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 and JOHN C. EDWARDS,

Defendants-Appellees.

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

REPLY BRIEF FOR APPELLANTS

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Introduction

Viewed in the Tolans' favor, the record discloses the following facts:

- the situation was not dangerously out of control when Cotton arrived; rather, Marian was simply talking to Cotton when he grabbed her and threw her into the garage door;
- Marian gave Cotton credible information that the Xterra was not stolen, Robbie was their son, and Robbie lived there;
- Cotton could have warned Robbie before firing but did not;
- Robbie made an "aggressive statement" when he heard Cotton slam his mother into the garage, but he did not scream at Cotton, jump up, or charge forward;
- Robbie merely started to stand, made no "crazy movements," and did not reach toward or away from his waist;
- Because the porch area was reasonably illuminated and the two men were only a few feet apart, Cotton should have been able to see Robbie's movements;
- Robbie was on his knees when Cotton shot him; and
- Cotton has given inconsistent testimony on the crucial subject of how Robbie's hands were positioned.

In light of these facts, a jury could find that Cotton was unreasonable to regard Robbie as an armed danger deserving a deadly response when he started to move, and that Robbie's actions immediately before the shooting did not reasonably portend a serious threat to Cotton. Summary judgment was therefore erroneous.

Cotton's arguments supporting affirmance are unconvincing. He relies heavily on Fifth Circuit decisions upholding shootings after suspects moved out of the officer's sight and made reaching motions. But Robbie was a few feet from Cotton, never moved out of his line of vision, and denies reaching toward or away from his waist or concealing his hands.

Cotton also emphasizes the testimony of two expert witnesses. It is settled, though, that adhering to police training or state rules does not immunize officers from constitutional claims. The courts are the arbiters of Fourth Amendment compliance, not law enforcement consultants.

Finally, Cotton claims Robbie's rights in this situation were uncertain. This case does not involve novel circumstances or tactics, however. It has been settled for decades that an officer may not legally shoot a suspect who does not pose a serious threat to the officer or others. Cotton therefore violated Robbie's clearly established Fourth Amendment rights.

Argument

I. Robbie's Excessive Force Claim

A. Cotton Ignores Clear and Material Factual Disputes

While the Tolans have focused their appeal on the detailed facts of the shooting, Cotton devotes very little of his brief to them. Nonetheless, there are material factual disputes precluding summary judgment.

1. The Facts Suggest Cotton Should Not Have Regarded Robbie as an Armed Threat

First, Cotton entirely ignores the Tolans' argument that a jury could find he should not have regarded Robbie as an armed danger in light of the totality of the circumstances surrounding the shooting. *See* Tolan Brf. 22-28. There was no specific reason to believe Robbie might have a gun, though the Tolans readily acknowledge police may approach suspected car thieves assuming they might be armed. *See* Tolan Brf. 24-35. More important, once Cotton arrived, his initial suspicion should have been dispelled – or so a jury could find – because Robbie's parents credibly vouched for their son. The Tolans, middle-aged homeowners in their pajamas, told Cotton they lived there, the Xterra was not stolen, and Robbie was their son. *See id*. at 25-26. Cotton confirmed he understood all this, but he did not respond by adjusting his approach to the encounter or his view of Robbie in any way. *See id*. Cotton charges that "the Tolans possessed, and controlled access to, the information necessary to resolve the investigation promptly and peaceably." Cotton Brf. 51. But he overlooks that they gave him that information before he shot Robbie. Ample legal authority demonstrates that an officer's failure to take new facts about a suspect into account and moderate his stance accordingly is unreasonable and supports liability. *See id.* at 27-28.

Tellingly, Cotton's brief makes only the barest reference to what happened at the Tolans' house before the precise moment of the shooting. He states that he "experienced difficulty in effectively controlling the people at the scene and this reasonably led him to be concerned for his personal safety." Cotton Brf. 31. This echoes the district court's characterization of Marian as an "individual out of control" and "disruptive." R.E. 4 (R. 2664, 2675). These descriptions simply disregard Marian's testimony. She testified that she was not "aggravated" or "agitated." Tolan Brf. 11-12, 25-26. She did not move to the wall immediately, as commanded, but then Cotton "walked behind [her], grabbed [her] by [her] right arm and threw [her] against the garage door." R. 2078(2-3); *see also* R.E. 7 (R. 1489(9-15)). In her account, she was merely talking to Cotton – as any citizen might when confronted by police on her front lawn – when he lost control and became the aggressor. Viewed from the Tolans' perspective, the record does not reflect that conditions were dangerously out of control. In fact, Cotton himself testified that "out of control may not be a good characterization." R. 1036(12-13).

Cotton also states conclusorily that there was "an unsafe environment" and "circumstances… were tense." Cotton Brf. 36-37. But a jury could find Cotton disregarded information apparent from the scene and

told to him by credible witnesses that should have considerably lowered the temperature during the incident, and led him to reappraise Robbie.

There is no way to justify the shooting unless Cotton was reasonable in believing Robbie was likely to be armed and dangerous, but a jury could find that belief to be unreasonable in light of the totality of the circumstances.

2. Factual Disputes About the Moment of the Shooting Also Preclude Summary Judgment

The Tolans also highlighted four material factual disputes regarding the shooting itself that should have precluded summary judgment. *See* Tolan Brf. 29-33. First, the parties dispute the visibility of the porch area. Cotton claimed it was "very dark" while the Tolans testified the scene was illuminated and Robbie was not in darkness. *See id.* at 29. This plainly bears on what Cotton saw and the reasonableness of his mistake in concluding Robbie was pulling a gun. Cotton's brief fails to grapple with this important dispute, let alone explain its supposed immateriality.

Second, the parties dispute whether Cotton warned Robbie. *See id*. The Tolans heard no warning, but Cotton testified he said "stop or no." *Id*. A jury could conclude Cotton had time to give a warning since he testified to speaking just before shooting Robbie. *See id*.; *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (warning required before shooting, if feasible). Robbie

also testified that Cotton "could have yelled to me get back down." R.E. 6 (R. 2504(15-16)). Cotton's brief is silent on this score as well.

Third, how Robbie began to stand is disputed. *See* Tolan Brf. 30. On the one hand, Edwards testified that Robbie appeared to be charging, and Cotton testified that Robbie jumped up. *See id*. Both claimed Robbie was on his feet when he was shot. *See id*. On the other hand, Robbie testified that he did not "jump up off the ground" but "just simply got up. Started to get up." *See id*. "I didn't run at him. I didn't jump up and make any crazy movements." *Id.* He only made it to his knees, not his feet. *See id.* These facts are obviously relevant to whether Cotton was reasonable to see Robbie's movements as life threatening. Was Robbie on his feet and in the process of aggressively charging at Cotton, or simply starting to stand up and on his knees? The answer to that contested question is plainly material.

Finally, the facts are unclear on the crucial issue of where Robbie's hands were and what he was doing with them. Cotton has been strikingly inconsistent about this. He has variously testified:

- He saw Robbie digging in his waistband;
- He did not actually see Robbie reaching into his pants but only saw that Robbie's hand was "at his waistband," "in the middle of his waist," or somewhere "in the center of his body;" and
- He does not know "that [he] could see [Robbie's] hand specifically" at all, but he relied on Robbie's "total movement."

See id. at 14-16, 31. Unlike Cotton and his ever-morphing descriptions, Robbie testified that he "did not make any gesture towards or away from my waistband," was not "reaching for anything," and did not "make any crazy movements." *Id.* at 32-33. His hands were somewhere near his chest area as he pushed himself off the ground, and one hand was then in the air. *See id.*[1]

Scattered throughout Cotton's brief are summary descriptions of the facts, but they do not accurately state the record when it is viewed, as it must be, in the Tolans' favor. Without citing to the record, Cotton likens Robbie to a suspect who "defies a police officer's commands for reasonable compliance during a police investigation, undertakes action that causes his hands to be concealed from the investigating officer's view and thereafter causes his body, and particularly his hands, to quickly move from a position outside the officer's line of sight toward a police officer" – all leading Cotton reasonably to fear serious harm. Cotton Brf. 24-25.

If Robbie's testimony is credited, he did not do anything to conceal his hands or quickly move them "from a position outside the officer's line of sight toward" Cotton. *Id.* He used his hands to push himself up, did not

[1] Cotton states that the Tolans have "inexplicably" included Robbie's affidavit giving this testimony in their Record Excerpts. Cotton Brf. 2-3. As discussed in their main brief, however, the district court credited Robbie's testimony that he did not reach toward his waist regardless of its exclusion of the affidavit. *See* Tolan Brf. 33 n. 6. Moreover, excluding the affidavit was clear error because Robbie's testimony there did not contradict his earlier deposition testimony. *See id.*

somehow hide them, made no sudden movements toward his waist, and did not move his hands outward toward Cotton. *See* Tolan Brf. 13, 32-33. When he started to stand up, Robbie was no longer complying with Edwards' earlier command to lie down, but it cannot be argued (and Cotton does not try) that mere disobedience of a police instruction justifies deadly force. Because Cotton was only a few feet from Robbie and a jury could find the area was illuminated, it could also find that Cotton should have been able to see Robbie's hands. Indeed, Cotton seemed to testify that he *did* see Robbie's right hand and that it was somewhere at the center of his body, though he also later testified that it might have been covered by his clothing. R. 1890(2-13), 1892(9-16). Nor is there any record support for the assertion that Robbie's hands moved "quickly from a position of concealment toward Sgt. Cotton." Cotton Brf. 54. Cotton gives no citation for this, and no witness testified that Robbie began extending his hands out toward Cotton.

Later in his brief, Cotton states:

> Sgt. Cotton experienced difficulty in effectively controlling the people at the scene and this reasonably led him to be concerned for his personal safety. Subsequently, when Robbie Tolan rose, verbalized threatening language, and spun toward Sgt. Cotton with Tolan's hand passing his waistband area while Sgt. Cotton was attempting to control Marian Tolan, Robbie Tolan's abrupt, unexpected, and aggressive movement, taken in context from the perspective of a reasonable police officer on the scene, became an immediately threatening situation… [A]n individual who is defiantly non-compliant and whose hands are going in,

> going to, or reasonably appear to be going to his waistband area, while turning, showing and expressing anger – all of which Robbie Tolan essentially admitted – certainly creates a very real threat to the officer.

Cotton Brf. 31-32.

The Tolans' testimony contradicts much of this passage. As discussed above, Cotton had no serious difficulty controlling people at the scene; the Court must credit Marian's account that she was merely talking to Cotton when he grabbed and threw her. Robbie did not testify to spinning toward Cotton while his hand passed his waist; he stated that he simply pushed himself up to his knees quickly, began to turn his body, and made *no* sudden hand gestures toward his waistband. His hands were at his chest as he made a push-up motion to get off the ground. Cotton states that Robbie made an "unexpected and aggressive movement" while Cotton "was attempting to control Marian Tolan." *Id.*; *see also* Cotton Brf. 11 (claiming Robbie took "admittedly aggressive actions"). The Tolans disagree. They say Marian was not out of control, Cotton threw her into the garage door regardless, and Robbie then started to rise but did not make any "aggressive movements." Far from taking "aggressive actions," he just started to stand and did not gesture toward or away from his waist as if drawing a weapon. For the same reason, Cotton is wrong to assert that Robbie's hands were "going in, going

to, or reasonably appear[ed] to be going to his waistband area." Robbie directly refutes this.

Robbie did acknowledge that his exclamation of "get your fucking hands off my mom" was an "aggressive statement" and that he likely had an angry facial expression. *See* Tolan Brf. 12-13, 35. But profane or challenging statements and looks are far removed from physical movements that suggest pulling a gun and therefore warrant a violent response. Cotton claims Robbie "screamed" at him. Cotton Brf. 55. Actually, Robbie testified to exactly the opposite – he said he "was not screaming." R.E. 6 (R. 2544(5-10)).

Finally, in his fleeting references to the facts of the case, Cotton fully ignores two important points in the Tolans' opening brief relating to the parties' factual disputes. First, the overt inconsistencies or evolutions in Cotton's testimony about the position of Robbie's hands argue strongly for denying summary judgment. The Tolans cite several decisions in the § 1983 context and others pointing to the importance of internal contradictions or variations in the testimony of key witnesses when deciding summary judgment. *See* Tolan Brf. 32.

Second, Cotton does not consider the rule discounting summary judgment testimony from interested witnesses. *See id.* at 40-41. The

judgment here rests on Cotton's testimony about Robbie's movements and how they reasonably gave rise to his supposed need to fire in self-defense. R.E. 4 (R. 2667) ("Robbie Tolan and Sergeant Cotton are the only two people who can provide factual information regarding the observations Sergeant Cotton made, which led him to fire"). Edwards testified that he did not see Robbie's hands and that Robbie disappeared from his view behind a plant after he rose. R. 1122. As Cotton is an interested witness, his testimony deserves no credence and summary judgment should have been denied because it is not required by Robbie's testimony alone.

When viewed in the Tolans' favor, the record would allow a jury to find that shooting Robbie amounted to excessive force.

B. The Decisions Cotton Cites Do Not Require Affirmance

Cotton devotes a substantial portion of his brief to summarizing seven Fifth Circuit decisions, five of which are also discussed in the Tolans' initial brief. *See* Cotton Brf. 13-24, Tolan Brf. 35-37. Excessive force claims are "necessarily fact-intensive and depend on the facts and circumstances of each particular case." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (quotations omitted). The decisions Cotton relies on are factually dissimilar to this case in crucial respects and therefore do not support summary judgment.

Cotton first cites *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985). Cotton Brf. 13-14. In *Young*, a marijuana buyer was confronted by an officer, reached toward his car seat or floorboard out of view, and was shot. *See id*. at 1351. The district court "found that 'Young apparently made a movement as if to duck back into the car to retrieve something,'" and "all witnesses agreed that at the moment David Young made a sudden movement Olson was justified in shooting." *Id*. at 1352. Robbie testified that he did not made any sudden hand gestures, and neither his hands nor any other part of his body were hidden from Cotton's view. The two men were only a few feet apart and the porch was not in darkness. Unlike in *Young*, all witnesses to this shooting do not agree Cotton was justified.

Cotton also cites *Reese v. Anderson*, where armed robbers led police on a chase and were then surrounded. *See* 926 F.2d 494, 496 (5th Cir. 1991); Cotton Brf. 14. One suspect defied orders to raise his hands and repeatedly reached down in the car below the sight line. *See id*. at 500. Then he "tipped his shoulder and reached further down." *Id.* at 501. The Court held that the officer "could reasonably believe [the suspect] had retrieved a gun and was about to shoot." *Id*. As with *Young*, the key difference between *Reese* and this case is that Robbie disputes reaching for anything or being out of Cotton's sight, much less doing so repeatedly. Witnesses in *Reese*

could have submitted affidavits supporting the plaintiff's version of events, but none did. *See id.* at 499. Here, Robbie has provided the necessary testimony contradicting the officer's self-serving account.

Cotton next cites two cases where cars or trucks sped toward officers who were then forced to fire or be run over. *See Fraire v. City of Arlington*, 957 F.2d 1268, 1271-72 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Hathaway v. Bazany*, 507 F.3d 312, 315-16 (5th Cir. 2007); Cotton Brf. 15. The facts of these cases bear no likeness to this one, though *Hathaway* is relevant in one sense. That decision states: "This is not an instance… where an officer fired after the perception of new information indicating the threat was past." 507 F.3d at 322. Robbie's *is* such a case; Cotton acquired persuasive new information on the scene that should have led him to see Robbie as unlikely to be an armed and dangerous car thief.

Cotton also invokes *Ontiveros v. City of Rosenberg*, 564 F.3d 379 (5th Cir. 2009). When a SWAT team arrived at his mobile home, Ontiveros hid behind a door, held an object over his head, and ignored commands to "Let me see your hands." *Id*. at 381. He "appeared to be blocking the door; moved out of [the officer's] sight when the door was kicked open; and appeared to be reaching into a boot" for a gun, leading the officer to shoot. *Id*. at 384. Robbie did not block Cotton, wave any objects, or move out of

his sight. Above all, he did not make a reaching gesture, meaning that a jury could also find he did not *appear* to be doing so.[2]

Manis v. Lawson, 585 F.3d 839 (5th Cir. 2009), the next decision Cotton discusses, nicely illustrates why summary judgment is inappropriate here. *See* Cotton Brf. 21-23. In *Manis*, officers roused a drunk and drugged man sleeping in a car. *See* 585 F.3d at 842. Once awake, the man flailed his arms, repeatedly reached under the car seat, ignored five commands to show his hands, and then appeared to retrieve an object and straighten up, prompting the shooting. *See id*. at 842, 844. As the Court noted and Cotton quotes: "The Appellees do not dispute the *only* fact material to whether Zemlick was justified in using deadly force: that Manis reached under the seat of his vehicle and then moved as if he had obtained the object he sought." *Id*. at 844 (emphasis in original); Cotton Brf. 23. Here, Robbie survived and very much disputes whether he reached for anything, and therefore whether he should have appeared to Cotton to have done so. If, as in *Manis*, Robbie did not dispute this, summary judgment might be

[2] Cotton quotes lengthy testimony given by an officer in *Ontiveros* that is similar to testimony offered here by his expert William Lewinski. *See* Cotton Brf. 19-21. The Court in *Ontiveros* quoted this testimony in a footnote but ascribed no legal significance to it. *See* 564 F.3d at 384 n. 2. Rather, the outcome in *Ontiveros* seems to rest on the testimony of the defendant, who was the only surviving witness to events before the shooting. *See id.* at 383. The Court did not somehow "tacitly adopt[]" the testimony quoted in *Ontiveros* as relevant to any and all excessive force cases, as Cotton seems to imply. Cotton Brf. 31. The effect of Lewinski's opinions in this case is discussed *infra*. at 21-23.

appropriate. But the reverse also holds true: how Robbie moved his hands and precisely where they were positioned are hotly disputed, obviously material, and preclude summary judgment.

Finally, Cotton relies on *Carnaby v. City of Houston*, 636 F.3d 183 (5th Cir. 2011). *See* Cotton Brf. 23-24. In that case:

> Carnaby was reaching down for approximately 2–3 seconds before moving to exit his vehicle, during which time the officers could not see his hands. He then began to exit the vehicle rapidly while moving his hands around toward an officer. Given those motions, the high-speed chase that immediately preceded the incident, and the knowledge that Carnaby possessed a handgun license, it was objectively reasonable for the officers to believe that Carnaby was about to bring a firearm to bear on them.

636 F.3d at 188. Carnaby was also "grasping an object" when he swung his hands toward the officer and was shot. *Id*. at 186. Again, Robbie did not hide his hands from view, had no object in them, and did not bring them toward Cotton. What happened right before Robbie's shooting was nothing akin to a car chase, and Cotton had no reason unique to Robbie – such as knowledge he owned a gun – to believe he was armed.

The Tolans acknowledge, as Cotton stresses, that "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." *Id* at 188 (quotation omitted). But this is not such a case. For

their part, the Tolans have identified several factually analogous decisions denying or reversing summary judgments for officers, *see* Tolan Brf. 37-40, but Cotton nowhere discusses or responds to them.

C. Cotton's Reliance on Expert Testimony is Misplaced

Cotton makes much of the expert testimony he offered below. *See* Cotton Brf. 25-36. In their initial brief, the Tolans give several reasons why Cotton's experts' opinions should not prevent their claims from reaching a jury. *See* Tolan Brf. 42-47. Cotton has not responded to any of them.

1. Adherence to TCLEOSE Standards is Not Relevant to Reasonableness Under the Fourth Amendment

First, Cotton focuses on the TCLEOSE training given to police officers. *See* Cotton Brf. 25-28. This instruction is based in part on judicial decisions "interpreting the Fourth Amendment," he states. *Id.* at 26. His argument has two parts: (i) TCLEOSE supposedly "provides a reliable, objective, means of… measuring the actions of Sgt. Cotton against the actions of a hypothetical reasonable police officer;" and (ii) Cotton acted like "a reasonable officer who had been trained under TCLEOSE," and therefore must have behaved reasonably under the Fourth Amendment. *Id*. at 28-29.

As the Tolans explain in their opening brief, this way of defending the shooting is legally insufficient. *See* Tolan Brf. 42-43. Courts, including this one, have consistently held that whether an officer complies with his training and the adequacy of that training are simply irrelevant to whether their actions violated the Fourth Amendment. The Supreme Court made this clear in *Whren v. United States*, where plaintiffs claimed the reasonableness of traffic stops could be judged by whether "the officer's conduct deviated materially from usual police practices." 517 U.S. 806, 814 (1996). The Court rejected replacing constitutional analysis with inquiries into compliance with policy: "We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities." *Id*. at 815 (citation omitted).

This Court directly rejected Cotton's position in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). Defendants there offered expert testimony from the same expert Cotton retained here – Albert Rodriguez – that Texas law enforcement policies allowed hog-tying, and that the procedure was therefore reasonable under the circumstances. *See id*. at 447. This Court held that a law enforcement expert's opinion does not establish reasonableness as a matter of law, and it squarely rejected deferring to an expert's opinion of what satisfies constitutional standards. *See id.*

Likewise, in *Reese*, an officer resisted excessive force claims by arguing that his conduct complied with Texas law on self-defense. *See* 926 F.2d at 500 and n. 7. The Court held that these standards are not pertinent:

> Anderson directs our attention to a number of Texas authorities on self-defense and the use of force by and in the presence of police officers. These do not form the framework for our analysis, however. As the Supreme Court has explained, a deadly force complaint under § 1983 is a federal constitutional claim, and is analyzed according to Fourth Amendment standards.

Id. Rodriguez bases his opinion on some of the same Texas statutes as did the officer in *Reese*, including the Texas law on justified use of deadly force, TEX. PENAL CODE § 9.32. R. 1793; 926 F.2d at 500 n. 7. He opines that deadly force is permissible "and not a violation of civil rights" when it complies with these state statutes. R. 1793. But *Reese* specifically forecloses this argument.

The result is the same when plaintiffs urge the relevance of police training. In *Young*, the district court found liability because the officer contravened "good police procedure." 775 F.2d at 1351. This Court reversed and held that deviations from policy, while possibly negligence, have no relation to liability under § 1983. *See id.* at 1353; *see also Stroik v. Ponseti*, 35 F.3d 155, 159 n. 4 (5th Cir. 1994).

Courts in other circuits agree. In *Thompson v. City of Chicago*, the Seventh Circuit upheld exclusion of a police use-of-force policy offered by the plaintiffs to give the jury "objective criteria with which to judge the officer's action" – exactly the reason why Cotton touts TCLEOSE training in this case. *See* Cotton Brf. 28; 472 F.3d 444, 453 (7th Cir. 2006). The court held that the policy "sheds no light on what may or may not be considered 'objectively reasonable' under the Fourth Amendment," and that 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." *Id*. at 454. Similarly, in *Marquez v. City of Albuquerque*, the plaintiff offered expert testimony on what constitutes reasonable force and whether use of a police dog violated law enforcement standards. *See* 399 F.3d 1216, 1221-22 (10th Cir. 2005). The plaintiff claimed the testimony would help "the jury in determining whether [the officer] used a reasonable amount of force." *Id*. at 1222. The Tenth Circuit upheld the exclusion since the testimony was irrelevant. *See id*.; *see also Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991).

If plaintiffs cannot establish unreasonableness under the Fourth Amendment by showing a violation of police training or procedure, defendants cannot establish reasonableness by showing compliance. Nor

does it matter that Texas state curriculum aims to incorporate constitutional requirements (as one would hope), or that Rodriguez, a non-lawyer, R. 1783, claims to have read some judicial decisions. *See* Cotton Brf. 26-27. Federal courts will not farm out their interpretation and application of the Fourth Amendment in particular cases to police trainers, state policymakers, or law enforcement trial consultants.

Moreover, despite heavily relying on Rodriguez's testimony about state law and police training, Cotton took the opposite view when successfully moving to exclude the affidavit of the Tolans' witness who testified to racial profiling by Bellaire police. R. 2275-76 (¶ 21), 2119-21. Cotton urged exclusion of the affidavit because it implied that a standard other than the Constitution governed police conduct. R. 2275. "Whether the individual governmental officials violated state law or internal departmental policy is not the focus of the court's inquiry," he argued. *Id*. (quotation and parenthetical omitted). Cotton's position is correct, but it applies equally to Rodriguez's opinions.

The Tolans have identified other problems with Rodriguez's testimony that Cotton fails to address, not least that he bases his opinion on Cotton's and Edwards's descriptions of key facts rather than the Tolans'

testimony. *See* Tolans' Brf. 44-46. Overall, his opinion does not require dismissal of the lawsuit.[3]

2. The Tolans Agree Officers Need Not Wait Until They See Suspects' Guns Before Firing

Cotton also relies on the opinions of his expert George Lewinski to argue that officers face split-second choices and cannot wait until a suspect's gun is visible before shooting. Cotton Brf. 29-36. Cotton summarizes Lewinski's findings on reaction times and how long it takes a person to draw and fire a gun. *See id*. at 32-34. Cotton's legal argument has two components: (i) "law enforcement officers are trained to understand that an officer must have a reasonable belief that the suspect is reaching for a weapon before using force to repel the threat," but (ii) "an officer is not required… [to] confirm the suspect is in fact reaching for a weapon before responding to a reasonably perceived threat." Cotton Brf. 30.

The Tolans fully agree with the second of these points, but this case turns on the first. The question is whether Cotton was reasonable in perceiving Robbie as a threat to his life, not whether he was permitted to fire after doing so. Lewinski's research on human reactions cannot resolve that

[3] Cotton claims the Tolans did not "challenge in the District Court the basis for [their] expert testimony." Cotton Brf. 25 n. 7. The Tolans did contest Rodriguez's testimony below. R. 1854-55, 2341. Even if they had not, the district court would still have been obliged to independently determine whether that testimony and Cotton's other proffered evidence require summary judgment, as this Court must. *See Hetzel v. Bethlehem Steel Corp*., 50 F.3d 360, 362 n. 3 (5th Cir. 1995).

issue. That a person can pull and fire a previously hidden gun in ¼ of a second says nothing about whether he appears to be doing so. An officer cannot preemptively shoot a non-threatening person just because that person could otherwise pull a gun and get off the first shot. Cotton and Lewinski even agree that "simply placing a hand in a waistband area is not necessarily considered an inherent threat," depending on the context. Cotton Brf. 38; R. 1670(¶ 13) (Lewinski Report). The whole inquiry, then, is simply whether Robbie reasonably appeared to be threatening Cotton's life considering all the circumstances present that night. That is not a matter for expert testimony, but should have been submitted to fact-finders. Indeed, Lewinski's opinions have been excluded by trial courts as irrelevant and an invasion of the province of the jury on exactly this basis.[4]

Moreover, as the Tolans note in their opening brief, Lewinski's opinions could justify almost any shooting. *See* Tolan Brf. 46. He believes, and Cotton argues, that officers can react "*preemptively* to a reasonably perceived threat." Cotton Brf. 31 (emphasis in original). Officers are trained to "*a very high degree of automaticity*," and police reactions must be

[4] *See, e.g., Lopez v. Chula Vista Police Dept*., 2010 WL 685014 at * 2 (S.D. Cal. 2010) (permitting Lewinski to testify on speed with which subject can pull and fire gun, but excluding opinion on whether officer acted in manner atypical for law enforcement personnel); *White v. Gerardot*, 2008 WL 4724004 at * 2 (N.D. Ind. 2008) (excluding Lewinski testimony on whether officer reasonably believed he had to shoot in self-defense and was correct to view suspect as threatening, but allowing testimony on what a reasonable officer would consider to be "an appearance of threat" and reaction times).

"*automatically programmed*." *Id*. at 33 (emphases in original). Preemptively shooting people based on automatic programming seems hard to square with the careful and individualized consideration required before police use deadly force, even in rapidly developing situations.

D. Robbie's Rights Were Clearly Established

Cotton additionally seeks qualified immunity on the basis that he could not have known shooting Robbie would violate Robbie's right to be free of unreasonable seizures. *See* Cotton Brf. 39-47. He contends that Fifth Circuit holdings have "consistently instructed" police that an officer may defend himself by shooting a subject if, given what he knew at the time, he "could reasonably have believed his life or bodily integrity was in imminent danger," even if the belief later proves mistaken. Cotton Brf. 44. The Tolans agree this is the well-established standard, but it works both ways: if Cotton could not "reasonably have believed his life or bodily integrity was in imminent danger," it should and would have been clear to him that shooting Robbie was unconstitutional. This is exactly what this Court held in *Reyes v. Bridgwater*. *See* 362 Fed. Appx. 403, 409, 2010 WL 271422 at * 5 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others. Here, the facts are unclear; was there such an immediate threat?").

Cotton insists that the contours of the right in question must be defined with particularity, and that the specific circumstances of the case must be considered. *See* Cotton Brf. 40-42. This point is thoroughly addressed in the Tolans' opening brief. *See* Tolan Brf. 47-52. As the Tolans argue there, they need not proffer an earlier case with exactly these facts, *e.g.*, middle aged parents in pajamas who credibly vouched for their son, the son lying prone on a porch, the officer having just thrown the mother into a garage door, the son shot on his knees without having gestured toward his waist, etc. *See Reyes*, 362 Fed. Appx. at 409, 2010 WL 271422 at * 5. "[F]actual distinctions between the cases do not alter the certainty about the law itself," *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005), and "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).

Cotton also reprises his argument about compliance with TCLEOSE training, asserting: "no established training standard shows that Sgt. Cotton's action of shooting Robbie Tolan violated clearly established applicable training standards." Cotton Brf. 44. As with Cotton's earlier reliance on police training, this is the wrong question. Robbie need not

identify "clearly established applicable training standards." Fourth Amendment requirements must be clearly established, not one or another training regimen. Moreover, whether a constitutional right is clearly established is a legal question for judges, not a factual one for experts. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (upholding exclusion of testimony of "police practices and procedures expert" that officers abided by Fourth Amendment standards because opinion was legal conclusion "for the court to make"). To the degree Cotton suggests that Rodriguez's and Lewinski's opinions establish immunity, *see* Cotton Brf. 46-47, this Court rejected a similar argument in *Gutierrez*:

> We do not believe that the Supreme Court intended by this statement ["if officers of reasonable competence could disagree on this issue, immunity should be recognized"] to mean that summary judgment must be granted in favor of the police whenever they can find an expert to testify that their actions were reasonable; in such a scenario, the police would virtually always win summary judgment.

139 F.3d at 447 (referring to statement in *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Here too, the fact that Cotton has enlisted experts to say they believe he acted reasonably does not determine the "clearly established" prong.

Adding insult to injury, Cotton further blames Robbie for causing the shooting by committing "misconduct," and argues that this establishes his own immunity. Cotton Brf. 45. Robbie was not charged with any offense, such as resisting arrest or obstructing an investigation. R. 1874(19-25). Cotton, on the other hand, was criminally prosecuted. Aggressive statements and pushing up from the ground – after an officer threw his mother into a garage door, no less – are not illegal acts. Nor did the other Tolans engage in "acts of resistance" or prevent officers from investigating. *Id.* at 46. By her account, Marian was not disruptive but merely talking to Cotton when he grabbed and threw her. This is another example of Cotton basing arguments on disputed facts viewed favorably to him rather than the Tolans.

Cotton also errs in claiming a plaintiff alleging excessive force must "show *the legality of [his own] conduct* was clearly established." Cotton Brf. 45 (emphasis in original). Criminal suspects are often engaged in illegality when confronted by police, including evading or resisting arrest, but officers may only use lethal force to prevent serious harm to themselves or others. *See Hathaway*, 507 F.3d at 320. The decision in *Sorenson v. Frerie*, 134 F.3d 325 (5th Cir. 1998), cited by Cotton, is inapposite. *See* Cotton Brf. 45. That was a wrongful arrest case, and the plaintiff had to

show her conduct was legal in order to negate the probable cause otherwise justifying the arrest. *See Sorenson*, 134 F.3d at 330. The rule has no applicability to other types of § 1983 cases.

The situation confronting Cotton was not so novel that an officer would doubt what the law required of him. Robbie's Fourth Amendment right to be free of the deadly force Cotton deployed was well settled.

II. Marian Tolan's Excessive Force Claim

The Tolans concede that "not every push or shove" violates the Fourth Amendment. Cotton Brf. 48. They also acknowledge that Cotton was entitled to "escort Marian Tolan out of the way." *Id.* at 49, Tolan Brf. 53-54. What they dispute is that Cotton merely gave Marian a harmless and necessary shove. At trial, Cotton may testify that "the scene was out of control" and that Marian "hindered" him. Cotton Brf. 48. At this stage, though, the Court must credit Marian's testimony that she was simply talking with Cotton when he grabbed her and threw her into the garage door. *See* Tolan Brf. 53-54. Moreover, while Cotton now defends his action as an intentional response to Marian's refusal to move voluntarily, Cotton Brf 49, he gave a different justification while testifying at his deposition. There, he stated that he reflexively pushed her away to focus on Robbie when Robbie yelled at him to release her. R.E. 8 (R. 1045(11) – 1046(21)). Clear factual

disputes about how Cotton handled Marian warrant proceeding to trial on her claim.

Cotton's analogy to *Saucier v. Katz*, 533 U.S. 194 (2001), is misplaced. *See* Cotton Brf. 52. Leaving aside that Cotton was not protecting the Vice President, there are no facts here suggesting Marian posed a threat to anyone, or that unseen others might have been present. *See id.* Cotton has never claimed to have been concerned about either of these possibilities, which is probably why this argument includes no citations to the record. After being shoved, the plaintiff in *Saucier* "caught himself just in time to avoid any injury." 533 U.S. at 198. Here, Marian testified that Cotton "slammed" her "very hard" into the garage door without provocation, causing pain and lasting bruises. *See* Tolan Brf. 54. She suffered more than *de minimus* injury. *See* Tolan Brf. 55-56 n. 11 (collecting cases); *accord Blackmon v. Garza*, __ Fed. Appx. __ 2012 WL 3086215 at * 7 (5th Cir. 2012) (headaches, nausea, shortness of breath, and blurred and dimmed vision more than *de minimus* injuries); *Brown v. Lippard*, 472 F.3d 384, 386-87 (5th Cir. 2006) (abrasions and pain in knee, hand and shoulder not *de minimus*). Cotton claims the Tolans have not identified analogous cases applying the Fourth Amendment rules they invoke, *see* Cotton Brf. 52, but

he does not address the several decisions cited in their brief. *See* Tolan Brf. 55-56 n. 11.

A jury could conclude Cotton did not need to slam Marian into the garage door, and doing so would have violated her established constitutional rights. She is therefore entitled to proceed with her claims.

Conclusion

The Court should reverse the dismissal of Robbie's and Marian's excessive force claims against Cotton and remand them for trial.

November 19, 2012 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2012, seven copies of the foregoing Plaintiffs-Appellants' Reply 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:

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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 6,781 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.

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Dated: November 19, 2012

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USDC No. 4:09-CV-1324

The following pertains to your reply brief electronically filed on 11/19/12.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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