No. 24-____

IN THE

Supreme Court of the United States

MATTHEW HUNADY,

Petitioner,

v.

DONNA CHISESI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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October 9, 2024

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QUESTIONS PRESENTED

Whether the Eleventh Circuit's decision that relied on the district court's use of a reasonable jury standard in a case arising from a law enforcement officer's use of deadly force rather than the reasonable officer standard used under a qualified immunity analysis to deny interlocutory review is contrary to this Court's jurisprudence regarding issues of qualified immunity.

PARTIES TO THE PROCEEDING

The Petitioner is Baldwin County Deputy Sheriff Matthew Hunady, in his individual capacity. Hunady was an Appellant below. The Respondent is Donna Chisesi. Respondent was also the Appellee and Plaintiff below.

Baldwin County Sheriff Huey "Hoss" Mack, in his individual capacity, was a defendant and appellant in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual who is not subject to R. 29.6.

RELATED PROCEEDINGS

The proceedings in federal district and appellate court identified below are directly related to the above-captioned case in this Court:

Donna Chisesi, as Independent Administratrix of the Estate of Jonathan Victor v. Mathew Hunady, et al. Filed in the United States District Court for the Southern District of Alabama, Case No. 1:19-cv-00221-C. Order denying qualified immunity entered on April 19, 2021.

On interlocutory appeal in the Eleventh Circuit Court of Appeals: *Donna Chisesi, as Independent Administratrix of the Estate of Jonathan Victor v. Mathew Hunady, et al*., No. 21-11700. Judgment entered April 16, 2024. Petition for Rehearing En Banc was denied July 11, 2024.

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The Eleventh Circuit's opinion is not reported but is available at 2024 WL 1638587 and is reprinted in the Appendix at 33a-48a.

The district court's opinion is also not reported but is available at 2021 WL 2099580 and is reprinted in the Appendix at 1a-30a.

STATEMENT OF JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on April 16, 2024. The Petition for Rehearing En Banc was denied on July 11, 2024. This Petition is timely filed on October 9, 2024. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fourth Amendment to the Constitution provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. Other provisions of law involved in the case include 42 U.S.C. § 1983 and 28 U.S.C. § 1291.

INTRODUCTION

In *Scott v. Harris*, this Court held that where a nonmovant's testimonial evidence is contradicted by video evidence, reviewing courts should view "the facts in the light depicted by the videotape." 550 U.S. 372, 380-81 (2007). In the seventeen years following this Court's opinion in *Scott*, use of video by law enforcement has prolificated, video tapes are no longer in use, and

courts have undertaken review of such evidence without further guidance from this Court.

This case arises an officer-involved shooting wherein the district court denied qualified immunity based upon its review of video evidence using a "reasonable jury" standard rather than the "reasonable officer" standard used under a qualified immunity analysis. The Eleventh Circuit, relying on the district court's interpretation of video evidence and use of the reasonable jury standard, then dismissed interlocutory review for lack of jurisdiction. Should this precedent remain, it will thwart law enforcement officials' entitlement to qualified immunity before trial contrary to the Court's jurisprudence.

This case, with its set of facts and interpretation of video evidence by the district court, provides an excellent vehicle for this Court not only to clarify the proper standard for review of video evidence under a qualified immunity analysis, but also provide the courts with additional guidance for undertaking review of video evidence since it rendered the *Scott* opinion.

STATEMENT OF THE CASE

A. Statement of the Facts.[1]

This case arises from the officer-related shooting involving Baldwin County Deputy Matthew Hunady that resulted in the death of Jonathan Victor. On May 12, 2017, first responders arrived at the scene of a single-vehicle accident on Alabama Interstate 10 involving the decedent, Jonathon Victor. (App. 34a) Firefighter Michael Tobias approached the vehicle and noticed that Victor's hands were wrapped in cloth and

[1] To supplement this statement of facts, videos referenced herein can be provided.

bleeding, and that he was acting strangely and aggressively. (App. 34a-35a) Tobias backed away and called the Baldwin County Sheriff's Office for help. (App. 35a)

Meanwhile, a paramedic also approached Victor's vehicle. (App. 35a) Victor shouted at the paramedic to leave. Significantly, the paramedic believed that he saw a weapon in Victor's lap. (App. 35a) Consequently, the paramedic and all others on scene retreated, took cover behind a parked vehicle, and waited for law enforcement to arrive. (App. 35a) The Baldwin County Sheriff's Office dispatch relayed to following information to responding deputies regarding Victor:

> (1) he was approximately 30 years old and had barricaded himself in his vehicle; (2) first responders had seen a weapon on his lap1 and were backing away from him; (3) he was covered in blood and had his arm wrapped; (4) he had jumped in the back of the vehicle and grabbed something, but they could not tell what it was; (5) he was not compliant with instructions; and (6) he was talking to himself.

(App. 35a)

Upon Deputy Matthew Hunady's arrival, first responders confirmed as least some of the information he received from dispatch and "specifically . . . that Victor was wide-eyed, acting irrationally, talking to himself, and possibly armed. (App. 36a) Deputy Hunady positioned himself with a rifle behind cover of a firetruck, which was about fifteen to twenty yards away from Victor's vehicle. (App. 36a) For roughly ten minutes, Hunady shouted that he was with the Sheriff's Office instructed Victor to exit the vehicle

with his hands raised, and assured Victor they were there to help him. (App. 36a) Despite these instructions, Victor remained in his vehicle moving around and Hunady unable to determine was Victor was doing. (App. 36a)

As identified by the Eleventh Circuit, the "dispute central to the case" arises when Victor stepped out of his vehicle. (App. 36a) When Victor emerged from the vehicle on the side closest to the officers, "he was holding his arm at an unusual angle with something wrapped around his hand." (App. 36a)

(Doc. 29-14)

(Doc. 29-14)

According to Deputy Hunady's real-time observation, "Victor took an aggressive, shooter's-type stance, with his arms punched out in front of his chest as if he were aiming a concealed object at the officers. . . . and based on Victor's actions at that time, "he believed that Victor was armed with a weapon." (App. 36a) Although not addressed in the Eleventh Circuit opinion, there were other objective facts present to support the conclusion that a reasonable officer could have believed Victor posed an immediate danger, such as, it is undisputed that Hunady had been warned that Victor was possibly armed, and Victor had some type of concealed object in his hands as he approached. Additionally, Victor continued to approach Hunady's and the first responders' position despite the fact Hunady gave multiple commands, and in the end pleaded with Victor, to stop his approach and drop what was in his hands. (App. 36a-37a)

The Respondent, on the other hand, based *solely* upon post-incident review of video footage, disputed Hundy's testimony by opining that "Victor never took

a shooter's-type stance or punched his arms out as if he were holding a gun. . . . [explaining] Victor was holding his arm because it was injured, and that Victor's arm was wrapped in cloth because it was bleeding." (App. 36a-37a As correctly noted in the Eleventh Circuit's opinion, "the district court, upon reviewing video footage of the incident, concluded that a reasonable jury could agree with either party's version of events." (App. 36a)

As Victor, after exiting his vehicle, continued his approach toward Deputy Hunady, other officers, and first responders' position, Hunady can be heard shouting commands to Victor:

> Drop what's in your hands. Drop what's in your hands. Drop it. Drop it. Drop it right now and put your hands up. We're just here to help you, man. We're just here to help you. Drop whatever you got in your hand, dude. Drop it. Drop it. Put your hands up, man. We're just here to help you. Put it down, dude. Put it down. Don't advance. Do not advance. Do not advance. Stand right there. Man, don't f****** do it. Put it down, put it down. Put it down right now. Put it down. Put it down. Put it down. Put it down.

(App. 37a) "Victor can at one point be heard responding, 'No, you drop it.'" (App. 37a) After the last "put it down," Hunady fired four shots at Victor resulting in his death. (App. 37a) Subsequently, it was revealed that Victor was not concealing a weapon under the raincoat concealing his hands as he approached but was merely holding a fanny pack under the coat. (App. 37a) After Victor walked out of view of the cameras shortly before Hunady fired his weapon, the Eleventh Circuit stated the following:

> We do not know from the videos or the rest of the record exactly how Victor reacted, physically, to Officer Hunady's commands. The videos do not answer that question because, as he began to advance toward the officers, the view of the cameras that recorded much of the incident became blocked by the firetruck behind which the officers were hiding. Testimony does not resolve the issue, either. Officer Hunady says that, in the moments leading up to the shooting, Victor never put down what was in his hands, never stopped advancing, and never put his hands up. An eyewitness testified, however, that Victor was "just standing there" when Officer Hunady opened fire.

(App. 37a-38a)

As discussed further below, the Eleventh Circuit neither affirmed nor reversed the district court's denial of qualified immunity to Deputy Hunady; instead, the court dismissed Hunady's appeal based on the conclusion that it lacked jurisdiction to hear his interlocutory appeal. (App. 40a-44a)

B. Course of Proceedings Below.

The Respondent, Donna Chisesi, the administratrix of Victor's estate, filed suit alleging claims against Deputy Matthew Hunady for excessive force under 42 U.S.C. § 1983 and under Alabama's wrongful death statute, Ala. Code § 6-5-410. (App. 34a) The United States District Court for the Southern District of Alabama denied Deputy Hunady's motion for summary judgment asserting entitlement to qualified immunity, and an interlocutory appeal to the Eleventh Circuit Court of Appeals followed. (App. 34a) Hunady filed a timely notice of interlocutory appeal asserting the basis of this appeal as the denial of qualified immunity

and that appellate jurisdiction was proper under 28 U.S.C. § 1291 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (stating "we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment"). (Doc. 41, pg. 1)

On August 16, 2023, the Eleventh Circuit issued an order directing the parties to file supplemental briefs addressing whether it had appellate jurisdiction in light of its opinion, issued a month earlier, in *English v. City of Gainesville*, 75 F.4th 1151 (11th Cir. July 27, 2023). (App. 31a) Based upon its opinion in *English*, the Eleventh Circuit dismissed Hunady's appeal for lack of appellate jurisdiction based on its holding in *English*. (App. 42a-43a) The Eleventh Circuit summarily denied Hunady's timely petition for rehearing en banc. (App. 49a)[2]

[2] The Respondent also alleged a § 1983 supervisory liability claim against Baldwin County Sheriff Huey Hoss Mack based upon a failure to train theory. (App.34a) The district court also denied qualified immunity to Sheriff Mack but was reversed by the Eleventh Circuit. (App. 27a-28a, 34a) The Respondent has filed a motion for an extension of time with this Court to file a petition for certiorari on the grant of qualified immunity to Mack.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding is contrary to the purpose of qualified immunity and will adversely affect law enforcement officers who may be entitled to qualified immunity prior to trial by limiting the availability of interlocutory appeals.

A. The Eleventh Circuit applied the incorrect legal standard in the context of qualified immunity by determining what a reasonable jury could conclude about an officer's use of force rather than determining what a reasonable officer under the circumstances could have concluded regarding the need to use force.

The Eleventh Circuit Court of Appeals' determination that it lacked jurisdiction to address Deputy Hunady's interlocutory appeal, was based upon the district court's erroneous conclusion that "whether Victor displayed aggressive, shooter's-type behavior" is material to the issue of whether Hunady's action violated clearly established law. (App. 41a) The Eleventh Circuit held it lacked interlocutory jurisdiction because the appeal involved whether a factual dispute is genuine, "i.e. whether a reasonable jury could decide the factual question in favor of the non-moving party." (App. 41a) Notably, the Eleventh Circuit recognized it *does* have interlocutory appellate jurisdiction over appeals that contest whether a factual dispute is material "i.e. whether the resolution of that dispute will affect the ultimate legal conclusion." (App. 40a) The Eleventh Circuit improperly dismissed Hunady's appeal because his appeal actually involved a mixed

question of law and fact that is ripe for interlocutory appeal.

The Eleventh Circuit opinion identified the outcome determinative issue of qualified immunity as whether Victor's actions were or were not "aggressive." (App. 41a-42a) As stated by the Eleventh Circuit,

> There is a factual dispute as to whether Victor displayed aggressive, shooter's-type behavior after exiting the vehicle and advancing toward the officers. Chisesi says, and the district court agreed, that a reasonable jury could agree with her that Victor did not behave in a threatening or aggressive manner. The district court thus concluded that the factual dispute was genuine. The district court then concluded that the dispute was material because a jury agreeing with Chisesi's version of events could find that Officer Hunady's shooting of Victor was unjustified and in violation of clearly established law.

(App. 41a) Whether a reasonable jury could conclude that Victor was "threatening," however, is immaterial to whether he is entitled to qualified immunity, or more specifically, whether his actions violated clearly established law. Whether Victor was, or was not, "threatening" may be a "genuine" factual dispute between Hunady and the Respondent's contrasting viewpoints. Whether a jury could conclude Victor was "threatening," however, should not have been an outcome determinative issue for qualified immunity. With the aid of hindsight, it becomes clear that Victor was not threatening anyone with the fanny pack concealed under his jacket.

Instead, the Eleventh Circuit, "should have asked whether a *reasonable officer* could conclude—considering all of the surrounding circumstances," that Victor posed an immediate threat of harm. *D.C. v. Wesby*, 583 U.S. 48, 61 (2018) (emphasis added) (applying the standard in the context of the determination of probable cause to arrest). Under a qualified immunity analysis, the appropriate outcome determinative issue is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Alternatively, as stated by the Eleventh Circuit, the test has been stated as whether it would be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Young v. Borders*, 850 F.3d 1274, 1282 (11th Cir. 2017) (emphasis in original). Under this standard, a mixed question of law and material fact was properly raised on interlocutory appeal. Specifically, whether under the facts most favorable to the nonmovant, could a reasonable officer have believed the use of deadly force was constitutionally reasonable. Unlike whether a jury could conclude Victor was "threatening," the resolution of the objective reasonable officer standard is "material" and would affect the ultimate issue of qualified immunity making this case ripe for interlocutory appeal.

The issues of (1) whether Victor's actions were "threatening" and (2) whether a reasonable officer, under the facts available to Hunady at the time of the incident, could have believed the decision to use deadly force was lawful are not mutually exclusive issues. Indeed, a jury could conclude that Victor's actions were not threatening, which given the hindsight knowledge that Victor was off his medications, suffering some type of mental or emotion disturbance, and merely

concealing a fanny pack instead of a pistol in his hand, could be a relatively easy conclusion for a jurist to retroactively decide. Nonetheless, under the reasonable officer standard, given the limited information available to Hunady and the limited time to reflect his use of force could still be determined constitutionally reasonable or not to have violated clearly established law. Accordingly, it is vital for the courts of appeal to address the appropriate outcome determinative question on the issue of qualified immunity at the interlocutory stage of litigation before the matter goes to trial.

B. The Eleventh Circuit misapplied the standard for applying video evidence under *Scott v. Harris*.

In *Scott v. Harris*, this Court addressed whether a district court improperly adopted a non-movant-plaintiff's testimonial evidence at summary judgment as true when the movant-defendant's video evidence contradicted the plaintiff's version of the facts. 550 U.S. 372, 378 (2007). This Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. Thus, this Court concluded the district court erred in relying on the plaintiff's visible fiction and "should have viewed the facts in the light depicted by the videotape." *Id.* at 380-81. Notably, in this case, the video evidence does not show the actual shooting because Victor walked out of view of the recording devices right before the shooting occurred. Because there was no video evidence, testimonial evidence should have been considered, which was never properly done by the district court or reviewed by the Eleventh Circuit.

In this case, the Eleventh Circuit held that it lacked appellate jurisdiction to hear Deputy Hunady's interlocutory appeal based on its opinion in *English v. City of Gainesville*, 75 F.4th 1151 (11th Cir. 2023). (App. 42a-43a) Thus, addressing the Eleventh Circuit's holding in this case necessitates a discussion of *English*. In *English*, two police officers involved in the fatal shooting of a man were denied qualified immunity based upon the district court's determination that a genuine issue of material fact existed between the officers' testimonial evidence and video evidence. 75 F.4th at 1153-54. On appeal, the sole issue addressed by the Eleventh Circuit was whether it had jurisdiction over a denial of qualified immunity that turned on an issue of evidentiary sufficiency. *Id.* at 1153.

The facts of *English* involved two police officers dispatched in response to a 911 call regarding a man who had discharged a round from a pistol in a high-traffic area and then began pointing it at himself and passing cars. 75 F.4th at 1153-54. Upon arrival, the officers observed the man standing in the median of a high-traffic area between a hospital and a parking deck. *Id.* at 1154. One officer observed the man holding a bag while the other observed him bent over at the waist with his right hand in a bag on the ground; neither officer saw a pistol anywhere on his person. *Id.*[3] The officers approached with their weapons drawn and shouted orders for the man to show and raise his hands. *Id*. The man's right hand was not visible to the officers, he failed to comply with their orders, and the

[3] The pistol was later recovered inside the bag on the ground. *English*, 75 F.4th at 1154.

officers warned the man he might be shot if he failed to comply. *Id.*

Both officers testified that just before discharging their weapons, they observed the man make a sudden movement. *English*, 75 F.4th at 1154. One officer described the man making "a hurried movement" with his right hand and shoulder towards the officers causing him to believe the man was drawing a pistol, and the other officer described the man making "a direct steady movement with his right hand towards the right side of his hip." *Id.* However, the incident was captured on multiple video devices, and the video evidence called into question the officers' testimony regarding the man making a quick movement as if to reach for a gun. *Id.* The district court opinion in *English*, provides more detail regarding factual dispute between the officers' testimonial evidence and video evidence as follows:

- [T]hough the officers say that they saw him make a quick motion as if to reach for a gun in his waistband, the videos leave that conclusion up for interpretation.
- There were multiple video angles of the encounter, and [the man's] supposed movement was almost imperceptible.
- [Video showed that as officers approached, the man] simply stood still, with his thumbs hooked in the pockets of his pants.
- [The videos showed the man] make the slightest, almost imperceptible movement just moments before he [was] shot.

English v. City of Gainesville, No. 2:20-CV-147-RWS, 2022 WL 2433384, at *5, 7 (N.D. Ga. Mar. 2, 2022).

Significantly, the video evidence directly contradicted the only evidence that could justify the officers' use of deadly force: the man's body movement just before they fired their weapons. A genuine issue of material fact existed between the officers' testimonial evidence and the video evidence.[4]

In this case, the Eleventh Circuit erroneously held "[t]here is no meaningful difference between the appeal in *English* and Officer Hunady's appeal. As in *English*, the only purported error Officer Hunady asks us to review—whether the district court correctly interpreted the video—is a factual one. Under *English*, and entirely consistent with *Scott*, we lack jurisdiction to make that call at this stage of the litigation." (App. 42a-43a) In this case, unlike *Scott* and *English*, there is no video evidence of the actual use of force to contradict testimonial evidence or use as a basis to deny interlocutory review. Instead, the issues raised on appeal by Deputy Hunady presented a mixed question of fact and law over which the Eleventh Circuit has jurisdiction for *de novo* review.

As recognized in the Eleventh Circuit opinion, the district court criticized Deputy Hunady's belief that Victor was holding a pistol based upon his observation that Victor stood in a Weaver-type shooting position and punched his arms out from his chest as though holding a weapon. (App. 6a-7a) The district court opinion states that the videos show Victor stepping out of the passenger side of the vehicle "with his elbows bent and his hands near his face and that a "reasonable finder of fact" could conclude from the

[4] In terms of the application of video evidence, the court in *English* simply applied this Court's holding from *Scott* regarding testimonial versus video evidence.

videos that Victor "did not" punch out his arms or stand in a Weaver-type stance, (App. 7a); however, the videos, and the screen captures from video contained in this Petition, show this conclusion lacks a basis in fact. Indeed, on video Victor is shown with his arms punched out from his chest as though holding a pistol. Significantly, this body positioning was in part what caused Hunady to believe that Victor was holding a concealed weapon in his hand. In the absence of interlocutory review, this obvious error by the district court cannot be challenged prior to trial.

Moreover, the videos in this case show that, unlike the subject in *English*, Victor did not stand motionless as officers approached. Instead, the videos show that Victor continued to approach Deputy Hunady's position despite multiple orders to stop his advance, drop the object in his hands, and show his hands. The district court stated that Victor's movement as he approached the position of Hunady could be viewed as "consistent with someone who has been injured in an automobile accident." (App. 14a) Significantly, the record is devoid of any evidence indicating that Victor was injured in an automobile accident that could lead a reasonable jury to such a conclusion. Thus, the district court's factually unsupported conclusion cannot be challenged prior to trial in the absence of interlocutory appeal.

Additionally, the district court concluded that "there was no particular reason to believe the cloth-wrapped object [in Victor's hands] was a firearm. (App. 14a) However, the evidentiary record shows that first responders reported that Victor was armed; audio from the bodycam footage demonstrates Deputy Hunady was aware of the report; Victor concealed a pistol-sized object in his hand; Victor held the object in a manner that a person could hold a pistol as though ready to

shoot, and Victor failed to stop his advance towards Hunady, drop the object in his hands, or show his hands as ordered by Hunady. These facts were not reasonably in dispute. Thus, the issues presented by Hunady, unlike the officers in *English*, are not merely a matter of a single factual determination. Instead, the issues presented are mixed question of law and fact requiring this Court to determine whether a reasonable officer, under such conditions, could have believed discharging his or her weapon at Victor "was lawful under clearly established law."

C. The Eleventh Circuit's failure to address the issue of qualified immunity on interlocutory appeal is contrary to the purpose of qualified immunity.

The Eleventh Circuit by applying a reasonable juror standard to support its conclusion that it lacked jurisdiction to hear Hunady's appeal rather than applying qualified immunity's reasonable officer standard will result in cases against law enforcement officers, who may have been entitled to qualified immunity, going to trial without interlocutory review. Such results will inevitably be contrary to a primary purpose of qualified immunity.

Qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). Qualified immunity "is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). This Court has "emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson*

v. Creighton, 483 U.S. 635, 646 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Mitchell*, 472 U.S. at 526). This Court has recognized that qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law" and that the immunity "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. "*Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery ..., as [i]nquiries of this kind can be peculiarly disruptive of effective government." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis in original). The Eleventh Circuit's failure to review Deputy Hunady's entitlement to qualified immunity is contrary to this Court's precedent.

CONCLUSION

The petition for certioraris is due to be granted.

Respectfully submitted,

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October 9, 2024

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action 19-0221-C

DONNA CHISESI, as Independent Administratrix of the Estate of Jonathan Victor, Deceased,

Plaintiff,

v.

MATTHEW HUNADY, *et al.*,

Defendants.

ORDER

This matter comes before the Court on defendants' Motion for Summary Judgment (doc. 30). The Motion has been briefed and is now ripe.

I. Background Facts.[1]

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[1] The Court is mindful of its obligation under Rule 56 to construe the record, including all evidence and factual inferences, in the light most favorable to the nonmoving party. *See Smith v. LePage*, 834 F.3d 1285, 1296 (11th Cir. 2016) ("It is not this Court's function to weigh the facts and decide the truth of the matter at summary judgment .... Instead, where there are varying accounts of what happened, the proper standard requires us to adopt the account most favorable to the non-movants.") (citations and internal quotation marks omitted). Accordingly, he record will be viewed in the light most favorable to plaintiff, with all justifiable inferences drawn in her favor. Also, federal courts cannot weigh credibility at the summary judgment stage. *See Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) ("Even if a

A. Nature of the Case.

This action arises from the fatal shooting of a motorist by a law enforcement officer following a single-vehicle accident in broad daylight on a busy interstate highway. The administratrix of the decedent's estate brings claims against the officer, solely in his individual capacity, and against the Sheriff of Baldwin County, also solely in his individual capacity, for wrongful death and personal injury. Those causes of action include claims under 42 U.S.C. § 1983 against the officer for wrongful death (Count I), against the officer for excessive force (Count II), against the Sheriff for *Monell* liability (Count III), and against the Sheriff for supervisory liability (Count IV). Defendants now move for summary judgment on all of these claims.

B. The Dispatch Call and the Scene.

On the afternoon of May 12, 2017, volunteer firefighters and paramedics were called to the scene of a single-car wreck on Interstate 10 in Baldwin County, Alabama, near mile marker 60. (Tobias Decl., ¶ 2, Doc. 29-4, PageID.313; Stockton Decl., ¶ 3, doc. 29-5, PageID.316.) Upon arrival, the firefighters were notified by bystanders that the driver of the wrecked vehicle (which was parked some distance off the roadway, in a grassy ditch in the median) was acting in a strange and erratic manner, and that he had

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district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices."). Therefore, the Court will "make no credibility determinations or choose between conflicting testimony, but instead accept[s] Plaintiff's version of the facts drawing all justifiable inferences in [her] favor." *Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir. 2008).

remained in the vehicle with the windows rolled up and the doors locked. (Tobias Decl., ¶ 3.) One of the firefighters, Michael Tobias, asked the driver (who was later identified as Jonathan Victor) to roll down his windows and allow Tobias to look at his hands, which were wrapped in a cloth and appeared to be bleeding. (*Id.*, ¶ 4.) When the driver refused and "continued to act strangely and aggressively," Tobias backed away and called the Baldwin County Sheriff's Office ("BCSO"). (*Id.*, ¶ 5.) Ambulance personnel approached the vehicle; however, Victor yelled at them to leave. (Crossland Decl., ¶ 4., Doc. 29- 6, PageID.319.) One of the ambulance personnel saw what he believed to be a weapon in Victor's lap. (*Id.*) At that point, EMS, firefighters and bystanders alike all retreated, took cover behind a parked vehicle, and waited for law enforcement to arrive. (*Id.*, ¶ 5.)

Upon being informed of these events via 911 operator, the BCSO dispatched officers to the scene. Through a series of calls, the 911 operator notified the BCSO dispatcher of the following facts and circumstances: (i) the suspect has "barricaded himself in the vehicle;" (ii) first responders "think he has a weapon on his lap," but they are "just kind of backing away from him;" (iii) the suspect was "[o]ne male approximately 30-years-old" who was "covered in blood and not for sure if he has a weapon on [*sic*] not, but he's got something in his lap;" (iv) the suspect had "jumped in the back of the vehicle and ... grabbed something" but "[t]hey can't tell what it is," such that the 911 operator did not "know what he's grabbing in the back;" (v) the suspect was "refusing to comply," was "covered in blood," and "got his arm wrapped;" and (vi) "now the subject is talking to himself, still locked in his vehicle, having conversations." (Doc. 29-10, PageID.362-65.) Most of this information was accurately relayed by the BCSO

dispatcher over the radio to responding deputies, with the exception that the dispatcher indicated, "911 advised that they did see a weapon on his lap" (*Id.*, PageID.365), which is not correct.

One of the responding officers was BCSO Deputy Matt Hunady, who heard the initial call over the radio as a "welfare concern" and self-dispatched to that location. (Doc. 29-2, PageID.240.)[2] In his deposition, Deputy Hunady testified that "the initial call came in that he was possibly armed and intoxicated and, you know, not cooperating with the requests of the paramedics and the firefighters." (Doc. 29-2, PageID.236.) Upon arriving at the scene, Deputy Hunady encountered the first responders, one of whom indicated that Victor "was wide-eyed, acting irrationally, talking to himself, and had basically cut off contact with them as they were trying to help. ... They said he was possibly armed." (*Id.*) From his position, Deputy Hunady was unable to see into Victor's vehicle because it had some kind of "dark mirrored window tint." (*Id.*, PageID.239.) He did not approach the vehicle "[d]ue to the information that we had that he was possibly armed." (*Id.*) The summary judgment record viewed most favorably to plaintiff supports a reasonable inference that Deputy Hunady did not attempt to debrief the first responders or bystanders in order to glean specific information as to exactly what they had or had not

[2] In summary judgment briefing, defendants emphasize that at some point the BCSO dispatcher changed the call status from a "welfare concern" to a "1033," meaning an emergency call in which the subject is armed and for which radio traffic should be cleared until the situation is resolved. (Doc. 32, PageID.424, ¶ 10.) But defendants have cited no record evidence that Deputy Hunady was actually aware at any time prior to the shooting that the call had been reclassified as a 1033 rather than a welfare concern.

seen with regard to the possibility that the subject in the vehicle might be armed. (Doc. 29, Exh. L.) During the standoff, however, Deputy Hunady made several statements reflecting his understanding that Victor "possibly" or "supposedly" had a weapon. (*Id.*)

Deputy Hunady took up position behind a fire truck parked roughly 15 to 20 yards away from Victor's vehicle. (Doc. 29-2, PageID.234-35.) For the next few minutes, Deputy Hunady attempted to communicate with Victor in the form of verbal directives and hand motions for him to exit the vehicle, all for the purpose of helping Victor. (*Id.*, PageID.235.)[3] Initially, the vehicle's passenger side window was slightly open, so Deputy Hunady called out to Victor that he was with the Sheriff's Office, that he needed Victor to come out of the vehicle with his hands up, and that the officers were there to help him. (Hunady Decl., ¶ 4, doc. 29-15, PageID.384.) After a few minutes, Victor closed the passenger side window completely. (*Id.*) Deputy Hunady could see Victor moving around inside the vehicle, but was unable to discern what he was doing or what was in his hands. (*Id.*)[4] For his part, Deputy Hunady kept his Ruger AR-15 BCSO-issued patrol rifle pointed at Victor's vehicle the entire time. (Doc. 29, Exh. M.) He also had on his person throughout this incident a nonlethal weapon in the form of a Taser, with cartridges that were effective to a maximum distance of 25 feet. (Doc. 29-2, PageID.242.)

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[3] When asked why he was wanting to help Victor, Deputy Hunady testified, "Due to the initial call, I came out as a welfare concern. The paramedics and fire were already on scene due to him being – driving off the road." (*Id.*)

[4] The video recording from Deputy Hunady's body cam reflects that he repeatedly shouted commands such as "Let me see your hands," "Come on out," "Step out of the vehicle," and the like throughout this time period. (Doc. 29, Exh. L.)

C. The Shooting.

The standoff lasted for approximately ten minutes, during which time Deputy Hunady periodically called for Victor to step out of the car, even as he maintained his position under cover behind a fire truck with his Ruger AR-15 pointed at the vehicle. (Doc. 29, Exh. M.)[5] Victor did not acknowledge or respond to these directives. Then, without warning, Victor abruptly opened the front passenger door of the vehicle (the door closest to the officers), and stepped out onto the wet grass. (*Id.*) What happened next is a source of profound disagreement in the record. For his part, Deputy Hunady asserts that Victor "immediately took an aggressive 'v-type' stance and punched his arms out in front of his chest as if he had a weapon; he stood in a weaver type shooting stance. ... Due to the subject's stance and the way he punched out his arms, I believed the subject was armed with a weapon." (Hunady Decl., ¶ 5, doc. 29-15, PageID.384.)

Video recordings of the event can be reasonably construed as portraying Victor's actions after exiting the vehicle quite differently than the aggressive shooting stance that Deputy Hunady ascribes to him.[6] Deputy

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[5] The BCSO has a negotiations team that is trained to deal with barricaded subjects. (Doc. 29-2, PageID.242.) At no time was that negotiations team called to the scene or otherwise contacted to ascertain its availability to assist in defusing the situation (*Id.*)

[6] There are three sets of video footage of the incident, including Deputy Hunady's body camera (doc. 29, Exh. L), Deputy Hunady's dash camera (doc. 29, Exh. M) and non-party witness Jorge Gutierrez's cell phone video (doc. 29, Exh. N). Collectively and individually, the video evidence is not as clear or unambiguous as one might wish because of the distance and angles of the cameras; therefore, this case is not controlled by the Supreme Court's guidance that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury

Hunady's dash camera video shows Victor stepping unsteadily out of the passenger side of the vehicle with his elbows bent and his hands near his face. (Doc. 29, Exh. M, at 25:24.) A reasonable finder of fact viewing that footage could conclude that Victor did not punch out his arms and did not assume an aggressive shooter stance. To be sure, Victor's hand or hands appeared to be wrapped in cloth, but that fact was consistent with what Deputy Hunady and other officers and first responders already knew, inasmuch as Victor had reportedly been covered in blood and had his arm wrapped. Approximately 30 to 40 seconds after exiting the vehicle, Victor began advancing slowly toward Deputy Hunady's position, appearing to have difficulty maintaining his footing in the wet uneven grassy median, and with his elbows still bent and his hands near his face. (*Id.* at 26:06.) In halting steps, Victor moved toward Deputy Hunady's position for approximately 15 seconds, at which time he disappeared from view on the dash camera video because of the position of the fire truck. A reasonable finder of fact could conclude from this video that Victor did not take aggressive action toward Deputy Hunady or anyone else, and that he did not punch out his arms in a shooter stance.[7]

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could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Rather, the relevant inquiry for summary judgment purposes here is how a reasonable finder of fact could view these video recordings, along with the other record evidence, in the light most favorable to plaintiff.

[7] The Gutierrez video could reasonably be viewed in much the same way; in fact, it appears to show Victor lowering his hands as he moved in the direction of Deputy Hunady, in a manner that could reasonably be construed as non-aggressive. (Doc. 29, Exh. N.) And at no time from Victor's exit from the vehicle until the

What is clear and unambiguous from the video evidence is Deputy Hunaday's communication with Victor. Beginning from the moment Victor stepped out of the vehicle until the time of the shooting roughly 60 seconds later, Deputy Hunady shouted the following commands, often in a rapid and repetitive manner:

> "Man, just step on out. Step on out. Drop what's in your hands. Drop what's in your hands. Drop it. Drop it. Drop it right now and put your hands up. We're just here to help you, man. We're just here to help you. Drop whatever you got in your hand, dude. Drop it. Drop it. Put your hands up, man. We're just here to help you. Put it down, dude. Put it down. Don't advance. Do not advance. Do not advance. Stand right there. Man, don't fucking do it. Put it down, put it down. Put it down right now. Put it down. Put it down. Put it down. Put it down."

(Doc. 29, Exh. L, at 11:06 – 12:06.) After the last "put it down," Deputy Hunady fired four shots at Victor from his Ruger AR-15 in quick succession.

Throughout this confrontation, Victor's only words to Deputy Hunady were to mutter, "No, you drop it," at

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shooting itself was Victor visible on Deputy Hunady's body camera video. (Doc. 29, Exh. L.) Simply put, the totality of the video evidence could reasonably be viewed in a manner that conflicts with, and undermines, defendants' position that Victor took an aggressive, shooter-type stance. On this record, a reasonable finder of fact could reject defendants' insistence that "Victor flung the passenger side door open, stepped out, and immediately took an aggressive 'v-type' stance and punched his arms out in front of his chest as if he had a pistol." (Doc. 32, PageID.428.) A reasonable viewer of the video evidence could conclude that this version of events described by defendants simply did not happen.

one point. (Hunady Decl., ¶ 6, doc. 29-15, PageID.385.) According to Deputy Hunady, as Victor advanced, he "believed that my life and the lives of the other Deputies, Medical and Fire personal [*sic*] and innocent drivers were in danger because I believed that he was armed." (*Id.*) At no time did Deputy Hunady actually see a gun, barrel, muzzle, or handle in Victor's possession, and at no time did Victor discharge or display a weapon. (Doc. 29-2, PageID.232.) Victor was approximately 20 feet away when Deputy Hunady opened fire. (*Id.*, PageID.235.)[8] At least one witness on the scene testified that at the time of the shooting, Victor "wasn't coming no further. ... He was just standing there." (Doc. 29-8, PageID.343.) All four shots struck Victor, one in the hand or arm, two in the abdomen, and one in the femoral, pelvic region. (Doc. 29-2, PageID.248.) First responders, including Deputy Hunady himself, immediately rendered first aid, providing medical care to Victor on the scene to attempt to stop the bleeding and save his life; however, Victor died as a result of those gunshot wounds. (*Id.*, PageID.232.) After the fact, Deputy Hunady discovered that Victor did not actually have a weapon in his hands, but instead carried only a "rain-type jacket wrapped around ... the fanny pack, and his hand." (*Id.*, PageID.238.) And

[8] The record reflects that Deputy Hunady had a Taser on his person throughout this event, and that the cartridges used by his Taser had an effective range of 25 feet. (Doc. 29-2, PageID.242.) As such, Victor was close enough to Deputy Hunady to be within range of the Taser when the shooting occurred. When asked why he elected not to deploy his Taser at the time, Deputy Hunady responded, "I could have, but I don't believe it ... would have solved this situation at the time, because I believed he was armed with a weapon." (Doc. 29-2, PageID.244.) On that basis, Deputy Hunady testified that he did not consider utilizing a Taser at any time during this incident. (*Id.*)

Deputy Hunady had no knowledge and no reason to believe that Victor had committed a crime at any time up until the moment of the shooting. (*Id.*, PageID.233.)

D. Deputy Hunady's Training.

The summary judgment record reflects that Deputy Hunady was a seasoned law enforcement officer, having joined the BCSO in April 2004 and having served as a deputy sheriff since March 2005. (Doc. 35-6, PageID.697.) Thus, he had approximately 12 years of experience prior to the incident. Hunady had also been certified as a SWAT officer. (*Id.*) Deputy Hunady's personnel file reflects that he had no prior complaints of excessive use of force and had never been disciplined for same. (*Id.*) Defendants' expert opines that Deputy Hunady had been properly trained in use of force concepts prior to this incident. (*Id.*) Plaintiff's expert disagrees. (Doc. 35-9, PageID.722-23.)

As a longtime deputy in the Baldwin County Sheriff's Office, Deputy Hunady underwent a 13-week basic academy hosted by the State of Alabama, followed by a 12-week field training officer program conducted by the BCSO. (Doc. 29-1, PageID.189.) As part of that field training officer program, Deputy Hunaday successfully completed training in the BCSO's standard operating procedures for use of deadly force. (*Id.*) Those procedures entail training that officers are to use the least amount of force necessary to render the situation safe, with the use of force continuum ranging from verbal commands all the way to the use of deadly force. (*Id.*, PageID.190.) The BCSO also conducts at least four training sessions per year, including both classroom opportunities and practical situations. (*Id.*, PageID.189.) During all times relevant to these proceedings, BCSO did not have officer training programs for crisis intervention, de-escalation, or for dealing with persons who

are suicidal or otherwise under acute mental distress. (*Id.*, PageID.188-90.)

II. Summary Judgment Standard.

Summary judgment should be granted 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." Rule 56(a), Fed.R.Civ.P. The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991) Once the moving party has satisfied its responsibility, the burden shifts to the non-movant to show the existence of a genuine issue of material fact. "If the nonmoving party fails to make 'a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) (footnote omitted). "In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 999 (11th Cir. 1992) (internal citations and quotations omitted). "Summary judgment is justified only for those cases devoid of any need for factual determinations." *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1016 (11th Cir. 1987 (citation omitted).

III. Analysis.

A. Qualified Immunity and Deputy Hunady.

Not surprisingly, defendants' Motion for Summary Judgment revolves principally around the issue of qualified immunity. "Qualified immunity offers complete protection for governmen officials sued in their individual capacities as long as their conduct violates no clearly establishe statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (quotation marks omitted). "To receive qualified immunity, the officer must first show that he acted within his discretionary authority." *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009). There appears to be no dispute – and no reasonable basis to dispute – that Deputy Hunady was acting within his discretionary authority at all relevant times; accordingly, the burden shifts to plaintiff to "show that qualified immunity should not apply." *Id.* To do so, she must show both (1) that Deputy Hunady violated a constitutional right of Victor's; and (2) that the relevant right was clearly established at the time of the alleged violation. *See, e.g., Jacoby v. Baldwin County*, 835 F.3d 1338, 1344 (11th Cir. 2016). On summary judgment, courts "normally take as true the testimony of the non-moving party and adopt [her] version of the facts in a qualified-immunity case." *Hinson v. Bias*, 927 F.3d 1103, 1118 (11th Cir. 2019).

The appropriate starting point for the qualified immunity analysis in this case is to examine whether there was a constitutional violation. Of course, the Fourth Amendment right to be free from unreasonable searches and seizures "encompasses the right to be free from excessive force during the course of a" seizure. *Oliver v. Fiorino*, 586 F.3d 898, 905 (11th Cir. 2009).

The inquiry is governed by the Fourth Amendment's "objective reasonableness" standard, which requires courts to consider "whether the officer's conduct is objectively reasonable in light of the facts confronting the officer." *Hinson*, 927 F.3d at 1117 (citations omitted). This analysis is performed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citations omitted). Courts must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Id.* (citations 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." *Thorkelson v. Marceno*, --- Fed.Appx. ----, 2021 WL 1100537, *3 (11th Cir. Mar. 23, 2021) (citation omitted). "The amount of force used to affect the seizure must be reasonably proportionate to the need for that force." *Shaw v. City of Selma*, 884 F.3d 1093, 1099 (11th Cir. 2018). "[A]nalysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether [Victor] posed an immediate threa to the officers or others; and (3) whether he actively resisted arrest." *Penley v. Eslinger*, 605 F.3d 843, 850-51 (11th Cir. 2010) (citation omitted). Of course, Victor neither had committed nor was suspected of having committed a crime, and did not resist arrest or flee; therefore, the first and third factors weigh unambiguously in plaintiff's favor. The critical factor here, as it is in so many excessive force cases, is the presence of absence of an imminent threat. *See, e.g., Shaw*, 884 F.3d at 1099 ("The decisive [factor] here is the threat of physical harm that Shaw posed at the time he was shot."); *Penley*, 605 F.3d at

851 ("In this case, the reasonableness analysis turns on the second of these factors: presence of an imminent threat.").

"The reasonableness of the shooting depends on the totality of the circumstances." *Shaw*, 884 F.3d at 1099; *see also Singletary v. Vargas*, 804 F.3d 1174, 1180 (11th Cir. 2015) ("[B]efore deciding whether a police officer has actually used excessive force, we must slosh our way through the factbound morass of reasonableness because, in the end, all that matters is whether [the officer's] actions were reasonable.") (citation and internal quotation marks omitted). Viewing the summary judgment record in the light most favorable to plaintiff, the relevant facts and circumstances known to Deputy Hunady on the scene were as follows: Victor had apparently been injured in a one-vehicle accident. No witness had reported to Deputy Hunady, either directly or indirectly, that Victor was armed, only that he was "possibly" armed.[9] Deputy Hunady never attempted to

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[9] Defendants argue in their reply that this characterization "ignores statements made to Plaintiff's own investigator by a civilian witness." (Doc. 39, PageID.775.) It is true that witness Donald Alumbaugh told plaintiff's investigator that when Alumbaugh and a firefighter had approached Victor's car before Deputy Hunady arrived on the scene, "the boy had a shirt wrapped around ... it looked like ... we thought it was a gun. He stuck it up at us like a weapon." (Doc. 29-8, PageID.329.) The trouble with defendants' reliance on Alumbaugh's statement for summary judgment purposes is that it was made on December 11, 2020, some three and a half years after the shooting. What matters is not what a witness saw or did not see, much less that witness's recounting of his recollection years after the fact. Instead, what matters for purposes of the Fourth Amendment excessive force inquiry is what Deputy Hunady knew at the time of the shooting. After all, "[w]e must see the situation through the eyes of the officer on the scene ...." *Crosby v. Monroe County*, 394 F.3d 1328, 1334 (11th Cir. 2004). Simply put, there is no evidence that Deputy Hunady was aware

follow up with any of the bystanders, first responders or Victor himself to ascertain whether Victor had a weapon. Victor remained barricaded in his vehicle for approximately ten minutes after Deputy Hunady arrived, even as Deputy Hunady repeatedly commanded him to exit the vehicle. When Victor finally stepped out of the car, a reasonable fact finder could conclude that he was neither aggressive nor threatening to Deputy Hunady or anyone else. Video footage shows Victor taking slow, hesitant, halting steps in the muddy grass of the median, all of which is consistent with someone who has been injured in an automobile accident. Victor made no threatening statements. To be sure, he appeared to hold an unidentified object wrapped in a cloth in his hand, which he did not relinquish despite Deputy Hunady's commands to "drop it." But there was no particular reason to believe the cloth-wrapped object was a firearm.[10] A reasonable finder of fact could conclude from the evidence that it did not look like a weapon and that Victor was not brandishing anything in an aggressive or threatening manner.

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of Alumbaugh's belief that he had seen a gun in Victor's hand. There is no record evidence that Alumbaugh ever relayed this information to Deputy Hunady, or that Deputy Hunady ever asked anyone on the scene whether they had seen a weapon on Victor's person or in his vehicle at any time. As such, Alumbaugh's statement to plaintiff's investigator is of no consequence for summary judgment purposes.

[10] In arguing otherwise, defendants rely "upon the report of Victor having a weapon." (Doc. 32, PageID.439.) In Deputy Hunady's own words, though, his understanding at the time was nothing more than "the subject possibly being armed." (Hunady Decl., ¶ 4, doc. 29-15, PageID.384.) Deputy Hunady was operating under nothing more than an unconfirmed, uncorroborated "possibility" that Victor possessed a weapon.

Moreover, Deputy Hunady's assertion that he shot Victor because he feared for his own life as well as the lives and safety of other officers, first responders and members of the public is one that a reasonable jury could reject. After all, Deputy Hunady and his colleagues were not standing out in the open, but instead had taken cover behind a fire truck. In the light most favorable to plaintiff, the record shows that Victor was not aggressive, was not advancing at the time of the shooting, was standing still approximately 20 feet from Deputy Hunady, and appeared disoriented or in shock from the accident. It is also significant that Victor was within range of Deputy Hunady's Taser, which he had on his person and available to deploy at any time had he elected to do so. Another relevant consideration is that during the entire time that they shouted commands at Victor from behind the safety of the fire truck, neither Deputy Hunady nor any other officer on the scene ever warned to Victor that he would be shot if he failed to comply with commands to "drop it," "stop advancing," and the like.

The Eleventh Circuit has explained that "[t]he use of deadly force is more likely reasonable if: the suspect poses an immediate threat of serious physical harm to officers or others; the suspect committed a crime involving the infliction or threatened infliction of serious harm ...; and the officers either issued a warning or could not feasibly have done so before using deadly force." *Salvato v. Miley*, 790 F.3d 1286, 1293 (11th Cir. 2015) (citations and internal quotation marks omitted). As discussed above, the summary judgment record may be reasonably viewed as showing that Victor did not pose an immediate threat of serious physical harm to anyone at the time of the shooting. Not only is the video evidence subject to multiple interpretations as to Victor's actions, but in his 15 minutes on the scene

Deputy Hunady had neglected to take any steps to ascertain whether anyone had actually seen Victor with a weapon and instead traded in speculation that he "possibly" or "supposedly" might be armed. Additionally, Victor had not committed – and was not suspected of having committed – any offense, much less a crime that involved infliction of serious physical harm to anyone. And Deputy Hunady failed to issue a warning to Victor, although it plainly would have been feasible for him to do so before resorting to the use of deadly force.[11]

In briefing the excessive force issue, both sides have relied on *Davidson v. City of Opelika*, 675 Fed.Appx. 955 (11th Cir. Jan. 17, 2017). Notwithstanding its unpublished status, *Davidson* is instructive for the analysis here. In *Davidson*, a police officer was dispatched to the scene when an erratic driver collided with an 18-wheeler on an interstate highway at night. As the driver exited the vehicle, he withdrew his wallet from his pocket. The officer, who had his gun drawn and his spotlight trained on the vehicle, yelled twice, "Let me

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[11] In that regard, the circumstances present here are markedly different from those in the Eleventh Circuit's very recent decision in *Thorkelson v. Marceno*, --- Fed.Appx. ----, 2021 WL 1100537 (11th Cir. Mar. 23, 2021). In *Thorkelson*, the suspect raised her gun (which was later determined to be a Pumpmaster BB gun, although the officers did not know it at the time) to her shoulder with her finger on the trigger, and aimed it at an officer, prompting another officer to shoot her in the chest. The Eleventh Circuit concluded that no warning was necessary in those circumstances because "Captain Casale shot Thorkelson only when she posed an imminent threat to a defenseless officer. Captain Casale was not required to warn Thorkelson before firing when that delay might have cost Deputy Linn his life." *Id.* at *3. By contrast, Deputy Hunady had ample time to warn Victor, and there was never a time when Victor posed an imminent threat to a defenseless officer or member of the public.

see your hands." The driver brought his hands together, and extended them outward toward the officer, with his wallet visible over the top of his hands. When he did so, the officer fired two shots, one of which struck the driver. The Eleventh Circuit concluded that the officer was entitled to qualified immunity, reasoning as follows:

> "The positions of the object and Davidson's hands – established by the video – are key. To be clear, Davidson exiting his vehicle, reaching behind himself, and holding an unidentified object would not have been sufficient to make Hancock's use of deadly force reasonable under the circumstances. But the unusual position of the dark object in Davidson's outstretched and clasped hands would have led a reasonable officer to believe that Davidson was pointing a gun at him."

Davidson, 675 Fed.Appx. at 959. Likewise, Victor exiting his vehicle and holding an unidentified object in his wrapped hands could not suffice, without more, to make Deputy Hunady's use of deadly force reasonable. Unlike in *Davidson*, however, there is evidence supporting a reasonable inference that Victor's hands were not outstretched and were not clasped. There was no "dark object" in this case because the incident occurred in broad daylight and only the cloth wrapped around Victor's hands was visible. Whereas the *Davidson* officer had just three seconds to evaluate and react to the situation, Deputy Hunady had ample time on the scene before the confrontation to marshal resources and devise contingencies to preserve life and maximize safety for everyone involved. Indeed, Deputy Hunady observed Victor walking slowly and unsteadily up the muddy embankment for more than a minute

before shooting him. Unlike the *Davidson* officer, Deputy Hunady had cover in the form of the fire truck behind which he was positioned. Plaintiff's evidence is that Victor was not advancing when he was shot, but that he was "just standing there." In short, the circumstances in *Davidson* that rendered the use of deadly force reasonable, as a matter of law, are wholly lacking here when the record viewed in the light most favorable to plaintiff. Victor's acts of exiting his vehicle (which he did in compliance with Deputy Hunady's commands) and holding something wrapped in cloth in his hands as he walked haltingly toward the shielded officers were simply not enough to make Deputy Hunady's use of deadly force reasonable as a matter of law under the circumstances. On this record, given the factual disputes and the multiple conflicting reasonable interpretations of the evidence, the question of the objective reasonableness *vel non* of Deputy Hunady's use of deadly force against Victor is one for the jury to resolve at trial, not for this Court to decide on summary judgment.

In so concluding, the undersigned has carefully heeded the appellate courts' stern admonition against armchair-quarterbacking the decisions of law enforcement officers in the field in tense, rapidly evolving circumstances. Indeed, the Court recognizes that "[i]n making an excessive force inquiry, we are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts." *Crosby v. Monroe County*, 394 F.3d 1328, 1333-34 (11th Cir. 2004). Likewise, the Supreme Court has instructed that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v.*

Huff, 565 U.S. 469, 477, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012). That does not mean, however, that law enforcement officers are necessarily, automatically insulated from liability for their decisions in the field. Where, as here the record supports a reasonable determination that the use of deadly force was not objectively reasonable, judges must say so. Importantly, this was not a split-second decision by Deputy Hunady. He had more than ten minutes on the scene to formulate plans and make arrangements to safeguard the lives of everyone involved. Although defendants protest that "Victor controlled the entire scene" (doc. 39, PageID.776), a jury could conclude that is simply not true. Indeed, it would be reasonable on this record to find that Deputy Hunady controlled the scene by continually commanding Victor to step out of the vehicle, rather than allowing him to remain there until more help (and appropriate specialized resources) could be called. Deputy Hunady had time to plan for what would happen if and when Victor did exit the vehicle and behaved erratically (which was entirely foreseeable given the reports of his erratic behavior inside the vehicle before Deputy Hunady arrived on the scene). He had time to make arrangements for the safety of law enforcement, first responders and members of the public. He had time to speak with witnesses to determine what, exactly, they had seen that might "possibly" have been a gun when they interacted with Victor. He had time to consider non-lethal force options, such as the Taser he was carrying on his person. He had time to consider calling in the BCSO's negotiation team. All of these elements were within Deputy Hunady's control, not Victor's. A reasonable jury could conclude, without running afoul of the judicial deference paid to police officers making split-second decisions in dangerous situations, that Deputy Hunady mismanaged those elements and violated

Victor's Fourth Amendment rights by unreasonably using deadly force to subdue him in a situation that posed no imminent threat.[12]

Having found that genuine issues of material fact remain as to whether Deputy Hunady violated a constitutional right of Victor's, the Court now turns to the "clearly established" prong of the qualified immunity analysis. "[A]lthough officials must have fair warning that their acts are unconstitutional, there need not be a case on all fours[] with materially identical facts, ... so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights." *Salvato*, 790 F.3d at 1294 (citation and internal quotation marks omitted). "Moreover, a plaintiff can point to a broader, clearly established principle [that] should control the novel facts in [her] situation." *Id.* (citation and internal quotation marks omitted). Without question, "the standard for excessive force is clearly

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[12] Last month, the Eleventh Circuit adopted a test for analyzing excessive force claims in the context of an officer responding to a medical emergency, rather than making an arrest. In such a case, the Eleventh Circuit determined, "courts should ask: (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others? (2) Was some degree of force reasonably necessary to ameliorate the immediate threat? (3) Was the force used more than reasonably necessary under the circumstances (*i.e.*, was it excessive)?" *Helm v. Rainbow City, Alabama*, 989 F.3d 1265, 1273 (11th Cir. 2021) (citation omitted). "If the answers to the first two questions are 'yes,' and the answer to the third question is 'no,' then the officer is entitled to qualified immunity." *Id.* at 1274 (citation omitted). If the *Helm* test were applied here, a reasonable finder of fact could conclude that the answer to the third question is "yes" even if the answers to the first two questions were "yes" (which is debatable). For that reason as well qualified immunity is inappropriate here.

established." *Id.* Defendants articulate no persuasive argument, and the Court is aware of none, that might support a conclusion that it was not clearly established that using deadly force on Victor in the circumstances described above violated the Fourth Amendment. If the facts are taken in the light most favorable to plaintiff, then Deputy Hunady used deadly force on a subject who was not behaving aggressively, who did not pose an imminent threat to anyone, who appeared dazed and confused after being injured in a car accident, and who was following the officers' instructions by exiting his vehicle and walking slowly toward them, all because he was holding an unidentified object wrapped in cloth in his injured hands. There is no plausible argument that a reasonable officer would not have known the use of deadly force to be a constitutional violation in those circumstances. Therefore, the Court readily concludes that plaintiff has satisfied the "clearly established" prong of the qualified immunity test.[13]

For all of the reasons, Deputy Hunady is not entitled to qualified immunity from plaintiff's § 1983 claims arising from the fatal shooting of Victor. The Motion for Summary Judgment is **denied** as to this issue.

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[13] Defendants correctly state that "[i]n the context of deadly force, the appropriate standard is that law enforcement officials are entitled to qualified immunity unless every reasonable officer in their position inevitably would conclude that deadly force was unnecessary and thus unlawful under the circumstances." (Doc. 32, PageID.443 (citing *Santana v. Miami-Dade County*, 688 Fed.Appx. 763, 770 (11th Cir. May 17, 2017)).) If the summary judgment record is viewed in the light most favorable to plaintiff, every reasonable officer in Deputy Hunady's position would conclude that deadly force was unnecessary and thus unlawful under the circumstances; therefore, the "clearly established" prong is satisfied.

B. Qualified Immunity and Sheriff Mack.

Next, defendants move for summary judgment in favor of defendant Sheriff Mack on the basis of qualified immunity. Defendants' position is that "this case involves an isolated incident involving a single deputy sheriff. Thus, Plaintiff cannot demonstrate that Sheriff Mack acted unconstitutionally. Nor can Plaintiff demonstrate that he acted in violation of clearly established law under a qualified immunity analysis." (Doc. 32, PageID.447.)

It is well-settled, of course, that supervisory liability exists under § 1983 for subordinates' constitutional violations only when the supervisor either "personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation." *Matthews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007) (citation omitted). Plaintiff argues that sufficient evidence of a causal connection exists to create a jury question, predicated on the notion that Sheriff Mack's failure adequately to train BCSO deputies evinces deliberate indifference to constitutional rights Such a theory of supervisory liability is cognizable under applicable law. *See, e.g., Keith v. DeKalb County, Georgia*, 749 F.3d 1034, 1052 (11' Cir. 2014) ("[U]nder § 1983, a supervisor can be held liable for failing to train his or her employees only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officers] come into contact.") (citations and internal quotation marks omitted).

There is no dispute that Sheriff Mack was responsible for training BCSO deputies and setting BCSO policy at all relevant times; indeed, he testified that he is "the highest level" at BCSO and that he is "known as the governor." (Doc. 29-1, PageID.188.) In support of

the failure-to-train theory, plaintiff identifies the following purported defects in BCSO training protocols for deputies such as Deputy Hunady during the relevant time period: (i) no specific training on armed, barricaded subjects; (ii) no specific training for subjects who are suicidal or otherwise under severe mental distress; and (iii) no de-escalation training of any kind until 2019 two years after this incident. (*Id.*, PageID.189-90.)

Moreover, plaintiff's expert has opined that the actions of Deputy Hunady and the other BCSO deputies on the scene on the day of the Victor shooting reveal a host of glaring training deficiencies, to-wit: (i) "the only implementation of a strategy or tactic for dealing with someone presenting as Victor did, was Hunady yelling to Victor that he wanted to help him;" (ii) "it was clear and obvious that Victor was in some manner mentally compromised," yet the BCSO officers did not implement "police procedures that were clearly called for," and there is no evidence that Sheriff Mack had ever provided them such training; (iii) "I cannot see where, if proper police procedures, tactics, and policy were implemented that there would be the necessity for a 'split second' decision by Hunady;" (iv) a reasonable, trained police officer would handle a barricaded subject like Victor by using minimally intrusive techniques, establishing a perimeter, weighing the need to apprehend the subject against the challenges of compelling the subject to submit to police authority, standing down when appropriate, requesting appropriate and specialized resources such as SWAT teams with bullet resistant shields and less lethal munitions, providing psychological services, debriefing witnesses, and so on, none of which Deputy Hunady or any of the BCSO officers on the scene followed. (Doc. 35-9, PageID.721-724.) Likewise, plaintiff's expert opined that the BCSO

deputies failed to follow, and apparently had not been trained in, well-established procedures and protocols for handling suicidal or mentally unstable subjects, such as (i) not barking orders at a subject who does not appear armed; (ii) calling in crisis intervention teams or other specialized resources with mental illness training; (iii) not pointing a firearm at the subject; and (iv) slowing it down and taking time to resolve the issue without loss of life. (*Id.*, PageID.725-26.) Plaintiff's evidence is that in the absence of such training, "we have a case of a reckless disregard to a known risk of harm by the fact that [BCSO deputies] were not given instruction about how to handle this." (Doc. 35-5, PageID.647.)

Defendants' rejoinder to plaintiff's failure-to-train argument is neither to present evidence that such training was actually furnished nor to assert that such training was unnecessary or causally disconnected from the Victor shooting. They do not argue that Sheriff Mack adequately trained Deputy Hunady and other BCSO deputies in these areas. They do not argue that training on these topics was not important for the tasks that BCSO deputies must perform on a usual and recurring basis in the field. Instead, defendants place their entire focus on the legal argument that Sheriff Mack cannot be liable on a failure-to-train theory in the absence of a "pattern of similar unconstitutional conduct by Baldwin County deputy sheriffs." (Doc. 32, PageID.447.) Simply put, defendants say Sheriff Mack is entitled to qualified immunity because there is no evidence of any such pattern of misconduct, which is a necessary precondition for a finding of deliberate indifference.

The trouble with defendants' position is that, even under the authorities they cite, such a pattern of

violations is not always required. *See, e.g., Connick v. Thompson*, 563 U.S. 51, 62, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) ("A pattern of similar constitutional violations by untrained employees is ***'ordinarily necessary'*** to demonstrate deliberate indifference for purposes of failure to train.") (emphasis added and citation omitted). "Ordinarily necessary" does not equate to "always necessary." To that end, the Supreme Court has explained the relevant principles as follows:

> "[W]e did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.
>
> * * *
>
> "[I]n a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequence of the policymakers' choice – namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable."

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 409-10, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Plaintiffs' evidence is that circumstances like Victor's are both common and recurring in law enforcement officers' daily activities, and that there is an obvious potential for a subject's federal rights to be violated in that situation. Indeed, plaintiffs' expert opines that there were as many as 1,000 officer-involved shootings during the 2015-2018 period involving circumstances such as Victor's, where the subject appeared to be in a mental health crisis, was not behaving like a criminal offender, exhibited aggressive or strange behavior, and was unarmed. (Doc. 35-9, PageID.724-25.) Approximately 29% of officer-involved shootings involve these recognized circumstances. (*Id.*, PageID.724.) As such, plaintiff has made an adequate showing that this is the kind of recurring situation presenting an obvious, highly predictable potential for violation that can trigger liability for failure to train, even in the absence of a pattern of violations. In other words, under the Supreme Court's reasoning in *Brown*, a finding of deliberate indifference can attach to Sheriff Mack's failure to provide training to BCSO deputies in the specified areas (*i.e.*, barricaded subjects, subjects with mental health crises, de-escalation tactics and strategies, etc.) even in the presence of a single constitutional violation, given the recurring nature of the situation and the predictability that an officer lacking specific tools to handle that recurring situation will violate a subject's federal rights.

For all of the foregoing reasons, "[g]iven this state of the law, as well as the conflicting evidence in this case, whether [Sheriff Mack] was deliberately indifferent is a question that should have been left to a jury. ...

In viewing the evidence in the light most favorable to [Chisesi], the nonmovant, we conclude genuine disputes of material fact remain on this element *Favors v. City of Atlanta*, --- Fed.Appx. ----, 2021 WL 915355, *6 (11th Cir. Mar. 10, 2021); *see also Brown*, 520 U.S. at 409 ("The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected deliberate indifference'....").)[14]

C. Other Legal Issues Raised on Summary Judgment.

A pair of other legal issues raised in defendants' Motion for Summary Judgment must be addressed at this time. First, defendants contend that Count I, the § 1983 wrongful death claim against Deputy Hunady, must be dismissed because it abated under Alabama law upon Victor's death. In particular, defendants rely on *Estate of Gilliam ex rel. Waldroup v. City of Prattville*, 639 F.3d 1041 (11th Cir. 2011), for the proposition that, under Alabama Code § 6-5-462, a § 1983 excessive force claim not filed prior to the decedent's death abates under Alabama law. *See id.* at 1050. The trouble with this line of reasoning is that *Gilliam* is distinguishable on its face. In *Gilliam*, the Eleventh Circuit explained, "We stress at the outset that this case, in its present procedural posture, does not involve a claim that the officers' unconstitutional conduct caused the decedent's death. ... Therefore, the

[14] As for the "clearly established" prong of the qualified immunity analysis, defendants advance no argument and make no showing that these principles were not clearly established at the time of the allegedly violative failure to train by Sheriff Mack.

only issue we address is ***whether a § 1983 excessive force claim that did not result in the decedent's death*** survives in Alabama or abates under Ala. Code § 6-5-462." *Id.* at 1044-45 (emphasis added). In stark con-trast to *Gilliam*, this case involves a § 1983 claim that did result in the decedent's death. As such, the *Gilliam* analysis and reasoning are not instructive here. Movants offer neither argument nor authority in support of any possible expansion of *Gilliam* to reach Count I, which is a § 1983 wrongful death claim based on alleged excessive force by Deputy Hunady. The Court will not apply *Gilliam* to dismiss Count I.[15]

Second, defendants argue that Count III, a § 1983 *Monell* liability claim against Sheriff Mack, is inapplicable as a matter of law. As pleaded in the Complaint, Count III specifically is framed as a claim for "*Monell* liability" predicated on the notion that, "Where a municipality's failure to supervise causes a constitutional violation, and such a failure reflects deliberate indifference to constitutional rights, the municipality may be found liable under 42 U.S.C. § 1983." (Doc. 1, ¶ 66, PageID.8.) That is an accurate statement of a *Monell* theory of liability. *See, e.g., Pierce v. Clayton County, Georgia*, 717 Fed.Appx. 866, 874 (11th Cir. Nov. 21, 2017) ("*Monell* imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that

[15] In passing, defendants also suggest, with neither elaboration nor citations to authority, that Count I's reference to a "duty to use reasonable care" is fatal to the claim and that Count I must be dismissed as duplicative of the Count II excessive force claim. (Doc. 32, PageID.433.) The Court declines to develop these fragmentary arguments for movants on summary judgment; however, the issue of whether Count I is properly dismissed as duplicative of Count II will be addressed at a later date after plaintiff is given fair notice and an opportunity to be heard.

policy is officially promulgated or authorized by custom.") (citation omitted). But plaintiff has sued Sheriff Mack only in his individual capacity, not his official capacity. She has not sued Baldwin County or the Baldwin County Sheriff's Office, nor has she otherwise sought to impose liability on the County or any municipality for policies that Sheriff Mack may be alleged to have formulated on behalf of the County, the BCSO or any municipal entity. Plaintiff has offered no legal explanation how a *Monell* claim could be proper against Sheriff Mack in his individual capacity under the circumstances presented here. As such, the Court agrees with defendants that a *Monell* claim is not cognizable against this defendant as pleaded in the Complaint; therefore, the Motion for Summary Judgment is **granted** as to Count III. Nothing herein affects plaintiff's claim in Count IV against Sheriff Mack for supervisory liability in his individual capacity under § 1983.

IV. Conclusion.

For all of the foregoing reasons, defendants' Motion for Summary Judgment (doc. 30) is **granted** as to Count III (*Monell* claim against Sheriff Mack) and that claim is **dismissed**. In all other respects, the Motion for Summary Judgment is **denied**.

DONE and ORDERED this 19th day of April, 2021.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11700

DONNA CHISESI, As Independent Administratrix of the Estate of Jonathon Victor, Deceased,

Plaintiff-Appellee,

versus

MATTHEW HUNADY, Individually and in his official capacity, HUEY HOSS MACK,

Defendants-Appellants,

BALDWIN COUNTY SHERIFF'S OFFICE,

Defendant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:19-cv-00221-C

ORDER

The parties are directed to file supplemental briefs, not to exceed ten double-spaced pages, addressing whether this Court has appellate jurisdiction in light of English v. City of Gainesville, No. 22-10927, --- F.4th ---, 2023 WL 4782733 (11th Cir. July 27, 2023). Parties should file their briefs within thirty days of the entry of this order.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11700

DONNA CHISESI, As Independent Administratrix of the Estate of Jonathon Victor, Deceased,

Plaintiff-Appellee

versus

MATTHEW HUNADY, Individually and in his official capacity, HUEY HOSS MACK,

Defendants-Appellants

BALDWIN COUNTY SHERIFF'S OFFICE,

Defendant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:19-cv-00221-C

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,* District Judge.

PER CURIAM:

This case concerns the shooting death of Jonathan Victor. Officer Matthew Hunady, a deputy with the Baldwin County Sheriff's Office, responded to the scene

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* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

of a single-car accident where the driver—Victor—was behaving erratically. Following a ten-minute stand-off, Officer Hunady shot and killed Victor. Donna Chisesi, the administratrix of Victor's estate, filed suit under 42 U.S.C. § 1983, bringing claims for excessive force and wrongful death against Officer Hunady and for supervisory liability on a failure to train theory against Baldwin County Sheriff Huey Hoss Mack. The district court denied Officer Hunady and Sheriff Mack's motion for summary judgment on qualified immunity grounds, and this interlocutory appeal followed. After oral argument and careful consideration, we dismiss Officer Hunady's appeal for lack of jurisdiction and reverse the district court's denial of qualified immunity with respect to Sheriff Mack.

I. FACTUAL BACKGROUND

The outcome of cases involving qualified immunity "depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2007). Notably, "[t]he 'facts' at the summary judgment stage are not necessarily the true, historical facts" because "they may not be what a jury at trial would, or will, determine to be the facts." *Cantu v. City of Dothan*, 974 F.3d 1217, 1222 (11th Cir. 2020). "Instead, the facts at this stage are what a reasonable jury could find from the evidence viewed in the light most favorable to the non-moving party . . . ." *Id.* Accordingly, we view the record in the most pro-Chisesi light possible while staying within the realm of reason.

On May 12, 2017, Victor was involved in a single-vehicle accident on Interstate 10 in Alabama. Volunteer firefighters and paramedics arrived first to assist Victor. When firefighter Michael Tobias approached Victor, he refused to roll down his window. Through the window, Tobias noticed that Victor's hands were

wrapped in cloth and that they appeared to be bleeding. Tobias also noticed that Victor was acting strangely and aggressively. As a result, Tobias backed away from Victor's vehicle and called the Baldwin County Sheriff's Office for assistance.

Meanwhile, a paramedic also approached Victor's vehicle. Victor shouted at the paramedic to leave. Significantly, the paramedic believed that he saw a weapon in Victor's lap. Consequently, the paramedic and all others on scene retreated, took cover behind a parked vehicle, and waited for law enforcement to arrive.

Upon speaking with the 911 operator, the Baldwin County Sheriff's Office dispatched to responding officers the following information about Victor: (1) he was approximately 30 years old and had barricaded himself in his vehicle; (2) first responders had seen a weapon on his lap[1] and were backing away from him; (3) he was covered in blood and had his arm wrapped; (4) he had jumped in the back of the vehicle and grabbed something, but they could not tell what it was; (5) he was not compliant with instructions; and (6) he was talking to himself.

Officer Hunady self-dispatched to the scene of Victor's single-vehicle accident. Officer Hunady is a seasoned law enforcement officer with approximately twelve years of experience. His initial law enforcement training was twenty-five weeks long, and the Baldwin County Sheriff's Office conducts at least four training sessions per year for active officers. The Baldwin County

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[1] Although the dispatcher for the Baldwin County Sheriff's Office relayed to responding officers that the first responders saw a weapon on Victor's lap, the 911 operator had only told the dispatcher that they *thought* they saw a weapon on Victor's lap.

Sheriff's Office, however, does not offer specific training programs in these three areas: (1) crisis intervention, (2) de-escalation techniques, and (3) engaging with persons who are suicidal or otherwise under acute mental distress.

Upon Officer Hunady's arrival, first responders confirmed to Officer Hunady at least some of the information that he had initially received over dispatch. More specifically, one first responder told Officer Hunady that Victor was wide-eyed, acting irrationally, talking to himself, and possibly armed.

With rifle in hand and aimed at Victor's vehicle, Officer Hunady positioned himself behind a firetruck that was about fifteen to twenty yards away. For roughly ten minutes, Officer Hunady shouted to Victor that he was with the Sheriff's Office, that he needed Victor to come out of the vehicle with his hands up, and that the officers were there to help him. Rather than comply with these instructions, Victor moved around in his vehicle. During this time, Officer Hunady could not determine what Victor was doing.

After ten minutes, Victor stepped out of the passenger side of his vehicle — the side closest to the officers. The dispute central to this case arose here. When Victor emerged from the vehicle, he was holding his arm at an unusual angle with something wrapped around his hand. Officer Hunady says that Victor took an aggressive, shooter's-type stance, with his arms punched out in front of his chest as if he were aiming a concealed object at the officers. Because of Victor's posture, Officer Hunady says he believed that Victor was armed with a weapon. Chisesi contests Officer Hunady's recollection and says that Victor never took a shooter's-type stance or punched his arms out as if he were holding a gun. Instead, based on the video, Chisesi

says that Victor was holding his arm because it was injured, and that Victor's arm was wrapped in cloth because it was bleeding. The district court, upon reviewing video footage of the incident, concluded that a reasonable jury could agree with either party's version of events.

Approximately thirty to forty seconds after exiting his vehicle, Victor began slowly to walk up an embankment toward Officer Hunady and other officers, who were behind a firetruck on the interstate. Officer Hunady can be heard on video shouting these commands while Victor was moving toward the officers:

> Drop what's in your hands. Drop what's in your hands. Drop it. Drop it. Drop it right now and put your hands up. We're just here to help you, man. We're just here to help you. Drop whatever you got in your hand, dude. Drop it. Drop it. Put your hands up, man. We're just here to help you. Put it down, dude. Put it down. Don't advance. Do not advance. Do not advance. Stand right there. Man, don't f****** do it. Put it down, put it down. Put it down right now. Put it down. Put it down. Put it down. Put it down.

Victor can at one point be heard responding, "No, you drop it." After the last "put it down," Officer Hunady fired four shots at Victor, killing him. Later investigation revealed that Victor was not armed—he was holding a fanny pack that he wrapped with a rain jacket.

We do not know from the videos or the rest of the record exactly how Victor reacted, physically, to Officer Hunady's commands. The videos do not answer that question because, as he began to advance toward the officers, the view of the cameras that recorded much of

the incident became blocked by the firetruck behind which the officers were hiding. Testimony does not resolve the issue, either. Officer Hunady says that, in the moments leading up to the shooting, Victor never put down what was in his hands, never stopped advancing, and never put his hands up. An eyewitness testified, however, that Victor was "just standing there" when Officer Hunady opened fire.

II. PROCEDURAL HISTORY

As the administratrix of Victor's estate, Chisesi filed a 42 U.S.C. § 1983 lawsuit against Officer Hunady and Sheriff Mack. Chisesi alleged excessive force and wrongful death in violation of the Fourth Amendment against Officer Hunady. As to Sheriff Mack, Chisesi alleged failure to properly train and supervise deputy sheriffs in responding to injured individuals who display signs of an altered state of mind.[2]

Officer Hunady and Sheriff Mack moved for summary judgment on qualified immunity grounds. The district court denied their motions.

In analyzing whether Officer Hunady was entitled to qualified immunity, the district court discussed whether he violated Victor's constitutional right to be free from excessive force and whether that right was clearly established at the time of the shooting. As to the first element, the district court concluded that a jury could find that Officer Hunady's use of deadly force was unconstitutional based, in large part, on its interpretation of the video evidence of the shooting. Specifically, the district court concluded that a

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[2] Chisesi also brought a claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), against Sheriff Mack. That claim is not before us in the instant appeal.

reasonable jury could view the video recordings of the shooting and find that Victor was neither aggressive nor threatening to Officer Hunady or to others on scene. At bottom, the district court held that a reasonable jury could find that Officer Hunady violated the Fourth Amendment by unreasonably using deadly force in a situation that posed no immediate threat. As to the second element—whether the constitutional violation was clearly established—the district court concluded that Chisesi met her burden because, if Victor was not threatening, "the standard for excessive force is clearly established" and Officer Hunady's conduct was obviously unconstitutional.

Likewise, the district court determined that Sheriff Mack was not entitled to immunity on the failure to train claim. In reaching this conclusion, the district court concluded that Sheriff Mack failed to train his deputies in dealing with barricaded subjects, subjects in mental health crises, and the use of de-escalation tactics and strategies. Even though Chisesi did not show a pattern of similar constitutional violations that would put Sheriff Mack on notice that his training programs were deficient, the district court still determined that qualified immunity was unavailable to Sheriff Mack because the shooting that occurred here "is the kind of recurring situation presenting an obvious, highly predictable potential for violation that can trigger liability for failure to train, even in the absence of a pattern of violations." The district court did not analyze the clearly established prong as it applied to the claim asserted against Sheriff Mack.

Officer Hunady and Sheriff Mack appealed the district court's denial of their motions for summary judgment.

III. THE APPELLATE JURISDICTION ISSUE

Before proceeding further with this appeal, we must first determine whether we have appellate jurisdiction. *See Patel v. City of Madison*, 959 F.3d 1330, 1337 (11th Cir. 2020) (the Court must *sua sponte* examine whether appellate jurisdiction exists). As a general rule, only orders that dispose of all claims against all parties are appealable. *Id.* Exceptions exist, however. Indeed, we often have appellate jurisdiction to review the denial of summary judgment on qualified immunity grounds, depending on which issues are part of the appeal. *Cottrell v. Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996). More specifically,

> when legal questions of qualified immunity are raised—either to determine whether any constitutional right was violated or whether the violation of that right was clearly established—interlocutory appellate jurisdiction exists. But if the only question before the appellate court is a factual one, review must wait for a later time.

Hall v. Flournoy, 975 F.3d 1269, 1276 (11th Cir. 2020).

In summary judgment parlance, *Hall* means that we have appellate jurisdiction over appeals that contest whether a factual dispute is "material"—i.e., whether the resolution of that dispute will affect the ultimate legal conclusion of whether a defendant is liable. *See* Fed. R. Civ. P. 56(a). But we have no jurisdiction over appeals that contest only whether a factual dispute is "genuine"—i.e., whether a reasonable jury could decide the factual question in favor of the non-moving party. *See id.* So when the parties are fighting about the genuineness of a factual dispute—but do not contest that factual dispute's materiality to the

outcome of the case—we lack appellate jurisdiction over the denial of a qualified-immunity summary judgment motion. *Hall*, 975 F.3d at 1276.

Applying the *Hall* standard to this appeal, we conclude (1) that we lack appellate jurisdiction over Officer Hunady's appeal because he contests only whether a reasonable jury could credit Chisesi's view of the evidence, and (2) that appellate jurisdiction exists for Sheriff Mack's appeal because his appeal raises legal questions.

We will start with Officer Hunady's appeal. There is a factual dispute as to whether Victor displayed aggressive, shooter's-type behavior after exiting the vehicle and advancing toward the officers. Chisesi says, and the district court agreed, that a reasonable jury could agree with her that Victor did not behave in a threatening or aggressive manner. The district court thus concluded that the factual dispute was genuine. The district court then concluded that the dispute was material because a jury agreeing with Chisesi's version of events could find that Officer Hunady's shooting of Victor was unjustified and in violation of clearly established law.

Officer Hunady contests only the district court's conclusion that a jury could agree with Chisesi's account of the incident. Officer Hunady's opening brief can be condensed into the following argument: The district court should be reversed because it "erroneously concluded that a" reasonable jury could disagree with Officer Hunady's contentions that "Victor appeared to pose an imminent threat of serious physical harm," or that it was at least "reasonable for him to believe that Victor was [a] danger[] to him," because "Victor stood in an aggressive shooting stance." Critically, Officer Hunady at no point argues on appeal that he did not

violate clearly established law even if Victor were not threatening the officers. He thus concedes, at least at this stage, that the outcome of the appeal turns on whether a jury could find as a matter of fact that Victor did not behave in a threatening and aggressive manner. Under Officer Hunady's logic, if a jury finds that Victor was threatening the officers, then there is qualified immunity; if the jury finds that Victor was not threatening the officers, then there is not. Accordingly, "all we are left with is the factual review of what happened—was [Chisesi's] version of events right, or was [Officer Hunady's]?" *Hall*, 975 F.3d at 1277. We lack jurisdiction over that kind of appeal.

Officer Hunady says his appeal should be treated differently because most of the incident was captured on video. We disagree. The Supreme Court has held that, when a video "utterly discredit[s]" the non-movant's version of events, a court may rely on that video to resolve factual disputes in a movant's favor. *Scott v. Harris*, 550 U.S. 372, 380 (2007). In *Scott*, the lower courts ignored a video in resolving a motion, which presented a legal question for review on appeal i.e., how should courts evaluate video evidence. But the district court here reviewed the video and concluded that the video does not "utterly discredit" Chisesi's contention that Victor was not threatening Officer Hunady and the other officers. In this posture—with Officer Hunady presenting no legal issues for us to resolve—we cannot review that conclusion by the district court. *See Hall*, 975 F.3d at 1278.

In fact, we recently dismissed a qualified immunity appeal involving a video in nearly identical circumstances to those presented by Officer Hunady's appeal. *See English v. City of Gainesville*, 75 F.4th 1151 (11th Cir. 2023). In *English*, police officers appealed a denial

of qualified immunity, arguing that their actions were justified because a suspect "posed an immediate threat of serious physical harm." *Id.* at 1156. Whether the suspect had posed a threat was a disputed fact. *Id.* The district court reviewed videos of the incident and concluded that a reasonable jury could watch the videos and agree with either side. *Id.* We said that "this is the type of ruling we lack jurisdiction to review." *Id.* There is no meaningful difference between the appeal in *English* and Officer Hunady's appeal. As in *English*, the only purported error Officer Hunady asks us to review—whether the district court correctly interpreted the video—is a factual one. Under *English*, and entirely consistent with *Scott*, we lack jurisdiction to make that call at this stage of the litigation.

Sheriff Mack's appeal is a different (and simpler) story. The facts underlying that claim are not in dispute. Instead, the centerpiece of Sheriff Mack's appeal is that the district court reached the wrong legal conclusion, even if all of Chisesi's factual contentions are treated as true. Specifically, Sheriff Mack argues that he cannot be held liable for his failure to train Officer Hunady, even if Officer Hunady violated Victor's clearly established constitutional rights. Sheriff Mack's argument is thus precisely the type of argument appropriate to invoke our interlocutory jurisdiction. Accordingly, we will review Sheriff Mack's appeal.

We note that there is no significant overlap in the facts underlying each party's appeal. Whether a reasonable jury could conclude that Victor was acting in a threatening and aggressive manner after the car accident says nothing about whether Sheriff Mack sufficiently trained his officers to de-escalate encounters with suspects experiencing mental health crises. So we need not address whether we would have jurisdiction

over Officer Hunady's appeal if it relied on fact disputes that we would need to address as part of answering Sheriff Mack's legal arguments.

IV. STANDARD OF REVIEW

Now that we are satisfied that we have jurisdiction over Sheriff Mack's interlocutory appeal, we review *de novo* the denial of his motion for summary judgment. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013). "When considering a motion for summary judgment, including one asserting qualified immunity, 'courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, [courts must] credit the nonmoving party's version.'" *Id.* at 1252 (quoting *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006)). Ultimately, summary judgment is appropriate if the evidence before the court 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).

V. ANALYSIS

We begin our analysis with a review of the law on qualified immunity. This doctrine "protects public officers 'from undue interference with their duties and from potentially disabling threats of liability.'" *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). Indeed, "[t]he qualified immunity defense shields 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Corbitt v. Vickers*, 929 F.3d 1304, 1311 (11th

Cir. 2019) (quoting *Harlow*, 457 U.S. at 818). Qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"[T]o establish qualified immunity, [a law enforcement officer] first must show that [he] was acting within the scope of [his] discretionary authority at the time of the alleged misconduct." *Paez*, 915 F.3d at 1284. After the initial showing is made,[3] "the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Id.* The plaintiff must then show two things: (1) that the law enforcement officer violated a constitutional right and (2) that this right was clearly established at the time of the alleged violation. *Id.* Significantly, an officer loses qualified immunity only if both elements of the test are satisfied. *Brown v. City of Huntsville*, 608 F.3d 724, 734 (11th Cir. 2010).

Turning to Sheriff Mack's appeal, the district court determined that Sheriff Mack was not entitled to qualified immunity on the failure to train claim. Even though Chisesi failed to show a pattern of similar constitutional violations, the district court determined that such evidence was unnecessary, reasoning that this was the kind of recurring situation that presents an obvious, highly predictable potential for a constitutional violation. We disagree.

Chisesi contends that Sheriff Mack is liable under § 1983 because he failed to train the deputies on barricaded subjects, subjects experiencing mental health crises, and de-escalation tactics and strategies. As an introductory matter, it is important to note that a supervisor's "'culpability for a deprivation of rights is

[3] Here, it is undisputed that Officer Hunady and Sheriff Mack were acting within their discretionary authority.

at its most tenuous where a claim turns on a failure to train.'" *Keith v. DeKalb Cnty.*, 749 F.3d 1034, 1053 (11th Cir. 2014) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)).

A supervisor can be held liable for failure to train under § 1983 "'only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officers] come into contact.'" *Id.* at 1052 (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Deliberate indifference is an exacting standard, requiring proof that a supervisor "disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61. This means that a plaintiff alleging a constitutional violation "must demonstrate that the supervisor had 'actual or constructive notice that a particular omission in their training program causes [his or her] employees to violate citizen's constitutional rights,' and that armed with that knowledge the supervisor chose to retain the training program." *Keith*, 749 F.3d at 1052.

A supervisor may be put on actual or constructive notice of deficient training in two ways. Ordinarily, a plaintiff must show "'[a] pattern of similar constitutional violations by untrained employees.'" *Id.* at 1053 (alteration in original) (quoting *Connick*, 563 U.S. at 62). Alternatively, a plaintiff may show actual or constructive notice "without evidence of prior incidents, if the likelihood for constitutional violation is so high that the need for training would be obvious." *Lewis*, 561 F.3d at 1293. But this second option—using a single incident as the basis for liability—is available in only a "narrow range of circumstances." *Bd. of Cnty. Commis of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997). The Supreme Court hypothesized that a supervisor could be liable without a prior pattern of

constitutional violations if, for example, he armed his police force with firearms and deployed the police—without any training—into the public to capture fleeing felons. *Connick*, 563 U.S. at 63–64 (citing *City of Canton*, 489 U.S. at 390 n.10).

Moreover, a single incident is unlikely to give rise to liability for failure to train where the underlying practice "does not carry a high probability for constitutional violations" or where its omission from the training program at issue is not "'glaring.'" *Lewis*, 561 F.3d at 1293 (quoting *Brown*, 520 U.S. at 410). So liability on this basis is rare.

In this case, the § 1983 claim asserted against Sheriff Mack rests solely on a single incident—the shooting of Victor—rather than a pattern of unconstitutional conduct. Even if Officer Hunady committed a constitutional violation, the "narrow circumstances" that justify imposing liability on Sheriff Mack for failure to train on the basis of a single incident are not present here. Chisesi presented evidence that from 2015 to 2018, there were at least 1,000 officer-involved shootings in the United States where the subject appeared to be in a mental health crisis. Although this evidence shows the possibility of recurring situations involving those suffering mental health crises, the evidence is far more equivocal on whether there was an obvious potential for the violation of constitutional rights and an obvious need for more or different training.

While certainly important training topics—engaging with mentally ill individuals, handling barricaded subjects, and performing de-escalation techniques—the failure to train officers in those areas does not "carry a high probability for constitutional violations in the manner intended by the 'so obvious' notice that would open the door to [supervisor] liability." *Id.*

Moreover, we cannot say that Sheriff Mack knew to a moral certainty that constitutional violations would result from declining to further train his deputies on engaging with individuals experiencing mental health crises. Thus, Sheriff Mack's failure to train sheriff deputies in these areas falls outside the limited circumstances that the Supreme Court has hypothesized could give rise to single-incident liability for failure to train. Ultimately, we conclude that Sheriff Mack is entitled to summary judgment because Chisesi failed to demonstrate that Sheriff Mack had actual or constructive notice that the particular omissions in the training program were likely to result in constitutional violations.

VI. CONCLUSION

For the reasons stated above, we DISMISS Officer Hunady's appeal for lack of jurisdiction. We REVERSE the district court's denial of summary judgment as to Sheriff Mack.

DISMISSED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11700

DONNA CHISESI, As Independent Administratrix of the Estate of Jonathon Victor, Deceased,

Plaintiff-Appellee,

versus

MATTHEW HUNADY, Individually and in his official capacity, HUEY HOSS MACK,

Defendants-Appellants,

BALDWIN COUNTY SHERIFF'S OFFICE,

Defendant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:19-cv-00221-C

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,* DISTRICT JUDGE.

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* Honorable J.P. Boulee, United States District Judge for the North ern District of Georgia, sitting by designation.

PER CURIAM:

The Petitions for Rehearing En Banc are DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petitions for Rehearing En Banc are also treated as a Petitions for Rehearing before the panel and are DENIED. FRAP 35, IOP 2.