

APPENDICES

Appendix A – Fifth Circuit Opinion

United States Court of Appeals
for the Fifth Circuit

No. 24-40239

United States Court of Appeals
Fifth Circuit

FILED

August 7, 2025

Lyle W. Cayce
Clerk

COLTON CARICO,

Plaintiff—Appellant,

versus

DEREK BRISTOW,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:22-CV-95

Before SOUTHWICK, OLDHAM, and RAMIREZ, *Circuit Judges.*

PER CURIAM:*

Police officers responded to a single-car accident that led them to Colton Carico's home. Carico came out of the house with a rifle, which he pointed only at himself. When ordered to drop the rifle, he instead turned around and began walking back inside. An officer shot him once in the back. Carico sued, arguing the officer violated his constitutional rights. The

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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district court awarded summary judgment to the officer based on qualified immunity. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Officer Derek Bristow responded to a single-vehicle accident and discovered the vehicle was registered to Colton Carico.¹ Carico was not at the scene, so Officer Bristow began driving to his address. On the way, Officer Bristow encountered a witness who described seeing a white male get into a tan vehicle with an Oklahoma license plate. When Officer Bristow arrived at Carico's address, he found a sedan with Oklahoma license plates in the driveway. Kayla Reger answered the door and identified herself as Carico's girlfriend. She repeatedly denied picking Carico up or even seeing him. Reger ultimately admitted she was lying.

Officer Bristow then asked to speak with Carico. Carico appeared and spoke to Officer Bristow through an open window in the storm door. Though Carico acknowledged he had been in an accident, he claimed someone else was driving but had "disappeared." When asked to step outside, Carico instead closed the interior door. Seconds later, Reger opened the interior door and told Officer Bristow that Carico was "really mad." Officer Bristow explained to Reger that he wanted Carico to step outside "due to his slurred speech and his red, glossy eyes."

Carico returned to the door and insisted he was not driving during the accident. When asked how much he had had to drink, Carico responded, "enough for you not to know." Officer Bristow threatened to arrest Carico if he did not cooperate. Reger then exited the home. Carico remained inside

¹ The entirety of Officer Bristow's response to the call, including his use of deadly force, is captured on his body-worn camera. The use of force is also captured on the body-worn camera of Officer Jacob McCraw.

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watching through the open storm door window briefly before disappearing into the home. A few minutes later, Carico closed the interior door again while Reger remained outside. Approximately one minute later, Carico opened the door again and asked if he could go to bed. Officer Bristow told him no and to step outside.

Carico then stepped outside the house but remained next to the open door. He was holding the barrel of a rifle to his chin with his left hand, while his right arm was straight down near but at least for some of the time not on the rifle's trigger. Carico said he would shoot himself in the head. Officer McCraw and Officer Bristow each yelled "drop the gun" once, and Bristow yelled "move" while Reger repeatedly yelled "no!" Carico turned and began moving back inside the house. His left hand remained on the rifle, holding it upright with his hand halfway between the stock and the muzzle. It is unclear where Carico's right hand was until one second before he was shot, when the video footage shows Carico's right hand was off the rifle while he used his right arm to push the door open as he moved inside. After Carico had completely turned and was facing inside the house, Officer Bristow shot him once in the back. The bullet struck Carico's spine and permanently paralyzed him. Approximately five seconds had passed between Carico stepping outside with the rifle and Officer Bristow shooting him. During that time, Carico never pointed his weapon at anyone but himself or threatened to harm anyone but himself.

Carico sued, asserting claims under 42 U.S.C. § 1983 against Officer Bristow and the City of Paris, Texas, in the United States District Court for the Eastern District of Texas. He claimed that Officer Bristow used excessive force in violation of his Fourth Amendment rights. Officer Bristow moved for summary judgment, asserting qualified immunity. The district court determined Officer Bristow was entitled to qualified immunity and

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granted summary judgment in Officer Bristow's favor. Carico timely appealed.

DISCUSSION

"We review the district court's grant of summary judgment *de novo*, applying the same standard as the district court." *Baker v. Coburn*, 68 F.4th 240, 244–45 (5th Cir. 2023). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A material fact is one that could "affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). The dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The assertion of qualified immunity shifts the burden "to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). All inferences must be drawn in the plaintiff's favor. *Id.* "[W]e review evidence in the light most favorable to the nonmoving party," but "we assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). When a video recording is present, we "view[] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

"To determine whether qualified immunity applies, courts generally engage in a two-part inquiry asking: (1) whether an official's conduct violated a statutory or constitutional right of the plaintiff; and (2) whether the right was 'clearly established' at the time of the violation." *Baker*, 68 F.4th at 245. We are permitted to start with either part of the inquiry and end there too depending on the result of the analysis. *Garcia v. Blevins*, 957 F.3d 596, 600

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(5th Cir. 2020). We begin by analyzing whether Carico’s constitutional rights were violated.

To succeed on an excessive force claim, Carico must establish “(1) 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.” *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005). “Excessive force claims are necessarily fact-intensive.” *Dewille v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). “The test for reasonableness is ‘not capable of precise definition or mechanical application.’” *Joseph ex rel. Joseph v. Bartlett*, 981 F.3d 319, 332 (5th Cir. 2020) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). In evaluating reasonableness, we typically consider “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.” *Graham*, 490 U.S. at 396. We consider the totality of the circumstances to determine if the level of force is justified. *See Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). We must account “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.

“When an officer uses deadly force, that force is considered excessive and unreasonable ‘unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.’” *Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (quoting *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018)). The question, therefore, is “whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force.” *Id.* (quoting *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996)).

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Carico asserts that (1) Officer Bristow's use of force was excessive and unreasonable because Carico did not pose an immediate threat, and (2) it was clearly established that Officer Bristow could not shoot him if he did not pose an immediate threat. Carico argues he did not pose an immediate threat for three reasons: (1) Officer Bristow knew that Carico did not threaten to harm anyone except himself; (2) Carico was actively deescalating the situation by putting the rifle down; and (3) there is no evidence that Carico intended to harm anyone other than himself. Carico argues the district court erred by failing to view the evidence in the light most favorable to him and ignoring genuine disputes of material fact as to whether his actions were threatening, whether the officers adequately warned him, and whether the officers gave him sufficient time to comply before resorting to deadly force.

Two cases are central to Carico's arguments: *Roque v. Harvel*, 993 F.3d 325 (5th Cir. 2021) and *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (*en banc*). This court found genuine disputes of material fact precluded summary judgment in both cases. Carico argues this case is like *Roque* and *Cole*, and therefore a jury must determine whether a reasonable officer would have considered Carico to still be a threat once he turned his back to the officers. We consider the applicability of each precedent.

In *Roque*, we considered the fatal shooting of a suicidal man. 993 F.3d at 329. There, a man repeatedly yelled at officers to shoot him as he held what was later determined to be a BB gun to his head. *Id.* at 330. He was told to drop the gun once, but video evidence showed he instead turned to face the officers. *Id.* The man was then shot once, and a video showed the gun falling to the ground. *Id.* Two seconds later, the officer attempted to shoot him again but missed. *Id.* Two seconds after that, he was fatally shot. *Id.* The officer claimed he took each shot because he believed the man was a danger to the life and safety of a bystander. *Id.* On appeal, the parties did not dispute the constitutionality of the first shot, so this court considered only

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the second and third. *Id.* at 333. The district court found factual disputes related to the final two shots; we concluded those factual disputes were material and, therefore, precluded summary judgment. *Id.* at 333–34. Importantly, we determined the factual disputes as to whether the man was still armed and still moving were relevant to “whether a reasonable officer would have known that [the man] was incapacitated after the first shot.” *Id.* Consistent with our precedent, we acknowledged the man would no longer be a threat if he was incapacitated, “[a]nd if he no longer posed a threat, [the officer’s] second and third shots were excessive and unreasonable.” *Id.*

Carico argues that, as in *Roque*, video evidence shows he had taken one hand off the rifle, such that he “only held the rifle’s barrel in a position where he could not have fired, to set it down while he moved away from everyone at the scene.” Carico argues that he therefore “posed far less threat than the [man] in *Roque*, as there was never a moment when Carico waved his gun at anyone other than himself.” Carico omits two vital differences from his analysis. First, the man in *Roque* had been shot once already and was possibly incapacitated by the time he was fatally shot. *Id.* at 330. Second, video evidence here shows, and Carico concedes, that he was still holding the firearm in one hand when he was shot.

Cole also involved a suicidal man. 935 F.3d at 448. There, the district court found genuine disputes of material fact that could allow a reasonable jury to conclude that the man did not pose a threat to the officers so as to justify shooting him without a warning. *Id.* at 453. Before he was shot, the man “backed out from the tree line in front of [the officers], ‘unaware of the [o]fficers’ presence.’” *Id.* at 448–49. The officers did not warn him or give him an opportunity to disarm himself. *Id.* at 449. The officers who shot him knew he “had already encountered fellow officers and walked away from them with his gun to his head, non-responsive, but without aggressive action.” *Id.* at 455. Factual disputes existed regarding what the officers knew

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before the shooting, whether they warned the man before shooting him, and what actions the man took before the shooting. *Id.* at 457. This case does not present the same factual concerns. Here, it is undisputed that Carico knew the officers were there, the officers shouted warnings to Carico, and Carico turned his back and began moving into his home, out of the officers' sight, after the warnings.

