No. 12-20296

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT R. TOLAN; BOBBY TOLAN;
MARIAN TOLAN; ANTHONY COOPER,

Plaintiffs-Appellants,

v.

JEFFREY WAYNE COTTON; JOHN C. EDWARDS;
CITY OF BELLAIRE, TEXAS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR APPELLANTS

George R. Gibson
Marvin Nathan
NATHAN SOMMERS JACOBS, P.C.
2800 Post Oak Boulevard
Houston, Texas 77056
Telephone: (713) 892-4843

Martin J. Siegel
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana Street, Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566

ATTORNEYS FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:

Robert R. Tolan, Bobby Tolan, Marian Tolan, Anthony Cooper

Trial and/or Appellate Counsel for Plaintiffs-Appellants:

Geoffrey Berg
David Berg
BERG & ANDROPHY
3704 Travis Street
Houston, Texas 77002

George R. Gibson
Marvin Nathan
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard
Houston, Texas 77056

Martin J. Siegel
LAW OFFICES OF MARTIN J. SIEGEL
Bank of America Center
700 Louisiana Street, Suite 2300
Houston, Texas 77002

Present and Former Defendants and Defendants-Appellees:

Jeffrey Wayne Cotton, John C. Edwards, Randall C. Mack, Byron Holloway Cynthia Siegel, Bernard Satterwhite, City of Bellaire, Bellaire Police Department

Trial and Appellate Counsel for Defendants-Appellees:

William S. Helfand
Norman Ray Giles
Chamberlain, Hrdlicka, White, Williams & Aughtry
1200 Smith Street, Suite 1400
Houston, TX 77002

Martin J. Siegel */s/*
Martin J. Siegel
Attorney of Record for
Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This case involves a police officer who shot and seriously injured a citizen. As this Court observed in a similar excessive force appeal: "A case of this gravity demands the utmost care." *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991). Appellees rightly argued to the district court that a "lawsuit against a law enforcement officer brought under the Constitution invokes… broad[] societal, and consequent legal, interests." R. 982. That is at least in part because dramatic, highly publicized events like police shootings play a significant role in shaping public opinion about law enforcement and government generally. This is especially true here, as the case attracted considerable local and national media attention.

Oral argument would also assist the Court in resolving the appeal. The case is not routine or simple, and the Court would benefit from the opportunity to explore the issues involved and sharpen the points of disagreement with counsel for the parties.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331 because it arises under the United States Constitution and federal law, 42 U.S.C. § 1983. R.E. 4 (R. 2627).[1] This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is taken from the district court's Amended Final Summary Judgment, entered under Fed. R. Civ. P. 54(b) on April 30, 2012, which dismissed all claims against Appellees Cotton and Edwards. R.E. 3 (R. 2715). Appellants timely filed an Amended Notice of Appeal on May 1, 2012. R.E. 2 (R. 2716-17).[2]

[1] Citation to "R.E.__" is to the tab at which the cited document appears in the Record Excerpts. Citation to "R. __" is to the specified page in the record. Citation to "R. __(__)" is to the specified page in the record and the line(s) containing the cited testimony in trial or deposition transcripts.

[2] The district court initially issued what it labeled a final judgment on March 31, 2012, though claims against other defendants remained pending despite the summary judgment for Edwards and Cotton. R. 2626. Appellants filed a notice of appeal from this judgment on April 27, 2012. R. 2712-13. They also moved for clarification or in the alternative that final judgment be entered under Fed. R. Civ. P. 54(b) as to all claims against Edwards and Cotton. R. 2705-06. The court then entered the Amended Final Summary Judgment pursuant to Rule 54(b), leading Appellants to file their Amended Notice of Appeal. R.E. 2-3.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether a jury could find a police officer's shooting of an unarmed suspect on his porch violated the Fourth Amendment where the officer had little reason to regard the suspect as armed or dangerous, and the suspect made no threatening gestures before he was shot.

2. Whether the Fourth Amendment right to be free of deadly force belonging to a suspect posing no serious threat to police or others was clearly established on December 31, 2008.

3. Whether a jury could find a police officer's slamming of a bystander into her garage door violated the Fourth Amendment where she was not suspected of any crime and did not threaten police, and whether her right in this regard was clearly established on December 31, 2008.

STATEMENT OF THE CASE

Appellants filed suit against Appellees Jeffrey Wayne Cotton and John C. Edwards and other defendants alleging that the shooting of Robert R. Tolan ("Robbie") by Bellaire police officer Jeffrey Cotton on December 31, 2008 constituted excessive force under the Fourth Amendment, for which Appellees are liable under 42 U.S.C. § 1983. R. 14-42. They also alleged Cotton used excessive force in slamming Marian Tolan into a garage door. *See id*. Cotton and Edwards moved for summary judgment claiming qualified immunity, which the district court granted. R.E. 4. Bobby Tolan and Anthony Cooper do not appeal the judgment. Robbie appeals the judgment dismissing his claim of excessive force against Cotton for shooting him, while Marian Tolan appeals the judgment dismissing her claim of excessive force against Cotton for slamming her into a garage door. No party appeals the judgment dismissing claims against Edwards.

INTRODUCTION

Shortly before 2:00 a.m. on New Year's Eve, 2008, Bellaire police officer Jeffrey Cotton shot Robbie Tolan at close range while Robbie was on his knees on his own front porch. Cotton believed Robbie might have stolen the car he drove home in – a mistake caused by another officer's entering the wrong license plate number in a computer terminal. Robbie's mother, in her front yard in her pajamas, told Cotton the car was hers and Robbie was her son. But Cotton slammed her into a garage door, prompting Robbie to yell at Cotton and start to get up off the ground. Cotton then shot him in the chest. Cotton did all this within 32 seconds of his arrival at the Tolans' home. He claimed Robbie looked like he was reaching for a gun in his waistband, though Robbie was unarmed and made no sudden gestures toward or away from his waist. A state grand jury indicted Cotton but he was acquitted at trial. Robbie also brought a civil suit alleging excessive force, but the district court dismissed the case on summary judgment.

The district court's decision is wrong. A jury could find that shooting Robbie was objectively unreasonable and thus violated the Fourth Amendment. Initially, it could find Cotton was unreasonable to view Robbie as armed and dangerous such that virtually any movement he made would be met with gunfire. Cotton arrived at the Tolans' home suspecting

Robbie and his cousin of car theft, which certainly justifies approaching cautiously, but the elder Tolans immediately told him the car was theirs and the supposed thieves were actually their sons, who lived there. Cotton's apparent disregard of this entirely credible information is part of what led him to view Robbie as an armed threat and to react to his movements by shooting him, but a jury could find this to be unreasonable.

A jury could also conclude Cotton was unreasonable in firing when Robbie started to stand up. Viewing the facts favorable to Robbie, he did not jump up but merely pushed off the ground and started to rise. He did not make any gesture toward or away from his waist or any other "crazy movement," and only reached his knees. This is not inherently threatening, and case law confirms that when parties disagree whether a suspect was reaching for what could be a weapon, a jury should resolve the key factual dispute. Here, a jury could find Cotton simply overreacted.

Lastly, Robbie's Fourth Amendment rights in this situation were clearly established. The parties dispute the facts, not the meaning or applicability of long-settled law.

In all, Cotton nearly killed Robbie on his own doorstep with scant justification. Considering the havoc he wreaked in 32 seconds, a jury could find he was out of control. Robbie deserves to see his claim put to a jury.

STATEMENT OF FACTS

I. The Shooting of Robbie Tolan

The Tolan family has lived at their home at 804 Woodstock Drive in Bellaire, Texas for 15 years. R. 1517(8-9), 1465(23-24). At the time of the shooting, Robbie was 23 years old, his cousin Anthony was 20, and his father Bobby was 63. R. 2054(13-16), 2052(18-19). Bobby is a former major league baseball player for the Cincinnati Reds and other teams. R. 2053(4-23). Because Robbie's mother Marian is from Texas, they decided to settle in Bellaire after his baseball career. R. 2053(24) – 2054(4). Robbie starred on baseball teams at Bellaire High School and in college, played on minor league teams, and was living at home and working at a restaurant during the off-season. R. 16-17(¶¶18-20), 2517(4-9). Anthony lives with the Tolans, who consider him a son. R. 2054(5-12).

A. The Beginning of the Encounter: A Mistaken Investigation

Shortly before 2:00 a.m. on December 31, 2008, Robbie and Anthony were returning from a night out and stopped by Jack in the Box. R. 2420(17) – 2421(8). Robbie was driving his 2004 Nissan Xterra, a small SUV. R. 1194(9-11), 1923(9-11). Bellaire police officer John Edwards pulled out of a parking lot at 1:50 a.m. and drove behind the Xterra for a few seconds. R. 1089(6) – 1091(19). There had been several "vehicle

burglaries" the previous night. R. 1085(8-12).

Because Edwards thought Robbie made a sudden or sharp turn onto Woodstock, he stopped in the intersection and waited for Robbie and Anthony to get out of the Xterra, which had stopped in front of the Tolans' home. R. 1091(20) – 1092(22). When they didn't do so "immediately," which Edwards said he found suspicious, he turned down Woodstock, which dead ends in a cul de sac. R. 1093(2-23). In fact, Robbie and Anthony had gotten out of the car but Anthony "stuck his head back in and he was looking around for his wallet." R. 2424(25) – 2425(3).

