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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 23, 2024
Lyle W. Cayce
Clerk

No. 22-20519

Janice Hughes Barnes, *Individually and as Representative of* the Estate of Ashtian Barnes, *Deceased*; Tommy Duane Barnes,

Plaintiffs—Appellants,

versus

Roberto Felix, Jr.; County of Harris, Texas,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-725

Before Higginbotham, Smith, and Elrod, *Circuit Judges*.

Patrick E. Higginbotham, *Circuit Judge*:

Officer Roberto Felix, Jr., a traffic enforcement officer for the Harris County Precinct 5 Constable's Office, fatally shot Ashtian Barnes on April 28, 2016, following a lawful traffic stop. Appellants Janice Hughes Barnes and Tommy Duane Barnes filed suit on behalf of Barnes, their son, asserting claims against defendants Officer Felix and Harris County under 42 U.S.C. § 1983. The district court granted Defendants' motion for summary judgment, finding no Fourth Amendment constitutional violation. Faithful to this Circuit's moment of threat doctrine, we AFFIRM.

I.

A.

Officer Roberto Felix, Jr. fatally shot Ashtian Barnes on April 28, 2016, following a lawful traffic stop. The facts leading up to the shooting are undisputed. At about 2:40 p.m., Officer Felix heard a radio broadcast from the Harris County Toll Road Authority giving the license plate number of a vehicle on the highway with outstanding toll violations. Spotting a Toyota Corolla with the matching plate on the Tollway, he initiated a traffic stop by engaging his emergency lights. Ashtian Barnes, the driver, pulled over to the median on the left side of the Tollway out of the immediate traffic zone. Officer Felix parked his car behind the Corolla.

Officer Felix approached the driver's side window and asked Barnes for his driver's license and proof of insurance. Barnes replied that he did not have the documentation and that the car had been rented a week earlier in his girlfriend's name. During this interaction, Barnes was "digging around" in the car. Officer Felix warned Barnes to stop doing so and, claiming that he smelled marijuana, asked Barnes if he had anything in the vehicle Officer Felix should know about. In response, Barnes turned off the vehicle, placing his keys near the gear shift, and told Officer Felix that he "might" have the requested documentation in the trunk of the car. What happened next was captured on Officer Felix's dash cam. The district court found:[1]

[1] "Much of the incident, including its unfortunate conclusion, was recorded by video cameras. Although courts must construe evidence in light most favorable to the nonmoving party, we will not adopt a plaintiff's characterization of the facts where unaltered video evidence contradicts that account." *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 381 (2007)).

- At 2:45:28, Felix orders Barnes to open the trunk of his vehicle. At this time, Barnes's left blinker is still on, indicating that the keys are still in the ignition.
- At 2:45:33, Barnes opens the trunk of the vehicle.
- At 2:45:36, Barnes's left blinker turns off.
- At 2:45:43, Felix asks Barnes to get out of the vehicle.
- At 2:45:44, Barnes's driver side door opens.
- At 2:45:47, Barnes's left blinker turns back on.
- At 2:45:48, Felix draws his weapon.
- At 2:45:49, Felix points his weapon at Barnes and begins shouting "don't fucking move" as Barnes's vehicle begins moving.

At this point, Officer Felix stepped onto the car with his weapon drawn and pointed at Barnes, and—as Appellants claim and as supported by the footage—"shoved" his gun into Barnes's head, pushing his head hard to the right. Then, the car started to move. While the car was moving, Officer Felix shot inside the vehicle with "no visibility" as to where he was aiming.[2] The next second, Officer Felix fired another shot while the vehicle was still moving. After two seconds, the vehicle came to a full stop, and Officer Felix yelled "shots fired!" into his radio. Officer Felix held Barnes at gunpoint until backup arrived while Barnes sat bleeding in the driver's seat. At 2:57 p.m., Barnes was pronounced dead at the scene.

The Homicide Division of the Houston Police Department investigated and presented a report to the Harris County District Attorney's Office, who presented the report to a grand jury on August 26 and August 31,

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[2] Officer Felix had "no visibility," i.e., could not see into the car, because his head was outside and above the roof of the car while he held on to the car frame.

2016. The grand jury returned a "no bill;" that is, it found no probable cause for an indictment. Harris County Precinct 5 Constable's Office also conducted an internal investigation and found that Officer Felix had not violated its Standard Operating Procedures.

B.

Appellants Janice Hughes Barnes and Tommy Duane Barnes, Ashtian Barnes's parents, filed suit on December 29, 2017, in state court on behalf of their son, asserting claims against defendants Officer Felix and Harris County under 42 U.S.C. § 1983 and the Texas Tort Claims Act.[3] Defendants removed the action to federal district court on March 7, 2018.

Defendants moved for summary judgment, arguing that Officer Felix did not violate Barnes's constitutional rights and was entitled to qualified immunity. Defendants argued that because Officer Felix reasonably feared for his life when Barnes's vehicle was moving, it was reasonable to deploy deadly force. In response, Plaintiffs argued Officer Felix's use of force was unreasonable because, even if Barnes attempted to flee the scene, he did not pose a threat justifying deadly force.

The district court granted Defendants' motion for summary judgment and found that there was no genuine dispute of fact material as to constitutional injury. First, the district court found that, although there were some inconsistencies as to Officer Felix's "motivations" for shooting Barnes, the dash cam footage resolved all lingering genuine disputes of material fact. According to the district court, "Plaintiffs have not cited any

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[3] On appeal, Appellants have abandoned their claims under the Texas Torts Claims Act.

evidence that would obfuscate the events depicted in the dash cam recording." It explained:

> [T]he dash cam footage shows that Felix did not draw his weapon until Barnes turned his vehicle back on despite Felix's order to exit the vehicle. Regardless of whether Felix drew his weapon before or after the vehicle started moving, Plaintiffs offer no lawful explanation for Barnes turning his car back on after Felix ordered him to exit the vehicle.

Second, the court found that Officer Felix's actions prior to the moment of threat, including that Officer Felix "jumped onto the door sill," had "no bearing" on the officer's ultimate use of force. Third, the court determined that the moment of threat occurred in the two seconds before Barnes was shot. At that time, "[Officer] Felix was still hanging onto the moving vehicle and believed it would run him over," which could have made Officer Felix "reasonably believe his life was in imminent danger."