Carico cites another of our precedents for the proposition that it is excessive force to shoot someone who is turned away. *See Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021). In *Poole*, an officer shot an unarmed man entering his truck after a low-speed chase. *Id.* at 422. The district court found factual disputes as to whether the officer warned the man before shooting him, the man was turned away during the shooting, and the officer could see the man's hands were empty. *Id.* at 423–24. The district court “determined that a jury could find [the officer] shot [the man] in the back, without warning and knowing his hands were empty” and denied qualified immunity. *Id.* at 424. We affirmed the district court's holding, emphasizing the “manifest unreasonableness of shooting an individual the officer can see is unarmed and not aggressive.” *Id.* at 424.

Carico correctly cites *Poole* for the proposition “that it is unreasonable for an officer to ‘seize an unarmed, nondangerous suspect by shooting him dead,’” and “a suspect is less of a threat when he is turning or moving away from the officer.” *Poole*, 13 F.4th at 425 (quoting *Garner*, 471 U.S. at 11). Nevertheless, the presence, or even suspected presence, of a firearm changes the analysis. *Allen v. Hays*, 65 F.4th 736, 744 (5th Cir. 2023). In fact, “whether the suspect is armed is often the key factor in determining if a threat to the officer justifies the use of deadly force.” *Poole*, 13 F.4th at 425. Even if there is no weapon, “binding caselaw demonstrates that what matters is whether [the officer] could *reasonably believe* that [the man] was reaching for or had a gun.” *Winder v. Gallardo*, 118 F.4th 638, 646 (5th Cir. 2024).

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Although Carico was turned away from the officers, the rifle was still in Carico's left hand, and Carico was attempting to move back into the residence, where he would be out of sight of the officers. Officer Bristow stated in an affidavit that he "could hear Carico talking to someone inside the residence" and "[i]t almost sounded like he was throwing things inside of the residence" before he exited with the rifle. The officers "had not cleared the interior of the residence and [they] did not know if there was another person inside the residence who may be shot by Carico." Furthermore, Officer Bristow "knew the exterior walls [of Carico's metal residence] could easily be penetrated by a rifle round" and the officers' "police vests could not withstand a bullet from a high-powered caliber rifle." Regardless of whether Carico was truly moving inside to place his firearm down, a reasonable officer on the scene could have understood Carico's actions as an attempt to remain armed and take cover, making him a threat to the officers, Reger, and any other potential bystanders inside the house, even as his back was turned to the officers.

As to the failure to adequately warn, Carico cites several cases, but each involves disputes as to whether the officers warned the person *at all*. *Cole*, 935 F.3d at 457; *Baker v. Putnal*, 75 F.3d 190, 198 (5th Cir. 1996); *Graves v. Zachary*, 277 F. App'x 344, 349 n.7 (5th Cir. 2008); *Giardina v. Lawrence*, 354 F. App'x 914, 916 (5th Cir. 2009). That factual dispute does not exist here, as Carico concedes both officers warned him to drop his weapon, Officer Bristow did not shoot Carico until he turned away after the warning, and Carico was still holding the firearm with one hand. Carico also argues that he "was putting his rifle down, *just as Bristow instructed*." Therefore, unlike in *Roque*, *Cole*, and *Poole*, Carico has failed to show a genuine dispute of material fact.

Hindsight can bring clarity, but we are to give ourselves "the perspective of a reasonable officer on the scene." *Betts v. Brennan*, 22 F.4th

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577, 582 (5th Cir. 2022) (quoting *Graham*, 490 U.S. at 396). We must avoid evaluating the officers' actions in a way that is "more reflective of the 'peace of a judge's chambers' than of a dangerous and threatening situation on the street." *Ramirez v. Knoulton*, 542 F.3d 124, 130 (5th Cir. 2008) (quoting *Leavitt*, 99 F.3d at 643). As we have already explained, we must consider "the fact that police officers are often forced to make split-second judgments" regarding "the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

Considering the totality of the circumstances — including Carico's intoxicated appearance, his unwillingness to cooperate, his sudden appearance with a rifle, and his actions of turning away and moving into the residence while still holding the rifle after being told to drop the weapon — a reasonable officer on the scene could have perceived Carico as an immediate threat to any unknown persons inside the home, his girlfriend standing next to him, or the officers. Therefore, it was not "clearly excessive" or "unreasonable" for Officer Bristow to use deadly force. We agree with the district court's conclusion that Carico's constitutional rights were not violated.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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NEW ORLEANS, LA 70130

August 07, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 24-40239 Carico v. Bristow
USDC No. 5:22-CV-95

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

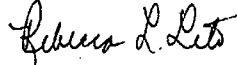
Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellant pay to Appellee the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Rebecca L. Leto, Deputy Clerk

Enclosure(s)

Mr. Colton Carico
Mr. Jeff S. Edwards
Mr. David James
Mr. Christopher Allen Klement
Mr. Darrell Gerard-Marc Noga
Mr. Paul Gregory Samuel
Mr. Michael C. Singley
Ms. Lisa Snead

Appendix B – Order Denying Rehearing

United States Court of Appeals
for the Fifth Circuit

No. 24-40239

United States Court of Appeals
Fifth Circuit

FILED

December 16, 2025

Lyle W. Cayce
Clerk

COLTON CARICO,

Plaintiff—Appellant,

versus

DEREK BRISTOW,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:22-CV-95

ON PETITION FOR REHEARING EN BANC

Before SOUTHWICK, OLDHAM, and RAMIREZ, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

Appendix C – District Court Summary Judgment Order

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

COLTON CARICO,

Plaintiff

v.

DEREK BRISTOW,

Defendant.

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§
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CIVIL ACTION NO. 5:22-CV-00095-RWS

ORDER

Before the Court is Defendant Derek Bristow's motion for summary judgment on qualified immunity. Docket No. 20. The parties briefed the motion (Docket Nos. 23, 25), and the Court held a hearing regarding the motion (Docket No. 27). For the reasons set forth below, Defendant's motion to dismiss (Docket No. 20) is **GRANTED** and Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

BACKGROUND

Plaintiff Colton Carico alleges that Defendant police officer Derek Bristow violated his constitutional right against the use of excessive force by unreasonably shooting Plaintiff. Plaintiff brings a claim under 42 U.S.C. § 1983 for violation of his Fourth Amendment right. Docket No. 1. Defendant has moved for summary judgment on the basis of his qualified immunity as a police officer. Docket No. 20.

I. Lead-up to the Armed Encounter

While on duty and working patrol, Defendant responded to a call about a single-vehicle accident and found a truck that had crashed through a gate and was turned on its side in a field. Docket No. 20-7 [hereinafter Bristow Bodycam Footage] at 00:30–12:12. Based on the license

plate, Plaintiff was the owner of the truck and lived near the scene of the accident. Docket No. 20-3 at 1. Witnesses reported that a man matching the description of Plaintiff left the crash and one witness reported that the man was picked up by a tan sedan with an Oklahoma license plate. *Id.*; Bristow Bodycam Footage at 00:30–12:12. Defendant arrived at the Plaintiff's residence and found a tan sedan with an Oklahoma license plate parked in the driveway. *Id.*

Defendant knocked on the front door and Plaintiff's girlfriend answered. *See* Bristow Bodycam Footage at 11:52. Over the course of 12 minutes, Defendant speaks to and interacts with Plaintiff's girlfriend multiple times outside Plaintiff's residence as she exits and re-enters the residence several times. *Id.* at 11:52–24:10. After initially telling Defendant that Plaintiff was not inside, Plaintiff's girlfriend eventually explained that she had not told the truth for fear of Plaintiff becoming upset with her and eventually told Defendant that Plaintiff was actually inside the residence and was angry about the situation. *Id.*

During the 12 minutes in which Defendant speaks to Plaintiff's girlfriend multiple times, Plaintiff opens the interior portion of his front door and twice speaks to Defendant through an open-air opening in the exterior portion of his front door.¹ *Id.* During this time, Officer Jacob McCraw also arrives on the scene and approaches the front door from a different angle. *Id.* at 21:22. Appearing intoxicated, erratic, and agitated, Plaintiff states that someone else had been driving his truck. *Id.* at 11:52–24:10. The second time Plaintiff speaks to Defendant, he asks if he can just go to bed. *Id.* at 23:58–24:10.

