarios, which are not before this court.

directly above his head with the knife 'palmed' in his left hand" and "raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members of [sic] neighbors were outside or in the vicinity."

Collectively, these factual disputes are material to resolving whether the officers reasonably believed that Flores posed a threat of serious harm at the time of the shooting. Construing the facts in Plaintiffs' favor, the district court found that a "reasonable officer would have concluded that Flores, who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender." We agree.

Flores had a knife, not a gun; was several feet away from the officers, the house, and the vehicle; had his hands in the air in a surrender position; and stood stationary in the officers' line of sight. Under these facts taken in the light most favorable to Plaintiffs, we conclude that the district court correctly identified material factual disputes as to whether the officers violated Flores's Fourth Amendment rights. Accordingly, we must address the second question of the analysis.

II. Flores's Fourth Amendment Right Was Clearly Established

The second question in the qualified immunity analysis is whether clearly established law prohibited

the officers from shooting Flores in these circumstances. *City of Escondido v. Emmons*, __ U.S. ___, 139 S. Ct. 500, 503, 202 L.Ed.2d 455 (2019). Again, the answer is yes.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). We cannot "'define clearly established law at a high level of generality,'" *id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)), especially in "the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts,'" *id.* (quoting *Katz*, 533 U.S. at 205, 121 S.Ct. 2151). "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela v. Hughes*, __ U.S. ___, 138 S. Ct. 1148, 1153, 200 L.Ed.2d 449 (2018) (per curiam). "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Id.* (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–79,

134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014)). We do "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 1152 (citation and internal quotation marks omitted).

"[T]he salient question . . . is whether the state of the law in [2015] gave [the officers] fair warning that their alleged treatment of [Flores] was unconstitutional." *Hope*, 536 U.S. at 741, 122 S.Ct. 2508. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning" to officers. *Id.* In fact, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* "[T]here can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances[.]" *Emmons*, 139 S. Ct. at 504 (citation and internal quotation marks omitted).

"In the excessive force context, a constitutional violation is clearly established if no reasonable officer could believe the act was lawful." *Darden*, 880 F.3d at 727. "Our case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced." *Id.* at 731; *see Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (holding that it was objectively unreasonable for an officer to slam an arrestee's face into a vehicle when the arrestee "was not resisting arrest or attempting to flee"); *Newman v. Guedry*, 703 F.3d 757, 760, 763 (5th Cir. 2012) (holding that it was objectively unreasonable for officers to tase an arrestee when the arrestee's "behavior did not rise

to the level of 'active resistance,' " despite the arrestee's alleged noncompliance with orders).

A reasonable officer would have understood that using deadly force on a man holding a knife, but standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds, would violate the Fourth Amendment. The officers argue that they were justified in using deadly force because Flores posed an immediate threat at several instances before their ultimate use of deadly force. However, "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of the force has ceased." *Lytle*, 560 F.3d at 413. To say otherwise would grant officers " 'an ongoing license to kill an otherwise unthreatening suspect' " who was threatening earlier. *Id.* (quoting *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999)).

In *Lytle*, taking the facts in the light most favorable to the plaintiff, we found that the officer could have "had sufficient time to perceive that any threat to him had passed by the time he fired[,]" which was "anywhere from three to ten seconds, perhaps even more" after the perceived threat, rather than "in near contemporaneity" with the perceived threat. 560 F.3d at 414 (citation and internal quotation marks omitted). Here, Vasquez and Sanchez had about five seconds to evaluate Flores, standing thirty feet away from them with a knife and with his hands in the air, before shooting him. At the time of the shooting, Flores's right in this case was " 'sufficiently clear that every reasonable official would have understood that what [the officers

did] violate[d] that right.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle*, 566 U.S. at 664, 132 S.Ct. 2088).

We find that if a jury accepts Plaintiffs' version of the facts as true, particularly as to what occurred in the moments before the deputies shot Flores, the jury could conclude that the officers violated Flores's clearly established right to be free from excessive force. *See Cole v. Carson*, 935 F.3d 444, 447, *as revised* (5th Cir. Aug. 21, 2019) (en banc) ("We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to the . . . excessive-force claim."). Accordingly, there are factual disputes that must be resolved to make the qualified immunity determination, disputes that are material, and we lack jurisdiction over this interlocutory appeal. *See Manis*, 585 F.3d at 843.

CONCLUSION

Because there are genuine issues of material fact that preclude summary judgment, we lack jurisdiction to review this appeal and DISMISS.

2017 WL 4562895
Only the Westlaw citation is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

Maritza AMADOR, individually and as representative of the Estate of Gilbert **Flores** and as next friend of minor R.M.F., Vanessa **Flores**, Marisela **Flores**, Carmen **Flores**, Rogelio **Flores**, Plaintiffs,
v.
BEXAR COUNTY, Officer Greg, **Vasquez**, individually and in his official, capacity, Robert Sanchez, individually, and in his official capacity, Defendants.

No. 5:15–cv–810–RP
|
Signed 10/11/2017

Attorneys and Law Firms

Robert Paul Wilson, Thomas J. Henry Injury Attorneys, San Antonio, TX, Thomas J. Henry, Thomas J. Henry, Injury Attorneys, Corpus Christi, TX, for Plaintiffs.

Albert Lopez, Law Offices of Albert Lopez, Jacquelyn Michelle Christilles, Bexar County District Attorney's Office, Leslie J.A. Sachanowicz, LaHood & Calfas & Susan A. Bowen, Bexar County District Attorney's Office, Charles Straith Frigerio, Attorney at Law San Antonio, TX, for Defendants.

ORDER

ROBERT PITMAN, UNITED STATES DISTRICT JUDGE.