Ultimately, the district court found that because "Barnes posed a threat of serious harm to Officer Felix" in the moment the car began to move, Officer Felix's use of deadly force was not excessive, "presumptively reasonable under controlling Fifth Circuit precedent," and did not cause a constitutional injury. Finding no genuine dispute of material fact as to the constitutional injury, the district court granted Officer Felix's motion for summary judgment. The district court also dismissed the claim against Defendant Harris County. On August 8, 2022, the district court issued an order clarifying that there was "no genuine issue of material fact as to whether [Officer] Felix violated Barnes's Fourth Amendment rights when he pointed his firearm at Barnes[.]"[4]

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[4] Appellants only appeal the first grant of summary judgment, not the subsequent August 8, 2022 order.

Appellant Janice Hughes Barnes timely appealed on September 28, 2022, claiming: (1) the district court erred in concluding that there was no dispute of material fact because there were inconsistencies between the dash cam video and Felix's own statements and testimony; and (2) the district court erred in granting summary judgment because the facts as alleged were sufficient to find that Officer Felix violated Barnes's constitutional rights as a matter of law.

Appellant Tommy Duane Barnes timely filed a separate, pro se brief on February 7, 2023, incorporating "the findings of Adam Fomby" and alleging claims near identical to those of Appellant Janice Barnes's. Defendants do not address Tommy Barnes's pro se brief.

II.

On summary judgment, the movant must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law;" the court reviews the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in its favor.[5]

III.

Bound by this Circuit's precedent, we affirm the district court's order holding that there is no genuine dispute of material fact as to constitutional injury. As the district court explained, we may only ask whether Officer Felix "was in danger '*at the moment of the threat*' that caused him to use deadly force against Barnes." In this circuit, "it is well-established that the 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

[5] FED. R. CIV. P. 56(a); *see also Deville v. Marcantel*, 567 F.3d 156, 163–64 (5th Cir. 2009) (per curiam).

of deadly force."[6] This "moment of threat" test means that "the focus of the inquiry should be on the act that led the officer to discharge his weapon."[7] "Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit."[8]

The district court here determined that the moment of threat occurred in the two seconds before Barnes was shot. At that time, "[Officer] Felix was still hanging onto the moving vehicle and believed it would run him over," which could have made Officer Felix "reasonably believe his life was in imminent danger." *Harmon v. City of Arlington* presented a similar fact pattern, in which an officer was perched on the running board of a runaway vehicle when the officer shot the fleeing driver.[9] Finding no constitutional violation, the opinion noted that the "brief interval—when [the officer] is clinging to the accelerating SUV and draws his pistol on the driver—is what the court must consider to determine whether [the officer] reasonably believed he was at risk of serious physical harm."[10] Similarly here, Officer Felix was still hanging on to the moving vehicle when he shot Barnes. Under *Harmon's* application of our Circuit's "moment of threat" test, Felix did not violate Barnes's constitutional rights. We focus on the precise moment of the threat as required and affirm the district court's judgment.

IV.

One of the required elements of a municipal liability claim is a showing of a "violation of constitutional rights whose moving force is the policy or

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[6] *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020).

[7] *Id.* (cleaned up).

[8] *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (cleaned up).

[9] *Harmon v. City of Arlington*, 16 F.4th 1159, 1162 (5th Cir. 2021).

[10] *Id.* at 1164.

custom [of the municipality]."[11] As the district court found no constitutional injury, it rightfully did not reach the Barnes' municipal liability claim. Finding no constitutional injury ourselves, we affirm the grant of summary judgment to Harris County.

* * * * *

Faithful to Circuit precedent on the moment of threat analysis, we AFFIRM the district court's judgment.

[11] *Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020) (citing *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)).

Patrick E. Higginbotham, *Circuit Judge*, concurring:

A routine traffic stop has again ended in the death of an unarmed black man, and again we cloak a police officer with qualified immunity, shielding his liability. The district court rightfully found that its reasonableness analysis under the Fourth Amendment was circumscribed to the "precise moment" at which Officer Felix decided to use deadly force against Barnes. I write separately to express my concern with this Circuit's moment of threat doctrine, as it counters the Supreme Court's instruction to look to the totality of the circumstances when assessing the reasonableness of an officer's use of deadly force.

To these eyes, blinding an officer's role in bringing about the "threat" precipitating the use of deadly force lessens the Fourth Amendment's protection of the American public, devalues human life, and "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."[1] *Tennessee v. Garner*'s[2] stricture on the taking of a life only to protect one's life or the life of another is the baseline of the Supreme Court's later validation of pretextual stops in *Whren v. United States*,[3] and in the following term *Maryland v. Wilson*, allowing an officer without more than

[1] *Abraham v. Raso* rejected reasoning in prior cases that prevented the court from considering any of the circumstances before the exact moment deadly force is used:

> We reject the reasoning . . . because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the "totality of the circumstances" with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. "Totality" is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

183 F.3d 279, 288 (3d Cir. 1999).

[2] 471 U.S. 1, 21 (1985).

[3] 517 U.S. 806, 810 (1996).

pretext to order the driver of the then lawfully stopped car to exit their vehicle.[4] Sound on their face but unforeseen in their future came the reality that these cases brought fuel to a surge of deadly encounters between the police and civilians.[5] This reality makes plain the wisdom of *Garner*'s baseline and that it ought not be further redrawn by refusing to look to the totality of the circumstances when a stop leads to the taking of a life.

I.

Barnes was stopped for a traffic violation—his girlfriend's rental car had several outstanding toll tag violations, none of which are arrestable offenses under Section 370.177 of the Texas Transportation Code.[6] While Barnes was not then a fleeing *felon* at the moment Officer Felix deployed deadly force, the starting point of the requisite Fourth Amendment analysis must still be *Garner*, which announced the bedrock principle that it is unreasonable for an officer to use deadly force to stop a fleeing suspect *unless* the suspect poses an immediate physical danger to the officer or others.[7] To

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[4] 519 U.S. 408 (1997).

[5] "Today, traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed—and have been sanctioned by numerous counties and major police departments." *Crane v. City of Arlington*, No. 21-10644, 2022 WL 4592035, at *1 (5th Cir. Sept. 30, 2022) (citation omitted); Sam Levin, *US Police Have Killed Nearly 600 People in Traffic Stops Since 2017, Data Shows*, GUARDIAN (Apr. 21, 2022), https://www.theguardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data.

