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,
Defendants-Appellees

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

APPELLEES' BRIEF

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

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

A. Parties:

Plaintiffs/Appellants:	Robert R. "Robbie" Tolan, Robert "Bobby" Tolan, Marian Tolan, Anthony Cooper
Defendants/Appellees:	Jeffrey Wayne Cotton, John C. Edwards

B. Former Defendants/Not a Party to Appeal:

Randall C. Mack, Byron Holloway
Cynthia Siegel, Bernard Satterwhite,
City of Bellaire, Texas,
Bellaire Police Department

C. City's risk fund: Texas Municipal League
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STATEMENT REGARDING ORAL ARGUMENT

Particularly because the District Court clearly analyzed and synthesized all of the evidence, resolving any disputes in favor of the Appellants, and properly applied Supreme Court and Circuit precedent in determining the propriety of summary judgment, Appellees believe the Judgment the District Court entered is appropriate for summary calendar affirmance. Appellees request an opportunity to present oral argument should this Court find oral argument to be appropriate.

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1. The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes that no jury could reasonably find Sergeant Cotton used excessive force against Robbie Tolan.

2. The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes his entitlement to qualified immunity.

3. The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes that no jury could reasonably find he used excessive force against Marian Tolan, and because Sergeant Cotton is entitled to qualified immunity.

4. Appellants abandoned all other claims of alleged error identified in their notice of appeal but not raised in their brief.

STATEMENT OF THE CASE

Appellants Robert (Robbie) Tolan[1] and Marian Tolan filed suit against Appellee Bellaire police Sergeant Jeffrey Cotton, claiming he used excessive force against Robbie and Marian Tolan.[2] {R 4}.[3] Sgt. Cotton timely filed an answer and asserted defenses, including qualified immunity. {R 92}. After discovery, Sgt. Cotton filed a motion for summary based upon qualified immunity. {R 908, 2395}. The Tolans filed a response in opposition. {R 1830}. Sgt. Cotton filed a reply to the Tolans' response {R 2212}, and objections to exhibits submitted by the Tolans {R 2261}. The Tolans filed a surreply {R 2336}, and response to the objections {R 2350}. Sgt. Cotton filed a response to the Tolans' surreply {R 2375}, and a reply to their response to the objections to their evidence. {R 2387}.

The District Court entered a well-reasoned order sustaining Sgt. Cotton's objections to inadmissible items the Tolans submitted in opposition to the motion for summary judgment. Inexplicably, the Tolans have included some of the

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1 Appellant Robert R. Tolan generally goes by the nickname of "Robbie" Tolan so he will be so identified in Appellee's briefing to avoid confusing him with his father Robert "Bobby" Tolan.

2 Appellants also brought various other claims against several other Defendants but those other claims and Defendants are not before this Court and have no bearing on resolution of the issues now on appeal. In the statement of the case in their opening brief, Appellants informed this Court that former Appellants Bobby Tolan and Anthony Cooper are not prosecuting this appeal, and also that no Appellant is now prosecuting an appeal of the District Court's judgment dismissing the claims brought against Officer John Edwards.

3 Appellee will utilize "R" to identify items from the Clerk's Record in this case and "Tab" to identify items in the Parties' Record Excerpts.

inadmissible items in Tab 5 of their record excerpts. {R 2570}. The inadmissible items are identified as R 2088-2093, R 2107-2109 (Appellants' Tab 5), R 2119-2135, 2144-2183, 2184-2207, 2570}. The District Court also entered a corrected memorandum and order {Appellants' Tab 4; R 2627}, granting Sgt. Cotton' motion for summary judgment. The District Court entered final summary judgment in Sgt. Cotton's favor. {R 2626}. The Tolans filed a motion for clarification of the final summary judgment order {R 2705} and the District Court entered an amended final summary judgment in favor of Sgt. Cotton {Appellants' Tab 3; R 2715}. The Tolans filed an initial notice of appeal {R 2712}, and subsequent amended notice of appeal {Appellants' Tab 2; R 2716}.

STATEMENT OF FACTS

The District Court thoroughly analyzed and painstakingly recited the factual record. These findings synthesize the testimony of all eyewitnesses to the incident and appropriately resolved any factual disputes in favor of the non-movants. This analysis is generally consistent with the evidence submitted by Appellees in support of the motion for summary judgment. Appellees', therefore, adopt the District Court's statement of facts as well as its determination that, although disputes exist about some details and interpretations of the facts, there are no disputes of material fact and the evidence shows Sgt. Cotton did not use excessive force and is entitled to qualified immunity. {R 2627}.

SUMMARY OF THE ARGUMENT

The District Court's Judgment should be affirmed in all respects. The record establishes that Sgt. Cotton reasonably fired in self-defense in response to provocation that could have resulted in any reasonable officer firing. Robbie Tolan's admitted movements at the moment of the shooting gave Sgt. Cotton reason to believe a serious physical threat then existed and, in light of this fact and the legal standard of objective reasonableness, Sgt. Cotton did not violate the Fourth Amendment.

Moreover, even if a dispute exists regarding whether Sgt. Cotton used force against Robbie Tolan that violated the Fourth Amendment, Cotton is still entitled to the protections of qualified immunity because he did not deprive Robbie Tolan of any clearly established right. Sergeant Cotton could not have been on notice that shooting Robbie Tolan in apparent self-defense would violate clearly established law. Sgt. Cotton's action complied with accepted police training standards pertaining to application of the Fourth Amendment and Robbie Tolan's misconduct precipitated the shooting, not Sgt. Cotton's reasonable response to Tolan's action. Therefore, any police officer, including Sgt. Cotton, could reasonably have believed the decision to shoot Robbie Tolan was lawful. Furthermore, Sgt. Cotton deployed only a minimal level of reasonable force necessary to escort Marian Tolan toward the garage so Sgt. Cotton could respond

to the potential threat posed by Cooper, Bobby and Robbie Tolan. Marian Tolan did not follow instructions or move without prompting even though asked to do so by Sgt. Cotton. Under these circumstances, it was objectively reasonable for Sgt. Cotton to escort, or even push, Marian Cotton to a place of relative safety so that Sgt. Cotton could secure the volatile scene and complete his investigation. Certainly such action does not refute Sgt. Cotton's claim to immunity. Additionally, the Tolans have abandoned all other claims of alleged error identified in their notice of appeal but not raised in their brief. Accordingly, this Court should affirm the District Court's judgment and grant all other relief to which each Appellee is justly entitled in law and equity.

ARGUMENTS AND AUTHORITIES

First Reply Point

The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes that no jury could reasonably find Sergeant Cotton used excessive force against Robbie Tolan.

A. Standard of Review

"This Court has jurisdiction under 28 U.S.C. § 1291 and reviews a grant of summary judgment *de novo*, applying the same standard as the district court." *Rockwell v. Brown*, 664 F.3d 985, 990 (5th Cir. 2011).

B. Summary Judgment Standard Applicable to Claims of Immunity

"The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992). There must be a demonstrable conflict in substantial evidence to create a jury question. *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969), *overruled on other grounds by Gautreaux v. Scurlock Marine Inc*., 107 F.3d 331, 339 (5th Cir. 1997). Substantive law identifies those facts that are material in resolving a motion for summary judgment and only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2512 (1986). Factual *controversies* are resolved in a non-movant's favor, "but only when there is an actual controversy, that is, when both Parties have submitted evidence of contradictory facts." *Wallace v. Texas Tech Univ*., 80 F.3d 1042, 1048 (5th Cir. 1996).

Unchallenged facts supporting summary judgment must be credited. *Eversley v. Mbank*, 843 F.2d 172, 173-174 (5th Cir. 1988). A court cannot ignore uncontroverted proof on material issues simply because there are differing versions of immaterial facts. *Gibson v. Rich*, 44 F.3d 276, 277-78 n.7 (5th Cir. 1995); *Fraire*, 957 F.2d at 1273. Moreover, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable

jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1776, 1776 (2007).

Additionally, "[a]lthough nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once [as here] properly raised." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). "The Fifth Circuit does not require that an official demonstrate that he did not violate clearly established federal rights; [] precedent places that burden upon plaintiffs." *See Salas v. Carpenter*, 980 F.2d 299, 304-06 (5th Cir. 1992). As such, when a law enforcement officer claims qualified immunity the burden shifts to the plaintiffs to muster evidence sufficient to rebut the officer's immunity defense. *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987); *Beck v. Texas State Board of Dental Exam'rs*, 204 F.3d 629, 633 (5th Cir. 2000).

Thus, because Sgt. Cotton and Officer Edwards invoked the defense of qualified immunity {R 92, 908}, "the burden of negating the defense lies with [the Tolans], even on summary judgment." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). To overcome the presumption of a law enforcement officer's qualified immunity under substantive law, it is imperative that the officer's actions be viewed from the perspective of a reasonable law enforcement officer on the scene and not in hindsight because settled law acknowledges the practical reality that "a

police officer views the facts through the lens of his police experience and expertise." *Ornelas v. United States*, 517 U.S. 690, 699-700, 116 S.Ct. 1657, 1663 (1996). This mandate applies even in the summary judgment context when the court is also required to consider evidence in the light most favorable to the person alleging a use of excessive force. *See Linbrugger v. Abercia*, 363 F.3d 537, 542-43 (5th Cir. 2004); *Fraire*, 957 F.2d at 1270; *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006). Thus, while a court considering a summary judgment record is required to consider the evidence in the light most favorable to an individual claiming excessive force was used, under substantive law, the Court must still adhere to the fundamental principle underlying the objective Fourth Amendment standard and immunity doctrine; that determination of the reasonableness of a police officer's use of force must be undertaken from the *perspective of a reasonable police officer* on the scene. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989).

Specifically, a vital precept in determining whether a summary judgment record rebuts a law enforcement officer's qualified immunity is that the Supreme Court has specifically mandated that only those facts known to the police officer count in judging the reasonableness of his action; not subjective facts known only to a plaintiff and certainly not information that is subject to a variety of interpretations by lay individuals with no relevant experience or expertise. *See U.S.*

v. Banks, 540 U.S. 31, 39, 124 S. Ct. 521, 527 (2003). This includes the requirement that the Court may not consider in its immunity analysis irrelevant, immaterial facts learned only after the challenged conduct. *See Sherrod v. Berry,* 856 F.2d 802, 807 (7th Cir. 1988).

Prominently, when judging qualified immunity in a law enforcement context, it is also impermissible for a reviewing court to interpose its own subjective beliefs and judgments regarding any favored method of police responses, procedures or tactics into an analysis that controlling precedent mandates must be conducted from the objective perspective of a reasonable police officer trained to perform law enforcement duties. *See Messerschmidt v. Millender*, __ U.S. __, 132 S.Ct. 1235, 1246-49 (2012); *Ryburn v. Huff*, __ U.S. __, 132 S.Ct. 987, 991-92 (2012); *Linbrugger*, 363 F.3d at 542-43 and *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994).

As its opinion and order make amply clear, the District Court appropriately applied these applicable summary judgment standards in determining the propriety of summary judgment in favor of Officer Edwards and Sgt. Cotton because the record establishes the officers did not violate the constitution and are protected from liability under both components of the immunity analysis.

C. Sergeant Cotton Did Not Use Excessive Force Against Robbie Tolan

In addressing the first prong of the immunity test, the District Court correctly determined Sgt. Cotton did not use excessive force against Robbie Tolan. As Circuit Judge Wiener explained for the court in *Fraire*, 957 F.2d at 1269-1270:

> Almost all excessive force cases are very fact intensive; this one is certainly no exception. And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. Our decision today is not dependent on the resolution of those discrepancies. We do, however, acknowledge our duty, in the context of summary judgment, to view the facts in the light most favorable to the non-movants – here the Plaintiffs.

Following this accepted procedure evidenced in nearly every decision of this Court in comparable police shooting cases over the last 27 years, the District Court here thoroughly analyzed the evidentiary record and correctly found that, although some insignificant details are disputed, the material facts necessary for resolution of the claims subject to this appeal are not. While, in some ways, Robbie Tolan and Sgt. Cotton, from their individual subjective perspectives, *view* the undisputed factual information differently; nonetheless, their differing opinions regarding the meaning or significance of the undisputed facts does not control the objective analysis the Court must undertake to resolve this appeal under controlling jurisprudence regarding qualified immunity. *See Anderson v. Creighton,* 483 U.S. 635, 641 (1987); *Lockett v. New Orleans City*, 607 F.3d 992 (5th Cir. 2010); *Pierce v. Smith,* 117 F.3d 866, 871 n.5 (5th Cir. 1997). Instead, the question is whether

any officer could have evaluated the undisputed evidence setting out the circumstances Sgt. Cotton encountered and have reasonably reached the decision that shooting in self-defense was constitutional under the clearly established law. Because, as the District Court found, an officer could have perceived a threat of serious injury based upon Robbie Tolan's admittedly sudden, expressive, and undisputedly aggressive actions, Sgt. Cotton is entitled to summary judgment in his favor. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009).

"A constitutional violation does not occur every time someone *feels* that they have been wronged or treated unfairly." *Shinn ex rel. Shinn v. College Station Independent School District*, 96 F.3d 783, 786 (5th Cir.) *cert. denied*, 520 U.S. 1211 (1997) (emphasis added). For purposes of evaluating a claim of alleged use of excessive force in the course of a seizure, the Fifth Circuit Court of Appeals has established the three part test the District Court correctly applied here. In order to prevail on such a claim, a plaintiff must show (1) some injury; (2) which resulted directly and only from a use of force that was clearly excessive to the need; and (3) that the excessiveness of which was objectively unreasonable. *Ontiveros*, 564 F.3d at 382. Resolution of whether evidence exists upon which a reasonable jury could conclude Sgt. Cotton used excessive force against Robbie Tolan requires analysis of the summary judgment evidence under the second and third prongs of this test. For the reasons discussed *infra*, the record establishes Sgt. Cotton's decision to

shoot Robbie Tolan was neither clearly excessive to the need, nor objectively unreasonable.

1. Applicable Clearly Established Legal Standards

Identification of clearly established law, the substantive law which is the applicable standard by which the record evidence must be considered, necessarily begins with identification and analysis of the relevant decisions of the Supreme Court and this Court. Application of this long-established controlling judicial authority[4] shows Robbie Tolan was not subjected to use of excessive force.

In order to support a claim for excessive force, the evidence must establish a use of force was "objectively unreasonable." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Controlling precedent mandates that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989); *see also Muehler v. Mena*, 544 U.S. 93, 108, 125 S. Ct. 1465, 1476 (2005). "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.*, and this case demonstrates that principle. Additionally, when evaluating the propriety of a

[4] It is noteworthy that the Tolans rely primarily on citations to unreported opinions and decisions outside the Fifth Circuit.

claimed use of excessive force during a police shooting event, the "standard of reasonableness at the moment applies." *See Graham*, 490 U.S. at 396, 109 S.Ct. at 1872. “The excessive force inquiry is confined to whether the [officer or another person] was in danger at the moment of the threat that resulted in the [officer’s use of deadly force].” *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011). As such, under the Fourth Amendment, “[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.” *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 2158 (2001).

Even before *Graham* was decided, however, this Court expressly held, in *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985), that no Fourth Amendment violation occurred in a police shooting case very much like that now before this Court. The *Young* Court pronounced that "no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts." In *Young*, City of Killeen police officer Kenneth Olson shot David Young during the investigation of suspected possession of marijuana. Officer Olson ordered Young to exit a vehicle but Young instead “apparently reached down to the seat or floorboard of his car and Olson, believing that Young had a gun, fired his own weapon. The shot was fatal.” 775 F.2d at 1351. No gun was found in the vehicle and an expert witness provided opinion

testimony criticizing Officer Olson's tactics prior to the moment at which he fired. *Id*. The *Young* Court, nonetheless, found Young's movements at the moment of the shooting gave Officer Olson reasonable cause to believe a threat of serious physical harm existed rendering Officer Olson's act of shooting Young not to violate the Fourth Amendment. *Id*. at 1353.

Six years after *Young* and two years after *Graham*, in *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), this Court considered a case in which City of Waco police officer Steve Anderson shot and killed Richard Crawford Jr. during the investigation of a suspected robbery. Crawford was later determined to have been unarmed. *Id*. at 496-97. Evaluating the record evidence, the *Reese* Court found:

> Crawford repeatedly reached down in defiance of Anderson's orders. At least twice, Crawford reached below Anderson's line of sight. The second time, Crawford tipped his shoulder and reached further down. Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot. That is, an officer would have probable cause to believe that "the suspect pose[d] a threat of serious physical harm." Anderson had repeatedly warned Crawford to raise his hands and was now faced with a situation in which another warning could (it appeared at the time) cost the life of Anderson or another officer. Under such circumstances, an officer is justified in using deadly force to defend himself and others around him.

Id. at 500-501. This Court held that "[t]he sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm." *Id*. at 502.

Thereafter, in *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992), this Court considered a case in which City of Arlington police officer James Lowery shot and killed Javier Fraire during the investigation of a suspected drunk driving incident. Officer Lowery told Fraire to place the truck he was driving in park and to turn off the ignition but Fraire, instead, shifted the truck into reverse and backed it onto a street. *Id*. at 1270. Fraire drove into a cul-de-sac and the truck stalled momentarily. When Officer Lowery exited his vehicle and approached Fraire's truck, Fraire drove the truck toward Officer Lowery, who shot Fraire. The *Fraire* plaintiff argued shooting Fraire was excessive in light of the relative seriousness of the drunk driving suspicion but this Court found "there can be no doubt that Lowery's act was one of virtual instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated." *Id*. at 1275.

The *Fraire* plaintiff also argued the tactics Officer Lowery utilized before the need to shoot arose placed him in risk of harm but, as in *Young*, this Court in *Fraire* held "[t]he constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest." *Id*. at 1276. The *Fraire* Court also noted that "[u]nder the circumstances of this fast moving and rapidly changing incident, we are not surprised that there are relatively minor discrepancies among the stories told by

[Officer] Lowery, [the decedent's friend] and bystanders on the cul-de-sac." *Id*. at 1279.

> We have learned to expect that, given the tension and heat of the pursuit and the element of surprise in such a stressful situation, the versions of the facts related by the protagonists and the witnesses will almost always differ somewhat in the myriad details of the action.

Id. "But in this case, such differences are insufficient to place facts at issue." *Id*. Like *Young* and *Reese*, the *Fraire* Court found that "a reasonable police officer could have believed that in firing he was not violating Fraire's constitutional right to be free of excessive force." *Id*. at 1281.

Fifteen years after *Fraire*, in *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007), this Court considered a case in which City of San Antonio police officer Steven Bazany shot and killed Jon Eric Hathaway during the investigation of a driving altercation. Officer Bazany approached a Mustang vehicle and directed its driver, Hathaway, to pull to the curb. Hathaway did so momentarily but when Officer Bazany reached a point 8-10 feet from the front of the Mustang, Hathaway drove the vehicle toward Officer Bazany. When Officer Bazany concluded he was unable to get out of the vehicle's path, he fired his handgun at Hathaway. Officer "Bazany did fire his weapon, though he does not know whether he drew and fired before, during, or immediately after he was struck by the Mustang. These events took place, on his account, within the snap of a finger." *Id*. at 316.

Hathaway argued any threat to Officer Bazany had passed before Hathaway was shot because the Mustang was not moving toward Officer Bazany when he actually fired. This Court, however, analyzed the relevant proximity and temporal factors and concluded "[g]iven the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly force." *Id*. at 322.

> This is not an instance [] where an officer fired after the perception of new information indicating the threat was past. Instead, the entirety of the officer's actions were predicated on responding to a serious threat quickly and decisively. That his decision is now subject to second-guessing-even legitimate second-guessing-does not make his actions objectively unreasonable given the particular circumstances of the shooting.[5]

Id. at 322.

In *Hathaway*, this Court therein reaffirmed the firmly established legal principle that "[t]he reasonableness of an officer's use of deadly force is therefore determined by the existence of a credible, serious threat to the physical safety of the officer or those in the vicinity." *Id* at 320.

The *Hathaway* Court also discussed that Officer "Bazany's failure to remember certain details does not amount to a 'well-supported suspicion of

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[5] "'[W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.'" *Stoik*, 35 F.3d at 158-59 (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)(citing *Reese*, 926 F.2d at 501)).

mendacity' undermining his credibility." *Id*. "The evidence before us-and the lack of specific facts to the contrary-requires a conclusion that Bazany fired his weapon and was struck by the Mustang in near contemporaneity." *Id*. Notably, the *Hathaway* Court also emphasized that Hathaway bore the burden of disproving Officer Bazany's claim to qualified immunity and that Hathaway failed to do so; therefore, summary judgment in Officer Bazany's favor was proper. *Id*. at 321.

Twenty four years after *Young*, this Court decided *Ontiveros v. City of Rosenberg*, 564 F.3d 379 (5th Cir. 2009). In *Ontiveros*, City of Rosenberg police Lieutenant Dewayne Logan encountered Modesto Ontiveros inside a small, dimly lit room during the investigation of an assault. When Lt. Logan observed Ontiveros holding an object above his head, Logan yelled several times "let me see your hands." Instead of displaying his hands, however, Ontiveros reached inside a boot he was holding. Lt. Logan interpreted this action as Ontiveros potentially obtaining a weapon so Logan shot Ontiveros. No weapon was found however. *Id*. at 381. In *Ontiveros*, this Court directly stated the long established controlling legal standard that "[a]n officer's use of deadly force is presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Id*. at 382.

As the District Court discussed in its decision in the case now before this Court, the *Ontiveros* Court reiterated the necessary requirements for an appropriate analysis of qualified immunity.

> Even if the plaintiffs established that the officer used excessive force (and thus performed an unreasonable seizure under the Fourth Amendment), the court would perform an entirely separate inquiry applying a different reasonableness standard. In order to evaluate the "clearly established law" prong of the qualified immunity test, the court must ask whether, at the time of the incident, the law clearly established that such conduct would violate the right. This inquiry focuses not on the general standard -when may an officer use deadly force against a suspect? - but on the specific circumstances of the incident - could an officer have reasonably have interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force? *Brosseau v. Haugen*, 543 U.S. 194, 199-200, 125 S.Ct. 596 (2004).
>
> > Excessive force incidents are highly fact-specific and without cases squarely on point, officers receive the protection of qualified immunity. *Id.* at 201, 125 S.Ct. 596; *see also Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034 (1987). ("Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." (internal quotations omitted).

Ontiveros, 564 F.3d at 383 n. 1.

Germane to the central issue now before this Court, in his testimony in *Ontiveros,* Texas Ranger Jeff Cook starkly explained the exigency confronting Lt. Logan and other police officers faced with a similar, inchoate, threat.

> Q. If Lieutenant Logan perceived Mr. Ontiveros's actions as Mr. Ontiveros putting his hand inside the boot do you think it would have been necessary for Lieutenant Logan to wait until Mr. Ontiveros exhibited a weapon before taking defensive action?

A. Absolutely not.

Q. And why not?
A. Because he will then be behind the curve on reacting. Action is always-action always beats reaction.

Q. If Mr. Ontiveros had a handgun in this boot, would there be any threat to Lieutenant Logan by Mr. Ontiveros just leaving his hand in the boot?
A. Absolutely.

Q. And why so?
A. Because you can shoot through a boot. If Mr. Ontiveros had a weapon, a gun in the boot, he could simply fire through the boot at Officer Logan.

Q. And do you think that it's likely that Lieutenant Logan would have had enough time to take appropriate steps to protect himself if he waited until Mr. Ontiveros removed a handgun from the boot if he had had one in there?
A. No. Once again, action beats reaction. If someone pulls a gun-I don't know if you want me to go into that or not but-

Q. Explain that for us.
A. Action is going to beat reaction every time. For example, if I have-if I have a gun and my brain-I have made the decision to shoot, then that message is going to travel down to my muscles and I'm going to shoot. For you to react to that-I have already started a process. You have to recognize it, then your brain has to tell your muscles to react, and then you're reacting to my actions. So action is going to beat reaction simply because of the cognitive element involved.

Q. Have you observed a training exercise where one training officer stands across a room from an officer, for example, and the training officer has his hand down next to his body with a gun in it and then the other officer is supposed to react? Have you seen that kind of training exercise?
A. I actually participated in that training about three weeks ago.

> Q. Can you explain that in detail, how that training section works?
> A. Well, we had simunition guns. I don't know if I need to explain, but it's guns that look and feel real but they don't shoot real bullets. And literally, I stood there and pointed a gun at the instructor and the instructor had the gun actually pointed to the ground and just told me to shoot whenever he acted. And I could not shoot him before he shot me. At best, I could tie him. He could bring the gun up, pull the trigger before I could pull the trigger. I never beat him, and at best I could tie him.
>
> Q. Is a tie good enough in this work?
> A. No, a tie, you die, you know.

564 F.3d at 384, n. 2

As in the instant appeal, this Court recognized the *Ontiveros* plaintiffs rested the majority of their argument on appeal on claimed disputes that were not material disputes at all but, instead, merely attempts to use "undisputed facts to imply a speculative scenario that has no factual support." *Id* at 383. In reversing an approach very similar to that advanced by the Tolans in the instant appeal, this Court explained, "[h]indsight and speculation create no genuine, material fact issue as to how a reasonable officer could have interpreted Ontiveros's actions." *Id*. at 384. Important to this appeal, this Court held a plaintiff's "conjecture arising from undisputed facts that do not materially contradict [the officer's] testimony" about why he fired, does not preclude summary judgment or provide grounds for denial. *Id*. at 385.

The same year it decided *Ontiveros*, in *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009), this Court considered a case in which City of Gretna police officer

Douglas Zemlik fatally shot Michael Manis during the investigation of a report of a Jeep parked idling on train tracks. Manis had been sleeping or passed out inside the vehicle. "The parties dispute[d] what happened after Manis was aroused." *Id*. at 842. The facts that were not disputed are that when officers awoke Manis, he reached under the seat. The officers on the scene ordered Manis to show his hands but he ignored the officers' commands and "[w]hen Manis appeared to retrieve some object and began to straighten up, Zemlik fired four rounds killing Manis." *Id*. Again, as do the Tolans, the *Manis* plaintiffs proffered various arguments regarding why Manis may have acted as he did such as he "only moved his arms out of drunken confusion, not combativeness," "Manis, oblivious to his fastened seat belt, tried unsuccessfully to get out of the Jeep," and that Officer "Zemlik shot Manis as he was attempting to straighten up and raise his hands in a display of submission. No weapon was recovered." *Id*.

This Court repeated the applicable legal standard as "[a]n 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*. at 843. Thus, an officer's use of deadly force is reasonable when a suspect moves his hands out of the officer's line of sight such that the officer could reasonably believe the suspect is reaching for a weapon. See *id*. at 844. This Court, in reversing a denial of summary judgment and rendering

judgment in Officer Zemlik's favor, found "[t]he Appellees do not dispute the *only* fact material to whether Kemlik 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. The Manis plaintiffs "nowhere offer evidence calling into question whether Manis actually reached under the seat in defiance of the officers' commands." *Id*. at 845.

Last year, this Court decided *Carnaby v. City of Houston*, 636 F.3d 183 (5th Cir. 2011), in which City of Houston police officer Charles Foster and others were investigating an incident of impersonating a police officer. Several officers commanded Carnaby to exit his vehicle and get on the ground. With the door of his car open, Carnaby leaned toward the floor of the car such that officers could not see Carnaby's hands at that instant. Carnaby began to exit his vehicle and "began to swing his hands - one of which was grasping an object - around toward [Officer] Washington. Seeing that, Foster fired his weapon through the car and hit Carnaby in the back. [Officer] Washington also fired an instant later, but his round struck the driver's door." *Id* at 186. Carnaby was searched when he fell to the ground and did not have a weapon on his person. A cell phone was found on the ground near Carnaby. *Id*. at 186-87.

Carnaby's survivor argued the officers' alleged negligence in approaching Carnaby caused them to be placed in a position of vulnerability. Regardless, this

Court again explained the correct legal standard as "[t]he use of deadly force may be proper regardless of an officer's negligence if, at the moment of the shooting, he was trying to prevent serious injury or death." *Id*. at 188. This Court found "[t]he officers were trying to prevent serious injury or death, so their use of force was reasonable, and we need not proceed further in the qualified immunity analysis." *Id*. at 189.

All of these decisions of this Court, and those of the Supreme Court upon which they are well founded, accurately demonstrate the clearly established legal standard applicable to resolution of this appeal and the reason the trial court's summary judgment should be affirmed; both on the grounds that Sgt. Cotton acted constitutionally and that, at the least, he is entitled to immunity. Tellingly, the Tolans have wholly failed their burden to demonstrate that *no police officer* could reasonably have believed shooting Robbie Tolan would be reasonable under this well settled basis of legal authority and the undisputed material facts, including Robbie Tolan's own admissions of his conduct that precipitated Sgt. Cotton's response in self-defense. The clearly established law, as evidenced by the relevant decisions of this Court, plainly shows that when a suspect, like Robbie Tolan here, 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 an officer's line of sight toward a police officer, a reasonable police officer could, and in documented decisions does, regard such action as posing a potential threat of serious harm to the officer or to others and is generally prompted, consistent with their training, to fire in self-defense.[6] *See Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis* and *Carnaby*.

2. A Reasonable Police Officer Would Be Trained to Use Force in Accordance with the Clearly Established Legal Standards

Police officers typically, and certainly those in the State of Texas due to the Texas Commission on Law Enforcement Standards and Education (TCLEOSE), are trained they may only use force in accordance with the clearly established legal standards discussed *supra*. Lieutenant Albert Rodriguez and Dr. William Lewinski[7] provided *uncontroverted* expert testimony regarding, not only what police officers are customarily taught, but also the legal and practical reasons why officers are instructed as they are. Their expert testimony is, therefore, extremely useful for purposes of identifying how and why, a reasonable police officer may

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[6] While no doubt the Tolans will argue in reply that these prior decisions of this Court show that police officers routinely shoot unarmed individuals without justification, such an argument ignores the reality that fewer individuals who are armed when shot by an officer would be expected to file a lawsuit, officers who fail to respond in time to save themselves are seldom sued, and also that officers in such circumstances who do not fire and luckily survive would likewise not likely be sued. This assertion, therefore, is of no moment.

[7] Notably, the Tolans now seek to criticize, through mere argument alone, the admitted testimony of Lt. Rodriguez and Dr. Lewinski but the Tolans did not challenged in the District Court the basis for this expert testimony and have failed to identify any evidence, including testimony from any other expert, which contradicts Rodriguez or Lewinski's uncontroverted testimony.

have appropriately responded in the circumstance Sgt. Cotton faced, {R 1664, 1782}, and why the Tolans cannot present controverting evidence.

Following the guidance of the Supreme Court in *Graham* regarding the appropriate methodology for evaluating a police use of force, Lt. Rodriguez evaluated Sgt. Cotton's decision to shoot Robbie Tolan under an objective standard and provided testimony regarding how a reasonable officer could appropriately have responded under the circumstances, the range of responses officers are trained could be suitable, and why that range of potential responses is proper. Lt. Rodriguez explained that the general manner in which police officers are most often trained through TCLEOSE provides a valid, objective, means for evaluating an officer's conduct because such TCLEOSE training is based upon that which a reasonable police officer could have believed appropriate. As Lt. Rodriguez discussed, the general content of TCLEOSE training regarding use of force is primarily based upon decisions of the United States courts interpreting the Fourth Amendment. Lt. Rodriguez studies, and uses when providing instruction to officers, court decisions pertaining to law enforcement action, including decisions of the Supreme Court and Fifth Circuit Court of Appeals informed by, and consistent with, research into officer action/reaction time, as discussed by Lt. Rodriguez and well-reasoned and discussed by Dr. Lewinski. The principle of "a tie, you die" discussed by Texas Ranger Jeff Cook in *Ontiveros* is precisely the

principle Lt. Rodriguez and Dr. Lewinski have studied, published about, taught and explained in their testimony regarding the reasonableness of Sgt. Cotton's response to the potential threat when he encountered the circumstances presented by Robbie Tolan. Notably, Lt. Rodriguez specifically identified the case decisions in *Graham, Tennessee v. Garner, Fraire, Hathaway, Manis, Ontiveros, Reese* and *Young* in his expert report and spoke of their significance in his analysis during his deposition testimony as cases he consults and relies upon in teaching when he provides instruction to law enforcement officers regarding application of Fourth Amendment limitations on an officer's use of force. {R 1735, 1751-52, 1782, 1785-86}.

Therefore, customary police training contains an element of how all officers are taught to apply the Fourth Amendment's constraints in real-life law enforcement operations. {R 1735, 1751-1752, 1791-1794}. Because all Texas peace officers receive much the same training through TCLEOSE, this training represents how officers are instructed they should respond, under state and federal law, when called upon to respond to incidents like that which occurred with the Tolans; it reflects the standard for a reasonable law enforcement officer. Officers are also trained, by TCLEOSE certified instructors, that the use of deadly force is not a violation of federal rights when that force is within the parameters provided by the relevant provisions of the Texas Penal Code, as has been endorsed by this

Court.[8] *See Fraire*, 957 F.2d at 1276-1277. Additionally, since all peace officers in Texas must comply with the dictates of the Texas Legislature regarding its statewide, comprehensive, police training program, as administered through TCLEOSE, all officers receive specific training regarding civil rights and laws of the United States. This training applies to both state and federal limitations regarding police use of force. *See* TEX.OCC. CODE § 1701.253(k), § 1701.351(a-1), § 1701.352(2)(A) and § 1701.402(b)(i). Therefore, TCLEOSE sponsored training provides a reliable, objective, means of identifying the training of a reasonable officer and, for measuring the actions of Sgt. Cotton against the actions of a hypothetical reasonable police officer anywhere in the United States, not only Texas, as the Tolans argue. {R 1782}.

Moreover, as both Lt. Rodriguez and Dr. Lewinski explained in their testimony, there are very practical police tactical justifications for the training—both on the constitution, and tactically in light of these constitutional mandates—police officers receive through TCLEOSE. Lt. Rodriguez's evaluation explains that law enforcement officers receive not only comprehensive training and education in the use of deadly force, civil rights issues and federal law related thereto in their TCLEOSE instruction, but also the tactical need to be prepared to defend

[8] The record certainly does not indicate the applicable Texas statutes are unconstitutional.

themselves in accordance with these legal limitations when confronted with situations like the one Robbie Tolan created in the instant case. {R 1664, 1782}.

Lt. Rodriguez's uncontroverted testimony shows Sgt. Cotton's actions were consistent with actions of a reasonable officer who had been trained under TCLEOSE state and federal use of force instruction and that Sgt. Cotton followed accepted training and, therefore understandably discharged his firearm to protect his life against Robbie Tolan's apparently life threatening actions. Consistent with the repeated findings of this Court, contemporary law enforcement training does not, as Lt. Rodriguez and Dr. Lewinski both testified, and Ranger Cook explained in *Oniveros*, train police officers to wait until they can positively confirm a suspect has a weapon before the use of deadly force is justified because it would then likely be too late to respond effectively in defense. If that were the case, many more law enforcement officers would be killed due to the fact that scientific analysis demonstrates, and officers are trained, as Ranger Cook aptly described in *Ontiveros,* that a suspect's actions are always faster than the officer's capability to react. Law enforcement training specifically addresses the fact that a suspect can access a firearm from the waistband area and shoot before an officer can react to shoot in defense if the officer waits until he positively confirms the existence of a weapon. Officers are therefore trained to understand that, even if the officer is able to shoot at the *same time the suspect fires*, it is of no likely advantage to the officer

as this Court specifically recognized in *Ontiveros*. Shooting at the same moment the suspect does means the officers could still be killed or seriously injured. {R 1664, 1782}.

Accordingly, and therefore as they must be, 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, as this Court has consistently held, an officer is not required, and therefore not trained, that he must confirm the suspect is in fact reaching for a weapon before responding to a reasonably perceived threat. Accordingly, law enforcement trainers educate officers on the fact that they simply do not have time to wait until they actually see a weapon before they take action to defend themselves in circumstances such as Robbie Tolan described he presented. Officers are trained that, if they wait to confirm the existence of a weapon, their likelihood of surviving the encounter decreases dramatically. Therefore, officers are trained not to wait to this point but, rather, to respond to actions *consistent with* an effort to retrieve or draw a weapon; *actions Robbie Tolan undertook.* {R 1664, 1782}.

Dr. William Lewinski's expert evaluation and testimony establishes the scientific reasons why police officers are taught about the practical relationship of action and reaction elements during a police event such as a shooting, because this understanding is necessary for an officer to survive an attack. Officer training

involves instruction designed to offset or reduce the potential danger to an officer and others during situations where an officer must react immediately to a serious risk of danger posed by threatening actions of an individual. Dr. Lewinski's research, like that of others, and as tacitly adopted by this Court in, for example, *Ontiveros,* has validated the training typically provided to officers regarding the need to recognize the dramatic disadvantages that perception, decision making, and reaction time pose for an officer when, as here, he is required to respond to a suspect's action that unfolds rapidly and can reasonably be perceived as potentially life threatening, even if it ultimately turns out not to be. Dr. Lewinski's research establishes that law enforcement officers are appropriately trained only when they are trained to respond *preemptively* to a reasonably perceived threat because that is the *only effective way* an officer has to reasonably protect himself from harm. {R 1664}.

In this incident as it evolved, Sgt. Cotton acquired information about the occupants of the suspected stolen vehicle, including their disregard of requests and commands of police. 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. Sgt. Cotton's concern was understandable as Dr. Lewinski's research shows that a person with the intent to resist an officer by shooting that officer can pull a weapon from the position Robbie Tolan was in and fire a gun toward an officer in, on average, ¼ of a second; way too fast for an officer to do anything more than react consistent with his TCLEOSE training and his own self-preservation instinct. Therefore, an individual who is defiantly non-compliant and whose hands are 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. {R 1664}.

For purposes of illustration and comparison, an average batter in a professional baseball game has approximately ½ a second of travel time of the ball from the pitcher's mound to home plate to react to the ball. In the situation Sgt. Cotton faced, he had only half that time, or possibly less, to recognize and then react to Robbie Tolan's aggressive actions which compressed the relevant time frame for responsive reaction. {R 1664}.

In Dr. Lewinski's research of officer involved shootings, he has acquired videos of officers being shot so quickly the only response they provided, when they reacted at all before being shot, was a flinch movement. Therefore, from a law

enforcement training and research perspective, an appropriate law enforcement response to an imminent, potentially deadly, threat necessarily requires some degree of reasonable anticipation to compensate for the lag time all human beings face due to the reactionary gap discussed by Dr. Lewinski and Lt. Rodriguez**.** Therefore, a primary purpose of law- enforcement training is to condition an appropriate response to a deadly threat so that it may be accomplished *reflexively* by the officer upon his detection of facts suggesting an imminent risk of serious injury. This means that, when an officer detects a threat in this type of situation, the only possible way for the officer to survive is if the officer's assessment of the threat and response thereto is trained to *a very high degree of automaticity*. This is due to the fact that even deliberate thought takes time. If the officer were to engage in any type of detailed assessment or prolonged thinking about the situation or his response, the initiation of the responding action would be delayed, by at least ½ to ¾ of a second at a minimum; more than enough time to be killed or seriously injured. Therefore, the officer's assessment and reaction must be nearly *automatically programmed*. Thus, as the Supreme Court and this Court have recurrently explained, the reasonableness of an officer's reaction to a situation like that created by Robbie Tolan cannot be reliably evaluated by resorting to information not immediately apparent to a reasonable officer at the scene of an incident under the circumstances presented at the moment of the perceived threat.

The average officer using a short stroke, light poundage, handgun, like the Kimber .45 caliber handgun Sgt. Cotton used, can rapidly pull the trigger at the rate of ¼ of a second per shot. Therefore, Dr. Lewinski's research shows the shooting time Sgt. Cotton had was approximately ½ a second, with the first bullet being fired at zero time and the third bullet being fired only ½ a second later. Undisputed research shows that, during the brief moments an officer is engaged in rapidly responding to save his life during this type of apparent, imminent threat, the officer is usually so intently focused on his response to the perceived threat, that once he has made the decision to shoot and start toward that responsive action, it practically precludes his ability to critically analyze the response during the incident itself, even if circumstances change during that incredibly short time. The perceived risk also impairs the officer's ability to note if conditions of the threat might have changed somewhat between the time he initiated his response and the actual completion of that response as recognized in *Hathaway*, as well as *Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009) and *Untalan v. City of Lorain*, 430 F.3d 312, 315-317 (6th Cir. 2005) applying a similar analysis. Simply put, although certainly understandable, the exigencies of the situation and the need to accomplish a potentially life-saving response occupies all of the officer's attention and cognitive resources. The officer is, quite literally scared for his life and the self-preservation instinct and training provide an automatic response. {R 1664}.

Accordingly, guided by his education, training and experience, including the scientific, peer-reviewed, replicated and published research he has conducted regarding the scientific principles underlying action/reaction principles and law enforcement officer training on this issue, Dr. Lewinski's expert evaluation establishes that any reasonable law enforcement officer would likely perceive a threat and could have responded as Sgt. Cotton did in this instance. {R 1664}. Indeed, arguably, Dr. Lewinsky's testimony emphasizes that Sgt. Cotton's was the *most* reasonable, and only safe, response to Robbie Tolan's admitted aggressiveness and under the circumstances of the unusual actions he undertook.

Thus, the record establishes Sgt. Cotton discharged his firearm based upon the totality of circumstances that existed at the time, in accordance with law enforcement training stemming from the United States Supreme Court's Decision in *Graham v Connor*. As *Graham* and its progeny instructs, and this Court's ample precedent holds in *accord*, that Tolan was later found to be unarmed is not pertinent to any aspect of the analysis of Sgt. Cotton's actions in accordance with his law enforcement officer training because that information could not have been known by Sgt. Cotton until after the time had passed for him to act in self-defense from an actual or perceived attack.[9] {R 1782}.

[9] Courts have actually determined such information to be "irrelevant" to evaluating the constitutionality of an officer's decision to shoot. *See Sherrod,* 856 F.2d at 807.

Unless he chose the alternative of waiting to see whether Tolan was going to attempt to shoot him, Sgt. Cotton had no other reasonable alternative but to resort to his handgun. And, for Sgt. Cotton to simply wait to see if he would be lucky or be dead was clearly not a reasonable alternative. In evaluating Sgt. Cotton's actions in light of how officers are customarily trained to apply constitutional principles, any reasonable law enforcement officer could have believed that Tolan presented an imminent threat of serious bodily injury or death. To be sure, the Tolans have not carried their burden to identify evidence showing *no* reasonable police officer could have thought so at the time. Sgt. Cotton's actions were, therefore, in compliance with accepted law enforcement training and practices, and federal law upon which they are founded. {R 1664, 1782}.

3. Sergeant Cotton Complied with Clearly Established Law

Whether measured solely by applicable clearly established legal precedents or by those judicial decisions as well as the training officers receive regarding application of the legal standards, the record establishes that Sgt. Cotton did not use excessive force against Robbie Tolan. Sgt. Cotton encountered Robbie Tolan in an unsafe environment, *Johnson*, 481 F.2d at 1033, and Sgt. Cotton unquestionably had the legal authority to use an objectively reasonable level of force to carry out his duties and protect himself from harm. *See Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Judged, as reasonableness must be, from the perspective

of a reasonable officer on the scene and, allowing for the undisputed fact that Sgt. Cotton was forced by the Tolans' actions to make split-second judgments—in circumstances that were tense, uncertain, and rapidly evolving—about the amount of force that was necessary in the particular situation, the decision to fire was reasonable under *Graham* and interpretive jurisprudence of this Court. Without employing the 20/20 vision of hindsight prohibited by *Graham*, 490 U.S. at 396, 109 S. Ct. 1865, there is simply nothing within the record which demonstrates that any other competent law enforcement officer could not reasonably have concluded his life was in danger and that firing in self-defense was appropriate in response to the uncontested factual account provided by Robbie Tolan.

Although the Tolans *argue* Sgt. Cotton's actions were unreasonable, they fail to identify *evidence* or *authority* that supports their argument. The evidentiary record instead establishes that during the nighttime Robbie Tolan was in an area on the porch of the house that had no direct lighting, Tolan yelled out "[g]et your fucking hands off my mom" as he pushed himself up very quickly from the prone position and angrily spun his entire body toward Sgt. Cotton in a quick, angry, and aggressive motion. {R 992, 1045-46, 1064, 1049, 1056, 1136, 1137, 1489-90, 2474, 2480, 2494, 2495}. Officer Edwards observed that Robbie Tolan was in, what Edwards perceived as a "charging position" as if he was *about to charge toward* Sgt. Cotton. {R 1121-22}.

While simply placing a hand in a waistband area is not necessarily considered an inherent threat, within some contexts such as those evidenced here and in other decisions of this Court discussed at length *supra*, that position or a movement toward and from that position can be a very threatening action. Context for a law enforcement officer is shaped by the training and experience of an officer, and by the information acquired by the officer as he approaches the incident and acquires information about the incident as it is unfolding. This information is typically compared with known facts such as information provided by training or factually accurate or perceived elements pertaining to the incident, and is used to help the officers reach a contextual understanding of the dynamics of an encounter. {R 1664}.

This record shows that *any officer on the scene* could reasonably have evaluated the circumstances to authorize firing to defend himself under the applicable standard for evaluating Sgt. Cotton's actions in this case. Application of the controlling legal standard, therefore, shows that Sgt. Cotton's reported perception of the events and split second, reflexive, reaction to that perception was reasonable under the totality of the tense, uncertain, and rapidly evolving circumstances all witnesses and the District Court agree he encountered. "This court has found an officer's use of deadly force to be reasonable when a suspect moves out of the officer's line of sight such that the officer could reasonably

believe the suspect was reaching for a weapon." *Manis*, 585 F.3d at 844. This precisely what occurred in this case so Sgt. Cotton did not use excessive force against Robbie Tolan.

Second Reply Point

The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes his entitlement to qualified immunity.

Even if a material factual dispute existed within the record under the general objective reasonableness test of the Fourth Amendment regarding whether Sgt. Cotton used excessive force against Robbie Tolan, summary judgment in Sgt. Cotton's favor is still required because Tolan does not meet his burden of identifying a material factual dispute on the second step of the required immunity analysis and, in fact, the evidence disproves the existence of any such dispute.[10] *See Brumfield* 551 F.3d at 326. For purposes of immunity, it "is not enough" that a factual dispute remains as to whether Robbie Tolan was deprived of a constitutionally protected right; Sgt. Cotton is nonetheless entitled to qualified immunity because the evidence establishes his decision to fire in self-defense when he did was objectively reasonable under the circumstances he encountered and

[10] While the record affirmatively establishes the reasonableness of Sgt. Cotton's conduct, the burden of proof on this issue is not his. Instead, the Tolans must negate the immunity defense by identifying evidence within the summary judgment record that shows Sergeant Cotton's conduct was objectively unreasonable in light of clearly established law at the time that the challenged conduct occurred. *See Collier*, 569 F.3d at 217.

moreover, he could not have been on notice that firing would be prohibited by clearly established law.[11] *See Brousseau*, 543 U.S. at 199, 125 S. Ct. at 599.

The qualified immunity analysis is a *two-step* process which entails both a determination of whether the plaintiff has shown the violation of a constitutional right, as well as also a determination of whether the conduct alleged was objectively reasonable in light of clearly established law at the time that the challenged conduct occurred. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987), and *Saucier*, 533 U.S. at 199, 121 S. Ct. at 2155. Therefore, if a court determines a plaintiff's allegations, if proved, would have violated a constitutionally protected right, a separate step in the reasoned qualified immunity analysis is a determination of whether the right allegedly violated, *considering the specific circumstances of the case*, was clearly established in a particularized sense at the time a defendant was alleged to have violated it such that a reasonable officer would have known his actions violated that clearly established law. *Saucier*, 533 U.S. at 201-02, 121 S. Ct. at 2155-56.

[11] It is worth noting, for example, that claims against Officer Hyman, the officer who fired the fatal shot in *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 1701 (1985), were dismissed based upon his qualified immunity despite the decision that his action was ultimately held unconstitutional. *See Garner*, 471 U.S. at 5, 105 S. Ct. at 1698; *Garner v. Memphis Police Department*, 8 F.3d 358, 365 (6th Cir. 1993). This frames the important difference between the constitutional test and the test of immunity which *Saucier* reminds must be respected in deciding an immunity case, *even where a constitutional violation may have occurred.*

Prominently, it is error to give mere lip service to the immunity standard and rely upon the general tests of *Graham* and *Garner* in finding fair notice of a clearly established right prohibiting use of excessive force. *Id*. "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. "For a legal principle to be clearly established, 'we must be able to point to controlling authority-or a robust consensus of persuasive authority-that defines the contours of the right in question with a high degree of particularity, *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011), and that places the statutory or constitutional question 'beyond debate,' *Ashcroft v. al-Kidd* __ U.S. __, 131 S.Ct. 2074, 2083 (2011)." *Waganfeald v. Gusman*, 674 F.3d 475, 483 (5th Cir. 2012)(quoting *al-Kidd*, 131 S.Ct. at 2083).

Moreover, "[t]he second prong [of a qualified immunity analysis] 'is better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendants was *objectively unreasonable* in the light of that then clearly established law.'" *Felton v. Polles,* 315 F.3d 470, 477 (5th Cir. 2002) (quoting *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998)). The second step of the analysis "focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or

factual setting in which it took place." *Pierce v Smith*, 117 F.3d 866, 882 n. 5 (5th Cir. 1997). The record before the Court disproves both inquiries here.

A. Sergeant Cotton Did Not Deprive Robbie Tolan of Any Clearly Established Right

The record establishes Sgt. Cotton did not deprive Robbie Tolan of a clearly established right of which a reasonable police officer would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738 (1982). "Clearly established for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 1799 (1999); *Sanchez v. Swyden*, 139 F.3d 464, 466 (5th Cir. 1998). If the law did not put the officer on notice *his specific conduct would be clearly unlawful*, dismissal based on qualified immunity is appropriate*, even if the conduct was in fact unconstitutional*. *See Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039; *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156; *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000). Whether a right was clearly established is an inquiry which "must be undertaken in light of the case's *specific context*, not as a broad general proposition." *Saucier*, 533 U.S. at 201-02, 121 S. Ct. at 2156 (emphasis added).

1. Tolan Cannot Identify a Clearly Established Right he Claims Sergeant Cotton Violated

Sgt. Cotton served Robbie Tolan with interrogatories in an effort to discover the basis of his claimed deprivation of a clearly established right but Tolan could not, or refused to, identify any clearly established right he contends Sgt. Cotton violated. {R 1616-1639}. Accordingly, not only does the record lack *any evidence* even suggesting Sgt. Cotton deprived Robbie Tolan of a clearly established right, Tolan is additionally precluded from taking the position that any does by his failure to participate in discovery by disclosing any basis for such a contention. *See* FED.R.CIV.P. 33, 37.

2. Sergeant Cotton Could Not Have Been on Notice Through Judicial Decisions that Shooting Robbie Tolan in Apparent Self-Defense Would Violate Clearly Established Law

The summary judgment record also establishes Sgt. Cotton could not have been on notice that shooting Robbie Tolan, based upon the undisputed facts of this case, would violate the applicable legal standards. "If the law at the time of a constitutional violation does not give the officer 'fair notice' that his conduct is unlawful, the officer is immune from suit," Even if his conduct was arguably unconstitutional. *Manis*, 585 F.3d at 845-46 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 599 (2004)). Long "[b]efore 2005, Supreme Court precedent and cases in this circuit authorized deadly force when an officer had 'probable cause to believe that the suspect posed[d] a threat of serious physical

harm.'" *Manis* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 1701 (1985)). The holdings of the Fifth Circuit over the last 27 years have consistently instructed officers that it is clearly established that a law enforcement officer may defend himself by shooting an individual provided that *any* officer, knowing only what that officer knows at the moment, could reasonably have believed his life or bodily integrity was in imminent danger, regardless of whether that officer's belief's, in fact, ultimately correct. *See Young*, 775 F.2d at 1352-53; *Reese*, 926 F.2d at 500-01; *Fraire*, 957 F.2d at 1275-76; *Ontiveros*, 564 F.3d at 384; *Hathaway*, 507 F.3d at 312; *Manis*, 585 F.3d at 844. This is the applicable body of clearly established law and, even if Sgt. Cotton's action violated the Fourth Amendment, there is absolutely no record evidence which establishes that no officer could reasonably have believed Sgt. Cotton's response to the threat Robbie Tolan posed was lawful.

3. Sergeant Cotton Followed Applicable Training Standards

As discussed fully *supra*, the summary judgment record establishes that Sgt. Cotton followed applicable TCLEOSE law enforcement officer training standards pertaining to use of reasonable force under the Fourth Amendment as discussed at length *supra*. Moreover, both Lt. Rodriguez and Dr. Lewinski testified expressly that no established training standard shows that Sgt. Cotton's action of shooting Robbie Tolan violated clearly established applicable training standards. There is no

accepted law enforcement officer standard that applies to the circumstances of this case which could have reasonably put Sgt. Cotton on notice that his action would be improper. Likewise, there is no training standard which establishes that a competent law enforcement officer could not reasonably believe that Sgt. Cotton's actions were within an acceptable range of legitimate law enforcement procedures. The record, instead, proves that Sgt. Cottong followed applicable TCLEOSE training standards pertaining to application of the Fourth Amendment. {R 1664, 1782}.

4. Robbie Tolan's Actions Led to his Injury

Notably moreover, the record plainly establishes that Robbie Tolan's own misconduct led to his injury. To overcome a police officer's assertion of qualified immunity, a plaintiff "must show *the legality of [his own] conduct* was clearly established." *Sorrenson v. Ferrie*, 134 F.3d 325, 328 (5th Cir. 1998). Robbie Tolan had no constitutionally protected right to take the actions he took which required Sgt. Cotton to respond reasonably to a perceived threat of harm. As discussed in detail *supra*, the record establishes that Robbie Tolan was engaged in misconduct, including resisting the Officers' lawful efforts to maintain the status quo and conduct an investigation when the incidents which form the basis of the suit occurred. As discussed *supra*, Robbie Tolan's actions were the driving force that accelerated the speed in which the pertinent events occurred. The Tolans'

refusal to permit Officer Edwards and Sgt. Cotton to conduct a field investigation, unhampered by the complications and additional variables caused by the Tolans' acts of resistance, greatly compressed the rate in which the officers were required to react in response. Therefore, Robbie Tolan cannot overcome Sgt. Cotton's qualified immunity because Tolan's conduct was not clearly lawful. *See id.*

B. An Officer Could Reasonably Have Believed Sergeant Cotton's Conduct Was Lawful

Robbie Tolan has failed in his burden to identify record evidence which shows that a competent officer could not reasonably have believed that Sgt. Cotton's decision to fire in response to Tolan's action was lawful. If officers of reasonable competence could disagree as to whether the alleged conduct violated a plaintiff's rights, immunity remains intact. *See Malley v Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). Although he bears the burden of proof on this issue, Robbie Tolan has failed to adduce any evidence showing that no reasonable officer could have believed that Sgt. Cotton's conduct was lawful in light of the information they possessed and clearly established as required to overcome immunity. *See Babb v. Dorman*, 33 F3d 472, 477 (5th Cir. 1994). In fact, the only testimony regarding this issue has been presented by Lt. Rodriguez and Dr. Lewinski and their testimony plainly supports immunity.

A police officer is entitled to qualified immunity when even an *arguable* basis for his actions exists, *Haggerty v. Texas Southern University*, 391 F.3d 653,

656 (5th Cir. 2004), and certainly Robbie Tolan has not disproven Sgt. Cotton's immunity under this demanding standard considering the clearly established legal and training standards and expert evaluations of Lt. Rodriguez and Dr. Lewinski. *See also Vance v. Nunnery*, 137 F.3d 270, 274 (5th Cir. 1998). This record, therefore, undeniably establishes that Sgt. Cotton is entitled to summary judgment in his favor based upon qualified immunity. *See Saucier*, 533 U.S. at 201-02, 121 S. Ct. at 2155-56.

Third Reply Point

The District Court appropriately granted summary judgment in favor of Sergeant Cotton because the evidentiary record establishes that no jury could reasonably find he used excessive force against Marian Tolan and because Sergeant Cotton is entitled to qualified immunity.

The record likewise establishes that Marian Tolan was not subjected to use of excessive force and, that even if a factual dispute exists as to whether she was, Sgt. Cotton is still protected by qualified immunity. *See Saucier supra*. Marian Tolan alleges that Sgt. Cotton's actions of what she describes as shoving her toward the garage door by taking hold of her arm and then later pushing her against the garage door constitute uses of excessive force. {R 1460-61, 1464-65, 1470, 1472, 1474}. However, a police officer cannot be subjected to liability merely because he uses force while carrying out his duties, and an officer cannot be held responsible for unfortunate results of use of *necessary force*. *Hill v. Carroll*

County, 587 F.3d 230, 237 (5th Cir. 2009). "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Law Enforcement officers are often required to use force to accomplish their duties and, significantly here, the Supreme Court has expressly held "'[n]ot every *push or shove*, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id*. (Quoting *Johnson v. Glick*, 481 F.2d 1028, 1033, *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462 (1973)) (emphasis added). "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*., and this altercation is a demonstration of that very principle. *See also Saucier,* 533 U.S. at 202, 121 S. Ct. at 2156.

The undisputed evidence shows Sgt. Cotton's attention was immediately drawn to Marian Tolan and that her behavior heightened the officers' tension because she was part of a scene that was out of control and that must be controlled before the investigation could be conducted successfully. {R 1035-36}. Marian Tolan hindered Sgt. Cotton's ability to search and handcuff Robbie Tolan. {1036}. Sgt. Cotton attempted to gain Marian Tolan's cooperation with the investigation by

asking her several times to step toward the garage door but she admits she flatly refused to comply with that reasonable request and she continued to protest the officers' presence while blocking Sgt. Cotton's efforts to safely secure the scene. {R 1036-37}. Marian Tolan interjected herself into the police investigation {1460-61} and refused to comply with Sgt. Cotton's requests to move out of the way without the use of some minimal force being applied. {R 1045, 1245, 1249-50, 1464-65, 1469-70, 1472, 1886}.

Sgt. Cotton, therefore, reasonably responded by following accepted law enforcement officer training regarding application of Fourth Amendment restrictions in the course of performing police duties when deciding to escort Marian Tolan out of the way and attempt to keep her from continuing to interfere. Sgt. Cotton also followed standard law enforcement training by attempting to de-escalate Marian Tolan's agitated state by asking her to calm down and informing her that things were going to be worked out as he attempted to physically direct her out of the way. The verbal de-escalation techniques were not effective in controlling Ms. Tolan however. {R 1782}.

Police trainers instruct police officers on the importance of stabilizing and "securing" law enforcement scenes involving felony suspects and multiple persons who are interfering with an arrest or investigation. Officers are trained to recognize they must first stop the suspects and other persons' movements, if the scene is to

be stabilized. Allowing individuals and/or the suspects to roam and/or interfere with the situation increases the degree of danger to all involved. {R 1782}.

Marian Tolan admits she did not comply with Sgt. Cotton's reasonable requests and she walked from the sidewalk to the Chevrolet Suburban, back to Cooper, and back toward an officer while the officers were attempting to stabilize the situation. Marian Tolan further admits she heard an officer tell her, during this tense time, to *"get against the wall,"* and that her response to the direction was the exclamation "are you kidding me?" Officers stopping and/or controlling suspect's and individual's movements in dangerous and uncertain scenes allows for the ability to safely confirm the unknown persons' and suspects' identity and/or their possible involvement in the situation. *See Jewett v. Anders,* 521 F.3d 818, 827 (7th Cir. 2008). Law enforcement officers must take reasonable steps in controlling the movements of suspects and persons that might be interfering before an officer proceeds to the identification, handcuffing, and/or verification of the information and suspects. {R 1782}.

Marian Tolan inserted herself into a law enforcement scene that was dangerous and uncertain and interfered with the officers' efforts to safely investigate a reported crime. The confusion at the scene in the first minutes could have been stabilized if Marian Tolan had simply chosen to follow Sgt. Cotton's instructions, as Bobby Tolan did, instead of acting to further inflame the situation

and increase this risk to all involved. This was an event in which the Tolans possessed, and controlled access to, the information necessary to resolve the investigation promptly and peaceably but their response to simply being approached by officers led the Tolans to take actions which made it much more difficult for Officer Edwards and Sgt. Cotton to obtain the necessary information, which significantly compressed the time frames within which the officers were required to interpret and analyze information; make decisions and take action; and increase the perception of risk to all involved. Regardless of Marian Tolans' motives, her actions unquestionably interfered with a prompt, safe, resolution of the investigation.

"There can be a constitutional violation only if injuries resulted from the officer's use of excessive force. Injuries which result from, for example, an officer's justified use of force to overcome resistance to arrest do not implicate constitutionally protected interests." *Johnson v. Morel*, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc). Fifth Circuit precedent is clear that, if any of the elements of a claim under this test fail, so too does a plaintiff's claim. *Id.* Therefore, any reasonable law enforcement officer could have believed that Marian Tolan was subject to the reasonable restraint Sgt. Cotton used here, even if the Court views it as a shove, as Marian Tolan describes it. {R 1782}.

Furthermore, Marian Tolan's claim is analogous to the facts in *Saucier*. As in *Saucier*, Marian Tolan seeks to make a federal case out of a mere push *out of* harm's way. As in *Saucier*, a "reasonable officer [in Sgt. Cotton's] position could have believed that hurrying [Marian Tolan] away from the scene…was within the bounds of appropriate police responses." *Saucier*, 533 U.S. at 208, 121 S.Ct. at 2160. Sergeant Cotton "did not know the full extent of the threat [the Tolans] posed or how many other persons there might be who, in concert with [Marian Tolan], posed a threat…" *Id.* "It cannot be said there was a clearly established rule that would prohibit using the force [Sgt. Cotton] did to place [Marian Tolan against the garage door] to accomplish these objectives. *Saucier*, 533 U.S. at 209, 121 S.Ct. at 2160.

Like Saucier, the Tolans failed to identify "any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule." *See id.* Also as in *Saucier*, "the force was not so excessive that [Marian Tolan] suffered hurt or injury." *Id.* Accordingly, the force Sgt. Cotton used against Marian Tolan was neither excessive to the need, nor objectively unreasonable under either the Fourth Amendment or a violation of clearly established rights under the more lenient immunity standards. *See Collier* and *Saucier supra*. Therefore, Sgt. Cotton is entitled to judgment on Marian Tolan's claim of alleged use of excessive force. *See id.*

Fourth Reply Point

Appellants abandoned all other claims of alleged error identified in their notice of appeal but not raised in their brief.

The Tolans listed various other claimed errors in their notice of appeal, all of which they have failed to address in their brief. Those issues have therefore been abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) and *Pate v. Wainwright*, 607 F.2d 669, 670 (5th Cir. 1979). Accordingly, Appellees do not address them here.

CONCLUSION AND PRAYER

It was appropriate for the trial court to grant summary judgment in favor of Sgt. Cotton. Sgt. Cotton's decision to fire was proper because, at the moment of the shooting, Robbie Tolan's movements and threats gave Sgt. Cotton reason to believe a threat then existed. In light of clearly established law, Robbie Tolan's actions were consistent with obtaining a weapon from his waistband area and being an immediate threat to Sgt. Cotton's life so Sgt. Cotton understandably fired in self-defense. Regardless of whether Robbie Tolan's actions were, in hindsight, actuality life threatening[12] or not, Sgt. Cotton was entitled to act upon his reasonable perception a dangerous threat existed.

As did the officers in *Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis* and *Carnaby*, Sgt. Cotton directed Robbie Tolan to lie on the ground but he did not

[12] There is absolutely no dispute about Robbie Tolan's being threatening to some degree.

comply with the commands to do so, like the individuals who were shot in *Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis*, *Carnaby* and *Rockwell*. Instead, as did the individuals shot in *Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis* and *Carnaby*, Robbie Tolan defied commands designed to maintain a stable, safe situation during the temporary detention and additionally undertook action that resulted in his body moving quickly, when his hands became unexpectedly concealed from Sgt. Cotton's view in an area from which a weapon may have been kept, and Tolan's body moved from a position of relative safety to a position from which a threat of harm could be inflicted, which also resulted in Tolan's hands moving quickly from a position of concealment toward Sgt. Cotton. This is a common recipe for a police shooting in the cases which reflect the clearly established law in the Fifth Circuit because any reasonable police officer would have cause to fear for his safety under such circumstances. The decisional law reveals this scenario has occurred in Killeen, Waco, Arlington, San Antonio, Rosenberg, Gretna, Houston, Garland and Bellaire, which shows how officers from various agencies of various sizes and locations reasonably respond to circumstances like those which resulted in Sgt. Cotton firing.

Moreover, in addition to the commonalities which resulted in officers firing in *Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis* and *Carnaby*, Robbie Tolan also displayed an angry look on his face and, as he was rising with his hands out of

Sgt. Cotton's line of sight and turning toward Sgt. Cotton, Tolan screamed "Get your fucking hands off my mom!" Although Sgt. Cotton had placed his gun into its holster up until this crucial moment the threat reached its apex, when Robbie Tolan engaged in this obviously threatening conduct, Sgt. Cotton understandably drew his gun and fired in self-defense as had the officers in *Young*, *Reese*, *Fraire*, *Hathaway*, *Ontiveros*, *Manis*, and *Carnaby* in response to less provocation. As in the decisions of this Court evidencing clearly established law, the fact is that Tolan's conduct could, and did, cause a reasonable officer to understandably fear for his life.

Moreover, even if a dispute exists regarding whether Sgt. Cotton used excesive force against Robbie Tolan, Cotton is nonetheless entitled to qualified immunity. Sergeant Cotton could not have been on notice that shooting Robbie Tolan in apparent self-defense would violate clearly established law. Sgt. Cotton followed applicable police training standards and it was Robbie Tolan's actions that actually led to his injury, not Sgt. Cotton's reasonable response to them. Any police officer could reasonably have concluded Sgt. Cotton's decision to fire, under the circumstances evidenced by the record, was lawful.

Furthermore, no jury could reasonably find that Sgt. Cotton used excesive force against Marian Tolan, or that Cotton is not entitled to qualified immunity as to her claim. Sgt. Cotton used a reasonable level of minimal force to escort Marian

Tolan toward the garage so that Sgt. Cotton could address the potential threat posed by others. Marian Tolan resisted reasonable escort and complains she was pushed against the garage door. Even if she was, this objectively reasonable action did not violate the 4th Amendment and certainly does not overcome Sgt. Cotton's claim to immunity in light of *Saucier supra*. Lastly, The Tolans abandoned all other claims of error they did not raise in their brief. Accordingly, this Court should affirm the District Court's judgment and grant all other relief to which each Appellee is justly entitled in law and equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellees' Brief has been served via CM/ECF System and/or certified mail, return receipt requested, on this 1st day of November 2012, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Circuit Rule 32.2 and 32.3, the undersigned certifies this brief complies with the typed-volume limitations of FED. R. APP. P. 32(a)(7).

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USDC No. 4:09-CV-1324

The following pertains to your appellees' brief electronically filed on 11/1/12.

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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