As he drove by the parked Xterra on his right and kept his eye on Robbie and Anthony, Edwards also tried to read and type the Xterra's license plate number into his mobile data terminal using his other hand. R. 1095(1-15). Edwards incorrectly entered the number and the "computer gave an alert that [he had] run a stolen vehicle." R. 1096(23-24), 1942(6-12). "Normal procedure" required Edwards to "run the tag twice" to confirm the car truly matched one reported stolen, but Edwards did not perform the confirmation. R. 1943(4-14). Rather, he told his dispatcher he "ran a stolen plate" and parked his car and waited for back up. R. 1097(2) – 1098 (25), 2432(4-15).

Anthony and Robbie then began walking up the driveway of their

home with bags of food. R. 2432(16) – 2434(5). Edwards shined his car's spotlight on them, got out of the police car, pointed his gun and a flashlight at them, and said "police" and "come here or get over here [or] something to that effect." R. 1100(6) – 1101(14), 1947(14-22). He then told them to get down on the ground and said something indicating he thought the Xterra was stolen. R. 2434(22) – 2435(24).[3]

Anthony responded to Edwards by saying "that's not true," while Robbie said "that's my car." R. 1295(3-19).[4] Robbie "just kept asking [Edwards] why. Why?" and saying "No, sir this is my car. Sir this is my car. This is my house. I live here." R. 1926(9-11), 2073(13-15). It appeared to Robbie that Edwards "refused to listen." R. 1926(4). While the three spoke, Anthony did not get down as Edwards had ordered because he believed he had done nothing wrong. R. 1305(11-23). Nor did Robbie immediately comply. R. 2545(1-6). But after a few seconds, Robbie did lie down on the front porch with his arms outstretched, his head facing the front door, and his feet toward the driveway. R. 1035(4-20), 2436(6-13).

B. Bobby and Marian Tolan Come Outside and Vouch for Robbie and Anthony

Approximately 15 seconds after Robbie and Anthony began walking

[3] A diagram of the scene at the Tolans' house appears at R. 1178.

[4] Edwards testified Robbie and Anthony responded to him with profanity. R. 1947(23) – 1948(1).

toward their front door, Marian and Bobby opened it and walked outside. R. 1295(20-24). They were in their pajamas. R. 2056(19). Bobby "heard Anthony or Robbie saying, they said we stole a car." R. 2058(2-3). Bobby told Robbie and Anthony to be quiet and get on the ground, and Anthony did so. R. 1300(14) – 1301(16), 1555(17-19). Robbie testified he was already lying down as instructed by Edwards when his parents came outside. R. 2436(6-13). Marian told Robbie to "shut up and do what they say." R. 1243(16-17), 1413(16) – 1414(5). The Tolans were not shouting. R. 1558(19) – 1559(15).

Bobby walked to Edwards with his hands up and said, "this is my nephew. This is my son. We live here. This is my house." R. 2059(17-21), R. 2075(7-11). Marian followed Bobby out of the house and said "sir this is a big mistake. This car is not stolen… That's our car." R. 2075(18-19). She was not "aggravated" but "in disbelief." R. 2075(21-22). As Anthony recalled, all four family members repeated "[t]he whole time we were out there… over and over": "It's our car. It's our house. We live here…. It's not stolen." R. 1299(10) – 1300(6). Edwards recognized that Bobby and Marian were trying to help by defusing the situation and gaining Robbie's and Anthony's compliance, though he said Marian later became agitated. R. 1952(16) – 1955(16). He did not see them as threats. *Id.*

Edwards ordered Bobby to move to a Chevrolet Suburban parked in the driveway and extend his arms spread eagle on the car, and Bobby complied. R. 2059(17) – 2060(5), 2075(13-14). Edwards asked if Bobby had any weapons; he said he did not. R. 1562(16-25). They talked calmly. R. 1564 (22) – 1565(1).

When Bobby and Marian went outside, their porch, driveway and front yard were illuminated by a gas lantern on a lamppost in the yard and two motion-activated floodlights over their garage, R. 1552(8-11), 1034(14-16), 2496(11) – 2497(18), in addition to the light given off by Edwards's car's spotlight and his flashlight. Bobby denied that the lantern is "probably more decorative than illuminating" and testified that it enables one to see whether there are people in the front yard, "within reason." R. 1552(15) – 1553(6). Some light was on the porch. R. 2497(13-18).

Cotton received Edwards's report and went to provide back up. R. 1020(19) – 1021(2). He did not consider it an "emergency call" and was not in an "unusual hurry." R. 1020(19-22). On the way, he heard Edwards ask "can you guys step it up," which Cotton took to mean "I need help now." R. 1026(16-20). Cotton then thought Edwards was "in a dangerous situation" and perceived "tension" in his voice. R. 1027(4-9).

Cotton arrived at the Tolans' home at 1:53 a.m., about one and a half

minutes after Edwards. R.E. 4 (R. 2632). He got out of his car, drew his gun, went to Edwards and asked, "What do you have, something to that effect." R. 1030(14) – 1031(13). Edwards said Robbie and Anthony "had gotten out of the stolen vehicle." R. 1031(15-19). Cotton testified that Robbie and Anthony were "laying on the ground complying with Officer Edwards' commands" at that point. R. 1031(20) – 1032(3). He also saw Marian and Bobby were in their "night clothes." R. 1033(12-13).

Cotton wanted to search and handcuff Robbie and Anthony but decided to get Marian "controlled" first. R. 1032(5-10). He approached Marian, who was talking to Edwards, and told her to "get against the wall." R. 2077(1-5). Cotton perceived her to be moving around in front of Edwards. R. 1030(2-4). She struck him as "very agitated" and "upset," while Marian testified she was not "aggravated" or "getting agitated" but "in disbelief." R. 1032(17-19), R.E. 7 (2075(20) – 2077(7)).

In response to Cotton's command, Marian said "Me? Are you kidding me? We've lived here 15 years. We've never had anything like this happen." R.E. 7 (R. 1465(22-25)). She also told Cotton "[t]hat car's not stolen." *Id*. (R. 1483(1-4)), R.E. 8 (1040(1-4)) (testifying Marian said "we live here, and what are you doing here, you shouldn't be here, and that's our car"). He understood the Tolans lived at the house and testified that Bobby

or Marian told him "that's my son." R.E. 8 (R. 1914(14-16), 1913(7-11)). Despite receiving this information, Cotton believed he "had no reason" to view Robbie as anything other than a car thief suspect, even after he shot him. *Id.* (R. 1068(22) – 1069(1)).

Cotton holstered his gun. R. 1042(3-4). He then grabbed Marian's right arm, walked her toward the garage door and slammed her into it. R.E. 7 (R. 1474(15-20), 1489(3-15)). Marian described the force Cotton used as "very hard," and the impact left substantial bruises on her arm and back days later. R. 2078(2) – 2079(23), 2089-91. The Tolans all heard a loud noise when Marian hit the door; as Anthony testified, "[i]t was a big bang and she slid down on her butt." R. 2035(17-24), 1928(21-22), 1567(24-25).

From his spot lying on the porch, Robbie turned his head to his left and saw Cotton grab his mother and slam her into the garage door. R. 1241(23), 1249(21-24). There was light on the porch and Robbie was "not in darkness" though it was lighter where Cotton and Marian were. R.E. 6 (R. 2497(13) – 2499(3)). By contrast, Cotton testified that the porch was "very dark." R. 1911(25). Seeing Cotton throw his mother into the garage door upset Robbie, R. 1249(16-19), who exclaimed, "get your fucking hands off my mom." R.E. 6 (R. 2499(17-24)). Robbie agreed this was an "aggressive statement" and that he probably had "an angry look" on his face

when he said it. R. 2500(2-10). His intention was "to tell [Cotton] to get his hands off my mom. I wasn't going anywhere." R.E. 6 (R. 2502(16-18)). He "was not screaming. They were just words." *Id*. (R. 2544(5-10)). Cotton testified Robbie yelled at him *before* he shoved Marian, and that he pushed her to get her out of the way and face Robbie, who had started to move. R.E. 8 (R. 1044(9) – 1046(15)).

As he yelled, Robbie also started to rise and turn toward Cotton and his mother. He pulled his arms back toward his chest and pushed up. R.E. 6 (R. 2494(22) – 2495(2)). "You're turning, you're pushing up with your hands, and turning towards your left," Robbie agreed. *Id*. (R. 2495(6-8)). He began to turn and stand up "pretty quickly" but testified that he did not "jump up off the ground." *Id.* (R. 2499(17-20), 2505(2)). Robbie "just simply got up. Started to get up." *Id*. (R. 2504(9-13). "I didn't run at him. I didn't jump up and make any crazy movements." *Id*. (R. 2544(3-4)). Cotton testified that Robbie did jump off the ground. R. 1057(20-21).

As Robbie rose, one of his hands was in the air, and he did not reach for anything with the other. R.E. 6 (R. 1929(20) – 1930(9)). As he averred:

> At the time I was shot, I was unarmed, I was on my knees, and I did not have anything in my hands. In the moments leading up to the shooting, I did not make any gesture towards or away from my waistband.