[6] TEX. TRANSP. CODE ANN. § 370.177 ("[T]he operator of a vehicle, other than an authorized emergency vehicle as defined by Section 541.201, that is driven or towed through a toll collection facility of a turnpike project shall pay the proper toll. The operator of a vehicle who drives or tows a vehicle through a toll collection facility and does not pay the proper toll commits an offense. An offense under this subsection is a misdemeanor punishable by a fine not to exceed $250.")

[7] 471 U.S. at 21.

assess whether Officer Felix was justified in his use of deadly force, *Garner* requires this Court to look to the "totality of circumstances."[8] Yet we do not.

We, and three of our sister courts, have narrowed the totality of circumstances inquiry by circumscribing the reasonableness analysis of the Fourth Amendment to the precise millisecond at which an officer deploys deadly force.[9] "[Our] excessive force inquiry is confined to whether the [officer] was in danger *at the moment of the threat* that resulted in the [officer]'s shooting.[10] Under this "moment of threat" doctrine, courts are prohibited from looking to "what has transpired up until the moment of the shooting itself[;]"[11] instead, the sole focus is on "the act that led the officer[] to discharge his weapon."[12] The moment of threat doctrine trims *Garner* with predictable results: by cabining the Court's analysis, it turns to the issue of qualified immunity after eliding the reality of the role the officers played in bringing about the conditions said to necessitate deadly force. "Necessity," either to protect an officer or another, requires that we be sensitive to all of the circumstances bearing on an officer's use of force. Revisiting our Circuit's precedents on the moment of threat would only return this Circuit to *Garner*'s metric of necessity—a totality of the circumstances.

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[8] *Id.* at 9.

[9] The district court found "'the moment of the threat' occurred *after* Felix jumped onto the door sill about 2:45:50, in the two seconds before Felix fired his first shot."

[10] *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001) (citing *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992)).

[11] *Fraire*, 957 F.2d at 1267.

[12] *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020).

II.

The Fifth Circuit's approach to the reasonableness analysis is the minority position, joined by the Second, Fourth, and Eighth Circuits. Indeed, a majority of circuits have adopted a distinct framework for assessing the reasonableness of an officer's use of deadly force.[13]

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[13] *See, e.g.*, *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) ("We first reject defendants' analysis that the police officers' actions need be examined for 'reasonableness' under the Fourth Amendment only at the moment of the shooting. We believe that view is inconsistent with Supreme Court decisions and with the law of this Circuit."); *Carswell v. Borough of Homestead*, 381 F.3d 235, 243 (3d Cir. 2004) ("All of the events leading up to the pursuit of the suspect are relevant."); *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) (considering the totality of circumstances even in the context of deadly force); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."); *Est. of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) ("If a fleeing felon is converted to a 'threatening' fleeing felon *solely* based on the actions of a police officer, the police should not increase the degree of intrusiveness."); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018) ("While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' the events leading up to the shooting, including the officers [sic] tactics, are encompassed in the facts and circumstances for the reasonableness analysis.") (internal citations omitted); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008) ("[W]e must pay 'careful attention' to factors such as 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' We also consider whether an officer's own 'reckless or deliberate conduct' in connection with the arrest contributed to the need to use the force employed.") (citations omitted) (internal citation omitted) (cleaned up); *Ayers v. Harrison*, 650 F. App'x 709, 719 (11th Cir. 2016) ("Officer Harrison's argument that our precedent precluded Ms. Ayers from advancing an 'officer created danger' theory at trial is both factually and legally incorrect."); *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) ("[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, where, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable."). *But see Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) ("The reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth

Whether an officer's use of force was excessive is "necessarily [a] fact-intensive" endeavor that "depends on the facts and circumstances of each particular case."[14] As the Supreme Court observed in *Scott v. Harris*, the Fourth Amendment analysis is necessarily a "factbound morass of reasonableness."[15] Yet the moment of threat doctrine starves the reasonableness analysis by ignoring relevant facts to the expense of life. The case before us is paradigmatic: we are prohibited from considering Officer Felix's decision to jump onto the sill of the vehicle with his gun already drawn, and—in the span of two seconds—his decision to elevate and fire his handgun into the vehicle—this for driving with an outstanding toll violation. Officer Felix's role in escalating the encounter is "irrelevant" in our Circuit.

If the moment of threat is the sole determinative factor in our reasonableness analysis, references to our supposed obligation to consider the totality of circumstances are merely performative.[16] Isolating the police-civilian encounter to the moment of threat begs the *Garner* question. That is, the moment of threat approach removes the consideration of the entire

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Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed.") (citations omitted); *Banks v. Hawkins*, 999 F.3d 521, 525–26 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2674 (2022) ("In any event, we evaluate the reasonableness of Hawkins's conduct by looking primarily at the threat present *at the time* he deployed the deadly force.") (citation omitted).

[14] *Amador*, 961 F.3d at 727 (quoting *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 728 (5th Cir. 2018)).

[15] 550 U.S. 372, 383 (2007) (cleaned up).

[16] *See id.* at 728 ("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.").

circumstances required by *Garner*, including the gravity of the offense at issue.

III.

Here, given the rapid sequence of events and Officer Felix's role in drawing his weapon and jumping on the running board, the totality of the circumstances merits finding that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force. This officer stepped on the running board of the car and shot Barnes within two seconds, lest he get away with driving his girlfriend's rental car with an outstanding toll fee. It is plain that the use of lethal force against this unarmed man preceded any real threat to Officer Felix's safety—that Barnes's decision to flee was made before Officer Felix stepped on the running board. His flight prompted Officer Felix to jump on the running board and fire within two seconds. This case should have enjoyed full review of the totality of the circumstances. The moment of threat doctrine is an impermissible gloss on *Garner* that stifles a robust examination of the Fourth Amendment's protections for the American public. It is time for this Court to revisit this doctrine, failing that, for the Supreme Court to resolve the circuit divide over the application of a doctrine deployed daily across this country.

APPENDIX B

United States District Court
Southern District of Texas
ENTERED
August 29, 2022
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANICE HUGHES BARNES, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:18-CV-725
	§	
ROBERTO FELIX JR., *et al*,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Second Motion for Summary Judgment (the "Motion") (Doc. #135), Plaintiff Janice Hughes Barnes' Response (Doc. #147), Defendants' Reply and Objections to Plaintiff Janice Hughes Barnes' Response (Doc. #150), Plaintiff Janice Hughes Barnes' Response to Defendants Objections (Doc. #153), Plaintiff Tommy Barnes' Response to the Motion (Doc. #155), and Defendants' Reply (Doc. #156). Having reviewed the parties' arguments and applicable law, the Court grants the Motion.