¹ The exterior portion of the front door includes glass panes at the bottom, but the top of the exterior portion of the front door allowed for open-air, face-to-face conversation between Plaintiff and Defendant. *Id.*

II. Armed Encounter

The armed encounter that follows happened relatively quickly over the course of about six to seven seconds. Bristow Bodycam Footage at 24:11–24:18. Plaintiff suddenly opens the exterior portion of his front door and steps onto his doorstep to reveal that he is holding a long gun. *Id.* at 24:11. Over the course of the next three seconds, the officers register that Plaintiff has brandished a gun and draw their own guns. *Id.* at 24:11–24:14. By the end of those three seconds, the officers have yelled a first warning to Plaintiff to drop the gun. *Id.* at 24:14. Over those same three seconds, it becomes apparent that Plaintiff is pointing his gun upwards at his own head² and Plaintiff can be heard suggesting that he “blow his [expletive] brains out.” Bristow Bodycam Footage at 24:11–24:14. Over the next two seconds, the officers yell and repeat their warnings to Plaintiff to drop his gun as Plaintiff continues to hold his gun. *Id.* at 24:14–16. After those two seconds, Plaintiff makes a sudden and abrupt counterclockwise turn and movement with his gun towards the doorway to the inside of his residence. *Id.* at 24:17; Docket No. 20-8 [hereinafter McCraw Bodycam Footage] at 03:42. Defendant then fires at Plaintiff, hitting him once in his back as Plaintiff is turning. Bristow Bodycam Footage at 24:18. Plaintiff then falls forward into his residence upon being shot. *Id.*; McCraw Bodycam Footage at 03:43. After the armed encounter, officers render aid to Plaintiff and Defendant emotionally explains to another officer who arrives on the scene that he “knew better than to let [Plaintiff] go back inside the [expletive] house.” Bristow Bodycam Footage at 24:20–37:18.³

² It is not immediately apparent when Plaintiff steps out from behind the door that he intends to point the gun at himself, but he is carrying the gun pointed upwards as he steps out from behind the front door. Bristow Bodycam Footage at 24:11. Over the course of the next three seconds, Plaintiff points the gun upwards at his own head. *Id.* at 24:11–24:14.

³ The bodycam footage captures additional aftermath of the armed encounter, including an encounter with Plaintiff’s father who arrived after Plaintiff was shot. Bristow Bodycam Footage

III. Summary Judgment Evidence

The summary judgment evidence includes video evidence from the bodycams of both Defendant and Officer McCraw as well as the officers' written statements and deposition testimony. *See* Bristow Bodycam Footage; McCraw Bodycam Footage; Docket Nos. 20-3, 20-4, 20-5, 20-6, 24-1, 24-2. While the parties' briefs frame the video evidence differently with respect to each side's positions, neither Plaintiff nor the remaining summary judgment evidence dispute the video evidence retrieved from the bodycams of the police officers.⁴ The remaining summary judgment evidence expands on what is observable in the video evidence, and Defendant asserts that it shows he reasonably believed at the time of the shooting that Plaintiff might take cover and fire at others from the inside of his residence. *See* Docket No. 20-3 at 2; Docket No. 20-4 at 2; Docket No. 20-5 at 66:24–67:13.

LEGAL STANDARD

I. Summary Judgment

Courts grant summary judgment when the moving party shows that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A genuine dispute of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The resolution of a genuine dispute of material fact “is the exclusive province of the trier of fact and may not be

at 24:20–37:18. But that additional aftermath does not particularly bear on the question before the Court regarding the shooting itself.

⁴ At the hearing on the motion, Plaintiff's counsel also acknowledged that the events of what happened can be observed on the video evidence, and that the remaining summary judgment evidence does not dispute the video evidence.

decided at the summary judgment stage.” *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578 n.3 (5th Cir. 2002). Thus, the court must not weigh evidence or make credibility findings, and it construes all facts and reasonable inferences in favor of the nonmovant. *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 328–29 (5th Cir. 2017). The party moving for summary judgment “always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323.

II. Qualified Immunity

“A qualified immunity defense alters the usual summary judgment burden of proof.” *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). “Once a defendant properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine’s protection.” *Howell v. Town of Ball*, 827 F.3d 515, 525 (5th Cir. 2016). But courts “still draw all inferences in the plaintiff’s favor” at summary judgment even when a qualified immunity defense is asserted. *Wilson v. City of Bastrop*, 26 F.4th 709, 712 (5th Cir. 2022).

When analyzing qualified immunity, courts “employ a familiar two-part test.” *Garza v. Briones*, 943 F.3d 740, 744 (5th Cir. 2019). “An officer merits qualified immunity unless (1) he violated a statutory or constitutional right of the plaintiff and (2) the right was clearly established at the time of the violation.” *Wilson*, 26 F.4th at 712 (internal quotations omitted). “An officer violates the Fourth Amendment when an arrestee suffers an injury that results directly and only from a clearly excessive and objectively unreasonable use of force.” *Cloud v. Stone*, 993 F.3d 379, 384 (5th Cir. 2021) (internal quotations omitted).

“When an officer uses deadly force, its reasonableness turns primarily on whether the officer ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm,

either to the officer or to others.” *Wilson*, 26 F.4th at 712 (internal quotations omitted). “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989).

III. Video Evidence

“Although [courts] review evidence in the light most favorable to the nonmoving party, [courts] assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.” *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). Courts “need not accept a plaintiff’s version of the facts for purposes of [qualified immunity] when it is blatantly contradicted and utterly discredited by video recordings.” *Garza v. Briones*, 943 F.3d 740, 744 (5th Cir. 2019) (internal quotations omitted).

DISCUSSION

Defendant argues that his motion for summary judgment on qualified immunity should be granted and Plaintiff’s claims should be dismissed with prejudice because (1) his use of force did not violate Plaintiff’s constitutional rights because it was not objectively unreasonable; and (2) his use of force was not objectively unreasonable in light of the clearly established law. Docket No. 20 at 1–2. Defendant contends that claims brought under 42 U.S.C. § 1983 require an underlying constitutional or statutory violation and Plaintiff only asserts an underlying Fourth Amendment violation. *Id.* at 8. Therefore, Defendant reasons that he need only show there is no constitutional Fourth Amendment violation here. *See id.* Defendant also points out that Plaintiff bears the burden of overcoming qualified immunity by demonstrating its inapplicability. *Id.* at 9–10. Defendant further argues Plaintiff cannot attempt to create a fact issue by contradicting the clear video evidence because, under Fifth Circuit law, video evidence prevails and no genuine issue of material

outside a truck stop and instead stood and raised his gun. *See* Docket No. 20 at 13 (citing *Garza v. Briones*, 943 F.3d 740, 743–44, 748 (5th Cir. 2019)).

Plaintiff responds, arguing that Defendant’s use of lethal force was unreasonable. Docket No. 23 at 5. Plaintiff contends that (1) deadly force is permitted only to protect the life of the shooting officer or others; (2) where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend the suspect does not justify the use of deadly force to do so; (3) a warning is required before deadly force is used where feasible; (4) the officers had no background information about Plaintiff that would indicate he would commit an act of violence against or pose a threat to anyone on the scene; (5) Plaintiff was under no legal obligation to exit his residence; (6) Plaintiff never threatened anyone but himself; (7) Plaintiff never pointed his firearm at anyone other than himself; (8) prior to discharging his firearm, Defendant gave Plaintiff no warning that he would do so; (9) at the time that Defendant discharged his firearm, Plaintiff was walking back into his residence; (10) Defendant did not know if Plaintiff was still armed when he discharged his firearm because at the time that Defendant discharged his firearm, he could not see any of the front of Plaintiff’s body and he could only see Plaintiff’s back; and (11) there was no flight risk because Plaintiff was walking into his home, not out into public. *Id.* at 5–7.

Plaintiff argues that these facts demonstrate that he did not pose an immediate threat because of the position of his body, his lack of threatening language or conduct, and that Defendant did not know if he was armed. *Id.* at 7. Plaintiff contends that Defendant’s assertion that he feared for people’s lives is a self-serving justification that is objectively unreasonable and insufficient when balanced against Plaintiff’s Fourth Amendment right. *Id.* According to Plaintiff, the mere

possession of a gun without any indication that it will be used for harm does not justify lethal force here. *Id.* at 7–8.

In his reply brief, Defendant argues that Plaintiff misstates the legal standard for what justifies an officer’s use of deadly force and that it can be determined by the existence of a credible, serious threat to the physical safety of the officer or those in the vicinity. Docket No. 25 at 3–4. Defendant further argues that Plaintiff fails to point to any summary judgment evidence that could overcome the video evidence and establish a genuine dispute of material fact. *See id.* at 6.

Here, the Court agrees with Defendant that his use of force was not objectively unreasonable and did not violate Plaintiff’s constitutional rights. Each of Plaintiff’s contentions is legally insignificant and/or factually incorrect, even when viewing the summary judgment evidence in the light most favorable to Plaintiff and drawing all inferences in Plaintiff’s favor.

First, lethal force was permitted here in view of the summary judgment evidence. “The use of deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.” *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (internal quotations omitted). Both video evidence and Defendant’s testimony show that, after Plaintiff’s sudden and abrupt movement with his gun, it was not objectively unreasonable for Defendant to have believed that Plaintiff may have been moving to take cover inside his residence and open fire at the officers, his girlfriend, or even at some unknown person inside his residence. This is especially true where undisputed summary judgment evidence shows that Plaintiff was agitated, erratic, and non-compliant with orders from the police to drop his gun. *See* Bristow Bodycam Footage at 24:11–24:18; *see also* *Wilson*, 26 F.4th at 715 (involving a defendant who “could have reasonably believed that the fleeing [plaintiff], who persistently held onto his gun against the officers’ orders, presented a threat to

[others'] safety); *Garza*, 943 F.3d at 743–44 (explaining that officers reasonably fired at the plaintiff that failed to comply with commands to put down his gun). As further discussed below, no evidence in the record could reasonably be used to show otherwise, even when viewed in the light most favorable to Plaintiff.⁵

Second, it was not objectively unreasonable for Defendant to believe that Plaintiff posed an immediate threat to the officers and Plaintiff's girlfriend at the precise moment Defendant fired at Plaintiff. The Fifth Circuit has explained that the reasonableness of an officer's use of force can change rapidly at any moment:

[O]ur precedent teaches that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Betts v. Brennan*, 22 F.4th 577, 584 (5th Cir. 2022) (quoting *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015)). But the inverse is also true. Force unreasonable in one moment may become reasonable in the next.