Before the Court are two motions: (1) Motion for Summary Judgment by Defendants Bexar County, Bexar County Sheriff's Office, Gregory Vasquez, in his official capacity, and Robert Sanchez, in his official capacity, (Dkt. 112); and (2) Motion for Summary Judgment by Defendants Gregory Vasquez and Robert Sanchez, (Dkt. 110). Having reviewed Defendants' motions, Plaintiffs' responses, and the relevant evidence and case law, the Court issues the following order.

I. BACKGROUND

Plaintiffs Maritza Amador—individually and as representative of the Estate of Gilbert Flores and as next friend of minor R.M.F.—Vanessa Flores, Marisela Flores, Carmen Flores, and Rogelio Flores filed this suit in September 2015 as the surviving family members of Gilbert Flores. On August 28, 2015, Gilbert Flores was shot and killed by two deputies with the Bexar County Sheriff's Office—Defendants Gregory Vasquez and Robert Sanchez. The incident began with a domestic disturbance at Flores's residence and a call to 911 for assistance. (Plaintiffs' Response to Bexar County's Motion for Summary Judgment, Dkt. 130, at 3). While en route to the residence in separate vehicles, Bexar County Sheriff's deputies Vasquez and Sanchez were told by dispatch that Flores was upset and had indicated he wanted to commit "suicide by cop." *Id.* Vasquez

arrived first, went to the front door, and had an altercation with Flores, who was holding a knife, outside the house. *Id.* Then Sanchez arrived at the house. *Id.* The deputies reported on their radio that Flores was going back into the house. *Id.* Sanchez fired a shot at Flores but missed. *Id.*

Flores went back to the residence, retrieved two metal folding chairs, and came back outside. (Plaintiffs' Expert Report, Dkt. 129, Ex. 6, at 12). Flores allegedly came at Vasquez with the knife, who discharged his Taser and struck the chair Flores was holding. *Id.* Vasquez struck Flores with his Taser, and the Taser fell from Vasquez's hand onto the street. *Id.* at 13. Flores went back towards his residence. *Id.*

At that point, a bystander began filming the incident on his phone. The video presents a mostly unobstructed view[1] of Flores and the deputies in the approximately eight minutes before the shooting. (*See* Flash Drive Containing the Video, Dkt. 131).[2] The

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[1] The points of possible obstruction are as follows. The video, for the first approximately 45 seconds, is filmed through a window screen that obscures the view of the scene. At about time stamp 5:15, the deputies walk off screen as they are backing away, at some distance, from Flores. Flores continues to be visible, but the deputies do not reappear until approximately minute 7:00. From that point until the shooting, the video shows Flores and the deputies except for two brief moments Flores can't be seen because Vasquez's patrol car is between Flores and the camera.

[2] The flash drive containing the video was brought to the Clerk's Office and filed as [131] and [132] "Motion to Supplement" Plaintiffs' two responses in opposition to Defendants' two motions for summary judgment.

video is taken by a neighbor from his second-floor apartment. (Plaintiffs' Expert Report, Dkt. 129, Ex. 6, at 12). As seen in the video, between the neighbor's apartment and Flores's house is a drainage ditch, an open grassy area, and the street. The neighbor zooms in, and the viewer can see the incident unfold. Both parties claim the video of the incident proves their version of events.

The video begins with the deputies standing, with their backs to the camera, on the street outside Flores's house. Flores, facing the camera, appears at about the 20-second mark standing outside near his front door. Flores appears to be talking and gesturing and is wearing only long shorts and shoes. The deputies are each holding a gun, and Vasquez holds a protective shield in his other hand. For the next several minutes, Flores continues to talk. At the 4:25 mark on the video, Flores walks into his front yard and picks up the folding chairs. At 4:40, he walks onto the street, and the deputies move away from him. At 4:45, he picks up the Taser off the ground as the deputies continue to distance themselves. Flores walks back to his front yard, drops the chairs, and walks back to the street holding the Taser. Flores throws the Taser in a direction away from the deputies. Back on his lawn, Flores begins to walk towards the deputies, who are off camera, and onto his next door neighbor's driveway. He continues to talk and gesture as he backs away from the deputies and towards his house. At 6:50, he picks up the chairs, unfolds them, and sets them on his front porch.

At 7:05, he walks away the deputies towards Vasquez's unlocked patrol car that is parked in the street, not right at the curb, (Flash drive containing the video, Dkt. 131), and has keys in the ignition and an AR–15 inside the car in a "holder," (Deposition testimony of Vasquez, Dkt. 110, Ex. 5, at 15–16). Because Flores is on the other side of the car from the camera, the viewer cannot discern what he does in those moments. Vasquez points his gun at Flores. Flores, who now appears to be barefoot, walks from the car and towards the deputies while continuing to talk and gesture. The deputies again back away. At 7:20, Flores walks away from the deputies and back towards the car. The deputies again advance towards Flores, and the viewer cannot see Flores while he is on the other side of the car. Flores reappears at 7:28. He stands in his driveway, not right next to the car and with some distance from the deputies. At 7:32, Flores moves the knife from his right hand to his left hand. Sanchez has his gun drawn. Deputy Estrada's patrol car siren is heard in the background.[3]

At 7:33, Flores stops walking and stands stationary in the driveway. He is about 29 feet away from Vasquez who is holding his protective shield and pointing his gun at Flores. (Plaintiffs' Expert Report, Dkt. 129, Ex. 6, at 16). Vasquez is in the street, standing next to a black sedan parked at the curb. *Id.* Sanchez is standing about 14 feet to the left of Vasquez, further into the middle of the street, and about 29 feet away

[3] Deputy Estrada was en route to the scene as back-up.

from Flores. *Id.* There is nothing behind the deputies blocking a possible retreat. Sanchez continues to have his gun pointed at Flores.

At about 7:35, Flores, still stationary in the driveway, puts both arms up in the air in a surrender pose. He remains motionless, with his hands in the air, for several seconds. Sanchez looks to Vasquez, and, according to their testimony, the deputies agree that they were going to end it. (*See*, *e.g.*, Deposition testimony of Vasquez, Dkt. 110, Ex. 5, at 23–24). At about 7:37, Vasquez shoots Flores, while he is motionless in the surrender pose, his feet still stationary. Sanchez immediately also shoots Flores, who collapses backwards onto the pavement and succumbs to the fatal gunshot wounds. At about 7:50, Estrada arrives and parks on the street near the black sedan.

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "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." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he moving party may [also] meet its burden by simply pointing to an absence of evidence to support the nonmoving party's case." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). The Court will view this evidence in the light most favorable to the nonmovant, *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993), and will "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

III. DISCUSSION

In their motions for summary judgment, Defendants make the following arguments:

(a) Bexar County Sheriff's Office is not a proper party and should be dismissed.

(b) The claims against the deputies in their official capacity are redundant and should be dismissed.

(c) The training provided to the deputies by the Sheriff's Office was not insufficient and shows that there was not deliberate indifference to the need for training.

(d) The Sheriff's Office policy manual regarding the use of force is not unlawful and does not demonstrate deliberate indifference.

(e) The Sheriff's Office conducted two investigations into the incident that led to Flores's death, and those investigations were not inadequate.

(f) Defendants Vasquez and Sanchez are entitled to qualified immunity.

In their response, Plaintiffs note that the Bexar County Sheriff's Office was dismissed as a separate party by the Court on October 15, 2015. (Plaintiff's Response to Bexar County Motion for Summary Judgment, Dkt. 130, at 2). Plaintiffs concede that "suing the Deputies in their official capacity is incorporated within their claims against Bexar County as the Deputies were within the course and scope of their

employment with the Bexar County Sheriff's Office at the time of the shooting. . . ." *Id.* Plaintiffs also withdraw their claims against Bexar County for claims related to the investigative and discipline process. *Id.*

Therefore, Defendants' arguments before the Court are narrowed to:

(a) The training provided to the deputies by the Sheriff's Office was not insufficient and shows that there was not deliberate indifference to the need for training.

(b) The Sheriff's Office policy manual regarding the use of force is not unlawful and does not demonstrate deliberate indifference.

(c) Defendants Vasquez and Sanchez are entitled to qualified immunity.

A. Municipal Liability

Plaintiffs allege Bexar County is liable under Section 1983 because (1) it maintained unconstitutional policies, and (2) it failed to adequately supervise or train its deputies. (Dkt. 130). It is well established that a governmental entity is not liable under Section 1983 on the theory of respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). A municipality is liable only for acts directly attributable to it "through some official action or imprimatur." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). To establish municipal liability under Section 1983, a plaintiff must show the deprivation of a federally protected right caused by action taken "pursuant to an official

municipal policy." *See Monell*, 436 U.S. at 691. Hence, a plaintiff must identify: "(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose moving force is that policy or custom." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (internal quotation marks omitted).

1. Bexar County's Policy Manual

Bexar County argues that (1) the Bexar County Sheriff's Office Manual sets out policies that, "when read in harmony with each other rather than in isolated pieces," are not unlawful and do not show deliberate indifference and (2) Plaintiffs fail to show a causal link between the policies they criticize and this incident or other instances that would suggest deliberate indifference. (Bexar County's Motion for Summary Judgment, Dkt. 112).

The Bexar County Sheriff's Office Manual (the "Policy Manual"), in pertinent part, contains the following provisions on use of force and use of deadly force. (Policy Manual, Dkt. 112, Ex. 2).

CHAPTER 9 – USE OF FORCE

REV. APRIL 15, 2014

9.01 POLICY

It is the policy of the Bexar County Sheriff's Office that deputies use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and

others the use of force must be objectively reasonable. The deputy must only use that force which a reasonably prudent officer would use under the same or similar circumstances.

9.02 PURPOSE

* * *

B. In each instance of the use of force, the officer should exhaust every reasonable means of employing the minimum amount of force to affect an objective before escalating to the next, more forceful method. However, an officer is not required to engage in prolonged combat or struggle rather than resorting to that method which will most quickly and safely bring the situation under control.

* * *

F. Where possible, an officer will use verbal persuasion first, followed thereafter in ascending order, by:

1. Physical strength and skill, ranging from restraint and come along holds to hand or foot strikes;

2. Approved ASP® baton used in the prescribed manner, chemical agents, Electronic Control Device (ECD)/Electronic Control Weapon (ECW); and

3. Approved firearm. Deputies must bear in mind the order of this continuum of force is not absolute, and the situation may require immediate use of a higher level of force.

* * *

9.10 USE OF DEADLY FORCE

A Preparation for use of deadly force.

1. To effectively accomplish their duties, it is recognized that during certain situations, an officer may find himself in a position of having to threaten the use of deadly force to thwart an arising situation possessing the immediate potential of leading to the necessity to protect life or prevent serious bodily injury.

2. Deputies may make special preparations for the use of deadly force as they observe the need to do so, consistent with 9.05, above.

* * *

e. Generally, an officer may use deadly force only in situations, which indicate that, the officer or another person may be seriously injured or killed if the deadly force is not used.

f. "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use, is capable of causing, death or serious bodily injury:

1) The discharge of a firearm is deadly force if directed at a person or at a location where persons may be;

* * *

g. It shall be incumbent on every officer to exhaust every reasonable means of employing only that amount of deadly force necessary to accomplish the purpose.

h. Where feasible, a verbal warning shall be given to the offender prior to the use of deadly force.

i. Once the immediate danger of death or serious bodily injury to an officer or another person has passed, deadly force shall not be used.

j. To the extent an officer has reasonable time for consideration, he shall never use deadly force which creates a greater risk to self and others (such as hostages, bystanders, and other Deputies) of death or serious bodily injury, than if he did not use such deadly force. This decision must reflect the circumstances. . . .