I. Background

On April 28, 2016, Roberto Felix Jr. ("Felix"), a traffic enforcement officer for the Harris County Precinct 5 Constable's Office, initiated a traffic stop of Ashtian Barnes ("Barnes") that ended in Felix fatally shooting Barnes. Doc. #135, Ex. 1 ¶¶ 4, 5. Full details of the events that led to Barnes' death can be found in the Court's March 31, 2021 Order, which granted summary judgment for Felix and Harris County, Texas (collectively "Defendants") on Plaintiffs Janice Hughes Barnes and Tommy Barnes' deadly force claims after finding that Felix's use of deadly force was not objectively unreasonable under established Fifth Circuit precedent that this Court is obligated to apply. Doc. #49. Defendants now move for summary judgment on Plaintiffs' remaining 42 U.S.C. § 1983 excessive force claims that are based on Felix "drawing his firearm and pointing it directly at and

inches away from [Barnes'] head," allegedly "without any reasonable suspicion that [Barnes] posed a threat." Doc. #135 and Doc. #66 at 1. Unlike Plaintiffs' since-dismissed deadly force claim that was based on Felix shooting his gun, Plaintiffs' excessive force claim is based on Felix's decision to brandish his gun. *See* Doc. #49 and Doc. #66 at 1. Relevant to this claim are the following facts.

At about 2:40 p.m. on April 28, 2016, Felix heard a radio broadcast from the Harris County Toll Road Authority regarding a prohibited vehicle on the Sam Houston Tollway. Doc. #135, Ex. 1 ¶ 4. At about 2:43 p.m., Felix located the vehicle and initiated the traffic stop. *Id.* ¶ 5; *Id.*, Ex. 2 at 00:49. The driver of the vehicle, Barnes, pulled over to the left shoulder of the Tollway "within seconds" of Felix activating his emergency lights and Felix parked his car behind the vehicle. *Id.*, Ex. 2 at 00:51, Ex. 3 at 30:16–22. At 2:44, Felix exited his vehicle and approached Barnes, who had already rolled down his window. *Id.*, Ex. 2 at 01:30; Doc. #147, Ex. 3 at 34:1–10. When Felix asked for Barnes' driver's license and proof of insurance, Barnes informed him that he did not have his license and that he had rented the vehicle a week earlier in his girlfriend's name. Doc. #135, Ex. 1 ¶ 6. Barnes began reaching around the vehicle and rummaging through papers, which resulted in Felix warning Barnes to stop "digging around" multiple times. *Id.* ¶ 7, Ex. 2 at 02:30.

Barnes then told Felix he might have identifying information in the trunk of the vehicle. *Id.*, Ex. 2 at 02:40. Felix asked Barnes to open his trunk, which Barnes did before he took his keys out of the ignition and turned the vehicle off. *Id.* at 02:45–52. Before heading to the trunk, Felix asked Barnes to exit the vehicle and stepped in between Barnes and his now open driver side door. *Id.* at 02:56. After retrieving his keys, Barnes then turned his vehicle back on. *Id.* at 03:03. One second letter, Felix drew his firearm and pointed it at Barnes. *Id.* at 03:04. As Barnes' vehicle began moving, Felix yelled "don't fucking move" twice. *Id.* at 3:05. Because the excessive force claim is based solely upon Felix brandishing his firearm, the fatal events that followed the brandishing are not

relevant to the claim or Motion now before the Court. *See* Doc. #135 and Doc. #66 at 1. Rather, Defendant's Motion argues that Felix is entitled to qualified immunity and because he did not use excessive force, all municipal liability claims against Harris County must fail as well. Doc. #135.

II. Legal Standard

a. Federal Rule of Civil Procedure 56

Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. When a public official raises "a good faith assertion of qualified immunity," the plaintiff has the burden of showing that the defense is not available. *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 329–30 (5th Cir. 2020) (citing *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016)). To do so, the plaintiff must first demonstrate "that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury." *Id.* at 330. Once qualified immunity is involved, "the plaintiff's version of those disputed facts must also constitute a violation of clearly established law." *Id.*

As with any motion for summary judgment, the court "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009)). But the court will "assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Id.* (quoting *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)).

b. Section 1983

Section 1983 imposes liability for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" caused by any person acting "under color of any statute,

ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The injured party may bring may a § 1983 claim against a state actor in their individual or official capacity or against a governmental entity of the state. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016), *as revised* (June 16, 2016) (citing *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)). To prevail on a claim under § 1983, the plaintiff must establish (1) a violation of a right secured by federal law (2) that "was committed by a person acting under color of state law." *Id.* (quoting *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)).

1. Qualified Immunity Defense

When a public official asserts qualified immunity against a § 1983 claim, the court must ask (1) whether the alleged conduct violated a constitutional right and (2) "whether the right in question was clearly established at the time of the alleged violation" as to put the official "on notice of the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111, 207 L. Ed. 2d 1051 (2020) (citing *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam)) (internal quotation marks omitted). "The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time." *Id.* The Court's analysis proceeds under the first prong—whether Felix violated Barnes's constitutional right to be free from excessive force.

III. Analysis

Defendants move for summary judgment on Plaintiffs' Section 1983 excessive force claim, arguing in part that it was objectively reasonable for Felix to draw and point his weapon in light of Barnes' conduct. Any claim "that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard." *Graham v. Connor*, 490 U.S. 386,

395 (1989). To establish a Fourth Amendment violation based on an officer's use of excessive force, the plaintiff must show "(1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Pena v. City of Rio Grande City*, 879 F.3d 613, 619 (5th Cir. 2018). "The second and third elements collapse into a single objective-reasonableness inquiry, guided by the following *Graham* factors: 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.* (cleaned up). 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." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quotation omitted). "The court must adopt the perspective of a reasonable officer on the scene, rather than judge with the 20/20 vision of hindsight." *Bros. v. Zoss*, 837 F.3d 513, 518 (5th Cir. 2016). "[T]he 'reasonableness' inquiry . . . 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.

Here, the dash cam video shows the following:

- At 2:45:28, Felix orders Barnes to open the trunk of his vehicle. At this time, Barnes' left blinker is still on, indicating that keys are still in the ignition.
- At 2:45:33, Barnes opens the trunk of the vehicle.
- At 2:45:36, Barnes' left blinker turns off.
- At 2:45:43, Felix asks Barnes to get out of the vehicle.
- At 2:45:44, Barnes' driver side door is opened.
- At 2:45:47, Barnes' left blinker turns back on.
- At 2:45:48, Felix draws his weapon.
- At 2:45:49, Felix points his weapon at Barnes and begins shouting "don't fucking move" as Barnes' vehicle begins moving.