R.E. 5 (R. 2108(¶ 2)), R.E. 7 (2081(9-12)) (Marian testimony that Robbie

was on his knees when shot); R.E.6 (1930(9)) (Robbie testifying "I wasn't reaching for anything"). Contrary to Robbie's and Marian's testimony that Robbie was on his knees when Cotton shot him, Cotton and Edwards testified that Robbie was on both feet. R. 1051(25) – 1052(3), 1121(15-25).[5]

C. Cotton Shoots Robbie

When Robbie began to get up, Cotton drew his gun and fired three times. R. 2501(9-22), 1900(18-19). One shot hit Robbie in the chest. *Id*. Robbie and Marian testified that Cotton did not say anything before he fired, whereas Cotton testified he said "stop" or "no." R. 1061(14-17), 2080(21-23), 2019(15-17). Cotton testified that when he first looked at Robbie, Robbie was "already getting up, probably halfway up or so, and was turning to his right rotating with his face toward the window… to turn and look at [Cotton]." R. 1047(8-25).

According to Cotton, it "appeared that [Robbie] was drawing a weapon from his waistband." R.E. 8 (R. 1892(4-5)). He often found people carry guns in their waistbands. R. 1049(24) – 1050(2). Cotton testified Robbie was wearing a dark jacket or hoodie not tucked into his pants. R. 1049(17-23). At his criminal trial, Cotton testified that it seemed "like [Robbie] was digging in his waistband." R.E. 8 (R. 1911(10-17)), 1891(3-

[5] Edwards also testified that Robbie "appeared to be charging or rushing," "[l]ike fixing to take off." R. 1958(1) – 1959(1).

19). He further testified:

> Q. In front of this jury today you've testified that Robbie Tolan was digging in his waistband, correct?
>
> A. That's correct.
>
> Q. Have you ever said anything different?
>
> A. Well, I may have characterized it differently reaching into his waistband or something like that.

R.E. 8 (R. 1915(1-6)).

When deposed in this case, Cotton testified that he did not actually see Robbie reaching into his pants and that his use of "like" in the phrase "like he was digging in his waistband" meant only that "his hand was in that area": "I don't mean that to mean, though, that he was reaching down inside of his pants necessarily. That's not – that wouldn't be accurately what I saw." *Id*. (R. 1891(21) – 1892(2)). Instead, he testified that Robbie's right hand was simply "at his waistband," "in the middle of his waist," or "in the center of his body." *Id*. (R. 1890(7-13)). Then he testified:

> Q. Was his hand outside of his clothing or inside of his clothing?
>
> A. *Oh, I don't know that I could see his hand specifically*. I could see where his hand was, but, you know, his clothing was probably covering his hand. It was dark. I could see his total movement, which is what made me believe that it wasn't necessarily just where his hand was, for instance.

> Q. But you know he was – he had his hand in the vicinity of his waistband?
>
> A. That's correct.

Id. (R. 1892(6-16)) (emphasis added). Cotton did not see Robbie's left hand at all. *Id*. (R. 1890(8)).

Cotton testified that he was in fear for his life when he shot Robbie. Asked why, he explained: "It wasn't any one thing. It was the totality of everything that was happening that put me in fear, which included the way he was getting up and where his hand was and – while he was getting up." R. 1052(24) – 1053(2).

Two minutes elapsed between when Edwards reported that Robbie and Anthony left the Xterra and when Cotton shot Robbie. R. 1164. Cotton was on the scene approximately 32 seconds before he fired. R. 1190(14) – 1191(3), 1493(6-9). By that time, other officers had arrived. R. 1577(17-22). After Cotton shot Robbie, he went to him, checked him for weapons, and asked what he was reaching for. R. 1899(5-13). He then called for an ambulance. R. 1900(9-10). Anthony was handcuffed and put in a police car, Bobby was walked at gunpoint to a second car, and Marian was placed in a third. R. 2083(17) – 2084(21). Marian was praying for Robbie but was told to be quiet. R. 2084(7-12). At one point Bobby saw an "officer walk by. I'm banging on the door and the window saying can I talk to somebody

and she just looked at me and continued to walk by." R. 2062(21) – 2063(1). The Tolans were forced to remain in the police cars for 45 to 75 minutes while their son's life hung in the balance, though they were never charged with any offense. R. 2084(20-21), 2063(16-17). After the shooting, Edwards checked the license plate again through a dispatcher and learned the Xterra was not stolen but registered to 804 Woodstock. R. 1988(13) – 1989(8).

When the ambulance arrived and Robbie was wheeled into it, he heard Cotton tell other officers, "we need to get our stories straight." R.E. 5 (R. 2109(¶ 5)). Cotton denies saying this. R. 1902(19-24). The bullet that struck Robbie hit his chest, collapsed his right lung, and entered his liver. R.E. 5 (R. 2108(¶ 3)). He was taken to a hospital and rushed into emergency surgery, where doctors were able to save his life. *Id.* (R. 2109(¶ 6)). They could not remove the bullet, though, which remains lodged in his body. *Id.*

II. Litigation in the District Court

A Harris County grand jury indicted Cotton for aggravated assault for shooting Robbie. *See State of Texas v. Jeffrey Cotton*, No. 1210528, District Court of Harris County, Texas, 232nd Judicial District; R. 1906. A jury acquitted him on May 11, 2010. *See id.* The Tolans filed this case on May 1, 2009. R. 14. Robbie alleged that the shooting violated the Fourth

Amendment's proscription of excessive force, while Marian alleged that Cotton's throwing her against the garage door did likewise. R. 31-35. *Id*. The Tolans also alleged other federal and state claims against Cotton, Edwards, and other defendants. R. 14, 28-41.

Following discovery, Cotton and Edwards moved for summary judgment on the basis of qualified immunity, which the district court granted. R.E. 4. Dismissing Robbie's excessive force claim, the court held that factual disputes about whether Cotton had been consistent in his description of how Robbie moved his hands, how Robbie was "vertically situated" when he was shot, and whether Robbie was reaching for something near his waistband were not material to the reasonableness of the shooting. *Id.* (R. 2667-76). The court also highlighted what it regarded as the dangerousness of the setting, including that the atmosphere was tense, Cotton was new on the scene, Marian was supposedly "being disruptive," and Cotton was told Robbie and Anthony "were suspected of felony automobile theft." *Id*. (R. 2675). The court further cited the testimony of two defense experts who opined on officers' reaction time, the nature of police training, and the reasonableness of Cotton's actions. *Id.* (R. 2677-79). The court also dismissed Marian's excessive force claim. *Id.* (R. 2663-66).

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment on the basis of qualified immunity. First, a jury could find Cotton violated Robbie's Fourth Amendment rights by shooting him. Cotton could not legally shoot Robbie unless it was objectively reasonable to believe he posed a serious danger. But Cotton unreasonably disregarded plentiful information apparent from the scene and directly provided by the Tolans that Robbie was not an armed threat. They told him the Xterra was not stolen, Robbie and Anthony lived at the house, and they were the Tolans' children. Unless Cotton had reason to suspect Robbie was armed and reaching for a weapon, shooting him was objectively unreasonable. Here, critical evidence Cotton seems to have ignored reasonably undermined any such belief. *See* Point II(A)(2), *supra*.

A jury could also find Cotton overreacted to Robbie's simple motion of beginning to stand up. Viewing the facts in Robbie's favor, he yelled at Cotton but then merely began to rise from the ground. He did not jump up, made no "crazy movements," and did not gesture toward or away from his waist. Moreover, a jury could find that since Robbie did not make any motions akin to reaching for a gun, he did not *appear to do so* either. Nearly every aspect of what Robbie was doing when he was shot is contested by the parties. Summary judgment on the issue of whether he reasonably appeared

dangerous was therefore erroneous. *See* Point II(A)(3), *supra*.

Robbie's right to be free of deadly force in this encounter was also clearly established. It has been settled for decades that using deadly force against someone who does not reasonably pose a serious threat transgresses the Fourth Amendment. What is unclear in this case are the facts, not the law. *See* Point II(B), *supra*.

Finally, the district court also erred in dismissing Marian's excessive force claim. She testified she was not disruptive but that Cotton slammed her into the garage door anyway, causing Robbie to yell and start to stand. She suffered pain and lasting bruises. Cotton contests these facts, but if a jury believes Marian, there could be no justification for Cotton's actions, which caused more than *de minimus* injury. *See* Point III, *supra*.

ARGUMENT

I. This Court's Review is De Novo

The Court "reviews a grant of summary judgment de novo, applying the same standard as the district court," and will "view all disputed facts and inferences in the light most favorable to the non-movant." *Rockwell v. Brown*, 664 F.3d 985, 990 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2433 (2012). Because excessive force cases are so individualized and fact-intensive, courts have recognized that summary judgment in this setting is

"frequently inappropriate." *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 520 n. 4 (7th Cir. 2012); *accord Sova v. City of Mount Pleasant*, 142 F.3d 898, 902 (6th Cir. 1998).

II. The Court Erred in Granting Summary Judgment on Robbie's Excessive Force Claim

Cotton's assertion of qualified immunity raises two questions: "(1) whether [his] conduct violated a constitutional right of the plaintiff, and (2) whether that right was clearly established at the time of the violation." *Rockwell*, 664 F.3d at 990. These are considered in turn.

