No. 19-

IN THE

# Supreme Court of the United States

MICHAEL HUNTER;
MARTIN CASSIDY; CARL CARSON,

*Petitioners,*

*v.*

RANDY COLE; KAREN COLE; RYAN COLE,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

On November 28, 2016, this Court granted the officers' first petition for writ of certiorari, vacated the opinion of the Fifth Circuit denying qualified immunity, and remanded the case for reconsideration in light of *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (*per curiam*). After remand, a majority of the Fifth Circuit, over dissents by seven judges, continued to deny immunity to Officer Hunter and Lieutenant Cassidy based on the opinion Cole's action of turning, gun in hand and finger on the trigger, toward Officer Hunter posed no threat, and the rationale that no existing factually similar precedent squarely governing the situation the officers encountered was necessary to fairly warn the officers their actions of firing in response to Cole's actions obviously violated clearly established law. The Fifth Circuit also denied qualified immunity to Officer Carson for allegedly causing Cole's pretrial detention in part by inaccurately reporting his perception of the shooting events in violation of the Fourteenth Amendment, even though in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), this Court held such a claim is properly analyzed under the Fourth Amendment. Therefore, the questions presented are:

**I. If the barrel of a gun is not yet pointed directly at an officer, does clearly established federal law prohibit police officers from firing to stop a person armed with a firearm from moving a deadly weapon toward an officer if the officer has not both shouted a warning and also waited to determine whether the imminent threat to life has subsided after the warning?**

**II. Does a police officer who inaccurately reports his perceptions of events during a dynamic shooting encounter violate clearly established rights under the Fourteenth Amendment?**

## PARTIES

Petitioners are Michael Hunter, Martin Cassidy, and Carl Carson.

Respondents are Randy Cole and Karen Cole, individually and as next friends of Ryan Cole.

## RELATED CASES

*Cole, et al v. Hunter, et al*, No. 3:13-cv-02719-O, U.S. District Court for the Northern District of Texas, Dallas Division entered January 24, 2014.

*Cole, et al v. Hunter, et al*, No. 3:13-cv-02719-O, U.S. District Court for the Northern District of Texas, Dallas Division entered December 22, 2014.

*Cole, et al v. Carson, et al*, No. 14-10228 and No. 15-10045, U.S. Court of Appeals for the Fifth Circuit, Judgment entered September 25, 2015.

*Hunter, et al v. Cole, et al*, No. 16-351, Supreme Court of the United States, Judgment entered November 28, 2016.

*Cole, et al v. Carson, et al*, No. 14-10228 and No. 15-10045, U.S. Court of Appeals for the Fifth Circuit, Judgment entered September 25, 2018.

*Cole, et al v. Carson, et al*, No. 14-10228 and No. 15-10045, U.S. Court of Appeals for the Fifth Circuit, Order granting En Banc Review February 8, 2019.

*Cole, et al v. Carson, et al*, No. 14-10228 and No. 15-10045, U.S. Court of Appeals for the Fifth Circuit, Judgment entered August 20, 2019.

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## OPINIONS BELOW

The third opinion of the United States Court of Appeals for the Fifth Circuit, which was en banc (with dissents) is reported as *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (*Cole III*) and reproduced at Appendix A (1a-9a).

The Order of the United States Court of Appeals for the Fifth Circuit granting En Banc review is reported as *Cole v. Carson*, 915 F.3d 378 (5th Cir. 2018) and reproduced at Appendix G (256a-257a).

The second opinion of the United States Court of Appeals for the Fifth Circuit, after remand from this Court, is reported as *Cole v. Carson*, 905 F.3d 334 (5th Cir. 2018) (*Cole II*) and reproduced at Appendix B (92a-117a).

The Order of the Supreme Court of the United States granting the Petition for Writ of Certiorari, is reported as *Hunter v. Cole*, 137 S. Ct. 497 (2016), and reproduced at Appendix C (118a-119a).

The first opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015) (Cole I) and reproduced at Appendix D (120a-173a).

The second opinion and order of the United States District Court for the Northern District of Texas, Dallas Division, is reported as *Cole v. Hunter*, 68 F.Supp.3d 628 (N.D. Tex. 2014) and reproduced at Appendix E (174a-207a).

The first unpublished opinion and order of the United States District Court for the Northern District of Texas,

Dallas Division, can be located as *Cole v. Hunter*, 2014 WL 266501 (N.D. Tex. 2014) and reproduced at Appendix F (208a-255a).

## JURISDICTIONAL STATEMENT

The collateral order doctrine provided jurisdiction to the Court of Appeals for the Fifth Circuit over the District Court orders denying qualified immunity to Officer Carson on January 24, 2014, asserted through a motion to dismiss, and Lieutenant Cassidy and Officer Hunter on December 22, 2014, asserted through a motion for summary judgment. 28 U.S.C. § 1291; *Plumhoff v. Rickard*, 572 U.S. 765, 771, 134 S. Ct. 2012, 2018-2019 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 671-672, 129 S. Ct. 1937 (2009).

On September 25, 2015, a panel of the Fifth Circuit filed an opinion denying qualified immunity to Petitioners. On June 17, 2016, the Fifth Circuit denied Petitioners' petition for rehearing en banc.

On September 15, 2016, Petitioners filed a petition for writ of certiorari, and on November 28, 2016, this Court granted the petition, vacated the Fifth Circuit judgment, and remanded the case to the Fifth Circuit for further consideration under *Mullenix, supra*.

After remand from this Court, on September 25, 2018, a panel of the Fifth Circuit filed an opinion that reinstated the judgment this Court had vacated. On October 9, 2018, Petitioners filed a petition for rehearing en banc and on February 8, 2019, the Fifth Circuit granted the petition.

On August 20, 2019, the Fifth Circuit, sitting en banc, issued an opinion denying immunity to Petitioners.

On November 5, 2019, Petitioners filed an application to extend the time for Petitioners to file a petition for writ of certiorari from November 18, 2019, to December 9, 2019. On November 7, 2019, this Court granted Petitioner's application extending the time to file their petition for writ of certiorari to December 9, 2019.

This Court has jurisdiction over the case now because Petitioners filed this petition for writ of certiorari by December 9, 2019, in accordance with 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### The Fourth Amendment to the Constitution of the United States

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.

### Fourteenth Amendment § 1 to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code Service § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

### A. Procedural History

Ryan Cole was injured in an armed encounter Cole initiated with police. Cole's parents sued Officer Hunter and Lieutenant Cassidy, alleging they violated Cole's Fourth Amendment right not to be subjected to excessive force. (App. 4a). The Coles also sued Officer Carson, claiming he violated Cole's rights under the Fourth and Fourteenth Amendments by allegedly lying and concealing evidence to protect Officer Hunter and Lieutenant Cassidy, which led to Cole being charged with assault. (App. 4a). The District Court denied Officer Carson's motion to dismiss (App. 247a) and denied Officer Hunter's and Lieutenant Cassidy's motion for summary judgment, rejecting all immunity defenses. (App. 207a).

In its first panel opinion, the Fifth Circuit dismissed appeals of the orders denying summary judgment to Officer Hunter and Lieutenant Cassidy and denying Officer Carson's immunity from a Fourteenth Amendment claim. (App.173a). The first panel reversed only the District Court order denying Officer Carson's immunity from claims under the Fourth Amendment and under *Brady*. (App. 145a, 173a). All three officers filed a petition for rehearing en banc before the Fifth Circuit, but that petition was denied. (App. 258a).

The Officers petitioned for a writ of certiorari, this Court granted the petition, vacated the first panel opinion, and remanded the case to the Fifth Circuit for reconsideration under this Court's decision in *Mullenix supra*. *Hunter v. Cole*, 137 S. Ct. 497 (2016) (App.118a).

On remand, the same Fifth Circuit panel issued a second opinion denying immunity, in which the panel also reinstated its first opinion this Court had vacated (App.105a, 115a-117a). Thereafter, the Fifth Circuit granted the officers' Petition for Fifth Circuit Rehearing En Banc. (App. 256a). The Fifth Circuit, sitting en banc with all fifteen Judges in active service, with the two Senior Judges who participated in the panel opinion, rejected Officer Carson's request for reconsideration of his immunity to the Fourteenth Amendment claim (App. 13a) and, instead of analyzing the case under *Mullenix*, a majority of the En Banc Court, including the two Senior Judges who had participated in the panel opinion, opined the Court lacked jurisdiction to rule on Officer Hunter's and Lieutenant Cassidy's immunity. (App. 26a, 28a, 54a, 58a, 64a and 78a).

**B. Relevant Facts**

Cole was a high school junior diagnosed with obsessive-compulsive disorder. On October 24, 2010, after a quarrel with his parents, Cole took several guns and ammunition from the family garage. Cole had those weapons with him when he visited his friend, Eric Reed Jr., late that night (App.210a). The next morning, Cole again visited Reed, who gained control of a revolver Cole had brought, but Cole warned Reed not to try to take the semi-automatic 9 mm pistol Cole carried because Cole didn't "wanna use it" on Reed. (App. 82a). Reed's father reported this threat to police before the shooting occurred. (App. 82a).

Afterwards, police from two agencies were informed Cole was armed and acting aggressively, officers searched for Cole (App. 30a, 211a). Officer Hunter and Lieutenant

Cassidy were aware Cole had threatened to harm anyone who tried to disarm him (App. 30a, 96a). Records generated by other officers confirm police radio broadcasts of Cole's general location, that Cole was armed, irate, distraught, and had threatened he would shoot anyone who came near him (App. 82a) (ROA.15-10045.1562, 1829) (ROA.15-10045.2063; 15-10045.2069-2070). After Cole left Reed's house, officers saw Cole and ordered him to stop, but Cole refused to comply with commands, including commands to drop the weapon and to stop. (App. 30a, 83a, 96a). Reports of other officers confirm these warnings to Cole. Lieutenant Cassidy and Officer Hunter were aware of these warnings and Cole's refusal to comply with them. (ROA.15-10045.1410, 1563) (ROA.15-10045.2064, 2070). Instead of heeding police warnings, Cole walked away from officers, intermittently placing his gun against his head as Cole walked toward train tracks separated by a wooded area adjacent to Highway 78, a major roadway (App. 84a).

After officers reported seeing Cole enter the wooded area, Officer Hunter and Officer Carson and Lieutenant Cassidy searched the highway side of the woods. Cole emerged from the wooded area by backing through the groundcover within 20 feet of Officer Hunter (App. 84a), who was approximately 100 feet from Cassidy and Carson (App. 213a). Since Cole was not facing the officers when Cole first stepped out of the woods, the officers' initial perception was that Cole was not immediately aware of the officers' presence as Cole exited the wood line. (App. 108a). Still Cole had the gun in his hand and his finger on the trigger. (App. 40a).

No officer fired before Cole had rotated his body, gun in hand, to a 90-degree angle toward Officer Hunter, and

officers fired as Cole was *still turning further toward* Officer Hunter (App. 203a), (ROA.15-10045.563, 1951-55, 3045), all while Cole had a finger on the trigger of his gun and was holding the barrel of his gun pointed upward in the direction of his head (App. 203a; ROA.15-10045.1947, 1950-52, 2508). Cole's body was *facing directly toward* Officer Hunter when the final shot was fired striking Cole while he still held his gun. (App. 31a) (ROA.15-10045.687, 1946, 1952, 1954, 1972-73, 2132). Although standing in different places, Officer Hunter, Lieutenant Cassidy, and Cole all fired their guns virtually simultaneously, over just 2.37 seconds (ROA.15-10045.1951, 2772, 2939). During the simultaneous gunfire, Cole also fired, allegedly involuntarily, and Cole's shot struck the right side of his head in an upward direction. (App. 97a; ROA.15-10045.889, 1942-43). All shots were fired during fewer than three seconds, while Cole, his finger on the trigger, turned toward Officer Hunter. (App. 30a, 31a).

The Coles' law enforcement procedures expert, Timothy Braaten, testified that if an individual is "in the process of pointing [a gun], then it's time to shoot." (ROA.15-10045.1974). Braaten testified further "that a reasonable officer is entitled to fire in self-defense when the suspect is in the process of pointing a firearm at him," (ROA.15-10045.1975), regardless of whether the process of pointing the firearm involved raising the handgun from a lower position to a higher position or higher position to lower position. (ROA.15-10045.1975). According to the Coles' expert, *movement in the process of pointing a gun* reasonably places an officer in fear for his life and justifies firing in self-defense. (ROA.15-10045.1975-1976).

The detective who investigated the shooting testified that Officer Hunter was in immense danger even when

Cole's gun was not pointed directly at Officer Hunter because Cole could suddenly point his gun at the officers before they could respond. (ROA.15-10045.2049-2050). Law enforcement trainer, Albert Rodriguez, testified that Officer Hunter and Lieutenant Cassidy had no other reasonable alternative but to fire when they did, and that waiting longer to fire would not have been a reasonably safe option. (ROA.15-10045.2128-2132, 2772).

*The Coles' Pleading Allegations Against Officer Carson*

Cole alleges Officer Carson lied and stated he saw Cole turn and point his gun at Officer Hunter. (App. 4a). Belying this pleading allegation, the Coles incorporated reports of their expert witnesses in their complaint.[1] In these sworn reports incorporated into the complaint, the Coles' experts identified Officer Carson's actual report, which stated Officer Carson heard gunshots and saw Officer Hunter and Lieutenant Cassidy firing, but Officer Carson *could not see what Cole was doing before the shots were fired* because Officer Hunter blocked Officer Carson's view. (App. 9a n. 17; ROA.15-10045.665, 687-688).

If the incorporated reports are not considered, Cole's claim under the Fourteenth Amendment is based on allegations Officer Carson reported Cole pointed his gun at Officer Hunter prior to the officers firing in defense of Officer Hunter, this alleged inaccurate report was a *lie*

1. The District Court expressly addressed objections to the expert reports and found the reports attached to the pleadings should properly be considered in evaluating the Coles' pleading allegations. (App. 215a).

that resulted in Cole being charged with the felony crime of aggravated assault on a public servant in addition to the crime of unlawfully carrying a weapon. As a result of the assault charge, Cole was placed under house arrest. The assault charge was subsequently dismissed by the District Attorney through a plea bargain on May 8, 2012, whereby Cole judicially confessed his guilt (ROA.15-10045.756-758) and Cole received deferred adjudication for the weapons charge. (App. 14a).

## SUMMARY OF THE ARGUMENT

According to the Coles' shooting reconstruction expert, after Ryan Cole backed out of the wooded area with his finger on the trigger of a loaded pistol within 20 feet of Officer Hunter, Cole rotated his body to a position at a 90-degree angle to Officer Hunter and continued turning his body to a position in which Cole, gun still in hand, was facing directly at Officer Hunter. The Coles' expert estimated Officer Hunter and Lieutenant Cassidy had three to five seconds to observe Cole's action, assess whether the circumstances presented an imminent threat of serious harm to Officer Hunter, and determine if and when firing was reasonably necessary to stop the threat Cole's actions presented. Two officers, standing 100 feet apart, simultaneously perceived what even the Coles' expert agrees was a real threat, and fired to stop the threat to Officer Hunter's life.

No officer fired until after Cole's conduct placed Officer Hunter's life in peril. The fact the officers' shots did not prevent Cole from completing his armed turn to face Officer Hunter demonstrates the officers did not fire too soon or without reason. All experts in this case agree

an officer cannot effectively stop a deadly threat to life if the officer waits to take action until after an armed assailant is pointing a firearm directly at an innocent victim, because by then it is simply too late for the officer to prevent a victim from being shot. Accordingly, officers are trained they must act to stop an armed aggressor who is moving a firearm toward another *before* the gun is pointed directly at a victim. That Lieutenant Cassidy and Officer Hunter realized simultaneously, from two different locations, the same perceived threat further shows both reacted reasonably under these circumstances; they did not violate clearly established law and are immune from suit.

The Fourth Amendment objective reasonableness standard and qualified immunity must be consistently interpreted with a practical understanding of facts in a meaningful way that provides officers a legitimate opportunity to save innocent lives. It is crucial that courts, in interpreting reasonableness under the Fourth Amendment and immunity, render reliable decisions that can be harmonized with the practical capabilities and needs of officers and the public officers serve.

The webs of mutating arguments the Coles have made, as pointed out by dissenting Judges, and the inconsistent reasoning evidenced by the various judicial opinions in this litigation, reveal a compelling basis for immunity. Realizing immunity protects all but the officer who knowingly acts illegally or plainly incompetently, the bedrock of immunity is fair notice to an officer when he acts that warns the officer his specific conduct in the circumstances the officer encountered is clearly unlawful. The Coles' arguments, like the various conflicting judicial

opinions filed in this case, demonstrate that during the few seconds Officer Hunter and Lieutenant Cassidy had to recognize and react to Cole's actions, no clear consensus of authority existed which prohibited the officers' objectively reasonable responses to the threat, so immunity is appropriate.

*Mullenix* and this court's other controlling precedents support immunity. Failing to comply with this Court's mandate to reconsider the opinion denying immunity, in light of *Mullenix*, and with no controlling authority prohibiting the officers' actions, the Fifth Circuit deprived the officers of immunity, and adopted a dangerous standard that would require officers facing a suspect who is armed and ready to shoot a pistol, who was turning in the direction of a nearby officer, to delay taking defensive action until officers first shout a warning and wait to determine whether the warning convinced the armed person not to shoot an officer or another. This opinion is incompatible with necessary police procedures and this Court's precedent.

The rule of law in the United States is based on the core principle that society relies on officers to protect citizens from threats to their safety. While most people are permitted, and generally encouraged, to flee from peril, officers are expected to confront deadly threats to protect members of the public from harm and from the need to protect themselves. Crucial to the proper function of this system of law is that an officer, who is not allowed to protect his own life and the lives of others, cannot fulfill his role in the justice system or his responsibility to the people who depend on police. Under the Fifth Circuit's opinion, those who are threatened with serious injury

or death by an armed adversary cannot depend on an officer to intervene to protect the innocent until after it is physically too late for the officer to stop a deadly attack.

Similarly, the Fifth Circuit simply refuses to follow this Court's mandate that the Fourth Amendment, not the Fourteenth Amendment, provides the appropriate standard for the claims asserted against Officer Carson. While the Fifth Circuit acknowledged the Fourth Amendment cannot support a claim against Officer Carson, contrary to this Court's controlling precedent, the Fifth Circuit invented a claim under the Fourteenth Amendment. Because the Fifth Circuit refused to comply with this Court's direct mandate and controlling precedent, three public servants come to this Court asking that it grant the petition and apply the law of immunity in accordance with this Court's well-defined precedent.

## REASONS FOR GRANTING THE PETITION

### I. Federal law does not require police officers to delay necessary defensive action until it is too late to stop a lethal threat posed by an armed person moving a firearm in the direction of an officer.

#### A. Instead of reconsidering this case in light of *Mullenix*, the Fifth Circuit doubled down on its rejection of controlling immunity precedent.

Three years ago, Officer Hunter and Lieutenant Cassidy petitioned this Court after the Fifth Circuit denied qualified immunity to the officers based on the same rationale the Fifth Circuit applied in *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014), wherein it identified a claimed

disputed "fact issue" which is "simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims." *Mullenix*, 136 S. Ct. at 307. This Court reversed *Luna* and confirmed that whether the "immediacy of the risk posed" authorized a reasonable officer to fire under settled law is a legal issue the court must decide, not a factual question for a jury. *Id.* at 308. In 2016, Officer Hunter and Lieutenant Cassidy pointed out the Fifth Circuit erred as it had in *Luna* in denying immunity in this case on the general conclusion deadly force violates the Fourth Amendment absent a sufficiently substantial and immediate threat. (App. 134a-139a). This Court rejected that standard as too general for assessing immunity. *Mullenix*, 136 S. Ct. at 308-309. (App. 127a, 128a, 130a, 132a, 137a). In *Mullenix*, this Court also found the Fifth Circuit erred further when it "ignored" cases which showed that Trooper Mullenix's assessment of the threat was reasonable. *Mullinex*, 136 S. Ct. at 311. The Fifth Circuit, citing *Luna*, committed the same error in this case. (App. 134a). This Court granted Officer Hunter's and Lieutenant Cassidy's initial petition, vacated the Fifth Circuit judgment, and remanded this case to the Fifth Circuit for further consideration under *Mullenix*.

After remand, the Fifth Circuit en banc still denied immunity. Instead of applying the standard *Mullenix* reaffirmed, the Fifth Circuit "doubled down" on its rejection of this Court's immunity jurisprudence. (App. 35a, 64a). The Fifth Circuit opinion suggests that court seeks to avoid actually reconsidering the case under *Mullenix*, because the Fifth Circuit denied immunity on the flawed rationale appellate courts lack jurisdiction to correct errors in the district court judgment that led to

the Fifth Circuit opinion this Court vacated, (App. 5a, 14a-26a), even though the district court judgment the Fifth Circuit continues to rely on is rife with the same legal errors this Court corrected in *Luna* in deciding *Mullenix*. (App. 17a, 18a, 127a-139a, 198a-207a). "[D]eciding legal issues of [the sort raised here] is a core responsibility of appellate courts, and requiring [courts] to decide such issues is not an undue burden." *Plumhoff*, 572 U.S. at 773, 134 S. Ct. at 2019.

If factual disputes exist, analysis of immunity is appropriate when, as here, disputes are not material to determining immunity. *Plumhoff*, 572 U.S. 765, 771-773 (2012). Like in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1770 n. 1 (2015), Officer Hunter and Lieutenant Cassidy presented and addressed the facts on appeal in the light most favorable to the Coles. Since the district court based its factual findings on testimony provided by the Coles' experts (App. 206a), Officer Hunter and Lieutenant Cassidy, likewise, accepted that testimony on appeal.

The district court opinion (App. 204a) and every brief Officer Hunter and Lieutenant Cassidy have filed establish that the factual statements the Coles' experts provided and the officers' contentions regarding the legal issue they bring to this Court have remained steadfast. Accepting the testimony of Coles' experts, the decision to fire did not violate settled law because an officer could have an objectively reasonable belief "Cole posed an immediate danger to the Officers." (App. 196a-197a, 203a-205a).

In their initial petition, the officers demonstrated this Court's jurisdiction to decide immunity and this

Court previously exercised jurisdiction over the case. No jurisdictional issue has changed. "Because of the importance of qualified immunity 'to society as a whole,' *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982), [this] Court often corrects lower courts when they wrongly subject individual officers to liability." *Sheehan*, 135 S. Ct. at 1774 n. 3. This Court has jurisdiction and authority to apply its supervisory power to correct the Fifth Circuit opinion that conflicts, on important legal issues, with the decisions of this Court and other courts of appeal. This Court should decide the officers' immunity because the Fifth Circuit failed to do so. *See Hunter v. Bryant*, 502 U.S. 224, 227-29, 534 536-37 (1991).

Identifying the Fifth Circuit's obligation to decide immunity, Fifth Circuit Judge Edith H. Jones, joined by Judges Jerry E. Smith, Priscilla R. Owen, James C. Ho, Stuart Kyle Duncan, and Andrew S. Oldham dissenting from the majority Fifth Circuit en banc opinion and found "the majority here double[d] down on the mistakes that got [the Fifth Circuit] reversed in *Mullenix*." (App. 35a, 64a). Because "[q]ualified immunity is lost if a case is erroneously permitted to go to trial," *Pierson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009), the dissent painstakingly identified the errors in the majority opinion and comprehensively discussed development of immunity from its inception. In contrast to remanding immunity to a jury that is ill-equipped to decide that legal issue, the dissent discussed the rationale underlying immunity that has guided its proper application over the last fifty years.

"[Q]ualified immunity claims raise legal issues quite different from any purely factual issues that might be confronted at trial," which a jury need decide. *Plumhoff*,

572 U.S. at 771, 134 S. Ct. at 2019. A jury's proper function is to judge facts, not assess the legal landscape on which immunity depends. The majority remitted immunity to a jury without identifying for the jury or district court an appropriate legal measure for assessing relevant clearly established law. Special interrogatories cannot cure that impediment. Special jury interrogatories provide no substitute for the judicial standard under which Officer Hunter's and Lieutenant Cassidy's immunity must be judged. "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

The dissent further explained that in evaluating facts from the perspective of a reasonable officer on the scene, judges must "be cautious about second-guessing a police officer's assessment made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477, 132 S. Ct. 987, 991-992 (2012) (*per curiam*). The majority's inexplicable conclusion Cole's actions posed "no threat" to Officer Hunter is not supported by any evidence, guiding principle or authority. (App. 17a-18a). "It is hard to imagine that pointing a [pistol] in any direction would not cause a reasonable officer to fear for someone's life." *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995). In their dissenting opinion, Judges Ho, Oldham, and Smith addressed this crucial point:

> [n]o member of [the Fifth Circuit] court has … confronted a mentally disturbed teenager who is brandishing a loaded gun near a school. And the *Mullenix* Court held that the qualified-

> immunity standard gives [Fifth Circuit judges] no basis for sneering at cops on the beat from the safety of [judicial] chambers.

(App. 70a) (citing *Mullenix*, 136 S. Ct. at 310-11 (citing Brief for National Association of Police Organizations et al. as *Amici Curiae*)).

These "red flags" in the evidence refute the conclusion Cole's actions posed "no threat." (App. 54a-56a). As in *Ryburn*, 565 U.S. at 476-77, 132 S. Ct. at 991-92, the majority's "method of analyzing the string of events that unfolded … was entirely unrealistic." (App. 17a-18a). The dissent discussed that reasonableness of force must be based on "the totality of the circumstances," and "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989).

> The majority opinion overlooks or omits undisputed material facts showing that any reasonable officer would have viewed Ryan Cole as a severe threat. Before the shooting, the defendant officers: (1) were tracking a distraught suspect wandering through the woods armed with a loaded 9mm semi-automatic handgun; (2) who had earlier that morning off-loaded a cache of weapons and ammunition at a friend's house; (3) who had already refused to give up his pistol when confronted by the police; and (4) who had threatened to "shoot anyone who came near him." Cole did not dispute those facts and, indeed, convinced the district court they were irrelevant.

(App. 78a).

Judge Duncan further discussed the district court's error in excluding from analysis necessary contextual facts that skewed the immunity analysis. (App. 79a) (citing *Johnson v. Jones*, 515 U.S. 304, 319, 115 S. Ct. 2151 (1995)). "[T]he prelude to the shooting gives unavoidable context for evaluating the officers' actions." (App. 79a). "That extra work is sometimes imperative, as here, 'to ensure that the defendant's right to an immediate appeal on the issue of materiality is not defeated solely on account of the district court's failure to [appropriately] articulate its reasons for denying summary judgment." (App. 79a) (quoting *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998), *denying reh'g in* 130 F.3d 96 (5th Cir. 1997).

*Mullenix* and *Sheehan*, 135 S. Ct. at 1778 illustrate the error in failing to consider the totality of the circumstances which provide relevant context to a reasonable officer on the scene. This Court analyzed the factual background leading to Trooper Mullenix's decision to fire shots. *See Mullenix*, 136 S. Ct. at 306-307. Just as the contextual facts were significant in evaluating the Trooper's action, a similar analysis of the facts was implicit in this court's mandate returning the instant case to the Fifth Circuit.

The dissent also pointed out that "[t]he calculus of 'reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" (App. 37a-38a) (quoting *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872 (1989)). Officer Hunter and Lieutenant Cassidy had "less time than it took to read the preceding sentence" to observe Cole's action, assess whether the

circumstances presented an imminent threat of serious harm to Officer Hunter, and determine if and when firing was reasonably necessary to stop the threat Cole's conduct presented. (App. 30a). Despite the evidence and this Court's precedent in *Ryburn*, 565 U.S. at 477, 132 S. Ct. at 992, "[w]ith the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent."

The panel majority erred more fundamentally in reaching that purely subjective conclusion without identifying any comparable judicial opinion that fairly warned officers the response to Cole's actions was clearly illegal. (App. 17a-21a). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701 (1999). The bedrock of immunity is fair notice to an officer when he acts warning him his conduct is clearly unlawful in the specific circumstance the officer is facing. *See Brosseau v. Haugen*, 543 U.S. 194, 205, 125 S. Ct. 596 (2004) (*per curiam*). Officer Hunter and Lieutenant Cassidy had no means "'reasonably [to] anticipate […] their conduct may give rise to liability for damages.'" *See Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 3034 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012 (1984)). "To be clearly established [under this Court's precedents], a right must be sufficiently clear that every reasonable offic[er] would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088 (2012). When two officers standing in different locations simultaneously perceive a need to use force to stop a threat, it cannot be said that *every* officer would have understood that that response to Cole's actions was clearly unlawful.

Under the Fourth Amendment's objective reasonableness standard, when an officer "reasonably but mistakenly believed that a suspect was likely to fight back … the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 (2001). "[T]he test for qualified immunity for excessive force 'has a further dimension' in addition to the deferential, on-the-scene evaluation of objective reasonableness." (App. 38a) (quoting *Saucier supra*). "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometime hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206, 121 S. Ct. at 2158 (internal citation and quotation marks omitted). Therefore, "[t]he only legal question that needs to be addressed by this [C]ourt is whether, under the circumstances of this five-second confrontation, *every* reasonable police officer would have reasonably perceived *no* life-threatening danger such that deadly force could be used to incapacitate Cole without a preliminary warning." (App. 34a). "[A]s a matter of law, was it clearly established that officers may not fire on a suspect, armed and ready to shoot a pistol, who is turning in their direction with one of their brethren ten to twenty feet away, unless the gun barrel points at them or they first shout a warning and await his response?" (App. 34a-35a). This Court's precedents provide the correct answer to that legal issue. Clearly established law does not require officers to hesitate to act until it is too late to stop the lethal threat Cole posed when he moved his pistol in the direction of Officer Hunter.

### B. Even when the barrel of a gun is not yet pointed directly at an officer, clearly established law does not prohibit officers from firing to stop an armed person from moving a firearm in the direction of an officer.

Officers cannot reasonably be required to wait and hope for the best until they are staring down the barrel of a gun before an officer may lawfully fire in self-defense or defense of another. (App. 44a, 56a). In *Mullenix*, 136 S. Ct. at 311, this Court explained that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." (quoting *Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007)). The Coles' expert, Braaten, testified that an officer *should not wait* until after a gun is pointed at him to act to defend himself. (ROA.15-10045.974-976). Braaten testified that "it's time to shoot" when a person is "in the process of pointing" his gun at an officer. (App. 197a, 204a) (ROA.15-10045.974). Even when the barrel of Cole's gun was not yet pointed directly at Officer Hunter, clearly established law did not prohibit Officer Hunter and Lieutenant Cassidy from firing to stop Cole from moving his pistol in the direction of Officer Hunter.

The scientific principle that *action* precedes *reaction* necessarily creates a delay in any person's physical ability to stop a deadly threat after the barrel of a gun is pointed at an officer because, by that time, it is simply *too late* for an officer to stop the threat. (App. 23a, 28a). "Contrary to the majority's dangerously unrealistic opinion, the fact is 'action beats reaction' every time." (App. 28a) (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 384 (5th Cir. 2009)). The majority's opinion, that officers may

not lawfully fire to stop an imminent threat to life until after an assailant points a gun directly at an innocent victim, is inconsistent with any decision of this Court, and defies the physiological limits of human performance. Hesitating to act until the barrel of a gun is pointed at an innocent person denies officers a reasonable opportunity to effectively act to protect lives. By the time an aggressor points a gun at another, it is literally *too late* to prevent the bullet from leaving the gun's barrel. Science establishes, and police experience shows, that an officer's *reaction* will be slower than a threatening person's *action* of firing a gun, so to accommodate for that scientific reality an officer must initiate defensive measures in a gunfight *before* a gun is *pointed at* an officer. Explaining this principle, Texas Ranger Jeff Cook testified in *Ontiveros*, 564 F.3d at 384 n. 2, "a tie" to the draw in a gunfight is simply "not good enough." "[A] tie, you die, you know." *Id.* An officer who ties has failed to stop the threat to life. *See id.* "A reasonable officer need not await the glint of steel before taking self-protective action; by then, it is often too late to take safety precautions." *Larsen Ex. Rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (emphasis added). Officers and others will die needlessly if officers must wait to fire until after a gun is pointed at an innocent person. (App. 17a-18a, 204a-206a). This Court has never "held that police officers confronted in close quarters with a suspect armed and ready to shoot must hope they are faster on the draw and more accurate". (App. 28a).

> The increasingly risky profession of law enforcement cannot put those sworn to "serve and protect" to a *Hobson's* choice: place their lives on the line by heroic forbearance or risk their financial security in defense of lawsuits.

> The Supreme Court has repeatedly stated in plain terms that the purpose of qualified immunity is to prevent precisely this quandary.

(App. 28a).

When an assailant is moving a firearm in the direction of an officer, it is not *reasonable* on any level, to expect the officer to wager life with inaction and simply "hope for the best." *Compare Mullenix*, 136 S. Ct. at 311-12; *Scott v. Harris*, 550 U.S. 372, 385, 127 S. Ct. 1769, 1778 (2007); *Estate of Krause v. Jones*, 765 F.3d 675, 681 (6th Cir. 2014); *Oakes v. Anderson*, 494 Fed. Appx. 35, 40 (11th Cir. 2012); *Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2010) (*per curiam*); *Garcia v. Santa Clara County*, 268 Fed. Appx. 588, 589 (9th Cir. 2008); *Elliott v. Leavitt*, 99 F.3d 640, 641-644 (4th Cir. 1996); *Wilson*, 52 F.3d at 1553. Rationally defining objective reasonableness demands officers have a realistic opportunity, informed by the scientific aspects of human perception and reaction time, to take defensive action that could stop an imminent threat of death from a firearm being moved in the direction of an officer or another. (App. 28a). In light of the physical need to act timely, "it is reasonable for police officers to move quickly if delay 'would gravely endanger their lives or the lives of others.'" *Sheehan*, 135 S. Ct. at 1775 (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-299, 87 S. Ct. 1642 (1967)). "This is true even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.'" *Sheehan*, 135 S. Ct. at 1775 (quoting *Heien v. North Carolina*, 574 U.S. 54, 61, 135 S. Ct. 530, 536 (2014). *Id.* "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using

more force than in fact was needed." *Saucier*, 533 U.S. at 205, 121 S. Ct. at 2158.

At best the Fifth Circuit has unfairly exposed Lieutenant Cassidy, Officer Hunter, and all other officers that follow them under comparable circumstances to undue risk of liability for reasonably acting to protect themselves or others. At worst, the Fifth Circuit's opinion could cause an officer to hesitate to act in time to save a life. In between, the Fifth Circuit leaves police instructors without any effective way to train officers to defend themselves or others, and police administrators cannot establish procedures under which officers may comply with the law and preserve the lives of innocents threatened by gun violence.

### C. Clearly established law does not require officers to shout a warning and wait to determine whether an imminent threat to life has subsided after the warning before an officer may lawfully fire to stop an armed person from moving a firearm in the direction of an officer.

The Coles' expert estimated Officer Hunter and Lieutenant Cassidy had three to five seconds while Cole emerged, gun in hand, from the wooded area; for officers to observe Cole's actions, assess whether the circumstances presented an imminent threat of serious harm to Officer Hunter, and determine if and when firing was reasonably necessary to stop Cole's armed threat. These few seconds may have provided time for an officer to shout another warning, but the feasibility of doing so under these circumstances certainly was not, and is not

established beyond debate. No preexisting constitutional authority precluded Officer Hunter or Lieutenant Cassidy from firing to stop Cole from moving his pistol in Officer Hunter's direction, regardless of whether these officers shouted another warning during the moments after Cole backed out of the wooded area with his finger on the trigger of a loaded pistol within 20 feet of Officer Hunter, while Cole rotated his body to a position at a 90-degree angle with Officer Hunter and continued turning his body to a position in which Cole, gun still in hand, was facing directly toward Officer Hunter. (App. 43a, 69a).

The Fifth Circuit opinion is premised on an incorrect interpretation of *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985). *Garner* addressed the very different question of whether an officer violates the Fourth Amendment by shooting, "to prevent escape," an unarmed suspect fleeing away from an officer when the suspect poses no risk of harm to anyone (App. 199a). *Garner*, 471 U.S. at 11, 105 S. Ct. at 1701. The factual circumstances in *Garner* are vastly different from those Officer Hunter and Lieutenant Cassidy met when they fired to protect Officer Hunter, not to prevent Cole's escape. (App. 42a, 69a, 89a). "Nothing in *Garner* prohibits an officer from using deadly force **in self-defense** when the officer has probable cause to believe that the suspect poses a threat of serious physical injury or death to the officer." *Fraire v. City of Arlington*, 957 F.2d 1268, 1280 (5th Cir. 1992) (emphasis added). This Court has rejected the suggestion *Garner* "establish[ed] a magical on/off switch that triggers rigid preconditions [such as verbal warnings before firing] whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382-83, 127 S. Ct. at 1777.

> *Garner* was simply an application of the Fourth Amendment's "reasonableness' test," *Graham*, [490 U.S. at 388], to the use of **a particular type of force in a particular situation**. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S. at 21, by shooting him "in the back of the head" while he was running away on foot, *id.* at 4, and when the officer "could not reasonably have believed that [the suspect] … posed any threat," and "never attempted to justify his actions on any basis other than **the need to prevent an escape,**" *id.* at 21. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts."

*Id.* (emphasis added).

*White v. Pauly*, 137 S. Ct. 548, 551(2017) confirms it is not clearly established that Lieutenant Cassidy and Officer Hunter were prohibited from firing to protect Officer Hunter "without first warning [Cole] to drop the weapon." This Court did not find that Officer White forfeited his immunity on this basis when the Tenth Circuit made the same error the Fifth Circuit has.

Even if the lack of another verbal warning could appropriately be considered a factor to be evaluated among others in analyzing immunity in this context, Lieutenant Cassidy and Officer Hunter could not have been guided by such a requirement when they fired because contrary pre-existing Supreme Court and Fifth Circuit precedent from

*Scott* and *Fraire, supra* demonstrate such an additional warning was not required. *See Brosseau*, 543 U.S. at 200 n.4, 125 S. Ct. at 600.

Furthermore, an officer on the scene could have reasonably believed issuing *additional* verbal warnings would likely be futile or may pose an unreasonable risk of harm to an officer and, thus, was not feasible under the circumstances. Officer Hunter and Lieutenant Cassidy knew Cole's friend had been unsuccessful in disarming Cole, Cole had threatened to harm anyone who tried to take his weapon, and before Cole entered the wooded area, officers ordered Cole to drop his gun but Cole had refused to do so. (App. 40a). Besides, had Lieutenant Cassidy and Officer Hunter further delayed taking defensive action until after they verbalized additional warnings and waited to determine whether or how Cole would respond to more verbal requests like those he previously rejected, an objective officer could have reasonably believed this additional delay in taking defensive action while Cole moved his gun in Officer Hunter's direction could have prevented any officer from having sufficient time to protect Officer Hunter as he stood a few feet from the deadly threat (App. 43a). *See Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997). The impracticality of the requirements the Fifth Circuit has set out are apparent. If the barrel of a gun is moving in the direction of a person, an imminent risk of serious harm exists that calls for immediate defensive action. The unreasonable condition posited by the majority prohibit an officer from reacting to defend himself or others from an imminent deadly threat without first shouting a warning and, thereafter, waiting for an unspecified amount of time to determine whether the imminent threat has subsided.

### D. No body of legal authority informed officers in October 2010 that settled law prohibited officers from firing to stop an armed, mentally unstable, person from moving a firearm in the direction of a nearby officer.

The Fifth Circuit also erred because no established judicial authority has before held that an officer may not lawfully shoot to stop an armed person unless the person has pointed the barrel of a firearm directly at a potential victim, or until after the officer has shouted a warning and awaited evidence, such as the assailant actually shooting, to confirm the warning was ineffective. *Mullenix* and this Court's other immunity decisions do not support the Fifth Circuit's pronouncement of clearly established law. In *Mullenix*, 136 S. Ct. at 308-309, this Court reversed and corrected the Fifth Circuit's "rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'" (quoting *Luna*, 773 F.3d at 725). "[T]his Court has previously considered – and rejected – almost that exact formulation of the qualified immunity question in the Fourth Amendment context." *Id*. at 309. The Fifth Circuit seeks to circumvent *Mullenix*, and the remand order, by re-characterizing the Fifth Circuit's former "sufficient threat" test as a "no threat" test, (App. 16a), and that court purports to support its "no threat" immunity test as a byproduct of "obvious" application of *Garner supra*. (App. 17a, 34a). This Court "to date has *never* identified an 'obvious' case in the excessive force context," (App. 66a), and "*Garner* in no way renders 'clearly established law' a requirement to give a warning, and await the armed suspect's response, before shooting. Nor does it mandate that the suspect's weapon be trained on the officer or

others." (App. 43a). The Fifth Circuit "majority's 'no threat' and 'obvious case' conclusions are contrary to this court's holdings. (App. 41a).

This Court rejected such notions in *Mullenix*. (App. 42a). *Mullenix*, 136 S. Ct. at 309, explained that in *Brosseau*, 543 U.S. at 199, 125 S. Ct. at 589-90, this Court held "that use of *Garner's* 'general' test for excessive force was 'mistaken.'" "The correct inquiry, th[is] Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through […] flight, when persons in the immediate area are at risk from that flight." *Mullenix*, 136 S. Ct. at 309 (quoting *Brosseau*, 543 U.S. at 199-200, 125 S. Ct. at 600)). Whether an officer violates settled law during a shooting incident is an area of the law "in which the result depends very much on the facts of each case," and when no case decision "squarely governs the case," an officer's actions fall within that "hazy border" that provides immunity to the officer. *Brosseau*, 543 U.S. at 201, 125 S. Ct. at 600; *Mullenix*, 136 S. Ct. at 312.

Assuming *arguendo Garner* supports the general proposition Officer Hunter or Lieutenant Cassidy may have violated the Fourth Amendment if Cole posed no threat, "ruling on qualified immunity requires an [additional] analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." *See Saucier*, 533 U.S. at 197, 121 S. Ct. at 2154. This Court emphasized in *Saucier* and "*Anderson* 'that the right the office[er] is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right

must be sufficiently clear that a reasonable office[er] would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156 (quoting *Anderson*, 483 U.S. at 640)). Controlling precedents do not place the conclusion that Officer Hunter or Lieutenant Cassidy used unreasonable force beyond debate, so Officer Hunter and Lieutenant Cassidy are immune.

Other than its bare opinion that *Garner* renders this case an obvious violation of the Fourth Amendment, the only judicial opinion the Fifth Circuit opined supports denial of immunity to Officer Hunter and Lieutenant Cassidy is *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996). This Court has never held circuit court precedent could clearly establish constitutional law, *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n. 8 (2018), and this Court does not require officers to foretell changes in federal law. *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018).

Furthermore, the Fifth Circuit's conclusion its "circuit precedent could constitute clearly established law in these circumstances," was error like in *Kisela*. As the dissent points out, Fifth Circuit law on this issue is anything but clear and generally favors immunity in the situation here. *See Ontiveros*. Assuming a lone circuit court opinion could provide a body of clearly established law that governs Officer Hunter's and Lieutenant Cassidy's actions, *Baker* does not. Sergeant Putnal shot Baker while Baker was seated inside a vehicle. "The only uncontroverted evidence is that there was a good deal of confusion on the beach and that Baker, Jr., at least began to face Putnal from his position in the truck." *Baker*, 75 F.3d at 198. On that evidentiary record "*Baker* cannot support any rule of clearly established law, much less explain what law was

'obvious'" on the facts now before the Court. (App. 51a). Sworn testimony from three witnesses to the shooting testified that **Baker was not even holding a gun when he was shot.** *Id.* **After the shooting, officers recovered a handgun under the passenger's seat of Baker's vehicle.** *Id.* at 193 (emphasis added). Therefore, "a jury could have found Baker was not holding a gun when Putnal killed him." (App. 90a). A jury could not so find as to Cole. Not only was Cole holding a gun in his hand throughout the shooting, he turned much further than did Baker to a position where Cole was facing directly toward Officer Hunter (App. 30a-31a), and no part of a vehicle provided any cover to Officer Hunter (App. 84a). In *Baker,* the Fifth Circuit found that under the facts of that case, a jury could have found Baker was not holding a gun when he was shot. That is not the case for Cole.