Doc. #135, Ex. 2 at 02:45–03:05.

Plaintiffs have not cited any evidence that would obfuscate the events depicted in the dash cam recording. Rather, Plaintiffs point to Felix's inconsistent testimony regarding what conduct by Barnes prompted Felix to draw his weapon. It is undisputed that before Felix drew his weapon, Barnes had turned off his car and put his keys in the center console. Doc. #147 at 7, Ex. 4 at 74:20–25. As to what caused Felix to draw his weapon, Plaintiffs note that Felix: (1) stated in his 2016 witness statement that he drew his weapon after seeing Barnes reach for his keys, (2) testified to a grand jury that he drew his weapon when he saw Barnes reaching down, (3) testified at his deposition that he drew his weapon as Barnes was putting the key in the ignition, and (4) stated in his affidavit that he drew his weapon when Barnes grabbed his keys and turned on the vehicle. Doc. #147 at 7, 16. Though there are slight differences in this testimony, all four scenarios are consistent with the dash cam video, which shows that four seconds after Felix asked Barnes to exit the vehicle, Barnes was still in the vehicle and the vehicle's blinker turned back on. Doc. #135, Ex. 2 at 02:58–03:03.

Though Plaintiffs argue that "Barnes reaching down after Felix opened his door . . . is just as consistent with him preparing to leave the rental car as refusing Felix's order," they offer no explanation as to why a passenger would need to reach down before exiting a vehicle. *See* Doc. #147 at 15. Conversely, the Fifth Circuit has found that an officer was justified in fatally shooting a driver who "reached down to the seat or floorboard of his car" after the officer ordered the driver to exit the vehicle. *Young v. City of Killeen, Tex.*, 775 F.2d 1349, 1351, 1353 (5th Cir. 1985). As such, the Court cannot say that pointing a weapon at a driver who "reaches down" for an unknown reason after the officer orders the driver to exit the vehicle is unreasonably excessive. *See id.*

Plaintiffs cite to two Fifth Circuit district court cases where qualified immunity was denied on an excessive force claim based on the brandishing of a firearm. The first is *Manis v. Cohen,* wherein the district court denied summary judgment based on conflicting testimony as to whether an

officer pointed his gun at the head of a man lawfully towing the officer's car or pointed the gun at the vehicle itself. CIV.A.3:00CV1955-P, 2001 WL 1524434, at *1–2, *8 (N.D. Tex. Nov. 28, 2001). The second is *Flores v. Rivas*, wherein the district court denied a motion to dismiss an excessive force claim because the complaint alleged that an officer brandished a weapon at numerous children who had committed no crime, gave no reason to believe they had committed a crime, had not done anything to threaten the safety of the officer or general public, and did nothing to resist or evade arrest. No. EP-18-CV-297-KC, 2020 WL 563799, at *7 (W.D. Tex. Jan. 31, 2020). Both of these cases are easily distinguishable.

Here, the dash cam footage shows that Felix did not draw his weapon until Barnes turned his vehicle back on despite Felix's order to exit the vehicle. Doc. #135, Ex. 2 at 02:58–03:03. Regardless of whether Felix drew his weapon before or after the vehicle started moving, Plaintiffs offer no lawful explanation for Barnes turning his car back on after Felix ordered him to exit the vehicle. *See* Doc. #147 at 16; *c.f. Manis*, 2001 WL 1524434, at *1 (explaining that the driver the officer pointed his gun at had the right to tow the officer's vehicle). Though Plaintiffs argue that there is only self-serving evidence that Barnes was attempting to flee, Plaintiffs do not offer any non-inimical explanation for Barnes's conduct. *See* Doc. #147 at 16. Moreover, even if such a reason exists, it was not objectively unreasonable for Felix to believe that Barnes was attempting to flee when Barnes turned his car on despite Felix's order to exit the vehicle. *C.f. Flores*, 2020 WL 563799, at *7 (noting that the children the officer pointed his weapon at did nothing to resist or evade arrest). As such, the Court cannot say that Felix pointing his weapon at Barnes when Barnes turned on his vehicle despite Felix's order was unreasonably excessive in violation of the Fourth Amendment.

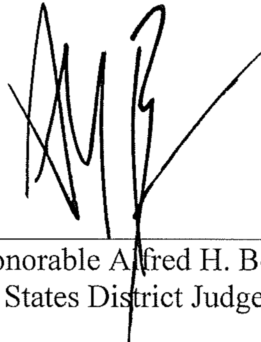
Accordingly, because Plaintiffs have failed to demonstrate a genuine issue of material fact as to a constitutional injury, their § 1983 claim fails. *See Joseph*, 981 F.3d at 329–30. Barring a

constitutional injury, Plaintiffs also cannot assert municipal liability against Harris County. *See Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (quoting *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)) ("Municipal liability under § 1983 requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom.").

IV. Conclusion

The Court is cognizant of the very narrow question before it: is there a genuine issue of material fact as to whether Felix violated Barnes' Fourth Amendment rights when he pointed his firearm at Barnes? For the reasons explained above, the Court finds that the answer to that question is no. The Court continues to invite the Fifth Circuit to review its very narrow approach to deadly-force claims. *See* Doc. #49 at 12. Nevertheless, the only issue before the Court today was Felix's decision to brandish his gun, not his decision to shoot it. Because Barnes did not comply with Felix's order to exit his vehicle and instead turned his vehicle on, it was not excessively unreasonable for Felix to brandish his weapon in an attempt to stop Barnes from fleeing. Accordingly, the Motion is GRANTED. This case is hereby DISMISSED.

It is so ORDERED.



AUG 2 9 2022

Date

The Honorable Alfred H. Bennett
United States District Judge

APPENDIX C

United States District Court
Southern District of Texas
ENTERED
March 31, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANICE HUGHES BARNES, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:18-CV-725
	§	
ROBERTO FELIX JR., *et al*,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Consolidated Motion for Summary Judgment (the "Motion") (Doc. #42); Plaintiffs' Response (Doc. #44), and Defendants' Reply (Doc. #45). At issue is the lawfulness of an officer's actions during a traffic stop that ended, not more than three minutes after it began, with the officer having fatally shot the driver of the vehicle. The question is whether the Court can consider the officer's conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside—in determining whether the officer used excessive force in violation of the Fourth Amendment. Under Fifth Circuit precedent, the answer is no. The Motion is therefore granted.