A. A Jury Could Find the Shooting Was Objectively Unreasonable and Therefore Violated Robbie's Fourth Amendment Rights

1. Legal Principles Defining Excessive Force

Robbie's excessive force claim is judged according to the Fourth Amendment's "objective reasonableness" standard. *See Graham v. Connor*, 490 U.S. 386, 388 (1989). Thus, a plaintiff alleging excessive force must show "(1) an injury (2) which resulted from the use of force that was clearly excessive to the need and (3) the excessiveness of which was objectively unreasonable." *Rockwell*, 664 F.3d at 991.

"An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others." *Id.*

(quoting *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)). The inquiry is objective; the officer's actual intentions or motivations are irrelevant. *See Graham,* 490 U.S. at 397. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The investigation into objective reasonableness should be wide-ranging, accounting for all factors giving rise to the use of force: "In analyzing the reasonableness of the specific use of force, courts must consider *the totality of the circumstances* surrounding the officer's decision." *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012) (emphasis added); *accord Tennessee v. Garner,* 471 U.S. 1, 8 (1985).

2. A Jury Could Find Cotton Was Unreasonable in Regarding Robbie as an Armed Threat

Before focusing on the moment Robbie was shot, it is essential to consider the totality of the circumstances that led Cotton to assume Robbie posed a threat to him in the first place – in this case, because he must have been reaching for a gun. *See Elizondo,* 671 F.3d at 510. The shooting cannot be justified unless Cotton was reasonable in assuming Robbie had a

weapon he was pulling from his belt. For example, if Robbie had been searched and found unarmed before acting as he did on the porch, there could be little doubt that shooting him in otherwise the same circumstances would be unreasonable.

Both the district court and Cotton recognized the critical nature of the circumstances surrounding the shooting in contributing to Cotton's purportedly reasonable belief that Robbie should be treated as an armed threat. The court repeatedly emphasized that the situation was "dangerous and uncertain," and "tense." R.E. 4 (R. 2664, 2675). It noted that Cotton was new to the scene and that Robbie and Anthony "were suspected of felony automobile theft." *Id.* (R. 2675). Cotton likewise maintains that it was not merely Robbie's physical actions that led him to fear for his life, but all the surrounding circumstances:

> [I]t's everything together, I couldn't give a – like a list that would say all of these different things, because there's all sort of factors that you're kind of analyzing and – and seeing and stuff as you go along. So I really – I couldn't – I couldn't say that this list is an all inclusive list of – of what made me feel that way.

R.E. 8 (R. 1053(17-25)). The location of Robbie's hand was only one facet of the encounter that made him feel endangered. R. 1056(7-8) ("along with a lot of other things that was one of the factors, yes"). It was also only one element that led him to think Robbie was reaching for a weapon: "Well, not

in and of itself, I mean, there – everything together made me believe that, yes. That was one of the things." R. 1056(16-18).

Yet a jury could find that Cotton was unreasonable in assessing the overall situation and regarding Robbie as so likely to be an armed and dangerous criminal that shooting him when he began to stand was appropriate. Cotton arrived on the scene believing Edwards was investigating car theft and that Robbie and Anthony were the suspects. And the Tolans certainly concede that car thieves are sometimes armed and violent and that officers are generally justified in approaching them that way.

But even at this initial stage of the encounter, there was no *specific* information Robbie was armed or even that he had stolen the Xterra, as opposed to, say, having bought or borrowed it from whomever did. *See, e..g*, *Carnaby v. City of Houston*, 636 F.3d 183, 188 (5th Cir. 2011) (reasonableness of officers' fear that suspect about to use gun based in part on knowledge he had handgun license). Car theft is not an inherently violent crime, and calling Robby a possible "felon" adds little to the analysis. *See, e.g., Garner*, 471 U.S. at 14 ("untenable" to assume "a 'felon' is more dangerous than a misdemeanant"). The bare knowledge that the Xterra was stolen could only reasonably have caused some intermediate level of

suspicion that Robbie had a weapon. *See, e.g., Bougess v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007) (general police knowledge that crack dealers usually carry guns no substitute for "particularized and supported sense of serious danger about a particular confrontation"); *Couden v. Duffy*, 446 F.3d 483, 497 (3rd Cir. 2006) (no reason to believe intruder armed though he was suspected of burglary, drug and weapons offenses).

More importantly, a jury could conclude that any reasonable suspicion Cotton might have had that Robbie was armed and that the situation was inherently perilous should have eased considerably or been dispelled altogether once he encountered Marian and Bobby. Marian and Bobby are late middle aged. They were in their pajamas. There was no basis to believe Marian and Bobby were car thieves or somehow involved in any crime, and nether Cotton nor Edwards has ever articulated any such suspicion. They were actually trying to help the police, as Edwards acknowledged. Cotton claims Marian was agitated and disruptive but Marian denied that; thus, a jury could find she was merely attempting to talk to officers and clarify the situation. R.E. 7 (R. 2077(6-7)) (Q: Are you getting agitated by this point [when talking to Cotton]? A: No. I was still in disbelief").

Above all, there is the information Marian directly communicated to Cotton. She told him: "We've lived here 15 years. We've never had

anything like this happen." *Id.* (R. 1465(22-25)). She told Cotton the Xterra was not stolen. *Id.* (R. 1483(1-4)), R. 1040(1-4). Cotton testified he fully understood the Tolans lived at the house and that Bobby or Marian told him "that's my son." R.E. 8 (R. 1914(14-16), 1913(7-11)). Thus, the aged sixty-ish homeowners in their pajamas, startled by the police visit at 2:00 a.m., told Cotton that the car he thought was stolen belonged to them, that the suspected thieves were their sons, and that they lived there. These entirely credible and non-threatening homeowners vouched for the supposedly dangerous car thieves.

All of this is obvious, powerful evidence bearing on whether it was reasonable to assume Robbie was armed and dangerous, and therefore to feel it necessary to shoot him when he simply began to stand up. Cotton may have arrived reasonably believing the suspects should be approached as typical car thieves, but he quickly obtained persuasive new data indicating otherwise by surveying the scene and hearing from plainly credible bystanders. He could not reasonably ignore this information in deciding how to deal with Robbie. Yet despite all he learned on the scene before firing, Cotton still believed he "had no reason" to see Robbie as anything other than a car thief suspect, even after shooting him. R.E. 8 (R. 1068(22) – 1069(1)). A jury could find this was patently unreasonable. *See, e.g., Ngo*

v. Storlie, 495 F.3d 597, 603 (8th Cir. 2007) (officer's failure to "take an extra moment to assess the situation adds to the unreasonableness of [his] actions under the circumstances").

Case law confirms Cotton's unreasonableness in this regard. In *Phillips*, for example, officers learned of a drunken driver in a stolen Nissan. *See* 678 F.3d at 517. But after this initial report, they learned that the license plate might belong to another car. *See id.* at 517-18. Nonetheless, when officers located the Nissan, they conducted a "high risk traffic stop" and fired a baton launcher to force the driver out. *See id.* The court found this unreasonable based on the updated information officers received:

> The conflicting information officers received could cause legitimate confusion, but at a certain point continuing confusion becomes objectively unreasonable. After the officers made the initial determination that they were dealing with a car theft, they appear to have had difficulty acknowledging subsequent information challenging their assumption…. It is not objectively reasonable to ignore specific facts as they develop (which contradict the need for this amount of force), in favor of prior general information about a suspect.

Id. at 523 (quotation omitted). Other decisions further illustrate that the reasonableness of force necessarily changes as new facts indicate suspects are less dangerous than originally thought. *See, e.g., Cyrus v. Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) ("a jury might reasonably conclude that the circumstances of the encounter here reduced the need for force as the

situation progressed"); *Smoak v. Hall*, 460 F.3d 768, 781 (6th Cir. 2006) ("Even if [officers] initially had a reasonable basis to believe that the Smoaks were armed and dangerous, these fears should have been dispelled much more quickly").

In sum, Cotton could only reasonably have shot Robbie if his belief that Robbie was armed and dangerous was reasonable, but a jury could find it was not. This is not to say the situation lacked tension or that the officers should have stopped investigating or left the scene – only that factfinders could conclude the overall circumstances greatly diminished any threat Robbie initially might have represented. The totality of the circumstances at issue argues strongly for Robbie's claim proceeding to trial.

3. A Jury Could Find Cotton Was Unreasonable in Reacting to Robbie's Movement by Shooting Him

Jurors could also conclude Cotton's reaction to Robbie's beginning to stand up was excessive. Viewing the facts in Robbie's favor, he yelled "get your fucking hands off my mom" after Cotton threw Marian into the garage door and Robbie began to stand. He did not jump up, made no sudden or rapid movements with his hands, and did not gesture toward or away from his waist. Yet Cotton shot him in the chest while he was halfway up and on his knees. Because there is a factual dispute as to whether it would be

objectively reasonable to think Robbie's movements endangered Cotton, summary judgment is improper.

a. Several Key Facts Are Disputed

The parties contest much about what happened at the moment Cotton shot Robbie. First, the parties dispute how well Cotton should have been able to see what Robbie was doing. Cotton testified that it was "very dark" on the porch. R. 1911(25). But the scene was illuminated by a gas lantern and two floodlights, R. 1552(8-11), 1034(14-16), R.E. 6 (2496(11) – 2497(18)), and Robbie was "not in darkness" because some light was on the porch. R.E.6 (R. 2497(13-18), 2498(24) – 2499(3)). The greater the visibility, the less Cotton could have reasonably misinterpreted Robbie's movement as threatening or seen him to be gesturing for his waist when he actually wasn't.

Second, the parties dispute whether Cotton warned Robbie. Warnings must be given to suspects before shooting them when feasible. *See Garner*, 471 U.S. at 11-12. Here, a jury could find a warning was feasible precisely because Cotton claims he actually gave one – telling Robbie "stop or no" before he fired – though he described this statement as "more of an automatic response" than an intentional warning. R. 1061(14-17), 1062(8-13); *see, e.g., Hemphill v. Schott*, 141 F.3d 412, 417-18 (2d Cir. 1998)

(denying summary judgment, noting disputed issue of warning, and observing that officers claimed they gave warning rather than denying feasibility). Yet Robbie and Marian testified Cotton "didn't say a word" before firing. R. 2080(21-23), 2019(15-17). Robbie had earlier been told to get on the ground, but this was a command, not a warning. Nothing said to Robbie by anyone offered an inkling that merely starting to stand up would cause him to be shot.

Third, the parties contest how Robbie turned and rose. Edwards testified Robbie was up, poised to move toward Cotton, and "appeared to be charging or rushing." R. 1958(1) – 1959(1). Cotton testified Robbie jumped off the ground. R. 1057(20-21). Both claimed Robbie was on his feet. R. 1051(25) – 1052(3), R. 1121(15-25). But Robbie described a very different motion: drawing his hands to his chest area, pushing up, and turning. R.E. 6 (R. 2494(18) – 2495(8)). While he moved "pretty quickly," he did not "jump up off the ground." R. *Id.* (2499(17-20), 2505(2)). As Robbie testified, he "just simply got up. Started to get up." *Id.* (R. 2504(9-13)). "I didn't run at him. I didn't jump up and make any crazy movements." *Id.* (R. 2544(3-4)). And he only made it to his knees. R.E. 5 (R. 2108(¶ 2)). Cotton testified Robbie was "probably halfway up or so" when he fired. R. 1047(10-12). Thus, Robbie had not bolted up, was not on

his feet, and was not about to charge forward.

Finally, the parties sharply dispute how Robbie's hands appeared. Cotton has given inconsistent testimony on the subject. At his criminal trial, he testified:

- it was like Robbie was digging in his waistband,
- he agreed he testified that Robbie was digging in his waistband,
- he may previously have characterized Robbie's movement as "reaching into his waistband or something like that."

R.E.8 (R. 1911(17), 1915(1-6). But in this case he disavowed the notion that he saw Robbie "digging" or "reaching" into his waistband. He testified only that Robbie's hand was – to quote the formulations most favorable to Robbie – at "the center of his body" or perhaps only "in the vicinity" of his waist. *Id*. (R. 1890(12-13), 1892(17-19)). To compound the confusion, Cotton also conceded he was not even sure he could actually "see [Robbie's] hand specifically" because "his clothing was probably covering" it and "[i]t was dark." *Id.* (R. 1892(11-14)). Still, despite the supposed darkness, he claimed he could see Robbie's "total movement," so that "it wasn't necessarily just where his hand was." *Id.* (R. 1892(14-16)).

Whether Cotton saw Robbie digging in his waistband, saw Robbie's hand somewhere in the vicinity of his waist, or did not see his hand at all but relied on Robbie's overall movement is a vitally relevant question to his

credibility and whether his testimony can possibly establish the threatening nature of Robbie's actions as a matter of law. As the Fourth Circuit put it in an excessive force case where the officer attempted to support his summary judgment motion with inconsistent accounts: "Viewing the facts in the light most favorable to [the plaintiff], we do not give substantial weight to Deputy Keller's inconsistent testimony." *Jones v. Buchanan*, 325 F.3d 520, 528 n. 4 (4th Cir. 2003); *accord Valladares v. Cordero*, 552 F.3d 384, 390 n. 2 (4th Cir. 2009) ("Whether [party] contradicted himself to the point of discrediting his testimony is a question for a trier of fact to decide"); *Wilson v. City of Des Moines*, 293 F.3d 447, 454 (8th Cir. 2002); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996) (denying summary judgment and noting officer "offered inconsistent statements on the crucial question of whether he saw Dickerson point his gun at McClellan"); *Bell v. Dow Chemical Co*., 847 F.2d 1179, 1186 (5th Cir. 1988) (same in antitrust case). The district court was wrong to discount Cotton's obvious inconsistency on this essential point. R.E. 4 (R. 2673-74).

In contrast to Cotton's shifting accounts about Robbie's appearing to reach for a weapon, Robbie testified flatly that he "did not make any gesture towards or away from my waistband." R.E. 5 (R. 2108(¶ 2)), *see also* R.E. 6 (R. 1929(20-23), 1930(9)) ("I wasn't reaching for anything"). He did not

"make any crazy movements." *Id.* (R. 2544(3-4)). When pushing himself off the ground, his hands were somewhere near his chest area, *id*. (R. 2494(18-21)), and then he was on his knees when he was shot. One of his hands was in the air. *Id*. (R. 1929(20-23), 1930(9)).[6]

b. <u>The Disputed Facts are Material and, Viewed in Robbie's Favor, Preclude Summary Judgment</u>

These four factual disputes are unquestionably material to whether the shooting was objectively reasonable and preclude summary judgment. *See, e.g, Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001) ("deciding what occurred when deadly force was employed obviously will control whether the Trooper's conduct was objectively reasonable*;* therefore, those facts are material" (emphasis removed)). If a jury finds that the porch was adequately lit, that no warning was given though one was feasible, that Robbie did not jump up but simply started to turn and stand and was shot on

[6] Cotton objected to Robbie's testimony in an affidavit given after his deposition that he did not reach toward or away from his waistband, R.E. 4 (R. 2108(¶ 2)), arguing that it contradicted his deposition testimony that he used his hands at the level of his chest or midsection to push himself off the ground. R. 2270-71. The court sustained the objection. R. 2570. However, it credited Robbie's testimony that he did not reach for his waistband, R.E. 4 (R. 2673) ("Robbie Tolan testified that he did not reach for his waistband area"), but found that fact to be non-material. *Id*. (R. 2675) ("The fact that Robbie Tolan did not reach for his waistband area is not material…"). The court may have been relying on Robbie's identical testimony at Cotton's criminal trial that he did not reach for anything. R.E. 6 (R. 1930(9)). In any case, the court erred in sustaining Cotton's objection because Robbie's affidavit does not remotely contradict his deposition testimony. Using hands at chest-level to push up off the ground is not the same as reaching for a waistband.

his knees, and that he did not make any sudden movements toward or away from his waistband, it could conclude that shooting him was excessive. These facts do not compel the conclusion as a matter of law that a "split-second" application of deadly force was necessary to save Cotton's life.

Moreover, Robbie's testimony that he did not make any gesture toward or away from his waistband would allow a jury to conclude that he did not reasonably *appear to be making* any such gesture, either. A jury is not obligated to find that the push-up movement Robbie made with his hands near his chest in order to stand looked anything like suddenly reaching for a gun. In addition, Cotton testified that he shot Robbie when he was probably halfway up, which a jury could find was after he moved to push himself up off the ground in any case. R. 1047(10-12). If a jury could find that Robbie did not appear to be drawing a weapon from his waistband, little remains of Cotton's justification for shooting Robbie. Suspects cannot be fair game for deadly force simply for having their hands in the general vicinity of some part of their body where a weapon could be hidden. After all, guns and knives can be concealed in socks or boots, leg holsters, waistbands, pants pockets, vest pockets, jackets or coats, and perhaps still other places – in other words, virtually all over the human body. Without the appearance of some threatening gesture, Robbie cannot reasonably be

considered to have endangered Cotton as a matter of law.

Robbie did exclaim "get your fucking hands off my mom" as he began to rise, R. 1928(23), but he "was not screaming" at Cotton and the outburst is perhaps at least somewhat extenuated by Cotton's slamming his mother into the garage door. R.E. 6 (R. 2544(5-10)). Though Robbie should have stayed silent or at least avoided profanity, coarse language and insolence are not shocking to police. They do not justify deadly force any more than most curses to an officer signal impending violence. *See, e.g, Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012) (suspect asking "Why was you talking to Mama that way?" was "potentially confrontational" but not an "overt threat"); *Vinyard v. Wilson*, 311 F.3d 1340, 1347-48 (11th Cir. 2002) (suspect's screaming at officers a nuisance but not threatening); *Bauer v. Norris*, 713 F.2d 408, 412 (8th Cir. 1983) ("The use of any force by officers simply because a suspect is argumentative, contentious, or vituperative is not to be condoned" (quotation omitted)).

There have been several decisions where "this court has upheld the use of deadly force where a suspect moved out of the officer's line of sight and could have reasonably been interpreted as reaching for a weapon." *Carnaby*, 636 F.3d at 188 (quotation omitted). In *Carnaby*, the suspect was stopped by police, reached down for 2-3 seconds while officers could not see

his hands, and began to get out of his car while moving his hands around toward an officer and holding something. *See id.* at 186, 188. In *Manis*, the suspect repeatedly reached underneath his car seat, appeared to retrieve an object, and began to straighten up. *See* 585 F.3d at 842. In *Ontiveros v. City of Rosenberg*, the suspect was mostly out of view around a corner and was then seen to be reaching into a boot for what could have been a weapon. *See* 564 F.3d 379, 381 (5th Cir. 2009). In *Reese v. Anderson*, the suspect violated officers' instructions to raise his hands and repeatedly reached down in his car below the officer's line of sight, at one point tipping his shoulder and reaching further than before. *See* 926 F.2d 494, 500-01 (5th Cir. 1991). And in *Young v. City of Killeen*, the suspect reached down to the seat or floorboard of his car, leading the officer to conclude he was retrieving a gun. *See* 775 F.2d 1349, 1350 (5th Cir. 1985).

In all these cases, there was no factual dispute that the suspect was reaching for something out of the officer's view or at least made a rapid hand gesture that could be interpreted that way. In each case, the suspect was killed and therefore could not offer evidence that he actually made no such questionable movement at all.[7] This case is markedly different.

[7] *See, e.g.*, *Carnaby*, 636 F.3d at 184 n. 1 (facts primarily discernable from police videos); *Manis*, 585 F.3d at 844 ("the Appellees do not dispute… that Manis reached under the seat of his vehicle and then moved as if he had obtained the object he sought"); *Ontiveros*, 564 F.3d at 383 ("Lt. Logan is the only witness to those events immediately

Robbie survived and has testified that he did not reach for anything, make any gesture toward or away from his waistband, or make any "crazy movements." He was never out of Cotton's view. By contrast, Cotton claims precisely that he perceived Robbie to be making a move toward his waist and construed the hand gesture to be the drawing of a weapon. These are diametrically opposed accounts, and if a jury believes Robbie it could also necessarily find that no reasonable officer would have perceived him to be reaching for anything or moving to pull a gun.

When the plaintiff in a shooting case has been able to offer evidence disputing the officer's account that the suspect made a motion akin to drawing or preparing to use a weapon, courts have denied summary judgment. Thus, in *Reyes v. Bridgwater*, police entered the suspect's home and, according to one officer's testimony, saw the suspect become more aggressive, throw a cigarette butt at officers, step forward, and raise a knife. *See* 362 Fed. Appx. 403, 405, 2010 WL 271422 at * 1 (5th Cir. 2010). The suspect's family members testified that he did not step toward officers or raise his knife. *See id.* One factor that persuaded this Court to reverse summary judgment for the officer was the factual dispute about whether the

surrounding the shooting"); *Reese*, 926 F.2d at 499-501 (adopting officers' account of suspect's actions because plaintiff's sole summary judgment evidence was eyewitness's deficient affidavit); *Young*, 775 F.2d at 1352 (noting district court's factual finding after trial that suspect moved back into his car as if to get something).

suspect made the "'threatening gesture (or motion)" described by the officer as justification for the shooting. *See id.* at 407, * 3.

Similarly, in *Cunningham v. Gates*, officers pursued a man they mistakenly believed to be an armed robbery suspect (Smith) and blocked his path on a residential street. *See* 229 F.3d 1271, 1279 (9th Cir. 2000). Officers yelled "freeze" and testified "they shot at Smith only after he moved his hand toward his waistband as if reaching for a gun." *Id.* at 1279. But because the suspect testified he made no such movement, the court upheld the denial of summary judgment:

> Defendants argue that the SIS officers who shot Smith reasonably mistook him for the fleeing suspect who they knew to be armed. Defendants also argue that they shot only after Smith moved his hand towards his waistband as if reaching for a gun. Smith claims that he made no threatening movements. Given this factual dispute, the shooting officers are not entitled to qualified immunity.

Id. at 1288-89.

In *Wilson*, two officers confronted a suspect in a field after he fled. *See* 293 F.3d at 449. They testified the suspect had his right hand hidden in a coat and ignored orders to show his hands and a warning he would be shot if he did not lie down. *See id.* at 451-52. One officer testified he then saw the suspect turn and extend a gun out with both hands, while the other testified he saw the suspect reach into his waistband and assume a shooting

stance. *See id*. at 452-53. However, because the officers' testimony was inconsistent both internally and between their two accounts; because an expert questioned the shooting since the officers made a decision "based on something they thought they saw but, in actuality, did not;" and because plaintiff offered "some physical evidence inconsistent with the defendants' account of the incident," the court of appeals upheld the district court's denial of summary judgment. *See id.* at 453-54.

Curry v. City of Syracuse is analogous. *See* 316 F.3d 324 (2d Cir. 2003). There, the officer testified that he tackled the suspect and that, in their ensuing struggle, the suspect repeatedly reached for his sock, leading the officer to think he was grabbing a weapon. *See id.* at 327-28. The officer clubbed the suspect. *See id.* Because the suspect denied reaching for his socks, however, the court affirmed the denial of summary judgment:

> The record contains a sworn statement from Curry that he never reached for his sock. If a jury believed Curry's testimony, and disbelieved Lynch's on this point, the jury reasonably could find that it was not reasonable for Lynch to believe that Curry had a weapon. If Lynch could not reasonably have believed that Curry had a weapon, then we cannot say that, as a matter of law, Lynch's hitting Curry in the head approximately ten times with his police radio was not excessive force. Summary judgment on this claim is not appropriate, as Curry's deposition testimony raises a genuine issue of material fact as to whether Curry reached for his sock.

Id. at 333-34.

Likewise, in *Ribbey v. Cox*, the officer who shot the suspect testified that, after his partner smashed the passenger window of the suspect's car, the suspect raised his hands as ordered but then lowered them again, turned to his left, and reached toward the car's console, prompting the policeman to fire. *See* 222 F.3d 1040, 1042-43 (8th Cir. 2010). Based on an affidavit given by another passenger in the car, the plaintiff argued that the suspect's movement was a reflexive reaction to the breaking glass rather than a lunge for a weapon. The court of appeals therefore affirmed the denial of summary judgment. *See id.* at 1043. Many other decisions also deny summary judgment in light of factual disputes about whether suspects reached for weapons or made other similar threatening gestures.[8]

Finally, it is significant that summary judgment necessarily rests on Cotton's testimony that Robbie's hands were somewhere in the vicinity of his waist or midsection and appeared to be drawing a gun, and that he had to make a split-second choice to save his life. Because Cotton is an interested

[8] *See, e.g., Jefferson v. Lewis*, 594 F.3d 454, 461-62 (6th Cir. 2010) (dispute over whether suspect pointed object thought to be gun toward officer or merely gripped a doorknob); *White v. Gerardot*, 509 F.3d 829, 834-35 (7th Cir. 2007) (dispute over whether suspect's hands were at waist motioning as if reloading a gun); *Howser v. Anderson,* 150 Fed. Appx. 533, 2005 WL 2673521 at * 5 (6th Cir. 2005) (dispute over whether suspect's hands were visible and suspect was trying to get up or turn over); *Hemphill*, 141 F.3d at 417-18 (dispute over whether suspect "made ambiguous motions rather than putting his hands up"); *Dickerson*, 101 F.3d at 1163-64 (dispute over whether suspect had hands at his side or pointed gun at officer); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (dispute over whether suspect picked up gun and raised it), *cert. denied*, 506 U.S. 972 (1992).

witness, his testimony in support of his own summary judgment motion is questionable. *See Reeves v. Sanderson Plumbing*, 530 U.S. 133, 151 (2000) (evidence supporting non-movant must come from disinterested witnesses). The rule discounting interested witness testimony on summary judgment has been repeatedly applied in excessive force and other cases. *See, e.g., Hudspeth v. City of Shreveport*, 270 Fed. Appx. 332, 334-335, 2008 WL 749547 at ** 2-3 (5th Cir. 2008) (excessive force); *Flores v. Palacios*, 381 F.3d 391, 395 (5th Cir. 2004) (same); *Bazan*, 246 F.3d at 492 (same); *Thomas v. Great Atl. and Pac. Tea Co., Inc*., 233 F.3d 326, 329 (5th Cir. 2000) (dram shop and tort case).

Here, both the trial court and Cotton asserted that he and Robbie "are the only two people who can provide factual information regarding the observations Sergeant Cotton made, which led him to fire." R.E. 4 (R. 2667), R. 957 (Cotton's motion). While the Tolans disagree – other family members gave testimony relevant to objective reasonableness – this Court cannot credit Cotton's account that Robbie made movements resembling reaching for a weapon or that his hand was in the vicinity of his waist. Absent such evidence, Robbie's testimony describing his yelling and then simply beginning to stand provides no basis to conclude he posed an apparent and imminent threat to Cotton's life as a matter of law.

4. Cotton's Experts Do Not Bolster His Case for Summary Judgment

The district court relied in part on two expert witnesses offered by Cotton, but neither provides adequate support to the decision. First, the district court cited Albert Rodriguez's testimony that an officer in these circumstances "could have had a reasonable belief that deadly force was immediately necessary," and that "based on how law enforcement officers are trained" someone rising from a prone position and turning would have his hands "very close to the waistband area." R.E. 4 (R. 2677) (quoting Rodriguez testimony). There are innumerable reasons why summary judgment cannot be founded on Rodriguez's testimony.

Initially, Rodriguez's conclusion that Cotton was objectively reasonable exceeds the bounds of proper expert testimony by reaching the ultimate issue in the case and invading the province of the factfinder. In *Gutierrez v. City of San Antonio*, this Court analyzed testimony from *this same expert (Rodriguez)* that hog-tying the plaintiff was reasonable considering officers' training and that case's circumstances. *See* 139 F.3d 441, 447 (5th Cir. 1998). The Court held that "an expert's opinion does not establish reasonableness as a matter of law, especially when directly contradicted by another expert's well-supported opinion" (Gutierrez also proffered expert testimony). *Id*; *accord Thompson v. City of Chicago*, 472

F.3d 444, 454 (7th Cir. 2006) (jury "in as good a position as the experts to judge whether the force… was objectively reasonable"); *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991). An expert like Rodriguez may supply information relating to reasonableness that is beyond the ken of laypeople, but his opinion on whether a shooting should or should not be deemed objectively reasonable carries no weight.

Next, the passages of Rodriguez's testimony quoted by the district court illustrate that his opinions rest almost entirely on "how Texas police officers are trained." R.E. 4 (R. 2677) (quoting Rodriguez testimony). Virtually every paragraph of his report refers to officer training and he discusses Texas state "TCLEOSE" standards and the penal code. R. 1791-1801. But adherence to police training and procedures or state law does not bear on objective reasonableness. That turns on Fourth Amendment standards, not those chosen by police departments or trainers like Rodriguez. Consequently, Robbie does not have to show Cotton acted at odds with his training, and following police training does not somehow confer immunity. *See, e.g., Whren v. United States*, 517 U.S. 806, 815-16 (1996) ("police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time" and are not proxies for Fourth Amendment requirements); *Thompson*, 472 F.3d at 454 ("the

violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established"); *Stroik v. Ponseti*, 35 F.3d 155, 159 n. 4 (5th Cir. 1994). Ironically, Cotton made precisely this point in moving to exclude certain of Robbie's summary judgment evidence. R. 2275-76 (¶ 21).

The court's reliance on Rodriguez's deposition testimony about how someone's hands would appear as they rise from the ground – a subject Rodriguez did not cover in his report – is even more dubious. R.E. 4 (R. 2677) (quoting Rodriguez testimony), R. 1782-1809 (Rodriguez report). At his deposition, he claimed to be "an expert on where someone's hands would be when they are doing a push-up" because he has "done a million of them" and supervises cadets who do push-ups. R. 1760(22) – 1761(11). But it hardly seems like an expert – much less one lacking scientific, medical, or biomechanics credentials ad-libbing on the topic at his deposition – is needed to instruct factfinders on how people stand up after doing a push-up. Nor did Rodriguez offer the slightest objective, scientific support for his opinion. *See id*. In addition, Cotton testified that he shot Robbie when he was halfway up, *i.e*., after Robbie's push-up motion. Moreover, if Rodriguez is correct that officers are trained to know that people getting up from a prone position will naturally have their hands close to their bodies,

R.E. 4 (R. 2677) (quoting Rodriguez testimony) – ignoring for the moment that Robbie actually testified that one of his hands was in the air – Cotton should have understood that Robbie was likely not reaching for anything in his waistband but simply making the normal physical movements anyone would when rising off the ground. If taken seriously, Rodriguez's opinion actually undermines Cotton's view of Robbie as a threat rather than just a typical person getting up from the ground.

Finally, Rodriguez's opinion is based solely on Cotton's account of the shooting, rendering it useless as a tool for deciding a summary judgment motion against Robbie. Thus, throughout his report he describes Robbie as reaching for his waistband or moving his hand to that area of his body.[9] In one passage, he calls Robbie's supposed "hand movement… toward his waistband" one of the "particularly important" factors supporting the reasonableness of Cotton's reaction. R. 1806(¶ 75). But of course Robbie expressly denies making any such motion. Rodriguez's view of the hand gesture's importance only highlights the materiality of the factual dispute about it and underscores the error of summary judgment. Rodriguez also adopts Cotton's and Edwards's view of other disputed facts, such as whether

[9] *See* R. 1790(¶ 24) ("reaching for his waistband area" and "moving toward his waistband area"), 1802(¶ 61) ("fast movement of his hand from his waistband area"), 1803(¶ 65) ("making a movement with his right hand toward his waistband"), 1804(¶67(11)) ("made a movement towards his waistband with his right hand"), 1805(¶71) ("reached toward his waistband").

Robbie stood up and charged at Cotton. R. 1804(¶ 67(10)). And he dubbed it "of major significance" that Cotton asked Robbie what he was reaching for after he shot him, R. 1807(¶ 75), though an officer's subjective beliefs are completely irrelevant to the objective reasonableness of his conduct. *See Graham,* 490 U.S. at 397. Absent adoption or even consideration of the facts as construed in Robbie's favor rather than Cotton's, Rodriguez's opinion cannot support summary judgment.

Lewinski provides no firmer support for the district court's decision. The court quoted his opinion about reactive behavior and how officers should shoot before waiting to see if suspects will fire first. R.E. 4 (R. 2678-79) (quoting Lewinski). But the Tolans do not quarrel with Lewinski's data on reaction times or argue that officers should wait until suspects produce weapons or shoot at them first. The issue is whether Robbie's actions and the other circumstances surrounding the incident should have caused a reasonable officer to fear for his life, not whether an officer should wait before firing once the threat is manifest and such a fear is therefore legally reasonable. Statistics about reaction times does not answer the question whether Robbie was reasonably threatening.

Indeed, Lewinski's opinions prove too much. He would seem to endorse shooting any person exhibiting "defiance" of police who then

gestures toward any part of his clothing that could conceal a weapon. R. 1670-71(¶ 14). Such a person could always pull a gun and fire first, and police responses "are trained to a very high degree of automaticity." R. 1672(¶ 19). But automatic shootings are not easily compatible with the Fourth Amendment, which demands careful and individualized assessment as well as sensitivity for the totality of the circumstances on the scene before a citizen is met with gunfire. Lewinski's testimony would justify almost any shooting as a matter of law and therefore cannot convincingly justify Robbie's.

* * * * * *

When the facts are considered in Robbie's favor, a jury could find that Cotton unreasonably treated him as armed and dangerous despite credible information indicating otherwise, and that Cotton then overreacted to his beginning to stand by shooting him. Coupled with Cotton's presence on the scene for a mere 32 seconds and his slamming Marian into the garage, a jury could view him as dangerously out of control. Robbie has proffered sufficient evidence that Cotton violated his Fourth Amendment rights.

B. Robbie's Right Not to be Shot by Cotton was Clearly Established Before the Shooting

Robbie's right not be shot during his encounter with Bellaire police was also well established by December 31, 2008. The "clearly established"

inquiry centers "on whether the officer had fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary" in order to supply the requisite notice. *Hope v. Pelzer,* 536 U.S. 730, 740-41 (2002) (citations and quotations omitted). "But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id.* at 741 (citations and quotations omitted).

Any reasonable officer would have understood the unlawfulness of shooting Robbie if the facts are construed in his favor, as they must be at this point. This Court observed in 2001 that "deadly force violates the Fourth Amendment *unless* 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Bazan*, 246 F.3d at 488 (quoting in part *Garner*, 471 U.S. at 11) (emphasis in original). If credible evidence provided to the officer on the scene just before the shooting suggested the suspects were innocent of the suspected

theft, if the scene was relatively visible, if no warning was given despite one being feasible, if the suspect did not jump up but simply started to stand and turn, if he made no sudden hand gestures toward or away from his waistband or otherwise, and if he was on his knees when shot, it would have been clear in 2008 that the suspect did not pose an immediate threat to an officer's life and that shooting him was therefore unconstitutional. No decision featuring the precise circumstances present here would have been necessary to inform Cotton of the illegality of his conduct.

Several decisions in analogous cases confirm the obviousness of Cotton's Fourth Amendment violation. In *Reyes*, the Court denied summary judgment in part because the parties disputed whether the suspect made the "threatening gesture" of stepping toward officers and raising his knife. 362 Fed. Appx. at 407, 2010 WL 271422 at * 3. As to whether the plaintiff's Fourth Amendment rights were clearly established, the Court held that the law governing officers who use deadly force against suspects engaging in non-threatening conduct is now sufficiently settled:

> The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others. Here, the facts are unclear; was there such an immediate threat? Bridgwater's version of the facts would say "yes," while the other witnesses' versions would say "no." The case presented here is not one where the law is not clearly established but rather one where the facts are not clearly established.

Id. at 409, * 5. Just as in *Reyes*, the law governing Cotton's encounter with Robbie is by now canonical; all that is opaque at this stage is what actually happened.

The Sixth Circuit reached a similar conclusion in *Sample v. Bailey*, where factual disputes about whether an officer used excessive force in shooting a suspected burglar hiding in a cabinet precluded summary judgment. *See* 409 F.3d 689, 697-98 (6th Cir. 2005). The officer claimed the suspect ignored commands to show his hands and appeared to reach in his jacket, while the suspect testified he complied with instructions and never put his hand inside his coat. *See id.* at 692-94. On the "clearly established" prong, the court found the shooting "'an obvious case' because it does not present a novel factual circumstance such that a police officer would be unaware of the constitutional parameters of his actions." *Id.* at 699. Since the rule against shooting a suspect threatening no immediate harm had long been clear, the absence of a "factually similar precedent case" was immaterial. *Id.* "[R]egardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or

others. These factual distinctions between the cases do not alter the certainty about the law itself." *Id*.

Craighead v. Lee is in the same vein. *See* 399 F.3d 954 (8th Cir.), *cert. denied*, 546 U.S. 957 (2005). The Eighth Circuit affirmed a denial of summary judgment where, according to the plaintiff, an officer fired without warning at a man holding a gun overhead while struggling with another man who had just committed a drive-by shooting. *See id*. at 958-62. The court found the suspect's rights clearly established:

> Hence, the issue is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate Craighead's right not to be seized by the use of excessive force. At least since *Garner* was decided nearly 20 years ago, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others. On the facts we are required to assume, Craighead did not pose a significant threat of death or serious physical injury to Lee at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward, as Craighead was keeping it from the smaller Scott.

Id. at 962; *see also, e.g*., *Fils v. City of Aventura*, 647 F.3d 1272, 1292 (11th Cir. 2011) (obvious that tasering suspect who made no threatening gestures and did not disobey officers violates rights).

As in these decisions, Cotton was plainly on notice that using deadly force against Robbie would be unconstitutional if he lacked an objectively

reasonable belief Robbie posed a serious danger. There is no need to identify factually identical case law. But even if such authority is necessary, it is plentiful. Many of the decisions cited herein – where courts found excessive force claims would succeed if juries accept plaintiffs' accounts of not making threatening motions – predate Robbie's shooting in 2008. *See, e.g.,* pp. 37-40 and n. 8, *supra* (citing *Reyes*, *Cunningham, Wilson, Curry, White, Hemphill, Dickerson* and *Curnow*).[10] These cases are not identical to this one in every last particular, but "there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). As excessive force cases based on quickly executed, reactive shootings of non-threatening suspects at relatively close range, they are more than sufficiently analogous to have notified Cotton that shooting someone who does not pose a risk of death or serious injury would violate the Fourth Amendment.

Lastly, the fact that Cotton made a mistake in shooting Robbie does not compel a finding of qualified immunity. There is no requirement that officials knowingly violate the Constitution – the "plainly incompetent" will

[10] To the degree these cases arise from other circuits, this Court will look to a "consensus of cases of persuasive authority" from other courts to decide whether rights are clearly established for purposes of qualified immunity. *See McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002), *cert. denied*, 537 F.3d 1232 (2003).

also face liability. *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012) (quotation omitted); *Manis*, 585 F.3d at 845. "Plainly, not all mistakes – even honest ones – are objectively reasonable." *Floyd v. City of Detroit*, 518 F.3d 398, 408 (6th Cir. 2008). In this case, there is no reason to doubt Cotton's mistake in believing Robbie to be armed and dangerous was genuine. But his failure to reassess the situation after learning what he did on the scene before firing, and his shooting an unarmed man on his knees – someone who yelled and started to rise without making threatening gestures only after Cotton himself slammed his mother into the garage – is at least plainly incompetent. The court's grant of summary judgment was therefore erroneous.

III. The Court Erred in Dismissing Marian's Excessive Force Claim

Marian's excessive force claim was also wrongly dismissed. Viewed in her favor, the facts establish that she was not disruptive when Cotton appeared. She was not "aggravated" but simply "in disbelief" at what appeared to her to be officers' unwillingness to listen to her. R.E. 7 (R. 2075(20) – 2077(7)). She may have walked between Edwards and Robbie and Anthony and failed to move quickly to the wall, as Cotton commanded. R. 1030 (2-4), R.E. 7 (2077(1-5)). Cotton was therefore justified in physically moving Marian to a place that would permit him to continue his

work on the scene. But there is no conceivable justification for throwing her into the garage door, rather than simply placing her out of the way and commanding her to stay put. The parties dispute how hard Cotton propelled her into the door, but Marian testified that he "slammed" or "threw" her into it. R.E. 7 (R. 1474(15-20), 1489(3-15)). Marian described the force involved as "very hard." R. 2078(2-25). The Tolans all heard a loud noise when she hit the door. R. 2035(17-24), 1928(21-22), 1567(24-25). The impact caused pain and substantial bruises on her arm and back that lasted at least several days. R. 2078(2) – 2079(23), 2089-91.

Notably, Cotton testified that he did not intend to shove Marian into the garage. Rather, he claims Robbie yelled at him to release his mother before he shoved Marian, and that he then reflexively pushed her away in order to focus on Robbie. R.E. 8 (R. 1045(11) – 1046(21)). The district court appears to have accepted Cotton's account of what came first instead of acknowledging the clear factual dispute. R.E. 4 (R. 2665) (stating Cotton pushed Marian away "once he heard the shout and saw Robbie Tolan in the act of getting up"). But assuming the facts are as Marian describes – that Cotton slammed her into the garage before Robbie yelled and without provocation – Cotton has offered no justification at all for his conduct.

"[I]n the context of custodial interrogation, the use of nearly any

amount of force may result in a constitutional violation when a suspect poses no threat to the officers' safety or that of others, and the suspect does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified." *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996) (quotation omitted). Something more than *de minimus* injury must be shown, but it need not be serious. *See Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005). "What constitutes an injury in an excessive force claim is therefore subjective – it is defined entirely by the context in which the injury arises." *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999), *as modified*, 186 F.3d 633 (5th Cir. 1999). Moreover, injuries that might otherwise be too minor to be actionable may support an excessive force claim if the officer exhibited malice and thereby revealed the absence of any legitimate law enforcement justification. *See id*. at 704.

Marian did not threaten force against the officers and she was not suspected of, arrested for, or charged with any crime. At most, Cotton was justified to use some minimal coercion to further his investigation of Robbie and Anthony, such as directing her out of the way. Slamming her into the garage was blatantly excessive and caused more than minimal injury.[11] A

[11] *See, e.g., Staten v. Tatom*, 465 Fed. Appx. 353, 359, 2012 WL 975017 at ** 5-6 (5th Cir. 2012) (denying summary judgment where officer took suspect to ground after finding weapon during pat-down); *Coons v. Lain*, 277 Fed. Appx. 467, 469-70, 2008 WL 1983580 at **1-2 (5th Cir. 2008) (reversing summary judgment where officer tackled

jury could find that it smacks of malice and thereby reveals a lack of any conceivable law enforcement purpose. Nor could Cotton argue that Marian's rights in this regard were not clearly established. Decisions before the incident make clear that using more than trivial force against a non-dangerous person at the scene of an investigation can violate the Fourth Amendment. *See* note 11, *supra*. Accordingly, the Court should reverse the summary judgment as to Marian's excessive force claim.

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person at scene, slammed him against wall, threw him down, and twisted arm behind his back); *Cortez v. McCauley*, 478 F.3d 1108, 1130-32 (10th Cir. 2007) (taking non-arrestee's arm, directing her out of home and placing her in police car could be excessive force where she was not a suspect and did not resist); *Tarver*, 410 F.3d at 749, 752-53 (summary judgment denied where officer slammed car door against arrestee's foot and head, crime under investigation was minor, and arrestee posed no threat); *Williams,* 180 F3d at 704 (brief choking of inmate causing dizziness, loss of breath and coughing state excessive force claim where officer acted maliciously).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of Robbie's and Marian's Fourth Amendment excessive force claims against Cotton and remand them for trial.

August 6, 2012

Respectfully Submitted,

Martin J. Siegel */s/*

Martin J. Siegel
Texas State Bar No. 18342125
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana St., Suite 2300
Houston, TX 77002
Telephone: (713) 226-8566

George R. Gibson
Marvin Nathan
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard
Houston, Texas 77056
Telephone: (713) 892-4843

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2012, seven copies of the foregoing Plaintiffs-Appellants' Brief were sent via third-party commercial carrier, overnight service, to the Clerk of the Court, and one copy was sent via First Class U.S. mail to:

William Helfand
Norman Ray Giles
Chamberlain, Hrdlicka, White, Williams & Aughtry
1200 Smith Street, Suite 1400
Houston, TX 77002

Counsel for Appellee

Martin J. Siegel /s/
Martin J. Siegel

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because this brief contains 13,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is printed in a proportionally spaced typeface using the Microsoft Word 2004 for Mac, Version 11.5.6, program in 14 point, Times New Roman font in body text and 12 point, Times New Roman font in footnote text.

Martin J. Siegel */s/*
Martin J. Siegel

Dated: August 6, 2012

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 07, 2012

Mr. Martin Jonathan Siegel
Law Office of Martin J. Siegel. P.C.
700 Louisiana Street
Bank of America Center
Suite 2300
Houston, TX 77002

No. 12-20296, Robert Tolan, et al v. Jeffrey Cotton, et al
USDC No. 4:09-CV-1324

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Sincerely,

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James deMontluzin, Deputy Clerk
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cc: Mr. David H. Berg
Mr. George R. Gibson
Mr. Norman Ray Giles