Judge Duncan's dissent, joined by Judges Smith, Owen, Ho, and Oldham provides a hypothetical dialog between an officer and his lawyer regarding what a reasonable officer could have learned from *Baker* regarding dealing with a suspect who is holding a gun in his hand. (App. 90a-91a). This example demonstrates that "*Baker* could not have 'established clearly that Cassidy's and Hunter's conduct … was unlawful" when they shot Cole as he emerged from the woods with his finger on the trigger of a loaded gun." (App. 91a quoting App. 18a). "Baker does not come close" for the purpose of "guid[ing] officers in the field" how to respond to Cole's acts. (App. 91a).

The Fifth Circuit failed to identify precedent that demonstrates, beyond debate, that Officer Hunter's or Lieutenant Cassidy's response to Cole's threat was clearly unlawful. No body of legal authority informed officers that

settled law prohibited officers from firing to stop Cole from moving his pistol in Officer Hunter's direction.

## II. Officer Carson could not have known in 2010 the Fifth Circuit would later create a cause of action whereby an officer accused of inaccurately reporting his perceptions of events during a dynamic shooting encounter would violate the Fourteenth Amendment.

The claim against Officer Carson is based on allegations in the body of his complaint that Officer Carson falsely stated Cole turned and pointed his gun at police, and that allegation conflicts with Cole's expert witness reports attached to the complaint which establish Officer Carson actually reported he heard gunshots and saw two officers firing, *but Officer Carson could not see what Cole was doing* when the shots were fired because Carson's view was obstructed by Officer Hunter (ROA.15-10045.665, 687-688). (App. 9a n. 17).

*Manuel*, 137 S. Ct. at 920-21, establishes the claim against Officer Carson must be assessed under the Fourth Amendment. As far back as 1994, five Justices in two opinions remitted to the Fourth Amendment such claims that a person had been held on unfounded charges by a policeman. *Manuel*, 137 S. Ct. at 918 (citing *Albright v. Oliver*, 510 U.S. 266, 271-273 (1994). Probable cause existed to arrest Cole for unlawfully carrying a weapon, a crime Cole confessed to committing. (App. 141a). The Fifth Circuit, therefore, appropriately dismissed the Fourth Amendment claim against Officer Carson in light of *Devenpeck v. Alford*, 543 U.S. 146, 153-154, 125 S. Ct. 588 (2004).

Officer Carson could not have known in 2010, the Fifth Circuit would years later enact a new, Fourteenth Amendment cause of action exposing him to liability on mere allegations he misstated the facts of a dynamic event. (App. 146a, 173a). *Manuel* and *Albright* demonstrate the claim against Officer Carson is not cognizable under the Fourteenth Amendment, but, even if uncertainty exists, as Fifth Circuit Judge Jones suggested comparing *Manuel* with *McDonough v. Smith*, 139 S. Ct. 2149 (2019) (App.29a), with such uncertainty even today, the right involved is not beyond debate and is not "sufficiently clear that every reasonable official would have understood what he was doing violates that right." *See Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (discussing that reviewing Judges could not even agree on the issue).

## CONCLUSION

Controlling precedent and the evidence establish that Officer Carson, Officer Hunter and Lieutenant Cassidy are immune. This Court's supervisory power is necessary because the Fifth Circuit opinion denying that immunity conflicts on important issues with the decisions of this Court and other courts of appeal. Accordingly, Officer Carson, Officer Hunter, and Lieutenant Cassidy ask the Court to grant their petition for writ of certiorari, apply controlling precedent, and enter judgment in favor of all three officers.

Respectfully Submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 20, 2019**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

CARL CARSON,

*Defendant-Appellant.*

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No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

MICHAEL HUNTER; MARTIN CASSIDY,

*Defendants-Appellants.*

Appeals from the United States District Court
for the Northern District of Texas.

*Appendix A*

August 20, 2019, Filed

Before STEWART, Chief Judge, and HIGGINBOTHAM, JONES, SMITH, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and JAMES L. DENNIS, EDITH BROWN CLEMENT, JENNIFER WALKER ELROD, LESLIE H. SOUTHWICK, CATHARINA HAYNES, JAMES E. GRAVES, STEPHEN A. HIGGINSON, GREGG COSTA, and KURT D. ENGELHARDT, Circuit Judges:[1]

**ON PETITION FOR REHEARING *EN BANC* FOLLOWING REMAND FROM THE UNITED STATES SUPREME COURT**

The Supreme Court over several years has developed protection from civil liability for persons going about their tasks as government workers in the form of immunity; not the absolute immunity enjoyed by prosecutors and judges, but a qualified immunity. Today we again repair to issues inherent in the qualification. The doctrine protects at the earliest stage of litigation at which the defense's application is determinable. To that end, courts have developed procedures and pretrial practices, including appellate

1. Judges Higginbotham and Clement, now Senior Judges of this court, are participating as members of the original panel.

review of pretrial denials, otherwise interlocutory and unappealable, and a reply to an answer under Rule 7(a) on order of the district court, particularized to address the defense of immunity in a motion to dismiss or for summary judgment. When those processes do not yield pretrial resolution, as with competing factual narratives, the full reach of qualified immunity gives way to a trial, the first point at which its application is determinable. And in obeisance to constitutional mandate, the worker's defense enjoys a right to the protection of a jury—long a bastion interposed between the state and person, and assured by the Founders. And it signifies that today the district judge has multiple ways to present fully the claims and defenses to a jury to ensure the government worker a full draw upon his immunity defense,[2] including resolution of the competing factual narratives, one of which—or a meld of both—may foreclose liability.[3]

In this case, police officers from Sachse, Texas argue that the district court should have sustained their defense of qualified immunity on their pretrial motions to dismiss and for summary judgment. Ryan Cole and his parents Karen and Randy (collectively "the Coles") sue Officer Carl Carson, Lieutenant Martin Cassidy, and Officer

2. *See* FED. R. CIV. P. 49; Fifth Circuit Civil Pattern Jury Instructions 10.3. *See also McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000).

3. In any treatment of the jury's role in stepping between state-afforded process and an individual defendant, it bears emphasis that the district judge can impanel a jury of at least six and as many as twelve members whose verdict, absent the parties' agreement otherwise, must be unanimous.

Michael Hunter of the Sachse Police Department under 42 U.S.C. § 1983. The Coles allege that the officers violated Ryan Cole's Fourth and Fourteenth Amendment rights during an incident in which Cassidy and Hunter shot Ryan without warning, and then lied about what happened. The officers filed dispositive pretrial motions in the district court, asserting the defense of qualified immunity. The district court denied these motions, concluding that immunity could not be determined at this stage of the proceeding. In *Cole I*, a panel of our court affirmed the denial of summary judgment as to the Coles' Fourth Amendment excessive-force claim and the denial of the motion to dismiss the Coles' Fourteenth Amendment false-charge claim, but reversed denials of the motion to dismiss the Coles' Fourth Amendment and *Brady* claims attacking the alleged fabrication of evidence.[4] The Supreme Court vacated *Cole I*, and remanded for consideration in light of its intervening decision in *Mullenix v. Luna*.[5] On remand, the panel affirmed the denial of summary judgment as to the excessive-force claim. Because the Coles' other claims were unaffected by the reasoning of *Mullenix*, the panel reinstated *Cole I*'s holdings on the fabrication-of-evidence claims. We reheard this case en banc to reconsider disposition of the Coles' excessive-force claim in light of *Mullenix*.

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4. *Cole v. Carson* ("*Cole I*"), 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016).

5. *Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016) (granting certiorari, vacating, and remanding for consideration in light of *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam)).

We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to the Coles' excessive-force claim. Limited by our jurisdiction to the materiality of factual disputes, we AFFIRM the denial of summary judgment on this claim and DISMISS Cassidy and Hunter's appeal. The Coles' remaining claims are unaffected by the reasoning of *Mullenix*, and so, as in *Cole I*, we AFFIRM denial of the motion to dismiss the Coles' Fourteenth Amendment false-charge claim; REVERSE denial of the motion to dismiss the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims based on qualified immunity; and return the case to the district court for trial and resolution of issues consistent with this opinion.

## I

### A.

On October 25, 2010, at around 10:30 a.m., the Sachse Police Department called available units to the neighboring town of Garland, Texas. There police were searching for Ryan Cole, a seventeen-year-old white male, reported to be walking in the neighborhood with a handgun. Officer Michael Hunter responded by proceeding immediately to the Garland neighborhood. In a statement given on the day of the incident, Hunter related that on arriving in the neighborhood, he overheard a civilian stating that Ryan had given up one of his guns, and that he had unsuccessfully tried to persuade Ryan to not keep his handgun. Hunter searched the area, and saw two

officers following Ryan, who was walking away from them holding his gun to his head, approaching a wooded area along Highway 78. Although told by officers that things were under control, Hunter volunteered to go behind the wooded area and possibly intercept Ryan, and suggested that Officer Carl Carson, who was also present, join him.

Four years later, after this litigation had commenced, Hunter for the first time recalled that the civilian he had overheard had described an altercation with Ryan in which Ryan had threatened him. He also then for the first time recalled hearing police-radio transmissions indicating that officers were protecting nearby schools because of "[Ryan]'s dangerous conduct which posed a risk of serious harm to a great many innocent in the vicinity." Hunter otherwise learned nothing "that would cause [him] to believe [Ryan] was violent or wanted to hurt anyone."[6] Hunter understood that Ryan was suicidal, and, four years after the incident, he also raised the possibility that Ryan was using suicide as a pretext to evade the police.

Meanwhile, Lieutenant Martin Cassidy had also heard the original dispatcher's summons. Cassidy called the Sachse Police Department for more information. On the day of the incident, Cassidy swore that he learned "this subject had shown up at [a] residence with a handgun and had just recently been seen walking away." But, four years later, after this litigation had commenced, like Hunter, Cassidy remembered learning more, including

6. In a 2014 declaration, Hunter stated that Cole refused a police officer's order to surrender his weapon. Hunter did not testify that he knew this fact at the time.

that Ryan "had threatened to shoot anyone who tried to take his gun"; had refused an order to drop his weapon; and might be headed for Sachse High School "to possibly engage in violence." Cassidy also decided to intercept Ryan on Highway 78.

The three officers separately arrived at the side of Highway 78 at around the same time. Hunter parked his motorbike and drew his duty weapon; Cassidy also drew his firearm and advised Carson to be ready to use his taser. The officers started walking along the tree line. A steep embankment rose from railroad tracks to the area along Highway 78. Ryan would have to climb this embankment to approach the tree line. Cassidy and Hunter used both the edge of the embankment and the vegetation to conceal themselves as they walked. Hunter also removed his white motorcycle helmet in order to be less conspicuous. Cassidy soon heard a message over the police radio: Ryan was ascending to the tree line. Hunter heard movement in the brush, and signaled to his colleagues.

What occurred next is disputed. Viewing the summary judgment evidence and drawing reasonable inferences in the light most favorable to the non-movant Coles, the district court determined that a reasonable jury could find the following: Ryan backed out from the tree line in front of Hunter and Cassidy, "unaware of the Officers' presence."[7] Ryan was holding his handgun pointed to his

7. *Cole v. Hunter*, 68 F. Supp. 3d 628, 645 (N.D. Tex. 2014). Viewing the evidence in a light most favorable to the Coles, the district court relied on the physical and audio evidence as interpreted by the Coles' expert crime-scene reconstructionist Thomas Bevel

own head, where it remained.[8] "[Ryan] never pointed a weapon at the Officers,"[9] and "never made a threatening or provocative gesture towards [the] Officers."[10] "Officers [Cassidy and Hunter] had the time and opportunity to give a warning" for Ryan to disarm himself.[11] However, the officers provided "no warning . . . that granted [Ryan] a sufficient time to respond,"[12] such that Ryan "was not given an opportunity to disarm himself before he was shot."[13] Hunter and Cassidy then shot Ryan multiple times. Officer Hunter's first shot struck Ryan as he was oriented away from the officers at a 90-degree angle—that is, he was not facing Officer Hunter.[14] Following impact of the first shot, as Ryan's body turned or fell towards Hunter,

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who opined that "no evidence . . . would indicate Mr. Cole was or could have been aware of the presence of the police officers prior to the time he was shot."

8. *Cole*, 68 F. Supp. 3d at 644.

9. *Cole*, 68 F. Supp. 3d at 644; *id.* at 645 ("[T]he evidence supports Plaintiffs' argument that Cole did not know of the Officers' presence.").

10. *Cole*, 68 F. Supp. 3d at 645-46.

11. *Id.* at 645. A reasonable jury could find the officers had up to five seconds during which they could have called out to Cole, sufficient time to make a warning according to Cole's expert.

12. *Cole*, 68 F. Supp. 3d at 645.

13. *Id.* 644-45 ("Cole was shot before he had an opportunity to disarm himself.").

14. *Id.* at 644.

he shot him a second time.[15] As an involuntary reflex to being shot, Ryan pulled the trigger, shooting himself in his temple.[16] But the officers did not know that.

Following the shooting, the three officers remained together at the scene. The Coles allege that during this time the officers conspired to insulate Cassidy and Hunter from liability with a fabricated narrative in which Ryan was facing Hunter and pointed his weapon at the officer, at which point Cassidy and Hunter fired on Ryan in defense. Eventually, members of the Garland Police Department arrived and took control of the scene, but did not follow the standard procedure of separating witnesses to ensure independent recollections. Instead, Cassidy and Hunter were allowed to return to their police station together. Later that day, the officers provided statements to investigators. Hunter stated that he had no chance to issue a command to Ryan. Cassidy and Carson, however, swore that, when Ryan backed out from the brush, they heard Hunter shout a warning to him. Hunter and Cassidy stated that Ryan then turned towards Hunter and pointed his handgun at Hunter, at which point both officers—fearing for Hunter's life—opened fire defensively.[17]

The Dallas County District Attorney presented the officers' narrative to a grand jury, which no-billed the officers and charged Ryan with felony aggravated assault

15. *Cole*, 68 F. Supp. 3d at 644.

16. *Id.*

17. Carson stated he could not see Cole's movement because Hunter obstructed his line of sight.

of a public servant. As a result of the charge, Ryan, incapacitated in intensive care, was placed under house arrest. About a month after the indictment, investigators received a ballistics report from the crime lab. The ballistics analysis, taken together with stippling observed around Ryan's head wound, made clear that Ryan had shot himself in the temple, confounding the officers' account.[18] Dallas County prosecutors then dropped the aggravated assault charge, accepting Ryan's plea to misdemeanor unlawful carry of a weapon, a $500 fine, and forfeiture of his handgun.

Ryan suffered permanent injuries, including cognitive impairment, partial paralysis, and other serious mental and physical disabilities.

**B.**

The Coles brought, inter alia, four Section 1983 claims against the officers. First, they allege a violation of Ryan's Fourth Amendment right against the use of excessive force arising from the shooting. Second, the Coles allege a violation of Ryan's Fourteenth Amendment right against the imposition of false charges arising from the fabrication of evidence. Third, they allege a violation of Ryan's Fourth Amendment right against unreasonable seizures arising from the fabrication of evidence. Fourth, they allege a *Brady* violation arising from the fabrication of evidence. The officers filed a motion to dismiss these

18. Stippling refers to a discoloration of the skin caused by hot gases and residue released immediately around a discharging firearm.

claims under Rule 12(b)(6), asserting qualified immunity defenses. The district court denied the motion in a January 2014 Memorandum Opinion and Order.[19] Carson alone appealed the denial of the motion to dismiss the Coles' three fabrication-of-evidence claims based on qualified immunity. The district court stayed these fabrication-of-evidence claims pending Carson's appeal, allowing the Coles limited discovery against Cassidy and Hunter's qualified immunity defenses to the excessive-force claim. With that discovery complete, the two officers moved for summary judgment, rearguing qualified immunity. The district court denied their motion and Cassidy and Hunter appealed.

The officers' appeals were consolidated. In 2015, in *Cole I*, a panel of this court affirmed the district court's denial of summary judgment on the Coles' excessive-force claim, affirmed denial of the motion to dismiss the Coles' Fourteenth Amendment false-charge claim, and reversed the denial as to the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims, finding the qualified immunity defense applicable for these claims. The officers petitioned the Supreme Court for a writ of certiorari. In November 2016, the Supreme Court granted certiorari, vacated the panel's judgment, and remanded

19. The Coles filed an initial complaint in September 2012. The officers moved to dismiss or in the alternative requested that the district court order a Rule 7(a) reply to the immunity defense. The district court then afforded the Coles opportunity to file a Rule 7 reply or amended complaint. The Coles filed an amended complaint. The officers then filed a second motion to dismiss.

the case for further consideration in light of *Mullenix v. Luna*,[20] decided in the intervening time.[21]

On remand from the Supreme Court, recognizing that its jurisdiction was limited to determining the materiality of factual disputes that the district court determined were genuine, the panel once again held that the applicability of qualified immunity for Cassidy and Hunter could not be determined at the summary judgment stage.[22] Finding the Supreme Court's remand order reached no further, the panel reinstated the *Cole I* opinion on the Coles' three fabrication-of-evidence claims.[23] The officers moved for rehearing en banc, which we granted. [24]

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20. 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015).

21. As this court and others have acknowledged, when the Supreme Court grants, vacates, and remands ("GVRs") a case, it does not make a decision on the merits of the case nor dictate a particular outcome. *See Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013); *Kenemore v. Roy*, 690 F.3d 639, 641-42 (5th Cir. 2012); *see also Texas v. United States*, 798 F.3d 1108, 1116, 418 U.S. App. D.C. 387 (D.C. Cir. 2015); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013); *Gonzalez v. Justices of Mun. Court of Bos.*, 420 F.3d 5, 7 (1st Cir. 2005).

22. *Cole v. Carson*, 905 F.3d 334, 347 (5th Cir. 2018), *reh'g granted*, 915 F.3d 378, 379 (5th Cir. 2019).

23. *Id.* at 341-42.

24. *Cole*, 915 F.3d at 379.

*Appendix A*

**II**

**A.**

We hear this case on remand from the Court for further consideration in light of *Mullenix*. We do not reach issues unaddressed by the mandate on remand,[25] and so we hold as in *Cole I* with respect to the Coles' three fabrication-of-evidence claims. First, we affirm the district court's denial of the motion to dismiss the Coles' Fourteenth Amendment claim regarding the imposition of false charges.[26] Second, finding qualified immunity applicable, we reverse the denial of the motion to dismiss

25. Appellants argue that the Supreme Court's 2017 decision in *Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), changes the legal landscape and justifies revisiting the Coles' Fourteenth Amendment false-charge claim. *Manuel* holds that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case," and, therefore, that the plaintiff in that case "stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention." *Manuel*, 137 S. Ct. at 918-19. It does not hold that the Fourth Amendment provides the exclusive basis for a claim asserting pre-trial deprivations based on fabricated evidence. We have already so determined in *Jauch v. Choctaw County*: "*Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees." *Jauch v. Choctaw Cty.*, 874 F.3d 425, 429 (5th Cir. 2017), *cert. denied sub nom. Choctaw Cty. v. Jauch*, 139 S. Ct. 638, 202 L. Ed. 2d 491 (2018).

26. *See Cole I*, 802 F.3d at 766-74.

the Coles' claim that the alleged fabrication of evidence violated the Fourth Amendment.[27] Lastly, finding qualified immunity applicable, we reverse the denial of the motion to dismiss the Coles' claim that the alleged fabrication of evidence entailed a *Brady* violation.[28]

**B.**

The qualified immunity inquiry includes two parts. In the first we ask whether the officer's alleged conduct has violated a federal right; in the second we ask whether the right in question was "clearly established" at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct.[29] The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time.[30]

On an appeal of a denial of summary judgment on the basis of qualified immunity, our jurisdiction is limited to examining the materiality of factual disputes the district court determined were genuine.[31] "[I]n an interlocutory appeal we cannot challenge the district

27. *See id.* at 764-65.

28. *See id.* at 765.

29. *Tolan v. Cotton*, 572 U.S. 650, 655-56, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam).

30. *Id.*

31. *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 408 (5th Cir. 2009); *see also id.* ("If the determination of qualified immunity would require the resolution of a genuinely disputed fact, then that fact is material and we lack jurisdiction over the appeal.").

court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true."[32] "[W]e lack jurisdiction to resolve the genuineness of any factual disputes" and "consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment."[33] Like the district court, we must view the facts and draw reasonable inferences in the light most favorable to the plaintiff and ask whether the defendant would be entitled to qualified immunity on those facts.[34] The Supreme Court has summarily reversed this court for failing to take the evidence and draw factual inferences in the non-movants' favor at the summary judgment stage.[35] In doing so, the Court emphasized that the requirement is no less binding "even when . . . a court decides only the clearly-established prong of the standard."[36] Within the limited scope of our inquiry, review is de novo.[37]

As instructed, we turn to the guidance provided by the Supreme Court in *Mullenix*. In that case, the Court

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32. *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc)).

33. *Id.* (internal quotations omitted).

34. *Lytle*, 560 F.3d at 409.

35. *Tolan*, 572 U.S. at 660.

36. *Id.* at 657.

37. *Trent*, 776 F.3d at 376.

reviewed a denial of qualified immunity to an officer who had shot and killed a fugitive in a car chase. This court had decided that the officer violated the clearly established rule that deadly force was prohibited "against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[38] The officer in *Mullenix* reasonably perceived some threat of harm, but we had held the threat was not "sufficient." The Supreme Court reversed our decision. It found that the rule we articulated lacked a referent to define the "sufficiency" of threats.[39] Precedents provided a "hazy legal backdrop," at best.[40] Given these deficient sources, an officer could not reasonably derive an applicable rule to govern his or her conduct in the situation.[41] Finding that we had defined the applicable rule with too much "generality,"[42] the Court reversed our holding that the officer had violated clearly established law.[43]

Under *Mullenix*, application of clearly established law is undertaken with close attention to the relevant legal rule and the particular facts of the case. Here, based on the facts taken in the light most favorable to the non-movant

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38. *Mullenix*, 136 S. Ct. at 308-09 (internal quotation marks omitted).

39. *Id.* at 309.

40. *Id.* at 309-10.

41. *Id.*

42. *Id.* at 311.

43. *Id.* at 312.

Coles, and with reasonable inferences drawn in their favor, the district court determined there were genuine factual disputes as to Ryan's and the officers' conduct, upon which a reasonable jury could find "[Ryan] . . . did not pose an immediate threat to the officers" when they opened fire.[44] It held that "on October 25, 2010, the date of the shooting, the law was clearly established" that "shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful."[45] As we will detail, the officers ask us to consider a different set of facts, but we cannot do so. We lack jurisdiction to reconsider the district court's factual determinations on an appeal from denial of summary judgment on qualified immunity.

*Tennessee v. Garner* announced the principle that the use of deadly force is permitted only to protect the life of the shooting officer or others: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[46] *Garner* also requires a warning before deadly force is used "where feasible,"[47] a critical component of risk assessment and

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44. *Cole*, 68 F. Supp. 3d at 645.

45. *Id.* at 643.

46. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

47. *Id.* at 11-12; *see also Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997).

de-escalation. The Supreme Court has repeatedly stated that this rule can be sufficient in obvious cases, and this court has applied it in such cases, without dependence on the fact patterns of other cases.[48]

The summary judgment facts, as determined by the district court, are that Ryan posed no threat to the officers or others to support firing without warning. The "Officers had the time and opportunity to give a warning and yet chose to shoot first instead."[49] This is an obvious case. Indeed, Officer Hunter conceded that he would have had no basis to fire upon Ryan unless Ryan had been facing him and pointing a gun at him.

This case is obvious when we accept the facts as we must. It is also informed by our precedent. Before 2010, *Baker v. Putnal* established clearly that Cassidy's and Hunter's conduct—on the facts as we must take them at this stage—was unlawful. For in *Baker*, members of the public told Officer Michael Putnal, a police officer patrolling a crowded Galveston beach area during spring break, that "someone had entered the crowd with a pistol-gripped shotgun."[50] Minutes later, Officer Putnal heard

48. *See White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (per curiam); *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277-78 (5th Cir. 2015); *cf. Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012).

49. *Cole*, 68 F. Supp. 3d at 645.

50. *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996).

gunfire and saw the crowd scurrying.[51] There was "a good deal of confusion on the beach."[52] Two people directed the officer to a car in which the gunman was supposedly sitting.[53] Putnal then saw Wendell Baker Jr. and another man sitting in a truck parked on the beach.[54] The parties disputed what happened next. Putnal stated he saw Baker loading a magazine into a handgun, that he warned Baker to freeze or drop the gun, that Baker instead turned the gun upon Putnal, at which point Putnal fired, killing Baker.[55] However, witnesses "state[d] that [Baker] took no threatening action . . . as the officer approached the truck," that Putnal issued no warning to Baker, and that "Baker . . . may have barely had an opportunity to see Putnal before [the officer] fired his gun."[56] The parties did not dispute that Putnal had been searching for a gunman, and that a gun had been recovered from Baker's seat, although they disputed whether and how Baker had been holding it, that is, whether he pointed it at Putnal.[57] It was also undisputed that Baker was turning to face Putnal from his seat, although medical reports indicated from "the nature of the wounds . . . that Baker . . . was

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51. *Id.*

52. *Id.* at 198.

53. *Id.* at 193.

54. *Id.*

55. *Id.* at 198.

56. *Id.*

57. *Id.*

not facing Putnal when he was shot."[58] Baker's survivors sued the officer, bringing, inter alia, a Fourth Amendment excessive-force claim.[59] The district court granted Putnal qualified immunity, crediting his account that he had fired in response to Baker turning and aiming the gun at him.[60] On appeal, we reversed and remanded the excessive-force claim for trial.[61] Recognizing the dispute as to the officer's warning, Baker's turn, and the position of Baker's gun, we found "simply too many factual issues to permit the Bakers' § 1983 claims to be disposed of on summary judgment."[62] "Chaos on the beach and Baker['s] mere motion to turn and face Putnal are not compelling reasons to find that [the officer's] use of force was not excessive as a matter of law."[63] Viewing the facts and drawing inferences "in the light most favorable to the nonmoving party," we held that "[t]he number of shots and the nature of the wounds raise . . . more of a question of fact than a court may dispose of on summary judgment."[64]

The Supreme Court's more recent qualified immunity decisions do not shift this analysis. In *Kisela v. Hughes*, police officers in Tucson, Arizona responded to a call that

58. *Id.*

59. *Id.* at 193.

60. *Id.* at 197.

61. *Id.* at 198.

62. *Id.*

63. *Id.*

64. *Id.* at 198-99.

a woman was behaving erratically with a knife and that she had been hacking at a tree.[65] When officers arrived on scene, the suspect, Amy Hughes, emerged from a house holding a large kitchen knife, and approached to within "striking distance" of a bystander in the driveway.[66] One of the officers, Andrew Kisela, whose further approach was impeded by a chain-link fence, repeatedly ordered Hughes to drop the knife, but Hughes did not follow his commands.[67] Kisela then fired on Hughes through the fence.[68] Hughes brought a Section 1983 excessive force claim against Kisela.[69] Reviewing a denial of qualified immunity to Kisela, the Supreme Court held that, in light of the officer's limited knowledge of the situation and Hughes's refusal to follow his repeated commands to drop the knife while within striking distance of the bystander—obstinance that heightened the risk of immediate harm to another—the law did not clearly establish that the officer's resort to deadly force was unlawful.[70]

In this case, Officers Cassidy and Hunter found themselves in a search for a suicidal teenager who they knew had already encountered fellow officers and walked

65. *Kisela v. Hughes*, 138 S. Ct. 1148, 1151, 200 L. Ed. 2d 449 (2018) (per curiam).

66. *Id.; id.* at 1154.

67. *Id.* at 1151.

68. *Id.*

69. *Id.*

70. *Id.* at 1153.

away from them with his gun to his head, non-responsive, but without aggressive action. The circumstances of the officers' encounter with Ryan, as in *Baker*, remain heavily disputed: as to whether Ryan was aware of the officers, whether and how he turned and aimed his gun, and whether Hunter warned Ryan to disarm himself. The district court here defined the facts in a 21-page opinion, finding genuine disputes regarding these facts, and, viewing these disputes in a light most favorable to the Coles, concluded that a reasonable jury could find that Ryan made no threatening or provocative gesture to the officers and posed no immediate threat to them. Unlike in *Kisela*, where the officer repeatedly warned an armed suspect to disarm, yet that suspect, facing the officer and hearing his warnings, refused to disarm, here the district court concluded that a reasonable jury could find Cassidy and Hunter opened fire upon Ryan without warning, even though it was feasible. On these facts, the officers' conduct violates clearly established law.

Rather than engage on the facts as we must take them at the summary judgment stage, the officers repeatedly argue from a different set of facts. While the district court found that Ryan was initially facing away from the officers when they fired the first shot, the officers now describe his "armed turn towards Officer Hunter." While the district court found that Ryan kept his gun aimed at his own head and never pointed it at the officers, the officers now suggest that Ryan's gun was "below his head," moving towards Hunter, and then only momentarily turned back towards Ryan's head at the moment he fired (ignoring Hunter's sworn statement that he fired only when the gun

was pointed toward him—a story prosecutors accepted until a ballistics report exposed its impossibility). And although the district court found that Ryan was not given an opportunity to disarm himself, the officers contend that he was warned to disarm before being shot. "Had the Officers delayed longer, reaction time lag would have precluded their ability to stop [Ryan] from shooting Officer Hunter," they argue. Based on this alternative set of facts, echoed again in oral argument to us as a full court, and in the teeth of those found by the district court, the officers now contend Ryan posed a "deadly threat," and no clearly established law in 2010 put the officers' response of firing in self-defense beyond the law.

The Coles and amicus Cato Institute are correct that it is beyond our jurisdiction to consider the officers' set of facts, a narrative evolving over time. "[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street," the caselaw "will not permit summary judgment in favor of the defendant official. . . . [A] trial must be had."[71] Whereas the officers will have a chance to present their factual narrative—and to question the Coles'—at trial, they cannot contest the facts in the current appeal.[72]

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71. *Saucier v. Katz*, 533 U.S. 194, 216, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (Ginsburg, J. concurring). *see also Tolan*, 572 U.S. at 660; *id.* at 662 (Alito, J., joined by Scalia, J., concurring in the judgment) (agreeing that "summary judgment should not have been granted" in that case because of the genuine issues of material fact); *Lytle*, 560 F.3d at 408-09.

72. *Cf. Tolan*, 572 U.S. at 660 ("The witnesses on both sides come to this case with their own perceptions, recollections, and even

The dissents also take issue with the disputed facts. Judge Duncan focuses on what he terms "undisputed pre-encounter events." But, particularly in light of the officers' evolving stories, it is disputed whether any of the events recounted were known to Hunter or Cassidy when they fired on Ryan. The dissent cites to the reports and affidavits of other officers and individuals to describe the events occurring before Hunter and Cassidy were called to the scene.[73] But looking at the evidence in the light most favorable to the Coles, Hunter and Cassidy were not aware of the disturbance at the Coles' house the previous night, the alleged cache of weapons left at the Reeds' house, Ryan's alleged suicidal threat, or his threat to shoot anyone who came near him.

And of course, what matters is what the defendant officers knew when they shot Ryan. *See, e.g., White v. Pauly*, 137 S. Ct. 548, 550, 196 L. Ed. 2d 463 (2017) (per curiam) ("Because this case concerns the defense of qualified immunity . . . the Court considers only the facts that were knowable to the defendant officers."); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474, 192 L.

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potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [the plaintiff's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.").

73. Recall that Hunter was a late-arriving officer who was not instructed by the Sachse or Garland police departments to pursue Ryan. *See supra* at 4.

Ed. 2d 416 (2015) (stressing that "a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer"). The dissents overlook the fundamental reason most of these facts should not be part of the analysis: we consider only what the officers knew at the time of their challenged conduct. "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017) (per curiam); *see also Brown v. Callahan*, 623 F.3d 249, 253 ("An official's actions must be judged in light of the circumstances that confronted him, without the benefit of hindsight." (citing *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989))). Despite the many "red flags" listed by the dissents as known to others, only those known to Hunter and Cassidy are relevant to the qualified immunity analysis.

Judge Jones's dissent fares no better in addressing some of the key facts of the shooting itself. Contrary to its assertion, the district court found that Ryan was facing at a 90-degree angle away from the officers when he was first shot. *Cole*, 68 F. Supp. 3d at 644. As for the "warning," the district court found that a reasonable jury could conclude that Ryan "was not given an opportunity to disarm himself before he was shot." *Id.* Relitigating the district court's assessment of factual disputes is not our role on interlocutory review.

What Hunter and Cassidy knew before shooting at Ryan, whether they warned him before doing so, and what

actions Ryan took before being shot are all disputed. The district court must afford Cassidy and Hunter qualified immunity at the earliest point the defense's applicability is determinable. Here, we have not yet reached that point. It will be for a jury to resolve what happened on October 25, 2010. The district court did not err in denying the officers qualified immunity at the summary judgment stage.

## III

The district court determined that genuine disputes of fact regarding Cassidy's and Hunter's entitlement to qualified immunity remain. We AFFIRM the district court's denial of summary judgment on the Coles' excessive-force claim and DISMISS Cassidy and Hunter's appeal; AFFIRM denial of the motion to dismiss the Coles' Fourteenth Amendment false-charges claim; REVERSE denial of the motion to dismiss the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims; and return the case to the district court for trial and resolution of issues consistent with this opinion.

JENNIFER WALKER ELROD, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and EDITH BROWN CLEMENT, CATHARINA HAYNES, STEPHEN A. HIGGINSON, GREGG COSTA, and KURT D. ENGELHARDT, Circuit Judges, concurring:

I concur fully in the majority opinion. Despite the outcry of the dissenting opinions, there is no new law being made or old law being ignored. The majority opinion takes no position on the public policy issues of the day regarding policing and the mentally ill. Rather, it follows the longstanding *en banc* rule that "we lack jurisdiction to review the *genuineness* of a fact issue" on an interlocutory appeal of a denial of summary judgment based on qualified immunity. *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (*en banc*) (quoting *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016)); *Kinney v. Weaver*, 367 F.3d 337, 341, 346-47 (5th Cir. 2004) (*en banc*). As the able district court determined, the facts are very much in dispute.

EDITH H. JONES, Circuit Judge, joined by SMITH, OWEN, HO, DUNCAN and OLDHAM, Circuit Judges, dissenting:

What "clearly established law" says that only a rogue cop would have shot at this mentally disturbed teenager within 3 to 5 seconds as the teen emerged from dense bushes ten to twenty feet away from Officer Hunter and, with his finger on the trigger of a loaded pistol pointed in the direction of his own head, began turning in the officer's direction? The majority state this is an "obvious case" for the denial of qualified immunity: the officers could not shoot without first announcing themselves to Cole or looking down the barrel of his gun. What is so obvious? Contrary to the majority's dangerously unrealistic proposition, "action beats reaction" every time. *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 384 (5th Cir. 2009). Neither we nor the Supreme Court has ever held that police officers confronted in close quarters with a suspect armed and ready to shoot must hope they are faster on the draw and more accurate. The increasingly risky profession of law enforcement cannot put those sworn to "serve and protect" to a *Hobson*'s choice: place their lives on the line by heroic forbearance or risk their financial security in defense of lawsuits. The Supreme Court has repeatedly stated in plain terms that the purpose of qualified immunity is to prevent precisely this quandary.

Respectfully dissenting, we are convinced that the Supreme Court's remand from the original panel opinion denying immunity meant something; the governing Supreme Court law is foursquare in the corner of Officers

Hunter and Cassidy; and they were entitled to receive summary judgment confirming their immunity from suit, not simply from liability.[1]

## I. Background

### A. Undisputed facts

The majority opinion paints a picture of the relevant facts that has evolved considerably from the first and second panel opinions to this final majority version. *Compare Cole v. Carson*, 802 F.3d 752, 755-56, 758 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (*Cole I*), *with Cole v. Carson*, 905 F.3d 334, 337-340 (5th Cir. 2018) (*Cole II*), *and supra.* Qualified immunity for the use of deadly force is assessed at the moment a law enforcement officer confronts a suspect, *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989), but the officer's understanding of facts leading up to the event color the question whether "a reasonable officer" could have believed his life or the lives of others were endangered. *White v. Pauly*, 137 S. Ct. 548, 550, 552, 196 L. Ed. 2d

1. We do not challenge the majority's decision to leave in place fabricated evidence charges against these two officers and Officer Carson. Only Carson, who was present at the encounter but did not shoot, appealed the district court's refusal to dismiss that claim. The Supreme Court has not been clear on the constitutional basis for such a claim, so we have no ground to criticize the majority. *Compare Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), *with McDonough v. Smith*, 139 S. Ct. 2149, 204 L. Ed. 2d 506 (2019), (refusing to rule on the constitutional grounding of such claims).

463 (2017). To the majority's picture, it is necessary to add undisputed facts recited in the prior opinions and undisputed evidence from plaintiffs' experts. Hornbook summary judgment law holds that although disputed facts are viewed in the light most favorable to non-movants, the entire record must be considered. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). Further, this court reviews *de novo* the materiality of the relevant facts. *Foley v. Univ. of Houston, Sys.*, 355 F.3d 333, 337 (5th Cir. 2003).

First, both officers who shot at Cole were aware that he had mental issues. Officer Cassidy had learned that Cole "had threatened to shoot anyone who tried to take his gun and had refused an order to drop his weapon." *Cole II*, 905 F.3d at 338. Officer Hunter watched Cole walk steadily down the train tracks ignoring other police who were yelling at him to stop and put down his 9 mm semi-automatic pistol. Both officers were aware that a bulletin had been disseminated about Cole to all law enforcement in Garland and Sachse, and three nearby schools in the vicinity of Highway 78, where Cole was heading, were being protected. *Cole II*, 905 F.3d at 337-38.

Second, Cole emerged from the vegetation, unaware of the officers' presence, within ten to twenty feet of Officer Hunter, and as he turned toward the officers, three to five seconds elapsed. That's less time than it takes to read the preceding sentence. Cole initially stood at a 90 degree angle to the police and then began turning counterclockwise toward them. His movement is conceded by plaintiffs' expert, supported by the ballistic evidence,

and recounted in the district court opinion. *Cole II*, 905 F.3d at 338 ("Cole began to turn counterclockwise."). Plaintiff's expert opines this interval was sufficient for the officers to command Cole to disarm and observe his reaction.

Third, his loaded pistol was pointed within thirty inches toward his head, *Cole I*, 802 F.3d at 756, and Cole's finger was on the trigger.

Next, the officers fired seven shots, two of which hit Cole. Officer Hunter's first shot hit Cole in the left arm, penetrating his body from the left. Another of Hunter's shots merely grazed Cole's left arm as he continued to turn and was facing Hunter. *Cole II*, 905 F.3d at 339. Cole's gun, according to the plaintiffs, involuntarily discharged and hit him in the head, "leaving stippling—gunpowder residue around the wound due to the gun being fired from less than thirty inches away." *Cole I*, 802 F.3d at 756.

Finally, the bodycam evidence shows that some officer began to issue a warning at about the time the shooting started. *Cole II*, 905 F.3d at 338.

## B. Prior panel reasoning

The district court denied qualified immunity to Hunter and Cassidy for the shooting[2] and refused to dismiss the

2. Query why Officer Cassidy, whose shots didn't hit the victim, can be sued? This court has held that qualified immunity must be applied individually to each defendant. *Meadours v. Ermel*, 483 F.3d 417, 421-22 (5th Cir. 2007). But no one raised the point here.

allegations of falsified evidence against Hunter, Cassidy, and Carson.

The original panel opinion affirmed,[3] concluding as to the excessive force allegation that "if the Coles' version of the evidence is believed, it was not objectively reasonable to use deadly force against Ryan Cole when the teenager emerged on foot from the wooded area with a gun to his own head and turned left." With regard to immunity, the panel held that by October 2010, "reasonable officers were on notice that they could not lawfully use deadly force to stop a fleeing person who did not pose a *severe and immediate risk to the officers or others*, and they had many examples of the sorts of threatening actions which could justify deadly force. Turning left while unaware of an officer's presence is not among them." *Cole I*, 802 F.3d at 762 (emphasis added) (footnote omitted). The panel's principal support for its legal reasoning was *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014), *rev'd sub nom. Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015). According to the panel, "the central [disputed] issue" is "whether Ryan pointed his gun at Officer Hunter." *Cole I*, 802 F.3d at 762. Absent such a threatening gesture, Cole was said to present no sufficient threat. *Id.*

The next panel opinion was formulated after the Supreme Court reversed us in *Mullenix* on the grounds

3. The correct disposition if this court agrees there are material fact issues in dispute regarding qualified immunity would be to dismiss the appeal, because our appellate jurisdiction exists only over questions of law. *Mitchell v. Forsyth*, 472 U.S. 511, 529-30, 105 S. Ct. 2806, 2816-17, 86 L. Ed. 2d 411 (1985).

that "none of our [the Supreme Court's own] precedents 'squarely governs' the facts here. Given [the suspect's] conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as [the officer] did." 136 S. Ct. at 310. On this second go-round, the panel conceded the deficiency of the "no sufficient threat" rule, but then concluded that, taken in the light most favorable to the plaintiffs, Cole's conduct posed "no threat" when he was shot, *Cole II*, 905 F.3d at 343, and the officers therefore violated a clearly established "no threat" rule. *Tennessee v. Garner* is cited as the basis for this "bright line" rule.[4] 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). This opinion was vacated by a vote to reconsider the case en banc.

### C. The Current Majority Opinion

Pivoting yet again, the en banc majority opinion commences with a paean to "the worker's . . . right to the protection of a jury," not even bothering to cite Supreme Court authorities that explain why qualified immunity is immunity from suit, not just liability. The majority opinion

4. The panel curiously described so-called clearly established law in both of its opinions with references to unpublished, non-precedential Fifth Circuit cases. The Supreme Court has expressed uncertainty over whether any circuit court cases, as opposed to its own decisions, may set out "clearly established law." *See Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 591 n. 8, 199 L. Ed. 2d 453 (2018); *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014); *Reichle v. Howards*, 566 U.S. 658, 665-66, 132 S. Ct. 2088, 2094, 182 L. Ed. 2d 985 (2012). It is incredible that this court would cite our avowedly non-precedential decisions for that purpose.

omits or ignores material undisputed facts recited above—the knowledge of the officers, Cole's turning toward them, the significance of his finger in a loaded pistol, and the three to five second interval—and hides behind the assertion that, relevant to qualified immunity, there are "genuine factual disputes as to Ryan's and the officers' conduct" such that a reasonable jury could find that Cole posed no "immediate threat" to the officers or others. Two paragraphs later, asserting that Cole posed "no threat . . . to support firing without warning," the majority deem this an "obvious case" for denial of immunity, because the "officers had time and opportunity to give a warning and yet chose to shoot first instead." The "obvious case" rationale again derives, in the majority's view, from *Garner*, fortified only by one Fifth Circuit case and the Supreme Court's decision in *Kisela v Hughes*.[5]

## DISCUSSION

The only legal question that needs to be addressed by this court is whether, under the circumstances of this five-second confrontation, *every* reasonable police officer would have reasonably perceived *no* life-threatening danger such that deadly force could be used to incapacitate Cole without a preliminary warning. Put otherwise, as a matter of law, was it clearly established that officers may not fire on a suspect, armed and ready to shoot a pistol, who is turning in their direction with one of their brethren

5. This dissent focuses on the majority opinion because Appellees' briefing offered nothing in addition to the meager authorities cited by the majority to support their "clearly established law" theory.

ten to twenty feet away, unless the gun barrel points at them or they first shout a warning and await his response?

The majority deny qualified immunity, seeming to answer on the basis of "disputed fact issues" that Cole posed "no threat." The majority's reasoning is at too high a level of generality. And the majority ignore the critical criterion for qualified immunity in Fourth Amendment cases: the reasonableness of the officers' reasonable perceptions. In sum, the majority here double down on the mistakes that got our court reversed in *Mullenix*.[6]

Before discussing these problems in detail, it is necessary to recapitulate the reasoning behind the Supreme Court's qualified immunity cases. The majority's bare mention of the standards for qualified immunity ignores the Court's rationale for the defense. Beginning with *Monroe v. Pape* in 1961, the Supreme Court unleashed federal courts to enforce constitutional commands against state actors pursuant to 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492 (1961). A foreseeable consequence of facilitating such lawsuits was that a deluge of litigation would follow, at least some of it ill-founded or frivolous. What was to be done to limit claims to those that might have merit? The Court decided in *Pierson v. Ray* that police officers

6. In *Mullenix*, the Supreme Court reversed this court and held an officer entitled as a matter of law to qualified immunity when he shot, and killed, a suspect fleeing from the police in his car at high speed. Following *Mullenix*, the Supreme Court vacated the judgment and remanded *Cole I*, no doubt in part because *Cole I* heavily relied on the reversed panel decision in *Mullenix*.

sued under Section 1983 should enjoy qualified immunity accorded at common law. 386 U.S. 547, 556-57, 87 S. Ct. 1213, 1219, 18 L. Ed. 2d 288 (1967).

For over fifty years, the Court has developed the standards of qualified immunity, well aware from the beginning that "the local police officer" is "that segment of the executive branch . . . that is most frequently and intimately involved in day-to-day contacts with the citizenry, and hence, most frequently exposed to situations which can give rise to claims under Sec. 1983 . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 244-45, 94 S. Ct. 1683, 1691-92, 40 L. Ed. 2d 90 (1974). The breadth of this shield represents a deliberate balance between affording a damages remedy for constitutional abuses and the social and personal costs inflicted by meritless claims. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987). The costs to society include the costs of litigation, the diversion of limited public resources, the deterrence of able people from going into public service, and the danger that fear of being sued will discourage officials from vigorously performing their jobs. *Id.; Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). The devastating costs imposed by unfounded lawsuits on officers otherwise entitled to immunity are reputational, potentially employment-related, financial and emotional. For these reasons, the Court has repeatedly explained that qualified immunity shields public officials not just from liability but from suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985); *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565

(2009) ("Qualified immunity is lost if a case is erroneously permitted to go to trial."). Some in the lower federal courts may disapprove of the Court's half century of authorities, but we may not functionally disregard them.

Nearly as venerable as the general defense of qualified immunity are the decisions applying it to Fourth Amendment claims against law enforcement officers. *Anderson v. Creighton* affirmed in 1987 that a law enforcement officer who participates in a warrantless search may be entitled to qualified immunity "if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful." 483 U.S. at 638, 107 S. Ct. at 3038. Justice Scalia's opinion reminded that "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotation marks omitted). In determining the objective legal reasonableness of the allegedly unlawful action, "[i]t should not be surprising . . . that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S. Ct. at 3039.

Two years later, the Court clarified that for alleged Fourth Amendment excessive force violations, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. The calculus of "reasonableness must embody allowance for the fact that police officers

are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97, 109 S. Ct. at 1872. Ultimately, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ." *Id.* at 397, 109 S. Ct. at 1872. Quoting these statements from *Graham*, the Court later explained that the test for qualified immunity for excessive force "has a further dimension" in addition to the deferential, on-the-scene evaluation of objective reasonableness. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158, 150 L. Ed. 2d 272 (2001). Justice Kennedy explained: "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* at 206, 121 S. Ct. at 2158 (internal citation and quotation marks omitted).

Evaluating the qualified immunity defense is thus a two-step process. The first is to determine whether the Fourth Amendment has been violated by conduct that, viewed from the officer's perspective and information at the time, is objectively unreasonable.[7] The second step

7. For present purposes, we "address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place." *Mullenix*, 136 S. Ct. at 308; *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818 (constitutional violation or qualified immunity may be decided first).

assesses the objective legal reasonableness of the action, that is, whether every reasonable officer would have known that the conduct in question was illegal. *See Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-16. The illegality must have been apparent, as held in cases that are factually similar to the situation confronting the officer. *White*, 137 S. Ct. at 552. Immunity must be granted to all but the plainly incompetent or those who knowingly violate the law. The Supreme Court has enforced immunity where officers acted negligently, *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3039-40; or when they could have used another method to subdue a suspect, *Mullenix*, 136 S. Ct at 310; or when the law governing their behavior in particular circumstances is unclear. *White*, 137 S. Ct. at 552. The Court emphasizes that the specificity of the applicable "clearly established" rule is especially important in Fourth Amendment cases. *Mullenix*, 136 S. Ct. at 308.

By denying plaintiffs their "day in court" at a preliminary stage, qualified immunity operates as a counterintuitive, albeit vital, defense. Thus, the Supreme Court has regularly reversed denials of qualified immunity where lower courts misapplied the standards. *See Wesby v. District of Columbia*, 816 F.3d 96, 102, 421 U.S. App. D.C. 391 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (citing eleven Supreme Court cases in five years reversing lower courts in the qualified immunity context including *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015), *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015); *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015); *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014);

*Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Wood v. Moss*, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); *Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012); *Ryburn v. Huff*, 565 U.S. 469, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012); *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Unfortunately, the majority here has fallen into the trap of "letting the jury sort out the truth" despite the gravity of the situation these officers faced.

As explained above, it is undisputed that the two officers confronted and then shot at Cole as he emerged from dense bushes ten to twenty feet from Officer Hunter, unaware of their presence, and began to turn in their direction. This all happened within three to five seconds. While he turned, Cole held a loaded 9mm semiautomatic pistol, finger on the trigger, pointed in the direction of his own head. The officers knew he was mentally distraught, had ignored other police commands to disarm, had issued threats, and proceeded walking in the direction of nearby schools.

For immunity purposes, the question phrased one way is whether *any* reasonable officers could have believed that Cole's split-second turning toward them posed a life-threatening danger such that lethal force was necessary. Alternatively, what "clearly established law" held as of October 2010 that under all of the relevant circumstances, deadly force was not justified unless either a warning was given and the suspect allowed a chance to react, or the

suspect actually turned his loaded pistol on the officer? The answer here directly parallels the Supreme Court's reasoning in *Mullenix*, which the majority seriously shortchanged.

In *Mullenix*, this court had denied qualified immunity to a trooper whose shot fatally wounded a suspect fleeing police in a high-speed chase. The Supreme Court's basic criticism of the panel decision was this: "In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308-09 (internal quotation marks and citation omitted).

The majority here posit as clearly established law, indeed an "obvious case," that a police officer may not use deadly force—without prior warning—against an armed, distraught suspect who, with finger in the pistol's trigger, posed "no threat" while turning toward an officer ten to twenty feet away. But in *Mullenix*, the Supreme Court reversed this court because "[t]he general principle that deadly force requires a sufficient threat hardly settles this matter." *Id.* at 309. Likewise, here, the majority's "no threat" and "obvious case" conclusions do not settle the matter of clearly established law.[8]

8. Worse, it treats as a disputed fact issue for immunity purposes what is clearly an issue of law. *See Wyatt v. Fletcher*, 718 F.3d 496, 502-03 (5th Cir. 2013).

That the majority here purport to extract clearly established law from *Tennessee v. Garner* was rebuked in *Mullenix*. The Supreme Court corrected this court by summary reversal because the Court itself had summarily rejected applying the general standard of *Tennessee v. Garner* to deny qualified immunity. *Mullenix*, 136 S. Ct. at 309 (*citing Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004)). Instead, the "correct inquiry" was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the precise situation she confronted. *Id.* Including *Mullenix* and *Brosseau*, a series of Supreme Court cases has held that *Tennessee v. Garner* does not state "clearly established law" governing the use of deadly force other than in *Garner*'s precise factual context, the shooting of an unarmed burglary suspect fleeing away from an officer.[9] The confrontation in this case with an armed, ready-to-fire suspect is "obviously" different.

We fail to understand how the denial of qualified immunity to Officers Hunter and Cassidy can be rescued simply by intoning that this is an "obvious case" under *Garner*. *Garner* affirmed the constitutionality of deadly force against suspects when necessary to protect the life of officers or others "if, where feasible, some warning has been given." 471 U.S. at 11-12, 105 S. Ct. at 1701.[10]

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9. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018); *White*, 137 S. Ct. at 552.

10. Turning on distinctly different facts, *Garner* alone does not establish pertinent clearly established law here, and the majority does not contend as much.

But *Garner* in no way renders "clearly established" a requirement to give a warning, and await the suspect's response, before shooting. Nor does it mandate that the suspect's weapon be trained on the officer or others. Like the rest of the calculus surrounding Fourth Amendment reasonableness, the "feasibility" of any such potentially deadly delay or factual nuance must be subjected to case-specific balancing with deference paid to the officer's reasonable perceptions in the midst of a tense situation. *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Indeed, in describing its holding at the outset, *Garner* states only that "[deadly] force may not be used unless it is necessary to prevent the escape [of an apparently unarmed suspected felon] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3, 105 S. Ct. at 1697.[11] No mention of a warning appears in this introduction, and "probable cause," not a fact-specific test, is the measure of the threat of harm.

Characterizing this case as a "no threat" or "obvious" Fourth Amendment violation is wrong for additional reasons. Whether, under the material undisputed facts,

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11. The majority cites *Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997), for the necessity of giving a warning "where feasible" before the use of deadly force. Oddly, *Colston* then immediately holds that the officer there "lying on his back with Colston nearby, had to immediately decide whether to shoot. In light of the totality of the circumstances facing Barnhart, Barnhart's failure to give a warning was not objectively unreasonable." *Id.* The feasibility of a warning is part of the overall Fourth Amendment analysis, not an independent sine qua non of official conduct.

Cole presented "no threat" to a reasonable police officer is the relevant issue to assess a Fourth Amendment violation. But the immunity question, which the majority elides, is whether *every* reasonable officer in this factual context would have known he could not use deadly force. *See Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-816. The majority's analysis conflates these inquiries. Second, the importance of grounding the inquiry in a specific factual context cannot be overstated. In this case, if Officer Hunter had stood a hundred feet away from Cole, or Cole had not been turning toward the officers, or Cole had put the handgun in his pocket and wasn't touching it, the analysis of qualified immunity could be quite different. Third, describing a situation as posing "no threat" is a conclusion, not an explanation or, as the majority seems to think, an exception to defining clearly established law in a specific context. No doubt there are rare "obvious" cases of Fourth Amendment violations committed by officers who are plainly incompetent or who knowingly violate the law. In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in "tense, uncertain and rapidly evolving" split-second situations, rather than stand down and jeopardize community safety.[12]

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12. *Compare Wesby*, 138 S. Ct. at 590 ("Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. But a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.") (internal citation and quotation marks omitted).

In their sole, erroneous dependence on *Garner*, the majority, "can cite no case from [the Supreme] Court denying qualified immunity because officers [entitled to apprehend Cole] selected one dangerous alternative over another." *Mullenix*, 136 S. Ct. at 310. The *Mullenix* Court showed that if anything, "clearly established law" was contrary to the plaintiff's position. The Court cited two prior Supreme Court car chase cases that resulted in immunity even though the fugitives—unlike the suspect in *Mullenix*—had not verbally threatened to kill any officers in their path. *Id.* at 310 (*citing Scott*, 550 U.S. at 384, 127 S. Ct. at 1778; *Plumhoff,* 572 U.S. at 777, 134 S. Ct at 2022). And in *Mullenix* itself, as here, the trooper had not warned the fugitive before shooting at his speeding car. These cases "reveal[ed] the hazy legal backdrop against which Mullenix acted," *Id.* at 309. Accordingly, the Court admonished, "[w]hatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances beyond debate." *Id.* at 311 (internal quotation marks omitted).

Not only do the majority cite "no case" in which the Supreme Court denied qualified immunity to an officer who used deadly force against a mentally distraught individual in circumstances like the present case, but to the contrary, the Court required qualified immunity in two somewhat similar cases. In *Sheehan*, officers used deadly force to subdue a mentally ill woman during an armed confrontation. The Court restated that the Fourth Amendment is not violated even if police officers, with the benefit of hindsight, may have made some

mistakes, because "[t]he Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" *Sheehan*, 135 S. Ct. at 1775 (quoting *Plumhoff*, 572 U.S. at 775, 134 S. Ct. at 2020).

Even closer to this case is *White v. Pauly*, where an officer arriving at the scene of an armed confrontation shot and killed a suspect without knowing whether his earlier-arrived colleagues had identified themselves as police. 137 S. Ct. at 550-51. In *White*, the Court chastised the lower court for "misunderst[anding]" the "clearly established" analysis by relying on the generalized pronouncements in *Graham* and *Garner*. *Id.* at 552. Whether Officer White should have second-guessed the preceding conduct of fellow officers hardly presented an "obvious case" pursuant to *Garner*. The Court speculated that perhaps, given the three-minute delay between when he arrived and when shots rang out, Officer White "should have realized that [a warning about police presence] was necessary before using deadly force." *Id.* There is a world of difference between three minutes and three seconds, which Officer Hunter had here, and between Officer White's securing himself behind a stone wall fifty feet from the suspect and Officer Hunter's standing fully exposed only ten to twenty feet away from Cole. The majority cannot reconcile the Supreme Court's insistence upon qualified immunity in *White* with their denial of the defense to Officers Hunter and Cassidy.

*Kisela v. Hughes*, cited in support of the majority, in no way articulates clearly established law concerning the necessity of a warning. First, the Court in *Kisela*

overturned the Ninth Circuit's denial of qualified immunity without addressing the preliminary Fourth Amendment violation. 138 S. Ct. at 1152. A decision holding only that there was no "clearly established law" cannot itself have defined "clearly established law." The Court also criticized the Ninth Circuit for failing to implement correctly the rule that an officer has not "violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* at 1153 (internal quotation marks omitted). The Court catalogued all the relevant circumstances of the confrontation that provoked the shooting: a knife-armed, threatening suspect, whose bizarre behavior had been called in to 911, disobeyed officers' commands to disarm for up to one minute before they felt compelled to shoot. *Id.* The Court concluded, "[t] his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect [the third party] would violate the Fourth Amendment." *Id.* Also "far from obvious" is the case before us, in which the officers had five seconds, not a whole minute, in which to decide whether to shoot at Cole.

Finally, the Supreme Court's decision in *Tolan v. Cotton* adds nothing to the substance of the qualified immunity discussion. In *Tolan*, the Court enumerated four critical, disputed evidentiary contentions relating to the officer's perception of danger to himself and thus to qualified immunity. 572 U.S. 650, 657-59, 134 S. Ct. 1861, 1866-67, 188 L. Ed. 2d 895 (2014). Because this court had failed to credit the plaintiff's disputed version of these facts, the Court vacated summary judgment for the officer

and remanded without deciding any merits issue. *Id.* at 657, 134 S. Ct. at 1866. In contrast, this dissent credits only undisputed material facts and plaintiffs' version of disputable facts.

Like this court's panel in *Mullenix*, the majority here offer no controlling Supreme Court precedent, including *Garner*, to support that "clearly established law" mandated that the officers hold their fire until they had both warned Cole and given him a chance to drop his gun or until he pointed the loaded weapon directly at them.

For good measure, the *Mullenix* Court also considered the potential similarity of lower court decisions that dealt with qualified immunity. 136 S. Ct. at 311. Fifth Circuit case law, the Court noted, did not "clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly." *Id.* at 311 (*citing Lytle v. Bexar County*, 560 F.3d 404, 412 (5th Cir. 2009)). But the Court quoted with approval an Eleventh Circuit case that granted immunity to a sheriff's deputy who fatally shot a mentally unstable individual "who was attempting to flee in the deputy's car, even though at the time of the shooting the individual had not yet operated the cruiser dangerously. The court explained that 'the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect...'" *Id.* at 311 (*quoting Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007)). Here, too, the thrust of *Mullenix* contradicts the majority's logic and holding.

Moreover, to the extent it is relevant[13], Fifth Circuit law does not support denying qualified immunity to Officers Hunter and Cassidy. The district court and, inferentially, the majority demand that qualified immunity be granted only if the suspect either disobeys immediate commands to disarm or points his weapon at the officers. The district court described such threatening actions as a *Manis* act.[14] It is true that in previous deadly force cases, this court approved qualified immunity for officers who reasonably believed that a non-compliant suspect was reaching toward where he could retrieve a weapon. *See Manis*, 585 F.3d at 842; *see also Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991); *Young v. City of Killeen, Tx.*, 775 F.2d 1349, 1352 (5th Cir. 1985). The hitch in these particular cases is that there wasn't actually a weapon, yet the officer's objectively reasonable perception was determinative as a matter of law. In another such officer shooting case, this court upheld qualified immunity where the suspect, who was being interrogated for drunk driving at the side of a freeway, turned to walk away from the officer, then appeared to turn around toward him while reaching under his shirttail for what the officer thought could be a concealed weapon. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 278 (5th Cir. 2016). This court added, "[f]urthermore, ...in the context of this case, it is immaterial whether Salazar turned left, right, or at all before being shot. Specifically, we have never required officers to wait until a defendant turns toward them, with weapon in hand, before applying deadly force to ensure their safety." 826 F.3d at 279 n. 6.

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13. *See* fn. 4, *supra*.

14. *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009).

While a "*Manis* act" can sustain qualified immunity even where no weapon is visible, it is not logical for an additional "act" to be mandated where the officers confront a suspect armed, ready to shoot his pistol, and turning toward them. An officer may be forced into shooting an unarmed suspect by a *Manis* act, and thus obtain qualified immunity. But it is perverse and inconsistent with Fifth Circuit law to hold that the officer has no qualified immunity because she is constitutionally forbidden to shoot an armed suspect in close quarters without either looking down the barrel of the weapon or awaiting his response to her command.

In fact, that is exactly what this court has not held. In *Ramirez v. Knoulton*, 542 F.3d 124, 127 (5th Cir. 2008), police shot a suspect they believed to be suicidal as he stood in profile to them, with a handgun in his right hand, and brought his hands together in front of his waist." He "never raised his weapon nor aimed it at the officers." *Id.* at 129. The court held that based on the officers' reasonable perception, no Fourth Amendment violation occurred, because the Constitution "does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." *Id.* at 130. *See also Colston*, 130 F.3d at 100; *Ontiveros*, 564 F.3d at 385 (holding no constitutional violation where officer thought suspect was reaching into his boot for a weapon during confrontation in a mobile home). As the Supreme Court put it in *Mullenix*, "the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here." 136 S. Ct. at 312.

The majority describe only one Fifth Circuit police shooting case, out of dozens this court has decided, as an "obvious case." *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996). Whether that characterization applies to the claimed Fourth Amendment violation in *Baker*, to qualified immunity analysis, or simply to this court's decision to remand for trial is unclear in the majority opinion. *Baker*, however, says nothing about the merits of the case or about clearly established law, holding instead that "[t]here are simply too many factual issues to permit the Bakers' § 1983 claims to be disposed of on summary judgment." *Baker*, 75 F.3d at 198. Hence, like *Kisela, Baker* cannot support any rule of clearly established law, much less explain what law is "obvious." Significantly, in *Baker*, whether the suspect was holding a gun visible to the officer was an important hotly contested issue, with eyewitnesses contradicting the officer's account of the incident. *Baker*, 75 F.3d at 198. Cole's case, in contrast, does not involve a "chaos on the beach" incident. The undisputed facts are starkly different here. It is undisputed, at a minimum, that Cole was holding a loaded weapon, his finger in the trigger, as he emerged from the woods; he was turning toward the officers; and they had five seconds to react. *Baker* does not show that the officers' conduct in *Cole* violated clearly established law.

To sum up, the majority opinion here repeats every error identified by the Supreme Court when it granted summary reversal in *Mullenix* and sent the instant case back for reconsideration. The majority's "clearly established" rule has changed, but not its errors. *Tennessee v. Garner* does not formulate "clearly established law" with

the degree of specificity required by the Supreme Court's decisions on qualified immunity. The majority's "no threat" and "obvious case" statements pose the issues here at an excessive level of generality. The majority has no Supreme Court case law demonstrating that Officers Hunter and Cassidy were either plainly incompetent or had to know that shooting at Cole was unconstitutional under the circumstances before them and with the knowledge they possessed—he was mentally distraught; he was armed with his finger in the pistol's trigger; he was very close to Hunter; he had been walking in the direction of schools for which extra police protection had been ordered; and he had ignored other officers' commands to stop and drop his weapon. And they had three to five seconds to decide how dangerous he could be to them. The majority cites not one case from this court denying qualified immunity under similar circumstances. *Mullenix* aptly summed it up for our purposes: "qualified immunity protects actions in the hazy border between excessive and acceptable force." 136 S. Ct. at 312 (internal quotation marks omitted). "[T]he constitutional rule applied by the Fifth Circuit was not 'beyond debate.'" *Id.*

It is not "clearly established" that police officers confronting armed, mentally disturbed suspects in close quarters must invariably stand down until they have issued a warning and awaited the suspects' reaction or are facing the barrel of a gun. "This was not a belief in possible harm, but a belief in certain harm. The fact that they would later discover this to be a mistaken belief does not alter the fact that it was objectively reasonable for them to believe in the certainty of that risk at that

time." *Carnaby v. City of Houston*, 636 F.3d 183, 188 n.4 (5th Cir. 2011). That is the law in the Fifth Circuit, and the majority has pointed to no clearly established law otherwise. Shooting at Cole may not have been the wisest choice under these pressing circumstances, but the officers' decision, even if assailable, was at most negligent. Hunter and Cassidy were neither plainly incompetent nor themselves lawbreakers. While we are confident a jury will vindicate their actions, they deserved qualified immunity as a matter of law. We dissent.

*Appendix A*

JERRY E. SMITH, Circuit Judge, dissenting:

This is a "red flag" case if ever there was one. The en banc majority commits grave error, as carefully explained in the dissents by Judge Jones, Judge Willett, Judges Ho and Oldham (jointly), and Judge Duncan. Yet eleven judges join the majority.

Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers. In light of today's ruling and the raw count of judges,[1] there is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires.

Red flags abound. Judge Duncan cogently details the "rich vein of facts" describing this plaintiff's undisputed actions in the hours leading up to the shooting.[2]

> • Red flag: a 9mm semi-automatic handgun and ammunition.
> • Red flag: a double-barrel shotgun with shells.

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1. This en banc court consists of the sixteen active judges, plus two senior judges who were on the original panel. Of those sixteen active judges, nine join the majority opinion.

2. I especially refer the reader to Part I of Judge Duncan's dissent, which sets forth the context and narrative of red-flag facts that easily justify qualified immunity. All three dissents persuasively explain the law of qualified immunity that the majority overlooks.

• Red flag: a .44 magnum revolver.
• Red flag: a .38 revolver.
• Red flag: a suspect who had broken into a gun safe and stolen an unknown quantity of weapons and ammunition.
• Red flag: a police visit the night before to the suspect's house because of a disturbance with his parents.
• Red flag: a suspect with a dangerous knife at his parents' house.
• Red flag: a suspect who had a wild look in his eye and was smoking K2.
• Red flag: a suspect, distraught over breaking up with his girlfriend, moving toward the school where she was a student.
• Red flag: a suspect near an elementary school.
• Red flag: a suspect with personal issues including drug abuse.
• Red flag: a suspect seen running through the woods with at least three weapons.
• Red flag: a suspect irate and distraught.
• Red flag: a suspect who said he would shoot anyone who came near him.
• Red flag: a suspect armed with at least one handgun and possibly three.
• Red flag: a suspect who had refused police demands to drop his weapon.
• Red flag: a suspect who deposited a cache of weapons and ammunition munition at a friend's house after arguing with his parents.
• Red flag: a suspect who yelled obscenities at an officer.

> • Red flag: a suspect who had threatened to kill his girlfriend and himself.
> • Red flag: a suspect whom the district court described as troubled.
> • Red flag: a suspect described in his complaint as suffering from obsessive compulsive disorder, treated with medications from numerous medical professionals, and having poor judgment and impaired impulse control.

* * * * *

Normally we expect police officers to recognize such red flags and to respond appropriately. Instead of protecting these officers from obvious danger to themselves and the public, however, the en banc majority orders them to stand down. What is the hapless officer to do in the face of today's decision? What indeed is the "clearly established law" that the majority now announces? The judges in the majority do not say.

The law of qualified immunity was poignantly summarized in 2019 by a dissenting judge who is now in the majority. Today's en banc ruling turns those words to dust.[3]

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3. *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting), *petition for rehearing en banc pending*:

> The implications of the majority's mistakes cannot be minimized. The majority decides that qualified immunity can be endangered by an affidavit filed at summary judgment that creates a fact issue nowhere else supported by record evidence.

I respectfully dissent.

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Worse still, it seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person's life to preserve our own or the lives of those around us.

The qualified immunity standard stops this privilege from blinding our judgment, preventing us from pretending we can place ourselves in the officers' position based on a cold appellate record. It prevents us from hubristically declaring what an officer should have done—as if we can expect calm calculation in the midst of chaos.

The majority opinion, written from the comfort of courthouse chambers, ignores that deference. Instead, it warns officers that they cannot trust what they see; they cannot trust what their fellow officers observe; they cannot trust themselves when posed with a credible threat. It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences.

DON R. WILLETT, Circuit Judge, dissenting:

I repeat what I said last month: The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal.[1]

Qualified immunity strikes an uneasy, cost—benefit balance between two competing deterrence concerns: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[2] By insulating incaution, the doctrine formalizes a rights—remedies gap through which untold constitutional violations slip unchecked. The real-world functioning of modern immunity practice—essentially "heads government wins, tails plaintiff loses"—leaves many victims violated but not vindicated. More to the point, the "clearly established law" prong, which is outcome-determinative in most cases, makes qualified immunity sometimes seem like unqualified impunity: "letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."[3]

That said, as a middle-management circuit judge, I take direction from the Supreme Court. And the Court's

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1. *Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

2. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (flagging these "two important interests").

3. *Zadeh*, 928 F.3d at 479.

direction on qualified immunity is increasingly unsubtle. We must respect the Court's exacting instructions—even as it is proper, in my judgment, to respectfully voice unease with them.[4]

## I

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[5] While this bar is not insurmountable, it is sky-high. And it is raised higher when courts leapfrog prong one (deciding whether the challenged behavior violates the Constitution) to reach simpler prong two: no factually analogous precedent. Merely proving unconstitutional misconduct isn't enough. A plaintiff must cite functionally identical authority that puts the unlawfulness "beyond debate" to "every" reasonable officer.[6] Last month, for example, the Eleventh Circuit, noting no "materially similar case" (thus no "clearly established law"), granted immunity to a police officer who fired at a family's dog but instead shot a 10-year-old child lying face-down 18 inches

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4. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (overruling prior precedent whose unsoundness had been "aptly described" by the court of appeals).

5. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

6. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 31 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011); *see also, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (per curiam).

from the officer.[7] Not only that, the court "expressly [took] no position" as to "whether a constitutional violation occurred in the first place."[8] Translation: If the same officer tomorrow shoots the same child while aiming at the same dog, he'd receive the same immunity. *Ad infinitum*.

The Supreme Court demands precedential specificity. But it's all a bit recursive. There's no earlier similar case declaring a constitutional violation because no earlier plaintiff could find an earlier similar case declaring a constitutional violation. "Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell."[9]

## II

In recent years, individual Justices have raised concerns with the Court's immunity caselaw.[10] Even so,

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7. *Corbitt v. Vickers*, 929 F.3d 1304, 1307-08 (11th Cir. 2019).

8. *Id.* at 1323.

9. *Zadeh*, 928 F.3d at 479-80 (Willett, J., concurring in part, dissenting in part).

10. Four sitting Justices "have authored or joined opinions expressing sympathy" with assorted critiques of qualified immunity. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93

the doctrine enjoys resounding, even hardening favor at the Court. Just three months ago, in a case involving the warrantless strip search of a four-year-old preschooler, a strange-bedfellows array of scholars and advocacy groups—perhaps the most ideologically diverse amici ever assembled—implored the Court to push reset.[11] To no avail. This much is certain: Qualified immunity, whatever its success at achieving its intended policy goals, thwarts the righting of many constitutional wrongs.

Perhaps the growing left—right consensus urging reform will one day win out. There are several "mend it, don't end it" options. The Court could revisit *Pearson*[12] and nudge courts to address the threshold constitutional merits rather than leave the law undeveloped.[13] Even if a particular plaintiff cannot benefit (due to the "clearly

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NOTRE DAME L. REV. 1798, 1800 (2018) (including Justices Thomas, Ginsburg, Breyer, and Sotomayor, plus recently retired Justice Kennedy); *see, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872, 198 L. Ed. 2d 290 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) (per curiam).

11. *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, 139 S. Ct. 2616, 204 L. Ed. 2d 265, 2019 WL 1116409, at *1 (2019). As for congressional reform, Congress's refusal to revisit § 1983 suggests Article I acquiescence.

12. 555 U.S. at 236.

13. As observers have cautioned, unfettered *Pearson* discretion contributes to "constitutional stagnation" by impeding the development of precedent. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 23-24 (2015).

established law" prong), this would provide moving-forward guidance as to what the law prescribes and proscribes. Short of that, the Court could require lower courts to explain *why* they are side-stepping the constitutional merits question.[14] Or the Court could confront the widespread inter-circuit confusion on what constitutes "clearly established law."[15] One concrete proposal: clarifying the degree of factual similarity required in cases involving split-second decisions versus cases involving less-exigent situations. The Court could also, short of undoing *Harlow* and reinstating the bad-faith prong, permit plaintiffs to overcome immunity by presenting *objective* evidence of an official's bad faith.[16] Not *subjective* evidence of bad faith, which *Harlow*, worried about "peculiarly disruptive" and "broad-ranging discovery," forbids.[17] And not unadorned *allegations* of bad faith. But objective evidence that the official actually realized that he was violating the Constitution.

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14. *Id.* at 7.

15. *See, e.g.*, RICHARD FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1047-50 (7th ed. 2015) (noting the difficulties of applying the clearly-established-law test); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 n.68 (2015) ("[W]hether a right is found to be 'clearly established' is very much a function of which circuit (and I would add, which judge) is asking the question, and how that question is framed.").

16. *Harlow v. Fitzgerald* prevents plaintiffs from relying on *subjective* evidence of bad faith. 457 U.S. 800, 815-16, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

17. *Id.* at 817.

Prudent refinements abound. But until then, as Judge Jones explains in today's principal dissent, the Supreme Court's unflinching, increasingly emphatic application of "clearly established law" compels dismissal.

## III

I remain convinced that contemporary immunity jurisprudence merits "a refined procedural approach that more smartly—and fairly—serves its intended objectives."[18] Yet I also remain convinced that a majority of the Supreme Court disagrees. My misgivings, I believe, are well advised. But we would be ill advised to treat the reform of immunity doctrine as something for this court rather than that Court.[19]

For these reasons, I respectfully dissent.

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18. *Zadeh*, 928 F.3d at 481 (Willett, J., concurring in part, dissenting in part).

19. As for the sidelong critique of me in the dissenting opinion of Judges Ho and Oldham, it is, respectfully, a pyromaniac in a field of straw men. I have not raised originalist concerns with qualified immunity. My concerns, repeated today, are doctrinal, procedural, and pragmatic in nature. Nor has my unease with modern immunity practice led me to wage "war with the Supreme Court's qualified-immunity jurisprudence." I am a fellow dissenter today, notwithstanding my unease, precisely because I believe the Court's precedent compels it. In short, I have not urged that qualified immunity be repealed. I have urged that it be rethought. Justice Thomas—no "halfway originalist"—has done the same. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

JAMES C. HO and ANDREW S. OLDHAM, Circuit Judges, joined by JERRY E. SMITH, Circuit Judge, dissenting:

Apparently SUMREVs mean nothing.

In *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014), we sent a state trooper to a jury "in defiance" of "the concept and precedents of qualified immunity." 777 F.3d 221, 222 (5th Cir. 2014) (Jolly, J., dissenting from denial of rehearing en banc). The Supreme Court summarily reversed us. *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam). Then they GVR'd us in *this* case and ordered us to reconsider our obvious error in light of *Mullenix*.

The en banc majority instead doubles down. That is wrong for all the reasons Judge Jones gives in her powerful dissent, which we join in full. We write to emphasize the en banc majority's unmistakable message: Four years after *Mullenix*, nothing has changed in our circuit.

**I.**

The Supreme Court has not hesitated to redress similar intransigence from our sister circuits—often through the "extraordinary remedy of a summary reversal." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) (Sotomayor, J., dissenting) (quotation omitted). *See, e.g., City of Escondido v. Emmons*, 139 S. Ct. 500, 202 L. Ed. 2d 455 (2019) (per curiam) (summarily reversing the Ninth Circuit); *Kisela*, 138 S. Ct. 1148, 200

L. Ed. 2d 449 (per curiam) (same); *District of Columbia v. Wesby*, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (reversing the D.C. Circuit); *White v. Pauly*, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam) (summarily reversing the Tenth Circuit); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015) (reversing the Ninth Circuit); *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (per curiam) (summarily reversing the Third Circuit); *Wood v. Moss*, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (reversing the Ninth Circuit); *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) (reversing the Sixth Circuit); *Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (per curiam) (summarily reversing the Ninth Circuit); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (reversing the Tenth Circuit); *Ryburn v. Huff*, 565 U.S. 469, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012) (per curiam) (summarily reversing the Ninth Circuit); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (same); *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam) (same).

In each of these cases, the Supreme Court reminded lower courts that qualified immunity requires us not only to identify a clearly established rule of law, but to do so with great specificity. Everyone agrees, of course, that Ryan Cole has a constitutional right not to be seized unreasonably. But "that is not enough" to subject a police officer to the burdens of our civil litigation system. *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The Supreme Court has "repeatedly told courts

. . . not to define clearly established law at [that] high level of generality." *al-Kidd*, 563 U.S. at 742. Rather, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308 (citation omitted).

Only by identifying a specific and clearly established rule of law do we ensure that the officer had "fair notice"—"in light of the specific context of the case, not as a broad general proposition"—that his or her *particular* conduct was unlawful. *Brosseau*, 543 U.S. at 198 (citation omitted). *See also, e.g., Sheehan*, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."); *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (same); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (same).

So where is our clearly established law at issue here? Unbelievably, the en banc majority says we don't need any. That's so, they say, because "[t]his is an obvious case." *Ante*, at 16. That's obviously wrong for three reasons.

First, the Supreme Court to date has *never* identified an "obvious" case in the excessive force context. And the majority thinks this is the first? A case where a mentally disturbed teenager—who has a loaded gun in his hand with his finger on the trigger; who has repeatedly refused to be disarmed; who has threatened to kill anyone who tries to disarm him; who poses such a deadly threat that police have been deployed to protect innocent students

and teachers at his nearby high school—turns toward the officers just ten to twenty feet away, giving them only seconds to decide what to do in response. Really?

Second, the Supreme Court has granted qualified immunity in much tougher cases than this one. In *Plumhoff*, for example, officers fired 15 shots and killed two *unarmed* men who fled a traffic stop. In *Brosseau*, an officer shot an *unarmed* man who refused to open his truck window. In *Kisela*, officers shot a woman who was hacking a tree with a kitchen knife. In *Sheehan*, officers shot an old woman holding a kitchen knife in an assisted-living facility. In all of these cases, the Court held the officers were entitled to qualified immunity.

Third, this is *Mullenix* all over again. There our court relied on clearly established law as articulated in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). *Garner* involved an unarmed man who fled from police after stealing $10. An officer fatally shot Garner in the back of the head as he attempted to climb a fence. Our court then extended *Garner* to Mullenix's case—which involved a man who led police on a high-speed car chase after violating his probation. A state trooper attempted to end the chase by shooting the speeding car's engine block—but he missed the engine, hit the driver in the face, and killed him. *See Luna*, 773 F.3d at 719-20 (discussing *Garner*). The Supreme Court summarily reversed us because—as should be painfully obvious from the Court's serial reversals in this area—that's not how qualified immunity works. *See Mullenix*, 136 S. Ct. at 308-09 (holding our court erred in our extrapolation of *Garner*

to new facts). And they GVR'd us *in this very case* to fix our mistakes in light of *Mullenix*. The Supreme Court's message could not be clearer.[1]

Still, somehow, today's majority does not get it. Here, as in *Mullenix*, the majority attempts to rely on *Garner* to establish the governing rule of law. From *Garner*, the majority somehow divines a rule that an officer cannot shoot a mentally disturbed teenager holding a gun near

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1. The Supreme Court issues GVRs when, as here, legal error infects the judgment below. *See, e.g., Hicks v. United States*, 137 S. Ct. 2000, 2000-01, 198 L. Ed. 2d 718 (2017) (Gorsuch, J., concurring) (defending GVR because "[a] plain legal error infects this judgment" and because petitioner "enjoys a reasonable probability of success" in getting judgment reversed on the merits); *id.* at 2002 (Roberts, C.J., dissenting) ("[W]ithout a determination from this Court that the judgment below was wrong or at least a concession from the Government to that effect, we should not, in my view, vacate the Fifth Circuit's judgment."). As the cert petition explained, our panel denied qualified immunity "based on the same rationale" on "which this Court reversed in *Mullenix*." Pet. at i, 2016 WL 4987324. We think it obvious the Supreme Court GVR'd because it agreed. And tellingly, the majority does not offer an alternative theory to explain the GVR. We ignore the Court's message at our peril. *See, e.g., Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006) (granting habeas relief to a state prisoner because the evidence was insufficient to prove she shook her grandbaby to death); *Patrick v. Smith*, 550 U.S. 915, 127 S. Ct. 2126, 167 L. Ed. 2d 861 (2007) (GVR'ing i/l/o *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)); *Smith v. Patrick*, 519 F.3d 900 (9th Cir. 2008) (again granting habeas relief); *Patrick v. Smith*, 558 U.S. 1143, 130 S. Ct. 1134, 175 L. Ed. 2d 967 (2010) (GVR'ing i/l/o *McDaniel v. Brown*, 558 U.S. 120, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010)); *Smith v. Mitchell*, 624 F.3d 1235 (9th Cir. 2010) (again granting habeas relief); *Cavazos v. Smith*, 565 U.S. 1, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (SUMREV'ing).

his school. This is demonstrably erroneous. In fact, one thing that unites the Supreme Court's recent reversals in cases involving qualified immunity and excessive force is the attempt by lower courts to extrapolate *Garner* to new facts. *See Mullenix*, 136 S. Ct. at 308-09; *Scott v. Harris*, 550 U.S. 372, 381-82, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (same); *Allen v. City of West Memphis*, 509 F. App'x 388, 392 (6th Cir. 2012) (extrapolating *Garner*), *rev'd by Plumhoff, supra.*

Moreover, there are additional parallels between *Mullenix* and this case. Consider the supposed requirement that an officer take some sort of non-lethal measure before using lethal force. In *Mullenix*, our court used the power of 20-20 hindsight to say that a reasonable officer should have used spike strips to stop the chase. *See* 773 F.3d at 720-21. The Supreme Court emphatically rebuked us. *See* 136 S. Ct. at 310. They told us that an officer does not have to expose himself or other officers to harm when the suspect has already refused to be disarmed. That meant Trooper Mullenix did not have to wait to see if the fleeing felon would shoot or run over the officer manning the spike strips. *See id.* at 310-11.

So too here. In this case, the majority complains that the officers did not provide sufficient warning. But there was no clearly established law requiring Officers Cassidy and Hunter to announce themselves—while caught in an open and defenseless position—and hope not to get shot. That is particularly true here because officers previously ordered Cole to put down his gun, he refused, and he threatened to kill anyone who attempted to disarm him.

And in *Mullenix*, as here, we accused the police officers of being cowboys. Earlier on the day of the shooting, Trooper Mullenix received a negative performance review for "not being proactive enough as a Trooper"; so in the aftermath of the shooting, Mullenix said to his supervisor, "How's that for proactive?" 773 F.3d at 717; *see also* 136 S. Ct. at 316 (Sotomayor, J., dissenting). The panel opinions and en banc majority opinion in this case likewise seethe with innuendo that Officers Hunter and Cassidy were wannabe cowboys looking for a gunfight. We are in no position to make such accusations. No member of this court has stared down a fleeing felon on the interstate or confronted a mentally disturbed teenager who is brandishing a loaded gun near his school. And the *Mullenix* Court held that the qualified-immunity standard gives us no basis for sneering at cops on the beat from the safety of our chambers. *See* 136 S. Ct. at 310-11 (majority op.) (citing Brief for National Association of Police Organizations et al. as *Amici Curiae*). Yet here we are. Again.

**II.**

The majority cannot dodge responsibility for today's decision by pointing to the limits of appellate jurisdiction. *See ante*, at 13-14 (majority op.); *ante*, at 1 (Elrod, J., concurring). We obviously lack interlocutory appellate jurisdiction to review the *genuineness* of an officer's fact dispute. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 313-14, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); *Kinney v. Weaver*, 367 F.3d 337, 346-47 (5th Cir. 2004) (en banc) (applying *Johnson v. Jones*).

But that does nothing to defeat jurisdiction where, as here, the factual disputes are *immaterial*. That is why the Supreme Court repeatedly has rejected such no-jurisdiction pleas from those who wish to deny qualified immunity. *See, e.g., Plumhoff*, 572 U.S. at 771-73; *id.* at 773 (noting existence of genuine fact dispute did not defeat appellate jurisdiction in *Scott v. Harris*).

All the fact disputes in the world do nothing to insulate this *legal* question: Is this an "obvious case" under *Garner*—notwithstanding a mountain of SUMREVs, GVRs, and pointed admonitions from the Supreme Court? The majority says yes. *Ante*, at 16. They obviously must have jurisdiction to say so. With respect, it makes no sense to say we lack jurisdiction to disagree with them.

**III.**

What explains our circuit's war with the Supreme Court's qualified-immunity jurisprudence? Two themes appear to be at play.

First, the majority suggests we should be less than enthused about Supreme Court precedent in this area, because it conflicts with plaintiffs' jury rights. To quote the panel: "Qualified immunity is a judicially created doctrine calculated to protect an officer from trial before a jury of his or her peers. At bottom lies a perception that the jury brings a risk and cost that law-enforcement officers should not face, that judges are preferred for the task—a judgment made by appellate judges." *Cole v. Carson*, 905 F.3d 334, 336 (5th Cir. 2018). Or in the words of

today's majority: "The Supreme Court over several years has developed protection from civil liability for persons going about their tasks as government workers" (a rather curious way to describe the men and women who swear an oath to protect our lives and communities). *Ante*, at 2. But "the worker's defense" must yield, in cases like this, "in obeisance to [the] constitutional mandate" of a jury trial. *Id.*

We appreciate the majority's candor. But inferior court judges may not prefer juries to the Justices.

Second, some have criticized the doctrine of qualified immunity as ahistorical and contrary to the Founders' Constitution. *Ante* at 2 (suggesting denial of qualified immunity is commanded by "the Founders"); *compare* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49-61 (2018), *with* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856-63 (2018); *see also Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), *revised on petition for reh'g en banc*, 928 F.3d 457, 473 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

As originalists, we welcome the discussion. But separate and apart from the fact that we are bound as a lower court to follow Supreme Court precedent, a principled commitment to originalism provides no basis for subjecting these officers to trial.

*Appendix A*

The originalist debate over qualified immunity may seem fashionable to some today. But it is in fact an old debate. Over two decades ago, Justices Scalia and Thomas noted originalist concerns with qualified immunity. But they also explained how a principled originalist would re-evaluate established doctrines. *See Crawford-El v. Britton*, 523 U.S. 574, 611-12, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (Scalia, J., joined by Thomas, J., dissenting).

A principled originalist would not cherry pick which rules to revisit based on popular whim. A principled originalist would fairly review decisions that favor plaintiffs as well as police officers. As Justice Scalia explained in a dissent joined by Justice Thomas, a principled originalist would evenhandedly examine disputed precedents that *expand*, as well as limit, § 1983 liability:

> [O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted . . . . [But] [t]he § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation, custom, or usage of any State," Rev. Stat. § 1979, 42 U.S.C. § 1983 (emphasis added), into a statute covering constitutional violations committed *without* the

> authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law.

*Id.* at 611.

Justices Scalia and Thomas ultimately concluded that it is better to leave things alone than to reconfigure established law in a one-sided manner. If we're not willing to re-evaluate all § 1983 precedents in a balanced and principled way, then it "is perhaps just as well" that "[w]e find ourselves engaged . . . in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote." *Id.* at 611-12.

Translation: If we're not going to do it right, then perhaps we shouldn't do it at all.

Subjecting these officers to trial on originalist grounds is precisely the unprincipled practice of originalism that Justices Scalia and Thomas railed against. And not just for the procedural reasons they identified in *Crawford-El*. What about the original understanding of the Fourth Amendment, which the plaintiffs here invoke as their purported substantive theory of liability in this case? Does the majority seriously believe that it is an "unreasonable seizure," *as those words were originally understood at the Founding*, for a police officer to stop an armed and mentally unstable teenager from shooting innocent officers, students, and teachers?

And make no mistake: Principled originalism is not just a matter of intellectual precision and purity. There are profound practical consequences here as well, given the important and delicate balance that qualified immunity is supposed to strike. As the Supreme Court has explained, qualified immunity ensures that liability reaches only "the plainly incompetent or those who knowingly violate the law." *Mullenix*, 136 S. Ct. at 308 (quotation omitted). And absent plain incompetence or intentional violations, qualified immunity must attach, because the "social costs" of any other rule are too high:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

*Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (alterations and quotations omitted); *see also, e.g., Sheehan*, 135 S. Ct. at 1774 n.3 (noting "the importance of qualified immunity to society as a whole").

For those who have expressed concerns about a "one-sided approach to qualified immunity," *Kisela*, 138 S. Ct. at

1162 (Sotomayor, J., dissenting); *see also Zadeh*, 902 F.3d at 499 & n.10 (Willett, J., concurring dubitante) (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)); 928 F.3d at 480 & n.61 (Willett, J., concurring in part and dissenting in part) (same), look no further than the majority opinion. The majority undoes the careful balance of interests embodied in our doctrine of qualified immunity, stripping the officers' defenses without regard to the attendant social costs.[2]

Now *that* is a one-sided approach to qualified immunity as a practical matter. And as Justices Scalia and Thomas have observed, it's also a one-sided approach to qualified immunity as an originalist matter: It abandons the defense without also reconsidering the source and scope of officers' liability in the first place. *See Crawford-El*, 523 U.S. at 611-12 (Scalia, J., joined by Thomas, J., dissenting). To quote Justice Alito: "We will not engage in this halfway originalism." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2470, 201 L. Ed. 2d 924 (2018). *See also id.* (criticizing litigants for "apply[ing] the Constitution's supposed original meaning only when it suits them"); *Gundy v. United States*, 139 S. Ct. 2116,

2. Those social costs are particularly stark today given widespread news of low officer morale and shortages in officer recruitment. *See, e.g.*, Ashley Southall, *When Officers Are Being Doused, Has Police Restraint Gone Too Far?*, N.Y. TIMES, July 25, 2019, at A22; Martin Kaste & Lori Mack, *Shortage of Officers Fuels Police Recruiting Crisis*, NPR (Dec. 11, 2018, 5:05 AM), https://n.pr/2Qrbrnq ; Jeremy Gorner, *Morale, Policing Suffering in Hostile Climate, Cops Say; 'It's Almost Like We're the Bad Guys,' Veteran City Officer Says*, CHI. TRIB., Nov. 27, 2016, at 1.

2131, 204 L. Ed. 2d 522 (2019) (Alito, J., concurring in the judgment) ("[I]t would be freakish to single out the provision at issue here for special treatment.").[3]

* * *

Our circuit, like too many others, has been summarily reversed for ignoring the Supreme Court's repeated admonitions regarding qualified immunity. There's no excuse for ignoring the Supreme Court again today. And certainly none based on a principled commitment to originalism.

Originalism for plaintiffs, but not for police officers, is not principled judging. Originalism for me, but not for thee, is not originalism at all. We respectfully dissent.

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3. In a footnote, Judge Willett notes that his criticism of the Supreme Court's qualified immunity precedents is not based on originalist grounds. *Ante*, at 4 n.19. To our minds, that makes his criticism harder, not easier, to defend. If his concerns are based on practical and not originalist considerations, then he should address them to the Legislature, rather than attack the Supreme Court as "one-sided." *Zadeh*, 902 F.3d at 499 & n.10 (Willett, J., concurring dubitante) (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)). He also invokes Justice Thomas's opinion in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872, 198 L. Ed. 2d 290 (2017). But that opinion cites Justice Scalia's opinion in *Crawford-El*, which (as we explained above) warns qualified immunity skeptics not to engage in halfway originalism.

STUART KYLE DUNCAN, Circuit Judge, joined by SMITH, OWEN, HO, and OLDHAM, Circuit Judges, dissenting:

The majority opinion overlooks or omits undisputed material facts showing that any reasonable officer would have viewed Ryan Cole as a severe threat. Before the shooting, the defendant officers: (1) were tracking a distraught suspect wandering through the woods armed with a loaded 9mm semi-automatic handgun; (2) who had earlier that morning off-loaded a cache of weapons and ammunition at a friend's house; (3) who had already refused to give up his pistol when confronted by the police; and (4) who had threatened to "shoot anyone who came near him." Cole did not dispute those facts and, indeed, convinced the district court they were irrelevant. Joining Judge Jones' dissent in full, I respectfully dissent on the additional grounds provided by these pre-encounter facts.

No one doubts some of the events on October 25, 2010—when the officers violently encountered Cole in the woods near Garland, Texas—are disputed. The question is whether those disputes are material. *See, e.g., Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 483 (5th Cir. 2001) ("threshold issue" on qualified immunity appeal "is whether the facts the district judge concluded are *genuinely disputed* are also *material*"). Judge Jones' dissent compellingly shows they are not: Resolving all disputes in Cole's favor, the undisputed facts still show the officers violated no clearly established law. Jones Dissent at 2-3, 11-22. The majority thus errs by concluding that "competing factual narratives" bar it from deciding qualified immunity. Maj. at 3.

I write separately to emphasize what led up to the shooting, and also to explain why those undisputed events provide further reasons to reverse. The majority and Judge Jones focus on the shooting itself, as did the district court. But the prelude to the shooting gives unavoidable context for evaluating the officers' actions.[1] Surprisingly, the district court did not even analyze those stage-setting facts, which it mistakenly deemed irrelevant. *See* Cole v. Hunter, No. 3:13-CV-02719-O, 2014 U.S. Dist. LEXIS 8796, 2014 WL 266501, at *13 n.5 (N.D. Tex. Jan. 24, 2014); Cole v. Hunter, 68 F. Supp. 3d 628, 642-43 (N.D. Tex. 2014). So, to assess their impact, we must "undertake a cumbersome review of the record." *Johnson v. Jones*, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). That extra work is sometimes imperative, as here, "to ensure that the defendant's right to an immediate appeal on the issue of materiality is not defeated solely on account of the district court's failure to articulate its reasons for denying summary judgment." *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998), *denying reh'g in* 130 F.3d 96 (5th Cir. 1997).

This detailed record review (*see* Part I) compels two conclusions (*see* Part II). First, the district court erred by excluding the undisputed events before the shooting. That error—based on a misreading of our precedent—

1. *See, e.g., Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474, 192 L. Ed. 2d 416 (2015) (courts "must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer"); *Tennessee v. Garner*, 471 U.S. 1, 9, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (whether a "particular" seizure was justified depends on "the totality of the circumstances").

truncated the qualified immunity analysis. That alone requires reversing the summary judgment denial. Second, in light of those pre-encounter facts, the majority's insistence that this is an "obvious case" collapses. Maj. at 16. Given what confronted the officers, the majority cannot say what they did was "obviously" unlawful. The only thing obvious is that no case told the officers, clearly or otherwise, how to respond when they met Cole that morning, emerging from the woods with his finger on the trigger of a loaded gun.

By denying qualified immunity and making the officers run the gauntlet of trial, the majority sets a precedent that "seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force." *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting).

## I.

The majority begins "around 10:30 a.m.," less than an hour before the shooting. Maj. at 4. But events began to unfold much earlier.[2] Around 2 a.m. that morning, Cole knocked on the door of his friend, Eric Reed Jr., to show him "a 44 magnum revolver." Awakened by the knocking, Eric Jr.'s father (Eric Sr.) left his room, saw Cole with the

2. All of these facts come from reports and transcriptions of radio transmissions made within a day or two of the incident. None come from affidavits submitted by the officers years later. And, as explained below, none of these pre-encounter facts was disputed by Cole or analyzed by the district court.

gun, and told him to leave. Eric Jr. convinced Cole to leave the revolver because "he [did not] need to be carrying a weapon around."

Around 8 a.m., Eric Jr. gave his father Cole's gun. Eric Sr., a retired Sachse police officer, then notified Officer Vernon Doggett, who came to the Reeds'. Eric Jr. told his father and Doggett that "[Cole] told him there were more guns on the side of the house." There, they found "a double barrel shot gun with some shot gun shells and what appeared to be a plastic bag with 9mm bullets," which Doggett secured. Eric Jr. also explained Cole "had broken up with his girlfriend and was going to kill himself and his girlfriend."

Doggett was a resource officer for Sachse High School, where Cole and his girlfriend attended. He contacted Sergeant Garry Jordan, told him about the guns, and asked to meet at the school. Doggett reported that Cole "may be at school with a 9mm handgun." Another officer checked whether Cole was in class, and Jordan searched the parking areas for Cole.

Not finding him, Jordan went to Coles' and spoke to his parents. He learned that, the previous evening, officers had responded to a disturbance there. Officers had found Cole's father "holding Ryan down" because "he did not want [Cole] to leave the residence with the pocket knife that he had." He said "his son had a wild look in his eye and . . . had been smoking K2." While the officers found there had been no assault, all agreed it was "a good idea for Cole to stay the night with a friend." The Coles had

not seen Ryan since then but reported he had "apparently returned home during the night and had opened the gun safe, removed an unknown amount [*sic*] of weapons, and reset the combination."

Meanwhile, Eric Jr. noticed Cole was back. He asked Cole if he was armed and Cole showed him a "38 revolver" and a "9mm semiauto." He convinced Cole to give him the revolver, but Cole told him he was not "getting the 9mm." Cole also said that the 9mm was loaded and that he did not "wanna use it on [Eric Jr.]" Cole stated that "he would shoot anyone who came near him." Cole left, and Eric Jr. called his father, who called the police.

Around 10:49 a.m., Officer Stephen Norris radioed "all available Sachse officers" to respond to the area of the Reed residence. He reported Cole was "observed running south of the location with 3 weapons, one a loaded 9mm." He also reported Cole was "irate and distraught and stated he would shoot anyone who came near him." Around the same time, Sachse Officer Michael Hunter was dispatched to assist Jordan at the Coles', but on arrival he was told by Sachse Officer Carl Carson he was not needed. As Hunter was leaving, he heard Norris' call advising Cole was "in the area . . . with a gun." Hunter stated he "did not know the specifics of the call at this point," but proceeded to the Reeds' residence. In response to Norris' call, Jordan also left the Coles'.

Sachse Officer Martin Cassidy also received Norris' dispatch and went to the area Norris indicated. He was given Cole's description and advised that Cole was "armed

with at least one handgun and possibly three." Cassidy spoke with Norris on the phone about "the proximity of Armstrong Elementary School to the location where [Cole] was last seen." Cassidy therefore went to check on the school and a nearby shopping center for any signs of Cole.

Meanwhile, Hunter arrived at the Reeds', where he met Jordan and Carson. Hunter overheard Eric Jr. say he had gotten "one gun" from Cole but that Cole had left "armed with a 9mm handgun." "Hunter put [Cole's] description out to other officers," and then he and Carson went to search for Cole. After speaking with the officers, Eric Jr. checked for more guns and found "6 firearms around [his] house."

Jordan then observed Officers Elliott and Sneed pass by in a patrol unit. Those officers found Cole nearby. Elliott reported that "Sneed . . . advised [Cole] to show his hands." Instead, Cole "reached into his waist band and pulled a pistol and placed it to his head after about three steps and refused to obey Lt. Sneed['s] commands." When Jordan arrived, Sneed "drew his duty weapon and yelled at [Cole] to drop the weapon," but Cole refused. As Cole continued eastbound towards Highway 78, Sneed "warned [Cole] that [he] would shoot him in the back if he tried to get to the highway or walk toward any innocent bystanders." Cole "would occasionally turn his head and yell obscenities at [Sneed]." Two other officers then parked "directly in front of [Cole's] path." To avoid them, Cole turned "northbound and began walking the railroad tracks." Jordan was constantly updating dispatch about Cole's movements. "Suddenly, [Sneed] observed [Cole] cut

eastbound and run up a hill and into the brush towards Highway 78." Dispatch reported that Cole was "off tracks coming through tree lines towards [Highway] 78."

Hunter, Carson, and Cassidy were monitoring Cole's movements from the dispatches. They arrived separately at the part of Highway 78 where Cole was thought to be. Hunter noted "[Cole] appeared to be walking towards the railroad track," and he advised Carson "[they] needed to go out to the highway and intercept [him]." Cassidy advised Carson to get out his taser and follow Cassidy. Hunter "parked further south on Highway 78 as [he] figured [Cole] would be on the railroad track paralleling Highway 78 at about [his] location." He guessed correctly. As Hunter "began to look for cover since [he] was out in the open," Cole "walked out from the brush approximately 10 to 20 feet from [Hunter]."

What followed was the shooting.

**II.**

Cole did not dispute these stage-setting events in opposing summary judgment. To the contrary, he argued any "prior events" before the shooting were "irrelevant." The district court agreed, excluding from its qualified immunity analysis the "events" from "earlier that morning," *Cole*, 2014 U.S. Dist. LEXIS 8796, 2014 WL 266501, at *13 n.5, and focusing solely on what happened "immediately before and during the shooting." Cole, 68 F. Supp. 3d at 644. That mistake skewed the district court's analysis and provides yet another reason why we should reverse.

First, the district court erred by excluding everything that happened before the officers' five-second encounter with Cole. That approach artificially truncates the qualified immunity analysis. In assessing qualified immunity, we "[c]onsider[ ] the specific situation confronting [officers]," *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778, 191 L. Ed. 2d 856 (2015), which "must be judged from the perspective of a reasonable officer on the scene[.]" *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). A "reasonable officer" does not shape his decisions based only on the seconds when he confronts an armed suspect; instead, he acts based on *all* relevant circumstances, including the events leading up to the ultimate encounter. *See, e.g., Escobar v. Montee*, 895 F.3d 387 (5th Cir. 2018) (courts evaluate excessive force claims "from the perspective of a reasonable officer on the scene, paying 'careful attention to the facts and circumstances of each particular case'") (quoting *Graham*, 490 U.S. at 396). That is precisely how the Supreme Court has instructed lower courts to assess whether force is excessive: The seminal case, *Tennessee v. Garner*, asks whether a seizure was justified, based not only on the immediate seizure, but on "the totality of the circumstances" facing the officers. 471 U.S. 1, 9, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). And qualified immunity cases, both from the Supreme Court and our court, routinely consider the background facts that shaped an officer's confrontation with a suspect in order to evaluate the officer's ultimate use of force.[3]

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3. *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 306, 193 L. Ed. 2d 255 (2015) (assessing officer's shooting of suspect during car chase beginning with events preceding the "18-minute chase"); *Plumhoff v. Rickard*, 572 U.S. 765, 768-70, 134 S. Ct. 2012, 188 L. Ed.

The district court's sole contrary authority was our statement in *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011), that the excessive force inquiry "is confined to whether the [officer or another person] was in danger *at the moment of the threat*." But the district court overread *Rockwell*. We made that statement in *Rockwell* to reject the notion that officers' negligence *before* a confrontation determines whether they properly used deadly force *during* the confrontation. *See id*. at 992-93 (rejecting argument that "circumstances surrounding a forced entry" bear on "the reasonableness of the officers' use of deadly force"). The cases *Rockwell* cited say that plainly. *See, e.g., Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) ("[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm.").[4] And the key case

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2d 1056 (2014) (assessing officer's shooting of suspects in Memphis, Tennessee after lengthy car chase beginning with traffic stop in "West Memphis, Arkansas"); *Brosseau v. Haugen*, 543 U.S. 194, 195, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (evaluating officer's shooting of fleeing suspect beginning with events "[o]n the day before the fracas"); *Colston*, 130 F.3d at 100 (determining officer's failure to warn was not objectively unreasonable "[i]n light of the totality of the circumstances facing [the officer]") (citing *Garner*, 471 U.S. at 10).

4. Our cases continue to apply the *Rockwell* "moment-of-the-threat" principle in this way. *See, e.g., Shepherd v. City of Shreveport*, 920 F.3d 278 (5th Cir. 2019) (explaining that, because the excessive force inquiry is "confined to whether the officer was in danger at the moment of the threat[,] . . . [t]herefore, any of the officers' actions leading up to the shooting are not relevant") (emphasis added) (internal quotes and citation omitted); *Harris v. Serpas*, 745 F.3d 767, 772-73 (5th Cir. 2014) (same) (discussing *Rockwell*).

*Rockwell* quoted for the "moment-of-the-threat" point recognized that pre-confrontation events could "set the stage for what followed in the field." *Bazan*, 246 F.3d at 493.

By misreading our cases, the district court blinded itself to a rich vein of facts—facts Cole did not dispute below—that round out the picture of the officers' violent encounter with Cole. At a minimum, that error alone requires reversing the denial of summary judgment and remanding for reconsideration of the officers' actions in light of *all* relevant undisputed facts. *See, e.g., White v. Balderama*, 153 F.3d 237, 242 (5th Cir. 1998) (concluding "limited remand" was appropriate given "lack of specificity in . . . district court's order denying summary judgment on the basis of qualified immunity").

Second, the undisputed pre-encounter events underscore why, contrary to the majority's view, this is far from an "obvious case." Maj. at 16. An "obvious case," the Supreme Court has explained, is one where an officer's actions are plainly unlawful under a generalized legal test, even if those actions do not contravene a "body of relevant case law." *Brosseau*, 543 U.S. at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)); *see also, e.g., White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (an "obvious case" means that "in the light of pre-existing law the unlawfulness [of the officer's actions] must be apparent") (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (cleaned up). As I understand the majority opinion, it believes this is an obvious case because a jury

could find that (1) Cole "posed no threat" to the officers; (2) the officers fired "without warning"; and (3) the officers had "time and opportunity" to warn Cole, but did not. Maj. at 15. According to the majority, this scenario would plainly violate *Garner*'s generalized test that an officer may not use deadly force to apprehend a suspect who "poses no immediate threat to the officer," unless he warns the suspect "where feasible." *Id.* (quoting *Garner*, 471 U.S. at 11-12).

Judge Jones' dissent shows that, even resolving all disputed facts in Cole's favor, the officers did not "obviously" violate *Garner*'s generalized test during the immediate shooting—that is, when in the space of five seconds at most, the officers met Cole at a distance of 10-20 feet as he backed out of the woods, still armed, and began to turn. Jones Dissent at 11-12. But if we include the undisputed facts leading up to the shooting, the notion that this is an "obvious case" crumbles. To believe that, we would have to blind ourselves to the facts that (1) the officers were searching for an irate, distraught suspect; (2) who was wandering through the woods armed with a loaded semi-automatic handgun; (3) who had refused police demands to turn over his weapon; (4) who had just that morning deposited a cache of weapons and ammunition at his friend's house; and (5) who had threatened to "shoot anyone who came near him." Those were the "totality of the circumstances" facing the officers, *Colston*, 130 F.3d at 100, and they were not disputed by Cole or the district court. Given those circumstances, the officers might have taken any number of actions when they met Cole in the woods that morning—they might have warned him, or shot

him, or shot in the air, or retreated, or remained frozen in place to see what he would do. But to say it is "obvious" what they should have done is to denude the concept of an "obvious case" of any meaning.

Once stripped of the conceit that this is an "obvious case," the majority has nothing left to justify its holding. The Supreme Court has bluntly told us that, outside the "obvious case" scenario, "*Garner* . . . do[es] not by [itself] create clearly established law[.]" *White v. Pauly*, 137 S. Ct. at 552. And, of course, the majority does not try to claim that the facts of *Garner* are anything like this case. In *Garner*, a police officer shot a fleeing, unarmed burglar in the back of the head. The officer admitted he did not even suspect the burglar was armed. *See* 471 U.S. at 3 (noting the officer "saw no sign of a weapon" at the time he shot and, afterwards, admitted "[he] was 'reasonably sure' and 'figured' that [the suspect] was unarmed"). Apples and oranges does not capture the chasm between that case and this one.

The majority does claim that our 1996 decision in *Baker v. Putnal*, "clearly established" that the officers' conduct here was unlawful. Maj. at 16 (citing 75 F.3d 190, 193 (5th Cir. 1996)). That is mistaken. In *Baker*, Officer Putnal was patrolling a crowded beach area when gunfire erupted. *Id.* Witnesses directed Putnal "toward a red car which they said contained the shooters." *Id.* He approached that car, but then saw two people sitting in another vehicle, a truck. *Id.* One of the truck's passengers, Wendell Baker, "turned in Putnal's direction . . . [and] Putnal shot and killed [him]." *Id.* While a pistol was recovered from the

truck, the plaintiffs denied Baker "was holding a pistol" when shot. *Id.* at 196. In other words, a jury could have found Baker was not holding a gun when Putnal killed him.

It is not hard to grasp the key difference between *Baker* and this case. When shot, Baker was *possibly not even holding a gun*. When shot, Cole was *undisputedly holding a gun*. Imagine this conversation between a police officer and the police department's lawyer:

OFFICER: I heard the Fifth Circuit just decided this *Baker* case. What does it tell me I should or shouldn't do in the field?

LAWYER: Well, *Baker* says you lose qualified immunity if you shoot someone sitting in a car doing nothing more threatening than just turning in your direction. In other words, someone you don't even see holding a weapon.

OFFICER: Makes sense. But tell me this. What if the person I approach *is* holding a gun?

LAWYER: Well, *Baker* doesn't speak clearly to that situation. I mean, the jury in *Baker* could have found the guy didn't even have a gun in his hand when the officer shot him.

In other words, contrary to the majority's view, *Baker* could not have "established clearly that Cassidy's and

Hunter's conduct . . . was unlawful" when they shot Cole as he emerged from the woods with his finger on the trigger of a loaded gun. Maj. at 16. To guide officers in the field, a controlling precedent must be "sufficiently clear that every reasonable [officer] would have understood that what he is doing violates" the Constitution. *Mullenix*, 136 S. Ct. at 308 (cleaned up). *Baker* does not come close.

The officers deserve qualified immunity on the excessive force claims. I respectfully dissent.

**APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 25, 2018**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

CARL CARSON,

*Defendant-Appellant.*

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No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

MICHAEL HUNTER; MARTIN CASSIDY,

*Defendants-Appellants*

Appeals from the United States District Court
for the Northern District of Texas.

*Appendix B*

September 25, 2018, Filed

**ON REMAND FROM THE UNITED STATES SUPREME COURT**

Before HIGGINBOTHAM, CLEMENT, and HIGGINSON, Circuit Judges

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Qualified immunity is a judicially created doctrine calculated to protect an officer from trial before a jury of his or her peers. At bottom lies a perception that the jury brings a risk and cost that law-enforcement officers should not face, that judges are preferred for the task—a judgment made by appellate judges.

We return to the October 25, 2010 shooting of Ryan Cole, at the time a seventeen-year-old high-school student in Sachse, Texas. Cole's parents, Karen and Randy, individually and as next friends of their son (collectively "the Coles") brought suit against Officer Carl Carson, Lieutenant Martin Cassidy, and Officer Michael Hunter of the Sachse Police Department under 42 U.S.C. § 1983. The Coles allege that the officers violated Cole's Fourth and Fourteenth Amendment rights during the shooting incident and by a subsequent fabrication of evidence. The officers filed dispositive pretrial motions in the district court, asserting the defense of qualified immunity. The district court denied these motions. In an earlier opinion, we affirmed the district court's denial of the officers' motions, with the exception of its denial of Carson's motion

to dismiss the Fourth Amendment claim arising from fabrication of evidence.[1] Our previous judgment has now been vacated by the Supreme Court,[2] and we consider the case on remand in light of the Court's decision in *Mullenix v. Luna*.[3] We affirm the denial of Cassidy and Hunter's motion for summary judgment, otherwise reinstate our previous opinion in this case, and remand for further proceedings consistent with this opinion.

## I

On October 25, 2010, at around 10:30 a.m., the Sachse Police Department called available units to the neighboring town of Garland, Texas. Police there were searching for Ryan Cole, a seventeen-year-old white male, last seen around Norfolk Drive armed with up to three weapons, including a nine-millimeter handgun.

Officer Michael Hunter responded by proceeding immediately to Norfolk Drive. In a statement given the day of the incident, Hunter described there encountering a young man who explained that Cole had given one of his guns to him, and that he had unsuccessfully tried to persuade Cole to surrender a handgun. In testimony given almost four years later in connection with this litigation,

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1. *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016).

2. *Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016).

3. *Id.* (granting certiorari, vacating, and remanding for consideration in light of *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam)).

Hunter could recall in further detail that the young man was Eric Reed Jr., and that Reed described an altercation with Cole, which culminated in Cole threatening Reed with harm. Beyond the physical description relayed over the police radio, Hunter otherwise learned nothing "that would cause [him] to believe Cole was violent or wanted to hurt anyone."[4] Hunter searched the area, but heard over the radio that the suspect had been located in a nearby alleyway. Hunter went to the location. There he saw two officers following Cole, who was walking away from the officers holding his gun to his head, approaching railroad tracks in a wooded area along Highway 78. Hunter testified to his understanding that Cole was suicidal, and four years after the incident he also raised the possibility for the first time that Cole was using suicide as a pretext to evade the police. Hunter also testified four years later that he had heard police-radio transmissions indicating that officers were protecting nearby schools because of "Cole's dangerous conduct which posed a risk of serious harm to a great many innocent in the vicinity." Hunter suggested to Officer Carl Carson, who had joined him on the scene, that they circle behind the wooded area to intercept Cole.

Meanwhile, Lieutenant Martin Cassidy had also heard the original dispatcher's summons. Cassidy called the Sachse Police Department for more information. On the day of the incident, Cassidy testified that he learned from the conversation that "this subject had shown up at [a]

4. In a 2014 declaration, Hunter stated that Cole refused a police officer's order to surrender his weapon. Hunter did not testify that he knew this fact at the time.

residence with a handgun and had just recently been seen walking away." Four years later, Cassidy testified that he had also learned much more: Cole was distraught from a recent separation from his girlfriend, also a student at Sachse High School; Cole had been involved in a domestic disturbance the previous night, and had brought a number of firearms to a friend's house, retaining possession of at least one and as many as three firearms. Cassidy had also learned that Cole "had threatened to shoot anyone who tried to take his gun," and had refused an order to drop his weapon. Sachse High School was about two miles from the search area, and Cassidy became concerned about the possibility that Cole intended to target the school. Following the search from his car, Cassidy also decided to intercept Cole on Highway 78.

The three officers arrived at the side of Highway 78 around the same time. Hunter drew his duty weapon; Cassidy also drew his firearm, and advised Carson to be ready to use his taser. The officers started walking along the tree line. A steep embankment rose from the railroad tracks to the area along Highway 78. Cole would have to climb this embankment to approach the tree line. Cassidy and Hunter used both the edge of the embankment and the vegetation to conceal themselves as they walked. Hunter also removed his white motorcycle helmet in order to be less conspicuous. Cassidy soon heard a message over the police radio: Cole was ascending to the tree line. Hunter heard movement in the brush, and signaled to his colleagues.

*Appendix B*

The Coles' narrative of the roughly five seconds that followed relies on medical reports, ballistics analysis, and evidence collected on the scene and retrieved from Cole's body.[5] Moments after Hunter signaled to his colleagues, Cole backed out of the brush. He was facing away from the officers, his right arm raised, holding the barrel of the handgun to his right temple. For three to five seconds the officers had an opportunity to yell out to Cole to freeze or drop his gun. But the officers perceived that Cole was unaware of their presence, and remained silent so as not to alert him.[6] Cole began to turn counterclockwise. Around this time either Carson or Cassidy began to issue a command to Cole.[7] Before the officer could warn Cole, however, Hunter fired, followed by Cassidy. Still holding the handgun to his temple, Cole pulled the trigger, firing into his head.

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5. These sources are interpreted by two experts retained by the Coles, a forensic expert and a former police officer; their affidavits were submitted to the district court as attachments to the Coles' First Amended Complaint.

6. The Coles' expert witnesses reviewed the recording from Hunter's body microphone and reported no warning before the shots commenced.

7. The two experts also reviewed a second recording from another officer's body microphone (they hypothesized it was Cassidy's or Carson's) and reported the beginning of the word "drop" was spoken either after the initial volley of shots were taken or immediately preceding the gunfire—this word was not spoken by Hunter. The Coles' expert witness listened to an audio recording of the incident captured on Hunter's motorcycle unit and heard no verbal warning.

The officers offer alternative accounts. They agree with each other that moments after Hunter signaled to Carson and Cassidy, Cole backed out from the brush about 10 to 20 feet in front of Hunter. On the day of the incident, Hunter did not specify the position of Cole's hands as he emerged from the brush. Four years later, however, Hunter recalled that Cole's hands were lowered, with the handgun in his right hand held no higher than waist-level. Cassidy, on the other hand, testified that Cole emerged with the handgun held to his head. Carson stated only that he saw Cole emerge from the tree line in front of Hunter, and that he "could not see what the suspect was doing before the shots were fired."

According to Carson, Hunter then gave Cole a command "about showing his hands or dropping his gun." Cassidy also testified that Hunter issued a command. In his initial statement Cassidy testified that high winds prevented him from hearing Hunter's words. Four years later, however, Cassidy could recollect that Hunter had shouted "[D]rop it!" Hunter himself equivocated on whether he shouted to Cole. Initially, Hunter stated that he had no chance to issue a command. Three days later, Hunter could no longer recollect whether he had or had not yelled to Cole. In a deposition four years after the incident, Hunter did not disagree with his fellow officers' recollection that he had issued a command.

Hunter and Cassidy testified that Cole turned and pointed his handgun at Hunter.[8] Hunter fired four rounds

8. Carson testified he could not see Cole's movement because Cassidy and Hunter obstructed his line of sight.

at Cole. Cassidy fired three. None of the officers recalled Cole discharging his own gun.

Eyewitnesses offer additional accounts. One witness, William Mackey, standing in a parking lot across the highway, heard one of the officers yell for Cole "to come out." Mackey recalled that when Cole emerged from the trees "roughly five officers" were on the scene, and more than one yelled for Cole to "drop his gun" before the shooting commenced. Mackey also remembered—in a second affidavit, sworn three years later—that Cole had "raise[d] his hand and point[ed] [an] object towards the officers." Another witness, Trent Kornegay, saw Hunter drop to a knee looking into the trees; as Cole emerged, someone said "drop the gun," then shots were fired. A third witness, Steve Ellis, also across the highway, saw Cole emerge, then heard officers yell "repeatedly" for Cole "to drop the weapon and stop" before the shooting commenced. A fourth eyewitness standing in the same parking lot, Jim Owens, testified that Cole's hands remained motionless by his sides during the whole incident, and that no words were spoken or shouted before shots were fired.

Of the officers' shots, two hit Cole. One round fired by Hunter passed through Cole's left arm, into his torso, fracturing a rib, bruising his lung, and lodging in his back. A second round, also fired by Hunter, grazed his left arm. None of Cassidy's shots struck Cole. A third round entered three inches above Cole's ear from Cole's right, with fragments of the bullet exiting the top of his skull. The entry wound exhibited stippling, that is, discoloration of the skin caused by hot gases and residue

released immediately around a discharging firearm. Ballistics analysis indicated that the trajectory of the third round was characteristic of a self-inflicted wound. When copper fragments were recovered from Cole's head, ballistics experts determined they had originated from Cole's handgun.

The Coles allege that while Cole was unconscious, bleeding "profusely" and "presumably . . . to death," the officers did nothing to help him. When paramedics arrived, Cole experienced cardiac arrest, but was resuscitated. He was then immediately taken to Baylor Hospital in Garland, where he was stabilized. Cole remained hospitalized, recovering from his injuries for months. He survived the shooting, but continues to suffer from serious mental and physical disabilities arising from his injuries.

Following the shooting, the three officers remained together at the scene, but never offered Cole assistance. The Coles allege that during this time the officers conferred, and agreed to fabricate a story that would insulate Cassidy and Hunter from liability. Eventually, members of the Garland Police Department arrived and took control of the scene, but did not follow the standard procedure of separating witnesses to ensure independent recollections. Instead, members of the Sachse Police Department were allowed to escort Cassidy and Hunter back to their police station. The officers later provided statements to Garland Police Department investigators at the Garland police station. Based on the officers' statements, Cole was charged with the misdemeanor

of unlawful carrying of a firearm[9] and the felony of aggravated assault of a public servant.[10] As a result of the assault charge, Cole, incapacitated in intensive care, was placed under house arrest. The Coles incurred substantial legal fees in connection with the charge. Around two years later, Cole received deferred adjudication on the unlawful carrying misdemeanor charge and the District Attorney dismissed the assault charge.

The Coles brought suit against Carson, Cassidy, and Hunter in the Eastern District of Texas.[11] The officers successfully transferred the case to the Northern District of Texas. The Coles' amended complaint brings three claims relevant here. First, the Coles bring a Section 1983 claim against Cassidy and Hunter, alleging a violation of Cole's Fourth Amendment right against the use of excessive force. Second, they bring a Section 1983 claim against all three officers alleging a violation of Cole's Fourth Amendment right against unreasonable seizures arising from the fabrication of evidence. Third, they bring a Section 1983 claim against all three officers alleging a

9. Under Texas Penal Code Chapter 46, it is a Class A misdemeanor to "intentionally, knowingly, or recklessly carr[y] on or about [one's] person a handgun" unless on one's premises or inside or en route to one's motor vehicle or watercraft. TEX. PENAL CODE § 46.02. It is lawful for a handgun permit holder to carry a concealed handgun, and, as of January 2016, for a permit holder to openly carry a handgun that is holstered. *Id.* at § 46.035.

10. Under Texas Penal Code Chapter 22, it is a first-degree felony offense to commit an assault on a public servant while the public servant is discharging an official duty. *Id.* § 22.02(b)(2)(B).

11. The Coles also named the City of Sachse as a defendant.

violation of Cole's Fourteenth Amendment due process rights arising from the same fabrication of evidence.

The officers moved to dismiss these claims, asserting absolute and qualified immunity defenses. In a January 24, 2014 Memorandum Opinion and Order, the district court denied the officers' motion. Carson alone appealed the denial of the motion in connection with the Coles' Fourth and Fourteenth Amendment claims. The district court stayed the fabrication of evidence claim as to Cassidy and Hunter pending Carson's appeal. The district court allowed limited discovery focused on Cassidy and Hunter's qualified immunity defenses to the Fourth Amendment excessive force claim. Those two officers moved for summary judgment on the Fourth Amendment excessive force claim, again asserting qualified immunity. The district court denied the motion and Cassidy and Hunter appealed.

We consolidated Cassidy and Hunter's appeal of the denial of summary judgment with Carson's appeal of the denial of the motion to dismiss. On September 25, 2015, we affirmed the district court's denial of summary judgment based on qualified immunity with respect to the Coles' Fourth Amendment excessive force claim against Cassidy and Hunter, and affirmed the district court's denial of the motion to dismiss with respect to the Coles' Fourteenth Amendment due process claim against Carson. With respect to the denial of Carson's motion to dismiss the Fourth Amendment fabrication of evidence claim, we reversed.

The officers filed a motion for rehearing and en banc review in this court, which we denied. They then petitioned the Supreme Court for a writ of certiorari. On November 28, 2016, the Supreme Court granted certiorari, vacated this court's judgment, and remanded the case for further consideration in light of *Mullenix v. Luna*,[12] decided in the intervening time. On remand, we called for supplemental briefing and oral argument. The parties' supplemental briefing is complete. We have heard oral argument.

## II

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[13] "Qualified immunity balances two important interests— the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[14] Qualified immunity involves not only immunity from liability, but also immunity from suit.[15] The qualified immunity inquiry includes two parts. In the first we ask

12. 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015).

13. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

14. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

15. *Id.*

whether the officer's conduct has violated a federal right; in the second we ask whether the right in question was "clearly established" at the time of the violation, such that the officer was on notice of the unlawfulness of his or her conduct.[16] The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time.[17]

In the first part of our review we turned to the claim of a constitutional violation for each assertion of the qualified immunity defense. We first held that a reasonable jury could find Hunter and Cassidy violated Cole's Fourth Amendment right against the use of excessive force, and held that this conduct violated clearly established law.[18] Regarding Carson's motion to dismiss, we held that the Coles failed to allege facts sufficient to make out a Fourth Amendment violation in connection with fabrication of evidence,[19] but that their allegations were sufficient to sustain the Fourteenth Amendment due process claim.[20] In connection with the latter claim, we also held that the alleged violation violated clearly established law.[21]

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16. *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861, 1865-66, 188 L. Ed. 2d 895 (2014).

17. *Id.*

18. *Cole*, 802 F.3d at 757-62.

19. *Id.* at 764-65.

20. *Id.* at 765-74.

21. *Id.* at 773-74.

We will not revisit the first part of the qualified immunity inquiry in connection with any of the Coles' claims, nor the question of clearly established law as regards the Coles' Fourteenth Amendment claim against Carson. We hear this case on remand from the Court for further consideration in light of *Mullenix*.[22] In *Mullenix*, the Court reversed a decision of this court in which we had found that a police officer violated clearly established law by shooting a fugitive during a car chase. In its decision the *Mullenix* Court addressed only the second part of the qualified-immunity inquiry: whether the officer's alleged conduct violated clearly established law.[23] The Court's mandate here reaches only this second part of the qualified immunity inquiry in connection with the Coles' Fourth Amendment claim against Cassidy and Hunter, and, as we need not, we do not reach issues unaddressed by the mandate on remand.[24] We reinstate our prior decision as concerns all other parts of the appeal and address only the existence of clearly established law as it informs the denial of Cassidy and Hunter's motion for summary judgment.

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22. *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015).

23. *Id.* at 308-12; *see also Aldaba v. Pickens*, 844 F.3d 870, 872 (10th Cir. 2016).

24. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (finding that, absent exceptional circumstances, the court generally addresses only issues within the scope of a mandate on remand). *But see Hill v. Black*, 920 F.2d 249, 250 (5th Cir. 1990), *modified on other grounds on denial of reh'g*, 932 F.2d 369 (5th Cir. 1991) (holding that the court has jurisdiction to reach issues unaddressed by the Supreme Court's mandate on remand).

Turning to that denial, we note that the district court did not weigh the evidence and resolve the factual disputes over the shooting of October 25, 2010, properly so.[25] Rather it asked only whether a jury should "resolve the parties' differing versions of the truth at trial."[26] The district court determined that genuine disputes of fact remained, that these disputes were material,[27] and should be resolved by a jury.

Our inquiry is more circumscribed. "An order denying a motion for summary judgment is generally not a final decision within the meaning of § 1291 and is thus generally not immediately appealable."[28] However, a denial of summary judgment on the basis of qualified immunity is immediately appealable under the collateral order doctrine.[29] With such an appeal our review is confined to the materiality of factual disputes identified by the district court.[30] We ask whether, if all factual disputes are resolved in the plaintiffs' favor, Cassidy and Hunter are entitled to qualified immunity as a matter of law. If so, the officers

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25. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

26. *Id.* (internal quotation marks omitted).

27. *See* Fed R. Civ. P. 56(a).

28. *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2018, 188 L. Ed. 2d 1056 (2014).

29. *Id.* at 2019 ("[P]retrial orders denying qualified immunity generally fall within the collateral order doctrine."); *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

30. *See Good v. Curtis*, 601 F.3d 393, 397-98 (5th Cir. 2010).

are due summary judgment; if not, we affirm the district court.[31] We take facts in a light most favorable to the non-movants, the Coles, and draw all justifiable inferences in their favor.[32] We consider the circumstances leading up to the officers' conduct,[33] but confine our inquiry to those facts knowable to the officers at the time.[34] Within the limited scope of our inquiry, review is de novo.[35]

The facts as we take them establish that Cole posed no threat to the officers or anyone else at the time Cassidy and Hunter shot him. The officers' limited knowledge of Cole created no reasonable expectation of an immediate violent confrontation: Cole was a high school student distraught over a recent breakup; he had carried his guns to a friend's house; the friend was unable to persuade Cole to part with the handgun, and Cole warned him not to try to take it. Both officers knew that Cole had walked away from two police officers without violent confrontation. At no point did Cassidy or Hunter hear orders to establish a perimeter around Cole, to conceal themselves, or to take cover, nor were there calls for backup from SWAT teams or tactical units to handle the situation. While Cole possessed a handgun, he did nothing to threaten the

31. *Id.*; *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

32. *Tolan*, 134 S. Ct. at 1866.

33. *Mendez v. Poitevent*, 823 F.3d 326, 333 (5th Cir. 2016).

34. *White v. Pauly*, 137 S. Ct. 548, 549-50, 196 L. Ed. 2d 463 (2017) (per curiam) ("[T]he Court considers only the facts that were knowable to the defendant officers.").

35. *Good*, 601 F.3d at 398.

officers. The officers understood that Cole was unaware of their presence, and Cassidy and Hunter took cover and remained silent so that Cole would remain unaware. When Cole backed out from the brush, he was facing away from the officers. Moreover, they could see that the handgun was pointed at Cole's head. The weapon was in this position as Cole turned counterclockwise, and remained trained there until he was shot. Hunter and Cassidy opened fire before Cole had turned to face them, and before he registered their presence. At no time did Cole pose, or reasonably appear to pose, an immediate threat to the officers or anyone other than himself.

The only question we answer is whether, given these facts, Cassidy and Hunter violated clearly established law. Here, we have the guidance the Court provided in *Mullenix*. In that case, the Court reviewed a denial of qualified immunity to an officer who had shot and killed a fugitive in a car chase. This court had decided that the officer violated the clearly established rule that deadly force was prohibited "against a fleeing felon who does not pose a *sufficient* threat of harm to the officer or others."[36] The officer in *Mullenix* reasonably perceived some threat of harm, but we had held the threat was not "sufficient." The Supreme Court reversed our decision. It found that the rule we articulated lacked a referent to define the "sufficiency" of threats.[37] Precedents provided a "hazy

36. *Mullenix*, 136 S. Ct. at 308-09 (emphasis added and internal quotation marks omitted).

37. *Id.* at 309 ("The general principle that deadly force requires a sufficient threat hardly settles th[e] matter.").

legal backdrop," at best.[38] Given these deficient sources, an officer could not reasonably derive an applicable rule to govern his or her conduct in the situation.[39] Finding that we had defined the applicable rule with too much "generality,"[40] the Court reversed our holding that the officer had violated clearly established law.[41]

It is significant that the Court's focus in *Mullenix* was upon generality. In some conceptual sense, a legal rule is necessarily general: it applies not only to the case in which it is articulated, but to all like cases. The *Mullenix* Court does not repudiate generality in this sense. Rather it repudiates a second variety of generality, one that does not reach all legal rules: generality as indeterminacy.[42] A rule that is general in that it is indeterminate cannot be "clearly established," because a reasonable officer attempting to interpret and apply that rule in

38. *Id.* at 309-10.

39. *Id.*

40. *Id.* at 311 (describing "the Fifth Circuit's error" in "defin[ing] the qualified immunity inquiry at a high level of generality").

41. *Id.* at 312.

42. The duality of the concept of generality is reflected in the multiple connotations of that term in common usage. *See, e.g.*, *General*, Oxford English Dictionary (online ed. 2018) (defining "general" both as "[i]ncluding . . . the parts of a specified whole, or the . . . things to which there is an implied reference; completely or approximately universal within implied limits; opposed to partial or particular," and as "[n]ot specifically limited or determined in application; relating or applicable to a whole class of objects, cases, or occasions" (emphasis omitted)).

particularized circumstances will face legal uncertainty. The officer cannot be on notice of the proper course of action. In this scenario, *Mullenix* tells us that the qualified immunity doctrine insulates the officer from liability.[43] On the other hand, a reasonable officer is capable of reasoning analogically from a determinate and categorical rule to conclude that given conduct is prohibited.[44] Such rules, once articulated, are clearly established law.

Here, a determinate and categorical rule applied to the facts facing Cassidy and Hunter: officers are prohibited from using deadly force against a suspect where the officers reasonably perceive no immediate threat. This no-threat rule was clearly established as early as 1985, when the Court articulated it in *Tennessee v. Garner*. In that case an officer shot a suspect in the absence of a reasonable perception of threat.[45] Analyzing the case, the *Garner* Court began by describing a widely applicable standard governing the constitutionality of seizures, balancing the intrusiveness of a seizure against government interests.[46] But it did not stop there. The Court also articulated a bright-line rule to govern the limit condition in which governmental officers face no threat from a suspect:

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43. *See Mullenix*, 136 S. Ct. at 308 (requiring that the rule be applicable such that "the statutory or constitutional question [is] beyond debate" and that the rule clarify "the violative nature of particular conduct" "(internal quotation marks and emphasis omitted)).

44. *See id.*

45. 471 U.S. 1, 2, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

46. *Id.* at 8.

"Where the suspect poses *no immediate threat* to the officer and *no threat to others*, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[47] The rule is categorical and determinate. It is general in the first sense of the term, but not in the second sense of indeterminacy.

By October 25, 2010 the no-threat rule had been clearly established for twenty-five years, and had been applied many times in this circuit. For example, in an unpublished 2008 decision, *Graves v. Zachary*, this court denied an officer qualified immunity for shooting a suspect who posed no threat to the officers or others.[48] We stated that where a suspect posed no threat, "the violation of his constitutional rights would have been obvious even without a body of relevant case law . . . . Under general precedents such as *Garner*, [the officer] should have known that his use of force was excessive."[49] Similarly, in an unpublished 2010 decision, *Reyes v. Bridgewater*, this court denied qualified immunity to an officer who shot a suspect who was armed with a knife but made no threatening gestures or motions towards the officer.[50] We invoked the "core, established rule" from *Garner* that "deadly force may not be used where the suspect poses no immediate threat to the officer and no threat to others . . . . It violates the

47. *Id.* at 11.

48. 277 F. App'x. 344, 349 (5th Cir. 2008) (unpublished).

49. *Id.* (internal quotation marks and citation omitted).

50. *Reyes v. Bridgwater*, 362 F. App'x 403, 407-08 (5th Cir. 2010) (unpublished).

Fourth Amendment to use deadly force absent such a threat."[51]

Cassidy and Hunter paint with too broad a brush when they argue that the Supreme Court's holdings preclude finding clearly established law in *Garner*. The officers fail to distinguish between the application of *Garner*'s "sufficiency of threat" balancing inquiry and the bright-line no-threat rule also articulated in that case. Unquestionably, where facts establish that officers reasonably perceived some threat, *Garner* requires a balancing analysis to gauge the "sufficiency" of the threat relative to the use of force. *Mullenix*, and several other decisions of the Court, conclude that this balancing exercise standing alone is too indeterminate to present as clearly established law.[52] Rather, in these situations, "[p]recedent involving similar facts can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful."[53]

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51. *Id.* at 407 (internal quotation marks and citation omitted).

52. *Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (addressing application of *Garner*'s objective reasonableness standard); *Plumhoff*, 134 S. Ct. at 2023-24 (2014) (addressing application of *Garner*'s standard where suspect "indisputably posed a danger both to officers involved and to any civilians who happened to be nearby"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (addressing application of *Garner*'s reasonableness standard where police reasonably perceived a threat).

53. *Kisela*, 138 S. Ct. at 1153 (internal quotation marks omitted); *see also Pauly*, 137 S. Ct. at 552; *Brosseau*, 543 U.S. at 201.

There is, however, a threshold inquiry as to whether the facts sustain finding any reasonably perceived threat at all. In situations where they do not, the Court has not repudiated application of *Garner*. On the contrary, it has repeatedly explained that, in what it calls "obvious case[s]," *Garner* provides clearly established law.[54] This court has held similarly. In *Mason v. Lafayette City-Parish Consolidated Government*, a police officer fired upon a suspect while responding to a purported armed robbery.[55] The officer fired seven shots, the final two of which hit the suspect in the back while he lay incapacitated by previous shots.[56] When the officer invoked qualified immunity in response to a Section 1983 excessive force claim, we reversed the district court's grant of summary judgment on the basis of the defense.[57] Addressing clearly established law, we held that *Garner* provided the relevant "command that deadly force is unconstitutional when 'a suspect poses no immediate threat to the officer and no threat to others.'"[58] Similarly, we applied the no-threat rule in the unpublished *Giardina v. Lawrence* decision.[59]

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54. *Brosseau*, 543 U.S. at 199 (observing that "in an obvious case" *Garner* "can 'clearly establish' the answer, even without a body of relevant case law"); *Pauly*, 137 S. Ct. at 552; *Kisela*, 138 S. Ct. at 1153.

55. 806 F.3d 268 (2015). The police understood the situation to be an armed robbery based on a 911 call. *Id.* at 272.

56. *Id.* at 273-74.

57. *Id.* at 278.

58. *Id.* (quoting *Garner*, 471 U.S. at 11).

59. 354 F. App'x 914, 916 (5th Cir. 2009) (per curiam) (unpublished) (citing *Garner*, 471 U.S. at 10-12).

There, the facts taken in a light most favorable to the nonmovant established that a national guardsman had shot a man who had been speaking with a 911 dispatcher on his cellphone.[60] We held that the defendant had violated the *Garner* no-threat rule: "[i]t is clearly established that it is unconstitutional for an officer to use deadly force where there is no threat of serious physical harm."[61]

We note in passing that, in dictum to an unpublished opinion last year, *Hatcher v. Bement*, this court characterized the *Garner* no-threat rule as a "general test,"[62] and reasoned that, under *Mullenix*, we "could not rely on th[e] general test detached from factual application."[63] Rather, we wrote, "this general test must be tethered to precedent containing facts analogous or near-analogous to the facts in the case under consideration . . . ."[64] *Hatcher*'s characterization of the no-threat rule as a "general" test is ambiguous given the term's multiple senses, as we explained. To the extent this dictum[65] from

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60. *Id.*

61. *Id.*

62. 676 F. App'x 238, 243 (5th Cir. 2017) (per curiam) (unpublished).

63. *Id.* (internal quotation marks omitted).

64. *Id.* (internal quotation marks omitted).

65. The characterization of *Garner*'s no-threat rule is dictum because the *Hatcher* court found that more recent circuit precedents provided the clearly established law governing its decision. *See Hatcher*, 676 F. App'x at 243-44; *see also Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) ("A statement is dictum if it

*Hatcher* suggests that we must identify a precedent mediating the application of *Garner*'s no-threat rule to a case's no-threat facts, we disagree. The Supreme Court has stated precisely otherwise,[66] and no other binding authority requires such mediation by precedent where an existing legal rule is determinate and applicable, that is, where the rule is clearly established.

Cassidy and Hunter argue that, as of October 25, 2010, the precedential waters were muddied by several decisions of this court. These decisions were premised on findings that officers reasonably perceived a threat in situations similar to Cassidy and Hunter's encounter with Cole. Under *Mullenix*, a rule of clearly established law must be specifically applicable to the facts before the court,[67] and applicable law can arise from precedents.[68] The Court cautions, however, against reasoning analogically from cases meaningfully distinct on the facts.[69] We heed that warning. Whether Cassidy and Hunter reasonably perceived a threat when they fired upon Cole is a factual question. It is one that the district court found genuinely disputed. Our inquiry takes the facts in a light most

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could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." (internal quotation marks omitted)).

66. *See supra* note 54.

67. *Mullenix*, 136 S. Ct. at 308 (2015).

68. *Id.* at 309.

69. *Id.* at 312.

favorable to the Coles, and in that light a factual premise of our analysis is that there was no reasonably perceived threat. The cases to which Cassidy and Hunter direct us are inapposite, because they are all premised on factual findings of a threat.[70] We cannot and will not revise the district court's identification of genuine fact disputes.

Cassidy and Hunter are not entitled to qualified immunity at this point in the case.

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70. *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991) (holding that *Garner* did not prohibit conduct where facts indicated that an officer reasonably perceived a threat from a non-compliant suspect after a car chase); *Young v. City of Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985) (holding that there was no constitutional deprivation where "all witnesses agreed" that the officer had reasonably perceived a threat at the time of the shooting); *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009) (affirming summary judgment on the basis of qualified immunity where facts indicated that a SWAT team officer reasonably perceived a threat from a non-compliant suspect barricaded behind a door); *Manis v. Lawson*, 585 F.3d 839, 845-46 (5th Cir. 2009) (holding that an officer was entitled to qualified immunity where facts established that he reasonably perceived a threat from a non-compliant suspect refusing to show his hands and appearing to retrieve a gun); *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006) (holding that an officer was entitled to summary judgment on an excessive force claim where facts indicated the officer reasonably perceived a threat from a non-compliant suspect); *Ramirez v. Knoulton*, 542 F.3d 124, 129-31 (5th Cir. 2008) (holding that an officer was entitled to qualified immunity where facts indicated that a suspect was "defiant and threatening"). *See also Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 (5th Cir. 2016) (holding that an officer was entitled to qualified immunity where the officer reasonably perceived a threat from a non-compliant suspect who physically struggled with the officer before suddenly reaching towards his waistband).

## III

Immunity from trial is an important component of qualified immunity, but denial at this stage does not necessarily deprive the officers of the immunity defense as to liability. We decide only that it will be for a jury to resolve what happened on October 25, 2010, and whether Cassidy and Hunter are or are not entitled to the defense. For our purposes, the district court determined there was a genuine factual dispute. We hold this dispute is material. We AFFIRM the denial of Cassidy and Hunter's motion for summary judgment, otherwise REINSTATE our previous opinion in this case, and REMAND for further proceedings consistent with this opinion.

## APPENDIX C— ORDER OF THE SUPREME COURT OF THE UNITED STATES, DATED NOVEMBER 28, 2016

SUPREME COURT OF THE UNITED STATES

No. 16-351

MICHAEL HUNTER, *ET AL.*,

*Petitioners*

v.

RANDY COLE, *ET AL.*

**ON PETITION FOR WRIT OF CERTIORARI** to the United States Court of Appeals for the Fifth Circuit.

**THIS CAUSE** having been submitted on the petition for writ of certiorari and the response thereto.

**ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Mullenix* v. *Luna,* 577 U.S. _____ (2015) (*per curiam*).

**IT IS FURTHER ORDERED** that the petitioners Michael Hunter, *et al.* recover from Randy Cole, *et al.* Three Hundred Dollars ($300.00) for costs herein expended.

*Appendix C*

November 28, 2016

By: /s/
Cynthia Rapp

**APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 25, 2015**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10228, No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees* ,

v.

CARL CARSON,

*Defendant-Appellant;*

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees,*

v.

MICHAEL HUNTER; MARTIN CASSIDY,

*Defendants-Appellants.*

September 25, 2015, Filed

Appeals from the United States District Court
for the Northern District of Texas

*Appendix D*

Before HIGGINBOTHAM, CLEMENT, AND HIGGINSON, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Seventeen-year-old Ryan Cole was severely injured in an armed encounter with police. Ryan and his parents, Karen and Randy Cole ("the Coles"), brought suit against Officers Michael Hunter and Martin Cassidy, alleging that they violated Ryan's Fourth Amendment right not to be subjected to excessive force. They also sued Officer Carl Carson, alleging Carson violated Ryan's rights under the Fourth and Fourteenth Amendments by lying and concealing evidence in order to protect Hunter and Cassidy; that he caused Ryan to be wrongfully charged with aggravated assault of a public servant. The district court denied Carson's motion to dismiss and Hunter and Cassidy's motion for summary judgment, rejecting the officers' immunity defense at the motion stage of the case.

We dismiss defendants' appeal of the district court's order refusing to grant summary judgment on the excessive force claim, and we affirm the district court's refusal to dismiss the due process claim relating to fabrication of evidence. However, we conclude that the district court erred in allowing all other claims to proceed.

*Appendix D*

## I

Seventeen-year-old Ryan Cole was a junior at Sachse High School.[1] Ryan suffered from obsessive-compulsive disorder. The night before the shooting, he quarreled with his parents, and later took guns and ammunition from their gun safe. He visited his friend Eric Reed Jr. late that night carrying weapons. The next morning, October 25, 2010, Ryan visited Eric again carrying two handguns: a revolver and a Springfield 9mm semi-automatic. At around 10:45 in the morning Ryan allowed Eric to take the revolver, and used Eric's cellphone to ask his grandparents to pick him up at a nearby CVS.

During the course of the morning, police were informed that Ryan was carrying at least one gun and acting aggressively, and they began looking for him. After Ryan left Eric's house with his remaining handgun, he was seen by several officers and ordered to stop. He continued to walk away from the officers and placed the gun against his own head. He walked towards a set of train tracks separated by a narrow wooded area and grassy strip from Highway 78, a major road. The CVS where he was to meet his grandparents was located on the other side of the wooded area, across Highway 78.

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1. One of the cases before us comes from a denial of summary judgment, and one from a denial of a motion to dismiss. They involve distinct standards of review and universes of relevant facts. For purposes of this summary, we describe the facts in broad strokes, turning to their detail as we address specific issues.

*Appendix D*

Three police officers—Hunter, Cassidy, and Carson—were attempting to locate Ryan on the other side of the wooded area, near Highway 78 and the CVS. Ryan crossed the wooded area and backed out of the woods near Officer Hunter, who was some distance from Officers Cassidy and Carson. The officers believed Ryan was unaware of them when he backed out, and remained quiet so as not to alert him. Then Ryan made some turning motion to his left. The officers say that he turned to face Officer Hunter and pointed his gun at him, while the Coles argue that he merely began to turn toward the CVS, still with his gun pointed at his own head. Whether any warning was given is disputed, but Officers Hunter and Cassidy opened fire, hitting Ryan twice. In addition, Ryan's gun discharged, hitting his own head, and leaving stippling—gunpowder residue around the wound due to the gun being fired from less than thirty inches away.

Ryan fell, and the officers ceased firing. He was picked up by an ambulance and taken for treatment of his severe injuries. Over time, Ryan has made a significant recovery, but lives with profound disabilities. He has incurred extensive medical bills and continues to require care. After the shooting, the three officers had an opportunity to confer before making their statements to police investigators—statements which conveyed that Ryan was given a warning and that he pointed his gun at Officer Hunter prior to being shot. The Coles argue that these statements are lies contradicted by recordings and physical evidence.

The officers' statements resulted in Ryan being charged with aggravated assault on a public servant—a felony. As a result of the assault charge, Ryan was placed

under house arrest. The assault charge was dismissed by the District Attorney on May 8, 2012, and Ryan received deferred adjudication for an unlawful carrying charge. The Coles incurred substantial legal fees in order to confront the aggravated assault charge, which they allege was concocted by the officers to justify the shooting.

## II

The Coles brought suit in the Eastern District of Texas. The appellant officers[2] moved to transfer; answered, asserting absolute and qualified immunity defenses; and moved to dismiss or alternatively for the court to order a reply to their immunity defenses under Federal Rule of Civil Procedure 7(a).[3] After transfer to the Northern District of Texas, the district court ordered the Coles to notify it whether they would file additional documents in the form of a Rule 7(a) Reply or an amended Complaint.

The Coles filed their First Amended Complaint which, as relevant here, includes § 1983 claims against Officers Cassidy and Hunter for excessive force and against all three officers for manufacturing and concealing evidence in order to get Ryan falsely charged with assault. The defendants moved to dismiss, with the appellant officers asserting absolute and qualified immunity defenses. The court then issued a Memorandum Opinion and Order denying the Motion to Dismiss with respect to the § 1983

2. Along with other defendants.

3. A procedure for employing Rule 7(a) to require a reply when a qualified immunity defense is pleaded with specificity was described in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995).

claims based on both excessive force and conspiracy to conceal and manufacture evidence to bring a false charge. Officer Carson appealed that order with regard to the latter claim; Officers Cassidy and Hunter did not. The district court stayed the false charge claim as to Cassidy and Hunter pending the result of Carson's appeal. We heard argument on that appeal.

Meanwhile, the district court allowed limited discovery focused on Officers Cassidy and Hunter's qualified immunity defense to the excessive force charge. Those two officers then moved for summary judgment on that charge, which the district court denied. Officers Cassidy and Hunter appealed, and we consolidated their appeal with Carson's.

## III

Following the chronology of the underlying events, we turn first to the excessive force claim. The district court denied Officers Cassidy and Hunter's motion for summary judgment, finding they were not entitled to qualified immunity because, under the plaintiffs' evidence, their use of force violated clearly established law.

### a. Qualified immunity inquiry at summary judgment

The officers are protected "from liability for civil damages" by qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known."[4] Qualified immunity is an immunity from suit and thus should be resolved as early as possible.[5] At summary judgment, it is the plaintiff's burden to rebut a claim of qualified immunity once the defendant has properly raised it in good faith.[6]

"District court orders denying summary judgment on the basis of qualified immunity are immediately appealable . . . when based on a conclusion of law."[7] We may not review the district court's determination that a genuine fact dispute exists,[8] but we are called to determine whether, resolving all fact disputes in the plaintiffs' favor, the defendants are nonetheless entitled to qualified immunity as a matter of law.[9] Within the limited scope of our inquiry, review is de novo.[10] We must:

> engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury

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4. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citation omitted).

5. *Id.* at 231-32.

6. *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992).

7. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997).

8. *Good v. Curtis*, 601 F.3d 393, 397 (5th Cir. 2010).

9. *Id.* at 397-98; *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

10. *Good*, 601 F.3d at 398.

> . . . show the officer's conduct violated a [federal] right . . . ." The second prong . . . asks whether the right in question was "clearly established" at the time of the violation.[11]

We may address either prong first.[12]

**b. Fourth Amendment violation**

To show a violation of the Fourth Amendment's prohibition against excessive force, the Coles must prove that "the force used was objectively unreasonable."[13] In assessing the reasonableness of the force, we examine:

> the facts and circumstances of the particular case—the need for force determines how much force is constitutionally permissible. The court should consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others,

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11. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865-66, 188 L. Ed. 2d 895 (2014) (citations omitted); *see also Trent v. Wade*, 776 F.3d 368, 384 (5th Cir. 2015) (rejecting idea that the second prong should be further subdivided to ask whether the defendants' actions were "objectively reasonable").

12. *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (citing *Pearson*, 555 U.S. at 236).

13. *Luna v. Mullenix*, 773 F.3d 712, 719 (5th Cir. 2014) (citing *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000)). The officers do not dispute that the Coles have produced evidence of "(1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need." *Luna*, 773 F.3d at 719.

> and whether he is actively resisting arrest or attempting to evade arrest by flight."[14]

In deadly force cases, "the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis."[15] Additionally, we bear in mind both that "[t]he intrusiveness of a seizure by means of deadly force is unmatched,"[16] and that the use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[17]

Accepting the Coles' best version of the evidence, as they must, Officers Cassidy and Hunter argue that shooting Ryan was not objectively unreasonable—that he presented an immediate threat of serious harm when they fired.[18] Accordingly, we recount the version of events most favorable to the Coles.

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14. *Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013) (footnotes omitted).

15. *Luna*, 773 F.3d at 719-20.

16. *Tennessee v. Garner*, 471 U.S. 1, 9, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

17. *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

18. Both the officers and the Coles focus on the reasonableness of the shooting as a whole, without any serious attempt to separate the analysis as to each officer.

*Appendix D*

Just before the shooting, Officer Hunter was in an exposed position between Highway 78 and the narrow wooded area separating it from the train tracks. He was looking for Ryan, expecting him to be nearby because of his own observations and a radio report that Ryan was on the railroad tracks near his position. Officer Cassidy was also between Highway 78 and the wooded area with Officer Carson, but was some distance away. Officer Hunter heard rustling in the woods near him, and signaled to the other officers that Ryan was there. Ryan then backed out of the woods with his gun to his own head, and his back to Officer Hunter. Both Officers Cassidy and Hunter believed Ryan was initially unaware of their presence, and stayed quiet so that he would not become aware of them. Ryan turned somewhat to his left, possibly in order to approach the CVS where his grandparents were waiting, and the officers opened fire without warning. Ryan turned further around as the officers continued firing, and his own gun, still pointed at his head and with his finger on the trigger, discharged involuntarily as a result of his being shot.

At the time they fired, the officers were aware that Ryan had been walking around the neighborhood holding a gun to his head, and that he had not surrendered to other officers who came in contact with him. Ryan looked like a teenager, and Officer Cassidy was aware that he had recently broken up with his girlfriend, a student at Sachse High. Officer Hunter believed Ryan might be suicidal or might simply be using the threat to himself to evade officers. Both officers were aware that Ryan had brought guns to Eric Reed Jr.'s house, and Officer Cassidy knew that there had been a disturbance at the Cole house the night before. The officers were aware that Ryan had told

Eric not to try to take his remaining gun, and that he did not "wanna use it on" him. This was the only threatening or aggressive action or speech Officer Hunter was aware of Ryan making. The officers knew that they were firing in the vicinity of a busy road, across from shops and other populated buildings. They knew there were schools within walking distance, and that measures were taken to secure them and to protect Ryan's ex-girlfriend.

First, the relevant principles. It is clear that the "use of deadly force, absent a sufficiently substantial and immediate threat, violate[s] the Fourth Amendment."[19] The threat must be "immediate";[20] we consider the totality of the circumstances,[21] including relevant information known to the officers.

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19. *Luna*, 773 F.3d at 725. Our focus is not upon actual risk, but upon the question of whether the officer could have "reasonably believe[d] that the suspect pose[d] a threat of serious harm to the officer or to others.'" *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014) (quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

20. *Luna*, 773 F.3d at 725; *Harris*, 745 F.3d at 772; *Sanchez v. Fraley*, 376 F. App'x 449, 453 & n.1 (5th Cir. 2010) (unpublished) ("[I]t was clearly established well before [2007] that 'deadly force violates the Fourth Amendment *unless* "the officer has probable cause to believe that the suspect poses a threat of serious physical harm"' . . . [which] must be 'immediate.'" (citations omitted) (quoting *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 488 (5th Cir. 2001), and *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985))); *Reyes v. Bridgwater*, 362 F. App'x 403, 407-09 (5th Cir. 2010); *Reese v. Anderson*, 926 F.2d 494, 500 (5th Cir. 1991).

21. *See Ramirez v. Knoulton*, 542 F.3d 124, 129 (5th Cir. 2008); *Reese*, 926 F.2d at 500.

The fact that a person has a gun and is behaving in a dangerous manner does not necessarily constitute an immediate and serious threat justifying use of deadly force. In unpublished but persuasive decisions, we have denied qualified immunity where a person, though undisputedly holding a gun to his own head, was complying with officers' orders,[22] and where a person, reportedly armed and a suspect in a double-homicide, had ceased running and had his arms at his sides.[23] When we have found officers justified for shooting suicidal people who were armed with guns, we have depended on the victim's *additional* threatening "*Manis*"[24] acts and disobedience of police commands, which elevated the immediacy and severity of the danger.[25]

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22. *Graves v. Zachary*, 277 F. App'x 344, 349 (5th Cir. 2008) (finding fact dispute over whether the victim was complying with officer's orders at the time he was shot to be material, notwithstanding the fact that he was holding a gun to his own head); *id.* at 348 ("Merely having a gun in one's hand does not mean *per se* that one is dangerous.").

23. *Sanchez*, 376 F. App'x at 451-52.

24. See discussion below at notes 34-40.

25. *See, e.g., Royal v. Spragins*, 575 F. App'x 300, 301, 303-04 (5th Cir. 2014) (emphasizing that suicidal victim ignored warning to drop his gun and pointed it at the officers); *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1134-35 (5th Cir. 2014) (emphasizing that the suicidal victim fired gun, ignored warnings to put it down, and moved towards officers with it); *Ramirez*, 542 F.3d at 127, 131 (emphasizing that suicidal victim with gun ignored officer's commands, got out of his car, and "brought his hands together in front of his waist" "as if to grip the handgun with both hands in preparation to aim it at the officers"); *see also City*

Our caselaw persuasively has held that the fact that a suicidal person who has a gun to his head, hence poses some deadly risk to officers and others, does not always justify shooting him.[26] Just as there is no "open season on suspects fleeing in motor vehicles,"[27] despite the inherent risks of such flight,[28] there is no open season on suspects with guns.[29] Instead, "the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable."[30] "[T]he threat must be sufficiently imminent at the moment of the shooting to justify deadly force."[31]

We conclude that the facts that Ryan was holding a gun to his head, that the officers believed he had made some threat to use it against a peer, and that the officers

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*of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1770, 1775, 191 L. Ed. 2d 856 (2015) (addressing shooting of woman with knife who threatened officers and, despite warnings and then pepper spray, "kept coming at the officers until she was 'only a few feet from a cornered Officer Holder.' At this point, the use of potentially deadly force was justified.").

26. *See, e.g., Graves*, 277 F. App'x at 349.

27. *Lytle v. Bexar Cty.*, 560 F.3d 404, 414-15 (5th Cir. 2009).

28. *Id.* at 415 ("Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public.").

29. *See Graves*, 277 F. App'x at 348 ("Merely having a gun in one's hand does not mean *per se* that one is dangerous.").

30. *Id.*

31. *Luna*, 773 F.3d at 723.

knew Ryan was attempting to evade officers, could not in the circumstances here justify the use of deadly force.[32] Though Ryan was approaching a busier area from which several witnesses observed the shooting, he was shot in a relatively open area with only the officers immediately present.[33] He was on foot and walking, not running, and he did not know Officers Hunter, Cassidy, and Carson were there.

Indeed, the officers do not argue that they were justified in shooting Ryan by the above circumstances alone. Instead, they focus on the fact that Ryan, whose back was initially towards Officer Hunter, turned to his left immediately before they shot. They argue that if they had waited, Ryan could have continued turning until he was facing Officer Hunter, and shot him before they could react. According to the officers, if Ryan had been allowed to turn around and face Officer Hunter without being fired on, he would have "posed an immediate deadly threat."

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32. The facts here contrast instructively with those in *Ballard v. Burton*, where we found that shooting was justified even if the suicidal victim did not point his gun directly at law enforcement officers just before he was shot because "during the course of the night's events [he] refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers." 444 F.3d 391, 402-03 (5th Cir. 2006).

33. Indeed, only Officer Hunter was reported by the officers as being in immediate danger. Of course, officers may use deadly force to protect their own lives, but the relative openness and lack of immediate bystanders or chaotic conditions informs our understanding of the circumstances.

The officers invoke cases in which we have found that a use of deadly force was justified expressly because the person, ignoring police warnings, made some threatening motion towards officers, or moved in a way reasonably interpretable as drawing an immediately dangerous weapon.[34] The act justifying deadly force is sometimes called a *Manis* act.[35] We have found qualified immunity was inappropriate due to the absence of a *Manis* act, even when the victim had or was believed to have a gun.[36]

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34. *See, e.g., Rice*, 770 F.3d at 1134-35 (finding no constitutional violation where police warned and then shot a suicidal man who "was undisputedly approaching the officers with a loaded weapon which he had recently fired and which he refused to surrender"); *Clayton v. Columbia Cas. Co.*, 547 F. App'x 645, 653 (5th Cir. 2013) (qualified immunity appropriate where "suspect with dangerous and violent propensities" "continued toward the Deputy, ignoring his commands"); *Elizondo v. Green*, 671 F.3d 506, 510-11 (5th Cir. 2012) (finding it was not clearly unreasonable to shoot a person who "ignored repeated instructions to put down the knife he was holding" and "was hostile, armed with a knife, in close proximity to [the officer], and moving closer"); *Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (finding no constitutional violation where victim ignored repeated police commands, "reached under the seat of his vehicle and then moved as if he had obtained the object he sought"); *id.* (collecting cases); *Ramirez*, 542 F.3d at 131 ("The totality of Ramirez's conduct could reasonably be interpreted as defiant and threatening. He repeatedly refused the officers' commands and ultimately stood, armed, several yards from the officers. Ramirez brought his hands together in what we believe could reasonably be interpreted as a threatening gesture, as if to grip the handgun with both hands in preparation to aim it at the officers.").

35. *See Manis*, 585 F.3d at 844.

36. *See Sanchez*, 376 F. App'x at 451-52 (finding qualified

Turning to one's left is not a threatening *Manis* act in these circumstances, particularly when the person does not even know the officers are there.[37] It is distinctly unlike raising a gun at officers or moving a gun up to waist-level and gripping as if preparing to fire.[38] The officers make much of our statement in *Rice* that "the material fact" was that the victim was "armed and moving toward the officers."[39] But moving purposefully towards an officer who is ordering the person to stop, with a drawn and recently fired gun,[40] is much more threatening than having a gun to one's own head, and turning without knowledge of the officer's presence.

In sum, if the Coles' version of the evidence is believed, it was not objectively reasonable to use deadly force against Ryan Cole when the teenager emerged on foot from the wooded area with a gun to his own head and turned to his left.

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immunity inappropriate in absence of *Manis* act where victim, who was a suspect in a double homicide and was reported to have a gun and to have "forcibly attempted to enter somebody's house," had ceased running and had his hands at his sides when shot); *Graves*, 277 F. App'x at 346 ("It is not disputed that [the victim] never verbally threatened [the officers], never pointed his gun at the officers, and did not even move aggressively.").

37. Recall that the officers themselves believed Ryan was not aware of their presence.

38. See cases cited in note 34.

39. *Rice*, 770 F.3d at 1135.

40. *Id.* at 1134-35.

**c. Clearly established law**

Under the second prong of the qualified immunity analysis, we ask whether it was clearly established in October 2010 that using deadly force against a person in circumstances like those here was objectively unreasonable:[41]

> A right is clearly established only if "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." A case directly on point is not required; rather, "[t]he central concept is that of 'fair warning': The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."[42]

In 2009, we held that "[i]t has long been clearly established that, absent any other justification for the

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41. *See Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

42. *Trent*, 776 F.3d at 383 (citations to *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014), and *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc), removed); *see also Sheehan*, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures.").

use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[43] In *Luna v. Mullenix* we extended that holding, finding that by March 2010, it was clearly established that shooting at a fleeing car whose driver had threatened to shoot pursuing police officers was objectively unreasonable.[44] We also held that it was clearly established by March 2010 that the threat in question had to be "sufficiently substantial and immediate."[45]

If anything, the foot pursuit of Ryan Cole presented a less severe and immediate threat than the chase in *Luna*. First, walking away on foot is less inherently dangerous than fleeing in a car. Second, though in Ryan's case officers could see that he was pointing a gun at his own head, he never threatened officers with it; in *Luna*, the victim not only claimed to have a gun in the fleeing car, but explicitly threatened to shoot police officers.[46] In *Luna*, we emphasized that the shooting officer decided to shoot the car before it came into view—that he was not forced to make a "split-second judgment."[47] In this case, though the officers may not have decided to shoot ahead of time, they were expecting to encounter exactly what they found: Ryan walking with a gun to his head.

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43. *Lytle*, 560 F.3d at 417.

44. 773 F.3d at 725.

45. *Id.*

46. *Id.* at 722 . It turned out that he did not actually have a gun.

47. *Id.* at 723-24.

By October 2010, we had also repeatedly analyzed the sufficiency of *Manis* acts to justify deadly force when the underlying circumstances might not otherwise justify it.[48] In short, by October 2010, reasonable officers were on notice that they could not lawfully use deadly force to stop a fleeing person who did not pose a severe and immediate risk to the officers or others, and they had many examples of the sorts of threatening actions which could justify deadly force.[49] Turning left while unaware of an officer's presence is not among them.

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48. *See, e.g., Sanchez*, 376 F. App'x at 451-52; *Reyes*, 362 F. App'x at 407; *Manis*, 585 F.3d at 844 (collecting cases); *Graves*, 277 F. App'x at 346; *Ramirez*, 542 F.3d at 127, 131; *Mace v. City of Palestine*, 333 F.3d 621, 624-25 (5th Cir. 2003).

49. The out-of-circuit cases cited by the officers do not lead to a different conclusion. They involve situations where the victim had been warned repeatedly yet moved a gun "very quickly" and pointed it at officers shortly before being shot, *see Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1311 (10th Cir. 2009); where it was difficult for officers to see, and the victim ignored commands at the scene of the shooting and instead escalated matters by raising a gun to his head, *see Garczynski v. Bradshaw*, 573 F.3d 1158, 1162-63, (11th Cir. 2009); where the victim fired a gun in a chaotic, crowded environment and then ignored an officer's orders to stop, *see Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997); and where the victim ignored the shooting officers' commands and moved either his gun hand or his other hand in the vicinity of his gun just prior to being shot, *see Thurman v. Hawkins*, CIV. 13-50-GFVT, 2014 U.S. Dist. LEXIS 122313, 2014 WL 4384387, at *1, 4 (E.D. Ky. Sept. 3, 2014). These cases are distinguishable from the facts before us, and in any event do not undermine this circuit's clearly established law.

Under the Coles' version of the facts, it was objectively unreasonable under clearly established law to shoot Ryan. As a result, the fact disputes identified by the district court—including the central issue of whether Ryan pointed his gun at Officer Hunter—are material, and we dismiss the appeal for lack of jurisdiction.

## IV

We now turn to the claim that Officer Carson lied and concealed evidence in order to protect Officers Hunter and Cassidy after the shooting. The district court refused to dismiss the Coles' claim that Officer Carson agreed and acted with others "to deprive Ryan Cole of various constitutional rights including, but not limited to, his right to remain free from malicious prosecution, wrongful conviction, and unlawful confinement." The court located the source of the rights in the "Fourth and Fourteenth Amendment[s]." Officer Carson appeals, asserting qualified and absolute immunity defenses as he did below.

The denial of a motion to dismiss based on qualified immunity or a substantial claim of absolute immunity is immediately appealable to the extent it turns on legal questions.[50] We review *de novo*,[51] accepting "all well-pleaded facts as true and draw[ing] all reasonable

50. *Mitchell v. Forsyth*, 472 U.S. 511, 525, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Hous. Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 268-69 & n.11 (5th Cir. 2007).

51. *Morgan*, 659 F.3d at 370 (qualified immunity); *Orellana v. Kyle*, 65 F.3d 29, 33 (5th Cir. 1995) (absolute immunity).

inferences in favor of the nonmoving party."[52] To avoid dismissal based on qualified immunity, the Coles had to allege (1) "a violation of a constitutional right" which (2) was "'clearly established' at the time of [Carson's] alleged misconduct."[53] The Coles had the burden of pleading "specific conduct and actions giving rise to a constitutional violation" to meet the defense.[54]

### a. Allegations that Officer Carson fabricated evidence

The Coles pled the following relevant facts in their First Amended Complaint (FAC) and the expert affidavits they attached to it.[55] First, Ryan was seen by several officers walking in public openly carrying a handgun, and at least one witness called police to report that he had a gun. The FAC alleges that when Ryan emerged from the wooded area, he was facing away from Officer Hunter, with the gun held to his own head. Without warning Ryan or identifying themselves, Officers Hunter and

52. *Morgan*, 659 F.3d at 370 (footnote omitted).

53. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *see also Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015) (en banc).

54. *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996).

55. Neither party argues that the facts alleged in the expert affidavits, which were attached to the FAC expressly to provide greater detail to meet the officers' immunity defenses, are not properly considered. *See Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014); *Wilson v. Birnberg*, 569 F. App'x 343, 344 n.1 (5th Cir. 2014).

Cassidy opened fire. After the shooting, Officers Carson, Cassidy, and Hunter were "permitted to leave the scene for a considerable period of time without any supervision," giving them opportunity to confer. The Coles allege that the officers "formed and carried out an agreement . . . to hide and cover up . . . the true events" in order to justify the use of force and avoid consequences for killing Ryan, who they believed was likely to die. Their alleged aim was to "prosecute and arrest Ryan Cole for . . . an offense that each of them knew he did not commit."

The Coles allege that Officer Carson made false statements to investigators that Ryan aimed his gun at Officer Hunter and that Hunter warned him before shooting. The Coles allege that physical evidence, recordings, and expert opinions show these statements cannot be true. They allege that the false statements led "Garland police officers [to] file[] a case with the District Attorney's office in Dallas County charging Ryan Cole with the felony offense of aggravated assault on a public servant." Ryan was subsequently indicted by a grand jury for that offense, based again on the officers' statements. "As a result of the fictitious charges . . . Ryan Cole was confined indefinitely under house arrest." We are also told that "[o]n or about May 8, 2012, the Dallas County District Attorney's office dismissed" the assault charge. "At or near the same time," Ryan "pleaded no contest" and "received deferred adjudication for the charge of unlawfully carrying a weapon." The Coles incurred substantial legal fees in order to confront the aggravated assault charge.

We address the alleged constitutional violations in turn.

**b. Fourth Amendment violation**

Pretrial use of fabricated evidence to secure a person's arrest can violate the Fourth Amendment.[56] However, we have said that in order to make out a Fourth Amendment claim under either a "false arrest" or "illegal detention" theory, the relevant actors must not be aware of facts constituting probable cause to arrest or detain the person for *any* crime.[57] The Supreme Court has made it clear that this is the law as far as warrantless arrests are concerned.[58]

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56. *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc) (noting that, in contrast to misconduct occurring at trial, Castellano's "arrest and pretrial detention" could support a Fourth Amendment claim).

57. *Whittington v. Maxwell*, 455 F. App'x 450, 458-59 (5th Cir. 2011) (stating that "[w]ith regard to pretrial confinement, '[t]he sole issue [under the Fourth Amendment] is whether there is probable cause for detaining the arrested person pending further proceedings,'" and finding illegal detention claim could stand where there was a factual dispute over the existence of probable cause); *O'Dwyer v. Nelson*, 310 F. App'x 741, 745 (5th Cir. 2009) ("'[T]o prevail in a § 1983 claim for false arrest,' . . . [a]s applied to the qualified immunity inquiry, the plaintiff must show that the officers could not have reasonably believed that they had probable cause to arrest the plaintiff for any crime." (citations omitted)).

58. *Devenpeck v. Alford*, 543 U.S. 146, 153-54, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).

There is some suggestion that the standard may be different when a magistrate is deceived in order to obtain a warrant.[59] In such a case, the focus may not be on what facts officers were aware of, but on whether, once the false information is excised, the information *presented to the magistrate* could justify the arrest.[60] We need not decide the precise contours of these issues now, however, because the Coles' First Amended Complaint fails to set out "specific conduct and actions" concerning Ryan's seizure which can survive qualified immunity.

In Texas, unlawful carrying consists of "intentionally, knowingly, or recklessly carr[ying] on or about [one's] person a handgun" or other weapon when one is not on his own property or inside of or directly en route to his

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59. *See Hamilton v. Collett*, 83 F. App'x 634, 637 (5th Cir. 2003) ("[T]he question is whether the allegedly false testimony was necessary to the Magistrate Judge's determination of probable case."); *see also Baldwin v. Placer Cty.*, 418 F.3d 966, 970 (9th Cir. 2005) (in search warrant case, finding that true information outside affidavit tainted by lies could not be used to sustain warrant).

60. *See Hamilton*, 83 F. App'x at 637. An arrest may be valid under the Fourth Amendment though the warrant was not if there was probable cause for a warrantless arrest. *See Behrens v. Sharp*, 15 F.3d 180, 1994 WL 24936, at *3-4 (5th Cir. 1994). We have said that the Fourth Amendment is not implicated by an arrest by an officer with probable cause, even when the offense is a misdemeanor occurring outside the officer's presence. *Fields v. City of S. Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991). However, this analysis may be affected if Ryan was at home when he was placed under house arrest. *Harris v. Canulette*, 997 F.2d 881, 1993 WL 261085, at *2 n.8 (5th Cir. 1993) (limiting *Fields* to arrests outside the home).

motor vehicle.[61] Based on the Coles' pleadings, it appears that, during the entire period Ryan was under house arrest, there was known probable cause to arrest him for unlawful carrying of a weapon. Both the unlawful carry and aggravated assault charges were disposed of "at or near the same time," after which Ryan was apparently no longer subject to house arrest.

To the extent that the Coles seek to argue that the existence of known probable cause to arrest Ryan for unlawful carrying is not fatal to their Fourth Amendment claim, they have failed to allege specific conduct to meet Officer Carson's qualified immunity defense. We are told only that Ryan was placed under house arrest "[a]s a result of [the] fictitious charges."

Given that the face of the FAC reveals the known existence of probable cause to arrest for unlawful carrying, and given the Coles' failure to plead facts supporting a theory of Fourth Amendment violation despite that probable cause, the Coles have not pled a violation of clearly established law, and Officer Carson is entitled to qualified immunity. Put another way, the Coles have alleged that Ryan was placed under house arrest *with* probable cause. That is not a clearly established Fourth Amendment violation without something more, and the Coles have not alleged what that something more might be.

61. Tex. Penal Code Ann. § 46.02.

**c. *Brady* violation**

The Coles argue that Officer Carson also violated Ryan's Fourteenth Amendment due process rights, due both to a *Brady*[62] violation, and more generally to his role in the filing of false charges. The Coles allege that Officer Carson committed a *Brady* violation in two ways: by lying to conceal his own knowledge that Ryan Cole never assaulted an officer, and by conspiring with other officers to conceal physical evidence also tending to exculpate Ryan. But prior to 2010, we had held that *Brady* is not implicated when there is no trial.[63] Ryan Cole was not tried for aggravated assault, nor did he plead guilty; the charge was dismissed. There is no suggestion that the aggravated assault charge was used as leverage to secure a plea on the unlawful carrying charge. It follows that Officer Carson was not on notice that withholding evidence in these circumstances could violate *Brady*, and he is entitled to qualified immunity for the alleged *Brady* violations.

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62. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

63. *United States v. Santa Cruz*, 297 F. App'x 300, 301 (5th Cir. 2008); *see also Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000) (applying rule in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), to bar *Brady* attack on state court conviction).

**d. Due process violation — fabrication of evidence**

We turn now to the Coles' claim that Officer Carson violated Ryan's clearly established due process rights when he allegedly lied to investigators to secure a false charge of aggravated assault.

We begin by recognizing that there is no "substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause."[64] That much is clear from the Supreme Court's fractured decision in *Albright v. Oliver*. In *Albright*, a plaintiff was wrongfully charged with selling a cocaine look-alike substance, a charge later dismissed.[65] The Court rejected his claim that the prosecution violated due process. We have held that *Albright*'s reach is limited; the case "did not speak to the Fourteenth Amendment beyond eschewing reliance upon substantive due process to create a requirement of probable cause to initiate a prosecution. . . ."[66] Moreover, "that portion of *Albright* that suggests that the Fourth Amendment applies to pretrial deprivations of liberty did not receive the support of a majority of the Justices."[67]

*Albright* also differs in two important ways from the case at hand. First, although the defendant detective in

64. *Albright v. Oliver*, 510 U.S. 266, 268, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (plurality).

65. *Id.* at 268-69.

66. *Castellano*, 352 F.3d at 948.

67. *Brothers v. Klevenhagen*, 28 F.3d 452, 456 n.3 (5th Cir. 1994).

*Albright* accepted the story of an unreliable informant and may have given "misleading" testimony,[68] there was no suggestion that he deliberately fabricated evidence. In contrast, the Coles allege that Officer Carson deliberately lied in order to get Ryan charged to cover an unlawful use of force. Several of our sister circuits have found this distinction pivotal in determining whether a due process violation is committed by the fabrication of evidence.[69]

Second, a majority of the Justices in *Albright* depended upon the potential availability of a Fourth Amendment recourse the plaintiff had rejected,[70] observing that Albright should have brought his claim under the Fourth Amendment.[71] In contrast, the Coles tried to make out a Fourth Amendment claim, but we have explained that

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68. *Albright*, 510 U.S. at 277 (opinion of Ginsburg, J.); *id.* at 292-93 (Stevens, J., dissenting).

69. *See Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (en banc) ("Although the Fourth Amendment covers seizures . . . law enforcement's intentional creation of damaging facts would not fall within its ambit."); *see also Kennedy v. Peele*, 552 F. App'x 787, 792-93 (10th Cir. 2014); *Drumgold v. Callahan*, 707 F.3d 28, 61-62 & n.27 (1st Cir. 2013).

70. *Albright*, 510 U.S. at 271 (plurality); *Id.* at 277 (opinion of Ginsburg, J.) (noting that "Albright deliberately subordinated invocation of the Fourth Amendment" as a "strategic decision); *id.* at 289 (opinion of Souter, J.).

71. The Justices noted that all of Albright's injuries could likely have been remedied via such a challenge. *Id.* at 274 (plurality); *id.* at 276-77 (opinion of Ginsburg, J.); *id.* at 288-91 (opinion of Souter, J.) (noting "rule of reserving due process for otherwise homeless substantial claims").

it is unavailing due largely to the existence of probable cause on another count. Yet setting aside his time seized under house arrest, Ryan still was framed and charged with a felony, and subjected to attendant monetary and reputational injuries flowing from such a serious charge. Unlike Albright, who *chose* to invoke substantive due process rather than the Fourth Amendment, Ryan Cole has no other option.

**1.**

We built upon the uncertain foundation of *Albright* in our en banc decision in *Castellano v. Fragozo*.[72] *Castellano* held that the elements of a state malicious prosecution claim were neither sufficient nor independently necessary to state a claim under § 1983 where a state actor allegedly fabricated evidence to procure an arrest and conviction.[73] Rather, the particular constitutional violation alleged had to be identified with clarity:[74]

> [C]ausing charges to be filed without probable cause will not without more violate the Constitution. . . . It is equally apparent that additional government acts that may attend the initiation of a criminal charge could give rise to claims of constitutional deprivation.

72. 352 F.3d 939.

73. *Id.* at 953-54.

74. *Id.* at 945.

> The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued.[75]

We ultimately found that a Fourth Amendment violation had been alleged with regard to Castellano's pretrial seizure, and a Fourteenth Amendment due process violation was pled with regard to the knowing use of fabricated evidence and perjury at trial.[76]

While the due process violation in *Castellano* was tied to the "right to a fair trial,"[77] we rejected the idea that "the specific constitutional rights guiding a criminal trial spend their force in assuring a fair trial."[78] Moreover, we later held in *Boyd v. Driver* that officials' perjured testimony and tampering with video evidence constituted a due process violation even where the plaintiff was acquitted.[79] Thus even when a trial functions properly to vindicate

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75. *Id.* at 953.

76. *Id.* at 953-55, 960. Thus, as in *Albright, Castellano* did not address a situation where the Fourth Amendment provided no recourse.

77. *Id.* at 942, 957-58.

78. *Id.* at 956.

79. 579 F.3d 513, 514-15 (5th Cir. 2009); *see also Boyd v. Driver*, 495 F. App'x 518, 523 (5th Cir. 2012) (reiterating that the first *Boyd* case decided no conviction was necessary).

a person's innocence, the "manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause ."[80]

We returned once more to *Albright* and *Castellano* in *Cuadra v. Houston Independent School District*.[81] There we considered a claim against a school district for manipulating evidence which led to charges against the plaintiff, and stated that the "claims are based on alleged pretrial deprivations of [plaintiff's] constitutional rights and, under the holding in *Albright*, such claims should be brought under the Fourth Amendment."[82] Citing *Cuadra*, we recently held in *Bosarge* that a person indicted and held for six months based on a mistaken identification had not stated a due process claim.[83] But neither *Cuadra* nor *Bosarge* involved deliberate fabrication of evidence to support false charges. *Cuadra* focused on a failure

80. *Boyd*, 579 F.3d at 515 (quoting *Castellano*, 352 F.3d at 942).

81. 626 F.3d 808 (5th Cir. 2010).

82. *Id.* at 814.

83. *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 2015 WL 4282372, at *5 (5th Cir. 2015). *Bosarge* also cited *Castellano*, which we have discussed, and *Blackwell v. Barton*, which involved a mistaken identification rather than intentional fabrication, and only a brief detention—no charges were brought. 34 F.3d 298, 300-01 (5th Cir. 1994).

of certain school officials to turn over a key document;[84] and in *Bosarge*, we did not credit conclusory allegations that the misidentification was intentional.[85] Neither case answers the question of whether deliberate fabrication by law enforcement officers to justify a police shooting violates due process.

In sum, we have held that a victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted. We have never decided whether false charges must survive to the trial stage in order to implicate due process rights.

**2.**

Our sister circuits have taken varying approaches to fabrication of evidence and "malicious prosecution" claims in the wake of *Albright*.[86] That said, they largely either have held that charges based on fabricated evidence support a due process claim, or have not yet answered the question. Two circuits have found that there is no due process claim in the absence of a conviction—a requirement we have not insisted upon.

The Ninth Circuit held in *Devereaux v. Abbey* that "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the

84. *Cuadra*, 626 F.3d at 811, 813-14.

85. *Bosarge*, 796 F.3d 435, 2015 WL 4282372, at *6.

86. *See, e.g., Castellano*, 352 F.3d at 949-53 (surveying the circuits' "approaches to malicious prosecution claims").

government,"[87] a formulation we quoted approvingly in *Good v. Curtis*.[88] In *Devereaux*, the plaintiff alleged that investigators charged him with rape and molestation on the basis of statements they should have known were false.[89] Though the charges were dropped in exchange for a guilty plea to two misdemeanors,[90] the Ninth Circuit reasoned that:

> Under *Pyle v. Kansas*, 317 U.S. 213, 216, 63 S. Ct. 177, 87 L. Ed. 214 (1942), the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution. While *Pyle* does not deal specifically with the bringing of criminal charges, as opposed to the securing of a conviction, we find that the wrongfulness of charging someone on the basis of deliberately fabricated evidence is sufficiently obvious, and *Pyle* is sufficiently analogous, that the right to be free from such charges is a constitutional right.[91]

In *Ricciuti v. N.Y.C. Transit Authority*, the police arrested a plaintiff with probable cause, but then allegedly fabricated a confession resulting in additional

87. 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc).

88. 601 F.3d at 398-99.

89. 263 F.3d at 1073.

90. *Id.*

91. *Id.* at 1075 (citation shortened).

charges.[92] The Second Circuit denied qualified immunity for the fabrication despite the fact that the charges were dismissed without trial.[93] The court held that "[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983."[94] The Second Circuit has since recognized that the fabrication in *Ricciuti* deprived the plaintiffs of liberty in part because it "caused [them] to be charged with a more serious crime."[95]

In *Pierce v. Gilchrist*, a plaintiff was arrested and convicted on the basis of falsified evidence created by an investigator.[96] Though not always distinguishing clearly between the plaintiff's Fourth and Fourteenth Amendment claims,[97] the Tenth Circuit upheld the district court's refusal to dismiss on qualified immunity grounds based on the use of false evidence to "induce prosecutors

92. 124 F.3d 123, 126-27, 129 (2d Cir. 1997).

93. *Id.* at 129-30 (citing due process cases and principles).

94. *Id.* at 130.

95. *Jovanovic v. City of New York*, 486 F. App'x 149, 152 (2d Cir. 2012). The circuit reiterated its holding in a later case which ended with a not-guilty verdict after "28 court appearances," an apparent reference to the burdensomeness of defending against false charges. *Jocks v. Tavernier*, 316 F.3d 128, 133, 138 (2d Cir. 2003).

96. 359 F.3d 1279, 1281-82, 1284 (10th Cir. 2004).

97. *See id.* at 1296 & n.11.

to initiate an unwarranted prosecution."[98] The court explained that it saw no "reason to distinguish between falsifying evidence to facilitate a wrongful arrest and engaging in the same conduct several days later to induce prosecutors to initiate an unwarranted prosecution."[99] Thus the fact that there was probable cause for the arrest was immaterial. In another "malicious prosecution" case ending in dismissal of criminal charges, the court explicitly rejected substantive and procedural due process claims[100] footed on a failure to hand over certain exculpatory evidence.[101]

More recently, the Tenth Circuit has clarified its stance. In *Klen v. City of Loveland*, the court reversed a grant of summary judgment against a claim that various defendants fabricated evidence "thus facilitating" prosecution of a plaintiff who eventually pleaded no-contest.[102] There the court noted that "[u]se of an indictment based on perjured testimony to bring charges, for example, itself represents a denial of due process"

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98. *Id.* at 1296.

99. *Id.*

100. *Becker v. Kroll*, 494 F.3d 904, 919-24 (10th Cir. 2007). The same month, the court considered, but rejected for other reasons, another Fourteenth Amendment claim where the charges ended in dismissal. *See generally Novitsky v. City Of Aurora*, 491 F.3d 1244 (10th Cir. 2007).

101. *Becker*, 494 F.3d at 924. The Tenth Circuit has also emphasized the importance of *intentional* fabrications. *See Kennedy*, 552 F. App'x at 792-93.

102. 661 F.3d 498, 515 (10th Cir. 2011).

despite the lack of a trial;[103] the "use of a perjured affidavit to defeat a defendant's attempt to dismiss an indictment on grounds of selective prosecution" could also support a due process claim.[104]

The Eighth Circuit likewise found that a due process claim is stated where a police officer claimed that, though he was innocent of using excessive force against a victim, he was "set up," prosecuted (and acquitted), and administratively charged "for patently arbitrary reasons."[105] In *Moran v. Clarke*, the en banc court held that the substantive due process claim should not have been denied in a judgment as a matter of law because the officer presented evidence that he was *intentionally* set up, and there was damage to his professional reputation and evidence of improper consideration of his race.[106] Such actions could violate fundamental rights and "shock the conscience."[107] The Eighth Circuit has since found that a substantive due process violation survived summary judgment in the absence of a trial where false evidence was used to cause plaintiffs to plead guilty,[108] and in a case where the charges were dropped without a plea.[109]

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103. *Id.* at 516.

104. *Id.*

105. *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (en banc).

106. *Id.* at 644-45, 647.

107. *Id.*

108. *Winslow v. Smith*, 696 F.3d 716, 735 (8th Cir. 2012).

109. *Livers v. Schenck*, 700 F.3d 340, 343-44, 354-55 (8th Cir. 2012).

*Appendix D*

The Second, Eighth, Ninth, and Tenth Circuits have thus all found denials of due process when charges rest on fabricated evidence. The Seventh Circuit's decisions appear to point the other way. The court has held that "a police officer does not violate an acquitted defendant's due process rights when he fabricates evidence."[110] Acquittal forecloses the claim.[111] In the Seventh Circuit's view, the only liberty interest damaged in such cases "stems from [plaintiff's] initial arrest"[112] and should be addressed under the Fourth Amendment;[113] being forced to defend oneself at trial is no deprivation of liberty.[114] The Seventh Circuit's no-due process violation decisions have occurred in cases that either did not address the availability of a Fourth Amendment claim[115] or found that the claim had been purposefully abandoned,[116] and it has suggested a willingness to consider deprivations short of conviction and imprisonment if properly raised.[117]

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110. *Saunders-El v. Rohde*, 778 F.3d 556, 560-61 (7th Cir. 2015).

111. *Id.* at 560-61.

112. *Id.* at 561 (quoting *Alexander v. McKinney*, 692 F.3d 553, 557 (7th Cir. 2012)).

113. *Alexander*, 692 F.3d at 557-58.

114. *Saunders-El*, 778 F.3d at 561.

115. *Id.* at 559-61.

116. *See Alexander*, 692 F.3d at 556.

117. *Serino v. Hensley*, 735 F.3d 588, 594-95 (7th Cir. 2013).

The remaining circuits do not appear to have answered the question before us. The First Circuit has held that police officers violate due process when they fabricate evidence in order to get someone falsely convicted[118] or immediately punished with segregation within a jail.[119] The circuit has emphasized the importance of the specific intent to fabricate or use false evidence,[120] and explained in oft-quoted broad terms that:

> [S]ome truths are self-evident. This is one such: if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction).[121]

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118. *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004).

119. *Surprenant v. Rivas*, 424 F.3d 5, 15 (1st Cir. 2005).

120. *See Drumgold*, 707 F.3d at 61-62 & n.27.

121. *Limone*, 372 F.3d at 44-45 (citation to *Devereaux*, 263 F.3d at 1074-75, omitted); *see also Halsey v. Pfeiffer*, 750 F.3d 273, 296 (3d Cir. 2014) (quoting *Limone*); *Whitlock v. Brueggemann*, 682 F.3d 567, 581-82 (7th Cir. 2012) (same); *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) (same); *Washington v. Wilmore*, 407 F.3d 274, 285 (4th Cir. 2005) (same); *Atkins v. County of Riverside*, 151 F. App'x 501, 506 (9th Cir. 2005) (same).

Clear enough, but the circuit does not appear to have explicitly addressed whether false charges in the absence of a conviction or immediate punishment state a denial of due process.

The Third Circuit considered a § 1983 claim that police fabricated evidence leading to charges and a wrongful conviction.[122] Though the court expressly did not answer "whether pre-trial detentions can implicate constitutional rights beyond the Fourth Amendment,"[123] it did state that "[w]hen falsified evidence is used as a basis to initiate the prosecution of a defendant, or is used to convict him, the defendant has been injured."[124] The Sixth Circuit "recognize[s] a . . . claim of malicious prosecution under the Fourth Amendment, which encompasses wrongful investigation, prosecution, conviction, and incarceration,"[125] but it remains unclear whether a substantive due process claim might lie in some circumstances. In *Gregory v. City of Louisville*, the court held that "the subset of malicious prosecution claims which allege continued detention without probable cause must be . . . analyzed under the Fourth Amendment,"[126] but expressly reserved the question of whether "malicious prosecution" claims based

122. *Halsey*, 750 F.3d at 288-89.

123. *Id.* at 293.

124. *Id.* at 289.

125. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) (citation omitted).

126. 444 F.3d 725, 750 (6th Cir. 2006).

on liberty deprivations distinct from pretrial detention might state due process violations.[127]

The D.C. Circuit does not appear to have addressed the issue of whether a due process claim could lie when police fabricate evidence, though it has noted its view that *Albright* "held that malicious prosecution does not violate 'substantive' due process rights."[128] The Eleventh Circuit has done likewise,[129] though noting the possibility that a procedural due process claim might lie.[130] The circuit recently recognized a due process claim where a plaintiff alleged that police officers shot, tasered, and beat him, and then fabricated a cover-up which resulted in two years of

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127. *Id.* at 748 n.10. In a recent unpublished decision where plaintiffs alleged constitutional violations stemming from several search warrants and an indictment, the court held that the Fourth Amendment rather than substantive due process governed the claims "[t]o the extent that [they] involve a challenge to the warrant affidavit and the resulting searches, seizures, and prosecutions." *Meeks v. Larsen*, 14-1381, 611 Fed. Appx. 277, 2015 U.S. App. LEXIS 7591, 2015 WL 2056346, at *9 (6th Cir. May 5, 2015). Besides being non-precedential, this was not a case of intentional fabrication of evidence, as the court did not credit conclusory allegations that the indictment or warrants were based on "false and misleading information." 2015 U.S. App. LEXIS 7591, [WL] at *4 (indictment); 2015 U.S. App. LEXIS 7591, [WL] at *6-7 (warrants).

128. *Pitt v. D.C.*, 491 F.3d 494, 512, 377 U.S. App. D.C. 103 (D.C. Cir. 2007).

129. *Wood v. Kesler*, 323 F.3d 872, 881 n.14 (11th Cir. 2003).

130. *U.S. Steel LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1289 (11th Cir. 2001).

jail and an eventual acquittal on charges of aggravated assault on a law enforcement officer.[131]

**3.**

All the circuits that have squarely considered the question have either found that a due process violation may lie where state officers fabricate evidence to support false charges against a plaintiff, or have found no due process violation in the absence of a conviction, an approach we have expressly rejected.[132] We agree with those that have found a due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person.

Executive action must shock the conscience in order to violate substantive due process.[133] We have said that:

> Conduct sufficient to shock the conscience for substantive due process purposes has been described in several different ways. It has been described as conduct that 'violates the decencies of civilized conduct'; conduct that is 'so brutal and offensive that it [does] not comport with

131. *Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 2015 WL 4098270, at *1-2, 9 (11th Cir. 2015).

132. *Boyd*, 579 F.3d at 514.

133. *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 867 (5th Cir. 2012); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *id.* at 860-62 (Scalia, J., concurring).

> traditional ideas of fair play and decency'; conduct that 'interferes with rights implicit in the concept of ordered liberty'; and conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'[134]

Deliberate framing of a person by the state offends the most strongly held values of our nation. We echo again the apt words of the First Circuit that, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals."[135] As the Third Circuit has stated, "no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence."[136] Here, the framing was allegedly done in order to conceal and justify excessive force against one of the people our laws and systems are supposed to protect. The rule of law, which we have cherished since our founding, cannot abide such conduct.

We agree with the Second Circuit that official framing of a person in these circumstances undermines the right to a fair trial.[137] Being framed and falsely charged brings

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134. *Doe ex rel Magee*, 675 F.3d at 867 (quoting *Lewis*, 523 U.S. at 846-47 & n.8).

135. *Limone*, 372 F.3d at 44-45.

136. *Halsey*, 750 F.3d at 292-93.

137. *Ricciuti*, 124 F.3d at 130; *see also Boyd*, 579 F.3d at

inevitable damage to the person's reputation, especially where, as here, the crime is a felony involving the threat of violence.[138] Alongside the reputational damage,[139] it requires the person framed to mount a defense,[140] and places him in the power of a court of law, where he may be required to appear.[141] Though these wrongs may be addressed through a Fourth Amendment challenge in many cases,[142] they do not disappear where there is no violation of that amendment. Instead, where there is no more specific constitutional protection available, the

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515 (noting that the right to a fair trial is undermined by state fabrication of evidence even when defendant is acquitted).

138. *See Albright*, 510 U.S. at 278 (opinion of Ginsburg, J.) (discussing the consequences of being charged with a serious offense); *id.* at 289 (opinion of Souter, J.).

139. *See id.* at 296 n.9 (Stevens, J., dissenting) (noting that *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), "recognized that liberty is infringed by governmental conduct that injures reputation in conjunction with other interests" and that "commencement of a criminal prosecution is certainly such conduct").

140. The Coles allege that they incurred «substantial legal fees and expenses for an attorney to defend Ryan Cole and to subsequently obtain the dismissal of the» aggravated assault on a public servant charge.

141. *See Albright*, 510 U.S. at 278 (opinion of Ginsburg, J.); *id.* at 289 (opinion of Souter, J.).

142. *See id.* at 274 (plurality); *id.* at 276-77 (opinion of Ginsburg, J.); *id.* at 288-91 (opinion of Souter, J.) (noting the "rule of reserving due process for otherwise homeless substantial claims").

Fourteenth Amendment may offer protection.[143] It does so here, where the conduct is undoubtedly shocking to the conscience and no conceivable state interest justifies the deprivations imposed.[144]

The Fourteenth Amendment forbids what allegedly happened to Ryan Cole. Where police intentionally fabricate evidence and successfully get someone falsely charged with a felony as cover for their colleagues' actions, and the Fourth Amendment is unavailing, there may be a due process violation.[145]

**4.**

Having found that the Coles have alleged a due process violation, we must also decide whether the violation was

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143. *See id.* at 273 (plurality) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'") (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)); *see also Soldal v. Cook Cty.*, 506 U.S. 56, 70, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.").

144. *See Moran*, 296 F.3d at 643, 647-48.

145. We also note that the district court in this case ruled that the Coles cannot seek a state law malicious prosecution remedy, and Officer Carson has not challenged that finding. *See Albright*, 510 U.S. at 283-84 (opinion of Kennedy, J.) (discussing the significance of adequate state post-deprivation remedies).

clearly established in October 2010. As the Supreme Court has explained, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right."[146] That is not the test, as it would "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability." [147] On the other hand, officials may be on notice that their conduct is unlawful even in "novel factual circumstances,"[148] though the courts have not had occasion to rule on "'materially similar' conduct."[149] Indeed, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[150]

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146. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

147. *Id.*

148. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

149. *Id.* at 753 (Thomas, J., dissenting); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009).

150. *Hope*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)); *see also Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) ("Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." (citation omitted)).

By 2010, no "reasonable law enforcement officer would have thought it permissible to frame somebody for a crime he or she did not commit."[151] Though the First Circuit was addressing official framing that led to conviction, and the state of the law in 1967, the principle applies with obvious clarity here. "To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false [evidence] at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice."[152] "[T]he wrongfulness of charging someone on the basis of deliberately fabricated evidence is sufficiently obvious,"[153] that in light of our due process violation holdings in *Castellano* and *Boyd* and the decisions of our sister circuits,[154] a reasonable officer in Officer Carson's shoes would have known his conduct violated the Constitution. "[N]o reasonably competent police officer could believe otherwise."[155]

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151. *Limone*, 372 F.3d at 50.

152. *Ricciuti*, 124 F.3d at 130.

153. *Devereaux*, 263 F.3d at 1075.

154. To reiterate, the Second, Eighth, Ninth, and Tenth Circuits have found due process violations in similar circumstances. The D.C., First, Third, Sixth, and Eleventh Circuits have not answered the question, though some have spoken in broad terms about the right not to be framed. The Fourth and Seventh have found no due process violation in the absence of a conviction, but based on a theory (the need for conviction) we have rejected.

155. *Ricciuti*, 124 F.3d at 130.

**5.**

Finally, the Coles have pled "specific conduct and actions giving rise to a constitutional violation."[156] We will not rehearse the pleadings in detail yet again. The Coles clearly allege that Officer Carson conspired with others and intentionally lied in order to cover for his colleagues, among other things telling investigators that Ryan turned and pointed his gun at the police. The Coles further allege that Officer Carson and other officers' lies led directly to the decision to charge Ryan with aggravated assault. As we have explained, that is enough for us to determine that they have pled a clearly established constitutional violation.

**V**

Officer Carson claims absolute immunity for all of his alleged conduct under *Rehburg v. Paulk*,[157] where the Supreme Court found that all grand jury witnesses have:

> absolute immunity from any § 1983 claim based on the witness' testimony. In addition . . . this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution . . . In the vast majority of cases

156. *Baker*, 75 F.3d at 195; *Schultea*, 47 F.3d at 1433.

157. 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012).

> involving a claim against a grand jury witness, the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony. We decline to endorse a rule of absolute immunity that is so easily frustrated.[158]

The Court recognized that absolute immunity does not "extend[] to *all* activity that a witness conducts outside of the grand jury room. For example, we have accorded only qualified immunity to law enforcement officials who falsify affidavits and fabricate evidence concerning an unsolved crime."[159]

Under *Rehburg*, Officer Carson is immune for grand jury testimony, preparation for that testimony, and any conspiracy to falsely testify. He argues that all of his alleged conduct falls into those categories, but the First Amended Complaint goes further. The Coles allege that Officer Carson made false statements in the course of the *initial* investigation into the shooting, before a decision had been made by prosecutors to charge Ryan with aggravated assault. The FAC indicates that Carson intended these statements to influence the decision to bring charges against Ryan in the first place.

An officer who lies to investigating officers in order to try to get someone charged with a crime—before

158. *Id.* at 1506-07.

159. *Id.* at 1507 n.1 (citations omitted).

the decision to charge has been made—is not entitled to absolute testimonial immunity. The Supreme Court has held that a prosecutor is not entitled to absolute immunity when she falsifies an affidavit supporting an arrest warrant.[160] Neither is a police officer who submits an affidavit for a warrant, leading to an arrest without probable cause.[161] Nor are prosecutors absolutely immune when they act alongside police officers to "solve" an unsolved crime by shopping for an unscrupulous expert.[162] *Rehberg* confirmed that these holdings are still good law.[163] We have likewise held that "non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial."[164]

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160. *Kalina v. Fletcher*, 522 U.S. 118, 129, 131, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

161. *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

162. *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

163. *Rehberg*, 132 S.Ct. at 1507 n.1 (listing each of the preceding three cases to illustrate that "absolute immunity [does not] extend[] to *all* activity that a witness conducts outside of the grand jury room").

164. *Castellano*, 352 F.3d at 958 & n.107 (citing *Buckley*, 509 U.S. at 275-76, and *Spurlock v. Satterfield*, 167 F.3d 995, 1003-04 (6th Cir. 1999), for the proposition that "[d]efendants cannot shield any pretrial investigative work with the aegis of absolute immunity merely because they later offered the fabricated evidence or testified at trial").

The conduct here—lying to investigators—comes closer to possibly preparing for grand jury testimony than some of the conduct in earlier cases, but the timing and purpose of the statements matter. The Supreme Court and this court have emphasized that absolute immunity for prosecutors, witnesses, and others is based on a need to protect central judicial proceedings.[165] Thus conduct that occurs during investigation to discover probable cause and before the decision to charge has been made is not generally entitled to absolute immunity.[166] Some of

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165. *Briscoe v. LaHue*, 460 U.S. 325, 334-35, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983) ("The central focus of our analysis has been the nature of the judicial proceeding itself."); *Kalina*, 522 U.S. at 125, 128 (noting that immunity covers "activities . . . intimately associated with the judicial phase of the criminal process"); *Malley*, 475 U.S. at 342-43 ("We have interpreted § 1983 to give absolute immunity to functions 'intimately associated with the *judicial* phase of the criminal process . . . ."); *Keko v. Hingle*, 318 F.3d 639, 643 (5th Cir. 2003) ("[A]n informal, *ex parte* probable cause hearing is not the type of judicial proceeding for which a witness's testimony would require the full shield of absolute immunity. . . . We decline to extend absolute witness immunity into an arena where the Supreme Court has not found factual testimony to justify such heightened protection.").

166. *Buckley*, 509 U.S. at 273-74 ("The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings . . . . Their mission at that time was entirely investigative . . . ."); *Hoog-Watson v. Guadalupe Cty.*, 591 F.3d 431, 438 (5th Cir. 2009) (finding under functional approach, "prosecutorial immunity protects 'the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial,' but not 'the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect

the false statements in this case are alleged to have been this investigation-stage type of conduct.

In these circumstances, lying to investigating officers is similar to falsifying a police report, which the Second Circuit recently held is not protected by testimonial immunity. The Second Circuit addressed how to apply *Rehberg* "when a § 1983 plaintiff alleges that the officer withheld and falsified evidence in addition to committing perjury before the grand jury."[167] It concluded that testimonial immunity does not bar § 1983 claims that can be made out without reference to the grand jury testimony or preparation for it.[168] As the court explained, "[t]he fact that [defendant's] grand jury testimony paralleled information he gave in other contexts [such as police reports] does not mean that [the claim] was 'based on' [the] grand jury testimony. Rather it was based on [defendant's] conduct that laid the groundwork for [the] indictment."[169] So here; the fact that some of Officer Carson's statements may have been presented to the grand jury can be excised from the complaint and the Coles still make out a case that

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be arrested.'"); *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 637 (5th Cir. 2000) ("[A]lthough a prosecutor is absolutely immune when she acts . . . as an advocate for the state by initiating and pursuing prosecution, or when her conduct is 'intimately associated with the judicial phase of the criminal process,' she does not enjoy absolute immunity for her acts of investigation . . . .") (citations omitted).

167. *Coggins v. Buonora*, 776 F.3d 108, 112 (2d Cir. 2015).

168. *Id.* at 113 & n.7.

169. *Id.* at 113.

Carson lied in order to ensure charges would be brought in the first place.

A final wrinkle must be addressed. While we have said that plaintiffs must plead with specificity when absolute immunity is asserted, just as with qualified immunity,[170] the Supreme Court has held that "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question."[171] Officials bear the "burden of establishing that they were functioning" in an absolutely immune role.[172] The Court's statements

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170. *Truvia v. Julien*, 187 F. App'x 346, 348 (5th Cir. 2006); *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) *abrogated on other grounds by Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

171. *Burns v. Reed*, 500 U.S. 478, 486-87, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been 'quite sparing' in our recognition of absolute immunity, and have refused to extend it any 'further than its justification would warrant.'") (citation omitted); *Buckley*, 509 U.S. at 269 (quoting *Burns*); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993) ("The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity.").

172. *Buckley*, 509 U.S. at 274 ("The question, then, is whether the prosecutors have carried their burden of establishing that they were functioning as 'advocates' . . . ."). This goes for cases before the Court on motions to dismiss, summary judgment, and directed verdict. *See id.* at 264 (motion to dismiss); *Burns*, 500 U.S. at 483 (directed verdict); *Antoine*, 508 U.S. at 431 (summary judgment).

emphasize its reluctance to take absolute immunity too far, and contemplate the need for defendants to take an active role in claiming it.[173] Following these cases and our own precedent, we have held at the *summary judgment* stage that the burden stays with the defendant to establish his entitlement to absolute immunity.[174]

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173. *Antoine*, 508 U.S. at 432 n.4 ("We have consistently 'emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been quite sparing in our recognition of absolute immunity . . . .'"); *Buckley*, 509 U.S. at 274 ("The question, then, is whether the prosecutors have carried their burden of establishing that they were functioning as 'advocates' . . . ."); *Malley*, 475 U.S. at 339-341 (noting that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."); *see also Lampton v. Diaz*, 639 F.3d 223, 228 (5th Cir. 2011) (noting failure of proponent of immunity to point to a case extending it to his situation).

174. *Hoog-Watson*, 591 F.3d at 437 n.6 ("For summary judgment purposes, *Buckley*[, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209], and *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997) . . . hold that the defendant who pleads the affirmative defense of absolute prosecutorial immunity bears the burden of proving that the conduct at issue served a prosecutorial function . . . . In contrast, more recent Fifth Circuit decisions hold that after the defendant pleads the defense of prosecutorial immunity, the *plaintiff* bears the burden of introducing evidence sufficient to convince a reasonable factfinder that the defendant acted outside the scope of the immunity. *Cousin v. Small*, 325 F.3d 627, 632-33 (5th Cir. 2003); *Beck*[, 204 F.3d at 633-34]. But because *Hart* came before *Cousin* and *Beck, Hart* controls.").

We need not decide whether a heightened pleading requirement applies at the motion to dismiss stage. We have already explained that the Coles pled "specific conduct and actions giving rise to a constitutional violation" insofar as they allege that Officer Carson fabricated evidence to get Ryan falsely charged. The Coles alleged that Officer Carson lied to investigating officers, telling them that Ryan turned around and pointed his gun at Officer Hunter prior to his being shot, and that Officer Hunter gave a warning before firing. They make it clear that some of these statements were made prior to the decision to charge, were intended to influence, and did influence that decision. Their pleadings are specific enough to meet any heightened pleading requirement.

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We DISMISS the appeal by Officers Hunter and Cassidy for lack of jurisdiction. We AFFIRM the denial of Officer Carson's motion to dismiss insofar as it relates to the Coles' due process claim based on fabricated evidence and REVERSE the denial as to the Fourth Amendment and *Brady* claims. We REMAND for further proceedings.

## APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED DECEMBER 22, 2014

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION

Civil Action No. 3:13-cv-02719-O

RANDY COLE AND KAREN COLE, INDIVIDUALLY AND AS NEXT FRIENDS OF RYAN COLE,

*Plaintiffs*,

v.

MICHAEL HUNTER, MARTIN CASSIDY, CARL CARSON AND THE CITY OF SACHSE, TEXAS,

*Defendants.*

### MEMORANDUM OPINION AND ORDER

Before the Court are Defendants Hunter and Cassidy's Motion for Summary Judgment and Brief and Appendix in Support (ECF No. 112-23), filed September 22, 2014; Plaintiffs' Response (ECF No. 145-47), filed October 28, 2014; and Defendants' Reply (ECF No. 148), filed November 7, 2014. Also before the Court are Defendants' Motion to Exclude the Testimony of Plaintiffs' Expert Tom Bevel and Appendix in Support (ECF No. 126-28, 132, 135), filed September 25, 2014; Plaintiffs' Response (ECF No. 142-44), filed October 28, 2014; Defendants' Reply

(ECF No. 149), filed November 7, 2014; Defendants' Motion to Exclude the Testimony of Plaintiffs' Expert Timothy Braaten and Appendix in Support (ECF No. 129-131, 136), filed September 25, 2014; Plaintiffs' Response (ECF No. 139-41), filed October 28, 2014; and Defendants' Reply (ECF No. 150), filed November 7, 2014.

Having considered the motions, related briefing, evidence, and applicable law, and for the reasons that follow, the Court finds that Defendants' Motion for Summary Judgment and Defendants' Motions to Exclude Expert Testimony should be and are hereby **DENIED**. The Court further **OVERRULES** Plaintiffs' Objection on the Basis of Judicial Estoppel, and the Court **DEFERS** ruling on Plaintiffs' Objections to Defendants' Experts Albert Rodriguez and Gene Henderson insofar as the objections exceed the scope of this summary judgment determination.

## I. BACKGROUND

This is an action by Plaintiffs Randy and Karen Cole, individually and as next friends of their son Ryan Cole ("Cole"), alleging claims under 42 U.S.C. § 1983 and state law against the City of Sachse, Texas ("City of Sachse" or "City"), and Michael Hunter ("Hunter"), Martin Cassidy ("Cassidy"), and Carl Carson ("Carson"), police officers for the City at the time of the incident precipitating this lawsuit. This case arises from the alleged use of deadly force by Officers Hunter and Cassidy (sometimes collectively, "the Officers") on the morning of October 25, 2010, in the City of Garland, Texas, when they shot Ryan Cole several times, causing profound mental and physical

disabilities. Plaintiffs allege causes of action based on unconstitutional use of deadly force, failure to train or supervise, and a subsequent conspiracy by Officers Hunter, Cassidy, and Carson to manufacture evidence and make use of perjured testimony.

In Count One of the First Amended Complaint, Plaintiffs assert a claim under 42 U.S.C. § 1983 for Officers Hunter and Cassidy's use of deadly force in violation of Ryan Cole's Fourth Amendment rights. In Counts Two and Three, Plaintiffs assert a claim under 42 U.S.C. § 1983 against the City of Sachse based on its facially unconstitutional policies on the use of deadly force (Count Two), and inadequate training, supervision, policies and practices (Count Three) that resulted in the unlawful shooting of Ryan Cole. In Count Four, Plaintiffs bring a claim under § 1983 against the Officers Hunter, Cassidy, and Carson for causing and participating in the unlawful prosecution of criminal charges using manufactured evidence and perjured testimony, without probable cause, in violation of Cole's Fourth and Fourteenth Amendment rights, and for conspiracy to deprive Cole of his constitutional rights. Count Four also seeks relief under state law for malicious prosecution. In addition to these claims, Plaintiffs Randy and Karen Cole also bring individual federal and state law bystander claims for mental anguish.

On January 24, 2014, the Court granted Defendants' motion to dismiss Plaintiffs' state law malicious prosecution claims and bystander claims against Officers Hunter, Cassidy, and Carson, as well as Plaintiffs' federal law bystander claims against the three officers and the City.

Mem. Op. & Order, Jan. 24, 2014, ECF No. 85. The Court denied Defendants' motion to dismiss Plaintiffs' remaining claims. *Id*. The denial of Defendant Carson's motion to dismiss Count Four on the basis of qualified immunity and failure to state a claim is now pending before the United States Court of Appeals for the Fifth Circuit. *See* Def. Carson's Notice Appeal, ECF No. 87.

On April 18, 2014, the Court ordered that "all proceedings concerning Count IV, including discovery, are hereby stayed pending the resolution of Defendant Carson's interlocutory appeal of this claim or further order of this Court." Order 11-12, Apr. 18, 2014, ECF No. 100. However, the Court permitted narrowly tailored discovery regarding Count One, provided that it is reasonably calculated to assist the Court in determining whether Defendants Hunter and Cassidy are entitled to qualified immunity on Count One at the summary judgment stage. *Id*.

Defendants Hunter and Cassidy now move for summary judgment, and both parties seek to exclude expert testimony. Plaintiff further objects to Defendants' motion for summary judgment on the basis of judicial estoppel. The motions and objections have been fully briefed and are ripe for determination.

## II. LEGAL STANDARD

### A. Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show "that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56(c).

When reviewing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Id.* at 250.

**B. Admissibility of Expert Testimony**

"The admissibility of expert testimony is governed by the same rules, whether at trial or on summary judgment." *First United Fin. Corp. v. U.S. Fid. & Guar. Co.*, 96 F.3d 135, 136-37 (5th Cir. 1996). "In rulings on the

admissibility of expert opinion evidence the trial court has broad discretion and its rulings must be sustained unless manifestly erroneous." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

Federal Rule of Evidence 702 governs the admissibility of expert testimony. *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). This rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Effective December 1, 2000, Rule 702 was amended to incorporate the principles first articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *See* Fed. R. Evid. 702, adv. comm. notes (2000). Under *Daubert*, expert testimony is admissible only if the proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the suit; and (3) the evidence is reliable. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988-89 (5th Cir. 1997). The trial court

is charged with making this preliminary determination under Fed. R. Evid. 104(a).[1] *Andrade Garcia v. Columbia Medical Center of Sherman*, 996 F.Supp. 617, 620 (E.D. Tex. 1998); *see also* Fed. R. Evid., adv. comm. notes (2000).

*Daubert* lists five non-exclusive factors to consider when assessing the scientific validity or reliability of expert testimony: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; (4) the existence and maintenance of standards and controls in the methodology; and (5) whether the theory or method has been generally accepted by the scientific community. *Daubert*, 509 U.S. at 593-94. These factors are not necessarily limited to scientific evidence and may be applicable to testimony offered by non-scientific experts, depending upon "the particular circumstances of the particular case at issue." *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). In either case, the *Daubert* analysis focuses on the reasoning or methodology employed by the expert, not the ultimate conclusion. *Watkins*, 121 F.3d at 989. The purpose of such an inquiry is "to make certain that

1. Fed. R. Evid. 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999) (quoting *Kumho Tire*, 526 U.S. at 152). Thus, a court "must review only the reasonableness of the expert's use of such an approach, together with his particular method of analyzing the data so obtained, to draw a conclusion regarding the specific matter to which the expert testimony is directly relevant." *American Tourmaline Fields v. Int'l Paper Co.*, No. 3:96-CV-3363-D, 1999 U.S. Dist. LEXIS 5790, 1999 WL 242690 at *2 (N.D. Tex. Apr. 19, 1999) (Fitzwater, J.) (citing *Kumho Tire*, 526 U.S. at 154).

The test of reliability is necessarily a flexible one. As the Supreme Court has recognized, the *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire*, 526 U.S. at 150; *see also Watkins*, 121 F.3d at 988-89 ("Not every guidepost outlined in *Daubert* will necessarily apply to expert testimony[.]"). A trial court has wide latitude in deciding how to determine reliability, just as it has considerable discretion with respect to the ultimate reliability determination. *Kumho Tire*, 526 U.S. at 152. Moreover, "the rejection of expert testimony is the exception rather than the rule." *See* Fed. R. Evid. 702, adv. comm. notes (2000). "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of*

*Land, More or Less, Situated in Leflore Cnty., Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996). Even after *Daubert*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *see also In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) ("The grounds for the expert's opinion merely have to be good, they do not have to be perfect.").

## III. ANALYSIS

Officers Hunter and Cassidy move for summary judgment on both counts remaining against them, Count One (Excessive Force) and Count Four (Conspiracy to Obtain Wrongful Conviction). Pursuant to this Court's April 18, 2014 Order, all proceedings related to Count 4 have been stayed. *See* Order 11-12, Apr. 18, 2014, ECF No. 100. In the Order, the Court informed the parties that, at this stage in the proceedings, it will only address issues helpful to a determination of whether Defendants are entitled to a summary judgement finding of qualified immunity. *Id.* at 11. Accordingly, the Court will limit its analysis to Defendants' motion for summary judgment on the excessive force count. Similarly, the Court will only address the parties' motions to exclude expert testimony insofar as the motions relate to summary judgment evidence necessary to resolve the issue of qualified immunity.[2]

2. For instance, the Court will not evaluate Defendants' argument in Part II.B.13 of its Brief in Support of its Motion to Exclude Bevel's Expert Testimony because events taking place after the shooting are beyond the scope of the qualified immunity analysis. *See* Order 11-12, Apr. 18, 2014, ECF No. 100.

*Appendix E*

## A. Motions and Objections Regarding Expert Testimony

Defendants move to exclude the testimony of Plaintiffs' experts Tom Bevel and Timothy Braaten. Plaintiffs object to the testimony of Defendants' expert Albert Rodriguez and the report of Gene Henderson. Plaintiffs further request an evidentiary hearing. The Court finds that an evidentiary hearing is not necessary to determine the admissibility of expert testimony for summary judgment purposes. Accordingly, the Court will address the challenges to each expert in turn.

### 1. Defendants' Motion to Exclude Testimony of Tom Bevel

The Court finds that Bevel is a qualified crime scene reconstructionist. *See* Pls.' App. Supp. Resp. Mot. Exclude Test. Bevel Ex. 2 (Bevel Aff.), App. 36-38, ECF No. 144. Bevel is the President of Bevel, Gardner & Associates, Inc., a forensic education and consulting company located in Oklahoma. *Id.* at App. 37. Bevel has served for ten years as an Associate Professor in the Masters of Forensic Science Program at the University of Central Oklahoma and for twenty-seven years in the Oklahoma City Police Department where he earned the rank of Captain. *Id.* He is an International Association for Identification certified crime scene reconstructionist and a graduate of the FBI National Academy. *Id.* at App. 37-38. His full CV is included on pages 50-55 of Plaintiffs' Appendix. *Id.* at App. 50-55.

The Court further finds that Bevel's testimony is relevant and satisfies the reliability requirements of Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 593-95. Bevel testified that he used the same methodology he would have used as a police supervisor investigating an officer involved in a shooting. Bevel Aff., at App. 36, ECF No. 144; *see also Kumho Tire*, 526 U.S. at 152 (holding that the purpose of the *Daubert* gatekeeping requirement is to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). He reviewed the pertinent documents and evidence, listed on page 56 of Plaintiffs' Appendix. Bevel Aff., at App. 39, ECF No. 144. He testified that he conducted his own independent, impartial investigation and reconstruction in accordance with sound principles and generally accepted techniques. *Id.* at App. 37. In his affidavit, Bevel described in detail his trajectory analysis and crime scene reconstruction processes. *See id.* at App. 39-45, 81-83. Based upon his analyses, Bevel concluded that Cole sustained two gunshot wounds from the Officers which caused Cole to involuntarily pull the trigger on the gun that he was aiming at his own head. *Id.* at App. 46-48. Based upon the timing and sequence of the gunshot wounds, Bevel concluded that it was unlikely that Cole was facing Officer Hunter or pointing his weapon at Officer Hunter when he was initially shot. *Id.* at App. 48-49. Overall, Bevel's testimony satisfies the requirements of Rule 702.

In Defendants' motion to exclude Bevel's testimony, Defendants contend that several of Bevel's opinions are not reliably supported by evidence in the record and thus must

be excluded. Defs.' Mot. Exclude Bevel Test. 11-23, ECF No. 126. Much of Defendants' brief is devoted to explaining which of Bevel's opinions conflict with Defendants' version of the facts, *id*. at 11-23, and which of Bevel's opinions are supported by Defendants' version of the facts, *id*. at 1-10. However, absent a valid reason to question the underlying basis of an expert's testimony, the mere fact that some expert conclusions conflict with witness testimony does not establish that the expert testimony is unreliable. *See Watkins*, 121 F.3d at 989 (holding that the *Daubert* analysis focuses on the reasoning or methodology employed by the expert, not the ultimate conclusion). Here, Defendants fail to set forth a valid basis for the distinction they attempt to draw between admissible and inadmissible evidence.

Further, Defendants admit that Bevel is competent to testify regarding "fundamental general information which is widely accepted by law enforcement professionals that is important in evaluating the reasonableness of the Officers' conduct." Defs.' Mot. Exclude Bevel Test. 1, ECF No. 126. Defendants' brief also appears to concede Bevel's competency as a crime scene reconstuctionist. For instance, Defendants affirm much of Bevel's testimony relating to crime scene reconstruction in general, *see, e.g., id*. at 4-5, and several of Bevel's opinions relating to crime scene reconstruction in this case specifically, *see, e.g., id*. at 6-7. At the same time, Defendants discount Bevel's conclusions when they conflict with the Officers' testimony, *see, e.g., id*. at 14-15. Similarly, much of Defendants' brief is devoted to arguing the ultimate conclusions that should be drawn from Bevel's testimony rather than objecting to Bevel's methodology. *See, e.g., id*. at 10. The Court finds

that these objections, including the arguments Defendants set forth in Parts II.B.1-3, 5, 7-10, 11 of their brief, go to the weight that should be given to the evidence rather than to the admissibility of the evidence. Bevel's testimony on such issues is admissible, and Defendants' arguments relating to the weight or proper interpretation of the evidence are more appropriately saved for cross-examination or oral argument.

The remaining portions of Defendants' brief bring specific challenges to the reliability of Bevel's methodology and the accuracy of the photographs upon which Bevel relied. Defs.' Mot. Exclude Bevel Test. 15-19, 22, ECF No. 126.

In Parts II.B.3-4 of Defendants' brief, Defendants argue that Bevel cannot reliably determine the sequence of gunshots based on audio recordings of the incident. *Id.* at 15-16. Defendants cite Plaintiffs' expert Steven D. Beck ("Beck") who stated that it is "not scientifically possible to determine the sequence of gunshots in question" to a reasonable degree of certainty. *Id.* at 16. However, in omitted portions of Beck's testimony, he indicated that listeners, such as the Garland police investigators and Captain Bevel, may be able to "interpret the sound of the recording to show different sounds by the discharge of one round as opposed to other rounds in the sequence." Pls.' App. Supp. Resp. Mot. Exclude Test. Bevel Ex. 6 (Beck Aff.), App. 135, ECF No. 144. Beck merely concluded that Bevel's interpretations of the recordings cannot be scientifically verified in the manner suggested by Defendants' expert Dr. Al Yonovitz. *Id.* Thus, the Court

finds Defendants' objections to the reliability of Bevel's conclusions based on the recordings to be without merit.

In Part II.B.6 of Defendants' brief, Defendants challenge Bevel's bullet trajectory analysis because his opinions differ from those of another expert in the field, Dr. Vincent Dimaio ("Dimaio"). Defs.' Mot. Exclude Bevel Test. 17-19, ECF No. 126. Bevel testified that he disagreed with Dimaio's opinion that bullets do not usually follow a straight path as they exit the body. *Id*. at 19. Here, Bevel did not rest on general assumptions, rather he confirmed that the bullet in question continued on a linear path by inspecting Cole's medical records and by physically examining Cole's person. Pls.' App. Supp. Resp. Mot. Exclude Test. Bevel 42, 80-82, 175, 177, ECF No. 144. Thus, the Court finds Defendants' objections to Bevel's trajectory analysis to be without merit.

Finally, in Part II.B.12 of Defendants' brief, Defendants challenge the accuracy of photographs upon which Bevel relied. Defs.' Mot. Exclude Bevel Test. 22, ECF No. 126. Defendants argue that there is no evidence in the record demonstrating that the photographic reconstruction of the scene correctly represents the individuals' placement during the incident. *Id*. The Garland police officers who took the photographs did not receive specific approval from the officers who were involved in the incident, and Officers Hunter and Cassidy now allege that the representation of their positions was inaccurate. Pls.' App. Supp. Resp. Mot. Exclude Test. Bevel Ex. 5 (Bevel Dep.) 72:8-73:19, App. 92, ECF No. 144. However, Bevel concluded that the Officers' accounts of their positions

were not consistent with the physical evidence, such as the location of the blood pool and shell casings. *Id.* 73:12-25, 135:9-137:16, at App. 93, 106-08. Bevel testified that the range of the ejection of shell casings from the firearm at issue would be between 50 and 80 inches from the weapon, and this value is generally accepted and not controversial among crime scene reconstructionists. *Id.* 138:3-139:1, at App. 109-10. Based upon his evaluation of the scene and his analysis of the physical evidence, Bevel concluded that the photographs taken by the Garland police department portrayed the relative positions of the people involved in the incident with reasonable accuracy. Therefore, the Court finds that Bevel's testimony relying upon the photographic evidence is admissible under Rule 702.

In summary, the Court finds that Bevel's expert opinions are suitable summary judgment evidence. Accordingly, Defendants motion to exclude or limit Bevel's testimony is **DENIED**.

**2. Defendants' Motion to Exclude Testimony of Timothy Braaten**

The Court finds that Braaten is a qualified expert on police administration, investigations, and procedure. *See* Pls.' App. Supp. Resp. Mot. Exclude Test. Braaten Ex. 2 (Braaten Aff.), App. 13-15, ECF No. 141. Braaten received a Bachelor of Arts in Psychology and Sociology from Concordia College and a Master of Public Administration degree from Wayne State University. *Id.* at App. 13. He is a graduate of the FBI National Academy. *Id.* at App. 14. Braaten gained experience as a police officer in Michigan,

before working as Chief of Police in Mequon, Wisconsin, Oak Ridge, Tennessee, and then Victoria, Texas. *Id.* at App. 13-14. Notably, he has investigated complaints against police officers, including incidents involving the use of deadly force and other violent crimes. *Id.* Additionally, for approximately six years, Braaten served as Executive Director of the Texas Commission on Law Enforcement Standards and Education in Austin, Texas. I*d.* at App. 14. His full CV is given in Plaintiffs' Appendix 39-42. *Id.* at App. 39-42.

The Court further finds that Braaten's testimony satisfies the reliability requirements of Rule 702. *See Daubert*, 509 U.S. at 593-95. Braaten testified that he used the same methodology he would have used as a police chief or police supervisor investigating or evaluating any officer involved shooting or other major incident. Braaten Aff., at App. 16, ECF No. 141; *see also Kumho Tire*, 526 U.S. at 152. He testified that he independently and impartially approached the case. Braaten Aff., at App. 16, ECF No. 141. Braaten reviewed the documents produced by both parties, including the Garland Police Department investigation file, the Sachse Internal Affairs reports, Bevel's crime scene reconstruction, Cole's medical records, and the audio and video recordings from the scene. *Id.* at App. 43. Based upon his investigation, Braaten concluded that at the time of the shooting, Cole was not facing or pointing the gun at Officer Hunter, Officer Hunter did not give an adequate warning under the circumstances, and thus the use of deadly force was not justified. *Id.* at App. 37. Contrary to Defendants' arguments that Braaten's opinions are based upon mere "supposition,"

the Court finds that Braaten has used reliable methods in his investigation applied reliably to the facts at hand. Defs.' Mot. Exclude Braaten Test. 18, ECF No. 129 (citing *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007)).

Defendants object to Braaten's qualifications, arguing that Braaten may not present expert opinions relating to his interpretation of the shooting events because he is not a shooting scene reconstructionist. Defs.' Mot. Exclude Braaten Test. 3, ECF No. 129. However, Rule 702 merely requires an expert to be qualified to testify in particular field, he or she need not be highly specialized. *Wellogix, Inc. v. Accenture, LLP*, 716 F.3d 867, 882 (5th Cir. 2013); *see also Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994). Here, Plaintiffs have established Braaten's extensive experience as a criminal investigator. Braaten Aff., at App. 13-16, ECF No. 141. The Court finds that experienced criminal investigators, such as Braaten, may express opinions as to the significance of facts in an officer involved shooting. It is also appropriate for Braaten to testify about police departments' standard of conduct for law enforcement officers who encounter an individual with a handgun pointed at himself.

Besides the challenges to Braaten's qualifications, Defendants' brief consists entirely of arguments that either extend beyond the scope of the qualified immunity analysis or address the weight rather than the admissibility of evidence. When determining the admissibility of evidence, district courts must afford "proper deference to the jury's role as the arbiter of disputes between conflicting opinions." *14.38 Acres of Land*, 80 F.3d at

1077 (quoting *Viterbo*, 826 F.2d at 422). "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *Id.* (quoting *Viterbo*, 826 F.2d at 422). Defendants' arguments consist of factual disputes and challenges to Braaten's conclusions which are more appropriately brought during cross examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. At this time, the Court does not determine questions beyond the scope of the qualified immunity analysis. In accordance with the Court's gatekeeping function, the Court determines that Braaten's testimony is competent summary judgment evidence. Accordingly, Defendants' motion to exclude or limit Braaten's testimony is **DENIED**.

### 3. Plaintiffs' Objection to the Testimony of Albert Rodriguez

Plaintiffs argue that Rodriguez's testimony must be excluded because it was untimely produced and, alternatively, they argue that the testimony violates several Federal Rules of Evidence. Pls.' Br. Resp. Mot. Summ. J. 7-8, ECF No. 146.

#### a. Timeliness Objections

Under Federal Rule of Civil Procedure 26(a), initial disclosures of expert reports must be "complete and

detailed." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 571 (5th Cir. 1996). Supplemental disclosures "are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information." *Id.* Supplemental opinions must not include material changes or corrections to the experts opinions. *Harmon v. Ga. Gulf Lake Charles LLC*, 476 F. App'x 31, 38 (5th Cir. 2012).

On June 27, 2013, Defendants' Expert Designation (ECF No. 54) identified Rodriguez as an expert who may testify. Subsequent email correspondence between the parties indicates that Plaintiffs were aware of the possible need to depose Rodriguez; however, Plaintiffs chose to postpone the deposition. *See* Pls.' App. Supp. Resp. Mot. Summ. J. 3-8, ECF No. 147.

Plaintiffs argue that Defendants failed to disclose Rodriguez's Supplemental Report before the August 18, 2014 discovery deadline, and thus the Supplemental Report must be excluded from the Court's consideration of the summary judgment motion. *See* Order, May 5, 2014, ECF No. 104. The Supplemental Report was first served on the Plaintiffs in the appendix in support of Defendants' motion for summary judgment on September 22, 2014, and Defendants did not receive the Court's permission for late filing of a Supplemental Report. Plaintiffs argue that the untimely disclosure of the Supplemental Report prejudiced them because the report would have prompted them to depose Rodriguez regarding his new opinions. However, Plaintiffs fail to identify any new opinions in the Supplemental report. Plaintiffs also have not

demonstrated that any changes to the report are material. Therefore, the Court finds that the Supplemental Report may be admitted at this stage in the proceedings.

**b. Evidentiary Objections**

The Court finds that Rodriguez is a qualified expert on police policies and procedures, including procedures involving the use of deadly force. *See* Defs.' App. Supp. Mot. Summ. J. Ex. Vol. 3 Tab 21 (Rodriguez Decl.), App. 844, ECF No. 121. Rodriguez has served as a law enforcement officer for approximately thirty-six years, including service as Commander of the Department of Public Safety Training Academy in Austin, Texas. *Id.* ¶ 1, at App. 844. He holds a Bachelor's Degree from Texas A&M and certifications from the Texas Commission on Law Enforcement Officer Standards and Education. *Id.* ¶ 3, at App. 844. He is a graduate of the 147th FBI National Academy in Quantico, Virginia. *Id.* He is FBI certified as a Use of Force and Defensive Tactics Instructor. *Id.* His full resume is attached in Defendants' Appendix on pages 881-84. *Id.* at App. 881-84.

Plaintiffs object to his qualifications to testify to legal conclusions, crime scene reconstruction, bullet trajectory analysis, mental health issues and involuntary/reflexive trigger pull syndrome. Pls.' Br. Resp. Mot. Summ. J. 9, ECF No. 146. Plaintiffs also object to several of Rodriguez's opinions on hearsay grounds.

The Court finds that an evaluation of each particularized objection exceeds the scope of the summary

judgment inquiry. Any objections relevant to information relied upon by the Court will be discussed in further detail below. Objections to expert testimony not covered in this Order may be raised when they become ripe at a later date in the proceedings.

#### 4. Plaintiffs' Objection to the Testimony of Gene Henderson

Plaintiffs object to Henderson's report and challenge Henderson's qualification to reconstruct shooting incidents or crime scenes. Pls.' Br. Resp. Mot. Summ. J. 15, ECF No. 146. They also object to a lack of basis for the video's crime scene reconstruction methodology, arguing that there is no basis anywhere in the record that Cole's movements were similar to the movements of the individual in the video. *Id*. at 16.

Because the Court does not rely on the Henderson report or Rodriguez's testimony concerning Henderson's report in its summary judgment determination, the Court does not reach the issue of whether to admit the Henderson report at this stage in the litigation.

### B. Plaintiffs' Objection on the Basis of Judicial Estoppel

The Court next turns to Plaintiff's objection to defendant's motion for summary judgment on the basis of judicial estoppel. Pls.' Br. Resp. Mot. Summ. J. 2-6, ECF No. 146.

*Appendix E*

Judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). In the Fifth Circuit, a party may be estopped only if the party's new position is "clearly inconsistent" with its prior position and the party had previously convinced the court to accept its prior position. *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003).

The Court finds that the alleged inconsistencies in the instant case are not so "clearly inconsistent" as to permit judicial estoppel. *See id.* Plaintiffs argue that amendments to Defendants' Answer establish inconsistent positions. Pls.' Br. Resp. Mot. Summ. J. 2-6, ECF No. 146. They argue, for instance, Officers Hunter and Cassidy's prior testimonies fail to mention that an officer gave the beginning of a warning to "drop it" or "drop the" before shots were fired. The answer also omitted testimony about Cole repositioning the gun to his head before firing. Defendants also amended their answer to allege that Defendants "perceived" that Cole pointed the gun at Officer Hunter.

It is not clear that these amendments are due to Defendants "playing 'fast and loose' with the court by 'changing positions based upon the exigencies of the moment.'" *Hall*, 327 F.3d at 400. Questions regarding possible inconsistencies within witness testimony are more appropriately placed before the jury. Overall, Plaintiffs' fail to establish that judicial estoppel would be appropriate. Accordingly, Plaintiffs' motion for judicial estoppel is **DENIED**.

### C. Officers Hunter and Cassidy's Motion for Summary Judgment Based Upon Qualified Immunity

The doctrine of qualified immunity protects government officials sued pursuant to 42 U.S.C. § 1983 "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). It is important to resolve qualified immunity questions at the earliest possible stage in the litigation. *Id.*

The burden of proof for overcoming a qualified immunity defense at the summary judgment stage rests upon Plaintiffs. *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992); *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001). Plaintiffs bear the burden of establishing that the facts show Defendants violated one of Plaintiffs' constitutional rights and the right was "clearly established" at the time of Defendants' alleged misconduct. *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009); *accord Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Pearson*, 555 U.S. at 236. "To negate a defense of qualified immunity and avoid summary judgment, the plaintiff need not present 'absolute proof,' but must offer more than 'mere allegations.'" *Ontiveros*, 564 F.3d at 382 (quoting *Reese v. Anderson*, 926 F.2d 494, 499 (5th Cir. 1991)).

Officers Hunter and Cassidy contend that they are entitled to a summary judgment determination of qualified

immunity because the undisputed facts show they acted in an objectively reasonable fashion when they shot Ryan Cole. Defs.' Br. Supp. Mot. Summ. J. 15-16, 31-32, ECF No. 113. Defendants argue that a reasonable officer could have reasonably perceived a threat to his own life when confronted by someone holding a loaded gun, with his finger on the trigger, who was turning to face the officer. *Id.* at 31-32. Defendants argue that a reasonable officer could have used deadly force to defend himself in such a situation. *Id.* at 31; *see also* Defs.' App. Supp. Mot. Summ. J. Vol. 3 Tab 13 (Braaten Dep.) 94:11-15, App. 743, ECF No. 120 (testifying that an officer is not required to wait to be fired upon in order to defend himself).

In opposition, Plaintiffs argue that genuine issues of material fact preclude the issuance of summary judgment. *See generally* Pls.' Br. Supp. Mot. Summ. J., ECF No. 146. According to Plaintiffs, the evidence suggests that Cole never pointed a gun at Officer Hunter; instead, Cole continuously directed the handgun toward his own head. *Id.* at 27-28, 43. Thus, Plaintiffs contend, it was unreasonable for the Officers to have perceived an imminent threat justifying the use of deadly force. *Id.* at 21. Plaintiffs further argue that it was unreasonable for Officers to have fired on Cole without first giving reasonable warnings. *Id.* at 18.

Viewing the evidence in the light most favorable to the non-movant, the Court finds that there are genuine issues of material fact regarding Cole's actions and the reasonableness of the Officer's conduct during the incident. Thus, at the summary judgment stage, Officers Hunter and Cassidy are not entitled to qualified immunity, and their motion for summary judgment is denied.

*Appendix E*

**1. Clearly Established Law**

As there are several highly contested factual issues, the Court will first turn to whether the right that the Officers allegedly violated was clearly established at the time of the alleged misconduct. *See Pearson*, 555 U.S. at 236. This inquiry considers the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at 244 (quoting *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)) (internal quotation marks omitted). A right is "clearly established" only when its contours are sufficiently clear that a reasonable public official would have realized or understood that his conduct violated the right in issue. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The right must not only be established in an abstract sense, but also in a more particularized sense such that it is apparent that the official's actions are unlawful in light of pre-existing law. *Id.* The underlying constitutional violation Plaintiffs allege here is excessive force, specifically excessive use of deadly force. Therefore, the relevant question is whether a reasonable officer could have believed that the use of deadly force by Officers Hunter and Cassidy under the circumstances was reasonable in light of the clearly established law.

The law proscribing excessive force has been clearly defined by *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), and *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

*Appendix E*

In order to establish excessive force, a plaintiff must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (citing *Ontiveros*, 564 F.3d at 382). Excessive force claims are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham*, 490 U.S. at 395. Specifically in the context of deadly force, the Supreme Court has determined that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

*Garner*, 471 U.S. at 11-12. "The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) (citation omitted) (emphasis in original). In evaluating whether the use of force was reasonable, courts look to the "totality of the circumstances," and give "'careful consideration

to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Ramirez v. Martinez*, 716 F.3d 369, 376 (5th Cir. 2013) (quoting *Graham*, 490 U.S. at 396) (internal citation omitted). Courts must evaluate the officer's action "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Poole*, 691 F.3d at 628 (citing *Graham*, 490 U.S. at 396). "The calculus must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

In this Court's prior Memorandum Opinion and Order, the Court found that the constitutional limits on the use of deadly force have been clearly established since 1985. Mem. Op. & Order 26, Jan. 24, 2014, ECF No. 85 (citing *Garner*, 471 U.S. at 11). As applicable here, it is clearly established that an officer using deadly force when a suspect does not pose a sufficient threat of harm, or immediate danger to the officer or to others, would have had reasonable warning that the use of deadly force violated the suspect's constitutional rights. *Id.; see also Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failure to apprehend the suspect does not justify the use of deadly force to do so."); *Reyes v. Bridgwater*, 362 F. App'x 403, 409 (5th Cir. 2010)

("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others.").

The Court found that the law prohibiting the use of deadly force in circumstances alleged by Plaintiffs was clearly established in a particularized sense as well. *See* Mem. Op. & Order 26-27, Jan. 24, 2014, ECF No. 85. In the prior Opinion, the Court examined case law applying the *Garner* standard to circumstances where officers have used deadly force in apprehending mentally unstable and/or suicidal individuals who are armed. *Id.* at 26-27 (citing *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006); *Mace v. City of Palestine*, 333 F.3d 621, 622 (5th Cir. 2003); *Ontiveros*, 564 F.3d at 385). The Court held that these cases, all decided prior to the shooting incident in this case, make it clear to a reasonable officer that shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful. *Id.* at 27. Otherwise stated, the law was clearly established at the time of the incident that, absent the "*Manis* act," *i.e.*, "the act that led [the officer] to discharge his weapon," there was no immediate threat sufficient to justify the use of deadly force. *Id.* at 27 (quoting *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009)). Therefore, on October 25, 2010, the date of the shooting, the law was clearly established, such that Officers Hunter and Cassidy would know that use of deadly force under the circumstances alleged by Plaintiffs violated Ryan Cole's Fourth Amendment rights.

*Id*. at 26 (citing *Brosseau v. Haugen*, 543 U.S. 194, 200, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)).

**b. Factual Showing**

Having affirmed that Plaintiffs alleged a violation of a clearly established right, the Court turns now to the remaining inquiry in the qualified immunity analysis. The Court must determine whether the summary judgment evidence, taken in the light most favorable to Plaintiffs, shows that the Officers' use of deadly force was unreasonable. If the Plaintiffs are unable to present evidence creating a genuine issue of material fact as to the reasonableness of the Officers' actions, then summary judgment must be entered in favor of Defendants. *See Ballard*, 444 F.3d at 403. Plaintiffs must present more than mere unsupported allegations to create a genuine fact issue. *See Ontiveros*, 564 F.3d at 382.

The factual circumstances present immediately before and during the shooting are highly contested in this action. Thus, the Court must determine whether the contested issues of fact are *material* to the qualified immunity analysis.

According to Plaintiffs' expert Bevel, Cole kept the handgun aimed at his own head as he turned to face the Officers, never pointing the handgun at Officer Hunter. Pls.' App. Supp. Resp. Mot. Summ. J. Ex. 5 (Bevel Aff.), App. 115-16, ECF No. 147 (concluding physical evidence of stippling and gunshot wounds not consistent with having pointed the handgun toward the Officers as Officer Hunter

described). Bevel concludes that Cole was initially facing away from the Officers at a 90 degree angle, holding a gun directed toward his own head, when he was first shot by the Officers. *Id.* at App. 117-18. This opinion is based in part on medical records showing that one bullet entered his left arm above the elbow and continued into his body. *Id.* at App. 114; *Id.* at Ex. 4 (Cole Med. Records), at App. 100-04. As he was turning toward the Officers, one of the Officers shot him with the second bullet, which grazed his left arm. Bevel Aff., at App. 114-15, ECF No. 147; Cole Med. Records, at App. 100-04, ECF No. 147. As an involuntary reflex to being shot, Cole pulled the trigger on the gun that he was aiming toward his own head. Bevel Aff., at App. 115-16, ECF No. 147 (basing opinion on comparing normal reaction time with the recorded time between the first and final gunshots). Thus, the harm caused by the bullet wound to Cole's head proceeded directly and only as a consequence of being shot. *See id.* Although the Officers had the opportunity to give a warning, Bevel concludes that the Officers gave no identification or warning that would have allowed Cole a sufficient time to respond. Bevel Dep. 142:1-18, at App. 145, ECF No. 144; *Id.* at Ex. 2 (Hunter Dep.) 189:13-191:10, App. 46-48 (stating that he does not remember whether he gave a warning); *see also* Def.'s App. Supp. Mot. Summ. J. Vol. 4 Tab 28 (Carson Dash Cam), App. 920, ECF No. 122 (audio recording of the incident).

Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Cole never pointed a weapon at the Officers and was not given an opportunity to disarm himself before he was shot. A jury

could find that it would not have been reasonable for the Officers to believe that they were being threatened, and therefore they were not justified in using deadly force without first issuing an adequate warning.

Defendants argue that even accepting all of Plaintiffs' facts, they are entitled to qualified immunity. Defs.' Br. Supp. Mot. Summ. J. 31, ECF No. 113. Defendants contend that the Officers' decision to shoot Cole would still be objectively reasonable on Plaintiffs' facts because Cole posed an immediate danger to the Officers. *Id.* "Cole was holding a loaded gun, with his finger on the trigger, while he was turning toward and then facing Officer Hunter. Cole could have shot Officer Hunter before Hunter could react and take action to defend himself." *Id.* at 32. Defendants argue that a reasonable officer could have feared for his life in such a situation and would not have to wait until fired upon to defend himself. *Id.* at 31; *see also* Braaten Dep. 94:11-15, at App. 743, ECF No. 120. Thus, Defendants contend that the Officers are entitled to summary judgment.

The Court disagrees with Defendants' conclusion. Viewing the competent summary judgment facts in the light most favorable to Plaintiffs, as the Court must at this stage in the litigation, Cole was unaware of the Officers' presence and no warning was given that granted him a sufficient time to respond. Bevel Dep. 142:1-18, at App. 145, ECF No. 144. Plaintiffs argue that it would not have been possible for Cole to have shot Officer Hunter before the Officer could react. *See id.* Viewing the evidence in this light, the Officers had the time and opportunity to give a

warning and yet chose to shoot first instead. *See id*. Such an action, if proven by Plaintiffs, would violate clearly established law set forth in *Garner* that an officer identify himself if feasible under the circumstances. *Garner*, 471 U.S. at 11-12.

Defendants rely upon *Ballard, Ontiveros Mace*, and *Elizondo*. Defs.' Br. Supp. Mot. Summ. J. 29, 32, 34, ECF No. 113 (citing *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006); *Ontiveros v. City of Rosenberg, Tex*., 564 F.3d 379 (5th Cir. 2009); *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003); *Elizondo v. Green*, 671 F.3d 506 (5th Cir. 2012)). However, in all four cases, the individual suspects were aware of the officers' presence and still refused to comply with the officers' instructions, thereby causing an objectively reasonable threat of harm to the officers. In *Ballard*, the suspect ignored an officer's command to put his rifle down, instead pointing the weapon in the air. 444 F.3d at 402. In *Ontiveros*, the individual ignored warnings to show his hands and instead reached into a boot as if to retrieve something. 564 F.3d at 381. In *Mace*, the individual refused to comply with the officer's command to put down a sword. 333 F.3d at 622. In *Elizondo*, the officer warned that he would shoot the suspect if he moved closer with his knife. 671 F.3d at 508.

As applied in the instant action, Defendants argue that Cole was aware of the Officers' presence, had time to put down the firearm, but chose to hold on to the gun. *See* Def.'s App. Supp. Mot. Summ. J. Vol. 3 Tab 18 (Tooke Dep.), App. 819, ECF No. 120 (stating that Cole could have suddenly turned and fired); *id*. at Vol. 3 Tab 21-22

(Rodriguez Reports), at App. 843-04. Under such facts, the defendants may be entitled to qualified immunity. *See* Mem. Op. & Order 18-22, ECF No. 85. However, the Court must view the facts in the light most favorable to Plaintiffs, and, accordingly, the Court relies largely upon the expert testimonies of Bevel and Braaten. The Court notes that it would reach the same conclusion were it only relying upon Bevel's expert opinions. Viewing the summary judgment evidence as is required, the evidence supports Plaintiffs' argument that Cole did not know of the Officers' presence and inadequate warnings were given. Unlike Ballard, Ontiveros, Mace, and Elizondo, Cole was shot before he had an opportunity to disarm himself and did not pose an immediate threat to the officers. In the instant action, the Officers would have had suitable opportunity to give a warning, and yet did not give Cole time to respond. Further, the Fifth Circuit requires the suspect display a threatening "Manis act" before it is objectively reasonable to use deadly force. *Manis*, 585 F.3d at 845. Encountering someone who is merely holding a gun to one's own head may not be a sufficiently threatening act. Here, Cole never made a threatening or provocative gesture toward Officers. Thus, it was not objectively reasonable for the Officers to use deadly force.

Courts are required "to be deferential to the choices made by police officers in high-risk situations." *Reyes*, 362 F. App'x at 407 (citing *Graham*, 490 U.S. at 397). "That deference, however, cannot extend so far as to ignore an officer's violation of the core, established rule that deadly force may not be used '[w]here the suspect poses no immediate threat to the officer and no threat to others.'"

*Id.* (quoting *Garner*, 471 U.S. at 11). Employing deadly force absent such a threat is a violation of the Fourth Amendment. *Id.* Due to the existence of genuine issues of material fact surrounding the Officers' use of deadly force, this case must be presented to a jury.

In summary, Plaintiffs have adequately identified genuine issues of material fact as to whether the Officers' use of deadly force was objectively unreasonable under clearly established law. Accordingly, the Court determines that Officers Hunter and Cassidy are not entitled to qualified immunity at this time.

## IV. CONCLUSION

Based on the foregoing, the Court **DENIES** Defendants' Motion for Summary Judgment (ECF No. 112); **DENIES** the Defendants' Motions to Exclude the Expert Testimony of Tom Bevel (ECF No. 126) and Timothy Braaten (ECF No. 129). The Court further **OVERRULES** Plaintiffs' Objection Based on Judicial Estoppel. The Court declines to rule on other objections as outside the scope of this Court's Scheduling Order. *See* Order 11-12, Apr. 18, 2014, ECF No. 100. Accordingly, the parties are instructed to raise any objection not decided in this order at the appropriate stage in the litigation.

**SO ORDERED** this **22nd** day of **December, 2014**.

/s/ Reed O'Connor
**Reed O'Connor**
**UNITED STATES DISTRICT JUDGE**

**APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED JANUARY 24, 2014**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:13-cv-02719-O

RANDY COLE AND KAREN COLE, INDIVIDUALLY AND AS NEXT FRIENDS OF RYAN COLE,

*Plaintiffs*,

v.

MICHAEL HUNTER, MARTIN CASSIDY, CARL CARSON, AND THE CITY OF SACHSE, TEXAS,

*Defendants*.

January 24, 2014, Decided
January 24, 2014, Filed

**MEMORANDUM OPINION AND ORDER**

Before the Court is Defendants' Second Motion and Brief to Dismiss for Failure to State a Claim and Alternative Request for Rule 7(a) Reply to Immunity (ECF No. 70), filed September 12, 2103. Having considered

the motion, response, reply, pleadings and applicable law, and for the reasons that follow, the motion is granted in part and denied in part.

## I. Factual Background and Procedural History

This is an action by Plaintiffs Randy and Karen Cole, individually and as next friends of their son Ryan Cole ("Plaintiffs"), alleging claims under 42 U.S.C. § 1983 and state law against the City of Sachse, Texas ("City of Sachse" or "City"), and Michael Hunter, Martin Cassidy, and Carl Carson, police officers for the City at the time of the incident made the basis of this lawsuit (sometimes collectively, "Officer Defendants"). This case arises from the alleged use of deadly force by Officers Hunter and Cassidy on the morning of October 25, 2010, in the City of Garland, Texas, when they shot Ryan Cole several times, causing profound mental and physical disabilities. Plaintiffs allege causes of action based on unconstitutional use of deadly force, failure to train or supervise, and a subsequent conspiracy by the Officer Defendants to manufacture evidence and make use of perjured testimony. Plaintiffs Randy and Karen Cole also seek to assert their own claims arising from the shooting.

The Court now sets forth the facts as alleged in Plaintiffs' First Amended Complaint, which is the live pleading. *See* ECF No. 67, First. Am. Compl.[1]

1. In reviewing a Rule 12(b)(6) motion to dismiss, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007).

*Appendix F*

## A. Excessive Force Allegations

On the evening of Sunday, October 24, 2010, Ryan Cole, a troubled seventeen-year-old high school student living at home with his parents in Garland, Texas, had an altercation with his father, resulting in the Garland Police Department sending officers to the home to investigate. *Id.* ¶¶ 4.1, 4.2. The officers determined no crime was involved and a satisfactory resolution was reached whereby Ryan Cole would be permitted to spend the night elsewhere if he chose. *Id.* ¶ 4.2. After the officers left, Ryan Cole told his parents he would spend the night at a friend's home or in a tree house in the woods near the Cole home. *Id.* After his parents went to sleep, and without their knowledge or permission, Ryan Cole re-entered the Cole residence, gained access to his father's locked gun safe in the garage, took one or more weapons, and went to visit a friend named Eric Reed, Jr., who lived nearby and whose father was a retired City of Sachse police officer. *Id.* ¶¶ 4.4, 4.5. Ryan Cole left the Reed residence that night, returning the following morning, Monday, October 25, 2010, sometime after 9:30 a.m. with a revolver and a Springfield 9mm semi-automatic handgun. *Id.* ¶¶ 4.5, 4.6. Ryan Cole left the revolver with Reed, Jr., but kept the semi-automatic handgun. *Id.* Before leaving the Reed home, Ryan Cole telephoned his grandparents and made arrangements for them to pick him up at a CVS drugstore at a major intersection near the Cole home. *Id.*

Plaintiffs allege on information and belief that either Reed, Sr. and/or Reed, Jr. reported to the Sachse Police Department that Ryan Cole possessed a handgun. *Id.* ¶ 4.7.

Although Ryan Cole never acted aggressively or violently toward anyone, Plaintiffs allege on information and belief that Reed, Sr. and/or Reed, Jr. exaggerated their reports of their interaction with Ryan Cole to imply or state that he was in some way aggressive or violent. *Id.*

After leaving the Reed home to meet his grandparents, Ryan Cole intended to walk through a wooded area located immediately north of State Highway 78 and west of Murphy Road in Garland in order to reach the CVS drugstore. *Id.* ¶ 4.8. Unknown to Ryan Cole, the City of Sachse Police Department sent a number of police units into the City of Garland to investigate Ryan Cole's actions. *Id.* At approximately 10:45 a.m., as Ryan Cole was walking down an alley toward the wooded area, Garland Police Officer Lt. H.W. Sneed approached him and ordered him to stop. *Id.* It is unclear from the pleadings to what extent Ryan Cole heard or understood Lt. Sneed, but Ryan Cole continued to walk toward the wooded area, removing the handgun from his waistband with his right hand and placing it against his right temple. *Id.* Around this time, Lt. Sneed was joined by Sachse Police Sergeant Garry Jordan. *Id.* Lt. Sneed and Sgt. Jordan followed Ryan Cole at a distance and then lost sight of him. *Id.*

Later, Ryan Cole exited the woods within view of his grandparents who were waiting for him in the parking lot of the CVS drugstore. *Id.* ¶ 4.9. When he left the wooded area, Ryan Cole had his back turned to Murphy Road and was facing the wooded area from which he had just emerged. *Id.* At that time, Ryan Cole was still holding the handgun in his right hand aiming it at the right side of

his head. *Id.* Unknown to Ryan Cole, three Sachse police officers were present in the area: Officer Michael Hunter (a motorcycle police officer); Lt. Martin Cassidy(a patrol supervisor); and Officer Carl Carlson (a patrol officer). *Id.* Each was armed with two weapons, a Taser and a .40 caliber semi-automatic Glock handgun, both issued by the City of Sachse Police Department. *Id.*

When Officer Hunter first observed Ryan Cole exiting the woods, Ryan Cole was facing away from Officer Hunter, still holding the handgun in his right hand pointed toward his head. *Id.* ¶ 4.10. Ryan Cole posed no immediate threat of death or serious injury to anyone. *Id.* Officer Hunter did not identify himself as a police officer or give any command or instruction to Ryan Cole. *Id.* At all times relevant to the incident, it was both feasible and necessary for Officer Hunter to identify himself as a police officer and give a warning to a citizen prior to the use of deadly force. *Id.* Instead, Officer Hunter immediately opened fire on Ryan Cole firing several shots, at least two of which struck Ryan Cole. *Id.* One struck Ryan Cole in his left upper arm and the second struck Ryan Cole in the lower portion of his left arm. *Id.* The lower shot went through Ryan Cole's left arm and then entered the left side of his back, completely incapacitating him. *Id.*

At the time he was shot, Ryan Cole was holding the handgun in his right hand pointed at the right side of his head with his finger inside the trigger guard of the weapon. *Id.* ¶ 4.11. When he was struck by Officer Hunter's gunfire, Ryan Cole involuntarily grasped or clutched his fingers resulting in an involuntary discharge of one

round from his handgun into his skull and brain. *Id.* The involuntary discharge of Ryan Cole's handgun was directly caused by Officer Hunter's act of shooting him. *Id.* As Ryan Cole fell to the ground, at a distance of well over 100 feet, Officer Cassidy also opened fire on Ryan Cole. *Id.* ¶ 4.12. At the time Officer Cassidy opened fire, Ryan Cole posed no threat of immediate or serious injury to anyone. *Id.* Officer Carson did not fire his handgun. *Id.*

As Ryan Cole lay unconscious and bleeding from potentially fatal wounds, the Officer Defendants did nothing to assist him. A period of several minutes passed from the time he was shot until City of Garland Fire Department paramedics arrived. *Id.* ¶ 4.14. Ryan Cole was near death when the paramedics arrived and experienced cardiac arrest just after their arrival. *Id.* ¶ 4.17. Due to the extraordinary skill and effort of the Garland Fire Department paramedics, Ryan Cole was resuscitated and immediately taken to Baylor Hospital in Garland and transferred on an emergency basis by helicopter to the Baylor University Medical Center in Dallas. *Id.* His condition was extremely critical and his family was informed that, in all probability, he would not survive the night. Later, a dangerous surgical procedure was required to save his life. *Id.*

In the medical records, doctors described what they referred to as "stippling" or "tattooing" around the entrance to the wound on the right side of Ryan Cole's head, which is an injury caused by the penetration of gunshot residue discharged from the barrel of a firearm. *Id.* ¶ 4.20. Stippling cannot occur unless the firearm that

caused it was discharged in close and immediate proximity to the skin. *Id.* This objective physical finding establishes that Ryan Cole's handgun was not pointed at Officer Hunter, but at his own head *Id.*

As a result of the shooting, Ryan Cole is profoundly disabled both physically and mentally. *Id.* ¶ 4.24. A substantial portion of the right side of his brain was injured and destroyed resulting in paralysis on the left side of his body. *Id.* He has no use of his left arm and only limited use of his left leg, and now suffers from a severe seizure disorder. *Id.* He will require constant trained medical care and personal assistance, mentally and physically, for daily living for the remainder of his life. *Id.* He has also suffered permanent and significant physical impairment and disfigurement of the body, including his face, head, arm and back as the result of the multiple gunshot wounds he sustained. *Id.*

At all times, the Officer Defendants were acting under color of state law within the course and scope of their employment as licensed peace officers for the City of Sachse Police Department, and Officers Hunter and Cassidy each participated directly or indirectly in the unlawful and unprovoked shooting of Ryan Cole. *Id.* ¶ 4.13. The Officer Defendants knew that failure to identify themselves as police officers or to give warning, if feasible, before using deadly force was a constitutional violation of a citizen's rights, and also knew that use of deadly force against a citizen who did not at that time present an immediate threat to the officers' or others' lives was a violation of that citizen's constitutional rights. *Id.* ¶ 4.17.

*Appendix F*

**B. Expert Reports**

Plaintiffs also attach expert reports to the First Amended Complaint. *See* Ex. 4 to First Am. Compl. (Affidavit of Tom Bevel); Ex. 5 to First Am. Compl. (Affidavit of Timothy A. Braaten). After reviewing the criminal investigation file on the incident from the City of Garland Police Department, including the detailed sworn account of Officers Hunter and Cassidy, the experts conclude that (1) Ryan Cole was not facing Officer Hunter at the time he was shot; (2) the physical evidence is not consistent with Officer Hunter's statements that Ryan Cole was pointing the 9mm handgun at him or any officer at the time he was shot; (3) at the time Ryan Cole's handgun discharged, it was being held by Ryan Cole in his right hand with the barrel of the handgun in close proximity to the right portion of Ryan Cole's head; (4) the discharge of the 9 mm handgun was an involuntary response to being startled when Ryan Cole was struck by gunfire from Officer Hunter; (5) there is no evidence from Officer Hunter's body microphone that he gave warnings or commands prior to opening fire; (6) when Ryan Cole exited the woods he would not have been aware of the Officers' presence at the scene; and (7) Officers Hunter and Cassidy's use of deadly force under the circumstances was not justified. *See generally* Exs. 4 and 5 to First Am. Compl.

Defendants ask the Court to disregard or strike the exhibits, arguing that these reports are not "written instruments" under Fed. R. Civ. P. 10(c). The Court rejects Defendants' argument. The expert reports at this juncture

serve merely to buttress Plaintiffs' contentions concerning their allegations of excessive force. Furthermore, Officers Hunter and Cassidy asserted they were entitled to qualified immunity and sought a Rule 7(a) Reply to this assertion. Plaintiffs instead opted to provide a First Amended Complaint pleading with particularity the facts they contend demonstrate the Officer Defendants are not entitled to qualified immunity, which is a proper response. The Court notes, however, that it would reach the same decision it reaches today without the expert reports. Further, the Court expresses no opinion as to whether the reports would ultimately be admissible in evidence for purposes of trial or summary judgment, or for any other purpose.

### C. Allegations Pertaining to Randy and Karen Cole

Plaintiffs Randy and Karen Cole, individually and on behalf of their son, allege they have incurred, and will continue to incur, substantial charges for hospital, medical, nursing, rehabilitative, psychological and allied health services which were reasonable and necessary for the treatment of Ryan Cole. First Am. Compl. ¶ 4.25. They allege they have experienced severe and substantial mental anguish and interruption of their normal relationship with their son, who now requires twenty-four hour care for the remainder of his life. *Id.* ¶ 4.26. They further allege that they had a contemporaneous perception of the shooting of their son by virtue of having heard the shots fired from their front yard, and have independently experienced significant emotional and mental anguish as a result of

this perception in the past. *Id.* ¶ 4.27. They allege that as a result of the Officer Defendants' false allegations that Ryan Cole committed an aggravated assault on a public servant, they were required, on behalf of their son, to incur substantial legal fees to defend Ryan Cole and obtain dismissal of the charges. *Id.* ¶ 4.28.

### D. Conspiracy and Cover Up Allegations

Plaintiffs also allege that after the shooting the Officer Defendants formed and carried out a conspiracy to cover up their unlawful use of deadly force and to falsely charge and convict Plaintiff Ryan Cole of the felony offense of aggravated assault on a public servant. Functioning as complaining witnesses, they each falsely declared under oath during the Garland Police Department investigation that at the time of the shooting Ryan Cole was facing Officer Hunter and had lowered and pointed his weapon directly at Officer Hunter. *Id.* ¶¶ 4.15, 4.16, 4.21. These false statements were intended to support Officer Hunter›s claim that he justifiably fired in self defense and that Officer Cassidy justifiably fired in defense of Officer Hunter and/or himself. *Id.* ¶ 4.15. Officers Cassidy and Carson falsely stated to investigating officers, and swore under oath, that they heard Officer Hunter give a verbal warning to Ryan Cole before shooting him. *Id.* ¶ 4.16. These statements were made to cover up the fact that Officer Hunter gave no warning prior to opening fire on Ryan Cole. *Id.* The Officer Defendants knew their false statements and testimony would be presented either directly or indirectly by the Dallas County District Attorney's Office to the grand jury, and that based on

these false statements, the grand jury would (and did) indict Ryan Cole for the felony offense of aggravated assault on a public servant. *Id.* ¶ 4.21.

As a result of these fictitious charges, Ryan Cole was placed indefinitely under house arrest. *Id.* On May 12, 2012, the Dallas County District Attorney's Office dismissed all charges that Ryan Cole had committed an aggravated assault on a public servant. *Id.* ¶ 4.21. Ryan Cole received deferred adjudication for the charge of unlawfully carrying a weapon. *Id.*

**E. Plaintiffs' Lawsuit**

On September 21, 2012, Plaintiffs filed this lawsuit in the Eastern District of Texas, Marshall Division. On July 15, 2013, after Defendants had filed motions to dismiss and the Officer Defendants had asserted qualified immunity, the case was transferred to the Northern District of Texas, Dallas Division. As stated above, following a status conference on August 1, 2013, the Court issued an Order directing Plaintiffs to inform the Court whether they intended to rely on the allegations in the initial complaint, or whether they wanted to file either a Rule 7(a) Reply or amended complaint in light of the Officer Defendants assertion of qualified immunity. *See* ECF No. 65, Aug. 8, 2013 Order. Plaintiffs opted to file their First Amended Complaint on August 15, 2013. *See* ECF No. 67, First Am. Compl.

In Count One of the First Amended Complaint, Plaintiffs assert a claim under 42 U.S.C. § 1983 for Officers

Hunter and Cassidy's use of deadly force in violation of Ryan Cole's Fourth Amendment rights. In Counts Two and Three, Plaintiffs assert a claim under 42 U.S.C. § 1983 against the City of Sachse based on its facially unconstitutional policies on the use of deadly force (Count Two), and inadequate training, supervision, policies and practices (Count Three) that resulted in the unlawful shooting of Ryan Cole. In Count Four, Plaintiffs bring a claim under § 1983 against the Officer Defendants for causing and participating in the unlawful prosecution of criminal charges using manufactured evidence and perjured testimony, without probable cause, in violation of Ryan Cole's Fourth and Fourteenth Amendment rights, and for conspiracy to deprive Ryan Cole of his constitutional rights. Count Four also seeks relief under state law for malicious prosecution. In addition to these claims, Plaintiffs Randy and Karen Cole also bring individual federal and state law bystander claims for mental anguish.

Officers Hunter and Cassidy move to dismiss the excessive force claim (Count One), arguing that Plaintiffs have failed to allege a constitutional violation under the Fourth Amendment arising from the October 25, 2010 shooting, and, even if they have, their use of force was objectively reasonable, entitling them to qualified immunity. The City moves to dismiss Counts Two and Three solely on the basis that Plaintiffs have failed to allege an underlying constitutional violation in Count One. The Officer Defendants move to dismiss Count Four as too conclusory, and for failure to plead a plausible constitutional "malicious prosecution" claim. The Officer

Defendants also move to dismiss Count Four asserting they are entitled to absolute immunity for their statements or testimony made in connection with the investigation of the shooting which resulted in the felony assault charges against Ryan Cole. As to the alternative state law claim for malicious prosecution, the Officer Defendants argue that it should be dismissed because they are entitled to statutory immunity, and because Plaintiffs failed to adequately allege the requisite elements of a malicious prosecution claim. Finally, Defendants move to dismiss Randy and Karen Cole's federal and state law bystander claims. Plaintiffs oppose the motion.

## II. Legal Standard for Dismissal under Fed. R. Civ. P. 12(b)(6)

To defeat a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and

plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678-79. When there are well-pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.* However, the Court does "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

In ruling on a motion to dismiss under Rule 12(b)(6), the Court cannot look beyond the pleadings. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Likewise, documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claims. *Id.*

*Appendix F*

## III. Analysis

### A. Count One - Plaintiffs' Excessive Force Claim

Officers Hunter and Cassidy contend Plaintiffs' § 1983 excessive force claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to allege a deprivation of a constitutionally protected right. Officers Hunter and Cassidy also assert they are entitled to qualified immunity because they acted in an objectively reasonable fashion when they shot Ryan Cole. In opposition, Plaintiffs argue that they have adequately alleged an excessive force claim and that Officers Hunter and Cassidy are not entitled to qualified immunity because, based on the pleadings, their conduct was objectively unreasonable under clearly established law.

Accepting all well-pleaded allegations as true, and viewing them in the light most favorable to Plaintiffs, for the reasons stated below, the Court finds that Officers Hunter and Cassidy's use of deadly force on the morning of October 25, 2010 was not objectively reasonable and violated a clearly established constitutional right. Thus, at the motion to dismiss stage, Officers Hunter and Cassidy are not entitled to qualified immunity, and their motion to dismiss will be denied.

#### 1. Qualified Immunity

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution

and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id.* To state a claim under § 1983, a plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States; and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

The doctrine of qualified immunity protects government officials sued pursuant to 42 U.S.C. § 1983 "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). A defendant official must affirmatively plead the defense of qualified immunity. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). "Qualified immunity balances two important interests - the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. This doctrine protects "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).

*Appendix F*

Qualified immunity provides immunity from suit rather than a mere defense to liability. *Pearson*, 555 U.S. at 227. Because immunity is "effectively lost if the case is erroneously permitted to go to trial," a denial of qualified immunity may be immediately appealed. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). "One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive." *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (citation omitted).

Courts generally apply the two-pronged analysis established in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), in determining whether a government official is entitled to qualified immunity for an alleged constitutional violation. The first prong of the *Saucier* analysis asks whether the facts alleged or shown are sufficient to establish a violation of a constitutional or federal statutory right. *Saucier*, 533 U.S. at 201. If the record establishes no violation, no further inquiry is necessary. On the other hand, if the plaintiff sufficiently establishes the violation of a constitutional or federal statutory right, the Court then asks whether the right was clearly established at the time of the government official's alleged misconduct. *Id.* A right is "clearly established" only when its contours are sufficiently clear that a reasonable public official would have realized or understood that his conduct violated the right in issue, not merely that the conduct was otherwise improper. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Thus, the right must not only be established in an abstract sense, but also in a more

particularized sense so that it is apparent to the official that his actions are unlawful in light of preexisting law. *Id.*

The Supreme Court has clarified that it is no longer mandatory for courts to consider the two prongs set out in *Saucier* in order, although the Court noted that it may be beneficial to do so. *Pearson*, 555 U.S. at 236. Under *Pearson*, courts are now permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Id.*

Thus, the Court will now address two questions: (1) have Plaintiffs alleged that Officers Hunter and Cassidy violated Ryan Cole's constitutional rights, and if so (2) whether these rights were clearly established at the time of the shooting, such that Officers Hunter and Cassidy acted in an objectively unreasonable fashion under such law.

**2. Discussion**

**a. The Alleged Constitutional Violation**

The Court first considers whether Plaintiffs have adequately alleged that Officers Hunter and Cassidy violated Ryan Cole's constitutional rights. *See Saucier*, 533 U.S. at 201 (When confronted with a claim of qualified immunity, a court must first ask the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?").

*Appendix F*

Plaintiffs allege that Officers Hunter and Cassidy used excessive force in violation of Ryan Cole's Fourth Amendment right to be free from unreasonable seizure. *See generally Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012) (the Fourth Amendment confers a "right to be free from excessive force during a seizure"); *Colston v. Barnhart*, 130 F.3d 96, 102 (5th Cir. 1997) ("The Fourth Amendment's protection against unreasonable seizures of the person has been applied in causes of action under 42 U.S.C. § 1983 to impose liability on police officers who use excessive force against citizens."). To state a claim for excessive force, Plaintiffs must show: "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole*, 691 F.3d at 628 (citing *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)).

The constitutional question in this case is governed by the principles set forth in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) and *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). An excessive force claim is analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham*, 490 U.S. at 395 ("Today we . . . hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."). Specifically in the context of deadly force, "[a] police officer may not seize

an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11. The Supreme Court has determined, however, that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

*Id.* at 11-12. "The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) (citation omitted). In evaluating whether the use of force was reasonable, courts look to the "totality of the circumstances," and give "'. . . careful consideration to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Ramirez v. Martinez*, 716 F.3d 369, 376 (5th Cir. 2013) (quoting *Graham*, 490 U.S. at 396) (internal citation omitted). Courts must evaluate the officer's action "from the

perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Poole*, 691 F.3d at 628 (citing *Graham*, 490 U.S. at 396). "The calculus must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The Court now turns to whether Plaintiffs have adequately alleged an injury caused by Officers Hunter and Cassidy's use of deadly force that was clearly excessive to the need and objectively unreasonable.[2] *See generally Saucier*, 533 U.S. at 201.

Although Officers Hunter and Cassidy do not dispute that they injured Ryan Cole when they shot him, they seek dismissal of any claims based on injuries resulting from the discharge of Ryan Cole's handgun, asserting that such injuries cannot have resulted "directly and only" from their alleged use of excessive force. Whether Ryan Cole "involuntarily grasped or clutched his fingers

2. Given the significant overlap in analysis, the Court will consider in tandem whether Plaintiffs have adequately alleged that the use of force was clearly excessive or clearly unreasonable. *See generally Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (addressing simultaneously the questions of whether force used was "excessive" and "unreasonable"); *Poole*, 691 F.3d at 628 (recognizing the "intertwined" nature of the inquiry for addressing excessive force claims where qualified immunity at issue, and examining whether officers' use of force was clearly excessive or clearly unreasonable in tandem).

resulting in the involuntary discharge of one round from that weapon into Ryan Cole's skull and brain" (*see* First Am. Comp. ¶ 4.11) as a direct result of being shot by Officer Hunter and/or Officer Cassidy, or whether Ryan Cole's injury resulted from a voluntary discharge of his weapon (as the Officer Defendants argue) is not a proper inquiry in resolving a Rule 12(b)(6) motion, as it is based on evidentiary considerations not before the Court. Based on the allegations in the First Amended Complaint, the Court finds that Plaintiffs have sufficiently alleged that all of Ryan Cole's injuries resulted directly and only from the officers' use of force. *See* First Am. Comp. ¶¶ 4.10, 4.11, 4.24. Given the extensive injuries alleged in the First Amended Complaint, *see id.* ¶ 4.24, the Court will focus its inquiry on whether Officers Hunter and Cassidy's conduct was "clearly excessive" or "clearly unreasonable." *See generally Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008)(finding where there was no dispute that plaintiff suffered injury, relevant inquiry is whether force was "clearly excessive" or "clearly unreasonable.").

Officers Hunter and Cassidy contend that their conduct was not excessive to the force needed or objectively unreasonable. In support, Defendants primarily rely on cases from other circuit courts where no excessive force was found. *See* Def. Mot. at 9-10 (citing *Garczynski v. Bradshaw*, 573 F.3d 1158, 1168-1169 (11th Cir. 2009); and *Thomson v. Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009)); *see also* Def. Reply at 4 (arguing *Garczynski* and *Thomson* are similar to the instant case, as they involve "individuals who held loaded guns, which they pointed at their own heads during at least a portion of the incident,

and under circumstances in which the individuals who were shot by officers were perceived to have engaged in deadly conduct"). In addition to being from other circuits, and thus not controlling, the crucial facts of these cases are distinguishable. In *Garczynski*, the Eleventh Circuit affirmed the district court's decision to grant summary judgment in favor of officers who used deadly force on an armed and potentially suicidal individual. The circuit court agreed that the force used was not excessive, and deadly force was justified, where the individual failed to comply with repeated commands to show his hands and drop the gun, and "[i]nstead of obeying these commands, [he] swung the gun from his head in the direction of the officers, at which point they fired." *Garczynski*, 573 F.3d at 1168. The court agreed that under such circumstances, "[t]he officers reasonably reacted to what they perceived as an immediate threat of serious harm to themselves." *Id.* In this case, by contrast, Plaintiffs allege that at the time Officer Hunter opened fire, Ryan Cole had his gun in his right hand pointed at the right side of his head, and was not facing Officer Hunter. The only averment that Ryan Cole turned and pointed the gun at Officer Hunter is from Officer Hunter's sworn version of the events. *See* City of Garland Police Department Affidavit In Any Fact of Officer Michael Hunter, Appendix to Pl. Resp. to Def. Mot. to Dismiss at Ex. 3 pp. 56-58 ("Hunter Aff.") (ECF 81-1). The Court notes that Officer Hunter admits he gave no warnings prior to shooting. *See id.* On a motion to dismiss, the Court accepts as true all well-pleaded facts alleged in the complaint. *Twombly*, 550 U.S. at 556. Thus, for purposes of analyzing the motion to dismiss, the Court must assume that Ryan Cole was facing away from Officer

Hunter with his gun pointed at his own head when Officer Hunter opened fire with no warning.

*Thomson* is also factually dissimilar. In *Thomson*, the Tenth Circuit affirmed the district court's decision to grant summary judgment in favor of officers who used deadly force on an armed and potentially suicidal individual. *Thomson*, 584 F.3d at 1310-1311. Crucial to the court's decision, it was undisputed that the suspect was pointing a gun at the officers almost immediately prior to the officer discharging his weapon, and had refused the officer's immediate command to drop the weapon. *See id.* Again, in this case, the alleged facts are to the contrary and are in dispute.

Defendants also rely on *Ontiveros* in their reply brief. In that case, an officer shot a suspect who refused to comply with officers' instructions, was bent over, and appeared to be reaching into a boot that was out of the officer's line of sight. *Ontiveros*, 564 F.3d at 385. The Fifth Circuit upheld the district court's decision to grant summary judgment in the officer's favor, citing a line of cases where the court has upheld the use of deadly force when the suspect refused instructions and took actions that could have reasonably been interpreted as reaching for a weapon, causing the officers to form a reasonable belief that they may be in immediate danger. *Id.* (citing *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991) (upholding the use of deadly force where the suspect repeatedly refused to keep hands raised and appeared to be reaching for an object when officers shot him); and *Young v. Killeen*, 775 F.2d 1349 (5th Cir. 1985) (upholding the use of deadly

force when the suspect refused instructions to exit the vehicle and reached down to the floorboard as if to grab a weapon)).

Here, Plaintiffs allege that Officer Hunter gave no warning prior to opening fire and that Ryan Cole at all times during the encounter was facing away from Officer Hunter with his gun in his right hand held against the right side of his head. There are no allegations that Ryan Cole was reaching for an object outside the officers' line of sight which could have been a weapon, or making any unexpected movements which could cause the officers to form a reasonable belief that they may be in immediate danger. Accordingly, *Ontiveros*, and the cases cited therein, do not support Officers Hunter and Cassidy's contention that deadly force, in the circumstances presented, was justified.

Having concluded that the cases cited by Officers Hunter and Cassidy are distinguishable from the instant case, the Court has conducted its own research for cases where the Fifth Circuit has examined the level of force justified where officers are presented with emotionally unstable individuals in possession of a weapon. In *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006), the Fifth Circuit held that an officer's use of deadly force was not excessive or unreasonable when a "mentally disturbed person," after irrationally driving his truck armed with a 30/30 rifle engaged in "stop-get-out-of-the-truck-and-shoot-activity," "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement

officers." In *Mace v. City of Palestine*, 333 F.3d 621, 623, 625 (5th Cir. 2003), the Fifth Circuit held that an officer's use of deadly force was not excessive or unreasonable when a disturbed and intoxicated individual, wielding a sword in a relatively confined space, refused to comply with the officer's command to put down the sword, and raised the sword toward the officer. And in *Elizondo v. Green*, 671 F.3d 506 (5th Cir. 2012), a case involving a suicidal seventeen-year old in possession of a knife, the Fifth Circuit affirmed the undersigned's decision to grant summary judgment based on qualified immunity in favor of an officer who used deadly force, where the individual refused to comply with the officer's "repeated instructions to put down the knife he was holding and [the individual] seemed intent on provoking [the officer]." *See id.* Further, "[a]t the time [the officer] fired his weapon, [the individual] was hostile, armed with a knife, in close proximity to [the officer], and moving closer." *Id.* The Fifth Circuit concluded: "Considering the totality of the circumstances in which [the officer] found himself, it was reasonable for him to conclude that [the individual] posed a threat of serious harm." *Id.*

In both *Ballard* and *Mace*, the suspect refused to comply with instructions from officers and made what a reasonable officer on the scene could believe was a threatening gesture toward the officers with a weapon immediately before the officers opened fire. As the Fifth Circuit held in *Mace*, "[i]t is not unreasonable for an officer in that situation to believe that there was a serious danger to himself and the other officers present." *Mace*, 333 F.3d at 625. In *Elizondo*, while it was factually disputed

whether the individual raised the knife toward the officer prior to the officer shooting him, the Fifth Circuit stated that the individual had refused to comply with the officer's warnings and orders, was hostile, in close proximity to the officers, and coming closer at the time the officer opened fire. *Elizondo*, 671 F.3d at 510. By contrast, Plaintiffs' First Amended Complaint alleges that Officer Hunter gave no warning prior to opening fire, that Ryan Cole at all times was facing away from Officer Hunter with his gun in his right hand held against the right side of his head, and there are no allegations that Ryan Cole made a threatening gesture toward Officer Hunter or approached him. Rather, the allegations are that Ryan Cole was not aware of the Officer Defendants' presence at the scene. Similarly, the allegations are that Officer Cassidy opened fire from a distance after Ryan Cole had already been shot by Officer Hunter, also without prior warning. Unlike in *Ballard, Mace, Elizondo*, and *Ontiveros, see supra*, based on the pleadings, this is not a situation where, considering the totality of the circumstances in which Officers Hunter and Cassidy found themselves, it was reasonable for them to conclude that Ryan Cole posed an immediate threat of serious harm to them or others, such that resorting to deadly force would be justified.

In addition to these published cases, the Court looks to an unpublished Fifth Circuit opinion that reversed and remanded a district court's decision to grant qualified immunity to an officer in a deadly force case where facts were disputed regarding whether the suicidal suspect threatened the officer with a weapon at all. *See Reyes v. Bridgwater*, 362 Fed. Appx. 403, 2010 WL 271422 (5th

Cir. 2010).[3] In *Reyes*, officers testified they broke down the door to decedent Reyes' apartment. Upon entering the apartment, they testified Reyes was holding a knife by his side some distance away from the officers, Reyes stepped forward, threw his cigarette at one of the officers, and raised the knife he was holding in a threatening manner at which time the officer shot and killed him. Other witnesses disputed the officer's account. *Reyes*, 362 Fed. Appx. 403, 2010 WL 271422, at *1-2. The officer argued that deadly force was justified because Reyes stepped towards him and raised the knife. *Id.* The court held that the evidence, viewed in the light most favorable to the decedent, did not support the district court's conclusion that there was no constitutional violation, since the evidence presented by plaintiffs showed that the decedent stood in his home, with a kitchen knife at his side, at a safe distance from the officer when the officer opened fire. 362 Fed. Appx. 403, [WL] at *4-5. Writing for the majority, Judge Haynes held:

> The Supreme Court has required courts to be deferential to the choices made by police officers in high-risk situations. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)[.] That deference, however, cannot extend so far as to ignore an officer's violation of the core, established rule that deadly force may not be used "[w]here the suspect poses no immediate threat to the officers and no threat to others." *Garner*, 471 U.S. at 10[.] It violates

3. Although unpublished opinions are not precedent, the Court cites this decision for its persuasive value.

> the Fourth Amendment to use deadly force absent such a threat.
>
> Here, there was no "immediate threat" as *Garner* requires. The evidence, viewed as required in this procedural posture [where the court must resolve conflicting evidence in favor of plaintiff] does not support the district court's conclusion that there was no constitutional violation . . . [T]he court must assume that [decedent] stood, in his own home, with a kitchen knife at his side, at a safe distance away from the officers when [the officer] opened fire. When [the officer] arrived on the scene, he was responding to a 911 call reporting a "domestic disturbance with possible violence"; he was not, that is, anticipating making a felony arrest, or even necessarily any arrest at all . . . Such a threat is by definition not "immediate" because the individual must still do something — the *Manis* "act"[4] — before the latent threat

4. The term "*Manis* act" finds its origin in a Fifth Circuit 2009 decision. *See Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009). In examining the reasonableness of an officer's use of deadly force and finding no excessive force under the circumstances, the Court in *Manis* stated: "None of these assertions, however, bear on whether Manis, in defiance of the officers' contrary orders, reached under the seat of his vehicle and appeared to retrieve an object [the police officer] reasonably believed to be a weapon. This was the act that led [the officer] to discharge his weapon and it is undisputed. In light of Manis's undisputed actions [the officer's] use of force was not excessive."

> materializes into any risk of harm. . . . Under the facts and in this situation, [the officer's] use of deadly force absent an *immediate* threat from [the decedent] was a constitutional violation.

*Id.* *4.

The facts that distinguish this case from *Ballard* and *Mace*, and make it more similar to *Reyes*, is the key issue that must be resolved to determine whether an officer using deadly force reasonably perceived an immediate threat. Based on the pleadings which the Court must accept as true, in the language of *Manis*, 585 F.3d at 845, there was no "act" to justify the shooting. Further, under *Garner*, any justification based on a suspect threatening the officer with a weapon is inapplicable to this case, as the allegations do not support any inference that Ryan Cole threatened the officers with the gun. *See Garner*, 471 U.S. at 11-12 ([I]f the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").[5]

The Court is well-aware that Officers Hunter and Cassidy dispute what occurred and what led them to shoot

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5. To the extent Defendants suggest in their motion to dismiss that events earlier that morning involving other officers justify their use of deadly force, this argument is unavailing. *See Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) ("The excessive force inquiry is confined to whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer's use of deadly force.") (internal punctuation and citation omitted).

Ryan Cole. This dispute creates a question of fact that goes to the heart of the qualified immunity inquiry and bars the Court from granting a motion to dismiss based on the pleadings. *See generally McClendon v. City of Columbia*, 305 F.3d 314, 325 (5th Cir. 2002) ("[T]he legally relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss. At the earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings . . . and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the [qualified immunity] inquiry.") (internal quotation marks and citations omitted) (original emphasis).

Based on this body of case law, as well as the *Graham* factors, and viewing all allegations in the First Amended Complaint as true, the Court concludes that Plaintiffs have sufficiently alleged that Ryan Cole suffered "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole*, 691 F.3d at 628. Accordingly, the Court denies Officer Hunter's and Officer Cassidy's motion to dismiss for failure to state a constitutional violation.

**b. Clearly Established Law**

The Court's finding that Plaintiffs have adequately alleged that Officers Hunter and Cassidy used excessive force (and thus performed an unlawful seizure under the

Fourth Amendment), does not end the Court's inquiry. The Court must also determine whether, nevertheless, qualified immunity is appropriate because the officers' actions were objectively reasonable "in light of clearly established law at the time of the conduct in question." *See Hampton Co. Nat'l Sur., L.L.C. v. Tunica*, 543 F.3d 221, 225 (5th Cir. 2008). Further, the qualified immunity reasonableness inquiry is separate from the Fourth Amendment objective reasonableness inquiry in excessive force cases. *Saucier*, 533 U.S. at 197. Under this second prong, the Court must determine whether the "right would be clear to a reasonable officer that the conduct was unlawful in the situation confronted." *Id.* at 202. As already stated, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. This standard operates to protect officers from the sometimes "hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 206. In evaluating this prong, "the court must ask whether, at the time of the incident, the law clearly established that such conduct would violate the [Constitution]. This inquiry focuses . . . on the specific circumstances of the incident — could an officer have reasonably interpreted the law to conclude that the perceived threat posed by a suspect was sufficient to justify deadly force." *Ontiveros*, 564 F.3d at 383 n.1 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199-200, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)). "Indeed, unless the violation is 'obvious,' there must be relevant case law that 'squarely governs' the situation with which the officers were presented and gives 'fair notice' that such conduct would violate the law." *Brosseau*, 543 U.S. at 200-201. The

Supreme Court has rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640.

The Constitutional limits on the use of deadly force have been clearly established since 1985 and provide that an officer using deadly force when a suspect does not pose a sufficient threat of harm or immediate danger to the officer or others would have had reasonable warning that the conduct at issue violated constitutional rights. *See Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failure to apprehend the suspect does not justify the use of deadly force to do so."). The Court finds that in this case the violation is "obvious," where the more generalized standards of *Graham* and *Garner, supra*, "clearly establish" that Officers Hunter and Cassidy's use of deadly force was objectively unreasonable, "even without a body of relevant case law[.]" *See Brosseau*, 543 U.S. at 199 (2004); *see also Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (noting in a case where Eighth Amendment violation was "obvious," there need not be a materially similar case for the right to be clearly established).

Even were this not an "obvious" case, the Court finds that on October 25, 2010, the date of the shooting, the law was "clearly established" in a more particularized sense, such that Officers Hunter and Cassidy would know that use of deadly force under the circumstances presented violated Ryan Cole's Fourth Amendment rights. *See*

*Brosseau*, 543 U.S. at 200. Although the parties have provided the Court with very little in the way of relevant case law, and Defendants have primarily relied on cases from other circuit courts, independent research shows case law applying the *Garner* standard to circumstances where officers have used deadly force in apprehending mentally unstable and/or suicidal individuals who are armed, such as in this case, and examined the facts and circumstances of these cases. *See Ballard*, 444 F.3d at 402-03; *Mace*, 333 F.3d at 625; *Ontiveros*, 564 F.3d at 385. These cases, all decided prior to the shooting incident in this case, would make it clear to a reasonable officer that shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful in the situation he confronted. Otherwise stated, the law was clearly established at the time of the incident that, absent the "*Manis* act," *i.e.*, "the act that led [the officer] to discharge his weapon," *see Manis*, 585 F.3d at 845, there was no immediate threat sufficient to justify the use of deadly force.

Once again, the Court finds the unpublished decision in *Reyes* to be instructive. As Judge Haynes stated in reversing the district court's decision to grant qualified immunity in the context of deadly force:

> The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others. Here, the

> facts are unclear; was there such an immediate threat? [The officer's] version would say "yes," while the other witnesses' version would say "no." The case presented here is not one where the law is not clearly established but rather where the facts are not clearly established. As such, summary judgment was improper.

*Reyes*, 362 Fed. Appx. 403, 2010 WL 271422, at *5. As in *Reyes*, this case presents a situation where the case law on use of deadly force is clearly established, both generally and in a more particularized sense, but the facts surrounding the incident in question are not. At the current procedural posture of the case, Officers Hunter and Cassidy's stated justification for use of deadly force cannot be considered by the Court.

In sum, Plaintiffs have adequately stated a claim that Officer Hunter's use of deadly force, when Plaintiff Ryan Cole was facing away from Officer Hunter, and pointing a gun at his own head, and where Officer Hunter failed to give a warning prior to shooting, was objectively unreasonable under clearly established law. Similarly, Plaintiffs have adequately alleged that Officer Cassidy's use of deadly force without warning, and after Ryan Cole had already been shot by Officer Hunter, was objectively unreasonable. Accordingly, the Court determines that Officers Hunter and Cassidy are not entitled to qualified immunity at this time.

### B. The City of Sachse & Officer Defendants in Their Official Capacity [6] (Counts Two and Three)

The City's motion to dismiss Plaintiffs' § 1983 claim is premised solely on the argument that Plaintiffs have failed to state a constitutional violation.[7] *See* ECF No. 70, Def. Mot. at 19 ("The City cannot be liable to Plaintiffs because the record establishes Ryan Cole was not deprived of a constitutionally protected right[.]"); ECF No. 84, Def. Reply at 10 ("Because the City can be liable only if an official policy or custom caused a deprivation of a civil right, and because Plaintiffs cannot establish a deprivation of a civil right, the claims against the City fail.") The Court

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6. To the extent that Plaintiffs are suing the Officer Defendants in their official capacity, an official capacity claim is merely another way of pleading an action against the entity of which the individual defendant is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Thus, Plaintiffs' allegations against the Officer Defendants in their official capacity are claims against the City. *See id.*

7. Section 1983 does not allow a municipality to be held vicariously liable for its officers' actions on a theory of respondeat superior. 42 U.S.C. § 1983; *see Board of the County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Rather, a municipality may be liable under § 1983 if the execution of one of its customs or policies deprives a plaintiff of his constitutional rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The City has not moved to dismiss on any grounds related to Plaintiffs' allegations that it has a facially unconstitutional excessive force policy, or has failed to adequately train or supervise its officers as to the use of excessive force.

has already determined that Plaintiffs have stated a claim for excessive force in violation of the Fourth Amendment, and therefore the Court denies the City's motion to dismiss Counts Two and Three of the First Amended Complaint.

### C. Officer Defendants - Plaintiffs' Claim for Fabrication of Inculpatory Evidence and Conspiracy to Violate Constitutional Rights (Count Four)

Officers Hunter, Cassidy and Carson move to dismiss Count Four of Plaintiffs' First Amended Complaint, where Plaintiffs allege as follows:

> ¶ 8.2 As previously set forth in detail, the Defendants Hunter, Cassidy and Carson formed and carried out a conspiracy to falsely charge and convict Plaintiff Ryan Cole of a felony offense of aggravated assault on a public servant, using the state criminal process to do so, based on «evidence» they had manufactured including their own perjured testimony.
>
> ¶ 8.3 At present, the civil laws of the State of Texas, as interpreted by the Supreme Court of Texas, do not provide a remedy or an adequate remedy to protect and compensate the Plaintiffs for such unlawful conduct. Alternatively, Defendants Hunter, Cassidy and Carson have conspired and did commit the common law tort of malicious prosecution under Texas law which proximately caused Plaintiffs damages.

First Am. Compl. ¶¶ 8.2, 8.3. Plaintiffs also allege in Count Four that in furtherance of their conspiracy, the Officer Defendants also committed the following unlawful acts: (1) they made false statements of fact to one or more Garland police officers in the course of the official investigation in violation of the Texas Penal Code; (2) they made false statements under oath to one or more Garland police department investigators and to the Dallas County District Attorney›s Office and to the Dallas County Grand Jury constituting the offense of aggravated perjury in violation of the Texas Penal Code; and (3) «concealed from the Grand Jury, the presiding state trial judge, and the Dallas County District Attorney›s Office, and Ryan Cole›s counsel evidence that was obviously exculpatory to Plaintiff Ryan Cole in connection with the fictitious charges that he had committed an aggravated assault on a public servant.» First Am. Compl. ¶ 8.13.

The Court will first address the Officer Defendants› arguments in support of dismissing Plaintiffs› federal claims in Count Four.

### 1. Claim for Fabrication of Inculpatory Evidence & Conspiracy

In Count Four, Plaintiffs allege that the Officer Defendants deprived Ryan Cole of his constitutional rights under the Fourth and Fourteenth Amendments by deliberately fabricating inculpatory evidence, providing false statements to City of Garland police after the shooting, and providing false statements under oath during the investigation. Plaintiffs further allege that

these unlawful acts ultimately led to a grand jury indicting Ryan Cole on a felony assault charge, a crime he did not commit. The Officer Defendants contend these claims must be dismissed because they are entitled to absolute immunity for their statements and testimony.

The Court rejects the Officer Defendants' argument that they are entitled to absolute immunity under the Supreme Court's decisions in *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983) and *Rehberg v. Paulk*, U.S., 132 S.Ct 1497, 182 L. Ed. 2d 593 (2012). *See* Def. Mot. at 15; Def. Reply at 7-9. In *Briscoe*, the Supreme Court held that a trial witness sued under § 1983 enjoys absolute immunity from any claim based on his testimony. 460 U.S. at 326. In *Rehberg*, the Supreme Court extended absolute immunity to include police officers testifying at an *ex parte* grand jury proceeding. 132 S.Ct. at 1506. To the extent Plaintiffs are challenging the Officer Defendants' pre-trial misconduct, the Officer Defendants have not established, based on their current briefing, that they are entitled to absolute immunity. While the Officer Defendants are not precluded from raising this argument at a later juncture in the case, they have not shown at this preliminary stage that absolute immunity precludes Plaintiffs' due process claims against them based on alleged fabrication of evidence and false statements made outside *ex parte* grand jury proceedings or trial.

The Court also rejects the Officer Defendants' argument that Plaintiffs' § 1983 conspiracy claims should be dismissed as too conclusory. Plaintiffs allege that the Officer Defendants acted in concert to deprive Ryan Cole

of various constitutional rights including, but not limited to, his right to remain free from malicious prosecution, wrongful conviction, and unlawful confinement which resulted from their fabricated inculpatory evidence and false statements. When the allegations in the First Amended Complaint and all reasonable inferences therefrom are viewed in Plaintiffs' favor, they support the existence of an agreement between and among the Officer Defendants to violate Ryan Cole's constitutional rights.

In sum, based on the pleadings, the Court denies the Officer Defendants' motion to dismiss the federal claims asserted in Count Four. The Officer Defendants may reassert their absolute immunity at a later time.[8]

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8. The Court rejects the Officer Defendants' highly conclusory assertion (citing no case law in support) that they are entitled to qualified immunity on the federal claims in Count Four. *See* Def. Mot. at 19-20. For the reasons already stated above, Plaintiffs have alleged sufficient facts to state a claim against the Officer Defendants for a violation of Ryan Cole's Fourth and Fourteenth Amendment rights. Further, assuming the truth of Plaintiffs' allegations in Count Four, the Court concludes that the Officer Defendants acted in an objectively unreasonable fashion under clearly established law. *See, e.g., Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004) ("[I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process.").

**2. State Law Malicious Prosecution Claim**

The Officer Defendants contend that Plaintiffs' state law malicious prosecution claims "are absolutely barred by the officers' statutory entitlement to immunity from such claims." Def. Mot. at 16 (citing Tex. Civ. Prac. & Rem. Code § 101.106(f)). In their response to the Officer Defendants' motion to dismiss based on the Texas Tort Claims Act ("TTCA"), Plaintiffs appear to concede that their malicious prosecution claim against the Officer Defendants may be foreclosed by the TTCA. *See* Pl. Resp. at 19 n.1; *see generally* Tex. Civ. Prac. & Rem. Code § 101.106. The parties are correct. Section 101.106(f) provides:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employees and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code § 101.106(f). Plaintiffs have alleged that the Officer Defendants were acting "within the course and scope of their employment for the City of Sachse, Texas." First Am. Compl. ¶ 4.13. As the claim

is considered to be against the Officer Defendants in their official capacities only, the Court grants the Officer Defendants' motion to dismiss the state law malicious prosecution allegations against them in their individual capacity. *See generally Franka v. Velasquez*, 332 S.W.3d 367, 378 (2011).

Further, in accordance with the TTCA's election-of-remedies provision, all state law claims against the Officer Defendants are hereby dismissed because Plaintiffs' tort claims arise under the TTCA, and the City of Sachse perfected its statutory right to dismissal of its employees upon filing its motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 101.106(e) ("If a suit under this chapter is filed against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."). Accordingly, the Court grants the Officer Defendants' motion to dismiss Plaintiffs' state law malicious prosecution claim.

### D. Randy and Karen Cole's Bystander Claims

Defendants argue that Plaintiffs' federal bystander claims must be dismissed for failure to allege a deprivation of their own constitutional rights. Def. Mot. at 22. As discussed below, the Court agrees. Defendants further argue that Plaintiffs' state law bystander claims must be dismissed pursuant to the Texas Civil Practice & Remedies Code, section 101.106(f), and for failure to allege a personal injury. *Id.* at 22-23. While the Court agrees that the state law bystander claims against the Officer Defendants must be dismissed as barred by the TTCA,

for the reasons stated below, the Court declines to dismiss these claims against the City.

**1. Section 1983 Bystander Claims**

Plaintiffs Randy and Karen Cole allege they have experienced severe and substantial mental anguish and interruption of their normal relationship with their son, who will now require twenty-four hour care for the remainder of his life. *See* First Am. Compl. ¶ 4.26. They further allege they had a contemporaneous perception of the shooting of their son by virtue of having heard it occur from their front yard. *Id.* ¶ 4.27. Among other relief, Randy and Karen Cole seek recovery for "[m]ental anguish in the past and in the future" caused by Defendants' conduct. *See id.* ¶ 10.1(i).

"Section 1983 imposes liability for violation of rights protected by the Constitution, not for violation of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). A civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983. *See generally Grandstaff v. Borger*, 767 F.2d 161, 172 (5th Cir. 1985); *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986); *see also Young v. Green*, 2012 U.S. Dist. LEXIS 115027, 2012 WL 3527040, at *4 (S.D. Tex. Aug. 15, 2012) ("[C]ase law holds that a bystander who witnesses a police action, but who is not himself or herself the object of that action, cannot recover for resulting emotional injuries

under § 1983, although there may be such a claim under state tort law.")

Accordingly, to the extent Plaintiffs Randy and Karen Cole seek to assert a § 1983 bystander claim for their emotional injuries based on police action directed at their son, the Court grants Defendants' motion to dismiss.

### 2. State Law Bystander Tort Claims

Plaintiffs Ryan and Karen Cole have also brought state law bystander claims against the City and the Officer Defendants. Citing the election-of-remedies provision of the TTCA, and noting that Plaintiffs filed suit against the governmental unit and its employees, Defendants move to dismiss Randy and Karen Cole's state law bystander claims against the Officer Defendants as barred by the TTCA. *See* Tex. Civ. Prac. & Rem. Code § 101.106. As already stated by the Court in connection with dismissal of Plaintiffs' state law malicious prosecution claims, *see supra* sec. III.C.2., where, as here, suit is filed against both a governmental unit and its employees, the governmental unit may move to dismiss the state law claims against the employee. *See* Tex. Civ. Prac. & Rem. Code § 101.106(e). Under this provision, as the City has exercised this option, the Court grants Defendants' motion to dismiss Plaintiffs' state law bystander claims against the Officer Defendants.

With regard to Plaintiffs' bystander claims against the City, Defendants argue that because Randy and Karen Cole did not suffer a "personal injury" or their own "bodily injury or death," they cannot recover against a

governmental entity under Texas law *See* Def. Mot. at 23 (citing Tex. Civ. Prac. & Rem. Code §§ 101.021, 101.023(c)). The Court rejects this argument.

In this excessive force case, Plaintiffs allege that Officers Hunter and Cassidy shot Ryan Cole with .40 caliber semi-automatic Glock handguns issued by the City of Sachse Police Department causing severe injury. *See* First Am. Compl. ¶ 4.9. A claim for the use or misuse of tangible personal property is a claim under the TTCA. *See* Tex. Civ. Prac. & Rem. Code § 101.021. Further, "[a] state law bystander claim may be brought under the Texas Tort Claims Act." *Young*, 2012 U.S. Dist. LEXIS 115027, 2012 WL 3527040, at *5 (citing *Hermann Hosp. v. Martinez*, 990 S.W.2d 476, 478-79 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)). To recover as a bystander under Texas law, a plaintiff is required to establish that:

(1) The plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it;

(2) The plaintiff suffered shock as a result of a direct emotional impact upon the plaintiff from a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and

(3) The plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

*United Servs. Automobile Ass'n v. Keith*, 970 S.W.2d 540, 542 (Tex. 1998) (citation omitted).

Plaintiffs Randy and Karen Cole do not allege they witnessed the shooting of their son, but allege that they "had a contemporaneous perception of the shooting of their son by virtue of having heard it occur from their front yard." *See* First Am. Compl. ¶ 4.27. That they did not witness the shooting of their son, but heard the shots from their front yard and sometime thereafter saw their wounded son, does not, on its own, defeat their bystander claim under Texas law. *See, e.g., Landreth v. Reed*, 570 S.W.2d 486, 490 (Tex. App.—Texarkana 1978, no writ) ("[A]ctual observance of the accident is not required if there is otherwise an experiential perception of it, as distinguished from a learning of it from others after its occurrence"); *Lehmann v. Wieghat*, 917 S.W.2d 379, 383 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (finding no error in submitting question to jury on whether a plaintiff had a "sensory and contemporaneous perception" of his son's shooting, as facts were disputed whether father perceived accident when he heard the gun shot from a distance away and approximately five to ten minutes later observed his son unconscious); *Bedgood v. Madalin*, 589 S.W.2d 797, 802-03 (Tex. Civ. App.—Dallas 1979) *affirmed in part, rev'd on other grounds*, 600 S.W.2d 773 (Tex. 1980) (allowing bystander claim where father "did not visually witness the accident [that killed his son] but rather heard it and then witnessed the results soon thereafter").

In short, under Texas law regarding bystander claims for mental anguish, and based on the pleadings, the Court denies Defendants' motion to dismiss Plaintiffs' state law bystander claims against the City.

## IV. Conclusion

Based on the foregoing, the Court **grants in part and denies in part** Defendants' Second Motion to Dismiss for Failure to State a Claim. *See* ECF No. 70. In particular, the Court **grants** Defendants' motion to dismiss: Plaintiffs' state law malicious prosecution claim against the Officer Defendants asserted in Count Four; Plaintiffs' state law bystander claims against the Officer Defendants; and Plaintiffs' federal law bystander claims against the Officer Defendants and the City, and **dismisses** these claims **with prejudice.**

The Court **denies** Defendants' motion to dismiss in all other part. Accordingly, the remaining claims in this case are: Plaintiffs' § 1983 excessive force claims against Defendant Officer Michael Hunter and Defendant Officer Martin Cassidy sued in their individual capacities (Count One); Plaintiffs' § 1983 claims against the City of Sachse (Counts Two and Three); Plaintiffs' federal claims asserted in Count Four against the Officer Defendants; and Plaintiffs' state law bystander claims for mental anguish against the City. The Court **denies as moot** Defendants' alternative request for Rule 7(a) Reply. An order requiring a scheduling conference and report for contents of scheduling order under Fed. R. Civ. P. 16(b) and 26 will issue separately.

*Appendix F*

**SO ORDERED** this **24th** day of **January, 2014.**

/s/
Reed O'Connor
UNITED STATES DISTRICT JUDGE

**APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 8, 2019**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

CARL CARSON,

*Defendant-Appellant.*

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cons. w/No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

MICHAEL HUNTER; MARTIN CASSIDY,

*Defendants-Appellants.*

Appeals from the United States District Court
for the Northern District of Texas.

*Appendix G*

February 8, 2019, Filed

**ON PETITION FOR REHEARING EN BANC**

(Opinion September 25, 2015, 5 Cir., 2015, 802 F.3d 752)
(Opinion on Remand from U.S. Sup.Ct. September 25, 2018, 5 Cir., 2018, 905 F.3d 334)

Before STEWART, Chief Judge, JONES, SMITH, DENNIS, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

**APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 17, 2016**

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees,*

v.

CARL CARSON,

*Defendant-Appellant.*

cons. w/15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

*Plaintiffs-Appellees*

v.

MICHAEL HUNTER; MARTIN CASSIDY,

*Defendants - Appellants*

Appeal from the United States District Court for the Northern District of Texas, Dallas

*Appendix H*

**ON PETITION FOR REHEARING *EN BANC***

(Opinion: September 25, 2015 , 5 Cir., _____ , _____ , F.3d _____)

Before HIGGINBOTHAM, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

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* Judge Costa did not participate in the consideration of the rehearing *en banc*.