

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually,
on behalf of all wrongful death
beneficiaries of
Anthony Marquis Franklin

Plaintiff,

Civil Action No. 1:23-cv-276

v.

KELBY RADFORD, individually;
RYAN RAWLINS, individually;
and JACOB BOWMAN, individually,

Defendants

_____ /

COMPLAINT FOR DAMAGE

Plaintiff DOROTHY C. MOTLEY, through and by her undersigned attorneys,
files this action against Defendant KELBY RADFORD, individually; RYAN
RAWLINS, individually; and JACOB BOWMAN, individually, and would show
the Court and Jury the following in support thereof:

INTRODUCTION

“He was reaching.... right?”

Statement of Officer Jacob Bowman soon after firing on
Anthony Marquis Franklin



Anthony Marquis Franklin

JURISDICTION AND VENUE

1.

This Court has original subject matter jurisdiction under 28 U.S.C. § 1331 and § 1343(4) over Plaintiff's claims under the U.S. Constitution, which are brought both directly under 42 U.S.C. § 1983.

2.

This Court has supplemental jurisdiction over Plaintiff's state law claim pursuant to 28 U.S.C § 1367 because it is so related to the federal claims that it forms part of the same case or controversy under Article III of the U. S. Constitution.

3.

Venue is proper in this District under 28 U.S.C § 1391(b)(1)(2). All of the events giving rise to this Complaint occurred within this District.

PARTIES

4.

Plaintiff DOROTHY C. MOTLEY is the natural parent of Anthony Marquis Franklin (“Anthony or Mr. Franklin”), deceased. She is a resident of the State of Texas and sue in her capacity as statutory beneficiaries under the Texas Wrongful Death Act, on behalf of all statutory beneficiaries of Anthony Marquis Franklin. Anthony Marquis Franklin died having no surviving spouse.

5.

Defendant KELBY RADFORD (hereinafter “Defendant Radford”) was/is a resident of the State of Texas. At all times, Defendant Radford was acting under the color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

6.

Defendant RYAN RAWLINS (hereinafter “Defendant Rawlins”) was/is a resident of the State of Texas. At all times, Defendant Rawlins was acting under the

color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

7.

Defendant JACOB BOWMAN (hereinafter “Defendant Bowman”) was/is a resident of the State of Texas. At all times, Defendant Bowman was acting under the color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

FACTUAL ALLEGATIONS

Events that occurred on January 15, 2023

8.

On January 15, 2023, at approximately 11:43 pm, Defendants Radford, Rawlins, and Bowman, located Mr. Franklin, a 31-year-old black man, who they believe matched the description of a suspected shooter in the Austin, Texas downtown area.

9.

Defendants Radford, Rawlins, and Bowman approached Mr. Franklin and ordered him to drop a gun. At that time, Mr. Franklin began running away from the Defendants.

10.

Defendant Radford began chasing Mr. Franklin on foot, Defendants Rawlins, and Bowman proceeded to pursue Mr. Franklin in an Austin Police Department issued ATV.

11.

During the chase, Mr. Franklin ran onto the porch of O. Henry Hall, administrative headquarters for the University of Texas System, located at 601 Colorado Street.

12.

As Defendant Radford approached the porch, an unknown white male jumped off the porch and ran away with his hands in air. Subsequently, Mr. Franklin attempted to leap over the wall of the porch resulting in him falling to the sidewalk on his back. Notably, while Mr. Franklin was leaping over the hall and falling to the ground, Defendant Radford yelled to Mr. Franklin to “show me your hands now.”

13.

Less than a second from Mr. Franklin making impact with the sidewalk, and while Mr. Franklin was lying flat on his back, Defendant Radford discharged his firearm several times in the direction of Mr. Franklin.

14.

Less than a second from Mr. Franklin making impact with the sidewalk, and while Mr. Franklin was lying flat on his back, Defendant Radford began to shoot his firearm in the direction of Mr. Franklin. Defendant Radford continued to fire his weapon as Mr. Franklin rolled over into a fetal position not facing Defendant Radford. Defendant Radford fired his weapon over ten times at Mr. Franklin while Mr. Franklin was balled up in a fetal position.

15.

At the time, Defendant Radford began to fire his firearm in the direction of Mr. Franklin, Defendant Rawlins and Bowman, while riding in the Austin Police Department issued ATV, began to discharge their firearms several times in the direction of Mr. Franklin, while Mr. Franklin was balled up in the fetal position.

16.

At the time Mr. Franklin was shot by the Defendants, He did not pose an immediate threat to the public nor the Defendants. Mr. Franklin was gun down while balled in the fetal position. As a result of being shot by the Defendants multiple times, Mr. Franklin died.

17.

At all times relevant, the Defendants, were acting under color of state law and scope of his employment as a law enforcement officer employed by City of Austin, Texas.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 – Excessive Force in Violation of the Fourth Amendment
(Against All Defendants)

18.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

19.

42 U.S.C. § 1983 provides that:

Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress.....

20.

The Defendants are persons for purposes of 42 U.S.C. § 1983.

21.

The Defendants, at all times relevant hereto, was acting under the color of state law in his capacity as a police officer for the City of Austin, Texas and their acts or omissions were conducted within the scope of their official duties or employment.

22.

At the time of the complained of events, Mr. Franklin had a clearly established constitutional right under the Fourth Amendment to be secure in his person from unreasonable seizure through excessive force.

23.

Mr. Franklin also had the clearly established Constitutional right under the Fourth Amendment to bodily integrity and to be free from excessive force by law enforcement.

24.

Any reasonable law enforcement officer knew or should have known of these rights at the time of the complained of conduct as they were clearly established at that time.

25.

The Defendants' actions and use of force, as described herein, were objectively unreasonable in light of the facts and circumstances confronting them and violated the Fourth Amendment rights of Mr. Franklin.

26.

The Defendants' actions and use of force, as described herein, were also malicious and/or involved reckless, callous, and deliberate indifference to Mr. Franklin's federally protected rights. The force used by the Defendants shocks the conscience and violated the Fourth Amendment rights of Mr. Franklin.

27.

The Defendants unlawfully seized Mr. Franklin by means of objectively unreasonable, excessive and conscious shocking physical force. The force used was deadly force and did cause the death of Mr. Franklin.

28.

The Defendants engaged in the conduct described by this Complaint willfully, maliciously, in bad faith, and in reckless disregard of Mr. Franklin's protected constitutional rights.

29.

The Defendants did so with shocking and willful indifference to Mr. Franklin's rights and with conscious awareness that it could cause Mr. Franklin severe bodily harm or death.

30.

The acts or omissions of the Defendants were the moving forces behind Mr. Franklin's death. The acts or omissions of the Defendants as described herein intentionally deprived Mr. Franklin of his constitutional rights and caused him other damages. The Defendants are not entitled to qualified immunity for their actions.

31.

As a proximate result of the Defendants' unlawful conduct, Mr. Franklin was killed. As a further result of the Defendants' unlawful conduct, Mr. Franklin has incurred special damages, including medical expenses and other special damages related expenses, in amounts to be established at trial.

32.

On information and belief, Mr. Franklin suffered lost future earnings and impaired earnings capacities from the not yet fully ascertained sequelae of his injuries, in amounts to be ascertained in trial. The Plaintiff is further entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988, pre-judgment interest and

costs as allowable by federal law. There may also be special damages for lien interests.

33.

In addition to compensatory, economic, consequential and special damages, the Plaintiff is entitled to punitive damages against all Defendants under 42 U.S.C. § 1983, in that the actions of the Defendants have been taken maliciously, willfully or with a reckless or wanton disregard of the constitutional rights of Mr. Franklin.

SECOND CLAIM FOR RELIEF
(Wrongful Death/Intentional)
(All Defendants)

34.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

35.

On January 15, 2022, the Defendants were employed and uniformed officers with the City of Austin, Texas who committed a battery when they discharged their weapons to intentionally strike Mr. Franklin that resulted in the untimely and unlawful death of Mr. Franklin.

36.

The aforementioned act of discharging their weapon at Mr. Franklin, was intentional and deliberate. The Defendants' acts were carried out in bad faith and with malicious intent to do grave bodily harm Mr. Franklin. As a direct and proximate result of their acts, Mr. Franklin was killed.

37.

The Defendants' intentional acts and omissions constitute proximate causes of the incident which resulted in injuries to and the death of Mr. Franklin, which the Plaintiff on behalf on behalf of all wrongful death beneficiaries of Mr. Franklin are entitled to recover damages under the Texas Wrongful Death Statute, Texas Statutes section 71.001, as more particularly described herein.

38.

WHEREFORE, Plaintiffs prays for the following relief:

1. Judgment for compensatory damages;
2. Judgment for exemplary or punitive damages against all Defendants;
3. Cost of suit;
4. The value of support and services the deceased person had provided to the surviving family member;
5. Loss of companionship, guidance, and protection provided by the deceased person;

6. Mental and emotional pain and suffering due to the loss of a child, and medical or funeral expenses any surviving family member has paid for the deceased person;

7. The deceased person's estate may also recover certain types of damages.

these include:

lost wages, benefits, and other earnings, including the value of lost earnings that the deceased person could reasonably have been expected to make if he or she had lived lost "prospective net accumulations" of the estate, or the value of earnings the estate could reasonably have been expected to collect if the deceased person had lived, and medical and funeral expenses that were paid by the estate directly.

Such other relief as this Honorable Court may deem just and appropriate.

THIRD CLAIM FOR RELIEF
(Assault and Battery)
(All Defendants)

39.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

40.

The Defendants pointed their firearm at Mr. Franklin and unjustifiably used deadly force against Mr. Franklin, such force was objectively excessive and unreasonable under the circumstances.

41.

The Defendants' intentional acts as described more fully hereinabove, put Mr. Franklin in actual, subjective apprehension of immediate harmful or offensive contact.

42.

Mr. Franklin's apprehension was objectively reasonable under the circumstances in that a person of ordinary care and prudence under the same or similar circumstances would have believed that harmful, or offensive contact was about to occur.

43.

The Defendants' actions against Mr. Franklin were unreasonable and unlawful. At the time Mr. Franklin was shot by the Defendants, Mr. Franklin did not pose any threat or harm to any law enforcement officers or others. The Defendants acted with a depraved indifference to human life and conscious disregard for the safety of the general public, constituted an intentional unwelcome and unprivileged touching of Mr. Franklin, and was undertaken in bad faith and with actual malice.

44.

As a further direct and proximate result of the conduct described above, Mr. Franklin died. Prior to his death Mr. Franklin suffered loss of his liberty and freedom,

bodily injury resulting in pain and suffering, mental anguish, and medical expenses for treatment and care. Mr. Franklin did not consent to contact from the Defendants.

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PRAYER FOR RELIEF

Plaintiff prays that this Court enter judgment for the Plaintiff and against each of the Defendants and grant:

1. compensatory and consequential damages, including damages for emotional distress, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determine by a jury;
2. economic losses on all claims allowed by law;
3. special damages in an amount to be determined at trial;
4. punitive damages on all claims allowed by law against Defendant Doe in an amount to be determine by the jury;
5. attorneys' fees and the costs associated with this action under 42 U.S.C. § 1988, including expert witness fees, on all claims allowed by law;
6. pre- and post-judgment interest at the lawful rate; and,
7. any further relief that this court deems just and proper, and any other appropriate relief a law and equity.

PLAINTIFF REQUESTS A TRIAL BY JURY.

Respectfully submitted this 14th day of March 2023.

MACK INJURY ATTORNEYS

/s/Nathaniel Mack III

Nathaniel Mack III

Texas Bar No.: 24078896

8023 Vantage Dr. Suite 690
San Antonio, Texas 78230
P:(210) 333-6225
F:(210) 855-3152
nmack@macktexaslaw.com

**THE LAW OFFICES OF HARRY M.
DANIELS, LLC**

/s/Harry M. Daniels

Harry M. Daniels

4751 Best Road Suite 490
Atlanta, GA 30337
Tel. 678.664.8529
Fax. 800.867.5248
daniels@harrymdaniels.com
*(Pending Admission to the in the United States District Court
for the Western District of Texas)*

STROM LAW FIRM

/s/Bakari Sellers

Bakari Sellers

6923 N. Trenholm Road
Columbia, SC 29206
Tel. 803.252.4800
bsellers@stromlaw.com
*(Pending Admission to the in the United States District Court
for the Western District of Texas)*

I. INTRODUCTION

1. On March 14, 2023, Plaintiff Dorothy C. Motley, proceeding through counsel, filed this lawsuit alleging three distinct causes of action seeking damages arising from the death of Anthony Marquis Franklin (“Franklin”). Plaintiff Motley is Franklin’s mother, and she claims that these Officers: **(1)** violated Franklin’s right to be free from excessive force under the Fourth Amendment pursuant to 42 U.S.C. § 1983;¹ **(2)** are liable to her for a Texas wrongful death claim² pursuant to “Texas Statutes section 71.001”;³ and **(3)** are liable for “assault and battery”—an intentional tort claim arising under Texas State law.⁴

2. The Officers now file this Partial Motion to Dismiss for Failure to State a Claim, because they are entitled to Statutory Immunity⁵ under the Texas Tort Claims Act for the wrongful death claim and the assault and battery claim. This motion does not challenge the Federal question claim under 42 U.S.C. § 1983. These Officers have filed an Original Answer to that claim concurrently with this Motion.⁶

II. LEGAL STANDARD

3. Rule 12(b)(6) provides for dismissal of an action for failure to state a claim upon which relief can be granted.⁷ Under Rule 8 of the Federal Rules of Civil Procedure, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸ To

¹ Pl. Orig. Compl, Dkt. # 1, pg. 7.

² Pl. Orig. Compl., Dkt. # 1, pgs. 11 – 12.

³ The undersigned presumes that Plaintiff is referring to Texas Civil Practices and Remedies Code §71.001 *et seq.*

⁴ Pl. Orig. Compl., Dkt. # 1, pg. 13.

⁵ Statutory Immunity and Official Immunity are different concepts that operate under differing standards. *See Matthews v. Harris Cnty.*, No. CV H-18-0014, 2018 WL 3818001, at **fn. 40** (S.D. Tex. Aug. 10, 2018).

⁶ *See* Defs.’ Orig. Answer, Dkt. # 22.

⁷ FED. R. CIV. P. 12(b)(6).

⁸ FED. R. CIV. P. 8(a)(2).

survive a motion to dismiss, a Plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”⁹ The court must accept the factual allegations of the complaint as true, and view them in the light most favorable to the plaintiff.”¹⁰ However, the court does not accept as true any legal conclusions,¹¹ and “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”¹²

III. ARGUMENTS & AUTHORITIES

A. The Officers are entitled to Statutory Immunity for Plaintiff’s Wrongful Death Claim. However, Plaintiff is permitted to assert she is entitled to wrongful death damages pursuant to state law.

4. Texas Civil Practices and Remedies Code § 71.002 provides an independent claim under state law for wrongful death. “To support a claim for wrongful death under Texas law, plaintiffs must allege that death resulted from the negligent or wrongful act of a person or his agent or servant.”¹³ However, these Officers are immune to this claim because they are statutorily barred by the Texas Tort Claims Act (TTCA).¹⁴

5. The Texas Supreme Court has made it clear that the election of remedies provision found in Texas Civil Practices and Remedies § 101.106(f) “foreclose[s] suit against a government employee in his individual capacity if he was acting within the scope of employment.”¹⁵ “The TTCA defines “scope of employment” as “the performance for a governmental unit the duties of

⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹⁰ *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

¹¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹² *Estate of I.C.D. v. Beaumont Indep. Sch. Dist.*, No. 1:18-CV-137, 2020 WL 1028073, at *4 (E.D. Tex. Mar. 2, 2020) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

¹³ *Carr v. City of Spring Valley Vill.*, No. CV H-18-2585, 2019 WL 1276100, at *12 (S.D. Tex. Mar. 20, 2019), *aff’d*, No. 19-20373, 2022 WL 1553539 (5th Cir. May 17, 2022).

¹⁴ TEX. CIV. PRAC. & REM. CODE §101.001 *et seq.*

¹⁵ *Carr*, 2019 WL 1276100, at *12 (citing *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011)).

an employee’s office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.”¹⁶

6. Specifically in regard to law enforcement officers, Texas law holds that “engaging in an arrest is conduct that is generally within an officer’s scope of employment”¹⁷ and that an officer “who uses excessive force is still acting within the ‘scope of employment’ for purposes of the TTCA.”¹⁸ Here, Plaintiff Motley concedes that the Officers were “acting under the color of state law in [their] capacity as...police officer[s] for the City of Austin, Texas...” when they fatally shot Franklin while trying to arrest him.¹⁹

7. Accordingly, as in *Carr*, “[b]ecause there is no dispute that plaintiffs have sued the defendant officers in their individual capacities for acts that occurred in the course and scope of their employment, [plaintiff’s] claims for negligence, *wrongful death*, and survival claims are subject to dismissal under § 101.106(f).”²⁰ However, as noted in *Hutcheson*, there is a difference between pursuing a state law *claim* under § 71.002 and asserting entitlement to wrongful death damages “pursuant to 42 U.S.C. § 1983, as allowed pursuant to state law...”.²¹ The latter permissibly provides the Plaintiff with damages should they succeed in their Federal excessive

¹⁶ *Matthews v. Harris Cnty.*, No. CV H-18-0014, 2018 WL 3818001, at *4 (S.D. Tex. Aug. 10, 2018) (citing TEX. CIV. PRAC & REM CODE § 101.001(5)).

¹⁷ *Id.* (citing *Fink v. Anderson*, 477 S.W.3d 460, 467 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

¹⁸ *Id.* (citing *Orr v. Copeland*, No. A-14-CV-212-LY, 2015 WL 3901654, at *2 (W.D. Tex. 2015)).

¹⁹ Pl. Orig. Compl., Dkt. #1, pg. 8 (cleaned up).

²⁰ *Carr*, 2019 WL 1276100, at *12 (emphasis added).

²¹ *Hutcheson v. Dallas Cnty., Tex.*, No. 3:17-CV-2021 BN, 2020 WL 1692950, at *19 (N.D. Tex. Apr. 7, 2020), *aff’d*, 994 F.3d 477 (5th Cir. 2021).

force claim. But “to the extent that [Plaintiff Motley does] assert a state law wrongful death *claim*...such a claim [must be] dismissed with prejudice.”²²

B. The Officers are entitled to Statutory Immunity for Plaintiff’s intentional tort claims of Assault and Battery, as they are explicitly not waived under the Texas Tort Claims Act.

8. The Officers are also entitled to Statutory Immunity for Plaintiff Motley’s state law assault and battery claims under Texas Civil Practice and Remedies Code § 101.106(f). As stated *supra*, “[t]he Texas Supreme Court has explained that the purpose of §101.106(f) was to foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment.”²³ Instead, under the Texas Supreme Court’s precedent in *Franka*, “all tort claims, *including intentional torts*, ‘could have been brought against the governmental unit, regardless of whether the governmental unit’s immunity from suit is expressly waived by the TTCA for those claims.’”²⁴ Again, Plaintiff Motley concedes that the Officers were “acting under the color of state law in [their] capacity as...police officer[s] for the City of Austin, Texas...” when they fatally shot Franklin while trying to arrest him.²⁵

9. “The [TTCA] does not waive immunity for intentional torts.”²⁶ Texas Civil Practice and Remedies Code § 101.057 explicitly states:

²² *Id.* (cleaned up) (emphasis added); *see also Francis v. Cnty*, No. CV H-14-2943, 2016 WL 6662275, at *18 (S.D. Tex. Nov. 10, 2016), *aff’d sub nom. Francis v. Garcia*, 702 Fed. Appx. 218 (5th Cir. 2017).

²³ *Bailey v. Willis*, No. 4:17-CV-00276-ALM-CAN, 2018 WL 3321461, at *13 (E.D. Tex. Jan. 11, 2018), Report and Recommendation adopted, No. 4:17-CV-00276, 2018 WL 2126476 (E.D. Tex. May 8, 2018).

²⁴ *Id.* (citing *Franka*, 332 S.W.3d at 381) (emphasis added).

²⁵ Pl. Orig. Compl., Dkt. #1, pg. 8 (cleaned up).

²⁶ *Hatton v. Harris Cnty, Jail*, No. CV H-18-1948, 2019 WL 1858826, at *3 (S.D. Tex. Apr. 25, 2019).

This chapter does not apply to a claim...arising out of **assault, battery**, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.²⁷

“This provision shields municipalities from suits arising out of intentional torts committed by governmental employees and [is] liberally construed to accomplish this objective.”²⁸

10. Accordingly, all of Plaintiff’s state law claims are barred. They cannot be brought against the individual Officers under the election of remedies provision articulated in § 101.106(f) and as interpreted by *Franka*.²⁹ Additionally, Plaintiff cannot replead these claims against the City of Austin, because the City would be entitled to governmental immunity under § 101.057 of the Texas Tort Claims Act.³⁰ These claims should therefore be dismissed with prejudice without permitting Plaintiff to replead.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman respectfully request that this Court dismiss Plaintiff’s claims of Wrongful Death/Intentional and Assault and Battery against them, and for all other relief to which they may be entitled, whether in law or in equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Stephen B. Barron

²⁷ TEX. CIV. PRAC. & REM. CODE § 101.057 (emphasis added).

²⁸ *Hatton*, 2019 WL 1858826, at *3 (citing *Gillum v. City of Kerrville*, 3 F.3d 117, 123 (5th Cir. 1993)).

²⁹ *Franka*, 332 S.W.3d at 381.

³⁰ *Pena v. City of Rio Grande City*, 870 F.3d 613, 625 (5th Cir. 2018); *see also Carr*, 2019 WL 1276100, at *13.

Blair J. Leake
State Bar No. 24081630
bleake@w-g.com
Stephen B. Barron
State Bar No. 24109619
sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

Harry M. Daniels, Jr.
daniels@harrymdaniels.com
LAW OFFICES OF HARRY M. DANIELS, LLC
4751 Best Road, Suite 490
Atlanta, GA 30337

Nathaniel Mack, III
nmack@macktexaslaw.com
MACK INJURY ATTORNEYS
8023 Vantage Dr., Suite 690
San Antonio, TX 78230

Bakari T. Sellers
bsellers@stromlaw.com
STROM LAW FIRM
6923 N. Trenholm, Suite 200
Columbia, SC 29206

/s/ Stephen B. Barron
Stephen B. Barron

I. ORIGINAL ANSWER

A. Jurisdiction and Venue.

1. The Officers admit that this Court has Jurisdiction over the Federal Question Claims brought by Plaintiff pursuant to 42 U.S.C. § 1983 and the United States Constitution.
2. The Officers **deny** that this Court has supplemental jurisdiction over Plaintiff's State Law Claims, because these Officers are entitled to Statutory Immunity pursuant to the Texas Tort Claims Act and other applications of Texas state law. A Motion to Dismiss pursuant to Rule 12(b)(6) has been filed concurrently with this Answer.
3. The Officers admit that Venue is proper in the Western District of Texas.

B. Parties.

4. The Officers are without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 4 of Plaintiff's Original Complaint, as these Officers currently have no basis to affirm or dispute if Dorothy C. Motley is the mother of decedent Anthony Marquis Franklin ("Franklin"), if he had a spouse, or if she is otherwise entitled to recover damages.
5. The Officers admit the allegations contained within Paragraphs 5 – 7 of Plaintiff's Original Complaint.

C. Facts.

1. As it pertains to the factual allegations contained in Paragraphs 8 – 16 of Plaintiff's Original Complaint, the Officers admit that on January 15, 2023—they were on duty as Austin Police Department Officers, when they responded to numerous 911 calls that a man was firing a gun near Lavaca and 6th Street. These 911 callers reported that a person had been shot in the head as a result of the shooting. Witnesses provided a description of the suspect matching Franklin's appearance

in the company of a black female. A City-wide search accordingly began for that suspect with the firearm.

6. During the search, these Officers canvased the area in an ATV¹ that was equipped with flashing lights and was clearly marked as a police vehicle. Eventually, the Defendants located Franklin on the corner of West 6th Street and Colorado Street and began observing him as he walked away with one hand in his pocket. Suddenly, they saw that Franklin had a gun. All of the Officers yelled “gun” and Officer Radford and Officer Bowman yelled for Franklin to drop the gun. Franklin disobeyed these commands, and instead bolted around the corner and began running Northbound up Colorado Street.

7. Officer Radford chased Franklin on foot while Officers Bowman and Rawlins pursued in the ATV. While running, Franklin darted up some stairs and onto the stoop of O’Henry Hall at 601 Colorado. Officer Radford again yelled for Franklin to drop the gun. While on the stoop, Franklin menaced an uninvolved male who fled in terror by jumping over the stone banister. While this was occurring, Officer Radford again yelled “show me your hands” at least twice. The uninvolved man then fled with his hands above his head.

8. Then—just as Officer Radford yelled “show me your [expletive] hands” for the *third time*—Franklin again disobeyed this command and took the following action: while firmly grasping his handgun in his right hand, Franklin vaulted over the stone banister and flipped over to land on his back on the pavement. While on his back, Franklin pointed the handgun directly at Officer Radford. Faced with a split-second decision in the face of potentially deadly force—from: (1) a man who had refused commands to disarm at least three times; (2) had allegedly shot someone

¹ Short for “All-Terrain Vehicle.”

in the head earlier that night, and; (3) had just leaped from a railing instead of submitting to arrest—all three Officers made the decision to shoot Franklin.

9. Franklin then threw his handgun a short distance away and it landed on the street in between the wheel of a parked car and the curb. The Officers ceased fire, and Franklin spun around while on the ground and began crawling toward the curb where his handgun landed. He then reached his hands down the curb towards the gun, and Officer Bowman yelled “don’t get the gun.” Simultaneously, Officer Rawlins repeatedly yelled “do not move” and Franklin responded “ok, I don’t have nothin’.”

10. Backup then arrived and Franklin was secured in handcuffs. While aid was being rendered to Franklin, Officer Bowman pointed out Franklin’s gun next to the curb to an arriving officer, saying that “he was reaching right...you can see it right there.” **It was a statement, not a question.** Otherwise, the Officers deny the factual allegations contained in Paragraphs 8 – 16 inconsistent with these facts articulated *supra*.

11. As to the allegations contained within Paragraph 17 of Plaintiff’s Original Complaint, the Officers admit that they were acting under the color of law during the incident that forms the basis of this lawsuit.

D. Causes of Action.

i. Fourth Amendment Excessive Force Claim against all Defendants.

12. As to the allegations contained in Paragraph 18 of Plaintiff’s Original Complaint, the Officers adopt and incorporate their responses to the previous Paragraphs of the Complaint.

13. As to the allegations contained in Paragraphs 19 – 30 of Plaintiff’s Original Complaint, the Officers admit that they were acting under the color of law during the incident that forms the basis of this lawsuit. Otherwise, pursuant to Federal Rule of Civil Procedure 8(b), a defendant need not

respond to plaintiff's mere legal conclusions. To the extent a response is required, these Officers deny that they violated Franklin's civil rights. Instead, their actions were justified under clearly established law. They are entitled to Qualified Immunity and raise that defense *infra*. Otherwise, denied.

14. As to the allegations contained in Paragraphs 31 – 33 of Plaintiff's Original Complaint, no answer is necessary from these Defendants. To the extent any answer is deemed necessary, the Officers admit that Plaintiff seeks the relief requested therein, but they deny Plaintiff is entitled to it.

ii. Wrongful Death/Intentional Claim against all Defendants.

15. As to the allegations contained in Paragraph 34 – 38 of Plaintiff's Original Complaint, the Defense does not answer these Paragraphs, as they are the subject of the pending Partial Motion to Dismiss—filed concurrently with this Original Answer.

iii. Assault and Battery Claims against all Defendants.

16. As to the allegations contained in Paragraph 39 – 44 of Plaintiff's Original Complaint, the Defense does not answer these paragraphs, as they are the subject of the pending Partial Motion to Dismiss—filed concurrently with this Original Answer.

E. Damages, Relief Requested, Jury Demand, & Prayer.

17. As to the unnumbered allegations contained on page 15 of Plaintiff's Original Complaint, no answer is necessary from these Officers. To the extent any answer is deemed necessary, the Officers admit that Plaintiff seeks the relief requested therein, but deny that Plaintiff is entitled to this relief.

II. AFFIRMATIVE DEFENSES & IMMUNITIES

18. The Officers deny any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the decedent by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq.*

19. The Officers hereby invoke the doctrine of Qualified Immunity, Official Immunity, and Statutory Immunity. Defendants discharged their obligations and public duties in good faith and would show that their actions were objectively reasonable in light of the law and the information possessed at that time, and that no clearly established law exists prohibiting them from using force against a person who is believed to have very recently used a deadly weapon, and was uncompliant with officer commands when those commands were given in order to secure the scene to make it safe for all persons involved.

20. Further and in the alternative, the incident in question and the resulting harm to Plaintiff were caused or contributed to by another persons' own illegal and/or violent or reckless conduct, including but not limited to the conduct of the decedent himself. To the extent legally applicable herein, the Officers invoke the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.²

21. The Officers further plead that, in the unlikely event they are found to be liable, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons, including the decedent himself.

22. The Officers plead that they had legal justification for each and every action taken by them relating to this incident based on the information available to them at the time.

² See TEX. CIV. PRAC & REM. CODE ANN. § 33.001.

23. The Officers assert the limitations and protections of Chapter 41 of the Texas Civil Practice & Remedies Code, and the Due Process Clause of the United States Constitution.

24. The Officers assert the limitations and protections of Chapter 101 of the Texas Civil Practice & Remedies Code.

25. The Officers reserve the right to assert additional affirmative defenses throughout the development of this case.

26. To the extent the Officers did not address any specific averment made by Plaintiff in her Original Complaint, they expressly deny all such averments.

III. JURY DEMAND

27. Pursuant to Federal Rule of Civil Procedure 48, these Defendant Officers hereby request a jury trial.

IV. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman pray that upon a final hearing of this cause, the Court dismiss all of Plaintiff's claims with prejudice, that all costs of court be assessed against Plaintiff, that they be awarded attorney fees incurred in the defense of this suit, and for all further relief to which they may be justly entitled.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Stephen B. Barron

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

Harry M. Daniels, Jr.

daniels@harrymdaniels.com

LAW OFFICES OF HARRY M. DANIELS, LLC

4751 Best Road, Suite 490

Atlanta, GA 30337

Nathaniel Mack, III

nmack@macktexaslaw.com

MACK INJURY ATTORNEYS

8023 Vantage Dr., Suite 690

San Antonio, TX 78230

Bakari T. Sellers

bsellers@stromlaw.com

STROM LAW FIRM

6923 N. Trenholm, Suite 200

Columbia, SC 29206

_____/s/ Stephen B. Barron

Stephen B. Barron

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,	§	No. 1:23-CV-276-DAE
individually, and on behalf of all	§	
wrongful death beneficiaries of	§	
Anthony Marquis Franklin,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
KELBY RADFORD,	§	
RYAN RAWLINS, and	§	
JACOB BOWMAN,	§	
Defendants.		

ORDER GRANTING DEFENDANTS' PARTIAL MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

The matter before the Court is Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman's ("Defendants") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. # 21.) Plaintiff did not file a response. After careful consideration, the Court, for the reasons that follow, **GRANTS** the Motion to Dismiss. (Dkt. # 21.)

BACKGROUND

On March 14, 2023, Plaintiff Dorothy C. Motley ("Plaintiff") filed this lawsuit alleging three distinct causes of action seeking damages arising from the death of Anthony Marquis Franklin ("Franklin"). Plaintiff Dorothy Motley is

Franklin’s mother, and in the complaint alleges that, during their pursuit of the decedent Franklin, Defendants discharged their weapons and struck Franklin multiple times, killing him. (Dkt. # 1 at 11–12.) Plaintiff alleges Defendants therefore: (1) violated Franklin’s right to be free from excessive force under the Fourth Amendment pursuant to 42 U.S.C. § 1983; (2) are liable to Plaintiff for a Texas wrongful death claim pursuant to “Texas Statutes section 71.001”;¹ and (3) are liable for the law intentional tort of assault and battery under Texas State law. (Dkt. # 1 at 7–13.) On August 18, 2023, Defendants filed a Partial Motion to Dismiss Plaintiff’s claims against them. (Dkt. # 21.) Defendants argue they are entitled to Statutory Immunity under the Texas Tort Claims Act for the wrongful death and assault and battery claims. (*Id.*) Defendants do not challenge Plaintiff’s federal 42 U.S.C. § 1983 claim. (*Id.*) Plaintiff did not file a response to Defendants’ Partial Motion to Dismiss.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for “failure to state a claim upon which relief can be granted.” In analyzing a motion to dismiss for failure to state a claim, the court “accept[s] ‘all well pleaded facts as true, viewing them in the light most favorable to the

¹ Defendants presume in their Motion to Dismiss that Plaintiff means Texas Civil Practices and Remedies Code § 71.001 *et seq.* The Court concurs this is the most reasonable interpretation.

plaintiff.” U.S. ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (quoting In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

DISCUSSION

Defendants move to dismiss two of Plaintiff’s three claims: (1) Plaintiff’s wrongful death claim; and, (2) Plaintiff’s intentional tort claims of assault and battery. (Dkt. # 1 at 11–15.) Defendants do not challenge Plaintiff’s federal 42 U.S.C. § 1983 claim. (Dkt. # 21.) Defendants argue the Texas Tort Claims Act (“TTCA”) affords them statutory immunity for the wrongful death and assault and battery claims, so they should be dismissed. (Dkt. # 21 at 3–6.) The Court addresses each claim in turn.

I. Plaintiff’s Wrongful Death Claim Must be Dismissed Because it is Precluded by the TTCA

Plaintiff first alleges a wrongful death claim against Defendants, which is presumed to be under section 71.001 *et seq.* of the Texas Civil Practices

and Remedies Code. (Dkt. # 1 at 11–13.) Under section 71 of the Code, “[a] person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's [wrongful acts or negligence].” Tex. Civ. Prac. & Rem. Code § 71.002(b). In her complaint, Plaintiff alleges that, during their pursuit of the decedent Franklin, Defendants discharged their weapons and struck Franklin multiple times, killing him. (Dkt. # 1 at 11–12.) Plaintiff asserts that, under Section 71, Defendants are therefore liable for damages because of Franklin’s death. (*Id.* at 12.) Defendants argue that this claim is precluded by the TTCA, and that they are entitled to Statutory Immunity under the statute. (Dkt. # 21 at 3–4.)

Both sovereign immunity and its counterpart, governmental immunity, protect the State and its subdivisions from monetary damages liability. *Prater v. Owens*, 667 S.W.3d 363, 371 (Tex. App.—Houston [1st Dist.] 2022, no pet.). Although these immunities can be waived, any statutory waivers of sovereign or governmental immunity must be interpreted narrowly. *Id.* The TTCA is one such waiver, providing *limited* waivers of governmental immunity in tort suits against the government or government employees. *Alexander v. Walker*, 435 S.W.3d 789, 790 (Tex. 2014). When bringing tort claims against the government or government employees, section 101.106 of the TTCA—otherwise known as the election-of-remedies provision—requires plaintiffs to choose

between suing a governmental unit or the governmental unit's employees at the outset of litigation. Garza v. Harrison, 574 S.W.3d 389, 399 (Tex. 2019).

When a suit is brought against a government employee, application of the elections-of-remedies provision turns on whether the suit is brought against the employee in an individual or official capacity. Walker, 435 S.W.3d at 790–91 (explaining the question is “whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable.”) This is because an official capacity suit against a governmental employee is “effectively a suit against the employing governmental unit . . .” Garza, 574 S.W.3d at 399 (stating that official capacity suits are “merely another way of pleading an action against the governmental employer.”) If an employee has acted within the scope of her employment and the governmental employer is therefore effectively impleaded by a suit, the TTCA applies and offers statutory immunity to the employee acting in her official capacity. Id. A suit against an employee for actions outside of her scope of employment is construed as a suit against the employee in her individual capacity and is not subject to the TTCA.

To determine whether a suit is against an employee in an official or individual capacity, “a court must determine: (1) whether the alleged conduct was within the scope of the employee's employment; and (2) whether the plaintiff's suit

could have been brought under the TTCA against the employee's governmental employer.” Walker, 435 S.W.3d at 791–92. If the answer to both questions is “yes,” the suit is construed as being against the government employee in her official capacity. Id. at 792.

Section 101.106(f) provides that suits against government employees in their official capacity should be dismissed upon a motion to dismiss by the government employee. Tex. Civ. Prac. & Rem. Code § 101.106(f) (“[o]n the employee's motion, the suit against the employee shall be dismissed . . .”). As the Walker court explained, the TTCA compels “dismissal of government employees when suit should have been brought against the government [employer].” 435 S.W.3d at 790. [S]ection 101.106(f) essentially prevents an employee from being sued at all for work-related torts and instead provides for a suit against the governmental employer.” Garza, 574 S.W.3d at 400.

A. Defendants Were Acting Within the Scope of Their Employment

The parties do not dispute that Defendants were acting within the scope of their employment. Plaintiff states in her complaint that Defendants’ acts and omissions “at all times relevant hereto . . . *were conducted within the scope of their official duties or employment.*” (Dkt. # 1 at 8.) Plaintiff also acknowledged that at least one of the Defendants pursued Franklin in an Austin Police Department ATV, further showing the actions were in the scope of Defendants’

employment. (Id. at 5.) Defendants also do not dispute they were acting within the scope of their employment.

Even if the parties disputed whether Defendants acted within the scope of their employment, it is still clear that Defendants’ conduct falls within the scope of their employment. Although the TTCA defines “scope of employment” in the Act, to define the term more clearly the Supreme Court of Texas has consistently turned to the Restatement (Third) of Agency. Matthews v. Harris Cnty., No. CV H-18-0014, 2018 WL 3818001, at *4 (S.D. Tex. Aug. 10, 2018) (citing Walker, 435 S.W.3d at 792). The Restatement provides that “[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” Id. (citing Restatement (Third) of Agency § 7.07(2) (2006)).

Plaintiff did not allege Defendants took any course of conduct that was not intended to serve the purposes of Defendants’ employer, the Austin Police Department. And Texas law is clear that “engaging in an arrest is conduct that is generally within an officer’s scope of employment” and that an officer “who uses excessive force is still acting within the ‘scope of employment’ for purposes of the TTCA.” Matthews, No. CV H-18-0014, 2018 WL 3818001, at *4. Plaintiff alleged in her complaint that this is the exact type of conduct in which Defendants engaged. (Dkt. # 1 at 4–7) (stating that Defendants were acting “under color of

state law . . . as a law enforcement officer,” and that Defendants ordered decedent to drop his weapon and pursued decedent after he tried to flee).

B. Plaintiff Could Have Brought Its Claims Against Defendants’
Governmental Employer

Since Defendants were acting within the scope of their employment, if Plaintiff’s claims “could have been brought under [the TTCA] against the governmental unit . . .,” the suit is against Defendants in their official capacity and subject to the TTCA. Tex. Civ. Prac. & Rem. Code § 101.106(f). The Supreme Court of Texas has repeatedly held that “[b]ecause the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be ‘under [the Tort Claims Act]’ for purposes of section 101.106.” Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 659 (Tex. 2008). Thus, tort claims against the government must be brought “under . . . [the TTCA]” for subsection (f) purposes even when the TTCA does not waive immunity for those claims. Walker, 435 S.W.3d at 792. Therefore, Plaintiff’s tort claims could have, and should have, been brought against the Austin Police Department—a governmental unit—under the TTCA.

Because Plaintiff’s wrongful death claim was based on conduct within the scope of the officers’ employment and could have been brought against the Austin Police Department under the TTCA, Plaintiff’s suit is considered against

the officers in their official capacity. Walker, 435 S.W.3d at 792 (citing Tex. Civ. Prac. & Rem. Code § 101.106(f)). Section 101.106(f) forecloses suits against officers in their official capacity and requires dismissal of the suit upon a motion by the Defendant. Tex. Civ. Prac. & Rem. Code § 101.106(f); Walker, 435 S.W.3d at 790. The Court dismisses Plaintiff's wrongful death claim with prejudice.²

II. Plaintiff's Intentional Tort Claims Against Defendants Are Precluded by the TTCA

Plaintiff also asserts intentional tort claims of assault and battery against Defendants. (Dkt. # 1 at 13–15.) Plaintiff asserts that, during their pursuit of decedent, Defendants intentionally used deadly force against Franklin when they discharged their weapons, striking Franklin multiple times and killing him. (Id. # 1 at 13.) Plaintiff asserts that Defendants' use of force was objectively excessive and unreasonable and was the direct and proximate cause of Franklin's death. (Id. at 13–14.) Plaintiff alleges Defendants are therefore liable for damages for the assault and battery that led to Franklin's death. (Id. at 15.) Defendants argue that these intentional tort claims, like the wrongful death claim, are precluded by the

² Section 101.106(f) provides that a plaintiff may amend a complaint to plead claims against the governmental employer of employees exempt from suit under the TTCA. A plaintiff has 30 days to do so. Given that it is well-past the 30-day deadline and Plaintiff did not respond to this Motion to Dismiss, the Court dismisses Plaintiff's claim with prejudice.

TTCA, and that they are entitled to Statutory Immunity under the statute. (Dkt. # 21 at 5–6.)

To determine whether Plaintiff’s claims are precluded by the TTCA, the Court must again determine whether the suit against Defendants is brought against them in an individual or official capacity. Walker, 435 S.W.3d at 791–92. As discussed above, if “(1) the alleged conduct was within the scope of the employee’s employment and (2) the plaintiff’s suit could have been brought under the TTCA against the employee’s governmental employer,” the suit is considered against the officers in their official capacity and must be dismissed. See Walker, 435 S.W.3d at 790–92 (“the statute compels ‘dismissal of government employees when suit should have been brought against the government.’”).

A. Defendants’ Conduct Falls Within the Scope of Their Employment

Defendants’ alleged conduct falls within the scope of their employment. As discussed above, the parties do not dispute this issue.

B. Plaintiff Could Have Brought Its Claim Against Defendants’ Governmental Employer

As Defendants acted within the scope of their employment, the Court next asks whether Plaintiff’s assault and battery claims could have been brought under the TTCA against Defendants’ governmental employer. Walker, 435 S.W.3d at 792. Again, the TTCA is the only avenue of relief for tort claims

against a governmental unit or its employees. Garcia, 253 S.W.3d at 659. So any tort claims must be brought under the TTCA, regardless of whether the Act waives governmental immunity for those claims. Walker, 435 S.W.3d at 792. Plaintiff's intentional tort claims of assault and battery could have been brought against the Austin Police Department—a governmental unit—under the TTCA.

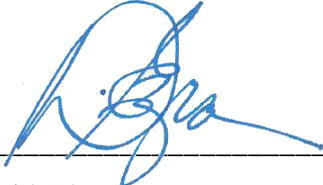
Because Plaintiff's intentional tort claims are based on conduct within the scope of the officers' employment and could have been brought against the Austin Police Department under the TTCA, Plaintiff's suit is construed as being against the officers in their official capacity. Walker, 435 S.W.3d at 792 (citing Tex. Civ. Prac. & Rem. Code § 101.106(f)). The Court dismisses Plaintiff's intentional tort claims of assault and battery with prejudice.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has failed to state a claim on which relief can be granted against Defendants. The Court **GRANTS WITH PREJUDICE** Defendants' Motion to Dismiss. (Dkt. # 21).

IT IS SO ORDERED

DATED: Austin, Texas, February 29, 2024.



David Alan Ezra
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

Case No. 1:23-cv-00276-DAE

EMERGENCY OPPOSED MOTION TO PARTIALL STAY THE CASE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Officers Kelby Radford, Ryan Rawlins, and Jacob Bowman (“Officer Defendants”), Defendants in the above-entitled and numbered causes, and file this Emergency Opposed Motion to Stay the Case, and in support thereof would respectfully show this Court as follows:

I. Summary of the Argument

1. The subject Officer Involved Shooting (“OIS”) occurred almost two years ago—on January 15, 2023—but the Travis County District Attorney’s Office has yet to follow its policy and custom to either present this case to a grand jury or provide a letter declining to prosecute the Officer Defendants herein. Officer Defendants have participated in working up this case while waiting for the grand jury process to resolve, but that has not yet occurred. The purpose of this motion is to ask for Court intervention to stay *only* the dispositive motion deadline and trial setting so that when the resolution of the civil case occurs it is decided based only on the merits rather than a Fifth

Amendment negative inference. In the alternative, the parties jointly request a two-week extension of the dispositive motion deadline to provide all parties additional time to brief the same.

II. Brief Factual & Procedural Background

2. Late at night on January 15, 2023, Decedent Anthony Marquis Franklin shot another person near Lavaca and 6th Street in Austin, Texas. Multiple witnesses reported the shooting via 911 calls, described a chaotic active shooter scene with a fleeing and scared crowd, and provided a description of the shooter that matched Decedent. APD officers began a manhunt in downtown Austin. The Officer Defendants encountered Franklin less than ten minutes later, saw that he had the gun in his hand, and ordered him to drop it. A foot chase ensued.

3. Officer Radford chased on foot while Officers Bowman and Rawlins pursued in a UTV. Multiple subsequent police commands were issued and again ignored during the chase. Officer Radford issued a final command to Franklin to show his hands, but Franklin responded by grasping the gun in his right hand, vaulting over a stone banister, and landing on his back on the pavement. Immediately after he landed, Franklin rolled and pointed his gun directly at Officer Radford. All three officers immediately opened fire to stop Franklin from shooting Officer Radford after having already shot another victim minutes earlier.

4. Prior to this incident, Travis County District Attorney Jose Garza (“DA Garza”), who took office on January 1, 2021, publicly campaigned on prosecution of law enforcement officers.¹ Jose Garza followed through on his campaign promises by ultimately indicting a record number of police officers.² DA Garza issued a press release on April 13, 2021 reiterating his intent to implement a policy of “tak[ing] all officer involved excessive force cases to the grand jury so that

¹ Jose for DA, available at <https://www.joseforda.com/law-enforcement-accountability>

² See e.g. Ex. 1 – 4.

the community can determine whether their actions constitute criminal conduct.”³ It has subsequently become the standard policy, custom, and practice for the Travis County District Attorney’s Office (“TCDAO”) to process all OIS incidents by either presenting them to a grand jury or providing the involved officers a declination letter declining to prosecute.

5. However, almost two years have passed, but the TCDAO has yet to either present this case to a grand jury or provide a declination letter or otherwise communicate its intent. The TCDAO previously released monthly press releases providing the status of each investigation into officer conduct, but it appears the office has since scrubbed those from the internet and is no longer releasing new online press releases regarding the same.

6. The undersigned is aware of other APD officers who have been involved in OIS incidents that took place *after* this the incident that forms the basis of this lawsuit, but where the TCDAO has already disposed of the case through one of the two manners referenced *supra*. The defense has asked but has not received an explanation as to why this case’s TCDAO review and processing have outlasted newer OIS incidents.

7. Plaintiff herein filed suit against the three Officer Defendants based on the subject OIS. The parties have conducted discovery, obtained source materials from the City of Austin via subpoena, and have each designated retained expert witnesses and exchanged their expert reports. The parties have agreed to depose the respective experts outside of the discovery period and have scheduled the depositions of the Officer Defendants to take place over the next two weeks. However, each officer is expected to invoke their Fifth Amendment rights unless or until the TCDAO either presents this OIS to a grand jury or provides a declination letter pursuant to TCDAO’s policy.

³ See Ex. 3.

III. Argument

A. The Officer Defendants ask that this Court stay the dispositive motion and trial setting to allow for the Officer Defendants to testify freely during both stages of litigation.

8. The Officer Defendants ask only that the Court stay the dispositive motion deadline and the trial setting to allow them to eventually provide full testimony in time to be used during the two dispositive stages of this lawsuit. The requested stay will hopefully be a short one given the other later incidents' faster resolutions. The Officer Defendants intend to continue with every other aspect of this case to help move litigation along as timely as possible under the circumstances. The consequence of not granting a stay would be that this case—which involved an armed suspect who had shot another person in the head minutes earlier—might be decided incorrectly because of an adverse inference based on the constitutional right not to testify against oneself.⁴

B. This Court has the authority to stay the deadlines at issue.

9. Federal district courts have “broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s].”⁵ The United States Supreme Court has recognized that there are “special circumstances” in which “the interests of justice” support or even require temporary stays.⁶ Stays are “common practice” when civil and criminal liability arise from the same incident because “criminal prosecutions often take priority over civil actions.”⁷ This Court

⁴ See e.g. *Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-2095D, 2002 WL 31495988, at *3 (N.D. Tex. Nov. 5, 2002).

⁵ *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

⁶ *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary “to prevent a party from suffering substantial and irreparable prejudice.”).

⁷ *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (“Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.”).

has often stayed civil cases to allow for the criminal investigations of the same incident to resolve.⁸ The Officer Defendants do not seek this *de facto* extension for the purposes of delay, but so that justice may be done.

C. The subject incident weighs in favor of a partial stay pursuant to the relevant elements.

10. When tasked with determining the propriety of a stay in light of parallel civil and criminal proceedings, courts generally consider six factors:

- “(1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the criminal case, including whether the defendants have been indicted;
- (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.”⁹

11. On balance, the six factors support a stay of further proceedings here. The TCDAO appears to no longer provide public disclosures about the status of investigations, and the parties must thus assume the TCDAO is indeed moving forward pursuant to its own stated policy and custom of presenting either a grand jury presentation or a declination letter. The Officer Defendants are actively seeking answers to the status of this case and will agree to provide this Court status updates regarding the same as soon as they are learned.

⁸ See *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Order (Dkt. # 72); see also *Javier Ambler v. Williamson Cnty.*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021), Order (Dkt. # 89); see also *Doe v. City of Austin*, No. 1:22-CV-00299-RP, 2022 WL 4234954, at *8 (W.D. Tex. Sept. 14, 2022) (Hightower, M.J.); see also *Kirsch v. City of Austin*, No. A-20-CV-01113-RP, 2022 WL 4280908, at *3 (W.D. Tex. Aug. 5, 2022) (Howell, M.J.); see also *DeSilva v. Taylor*, No. 1:21-cv-00129-RP, 2022 WL 545063, at *4 (W.D. Tex. Feb. 23, 2022) (Hightower, M.J.); see also *Quiroz v. Pineda*, No. 1:21-cv-00443-RP (W.D. Tex. Dec. 5, 2022), Order (Dkt. # 45) (Pitman, J.).

⁹ *Bean v. Alcorta*, 220 F.3d 772, 775 (W.D. Tex. 2016); *Doe*, 2022 WL 4234954, at *4.

12. As to (1) overlap, courts often describe this factor as the “most important consideration for issuing a stay.”¹⁰ The TCDAO’s grand jury presentation of this case would necessarily encompass the same issues—with Plaintiff’s allegations of excessive force presumably being investigated for aggravated assault by a public servant.¹¹

13. As to (2) the status of the criminal case, there is admittedly no active indictment. The timing of the case relevant to other resolved cases suggests that action by the TCDAO should take place relatively soon, however, and that a potential indictment—or at least information regarding the same—should be relatively imminent.

14. As to (3) prejudice to a plaintiff, Plaintiff will suffer no prejudice beyond delay, which is inherently “true in any case in which a stay is granted.”¹² Mere delay is not enough, and a nonmovant must instead identify some specific “discovery that is available now but would be unavailable later should a stay be granted,” or identify specific “witnesses [who] will be unable to testify” after a stay is lifted.¹³ Plaintiff has had free reign to conduct any non-party deposition she so desired, and thus cannot establish any such prejudice here. This is especially true given that this entire incident was captured on multiple bodycam videos.

15. In contrast, the Officer Defendants would suffer (4) a great burden if forced to participate in the dispositive stages of litigation before their cases are at least presented to a grand jury. Each

¹⁰ See e.g. *Doe*, 2022 WL 4234954, at *5; *DeSilva*, 2022 WL 545063, at *3; *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002).

¹¹ See TEX. PENAL CODE ANN. § 22.02(a)(2), (b)(2)(A); See e.g. Order (Dkt. 39), at 4; *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Order (dt. # 39) (Howell, M.J.) (holding overlap for § 1983 excessive force and aggravated assault, and stating “[t]he question is simple: do the facts overlap? Here, they undeniably do.”).

¹² *Kirsch*, 2022 WL 4280908, at *2.

¹³ *DeSilva*, 2022 WL 545063, at *3.

Officer Defendant will face “a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness” and defendant in this civil case.¹⁴

16. A partial stay also favors (5) judicial economy and this Court’s management of its docket.¹⁵ If this partial stay request is denied but subsequently the Officer Defendants are no-billed between now and trial, this Court will have to consider a bevy of motions asking for new dispositive motion opportunities, motions affecting trial, and more. If this case is partially stayed, however, such motions will never be needed. If, in contrast, the Officer Defendants are instead indicted, the defense would be obligated to file a new motion to stay the case. Under that latter scenario, a stay now could also streamline the civil case depending on the outcome of the criminal trial.¹⁶ Under either scenario, more motion practice would be almost inevitable unless a partial stay is granted now to allow the criminal process to resolve first.

4. Granting a partial stay now likewise (6) supports the public’s interest. The public has an interest in the just and constitutional resolution of disputes with minimal delay.¹⁷ However, that resolution must be weighed against the possibility that the “integrity” of a citizen’s constitutional rights might be in jeopardy.¹⁸ The Fifth Circuit has also recognized that the public has an interest in protecting law enforcement, and “ensuring the criminal discovery process is not subverted.”¹⁹ Considering these principles, the public interest factor also weighs in favor of granting the Officer Defendants’ requested partial stay. The public also has a vested interest in maintaining the integrity of a citizen’s choice to invoke the Fifth Amendment—and in being shielded from the unavoidable

¹⁴ *DeSilva*, 2022 WL 545063, at *4.

¹⁵ *See Bean*, 220 F. Supp. 3d at 377; *Meyers*, 2016 WL 393552 at *7; *Librado*, 2002 WL 31495988, at *3.

¹⁶ *Kirsch*, 2022 WL 4280908, at *3.

¹⁷ *See Collins*, 2011 WL 3874910, at *4; *see also Librado*, 2002 WL 31495988, at *3; *see also Frierson v. City of Terrell*, No. CIV.A. 3:02CV2340-H, 2003 WL 21355969, at *4 (N.D. Tex. June 6, 2003).

¹⁸ *Frierson*, 2003 WL 21355969, at *4.

¹⁹ *Offill*, 2008 WL 958072, at *4 (citing *Campbell* at 487).

tainting of that constitutional right discussed *supra* if this motion is not granted.²⁰ Lastly, the public is also served by both criminal and civil matters being resolved fairly and accurately. The public is thus most certainly *not* served by allowing a motion for summary judgment—much less a trial—based on a fleeing active shooter with a gun to be potentially decided based on an adverse inference rather than the actual facts of the case.

D. In the alternative, the parties jointly request a two-week extension of all summary judgment deadlines.

17. In the alternative, if the Court does not grant the requested partial stay, all parties to this case jointly request that this Court grant all parties a two-week extension on the current dispositive motion deadline. The parties have scheduled the depositions of each Officer Defendant for this week and next, and all parties agree that additional time will ultimately be needed to fully brief the same.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grant this motion, stay the summary judgment deadlines and current trial setting, and for all other relief to which they may be entitled in law or in equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

²⁰ See *Campbell*, 307 F.2d at 487.

Stephen B. Barron
State Bar No. 24109619
sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF CONFERENCE

On October 17, 2024, the undersigned conferred with Plaintiff's counsel regarding the requested extension. Plaintiff's counsel is opposed to Defendants' request for a partial stay of this case. However, Plaintiff's counsel joins in the alternative request for an extra two weeks of time for all motion for summary judgment deadlines.

/s/ Blair J. Leake
Blair J. Leake

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2024, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake
Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

Case No. 1:23-cv-00276-DAE

**FIRST AMENDED EMERGENCY OPPOSED MOTION FOR
PARTIAL STAY OF CASE**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Officers Kelby Radford, Ryan Rawlins, and Jacob Bowman (“Officer Defendants”), Defendants in the above-entitled and numbered causes, and file this First Amended Emergency Opposed Motion for Partial Stay of Case, and in support thereof would respectfully show this Court as follows:

I. Summary of the Argument

1. The subject Officer Involved Shooting (“OIS”) occurred almost two years ago—on January 15, 2023—but the Travis County District Attorney’s Office has yet to follow its policy and custom to either present this case to a grand jury or provide a letter declining to prosecute the Officer Defendants herein. Officer Defendants have participated in working up this case while waiting for the grand jury process to resolve, but that has not yet occurred. The purpose of this motion is to ask for Court intervention to stay *only* the dispositive motion deadline and trial setting so that when

the resolution of the civil case occurs it is decided based only on the merits rather than a Fifth Amendment negative inference. In the alternative, the parties jointly request a two-week extension of the dispositive motion deadline to provide all parties additional time to brief the same.

II. Brief Factual & Procedural Background

2. Late at night on January 15, 2023, Decedent Anthony Marquis Franklin shot another person near Lavaca and 6th Street in Austin, Texas. Multiple witnesses reported the shooting via 911 calls, described a chaotic active shooter scene with a fleeing and scared crowd, and provided a description of the shooter that matched Decedent. APD officers began a manhunt in downtown Austin. The Officer Defendants encountered Franklin less than ten minutes later, saw that he had the gun in his hand, and ordered him to drop it. A foot chase ensued.

3. Officer Radford chased on foot while Officers Bowman and Rawlins pursued in a UTV. Multiple subsequent police commands were issued and again ignored during the chase. Officer Radford issued a final command to Franklin to show his hands, but Franklin responded by grasping the gun in his right hand, vaulting over a stone banister, and landing on his back on the pavement. Immediately after he landed, Franklin rolled and pointed his gun directly at Officer Radford. All three officers immediately opened fire to stop Franklin from shooting Officer Radford after having already shot another victim minutes earlier.

4. Prior to this incident, Travis County District Attorney Jose Garza (“DA Garza”), who took office on January 1, 2021, publicly campaigned on prosecution of law enforcement officers.¹ Jose Garza followed through on his campaign promises by ultimately indicting a record number of police officers.² DA Garza issued a press release on April 13, 2021 reiterating his intent to

¹ Jose for DA, available at <https://www.joseforda.com/law-enforcement-accountability>

² See e.g. Ex. 1 – 4.

implement a policy of “tak[ing] all officer involved excessive force cases to the grand jury so that the community can determine whether their actions constitute criminal conduct.”³ It has subsequently become the standard policy, custom, and practice for the Travis County District Attorney’s Office (“TCDAO”) to process all OIS incidents by either presenting them to a grand jury or providing the involved officers a declination letter declining to prosecute.

5. However, almost two years have passed, but the TCDAO has yet to either present this case to a grand jury or provide a declination letter or otherwise communicate its intent. The TCDAO previously released monthly press releases providing the status of each investigation into officer conduct, but it appears the office has since scrubbed those from the internet and is no longer releasing new online press releases regarding the same.

6. The undersigned is aware of other APD officers who have been involved in OIS incidents that took place *after* this the incident that forms the basis of this lawsuit, but where the TCDAO has already disposed of the case through one of the two manners referenced *supra*. ***Since the filing of the original version of this motion, the defense has been informed that the TCDAO is awaiting an opinion from its retained expert witness before it presents this OIS to a grand jury.***

7. Plaintiff herein filed suit against the three Officer Defendants based on the subject OIS. The parties have conducted discovery, obtained source materials from the City of Austin via subpoena, and have each designated retained expert witnesses and exchanged their expert reports. The parties have agreed to depose the respective experts outside of the discovery period, and have scheduled the depositions of the Officer Defendants to take place over the next two weeks. However, each officer is expected to invoke their Fifth Amendment rights unless or until the

³ See Ex. 3.

TCDAO either presents this OIS to a grand jury or provides a declination letter pursuant to TCDAO's policy. The current dispositive motion deadline is November 1, 2024.⁴

III. Argument

A. The Officer Defendants ask that this Court stay the dispositive motion and trial setting to allow for the Officer Defendants to testify freely during both stages of litigation.

8. The Officer Defendants ask only that the Court stay the dispositive motion deadline and the trial setting to allow them to eventually provide full testimony in time to be used during the two dispositive stages of this lawsuit. The requested stay will hopefully be a short one given the other later incidents' faster resolutions. The Officer Defendants intend to continue with every other aspect of this case to help move litigation along as timely as possible under the circumstances. The consequence of not granting a stay would be that this case—which involved an armed suspect who had shot another person in the head minutes earlier—might be decided incorrectly because of an adverse inference based on the constitutional right not to testify against oneself.⁵

B. This Court has the authority to stay the deadlines at issue.

9. Federal district courts have “broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s].”⁶ The United States Supreme Court has recognized that there are “special circumstances” in which “the interests of justice” support or even require temporary stays.⁷ Stays are “common practice” when civil and criminal liability arise from the

⁴ Dkt. # 24, pg. 2.

⁵ See e.g. *Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-2095D, 2002 WL 31495988, at *3 (N.D. Tex. Nov. 5, 2002).

⁶ *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

⁷ *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary “to prevent a party from suffering substantial and irreparable prejudice.”).

same incident because “criminal prosecutions often take priority over civil actions.”⁸ This Court has often stayed civil cases to allow for the criminal investigations of the same incident to resolve.⁹ The Officer Defendants do not seek this *de facto* extension for the purposes of delay, but so that justice may be done.

C. The subject incident weighs in favor of a partial stay pursuant to the relevant elements.

10. When tasked with determining the propriety of a stay in light of parallel civil and criminal proceedings, courts generally consider six factors:

- “(1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the criminal case, including whether the defendants have been indicted;
- (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.”¹⁰

11. On balance, the six factors support a stay of further proceedings here. The TCDAO appears to no longer provide public disclosures about the status of investigations, and the parties must thus assume the TCDAO is indeed moving forward pursuant to its own stated policy and custom of

⁸ *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (“Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.”).

⁹ *See Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Order (Dkt. # 72); *see also Javier Ambler v. Williamson Cnty.*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021), Order (Dkt. # 89); *see also Doe v. City of Austin*, No. 1:22-CV-00299-RP, 2022 WL 4234954, at *8 (W.D. Tex. Sept. 14, 2022) (Hightower, M.J.); *see also Kirsch v. City of Austin*, No. A-20-CV-01113-RP, 2022 WL 4280908, at *3 (W.D. Tex. Aug. 5, 2022) (Howell, M.J.); *see also DeSilva v. Taylor*, No. 1:21-cv-00129-RP, 2022 WL 545063, at *4 (W.D. Tex. Feb. 23, 2022) (Hightower, M.J.); *see also Quiroz v. Pineda*, No. 1:21-cv-00443-RP (W.D. Tex. Dec. 5, 2022), Order (Dkt. # 45) (Pitman, J.).

¹⁰ *Bean v. Alcorta*, 220 F.3d 772, 775 (W.D. Tex. 2016); *Doe*, 2022 WL 4234954, at *4.

presenting either a grand jury presentation or a declination letter. *Since the filing of the original version of this motion, the defense has been informed that the TCDAO is awaiting an opinion from its retained expert witness before it presents this OIS to a grand jury.*

12. As to (1) overlap, courts often describe this factor as the “most important consideration for issuing a stay.”¹¹ The TCDAO’s grand jury presentation of this case would necessarily encompass the same issues—with Plaintiff’s allegations of excessive force presumably being investigated for aggravated assault by a public servant.¹²

13. As to (2) the status of the criminal case, there is admittedly no active indictment. The TCDAO represented to the defense within the last 24 hours that it will present this case to a grand jury as soon as it receives an opinion from its retained use of force expert, however, and thus the grand jury decision and potential legal jeopardy is potentially imminent.

14. As to (3) prejudice to a plaintiff, Plaintiff will suffer no prejudice beyond delay, which is inherently “true in any case in which a stay is granted.”¹³ Mere delay is not enough, and a nonmovant must instead identify some specific “discovery that is available now but would be unavailable later should a stay be granted,” or identify specific “witnesses [who] will be unable to testify” after a stay is lifted.¹⁴ Plaintiff has had free reign to conduct any non-party deposition she so desired, and thus cannot establish any such prejudice here. This is especially true given that this entire incident was captured on multiple bodycam videos.

¹¹ See e.g. *Doe*, 2022 WL 4234954, at *5; *DeSilva*, 2022 WL 545063, at *3; *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002).

¹² See TEX. PENAL CODE ANN. § 22.02(a)(2), (b)(2)(A); See e.g. Order (Dkt. 39), at 4; *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Order (dt. # 39) (Howell, M.J.) (holding overlap for § 1983 excessive force and aggravated assault, and stating “[t]he question is simple: do the facts overlap? Here, they undeniably do.”).

¹³ *Kirsch*, 2022 WL 4280908, at *2.

¹⁴ *DeSilva*, 2022 WL 545063, at *3.

15. In contrast, the Officer Defendants would suffer (4) a great burden if forced to participate in the dispositive stages of litigation before their cases are at least presented to a grand jury. Each Officer Defendant will face “a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness” and defendant in this civil case.¹⁵

16. A partial stay also favors (5) judicial economy and this Court’s management of its docket.¹⁶ The defense has just learned that a grand jury presentation should happen in the near future pending an expert opinion. If this partial stay request is denied but the Officer Defendants are subsequently no-billed between now and trial, this Court will have to consider a bevy of motions asking for new dispositive motion opportunities and likely other motions. If this case is partially stayed to allow the grand jury to proceed, however, such motions will never be needed. If, in contrast, the Officer Defendants are indicted, the defense would be obligated to file a new motion to stay the case. Under that latter scenario, a stay now could also streamline the civil case depending on the outcome of the criminal trial.¹⁷ Under either scenario, more motion practice would be almost inevitable unless a partial stay is granted now to allow the criminal process to resolve first. The most efficient way to handle this case from a judicial economy perspective would thus be to provide a presumably-short stay and experience the least amount of corresponding motion practice.

4. Granting a partial stay now likewise (6) supports the public’s interest. The public has an interest in the just and constitutional resolution of disputes with minimal delay.¹⁸ However, that resolution must be weighed against the possibility that the “integrity” of a citizen’s constitutional

¹⁵ *DeSilva*, 2022 WL 545063, at *4.

¹⁶ *See Bean*, 220 F. Supp. 3d at 377; *Meyers*, 2016 WL 393552 at *7; *Librado*, 2002 WL 31495988, at *3.

¹⁷ *Kirsch*, 2022 WL 4280908, at *3.

¹⁸ *See Collins*, 2011 WL 3874910, at *4; *see also Librado*, 2002 WL 31495988, at *3; *see also Frierson v. City of Terrell*, No. CIV.A. 3:02CV2340-H, 2003 WL 21355969, at *4 (N.D. Tex. June 6, 2003).

rights might be in jeopardy.¹⁹ The Fifth Circuit has also recognized that the public has an interest in protecting law enforcement, and “ensuring the criminal discovery process is not subverted.”²⁰ Considering these principles, the public interest factor also weighs in favor of granting the Officer Defendants’ requested partial stay. The public also has a vested interest in maintaining the integrity of a citizen’s choice to invoke the Fifth Amendment—and in being shielded from the unavoidable tainting of that constitutional right discussed *supra* if this motion is not granted.²¹ Lastly, the public is also served by both criminal and civil matters being resolved fairly and accurately. The public is thus most certainly *not* served by allowing a motion for summary judgment—much less a trial—based on a fleeing active shooter with a gun to be potentially decided based on an adverse inference rather than the actual facts of the case.

D. In the alternative, the parties jointly request a two-week extension of all summary judgment deadlines.

17. In the alternative, if the Court does not grant the requested partial stay, all parties to this case jointly request that this Court grant all parties a two-week extension on the current dispositive motion deadline. The parties have scheduled the depositions of each Officer Defendant for this week and next, and all parties agree that additional time will ultimately be needed to fully brief the same.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grant this motion, stay the summary

¹⁹ *Frierson*, 2003 WL 21355969, at *4.

²⁰ *Offill*, 2008 WL 958072, at *4 (citing *Campbell* at 487).

²¹ *See Campbell*, 307 F.2d at 487.

judgment deadlines and current trial setting, and for all other relief to which they may be entitled in law or in equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF CONFERENCE

On October 17, 2024, the undersigned conferred with Plaintiff's counsel regarding the requested extension. Plaintiff's counsel is opposed to Defendants' request for a partial stay of this case. However, Plaintiff's counsel joins in the alternative request for an extra two weeks of time for all motion for summary judgment deadlines.

/s/ Blair J. Leake

Blair J. Leake

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2024, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake

Blair J. Leake

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,

Plaintiff,

V.

KELBY RADFORD, individually;
RYAN RAWLINS, individually;
and JACOB BOWMAN, individually,

Defendants.

[illegible]

Case No. 1:23-cv-00276-DAE

**PLAINTIFF’S RESPONSE AND MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ FIRST AMENDED EMERGENCY
MOTION FOR PARTIAL STAY OF CASE**

NOW COMES Plaintiff Dorothy C. Motley and files this response and memorandum in opposition to Defendants' First Amended Emergency Motion for Partial Stay of Case and would respectfully demonstrate unto this Court as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2023, at approximately 11:43 p.m., Defendants Radford, Rawlins, and Bowman located Decedent Anthony Franklin (“Decedent”), who they believed matched the description of a suspected shooter in the Austin, Texas downtown area. Defendants approached Decedent and ordered him to drop a gun, and Decedent began running away from Defendants. Defendant Radford pursued Decedent on foot

while Defendants Rawlins and Bowman pursued him on an Austin Police Department issued ATV. During the chase, Decedent ran onto the porch of O. Henry Hall, administrative headquarters for the University of Texas.

Decedent then attempted to leap over the wall of the porch but fell to the sidewalk on his back. While Decedent was leaping over the wall and falling, Defendant Radford yelled to Decedent to “show me your hands now.” Less than a second after Decedent made impact with the sidewalk and dropping the gun, and while he was laying on his back, Defendant Radford discharged his firearm several times in the direction of Decedent and continued firing as Decedent rolled over into the fetal position facing away from Defendant Radford. Defendant Radford ultimately fired his weapon over ten times at Decedent while he was balled up in the fetal position. As Defendant Radford began firing at Decedent, Defendants Rawlins and Bowman, while riding the ATV, began to discharge their firearms several times at Decedent while he was in the fetal position. As a result of being shot by Defendants multiple times, Decedent died.

Plaintiff thereafter filed the instant lawsuit on March 14, 2023. The parties have exchanged written discovery, obtained source materials from the City of Austin, and have designated retained expert witnesses and exchanged their reports. Notably, the Plaintiff via counsel have made several requests to the Defendants’ counsel to depose

the Defendants officer since October 3, 2023.¹ However, not until the Plaintiff sought intervention from this Court did the Defendants provide dates to depose the Defendant officers on October 24, 2024, and October 30, 2024, days before the close of discovery on November 1, 2024. After the parties set a date to depose the Defendants, the Defendant now seek to stay the dispositive motion deadline and trial setting in this matter pending resolution of a potential criminal case despite the lack of any indictment, asserting that the same is necessary to preserve their Fifth Amendment Rights. However, as will be demonstrated below, Defendants are not entitled to the requested stay.

ARGUMENT

Defendants are not entitled to a stay in this matter, as they have not been indicted and the factors laid out by the Fifth Circuit for determining whether a stay is appropriate weigh against the requested relief.

“The stay of a pending matter is ordinarily within the trial court’s wide discretion to control the course of litigation.” *In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990). “This authority has been held to provide the court the ‘general discretionary power to stay proceedings before it in control of its docket and in the interests of justice.’” *Id.* (quoting *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982)).

¹ Emails from Plaintiff’s counsel to the Defendants’ counsel requesting dates to depose the Defendant officers on October 3, 2023. Plaintiffs follow up her request to depose the Defendant officers on October 18, 2023, and additional request to depose on March 4, 2024. (Exhibit 1).

Accordingly, “a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.” *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). Notably, however, “[t]he granting of a stay of civil proceedings due to pending criminal investigation is an extraordinary remedy, not to be granted lightly.” *United States v. Simcho*, 326 Fed. Appx. 791, 792–93 (5th Cir. 2009) (quoting *In re Who's Who Worldwide Registry, Inc.*, 197 B.R. 193, 195 (Bankr. E.D.N.Y. 1996)). Thus, “[i]t ‘is the rule, rather than the exception’ that civil and criminal cases proceed together.” *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 758, 761 (W.D. Tex. 2008) (quoting *IBM v. Brown*, 857 F.Supp. 1384, 1387 (C.D. Cal. 1994)). Ultimately, in considering whether a stay is warranted, Courts consider the following factors:

- (1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the criminal case, including whether the defendants have been indicted;
- (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.

Id. at 762 (citation omitted).

Overlap of Cases

Previously, this Court has found that “[w]here no indictment has as yet been handed up against [the defendant], the court cannot determine with certainty the degree of overlap between [the civil] action and the criminal investigation.” *Id.* (alterations in

original) (citation and internal quotation marks omitted). Here, because Defendants have not been indicted, the Court would be forced to speculate as to the degree of overlap between the instant action and a potential criminal case. As such, this factor weighs against Defendants' motion or, at best, should be weighted neutrally.

Status of Criminal Case and Indictment

"A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct." *Id.* at 762–63 (quoting *Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc. et al.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). Notably, Defendants seek a stay on the basis of their Fifth Amendment rights against self-incrimination. However, this Court has previously found that "[a] defendant's privilege against self-incrimination is a factor favoring a stay *only after that defendant has been indicted.*" *Id.* at 763 (citation and internal quotation marks omitted) (emphasis added). Moreover, this Court has also noted "[t]he weight of authority suggests that a stay is generally not appropriate before indictment." *Id.* (citation omitted). Accordingly, because Defendants have not been indicted, this factor weighs against a stay. *See id.* ("Chavez has not been indicted, though he is the subject of a criminal investigation. Accordingly, th[e] Court finds that this factor weighs against a stay.").

Prejudice to Plaintiff

"[T]he compensation and remedy due a civil plaintiff should not be delayed." *Id.* (alteration in original) (quoting *Gordon v. FDIC.*, 138 U.S. App. D.C. 308, 427 F.2d

578, 580 (D.C. Cir. 1970)). “Plaintiffs have a legitimate interest in the expeditious resolution of their case.” *Id.* (quoting *Trs. of Plumbers & Pipefitters Nat’l Pension Fund*, 886 F.Supp. at 1140).

In *Gonzalez*, this Court found that this factor weighed against granting a stay. This Court noted that “Chavez requests a stay until ‘such time as the concurrent criminal investigation and proceedings are concluded,’ which time is currently indeterminate.” *Id.* Thus, this Court explained, “[e]ven if the Grand Jury indicted Chavez tomorrow, it could take several months to resolve the criminal case.” *Id.* This Court also found “[w]hen considering the amount of time required for the prosecution of Chavez (should he be indicted), and then the time required for the prosecution of Gonzalez’s civil case, concerns regarding witnesses’ fading memories and poor health are certainly not insignificant.” *Id.* Ultimately, this court concluded “[i]nsofar as staying the instant action could significantly delay and prejudice Gonzalez’s ability to obtain relief, the Court concludes that this factor weighs against granting the instant Motion.” *Id.* at 763–64. This Court should similarly find that this factor weighs against granting Defendants’ motion. Additionally, the Defendants failed to produce the Defendant officers for deposition and only production the Defendant officers after the Plaintiff sought this Court’s intervention.

Burden on Defendants

In analyzing the potential burden on a criminal defendant’s Fifth Amendment rights, this Court has explained “[i]t is not unconstitutional to force [civil defendants]

to choose between the negative inferences drawn from their silence in [a civil case] and their Fifth Amendment privilege.” *Id.* at 764 (second and third alterations in original) (citation and internal quotation marks omitted). Thus, “[a] party asserting prejudice to his Fifth Amendment right must demonstrate ‘more than the mere possibility of prejudice[,]’” and “[a]llegations of prejudice to criminal cases from civil discovery are ‘conclusory and insufficient to warrant a stay.’” *Id.* (alteration in original) (quoting *In re Ramu Corp.*, 903 F.2d at 320). As such, “[t]he [movant] should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient.” *Id.* (second alteration in original) (quoting *In re Ramu Corp.*, 903 F.2d at 320).

This Court has also found that the “pre-indictment nature of [a] pending criminal investigation weakens” a defendant’s Fifth Amendment Interest. *Id.* As such, this court explained “[w]hile it is *possible* that [a defendant] will be confronted with a situation where he will have to choose whether to assert his Fifth Amendment right, there are other means to protect his interest.” *Id.*

Furthermore, the Fifth Circuit has observed that “[m]any cases have held that parallel criminal and civil trials or investigations do not raise questions of constitutional magnitude with respect to the privilege against self-incrimination.” *Hoover v. Knight*, 678 F.2d 578, 581 (5th Cir. 1982). In *United States v. White*, the Fifth Circuit addressed a motion to stay, noting that the defendant “contend[ed] that being forced to go to trial in a civil case while criminal charges arising out of the same conduct were pending

forced him to choose between preserving his fifth amendment privilege and losing the civil suit.” 589 F.2d 1283, 1286 (5th Cir. 1979). The Fifth Circuit disagreed, finding that the defendant “overstate[d] his dilemma.” *Id.* The Court explained that the defendant “was not forced to surrender his privilege against self-incrimination in order to prevent a judgment against him; although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment would have necessarily resulted in an adverse judgment.” *Id.* The Court found that the plaintiff “was put to the proof of its case, []and there is no indication that under Georgia law silence on the part of defendant would compel a verdict for plaintiff.” *Id.* at 1287 (internal citation omitted). Moreover, the Court further noted that “[s]ince there [wa]s no forfeiture of any property or benefit, we can see no impermissible effect on [defendant]’s fifth amendment privilege in the present case.” *Id.*

Accordingly, this factor weighs against Defendants because Defendants have not demonstrated anything more than a mere possibility of prejudice, this Court has other means to protect Defendants’ Fifth Amendment interests outside of a stay, and there is no indication that invocation of their Fifth Amendment rights will result in an adverse judgment against Defendants.

Interests of the Court

“In determining the propriety of a stay, a court can consider its own interests in efficient administration and judicial economy.” *Gonzalez*, 571 F. Supp. 2d at 765.

“[T]he Court has an interest in moving its cases to an expeditious conclusion.” *Id.* (alteration in original) (citation and internal quotation marks omitted). However, “[a] policy of freely granting stays solely because a litigant is defending simultaneous multiple suits interferes with judicial administration.” *Id.* (quoting *In re CFS-Related Secs. Fraud Litig.*, 256 F. Supp. 2d 1227, 1242 (Okla. 2003)). Moreover, “[w]here no indictment has been returned and the civil case has been pending for more than a year, *staying [a] civil action until the completion of any criminal proceeding would lead to unwarranted delay of th[e] action.*” *Id.* (second alteration in original) (emphasis added) (citation and internal quotation marks omitted).

In *Gonzalez*, this Court noted that “[t]he instant action []has been pending on the Court's docket for more than a year and a half.” *Id.* As such, “[g]iven the uncertainty as to whether Chavez will be indicted, there is a *possibility* that this action could be stayed for no reason. *Id.* “Thus, the Court finds that its interests are best served by proceeding with the instant action and this factor weighs against a stay.” *Id.*

Here, Plaintiff filed her Complaint on March 14, 2023. As such, the instant action has been pending for over a year-and-a-half. As previously discussed, Defendants have not been indicted. Thus, if this Court were to issue a stay, there is a possibility the action would be stayed for no reason. Accordingly, like this Court found in *Gonzalez*, the Court’s interests are best served by proceeding with the instant action. This factor therefore weighs against Defendant.

Public Interest

This Court has found previously indicated that “[t]he public has an interest in both the prompt resolution of civil cases as well as the prosecution of criminal cases.” *Id.* (quoting *In re CFS-Related Secs. Fraud Litig.*, 256 F. Supp. 2d at 1242). As indicated above, this instant action has already been pending for over a year-and-a-half. Moreover, because Defendants have not been indicted, a stay pending resolution of the criminal investigation and proceedings could result in an indefinite delay of the instant action. Thus, because the public has an interest in the prompt resolution of the civil case, this factor weighs against granting Defendants’ motion.

CONCLUSION

Based on the foregoing, this Court should deny Defendants’ First Amended Emergency Motion for Partial Stay of Case. However, Plaintiff does consent to the requested two-week extension of all summary judgment deadlines.

Submitted this 28th day of October 2024.

LAW OFFICES OF HARRY M.
DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

MACK INJURY ATTORNEYS

Nathaniel Mack, III, Esq.
Texas Bar No. 24078896

8023 Vantage Drive, Suite 690
San Antonio, TX 78230
(T) 210-333-6225
(F) 210-853-3152
nmack@macktexaslaw.com

STROM LAW FIRM

Bakari Sellers, Esq.

6923 N. Trenholm Road
Columbia, SC 29206
Tel. 803.252.4800
bsellers@stromlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon all parties in this case by Statutory Electronic Service and via e-mail.

Submitted this 28th day of October 2024.

LAW OFFICES OF HARRY M.
DANIELS

/s/ Harry M. Daniels

Harry M. Daniels, Esq.

Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

1. The facts surrounding the scheduled-but-cancelled depositions of the Officer Defendants merit some clarification based on how they were described in Plaintiff's response brief. There was admittedly a delay in agreeing to dates for the depositions of the Officer Defendants, and for that the defense takes responsibility. There were issues that included a shortage of calendar dates that worked with defense counsel and the Officer Defendants, but that is no excuse. The undersigned counsel accordingly went to great effort this past month to move his calendar around to make it

possible to prepare and present all three of his clients prior to the dispositive motion deadline, called Plaintiff's counsel to apologize for the circumstances, agreed to extend the discovery period, and offered and agreed to pay expedited fees for the three depositions to make sure the timing of them did not prejudice Plaintiff. None of the undersigned's actions were motivated in whole or in part by the brief email Plaintiff's counsel sent to the Courtroom Deputy.

2. On the scheduled day, Plaintiff counsel unexpectedly cancelled by emailing at 7:13 a.m. announcing that the first two depositions needed to be postponed because Plaintiff's counsel had an oral argument setting. Plaintiff counsel's associate attorney later emailed on the same day and announced that all three Officer Defendants' depositions were now being cancelled. The Officer Defendants thus agreed to depositions, prepared for them, and would have been presented for the same but for Plaintiff Counsel's day-of cancellations.

II. An indictment is not a strict prerequisite for a stay.

3. Plaintiff's representation that a stay without an indictment is impossible defies this Court's own prior rulings. In *Drake*, this Court stayed the case "for ninety days pending the outcome of the forecasted indictment against him" by the very same District Attorney.¹ The Fifth Circuit has previously reversed a trial court and remanded to stay a lawsuit entirely until the un-indicted Plaintiff's criminal statute of limitation had run.² Other Courts have likewise ordered stays for un-indicted Defendants.³ The fact that the grand jury proceeding has not yet occurred for these Officer Defendants is not dispositive against the requested partial stay.

III. The prejudice to the Officer Defendants looms large.

¹ Order, *Drake v City of Austin*, 1:20-cv-00956-RP (W.D. Tex. Sept. 21, 2021), Dkt. 31, pg. 7.

² See *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 (5th Cir. 1979).

³ See e.g., *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d. Cir. 1985) (noting that "the district court granted [a motion to stay] until the U.S. Attorney's office announced that it had declined prosecution.").

4. The Officer Defendants have met their burden to prove that forcing them to move forward with the dispositive stages of litigation would constitute severe prejudice. As this Court has held, “an Officer faces a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness in [a] parallel civil action,” and moreover that “such defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the prosecution.”⁴ The Officer Defendants also have an interest in testimony provided during a deposition or trial not being utilized against them in the grand jury proceeding expected to be held in the near future. The Officer Defendants have thus shown that the risk of prejudice in Travis County, Texas is not just real—it is downright *looming*⁵—and the requested stay is therefore appropriate.

IV. Plaintiff has not met her burden to articulate any prejudice beyond the categorically-insufficient temporal delay.

5. “[I]n evaluating the plaintiff’s burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim.”⁶ Even if the parallel criminal case is “proceeding slowly and uncertainly” it does “***not*** weigh heavily against a stay.”⁷ There is no risk of Plaintiff being denied the right to timely obtain discovery while memories are fresh because the parties fully participated in discovery—including scheduling and preparing for the Officer Defendants’ depositions before they were cancelled by

⁴ *DeSilva v. Taylor*, No. 1:21-CV-00129-RP, 2022 WL 545063, at *4 (W.D. Tex. Feb. 23, 2022).

⁵ See e.g., Melia Masumoto, Britny Eubank, Tony Plohetski, *Austin police officer found guilty of deadly conduct*, KVUE (Updated Oct. 6, 2024 5:19 PM), <https://www.kvue.com/article/news/crime/christopher-taylor-verdict-austin-police-mauris-desilva-shooting/269-6de688df-a622-4234-8997-425d8b13ec57>.

⁶ *Alcala v. Tex. Webb Cnty.*, 625 F.Supp.2d 391, 397 (S.D.Tex.2009) (internal quotation marks omitted).

⁷ See *Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002) (emphasis added) (granting stay of discovery in case where Plaintiff argued criminal case was proceeding slowly and with no trial date).

Plaintiff mere hours before they were set to begin. The defense has asked for the dispositive stages of this lawsuit to be stayed, but has **never** asked for discovery to be delayed or stayed in any way. Thus, fading memories or deteriorating evidence “[are] **not** a concern in the present case...because the parties already completed discovery,” and Plaintiff has thus already been provided every opportunity to “preserve[] the evidence [s]he needs for trial.”⁸

6. Video evidence of the incident has already been preserved from the bodycam footage of each officer as well as from stationary surveillance cameras. The Officer Defendants have likewise already provided sworn *Garrity* statements during IA interviews about the incident, and thus their memories and observations are already locked in for Plaintiff’s use and consideration. There is simply no risk of evidentiary deterioration, nor any risk of testimonial degradation either because the parties engaged in discovery. Plaintiff’s failure to articulate any prejudice beyond the mere possibility of delay fails to meet her burden to oppose the requested stay of the dispositive motion and trial settings. A presumably short stay of this case, as requested, is therefore an appropriate measure to prevent tainting the Constitutional rights at issue.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grant their emergency motion to stay summary judgment deadlines and current trial setting, and for all other relief to which they may be entitled in law or in equity.

⁸ *Id.* (emphasis added) (finding no prejudice to Plaintiff from a stay because he had been given the opportunity to conduct full discovery).

WRIGHT & GREENHILL, P.C.
4700 Mueller Blvd., Suite 200
Austin, Texas 78723
(512) 476-4600
(512) 476-5382 – Fax

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

I hereby certify that on the 29th day of October, 2024, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

Page 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,	§	No. 1:23-cv-00276-DAE
individually, and on behalf of all	§	
wrongful death beneficiaries of	§	
Anthony Marquis Franklin,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	
	§	
KELBY RADFORD, RYAN	§	
RAWLINS, and JACOB BOWMAN,	§	
<i>Defendants.</i>	§	

ORDER DENYING DEFENDANTS' EMERGENCY OPPOSED MOTION FOR
PARTIAL STAY OF CASE

Before the Court is Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman's ("Officer Defendants") First Amended Emergency Opposed Motion for Partial Stay of Case, filed on October 22, 2024. (Dkt. # 33.) On October 28, 2024, Plaintiff Dorothy C. Motley ("Plaintiff") filed her response. (Dkt. # 34.) On October 29, 2024, Officer Defendants filed their reply. (Dkt. # 35.) The Court finds this matter suitable for disposition without a hearing. After careful consideration of the filings and relevant case law, the Court, for the following reasons, **DENIES** Defendants' motion for partial stay of the case.

BACKGROUND

On January 15, 2023, Officer Defendants Radford, Rawlins, and Bowman engaged in an officer involved shooting in Austin, Texas. (Dkt. # 1 at 4–

6.) Plaintiff is the parent of Anthony Marquis Franklin, who allegedly died as a result of the officer involved shooting. (*Id.* at 3.) On March 14, 2023, Plaintiff filed suit against Officer Defendants under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment and for wrongful death. (Dkt. # 1.)

On January 8, 2024, the Court entered a Scheduling Order, setting the discovery deadline for October 4, 2024, and the dispositive motion deadline for November 1, 2024. (Dkt. # 24.) On October 31, 2024, the Court granted a two-week extension for the dispositive motion deadline. (Dkt. # 36.)

The Travis County District Attorney’s Office (“TCDAO”) has not presented the officer involved shooting matter to a grand jury nor provided the involved officers a declination letter declining to prosecute. (Dkt. # 33 at 3.) Therefore, Officer Defendants seek “Court intervention to stay only the dispositive motion deadline and trial setting so that when the resolution of the civil case occurs it is decided based only on the merits rather than a Fifth Amendment negative inference.” (*Id.* at 1–2.)

LEGAL STANDARD

A stay of a pending matter is “within the trial court’s wide discretion to control the course of litigation, which includes authority to control the scope and pace of discovery.” *In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990). This authority stems from a district court’s inherent power to “control the disposition of

the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); see also Dominguez v. Hartford Fin. Servs. Grp., Inc., 530 F.Supp.2d 902, 905 (S.D. Tex. 2008) (quoting same).

In the context of parallel civil and criminal proceedings, “there is no general federal constitutional, statutory, or common law rule” barring their simultaneous prosecution. Buehler v. City of Gonzales, No. 5:15–CV–198, 2015 WL 3651573, at *1 (W.D. Tex. June 11, 2015) (quoting Sec. Exch. Comm'n v. First Fin. Grp. of Tex., Inc., 659 F.2d 660, 666 (5th Cir. 1981)). A district court may, however, in its discretion stay the civil action. Id. In ruling on requests for stays of the civil side of parallel proceedings, “[j]udicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.” Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962). “Such a stay contemplates ‘special circumstances’ and the need to avoid ‘substantial and irreparable prejudice.’” United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983) (quoting First Fin. Grp. of Tex., 659 F.2d at 668). One such circumstance “is to preserve a defendant's Fifth Amendment right against self-incrimination and to resolve the conflict he would face between asserting this right and defending the civil action.” Alcala v. Tex. Webb Cty., 625 F.Supp.2d 391, 397 (S.D. Tex. 2009).

While by its terms applicable only in criminal proceedings, the Fifth Amendment “has long been held to extend to compelling answers by parties or witnesses in civil litigation . . . ‘wherever the answer might tend to subject to criminal responsibility him who gives it.’” United States ex rel. Gonzalez v. Fresenius Med. Care N. Am., 571 F.Supp.2d 758, 761–62 (W.D. Tex. 2008) (quoting Nat'l Acceptance Co. of Am. v. Bathalter, 705 F.2d 924, 926 (7th Cir. 1983)). “The fact that the privilege is raised in a civil proceeding rather than a criminal prosecution does not deprive a party of its protection.” Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1086 (5th Cir. 1979). However, “[a] mere relationship between civil and criminal proceedings . . . does not necessarily warrant a stay.” Gonzalez, 571 F.Supp.2d at 762 (citing In re Ramu Corp., 903 F.2d at 320). To determine whether a stay of civil proceedings is warranted to protect an individual’s Fifth Amendment rights, a court should consider the following six factors:

(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest.

Id. (quoting Sec. Exch. Comm'n v. AmeriFirst Funding, Inc., No. 3:07–CV–1188–D, 2008 WL 866065, at *2 (N.D. Tex. Mar. 17, 2008)); Meyers v. Pamerleau, No. 5:15–CV–524–DAE, 2016 WL 393552, at *5 (W.D. Tex. Feb. 1,

2016). The Court examines whether a stay is warranted, considering these six factors.

DISCUSSION

Officer Defendants request that the Court stay the dispositive motion deadline and trial setting. (Dkt. # 33 at 1.) The current dispositive motion deadline is now set for November 15, 2024. (Dkt. # 36.) There is no current trial date set. Plaintiff responds that Defendants are not entitled to a stay in this matter, as they have not been indicted and the factors laid out by the Fifth Circuit for determining whether a stay is appropriate weigh against the requested relief. (Dkt. # 34 at 3.)

A. Criminal and Civil Case Overlap

The first and “most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues.” Meyers, 2016 WL 393552, at *6 (quoting AmeriFirst Funding, 2008 WL 866065, at *2). Where there is significant overlap, self-incrimination is more likely and thus weighs in favor of a stay. AmeriFirst Funding, 2008 WL 866065, at *2. On the other hand, “[i]f there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay.” Id. (quoting Trs. of Plumbers & Pipefitters Nat’l Pension Fund v. Transworld Mech. Inc., 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995)).

Defendants claim it has become the “standard policy, custom, and practice” for the TCDAO to process all officer involved shootings “by either

presenting them to a grand jury or providing the involved officers a declination letter declining to prosecute.” (Dkt. # 33 at 3.) However, to date, Defendants have not been subject to a grand jury proceeding or received a declination letter. (Id.)

Plaintiff contends that because Officer Defendants have not been indicted, the Court would be forced to speculate as to the degree of overlap between the instant action and any potential criminal case. (Dkt. # 34 at 5.) The Court agrees. Therefore, this factor leans in favor of denying the stay.

B. Status of the Criminal Case

The second factor to be considered is the status of the criminal case. Gonzalez, 571 F.Supp.2d at 762. “A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct.” Id. at 762–63 (quoting Trs. of Plumbers & Pipefitters Nat'l Pension Fund, 886 F.Supp. at 1139). The primary issue with this factor is that Officer Defendants have not yet been indicted for the officer involved shootings.

Officer Defendants argue “[a]n indictment is not a strict prerequisite for a stay.” (Dkt. # 35 at 2.) Officer Defendants cite to Drake v. City of Austin, 1:20-cv-00956-RP (W.D. Tex. Sept. 16, 2020) as an example where the Court stayed the case pending the outcome of a “forecasted indictment.” However, the Drake case is not entirely on point here. There, the Travis County District Attorney had verbally and publicly indicated his intent to indict the officer. Drake, 1:20-cv-

00956-RP, Dkt. # 31 at 4. Indeed, the District Attorney even provided an approximate date in which those cases were expected to be presented to a Travis County grand jury. Id. at 7. There has been no such indication of intent here by the same District Attorney. (See Dkt. # 33 at 3.)

Relying on Gonzalez, 571 F. Supp. 2d at 763, Plaintiff highlights that “[a] defendant’s privilege against self-incrimination is a factor favoring a stay *only after* that defendant has been indicted.” (Dkt. # 34 at 5) (emphasis added). At this time, Officer Defendants have not been indicted, nor are Defendants guaranteed with certainty to be subject to criminal proceedings.

Defense claims the TCDAO represented that it will present this case to a grand jury as soon as it receives an opinion from its retained use of force expert, and thus the grand jury decision and potential legal jeopardy is potentially imminent. (Dkt. # 33 at 6.)

While it may be possible,¹ the Officer Defendants’ involvement in a criminal proceeding is currently hypothetical. That is, there is no approximate date of a grand jury proceeding nor is there any specific indication that the case will be presented to one. The status of any potential grand jury proceeding entirely

¹ Officer Defendants also point to examples of other officer involved shootings that resulted in an officer being subjected to a criminal case. (See Dkts. ## 33 at 2, Ex. 1–3; 35 at 3, n.5.) However, Defendants do not point to any evidence that would indicate their own case will be presented to a grand jury with at least some degree of certainty.

depends on the TCDAO's allegedly forthcoming expert opinion. Therefore, this factor leans in favor of denying the stay.

C. Plaintiff's Private Interests

The court also weighs “the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay.” Gonzalez, 571 F.Supp.2d at 762 (quoting AmeriFirst Funding, 2008 WL 866065, at *2). When evaluating the burden the plaintiff would bear as a result of a stay, a court “may require a plaintiff to establish more prejudice than simply a delay in its right to expeditiously pursue his claim.” Akuna Matata Invs., Ltd. v. Tex. Nom Ltd. P'ship, No. SA-05-CV-1053-FB, 2008 WL 2781198, at *3 (W.D. Tex. Apr. 14, 2008). As to this factor, Defendants argue that Plaintiff will suffer no prejudice beyond delay. (Dkt. # 33 at 6.)

Plaintiff argues that the civil case has been pending for over a year and a half, the reasons for the stay are too speculative, and that length of stay Defendant is requesting is too indefinite. (Dkt. # 34 at 5, 9, 10.) Plaintiff relies on Gonzalez, where this Court noted that “Chavez requests a stay until ‘such time as the concurrent criminal investigation and proceedings are concluded,’ which time is currently indeterminate.” Gonzalez, 571 F.Supp.2d at 763. Thus, this Court explained, “[e]ven if the Grand Jury indicted Chavez tomorrow, it could take several months to resolve the criminal case.” Id.

The Court agrees and finds this factor leans in favor of denying the stay. Because there is no timeframe of any potential criminal indictment of Officer Defendants that can be provided to Plaintiff, a stay, even if only as to the dispositive motions and jury trial, is not appropriate at this time. Therefore, this factor leans in favor of denying the stay.

D. Defendants' Private Interests

The court also considers the private interests of the defendant in securing the stay and the burden that would result if the stay is denied. Gonzalez, 571 F.Supp.2d at 762. Officer Defendants argue they will suffer a great burden if forced to participate in the dispositive stages of litigation before their cases are at least presented to a grand jury. (Dkt. # 33 at 7.) Specifically, the Officer Defendants claim they will face a conflict between asserting his Fifth Amendment rights and fulfilling their legal obligations as a witness and defendant in this case. (Id.) Defendants claim they have an interest in “testimony provided during a deposition or trial not being utilized against them in the grand jury proceeding expected to be held in the near future.” (Dkt. # 35 at 3.)

Plaintiff responds that Defendants have not demonstrated anything more than a mere possibility of prejudice, this Court has other means to protect Defendants' Fifth Amendment interests outside of a stay, and there is no indication

that invocation of their Fifth Amendment rights will result in an adverse judgment against Defendants. (Dkt. # 34 at 8.)

Each officer is expected to invoke their Fifth Amendment rights unless or until the TCDAO either presents the officer involved shooting to a grand jury or provides a declination letter pursuant to TCDAO's policy. Officer Defendants argue "the consequence of not granting a stay would be that this case might be decided incorrectly because of an adverse inference based on the constitutional right not to testify against oneself." (Id. at 4.)

The issue is that it is unknown whether or when a grand jury proceeding will be held against Officer Defendants. As it stands, the TCDAO is awaiting an opinion from its retained expert witness before it decides to present the officer involved shooting to a grand jury. (Id. at 3.) The Court recognizes the importance of Defendant Officers' Fifth Amendment right against self-incrimination. However, "it is not unconstitutional to force [civil defendants] to choose between the negative inferences drawn from their silence in [a civil case] and their Fifth Amendment privilege." Gonzalez, 571 F. Supp. 2d at 764 (quoting U.S. ex rel. Shank v. Lewis Enterprises, Inc., No. CIV. 04-CV-4105-JPG, 2006 WL 1064072, at *4 (S.D. Ill. Apr. 21, 2006)).

In addition, there are alternative means available to protect Officer Defendants' Fifth Amended rights, "including sealing answers to interrogatories,

sealing answers to depositions, imposing protective orders, imposing a stay for a finite period of time, limiting a stay to a particular subject, or limiting disclosure only to counsel.” See In re CFS-Related Secs. Fraud Litig., 256 F.Supp.2d 1227, 1240 (N.D. Okla. 2003).

Therefore, the Court concludes that this factor only slightly favors granting the requested stay.

E. Interest of the Courts

The interest of the courts is also considered in determining whether to grant a stay. Gonzalez, 571 F.Supp.2d at 762. “In determining the propriety of a stay, a court can consider its own interests in efficient administration and judicial economy.” Id. at 765. While the Court has an interest in expeditiously moving its cases through the judicial system, the resolution of criminal proceedings before civil actions may advance judicial economy by promoting settlements and streamlining civil proceedings. Walker v. Wilburn, No. 3:13-CV-4896-D, 2015 WL 5873392, at *9 (N.D. Tex. Oct. 5, 2015).

Defendant argues more motion practice would be almost inevitable unless a partial stay is granted now to allow the criminal process to resolve first. (Dkt. # 33 at 7.) Plaintiff responds that if the Court were to issue a stay, there is a possibility the action would be stayed for no reason, given the uncertainty as to whether Defendants will be indicted. (Dkt. # 34 at 9.)

Here, although Plaintiff correctly notes that this case has been ongoing for over one and a half years, the Court concludes neither granting nor denying the partial stay will unduly interfere with its management of its docket. In addition, the Court will not be burdened with more motion practice should there be a material change in circumstances regarding the allegedly “expected” grand jury proceedings. Therefore, this factor is neutral.

F. Public Interest

Finally, the public interest is considered to determine whether a stay of civil proceedings is warranted to protect an individual's Fifth Amendment rights. Id. at 762. “The public has an interest in both the prompt resolution of civil cases as well as the prosecution of criminal cases.” Id. at 765 (quoting In re CFS—Related Secs. Fraud Litig., 256 F.Supp.2d at 1242). At the same time, the public also has an interest in protecting the constitutional rights of criminal defendants. See Meyers, 2016 WL 393552, at *7.

Officer Defendants argue the public is served by both criminal and civil matters being resolved fairly and accurately. (Dkt. # 33 at 8.) According to Defendants, the public, however, is not served by allowing a motion for summary judgment “based on a fleeing active shooter with a gun to be potentially decided based on an adverse inference rather than the actual facts of the case.” (Id.)

Because a parallel criminal proceeding has not even begun, the Court finds that the public's interest in a prompt resolution of the instant action weighs against a stay.

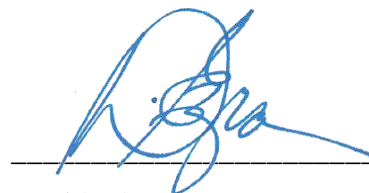
Accordingly, in light of the court wide discretion governing stays of civil actions, the Court finds that Defendants' Motion for Partial Stay of the Case is not warranted at this time.

CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's Emergency Motion for Partial Stay of the Case **WITHOUT PREJUDICE**. (Dkt. # 33.) Officer Defendants may move to stay the case at a later date if a material change in circumstances occurs, which in Defendants' view warrants this Court's consideration.

IT IS SO ORDERED.

DATED: Austin, Texas, November 4, 2024.



David Alan Ezra
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

[illegible]

Case No. 1:23-cv-00276-DAE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman (hereinafter “Officer Defendants”), respectfully file this Motion for Summary Judgment and dismissal on the grounds they are entitled to Qualified Immunity and dismissal on all of Plaintiff’s claims:

I. SUMMARY OF THE ARGUMENT

1. This case presents a § 1983 fact pattern that rarely results in a lawsuit: an active shooter who points a gun at both a citizen and police officers in the split second before the officers shot him. Even Plaintiff's own expert concedes that the Officer Defendants' decision to utilize deadly force may have been reasonable because decedent Anthony Franklin's gun arm was outstretched toward them when they began firing. Plaintiff's theory of liability appears to be an argument that the Officer Defendants should have stopped shooting earlier—despite all shots being fired uninterrupted in roughly three seconds. This Court has already rejected such an argument in at least one other case. The evidence reflects that the use of deadly force against Decedent—an (i) active shooter who (ii) refused all police commands, (iii) was fleeing through a crowded area gun-in-hand, (iv) pointed a gun at a civilian, and (v) pointed a gun at police officers—did not amount to a constitutional violation.

2. Plaintiff also cannot meet her burden on the clearly established law prong of qualified immunity. There is no binding precedent that deals squarely with the facts and issues of this case, nor any binding precedent that would have put the Officer Defendants on notice that using deadly force in this situation would be unconstitutional. Under Fifth Circuit precedent, there are no inferences that could overcome the clear video evidence in this case. The Officer Defendants are thus entitled to the defense of qualified immunity.

II. SUMMARY JUDGMENT FACTS & EVIDENCE

A. Decedent Anthony Franklin got into one or more arguments in downtown Austin and ultimately shot a man in the head, resulting in a panicked crowd and multiple 911 calls.

3. Franklin's girlfriend lived with him in Dallas and were on vacation together in Austin on

the night of the incident, January 15, 2023.¹ Franklin at that time had a bond condition that prohibited him from being in her presence due to arrest for Continuous Family Violence.² She was interviewed by investigators and stated that Franklin became “extremely intoxicated” on the night of incident. She also stated he was “involved in an argument with someone downtown.”³ Later toxicology tests confirmed he was well over double the legal threshold for intoxication.⁴ She recalled that Franklin at some point pulled out his gun and started shooting, but she did not know at whom he was aiming. She ran away, fell to the ground, and claims she did not see him again the rest of the night.⁵

4. One witness appears to have been the individual (or at least *one* of individuals) Franklin got into an argument with on the night in question. He told investigators that he was on 6th Street and Colorado Street looking at a female wearing a green shirt when a man matching Franklin’s description told him “don’t be looking at my girl” and brandished a gun at him.⁶

5. A second juvenile witness stated he saw a man matching Franklin’s description arguing with a woman and saw the man pull his gun out. He and his friend ran away and heard multiple gunshots.⁷ Witness Joshua Sarate was riding a scooter on 6th Street when he saw an argument followed by a man matching Franklin’s description fire a grey gun multiple times into the air.⁸ A third witness driving an Uber heard two “pop” sounds, saw a man in a white shirt fall to the ground,

¹ See **Ex. 14**, *SIU Presentation*, **pg. 33**; see also **Ex. 3**, *APD General Offense (GO) Report*, **pg. 133**.

² See **Ex. 3**, *APD GO Report*, **pgs. 132-33**; see also **Ex. 14**, *SIU Presentation*, **pg. 5**.

³ *Id.*

⁴ **Ex. 15**, *Toxicology Report*.

⁵ See **Ex. 14**, *SIU Presentation*, **pg. 33**; see also **Ex. 3**, *APD GO Report*, **pgs. 132-33**.

⁶ See **Ex. 14**, *SIU Presentation*, **pg. 34**.

⁷ See **Ex. 14**, *SIU Presentation*, **pg. 35**.

⁸ See **Ex. 14**, *SIU Presentation*, **pg. 30**; see also **Ex. 3**, *APD GO Report*, **pgs. 47, 50, and 89**.

and saw a man matching Franklin's description standing in the middle of the street with a grey firearm in his hand.⁹

6. The victim of the shooting, Cole Whitford, was walking on West 6th Street. He saw a man running across the street while shooting his gun in the air. He tried running away from the man but was hit in the head by one of his bullets. He later gave a description of the shooter to police that matched Franklin's description.¹⁰

7. Five separate "shots-fired" 911 calls were made at 11:33 p.m., 11:34 p.m., 11:35 p.m., and 11:36 p.m.¹¹ Overall, the evidence reflects a chaotic, active shooter situation in a crowded downtown environment.

B. The Officer Defendants engaged in a manhunt that found Franklin within ten minutes of the shooting.

8. The three Officer Defendants were all on duty and working shifts patrolling the downtown area near the vicinity of the shooting. They were all wearing clearly marked police uniforms and were riding in an ATV that was clearly marked as a police vehicle with flashing red and blue lights and sirens.¹²

9. APD dispatch announced the suspect's description over police radio at 11:39 p.m.¹³ The call notes reflect that dispatch announced the shooter was a black male with a black shirt with afro style hair, that he was headed northbound toward 6th Street and Lavaca Street, and that he was intoxicated and waving a gun in the air.¹⁴

⁹ See **Ex. 14**, *SIU Presentation*, **pg. 31**; see also **Ex. 3**, *APD GO Report*, **pg. 89**.

¹⁰ See **Ex. 14**, *SIU Presentation*, **pg. 32**; see also **Ex. 3**, *APD GO Report*, **pgs. 17, 30, and 125**.

¹¹ See **Ex. 14**, *SIU Presentation*, **pg. 10**; see also **Exs. 16 – 20**, *911 Calls 1 – 5*.

¹² See **Ex. 1**, *Report of Albert Rodriguez*, **pg. 5**; see also generally **Ex. 8**, *Radford BWC*; **Ex. 9**, *Rawlins BWC*; and **Ex. 10**, *Bowman BWC*.

¹³ See **Ex. 14**, *SIU Presentation*, **pg. 13**; see also **Ex. 4**, *Incident Detail Report*, **pg. 3**.

¹⁴ See **Ex. 4**, *Incident Detail Report*, **pg. 3**; see also **Ex. 3**, *APD GO Report*, **pg. 20**.

10. The video evidence in this case is voluminous and clear about the threat the Officer Defendants faced in the moment.¹⁵ Officer Rawlins drove the police ATV.¹⁶ Officer Bowman rode in the passenger seat.¹⁷ Officer Radford rode in the backseat.¹⁸ Officer Rawlins can be heard telling Officer Bowman that dispatch has said the call involves a “gunshot wound” sustained on Lavaca Street.¹⁹ One of the Officer Defendants can be heard stating that dispatch has said the victim was “shot in the head.”²⁰ Officer Bowman later recalled in a sworn interview they were thus “looking for...a suspect that is carrying a firearm who has already used deadly force.”²¹ One of the Officers then states that dispatch has announced it is a “black male with a gun.”²² The Officers Defendants continue driving around the area with lights and sirens actively looking for the shooter and asking for more clarification about his description.²³ Numerous cars and pedestrians can be seen in the area—reflecting the crowded nature of the situation and the corresponding danger to the public for an active shooter to be on the loose.

C. Franklin failed to follow commands and pointed his gun at one of the officers, resulting in all three Officer Defendants utilizing deadly force.

11. Franklin can be seen in a black hoodie walking next to a woman in white clothing.²⁴ One of the Officer Defendants sees Franklin with a gun in his hand and yells “he’s got a gun!”²⁵ The

¹⁵ The Officer Defendants incorporate all attached videos and materials filed in support of this motion herein for all purposes.

¹⁶ See generally **Ex. 9**, *Rawlins BWC*.

¹⁷ See generally **Ex. 10**, *Bowman BWC*.

¹⁸ See generally **Ex. 8**, *Radford BWC*.

¹⁹ See **Ex. 10**, *Bowman BWC*, **00:57 – 01:05**.

²⁰ *Id.* at **01:20 – 01:25**; see also **Ex. 5**, *Bowman IA Statement*, **pg. 6**.

²¹ **Ex. 5**, *Bowman IA Statement*, **pg. 6**.

²² **Ex. 10**, *Bowman BWC*, **01:47 – 01:53**.

²³ **Ex. 10**, *Bowman BWC*, **01:49 – 06:47**.

²⁴ **Ex. 8**, *Radford BWC*, **08:16 – 08:26**.

²⁵ **Ex. 10**, *Bowman BWC*, **06:47 – 06:49**.

Officer Defendants issue multiple commands to Franklin to “drop the gun!”²⁶ Officer Radford jumps out of his vehicle to chase the shooter on foot.²⁷ Franklin responds by disobeying all police commands and fleeing on foot. Officer Radford issues another command of “show me your hands! show me your hands!” as Franklin runs up nearby steps of a building and menaces an uninvolved citizen with his gun, resulting in the man running with his hands in the air away from the assailant.²⁸ Surveillance footage confirms Franklin deliberately pointed his gun at the uninvolved man.²⁹

12. Officer Radford issues a final command of “show me your fucking hands now!” Franklin disobeys and jumps over the railing, falling to the ground.³⁰ Franklin had been holding his gun in his right hand during the chase—as corroborated by the body worn camera video footage as he is falling—and can be seen stretching the same right hand toward Officer Radford while on the ground. At 08:41, two things happen in the same 1-second time period: (i) Franklin’s gun arm can be seen pointing towards Officer Radford, and (ii) Officer Radford begins firing at Franklin.³¹ There is no discernable gap in time or hesitation. Franklin begins rolling over holding the gun under his body, and appears to possibly lift up his back legs to see—and possibly even shoot at—the officers between his legs.³² Not until 08:46 does Franklin finally—for the first time—push or throw his gun away from himself as initially instructed, as clearly shown on video.³³ No shots were fired after Franklin finally drops his weapon.

²⁶ **Ex. 10**, *Bowman BWC*, **06:48 – 06:55**.

²⁷ **Ex. 8**, *Radford BWC*, **08:23 – 08:42**.

²⁸ **Ex. 8**, *Radford BWC*, **08:20 – 08:42**.

²⁹ **Ex. 12**, *Entry Way Surveillance Video*, **00:12 – 00:21**.

³⁰ **Ex. 8**, *Radford BWC*, **08:37 – 8:40**.

³¹ See e.g., **Ex. 8**, *Radford BWC*, **08:40** (at **08:40-41**, grey gun seen in Franklin’s hand as his body first hits the ground).

³² *Id.* at **08:42**.

³³ *Id.* at **08:46**.

III. LEGAL STANDARD

A. Summary Judgment Standard.

13. Pursuant to Federal Rule of Civil Procedure 56, summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.³⁴ What facts are material is determined by substantive law.³⁵ The mere existence of some factual dispute cannot defeat an otherwise properly supported motion for summary judgment. There is no genuine dispute for trial when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.³⁶ The moving party may also meet its burden simply by pointing to an absence of evidence to support the nonmoving party's case.³⁷

B. Qualified Immunity Standard.

14. “Qualified immunity cases present two questions. First, did the officers violate a constitutional right? Second, was the right at issue clearly established at the time?”³⁸ “Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official’s allegedly wrongful conduct violated clearly established law.”³⁹ At the summary judgment stage, a Court must assign greater weight “to the video recording taken” at the scene and may discount a plaintiff’s version of the facts that are clearly contradicted by that video evidence.⁴⁰ “It is the plaintiff’s burden to find a case in his favor that does not define the law at a ‘high level of generality.’”⁴¹ “[O]fficer negligence is not a

³⁴ FED. R. CIV. P. 56.

³⁵ *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

³⁶ *Scott v. Harris*, 550 U.S. 372, 380 (2007).

³⁷ *Boudreau v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005).

³⁸ *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 2268529, at *1 (5th Cir. May 20, 2024).

³⁹ *Baker v. Coburn*, 68 F.4th 240, 244 (5th Cir. 2023), as revised (May 19, 2023).

⁴⁰ *Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022).

⁴¹ *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (per curiam) (internal quotation marks and citation omitted).

basis to deny qualified immunity.”⁴² Qualified immunity “represents the norm, and courts should deny a defendant immunity only in rare circumstances.”⁴³ “Discovery is not a prerequisite to the disposition of a motion for summary judgment,” including summary judgments based on qualified immunity.⁴⁴ When there is reliable video evidence depicting the incident the reviewing court must view the facts in the light depicted by the recordings of the incident.⁴⁵

IV. ARGUMENTS & AUTHORITIES

A. Plaintiff must meet her burden to overcome qualified immunity on an officer-by-officer basis.

15. “The district court must [examine] the actions of defendants individually in the qualified immunity context.”⁴⁶ The qualified immunity burden of proof is on the plaintiff’s shoulders to prove “(1) ‘whether the facts that a plaintiff has alleged make out a violation of a constitutional right’ and (2) ‘whether the right at issue was ‘clearly established’ at the time of the defendant’s alleged misconduct.”⁴⁷ The Officer Defendants maintain that *all* of their collective actions were constitutional and protected by qualified immunity. Based on her retained expert’s report, however, Plaintiff’s theory of recovery appears to be that some shots—but not others—were allegedly unreasonable. It is hard to imagine how Plaintiff could minutely parse one shot from another given the roughly three-second time horizon for all of the shots collectively. Plaintiff is

⁴² *Mason v. Faul*, 929 F.3d 762, 764 (5th Cir. 2019).

⁴³ *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (internal quotation marks and citations omitted).

⁴⁴ *Williams v. Bexar Cnty.*, No. 22-50289, 2024 WL 3326082, at *4 (5th Cir. July 8, 2024) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990)).

⁴⁵ *Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

⁴⁶ *Kitchen v. Dall. Cty.*, 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Atteberry v. Nocona Gen Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015); *see also Wallace v. Taylor*, No. 22-20342, 2023 WL 2964418, at *3 (5th Cir. Apr. 14, 2023).

⁴⁷ *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 727 (5th Cir. 2018) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

nevertheless required to individually address each officers' actions and meet her qualified immunity burden on a defendant-by-defendant basis.

B. All of Plaintiffs' claims for Excessive Force must be dismissed. The Officer Defendants' uses of force were (a) not a constitutional violation under the Fourth Amendment, and (b) were not a violation of any clearly established constitutional right.

16. The Officer Defendants' force did not violate the Fourth Amendment, and a comprehensive review of the Fifth Circuit's precedent as of January 2023 reveals that the Officer Defendants likewise did not violate a clearly established right.⁴⁸

a. The *Graham* factors reflect that the Officer Defendants' use of deadly force was reasonable.

17. "All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."⁴⁹ "Determining whether an officer's use of force was objectively reasonable requires careful attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."⁵⁰ These elements are referred to as the *Graham* factors after the Supreme Court's seminal decision in *Graham v. Connor*.

18. *Graham* teaches that the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

⁴⁸ *Graham v. Connor*, 490 U.S. 386 (1989).

⁴⁹ *Deshotels v. Marshall*, 454 Fed. Appx. 262, 267 (5th Cir. 2011) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 487 (5th Cir. 2001)).

⁵⁰ *Id.* (numerals added) (citing *Graham*, 490 U.S. at 396).

hindsight....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.”⁵¹ Specifically, courts are instructed to consider the “totality of the circumstances as perceived by ‘a reasonable officer on the scene.’”⁵²

19. The “totality of the circumstances” facing these officers was exceptionally dangerous from go. They were dispatched to an active shooter “gun hotshot” call, which indicates that a gun was presently being discharged.⁵³ The officers also received information from dispatch that the shooter had shot a person in the head.⁵⁴ It was also reported that the shooter was waving the gun around and was intoxicated.⁵⁵ There was some initial confusion over his exact description pertaining to the size of his hair, but later-discovered evidence from Franklin’s girlfriend corroborates the fact that Franklin was indeed the shooter in question.⁵⁶

20. Roughly ten minutes after the 911 calls came in, the Officer Defendants saw Franklin, ***observed the gun in his hand***, and Officer Bowman issued multiple commands for him to drop the gun.⁵⁷ A foot chase ensued whereby multiple additional police commands were issued. ***Franklin disobeyed all of those commands.***⁵⁸ Near the end of the chase, Franklin is seen on video

⁵¹ *Graham*, 490 U.S. at 396 – 97.

⁵² *Hatcher v. Bement*, 676 F.App'x 238, 243 (5th Cir. 2017) (citing *Graham*, 490 U.S. at 396).

⁵³ See **Ex. 1, Report of Albert Rodriguez, pg. 4, ¶ 10; see also Ex. 3, APD GO Report, pgs. 29, 44, 47, and 108.**

⁵⁴ See **Ex. 1, Rodriguez Report, pg. 4, ¶ 11; see also Ex. 4, Incident Detail Report, pg. 3.**

⁵⁵ See **Ex. 1, Rodriguez Report, pg. 4, ¶ 12; see also Ex. 4, Incident Detail Report, pg. 3.**

⁵⁶ See **Ex. 3, APD GO Report, pgs. 125 and 133.**

⁵⁷ See **Ex. 1, Rodriguez Report, pg. 5, ¶ 14; see also Ex. 5, Bowman IA Statement, pg. 7.**

⁵⁸ See **Ex. 1, Rodriguez Report, pg. 4, ¶ 14 – 15; see also Ex. 5, Bowman IA Statement, pg. 7; see also Ex. 6, Radford IA Statement, pg. 11, see also Ex. 7, Rawlins IA Statement, pg. 10.**

pointing his gun at a nearby uninvolved male, who responded by putting his hands in the air and fearfully running away from Franklin.⁵⁹

21. Officer Radford yelled his final command to “show me your fucking hands!” but Franklin disobeyed, jumped over a nearby railing, and pointed his gun toward the officers while he was in the air.⁶⁰ He then *pointed the gun at the officers* again while laying on the ground.⁶¹ There were thus multiple points in time during the encounter when it would have been both reasonable and constitutional to use deadly force against Franklin based on the *Graham* factors.

22. “An officer’s use of deadly force is not unreasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others.”⁶² The decision to use deadly force must be judged from the perspective of a reasonable officer on the scene, rather than with the perfect 20/20 vision of hindsight.⁶³ Applying *Graham*, there is no question that (1) Franklin was believed to have committed a deadly, serious crime;⁶⁴ (2) the armed Franklin posed a deadly threat to the uninvolved male, the officers on the scene, and the public around him in downtown Austin; and (3) he was both fleeing and resisting by physically threatening to use deadly force against the officers by pointing a gun at them. The use of deadly force against him was thus objectively reasonable pursuant to *Graham*, and this Court may end its analysis at the threshold constitutional level of analysis.

⁵⁹ See **Ex. 1**, *Rodriguez Report*, **pg. 5, ¶ 15**; see also **Ex. 2**, *Rodriguez Illustrations*, **##1 – 3, pgs. 3 – 4**; see also **Ex. 8**, *Radford BWC*, **08:38–41**; see also **Ex. 12**, *Entry Way Surveillance Video*, **0:14–18**.

⁶⁰ See **Ex. 1**, *Rodriguez Report*, **pg. 5, ¶ 15**; see also **Ex. 2**, *Rodriguez Illustrations*, **##4 – 6, pgs. 3 – 4**; see also **Ex. 8**, *Radford BWC*, **08:38–41**.

⁶¹ **Ex. 2**, *Rodriguez Illustrations*, **##8 – 10, pgs. 5 – 6**; see also **Ex. 8**, *Radford BWC*, **08:38–41**.

⁶² *Argueta v. Jaradi*, 86 F.4th 1084, 1088 (5th Cir. 2023) (citing *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)).

⁶³ See *id.*

⁶⁴ See TEX. PENAL CODE ANN. §§ 22.02(a)(2) (aggravated assault with a deadly weapon), 22.05(b), (e) (deadly conduct utilizing a firearm).

b. The mere furtive nature of the armed-and-dangerous suspect's actions legally merited deadly force.

23. “Courts must be careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while *confronted with a violent individual*.”⁶⁵ In a matter of seconds, there were several different occurrences that—on their own—would render the Officer Defendants’ use of deadly force against a known *violent individual* reasonable as a matter of law. The suspect was known to have just shot another person, and he was now observed holding the gun in his hand, refusing to follow police commands, and running around through downtown Austin past vulnerable civilians. Officer Radford stated in his IA interview that he believed the suspect was one trigger pull away from firing the gun in his hand.⁶⁶

24. The Fifth Circuit has “*never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety*,” nor the safety of the public at large.⁶⁷ In *Salazar-Limon*, a suspect’s act of merely reaching for a waistband—where a gun *could* be hidden but ultimately was not—after resisting arrest and refusing police commands rendered the use of deadly force “not excessive under the circumstances.”⁶⁸ Here, in contrast, Franklin did not need to reach for a gun because *he already had the gun in his hand*. More than just resisting arrest like in *Salazar-Limon*, Franklin was also believed to—and *actually had*—

⁶⁵ *Hathaway v. City of San Antonio*, No. SA-05-CA-0175-FB, 2005 WL 5898299, at *4 (W.D. Tex. Sept. 23, 2005) (emphasis added), report and recommendation adopted, No. SA-05-CA-0175-FB, 2006 WL 6372333 (W.D. Tex. Mar. 29, 2006), aff’d sub nom. *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007) (citing *Wagner v. Bay City, Texas*, 227 F.3d 316, 321 (5th Cir. 2000)).

⁶⁶ See **Ex. 1, Rodriguez Report, pg. 6, ¶ 14**; see also **Ex. 6, Radford IA Statement, pg. 7**.

⁶⁷ *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 n.6 (5th Cir. 2016), as revised (June 16, 2016) (emphasis added).

⁶⁸ *Id.* at 276.

just shot someone with that same gun minutes earlier. In addition to being visibly armed and a *fleeing active shooter*, Franklin was running loose in downtown Austin—a town known for its crowded night life—and thus was a danger to the public.⁶⁹ The danger he posed to the public is corroborated by the fact that he pointed his gun at a nearby uninvolved man—sending him fleeing into the night—mere seconds before the officers used deadly force.

25. In *Argueta*, the officer’s split-second decision to use deadly force in response to a different furtive gesture—a suspect “clutching his right arm to his side as he fled police confrontation...akin to reaching for a waistband”—was also held to not be a violation of the Fourth Amendment.⁷⁰ In *Manis*, the officers’ deadly force was found to be reasonable after the suspect flailed his arms aggressively at them and then reached under his car seat where a gun *could* have been stowed.⁷¹ Applied here collectively, the Officer Defendants were thus constitutionally entitled to utilize deadly force against Franklin *even before he pointed his gun at them*. What could be more furtive than a known active shooter running from police while holding a gun in a downtown area, refusing their repeated commands to drop the gun, and then pointing the gun at a nearby uninvolved male? Plaintiff’s excessive force claims should be dismissed accordingly.

c. The Officer Defendants were undeniably authorized to use deadly force in response to the suspect’s act of pointing his gun toward them.

26. As established *supra*, the Officer Defendants were facing an armed suspect known to have just shot another person minutes earlier, refusing to follow police commands, and had just pointed his gun at an uninvolved male. Deadly force was already constitutionally authorized by this point.

⁶⁹ **Ex. 9**, *Rawlins BWC*, **3:15 – 6:40**, **Ex. 10**, *Bowman BWC*, **3:15 – 6:45**, **Ex. 11**, *Construction Surveillance Video on 6th St.*, **00:00 – 3:17**.

⁷⁰ *Argueta*, 86 F.4th at 1091.

⁷¹ *Manis v. Lawson*, 585 F.3d 839, 842 (5th Cir. 2009).

The undeniable *coup de grace* for deadly-force justification was when the suspect appeared to point his gun at the officers.

27. “An officer’s use of deadly force is not unreasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others.”⁷² “An officer is permitted to take steps to protect himself, his partner, and the residential community when an armed suspect is running from police, especially if he reasonably believes that an armed suspect is preparing to fire a weapon.”⁷³ It is hard to imagine an act more threatening than an active shooter pointing his gun at another person. *Even Plaintiff’s own expert admits that video footage shows that Franklin’s arm was “extended in the direction of Officer Radford” in the split second before the Officer Defendants utilized deadly force.*⁷⁴ Plaintiff’s expert even concedes that the initial deadly force utilized by the Officer Defendants “*may have been a reasonable response to the perceived threat posed by Mr. Franklin with an outstretched arm.*”⁷⁵ The Officer Defendants’ decision to use deadly force was—as Plaintiff’s own law enforcement expert concedes—justified, and Plaintiff’s claims should be dismissed accordingly.

d. Plaintiff’s argument that the Officer Defendants fired too many rounds lacks merit.

28. Based on her expert report, Plaintiff is expected to argue the Officer Defendants simply shot too many times, and thus that the final rounds discharged were unreasonable. This argument lacks merit both from a legal and practical standpoint.

⁷² *Argueta*, 86 F.4th at 1088 (citing *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)).

⁷³ *Sims v. City of Moss Point*, No. 1:20CV247-HSO-RHWR, 2022 WL 866262, at *4 (S.D. Miss. Mar. 22, 2022), *aff’d sub nom. Sims v. Shipman*, No. 22-60223, 2023 WL 5133305 (5th Cir. Aug. 10, 2023) (citations omitted).

⁷⁴ **Ex. 13, Report of Geoffrey Alpert, pgs. 5 – 7.** (emphasis added)

⁷⁵ *Id.* at **pg. 8.** (emphasis added)

29. In *Ondrej*, this Court recently rejected an identical argument. The suspect had an “Uzi” gun in her waistband and was walking near a school. An officer confronted her. She put her hands up and allegedly told him that it was a toy, but then the video footage shows her reaching for her waistband. The officer fired five shots, and one of Plaintiff’s theories of liability was that the first, second, and third shots had allegedly incapacitated her, and thus the fourth and fifth shots were unreasonable. This Court disagreed:

Review of the audio on the passerby dashcam video is helpful to analyze this theory of liability. The audio reveals Sgt. Perry fired, in rapid succession, five uninterrupted shots in under two seconds. Sgt. Perry never hesitated or disengaged and then reengaged in shooting. Sgt. Perry’s dashcam video reveals the same definite and irrefutable conclusion.⁷⁶

30. Here, the Officer Defendants likewise fired their shots in rapid succession lasting—collectively—roughly three seconds. Officer Radford was both on foot and the closest of the Officer Defendants to the assailant, and his twelve shots were all fired in roughly three seconds.⁷⁷ Officer Rawlins’s five shots were all fired less than two seconds apart.⁷⁸ Officer Bowman’s two shots were fired less than one second apart.⁷⁹ As in *Ondrej*, they likewise never hesitated between shots or disengaged and reengaged in shooting—nor could they given the mere three-second time horizon for the entirety of the volley. Just as in *Ondrej*, the “summary judgment evidence dispels [] Plaintiffs’ theory of recovery and any cited legal support” for her expected argument that any of the later shots were somehow unconstitutional.⁸⁰

⁷⁶ *Ondrej v. Perry*, No. SA-21-CV-00281-JKP, 2023 WL 6453478, at *7 (W.D. Tex. Oct. 2, 2023).

⁷⁷ **Ex. 8, Radford BWC, 8:41–44.**

⁷⁸ **Ex. 9, Rawlins BWC, 7:04–05.**

⁷⁹ **Ex. 10, Bowman BWC, 7:07–08.**

⁸⁰ *Ondrej*, 2023 WL 6453478, at *7.

31. In *Valderas*, the Fifth Circuit similarly discarded the plaintiff's argument that his alleged act of dropping the gun at the last second created potential liability for the officers who shot him. A wanted violent felon, the *Valderas* plaintiff "admit[ted] to pulling a gun from his trousers" but argued that "deadly force was no longer reasonable once he threw the gun into the vehicle."⁸¹ The body worn camera video evidence, however, showed only him leaning into the car and never clearly showed him discarding the weapon he had in his hands moments earlier. If he truly did discard the gun, then the officers could not have known it based on their positioning and the short time frame during which everything happened. The Fifth Circuit affirmed the trial court's summary judgment dismissal and noted that "our circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon."⁸² The Fifth Circuit also noted that "*if it is immaterial whether a plaintiff was actually [still] armed.*"⁸³ Just like in *Valderas*, Franklin was a known violent felon and refused to follow police commands—and was *actually armed and had pointed his gun toward officers*. The Officer Defendants contend that the video evidence shows that Franklin was armed up until he threw the gun away from himself after the Officer Defendants had already ceased shooting. Even if he was not, however, it is immaterial under Fifth Circuit law whether he was still armed when the final shots were fired—especially given that how quickly the rounds were all discharged—and Plaintiff's claims should be dismissed accordingly.

e. Excessive Force second prong: the Officer Defendants' decision to use deadly force did not violate clearly established law.

⁸¹ *Valderas v. City of Lubbock*, 937 F.3d 384, 390 (5th Cir. 2019).

⁸² *Id.* (citing *Manis*, 585 F.3d at 844-45) (collecting cases).

⁸³ *Id.* (citing *Romero v. City of Grapevine*, 888 F.3d 170, 178 (5th Cir. 2018)) (granting qualified immunity where officer shot uncooperative, aggressive man who ultimately proved to be unarmed) (emphasis added).

32. The second prong of the qualified immunity question, “whether the officer violated clearly established law—is a doozy.”⁸⁴ The section 1983 plaintiff bears the burden of proof, “[a]nd that burden is heavy: A right is clearly established only if relevant precedent has placed the constitutional questions beyond debate.”⁸⁵ In *Morrow*, the Fifth Circuit exhaustively laid out the “four applicable commandments” that a plaintiff must satisfy to establish that the constitutional question is beyond debate.⁸⁶

33. **First**, the relevant constitutional question must be framed with specificity and granularity.⁸⁷ The Supreme Court has “repeatedly told courts not to define clearly established law at [that] high level of generality.”⁸⁸ “Rather, the dispositive question is whether the violative nature of *particular* conduct is clearly established.”⁸⁹ **Second**, clearly established law comes only from holdings, not dicta.⁹⁰ This is because “officers are not charged with memorizing every jot and tittle [the courts] write to explain [their orders].”⁹¹

34. **Third**, “overcoming qualified immunity is especially difficult in excessive-force cases.”⁹² This is because this is an area of the law in which “the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.”⁹³ That means that the law must be “so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable

⁸⁴ *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

⁸⁵ *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

⁸⁹ *Id.* (citing *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)).

⁹⁰ *Sorenson v. Ferrie*, 134 F.3d 325, 329 n.7 (5th Cir. 1998).

⁹¹ *Morrow*, 917 F.3d at 874.

⁹² *Id.* at 876.

⁹³ *Id.* (citing *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)).

officer would know it immediately.”⁹⁴ **Finally**, the last commandment is that courts “must think twice before denying qualified immunity.” “Because of the importance of qualified immunity to society as a whole, the Supreme Court often corrects lower courts when they wrongly subject officers to liability.”⁹⁵

35. Here, Plaintiff cannot meet her burden to provide case law that placed it “beyond debate” that, on January 15, 2023, clearly established law held that the Officer Defendants’ conduct violated Anthony Franklin’s constitutional rights when they made the split-second decision to use lethal force under the facts presented. As established *supra*, the Fifth Circuit has time and time again granted qualified immunity to officers using deadly force against a suspect who reaches for what could be—but is ultimately *not*—a gun. It is consequently impossible to argue that the Officer Defendants could shoot at someone merely reaching for a gun, but could *not* shoot someone who is (i) already holding a gun in his hand, (ii) pointing the gun at a civilian, and subsequently (iii) pointing the gun at a police officer. There simply is no binding precedent even remotely close to the facts of this case. The Officer Defendants are thus entitled to qualified immunity under the second prong of the test, as well, and all of Plaintiff’s claims against them must be dismissed as a result.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman respectfully request that this Court grant summary judgment on the grounds that Officer Defendants did not violate Decedent’s constitutional rights, or in the alternative are

⁹⁴ *Id.*

⁹⁵ *Id.*

entitled to qualified immunity on all of Plaintiff's claims, and for all other relief to which they may be justly entitled in law or equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2024, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake

Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

§ § § § § § § § § § § § § § § §

Case No. 1:23-cv-00276-DAE

DECLARATION OF CITY OF AUSTIN CUSTODIAN OF RECORDS

1. “My name is LaMarcus Wells. I am over 18 years of age, of sound mind, capable of making this Declaration, and personally acquainted with the facts stated herein. I have personal knowledge of the facts stated in this Affidavit and they are all true and correct.
2. I am Custodian of Records for City of Austin, and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.
3. Attached hereto to Defendants’ Motion for Summary Judgment are the following so numbered Exhibits, which are the original records or exact duplicates of the original records that are kept and maintained in the regular course of the City’s Business and were produced by the City of Austin in the course of this litigation:

Exhibit 3: Austin Police Department General Offense Report (GO) #23-0151507
(OFC 0085-0286)

Exhibit 4: Incident Detail Report (OFC 0057-0084)

Exhibit 5: Officer Jacob Bowman Signed IA Transcript (OFC 0318-0338)

- Exhibit 6:** Officer Kelby Radford Signed IA Transcript (**OFC 0039-0360**)
- Exhibit 7:** Officer Ryan Rawlins Signed IA Transcript (**OFC 0361-0381**)
- Exhibit 8:** Officer Kelby Radford Body-Worn Camera (BWC) Video (**OFC 0027**)
- Exhibit 9:** Officer Ryan Rawlins Body-Worn Camera (BWC) Video (**OFC 0026**)
- Exhibit 10:** Officer Jacob Bowman Body-Worn Camera (BWC) Video (**OFC 0025**)
- Exhibit 11:** Construction Surveillance Video on 6th St.
- Exhibit 12:** Entry Way Surveillance Video at 601 Colorado St.
- Exhibit 14:** SIU Officer Involved Shooting Briefing Presentation
- Exhibit 15:** Toxicology Report
- Exhibit 16:** 911 Call (1) (**OFC 0028**)
- Exhibit 17:** 911 Call (2) (**OFC 0029**)
- Exhibit 18:** 911 Call (3) (**OFC 0030**)
- Exhibit 19:** 911 Call (4) (**OFC 0031**)
- Exhibit 20:** 911 Call (5) (**OFC 0032**)

4. These records were made by, or from information transmitted by, City Officials with knowledge of the facts or events depicted therein, and it is the regular practice of the City of Austin that such records be created or obtained at or near the time of each act, event, condition, depiction, or opinion depicted therein.

5. This Declaration is made in accordance with 28 U.S.C. § 1746, and I declare under the penalty of perjury that the foregoing is true and correct.

Executed in the County of Travis, Texas on November 15, 2024.

Sgt. LaMarcus Wells
#6103

Sgt. LaMarcus Wells
Custodian of Records

Digitally signed by Sgt.
LaMarcus Wells #6103
Date: 2024.11.15 14:45:00 -06'00'

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,

Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,

Defendants.

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Case No. 1:23-cv-00276-DAE

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COME Plaintiff Dorothy C. Motley (hereinafter “Plaintiff”), respectfully file this Response to Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman’s¹ Motion for Summary Judgment on the grounds they are entitled to Qualified Immunity and dismissal on all of Plaintiff’s claims:

I. Summary of the Argument

The Defendants have presented this case to this Honorable Court in a very misleading fashion in support of their Motion for Summary Judgment. First and foremost, the Defendant Officers cannot point to a scintilla of admissible evidence in the record that support their

¹ The Defendants arrested their 5th Amendment when deposed by Plaintiff's counsel because the criminal case is awaiting presentment to the grand jury.

position that Anthony Franklin was an active shooter on the date in question. In fact, the Defendant Officers conceded just prior to shooting and killing Mr. Franklin, the Mr. Franklin did not match the description of a person who previously fired shots in downtown Austin, Texas on the date in question. Moreover, witnesses to the shooting called 911 and gave a description of the shooter. Notably, those description did not match Mr. Franklin. The only crime that Mr. Franklin was remotely suspected of was displaying a handgun in plain view of another person in a public place in violation of Texas Penal Code § 46.02 which is only a Class A misdemeanor. It is undisputed that after Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin in the back. At the moment the Defendant Officers discharged their weapons, Mr. Franklin did not pose an immediate threat to them or the public at the time he was shot and killed by the Defendant Officers. The Fifth Circuit has clearly established that an officer cannot continue to fire at someone who is objectively downed or incapacitated regardless at that person is armed or not. Video evidence in this case is crystal clear that the Defendants Officers discharged the firearms at Mr. Franklin while Mr. Franklin was downed or incapacitated. Thus, the Defendants Officers are not entitled to the defense of qualified immunity.

II. Plaintiff's Response to Defendant Summary Judgment Facts & Evidence

- A.** The Defendant Offices rely heavily on inadmissible hearsay in support of their motion for summary judgment.

Before addressing the Defendant Officers' evidence in support of their motion for summary judgment, the attention must be brought to this Court that evidence submitted by the Defendant Officers is inadmissible hearsay.

The Federal Rule of Civil Procedure 56 generally requires that "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(c)(4). Inadmissible hearsay is not properly considered in ruling on a motion for summary judgment.² Documents containing hearsay statements, that would not be admissible as testimony at trial, may not be set forth in an affidavit to support a motion for summary judgment.³

B. Plaintiff objects to the *APD GO Report and SIU Presentation* as inadmissible hearsay and objects to statements and summaries of statements attributed to witness statement in the report that are offered to prove the truth of the matter asserted in the report and presentation.

1. *APD GO Report*

Police reports are admissible, at least in part, under an exception to the hearsay rule as public records that set forth factual findings from a legally authorized investigation. *See* Fed.R.Evid. 803(8)(A)(iii). Such reports are presumed to be trustworthy and admissible; therefore, it is the burden of the party opposing admission to demonstrate a lack of trustworthiness.⁴ The trustworthiness of a report admitted under this hearsay exception depends on whether the report was compiled or prepared in a way that indicates that its

² See Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 511 n.5 (5th Cir. 2001) ("Because these statements are hearsay, they are not competent summary judgment evidence.") (citation omitted); Goodwin v. Johnson, 132 F.3d 162, 186 (5th Cir. 1997) (explaining that proffered statement was inadmissible hearsay and, thus, was not competent summary judgment evidence) (citation omitted).

³ H. Sand Co., Inc. v. Airtemp Corp., 934 F.2d 450, 454-455 (2d Cir. 1991); see also Broadway v. City of Montgomery, 530 F.2d 657, 661 (5th Cir. 1976).

⁴ See Reliastar Life Ins. Co. v. Thompson, Civil No. M-07-140, 2008 WL 4327259, at *4 (S.D.Tex. Sept. 16, 2008) (citing Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir.1991)).

conclusions can be relied upon.⁵ “Certain information in a police report, however, such as witness statements offered to prove the truth of the matter asserted, are ‘hearsay within hearsay’ and are inadmissible unless each level of hearsay qualifies under one of the hearsay exceptions.”⁶ (citations omitted). The portions of the reports that reflect the officers' first-hand observations based on their investigations and experience are admissible.⁷ But the portions of the reports containing the officers' mere opinions are not admissible.⁸ And the witness statements in the reports may be admissible under Rule 801(d)(2) as statements made by a party or individual in a representative capacity, but, to the extent the witness statements are offered to prove the truth of the matter asserted in the reports, they are inadmissible hearsay within hearsay.⁹ Here, the Defendants have an offered report in support of their motion for summary that is riddled with hearsay within hearsay. The Court should exclude all witness statements that are offered to prove the truth of the matter asserted in the reports, that are inadmissible hearsay within hearsay.

2. *SIU Presentation*

As stated above, inadmissible hearsay is not properly considered in ruling on a motion for summary judgment.¹⁰ Plaintiff objects to the SIU Presentation as inadmissible hearsay and objects to statements and summaries of statements attributed to witness statement in the SIU

⁵ See id. (citing Moss, 933 F.2d at 1305 (listing factors to consider to determine trustworthiness), 1307).

⁶ Id.

⁷ See id. (citations omitted).

⁸ See id.

⁹ See id.

¹⁰ See Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 511 n.5 (5th Cir. 2001) (“Because these statements are hearsay, they are not competent summary judgment evidence.”) (citation omitted); Goodwin v. Johnson, 132 F.3d 162, 186 (5th Cir. 1997) explaining that proffered statement was inadmissible hearsay and, thus, was not competent summary judgment evidence).

presentation that are offered to prove the truth of the matter asserted in the SIU PowerPoint presentation.

C. Plaintiff objects to the *APD GO Report and SIU Presentation* lacks trustworthiness and contains officers' mere opinions.

Statements of Brittany Shepard

Defendant Officers alleges in their MSJ the following:

That Mr. Franklin's girlfriend was interviewed by investigators and stated that Franklin became "extremely intoxicated" on the night of incident. She also stated he was "involved in an argument with someone downtown." ³ Later toxicology tests confirmed he was well over double the legal threshold for intoxication. ⁴ She recalled that Franklin at some point pulled out his gun and started shooting, but she did not know at whom he was aiming. She ran away, fell to the ground, and claims she did not see him again the rest of the night.

See [Doc. 38 pg. 3]; [Def. Ex. 14 pg. 34 of 68].

However, the *APD GO Report* states the following:

Brittany Shepard

When questioned about the B/M that she was observed nearby at the Chick-fil-A earlier, Brittany claimed she didn't know the subject and was just walking by him at the time. She also denied being involved or witnessed any shooting tonight. I then attempted to confirm over the radio the outstanding B/F suspect's description to make sure Brittany was not that suspect. I was informed that the B/F suspect had an updated description of H/F wearing a white shirt which Brittany did not match that description. I then released Brittany from detainment. I then continued to hold the perimeter at W 7th St/Colorado St until relieved.

See [Def. Ex. 3 pg. 21 of 196].

The above clearly show inconsistencies in the *APD GO Report and SIU Presentation*.

Statements of Joshua Sarate

Further, Defendant Officers alleges the following in the SIU Presentation that Joshua Sarate *saw a black male wearing a black hoodie with a gray gun fire multiple rounds in the*

air. See [Def. Ex. 14 pg. 31 of 68]. However, the *APD GO Report* states that Joshua Sarate said ***he couldn't recall what the male suspect was wearing***. See [Def. Ex. 3 pg. 41 of 196].

The above clearly show inconsistencies in the *APD GO Report and SIU Presentation*.

Statements of Issac Boston

Further, Defendant Officers alleges the following in the SIU Presentation that Issac Boston was looking at a female wearing a money green shirt when a black male wearing all black with a small afro came up and told him “don’t be looking at my girl.” The black male then lifted his shirt and displayed a gun. See [Def. Ex. 14 pg. 35 of 68]. However, the *APD GO Report* don’t even mention Issac Boston name at all. See [Def. Ex. 3].

The above statements are the epitome of an opinionated and untrustworthy report. Therefore, the Courts must reject all evidence offered by the Defendants to support their motion for summary judgment via the *APD GO Report* and *SIU Presentation*.

III. Plaintiff’s Statement of Additional Facts & Evidence.

1. On the date of the incident a 911 caller stated that a man was driving in a vehicle and shooting people. See [Def. Ex. 17 - 911 Call (2) (Ofc 0029) - Sealed Document]
2. The Defendant Officers were searching for a person with a white shirt and large afro as the possible shooter. See [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 07:00 – 08:20]
3. Mr. Franklin had was wearing a black shirt and did not have a large afro. See [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 07:00 – 08:20].
4. The Defendant Officers acknowledge that Mr. Franklin was not the suspected shooter and had identified a possible suspect further up the street. However, they diverted their attention

back to Mr. Franklin because a girl was yelling at him. [Def. Ex 9 - Radford BWC (OFC 0027) - Sealed Document at 06:04 – 06:44].

5. Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin. [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 08:41 – 08:44]; [Def. Ex 9 - Radford BWC (OFC 0027) - Sealed Document at 07:02 – 07:05]; Def. Ex. 10 - Bowman BWC (OFC 0025) - Sealed Document at 07:05 – 07:08] [Pl. Exhibit 1 – Surveillance camera recording of the shooting]
6. Mr. Franklin suffered gunshots wound to his back, left buttocks and left hip. [Pl. Exhibit 2 – Medical Examiner Report]
7. At the moment the Defendant Officers discharged their weapons, Mr. Franklin did not pose an immediate threat to them or the public at the time he was shot and killed by the Defendant Officers. [Pl. Exhibit 1 – Surveillance camera recording of the shooting].
8. Defendant Radford exercised his 5th Amendment to the following question:

Q. At the time that Mr. Franklin was, I guess, on his knees in a crouched, cradle position at that time he was no longer a threat to you, Officer Radford -- I mean, you, Officer Rawlins, Officer Bowman or anybody else at that particular time.

A. On the advice of counsel, I invoke my Fifth Amendment privilege and respectfully decline

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Kelby Radford Motley, Dorothy C. v. Radford, Kelby, et al	November 2
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Page 16

to answer your question.

Pl. Ex. 3, Deposition of Kelby Radford at pg. 15:18-16:1

9. Defendant Bowman exercised his 5th Amendment to the following question:

Q. Prior to discharging your weapon, at no time was Mr. Franklin a threat to you, your fellow officers or the public; is that correct?

A. On the advice of counsel, I invoke my Fifth Amendment privilege and respectfully decline to answer your question.

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Jacob Bowman November 21, 2024
Motley, Dorothy C. v. Radford, Kelby, et al

Page 24

Pl. Ex. 4, Deposition of Jacob Bowman at pg. 23:24-24:4

10. Defendant Rawlins exercised his 5th Amendment to the following question:

Q. Based on your vantage, where you was located at in the ATV, you couldn't see if Mr. Franklin in fact pointed his weapon at anybody; is that correct?

A. On the advice of counsel, I invoke my Fifth Amendment privilege and respectfully decline to answer your question.

Q. And the only reason you started shooting, because Officer Radford began to fire his weapon; correct?

A. On the advice of counsel, I invoke my Fifth Amendment privilege and respectfully decline to answer your question.

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Ryan W. Rawlins November 21, 2024
Motley, Dorothy C. v. Radford, Kelby, et al

Page 30

Pl. Ex. 5 Deposition of Ryan Rawlins at pg. 29:14-30:1

IV. Legal Standard

A. Summary Judgment Standard.

The party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.”¹¹ The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial.¹² After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted.¹³ When reviewing a motion for summary judgment, we must “must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” No genuine issue of disputed fact exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”¹⁴

B. Qualified Immunity Standard.

The doctrine of qualified immunity shields public officials from suit and liability under § 1983, “so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”¹⁵

The court evaluates claims of qualified immunity at summary judgment using a two-pronged inquiry, which may be considered in either order.¹⁶ The first prong “asks whether the

¹¹ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

¹² Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986); Wise v. E.I. Dupont de Nemours & Co., 58 F.3d 193, 195 (5th Cir. 1995).

¹³ Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000).

¹⁴ Mason ex rel. Mason v. Lafayette City-Parish Consol. Gov’t, 806 F.3d 268, 274-75 (5th Cir. 2015)

¹⁵ Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)); accord Crane v. City of Arlington, 50 F.4th 453, 463 (5th Cir. 2022); see also Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986)

¹⁶ Pearson, 555 U.S. at 236.

facts, 'taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right.'" ¹⁷

When a defendant pleads qualified immunity as a defense, the plaintiff must rebut the defense by raising a "'genuine issue of material fact suggesting [the defendant's] conduct violated an actual constitutional right,' and [the defendant's] actions were 'objectively unreasonable in light of clearly established law at the time of the conduct in question.'" ¹⁸

V. Arguments & Authorities

A. A genuine issue of material fact exists as to whether the Defendants Officers violated a clearly established constitutional right.

In Mason ex rel. Mason v. Lafayette City-Parish Consol. Gov't, the Fifth Circuit held that a police officer was not entitled to qualified immunity when he shot an armed man after the armed was down on ground and appeared incapacitated.¹⁹ 806 F.3d 268 (5th Cir. 2015). Notably, the Mason ex rel. Mason Court opined the following:

We therefore must determine whether Faul is entitled to qualified immunity on the grounds that he did not violate clearly established law. The law is clearly established if there is factually similar, controlling case law from this court or the Supreme Court. The present case is an “obvious one where *Graham* and *Garner* alone offer a basis for decision.” The constitutionality of the final two shots can be decided on the threshold issue—under *Garner*—of whether *deadly* force was permissible, i.e., whether Mr. Mason objectively posed an immediate threat. The second, more complex inquiry dictated by *Graham*—balancing the severity of the threat against other factors—is not necessary here. A reasonable jury could conclude that when Faul fired the final two shots, Mr. Mason would have appeared incapacitated to an objectively reasonable officer. Shooting a clearly incapacitated suspect is inconsistent with *Garner*'s command that deadly force is unconstitutional when a “suspect poses no immediate threat to the officer and no threat to others.” We therefore conclude that there are material fact

¹⁷ Tolan v. Cotton, 572 U.S. 650, 655-56 (2014) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)) (cleaned up). The second prong of the analysis “asks whether the right in question was ‘clearly established’ at the time of the violation.” Id. (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

¹⁸ Bagley v. Guillen, 90 F.4th 799, 802 (5th Cir. 2024) (quoting Brumfield v. Hollins, 551 F.3d 322, 326 (5th Cir. 2008)).

¹⁹ 806 F.3d 268 (5th Cir. 2015).

questions as to whether Faul is entitled to qualified immunity for firing the final two shots. The district court erred in granting Faul's motion for summary judgment on the Fourth Amendment and state law claims.²⁰

The Defendants want this court to believe that Mr. Franklin was an active shooter whom they tracked down, who displayed a firearm, and they shot him. Upon review of the Plaintiff's additional facts, this Court will find that a genuine issue of material fact exists as to whether Mr. Franklin was an active shooter. However, it is undisputed that Mr. Franklin was shot in the back by while he was down on the ground. In the Mason ex rel. Mason, Mr. Mason was shot 5 times while he was standing and 2 times while he was on the ground. Here, Mr. Franklin was shot 19 times collectively by the Defendant Officers. According to the body camera of the Defendant Officers, arguably all shots were fired when Mr. Franklin was on the ground crouched in a fetal position. As in Mason ex rel. Mason, this case as well can be decided on the threshold issue—under Garner—of whether deadly force was permissible Graham v. Connor, the Supreme Court directed courts determining an officer's objective reasonableness to pay “careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.”²¹ We consider reasonableness “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²² Additionally, we must make “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.” Our inquiry is limited to whether the officer “was in danger at the moment of the threat”

²⁰ Id. at 277-78 (5th Cir. 2015).

²¹ “490 U.S. 386, 396, (1989).”

²² Id.

that resulted in the use of force.²³ We have explained that “an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.”²⁴ Notably, the Defendants Officer here asserted their 5th amendment right when question as to whether Mr. Franklin was a threat at the time they discharged their weapons. It has been long held that an adverse inference may be drawn from a witness' assertion of her fifth amendment rights in civil case.²⁵ This Cour may infer that the Defendants Officer refused to answer this material question because the answer is “no” Mr. Franklin was not a threat to them at the time they discharged their weapons.²⁶

1. The severity of the crime at issue

As explain above, the only crime that Mr. Franklin was remotely suspected of was displaying a handgun in plain view of another person in a public place in violation of Texas Penal Code § 46.02 which is only a Class A misdemeanor. The Defendant Officers was aware the Mr. Franklin did not match the description of the shooting suspect at the time they chased him.

2. Whether the suspect poses an immediate threat to the safety of the officers or others

It is undisputed that after Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin in the back. At the moment the Defendant Officers discharged their weapons, Mr. Franklin did not pose an immediate threat to them or the public at the time he was shot and killed by the Defendant Officers.

3. Whether he is actively resisting arrest or attempting to evade arrest by flight

²³ Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir.2011)

²⁴ Lytle v. Bexar Cnty., 560 F.3d 404, 413 (5th Cir.2009).

²⁵ State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 119 (5th Cir. 1990)

²⁶ The Defendants' criminal case is awaiting presentment to the Travis County grand jury.

Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin in the back. He was no longer resisting arrest or evading arrest at the moment the Defendant Officers discharged their weapons. The record reflects that the Defendant Officer discharged their firearms collectively a total of 19 times. It is undisputed that Mr. Franklin was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin in the back. He was no longer resisting arrest or evading arrest at the moment the Defendant Officers discharged their weapons. Therefore, and like Mason ex rel. Mason, a genuine issues of material fact arise as to whether the force used against Mr. Franklin was excessive under Graham.

Based on the above, the Plaintiff respectfully request the Court to deny the Defendant Officers motion for summary judgment.

Submitted this 13th day of December 2024.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

MACK INJURY ATTORNEYS

Nathaniel Mack, III, Esq.
Texas Bar No. 24078896

8023 Vantage Drive, Suite 690

San Antonio, TX 78230
(T) 210-333-6225
(F) 210-853-3152
nmack@macktexaslaw.com

STROM LAW FIRM
Bakari Sellers, Esq.

6923 N. Trenholm Road
Columbia, SC 29206
Tel. 803.252.4800
bsellers@stromlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon all parties in this case by Statutory Electronic Service and via e-mail.

Submitted this 13th day of December 2024.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

§ § § § § § § § § § § § § § § §

Case No. 1:23-cv-00276-DAE

**UNOPPOSED MOTION FOR LEAVE TO WITHDRAW FIFTH AMENDMENT
INVOCATIONS AND PRESENT OFFICER DEFENDANTS FOR NEW DEPOSITIONS,
OR IN THE ALTERNATIVE,
MOTION FOR LEAVE FOR EXTENSION OF TIME TO FILE
DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Officers Kelby Radford, Ryan Rawlins, and Jacob Bowman, Defendants in the above-entitled and numbered causes, and file this Unopposed Motion to Withdraw Fifth Amendment Invocations and Present Officer Defendants for New Depositions, or in the Alternative, Motion for Leave for Extension of Time to file Defendants' Reply in support of Summary Judgment, and in support thereof would respectfully show this Court as follows:

I. The Officer Defendants have now been no billed and seek the right to have their motion for summary judgment be considered on evidence that includes new depositions without Fifth Amendment invocations.

1. The Officer Defendants learned earlier this week that the Travis County District Attorney's Office had presented their case to a grand jury, and that the grand jury issued a "no bill" determining that there was not cause to prosecute them for the subject incident. Previously, the

Officer Defendants had invoked their Fifth Amendment rights in response to deposition questioning while the grand jury was still pending.¹ Plaintiff cited their invocations in her response to the Officer Defendants' Motion for Summary Judgment.² The Officer Defendants maintain that the video is clear and that summary judgment should be granted regardless of said invocations. In an abundance of caution, however, the Officer Defendants seek the right to present themselves for second depositions to allow them to testify fully and let this case be decided upon the merits.

2. The Officer Defendants thus file this motion to move for leave to withdraw their prior Fifth Amendment invocations; allow them to be presented for a second set of depositions (paid for by the defense). To make the possible, the Officer Defendants move to stay and/or moot the current motion for summary judgment and issue a new deadline to file dispositive motions to allow for such new testimony to be considered by this Court. Plaintiff's counsel is graciously unopposed to this motion.

II. It is in this Court's discretion to provide the requested relief.

3. Courts have faced this issue before and have come down in favor of promoting rulings that allow the withdrawal of Fifth Amendment invocations to allow cases to be decided on the merits. "The Supreme Court has cautioned against making invocations of the Fifth Amendment privilege against self-incrimination unnecessarily burdensome to the defendant."³ In *Davis-Lynch*, the Fifth Circuit reversed a District Court's decision to deny a request to withdraw a Fifth Amendment invocation and sit for a new deposition.⁴ The motion to withdraw *Davis-Lynch* importantly occurred prior to the discovery deadline, which is not the case here. However, the Officer

¹ Defs.' First Am. Emergency Opp. Mot. for Partial Stay, Dkt. 33.

² Pl.'s Resp. to Mot. Summ. J., fn. 1, Dkt. 42.

³ *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 549 (5th Cir. 2012), *as revised* (Jan. 12, 2012).

⁴ *Id.*

Defendants cannot control the exceedingly late timing of the grand jury presentation, and thus the timing is no fault of their own. More importantly, this motion is unopposed and thus the opposing party does not raise any issues of undue prejudice. “[A] party may withdraw its assertion of the Fifth Amendment privilege, even at a late stage in litigation, if circumstances indicate that (1) the litigant was not using the privilege in a tactical, abusive manner, and (2) the opposing party would not experience undue prejudice as a result.”⁵ This Court thus has the power to grant the requested relief.

III. In the alternative, the Officer Defendants move for two weeks of additional time to file their Reply in support of their Motion for Summary Judgment.

4. If this Court determines that the requested relief is either improper or unnecessary, the Officer Defendants respectfully move for leave for additional time to file their Reply in support of their pending Motion for Summary Judgment. This request is not being made for delay, but only so that justice may be done. Defendants’ current deadline to file their Reply is today, December 20, 2024. The Officer Defendants move for two additional weeks of time to file their Reply, which would put the new date on **January 3, 2025**.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grant this unopposed motion and allow Defendants to withdraw their Fifth Amendment invocations and allow them to be presented for new depositions, or in the alternative, allow Officer Defendants to file their Reply in support of summary judgment on or before **January 3, 2025**, and for all other relief to which they may be entitled in law or in equity.

⁵ *Id.* (citing *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 193 (3d Cir. 1994)).

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF CONFERENCE

On December 17, 2024, the undersigned conferred with Plaintiff's counsel via email. Plaintiff's counsel is unopposed to Defendants' Motion.

 /s/ Blair J. Leake

Blair J. Leake

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2024, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

 /s/ Blair J. Leake

Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

Case No. 1:23-cv-00276-DAE

ORDER

Before the Court is Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman's Unopposed Motion to Withdraw Fifth Amendment Invocations and Present Officer Defendants for New Depositions, or in the Alternative, Motion for Leave for Extension of Time to file Defendants' Reply in support of Summary Judgment. After consideration, the Court is of the opinion that Defendants' Motion to withdraw their Fifth Amendment invocations and allow them to be presented for new depositions is GRANTED. Defendants' Alternative Motion for Leave for Extension of Time to file their Reply in Support of Summary Judgment is GRANTED.

IT IS ORDERED that Defendants' Fifth Amendment Invocations are hereby
WITHDRAWN and Officer Defendants may be presented for new depositions. Defendants agree
to bear the court reporter and/or videographer cost of such depositions.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Dkt. 38) is hereby MOOT. Defendants' new deadline to file their dispositive motions is on or before March 5, 2025.

SIGNED: Austin, Texas, December 26, 2024.

A handwritten signature in blue ink, appearing to read 'D. Ezra', is positioned above a horizontal line.

DAVID A. EZRA
SENIOR U.S. DISTRICT JUDGE

RECEIVED

DEC 26 2024

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

DEC 26 2024

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,

Plaintiff,

v.

Case No. 1:23-cv-00276-DAE

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,

Defendants.

NOTICE OF MANUAL FILING EXHIBITS

Plaintiffs give notice of filing the following exhibits to Plaintiffs' Suggestions in Opposition to Defendants Motion for Summary Judgment on one flash drive:

1. Plaintiffs Exhibit 1– Surveillance camera recording of the shooting
2. Plaintiff's Exhibit 2 -Medical Examiner Report, to be SEALED pursuant to Confidentiality and Protective Order [Doc. 28].

Submitted this 13th day of December 2024.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

MACK INJURY ATTORNEYS

Nathaniel Mack, III, Esq.
Texas Bar No. 24078896

8023 Vantage Drive, Suite 690
San Antonio, TX 78230
(T) 210-333-6225
(F) 210-853-3152
nmack@macktexaslaw.com

STROM LAW FIRM
Bakari Sellers, Esq.

6923 N. Trenholm Road
Columbia, SC 29206
Tel. 803.252.4800
bsellers@stromlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon all parties in this case by Statutory Electronic Service and via e-mail.

Submitted this 13th day of December 2024.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

IN THE UNITED STATES DISTRICT COURT
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DOROTHY C. MOTLEY,
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KELBY RADFORD,
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JACOB BOWMAN,
Defendants.

§ § § § § § § § § §

Case No. 1:23-cv-00276-DAE

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman (hereinafter “Officer Defendants”), respectfully file this Second Motion for Summary Judgment and dismissal on the grounds they are entitled to qualified immunity and dismissal on all of Plaintiff’s claims:

I. SUMMARY OF THE ARGUMENT

1. This case presents a § 1983 fact pattern that rarely results in a lawsuit: an active shooter who points a gun at both a citizen and police officers in the split second before the officers shot him. Even Plaintiff's own expert concedes that the Officer Defendants' decision to utilize deadly force may have been reasonable because decedent Anthony Franklin's gun arm was outstretched and pointing toward them when the officers began firing. Plaintiff's theory of liability appears to be an argument that the Officer Defendants should have stopped shooting earlier—despite all shots being fired uninterrupted in roughly three seconds. This Court has already rejected such an argument in at least one other case. The use of deadly force against Decedent—an (i) active shooter vigilante who (ii) *responded to being approached by police by drawing his gun*, (iii) refused all police commands to drop his gun, (iv) pointed a gun at a nearby civilian, and (v) *pointed a gun directly at police officers chasing him*—did not constitute a constitutional violation.

2. Plaintiff likewise cannot meet her burden to overcome the clearly established law prong of qualified immunity. There is no binding precedent that deals squarely with the facts and issues of this case, nor any binding precedent that would have put the Officer Defendants on notice that their use of deadly force against an active shooter fugitive who—among other things—had just pointed his gun at them would be an unconstitutional act. The Officer Defendants are thus entitled to the defense of qualified immunity.

II. SUMMARY JUDGMENT FACTS & EVIDENCE

A. The Officer Defendants incorporate by reference their Declarations herein.

3. The Officer Defendants incorporate by reference the entirety of their three respective Declarations herein for all purposes.¹ Each Declaration recounts the facts of the incident in

¹ See generally **Ex. 22**, *Rawlins Decl.*; **Ex. 23**, *Bowman Decl.*; and **Ex. 24**, *Radford Decl.*

question from each officers' perspective.

B. Decedent Anthony Franklin got into one or more arguments in downtown Austin and ultimately shot a man in the head, resulting in a panicked crowd and multiple 911 calls.

4. Franklin's girlfriend lived with him in Dallas and were on vacation together in Austin on the night of the incident, January 15, 2023.² Their trip happened despite the fact that Franklin had recently been arrested for Continuous Family Violence against that same girlfriend, and a Dallas area court had issued a bond condition that actively prohibited him from being in her presence.³ The girlfriend was later interviewed by investigators and stated that Franklin had become "extremely intoxicated" on the night of incident. She also stated he was "involved in an argument with someone downtown."⁴ She also told investigators that Franklin had pulled out his gun and started shooting, but she did not know at whom he was aiming. She ran away, fell to the ground, and claims she did not see him again the rest of the night.⁵ Later toxicology tests confirmed Franklin was well over double the legal threshold for intoxication when the subject incident occurred.⁶

5. One witness appears to have been one of the individuals Franklin got into an argument with on the night in question. He told investigators that he was on 6th Street and Colorado Street looking at a female wearing a green shirt when a man matching Franklin's description told him "don't be looking at my girl" and brandished a gun at him.⁷

² See **Ex. 14**, *SIU Presentation*, **pg. 33**; see also **Ex. 3**, *APD General Offense (GO) Report*, **pg. 133**.

³ See **Ex. 3**, *APD GO Report*, **pgs. 132-33**; see also **Ex. 14**, *SIU Presentation*, **pg. 5**.

⁴ *Id.*

⁵ See **Ex. 14**, *SIU Presentation*, **pg. 33**; see also **Ex. 3**, *APD GO Report*, **pgs. 132-33**.

⁶ **Ex. 15**, *Toxicology Report*.

⁷ See **Ex. 14**, *SIU Presentation*, **pg. 34**.

6. A second juvenile witness stated he saw a man matching Franklin’s description arguing with a woman and saw the man pull his gun out. He and his friend ran away and heard multiple gunshots.⁸ A third witness was riding a scooter on 6th Street when he saw an argument followed by a man matching Franklin’s description fire a grey gun multiple times into the air.⁹ A fourth witness had been driving an Uber when heard two “pop” sounds, saw a man in a white shirt fall to the ground, and saw a man matching Franklin’s description standing in the middle of the street with a grey firearm in his hand.¹⁰

7. The ultimate victim of Franklin’s gun violence was walking on West 6th Street. He saw a man—Franklin—running across the street while shooting his gun in the air. He tried running away from the man, but Franklin ultimately shot him in the head—the intention of which is unknown. He later gave a description of the shooter to police that matched Franklin’s description.¹¹

8. Five separate “shots-fired” 911 calls were made at 11:33 p.m., 11:34 p.m., 11:35 p.m., and 11:36 p.m.¹² Overall, the evidence reflects a chaotic, active-shooter situation in a crowded downtown environment. The only information about the shooting known by the Officer Defendants was that he had shot someone in the head in downtown Austin, and a general description of the shooter and his female companion.

C. The Officer Defendants engaged in a manhunt that located Franklin within ten minutes of the shooting.

9. The three Officer Defendants were all on duty and working shifts patrolling the downtown area near the vicinity of the shooting. They were all wearing clearly marked police uniforms and

⁸ See Ex. 14, *SIU Presentation*, pg. 35.

⁹ See Ex. 14, *SIU Presentation*, pg. 30; see also Ex. 3, *APD GO Report*, pgs. 47, 50, and 89.

¹⁰ See Ex. 14, *SIU Presentation*, pg. 31; see also Ex. 3, *APD GO Report*, pg. 89.

¹¹ See Ex. 14, *SIU Presentation*, pg. 32; see also Ex. 3, *APD GO Report*, pgs. 17, 30, and 125.

¹² See Ex. 14, *SIU Presentation*, pg. 10; see also Exs. 16 – 20, *911 Calls 1 – 5*.

were riding in a Utility Task Vehicle (UTV) that was clearly marked as a police vehicle with flashing red and blue lights and sirens.¹³

10. APD dispatch announced the suspect's description over police radio at 11:39 p.m.¹⁴ The call notes reflect that dispatch announced the shooter was a black male with a black shirt with afro style hair, that he was headed northbound toward 6th Street and Lavaca Street, and that he was intoxicated and waving a gun in the air.¹⁵

11. The video evidence in this case is voluminous and clear about the threat the Officer Defendants faced in the moment, and most or all of their knowledge and sworn testimony is corroborated by their statements and conduct captured on body worn camera (BWC) footage.¹⁶ Officer Rawlins drove the police UTV.¹⁷ Officer Bowman rode in the passenger seat.¹⁸ Officer Radford rode in the backseat.¹⁹

12. The Officers knew they were looking for a suspect who had just shot a victim in the head.²⁰ The descriptions changed slightly during the short manhunt, but dispatch ultimately advised that the shooter had been described by witnesses as a black male, wearing black clothes, thin build, carrying a grey gun, an afro style haircut, roughly 6'1", and was accompanied by a woman wearing white clothes.²¹ The Officers Defendants continued driving around the area with lights and sirens

¹³ See **Ex. 1**, *Report of Albert Rodriguez*, **pg. 5**; see also generally **Ex. 8**, *Radford BWC*; **Ex. 9**, *Rawlins BWC*; and **Ex. 10**, *Bowman BWC*.

¹⁴ See **Ex. 14**, *SIU Presentation*, **pg. 13**; see also **Ex. 4**, *Incident Detail Report*, **pg. 3**.

¹⁵ See **Ex. 4**, *Incident Detail Report*, **pg. 3**; see also **Ex. 3**, *APD GO Report*, **pg. 20**.

¹⁶ The Officer Defendants incorporate all attached videos and materials filed in support of this motion herein for all purposes.

¹⁷ See generally **Ex. 9**, *Rawlins BWC*.

¹⁸ See generally **Ex. 10**, *Bowman BWC*.

¹⁹ See generally **Ex. 8**, *Radford BWC*.

²⁰ **Ex. 5**, *Bowman IA Statement*, **pg. 6** (Officer Bowman recalling in a sworn interview they were "looking for...a suspect that is carrying a firearm who has already used deadly force.")

²¹ See e.g., **Ex. 22**, *Rawlins Decl.*, **pg. 2**, ¶¶ 5 – 7; see also e.g., **Ex. 10**, *Bowman BWC*, **01:47 – 01:53**.

actively looking for the shooter and asking for more clarification about his description.²² Numerous cars and pedestrians can be seen in the area—reflecting the crowded nature of the situation and the corresponding danger to the public for an active shooter fugitive to be on the loose.

D. Franklin responded to being approached by police by drawing his gun, and then he fled, refused to follow commands, and pointed his gun at the officers—forcing all three Officer Defendants to utilize deadly force to stop him.

13. The Officers continuously communicated in the vehicle to compare notes about the descriptions and apply them to subjects they could find that matched the descriptors, in whole or in part.²³ Based on their training and experience, they knew that suspects attempting to evade a manhunt usually do not act relaxed nor interested in police efforts, and instead would become tense and awkward, and move away from police officers in the vicinity. Such training and experience assisted the Officers in identifying Franklin as a suspect, because he tensed up and started moving away from the Officers' police-marked UTV.²⁴ The Officers observed Franklin at the corner of 6th Street and Colorado, and he matched most of the descriptors provided for the man who had just shot someone in the head minutes earlier—a black male, black clothes, thin build, short afro style haircut, and accompanied by a woman wearing white clothes.²⁵ As they slowly moved toward Franklin's position in the police-marked UTV, *Franklin menacingly responded to the approaching police officers by drawing his grey gun out of his pocket.*²⁶ The matching descriptors, matching companion, matching gun, suspicious behavior, and menacing act of

²² Ex. 10, *Bowman BWC*, 01:49 – 06:47.

²³ Ex. 23, *Bowman Decl.*, pg. 2, ¶ 6.

²⁴ Ex. 22, *Rawlins Decl.*, pg. 2, ¶¶ 7, 9.

²⁵ Ex. 8, *Radford BWC*, 08:16 – 08:26.

²⁶ Ex. 23, *Bowman Decl.*, pg. 3, ¶¶ 11, 12.; see also Ex. 10, *Bowman BWC*, 06:47 – 06:49.

drawing his gun in response to police officers approaching him collectively made it clear that the active shooter had been found.

14. Based on the Officers' training and experience, suspects who are attempting to peacefully flee almost always discard the weapon used in the crime during flight. Fleeing felons who instead keep their weapon are usually more likely to use their weapon to shoot any officers attempting to detain them. This is especially true for fleeing felons who hold the gun in their hand rather than hide it in a pocket or bag. The Officers thus believed that Franklin's continued possession of the handgun made Franklin an even more potentially deadly suspect to confront and detain.²⁷ Moreover, Franklin's affirmative act of drawing his gun in direct response to police officers approaching him further increased the likelihood of Franklin utilizing deadly force against any police who engage him.

15. Franklin fled. The Officer Defendants issued multiple commands, including to "drop the gun!"²⁸ Officer Radford jumped out of the UTV to chase the shooter on foot.²⁹ Officer Radford issued another command of "show me your hands! show me your hands!" as Franklin ran up nearby steps of a building onto a low balcony, resulting in an uninvolved man running away from the assailant with his hands in the air.³⁰ Surveillance footage confirms Franklin deliberately pointed his gun at—and thus violently threatened—the uninvolved innocent bystander mere seconds before the officer-involved shooting.³¹

²⁷ See e.g., **Ex. 22**, *Rawlins Decl.*, **pg. 3, ¶ 11**.

²⁸ **Ex. 10**, *Bowman BWC*, **06:48 – 06:55**.

²⁹ **Ex. 8**, *Radford BWC*, **08:23 – 08:42**.

³⁰ **Ex. 8**, *Radford BWC*, **08:20 – 08:42**.

³¹ **Ex. 12**, *Entry Way Surveillance Video*, **00:12 – 00:21** (The Officer Defendants concede that they were not actively aware that Franklin threatened the bystander with his gun, but such evidence is valid rebuttal evidence to any suggestion that Franklin had purely peaceful intentions during his flight).

16. Officer Radford issued a final command of “show me your fucking hands now!” Franklin disobeyed, jumped over the balcony railing, and landed on the ground.³² Franklin had been holding his gun in his right hand during the chase—as corroborated by the body worn camera video footage as he is falling—and can be seen stretching the same right hand toward Officer Radford while on the ground. At 08:41, two things happen in the same one-second time frame: (i) Franklin’s gun arm can be seen pointing towards Officer Radford, and (ii) Officer Radford begins firing his sole volley of rounds at Franklin.³³ Officers Rawlins heard the gunfire and believed Franklin was actively shooting at him, and he responded by likewise discharging his weapon at Franklin. Officer Bowman opened fire, as well, as soon as Franklin pointed his gun at him and the other officers.

17. There is no discernable gap in time or hesitation between any of the rounds fired, respectively, because police officers are trained to put one uninterrupted volley of rounds down range when faced with an imminent deadly threat.³⁴ The Officer Defendants justifiably chose to use deadly force because they believed Franklin was imminently about to kill them or an innocent bystander.³⁵

18. Not until 08:46 does Franklin finally—for the first time—discard his gun as initially instructed.³⁶ No officer fired any shot after Franklin did so. APD created a brief investigative summary of portions of the facts of the incident prior to the prosecutorial review process.³⁷ This

³² **Ex. 8, Radford BWC, 08:37 – 8:40.**

³³ *See e.g., Ex. 8, Radford BWC, 08:40* (at **08:40-41**, grey gun seen in Franklin’s hand as his body first hits the ground).

³⁴ *See e.g., Ex. 24, Radford Decl., ¶¶ 13, 17.*

³⁵ *See Ex. 24, Radford Decl., ¶¶ 13, 17; see also Ex. 22, Rawlins Decl., ¶¶ 15, 19; see also Bowman Decl., ¶¶ 16, 20.*

³⁶ *Id.* at **08:46.**

³⁷ *See generally Ex. 21, Investigative Summary.*

case was subsequently reviewed by a grand jury, which ultimately no-billed the Officer Defendants. All three Officers have subsequently returned in full to their duties as police officers.

III. LEGAL STANDARD

A. Summary Judgment Standard.

19. Pursuant to Federal Rule of Civil Procedure 56, summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.³⁸ What facts are material is determined by substantive law.³⁹ The mere existence of some factual dispute cannot defeat an otherwise properly supported motion for summary judgment. There is no genuine dispute for trial when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.⁴⁰ The moving party may also meet its burden simply by pointing to an absence of evidence to support the nonmoving party's case.⁴¹

B. Qualified Immunity Standard.

20. "Qualified immunity cases present two questions. First, did the officers violate a constitutional right? Second, was the right at issue clearly established at the time?"⁴² "Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law."⁴³ At the summary judgment stage, a Court must assign greater weight "to the video recording taken" at the scene and may discount a plaintiff's version of the facts that are clearly contradicted by that video evidence.⁴⁴ "It is the plaintiff's burden to find a case in his

³⁸ FED. R. CIV. P. 56.

³⁹ *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

⁴⁰ *Scott v. Harris*, 550 U.S. 372, 380 (2007).

⁴¹ *Boudreau v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005).

⁴² *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 2268529, at *1 (5th Cir. May 20, 2024).

⁴³ *Baker v. Coburn*, 68 F.4th 240, 244 (5th Cir. 2023), as revised (May 19, 2023).

⁴⁴ *Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022).

favor that does not define the law at a ‘high level of generality.’”⁴⁵ “[O]fficer negligence is not a basis to deny qualified immunity.”⁴⁶ Qualified immunity “represents the norm, and courts should deny a defendant immunity only in rare circumstances.”⁴⁷ “Discovery is not a prerequisite to the disposition of a motion for summary judgment,” including summary judgments based on qualified immunity.⁴⁸

IV. ARGUMENTS & AUTHORITIES

A. Plaintiff must meet her burden to overcome qualified immunity on an officer-by-officer basis.

21. “The district court must [examine] the actions of defendants individually in the qualified immunity context.”⁴⁹ The qualified immunity burden of proof is on the plaintiff’s shoulders to prove “(1) ‘whether the facts that a plaintiff has alleged make out a violation of a constitutional right’ and (2) ‘whether the right at issue was ‘clearly established’ at the time of the defendant’s alleged misconduct.’”⁵⁰ The Officer Defendants maintain that *all* of their collective actions were constitutional and protected by qualified immunity. Based on her retained expert’s report, however, Plaintiff’s theory of recovery appears to be that some shots—but not others—were allegedly unreasonable. It is hard to imagine how Plaintiff could minutely parse one shot from

⁴⁵ *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (per curiam) (internal quotation marks and citation omitted).

⁴⁶ *Mason v. Faul*, 929 F.3d 762, 764 (5th Cir. 2019).

⁴⁷ *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (internal quotation marks and citations omitted).

⁴⁸ *Williams v. Bexar Cnty.*, No. 22-50289, 2024 WL 3326082, at *4 (5th Cir. July 8, 2024) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990)).

⁴⁹ *Kitchen v. Dall. Cty.*, 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Atteberry v. Nocona Gen Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015); *see also Wallace v. Taylor*, No. 22-20342, 2023 WL 2964418, at *3 (5th Cir. Apr. 14, 2023).

⁵⁰ *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 727 (5th Cir. 2018) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

another given the roughly three-second time horizon for all of the shots collectively. Plaintiff is nevertheless required to individually address each officers' actions and meet her qualified immunity burden on a defendant-by-defendant basis.

B. All of Plaintiffs' claims for Excessive Force must be dismissed. The Officer Defendants' uses of force were (a) not a constitutional violation under the Fourth Amendment, and (b) were not a violation of any clearly established constitutional right.

22. The Officer Defendants' force did not violate the Fourth Amendment, and a comprehensive review of the Fifth Circuit's precedent as of January 2023 reveals that the Officer Defendants likewise did not violate a clearly established right.⁵¹

a. The *Graham* factors reflect that the Officer Defendants' use of deadly force was reasonable.

23. "All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."⁵² "Determining whether an officer's use of force was objectively reasonable requires careful attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."⁵³ These elements are referred to as the *Graham* factors after the Supreme Court's seminal decision in *Graham v. Connor*.

⁵¹ *Graham v. Connor*, 490 U.S. 386 (1989).

⁵² *Deshotels v. Marshall*, 454 Fed. Appx. 262, 267 (5th Cir. 2011) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 487 (5th Cir. 2001)).

⁵³ *Id.* (numerals added) (citing *Graham*, 490 U.S. at 396).

24. *Graham* teaches that the “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....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.”⁵⁴ Specifically, courts are instructed to consider the “totality of the circumstances as perceived by ‘a reasonable officer on the scene.’”⁵⁵

25. The “totality of the circumstances” facing these officers was exceptionally dangerous from go. They were dispatched to an active shooter “gun hotshot” call, which indicates that a gun was presently being discharged.⁵⁶ The officers also received information from dispatch that the shooter had shot a person in the head.⁵⁷ It was also reported that the shooter was waving the gun around and was intoxicated.⁵⁸ There was some initial confusion over his exact description pertaining to the size of his hair, but later-discovered evidence from Franklin’s girlfriend corroborates the fact that Franklin was indeed the shooter in question.⁵⁹

26. Roughly ten minutes after the 911 calls came in, the Officer Defendants saw Franklin, ***observed the gun in his hand***, and Officer Bowman issued multiple commands for him to drop the gun.⁶⁰ Even more menacingly, Officer Bowman witnessed Franklin respond to police approaching him by drawing his gun—suggesting Franklin was preparing to now use that gun

⁵⁴ *Graham*, 490 U.S. at 396 – 97.

⁵⁵ *Hatcher v. Bement*, 676 F.App'x 238, 243 (5th Cir. 2017) (citing *Graham*, 490 U.S. at 396).

⁵⁶ See **Ex. 1, Report of Albert Rodriguez, pg. 4, ¶ 10; see also Ex. 3, APD GO Report, pgs. 29, 44, 47, and 108.**

⁵⁷ See **Ex. 1, Rodriguez Report, pg. 4, ¶ 11; see also Ex. 4, Incident Detail Report, pg. 3.**

⁵⁸ See **Ex. 1, Rodriguez Report, pg. 4, ¶ 12; see also Ex. 4, Incident Detail Report, pg. 3.**

⁵⁹ See e.g., **Ex. 3, APD GO Report, pg. 133; see also Ex. 14, SIU Presentation, pg. 33.**

⁶⁰ See **Ex. 1, Rodriguez Report, pg. 5, ¶ 14; see also Ex. 5, Bowman IA Statement, pg. 7.**

against the Officer Defendants.⁶¹ A foot chase ensued whereby multiple additional police commands were issued. ***Franklin disobeyed all of those commands.***⁶² Near the end of the chase, Franklin is seen on video ***pointing his gun at a nearby uninvolved male***, who responded by putting his hands in the air and fearfully running away from Franklin.⁶³

27. Officer Radford yelled his final command to “show me your fucking hands!” but Franklin disobeyed, jumped over a nearby railing, and arguably pointed his gun toward the officers while he was in the air.⁶⁴ He then ***pointed the gun at the officers*** right after he landed on the ground.⁶⁵ Rawlins genuinely believed that the gunfire he heard immediately thereafter was Franklin actively shooting at him or another officer.⁶⁶ There were thus multiple points in time during the encounter when it would have been both reasonable and constitutional to use deadly force against Franklin based on the *Graham* factors.

28. “An officer’s use of deadly force is not unreasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others.”⁶⁷ The decision to use deadly force must be judged from the perspective of a reasonable officer on the scene, rather than with the perfect 20/20 vision of hindsight.⁶⁸ Applying *Graham*, there is no question that (1) Franklin

⁶¹ **Ex. 23, Bowman Decl., pg. 3, ¶¶ 11, 12.**

⁶² **See Ex. 1, Rodriguez Report, pg. 4, ¶ 14 – 15; see also Ex. 5, Bowman IA Statement, pg. 7; see also Ex. 6, Radford IA Statement, pg. 11, see also Ex. 7, Rawlins IA Statement, pg. 10.**

⁶³ **See Ex. 1, Rodriguez Report, pg. 5, ¶ 15; see also Ex. 2, Rodriguez Illustrations, ##1 – 3, pgs. 3 – 4; see also Ex. 8, Radford BWC, 08:38–41; see also Ex. 12, Entry Way Surveillance Video, 0:14–18.**

⁶⁴ **See Ex. 1, Rodriguez Report, pg. 5, ¶ 15; see also Ex. 2, Rodriguez Illustrations, ##4 – 6, pgs. 3 – 4; see also Ex. 8, Radford BWC, 08:38–41.**

⁶⁵ **Ex. 2, Rodriguez Illustrations, ##8 – 10, pgs. 5 – 6; see also Ex. 8, Radford BWC, 08:38–41.**

⁶⁶ **Ex. 22, Rawlins Decl., pg. 4, ¶¶ 14, 15.**

⁶⁷ *Argueta v. Jaradi*, 86 F.4th 1084, 1088 (5th Cir. 2023) (citing *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)).

⁶⁸ *See id.*

was believed to have committed a deadly, serious crime;⁶⁹ (2) the armed Franklin posed a deadly threat to the uninvolved male, the officers on the scene, and the public around him in downtown Austin; and (3) he was both fleeing and resisting by physically threatening to use deadly force against the officers by pointing a gun at them. The use of deadly force against him was thus objectively reasonable pursuant to *Graham*, and this Court may end its analysis at the threshold constitutional level of analysis.

b. The mere furtive nature of the armed-and-dangerous suspect's actions legally merited deadly force.

29. “Courts must be careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while *confronted with a violent individual*.”⁷⁰ In a matter of seconds, there were several different occurrences that—on their own—would render the Officer Defendants’ use of deadly force against a known *violent individual* reasonable as a matter of law. The suspect was known to have just shot another person, and he was now observed actively drawing and/or holding the gun in his hand, refusing to follow police commands, and running around through downtown Austin past vulnerable civilians. Officer Radford testified during his sworn IA interview that he believed the suspect was one trigger pull away from firing the gun in his hand.⁷¹

30. The Fifth Circuit has “*never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety*,” nor the safety

⁶⁹ See TEX. PENAL CODE ANN. §§ 22.02(a)(2) (aggravated assault with a deadly weapon), 22.05(b), (e) (deadly conduct utilizing a firearm).

⁷⁰ *Hathaway v. City of San Antonio*, No. SA-05-CA-0175-FB, 2005 WL 5898299, at *4 (W.D. Tex. Sept. 23, 2005) (emphasis added), report and recommendation adopted, No. SA-05-CA-0175-FB, 2006 WL 6372333 (W.D. Tex. Mar. 29, 2006), aff’d sub nom. *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007) (citing *Wagner v. Bay City, Texas*, 227 F.3d 316, 321 (5th Cir. 2000)).

⁷¹ See **Ex. 1**, *Rodriguez Report*, **pg. 6**, ¶ **14**; see also **Ex. 6**, *Radford IA Statement*, **pg. 7**.

of the public at large.⁷² In *Salazar-Limon*, a suspect’s act of merely reaching for a waistband—where a gun *could* be hidden but ultimately was not—after resisting arrest and refusing police commands rendered the use of deadly force “not excessive under the circumstances.”⁷³ Here, in contrast, Franklin did not need to reach for a gun because *he already had drawn the gun as a direct response to police approaching him*. More than just resisting arrest like in *Salazar-Limon*, Franklin had just shot someone with that same gun minutes earlier. In addition to being visibly armed and a **fleeing active shooter**, Franklin was running loose in downtown Austin—a town known for its crowded night life—and thus was a danger to the public.⁷⁴ The danger he posed to the public is corroborated by the fact that he pointed his gun at—and thus issued a fatal threat to—a nearby uninvolved man mere seconds before the officers utilized deadly force to stop his potentially deadly and ongoing crime spree.

31. In *Argueta*, the officer’s split-second decision to use deadly force in response to a different furtive gesture—a suspect “clutching his right arm to his side as he fled police confrontation...akin to reaching for a waistband”—was also held to not be a violation of the Fourth Amendment.⁷⁵ In *Manis*, the officers’ deadly force was found to be reasonable after the suspect flailed his arms aggressively at them and then reached under his car seat where a gun *could* have been stowed.⁷⁶ Applied here collectively, the Officer Defendants were thus constitutionally entitled to utilize deadly force against Franklin *even before he pointed his gun at them*. What could be more furtive than a known active shooter drawing his gun in response to police officers approaching him,

⁷² *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 n.6 (5th Cir. 2016), as revised (June 16, 2016) (emphasis added).

⁷³ *Id.* at 276.

⁷⁴ **Ex. 9, Rawlins BWC, 3:15 – 6:40, Ex. 10, Bowman BWC, 3:15 – 6:45, Ex. 11, Construction Surveillance Video on 6th St., 00:00 – 3:17.**

⁷⁵ *Argueta*, 86 F.4th at 1091.

⁷⁶ *Manis v. Lawson*, 585 F.3d 839, 842 (5th Cir. 2009).

refusing their repeated commands to drop the gun, and then pointing the gun at a nearby uninvolved bystander? Plaintiff's excessive force claims should be dismissed accordingly.

c. The Officer Defendants were undeniably authorized to use deadly force in response to the suspect's act of pointing his gun toward them.

32. As established *supra*, the Officer Defendants were facing an armed suspect known to have just shot another person minutes earlier, refusing to follow police commands, had just drawn his gun in response to police officers approaching him, and then pointed that gun at an uninvolved male. Deadly force was already constitutionally authorized by this point. The undeniable *coup de grace* for deadly-force justification was when the suspect pointed his gun at the officers.

33. "An officer's use of deadly force is not unreasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others."⁷⁷ "An officer is permitted to take steps to protect himself, his partner, and the residential community when an armed suspect is running from police, especially if he reasonably believes that an armed suspect is preparing to fire a weapon."⁷⁸ It is hard to imagine an act more threatening than an active shooter fugitive pointing his gun at a police officer attempting to arrest him. *Even Plaintiff's own expert admits that video footage shows that Franklin's arm was "extended in the direction of Officer Radford" in the split second before the Officer Defendants utilized deadly force.*⁷⁹ Plaintiff's expert even concedes that the initial deadly force utilized by the Officer Defendants "*may have been a reasonable response to the perceived threat posed by Mr. Franklin with an outstretched arm.*"⁸⁰

⁷⁷ *Argueta*, 86 F.4th at 1088 (citing *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)).

⁷⁸ *Sims v. City of Moss Point*, No. 1:20CV247-HSO-RHWR, 2022 WL 866262, at *4 (S.D. Miss. Mar. 22, 2022), *aff'd sub nom. Sims v. Shipman*, No. 22-60223, 2023 WL 5133305 (5th Cir. Aug. 10, 2023) (citations omitted).

⁷⁹ **Ex. 13, Report of Geoffrey Alpert, pgs. 5 – 7** (emphasis added).

⁸⁰ *Id.* at **pg. 8** (emphasis added).

The Officer Defendants’ decision to use deadly force—as Plaintiff’s own law enforcement expert grudgingly concedes—was justified, and Plaintiff’s claims should be dismissed accordingly.

d. Plaintiff’s argument that the Officer Defendants fired too many rounds lacks merit both factually and legally.

34. Based on her expert report, Plaintiff is expected to argue the Officer Defendants simply shot too many times, and thus that the final rounds discharged were unreasonable. This argument lacks merit both from a legal and practical standpoint.

35. In *Ondrej*, this Court recently rejected an identical argument. The suspect had an “Uzi” gun in her waistband and was walking near a school. An officer confronted her. She put her hands up and allegedly told him that it was a toy, but then the video footage shows her reaching for her waistband. The officer fired five shots in total. One of the plaintiff’s theories of liability was that the first, second, and third shots had incapacitated her, and thus the fourth and fifth shots were allegedly unreasonable. This Court disagreed:

Review of the audio on the passerby dashcam video is helpful to analyze this theory of liability. The audio reveals Sgt. Perry fired, in rapid succession, five uninterrupted shots in under two seconds. Sgt. Perry never hesitated or disengaged and then reengaged in shooting. Sgt. Perry’s dashcam video reveals the same definite and irrefutable conclusion.⁸¹

36. Here, the Officer Defendants likewise each fired one uninterrupted volley, respectively, in rapid succession that lasted roughly three seconds in total. Officer Radford was both on foot and the closest of the Officer Defendants to the assailant, and his twelve shots were all fired in roughly three seconds.⁸² Officer Rawlins’s five shots were all fired less than two seconds apart.⁸³ Officer

⁸¹ *Ondrej v. Perry*, No. SA-21-CV-00281-JKP, 2023 WL 6453478, at *7 (W.D. Tex. Oct. 2, 2023).

⁸² **Ex. 8, Radford BWC, 8:41–44.**

⁸³ **Ex. 9, Rawlins BWC, 7:04–05.**

Bowman’s two shots were fired less than one second apart.⁸⁴ As established in their declarations, each officer’s conduct was in accordance with their training of responding to an imminent deadly threat by putting multiple consecutive shots downrange. As in *Ondrej*, the Officer Defendants likewise never hesitated between shots or disengaged and reengaged in shooting—nor could they have done so given the mere three-second time horizon. Just as in *Ondrej*, the “summary judgment evidence dispels [] Plaintiffs’ theory of recovery and any cited legal support” for her expected one-too-many-shots argument.⁸⁵

37. In *Valderas*, the Fifth Circuit similarly discarded the plaintiff’s argument that his alleged act of dropping the gun at the last second created potential liability for the officers who shot him. A wanted violent felon, the *Valderas* plaintiff “admit[ted] to pulling a gun from his trousers” but argued that “deadly force was no longer reasonable once he threw the gun into the vehicle.”⁸⁶ The body worn camera video evidence, however, showed only him leaning into the car and never clearly showed him discarding the weapon he had in his hands moments earlier. If he truly did discard the gun, then the officers could not have known it based in part on the short time frame during which everything happened. The Fifth Circuit affirmed the trial court’s summary judgment dismissal and noted that “our circuit has repeatedly held that an officer’s use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon.”⁸⁷ The Fifth Circuit also noted that “*[i]t is immaterial whether a plaintiff was actually [still] armed.*”⁸⁸ Just like in *Valderas*, Franklin was a known violent felonious actor and refused to

⁸⁴ **Ex. 10, Bowman BWC, 7:07–08.**

⁸⁵ *Ondrej*, 2023 WL 6453478, at *7.

⁸⁶ *Valderas v. City of Lubbock*, 937 F.3d 384, 390 (5th Cir. 2019).

⁸⁷ *Id.* (citing *Manis*, 585 F.3d at 844-45) (collecting cases).

⁸⁸ *Id.* (citing *Romero v. City of Grapevine*, 888 F.3d 170, 178 (5th Cir. 2018)) (granting qualified immunity where officer shot uncooperative, aggressive man who ultimately proved to be unarmed) (emphasis added).

follow police commands. Unlike the *Valderas* plaintiff, Franklin was ***actually armed and pointed his gun toward officers***.

38. The video evidence shows that Franklin was armed and dangerous—especially given his menacing and felonious conduct in the preceding minutes—right up until he slid the gun away from himself. Even if Plaintiff argues otherwise, *Valderas* teaches that it would be immaterial under Fifth Circuit law, especially given how quickly the uninterrupted rounds were all discharged. Police officers do not have the luxury of freeze frames. The likewise do not have the reaction speed of a “Sawstop”⁸⁹ to cease firing mid-volley after looking down the barrel of an active shooter’s gun one second earlier. The operative fact is the imminent deadly threat perceived when the officer begins to fire his volley, not what happens a split second later. Plaintiff’s claims should be dismissed accordingly.

e. The Officer Defendants’ decision to use deadly force did not violate clearly established law.

39. The second prong of the qualified immunity question: “whether the officer violated clearly established law—is a doozy.”⁹⁰ The section 1983 plaintiff bears the burden of proof, “[a]nd that burden is heavy: A right is clearly established only if relevant precedent has placed the constitutional questions beyond debate.”⁹¹ In *Morrow*, the Fifth Circuit exhaustively laid out the “four applicable commandments” that a plaintiff must satisfy to establish that the constitutional question is beyond debate.⁹²

⁸⁹ See e.g., <https://www.youtube.com/watch?v=O8EX7mt3ByE>.

⁹⁰ *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

⁹¹ *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

⁹² *Id.*

40. **First**, the relevant constitutional question must be framed with specificity and granularity.⁹³ The Supreme Court has “repeatedly told courts not to define clearly established law at [that] high level of generality.”⁹⁴ “Rather, the dispositive question is whether the violative nature of *particular* conduct is clearly established.”⁹⁵ **Second**, clearly established law comes only from holdings, not dicta.⁹⁶ This is because “officers are not charged with memorizing every jot and tittle [the courts] write to explain [their orders].”⁹⁷

41. **Third**, “overcoming qualified immunity is especially difficult in excessive-force cases.”⁹⁸ This is because this is an area of the law in which “the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.”⁹⁹ That means that the law must be “so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately.”¹⁰⁰ **Finally**, the last commandment is that courts “must think twice before denying qualified immunity.” “Because of the importance of qualified immunity to society as a whole, the Supreme Court often corrects lower courts when they wrongly subject officers to liability.”¹⁰¹

42. Here, Plaintiff cannot meet her burden to provide case law that placed it “beyond debate” that, on January 15, 2023, clearly established law held that the Officer Defendants’ conduct violated Anthony Franklin’s constitutional rights when they made the split-second decision to use

⁹³ *Id.*

⁹⁴ *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

⁹⁵ *Id.* (citing *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)).

⁹⁶ *Sorenson v. Ferrie*, 134 F.3d 325, 329 n.7 (5th Cir. 1998).

⁹⁷ *Morrow*, 917 F.3d at 874.

⁹⁸ *Id.* at 876.

⁹⁹ *Id.* (citing *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

lethal force under the facts presented. As established *supra*, the Fifth Circuit has time and time again granted qualified immunity to officers using deadly force against a suspect who reaches for what could be—but is ultimately not—a gun. It would defy logic to argue that police officers *could* constitutionally shoot at someone merely reaching for where a gun might be hidden, but could not constitutionally shoot (i) a fleeing violent fugitive who had just shot someone in the head; (ii) who subsequently drew his gun as a direct response to police officers approaching him; (iii) who refused all commands to drop his gun; and (iv) ***pointed his gun at police officers***. There simply is no binding precedent even remotely close to the facts of this case that would have provided such notice to any police officer working within the territorial boundaries of the Fifth Circuit. The Officer Defendants are thus entitled to qualified immunity under the second prong of the test, as well, and all of Plaintiff’s claims against them must be dismissed accordingly.

IV. **PRAYER**

WHEREFORE PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman respectfully request that this Court grant summary judgment on the grounds that Officer Defendants did not violate Decedent’s constitutional rights, or in the alternative find they are entitled to qualified immunity on all of Plaintiff’s claims, and for all other relief to which they may be justly entitled in law or equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.
 4700 Mueller Blvd., Suite 200
 Austin, Texas 78723
 (512) 476-4600
 (512) 476-5382 – Fax

By: /s/ Blair J. Leake
 Blair J. Leake
 State Bar No. 24081630
bleake@w-g.com

Stephen B. Barron
State Bar No. 24109619
sbarron@w-g.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2025, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

_____/s/ Blair J. Leake
Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

§ § § § § § § § § § § § § § § §

Case No. 1:23-cv-00276-DAE

DECLARATION OF CITY OF AUSTIN CUSTODIAN OF RECORDS

1. “My name is LaMarcus Wells. I am over 18 years of age, of sound mind, capable of making this Declaration, and personally acquainted with the facts stated herein. I have personal knowledge of the facts stated in this Affidavit and they are all true and correct.
2. I am Custodian of Records for City of Austin, and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.
3. Attached hereto to Defendants’ Motion for Summary Judgment are the following so numbered Exhibits, which are the original records or exact duplicates of the original records that are kept and maintained in the regular course of the City’s Business and were produced by the City of Austin in the course of this litigation:

Exhibit 3: Austin Police Department General Offense Report (GO) #23-0151507
(OFC 0085-0286)

Exhibit 4: Incident Detail Report (OFC 0057-0084)

Exhibit 5: Officer Jacob Bowman Signed IA Transcript (OFC 0318-0338)

- Exhibit 6:** Officer Kelby Radford Signed IA Transcript (**OFC 0039-0360**)
- Exhibit 7:** Officer Ryan Rawlins Signed IA Transcript (**OFC 0361-0381**)
- Exhibit 8:** Officer Kelby Radford Body-Worn Camera (BWC) Video (**OFC 0027**)
- Exhibit 9:** Officer Ryan Rawlins Body-Worn Camera (BWC) Video (**OFC 0026**)
- Exhibit 10:** Officer Jacob Bowman Body-Worn Camera (BWC) Video (**OFC 0025**)
- Exhibit 11:** Construction Surveillance Video on 6th St.
- Exhibit 12:** Entry Way Surveillance Video at 601 Colorado St.
- Exhibit 14:** SIU Officer Involved Shooting Briefing Presentation
- Exhibit 15:** Toxicology Report
- Exhibit 16:** 911 Call (1) (**OFC 0028**)
- Exhibit 17:** 911 Call (2) (**OFC 0029**)
- Exhibit 18:** 911 Call (3) (**OFC 0030**)
- Exhibit 19:** 911 Call (4) (**OFC 0031**)
- Exhibit 20:** 911 Call (5) (**OFC 0032**)

4. These records were made by, or from information transmitted by, City Officials with knowledge of the facts or events depicted therein, and it is the regular practice of the City of Austin that such records be created or obtained at or near the time of each act, event, condition, depiction, or opinion depicted therein.

5. This Declaration is made in accordance with 28 U.S.C. § 1746, and I declare under the penalty of perjury that the foregoing is true and correct.

Executed in the County of Travis, Texas on November 15, 2024.

Sgt. LaMarcus Wells
#6103

Sgt. LaMarcus Wells
Custodian of Records

Digitally signed by Sgt.
LaMarcus Wells #6103
Date: 2024.11.15 14:45:00 -06'00'

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Dorothy C. Motley,	)	
individually and on behalf of all	)	C/A # :1:23-CV-276-DAE
wrongful death beneficiaries of	)	
Anthony Marquis Franklin,	)	UNOPPOSED MOTION FOR
	)	LEAVE TO FILE RESPONSE TO
	)	DEFENDANTS' SECOND MOTION
	)	FOR SUMMARY JUDGMENT
	)	
Plaintiff,	)	
	)	
	)	
	)	
v.	)	
	)	
Kelly Radford, Ryan Rawlings and	)	
Jacob Bowman,	)	
	)	
Defendants.	)	

**PLAINTIFF'S UNOPPOSED MOTION LEAVE FOR TO FILE RESPONSE TO
DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Dorothy C. Motley, individually and on behalf of all wrongful death beneficiaries of Anthony Marquis Franklin, by and through her counsel, pursuant to Fed. R. Civ. P. 6(b)(1)(AB) requests for leave to file a response to Defendants' Second Motion For Summary Judgment.

In support of this motion, Plaintiff states the following:

1. The Defendants filed their Second Motion For Summary Judgment on March 5, 2025.
2. The Plaintiff's Response was due on March 19, 2024.
3. Plaintiff's Counsel mistakenly believed that Plaintiff response was not due until days March 27, 2025, 14 days from March 13, 2025, the date the Court granted the Defendants motion to filed Exhibits to the Motion Under Seal.

4. Plaintiff's lead counsel has brief due at the United States Court of Appeals for the Eight Circuit on March 26, 2025, and need additional time to respond to the Defendants' Second Motion for Summary Judgment.
5. The Plaintiff intends to respond to the Defendants Second Motion for Summary Judgement as she did to the Defendants' Original Motion for Summary Judgment.
6. Additionally, Plaintiff have yet to received all of the Defendants' deposition transcript form the Court reporter.
5. Prior to filing this motion, the undersigned conferred with opposing counsel and opposing Counsel do not oppose the requested extension.

Wherefore, the Plaintiff respectfully requests that the Court grants leave file a response to Defendants' Second Motion for Summary Judgment no later than March 30,, 2025.

Respectfully submitted,

MACK INJURY ATTORNEYS

/s/Nathaniel Mack III

Nathaniel Mack III

Texas Bar No.: 24078896

8023 Vantage Dr. Suite 690

San Antonio, Texas 78230

P:(210) 333-6225

F:(210) 855-3152

nmack@macktexaslaw.com

THE LAW OFFICES OF HARRY M. DANIELS, LLC

/s/Harry M. Daniels

Harry M. Daniels

4751 Best Road Suite 490

Atlanta, GA 30337

Tel. 678.664.8529

Fax. 800.867.5248

daniels@harrymdaniels.com

STROM LAW FIRM

/s/ Bakari T. Sellers
6923 N. Trenholm Road
Columbia, SC 29203
Tel: 803-252-4800
bsellers@stromlaw.com

Attorneys for the Plaintiff

AGREED:

WRIGHT & GREENHILL, PC

By: /s/ Blair J. Leake
Blair J. Leake
State Bar No.: 24081630
bleake@w-g.com
Attorney for the Defendants

Dated: March 24, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,

Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,

Defendants.

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Case No. 1:23-cv-00276-DAE

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COME Plaintiff Dorothy C. Motley (hereinafter “Plaintiff”), respectfully file this Response to Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman’s Motion for Summary Judgment on the grounds they are entitled to Qualified Immunity and dismissal on all of Plaintiff’s claims:

I. Summary of the Argument

The Defendants have presented this case to this Honorable Court in a very misleading fashion in support of their Motion for Summary Judgment. First and foremost, the Defendant Officers cannot point to a scintilla of admissible evidence in the record that support their position that Anthony Franklin was an active shooter on the date in question. In fact, the Defendant Officers conceded just prior to shooting and killing Mr. Franklin, the Mr. Franklin

did not match the description of a person who previously fired shots in downtown Austin, Texas on the date in question. Moreover, witnesses to the shooting called 911 and gave a description of the shooter. Notably, those description did not match Mr. Franklin. The only crime that Mr. Franklin was remotely suspected of was displaying a handgun in plain view of another person in a public place in violation of Texas Penal Code § 46.02 which is only a Class A misdemeanor. It is undisputed that after Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin back to front. At the moment the Defendant Officers discharged their weapons, Mr. Franklin was rolling away from the Defendant Officers and was not immediate threat to them or the public at the time he was shot and killed by the Defendant Officers. *The Fifth Circuit has clearly established that an officer cannot continue to fire at someone who is objectively downed or incapacitated regardless at that person is armed or not.* In light depicted by the video evidence in this case, it is crystal clear that the Defendants Officers used excessive and unwarranted force by discharging their firearms collectively 19 times at Mr. Franklin while Mr. Franklin was downed or incapacitated that resulted in Mr. Franklin's death. Thus, the Defendants Officers are not entitled to the defense of qualified immunity.

II. Plaintiff's Response to Defendant Summary Judgment Facts & Evidence

- A.** The Defendant Offices rely heavily on inadmissible hearsay in support of their motion for summary judgment.

Before addressing the Defendant Officers' evidence in support of their motion for summary judgment, the attention must be brought to this Court that evidence submitted by the Defendant Officers is inadmissible hearsay.

The Federal Rule of Civil Procedure 56 generally requires that "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(c)(4). Inadmissible hearsay is not properly considered in ruling on a motion for summary judgment.¹ Documents containing hearsay statements, that would not be admissible as testimony at trial, may not be set forth in an affidavit to support a motion for summary judgment.²

B. Plaintiff objects to the *APD GO Report and SIU Presentation* as inadmissible hearsay and objects to statements and summaries of statements attributed to witness statement in the report that are offered to prove the truth of the matter asserted in the report and presentation.

1. *APD GO Report*

Police reports are admissible, at least in part, under an exception to the hearsay rule as public records that set forth factual findings from a legally authorized investigation. *See* Fed.R.Evid. 803(8)(A)(iii). Such reports are presumed to be trustworthy and admissible; therefore, it is the burden of the party opposing admission to demonstrate a lack of trustworthiness.³ The trustworthiness of a report admitted under this hearsay exception depends on whether the report was compiled or prepared in a way that indicates that its

¹ See Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 511 n.5 (5th Cir. 2001) ("Because these statements are hearsay, they are not competent summary judgment evidence.") (citation omitted); Goodwin v. Johnson, 132 F.3d 162, 186 (5th Cir. 1997) (explaining that proffered statement was inadmissible hearsay and, thus, was not competent summary judgment evidence) (citation omitted).

² H. Sand Co., Inc. v. Airtemp Corp., 934 F.2d 450, 454-455 (2d Cir. 1991); see also Broadway v. City of Montgomery, 530 F.2d 657, 661 (5th Cir. 1976).

³ See Reliastar Life Ins. Co. v. Thompson, Civil No. M-07-140, 2008 WL 4327259, at *4 (S.D.Tex. Sept. 16, 2008) (citing Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir.1991)).

conclusions can be relied upon.⁴ “Certain information in a police report, however, such as witness statements offered to prove the truth of the matter asserted, are ‘hearsay within hearsay’ and are inadmissible unless each level of hearsay qualifies under one of the hearsay exceptions.”⁵ (citations omitted). The portions of the reports that reflect the officers' first-hand observations based on their investigations and experience are admissible.⁶ But the portions of the reports containing the officers' mere opinions are not admissible.⁷ And the witness statements in the reports may be admissible under Rule 801(d)(2) as statements made by a party or individual in a representative capacity, but, to the extent the witness statements are offered to prove the truth of the matter asserted in the reports, they are inadmissible hearsay within hearsay.⁸ Here, the Defendants have an offered report in support of their motion for summary that is riddled with hearsay within hearsay. The Court should exclude all witness statements that are offered to prove the truth of the matter asserted in the reports, that are inadmissible hearsay within hearsay.

2. *SIU Presentation*

As stated above, inadmissible hearsay is not properly considered in ruling on a motion for summary judgment.⁹ Plaintiff objects to the SIU Presentation as inadmissible hearsay and objects to statements and summaries of statements attributed to witness statement in the SIU

⁴ See id. (citing Moss, 933 F.2d at 1305 (listing factors to consider to determine trustworthiness), 1307).

⁵ Id.

⁶ See id. (citations omitted).

⁷ See id.

⁸ See id.

⁹ See Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 511 n.5 (5th Cir. 2001) (“Because these statements are hearsay, they are not competent summary judgment evidence.”) (citation omitted); Goodwin v. Johnson, 132 F.3d 162, 186 (5th Cir. 1997) explaining that proffered statement was inadmissible hearsay and, thus, was not competent summary judgment evidence).

presentation that are offered to prove the truth of the matter asserted in the SIU PowerPoint presentation.

C. Plaintiff objects to the *APD GO Report and SIU Presentation* lacks trustworthiness and contains officers' mere opinions.

Statements of Brittany Shepard

Defendant Officers alleges in their MSJ the following:

That Mr. Franklin's girlfriend was interviewed by investigators and stated that Franklin became "extremely intoxicated" on the night of incident. She also stated he was "involved in an argument with someone downtown." ³ Later toxicology tests confirmed he was well over double the legal threshold for intoxication. ⁴ She recalled that Franklin at some point pulled out his gun and started shooting, but she did not know at whom he was aiming. She ran away, fell to the ground, and claims she did not see him again the rest of the night.

See [Doc. 38 pg. 3]; [Def. Ex. 14 pg. 34 of 68].

However, the *APD GO Report* states the following:

Brittany Shepard

When questioned about the B/M that she was observed nearby at the Chick-fil-A earlier, Brittany claimed she didn't know the subject and was just walking by him at the time. She also denied being involved or witnessed any shooting tonight. I then attempted to confirm over the radio the outstanding B/F suspect's description to make sure Brittany was not that suspect. I was informed that the B/F suspect had an updated description of H/F wearing a white shirt which Brittany did not match that description. I then released Brittany from detainment. I then continued to hold the perimeter at W 7th St/Colorado St until relieved.

See [Def. Ex. 3 pg. 21 of 196].

The above clearly show inconsistencies in the *APD GO Report and SIU Presentation*.

Statements of Joshua Sarate

Further, Defendant Officers alleges the following in the SIU Presentation that Joshua Sarate *saw a black male wearing a black hoodie with a gray gun fire multiple rounds in the*

air. See [Def. Ex. 14 pg. 31 of 68]. However, the *APD GO Report* states that Joshua Sarate said ***he couldn't recall what the male suspect was wearing***. See [Def. Ex. 3 pg. 41 of 196].

The above clearly show inconsistencies in the *APD GO Report and SIU Presentation*.

Statements of Issac Boston

Further, Defendant Officers alleges the following in the SIU Presentation that Issac Boston was looking at a female wearing a money green shirt when a black male wearing all black with a small afro came up and told him “don’t be looking at my girl.” The black male then lifted his shirt and displayed a gun. See [Def. Ex. 14 pg. 35 of 68]. However, the *APD GO Report* don’t even mention Issac Boston name at all. See [Def. Ex. 3].

The above statements are the epitome of an opinionated and untrustworthy report. Therefore, the Courts must reject all evidence offered by the Defendants to support their motion for summary judgment via the *APD GO Report* and *SIU Presentation*.

III. Plaintiff’s Statement of Additional Facts & Evidence.

1. On the date of the incident a 911 caller stated that a man was driving in a vehicle and shooting people. See [Def. Ex. 17 - 911 Call (2) (Ofc 0029) - Sealed Document]
2. The Defendant Officers were searching for a person with a white shirt and large afro as the possible shooter. See [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 07:00 – 08:20]
3. Mr. Franklin had was wearing a black shirt and did not have a large afro. See [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 07:00 – 08:20].
4. The Defendant Officers acknowledge that Mr. Franklin was not the suspected shooter and had identified a possible suspect further up the street. However, they diverted their attention

back to Mr. Franklin because a girl was yelling at him. [Def. Ex 9 - Radford BWC (OFC 0027) - Sealed Document at 06:04 – 06:44].

5. Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin. [Def. Ex 8 - Radford BWC (OFC 0027) - Sealed Document at 08:41 – 08:44]; [Def. Ex 9 - Radford BWC (OFC 0027) - Sealed Document at 07:02 – 07:05]; Def. Ex. 10 - Bowman BWC (OFC 0025) - Sealed Document at 07:05 – 07:08] [Pl. Exhibit 1 – Surveillance camera recording of the shooting]
6. Mr. Franklin suffered gunshots wound to his back, left buttocks and left hip. [Pl. Exhibit 2 – Medical Examiner Report]¹⁰
7. Defendant Officers discharged their weapons collectively 19 times. Mr. Franklin was in a crouched fetal and was not posing an immediate threat to them or the public at the time he was shot and killed by the Defendant Officers. Despite of being incapacitated the Defendant Officers continue to use unwarranted force that resulted in Mr. Franklin’s death. [Pl. Exhibit 1 – Surveillance camera recording of the shooting].¹¹

IV. Legal Standard

A. Summary Judgment Standard.

The party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.”¹² The burden then shifts to the

¹⁰ Pl. Exhibit 2 – Medical Examiner Report has been previously manually filed with the Court. See Doc. 46

¹¹ Pl. Exhibit 1 – Surveillance camera recording of the shooting has been previously manually filed with the Court. See Doc. 46

¹² Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

nonmoving party to establish the existence of a genuine issue for trial.¹³ After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted.¹⁴ When reviewing a motion for summary judgment, we must “must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” No genuine issue of disputed fact exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”¹⁵

B. Qualified Immunity Standard.

The doctrine of qualified immunity shields public officials from suit and liability under § 1983, “so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”¹⁶

The court evaluates claims of qualified immunity at summary judgment using a two-pronged inquiry, which may be considered in either order.¹⁷ The first prong “asks whether the facts, ‘taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a federal right.’”¹⁸

¹³ Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986); Wise v. E.I. Dupont de Nemours & Co., 58 F.3d 193, 195 (5th Cir. 1995).

¹⁴ Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000).

¹⁵ Mason ex rel. Mason v. Lafayette City-Parish Consol. Gov’t, 806 F.3d 268, 274-75 (5th Cir. 2015).

¹⁶ Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)); accord Crane v. City of Arlington, 50 F.4th 453, 463 (5th Cir. 2022); see also Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986).

¹⁷ Pearson, 555 U.S. at 236.

¹⁸ Tolan v. Cotton, 572 U.S. 650, 655-56 (2014) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)) (cleaned up). The second prong of the analysis “asks whether the right in question was ‘clearly established’ at the time of the violation.” Id. (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

When a defendant pleads qualified immunity as a defense, the plaintiff must rebut the defense by raising a "'genuine issue of material fact suggesting [the defendant's] conduct violated an actual constitutional right,' and [the defendant's] actions were 'objectively unreasonable in light of clearly established law at the time of the conduct in question.'"¹⁹

V. Arguments & Authorities

A. A genuine issue of material fact exists as to whether the Defendants Officers violated a clearly established constitutional right.

In Mason ex rel. Mason v. Lafayette City-Parish Consol. Gov't, the Fifth Circuit held that a police officer was not entitled to qualified immunity when he shot an armed man after the armed was down on ground and appeared incapacitated.²⁰ 806 F.3d 268 (5th Cir. 2015). Notably, the Mason ex rel. Mason Court opined the following:

We therefore must determine whether Faul is entitled to qualified immunity on the grounds that he did not violate clearly established law. The law is clearly established if there is factually similar, controlling case law from this court or the Supreme Court. The present case is an “obvious one where *Graham* and *Garner* alone offer a basis for decision.” The constitutionality of the final two shots can be decided on the threshold issue—under *Garner*—of whether *deadly* force was permissible, i.e., whether Mr. Mason objectively posed an immediate threat. The second, more complex inquiry dictated by *Graham*—balancing the severity of the threat against other factors—is not necessary here. A reasonable jury could conclude that when Faul fired the final two shots, Mr. Mason would have appeared incapacitated to an objectively reasonable officer. Shooting a clearly incapacitated suspect is inconsistent with *Garner*'s command that deadly force is unconstitutional when a “suspect poses no immediate threat to the officer and no threat to others.” We therefore conclude that there are material fact questions as to whether Faul is entitled to qualified immunity for firing the final two shots. The district court erred in granting Faul's motion for summary judgment on the Fourth Amendment and state law claims.²¹

¹⁹ Bagley v. Guillen, 90 F.4th 799, 802 (5th Cir. 2024) (quoting *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)).

²⁰ 806 F.3d 268 (5th Cir. 2015).

²¹ Id. at 277-78 (5th Cir. 2015).

The Defendants want this court to believe that Mr. Franklin was an active shooter whom they tracked down, who displayed a firearm, and they shot him. Upon review of the Plaintiff's additional facts, this Court will find that a genuine issue of material fact exists as to whether Mr. Franklin was an active shooter. However, it is undisputed that Mr. Franklin was shot in the back by while he was down on the ground. In the Mason ex rel. Mason, Mr. Mason was shot 5 times while he was standing and 2 times while he was on the ground. Here, the Defendants fired 19 times collectively. According to the body camera of the Defendant Officers, arguably all shots were fired when Mr. Franklin was on the ground crouched in a fetal position. As in Mason ex rel. Mason, this case as well can be decided on the threshold issue—under Garner—of whether deadly force was permissible. Graham v. Connor, the Supreme Court directed courts determining an officer's objective reasonableness to pay “careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.”²² We consider reasonableness “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²³ Additionally, we must make “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.” Our inquiry is limited to whether the officer “was in danger at the moment of the threat” that resulted in the use of force.²⁴ We have explained that “an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.”²⁵

²² “ 490 U.S. 386, 396, (1989).”

²³ Id.

²⁴ Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir.2011)

²⁵ Lytle v. Bexar Cnty., 560 F.3d 404, 413 (5th Cir.2009).

1. **The severity of the crime at issue**

As explain above, the only crime that Mr. Franklin was remotely suspected of was displaying a handgun in plain view of another person in a public place in violation of Texas Penal Code § 46.02 which is only a Class A misdemeanor. The Defendant Officers was aware the Mr. Franklin did not match the description of the shooting suspect at the time they chased him.

2. **Whether Mr. Franklin posed an immediate threat to the safety of the officers or others is an issue of material fact in the case.**

It is undisputed that after Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin back to front. At the moment the Defendant Officers discharged their weapons, Mr. Franklin did not pose an immediate threat to them or the public at the time he was shot and killed by the Defendant Officers. Even if this Court find that the initial shots of the Defendant Officers justified, the constitutionality of the remaining shots can be decided on the threshold issue—under Garner—of whether *deadly* force was permissible, i.e., whether Mr. Franklin objectively posed an immediate threat. The second, more complex inquiry dictated by Graham—balancing the severity of the threat against other factors—is not necessary here. A reasonable jury could conclude that when the Defendant Officers fired the remaining shots, Mr. Mr. Franklin would have appeared incapacitated to an objectively reasonable officer.

3. **Whether Mr. Franklin was actively resisting arrest or attempting to evade arrest by flight is an issue of material fact in the case**

Mr. Franklin fell to the ground, he immediately rolled over facing away from the Defendant Officers and was crouched in a fetal position when the Defendants Officers discharged their weapons 19 times striking Mr. Franklin back to front. He was no longer resisting arrest or

evading arrest at the moment the Defendant Officers discharged their weapons. The record reflects that the Defendant Officer discharged their firearms collectively a total of 19 times. It is undisputed that Mr. Franklin was crouched in a fetal position when the Defendants Officers discharged and continue to discharge their weapons 19 times striking Mr. Franklin back to front. He was no longer resisting arrest or evading arrest at the moment the Defendant Officers discharged their weapons. Therefore, and like Mason ex rel. Mason, a genuine issues of material fact arise as to whether the force used against Mr. Franklin was excessive under Graham. The video evidence in this case creates an issue of material fact that a reasonable jury could conclude that the Defendants Officers use excessive force by collectively firing 19 shots a Mr. Franklin while Mr. Franklin was crouched in a fetal position.

Based on the above, the Plaintiff respectfully request the Court to deny the Defendant Officers motion for summary judgment.

Submitted this 30th day of March 2025.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

MACK INJURY ATTORNEYS

Nathaniel Mack, III, Esq.
Texas Bar No. 24078896

8023 Vantage Drive, Suite 690

San Antonio, TX 78230
(T) 210-333-6225
(F) 210-853-3152
nmack@macktexaslaw.com

STROM LAW FIRM
Bakari Sellers, Esq.

6923 N. Trenholm Road
Columbia, SC 29206
Tel. 803.252.4800
bsellers@stromlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon all parties in this case by Statutory Electronic Service and via e-mail.

Submitted this 30th day of March 2025.

LAW OFFICES OF HARRY M. DANIELS

/s/ Harry M. Daniels
Harry M. Daniels, Esq.
Georgia Bar No. 234158

4751 Best Road, Suite 490
Atlanta, GA 30337
(T) 678-664-8529
(F) 800-867-5248
daniels@harrymdaniels.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

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Case No. 1:23-cv-00276-DAE

**UNOPPOSED MOTION FOR LEAVE FOR EXTENSION OF TIME TO FILE REPLY
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Officers Kelby Radford, Ryan Rawlins, and Jacob Bowman, Defendants in the above-entitled and numbered causes, and files this Unopposed Motion for Leave for Extension of Time to file their Reply brief in support of Defendants' Motion for Summary Judgment (Dkt. 47), and in support thereof would respectfully show this Court as follows:

I. Relevant Procedural Background

1. Defendants’ filed their Motion for Summary Judgment on March 5, 2025 (Dkt. 47). Plaintiff filed her Response on March 30, 2025 (Dkt. 50). Defendants’ deadline to file their Reply brief is today, April 7, 2025.

II. Request for Leave

2. Defendants respectfully request leave from this Court to be granted a 1-week extension of time to submit their Reply brief which would extend their deadline to **Monday, April 14, 2025**.

Counsel believes that extra time is needed, due in part to other pressing legal matters but also due to the complexity of the case at bar, to properly ascertain the facts and to address the Response filed by Plaintiff's counsel. The Defense does not seek this extension for the purposes of delay, but so that justice may be done.

3. The undersigned has conferenced with Plaintiff's counsel regarding this motion. Counsel for Plaintiff is unopposed to the requested extension.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants, Officers Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grant this unopposed motion and allow Defendants to file their Reply on or before **April 14, 2025**, and for all other relief to which they may be entitled in law or in equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.
4700 Mueller Blvd., Suite 200
Austin, Texas 78723
(512) 476-4600
(512) 476-5382 – Fax

By: /s/ Blair J. Leake
Blair J. Leake
State Bar No. 24081630
bleake@w-g.com
Stephen B. Barron
State Bar No. 24109619
sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
AND JACOB BOWMAN**

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2025, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake
Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
wrongful death beneficiaries of
Anthony Marquis Franklin,
Plaintiff,

V.

KELBY RADFORD,
RYAN RAWLINS, and
JACOB BOWMAN,
Defendants.

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Case No. 1:23-cv-00276-DAE

**UNOPPOSED MOTION FOR LEAVE TO EXCEED PAGE LIMIT OF DEFENDANTS’
REPLY IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, who file this Unopposed Motion for Leave to Exceed Page Limits of Defendants' Reply in Support of their Second Motion for Summary Judgment (Dkt. 47) and in support thereof, would respectfully show unto the Court as follows:

I. RELIEF SOUGHT

1. Defendants respectfully request leave of Court to file their Second Motion for Summary Judgment in excess of the page limits as set forth by the Local Rules of the Western District. Pursuant to Local Rule CV-7, Replies in support of a non-discovery related motion are permitted ten (10) pages. Defendants now request leave of the Court to file their Reply in excess of the limit by an additional one (1) page—for a total of eleven (11) pages excluding the caption, signature block, and certificates.

2. Defendants request such leave because the undersigned believes the extra page is necessary and important to this Court's ability to receive a full discussion of the facts and legal issues presented. This Reply in Support of Summary Judgment involves an excessive force claim, which the Fifth Circuit has held are "necessarily fact intensive."¹

3. Counsel conferenced with Plaintiff's counsel requesting up to an additional five (5) pages. Plaintiff's counsel indicated they were unopposed this request. However, after editing, the Reply only exceeded page limits by one (1) page.

II. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman, respectfully request that this Court grants their Motion for Leave, allow Defendants to file their reply that is no longer than **eleven (11) pages**, and for such other and further relief to which they may justly be entitled.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

ATTORNEYS FOR DEFENDANTS

¹ *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009).

CERTIFICATE OF CONFERENCE

Counsel for the defense has complied with the Court's requirement to confer. On April 14, 2025, Defense counsel conferred with Plaintiff's counsel via email requesting up to an additional five (5) pages. Plaintiff's counsel indicated they were unopposed this request. However, after editing, the Reply only exceeded page limits by one (1) page.

/s/ Blair J. Leake
Blair J. Leake

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2025, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake
Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually, and on behalf of all
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Case No. 1:23-cv-00276-DAE

**DEFENDANTS' REPLY IN SUPPORT OF
SECOND MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, Kelby Radford, Ryan Rawlins, and Jacob Bowman (hereinafter “Officer Defendants”), respectfully file this Reply in Support of their Second Motion for Summary Judgment (Dkt. 47) and dismissal on the grounds they are entitled to qualified immunity and dismissal on all of Plaintiff’s claims:

I. SUMMARY OF THE ARGUMENT

1. Plaintiff has failed to carry her qualified immunity burden to show that the Officer Defendants’ “particular conduct is clearly established” as a constitutional violation. A sister court has already looked and found no precedent “where the Fifth Circuit has found a violation of a clearly established right where officers used deadly force against an armed suspect who pointed a weapon at one or more officers”—such as here. Plaintiff’s cited *Mason* precedent also explicitly involves two separate rounds of volleys with a clear gap of time in between, which this Court and others have held is legally distinct from an uninterrupted volley of shots—such as here. Plaintiff did not—and cannot—identify any binding precedent involving the same factual scenario.

2. Plaintiff’s objections to witness statements do not change the video-footage-proven fact that *the Officer Defendants were engaged in a manhunt for an active shooter* in downtown Austin. Mere minutes after a victim was shot in the head, the Officer Defendants found the armed-and-defiant Decedent who matched almost every descriptor of the shooter (and *was* the active shooter by all accounts). Decedent drew his gun upon seeing police approaching him. Decedent refused commands to drop his gun. Decedent then pointed his gun at the police officers chasing him—as conceded by Plaintiff’s own expert. They responded a split second later by each sending one uninterrupted volley of shots at him. If confronting an armed-and-defiant active shooter is not shielded by qualified immunity, then it is hard to imagine what possibly could be.

II. ARGUMENTS & AUTHORITIES

A. **The objected-to evidence is admissible during the summary judgment stage for context and rebuttal purposes.**

3. Portions of the Officer Defendants’ summary judgment evidence were largely presented for the purpose of providing context for the Court in a concise format. Generally, the only evidence that is directly material to the use of force analysis are the facts that were “knowable” to the officers

at the time the force was used.¹ For example, two differing witness statements² taken on different days that were never relayed to the Officer Defendants would not be directly probative here for an excessive force analysis. Plaintiff's objections represent an attempt to muddy the issues by attacking mere context evidence rather than the deadly force analysis: the inherent danger of confronting an armed-and-defiant active shooter who has just pointed a gun at officers.³

4. The above disclaimer notwithstanding, such evidence is still proper at the summary judgment stage for context and preemptive rebuttal purposes:

Summary judgment evidence need not be authenticated or presented in admissible form to be competent under Rule 56. Instead, the relevant question is whether its proponent has shown that it could "be presented in a form that would be admissible at trial."⁴

5. The police report and SIU presentation slideshow at issue each reflect that numerous witnesses saw Decedent firing his gun in downtown Austin on January 15, 2023, including his own girlfriend and the victim he shot in the head. It was Plaintiff's burden to prove that any such statements were untrustworthy, yet Plaintiff failed to depose or obtain their declarations for this Court's consideration.⁵ If a trial proves necessary—and if Plaintiff truly wants to challenge that Decedent was not the shooter in front of a jury—then the Officer Defendants will call one or more of the cited witnesses to testify regarding the same matters they were quoted about in the summary

¹ See e.g., *White v. Pauly*, 580 U.S. 73, 76–77 (2017) ("Because this case concerns the defense of qualified immunity, however, the Court considers ***only the facts that were knowable to the defendant officers.***") (emphasis added).

² Pl.'s Resp. to Mot. Summ. J., pg. 5, Dkt. 50.

³ *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (For cases where deadly force is involved, the Fifth Circuit has narrowed the excessive force inquiry to "whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting.").

⁴ *Flores v. United Rd. Servs. Midwest, Inc.*, No. 5:19-CV-1066-DAE, 2021 WL 9908546, at *5 (W.D. Tex. July 22, 2021) (citing *inter alia* *Lee v. Offshore Logistical & Transp.*, L.L.C., 859 F.3d 353, 355 (5th Cir. 2017)).

⁵ See *Reliastar Life Ins. Co. v. Thompson*, No. CIV. M-07-140, 2008 WL 4327259, at *4 (S.D. Tex. Sept. 16, 2008).

judgment evidence. The Officer Defendants have thus proven that the summary judgment evidence provided to this Court “[can] be presented in a form that would be admissible at trial,” and thus may be validly considered at this juncture for purposes that include background context.

B. Plaintiff’s “additional facts” are a curated attempt to generate alleged minor inconsistencies—many of which are directly contradicted by summary judgment evidence and the deposition testimony Plaintiff chose not to use.

6. The Officer Defendants previously invoked their Fifth Amendment rights during the initial depositions in this case due to pending grand jury proceedings. After the grand jury later no-billed them, the Officer Defendants sought and were granted the right to be deposed a second time so they could testify fully and openly—at their own expense. Plaintiff’s counsel took all three Officer Defendants’ depositions shortly before Plaintiff’s summary judgment response brief was due. Several of the issues raised in Plaintiff’s response brief were explored in detail during those depositions. Glaringly, Plaintiff made the tactical decision *not* to provide this Court the Officer Defendants’ deposition transcripts as summary judgment evidence.

7. Respectfully, Plaintiff’s response brief instead cherry picks and distorts what the video footage depicts. On the night in question, Decedent was wearing black clothes and his girlfriend was wearing white clothes. However, Plaintiff claims in his response brief that Officer Rawlins was looking for a suspect *wearing* a white shirt by citing a statement from the harder-to-hear Officer Radford’s body camera footage.⁶ Officer *Rawlins*’s video footage reveals that Officer Rawlins actually said that a potential suspect he was observing was not “*with* [someone wearing] a white shirt”—and then Officer Bowman immediately pointed out that the suspect was actually

⁶ Pl.’s Resp. to Mot. Summ. J., pg. 6, Dkt. 50.

with a woman wearing white shirt.⁷ Plaintiff's counsel questioned Officer Rawlin about this fact during his deposition but tactically chose not provide his sworn answers to this Court.

8. Thankfully, the existing summary judgment evidence sufficiently corroborates that the officers were searching for a male suspect wearing black clothes. Minutes earlier, for example, Officer Rawlins asked dispatch to repeat the suspect's description, and Officer Bowman responded to him that the suspect description is "black male, black shirt."⁸ After Officer Radford joined them in the vehicle, Officer Bowman reiterated again moments later that the description was "afro...afro, black shirt, afro."⁹ Each Officer Defendants' declarations likewise corroborate the description of the suspect known to them when they confronted Decedent.¹⁰

9. Plaintiff also argues that "[t]he Defendant Officers acknowledged that Mr. Franklin was not the suspected shooter" because of one stray comment from *only* Officer Rawlins. The statement in question was "that's not him," but there is nothing in the summary judgment record suggesting that Officer Rawlins was talking about Decedent when he said that.¹¹ Plaintiff failed to provide any deposition testimony or other evidence that supports her interpretation. The evidence that *is* in the record reflects that Officer Rawlins's statement of "that's not him" was referring to a different "relaxed black male [he] had concluded was not the shooter."¹²

10. Plaintiff also alleges that the Officer Defendants only considered Decedent to be the active shooter because his girlfriend was yelling at him, but the rest of the summary judgment record

⁷ **Ex. 9**, *Rawlins BWC*, 5:34 – 5:38, Dkt. 47-9.

⁸ **Ex. 10**, *Bowman BWC*, 2:25 – 2:30 ("what is the suspect's description?"); 2:55 – 3:00 ("black male, black shirt"), Dkt. 49-10.

⁹ *Id.* at 3:08 – 3:15 (Bowman asks to be taken to next intersection); 3:15-3:21 ("Radford says "afro...afro, black shirt, afro.").

¹⁰ **Ex. 22**, *Rawlins Decl.*, Dkt. 47-22; **Ex. 23**, *Bowman Decl.*, Dkt. 47-24; **Ex. 24**, *Radford Decl.*, Dkt. 47-26.

¹¹ Pl.'s Resp. to Mot. Summ. J., pgs. 4–5, Dkt. 50.

¹² **Ex. 22**, *Rawlins Decl.*, pgs. 2–3, ¶ 7, Dkt. 47-22.

squarely and exhaustively contradicts that claim.¹³ Likewise, while it may be true that Decedent was shot while he was on the ground,¹⁴ it doesn't change the fact that he was pointing his gun at the Officer Defendants *while he was on the ground*.¹⁵

11. The Supreme Court has reiterated time and again that “[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.”¹⁶ Plaintiff's cherry-picked and distorted factual claims are blatantly contradicted by the record, and this Court should not adopt it.

C. The District Court of the Northern District of Texas confirmed in *Hodge* that no clearly established law exists to protect a suspect who points a gun at police officers from the use of deadly force in return.

12. Plaintiff argues that *Mason* created clearly established law that would defeat qualified immunity in this case. The District Court of the Northern District of Texas examined *Mason* in the *Hodge* case discussed *infra* and squarely disagreed with Plaintiff's arguments herein. *Hodge* did not identify “*any case where the Fifth Circuit has found a violation of a clearly established right where officers used deadly force against an armed suspect who pointed a weapon at one or more*

¹³ See e.g., *Id.* at ¶¶ 8–9 (stating that Officer Rawlins was drawn to Decedent because Officer Bowman pointed him out as having a black jacket, and because he observed he was a black male, had a thin build, was displaying very suspicious behavior based on his law enforcement training and experience, because he had a gun in his hand, and because he fled as soon as the Officer Defendants engaged him.).

¹⁴ Pl.'s Resp. to Mot. Summ. J., pg .7, Dkt. 50.

¹⁵ See e.g., **Ex. 2, *Rodriguez Illustrations*, pgs. 5–6**, Dkt. 47-2.

¹⁶ *Scott v. Harris*, 550 U.S. 372, 380 (2007).

officers.”¹⁷ The Officer Defendants herein are likewise entitled to the defense of qualified immunity on the clearly established law prong—at the very least.¹⁸

D. *Mason* and related precedents only serve to provide legal validity to the Officer Defendants decision to each fire one volley of rounds at Decedent.

13. Plaintiff cites *Mason* to argue that the final shots fired by the Officer Defendants could be excessive or unconstitutional. In reality, the language of the *Mason* decision itself, Supreme Court precedents, and other related on-point precedents demonstrate that the Officer Defendants’ actions were both reasonable and squarely protected by qualified immunity.

a. Unlike here, *Mason* had two separate volleys of shots—one fired before obvious incapacitation and one fired afterwards—with a clear gap of time in between.

14. In *Mason*, the officer fired one volley of shots at the assailant, “*temporarily stopped firing*,” and then after a clear break in time “fired [another] two shots into Mr. Mason’s back” as he laid incapacitated and face-down on the ground.¹⁹ A witness testified that “once [the decedent] was on the ground she only saw him, ‘pick up his head and put it back down.’”²⁰ The Fifth Circuit noted that “the record reflects that *there was a break between the first five and last two shots*,” and that other evidence corroborated the incapacitation of the decedent before the second volley of shots—namely that his arm was so injured that it was unlikely he could have even moved his arm as alleged.²¹ “In light of [the witness and medical expert’s] testimony, a reasonable jury could

¹⁷ *Hodge v. Engleman*, 636 F. Supp. 3d 727, 735 (N.D. Tex. 2022), *aff’d*, 90 F.4th 840 (5th Cir. 2024) (emphasis added).

¹⁸ **Ex. 13**, *Report of Geoffrey Alpert*, **pgs. 5–7**, Dkt. 47-13 (Plaintiff’s own expert admits that the video shows that decedent extended his gun toward the Officer Defendants).

¹⁹ *Mason v. Lafayette City-Par. Consol. Gov’t*, 806 F.3d 268, 273 (5th Cir. 2015).

²⁰ *Id.* at 274.

²¹ *Id.* at 277.

conclude that Mr. Mason lay incapacitated on the ground and did not move in a threatening manner” during the gap in time between the two separate volleys.²²

15. The *Mason* panel cited the Supreme Court’s holding in *Plumhoff*, which reflects perfectly the differences between *Mason* and the case at bar:

This would be a different case if petitioners had initiated ***a second round of shots*** after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is ***not*** what happened.²³

16. That is ***not*** what happened here either. No Officer Defendant fired a “second round of shots” at all. There was thus no gap in time when any Officer Defendant could have had the chance to perceive that Decedent was allegedly incapacitated. Decedent certainly did not surrender before any Officer began firing. The Officer Defendants’ actions were thus reasonable and merit summary judgment at the threshold level.

b. Numerous other precedents likewise support the Officer Defendants’ split-second decisions herein—including the shots fired while Decedent was on the ground.

17. The Supreme Court has emphasized that “if police officers are justified in firing at a suspect in order to end a severe threat to public safety”—such as here where an active shooter was fleeing, defying commands to drop his gun, and ***pointing his gun at a civilian and then at officers***—“the officers need not stop shooting until the threat has ended.”²⁴ In *Berube*, the assailant raised a hammer while standing ten feet away from an officer. The officer fired at the assailant, and the final shots of her single “fusillade” of shots allegedly occurred after the assailant fell to the ground.

²² *Id.*

²³ *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (emphasis added).

²⁴ *Id.* at 777; see also *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (noting that “the Supreme Court’s standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.”).

The First Circuit held that an officer cannot be penalized for the last rounds of one “fusillade” of shots just because the final shots occurred after an assailant falls down:

It may well be true that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from the very brief time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. ***Conley's actions cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself.***²⁵

The Officer Defendants’ actions herein likewise cannot be branded unreasonable just because they allegedly did not perfectly calibrate the number of rounds fired in their own respective *sole* fusillades.

18. In the original *Sheehan* opinion, the Ninth Circuit agreed. Sheehan argued that the officer’s final shot amounted to excessive force because the suspect had fallen down before the final shot was fired. “Assuming, as we must, that Sheehan had already reached the ground when Reynolds fired the final shot, we nonetheless hold that Reynolds is entitled to qualified immunity. Even if Reynolds continued to fire after Sheehan reached the ground, ‘it is clear from the very brief time that elapsed that [Reynolds] made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation.’”²⁶

19. In *Dasho*, a man ran at officers holding a knife. The Officers “fired thirteen times in the space of 1.5 to 3 seconds,” and the plaintiff alleged that the officers “continued shooting him after he ‘fell to the ground and was immobilized.’” The court granted the officers summary judgment, cited *Plumhoff*, and held that, “when faced with a tense, uncertain, rapidly evolving, and dangerous situation such as the one that existed here, ***an officer may reasonably fire a volley of shots at a***

²⁵ *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007).

²⁶ *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1230 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom. City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) (citing *Berube*, 506 F.3d at 85).

threatening suspect, even if some of those shots are fired as the suspect falls to or lies on the ground.”²⁷

20. In *Dunklin*, Officers fired at a suspect who had fallen to the ground.

This was a rapidly evolving situation that lasted—from the first to the last shot—7 to 8 seconds. Both officers saw a gun in Barnes’ hands...***While Barnes was on the ground***, the Officers could not see his hands and believed that he posed a continuing danger...Under the ‘split-second’ circumstances of this case, it was ***reasonable for the Officers to continue firing their weapons until they believed that Barnes no longer presented a threat.***²⁸

21. In *Estate of Rodgers*, an officer fired “***a second volley of shots***” ***two seconds after a suspect “fell to the ground...slightly curled up, thus presenting the top or back of his head to”*** the officer—and where the suspect had dropped his firearm before the second volley. The Fourth Circuit held that “nothing in the record indicates that Officer Waters knew that Rodgers had dropped his weapon, and thus was no longer a threat. We conclude that on this evidence, ***a reasonable factfinder could only conclude that Officer Waters was acting to ensure the neutralization of a deadly threat.***”²⁹

22. In *Webb*, the court was tasked with deciding whether firing a “third shot...after Mr. Webb had fallen to the ground” was reasonable. The Court held that the earlier shots were reasonable because the suspect had aimed a gun at officers, and thus, correspondingly, the final shot taken after the suspect had fallen down was the officer “acting to ensure the neutralization of a deadly threat” and thus was likewise reasonable.³⁰

²⁷ *Dasho v. City of Fed. Way*, No. C12-1398JLR, 2015 WL 3796284, at *3 (W.D. Wash. June 17, 2015).

²⁸ *Barnes v. City of Pasadena*, No. 10-CV-00470-JHN-PJWX, 2011 WL 13143536, at *8 (C.D. Cal. May 5, 2011), *aff’d*, 508 F. App’x 663 (9th Cir. 2013) (emphasis added).

²⁹ *Est. of Rodgers ex rel. Rodgers v. Smith*, 188 F. App’x 175, 183 (4th Cir. 2006) (emphasis added).

³⁰ *Webb v. Raleigh Cnty. Sheriff’s Dep’t*, 761 F. Supp. 2d 378, 392 (S.D.W. Va. 2010).

23. In *Patterson*, the plaintiff likewise attempted to argue that the officers’ final shots were unconstitutional because by that point “he was shot after falling to the ground.” The Court found his fall to the ground to be inconsequential because the plaintiff had “***not alleged facts supporting any significant gap in shooting***...and the record does not support such a determination. Rather, the reasonable inference is that ***the shots proceeded in nearly serial fashion***...”³¹

24. In *Ayala*, officers were alleged to have shot the suspect one last time “several seconds after the other shots...while he was on the ground.” Even after the suspect fell to the ground, the court held that the evidence did not show that the officer knew before he fired the last shot that “the danger to him had clearly and unmistakably passed.” The court concluded that “***[t]he Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm***.”³²

25. In *Cantu*, this Court dealt with a similar fact pattern, analyzed *Mason* as a precedent, and found the officers’ multiple rounds fired in single respective volleys—including allegedly firing “eight additional times after he collapsed”—were reasonable:

Camacho and Mattingly fired at Cantu immediately after he pointed a gun at Joseph and Mattingly, and ***the two fired every shot within a few seconds***. Plaintiffs offer no evidence to indicate that it was clear to Camacho and Mattingly that Cantu was no longer a threat after the first shots. ***There was no break between the shots fired while Cantu was standing and those fired after he fell to the ground***...³³

26. In *Hodge*, the plaintiff argued that the “the quantity of shots...coupled with their ***continued use of force after Hodge was incapacitated on the ground***, constituted excessive force.”³⁴ The

³¹ *Patterson v. Randazzo*, 160 F. Supp. 3d 849, 863 (M.D.N.C. 2016) (emphasis added).

³² *Ayala v. Wolfe*, No. 1:11-CV-624, 2012 WL 3644740, at *7 (M.D.N.C. Aug. 23, 2012), *aff’d*, 546 F. App’x 197 (4th Cir. 2013) (emphasis added).

³³ *Cantu v. Austin Police Dep’t*, No. 1:21-CV-00084-DAE-SH, 2023 WL 8634821, at *8 (W.D. Tex. Dec. 12, 2023), report and recommendation adopted, No. 1:21-CV-84-DAE, 2024 WL 492395 (W.D. Tex. Feb. 8, 2024), reconsideration denied, No. 1:21-CV-84-DAE, 2024 WL 2318176 (W.D. Tex. Apr. 16, 2024), and *aff’d*, No. 24-50397, 2025 WL 229490 (5th Cir. Jan. 17, 2025) (emphasis added).

³⁴ *Hodge*, 636 F. Supp. 3d at 735.

Northern District of Texas District Court noted that “[w]hen considering the threat posed to an officer, the Fifth Circuit gives great weight to whether a suspect is armed and defiant”—such as here.³⁵ In *Hodge*, the suspect refused police commands to show his hands, kept his gun in hand, and then pointed his gun in the officers’ direction. The court held that the two officers, “operating under rapidly evolving circumstances, were ‘*not required to wait until [Hodge shot his gun] to confirm that a serious threat of harm exist[ed].*’” The Court likewise held that the number of shots fired (19), and that some of them were fired after Hodges fell to the ground, did not change the court’s conclusion that the officer’s actions were reasonable.³⁶

27. Applied here, society asked and expected these Officer Defendants to find and stop an active shooter in our community. Minutes later, they confronted that *armed-and-defiant active shooter*, and he responded by *drawing and aiming his gun at them*. After his jump-and-roll maneuver—with only a split second to act—the law did not require the Officer Defendants to first confirm that Decedent was going to shoot yet another person before they could legally act to protect themselves. Once a gun is aimed, it’s too late to stop the fatal consequences that usually follow. That is not a risk the law—in good conscience—can ask police officers and their families to take.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman respectfully request that this Court grant summary judgment on the grounds that they did not violate Decedent’s constitutional rights, or in the alternative find they are entitled

³⁵ *Id.* (citing *inter alia* *Garza v. Briones*, 943 F.3d 740 (5th Cir. 2019)) (emphasis added).

³⁶ *Id.*

to qualified immunity on all of Plaintiff's claims, and for all other relief to which they may be justly entitled in law or equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.

4700 Mueller Blvd., Suite 200

Austin, Texas 78723

(512) 476-4600

(512) 476-5382 – Fax

By: /s/ Blair J. Leake

Blair J. Leake

State Bar No. 24081630

bleake@w-g.com

Stephen B. Barron

State Bar No. 24109619

sbarron@w-g.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2025, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake

Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY, individually,	§	NO. 1:23-CV-276-DAE
and on behalf of all wrongful death	§	
beneficiaries of Anthony Marquis	§	
Franklin,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	
	§	
KELBY RADFORD, RYAN	§	
RAWLINS, and JACOB BOWMAN,	§	
	§	
<i>Defendants.</i>	§	

ORDER: (1) GRANTING SECOND MOTION FOR SUMMARY JUDGMENT;
AND (2) OVERRULING OBJECTIONS TO EVIDENCE

Before the Court is: (1) Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman’s (“Officer Defendants”) Second Motion for Summary Judgment (Dkt. # 47); and (2) Plaintiff Dorothy C. Motley’s (“Plaintiff”) objections to Defendants’ summary judgment evidence (Dkt. # 50).

The Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda in support of and in opposition to the motion and the relevant law, the Court, for the reasons that follow, **GRANTS** the motion for summary judgment, and **OVERRULES** the objections to Defendants’ summary judgment evidence.

BACKGROUND

This case arises from an officer-involved shooting on January 15, 2023, that resulted in the death of Anthony Marquis Franklin (“Franklin”).

Franklin was the son of Plaintiff Dorothy C. Motley. (Dkt. # 1 at 3.)

Around 11:30 p.m. on the night of January 15th, officers responded to several “shots-fired” 911 calls in downtown Austin. (Dkts. ## 48-14–18; 48-3.)

At the time, Officer Defendants were all on duty and working shifts patrolling the area. (Dkts. ## 47-22; 47-24; 47-26.) Austin Police Department (“APD”) dispatch announced the suspect’s description over police radio at 11:39 p.m. and described the shooter as a Black male with a black shirt and afro style hair.¹ (Dkt. # 48-3 at

¹ While there were initially varying reports about the suspect’s clothing, and whether the suspect was in a vehicle, the record evidence demonstrates that officers were looking for a male suspect wearing black or dark clothes who was on foot. (Dkts. ## 48-3; 47-22 at ¶¶ 5–7; 47-24 at ¶ 5; 47-26 at ¶ 3; 48-9 at 02:25-03:00, 03:15-03:21.) The Court will therefore not credit Plaintiff’s assertions to the contrary. (Dkt. # 50 at 6 (contending police were searching for a suspect who was in a vehicle and who had on a white shirt); see Dkts. ## 48-8 at 05:34-05:38 (“He’s not *with* a white shirt though.” (emphasis added)); 47-22 at ¶¶ 6–7 (explaining that the suspect was with a white-shirted female); 48-3 at 4 (repeatedly describing the suspect as wearing dark clothes and describing the suspect as waving a gun around and not as driving a vehicle)); Scott v. Harris, 550 U.S. 372, 380 (2007) (directing courts not to rely on a party’s account of events when that account is “so utterly discredited by the record that no reasonable jury could have believed [it]” and instead instructing courts to “view the facts in the light depicted by the videotape”). For purposes of deciding the instant motion, however, the Court will assume that the officers were looking for someone with a large afro, which Officer Defendants do not deny. See Darden v. City of Fort Worth, 880 F.3d 722, 727 (5th Cir. 2018), cert. denied, 586 U.S. 816 (2018) (noting that at

4.) Dispatch advised that the suspect had just shot an individual in the head, that the shooter was heading north towards 6th Street and Lavaca Street, and that he appeared intoxicated and was waving a gun around. (Id.; Dkt. # 48-4 at 7.) He was further described as being around 6’1” or 6’2” and having a thin build. (Dkt. # 48-3 at 4.) Dispatch also advised that he was accompanied by a Black female in white clothes. (Dkts. ## 47-22 at ¶ 6; 47-24 at ¶ 6; 47-26 at ¶ 3; 48-8 at 04:00-04:14)

In response to these reports, Officer Defendants began driving around the area in a Utility Task Vehicle (“UTV”) to look for persons that matched the description. (Dkt. # 47-22 at ¶ 6.) The UTV was clearly marked as a police vehicle with flashing blue lights and sirens, and the officers were all in uniform. (See generally Dkts. ## 48-7; 48-8; 48-9.) As the officers were driving downtown, they observed Franklin at the corner of 6th Street and Colorado Street. (Dkt. # 47-22 at ¶ 13; Dkt. # 48-7 at 07:45-08:26.) Franklin was a Black male dressed in dark clothing and was accompanied by a woman in a white shirt. (Dkts. ## 47-24 at ¶ 8; 48-8 at 06:00-06:45.)

It is unclear from the Body Worn Camera (“BWC”) footage whether or not Officer Defendants believed Franklin to be a suspect as they approached.

summary judgment, courts must view the facts in the light most favorable to the non-moving party); (Dkt. # 47-22 at ¶ 5).

(Dkt. # 48-8 at 05:30-06:45.) According to Officer Defendants, they had indeed identified Franklin as a suspect because he matched most² of the descriptors provided for the shooter and he tensed up and started moving away from the UTV as the officers drove closer, a telltale sign of a suspect attempting to evade capture. (Dkts. ## 47 at 6; 47-22 at ¶¶ 7–9.) According to Plaintiff, however, Officer Defendants acknowledged that Franklin was not the suspected shooter and had instead identified someone else further up the street. (Dkt. # 50 at 6–7.) Plaintiff contends that Officer Defendants turned their attention back to Franklin not because they believed him to be the shooter but because a woman was yelling at him. (Id.)³

Nevertheless, it is undisputed that as Officer Defendants approached Franklin in the police-marked UTV, he drew a grey⁴ gun out of his pocket. (Dkts. ## 47-24 at ¶ 11; 47-26 at ¶ 9; 48-8 at 06:35-06:45; 48-7 at 08:10-08:25; see Dkt.

² It is undisputed that Franklin did not have a large afro. (See Dkts. ## 47 at 6; 50 at 6.) Otherwise, Franklin matched the descriptors provided by dispatch for the shooter. (See Dkts. ## 48-3; 47-22.)

³ Although the video footage is not conclusive on this point, it does seem to support Plaintiff's account. (See Dkt. # 48-8 at 05:30-06:45 (Officer Bowman identifies an individual on the corner up ahead as matching the suspect's descriptors but then subsequently states "this girl is yelling at a dude right here *though*" (emphasis added)).)

⁴ In their summary judgment motion, Officer Defendants assert that the suspect they were searching for was alleged to have a grey gun. (Dkt. # 47 at 5.) The only support the Court can find for this assertion is a statement in Officer Rawlins' declaration that Franklin's gun "matched the description of the gun used by the shooter." (Dkt. # 47-22 at ¶ 10.) Plaintiff does not appear to dispute this account.

50.) At that point, Officer Jacob Bowman (“Officer Bowman”) yelled to the other officers, “he’s got a gun,” and Franklin fled, gun in hand. (Dkts. ## 48-8 at 06:35-06:45; 48-7 at 08:10-08:30.) Officer Defendants jumped out of the UTV and shouted at Franklin to “drop the gun!” (Dkt. # 48-7 at 08:20-08:35.) Officer Kelby Radford (“Officer Radford”) ran after Franklin on foot, continuing to shout at him to “drop the gun.” (Id.) Officers Ryan Rawlins (“Officer Rawlins”) and Bowman returned to the UTV to follow. (Dkt. # 48-9 at 06:45-07:04.) Officer Radford then shouted a command of “show me your hands! show me your hands!” as Franklin ran up the steps of a nearby building. (Dkt. # 48-7 at 08:30-08:38.) At that point, a bystander, who had apparently been in the alcove-like area that Franklin ran to, jumped over a short wall onto the sidewalk. (Id.) The bystander raised his arms above his head and ran away. (Id. at 08:35-08:38.) Franklin followed the bystander, jumping over the wall and falling onto the sidewalk. (Id. at 08:36-08:40.) As he did so, Officer Radford shouted, “show me your fucking hands now!” (Id.)

When Franklin jumped over the wall, he held the gun in his right hand. (Dkt. # 48-7 at 08:36-08:40.) Franklin then hit the ground and landed on his back, the gun still clutched in his right hand. (Id.) As he landed, Franklin’s gun

arm pointed directly at Officer Radford,⁵ and at that moment, Officer Radford began firing a volley of shots at Franklin. (Id. at 08:38-08:41.) After Officer Radford began shooting, Officers Rawlins and Bowman opened fire at Franklin as well. (Dkts. ## 38-8 at 06:59-07:05; 48-9 at 07:02-07:08.) Officers Rawlins and Bowman testified that when Franklin landed, they saw his gun pointed at all three of the officers generally⁶ and so began shooting, believing that if they did not do so, Franklin would kill or seriously injure someone. (Dkts. ## 47-22 at ¶¶ 14–15; 47-24 at ¶¶ 15 – 16.)

As Officer Defendants fired at Franklin, he rolled over and crouched into a fetal position, facing away from the officers. (Dkt. # 48-7 at 08:40-08:44.) Officer Defendants continued shooting for approximately two more seconds.⁷ (Id. at 08:42-08:44.) After Officer Defendants stopped shooting, Franklin discarded the gun that was in his right hand. (Id. at 08:44-08:46; Dkt. # 46, Ex. 1 at 00:06-

⁵ Plaintiff does not appear to dispute this fact, and regardless, the Court would not credit such an assertion, as it is visible in the video footage that the gun points at Officer Radford directly. (See Dkt. # 50; see also Dkts. ## 46, Ex. 1 at 00:06-00:09; 48-7 at 08:38-08:41.)

⁶ The BWC footage appears to support this account, although it is not very clear. From Officer Radford's BWC, it looks like, as Franklin falls and hits the ground, his gun pointed towards the street before pointing directly at Officer Radford and then back towards the street where the UTV vehicle would have been located. (See Dkt. # 48-7 at 08:38-08:41.)

⁷ Notably, all of the officers fired continuous volleys of shots; there is no discernable gap in time or hesitation between any of the rounds fired. (Dkts. ## 48-7; 48-8; 48-9.)

00:14.) No officer fired any shot after Franklin dropped his gun. (Dkt. # 48-7 at 08:44-09:35.) Ultimately, Officer Defendants fired 19 shots at Franklin. (Dkts. ## 47-22 at ¶ 16 (fired five rounds); 47-24 at ¶ 17 (fired two rounds); 47-26 at ¶ 14 (fired twelve rounds).) Franklin suffered gunshot wounds to his back, left buttocks, and left hip, and he later died from those wounds. (Dkt. # 46-1.)

On March 14, 2023, Plaintiff Dorothy C. Motley, individually and on behalf of all wrongful death beneficiaries of Anthony Marquis Franklin, filed suit in this case, alleging an excessive force claim pursuant to 42 U.S.C. § 1983, arguing that Officer Defendants violated Franklin's Fourth Amendment rights under the United States Constitution. (Dkt. # 1.) Plaintiff also brought a wrongful death claim and an intentional tort claim of assault and battery. (Id.) On August 18, 2023, Officer Defendants filed a partial motion to dismiss. (Dkt. # 21.) On February 29, 2024, Court granted the motion and dismissed Plaintiff's wrongful death and assault and battery claims, leaving only the § 1983 excessive force claim. (Dkt. # 27.)

On March 5, 2025, Officer Defendants filed the instant motion for summary judgment. (Dkt. # 47.) On March 30, 2025, Plaintiff timely filed a response in opposition to the motion, which contains objections to Defendants' summary judgment evidence. (Dkt. # 50.) Officer Defendants then filed a reply. (Dkt. # 53.)

LEGAL STANDARD

“Summary judgment is appropriate only if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” Vann v. City of Southaven, 884 F.3d 307, 309 (5th Cir. 2018) (citations omitted); see also Fed. R. Civ. P. 56(a). “A genuine dispute of material fact exists when the ‘evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Bennett v. Hartford Ins. Co. of Midwest, 890 F.3d 597, 604 (5th Cir. 2018) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)).

“A qualified immunity defense alters the usual summary judgment burden of proof.” Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010). Ordinarily, at summary judgment, the non–movant must bring forward evidence to create a genuine issue of material fact only *after* the movant shows entitlement to judgment as a matter of law. Giles v. Gen. Elec. Co., 245 F.3d 474, 493 (5th Cir. 2001). However, when, as here, a defendant properly pleads qualified immunity, the burden shifts to the plaintiff to demonstrate that the defendant is not entitled to immunity. See Escobar v. Montee, 895 F.3d 387, 393 (5th Cir. 2018); Romero v. City of Grapevine, 888 F.3d 170, 176 (5th Cir. 2018).

In deciding whether a fact issue has been created, a court must “view the facts in the light most favorable to the nonmovant.” Darden v. City of Fort Worth, 880 F.3d 722, 727 (5th Cir. 2018), cert. denied, 586 U.S. 816 (2018). A

court must also draw all reasonable inferences in favor of the nonmoving party, and it “may not make credibility determinations or weigh the evidence.” Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). But “[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment.” United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)). And, when one party’s version of the facts “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 (2007).

Additionally, at the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017).

DISCUSSION

Officer Defendants have properly invoked the defense of qualified immunity and now move for summary judgment on that basis. (Dkt. # 47.) “To state a claim under § 1983, a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by

someone acting under color of state law.” Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 252–53 (5th Cir. 2005). “The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a person would have known.” Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted).

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Id. Because qualified immunity is immunity from suit rather than a defense to liability, immunity questions should be resolved at the earliest possible stage in litigation. Id. at 231–32.

“In determining whether an officer is entitled to qualified immunity, courts engage in a two-step inquiry.” Romero, 888 F.3d at 176. “The first asks whether the facts, ‘[t]aken in the light most favorable to the party asserting the injury, . . . show the officer’s conduct violated a [federal] right[.]’” Tolan v. Cotton, 572 U.S. 650, 655–56 (2014) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). The second “asks whether the right in question was ‘clearly established’ at the time of the violation.” Id. at 656 (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

I. Violation of a Federal Right

Plaintiff alleges a § 1983 claim for the violation of the Fourth Amendment right to be free from excessive force, alleging that Officer Defendants used excessive force when they shot Franklin 19 times while he was balled up in a fetal position. (Dkt. # 1 at 4–7.) The Fourth Amendment confers a right to be free from excessive force during an arrest. Deville v. Marcantel, 567 F.3d 156, 169 (5th Cir. 2009) (per curiam). To establish a claim of excessive force under the Fourth Amendment, a plaintiff must show “(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable.” Cass v. City of Abilene, 814 F.3d 721, 731 (5th Cir. 2016) (citation and internal quotation marks omitted).

“Excessive force claims are necessarily fact-intensive; whether the force used is ‘excessive’ or ‘unreasonable’ depends on ‘the facts and circumstances of each particular case.’” Deville, 567 F.3d at 167 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). Guiding this inquiry, the Supreme Court has identified three sets of facts which deserve careful consideration in determining whether the force used is “excessive” or “unreasonable”: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396; see also Griggs v. Brewer, 841

F.3d 308, 313–14 (5th Cir. 2016) (“A court must measure the force used under the facts as a reasonable person would perceive them, not necessarily against the historical facts.”). Courts must evaluate the officer’s action “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Poole v. City of Shreveport, 691 F.3d 624, 628 (5th Cir. 2012) (citing Graham, 490 U.S. at 396). “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. (citation and internal quotation marks omitted). However, “[t]he question is one of objective reasonableness, not subjective intent, and an officer’s conduct must be judged in light of the circumstances confronting him, without the benefit of hindsight.” Manis v. Lawson, 585 F.3d 839, 843 (5th Cir. 2009) (citation and internal quotation marks omitted).

However, when a law enforcement officer uses deadly force, the “objective reasonableness balancing test is constrained. It is objectively unreasonable to use deadly force unless it is necessary to prevent a suspect’s escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” Flores v. City of Palacios, 381 F.3d 391, 399 (5th Cir. 2004) (quoting Tennessee v.

Garner, 471 U.S. 1, 3 (1985)) (internal quotation marks omitted). In Manis, the Fifth Circuit explained that the focus of the inquiry is “the act that led [the officer] to discharge his weapon.” 585 F.3d at 845. “It is well-established that the excessive force inquiry is confined to whether the officer [] 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, 992–93 (5th Cir. 2011) (quoting Bazan ex rel. Bazan v. Hidalgo County, 246 F.3d 481, 493 (5th Cir. 2001)) (emphasis in original).

Further, when claims of excessive force are brought against multiple officers in connection with a single event, a court must analyze the officers’ actions separately. Buehler v. Dear, 27 F.4th 969, 985 (5th Cir. 2022) (quoting Darden v. City of Fort Worth, 880 F.3d 722, 731 (5th Cir. 2018)). A separate analysis is not required, however, when it is alleged that the officers acted in unison. Amador v. Vasquez, 961 F.3d 721, 727 n.5 (5th Cir. 2020). Accordingly, in this case, the Court will first analyze the actions of Officer Radford before jointly analyzing the actions of Officers Rawlins and Bowman.⁸

A. Officer Radford

Here, it is undisputed that Officer Radford fired his first and only volley of shots at Franklin only after Franklin pointed a gun at Officer Radford, a

⁸ The Complaint makes distinct allegations as to Officer Radford but discusses the actions of Officers Rawlins and Bowman together. (Dkt, # 1 at 5–6),

fact the video footage confirms. (See Dkt. # 50; see also Dkts. ## 46, Ex. 1 at 00:06-00:09; 48-7 at 08:38-08:41.) This fact, on its own, would allow a reasonable officer to believe that Franklin posed an immediate safety threat, thereby justifying the use of deadly force, and the Court could end its analysis there. Hodge v. Engleman, 636 F. Supp. 3d 727, 735 (N.D. Tex. 2022), aff'd, 90 F.4th 840 (5th Cir. 2024) (“Regardless of whether [the decedent] aimed at [the first officer] or [the second officer] when he carried his gun, [the decedent] did pose a ‘significant and imminent threat of serious harm’ to both officers by pointing the weapon in their direction from no more than fifteen feet away. . . Under Fifth Circuit law, [the officers] were entitled to use deadly force under these circumstances.” (citation omitted)); see Garza v. Briones, 943 F.3d 740, 748 (5th Cir. 2019) (holding that the officers’ shooting and killing of a suspect armed with a BB gun was reasonable when the suspect refused to obey requests to drop his weapon and raised what appeared to be a real gun in the direction of an officer); Wilson v. City of Bastrop, 26 F.4th 709, 714 (5th Cir. 2022) (“[W]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety. . . By the same token, officers need not wait until a fleeing suspect turns his weapon toward bystanders before using deadly force to protect them.” (internal quotations and citations omitted)).

Plaintiff argues that Franklin did not pose an immediate threat to the officers or the public because he was crouched in a fetal position, facing away from Officer Defendants when Officer Defendants discharged their weapons. (Dkt. # 50 at 10, 11.) First, the Court does not agree that at the time of the first shots, Franklin was facing away from Officer Defendants and crouched in a fetal position. The video footage does not support such an account, and the Court will therefore not credit it. (Dkt. # 48-7 at 08:38-08:41.) Rather, the video footage reveals that at the time of the first shots, Franklin was on the ground, holding a gun pointed in the direction of Officer Radford. (Id.) Second, that Franklin was on the ground at the time of the first shots is of no moment. As the Supreme Court and the Fifth Circuit have repeatedly emphasized, the question is whether the individual poses an immediate threat to the officers or others. Garner, 471 U.S. at 11; Rockwell, 664 F.3d at 992–93. While it is true that if an individual is incapacitated, they can no longer pose a threat, Roque v. Harvel, 993 F.3d 325, 334 (5th Cir. 2021), the mere fact that Franklin was on the ground does not mean he was necessarily incapacitated, and the evidence reveals that Franklin was *not* clearly incapacitated at the time the first shots were fired, (See Dkt. # 48-7 at 08:38-08:41).⁹ In the video footage, Franklin can be seen hitting the ground,

⁹ In other words, based on its review of the video footage, the Court finds that there is no genuine issue of material fact as to whether Franklin was incapacitated at this

sitting partway up, and pointing the gun in the direction of Officer Radford. (Id.) A reasonable officer in Officer Radford's circumstances could believe that Franklin posed an immediate safety threat at that point, and Plaintiff's arguments to the contrary are without merit.

Plaintiff next argues that even if the first shots were justified, the remaining shots were not. (Dkt. # 50 at 11.) In Plaintiff's view, a reasonable jury could conclude that, when Franklin rolled over to face away from the officers, an objectively reasonable officer would believe that Franklin was incapacitated, thereby making any shots from that point on excessive. (Id.) However, the Supreme Court has held that, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." Plumhoff v. Rickard, 572 U.S. 765, 777 (2014). While some shots were fired after Franklin turned away and crouched in a fetal position, Officer Radford ceased shooting within two seconds of Franklin turning over and did not resume firing their weapons at any point after. And crucially, Officer Radford fired one continuous volley of shots; there was no break or hesitation between rounds. Officer Radford's actions, then, did not run afoul of the Fourth Amendment. Plumhoff, 572 U.S. at 777 (holding that officers can continue to

moment such that he could not pose an immediate threat of significant harm to the officers or others.

shoot until the threat has ended and noting that “[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the decedent]”); Hodge, 636 F. Supp. 3d at 735 (finding that the fact that officers fired 19 shots in approximately three-and-a-half seconds and some of those shots were after the decedent fell to the ground and was rendered defenseless did not change the court’s conclusion that the officers’ actions were reasonable because the officers stopped shooting within one second after the incapacitation and did not resume); cf. Mason v. Lafayette City-Par. Consol. Gov’t, 806 F.3d 268, 274, 277–78 (5th Cir. 2015) (holding that a genuine issue of material fact existed as to the reasonableness of an officer’s final shots when he shot a suspect five times, the suspect then “lay on the ground,” and after a break, the officer fired two more shots into the decedent’s back).

Finally, Plaintiff argues that the force used against Franklin was excessive because the only crime officers suspected Franklin of committing was displaying a handgun in plain view in a public place, a Class A misdemeanor. (Dkt. # 50 at 11.) According to Plaintiff, Officer Defendants were “aware that [Franklin] did not match the description of the shooting suspect at the time they chased him.” (Id.) Therefore, the deadly force used by the officers was objectively unreasonable. (See id.)

As an initial matter, the Court finds that it would be reasonable for an officer in the same circumstances as Officer Defendants to believe that Franklin was the active shooter, not merely someone who was displaying a handgun in a public place. At the time Officer Defendants approached Franklin, they were responding to a “gun hotshot” call, which indicates that a gun is presently being discharged. (Dkt. # 47-1 at ¶ 10.) They had received information that the shooter had shot a person in the head and that the shooter was intoxicated and waving a gun around. Officer Defendants then observed Franklin, a Black male with a thin build, short afro-style haircut, in dark clothes, accompanied by a female wearing white—a match for most of the suspect’s descriptors. While the Court accepts Plaintiff’s narrative Officer Defendants did not initially believe Franklin to be the shooter,¹⁰ the Court finds that it would be reasonable for Officer Defendants to

¹⁰ At summary judgment, the Court must view the facts in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant’s favor. Tolan, 572 U.S. at 656–57. This is so unless the non-movant’s account of the facts is so contradicted by the record that no reasonable jury could believe it. Scott, 550 U.S. at 380. Here, Plaintiff argues that Officer Defendants did not believe Franklin to be the shooter because he did not match the descriptors of the suspect and because Officer Defendants themselves acknowledged that Franklin was not the suspected shooter. (Dkt. # 50 at 6–7.) As described previously, however, Plaintiff’s assertions that the suspected shooter was wearing a white shirt and was in a vehicle are blatantly contradicted by the record and will therefore not be credited. On the other hand, Plaintiff’s assertion that Officer Defendants had originally dismissed Franklin as a suspect is not similarly contradicted and is, in fact, supported by the record. (See Dkt. # 48-8 at 05:30-06:45). Accordingly, for purposes of the instant motion, the Court will assume that Officer Defendants did not believe Franklin to be the suspect before he pulled the gun from his pocket.

believe that Franklin was the shooter when he pulled a gun from his pocket and ran away and therefore that Franklin was the shooter at the time shots were fired. (See id. (explaining that because Franklin matched most of the visual descriptors, pulled a gun when the officers approached, and immediately fled on foot when officers announced they could see the gun, they believed that he was the active shooter)).

Moreover, even if Officer Defendants did not believe that Franklin was the active shooter at the time they discharged their weapons, this issue is immaterial to the Court’s analysis of Officer Radford’s use of deadly force. Rockwell, 664 F.3d at 991 (“An officer’s use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others . . . 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]” (citations omitted) (emphasis in original)); Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir.1992) (“[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm.”).¹¹

¹¹ Plaintiff’s argument that a fact issue exists as to whether Franklin was actively resisting arrest or attempting to evade arrest by flight is likewise immaterial to the Court’s analysis in these circumstances. (See Dkt. # 50 at 11–12); see Ondrej v. Perry, No. SA-21-CV-00281-JKP, 2023 WL 6453478, at *6 (W.D. Tex. Oct. 2, 2023) (noting that the first and third Graham factors are not relevant to the court’s

Given the foregoing and considering the totality of the facts and circumstances, a reasonable officer in Officer Radford's position would have reasonably believed Franklin posed an immediate threat of significant harm at the time the shots were fired. It was therefore not unreasonable for Officer Radford to use deadly force to protect himself and others, and he did not violate Franklin's Fourth Amendment rights by doing so.

B. Officers Rawlins and Bowman

As with Officer Radford, the Court finds that at the time Officers Rawlins and Bowman fired on Franklin, they could have reasonably believed that Franklin posed an immediate threat of harm to themselves or others. Both Officers Rawlins and Bowman only began shooting after Officer Radford fired his first shots. (Dkts. ## 47-8 at 07:00-07:05; 47-9 at 07:00-07:10.) The officers both provided testimony that they began shooting after they saw Franklin's gun pointed at the direction of all three officers generally. (Dkts. ## 47-22 at ¶¶ 14–15; 47-24 at ¶¶ 15–16.) Plaintiff does not dispute this testimony, and the video footage appears to support this account. (See Dkt. # 48-7 at 08:38-08:41.) Officer Rawlins also provided testimony that immediately after he saw the gun pointed at the

analysis of excessive force claims when deadly force is used). Moreover, the Court does not agree that there is a fact issue here where Franklin ran from officers, gun in hand, disobeyed commands to stop and to show his hands, and pointed a gun directly at an officer.

officers, he heard gunfire and believed it might have been Franklin shooting at him or another officer. (Dkt. # 47-22 at ¶¶ 14–15.) Under these facts, a reasonable officer in Officer Rawlins and Officer Bowman’s positions would fear for his immediate safety, or the safety of others, at the moment of the shooting. And, similar to Officer Radford, although Officers Rawlins and Boman continued shooting at Franklin after he rolled away from the officers, they stopped within two seconds, and each fired one continuous volley of shots. They, like Officer Radford, then, did not violate Franklin’s constitutional rights in these circumstances. Plumhoff, 572 U.S. at 777. Thus, considering all of the evidence before it and drawing all factual inferences in the non-moving parties’ favor, the Court concludes that Officers Rawlins and Bowman’s actions were objectively reasonable and did not violate Franklin’s right to be free from excessive force.

Because the Court has determined that Officer Defendants’ use of deadly force was objectively reasonable, and that Franklin’s Fourth Amendment right to be free from the use of excessive force was not violated, the Court need not consider the issue of whether that right was clearly established. See Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010) (“A court may rely on either prong of the defense in its analysis.”). Officer Defendants are entitled to qualified immunity in this case.

II. Objections to Evidence

In her response, Plaintiff raises several objections to Defendants' summary judgment response and evidence. Specifically, Plaintiff objects to the APD GO Report, (Dkt. # 48-2), and the SIU Presentation, (Dkt. # 48-12) because they purportedly contain inadmissible hearsay and lack trustworthiness. (Dkt. # 50 at 2–6.) However, in considering the summary judgment motion, the Court did not rely on these exhibits so the objections will be **OVERRULED AS MOOT**.¹²

CONCLUSION

Based on the foregoing, the Court will **GRANT** Officer Defendants' Motion for Summary Judgment (Dkt. # 47) and **OVERRULE** Plaintiff's Objections to Defendant's Summary Judgment Evidence (Dkt. # 50). Because Officer Defendants are entitled to summary judgment on Plaintiffs' § 1983 claims, they are **DISMISSED WITH PREJUDICE**. The Clerk's Office is **INSTRUCTED TO ENTER JUDGMENT** and **CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: Austin, Texas, March 16, 2026.



David Alan Ezra
Senior United States District Judge

¹² To the extent that Plaintiff is objecting to the Court's consideration of evidence that was not known to the officer at the time of the shooting, the Court has not considered such evidence and so similarly overrules any objection to that effect. See Cole v. Carson, 935 F.3d 444, 456 (5th Cir. 2019).

UNITED STATES DISTRICT COURT

for the

Western District of Texas

DOROTHY C. MOTLEY

Plaintiff

v.

KELBY RADFORD et al.

Defendant

Civil Action No. 1:23-CV-276-DAE

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars (\$ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☒ other: The Court will GRANT Officer Defendants' Motion for Summary Judgment and OVERRULE Plaintiff's Objections to Defendant's Summary Judgment Evidence. Because Officer Defendants are entitled to summary judgment on Plaintiffs' § 1983 claims,

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☒ decided by Judge David Alan Ezra _____ on a motion for Summary Judgment.

Date: 03/16/2026PHILIP J. DEVLIN
CLERK OF COURT


Signature of Clerk or Deputy Clerk