Wilson, 26 F.4th at 714. Here, although it occupies a relatively short amount of time over the course of about seven to eight seconds in total, the Court views Defendant's armed encounter with Plaintiff in three parts: escalation, de-escalation, and re-escalation. *See Bristow Bodycam Footage* at 24:11–24:18. When Plaintiff emerges and steps outside to reveal he is holding his gun, he immediately escalates his encounter with the officers to an armed encounter and a life-threatening emergency for all of those present. *See id.* at 24:11. Next, while it takes a moment for the officers

⁵ At the hearing on the motion, when asked if Plaintiff disputed the allegation that he was intoxicated during the encounter with Defendant, Plaintiff's counsel declined to answer and requested that the Court rely on the record. Relying on the record, the undisputed evidence shows that Plaintiff was intoxicated and expressing suicidal ideations. *See, e.g., Bristow Bodycam Footage* at 24:11–24:18. Being intoxicated and suicidal might be used to show that Plaintiff only meant to harm himself in the de-escalation period before his sudden movement. *See id.* at 24:14–24:16. But Plaintiff's decision to suddenly and abruptly turn toward his residence with his gun re-escalated the situation and required that the officers make a split-second judgment call as to whether Plaintiff might now harm others as well. *See id.* at 24:17.

to draw their weapons and warn Plaintiff to drop his gun, the encounter de-escalates as Plaintiff points the gun at himself and suggests that he might shoot himself. *See id.* at 24:11–24:14. Indeed, the officers repeat the warning and provide Plaintiff time to comply with their order to drop his gun. *Id.* at 24:14–24:16. Finally, after failing to drop his gun or state any intention to do so, Plaintiff’s sudden and abrupt counterclockwise turn and movement toward the inside of his residence—while holding his gun—re-escalated the situation and required that Defendant make a split-second decision as to whether to fire at Plaintiff before he could disappear from view, re-enter his residence with his gun, and conceivably take cover and fire at others. *Id.* at 24:17. Upon Plaintiff’s sudden re-escalation of the situation, it was not objectively unreasonable for Defendant to believe that Plaintiff posed an immediate threat both to Plaintiff’s girlfriend and the officers.

Third, the officers warned Plaintiff to drop his gun for as long as it was feasible before Plaintiff’s sudden movement with his gun required them to react. During the de-escalation period described above, the officers warned Plaintiff to drop his gun. Bristow Bodycam Footage at 24:11–24:14. Officers only ceased giving warnings and fired at Plaintiff when Plaintiff’s sudden and abrupt movement with his gun re-escalated the armed encounter, making it no longer feasible for the officers to give further warnings or allow more time for Plaintiff to respond to the already-given warnings. *See id.* at 24:17.

Fourth, Plaintiff ignores the summary judgment evidence by contending that the officers had no background information about Plaintiff to reasonably indicate he would commit an act of violence against or posed a threat to anyone on the scene. Indeed, Defendant had communicated face-to-face with Plaintiff multiple times in the minutes before the armed encounter and already observed him in an agitated and erratic state. *Id.* at 11:52–24:10. And Plaintiff’s girlfriend communicated to Defendant that Plaintiff would be upset with her for speaking to the officers. *Id.*

Fifth, whether Plaintiff was under a legal obligation to exit his residence is immaterial because Plaintiff voluntarily exited his residence while revealing that he was holding a gun. Bristow Bodycam Footage at 24:11. Even if Plaintiff could have stayed in his residence, the summary judgment evidence indisputably shows that he did not. Plaintiff's voluntary exit from his residence while brandishing his gun is precisely what escalated the situation in the first place.

Sixth, it was not objectively unreasonable for Defendant to consider Plaintiff's sudden and abrupt movement with his gun as a serious threat to others, especially after Plaintiff did not comply with orders from the officers to drop his gun. *See Wilson*, 26 F.4th at 714–15 (confirming that the Fifth Circuit has “never required officers to wait until [someone] turns towards them, with weapon in hand, before applying deadly force to ensure their safety” and explaining that “officers need not wait until a fleeing suspect turns his weapon toward bystanders before using deadly force to protect them”); *Garza*, 943 F.3d at 748 (explaining 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”).

Seventh, Plaintiff need not have pointed his gun at anyone else to have posed a serious threat to them. *See Wilson*, 26 F.4th at 714 (discerning that “[e]ven assuming [plaintiff] did not point a gun at [defendant]'s squad car, the undisputed facts still justified the exercise of lethal force”); *Garza*, 943 F.3d at 747 (explaining that a plaintiff may pose “a serious threat regardless of the direction that [plaintiff] was pointing his gun just before he was shot”).

Eighth, the officers' warning to “drop the gun” sufficed. Plaintiff cites no legal authority requiring the police warning to specifically give advance notice that the officer is going to fire his weapon. In other words, Plaintiff does not show that Defendant or any other officer is required to expressly warn Plaintiff to “drop the gun *or I'll shoot*” before firing.

Ninth, even viewing the evidence in the light most favorable to Plaintiff as him being shot as he entered his residence (rather than merely turning counterclockwise toward his residence), that does not make Defendant's decision to shoot Plaintiff an objectively unreasonable one given Plaintiff's sudden movement with his gun, at close range, after failing to comply with police orders to drop the gun. The proximity of the armed encounter to Plaintiff's residence, and the fact that Plaintiff fell into his residence after being shot, is the result of Plaintiff's decision to exit his residence and brandish a gun as he confronted police officers just outside his front doorstep.

Tenth, given the suddenness of Plaintiff's counterclockwise turn away from Defendant and toward his residence, it was not objectively unreasonable for Defendant to have understood that Plaintiff was still holding the gun when Defendant fired at Plaintiff. As Plaintiff turns, his back begins to face Defendant, and, eventually, Defendant can no longer see Plaintiff's gun in front of Plaintiff. Bristow Bodycam Footage at 24:17–24:18. Nevertheless, the video evidence shows that this happens very rapidly in a split-second, and no summary judgment evidence shows that Defendant could have understood that Plaintiff could have dropped his gun in that split-second instant. *Id.* at 24:17. While not known to Defendant at the time, Officer McCraw's bodycam footage indeed confirms that Plaintiff was still holding his gun when Defendant fired at Plaintiff.⁶ McCraw Bodycam Footage at 03:42–03:43.

Eleventh, even assuming *arguendo* there was no risk of flight by Plaintiff as he turned toward his residence, there still remained a risk that he might take cover and fire at others. It was not objectively unreasonable to believe that Plaintiff, in his agitated, erratic, and non-compliant

⁶ Moreover, while the summary judgment evidence does not indisputably show that one of Plaintiff's fingers was on the trigger, the undisputed summary judgment evidence does show that Plaintiff's hand was near the trigger. See Bristow Bodycam Footage at 24:17; McCraw Bodycam Footage at 03:42–03:43; Docket No. 24-2 at 87:7–18, 89:18–22; Docket No. 20-6 at 41:9–14.

state, might have fired on the officers, his girlfriend, or some other unknown person in his residence. *See* Docket No. 20-3 at 2; Docket No. 20-4 at 2; Docket No. 20-5 at 66:24–67:13.

Overall, the totality of the circumstances here supports that it was not objectively unreasonable for Defendant to believe that Plaintiff posed a serious threat that justified the use of lethal force. The Court has reviewed video evidence from Defendant's bodycam footage of the lead-up to the armed encounter, as well as multiple angles of video evidence from both Defendant's and Officer McCraw's bodycam footage of the armed encounter and its aftermath. The Court reviewed the armed encounter by replaying the multiple angles of video evidence. But, importantly, Defendant did not have the benefit of reviewing multiple angles of what occurred over and over again. For that reason, the law requires his actions not to be evaluated in 20/20 hindsight but rather from the point of view of a reasonable officer at the time of the encounter. *See Graham*, 490 U.S. at 396. In doing so, it was not objectively unreasonable for Defendant to have thought, in the rush of the moment, that Plaintiff's sudden and abrupt turn and movement with a gun posed a serious threat of Plaintiff taking cover to fire his gun at others. Accordingly, Defendant's use of lethal force did not violate Plaintiff's constitutional right.

II. Defendant's use of force was not objectively unreasonable in light of the clearly established law

Next, Defendant argues that his use of force was not objectively unreasonable in light of the clearly established law, and therefore he is entitled to qualified immunity. Docket No. 20 at 15. Under the second prong of the analysis, Defendant contends that his actions were not objectively unreasonable for the same reasons as under the first prong. *Id.* at 16. Defendant states that courts look to how a reasonable officer would perceive the facts and not necessarily the historical facts of the case. *Id.* But Defendant maintains the historical facts here also support his

arguments. *Id.* Defendant contends that Plaintiff's introduction of a deadly weapon into the situation was entirely unprovoked and turned a wellness check into a life-threatening situation. *Id.*

Plaintiff responds, arguing that Defendant's unreasonable use of lethal force violated his clearly established right against such use of force. Docket No. 23 at 8. Plaintiff primarily cites *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019), to show this right was clearly established under the law. Docket No. 23 at 8. Plaintiff contends that, in *Cole*, police officers searched for the plaintiff who was known to be armed and suicidal and encountered him pointing a gun at his own head. *Id.* Plaintiff argues that, like *Cole*, Defendant provided Plaintiff no warning that allowed Plaintiff sufficient time to respond. *Id.* at 8–9. Plaintiff further argues that, like *Cole*, a reasonable jury could conclude that Plaintiff was not given an opportunity to disarm himself before he was shot. *Id.* And Plaintiff argues that, like *Cole*, he never pointed a weapon at the officers and never made a threatening or provocative gesture towards the officers. *Id.* While Plaintiff admits that, unlike *Cole*, Plaintiff was aware of the police presence in this case, Plaintiff argues that *Cole* is materially similar such that it serves as clearly established law to show that Defendant's use of force was objectively unreasonable "because [Defendant] shot [Plaintiff] in the back [two] seconds after telling [Plaintiff] to drop his weapon and without knowing whether [Plaintiff] was still armed." *Id.* at 9.

On reply, Defendant argues that *Cole* found the following facts were heavily disputed: (1) whether the plaintiff was aware of the officers; (2) whether the officers warned the plaintiff to disarm himself; and (3) whether and how the plaintiff turned and aimed his gun. Docket No. 23 at 2–3. Defendant points out that, here, there is no dispute that: (1) Plaintiff was aware of the officers; (2) the officers gave Plaintiff clear commands to drop his gun, which Plaintiff disregarded; and (3)

Plaintiff abruptly turned towards Officer McCraw and began retreating into his residence after being given commands to drop his gun. *Id.*

Here, the Court agrees with Defendant that clearly established law does not provide that Defendant's use of force was objectively unreasonable. First, unlike *Cole*, it is undisputed that Plaintiff was clearly aware of the police officers' presence. And the summary judgment evidence reflects this awareness of the officers because Plaintiff conversed face-to-face with the police officers multiple times through the open-air opening in the exterior portion of his front door in the minutes leading up to the shooting. *See* Bristow Bodycam Footage at 11:52–24:10.

Second, Plaintiff is incorrect that he was not warned to drop his gun with sufficient time to respond; rather, the officers gave warnings for as long as they could before Plaintiff's sudden movement with the gun required them to react. The officers did not fire immediately when Plaintiff suddenly exited his front door, brandished a gun, and immediately escalated the situation in a life-threatening manner. *Id.* at 24:11–24:14. Instead, the officers drew their own guns and gave repeated warnings to Plaintiff to drop his gun. *Id.* It took about three seconds for the officers to yell their first warning while they were working to draw their own guns and register what Plaintiff intended to do with his gun. *Id.* Over those same three seconds, it becomes apparent that Plaintiff is pointing his gun upwards at his own head, and Plaintiff can be heard expressing suicidal ideations.⁷ Bristow Bodycam Footage at 24:11–24:14. Over the next two seconds, the officers continue yelling and repeating their warnings to drop the gun. *Id.* at 24:14–24:16. Over those two seconds, the summary judgment evidence could show that it was objectively unreasonable for the officers to fire because the situation de-escalates as it had become apparent that Plaintiff was

⁷ Unlike the handgun in *Cole*, Plaintiff points a long gun at himself here. Bristow Bodycam Footage at 24:11–24:16. It is not certain that Plaintiff would have been able to fire the long gun at himself based on his body position and his hand position on the long gun at the time. *See id.*

expressing suicidal ideations. But, after those two seconds, Plaintiff makes a sudden and abrupt move with his gun towards the inside of his residence, requiring the officers to make a split-second decision whether to fire. *Id.* at 24:17. Plaintiff's sudden movement with his gun following those two seconds essentially re-escalates the situation and makes it once again not objectively unreasonable for the officers to fire. *See id.* Even viewing the summary judgment evidence in the light most favorable to Plaintiff, the officers allowed Plaintiff as much time as they could for Plaintiff to respond to their warnings and drop his gun. *Cf. Cole*, 935 F.3d 444, 453 (explaining that the officers in *Cole* "had the time and opportunity to give a warning and yet chose to shoot first instead"). Plaintiff's opportunity to respond to the officers' warnings expired after two seconds only because Plaintiff decided to pose an additional threat by suddenly and abruptly turning and moving toward the inside of his residence with his gun. Bristow Bodycam Footage at 24:17.

Third, Plaintiff's sudden and abrupt counterclockwise turn and movement with his gun toward the inside of his residence is a threatening enough gesture to be distinguished from *Cole*. *See id.* As established above, Plaintiff need not have pointed his gun at the officers to justify their use of lethal force. *See supra* Discussion Section I. Summary judgment evidence in the form of video evidence, deposition testimony, and written statements reveals that Defendant reasonably believed that Plaintiff may have opened fire from inside his residence at the officers, his girlfriend, or even some unknown person inside his residence. *See* Bristow Bodycam Footage 24:11–24:18; Docket No. 20-3 at 2; Docket No. 20-4 at 2; Docket No. 20-5 at 66:24–67:13. Indeed, video evidence shows Plaintiff's girlfriend telling Defendant before the shooting that Plaintiff was angry and that she feared Plaintiff would be more upset with her for speaking to the police and telling them the truth that Plaintiff was inside the residence. Bristow Bodycam Footage at 15:50–17:25.

Even viewing the summary judgment evidence in the light most favorable to Plaintiff, and considering Plaintiff's arguments that his suicidal ideations in the previous moments and intoxicated state might have made him less of a threat to others, no competent summary judgment evidence shows that it was objectively unreasonable for Defendant to have thought that Plaintiff might take cover and fire⁸ at others when Plaintiff turned suddenly and abruptly with his gun towards the inside of his residence.⁹

Fourth, it bears noting that *Cole* questioned the officers' knowledge at the time of the shooting "particularly in light of the officers' evolving stories" that involved a heavily disputed factual record and allegations of fabricated evidence and narratives. *See Cole*, 935 F.3d 454. But here, unlike *Cole*, the video evidence from the officer's bodycams provides multiple vantage points of the shooting and the Defendant's investigation leading up to the shooting. And that video evidence is not disputed or contradicted by the rest of the summary judgment evidence. Ultimately, *Cole* does not serve as clearly established law to provide that Defendant's use of force was objectively unreasonable in this case.

⁸ Summary judgment evidence shows that Plaintiff's gun was indeed loaded with ammunition. *See, e.g.*, Bristow Bodycam Footage at 25:01–25:13. But that is not a consideration here where the law requires that the officers' objective reasonableness be examined at the time based on what the officers knew. Defendant could not have known whether Plaintiff's gun was loaded or not, and Defendant could have reasonably assumed it was loaded given Plaintiff's behavior.

⁹ It bears noting that Plaintiff does not represent that Plaintiff "moved his gun in compliance with commands to drop his gun" which was a critical issue in a recent decision by the Eighth Circuit that determined a genuine dispute of material fact existed in a case with a suicidal plaintiff pointing a gun at himself. *See Partridge v. City of Benton, Arkansas*, 70 F.4th 489, 493 (8th Cir. 2023). Instead, this case mirrors the "in-between scenario" envisioned by the *Partridge* court that a gun was moved in a menacing action even though it was never pointed at police officers. *Id.* at 492 n.2. While the *Partridge* court lacked video evidence of the shooting itself to confirm any such in-between scenario (*see id.*), the instant case presents multiple angles of video evidence to confirm at the qualified immunity stage that such an in-between scenario transpired here.

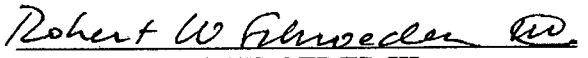
CONCLUSION

Even viewing the summary judgment evidence in the light most favorable to Plaintiff and drawing all inferences in Plaintiff's favor, Defendant's use of force was not objectively unreasonable. Thus, the Court finds that qualified immunity applies because Defendant did not violate any constitutional right of Plaintiff that was clearly established and no genuine dispute of material fact exists. Accordingly, for the reasons set forth above, it is

ORDERED that Defendant's motion for summary judgment (Docket No. 20) is **GRANTED**. It is further

ORDERED that Plaintiff's claims in the above-captioned case are **DISMISSED WITH PREJUDICE**. A final judgment will be entered in accordance with this Order.

So ORDERED and SIGNED this 14th day of March, 2024.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

Appendix D – District Court Final Judgment

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

COLTON CARICO,

Plaintiff

v.

DEREK BRISTOW,

Defendant.

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CIVIL ACTION NO. 5:22-CV-00095-RWS

FINAL JUDGMENT

Pursuant to the Court's Order dismissing the above-captioned case, the Court hereby enters Final Judgment. Accordingly, it is

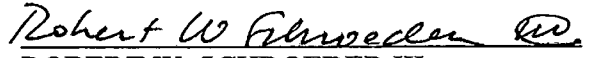
ORDERED that Plaintiff's claims in the above-captioned case are **DISMISSED WITH PREJUDICE**. It is further

ORDERED that any pending motions in the above-captioned case are **DENIED-AS-MOOT**.

The Clerk of the Court is directed to close the case.

It is so **ORDERED**.

SIGNED this 14th day of March, 2024.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

decided at the summary judgment stage.” *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578 n.3 (5th Cir. 2002). Thus, the court must not weigh evidence or make credibility findings, and it construes all facts and reasonable inferences in favor of the nonmovant. *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 328–29 (5th Cir. 2017). The party moving for summary judgment “always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323.

II. Qualified Immunity

“A qualified immunity defense alters the usual summary judgment burden of proof.” *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). “Once a defendant properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine’s protection.” *Howell v. Town of Ball*, 827 F.3d 515, 525 (5th Cir. 2016). But courts “still draw all inferences in the plaintiff’s favor” at summary judgment even when a qualified immunity defense is asserted. *Wilson v. City of Bastrop*, 26 F.4th 709, 712 (5th Cir. 2022).

When analyzing qualified immunity, courts “employ a familiar two-part test.” *Garza v. Briones*, 943 F.3d 740, 744 (5th Cir. 2019). “An officer merits qualified immunity unless (1) he violated a statutory or constitutional right of the plaintiff and (2) the right was clearly established at the time of the violation.” *Wilson*, 26 F.4th at 712 (internal quotations omitted). “An officer violates the Fourth Amendment when an arrestee suffers an injury that results directly and only from a clearly excessive and objectively unreasonable use of force.” *Cloud v. Stone*, 993 F.3d 379, 384 (5th Cir. 2021) (internal quotations omitted).

“When an officer uses deadly force, its reasonableness turns primarily on whether the officer ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm,

either to the officer or to others.” *Wilson*, 26 F.4th at 712 (internal quotations omitted). “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989).

III. Video Evidence

“Although [courts] review evidence in the light most favorable to the nonmoving party, [courts] assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.” *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). Courts “need not accept a plaintiff’s version of the facts for purposes of [qualified immunity] when it is blatantly contradicted and utterly discredited by video recordings.” *Garza v. Briones*, 943 F.3d 740, 744 (5th Cir. 2019) (internal quotations omitted).

DISCUSSION

Defendant argues that his motion for summary judgment on qualified immunity should be granted and Plaintiff’s claims should be dismissed with prejudice because (1) his use of force did not violate Plaintiff’s constitutional rights because it was not objectively unreasonable; and (2) his use of force was not objectively unreasonable in light of the clearly established law. Docket No. 20 at 1–2. Defendant contends that claims brought under 42 U.S.C. § 1983 require an underlying constitutional or statutory violation and Plaintiff only asserts an underlying Fourth Amendment violation. *Id.* at 8. Therefore, Defendant reasons that he need only show there is no constitutional Fourth Amendment violation here. *See id.* Defendant also points out that Plaintiff bears the burden of overcoming qualified immunity by demonstrating its inapplicability. *Id.* at 9–10. Defendant further argues Plaintiff cannot attempt to create a fact issue by contradicting the clear video evidence because, under Fifth Circuit law, video evidence prevails and no genuine issue of material

fact exists when the video is contradicted by fanciful statements in the record at summary judgment. *Id.* at 10. The Court considers these arguments as it steps through its analysis of the qualified immunity prongs below.

I. Defendant's use of force did not violate Plaintiff's constitutional rights

Defendant argues that his use of force does not violate Plaintiff's constitutional rights because it was not objectively unreasonable. Docket No. 20 at 15. Defendant contends that the totality of the circumstances shows the use of force was reasonable under the fact-intensive inquiry that is required here. *Id.* at 12–15. Defendant contends that he reasonably feared for his life, the life of Plaintiff's girlfriend (whom Defendant alleges Plaintiff was angry at for speaking to the police), and the life of his fellow officer on the scene. *See id.* at 12. Defendant contends that it was reasonable to conclude Plaintiff posed a serious threat of physical injury or death because Plaintiff was angry, threatening, intoxicated, suicidal, and defiant while holding a high-powered rifle. *Id.* at 13–14 (citing Docket Nos. 20-3, 20-4). Defendant further contends that he did not violate Plaintiff's constitutional rights by making the quick decision to shoot when Plaintiff defied repeated commands to drop the gun and quickly turned to go back into his home where he would have been provided with cover to fire on the officers or anyone else with a high-powered rifle. *Id.* at 14–15. In support of his arguments, Defendant cites *Wilson v. City of Bastrop*, where the Fifth Circuit determined an officer was reasonable in shooting at the plaintiff when the plaintiff stepped out of a truck and ran toward people with a gun while ignoring numerous orders to stop and drop the gun. Docket No. 20 at 14 (citing *Wilson v. City of Bastrop*, 26 F.4th 709, 713 (5th Cir. 2022)). At the hearing, Defendant also focused on *Garza v. Briones*, where the Fifth Circuit determined that an officer was reasonable in shooting at the plaintiff when the plaintiff failed to comply with repeated orders from officers to drop his gun (which turned out to be a BB gun) while sitting

outside a truck stop and instead stood and raised his gun. *See* Docket No. 20 at 13 (citing *Garza v. Briones*, 943 F.3d 740, 743–44, 748 (5th Cir. 2019)).

Plaintiff responds, arguing that Defendant’s use of lethal force was unreasonable. Docket No. 23 at 5. Plaintiff contends that (1) deadly force is permitted only to protect the life of the shooting officer or others; (2) where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend the suspect does not justify the use of deadly force to do so; (3) a warning is required before deadly force is used where feasible; (4) the officers had no background information about Plaintiff that would indicate he would commit an act of violence against or pose a to threat anyone on the scene; (5) Plaintiff was under no legal obligation to exit his residence; (6) Plaintiff never threatened anyone but himself; (7) Plaintiff never pointed his firearm at anyone other than himself; (8) prior to discharging his firearm, Defendant gave Plaintiff no warning that he would do so; (9) at the time that Defendant discharged his firearm, Plaintiff was walking back into his residence; (10) Defendant did not know if Plaintiff was still armed when he discharged his firearm because at the time that Defendant discharged his firearm, he could not see any of the front of Plaintiff’s body and he could only see Plaintiff’ back; and (11) there was no flight risk because Plaintiff was walking into his home, not out into public. *Id.* at 5–7.

Plaintiff argues that these facts demonstrate that he did not pose an immediate threat because of the position of his body, his lack of threatening language or conduct, and that Defendant did not know if he was armed. *Id.* at 7. Plaintiff contends that Defendant’s assertion that he feared for people’s lives is a self-serving justification that is objectively unreasonable and insufficient when balanced against Plaintiff’s Fourth Amendment right. *Id.* According to Plaintiff, the mere

possession of a gun without any indication that it will be used for harm does not justify lethal force here. *Id.* at 7–8.

In his reply brief, Defendant argues that Plaintiff misstates the legal standard for what justifies an officer's use of deadly force and that it can be determined by the existence of a credible, serious threat to the physical safety of the officer or those in the vicinity. Docket No. 25 at 3–4. Defendant further argues that Plaintiff fails to point to any summary judgment evidence that could overcome the video evidence and establish a genuine dispute of material fact. *See id.* at 6.

Here, the Court agrees with Defendant that his use of force was not objectively unreasonable and did not violate Plaintiff's constitutional rights. Each of Plaintiff's contentions is legally insignificant and/or factually incorrect, even when viewing the summary judgment evidence in the light most favorable to Plaintiff and drawing all inferences in Plaintiff's favor.

First, lethal force was permitted here in view of the summary judgment evidence. “The use of deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.” *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (internal quotations omitted). Both video evidence and Defendant's testimony show that, after Plaintiff's sudden and abrupt movement with his gun, it was not objectively unreasonable for Defendant to have believed that Plaintiff may have been moving to take cover inside his residence and open fire at the officers, his girlfriend, or even at some unknown person inside his residence. This is especially true where undisputed summary judgment evidence shows that Plaintiff was agitated, erratic, and non-compliant with orders from the police to drop his gun. *See* Bristow Bodycam Footage at 24:11–24:18; *see also* *Wilson*, 26 F.4th at 715 (involving a defendant who “could have reasonably believed that the fleeing [plaintiff], who persistently held onto his gun against the officers' orders, presented a threat to

[others'] safety); *Garza*, 943 F.3d at 743–44 (explaining that officers reasonably fired at the plaintiff that failed to comply with commands to put down his gun). As further discussed below, no evidence in the record could reasonably be used to show otherwise, even when viewed in the light most favorable to Plaintiff.⁵

Second, it was not objectively unreasonable for Defendant to believe that Plaintiff posed an immediate threat to the officers and Plaintiff's girlfriend at the precise moment Defendant fired at Plaintiff. The Fifth Circuit has explained that the reasonableness of an officer's use of force can change rapidly at any moment:

[O]ur precedent teaches that “an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.” *Betts v. Brennan*, 22 F.4th 577, 584 (5th Cir. 2022) (quoting *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015)). But the inverse is also true. Force unreasonable in one moment may become reasonable in the next.

Wilson, 26 F.4th at 714. Here, although it occupies a relatively short amount of time over the course of about seven to eight seconds in total, the Court views Defendant's armed encounter with Plaintiff in three parts: escalation, de-escalation, and re-escalation. *See* Bristow Bodycam Footage at 24:11–24:18. When Plaintiff emerges and steps outside to reveal he is holding his gun, he immediately escalates his encounter with the officers to an armed encounter and a life-threatening emergency for all of those present. *See id.* at 24:11. Next, while it takes a moment for the officers

⁵ At the hearing on the motion, when asked if Plaintiff disputed the allegation that he was intoxicated during the encounter with Defendant, Plaintiff's counsel declined to answer and requested that the Court rely on the record. Relying on the record, the undisputed evidence shows that Plaintiff was intoxicated and expressing suicidal ideations. *See, e.g.*, Bristow Bodycam Footage at 24:11–24:18. Being intoxicated and suicidal might be used to show that Plaintiff only meant to harm himself in the de-escalation period before his sudden movement. *See id.* at 24:14–24:16. But Plaintiff's decision to suddenly and abruptly turn toward his residence with his gun re-escalated the situation and required that the officers make a split-second judgment call as to whether Plaintiff might now harm others as well. *See id.* at 24:17.

to draw their weapons and warn Plaintiff to drop his gun, the encounter de-escalates as Plaintiff points the gun at himself and suggests that he might shoot himself. *See id.* at 24:11–24:14. Indeed, the officers repeat the warning and provide Plaintiff time to comply with their order to drop his gun. *Id.* at 24:14–24:16. Finally, after failing to drop his gun or state any intention to do so, Plaintiff’s sudden and abrupt counterclockwise turn and movement toward the inside of his residence—while holding his gun—re-escalated the situation and required that Defendant make a split-second decision as to whether to fire at Plaintiff before he could disappear from view, re-enter his residence with his gun, and conceivably take cover and fire at others. *Id.* at 24:17. Upon Plaintiff’s sudden re-escalation of the situation, it was not objectively unreasonable for Defendant to believe that Plaintiff posed an immediate threat both to Plaintiff’s girlfriend and the officers.

Third, the officers warned Plaintiff to drop his gun for as long as it was feasible before Plaintiff’s sudden movement with his gun required them to react. During the de-escalation period described above, the officers warned Plaintiff to drop his gun. Bristow Bodycam Footage at 24:11–24:14. Officers only ceased giving warnings and fired at Plaintiff when Plaintiff’s sudden and abrupt movement with his gun re-escalated the armed encounter, making it no longer feasible for the officers to give further warnings or allow more time for Plaintiff to respond to the already-given warnings. *See id.* at 24:17.

Fourth, Plaintiff ignores the summary judgment evidence by contending that the officers had no background information about Plaintiff to reasonably indicate he would commit an act of violence against or posed a threat to anyone on the scene. Indeed, Defendant had communicated face-to-face with Plaintiff multiple times in the minutes before the armed encounter and already observed him in an agitated and erratic state. *Id.* at 11:52–24:10. And Plaintiff’s girlfriend communicated to Defendant that Plaintiff would be upset with her for speaking to the officers. *Id.*

Fifth, whether Plaintiff was under a legal obligation to exit his residence is immaterial because Plaintiff voluntarily exited his residence while revealing that he was holding a gun. Bristow Bodycam Footage at 24:11. Even if Plaintiff could have stayed in his residence, the summary judgment evidence indisputably shows that he did not. Plaintiff's voluntary exit from his residence while brandishing his gun is precisely what escalated the situation in the first place.

Sixth, it was not objectively unreasonable for Defendant to consider Plaintiff's sudden and abrupt movement with his gun as a serious threat to others, especially after Plaintiff did not comply with orders from the officers to drop his gun. *See Wilson*, 26 F.4th at 714–15 (confirming that the Fifth Circuit has “never required officers to wait until [someone] turns towards them, with weapon in hand, before applying deadly force to ensure their safety” and explaining that “officers need not wait until a fleeing suspect turns his weapon toward bystanders before using deadly force to protect them”); *Garza*, 943 F.3d at 748 (explaining 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”).

Seventh, Plaintiff need not have pointed his gun at anyone else to have posed a serious threat to them. *See Wilson*, 26 F.4th at 714 (discerning that “[e]ven assuming [plaintiff] did not point a gun at [defendant]'s squad car, the undisputed facts still justified the exercise of lethal force”); *Garza*, 943 F.3d at 747 (explaining that a plaintiff may pose “a serious threat regardless of the direction that [plaintiff] was pointing his gun just before he was shot”).

Eighth, the officers' warning to “drop the gun” sufficed. Plaintiff cites no legal authority requiring the police warning to specifically give advance notice that the officer is going to fire his weapon. In other words, Plaintiff does not show that Defendant or any other officer is required to expressly warn Plaintiff to “drop the gun *or I'll shoot*” before firing.

Ninth, even viewing the evidence in the light most favorable to Plaintiff as him being shot as he entered his residence (rather than merely turning counterclockwise toward his residence), that does not make Defendant's decision to shoot Plaintiff an objectively unreasonable one given Plaintiff's sudden movement with his gun, at close range, after failing to comply with police orders to drop the gun. The proximity of the armed encounter to Plaintiff's residence, and the fact that Plaintiff fell into his residence after being shot, is the result of Plaintiff's decision to exit his residence and brandish a gun as he confronted police officers just outside his front doorstep.

Tenth, given the suddenness of Plaintiff's counterclockwise turn away from Defendant and toward his residence, it was not objectively unreasonable for Defendant to have understood that Plaintiff was still holding the gun when Defendant fired at Plaintiff. As Plaintiff turns, his back begins to face Defendant, and, eventually, Defendant can no longer see Plaintiff's gun in front of Plaintiff. Bristow Bodycam Footage at 24:17–24:18. Nevertheless, the video evidence shows that this happens very rapidly in a split-second, and no summary judgment evidence shows that Defendant could have understood that Plaintiff could have dropped his gun in that split-second instant. *Id.* at 24:17. While not known to Defendant at the time, Officer McCraw's bodycam footage indeed confirms that Plaintiff was still holding his gun when Defendant fired at Plaintiff.⁶ McCraw Bodycam Footage at 03:42–03:43.

Eleventh, even assuming *arguendo* there was no risk of flight by Plaintiff as he turned toward his residence, there still remained a risk that he might take cover and fire at others. It was not objectively unreasonable to believe that Plaintiff, in his agitated, erratic, and non-compliant

⁶ Moreover, while the summary judgment evidence does not indisputably show that one of Plaintiff's fingers was on the trigger, the undisputed summary judgment evidence does show that Plaintiff's hand was near the trigger. *See* Bristow Bodycam Footage at 24:17; McCraw Bodycam Footage at 03:42–03:43; Docket No. 24-2 at 87:7–18, 89:18–22; Docket No. 20-6 at 41:9–14.

state, might have fired on the officers, his girlfriend, or some other unknown person in his residence. *See* Docket No. 20-3 at 2; Docket No. 20-4 at 2; Docket No. 20-5 at 66:24–67:13.

Overall, the totality of the circumstances here supports that it was not objectively unreasonable for Defendant to believe that Plaintiff posed a serious threat that justified the use of lethal force. The Court has reviewed video evidence from Defendant's bodycam footage of the lead-up to the armed encounter, as well as multiple angles of video evidence from both Defendant's and Officer McCraw's bodycam footage of the armed encounter and its aftermath. The Court reviewed the armed encounter by replaying the multiple angles of video evidence. But, importantly, Defendant did not have the benefit of reviewing multiple angles of what occurred over and over again. For that reason, the law requires his actions not to be evaluated in 20/20 hindsight but rather from the point of view of a reasonable officer at the time of the encounter. *See Graham*, 490 U.S. at 396. In doing so, it was not objectively unreasonable for Defendant to have thought, in the rush of the moment, that Plaintiff's sudden and abrupt turn and movement with a gun posed a serious threat of Plaintiff taking cover to fire his gun at others. Accordingly, Defendant's use of lethal force did not violate Plaintiff's constitutional right.

II. Defendant's use of force was not objectively unreasonable in light of the clearly established law

Next, Defendant argues that his use of force was not objectively unreasonable in light of the clearly established law, and therefore he is entitled to qualified immunity. Docket No. 20 at 15. Under the second prong of the analysis, Defendant contends that his actions were not objectively unreasonable for the same reasons as under the first prong. *Id.* at 16. Defendant states that courts look to how a reasonable officer would perceive the facts and not necessarily the historical facts of the case. *Id.* But Defendant maintains the historical facts here also support his

arguments. *Id.* Defendant contends that Plaintiff's introduction of a deadly weapon into the situation was entirely unprovoked and turned a wellness check into a life-threatening situation. *Id.*

Plaintiff responds, arguing that Defendant's unreasonable use of lethal force violated his clearly established right against such use of force. Docket No. 23 at 8. Plaintiff primarily cites *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019), to show this right was clearly established under the law. Docket No. 23 at 8. Plaintiff contends that, in *Cole*, police officers searched for the plaintiff who was known to be armed and suicidal and encountered him pointing a gun at his own head. *Id.* Plaintiff argues that, like *Cole*, Defendant provided Plaintiff no warning that allowed Plaintiff sufficient time to respond. *Id.* at 8–9. Plaintiff further argues that, like *Cole*, a reasonable jury could conclude that Plaintiff was not given an opportunity to disarm himself before he was shot. *Id.* And Plaintiff argues that, like *Cole*, he never pointed a weapon at the officers and never made a threatening or provocative gesture towards the officers. *Id.* While Plaintiff admits that, unlike *Cole*, Plaintiff was aware of the police presence in this case, Plaintiff argues that *Cole* is materially similar such that it serves as clearly established law to show that Defendant's use of force was objectively unreasonable "because [Defendant] shot [Plaintiff] in the back [two] seconds after telling [Plaintiff] to drop his weapon and without knowing whether [Plaintiff] was still armed." *Id.* at 9.

On reply, Defendant argues that *Cole* found the following facts were heavily disputed: (1) whether the plaintiff was aware of the officers; (2) whether the officers warned the plaintiff to disarm himself; and (3) whether and how the plaintiff turned and aimed his gun. Docket No. 23 at 2–3. Defendant points out that, here, there is no dispute that: (1) Plaintiff was aware of the officers; (2) the officers gave Plaintiff clear commands to drop his gun, which Plaintiff disregarded; and (3)

Plaintiff abruptly turned towards Officer McCraw and began retreating into his residence after being given commands to drop his gun. *Id.*

Here, the Court agrees with Defendant that clearly established law does not provide that Defendant's use of force was objectively unreasonable. First, unlike *Cole*, it is undisputed that Plaintiff was clearly aware of the police officers' presence. And the summary judgment evidence reflects this awareness of the officers because Plaintiff conversed face-to-face with the police officers multiple times through the open-air opening in the exterior portion of his front door in the minutes leading up to the shooting. *See* Bristow Bodycam Footage at 11:52–24:10.

Second, Plaintiff is incorrect that he was not warned to drop his gun with sufficient time to respond; rather, the officers gave warnings for as long as they could before Plaintiff's sudden movement with the gun required them to react. The officers did not fire immediately when Plaintiff suddenly exited his front door, brandished a gun, and immediately escalated the situation in a life-threatening manner. *Id.* at 24:11–24:14. Instead, the officers drew their own guns and gave repeated warnings to Plaintiff to drop his gun. *Id.* It took about three seconds for the officers to yell their first warning while they were working to draw their own guns and register what Plaintiff intended to do with his gun. *Id.* Over those same three seconds, it becomes apparent that Plaintiff is pointing his gun upwards at his own head, and Plaintiff can be heard expressing suicidal ideations.⁷ Bristow Bodycam Footage at 24:11–24:14. Over the next two seconds, the officers continue yelling and repeating their warnings to drop the gun. *Id.* at 24:14–24:16. Over those two seconds, the summary judgment evidence could show that it was objectively unreasonable for the officers to fire because the situation de-escalates as it had become apparent that Plaintiff was

⁷Unlike the handgun in *Cole*, Plaintiff points a long gun at himself here. Bristow Bodycam Footage at 24:11–24:16. It is not certain that Plaintiff would have been able to fire the long gun at himself based on his body position and his hand position on the long gun at the time. *See id.*

expressing suicidal ideations. But, after those two seconds, Plaintiff makes a sudden and abrupt move with his gun towards the inside of his residence, requiring the officers to make a split-second decision whether to fire. *Id.* at 24:17. Plaintiff's sudden movement with his gun following those two seconds essentially re-escalates the situation and makes it once again not objectively unreasonable for the officers to fire. *See id.* Even viewing the summary judgment evidence in the light most favorable to Plaintiff, the officers allowed Plaintiff as much time as they could for Plaintiff to respond to their warnings and drop his gun. *Cf. Cole*, 935 F.3d 444, 453 (explaining that the officers in *Cole* "had the time and opportunity to give a warning and yet chose to shoot first instead"). Plaintiff's opportunity to respond to the officers' warnings expired after two seconds only because Plaintiff decided to pose an additional threat by suddenly and abruptly turning and moving toward the inside of his residence with his gun. Bristow Bodycam Footage at 24:17.

Third, Plaintiff's sudden and abrupt counterclockwise turn and movement with his gun toward the inside of his residence is a threatening enough gesture to be distinguished from *Cole*. *See id.* As established above, Plaintiff need not have pointed his gun at the officers to justify their use of lethal force. *See supra* Discussion Section I. Summary judgment evidence in the form of video evidence, deposition testimony, and written statements reveals that Defendant reasonably believed that Plaintiff may have opened fire from inside his residence at the officers, his girlfriend, or even some unknown person inside his residence. *See* Bristow Bodycam Footage 24:11–24:18; Docket No. 20-3 at 2; Docket No. 20-4 at 2; Docket No. 20-5 at 66:24–67:13. Indeed, video evidence shows Plaintiff's girlfriend telling Defendant before the shooting that Plaintiff was angry and that she feared Plaintiff would be more upset with her for speaking to the police and telling them the truth that Plaintiff was inside the residence. Bristow Bodycam Footage at 15:50–17:25.

Even viewing the summary judgment evidence in the light most favorable to Plaintiff, and considering Plaintiff's arguments that his suicidal ideations in the previous moments and intoxicated state might have made him less of a threat to others, no competent summary judgment evidence shows that it was objectively unreasonable for Defendant to have thought that Plaintiff might take cover and fire⁸ at others when Plaintiff turned suddenly and abruptly with his gun towards the inside of his residence.⁹

Fourth, it bears noting that *Cole* questioned the officers' knowledge at the time of the shooting "particularly in light of the officers' evolving stories" that involved a heavily disputed factual record and allegations of fabricated evidence and narratives. *See Cole*, 935 F.3d 454. But here, unlike *Cole*, the video evidence from the officer's bodycams provides multiple vantage points of the shooting and the Defendant's investigation leading up to the shooting. And that video evidence is not disputed or contradicted by the rest of the summary judgment evidence. Ultimately, *Cole* does not serve as clearly established law to provide that Defendant's use of force was objectively unreasonable in this case.

⁸ Summary judgment evidence shows that Plaintiff's gun was indeed loaded with ammunition. *See, e.g.*, Bristow Bodycam Footage at 25:01–25:13. But that is not a consideration here where the law requires that the officers' objective reasonableness be examined at the time based on what the officers knew. Defendant could not have known whether Plaintiff's gun was loaded or not, and Defendant could have reasonably assumed it was loaded given Plaintiff's behavior.

⁹ It bears noting that Plaintiff does not represent that Plaintiff "moved his gun in compliance with commands to drop his gun" which was a critical issue in a recent decision by the Eighth Circuit that determined a genuine dispute of material fact existed in a case with a suicidal plaintiff pointing a gun at himself. *See Partridge v. City of Benton, Arkansas*, 70 F.4th 489, 493 (8th Cir. 2023). Instead, this case mirrors the "in-between scenario" envisioned by the *Partridge* court that a gun was moved in a menacing action even though it was never pointed at police officers. *Id.* at 492 n.2. While the *Partridge* court lacked video evidence of the shooting itself to confirm any such in-between scenario (*see id.*), the instant case presents multiple angles of video evidence to confirm at the qualified immunity stage that such an in-between scenario transpired here.

CONCLUSION

Even viewing the summary judgment evidence in the light most favorable to Plaintiff and drawing all inferences in Plaintiff's favor, Defendant's use of force was not objectively unreasonable. Thus, the Court finds that qualified immunity applies because Defendant did not violate any constitutional right of Plaintiff that was clearly established and no genuine dispute of material fact exists. Accordingly, for the reasons set forth above, it is

ORDERED that Defendant's motion for summary judgment (Docket No. 20) is **GRANTED**. It is further

ORDERED that Plaintiff's claims in the above-captioned case are **DISMISSED WITH PREJUDICE**. A final judgment will be entered in accordance with this Order.

So ORDERED and SIGNED this 14th day of March, 2024.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

COLTON CARICO,

Plaintiff

v.

DEREK BRISTOW,

Defendant.

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CIVIL ACTION NO. 5:22-CV-00095-RWS

FINAL JUDGMENT

Pursuant to the Court's Order dismissing the above-captioned case, the Court hereby enters Final Judgment. Accordingly, it is

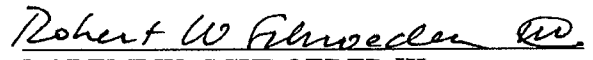
ORDERED that Plaintiff's claims in the above-captioned case are **DISMISSED WITH PREJUDICE**. It is further

ORDERED that any pending motions in the above-captioned case are **DENIED-AS-MOOT**.

The Clerk of the Court is directed to close the case.

It is so **ORDERED**.

SIGNED this 14th day of March, 2024.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE