No. 19-

IN THE

Supreme Court of the United States

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Petitioner,

v.

GERALD E. WENGERT, IN HIS INDIVIDUAL CAPACITY, SCOTT ISRAEL, IN HIS INDIVIDUAL CAPACITY, AND SCOTT ISRAEL, IN HIS OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BARBARA A. HEYER
Counsel of Record
HEYER & ASSOCIATES, P.A.
1311 S.E. 4th Avenue
Fort Lauderdale, FL 33316
(954) 522-4922
civilrtslaw@hotmail.com

Counsel for Petitioner

290107

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

In the case at bar, the Eleventh Circuit accepted jurisdiction of an interlocutory ruling based upon the defense of qualified immunity. The district court had denied summary judgment as to all counts, including the defense of qualified immunity. The denial was based upon the Petitioner's extensive record evidence from which the district court had found:

> "[P]laintiff disputes almost every aspect of Wengert's story. She contends, *inter alia*, that Thompson had nothing to do with the robbery, did not fit the robbery suspects' descriptions, did not flee arrest, was not armed, and did not shoot at Wengert. Under those facts, there would have been no probable cause for Thompson's arrest, no legal reason for Wengert to shoot him, and therefore no qualified immunity." (App. B, 32a).

Thereafter, the Eleventh Circuit reversed the district court's denial of summary judgment based upon qualified immunity, as well as all other federal and state claims which had been brought by the Petitioner, "[b]ecause the district court's findings were not adequate. We undertake our own review of the record." (App. A, p. 3a).

Three questions are presented:

1. Under what circumstances may an appellate court review the findings of the district court with respect to the validity of the disputed material facts where there exists no legal question concerning a clearly established federal right that needs to be decided by the court?

2. Can an appellate court, having disagreed with a district court's assessment of the evidence, thereafter reverse the findings of the district court, and substitute its findings of fact based upon the moving parties version of the evidence?

3. Can an appellate court substitute its own findings of fact based upon the moving parties' version of the evidence then accept pendent jurisdiction and reverse a district court's non-final order on federal and state claims not the subject of the appeal by finding that they were "inextricably intertwined," to the defense of qualified immunity?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

RELATED CASES STATEMENT

Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased v. Gerald Wengert, et al., No. 16-61595-Civ-Cooke, United States District Court for the Southern District of Florida. Order denying summary judgment entered on January 31, 2018.

Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased v. Gerald Wengert, et al., No. 18-10776-EE, U.S. Court of Appeals for the Eleventh Circuit. Order granting jurisdiction on June 18, 2018.

Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased v. Gerald Wengert, et al., No. 18-10776-EE, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on May 17, 2019

Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased v. Gerald Wengert, et al., No. 18-10776-EE, U.S. Court of Appeals for the Eleventh Circuit. Rehearing en banc denied on July 11, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the lower court's denial of summary judgment as to all counts is included as Appendix A. The opinion of the United States District Court for the Southern District of Florida (Cooke, J.), denying Respondents' Motions for Summary Judgment is included as Appendix B. The Order of the United States Court of Appeals for the Eleventh Circuit accepting jurisdiction is included as Appendix C. The order of the United States Court of Appeals for the Eleventh Circuit is included as Appendix D.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 17, 2019. Petitioner's timely Petition for Rehearing En Banc was denied on July 11, 2019 and included as Appendix D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

On June 6, 2014, Respondent Wengert, a deputy sheriff with the Broward County Sheriff's office in Florida, shot and killed Steven Thompson. Respondent Wengert had discharged his gun twenty-five times. Respondent was sixty-five feet away down a hallway that had been described by an eyewitness as a dark, ominous hallway like a "horror show," when he shot Thompson eight times to the back of his body. Thereafter, Respondent shot Thompson a ninth time, (the fatal shot to the groin which traveled up through his vital organs) while he lay writhing in pain on the floor of the apartment building.

Petitioner filed the present case under 42 U.S.C. §1983 claiming that Thompson was not the armed robber that Respondent and other law enforcement personnel were looking for, that he posed no threat to Wengert (or anyone else), that he did not shoot at Wengert, and that the gun attributed to him had been planted at the scene to justify Wengert's actions in violation of his rights under the Fourth Amendment to the United States Constitution.

In response to summary judgment, Petitioner supported the allegations made in her complaint with extensive evidence which came from the testimony of the Broward County Sheriff's personnel, including its forensic experts, its official records, including crime scene reports, diagrams and photographs, other law enforcement personnel, and independent witnesses. Relying upon this evidence presented by the non-moving party, the district court properly denied summary judgment as to all claims brought by the Petitioner. Respondents appealed the district court's rejection of their claim to qualified immunity.

On May 17, 2019, the Eleventh Circuit reversed the district court's ruling as to Respondent's claim to qualified immunity, as well as all of Petitioner's federal and state claims which had not been part of the interlocutory appeal. The Eleventh Circuit held that the district court's findings were not adequate and thereafter, instead of remanding it to the district court with instructions, it substituted its findings of fact based solely upon the moving parties' version of the facts.

Relying only on the facts presented by the moving parties, the Eleventh Circuit stated:

> "Presented alone, these conflicting accounts would likely be sufficient to establish a genuine dispute that Thompson did not fire at Wengert. But the audio of the shooting resolves these conflicting accounts. The audio captures one or two initial shots, a call over the radio of 'shots fired,' someone—presumably Wengert—shouting 'put the gun down,' and

> *then* a barrage of gunfire." (Emphasis supplied). (App. A, p. 14a).

In stark contrast, the district court did not and could not find any evidence on the audio of "one or two initial shots," nor "Wengert—shouting 'put the gun down.'" This is true because the evidence cited by the Eleventh Circuit does not exist. The Eleventh Circuit apparently relied solely upon the representations of the moving parties, and clearly failed to listen to the audiotape. The radio transmissions and the CAD reports (dispatch reports in real time) do not reflect any "initial shots," nor is there any evidence on the dispatch tape of anyone saying "put the gun down." The only thing that is audible on the recording is a Lauderhill Officer, Weeks saying "shots fired...shots fired", "lock down papa building" and giving the address of the location, with the sound of numerous shots in the background. There is no recording of "one or two initial shots" prior to Officer Weeks radioing "shots fired," despite what is stated in the Eleventh Circuit opinion. There is absolutely nothing on the audio that provides the basis for the court's conclusion that "one or two initial shots" could be heard. Wengert shot his gun 25 times, reloading one time. What can be heard on the audio is Wengert methodically shooting his gun 14 times. Wengert was well into his barrage of shooting at the point in time that the dispatch tapes of the various 911 calls and Weeks' call were recorded. Nowhere on the audiotape can it be heard that "someone—presumably Wengert—shouting 'put the gun down." The cited "facts" relied upon in reversing the district court's ruling simply do not exist.

The Eleventh Circuit opinion states that "officers and an apartment resident... remember hearing a 'defining

shot' before the rest of the gunfire broke out." (App. A, p. 13a-14a). However, the record evidence shows that the only "independent" officer/witness in this regard was Lauderhill Officer Weeks, who testified that he was unable to hear any difference in the gunshot sounds even though he was standing directly outside the glass door and could see Wengert shooting. Likewise, no distinguishable single shot was heard by any apartment resident, although one heard someone shout, "I'm going to kill you, motherfucker." immediately followed by a barrage of shots. Respondent Wengert has admitted that Thompson had said nothing to him prior to the shooting. Other apartment residents also heard multiple gunshots and Thompson screaming, "help, help" and "he's shooting me" and "I'm shot."

The Eleventh Circuit opinion relies solely on the interpretation of the disputed facts presented by the moving party. The appellate court states that "[t]he officers firmly dispute that any gun was planted at the scene" and "that the evidence instead supports Wengert's version of the facts: Thompson was armed, fired the first shot, and only then did Wengert return fire." (Emphasis added). (App. A, p. 16a). The only support for Respondents' "firm dispute" that a gun was planted are their own statements which the appellate court accepted to the exclusion of all the forensic and eyewitness evidence, including the audiotape.

The forensic evidence demonstrated that the gun (a Luger) alleged to have been in Thompson's hand the entire time was 51 feet from where his body lay as Wengert continued to shoot him. Respondent claimed that Thompson shot at him at close range twice. However, only one cartridge and one projectile attributed to the gun in question were found and both items were located

in inexplicable locations. The flattened projectile was positioned around a corner and on the other side of a door with no physical evidence to demonstrate how it got there, i.e., no strike marks and no holes. The Eleventh Circuit opinion makes no reference to this critical piece of evidence. Additionally, the crime scene detective had marked and measured all of the evidence, including the Luger, and testified that no one ever told him that any evidence had been moved, otherwise he would have included such information in his report.

The record evidence demonstrates the following: The location of where Thompson's body fell was approximately in the middle of a long narrow hallway. The gun in question was 51 feet away near the west end of the hallway. Lauderhill Police Officer Weeks, who was at the east end of the hallway, testified that he "peeked" into the hallway after a deputy gave him the all clear, and saw a gun pretty much down virtually the entire length of the hallway (at the far west end) from where he was standing at the glass door entrance. Officer Weeks also stated: "They never moved the gun. The gun was always there." Another Lauderhill Officer, Michel, who was subsequently stationed at the far west end of the hallway (the other end of the hallway from Weeks), over 51 feet away from where Thompson lay dying and at the same doorway where two other deputies, Yoder and Koutsofios had been positioned during the shooting stated that from where he stood, "a couple of feet away was a gun, a black, a black probably a Glock looks like it...lying in the middle of the hallway." The court failed to mention any of this record evidence.

The Eleventh Circuit opinion instead relied upon the statements of the Respondent and another interested

person, deputy sheriff Yoder. Despite the evidence from the Lauderhill officers and the physical evidence, the court relied upon one of at least two different versions of deputy Yoder's stories, stating "that as he approached, he saw a gun next to Thompson...that he kicked the gun down the hallway and away from Thompson...that the gun slid twenty to twenty-five feet down the hallway." (App. A, p.5a). In fact, it was only after the filing of the lawsuit, in an attempt to align their testimony with the physical evidence, that the gun was at the far west end of the hallway, 51 feet away from Thompson, that Wengert and Yoder then reversed their prior testimonies. In those recitations, Wengert and Yoder testified that they had not moved or touched the gun. Yoder's testimony that "obviously we didn't touch it" was interpreted by the Eleventh Circuit to mean: "we understand that statement to mean the deputies did not touch the weapon or remove it from the hallway after Yoder had kicked the weapon to put it out of Thompson's reach." (Emphasis added). (App. A, p. 5a, n.1). Other than Wengert, the alleged kicking of the gun by Yoder was not observed by any other law enforcement officers or anyone else.

The forensic evidence demonstrated that Thompson's fingerprints were not on the gun nor was there any trace of blood on the gun that Wengert claimed was still in Thompson's hand as he lay in a pool of blood. There was no evidence of any gunshot residue on Thompson's hands or clothes although his hands had been swabbed and covered with plastic bags. The completed test kit was submitted to property. There was no evidence of Thompson's fingerprints or DNA on the magazine or cartridges in the gun. Thompson's "contact DNA" was only on the outside of the weapon which is consistent with the gun being

swiped across his hand as he lay dying in the corridor. The evidence demonstrated that the semi-automatic gun in question had four bullets in the magazine and no bullet in the chamber. The Respondents had attempted to deflect this evidence by suggesting that the gun was inoperable, something that was disputed by their own ballistics expert.

The Eleventh Circuit, accepting the Respondents' version of the facts, stated that the deputies:

> "[e]ncountered Thompson and a group of other men. ...Thompson was a 26-year-old black male. He was approximately 5'8" and weighed 210 pounds. That evening, Thompson was wearing primarily black clothing, although his shorts also had a white and orange pattern. His sneakers were black and orange, and he was wearing a hat with white lettering. Thompson was close to the stolen phone, based on the GPS data." (Emphasis added). (App. A, p. 4a).

The record evidence actually showed that the GPS tracking the cell phone located the ping as coming from the center of the parking lot where a group of black men were standing. Thompson was not near that group. He was just exiting the door of an apartment building. The record evidence also showed that the description of the suspects known to the deputies at the shooting scene, including Respondent Wengert, prior to the incident, was vague and could apply to almost anyone at the scene: two black males, one thin, one heavy, dressed all in black. The record evidence also showed that nine (9) minutes prior to encountering Thompson, deputies had been notified by a

Lauderhill undercover officer that he knew who the two armed robbers were, and had texted photos of the two suspects to another Lauderhill officer and K-9 deputy sheriff Yoder. The Broward Sheriff's office has admitted that it did not retain a copy of the photograph. None of this critical evidence was in the Eleventh Circuit opinion.

The Eleventh Circuit goes on to state that:

> "there is no evidence that deputies prevented EMS from treating Thompson to give themselves time to plant a gun. EMS records show that fire rescue made their way towards Thompson approximately one minute after arriving on the scene. They began treating Thompson's injuries another minute later." (Emphasis added). (App. A, p.15a).

This is absolutely incorrect. What the record evidence actually shows is that fire rescue was called at 11:18 p.m., arrived at the entrance to the apartment building at 11:21, and were prevented by law enforcement from entering the building until 11:33. Wengert and Yoder were the only deputies in the hallway when Yoder instructed other officers, outside, not to let fire rescue or anyone in until they made sure "another shooter" wasn't there in the hallway. The record shows that at that time Respondent and Yoder were fully aware that there was only one suspect at that apartment complex. Despite this claimed concern for a possible second shooter, Wengert chose that twelve minute time period to leave the shooting scene, allegedly to move his vehicle. He also testified that he then reentered the scene. The twelve minutes provided more than sufficient time for Respondent and his cohorts

to stage the shooting scene before allowing other law enforcement personnel and fire rescue personnel to enter the hallway to treat Thompson and view the evidence.

The record evidence cited herein is only a sample of the incorrect findings in the Eleventh Circuit opinion. Instead of reviewing the evidence as the district court had clearly done, the Eleventh Circuit simply adopted the version of the moving parties, including their blatant misrepresentations. The district court was correct that Petitioner had properly disputed "virtually every material fact" raised by Respondents, with extensive record evidence.

It was improper for the Eleventh Circuit to substitute its findings based upon the moving parties' version of the facts when the record evidence blatantly contradicted their version.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit, having improperly found the district court's findings to be inadequate, substituted its own findings of materially disputed facts based upon the moving party's version of the evidence, which is in conflict with the decisions of this Court, and several Courts of Appeals

This Court has held "that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319 (1995). In reaffirming *Johnson,* this Court, in *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2019 (2014)

stated "that a determination of evidence sufficiency is closely related to other determinations that the trial court may be required to make at later stages of the case," and that "appellate courts have 'no comparative expertise' over trial courts in making such determinations and that forcing appellate courts to entertain appeals from such orders would impose an undue burden." (Internal citations omitted). "To be reviewable, a pretrial qualified immunity appeal must present a legal question concerning a clearly established federal right that can be decided apart from considering sufficiency of the evidence relative to the correctness of the plaintiff's alleged facts." (Citations omitted). (Emphasis added). *Koch v. Rugg*, 221 F.3d 1283, 1294 (11th Cir. 2000).

The Eleventh Circuit opinion relies solely upon the moving parties version of the disputed material facts including the lie that "one or two initial shots" and "put down the gun" could be heard on the dispatch tape. A review of the record evidence presented by Petitioner leads to the "inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed to properly to acknowledge key evidence offered by the party opposing that motion." *Tolan v. Cotton*, 134 S.Ct. 1861, 1867-8 (2014).

The Eleventh Circuit's opinion, which credits the evidence of the moving parties in order to reverse the district court's ruling, reflects a "clear misapprehension of summary judgment standards." *Id.* at 1868. The standard of proof has not been altered by *Scott v. Harris,* 550 U.S. 372 (2007). It is still required that, as here, "an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* [*v. Connor*, 490 U.S. 386 (U.S. 1989)] will not permit summary

judgment in favor of the defendant official. " *Saucier v. Katz*, 533 U.S. 194, 216 (2001).

Unlike the decisive videotape evidence in *Scott* which unequivocally contradicted the plaintiff's version of the evidence, the evidence herein clearly demonstrates that the dispatch tape relied upon by the Eleventh Circuit blatantly contradicts that court's version of the materially disputed facts.

Rule 56(a) of the Federal Rules of Civil Procedure directs a district court to set forth "on the record," the reasons for their disposition of summary judgment motions, although the particular form and content are left to the court's discretion. See: Advisory Committee Note to 2010 Amendments; *Enterprise Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, n.4 (10th Cir. 2013).

> "[A]bsent some indication of a material issue being overlooked or an incorrect legal standard being applied, we do not require district courts to write elaborate essays using talismanic phrases. *See, e.g., United States v. Cossey*, 632 F.3d 82, 87 (2d Cir.2011) ('strong presumption' on review of sentencing that the district court 'considered all arguments properly presented to [it], unless the record clearly suggests otherwise'); *cf. In re Mazzeo*, 167 F.3d 139, 142 (2d Cir.1999) (Fed.R.Civ.P. 52(a) explanation of reasoning does not require 'punctilious detail or slavish tracing of the claims issue by issue and witness by witness' (internal quotations and alterations omitted)); *Badgley v. Santacroce*, 815 F.2d 888, 889 (2d Cir.1987) (same). All that

> is required is a record sufficient to allow an informed appellate review."

Jackson v. Federal Exp., 766 F.3d 189, 196-7 (2d Cir. 2014).

Under Rule 1.510(d) of the Florida Rules of Civil Procedure, a summary judgment order should specify the material "facts that appear without substantial controversy" and those facts which remain "actually and in good faith controverted." However, where the trial court fails to make specific findings, the appellate court may rely upon the "ample documentary and other evidentiary support for the trial court's rulings." *Destin Pointe Owners' Ass'n, Inc. v. Destin Parcel* 160, LLC, p.2 (Fla. App., 2019).

Because it did not agree with district court's assessment of the evidence, the Eleventh Circuit found the court "findings were not adequate." (App. A, p. 3a). In fact, a review of the district court's order demonstrates that its ruling was entirely appropriate. As the district court's order demonstrates, it had reviewed and cited to the audio tape in question, with respect to certain issues of disputed material fact concerning the following: (1) the descriptions of the robbery suspects known to the deputies at the time of the shooting; (2) that one of the suspects was believed to be miles away from the location of the GPS ping and, (3) that the deputies had been sent a photograph of the actual suspects nine minutes prior to encountering the decedent, Steven Thompson. The district court having reviewed the audio dispatch tape, did not hear the "one or two initial shots" or "put down the gun," cited by the Eleventh Circuit because, in fact, <u>they are not on the audio dispatch tape</u>.

The moving parties' representations do not exist on the audiotape, yet they were accepted by the Eleventh Circuit as "blatantly contradicting" the nonmoving party's version of facts.

When a district court does not explicitly identify which material facts are in dispute, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 515 U.S. at 319. The evidence must be construed in the light most favorable to the nonmovant, regardless of whether the court feels that one party's version of events is more credible than the other's. *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002).

> "By characterizing Plaintiff's legitimate interpretation of the physical and forensic evidence as 'pure speculation' and 'disputed by affirmative evidence ... most obviously, the officers' testimony,' the majority concludes that Plaintiff's interpretation of the physical evidence amounts to conjecture. Granting summary judgment on qualified immunity under these facts therefore sets up a paradigm where, no matter how many inconsistent accounts of an incident an officer gives and no matter what viable theory is supported by forensic evidence, a fourth-amendment claim arising out of a deadly shooting will never survive summary judgment, unless a third-party eye-witness can support Plaintiff's narrative or the plaintiff survives the shooting. <u>This cannot be the evidentiary standard in qualified immunity cases</u>."

Hammett v. Paulding County, 875 F.3d 1036, 1058 (11th Cir. 2017)(Williams, Dissenting in part).

"As we have clarified, Scott is the exception, not the rule. It does not 'abrogate the proper summary judgment analysis, which in qualified immunity cases 'usually means adopting...the plaintiff's version of the facts.'" *Harris v. Pittman*, No. 17-7308 at *18 (4th Cir. 2019) quoting *Witt v. W.Va. State Police, Troop 2*, 633 F.3d 272, 276 (4th Cir. 2011). "That standard continues to apply in the face of 'documentary evidence' that lends support to a government official's account of events, id., or even makes it 'unlikely' that the plaintiff's account is true." *Id.* quoting *United States v. Hughes*, 606 F.3d 311, 319-20 (6th Cir. 2010) (holding that *Scott* does not apply to photographs rendering plaintiff's account 'unlikely').

> "Summary judgment is proper under *Scott* only when there is evidence - like the videotape in *Scott* itself - of undisputed authenticity that shows some material element of the plaintiff's account to be 'blatantly and demonstrably false.' *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3d Cir. 2007) (refusing to extend *Scott* to evidence in form of police photographs that fail to depict 'all of the defendant's conduct and all of the necessary context'); see also *Witt*, 633 F.3d at 277 (holding Scott inapplicable to soundless video that does not capture key disputed facts)."

(Emphasis added). *Harris,* No. 17-7308 at *18-19.

Therefore, "'[a] defendant challenging a denial of summary judgment on qualified immunity grounds must be willing to concede the most favorable view of the facts to

the plaintiff for purposes of the appeal.'" (internal citation omitted). *Harris v. Lasseigne*, No.14-1033 at *5 (6th Cir. 2015). "In circumstances where 'a defendant relies instead on her own disputed view of the facts, the appeal boils down to issues of fact and credibility determinations that we cannot make,' and this court does not have jurisdiction." (Emphasis added). *Id.*, quoting *Thompson v. Grida*, 656 F.3d 365, 367 (6th Cir. 2011).

> "On an interlocutory appeal of a denial of qualified immunity, our review is limited to 'purely legal issues.' *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998). '[W]e must take, as given, the facts that the district court assumed when it denied summary judgment for a (purely legal) reason.' *Id.* (internal quotation marks and alteration omitted). '[W]here the district court does not explicitly set out the facts that it relied upon, we undertake a review of the pretrial record only to the extent necessary to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.' *Id.*"

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1007 (9th Cir. 2017). See also: *Estate of Booker v. Gomez*, 745 F.3d 405, 410 (10th Cir. 2014)(reviewing the "entire record" including "video clips" to determine which facts the district court "likely assumed").

In *Coble v. City of White House, Tenn.*, No. 08-314, 2009 WL 2850764, at *11 (M.D.Tenn. Aug. 29, 2009), the district court determinated that, in light of an audio recording, it was not required to accept the nonmoving party's version of the events. The Sixth Circuit reversed,

noting that "[m]any factors could affect what sounds are recorded, including the volume of the sound, the nature of the activity at issue, the location of the microphone, whether the microphone was on or off, and whether the microphone was covered." *Coble v. City of White House, Tenn.*, 634 F.3d 865, 869 (6th Cir. 2011). "Facts that are not blatantly contradicted by the audio recording remain entitled to an interpretation most favorable to the non-moving party. ...Even if part of Coble's testimony is blatantly contradicted by the audio recording, that does not permit the district court to discredit his entire version of the events. We allow cases to proceed to trial even though a party's evidence is inconsistent, because in reviewing a summary judgment motion, credibility judgments and weighing of the evidence are prohibited." (Emphasis added). *Id.* at 870. (Citation and quotations omitted.)

> "As to their first argument, the police officers overstate the relevance of Scott, in which the court found 'an added wrinkle,' in the form of an unadulterated videotape that captured the entire incident. . . . The court held that a court may not adopt a "blatantly contradicted" version of the facts for summary judgment purposes. By contrast, only part of the incident involving the Yorks and the police officers was captured on an audio tape, portions of which are unintelligible. Setting aside the fact that the court referenced the tape several times in its order and it is not 'blatantly contradicted,' by Mr. York's version of the events, the tape does not establish that the officers are entitled to summary judgment. Instead, accepting Mr.

> York's version of the events as true, the fact finder could easily find constitutional violations."

York v. City of Las Cruces, 523 F.3d 1205, 1210-11 (10th Cir., 2008).

In *Sears v. Roberts*, 922 F.3d 1199, 1208-09 (11th Cir. 2019):

> "[T]here's a big difference between the record evidence presented in *Scott* and the evidence proffered here. In *Scott*, the record evidence that blatantly contradicted the plaintiff's version of events was a videotape of the car chase at issue. Id. at 378-79, 127 S. Ct. at 1775. Here, the officers' documentary evidence consists mainly of various forms of their own testimony. . . . Those reports just pit the correctional officers' word against Sears' word. That is different from Scott where a videotape of the incident definitively established what happened and what did not. See id. at 380, 127 S. Ct. at 1776; see also *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) (affirming denial of summary judgment because, absent a video recording of the incident, defendant's forensic evidence did 'not so utterly discredit [plaintiff's] testimony that no reasonable jury could believe it'). At this stage in the proceedings, we must resolve the conflict of evidence in favor of Sears. The district court erred by weighing the evidence and making its own credibility determinations at the summary judgment stage." (Emphasis added).

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. In the instant case, the Eleventh Circuit opinion usurped the jury's factfinding function, labeling the district court's review as unreasonable and "blatantly contradicted." According to the Eleventh Circuit opinion, no reasonable person could listen to the dispatch tape and not come to the conclusion that the deadly force was necessary and justified. In fact, a reasonable person, that being the district court judge who actually listened to the dispatch tape, as well as reviewed all the forensic evidence and independent witness testimony presented by the non-moving party, concluded that there were material facts in dispute.

Although "this Court is not equipped to correct every perceived error coming from the lower federal courts," it did intervene where the lower court "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion" to correct "a clear misapprehension of summary judgment standards in light of our precedents." *Tolan,* 134 S.Ct. at 1868.

> "Our failure to correct the error made by the courts below leaves in place a judgment that accepts the word of one party over the word of another. It also continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit

> of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified immunity cases imposes no less harm on "'society as a whole,'" than does the erroneous denial of summary judgment in such cases. We took one step toward addressing this asymmetry in Tolan . 572 U.S., at ––––, 134 S.Ct., at 1868. We take one step back today."

Salazar–Limon v. Houston, 137 S.Ct. 1277, 1282-3 (2017), Justice Sotomayor, joined by Justice Ginsburg, dissenting.

In the instant case, the dispatch tape, the very evidence which the court relied upon to reverse the district court, completely discredits it ruling. To allow the findings of the Eleventh Circuit to stand would require ignoring the patently contradicting evidence and lack of evidence on the audio tape in question.

II. The Eleventh Circuit, having improperly substituted its findings of disputed material facts based upon the moving parties' version of the evidence and accepting pendent jurisdiction, is in conflict with the decisions of this Court, several Courts of Appeals and Florida courts.

Based upon the moving parties' version of the disputed facts, the Eleventh Circuit substituted its version of the findings of fact and, exercised pendent jurisdiction over claims that were not before the court claiming that they were "inextricably intertwined" with the denial of qualified immunity." (App. A, p. 7a-8a, n.2).

In sharp contrast, the district court based upon its review of the evidence presented by the non-moving party

had properly denied Respondents' summary judgment motions as to Petitioner's state tort claims and her §1983 *Monell* claim. Based upon the district court's findings, said state and federal *Monell* claims would not be "inextricably intertwined" with the claims against Respondents Israel and Wengert, individually. As the Eleventh Circuit has stated in the past, "[a]lthough interlocutory review of the immunity available to Defendants Bishop and Powers individually is permissible, there is no pendent party appellate jurisdiction to permit us to review the claim against a separate defendant, Sheriff Cannon in his official capacity because immunity issues are not inextricably interwoven in that claim." *Jones v. Cannon*, 174 F.3d 1271, 1293 (11th Cir. 1999).

The municipal liability claims herein raise entirely separate disputed facts and issues of whether the Broward Sheriff's Office (Israel) was negligent in its hiring, retention and supervision of Wengert, and/or whether it was deliberately indifferent in its hiring, supervision and discipline of its deputies which was the moving force that caused the shooting of Steven Thompson by Wengert. This is not an issue that must be determined – or even considered – in resolving the immunity claims. *Jones,* 174 F.3d at 1293-4.

Official-capacity liability and qualified immunity involve fundamentally different inquiries, even if they arguably share some common ground. *Jones,* 174 F.3d at 1292-93. Where separate defendants brought separate official-capacity and qualified-immunity claims, while the "defendants' claims shared a common question—i.e., whether the plaintiff's constitutional rights were violated—one common question did not make the claims 'inextricably intertwined.'" *Id.* at 1279, 1283-86, 1293.

Finally, as to the question regarding sovereign immunity for the official capacity state law claim, the Florida Supreme Court and the Eleventh Circuit have determined that claims of sovereign immunity under Florida state law are not entitled to interlocutory review. *Jones,* 174 F.3d at 1293.

It was improper for the Eleventh Circuit to accept pendent jurisdiction based upon their substituted findings of fact which were "blatantly contradicted" by the record evidence presented by the non-moving party.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant certiorari.

Respectfully submitted,

Barbara A. Heyer
Counsel of Record
Heyer & Associates, P.A.
1311 S.E. 4th Avenue
Fort Lauderdale, FL 33316
(954) 522-4922
civilrtslaw@hotmail.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 17, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10776

D.C. Docket No. 0:16-cv-61595-MGC

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Plaintiff-Appellee,

versus

GERALD E. WENGERT, IN HIS INDIVIDUAL CAPACITY, SCOTT ISRAEL, IN HIS INDIVIDUAL CAPACITY, SCOTT ISRAEL, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

May 17, 2019, Decided

Appendix A

Before WILSON, JILL PRYOR, and SUTTON,[*] Circuit Judges.

PER CURIAM:

Deputy Sheriff Gerald Wengert shot and killed Steven Jerold Thompson while out on a dispatch call regarding a suspected armed robbery. Thompson's sister and personal representative, Donnett Taffe, subsequently sued Wengert in his individual capacity, alleging that he violated Thompson's Fourth and Fourteenth Amendment rights by using excessive deadly force. Taffe also sued the former Broward County Sheriff, Scott Israel, in both his individual and official capacities for the negligent hiring, training, and supervision of Wengert. The district court, citing disputed issues of material fact about the shooting, denied qualified immunity to both Wengert and Israel and denied their motion for summary judgment on all claims. Wengert, Israel, and the Sheriff's Office appeal that ruling.

After careful review and with the benefit of oral argument, we conclude that Taffe failed to establish a genuine dispute of material fact that would preclude summary judgment. Accordingly, we are compelled to reverse the district court's denial of summary judgment on all claims.

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[*] Honorable Jeffrey S. Sutton, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix A

I. Background

A. Facts

"In exercising our interlocutory review jurisdiction in qualified immunity cases, we are not required to make our own determination of the facts for summary judgment purposes; we have discretion to accept the district court's findings, if they are adequate. But we are not required to accept them." *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996) (internal citations omitted). Because the district court's findings were not adequate, we undertake our own review of the record.

In June 2014, two women called the police to report that two men had robbed them of their belongings and cellphones at gunpoint. Deputies from the Broward Sheriff's Office, including Deputy Wengert, were dispatched to investigate. The callers described the robbers as two black males with low-cut hair and dark clothing. One suspect was 5'10" with a thin build and had a black semiautomatic weapon. The other suspect was 5'8" with a heavy-set build. At least one suspect wore "bright sneakers." A deputy asked dispatch if the victims noticed whether the suspects had any distinguishing characteristics. Dispatch responded, "[The victims are] advising no. She's saying they could have had it but she was just too sidetracked looking at the weapon."

Using a GPS application, deputies quickly tracked one of the stolen cellphones to Cypress Grove Apartments. Officers from the Lauderhill Police Department joined

the search. Law enforcement tracked the stolen phone to the parking lot at the southern end of the apartment complex. When the deputies neared the parking lot, they encountered Thompson and a group of other men.

Thompson was a 26-year-old black male. He was approximately 5'8" and weighed 210 pounds. That evening, Thompson was wearing primarily black clothing, although his shorts also had a white and orange pattern. His sneakers were black and orange, and he was wearing a hat with white lettering. Thompson was close to the stolen phone, based on the GPS data. When the officers reached the parking lot, Thompson quickly turned around and reentered the apartment building. Officers demanded Thompson stop, but Thompson did not respond. Deputies Wengert and Clark chased after Thompson into the building.

Deputy Wengert later described what happened inside. He testified that after entering the apartment hallway, Wengert saw Thompson in front of him with a firearm pointed in Wengert's direction. Thompson fired what Wengert believed to be two shots, which missed Wengert. Thompson kept running down the hallway, keeping his firearm pointed behind him towards Wengert. Wengert fired and hit Thompson. Wengert told Thompson to drop his gun and continued to fire when Thompson did not comply. Wengert stopped firing when he saw that Thompson had dropped the gun and it was a safe distance away from him. An audio recording of the shooting is consistent with this testimony. The audio captures a distinct series of events: one or two shots, a call over the radio of "shots fired," someone—presumably Wengert—

shouting "put the gun down," and then a barrage of gunfire. Wengert ultimately fired 25 rounds. Eight hit Thompson from behind. A ninth hit him while he was on the ground.

By the time the gunfire ceased, multiple law enforcement officers had converged upon the hallway. Officer Weeks from the Lauderhill Police Department—an agency wholly separate from the Broward Sheriff's Office—was first to arrive at the scene. Officer Weeks testified that almost immediately after the shooting, he peered into the hallway, where he saw a gun next to Thompson. At the time Officer Weeks saw the gun next to Thompson, Wengert was still behind a wall in his position of cover, and no other deputy or officer had entered the hallway.

Deputy Yoder of the Broward Sheriff's Office testified that he arrived at the scene twenty to thirty seconds after the gunfire ceased. Deputy Yoder testified that he approached Thompson, who was still alive and cursing at the officers. Deputy Yoder testified that as he approached, he saw a gun next to Thompson. Deputy Yoder then testified that he kicked the gun down the hallway and away from Thompson to ensure that he could not reach it.[1] Deputy Yoder estimated that the gun slid twenty to twenty-five feet down the hallway.

1. We acknowledge, as Taffe points out, that on the night of the shooting, Deputy Yoder stated that the deputies did not touch the weapon. After reading Deputy Yoder's later deposition, we understand that statement to mean the deputies did not touch the weapon or remove it from the hallway after Yoder had kicked the weapon to put it out of Thompson's reach.

Officers then handcuffed Thompson and called EMS. After the shooting, Wengert moved his car to the side of the building where the incident occurred. He eventually went back into the building. EMS transported Thompson to a local hospital, but he died that night from his injuries.

After the shooting, investigators recovered a gun—a Diamondback Luger—from the apartment hallway. A final investigative report placed the gun 51 feet from where Thompson's body had come to rest. Investigators also recovered a casing from the Diamondback Luger. The gun tested positive for Thompson's DNA.

B. Procedural History

Thompson's personal representative, Donnett Taffe, sued the defendants in Florida state court. The defendants removed the case to federal court. Taffe filed an Amended Complaint with five claims:

- **Count I**: State law assault and battery claim against Wengert for unlawfully shooting Thompson;

- **Count II**: Claim under 42 U.S.C. § 1983 against Wengert, in his individual capacity, for unlawfully shooting Thompson (asserting Fourth and Fourteenth Amendment claims for using excessive force);

- **Count III**: State law tort claim against Israel, in his official capacity, for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death;

- **Count IV**: Claim under 42 U.S.C. § 1983 and state tort law against Israel, in his individual capacity, for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death; and

- **Count V**: Claim under 42 U.S.C. § 1983 against Israel, in his official capacity, for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death

The defendants sought summary judgment on all counts, and both Wengert and Israel argued that they were entitled to qualified immunity on the claims against them in their individual capacities.

As the district court recognized, the parties dispute what happened that night. Taffe alleges that Thompson had nothing to do with the robbery, did not fit the robbery suspects' descriptions, was not armed, and did not shoot at Wengert. Taffe also alleges that Wengert planted the gun recovered at the scene. The defendants maintain, however, that Thompson *did* meet the description of the robbery suspect, *was* armed, and *did* fire the first shot at Wengert, who returned fire until the threat was subdued. The officers firmly dispute that any gun was planted at the scene. The district court, finding these stories incompatible, concluded that disputed issues of material fact remained. The district court denied qualified immunity to both Wengert and Israel and denied the Defendants' joint motion for summary judgment on all claims. All Defendants appealed.[2]

2. On appeal, we asked the parties whether we have pendent appellate jurisdiction to review the district court's denial of summary

II. Standard of Review

We review a district court's denial of summary judgment on qualified immunity grounds de novo. *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003). Generally, "[w]e resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts." *Id.* But "facts must be viewed in the light most favorable to the nonmoving party only if there is a '*genuine*' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (emphasis added) (quoting Fed. R. Civ. P. 56(c)); *see also Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010) ("Though factual inferences are made in [Plaintiff's] favor, this rule applies only *to the extent supportable by the record*."). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (internal quotation omitted).

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judgment on the claims against the Sheriff's Office. Because those claims are "inextricably intertwined" with the denial of qualified immunity, we exercise pendent appellate jurisdiction over those claims. *See King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009).

Appendix A

III. Discussion

A. Qualified Immunity

Qualified immunity shields government officials sued in their individual capacities from liability when they act within their discretionary authority and when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "Because qualified immunity is a defense not only from liability, but also from suit, it is important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation omitted).

To invoke qualified immunity, an official must first demonstrate that he was acting within the scope of his discretionary authority. *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013). The burden then shifts to the plaintiff to establish both that the officer's conduct violated a constitutionally protected right and that the right was clearly established at the time of the misconduct. *Id.* We may decide these issues in either order, but to survive a qualified immunity defense, the plaintiff must satisfy both. *Id.* at 1120-21. "If the conduct did not violate a constitutional right, the inquiry ends there." *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005).

B. Section 1983 Claim Against Wengert

Because there is no doubt that Wengert was acting within his discretionary authority the night of the shooting, the burden shifts to Taffe to show, at a minimum, that Wengert's conduct violated a constitutionally protected right. *Maddox*, 727 F.3d at 1120.

Taffe first argues that Wengert did not have probable cause to arrest Thompson. "To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586, 199 L. Ed. 2d 453 (2018) (internal quotation omitted). Probable cause depends on the totality of the circumstances and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Arresting officers are also entitled to qualified immunity if the officer had arguable probable cause for the arrest. *See Ferraro*, 284 F.3d at 1195. "Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest." *Id.* (internal quotation omitted). At this stage, in determining whether Wengert had probable cause or arguable probable cause to arrest Thompson, we view the facts—to the extent supported by the record—in the light most favorable to Taffe. *See Penley*, 605 F.3d at 853.

After reviewing the record, we find that Wengert had at least arguable probable cause to arrest Thompson. The totality of the circumstances would have led the officers to believe that Thompson matched the description of the robbery suspect. Dispatch reported that one of the robbery suspects was a black male who was 5'8" with a heavy-set build. The suspects were wearing dark clothing and one had bright sneakers. When the officers tracked the stolen cell phone to the Cypress Grove Apartments, they encountered Thompson. Thompson was a black male who was approximately 5'8" and weighed 210 pounds. He was wearing primarily dark clothing and had black and orange sneakers. Thompson was very close to the GPS location of the stolen phone. Under the totality of the circumstances, Thompson was thus a plausible match, and perhaps even a strong match, for the robbery suspect.[3] A reasonable officer in the same circumstances as Wengert would have believed he had probable cause to arrest Thompson.

Taffe next argues that Wengert violated Thompson's constitutional rights by using excessive deadly force against him. Apprehending a suspect through the

3. Taffe argues that officers should have known that Thompson did not match the robbery suspect because Thompson had distinguishing characteristics—such as gold teeth and scars—and the officers were affirmatively told that the suspects did not have such characteristics. The dispatch audio, however, states that the victims could not provide distinguishing characteristics for the suspects. The officers did not have affirmative knowledge that suspects should *lack* distinguishing characteristics, and thus there was no reason for them to conclude that Thompson did not match the description of the robbery suspect.

use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). An officer may use deadly force against a person he reasonably perceives as posing an imminent threat of serious physical harm to an officer or others. *Arrugueta*, 415 F.3d at 1256; *see also Hammett v. Paulding Cty.*, 875 F.3d 1036, 1048 (11th Cir. 2017) (explaining that an officer may use deadly force when he reasonably believes that his own life is in peril).

Taffe alleges that Thompson was unarmed on the night of the shooting and thus could not fire the first shot. Taffe further asserts that Wengert (or other deputies) planted a gun at the scene after the shooting.[4] If true, Wengert would not be entitled to qualified immunity or summary judgment on Taffe's excessive force claim. But to preclude summary judgment, Taffe cannot rely on "mere allegations" in her pleadings, and instead must put forward evidence that creates a *genuine* dispute of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Taffe has not met this burden.

Taffe argues that, contrary to Wengert's testimony, Thompson was not armed that night. In support, she offers deposition testimony from Imani Key, a friend of Thompson, who testified that someone named Nate told

4. Taffe's Amended Brief implied that Wengert himself planted the gun near Thompson's body. At oral argument, Taffe's counsel maintained that Deputies Koutsofios and Yoder planted the gun, and that Wengert planted the casing.

her that he did not see Thompson with a gun. Nate did not testify. Taffe also offers deposition testimony from Rodney Moss, another friend of Thompson, as definitive proof that Thompson did not have a gun. Moss testified that earlier on the day of the shooting, he did not see Thompson with a gun. Moss also stated, however, "[a]nything after that, I wasn't there so I wouldn't know."

Key's testimony is inadmissible hearsay. We "may consider a hearsay statement in passing on a motion for summary judgment [only] if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012) (internal quotation omitted). Taffe fails to explain how Key's testimony could be reduced to admissible evidence at trial, and we therefore decline to consider it. Additionally, Moss's testimony indicates only that Thompson was unarmed earlier that day. Taffe therefore has not put forward any admissible testimony—credible or not—that Thompson was not armed on the evening of the incident.

Taffe also argues, contrary to Wengert's testimony, that Thompson did not fire the first shot. In support, she offers testimony from some apartment residents who do not remember hearing a single defining shot, only a general barrage of gunfire. Officer Weeks also testified that he only remembered hearing general gunfire. In addition, no apartment resident testified that they remembered hearing Wengert telling Thompson to drop a gun. Wengert, on the other hand, presented testimony from officers and an apartment resident who remember

hearing a defining shot before the rest of the gunfire broke out.

Presented alone, these conflicting accounts would likely be sufficient to establish a genuine dispute that Thompson did not fire at Wengert. But the audio of the shooting resolves these conflicting accounts. The audio captures one or two initial shots, a call over the radio of "shots fired," someone—presumably Wengert—shouting "put the gun down," and *then* a barrage of gunfire.

Taffe finally alleges that Wengert planted a gun at the scene after the shooting. Wengert testified that after the shooting, he left the hallway and moved his car around to the side of building where the incident occurred. Taffe strongly implies that when Wengert did so, he obtained a new gun and casing, swiped the gun onto Thompson's hand to pick up Thompson's DNA, and dropped the gun in the hallway.[5] Taffe argues that Wengert had time to execute this plan because the deputies staged EMS outside and prevented EMS from treating Thompson until Wengert could finish planting the gun. Moreover, Taffe argues that the other officers never saw the gun near Thompson, and instead the officers only saw the gun "in the middle of the hallway."[6]

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5. At oral argument, however, Taffe's counsel maintained that Deputies Koutsofios and Yoder planted the gun, and that Wengert planted the casing.

6. Contrary to Taffe's characterization, Officer Michel testified that immediately after the shooting, he saw the gun "a couple of feet away" from Thompson. Officer Michel also stated that the gun was "in the middle of the hallway," but this is consistent with the gun

After careful review, we find that the record evidence contradicts Taffe's version of events. Every law enforcement officer who had an opportunity to see the scene testified that they saw the gun next to or relatively near Thompson immediately after the shooting.[7] Moreover, there is no evidence that deputies prevented EMS from treating Thompson to give themselves time to plant a gun. EMS records show that fire rescue made their way towards Thompson approximately one minute after arriving on the scene. They began treating Thompson's injuries another minute later.

In their depositions, the law enforcement officers—including those unaffiliated with the Broward Sheriff's Office—explicitly refuted the allegation that anyone planted a gun at the scene. Officer Weeks, who had never met Wengert before that night, testified that if someone had planted a gun, he would have considered such behavior to be a crime and he would have reported it.

Ultimately, the allegation that Wengert or another deputy planted a gun in the hallway, is, at best, speculation. And "[a]lthough all reasonable inferences are to be drawn in favor of the nonmoving party, an inference based on

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being close to Thompson, as Thompson was shot and went down in the middle of the hallway.

7. We acknowledge Taffe's argument that the officers' testimony about the placement of the gun immediately after the shooting is not perfectly consistent. For example, one remembers the gun a "couple feet away from Thompson," another about 10 feet, and another 15-20 feet. We find this discrepancy insufficient to preclude summary judgment in the face of all other evidence.

speculation and conjecture is not reasonable." *Hammett*, 875 F.3d at 1049 (internal quotation omitted).

To preclude summary judgment, Taffe must go beyond the allegations in her pleadings and put forward evidence that creates a genuine dispute of material fact. *Liberty Lobby*, 477 U.S. at 248. But "[a] genuine dispute requires more than some metaphysical doubt as to the material facts." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009) (per curiam) (internal quotation omitted). Instead, a genuine dispute arises when "the evidence is such that a reasonable jury could find for the nonmovant." *Hammett*, 875 F.3d at 1049. Here, no reasonable jury could accept Taffe's version of events based on the evidence in the record.[8] The district court's denial of qualified immunity relied largely on Taffe's allegations, not the evidence in the record. The evidence instead supports Wengert's version of the facts: Thompson was armed, fired the first shot, and only then did Wengert return fire.

Officers may use deadly force against individuals they reasonably perceive pose an imminent threat of serious physical harm to the officers or others. *Arrugueta*, 415 F.3d at 1256. Under that standard, Wengert did not use excessive force. Wengert is thus entitled to qualified immunity and summary judgment on this claim.

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8. This does not mean that a reasonable jury could never conclude that an officer planted a gun to cover up the shooting of an unarmed citizen. But a reasonable jury could not accept Taffe's theory because the record evidence does not support Taffe's version of events.

C. State Law Assault and Battery Claim

Taffe also sued Wengert under Florida law for assault and battery. The district court denied summary judgment on this claim.

"Pursuant to Florida law, police officers are entitled to a presumption of good faith in regard to the use of force applied during a lawful arrest, and officers are only liable for damage where the force used is 'clearly excessive.'" *Davis v. Williams*, 451 F.3d 759, 768 (11th Cir. 2006) (quoting *City of Miami v. Sanders*, 672 So. 2d 46, 47 (Fla. 3d DCA 1996)). An officer in Florida is also entitled to use deadly force when "he or she reasonably believes [such force] to be necessary to defend himself or herself or another from bodily harm while making the arrest." Fla. Stat. § 776.05(1). Because we have already concluded that Wengert's force was objectively reasonable under the circumstances, we reverse the district court and grant summary judgment to Wengert on this claim.

D. State Law Negligent Hiring and Retention Claim

Taffe sued Sheriff Israel under Florida state tort law for the negligent hiring, supervision, and retention of Wengert, resulting in Thompson's wrongful death. The district court denied summary judgment on this claim.

To succeed on a negligent hiring or retention claim, the plaintiff must demonstrate, among other things, that the employee committed an underlying willful tort. *See,*

e.g., *Magill v. Bartlett Towing, Inc.*, 35 So. 3d 1017, 1020 (Fla. 5th DCA 2010). Because Taffe has not done so, these claims cannot succeed as a matter of law. Accordingly, we reverse the district court and grant summary judgment to Sheriff Israel on this claim.

E. Supervisory Liability and Municipal Liability Claims

Finally, Taffe sued Sheriff Israel in both his individual and official capacities for the negligent hiring, supervision, and retention of Wengert, resulting in Thompson's wrongful death. The district court denied summary judgment on both claims.

"Supervisory liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990). And "to impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004).

Because Taffe has not established that Thompson's constitutional rights were violated, neither the supervisory liability claim nor the municipal liability claim can succeed as a matter of law. We thus reverse the district court

and grant summary judgment to Sheriff Israel and the Sheriff's Office on both claims.

IV. Conclusion

Thompson's death was undoubtedly tragic. But no reasonable jury could accept Taffe's theory based on the record evidence. Allowing such a case to proceed to trial would "stretch the summary judgment standard far beyond its breaking point." *Hammett*, 875 F.3d at 1048.

Accordingly, we reverse the judgment of the district court and grant qualified immunity and summary judgment to Deputy Wengert, Sheriff Israel, and the Sheriff's Office on all claims.

REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JANUARY 31, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61595-Civ-COOKE/TORRES

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Plaintiff,

vs.

GERALD E. WENGERT AND SCOTT J. ISRAEL,

Defendants.

January 31, 2018, Decided
January 31, 2018, Entered on Docket

ORDER ON MOTION FOR SUMMARY JUDGMENT

This action arises from a police shooting that resulted in the death of a young black man. Plaintiff Donnett M. Taffe, Personal Representative of the Estate of Steven Jerold Thompson, deceased, brings suit against the shooter, Defendant Gerald E. Wengert, in his official capacity as a deputy sheriff for the Broward County Sheriff's Office ("BCSO"). Plaintiff also asserts claims

against Defendant Scott J. Israel, both individually and in his official capacity as Broward County Sheriff. I have jurisdiction under 28 U.S.C. §§ 1331 and 1367.

Pending is Defendants' Joint Motion for Summary Judgment. (ECF No. 102). For the reasons that follow, I deny the Motion.

I. BACKGROUND

Wengert began his career as a law enforcement officer in 1999 with the Cooper City Police Department ("CPD"), prior to its merger with BCSO in 2004. (ECF No. 100 ¶¶ 1-2). Before hiring Wengert, CPD screened and interviewed him, and required him to pass various tests, including psychological examinations and a polygraph. (*Id.* ¶ 3). Wengert also submitted to a Florida Department of Law Enforcement background investigation. (*Id.* ¶ 4). According to Defendants, nothing CPD learned about Wengert during the hiring process called his fitness for the job into question. (ECF No. 102 at 17-18).

Now a deputy for BCSO, Wengert regularly participates in training courses and in-service training (ECF No. 100 ¶ 9), and earns consistently high marks in his performance evaluations. (*Id.* 100 ¶ 5). One evaluator noted that Wengert "is an excellent police officer and . . . is a pleasure to supervise." (ECF No. 100-7 at 42). Another commented that Wengert is an "exemplary employee" who presents a "positive image to the community, businesses, and internal departments." (ECF No. 100-7 at 14, 16). Indeed, according to Defendants, Wengert has received

internal commendations and unsolicited praise from the community throughout his service at CPD and BCSO. (ECF No. 100 ¶¶ 7-8).

But Wengert's record as a deputy sheriff is not immaculate. Between 2004-2014, he was involved in more than seventy documented use-of-force incidents, eight of which resulted in Internal Affairs ("IA") investigations.[1] (ECF No. 121-8). He was suspended from July 2012 to May 2013 after being charged with falsifying records, official misconduct, and battery.[2] (ECF No. 120 ¶ 5). He was suspended again in June 2015 pending a State Attorney's investigation into a use-of-force incident that resulted in injuries to a suspect. (*Id.*). In both instances, however, he was cleared of wrongdoing and reinstated. (*Id.*).

Prior to the shooting, BCSO had an Early Intervention Program ("EIP") which required IA to provide written notice to command-level staff "[w]hen employees are identified as being involved in three or more incidents in three months or five incidents in one year." (ECF No. 121-22 at 5). "The EIP report makes no conclusions or determinations concerning job stress, performance problems, or validity of any pending or active investigations of· misconduct. The report is designed as a resource to assist supervisors in evaluating and guiding employees." (*Id.*). In theory, command-level staff reviews the EIP report, discusses it with the involved employee, and

1. In each instance, BCSO found Wengert's conduct to be compliant with BCSO policies. (ECF No. 120 ¶ 5).

2. *State v. Gerald Wengert*, No. 12-10446CF10A.

suggests, in writing, intervention options to higher-ups. (*Id.*). According to Plaintiff, IA issued seven EIP reports about Wengert between 2005 and 2015. (*Id.*). Despite those warnings, no one at BCSO intervened to disrupt Wengert's alleged pattern of misconduct. (*Id.*)

On June 5, 2014, Wengert and several other BCSO deputies were responding to a dispatch call regarding a suspected armed robbery in Lauderhill, Florida. (ECF No. 100 ¶ 29-30). Dispatch provided the deputies with descriptions of the suspects based on information gathered from the victims. (*Id.* ¶ 31). "Subject #1 was described to be in his 20s, [5'9" to 5'10"], 160-170 pounds, low cut wearing dark shirt with dark shorts," and "Subject #2 was described to be 20-30 [years old, 5'8" to 5'9"], 190-200 pounds, also low cut, dark shirt with dark shorts and bright shoes possibly orange." (*Id.*).

Two cell phones — a Sprint phone and an iPhone — were stolen during the robbery. (ECF No. 120 ¶ 32). Using cell-phone tracking software, BCSO located the Sprint phone in Pembroke Pines, some nineteen miles from the crime scene. (*Id.*). The iPhone, on the other hand, was at Cypress Grove Apartments, just four miles away. (*Id.*) The deputies converged on that location to investigate. (*Id.*).

Once on site, the deputies began a search of the apartment complex. (ECF Nos. 100 ¶ 34, 120 ¶ 34). One of the deputies tracking the iPhone observed that it was transmitting from the center of a parking lot in the southern part of the complex. (ECF No. 120 ¶ 35). When the deputies arrived at the south parking lot, they

observed two people standing in the area of the iPhone signal. (ECF Nos. 100 ¶ 35, 120 ¶ 35). As the deputies approached them, they saw Thompson, who was at the complex visiting a friend, walk out one of the buildings. (ECF Nos. 100 ¶ 36, 120 ¶ 35). Wengert announced himself as a police officer ordered Thompson to stop. (ECF No. 100 ¶ 36).

Thompson was a twenty-six year old black male standing 5'6" tall and weighing 210 pounds. (ECF Nos. 75 ¶ 47, 120 ¶ 36). He had a moustache and beard, numerous tattoos, a noticeable abrasion-type scar along the left side of his chin and his front four teeth were capped in gold. (ECF Nos. 75 ¶ 47, 120 ¶ 36). He was wearing a black, sleeveless tank top and oversized athletic shorts. (ECF Nos. 75 ¶ 47, 120 ¶ 36). The shorts had a large white diamond design with a wide orange border that ran from the waistband to the hem on each side of the garment. (ECF Nos. 75 ¶ 47, 120 ¶ 36). He also was wearing a baseball cap with large silver letters spelling AKOO on the front and a pair of Nike Airmax shoes that were predominately black and orange. (ECF Nos. 75 ¶ 47, 120 ¶ 36).

When Thompson saw the deputies, he turned around and reentered the building. (ECF Nos. 100 ¶ 36, 120 ¶ 36). Wengert claims Thompson also reached into his pants for what Wengert assumed to be firearm. (*Id.*). Wengert and another deputy pursued Thompson into the building, while other deputies took up positions outside. (ECF Nos. 100 ¶ 37-40, 120 ¶ 37-40).

Inside the building, Wengert encountered Thompson in a corridor and opened fire.[3] (ECF No. 75 ¶ 51, 120 ¶¶ 37-40). In total, Wengert fired twenty-five rounds, which required him to reload. (ECF No. 75 ¶ 55, 120 ¶ 42). He hit Thompson eight times from behind. (ECF No. 75 ¶ 52, 120 ¶ 43). One shot shattered Thompson's femur and caused him immediately to fall. (ECF No. 120 ¶ 43). Wengert fired the lethal ninth shot while Thompson was on the ground. (*Id.*). It entered through his scrotum, perforating his left testicle, the abdominal wall, liver, diaphragm, lung, and ended up in his armpit. (ECF No. 75 ¶ 54, 120 ¶ 43). Thompson died at the hospital later that night. (ECF No. 75 ¶ 60).

Israel travelled to the scene early the next day to initiate an investigation. (*Id.* ¶ 62). According to Plaintiff, the investigation was incomplete and designed to cover up Wengert's misconduct. (*Id.* ¶ 64). She alleges that Israel relied exclusively on Wengert's subjective justification for his actions, and ignored any evidence that did not support Wengert's version of events. (*Id.* ¶ 64). As a result, Plaintiff argues, "Wengert was not prosecuted for the killing of an unarmed man." (*Id.* ¶ 74).

Plaintiff brought this action on May 26, 2016 in Florida state court. (ECF No. 1-1). Defendants removed (ECF No.

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3. Defendants claim that Wengert and Thompson "exchanged gun fire" and were in a "fire fight." (ECF No. 100 ¶ 41). Plaintiff disputes that assertion, arguing that Thompson was not even armed when Wengert shot him. (ECF Nos. 75 ¶ 49, 120 ¶ 44). She points to the fact that the only gun investigators found in the corridor was fifty-one feet from Thompson's body. (ECF No. 120 ¶ 43).

1), and Plaintiff filed an Amended Complaint (ECF No. 75) stating five claims for relief:

> **Count I**: State-law assault and battery claim against Wengert, in his official capacity, for unlawfully shooting Thompson (*Id.* ¶¶ 82-85);
>
> **Count II**: Claim under 42 U.S.C. § 1983 against Wengert, in his official capacity, for unlawfully shooting Thompson (*Id.* ¶¶ 86-90);
>
> **Count III**: State-law tort claim against Israel, in his official capacity, for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death (*Id.* ¶¶ 91-101);
>
> **Count IV**: Claim under 42 U.S.C. § 1983 and state law against Israel, in his individual capacity, for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death (*Id.* ¶¶ 102-109); and
>
> **Count V**: Claim under 42 U.S.C. § 1983 against BCSO for negligent hiring, supervision, and retention, resulting in Thompson's wrongful death (*Id.* ¶¶ 110-23).

Defendants seek summary judgment on all Counts. (ECF No. 102).

Appendix B

II. STANDARD OF REVIEW

Summary judgment "shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642 (11th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)) (internal quotations omitted); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). Thus, the entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

"The moving party 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). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Id.*

Rule 56 "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Thus, the

nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (internal quotation marks omitted).

"A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Damon*, 196 F.3d at 1358. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Abbes v. Embraer Servs., Inc.*, 195 F. App'x 898, 899-900 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

When deciding whether summary judgment is appropriate, "the evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party." *Bush v. Houston County Commission*, 414 F. App'x 264, 266 (11th Cir. 2011).

III. DISCUSSION

Defendants seek summary judgment on four grounds: (1) Wengert is entitled to qualified immunity (Counts I & II); (2) Israel, in his official capacity, was not negligent in implementing hiring, supervision, and retention policies at BCSO (Count III); (3) Israel, in his individual capacity, was not negligent in hiring, supervising, or retaining Wengert (Count IV); and (4) there can be no municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (Count V).

Appendix B

A. Wengert: Qualified Immunity (Counts I & II)

Wengert claims he is entitled to qualified immunity. "Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "Qualified immunity offers 'complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (quoting *Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001)).

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). To receive qualified immunity, a public official must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (citation omitted). The burden then shifts to the plaintiff to show that qualified immunity is not appropriate. *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) ("Once an officer or official has raised the defense of qualified immunity, the burden of persuasion as to that issue is on the plaintiff.").

Appendix B

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (1977), the Supreme Court set forth a two-part test for evaluating a claim of qualified immunity. As a "threshold question," a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Lee*, 284 F.3d at 1194 (quoting *Saucier*, 533 U.S. at 201); and then, if a constitutional right would have been violated under the plaintiff's version of the facts, the court must determine "whether the right was clearly established." *Lee*, 284 F.3d at 1194. This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.*; *see also Marsh v. Butler County*, 268 F.3d 1014, 1031-33 (11th Cir. 2001) (en banc).

Here, as Plaintiff herself concedes, the issue "is not whether [Wengert] had the right to make arrests, it [is] the manner in which he made arrests or, in this case, killed a citizen, that is at the heart of this lawsuit." (ECF No. 126 at 10-11). There is no question that Wengert was acting within his discretionary authority as a police officer at all times relevant to this action. *See Lee*, 284 F.3d at 1194 (in excessive force case, "there can be no doubt that [the officer] was acting in his discretionary capacity when he arrested [the plaintiff]."). The issue, then, is whether the arrest was lawful.

Plaintiff argues that the arrest violated Thompson's constitutional rights under the Fourth and Fourteenth Amendments. Defendants counter that Wengert had probable cause to make the arrest, and that the force he used was permissible:

> Thompson refused to answer questions and obstructed the lawful investigation which Deputy Wengert was conducting concerning an armed robbery and then upon firing at Deputy Wengert and wielding a firearm at Deputy Wengert, Deputy Wengert had probable cause to arrest Mr. Thompson. Upon Mr. Thompson fleeing from arrest, Deputy Wengert lawfully pursued Mr. Thompson. During the course of the pursuit, Mr. Thompson shot at Deputy Wengert and Deputy Wengert lawfully responded with force including deadly force and acted in self-defense.

(ECF No. 102-5).

If I accepted Wengert's account as true without further inquiry, qualified immunity plainly would apply. Thompson fit the robbery suspects' descriptions, fled police to avoid arrest, and shot at Wengert. Those acts would be more than sufficient to establish probable cause. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (probable cause exists when suspect threatens officer with weapon). As for the use of deadly force, it is well settled that a police officer can use such force when he feels he or another person in under imminent threat of severe bodily harm or death. *See, e.g., McCormick v. City of Ft. Lauderdale*, 333 F.3d 1234, 1246 (11th Cir. 2003). In other words, if Thompson was shooting at Wengert, Wengert had every right to shoot back.

But Plaintiff disputes almost every aspect of Wengert's story. She contends, *inter alia*, that Thompson had nothing to do with the robbery, did not fit the robbery suspects' descriptions, did not flee arrest, was not armed, and did not shoot at Wengert. Under those facts, there would have been no probable cause for Thompson's arrest, no legal reason for Wengert to shoot him, and therefore no qualified immunity.

Of course, a third possibility exists: perhaps neither side's version of events is completely accurate, and the truth lies somewhere in between. Clearly, questions of material fact remain precluding summary judgment in Wengert's favor on Counts I & II. I will revisit Wenger's qualified immunity claim after trial with the benefit of a complete record.

B. Israel: Official Capacity (Count III)

Count III alleges that Israel, as Broward County Sheriff, was negligent in implementing hiring, supervision, and retention policies at BCSO. "To establish a claim for negligent hiring, supervision and/or retention, a plaintiff must prove that the employer owed a legal duty to the plaintiff to exercise reasonable care in hiring and retaining safe and competent employees." *Spadaro v. City of Miramar*, 2013 U.S. Dist. LEXIS 16714, 2013 WL 495780, at *13 (citing *Magill v. Bartlett Towing, Inc.*, 35 So. 3d 1017, 1020 (Fla. Ct. App. 2010)). "Additionally, the employer's failure to investigate or take corrective action 'must be the proximate cause of the plaintiff's harm,' and there must be 'a connection and foreseeability between

the employee's employment history and the current tort committed by the employee.'" *Blue*, 2011 U.S. Dist. LEXIS 63159, 2011 WL 2447699, at *4 (citations omitted).

Here, setting aside whether Israel was negligent in implementing hiring, supervision, and retention policies at BCSO, a question of fact remains as to whether Wengert committed a tort against Thompson. If Wengert was faultless in the shooting and there was no tort, then Plaintiff has no claim against Israel. As discussed above, whether Wengert was at fault turns at least in part on whether Thompson was firing a gun at him. *See supra* Part III.A. That question, among others, is a matter of vigorous dispute between the parties. I therefore decline to grant summary judgment as to Count III.

C. Israel: Individual Capacity (Count IV)

Count IV is a § 1983/state law wrongful-death claim against Israel, in his individual capacity. Federal law is silent on the question of whether a decedent's legal representative can bring a section 1983 claim for the decedent's death. *See Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014). Under 42 U.S.C. § 1988, when federal law is "deficient" in the provision of suitable remedies, state statutory or common law applies, unless it is inconsistent with the Constitution or federal law, in which case that state statutory or common law does not apply. *See Sharbaugh v. Beaudry*, 267 F. Supp. 3d 1329, 1329-35 (N.D. Fla. 2017) (applying state statute to § 1983 wrongful death claim). I therefore look to Florida's wrongful death statute, Fla. Stat. § 768.19, to assess

Count IV. Section 768.19 creates a cause of action when "the death of a person is caused by the wrongful conduct, negligence, default, or breach of contract or warranty of any person."

Here, Plaintiff asserts that Israel was "deliberately indifferent"[4] about (1) "his duties in that he either expressly or impliedly acknowledged and assented to the failure to train, supervise, control or otherwise screen employees of [BCSO] including, but not limited to, [Wengert], for dangerous propensities, lack of training and/or skill or other characteristics making said officers and employees unfit to perform their duties," and (2) "the safety of the public, including [Thompson], by failing to remedy these problems, even though he had notice of them." (ECF No. 75 ¶¶ 106-09). Plaintiff argues Israel's alleged deliberate indifference violated § 1983 and state law.

Plaintiff claims Israel is liable as Wengert's supervisor. "Supervisor liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *Braddy v. Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998)

4. To demonstrate a claim of deliberate indifference, a plaintiff must show: (1) subjective knowledge of a risk of serious harm due to the lack of certain policies, or the failure to adhere to existing policies; (2) disregard of that risk; and (3) conduct that is more than gross negligence. *See Franklin v. Curry*, 738 F.3d 1246, 1250 (11th Cir. 2013) (citing *Goodman v. Kimbrough*, 718 F.3d 1325, 1331-32 (11th Cir. 2013) (internal quotation marks omitted)).

(quoting *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)). A "causal connection" may exist if a supervisor had the ability to prevent or stop a known constitutional violation by exercising his supervisory authority and he failed to do so. *Keating v. City of Miami*, 598 F.3d 753, 765 (11th Cir. 2010). "The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous." *Braddy*, 133 F.3d at 802.

Here, there is no evidence that Israel personally participated in the shooting. Plaintiff instead argues that the evidence shows a causal connection between the shooting and Israel's alleged indifference about hiring, supervising, and retaining Wengert. Even assuming Plaintiff is correct, and there is a causal connection, she still must prove an underlying constitutional violation or tort, otherwise the claims against Israel fall apart. As there are open questions about the circumstances of the shooting, summary judgment as to Count IV is not warranted.[5]

D. Plaintiff's *Monell* Claim (Count V)

In Count V, Plaintiff seeks to hold BCSO liable for Wengert's alleged misconduct under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611

5. Defendants also argue that Israel is entitled to sovereign immunity. It is well-settled, however, that "[t]he retention and supervision of a [police officer] by a [police department] are not acts covered with sovereign immunity." *Slonin v. City of West Palm Beach*, 896 So. 2d 882, 884 (Fla. Ct. App. 2005).

(1978). In *Monell*, the Supreme Court held that a municipal corporation can be named as a defendant in a § 1983 action. *Id.* at 701. To establish municipal liability under § 1983, a plaintiff must prove that: "(1) his constitutional rights were violated, (2) the municipality had a custom or policy that constituted deliberate indifference to his constitutional rights, and (3) the policy or custom caused the violation of his constitutional rights." *Ludaway v. City of Jacksonville*, 245 F. App'x 949, 951 (11th Cir. 2007) (citing *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)). Thus, as is the case with Counts III and IV, Count V hinges, at least in part, on whether Wengert violated Thompson's constitutional rights. Defendants are therefore not entitled to summary judgment on Count V.

IV. CONCLUSION

The common denominator of Plaintiff's claims is that each requires proof that Wengert committed an unlawful act when he shot and killed Thompson. If he did not, all of Plaintiff's claims fail as a matter of law. It therefore might be beneficial to resolve that issue at trial before moving on to hiring, supervision, and retention issues. If the parties agree with the Court's assessment, they should consider how the trial might be structured to achieve that result. In any event, Defendants' Joint Motion for Summary Judgment (ECF No. 102) is **DENIED**.

DONE and **ORDERED** in chambers at Miami, Florida, this 31st day of January 2018.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 11, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10776-EE

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Plaintiff-Appellee,

v.

GERALD E. WENGERT, INDIVIDUALLY FOR ACTIONS TAKEN IN HIS OFFICIAL CAPACITY AS A DEPUTY SHERIFF FOR THE BROWARD COUNTY SHERIFF'S OFFICE, SCOTT ISRAEL, INDIVIDUALLY, SCOTT J. ISRAEL, IN HIS OFFICIAL CAPACITY ONLY,

Defendants-Appellants.

June 11, 2018, Decided

Appeal from the United States District Court
for the Southern District of Florida.

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

The second issue raised in the jurisdictional question that we issued, concerning whether we have jurisdiction

over the portion of the district court's January 31, 2018 order denying summary judgment on the official-capacity claims against Scott J. Israel, is CARRIED WITH THE CASE. This appeal may proceed as to the denial of qualified immunity as to Mr. Israel, in his individual capacity, and as to defendant Gerald E. Wengert. *See Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *Koch v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

A final determination regarding jurisdiction will be made by the panel to whom this appeal is submitted for a decision on the merits.

APPENDIX D— DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 11, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10776-EE

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Plaintiff-Appellee,

v.

GERALD E. WENGERT, INDIVIDUALLY FOR ACTIONS TAKEN IN HIS OFFICIAL CAPACITY AS A DEPUTY SHERIFF FOR THE BROWARD COUNTY SHERIFF'S OFFICE, SCOTT ISRAEL, INDIVIDUALLY, SCOTT J. ISRAEL, IN HIS OFFICIAL CAPACITY ONLY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Appendix D

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

BEFORE: WILSON, JILL PRYOR, and SUTTON,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:
/s/_____
UNITED STATES CIRCUIT JUDGE

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* Honorable Jeffrey S. Sutton, United States Circuit Judge for the Sixth Circuit, sitting by designation.