* * *

n. The following are examples which may be considered deadly force situations depending on the circumstance:

1) Shooting at, or stabbing an officer;

2) Striking an officer with a club or a blunt instrument;

3) The pointing of a firearm at an officer;

4) Advancement towards an officer by a suspect exhibiting a firearm, knife or club in a manner and in close enough proximity to the officer to give reason to believe that the officer may be assaulted;

5) A physical struggle in which the suspect is attempting to remove or has removed the officer's firearm or less lethal weaponry from the officer's possession.

Plaintiffs maintain that the Policy Manual: (1) fails to define what an imminent threat is with regard to the use of deadly force and does not state that that the immediate threat must be objectively reasonable; (2) starts with an objective basis for the use of deadly force but then impermissibly moves to a subjective standard that allows the officer to use her personal judgment for what continuum of force is necessary based on what the officer believes will help control the situation quickly and safely; (3) sets out the goal of expediency so that an officer need not engage in a prolonged struggle and can skip the continuum of force if the officer subjectively believes it is the most efficient way to end the event; and (4) allows an officer to use deadly force even when there is no immediate danger. (Plaintiff's Response to Bexar County's Motion for Summary Judgment, Dkt. 130, at 8).

The test of reasonableness under the Fourth Amendment is an objective one. *L.A. Cty. v. Rettele*, 550 U.S. 609, 614 (2007) (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Under the "objective reasonableness" standard, the inquiry is whether an officer's actions are objectively reasonable in light of the facts and circumstances confronting them. *Graham*, 490 U.S. at 397. The question therefore is whether the Policy Manual comports with this standard.

The thrust of Plaintiffs' argument is that the Policy Manual shifts from the permissible objective standard to impermissible subjective standards for the use of deadly force. To support their argument, Plaintiffs rely on *Davis v. Montgomery Cty*, No. CIV.A. H:07–505,

2009 WL 1226904 (S.D. Tex. Apr. 30, 2009). In *Davis*, the court evaluated whether Montgomery County's policy regarding the use of force was consistent with the Constitution. *Id.* at *7. A county official, when asked about Montgomery County's policy regarding the use of force, "responded that the key to determining the appropriate level of force is 'what the officer may have felt was reasonable.'" *Id.* The court found that that statement of policy suggested a subjective standard in violation of the constitutional requirement of objective reasonableness. *Id.*

In this case, the Policy Manual provides an objective reasonableness standard in the use of force section 9.01: "It is the policy of the Bexar County Sheriff's Office that deputies use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and others the use of force must be objectively reasonable. The deputy must only use that force which a reasonably prudent officer would use under the same or similar circumstances." (Bexar County's Motion for Summary Judgment, Dkt. 112, Ex. 2). To the contrary, section 9.10 on deadly force does not provide a similar objective reasonableness standard. Bexar County attempts to cure that deficiency by arguing that the Policy Manual should be read as a whole. Reading 9.01 (use of force) in conjunction with 9.10 (use of deadly force) at best leads the Court to conclude the Policy Manual is ambiguous. It also highlights that the Bexar County Sheriff was aware of the objective reasonableness standard but yet applied it in only one section.

Plaintiffs further rely on the testimony of Deputies Vasquez and Sanchez. The deputies testified that they were justified in shooting Flores based on their subjective beliefs that they were in imminent danger. (Plaintiffs' Response to Bexar County's Motion for Summary Judgment, Dkt. 130, at 11–12). For example, Deputy Sanchez was asked: "[C]ould you have legally, within the Bexar Sheriff County policy and the law the way you were taught it, shoot and kill that person?" *Id.* at 11. His response was: "As long as I feel that he's a threat to my life or to Deputy Vasquez or to a family member, yes." *Id.* Their testimony makes sense given that the Policy Manual states an arguably subjective standard: "Generally, an officer may use deadly force only in situations, which indicate that, the officer or another person may be seriously injured or killed if the deadly force is not used." (Sanchez deposition testimony, Dkt. 112, Ex. 2).

In fact, Deputies Vasquez and Sanchez's supervisor Sergeant Pedraza testified that he was not told, and did not know, the definition of the term "objectively reasonable" in a use of force context:

> Q: In all of your training with the Bexar County Sheriff's Department, you've never had anybody tell you what an objectively reasonable use of force would be?
>
> A: No, sir.

(Plaintiffs' Response to Bexar County's Motion for Summary Judgment, Dkt. 130, at 12).

In addition to the testimony of the deputies and Sergeant Pedraza, Plaintiffs present the deposition testimony of Sergeant Baeza, who investigated the shooting, and determined there were no policy violations when the deputies used deadly force based on their subjective beliefs:

> Q: So is your understanding of Bexar County policy that even if a reasonably prudent officer would not use force, if the subjective belief of the officer involved was such that he was in fear of his life he could use force?
>
> A: Yes. If that officer feels like he needs to use force because he is in fear of his safety, then, yes, he can use force at that time.
>
> Q: Even if a reasonably prudent officer wouldn't have under the same or similar circumstances?
>
> A: [I] mean, if you're the one that's in that situation and you're fearing for your life at that moment . . . then you're going to be justified in using the force.

(Plaintiffs' Response to Bexar County's Motion for Summary Judgment, Dkt. 130, at 14).

While Plaintiffs may have offered sufficient evidence showing that Bexar County's Policy Manual was inadequate, Plaintiffs also must show that the policy was adopted with "deliberate indifference." "Only where a municipality's failure to [establish a policy] in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that

is actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (quoting *Monell*, 436 U.S. at 694) (bracketed text in original). "Deliberate indifference is a stringent standard of fault" and requires a showing of "more than negligence or even gross negligence." *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (quoting *City of Canton*, 489 U.S. at 388).

In this case, Plaintiffs' strongest evidence of deliberate indifference is Sergeant Baeza's testimony, which conceivably shows that Bexar County, through its internal investigation, had the requisite knowledge and condoned the deputies' conduct that was impermissibly based on their subjective belief that they were in imminent danger. *See Davis*, 2009 WL 1226904, at *7 ("Plaintiff also provides evidence that the County approved of [the officer's] actions based on [the officer's] feeling that [the suspect] was a threat to him. . . . This approval is consistent with a policy which condones the use of deadly force based on a subjective analysis."). However, Sergeant Baeza is not a final policymaker for Bexar County through whom Bexar County could be liable, and Plaintiffs do not argue otherwise. "A single decision by a policy maker may, under certain circumstances, constitute a policy for which a [municipality] may be liable." *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000) (internal brackets omitted). However, this "single incident exception" is extremely narrow and gives rise to municipal liability only if the municipal actor is a final policymaker. *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008). The question

of "[w]hether a particular official has final policymaking authority is a question of state law," *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir.2003) (emphasis in original), and courts have held that a deputy or sergeant is not an official with policymaking authority for a governmental entity, *see*, *e.g.*, *Johnson v. Deep E. Texas Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) ("[T]he only County officials or employees whose conduct is complained of are Mendiola and Courtney, each of whom was only a deputy sheriff and hence was not a policymaker."); *Hudson v. Lujan*, No. 3:15–CV–3337–G–BK, 2016 WL 3198052, at *3 (N.D. Tex. May 17, 2016), report and recommendation adopted, No. 3:15–CV–3337–G (BK), 2016 WL 3182024 (N.D. Tex. June 8, 2016) ("[T]here is no allegation (nor could there be) that the sergeant is an official with policymaking authority for the City.")

Finally, Plaintiffs must also show a constitutional violation whose moving force is that policy. *Pineda*, 291 F.3d at 328. To succeed, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). Again, Plaintiffs point to the testimony of people who are not final policymakers: the deputies and their subjective belief that Flores posed an imminent threat that led them to shoot him, to Sergeant Pedraza's testimony in which he said he neither knew what objectively reasonable was nor had been trained on it, and to Sergeant Baeza's testimony that

the deputies did not violate Bexar County policy. Even if the testimony shows a violation of Flores's constitutional rights and even if the deputies' actions were the moving force behind the violation, the decisions of the deputies and sergeants are not decisions that can be elevated and attributed to Bexar County. *See Valle v. City of Houston*, 613 F.3d 536, 544 (5th Cir. 2010) (holding that a city could not be held liable for a captain's decision to order entry into the home, even if it was "arguably the 'moving force' behind the constitutional violations that resulted in the suspect's death, because his decision was not a decision by a final policymaker of the city"). Accordingly, the Court grants summary judgment in favor of Bexar County on Plaintiffs' claims that Bexar County's Policy Manual was inadequate.

B. Bexar County's Training and Supervision

In its motion, Bexar County argues that Plaintiffs cannot succeed on their claim that Bexar County's training pertaining to the use of deadly force and non-lethal control devices and tactics was inadequate. Bexar County contends that (1) Plaintiffs provide no specific examples about what training the deputies should have been received or how their training was lacking; (2) the Bexar County Sheriff's Office provides a sufficient number of required classes throughout the year; (3) Bexar County needs only to show that its training was in compliance with the state-mandated training standard; and (4) Plaintiffs cannot show that "TCOLE training" is inadequate.

Bexar County also asserts that (1) the Bexar County Sheriff's Office supervision policy was adequate on its face; (2) instructions provided to the deputies during the incident are not actionable policy statements; (3) Plaintiffs fail to show the policy ordered the use of unjustified deadly force and that it was adopted and maintained with deliberate indifference to the constitutional rights of citizens; and (4) Bexar County cannot be held liable for the actions of the supervisors based on this incident alone.

Under certain circumstances, a county can be liable for a failure to train its employees. *See Conner v. Travis Cty.*, 209 F.3d 794, 796 (5th Cir. 2000). The plaintiff must show that: "(1) the county's training policy procedures were inadequate, (2) the county was deliberately indifferent in adopting its training policy, and (3) the inadequate training policy directly caused the constitutional violation." *Kitchen v. Dall. Cty.*, 759 F.3d 468, 484 (5th Cir. 2014). Deliberate indifference can be established by demonstrating a pattern of violations or, in limited circumstances, by "single-incident liability" where a violation would result from the "highly predictable consequence" of a particular failure to train. *Id.*

Plaintiffs do not claim that Bexar County's training is inadequate in the sense that the deputies should have taken additional education classes; rather, Plaintiffs claim that because the Policy Manual is unconstitutional on its face, Bexar County was aware that a constitutional violation would likely occur and therefore showed deliberate indifference. (Plaintiffs' Response

to Bexar County's Motion for Summary Judgment, Dkt. 130, at 19). Plaintiffs argue that this case falls within the narrow exception allowing a single incident of misconduct to give rise to a claim of deliberate indifference.

A single incident is usually insufficient to demonstrate deliberate indifference. *See*, *e.g.*, *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) (explaining that proof of deliberate indifference "generally requires a showing of more than a single instance of the lack of training or supervision causing a violation of constitutional rights") (internal quotation marks omitted). Deliberate indifference requires that Plaintiffs "show that the failure to train reflects a deliberate or conscious choice to endanger constitutional rights." *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998) (internal quotation marks omitted). The Fifth Circuit "has been highly reluctant to permit this exception to swallow the rule that forbids mere respondeat superior liability." *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005).

The circumstances necessary to find that a single instance of failure to train an officer are not present here. "[T]o hold a municipality liable for failure to train an officer, it must have been obvious that the highly predictable consequence of not training its officers was that they would apply force in such a way that the Fourth Amendment rights of citizens were at risk." *Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009) (internal quotation marks omitted). Plaintiffs have proffered no evidence showing that Bexar County

was aware of any risk of injury from its failure to adequately train and no evidence that the improper use of deadly force had caused previous constitutional violations. Plaintiffs presented no material fact question to show that it should have been obvious to the policymakers that the risk of serious injury was a "highly predictable consequence" of the failure to train. *See id.* Accordingly, the Court grants summary judgment to Bexar County on Plaintiffs' claims for training liability.

Plaintiffs also state that Bexar County's supervision policy was inadequate. When, as here, a plaintiff alleges a failure to supervise, "the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Estate of Davis*, 406 F.3d at 381. Plaintiffs, however, fail to provide any substantive analysis or case law support for their contention in their response. (*See* Plaintiffs' Response to Bexar County's Motion for Summary Judgment, Dkt. 130). Plaintiffs therefore have failed to raise a genuine issue of material fact as to supervision, and Bexar County is entitled to summary judgment on the issue of whether it is liable for inadequate supervision.

C Qualified Immunity

Defendants Vasquez and Sanchez claim they are entitled to qualified immunity. "Qualified immunity protects public officials from suit unless their conduct violates a clearly established constitutional right." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (internal quotation marks omitted). To overcome a claim of qualified immunity, a plaintiff must show that (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A district court has discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

1. Deputies Vasquez and Sanchez Violated Flores's Constitutional Right

The Court first considers whether Defendants Vasquez and Sanchez violated a constitutional right when they killed Flores by using excessive force and whether that use of force was objectively unreasonable. "A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). "Determining 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 interests against the countervailing governmental interests

at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted).

Reasonableness is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. at 396. "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. The inquiry requires analyzing the totality of the circumstances. *Plumhoff*, 134 S. Ct. at 2020.

However, when a law enforcement officer uses deadly force, the "objective reasonableness balancing test is constrained. It is objectively unreasonable to use deadly force unless it is necessary to prevent a suspect's escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)) (internal quotation marks omitted). In *Manis v. Lawson*, the Fifth Circuit explained that the focus of the inquiry is "the act that led [the officer] to discharge his weapon." 585 F.3d 839, 845 (5th Cir. 2009).

In this case, the deputies attempt to support their claim for qualified immunity by arguing that their conduct should be judged based on the circumstances that confronted them. (Deputies' Motion for Summary

Judgment, Dkt. 110 at 12). The Court agrees, to an extent. The Court looks to the circumstances they encountered but focuses its inquiry on the moment before the deputies shot Flores. In the approximately twelve minutes before they shot Flores, the deputies testified that Flores disobeyed their commands that he drop his knife; Vasquez testified that Flores attacked him with the knife; the deputies testified that Flores opened the door to a patrol car that had keys in the ignition and an AR–15 inside; the deputies testified Flores attempted to use Vasquez's Taser against the deputies; the deputies testified that Flores stated that he wanted to commit "suicide by cop;" and the deputies testified that Flores took his knife from his waistband and positioned the knife in his left hand in a "pre-attack indicator mode, gripping the handle of the knife." *Id.*

Construing the facts in a light favorable to the nonmovant Plaintiffs, the Court finds there are genuine issues of factual dispute with several of the scenarios posed by the deputies. First, Plaintiffs admit that the deputies radioed that Flores was attempting to enter the patrol car, but it is not clear whether Flores did open the door or did look inside to see the keys in the ignition or see the weapon that was inside the SUV. (Plaintiffs' Response to Deputies' Motion for Summary Judgment, Dkt. 129, at 3). Second, the deputies testified that Flores, when he picked up Vasquez's Taser that had been left on the street, "attempted to use [it or] activate it against the deputies." (Deputies' Motion for Summary Judgment, Dkt. 110, at 12). Although Flores did pick up the Taser off the street and appears

to have looked at it, he quickly tossed it away. (Flash drive containing the video, Dkt. 131). A reasonable officer would not have necessarily assumed that Flores was attempting to activate it in use against the officers. Additionally, Flores threw the Taser away from the scene, and the deputies do not claim he threw it at them.

Finally, and perhaps of most significance, there is disagreement between the parties about the moment before the deputies shot Flores. In those several seconds, Flores held a knife in one hand and had both of his hands up. *Id.* He was not moving towards the deputies. *Id.* Much of the rest seems to be in dispute, and the Court must construe the facts in favor of Plaintiffs. *See*, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (holding that, in a deadly force case, the Fifth Circuit improperly failed to credit the nonmovant's evidence and draw reasonable inferences in his favor on the defendant's motion for summary judgment). Defendants' expert claims that the way Flores held the knife is in a "pre-attack indicator mode, gripping the handle of the knife." (Deputies' Motion for Summary Judgment, Dkt. 110, at 12). Plaintiffs describe it differently: Flores "exchang[ed] the knife from his right hand to his left hand while his hands were down at his side." (Plaintiffs' Response to Deputies' Motion for Summary Judgment, Dkt. 129, at 3). According to Plaintiffs, Flores, who was no longer next to the patrol car and was back on his driveway some twenty or more feet away from the deputies, then "raised both of his hands directly above his head with the knife 'palmed' in his left hand" and

"raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members of neighbors were outside or in the vicinity." *Id.* at 3–4 & 11.

Plaintiffs emphasize that the deputies testified they conferred with each other before shooting Flores and agreed that the encounter had gone on too long and they were going to end it. *Id.* at 5 & n.23. Plaintiffs argue that their discussion before shooting Flores shows that they were not under an immediate threat of harm. *Id.* at 12. Plaintiffs additionally point to discrepancies between what is seen in the video and the deputies' testimony, including the distance between Flores and the deputies and whether Flores was moving towards the deputies. *Id*. at 13. The parties' experts also analyze Flores' action—or inaction—before the shots were fired and reach contrary conclusions about how a reasonable officer would have viewed Flores's actions. *Id*. at 13–15.

The Court must examine this moment carefully because the Court's inquiry is confined to whether the deputies were "in danger at the moment of the threat that resulted in [their] use of deadly force." *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011) (rejecting plaintiffs' urging that the court examine the circumstances surrounding a preceding forced entry that led to the fatal shooting because the court need only look to the time of the shooting to determine reasonableness). Based on the circumstances facing Vasquez and

Sanchez right before they shot Flores[4] and construing the facts in favor of Plaintiffs, the Court finds that a reasonable officer would have concluded that Flores, who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender. Therefore, the deputies' use of deadly force was not reasonable. *See Reyes v. Bridgwater*, 362 F. App'x 403, 407–09 (5th Cir. Jan. 22, 2010) (holding that it was unreasonable for an officer to use deadly force when the suspect was armed with a knife "at a safe distance away from the officers" and was not advancing toward the officers); *see also Cullum v. Siemens*, No. SA–12–CV–49–DAE, 2013 WL 5781203, at *9–10 (W.D. Tex. Oct. 25, 2013) (finding deadly force was unreasonable because the armed suspect's hand was "palm-up in a 'stop' gesture" that was "submissive" and he did not present an immediate threat); *Jamison v. Metz*, 541 F. App'x 15, 19–20 (2d Cir. Sept. 12, 2013) (holding that officers were not entitled to qualified immunity where the suspect had stopped and was in an act of surrendering by putting his hand in the air); *Green v. Taylor*, 239 F. App'x 952, 958 (6th Cir. Aug. 30, 2007) (holding

[4] In addition to the evidence presented by the parties, the Court notes that "[v]ideo evidence can be dispositive on a motion for summary judgment . . . [and the Court is] to rely on clear video evidence when such evidence is available." *Guerra v. Bellino*, No. 15–51252, 2017 WL 3397430, at *3 (5th Cir. Aug. 8, 2017) (citing *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)). In this case, the parties do not dispute whether the video should be considered and both parties contend the video supports their differing versions of the facts. As noted, the video does not resolve all of the factual disputes.

that the officer's use of deadly force was not reasonable because the suspects were stopped and attempting to surrender with hands in the air or on the steering wheel); *Robinson v. Nolte*, 77 F. App'x 413, 414 (9th Cir. Oct. 2, 2003) (holding that the use of deadly force violated the suspect's Fourth Amendment rights where the suspect had "his arms raised over his head in a classic surrender position, with a gun in his lap"); *Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1185 (D. Haw. 2003) (finding that a reasonable jury could conclude that the officer's conduct violated the suspect's Fourth Amendment rights when the suspect was shot as he was stepping away from a car with his hands in the air).

The deputies assert that several analogous cases support their entitlement to qualified immunity; however, the facts of those cases are not sufficiently similar to make the cases analogous: *Mullinex v. Luna*, 136 S.Ct. 305, 309 (2015) (noting that the fleeing, reportedly intoxicated suspect threatened to shoot officers during a high-speed car chase and was moments away from encountering an officer); *Manis*, 585 F.3d at 844–45 (holding that the officer was entitled to qualified immunity where the suspect, after being roused when passed out in his car, reached under the seat of his car in defiance of the officers' commands and "moved as if he had obtained the object he sought" and that fact was not in dispute); *Mendez v. Poitevent*, 823 F.3d 326, 332–33 (5th Cir. 2016) (holding that an officer was entitled to qualified immunity where "[i]n the moments leading up to the shooting, [the suspect] had struggled

violently and aggressively against [the officer] . . . disarmed him of his baton; prevented him from using his radio to call for backup; potentially attempted to obtain his gun; concussed and disoriented him; and broke free of his grasp; at the precise moment the officer's vision is impaired and he fears losing consciousness—and the evidence indicates that it was not apparent to [the officer] that [the suspect] was running away"). The deputies also rely on *Guerra v. Bellino*, No. 15–51252, 2017 WL 3397430 (5th Cir. Aug. 8, 2017).[5] The court's holding in *Guerra* is equally inapposite. In *Guerra*, the suspect was moving rapidly either at the officer or close to where the officer was previously positioned from just a car's length away from the officer. *Id.* at *4. Whereas in this case, Flores was not only at a much greater distance from the deputies, but he also was not moving at all.[6]

In their motion, the deputies categorize many instances from the incident as "deadly force scenarios," (Deputies' Motion for Summary Judgment, Dkt. 110, at 4–7), and argue that the deputies' conduct should be

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[5] The deputies cite to a June decision issued by the Fifth Circuit in the same case, but that opinion was withdrawn and superseded by the opinion discussed in this order.

[6] The Court also notes that the deputies encourage this Court to follow cases that contradict their assertion—discussed *infra*—that the Court must focus only on the totality of the circumstances in determining whether deadly force was justified. For example, in *Guerra*, the Fifth Circuit stated that the suspect's "cooperation prior to the point at which he charged [the officer was] immaterial" because the officer's actions "are to be judged at the time of the shooting." *Guerra*, 2017 WL 3397430, at *4.

judged by the totality of the circumstances, not the moment of the shooting, *id.* at 12–16. Regarding the other alleged deadly force scenarios, the Court is not called upon to decide whether it would have been reasonable for an officer to use deadly force in those other instances since deadly force was not used during those "scenarios," and the Court will not speculate about the reasonableness of deadly force during other parts of the incident. Moreover, to the extent that the deputies argue that a previous instance during which it may have been reasonable for an officer to use deadly force creates a lasting presumption of reasonableness, the Court disagrees. While Flores may have posed an immediate and significant threat of harm at some previous point during the encounter, "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 413 (5th Cir. 2009). In *Lytle*, the suspect drove a car towards the police officer, which the Fifth Circuit suggested may have led a reasonable officer to use deadly force, but the officer did not fire his gun at the car until the car was moving away from the officer and was three or four houses away. *Id.* The Fifth Circuit therefore concluded that "even were we to assume that shooting at the Taurus was reasonable at the moment it was backing up toward [the officer], that does not necessarily make his firing at the vehicle when it was driving away from him equally reasonable." *Id.*

To support their argument regarding the totality of the circumstances, the deputies rely on *Clayton v.*

Columbia Casualty Company, in which the Fifth Circuit affirmed qualified immunity for an officer who shot a suspect, to support their theory. 547 Fed. App'x 645 (5th Cir. Nov. 26, 2013). The *Clayton* facts are not analogous.[7] In *Clayton*, the suspect threatened to shoot the deputy who thought the suspect had a gun; the suspect had a knife and was cutting himself on the neck; despite demands to stop, the suspect continued to move towards the deputy; an eyewitness described the suspect's movement towards the deputy as "real ugly like, scary like" and he was shouting at the deputy; the suspect kept walking "aggressively" while the deputy once again told him to stop; the deputy was between the suspect and the victim and other innocent bystanders; and the deputy shot the suspect, whose arms were at his side, once he was within five feet of the deputy. *See id.* at 647–48, 650.

The district court and the Fifth Circuit in *Clayton* were confronted with a different factual scenario, and, on appeal, the main factual point of contention was whether the suspect was still holding a knife as he aggressively walked towards the deputy. *Id.* at 651–52. The Fifth Circuit found "much evidence" to show that the suspect still had the knife, including the knife found near the suspect's body, but the court also concluded that whether the suspect held a knife at the time he was shot was not outcome determinative. *Id.* at 652. Among many differences between the facts of *Clayton* and the instant case, the most significant are

[7] One similarity to this case is that the suspect in *Clayton* also expressed a desire to commit suicide by cop. *Id.* at 647–48.

that, in *Clayton*, the suspect was moving towards the deputy in a scary and aggressive manner, and the deputy fired his gun when the suspect was within only five feet, arguably almost within the striking zone—with the suspect's forward motion—to a reasonable officer. The moment of the shooting therefore was not as it was in this case where Flores was not moving in any direction, much less towards the deputies, for several seconds and had his hands in the air and was shot from a distance of almost thirty feet. (Flash drive containing video, Dkt. 131, and Plaintiffs' Expert Report, Dkt. 129, Ex. 6, at 16–17). Therefore, the Court finds *Clayton* neither dispositive nor instructive.

Finally, in reaching the conclusion that Plaintiffs have overcome the first prong of the quality immunity inquiry, the Court follows the Fifth Circuit's guidance that "the reasonableness of an officer's conduct under the Fourth Amendment is often a question that requires the input of a jury. This is not only because the jury must resolve disputed fact issues but also because the use of juries in such cases strengthens our understanding of Fourth Amendment reasonableness." *Lytle*, 560 F.3d at 411.

2. Flores's Constitutional Right Was Clearly Established

For the second prong of the qualified immunity inquiry, the Court analyzes whether Flores's constitutional right was clearly established at the time of the incident. A right is clearly established when "the

contours of a right are sufficiently clear that every reasonable official would have understood that what [the officer] was doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation marks and brackets omitted). While a case need not be directly on point, the "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

In this case, the Court surveys the law as it existed on August 28, 2015, the date of the shooting. The deputies maintain that Flores's right was not clearly established but only cite general propositions of how the analysis proceeds for this second prong and do not argue (1) that there was a lack of relevant case law or (2) cases held that suspects' similar rights were not clearly established. (Deputies' Reply in support of their Motion for Summary Judgment, Dkt. 134, at 5–9).[8] When he was killed by the deputies, Flores was in plain sight, was not advancing towards the deputies, raised his arms in apparent surrender with the knife palmed in one hand, stood motionless, and was more than twenty feet away from both deputies. (Flash drive containing video, Dkt. 131, and Plaintiffs' Expert Report, Dkt. 129, Ex. 6, at 16–17).

Ample cases show that shooting a suspect under these circumstances was a violation of clearly established law. *See Reyes*, 362 F. App'x at 407–09 (holding that it was unreasonable for an officer to use deadly

[8] In their opening brief, the deputies do not substantively address the second prong. (Dkt. 110).

force when the suspect was armed with a knife "at a safe distance away from the officers" and was not advancing toward the officers); *Cullum*, 2013 WL 5781203, at *9–10 (finding deadly force was unreasonable because the armed suspect's hand was "palm-up in a 'stop' gesture" that was "submissive" and he did not present an immediate threat); *Hemphill v. Schott*, 141 F.3d 412, 417 (2d Cir. 1998)[9] ("[A]ccepting as true, as we must, [the suspect's] version of the facts immediately preceding the shooting, [the officer's] alleged decision to use potentially deadly force upon a suspect who stopped and raised his arms in the air when commanded to do so does not qualify as reasonable under the remaining factors we must consider."); *Jamison*, 541 F. App'x at 19–20 (holding that officers were not entitled to qualified immunity where the suspect had stopped and was in an act of surrendering by putting his hand in the air and where their conduct violated clearly established law); *Green*, 239 F. App'x at 958 (holding that the officer's use of deadly force was not reasonable because the suspects were stopped and attempting to surrender with hands in the air or on the steering wheel and concluding that it was a violation of clearly established law); *Robinson*, 77 F. App'x at 414 (holding that the use of deadly force violated the suspect's clearly established Fourth Amendment rights where the suspect had "his arms raised over his head in a classic surrender position, with a gun in his lap");

[9] This Court may also look to other circuits to determine whether a right was clearly established. *See McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (looking to sister circuits).

Kanae, 294 F. Supp. 2d at 1185 (finding that a reasonable jury could conclude that the officer's conduct violated the suspect's Fourth Amendment rights when the suspect was shot as he was stepping away from a car with his hands in the air).

Accordingly, this Court concludes that Flores's constitutional right was clearly established in August 2015, and Plaintiffs have satisfied the second prong of the qualified immunity inquiry. The deputies therefore are not entitled to qualified immunity.

VI. CONCLUSION

For these reasons, the Court GRANTS [112] Bexar County's Motion for Summary Judgment and DENIES [110] Deputies Vasquez and Sanchez's Motion for Summary Judgment.