I. Background

a. The Shooting

On April 28, 2016, Roberto Felix Jr., a traffic enforcement officer for the Harris County Precinct 5 Constable's Office, was patrolling the Sam Houston Tollway. Doc. #42, Ex. 1 ¶ 4. At about 2:40 p.m., he heard a radio broadcast from the Harris County Toll Road Authority regarding a prohibited vehicle on the Tollway. *Id.* After requesting more information, he received a license plate number for the vehicle and began looking for it. *Id.* He located the vehicle, a Toyota Corolla, and initiated the traffic stop by activating his emergency lights. *Id.* ¶ 5. The driver, Ashtian

Barnes, pulled over to the left shoulder of the Tollway, and Felix parked his car behind the Corrolla. *Id.*

At about 2:43 p.m., Felix exited his vehicle and approached Barnes. *Id.*, Ex. 3, Video 1 at 85T14. When Felix asked for Barnes's driver's license and proof of insurance, Barnes informed him that he did not have his license and that he had rented the vehicle a week earlier in his girlfriend's name. *Id.*, Ex. 1 ¶ 5. Felix stated that Barnes was reaching around the vehicle and rummaging through papers. *Id.* ¶ 7. Several times, Felix warned Barnes to stop "digging around." *Id.*, Ex. 3, Video 1 at 85T14. Felix also asked Barnes whether he had anything in the vehicle he should know about, claiming he smelled marijuana. *Id.* At some point, Barnes reached over and turned off the vehicle's ignition, placing his keys near the gear shift. *Id.*, Ex. 1 ¶ 7. Felix then told Barnes to open his trunk. *Id.*, Ex. 3, Video 1 at 85T14.

At about 2:45 p.m., Felix next asked Barnes to step out of the vehicle, his right hand guarding his holster as the driver's side door opened. *Id.* Felix stated that, instead, Barnes grabbed his keys and turned on the vehicle. *Id.*, Ex. 1 ¶ 9. At that time, Felix was standing next to the open driver's side door. *Id.*, Ex. 3, Video 1 at 85T14. Felix jumped onto the door sill of the vehicle, though it is unclear whether that occurred before or after the vehicle had already began accelerating. Doc. #42, Ex. 1 ¶ 10; *id.*, Ex. 5 ¶ 27; Doc. #44, Ex. 2 at 90:19–24. As the vehicle moved forward, Felix yelled, "Don't fucking move!" twice. Doc. #42, Ex. 3, Video 1 at 85T14. Felix briefly drew his right hand out of the vehicle, holding onto his gun, before reinserted toward Barnes. *Id.*; Doc. #44 at 96:11–16. One second later, Felix shot inside the vehicle, his gun pointed downward, with "no visibility" of where he was aiming. *Id.* at 94:13–15, 97:1–3; Doc. #42, Ex. 3, Video 1 at 85T14. The next second, he fired another shot. *Id.* After about two seconds, the vehicle came to halt, and Felix yelled, "Shots fired!" into his radio. *Id.* Felix held Barnes at

gunpoint until backup arrived, while Barnes sat bleeding in the driver's seat. *Id.*, Ex. 1 ¶ 12; Doc. #44, Ex. 2 at 100:1–4. At 2:57 p.m., Barnes was pronounced dead at the scene. Doc. #42, Ex. 5.

b. The Suit

Following the shooting, the Homicide Division of the Houston Police Department investigated the incident and presented a report to the Harris County District Attorney's Office. Doc. #44, Ex. 10 at 7. The District Attorney's Office presented the report to a grand jury on August 26 and August 31, 2016. *Id.* The grand jury ultimately returned a "no bill" in the case. *Id.* Harris County Precinct 5 Constable's Office also conducted an internal investigation and found no violations of its Standard Operating Procedures. *Id.*; *id.*, Ex. 11.

On December 29, 2017, Plaintiffs Janice Hughes Barnes and Tommy Duane Barnes filed an Original Petition in state court on behalf of Ashtian Barnes, asserting claims against Felix and Harris County, Texas (collectively "Defendants") under 42 U.S.C. § 1983 and the Texas Tort Claims Act.[1] Doc. #1, Ex. 2. Defendants removed the action to this Court on March 7, 2018. Doc. #1. Defendants now move for summary judgment on Plaintiffs' § 1983 claims, arguing that Felix did not violate Barnes's constitutional rights and is entitled to qualified immunity. Doc. #42. Defendants also seek judgment as a matter of law as to Plaintiffs' municipal liability claims against Harris County. Doc. #44.

II. Legal Standard

a. Federal Rule of Civil Procedure 56

Summary judgment is proper if there is no genuine dispute of material fact and the moving

[1] Plaintiffs do not address their cause of action under the Texas Tort Claims Act in the Response to the Motion. *See* Doc. #44. Because Plaintiffs have presented no evidence to support such relief, those claims are hereby DISMISSED.

party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. When a public official raises "a good faith assertion of qualified immunity," the plaintiff has the burden of showing that the defense is not available. *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 329–30 (5th Cir. 2020) (citing *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016)). To do so, the plaintiff must first demonstrate "that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury." *Id.* at 330. Once qualified immunity is involved, "the plaintiff's version of those disputed facts must also constitute a violation of clearly established law." *Id.*

As with any motion for summary judgment, the court "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009)). But the court will "assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Id.* (quoting *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)).

b. Section 1983

Section 1983 imposes liability for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" caused by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The injured party may bring may a § 1983 claim against a state actor in their individual or official capacity or against a governmental entity of the state. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016), *as revised* (June 16, 2016) (citing *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)). To prevail on a claim under § 1983, the plaintiff must establish (1) a violation of a right secured by federal law (2) that "was committed by a person acting under color of state law." *Id.*

(quoting *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)).

1. Qualified Immunity Defense

When a public official asserts qualified immunity against a § 1983 claim, the court must ask (1) whether the alleged conduct violated a constitutional right and (2) "whether the right in question was clearly established at the time of the alleged violation" as to put the official "on notice of the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111, 207 L. Ed. 2d 1051 (2020) (citing *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam)) (internal quotation marks omitted). "The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time." *Id.*

The Supreme Court has walked back the requirement that a court must resolve the constitutional question first, leaving it to the sound discretion of the courts to decide "the order of decision-making that will best facilitate the fair and efficient disposition of each case." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *cf. Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts considering qualified immunity claim to first address whether a violation occurred to promote "the law's elaboration from case to case"). Even so, the Fifth Circuit has recognized the "value in addressing the constitutional merits to develop robust case law on the scope of constitutional rights." *Joseph*, 981 F.3d at 332. Thus, the Court's analysis proceeds under the first prong—whether Felix violated Barnes's constitutional right to be free from excessive force.

III. Analysis

Any claim "that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard." *Graham v. Connor*, 490 U.S. 386,

395 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). To establish a Fourth Amendment violation based on an officer's use of excessive force, the plaintiff must show (1) an injury, (2) "which resulted from the use of force that was clearly excessive to the need," (3) "the excessiveness of which was objectively unreasonable." *Ramirez v. Martinez*, 716 F.3d 369, 377 (5th Cir. 2013) (quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

Ordinarily, a court considers three factors in determining whether an officer's use of force was reasonable: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Joseph*, 981 F.3d at 332 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But in cases involving the use of deadly force, the Fifth Circuit has developed a much narrower approach, effectively eschewing the first and third factors. In this Circuit, the use of deadly force is "presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009) (citing *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir.2003)). And so, when an officer in this Circuit reasonably believes he has encountered such a threat, the constitutional inquiry ends there.[2] *See Manis v. Lawson*, 585 F.3d

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[2] To be sure, this approach is not unform among the circuit courts of appeals. The Seventh, Six, and Tenth Circuits have adopted a more nuanced framework when the officer's own conduct exacerbates the excessiveness of the deadly force used. *See Est. of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) ("If a fleeing felon is converted to a 'threatening' fleeing felon solely based on the actions of a police officer, the police should not increase the degree of intrusiveness.); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008) (citation omitted) ("We also consider whether an officer's own 'reckless or deliberate conduct' in connection with the arrest contributed to the need to use the force employed."); *but see Cnty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546, 198 L. Ed. 2d 52 (2017) (citing *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)) (striking down Ninth Circuit permitting excessive force claim under Fourth Amendment "where an officer

839, 843 (5th Cir. 2009) (citing *Ontiveros*, 564 F.3d at 382) ("An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others.").

In evaluating the reasonableness of the officer's belief, the court must only ask "whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer's use of deadly force." *Rockwell*, 664 F.3d at 991 (5th Cir. 2011) (quoting *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir.2001)) (alterations omitted and emphasis in original); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) (citing *Young v. City of Killeen*, 775 F.2d 1349, 1352 (5th Cir.1985)) ("[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm."). To that end, courts in this Circuit should focus on "the act that led the officer to discharge his weapon." *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020), *cert. denied*, No. 20-585, 2021 WL 850625 (U.S. Mar. 8, 2021) (quoting *Manis*, 585 F.3d at 845) (alteration omitted). In doing so, the court must view the act "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," taking into account "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* (quoting *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 729 (5th Cir. 2018)); *see Ramirez v. Knoulton*, 542 F.3d 124, 129–30 (5th Cir. 2008) (quoting *Flores v. City of*

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intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation"). Similarly, the Third Circuit considers the totality of the circumstances, even if deadly force is involved. *See Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir.1999) ("Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?").

Palacios, 381 F.3d 391, 399 (5th Cir. 2004)) (internal quotation marks omitted) ("To gauge the objective reasonableness of the force used by a law enforcement officer, [the court] must balance the amount of force used against the need for force, paying careful attention to the facts and circumstances of each particular case.").

With that framework in mind, the Court now turns to the facts in the record, viewing them in the light most favorable to Plaintiffs. *See Newman*, 703 F.3d at 761. Because the record contains a dash cam recording of the incident, the Court starts there. *Id.* In chronological order, the dash cam video shows the following:

- Felix pulls over Barnes's vehicle at 2:43 p.m. and walks over to the vehicle about a minute later.
- Beginning at 2:45 p.m., Barnes orders Barnes to "stop digging around" at least three times.
- Barnes tells Felix that he has identification in the trunk.
- At about 2:45:33, the trunk opens.
- At about 2:45:43, Felix asks Barnes to step out of the vehicle, and it appears that Barnes opens the driver's-side door.
- As the door opens, Felix's right hand was on the holster of his gun.
- At about 2:45:48, the vehicle's taillights turn on.
- About one second later, Felix draws his gun, and the vehicle starts to move forward.
- Felix appears to step onto the door sill of the vehicle as the door begins to close.
- As the vehicle accelerates, Felix yells, "Don't fucking move!" twice.
- Felix briefly pulls his gun hand out of the vehicle.
- At about 2:45:52, Felix fires his first shot.
- Two seconds later, the vehicle comes to a complete stop.

Doc. #42, Ex. 3, Video 1 at 85T14.

Plaintiffs have not cited any evidence that would obfuscate the events depicted in the dash cam recording. Rather, Plaintiffs point to Felix's inconsistent testimony regarding the events leading up to the shooting. For instance, Felix stated that he jumped onto the door sill because he was afraid the door would close on him, causing him to be "pinned" and "drug" by the vehicle.

Doc. #44, Ex. 2 at 91:19–94:3, 178:8–9; *id.*, Ex. 3 at 12; *id.*, Ex. 7 at 3; *id.*, Ex. 8 at 2; *see also id.* at 11 ("[M]y initial reaction was, I'm going to get run over."); *id.* at 12 ("When he drove off and that door pinned me . . . I believed if I were to let go I would have got run over by the car."); *id.* at 14 ("The only option that I had at that point was to grab a hold of something and my body reacted to hold on and jump on."). Yet, Felix's testimony also suggests that he was determined to prevent Barnes from fleeing, even before the vehicle began to move, ostensibly to protect the general public. *Id.*, Ex. 2 at 80:17–19, 106:23–107:2; *see also id.* at 81:17–21 ("[M]y actions were to draw my weapon because I already had a perception of maybe something, a weapon or him trying to flee at the same [] moment."); *id.* at 178:21–23 ("My attempt was to . . . stop him from fleeing," from causing injury to myself or others and that was my actions on that day."); 107:4–7 ("Along with leaving the scene . . . in a motor vehicle is a felony charge . . . it is evading . . . that's why I drew my weapon."); *id.*, Ex. 3 at 10 ("At that point I reached in with my left hand to try to keep him from putting the car in gear and driving off and possibly causing another situation."); *id.* at 16 ("[W]hen he went for the key and my thought was, something is that severe that he's going to put my life in danger, he could easily put somebody else's life in danger as well."). Felix also conceded that

> I had nothing on Mr. Barnes, not even a name, so I didn't know who he was, what he was capable of or what he could [] do. So for him trying to flee [] in this situation definitely threw up a flag that there was something . . . that needed to be stopped.

Id., Ex. 2 at 179:8–13. But this testimony, while relevant to Felix's decision-making and motivations, has no bearing on whether Felix was in danger "*at the moment of the threat*" that caused him to use deadly force against Barnes. *See Rockwell*, 664 F.3d at 991.

In fact, "the moment of the threat" occurred *after* Felix jumped onto the door sill at about 2:45:50, in the two seconds before Felix fired his first shot. Doc. #42, Ex. 3, Video 1 at 85T14; *see also id.*, Ex. 9 at 9. In that moment, Felix was still hanging onto the moving vehicle and

believed it would run him over.[3] Doc. #44, Ex. 2 at 127:4–12; *id.*, Ex. 3 at 12; *id.*, Ex. 7 at 3. Additionally, Defendants' law enforcement expert Jared Zwickey stated that Felix "reasonably believed his life was in imminent danger of death or great bodily injury when Mr. Barnes refused to follow the deputy's commands to stop the vehicle from moving while the deputy's left foot was partially standing on the door sill of the vehicle." Doc. #42 at 33

Plaintiffs contend that any danger perceived by Felix was "created solely by himself, and not through the actions of [] Barnes." Doc.#44 at 18. But the Fifth Circuit does not consider "what had transpired up until the shooting itself" in assessing the reasonableness of an officer's use of deadly force, even when the officer's conduct departs from established police procedures. *See Fraire*, 957 F.2d at 1276 ("Even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections."); *Rockwell*, 664 F.3d at 992 (finding argument that officers' breach of locked door "necessarily caused the shooting" was 'nothing more than speculation"). Likewise, it is immaterial that Felix fired the second shot "almost immediately after the first," as noted by Plaintiffs' law enforcement expert Todd Maloney. Doc. #44, Ex. 6 at 9. Once the use of deadly force is justified, nothing in the Fourth Amendment bars the officer from protecting himself, even if that means firing multiple rounds. *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015).

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[3] Felix has also stated that, while standing on the door sill, he felt "pressure" or a "tug" against his gun holster and "had to discharge my weapon to stop that threat." Doc. #44, Ex. 2 at 95:3–9; *id.*, Ex. 3 at 11, 13. In other words, according to Felix, his use of deadly force was also justified by the "tug" or "pressure" he felt near his holster. Not only is this not depicted in the dash cam recording, but it also suggests that Barnes was attempting a maneuver of near stuntman proportions, attempting to disarm Felix while simultaneously operating the vehicle. Because the possibility of such danger is slight, and the evidence supporting it scant, the Court finds this purported feeling insufficient to give Felix "reason to believe, at that moment, that there was a threat of physical harm." *See Young*, 775 F.2d at 1352.

In short, viewing the evidence in Plaintiffs' favor, the Court finds Felix's use of deadly force "presumptively reasonable" under controlling Fifth Circuit precedent. *See Ontiveros*, 564 F.3d at 382. Once Felix decided to jump onto the door sill, escalating the encounter even further, Barnes's continued operation of the vehicle put Felix at risk of serious harm. Because it is this act—and this act alone—that the Fifth Circuit has instructed courts to evaluate, this Court's inquiry begins and ends there. *See Amador*, 961 F.3d at 724. Therefore, because Barnes posed a threat of serious harm to Felix, his use of deadly force was not excessive, and there can be no constitutional violation. *See Manis*, 585 F.3d at 843.

Accordingly, because Plaintiffs have failed to demonstrate a genuine dispute of material fact as to a constitutional injury, their § 1983 claim fails even without considering Felix's qualified immunity defense. *See Joseph*, 981 F.3d at 329–30. Barring a constitutional injury, Plaintiffs also cannot assert municipal liability against Harris County. *See Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (quoting *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)) ("Municipal liability under § 1983 requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom.").

IV. Conclusion

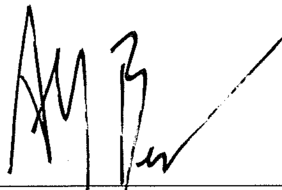
The Court is mindful that police officers often must "make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Amador*, 961 F.3d at 728. But as Judge Higginbotham wrote in *Mason v. Lafayette*,

> At some point, an officer crosses the line between setting up a risky situation and actually himself directly causing the "threat." Officers are at risk in nigh every traffic stop as they approach a vehicle, as are the persons in that vehicle—so also with street confrontations. Yet no one will maintain that an officer can lawfully avoid all risk by simply shooting and asking questions later.

Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 288–89 (5th Cir. 2015) (Higginbotham, J., concurring in part and dissenting in part); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) ("[The Court's decision] sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."). By limiting the focus of the judicial inquiry so narrowly as to only examine the precise moment the officer decided to use deadly force, the Fifth Circuit has effectively stifled a more robust examination of the Fourth Amendment's protections when it comes to encounters between the public and the police. The Court invites this Circuit to consider the approach applied by its sister courts, affording § 1983 claimants the opportunity to have each party's conduct reviewed objectively and, if appropriate, hold officers accountable when their conduct has directly resulted in the need for deadly force and infringed upon the rights secured by the Fourth Amendment.

But ultimately duty bound to faithfully apply current Fifth Circuit precedent in cases involving the use of deadly force, the Court determines that at the exact moment Felix was hanging onto Barnes's vehicle, and Barnes was attempting to flee, Barnes posed a serious threat of harm to Felix. Accordingly, the Motion is GRANTED. This case is hereby DISMISSED.

It is so ORDERED.



MAR 3 1 2021

Date

The Honorable Alfred H. Bennett
United States District Judge

APPENDIX D

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 23, 2024
Lyle W. Cayce
Clerk

No. 22-20519

Janice Hughes Barnes, *Individually and as Representative of* the Estate of Ashtian Barnes, *Deceased*; Tommy Duane Barnes,

Plaintiffs—Appellants,

versus

Roberto Felix, Jr.; County of Harris, Texas,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-725

Before Higginbotham, Smith, and Elrod, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring.