UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 20-6145

(1) CHARLESETTA REDD, Individually and as Personal Representative of the ESTATE of BRIAN SIMMS, JR., deceased,

Plaintiff-Appellant,

v.

PAUL GALYON, Individually,

CITY OF OKLAHOMA CITY, a municipality, ex rel. CITY OF OKC POLICE DEPARTMENT.

And WILLIAM CITTY, individually,
Defendants-Appellees.

Pursuant to 10th Cir.

Rule 28.2(C)(4), Appellant Requests

Oral Argument.

REPLY BRIEF OF APPELLANT CHARLESETTA REDD

Appealed from The United States District Court
for the Western District of Oklahoma
The Honorable Judge Robin J. Cauthron
Case No. CIV-15-263-C

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APPELLANT'S REPLY BRIEF

Appellant Charlesetta Murray (formerly Redd), hereby submits her Reply Brief for the Court's consideration. In the interests of judicial efficiency, Appellant submits a joint reply to the responses filed by all Appellees. Ms. Murray asserts that the District Court erred in granting summary judgment to Appellees as to both her claims of common law negligence/gross negligence and in cloaking Appellee Galyon with the defense of qualified immunity. These errors warrant a reversal of the District Court's Order on Summary Judgment.

From even a cursory review of Appellants' Response briefs and their partial version and elicitation of the events surrounding the violent shooting death at issue in this case, it is clear that dozens of *disputed* issues of material fact exist surrounding the Appellant's properly pled claims which should have precluded summary judgment. The Tenth Circuit has spoken loudly and clearly on this issue, in holding that: "[U]nreasonable force claims are generally fact questions for the jury." ***Buck v. City of Albuquerque,*** 549 F.3d 1269 (10th Cir. 2008) (citing ***Quezada v. County of Bernalillo,*** 944 F.2d 710, 715 (10th Cir. 1991) ("[W]hether the police used excessive force in a §1983 case has always been seen as a factual inquiry best answered by the fact finder.") "Because the reasonableness inquiry overlaps with the qualified immunity analysis, a qualified immunity defense [is] of less value when raised in defense of an excessive force claim." ***Medina v. Cram,*** 252 F.3d 1124,

1131 (10th Cir. 2001) (internal citation omitted). "Consequently, [the Tenth Circuit] will not approve summary judgment in excessive force cases – based on qualified immunity or otherwise – if the moving party has not quieted all disputed issues of material fact." ***Olsen v. Layton Hills Mall,*** 312 F.3d 1304, 1314 (10th Cir. 2002).

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANT'S COMMON LAW NEGLIGENCE/GROSS NEGLIGENCE CLAIMS

There is one fatal flaw in the arguments of Galyon and the District Court below, to wit: relying upon the premise that an intentional *act* must always equal only an intentional *tort*. The trial court affirmatively construed the allegations in Appellant's Second Amended Complaint to be the *intentional tort* of assault and battery, not negligence/gross negligence. The trial court's rationale is clear: "[i]t is undisputed that Defendant Galyon intended to *discharge his firearm aimed at Simms*." Ms. Murray concedes that Galyon intended to *discharge his weapon* at the time he did, but it is what also occurred both before and after that decision to fire was made that belies the conclusion that the *tort* alleged is intentional and can only be asserted as assault and battery. To find otherwise invites the logically absurd conclusion that every shooting that harms another is an intentional tort regardless of whether done by a private citizen or a law enforcement officer.

The allegations made against Galyon for gross negligence are that he was "grossly negligent in the performance of his duties as a private security guard on

behalf of the [d]efendants. . .in failing to act as a reasonable security guard would and should act under the same or similar circumstances" and that "Galyon's actions in shooting the decedent 12 (sic) times at close range and killing him were unnecessarily excessive, willful and wanton and in reckless disregard for the rights of Mr. Simms, Jr. to be secure in his person." Aplt. App. Vol. I at 40.

Appellees attempt to conflate Appellant's other claims, which involve more intricate legal issues and constitutional standards, with the common law claim of negligence/gross negligence asserted against Galyon. This claim could – and should – be considered discretely from the law enforcement and governmental tort claim context. No qualified immunity or specter of governmental protection exists in defense of negligence/gross negligence.

The district court acknowledged "an assault and battery claim requires the element of intent and Plaintiff has not alleged Defendant acted with intent." Aplt. App. Vol. 7 at 1770. But from an intent to *discharge his firearm*, the court's order then directly concludes that "Plaintiff is substantively pleading a cause of action for assault and battery." *Id.* This intellectual leap is simply untenable because Galyon's *intent* to discharge his weapon, aimed at Simms, does not, by itself, equate to an intentional tort. If it did, it would logically follow that Galyon must have *intended* to shoot Brian Simms at least nine (9) times and intended to *kill* him. Galyon *admitted* he was uncertain how many shots he fired, and said he only

intended to neutralize the threat he perceived Simms to be. Aplt. App. Vol. 6 at 1329. It is difficult to imagine Galyon admitting that he *intended to shoot* Simms nine (9) times and that he *intended to kill* Simms.[1] In fact, the evidence is undisputed that Galyon had no recollection of firing nine (9) times and continued shooting until he "felt the threat was diminished." *Id.*

Galyon may have *intended* the initial act of firing his weapon but that is where his intent stopped. More importantly, that is not dispositive of whether a reasonable jury could find that he was negligent *before* firing in the first place or was negligent/grossly negligent for firing and continuing to fire when it was clear that Simms was already gravely injured and could no longer be reasonably perceived as a threat. In fact, Appellant alleged that Galyon's actions after the initial decision to shoot were *reckless, wanton and grossly negligent.* It is these actions which caused the death of her son and these actions that form the basis for the viable negligence/gross negligence claims against Galyon. As it has been noted, the claim for *negligence/gross negligence* has a two-year statute of limitations and was timely brought by Ms. Murray, the master of her own allegations and pleadings.

Gross negligence is *not* an intentional tort under Oklahoma law, and the law is clear that one can intend an *act* without intending its consequences.

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[1] The very nature of negligence as a basis of recovery is inconsistent with activity that would produce an "expected or intended" injury…" ***Broom v. Wilson Paving & Excavating, Inc.***, 2015 OK 19, ¶ 32, 356 P.3d 617, 629.

> While "ordinary" and "gross" negligence differ in *degree,* "negligence" and "willful and wanton misconduct" differ in *kind.* We cannot read into our comparative negligence regime an abrogation of the common law's dichotomous division of *actionable tortious conduct* into (1) *negligence* and (2) *willful acts that result in intended or unintended harm.* The *intent* in *willful and wanton misconduct is not an intent to cause the injury;* it is an *intent to do an act* -- or the failure to do an act -- in reckless disregard of the consequences and *under such circumstances that a reasonable man would know,* or have reason to know, *that such conduct would be likely to result in substantial harm to another.*
>
> … Gross negligence may be deemed equivalent of willful and wanton misconduct for punitive damages assessment when it demonstrates such a total disregard of another's rights that it may be equated with evil intent or implies such entire want of care or recklessness of conduct that it (a) can be likened to positive misconduct or (b) evinces a conscious indifference to predictable adverse consequences.

Graham v. Keuchel, 1993 OK 6, ¶¶ 49-50, 847 P.2d 342, 361-362. (Emphasis in original). In this case, it is the *recklessness* with which Galyon first shot and continued shooting after any perceived threat had been abated, killing Simms, that gives rise to the claim that he was *grossly negligent.* Thus, the analysis is clear that the court below erred in morphing Appellant's properly pled negligence/gross negligence claims into a claim for the intentional tort of assault and battery, just so she could then grant summary judgment to the Appellees based on the one-year statute of limitations. Appellant prays this Court find that a viable claim for negligence/gross negligence was presented and must be remanded for the jury's consideration.

Galyon cites to ***Benavidez v. United States,*** 177 F. 3d 927(10th Cir. 1999) to attempt to justify the district court's ruling. However, the holdings of this case strongly support that the district court erred when she made the conclusion that, because Galyon's conduct must have been intentional, Appellants cannot allege and try to prove to the jury that Galyon's acts were negligent and/or grossly negligent.

In *Benavidez*, Plaintiff alleged a government-employed psychologist negligently mismanaged their patient-therapist relationship by engaging in sexual contact and drug and alcohol abuse with plaintiff. The district court found that the therapist's actions constituted an intentional tort and dismissed appellant's suit for lack of jurisdiction due to the intentional tort exception to the Federal Tort Claims Act (FTCA), 28 U.S.C.S. § 1346(b)(1). On appeal, the issue before the court was whether the therapist's alleged conduct constituted a negligent, or wrongful act rather than an assault or battery for purposes of the FTCA.

The Tenth Circuit reversed the decision of the district court and held that the allegations in **plaintiff's complaint sufficiently supported a claim for professional negligence or malpractice** and that the claim, therefore, did not fall within the intentional tort exception to the FTCA's waiver of sovereign immunity. The Court concluded that "[n]owhere in the complaint or in the record [was there] any support for the district court's conclusion. . ." ***Benavidez v. United States,*** 177 F.3d 927, 931 (10th Cir. 1999)(Emphasis added).

Like the defendant therapist in the *Benavidez* case, Galyon is an experienced and trained professional law enforcement officer whose conduct and behavior is held to a higher standard than an ordinary person. Moreover, at the time he shot and killed Simms, Galyon was off-duty and acting as a security agent of a private entity – thus making a claim for negligence/gross negligence even more conceivable. As such, the District Court erred when it improperly made conclusions of fact, and in turn law, that Galyon's actions were "intentional" to support granting summary judgment on Appellant's common law negligence claim based on missing the one-year statute of limitations to file a civil claim for the intentional tort of assault and battery.

II. THIS COURT SHOULD PRECLUDE OFF-DUTY OFFICERS FROM ASSERTING A QUALIFIED IMMUINTY DEFENSE

As recognized by both Ms. Murray and Galyon, neither this Court nor the Supreme Court has specifically addressed whether off-duty police officers providing security services are entitled to assert the defense of qualified immunity. However, this acknowledgment by both parties does not take away the discretion this Court has to consider and resolve this question for the first time, just as the Ninth Circuit did in ***Bracken v. Okura,*** 869 F.3d 771, 777 (9th Cir. 2017). *See* ***Folks v. State Farm Mut. Auto. Ins. Co.***, 784 F.3d 730, 738 (10th Cir. 2015). The nature and lasting effects on the rights of citizens regarding this issue should cause concern and justify this Court's use of its discretion to address and resolve it.

Qualified immunity, as a judicially created protection, has been and will continue to be addressed on a case-by-case basis. Although, this is a case of first impression to this Court, the issue is a simple one: whether the protection of qualified immunity should be inflated to include police officers who are "off-duty" and/or working an "extra-duty" job employed/contracted by privately owned entities to advance the profits of that entity?

The further expansion of the qualified immunity doctrine in this way would open the doors to the abuse and misuse of authoritative power by law enforcement officers when acting outside the scope of their government employment. This inflation would also result in the incentive for privately-owned entities to circumvent their own potential duties and risk of civil liability for the actions of law enforcement officers who were hired to perform private, contract services to advance the means and profits of the entity.

Galyon relies on ***Filarsky v. Delia***, 556 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012), in support of his right to assert the defense of qualified immunity in this context. However, that case can be easily distinguished from the present case. The *Filarsky* case involved a §1983 action by a city firefighter, Delia, against the City, its fire department, Chief firefighter, and Filarsky, a private individual, "retained by the City to participate in internal affairs investigations." ***Id.*** at 384. The District Court granted summary judgment to all the individual defendants,

concluding that they were protected by qualified immunity. The Court of Appeals for the Ninth Circuit affirmed with respect to all defendants except Filarsky. *Id.* at 382. The Court of Appeals concluded that because Filarsky was not acting as a City employee, he was not entitled to seek the protection of qualified immunity. *Id.* at 383.

The Supreme Court held: “there is no dispute that qualified immunity is available for the sort of investigative activities [performed by Filarsky] at issue,” but denied it to Filarsky, because he was not a public employee but was instead a private individual “retained by the City to participate in internal affairs investigations.” *Id. at 384* (citing ***Pearson v. Callahan**, 555 US 223 (2009)).* The Court’s analysis in the *Filarsky* case and prior cases addressing the extension of the qualified immunity protection is supportive of precluding the use of qualified immunity by Officer Galyon in this present case.

In *Filarsky*, the Supreme Court relied on its holding in ***Richardson v. McKnight***, 521 U.S. 399, 409-411, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997), when coming to their decision. In *Richardson*, the Court “considered whether guards employed by a privately run prison facility could seek the protection of qualified immunity. . . [and] it determined that prison guards employed by a private company and working in a privately run prison facility did **not** enjoy the same protection. *Id.* at 393 (Emphasis added). The Court noted that *Richardson* was a “narrow”

decision . . . [and] emphasized that "the particular circumstances of that case -- a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"-- combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983." ***Filarsky v. Delia***, 556 U.S. 377, 393 (Emphasis added).

Here, the facts are notably different and distinguishable than those in *Filarsky*. Galyon, was a City employee at the time, acting *not* in his capacity as a police officer, but acting as a private security guard. Galyon was hired by a private entity, not by any governmental entity, to perform security services and advance the profits of the entities involved in holding the concert at the Farmer's Market that night. Aplt. App. Vol. 1 at 50. Galyon was not under the direct supervision or directions of the government while performing private security services at the concert venue for this rap concert. Galyon was compensated for performance of security services at the concert by Event Security, L.L.C., by agreement, just like he had been multiple times before. Aplt. App. Vol. 6 at 1441-1442. Therefore, qualified immunity should be denied for Appellee Galyon, just as it was for the prison guards in *Richardson* under a similar context and rationale.

Appellees also rely heavily on the language of OCPD Policy 270.10, "a police officer may be secondarily employed with a private business where the condition exists for the actual or potential use of law enforcement powers, including crowd control and security, but may not enforce the house rules of a private employer unless the enforcement would constitute a law enforcement activity." Aplt. App. Vol. 2 at 557. However, the mere existence of this policy certainly does not automatically enable Galyon to assert qualified immunity.

As described by Galyon, at the time he engaged with Simms, he was not enforcing "house rules" but was "acting pursuant to his statutory duties as a law enforcement officer at all times" and was engaged in "preventive policing." Aplt. App. Vol. 1 at 63; Vol. 7 at 1616-1617; Galyon Response Brief, p. 27. This is a circular argument though, as Galyon was clearly hired to engage in security by providing "preventative policing" while in his uniform - even though off-duty, thus enforcing the "house rules" of the entity who hired him in that context. *Id.* This case is an illustration of how a judicially created protection can be overapplied and misused and result in a tragedy if no limits and boundaries are in place. Therefore, the resolution of this issue is both ripe and necessary.

Contrary to Appellees' position, the adoption of a new rule by this Court would not deprive a large number of law enforcement officers of the protection afforded by qualified immunity. Instead, it would ensure individual rights are

protected while also protecting municipalities from liability when their employees act *within the scope of their employment*. This construction would place accountability on officers, police departments and privately-owned entities alike to ensure that proper procedures, supervision and training are followed. It would also prevent the circumvention of liability for any negligent or reckless acts or omissions by a state or government actor while working within the scope of employment of privately-owned entities simply by hiding behind the shield of qualified immunity.

III. GALYON VIOLATED CLEARLY ESTABLISHED LAW BY APPROACHING THE VEHICLE OF BRIAN SIMMS

Galyon argues that Simms "did not have any constitutional right not to be approached by police" as he sat in the vehicle. Although Appellee cites to past cases in an effort to demonstrate that no constitutional violation occurred when he approached the vehicle, a thorough analysis of the cases cited by Appellee and the record in this present case support a much different conclusion.

The encounter between Simms and Galyon was not a consensual one as Galyon would like to persuade this Court. The encounter was an investigative detention and required reasonable suspicion supported by articulable facts that criminal activity may be afoot. Galyon's interview with Detective Hurst shortly after Simms' death, as well as his deposition testimony, supports the conclusion that no reasonable suspicion was present at the time he decided to approach the vehicle where Simms sat and make contact with him. Aplt. App. Vol. 3 at 620-622; 628-

633; Vol. 6 at 1443-1445 The Tenth Circuit clearly allows a jury to evaluate the officer's own actions leading up for the force event. "The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'" ***Jiron v. City of Lakewood,*** 392 F.3d 410, 415 (10thCir.2004) (quoting ***Sevier v. City of Lawrence, Kansas,*** 60 F.3d 695, 699 (10th Cir. 1995).

Appellee Galyon accurately states that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." ***Florida v. Bostick***, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (quoting ***Florida v. Royer***, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion)). These types of encounters are "referred to as consensual encounters which do not implicate the Fourth Amendment." See ***United States v. Lopez***, 443 F.3d 1280, 1283 (10th Cir. 2006) and ***United States v. Hernandez***, 847 F.3d 1257, 1263 (10th Cir. 2017). Nevertheless, the encounter at issue between Simms and Appellee Galyon was not consensual. This is supported by applying this Court's test and factors described in ***United States v. Hernandez***, 847 F. 3d 1257,1263-64 (10th Cir. 2017).

> "In determining whether an encounter between a police officer and a citizen is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988)). **"[T]he test allows officers to make inquiries so long as they don't throw their official weight around unduly."** *United States v. Tavolacci*, 895 F.2d 1423, 1425, 283 U.S. App. D.C. 1 (D.C. Cir. 1990). There are no per se rules that govern this inquiry; "[r]ather, every case turns on the **totality of the circumstances presented**." *United States v. Hill*, 199 F.3d 1143, 1147 (10th Cir. 1999) (quoting *United States v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994) (en banc))(Emphasis added).

United States v. Hernandez, 847 F.3d 1257, 1263-64 (10th Cir. 2017).

In *Hernandez,* the Court delineates a non-exhaustive list of factors to be considered in determining whether a reasonable person would feel free to terminate his encounter with the police:

> "the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent. *Lopez*, 443 F.3d at 1284 (quoting *United States v. Spence*, 397 F.3d 1280, 1283 (10th Cir. 2005))."

Id. at 1264.

Here, Simms was sitting peacefully asleep in a vehicle in a public parking lot outside of a concert venue. Both Galyon and Escobar approached the vehicle wearing their full Oklahoma City Police uniforms. App. Vol. 6 at 1314. Galyon did not identify himself as a police officer at the time he initiated communication with Simms but testified that he used an "authoritative tone" when speaking as he approached the vehicle. App. Vol. 6 at 1313. Then, Galyon drew his weapon with the intent to shoot, based on his own testimony, never having identified himself as a police officer or advised Simms at any time that he had the right to terminate the encounter or refuse consent. App. Vol. 6 at 1314-1315. When looking at the totality of the circumstances, the factors weigh in favor of the encounter NOT being consensual between Simms and Galyon.

The *Terry* doctrine and its progeny also support that the approach of the vehicle by Galyon was a constitutional violation. *See* ***Terry v. Ohio,*** 392 U.S. 1 (1968). *Terry* defines two (2) distinct types of searches and seizures - an investigative detention ("stop") in which a police officer, for the purpose of investigation, may briefly detain a person on less than probable cause, see ***United States v. Sokolow***, 490 U.S. 1, 109 S. Ct. 1581 (1989), and a protective search ("frisk"). . ." ***United States v. King***, 990 F.2d 1552, 1557 (10th Cir. 1993). Because there was no frisk or search involved in the present case, the encounter should be viewed as an investigative detention/stop.

As such, "[t]o determine whether an investigative detention. . . is reasonable under the Fourth Amendment, the inquiry first asks whether the "officer's action was justified at its inception" and, if so, then that action must have been "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. This means that to *begin* the interference, the officer must have an articulable and reasonable suspicion that the person detained is engaged in criminal activity." Citing *Sokolow*, 490 U.S. at 7., *Id.* at 1557.

Also, as noted, the Tenth Circuit considers "an officer's conduct prior to the suspect's threat of force if the conduct is immediately connected to the suspect's threat of force" and has made clear that "the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *See* ***Pauly v. White*** *(Pauly I)*, 814 F.3d 1060 (10th Cir. 2016), overruled in part on other grounds by ***White v. Pauly*** *(Pauly II),* 137 S.Ct. 548 (2017)(per curiam).

Appellee's statement in his Response that, because *Terry* does not provide much guidance as to what constitutes "appropriate circumstances" or "an appropriate manner" to approach an individual it therefore does not clearly establish that any reasonable officer would understand the actions taken by Galyon violated the Fourth Amendment, lacks rationale and goes against well-established law. Courts are clear

about a plaintiff's burden as it relates to the constitutional violation being "clearly established" at the time. This burden does not require a plaintiff to refer to "a case directly on point for a right to be clearly established. . ." ***Kisela v. Hughes***, 138 S.Ct. 1148, 1152 (2018) (quoting *White*, 137 S.Ct. at 551). "[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." ***Browder v. City of Albuquerque,*** 787 F.3d 1076, 1082-1083 (10th Cir. 2015).

Additionally, there is certainly an expectation for officers to preserve an individual's constitutional rights, but even more so as it pertains to investigatory stops. As a highly ranked and experienced officer with numerous years of service, Galyon's abundance of training and practice is highly supportive of fair notice to him that approaching a vehicle for an investigative stop or "preventative policing" without the required amount of reasonable suspicion may be or may lead to a constitutional violation.

IV. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANT'S §1983 CLAIM FOR EXCESSIVE FORCE

As this Court noted in *Pauly* I, "the inquiry is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances

justified the use of force. *Id.* at 1071. Thus, deadly force must have been justified at the time of Galyon made the first decision to fire his weapon and each time thereafter that he did so. In this case, the number of shots fired at Simms (at least nine) was extraordinary and clearly excessive given the fact that both Galyon and Escobar admit they never saw Simms draw the gun or make any threatening motion with the gun towards the officers. Aplt. App. Vol. 6 at 1421-1422; Vol. 7 at 1575.

The 10th Circuit has relied upon the four (4) factors from ***Thomson v. Salt Lake County***, 584 F.3d 1304 (10th Cir. 2009) to guide its analysis in excessive force cases. The factors are: 1) whether the officers ordered the suspect to drop his weapon and the suspect's compliance with police commands; 2) whether any hostile motions were made with the weapon towards the officers; 3) the distance separating the officer and the suspect; and 4) the manifest intentions of the suspect. Additionally, the 10th Circuit has endorsed the application of the *Thomson* factors to a given set of facts in segmented fashion. *See* ***Perea v. Baca,*** 817 F.3d 1198 (10th Cir. 2016) (citing ***Fancher v. Barrientos,*** 723 F.3d 1191 (10th Cir. 2013)(although a single shot by an officer may have been justified, the following six shots were clearly unlawful because they occurred after arrestee no longer posed a threat of serious harm.). Simply put, where circumstances permit officers to reevaluate the scene, it is appropriate to address a string of force incidents separately.

Applying the *Thomson* factors in segmented fashion to this case underscores the unreasonableness of Galyon's conduct. As discussed, the initial use of deadly force was objectively unreasonable. Galyon approached the vehicle with his flashlight and startled Simms awake. Aplt. App. Vol. 6 at 1445-1447. There was no identification of his being a police officer. Aplt. App. Vol. 5 at 1241-1242. There were no proper lawful orders given by Galyon such as "put your hands up" or "freeze" – and therefore no opportunity given for Simms to comply. Aplt. App. Vol. 6 at 1448; Vol. 7 at 1650; *Id.* Moreover, there is no evidence of hostile motions by Simms with the weapon or otherwise before Galyon unloaded his gun through the passenger window at Simms from point blank range. *Id.*

From there, the evidence is that Galyon fired at least nine (9) shots in a series of three (3) "bursts." Aplt. App. Vol. 7 at 1620. Following the first burst of shots, the undisputed forensic evidence shows that Simms was not holding the gun and was leaning away from Galyon in retreat. Aplt. App. Vol. 7 at 1650-1651. Yet, Galyon continued to relentlessly fire and, by the third burst of shots, the forensic evidence shows that the bullets were entering Simms lower right back and traveling parallel from the line of fire, upwards in Simms body into his vital organs as he laid slumped over and incapacitated from the flood of bullets, bleeding to death. Aplt. App. Vol. 6 at 1453; Vol. 7 at 1599, 1647. In fact, Galyon doesn't recall what, when or why he stopped firing, even though his partner had to tell him

to cease fire. Aplt. App. Vol. 6 at 1449. Again, Escobar, an admittedly reasonable officer faced with the same set of circumstances, fired no shots at Simms. Aplt. App. Vol. 3 at 820. There is perhaps no better example of what a reasonable officer under the same circumstances should have done in this case than Escobar himself.

In ***Plumhoff v. Rickard,*** 134 S.Ct. 2012 (2014), in a case involving officers shooting 15 times in 10 seconds at a fleeing vehicle, the Supreme Court acknowledged 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 driver] and had ended any threat…" Moreover, it is well-established in this Court that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." ***Thomas v. Durastanti,*** 607 F.3d 655, 656 (10th Cir. 2010).

Courts have also held that where a purported weapon is observed, like is alleged in this case, it would be unreasonable to shoot a suspect who is not making hostile motions with the weapon. *See* ***Dorato v. Smith,*** 108 F.Supp 3d 1064 (D.N.M. 2015)(explaining that the second factor was inapplicable because "[Officer] Smith does not indicate that Tillison made any hostile motions with the [suspected gun] towards him – just that he held it out the window in a particular way.").

The *Dorato* case and this factual analysis provides useful context for the analysis of the facts in this matter.

In *Dorato,* the officer, in approaching the parked vehicle that he believed was stolen, **identified himself as a police officer and ordered the driver to show him his hands by placing them outside the car window.** *Id. at* 1076. Instead of obeying the officer's commands, the driver of the vehicle continued moving inside the car and reached down and then to the back of the vehicle. The Officer claimed that the driver's conduct concerned him as he believed the driver was reaching for a weapon. **Officer Smith began commanding the driver to "[l]et me see your hands. Let me see your hands."** *Id.* at 1078. **Again, the driver did not comply with these directives** and instead placed the vehicle in reverse and slammed into the Officer's patrol car. The Officer, suspecting the driver was trying to flee, fired a shot into the left rear tire of the vehicle, which did not disable it. *Id.* at 1080-1082. While the vehicle remained in motion, the driver moved his right arm over his left, holding a black object in his right hand and pointing it outside his driver side window "gangster style." *Id.* at 1083-84. The Officer, claiming to believe the object was a gun, shot and killed the driver. The object was in fact a cell phone. *Id.*

In denying the Officer's motion for summary judgment, the *Dorato* Court held that there was a genuine dispute whether the Officer could have reasonably believed that the driver posed a threat. First, the court noted the officer was standing

particularly close to the driver such that he could more readily conclude that the driver was not holding a firearm. The same is true here. Indeed, Officer Galyon opened fire on Simms, who was seated in the driver's seat, through the passenger window of the car despite never having seen Simms grab or make any hostile movement with the weapon, making his decision to shoot unreasonable on its face.

The *Dorato* Court also found that the driver's "conduct showed that his manifest intent was to flee," not that he was "trying to attack [the officer]." *Id.* The same can obviously be said about Simms' admitted actions in this case – having never actually drawn the gun, pointed it or made any hostile movement with the weapon in his hand. In fact, the evidence shows Simms was turning away from the direction of the passenger window and Galyon's flood of bullets. Simms' manifest intent was clearly to retreat, not to attack.

Finally, the *Dorato* Court held that the reasonableness of the Officer's belief that the driver was holding a gun and not a phone were questions for the jury to decide. *See Id.* at 1155. Here, there is a greater argument that a jury should decide whether it was reasonable for Galyon to believe that Simms was reaching for a gun or ever posed an imminent threat of deadly harm to begin with.

Recently, in ***Estate of Smart v. City of Wichita***, 951 F.3d 1161 (10th Cir. 2020), this Court reviewed a grant of qualified immunity under circumstances instructive of the issue here, and reasoned that several factors taken in the light most

favorable to the plaintiffs could enable a reasonable jury to conclude that the officer "had the opportunity to perceive that any threat [posed by Smart] had passed by the time [the officer] fired his final shots." Similar to this case, the *Smart* decision noted that "[p]laintiffs' medical expert explained that Mr. Smart's three…bullet wounds indicated he had been shot three times in the back, while on the ground. From this evidence, a reasonable jury could conclude that by the time [the officer] fired his final shots, Mr. Smart was no longer a threat." Thus, the Court reversed the district court's grant of qualified immunity with respect to the final shots because the officer "violated clearly established law if he shot Mr. Smart after it would have been clear to a reasonable officer that the perceived threat had passed." *Id.* at 1176.

Likewise, in ***Fancher v. Barrientos****,* 723 F.3d 1191 (10th Cir. 2013)*,* this Court affirmed a district court's denial of qualified immunity as to an officer's final shots because the officer lacked probable cause to believe the suspect still posed a threat when he fired those additional shots. The Court noted:

> "According to the factual scenario upon which the district court based its rejection of…qualified immunity,…[Officer] Barrientos fired six shots into a suspect who was 'no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger to the public, Barrientos or other responding officers…"
>
> "This allowed him '**enough time…to recognize and react to the changed circumstances and cease firing his gun**. Under these circumstances, we have no_trouble concluding Barrientos

> lacked probable cause to believe Domniguez posed a threat of serious harm…at the time he fired shots two through seven."
>
> This rationale clearly places officers on notice that the use of deadly force is unreasonable when a reasonable officer would have perceived that **the threat had passed**. It also demonstrates that considering the precise moment the officer used force is important because '**circumstances may change within seconds, eliminating the justification for deadly force**."

Id. at 1200. (Emphasis Added)

Again, it is undisputed Galyon continued to use deadly force and initiated two (2) additional bursts of 3-4 shots from his firearm while Simms laid slumped over to his left side in surrender position and trying to retreat away towards the driver side door of the parked car. The second and third round of shots by Galyon were gratuitous and objectively unreasonable such that a reasonable jury could clearly find they were excessive. Thus, summary judgment based on qualified immunity was error and must be overturned.

V. THE DISTRICT COURT IMPROPERLY HELD APPELLEES CITY OF OKLAHOMA CITY AND WILLIAM CITTY WERE ENTITLED TO SUMMARY JUDGMENT BASED ON THE GRANTING OF QUALIFIED IMMUNITY TO APPELLEE GALYON.

Based upon the court's rulings on the issue of qualified immunity, the district court also dismissed Ms. Murray's claims against both the City of Oklahoma City and Chief William Citty. Aplt. App. Vol. 7 at 1776-1777. Because the district court found no issue of material facts relating to an excessive force violation, "there is no need to further analyze this issue. Defendant OKC is entitled to summary judgment

on Plaintiff's failure to train and failure to discipline claim." Aplt. App. Vol. 7 at 1776. "And as a result, there is no additional analysis necessary regarding Plaintiff's supervisory claim because there is no constitutional violation at issue. Defendant Citty is entitled to summary judgment on the supervisory claim." Aplt. App. Vol. 7 at 1777. Therefore, when Ms. Murray's claims against Galyon are remanded, the corresponding claims against the City of Oklahoma City and Chief Citty should be reinstated and be litigated accordingly.

> Because we reverse the district court's qualified immunity determination, we likewise reverse the district court's grant of summary judgment to the Sheriff on this claim.

Bickford v. Hensley, 2020 U.S. App. LEXIS 33400, *12, __ Fed. Appx. __, 2020 WL 6227029 (10th Cir. October 23, 2020) (UNPUBLISHED).

CONCLUSION

For all the above reasons, Appellant respectively requests that this Honorable Court overturn the district court's errors in granting summary judgment to the Appellees and permit this case, and clear example of police misconduct and excessive force, to be tried to a jury. In preparing this appeal, Appellant found no more egregious example of excessive force than exists in this case. Galyon relentlessly and callously fired at least nine (9) gun shots at point blank range, through an open car window, at a seated, helpless Simms. As this Court noted recently: "it would be remarkable if the most obviously unconstitutional conduct

should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." ***Browder v. City of Albuquerque,*** 787 F.3d 1076, 1082-1083 (10th Cir. 2015).

Date: January 7, 2021.

Respectfully Submitted,

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I hereby certify that on this the 7th day of January 2021, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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