

NO. 17-41235

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**CARMEN TREVINO, Individually, as Representative of the Estate of Jose
Roman Rodriguez, Deceased and on Behalf of all those Entitled to Recover
Under the Texas Wrongful Death Act for the death of Jose Roman
Rodriguez; NOEMI LONGORIA, As Next Friend of Minor Children G.R.R.
and G.N.R.,**
Plaintiffs - Appellees

v.

ROLANDO TRUJILLO, JR.,
Defendant - Appellant

On Appeal from the United States District Court,
Southern District of Texas, Brownsville Division
Civil Action Number 16-cv-262

BRIEF OF APPELLANT ROLANDO TRUJILLO, JR.

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CERTIFICATE OF INTERESTED PERSONS

Case No. 17-41235; *Carmen Trevino, Individually and as Representative of the Estate of Jose Roman Rodriguez, Deceased, and Noemi Longoria, as Next Friend of Minor Children R.G.R. and G.N.R. v. Rolando Trujillo, Jr.*; In the United States Court of Appeals for the Fifth Circuit

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

Defendant - Appellant:

Rolando Trujillo, Jr.

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Plaintiffs - Appellees:

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Noemi Longoria, As Next Friend of Minor Children R.G.R. and G.N.R.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes this Court's previous rulings on qualified immunity make the legal arguments at issue clearly presented without the necessity of oral argument; however, given the Appellees' focus on attempting to create genuine issues of material fact when the record does not support it, Appellant requests oral argument to address these issues and to be of assistance to the Court as may be needed.

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JURISDICTIONAL STATEMENT

This is an interlocutory appeal based upon the denial of qualified immunity in a civil action filed under 42 U.S.C. § 1983. The district court has jurisdiction under 28 U.S.C. § 1331. The District Court denied Defendant-Appellant Rolando Trujillo, Jr.'s Motion for Summary Judgment on the issue of qualified immunity on December 4, 2017. (ROA.872-884). Appellant Rolando Trujillo, Jr. timely filed his Notice of Interlocutory Appeal on December 8, 2017. (ROA.885-887). This Honorable Court has jurisdiction under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 2815-2817, 86 L.Ed.2d 411 (1985).

STATEMENT OF ISSUES

1. Whether the District Court erroneously denied summary judgment on the issue of Officer Trujillo's qualified immunity when the record establishes that Jose Roman Rodriguez was not subjected to a constitutional deprivation?
2. Whether the District Court erroneously denied Officer Trujillo's motion for summary judgment as to qualified immunity when the record establishes he is entitled to qualified immunity even if, *arguendo*, Rodriguez's rights were violated?

STATEMENT OF THE CASE

This is a section 1983 civil rights lawsuit filed by Carmen Trevino, Individually as Representative of the Estate of Jose Roman Rodriguez, Deceased,

Noemi Longoria, as Next Friend of Minor Children R.G.R. and G.N.R., and Jose Guadalupe Rodriguez Vega against City of Brownsville Police Department Officer Rolando Trujillo, Jr. They allege Officer Rolando Trujillo, Jr.'s actions amounted to an unreasonable seizure and wrongful use of excessive force in violation of Decedent Jose Roman Rodriguez's rights under the Fourth and Fourteenth Amendments of the U.S. Constitution. (ROA.487-490).

The Appellant filed a motion for summary judgment based upon qualified immunity. (ROA.116-471, 696-870). The District Court denied the Appellant's motion as to qualified immunity. (ROA.872-884). The Appellant perfected his appeal from the District Court's ruling. (ROA.885).

STATEMENT OF FACTS

On July 17, 2015 at approximately 2:06 a.m., Officer Rolando Trujillo Jr. responded to 1725 International Boulevard, a 7-Eleven convenience store, in reference to a theft that had just occurred. (ROA.147). As Officer Trujillo drove into the 7-Eleven parking lot, he observed that the store clerk was standing in the middle of the parking lot looking towards the area of U.S. Highway 77 southbound Frontage Road. (ROA.147). Officer Trujillo then drove up next to the store clerk who stated that a brown colored SUV had taken merchandise from the store without paying and had just left and was going towards the expressway. (ROA.147). Officer Trujillo

observed that the store clerk appeared to be nervous at the time and he observed that the clerk appeared to be in fear as he had a fixed stare on the direction of travel of the suspects. (ROA.147). Officer Trujillo then left the store in order to check the area for the suspect's vehicle. (ROA.147). Officer Trujillo advised the clerk that he was going to check the area before returning to complete the report. (ROA.147). Officer Trujillo was then advised by the Brownsville Police Department communications network that the suspect vehicle was on International Blvd. and going towards the expressway. (ROA.147). Officer Trujillo also observed information relayed on his police unit's mobile data computer that the suspect was wearing a blue shirt and pink shorts. (ROA.147).

Officer Trujillo proceeded across International Blvd. and drove onto U.S. Highway 77 southbound on the frontage road ramp. (ROA.147). As he began to approach the end of U.S. Highway 77 by University Blvd., Officer Trujillo observed that there was only one vehicle at the red light that matched the suspect's vehicle description. (ROA.147). The other three vehicles at the stop light were not SUV's and were not the color brown. (ROA.147, 449). Officer Trujillo observed that there was a brown GMC Jimmy TX license plate no. BMW0706, in the outermost left turning lane onto East Avenue. (ROA.147, 449). Officer Trujillo was aware that there had been previous multiple aggravated robberies in the City of Brownsville,

where the suspects had used a handgun and fired it during the robberies. (ROA.147, 161-162, 449, 454-455). In those calls, the suspect vehicle was also a brownish or gold color older model SUV. (ROA.147, 161-162, 449, 454-455). Officer Trujillo recalled that this information was relayed to the patrol officers on duty during their daily roll call, via daily lookouts. (ROA.147, 161-162, 449, 454-455). He stated that his level of awareness was raised as this vehicle was very similar and was also a suspect to the current theft. (ROA.147, 161-162).

Officer Trujillo then advised via radio to the communications network that he had a visual on a possible suspect vehicle and was going to conduct a traffic stop on the vehicle. (ROA.147). As Officer Trujillo was awaiting for the light to turn green, he observed that the driver of said vehicle was constantly looking into the side view mirror back towards the officer's clearly marked police unit. (ROA.147). When the light at University Blvd. and U.S. Highway 77 southbound expressway turned green, Officer Trujillo proceeded to activate the full front and rear emergency lights of his police unit. (ROA.147-148, 449). In addition to the red and blue emergency lights, Officer Trujillo also briefly activated the emergency siren which activates a short but very loud yelp. (ROA.148, 449). He then deactivated the emergency siren and left the emergency lights activated on the police unit. (ROA.148, 449). As the suspect vehicle turned eastbound onto East Avenue, Officer Trujillo turned on the spotlight

of the police unit and pointed it directly into the driver's side door and the driver's side view mirror. (ROA.148, 449). Officer Trujillo observed that the driver was staring into the side view mirror looking at the police unit and was talking to someone in the vehicle with him. (ROA.148, 449). Officer Trujillo was unable to determine how many occupants were in the vehicle at this time due to the dark tint on the rear window of the suspect vehicle. (ROA.148, 449). Officer Trujillo then activated the takedown lights function on the emergency light bar which sends a solid white beam of light forward, but that did not give Officer Trujillo better visibility due to the dark tint of the suspect vehicle. (ROA.148, 449).

As Officer Trujillo continued to pursue the suspect vehicle, East Avenue was beginning to merge from three lanes of eastbound flowing traffic into two lanes. (ROA.148, 449). Officer Trujillo then noticed the driver of the suspect vehicle was still looking back at the police unit, but the driver of the suspect vehicle refused to stop or slow down. (ROA.148, 449). Officer Trujillo believed that normally, a law abiding citizen would immediately pull over once a police unit activates its emergency lights and sirens. (ROA.148). Officer Trujillo's level of awareness and concern for his safety began to rise as the driver of the suspect vehicle was still refusing to stop his vehicle. (ROA.148). Officer Trujillo then advised via radio to the communications network that the suspect vehicle was still traveling and was

currently passing Valor St. (ROA.148, 449). At this point the suspect vehicle had already traveled approximately 0.2 miles. (ROA.148, 449). The driver of the suspect vehicle had multiple opportunities to stop the vehicle, yet the driver of the suspect vehicle even intentionally passed Valor St., which was completely out of the way of the normal flowing traffic. (ROA.148, 449).

Officer Trujillo then began to use the manual air horn on the police unit two times in order to further instruct the suspect vehicle to pullover immediately. (ROA.148, 449). The suspect vehicle continued to travel and still refused to stop on East Avenue until it started to approach Lizka Ln. (ROA.148, 449). The suspect vehicle then came to a slow stop right before Lizka Ln. (ROA.148, 449). Officer Trujillo immediately exited the police unit wearing a full Brownsville P.D. police officer uniform and began to approach the suspect vehicle. (ROA.148, 449). Officer Trujillo immediately used his flashlight in order to start illuminating the interior of the suspect's vehicle. (ROA.148, 449). As Officer Trujillo was walking up to the rear driver's side door, he observed that the front passenger side door opened rapidly and a male suspect wearing a blue polo style shirt and pink shorts looked in his direction. (ROA.148, 449). At that moment, Officer Trujillo's level of awareness was very high because a normal citizen would not exit their vehicle and flee from the police in the middle of a traffic stop. (ROA.148). Officer Trujillo had an

increasingly heightened level of awareness and concern because he believed that the suspect who exited the suspect vehicle was going to try to attempt to try to cause harm to him. (ROA.148). Officer Trujillo then noticed that the passenger that had exited the suspect vehicle had lowered his body and hid from the officer's view. (ROA.148, 449).

Officer Trujillo felt this was a very dangerous situation for him, as without a visual of the suspect who had exited the vehicle, he was unaware if that suspect had a weapon, or from which direction he was going to approach. (ROA.148). Officer Trujillo was also aware that he was outnumbered by the suspects since he was the only officer on scene. (ROA.148, 449). Officer Trujillo then stepped towards the driver's side window in order obtain a visual of the driver of the suspect vehicle and possibly the suspect passenger. (ROA.148, 449). Officer Trujillo then observed that the suspect driver was staring at the passenger that began running away. (ROA.148-149). Because the suspect driver, who was later identified as Jose Roman Rodriguez, was slightly distracted, Officer Trujillo opened the driver's door. (ROA.148-149). Officer Trujillo then asked Mr. Rodriguez what had happened back there, referring to both the theft at the Seven Eleven and why he had not stopped the vehicle. (ROA.149, 449, 764-768). Officer Trujillo stated that Mr. Rodriguez responded, "No, yo no se nada"—which translates to, "No, I do not know anything." (ROA.149, 449,

764-768). However, before Officer Trujillo was able to further clarify, he observed that the passenger suspect that had fled was running towards an empty field in the direction of Veteran's Plaza, located at 2500 East Avenue. (ROA.149, 449). Officer Trujillo then attempted to relay further information to the communications network via portable radio as he was looking at the passenger who was fleeing the traffic stop. (ROA.149, 449, 764-768). When Officer Trujillo reached for his portable radio and glanced over the hood of the vehicle, he observed Mr. Rodriguez close the driver's side door quickly. (ROA.149, 449, 764-768). Officer Trujillo then immediately reached out for the driver's door window frame and was able to slightly grab a hold of it. (ROA.149, 449). Officer Trujillo observed Mr. Rodriguez place his hand on the driver's side door from the interior and pushed the left side of his body against the door. (ROA.149). Officer Trujillo believed that Mr. Rodriguez was trying to strike him with the door of the vehicle. (ROA.149). Officer Trujillo then stepped back slightly and immediately ordered Mr. Rodriguez to turn off the vehicle, but Mr. Rodriguez refused and saw that Mr. Rodriguez's right hand was reaching into the small area between the driver's seat and the center console. (ROA.149, 449). At that moment, Officer Trujillo completely lost sight of Mr. Rodriguez's hand. (ROA.149). Officer Trujillo observed a look of desperation on Mr. Rodriguez's face as he was desperately reaching and searching rapidly for something between the driver's seat

and the center console. (ROA.149). Mr. Rodriguez began to rev the engine of the vehicle and stated, “No pos no,” which translates to, “No, well no.” (ROA.149, 449). At that point in time, Officer Trujillo believed that Mr. Rodriguez was attempting to flee from a lawful traffic stop. (ROA.149). Officer Trujillo ordered Mr. Rodriguez to get out of the car in Spanish while Mr. Rodriguez looked directly at Officer Trujillo and then looked directly at Officer Trujillo’s duty weapon. (ROA.149). Mr. Rodriguez refused Officer Trujillo’s verbal command and said, “pos nombre”, which translates to, “well, no” and Mr. Rodriguez quickly opened the center console of the vehicle with his right hand. (ROA.149). Once Mr. Rodriguez placed his hand inside of the center console, Officer Trujillo’s line of sight was completely blocked and he could not see Mr. Rodriguez’s right hand. (ROA.149). During this time, Officer Trujillo immediately unholstered his duty issued Sig Sauer P226 and was in the process of actively targeting the suspect, when Mr. Rodriguez then began to pull out an object that was long and a dull gray color. (ROA.149, 449). Officer Trujillo attempted to scream at Mr. Rodriguez, but before he was able to give a complete order again, Mr. Rodriguez pulled his right hand across his chest in Officer Trujillo’s immediate direction, while cocking his head backwards towards him. (ROA.149). Officer Trujillo stated that he focused directly on the long gray object in Mr. Rodriguez’s right hand and immediately bladed his body off towards Mr. Rodriguez

in a defensive position. (ROA.149, 449).

Mr. Rodriguez's movement was so rapid that Officer Trujillo was only able to focus on a blur of his tattoo from the top of Mr. Rodriguez's right hand and a long gray object in his hand. (ROA.149). At this point, Officer Trujillo believed that Mr. Rodriguez was about to use a deadly weapon against him, and believed that his life was in immediate danger. (ROA.149). Officer Trujillo was terrified that his life was about to come to an end. (ROA.149). Officer Trujillo reasonably believed that it was immediately necessary to stop Mr. Rodriguez from using any type of weapon against him. (ROA.149, 158, 283, 318-319, 744). Officer Trujillo believed that Mr. Rodriguez had a weapon in this hand and was going to use deadly force in order to avoid being placed under arrest. (ROA.149). Officer Trujillo feared for his life and safety at that moment. (ROA.149). Due to the totality of the circumstances facing Officer Trujillo at that time, and all of Mr. Rodriguez's actions, Officer Trujillo then fired four shots at Mr. Rodriguez. (ROA.150). As the second or third shot was being fired, Mr. Rodriguez placed his vehicle in drive and began to accelerate away from Officer Trujillo at a high rate of speed. (ROA.150,449). Officer Trujillo believed that Mr. Rodriguez was still a threat to him and the community especially since Mr. Rodriguez drove away recklessly and erratically at a high rate of speed. (ROA.150, 449). Officer Trujillo heard the sound of the tires screeching as Mr. Rodriguez sped

off. (ROA.150,449). Officer Trujillo believed that Mr. Rodriguez was again intentionally evading detention. (ROA.150,449). Officer Trujillo then ran back to his marked patrol unit and began to pursue Mr. Rodriguez again. (ROA.150,449). Mr. Rodriguez drove down East Avenue and stopped his vehicle near the exit of Veteran's Plaza about half a block away. (ROA.150,449). Officer Trujillo then placed his police unit behind the suspect's vehicle and again exited his police unit in order to approach Mr. Rodriguez. (ROA.150,449). As he exited the police unit, Officer Trujillo had his police issued duty weapon drawn and was actively targeting Mr. Rodriguez. (ROA.150,449). As Officer Trujillo was approaching the driver's side, he observed that Mr. Rodriguez was moving around in the driver's seat and then suddenly Mr. Rodriguez's vehicle moved backwards rapidly and crashed into the front end of the police unit. (ROA.150,449). Officer Trujillo believed that Mr. Rodriguez was intentionally trying to cause further harm to him by using his vehicle to intentionally strike the police unit. (ROA.150). Officer Trujillo stated that he was again in fear for his life and safety since Mr. Rodriguez was still attempting to leave the location, even if it meant crashing into a police unit. (ROA.150). Officer Trujillo was unable to see Mr. Rodriguez's hands at that moment. (ROA.150).

Officer Trujillo observed that Mr. Rodriguez was still moving his right hand around the center of the vehicle out of his view. (ROA.150). While actively

targeting Mr. Rodriguez, Officer Trujillo commanded him to put the vehicle in park multiple times. (ROA.150,449). Mr. Rodriguez refused to comply and shook his head from side to side. (ROA.150). Officer Trujillo then advised the communication network to send EMS to the location because there was a subject that had been shot. (ROA.150,449). Officer Trujillo then noticed that Mr. Rodriguez finally placed his hands in front of him with his palms open. (ROA.150).

Officer Trujillo then reached into the vehicle with his left hand and turned the key in the ignition backwards to turn off the vehicle, while still actively targeting Mr. Rodriguez with his duty weapon in his right hand. (ROA.150,449). Officer Trujillo then took a step back and quickly attempted to scan the area around him, due to the second suspect still being at large. (ROA.150,449). He was fearful that the other suspect could possibly return to attempt to cause harm to him. (ROA.150). Officer Trujillo believed that it was immediately necessary to apprehend the second suspect because he could also pose a threat to the community. (ROA.150).

Officer Trujillo then continued to keep Mr. Rodriguez actively targeted until a back up officer arrived on scene in order to assist with safely apprehending Mr. Rodriguez. (ROA.150,449). After a few moments, Sergeant Avitia arrived on scene along with Officer J. Alejandro and Officer A. Ortiz. (ROA.150, 449). Sergeant Avitia exited his marked patrol unit and asked Officer Trujillo what had happened

while walking up to the driver's side of the vehicle. (ROA.150, 449). Officer Trujillo advised that Rodriguez was not cuffed and he provided cover as Officer Ortiz pulled Mr. Rodriguez out of the driver's seat and placed him on the ground. (ROA.150, 449). Officer Trujillo then immediately placed hand restraints on Mr. Rodriguez and began to pat him down for any weapons. (ROA.151, 449). Officer Trujillo found Mr. Rodriguez's wallet and removed his Texas Identification card in order to identify him. (ROA.151). Officer Trujillo observed that there was a silver tool and a large screwdriver near the driver's side in the vehicle. (ROA.151, 436-437). A large gray and red screwdriver was found among the contents near the driver's side of the vehicle. (ROA.436-437). This was likely the large gray object that Officer Trujillo saw in Mr. Rodriguez's hand. Officer Trujillo also observed that there were multiple cases of Bud Light beer in the passenger side of the vehicle. (ROA.151).

After removing Mr. Rodriguez from the vehicle, it appeared he sustained two gunshot wounds to the chest. (ROA.446, 457). Emergency Medical Services were called to the scene and Mr. Rodriguez was transported to Valley Baptist Medical Center where he was pronounced dead at 3:15 a.m. (ROA.457). Justice of the Peace Benny Ochoa ordered an autopsy. (ROA.457). The final autopsy report indicated that Mr. Rodriguez sustained two gunshot wounds to the chest, both of which had a

course path of left to right. (ROA.457, 460-461). The toxicology report indicated positive findings in Mr. Rodriguez for Ethanol, Cocaine, and Benzoylecgonine. (ROA.458).

After conducting an internal investigation, the Internal Affairs Division of the Brownsville Police Department (BPD IA) concluded that Officer Rolando Trujillo Jr. adhered to departmental policy in the use of deadly force. (ROA.446). BPD IA concluded that Officer Trujillo used deadly force to protect himself from what was reasonably believed to be an immediate threat of death or serious bodily harm. (ROA.446). The Texas Department of Public Safety Texas Rangers conducted the investigation into the officer-involved shooting incident and submitted their findings to the Cameron County District Attorney's Office. (ROA.283). The investigation was presented to a Grand Jury in Cameron County. (ROA.283). The Grand Jury returned a No Bill on all charges against Officer Rolando Trujillo, Jr. for his role in the officer-involved shooting and death of Jose Roman Rodriguez. (ROA.452).

STANDARD OF REVIEW

This Court reviews the district court's denial of a motion for summary judgment *de novo*. *Threadgill v. Prudential Sec. Group, Inc.*, 145 F.3d 286, 292 (5th Cir. 1998). In addressing the legal standard at the summary judgment stage on the defense of qualified immunity, it is the plaintiff's burden to rebut a claim of qualified

immunity once the defendant has properly raised it in good faith. *Cole v. Carson*, 802 F.3d 752, 757 (5th Cir. 2015). And this Court has stated that this is a “*demanding standard*.” (*Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 1517 (2016) (emphasis added). “This burden is not satisfied with ‘some metaphysical doubt as to the material facts,’ by ‘conclusory allegations,’ by ‘unsubstantiated assertions,’ or by only a ‘scintilla’ of evidence.” *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). And even though courts are to “resolve factual controversies in favor of the nonmoving party,” they do so only “when there is an *actual controversy*, that is, when both parties have submitted evidence of contradictory facts.” *Id.* (emphasis added). Courts will not, “in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts” to survive summary judgment.¹ *Id.* Further, the party responding to a summary judgment motion must support its response with specific, non-conclusory affidavits or other competent summary judgment evidence. *See Reese v. Anderson*, 926 F.2d 494, 498 (5th Cir. 1991). The non-moving party cannot meet its burden by asserting conclusory opinions that are unsubstantiated and unsupported by the

¹*See Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177, 3188 (1990) (resolving actual disputes of material facts in favor of nonmoving party “is a world apart from ‘assuming’ that general averments embrace the ‘specific facts’ needed to sustain the complaint. . . . It will not do to ‘presume’ the missing facts because without them the affidavits would not establish the injury that they generally allege”).

competent summary judgment evidence. *Id.* at 499. Factual opinions or conclusions are the textbook example of conclusoriness. *Id.* Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). Conjecture and unverified assertions are not a specific showing of solid evidence to shield one from summary judgment. *Nowlin v. Resolution Trust Corporation*, 33 F.3d 498, 505 (5th Cir. 1994).

Furthermore, in an interlocutory appeal in which the defendant asserts qualified immunity, and the district court denied a motion for summary judgment on the issue of qualified immunity finding that genuine factual disputes exist, this Court must accept the plaintiffs' version of the facts as true ***to the extent reflected by proper summary judgment evidence***. *See Haggerty v. Texas Southern University*, 391 F.3d 653, 655 (5th Cir. 2004) ("In an interlocutory appeal in which the defendant asserts qualified immunity, to the extent that the district found that genuine factual disputes exist, we accept the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true.") (emphasis added). *See also Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013).

SUMMARY OF THE ARGUMENT

The record establishes there is no genuine issue of material fact in dispute,

therefore, the District Court erroneously denied Officer Trujillo's motion for summary judgment on the issue of qualified immunity. The record establishes that Rodriguez was not deprived of any constitutionally protected right and that, even if he had been, Officer Trujillo is protected from liability by qualified immunity.

The Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386, 396 (1989) instructs that not every police shooting, even if it may later in the course of litigation seem subject to second-guessing, violates the Fourth Amendment. The constitutional inquiry is whether a law enforcement officer's decision to shoot a criminal suspect is objectively reasonable under the totality of the circumstances confronting him as judged from the perspective of a reasonable officer on the scene, not aided by the benefit of 20/20 hindsight. A determination of a law enforcement officer's reasonableness under the Constitution, must therefore embody allowances for the fact that officers are often, as in the instant case, 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. As such, an officer like Officer Trujillo who acts reasonably, but perhaps mistakenly, does not violate the Fourth Amendment.

Application of that standard to the factual record in the instant litigation shows that the District Court's opinion was erroneous and must be reversed because

Rodriguez was not subjected to a constitutional deprivation.

Furthermore, the Supreme Court's opinion in *Saucier v. Katz*, 533 U.S. 194, 205 (2001) instructs that, when a law enforcement officer reasonably—even if mistakenly—believes an individual poses a serious threat to the officer's safety; the officer is justified in using greater force than in fact may later be found was needed because reasonable mistakes can be made as to the legal constraints on police conduct in such circumstances. Where, as here, an officer's arguable mistake regarding the amount of force required to respond to a perceived threat is reasonable at the time, the officer is entitled to the shield of qualified immunity which protects him from the sometimes hazy border between excessive and acceptable force based upon facts learned later. Application of the facts in the instant litigation to the standard required under *Saucier* clearly shows that Officer Trujillo is entitled to qualified immunity.

The District Court, therefore, erred in denying Appellant's claims and ruled inconsistent with its duty under Rule 56, FED. R. CIV. P. The District Court did not properly consider Appellant's motion for summary judgment on the issue of qualified immunity under the proper standard and erroneously concluded that Officer Trujillo was not entitled to qualified immunity.

ARGUMENT AND AUTHORITIES

I. The District Court erroneously denied summary judgment on the issue of Officer Trujillo's qualified immunity because the record establishes that

Jose Roman Rodriguez was not subjected to a constitutional deprivation.

A. Officer Trujillo’s Decision to Use Deadly Force in Self Defense Was Objectively Reasonable

The fully developed factual record establishes that it was objectively reasonable for Officer Trujillo to conclude that shooting Rodriguez in self defense was not clearly excessive to the need under the totality of the circumstances Officer Trujillo faced at the time. Appellees have failed to identify, and the record fails to reveal, any material fact which raises any significant dispute on this issue. Instead, Appellees would ask the court to turn a blind eye to the uncontroverted evidentiary record, disbelieve competent evidence, and to rule against the record evidence based upon nothing more than factually insupportable, speculation and conjecture as a substitute for competent summary judgment evidence; a practice this Court cannot indulge and which summary judgment procedure does not permit. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2739 (1982); Accord, *Littlefield v. Forney Independent School District*, 268 F.3d 275, 282 (5th Cir. 2001).

“[A] dispute about a material fact is ‘genuine’ ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “After consulting applicable law to ascertain the material factual issues...” this Court may “resolve factual controversies in favor of the non-moving

party, however, only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts. Conclusory allegations, speculation, and unsubstantiated assertions are not evidence.” *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

Appellees’ claim that Rodriguez was subjected to a constitutional deprivation is dependent upon the unsupported argument that Officer Trujillo is lying about the circumstances of the shooting even though there is absolutely no evidence which even suggests he is. The Appellees would ask the Court to disbelieve Officer Trujillo’s testimony even though the competent summary judgment evidence, including unimpeached testimony by disinterested witnesses, corroborates Officer Trujillo’s testimony and no record evidence refutes it. If a party could successfully overcome summary judgment by merely claiming that uncontroverted evidence might be disregarded by a fact finder as the Appellees asked the district court to do in this case, summary judgment procedure would be of little consequence in disposing of unmeritorious claims. Indeed, Rule 56 expressly precludes such a result. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986); *Jones v. Sheehan, Young & Culp*, 82 F.3d 1334, 1338 (5th Cir. 1996). Instead, absent countervailing evidence, the fact finder must accept a defendant’s uncontroverted explanation of the reason for his action. *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295 (5th Cir.1994).

For the reasons discussed fully *infra*, the record shows that Rodriguez was not subjected to a constitutional deprivation and that the District Court erroneously denied summary judgment on the issue of Officer Trujillo’s qualified immunity.

1. Officer Trujillo’s Actions must be Analyzed from the Perspective of a Reasonable Law Enforcement Officer on the Scene

Supreme Court jurisprudence expressly mandates that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). This constitutionally required mandate is required even in the summary judgment context when the court is also required to consider evidence in the light most favorable to the person alleging a use of excessive force. *See Linbrugger v. Abercia*, 363 F.3d 537, 542-43 (5th Cir. 2004); *Fraire v. City of Arlington*, 957 F.2d 1268, 1270 (5th Cir 1992); *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006); *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001).

Thus, while a reviewing court is required to consider the evidence in the light most favorable to an individual claiming excessive force, the Court cannot “find” facts which are not in the record and the Court must still adhere to the fundamental principle underlying immunity; that determination of the reasonableness of a police officer’s use of force must be undertaken from the perspective of a reasonable police officer on the scene. *Id.* Of particular significance here, settled law acknowledges

the practical reality that “a police officer views the facts through the lens of his police experience and expertise.” *Ornelas v. United States*, 517 U.S. 690, 699-700, 116 S.Ct. 1657, 1663 (1996). Thus, the facts known to the experienced police officer are what count in judging the reasonableness of his action—not subjective facts known only to a plaintiff and certainly not information that is subject to a variety of interpretations by a plaintiff’s attorney who is unskilled in the law enforcement field. *See U.S. v. Banks*, 540 U.S. 31, 39, 124 S. Ct. 521, 527 (2003). It is likewise impermissible for a reviewing court to interpose its own subjective beliefs and judgments regarding its favored method of police response, procedures or tactics into an analysis that controlling precedent mandates must be conducted from the objective perspective of a reasonable police officer performing law enforcement duties. *See Linbrugger*, 363 F.3d at 542-43; *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994).

Therefore, the analysis here requires appropriate regard for the reasonable perceptions of the police officers on the scene with the expertise necessary to perform the duties of their profession, not aided by the benefit of hindsight.

2. The Record Disproves the Claimed Use of Excessive Force

The record establishes that Officer Trujillo’s actions were performed within constitutional bounds. Consistent with Supreme Court authority, the Fifth Circuit Court of Appeals has established a three part test for consideration of a claim of

excessive force during detention under § 1983. In order to prevail on an excessive force claim, a plaintiff must show (1) some injury; (2) which resulted directly and only from a use of force that was clearly excessive to the need; and (3) the excessiveness of which was objectively unreasonable. *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994). “There can be a constitutional violation only if injuries resulted from the officer’s use of excessive force. Injuries which result from, for example, an officer’s justified use of force to overcome resistance to arrest do not implicate constitutionally protected interests.” *Johnson v. Morel*, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc). If any of the elements of a claim under this test fail, so too does a plaintiff’s claim. *Id.* As the Supreme Court directs, determination of the reasonableness of Officer Trujillo’s decision to fire requires careful attention to the facts and circumstances of this case, including why Officer Trujillo was attempting to effectuate a lawful traffic stop and arrest of Rodriguez and his passenger, whether Rodriguez’s and his passenger’s actions and condition were serious, whether Rodriguez’s and his passenger’s actions posed an immediate threat to the safety of Officer Trujillo, and whether Rodriguez and his passenger actively resisted detention and attempted to evade arrest by flight. *See Graham*, 490 U.S. at 396. Evaluation of these factors shows that Officer Trujillo acted within constitutional limits.

The record clearly reflects the totality of the circumstances facing Officer

Trujillo at the time of the incident. Officer Trujillo responded to 1725 International Blvd. (a 7-11 store) in reference to a theft that had just occurred. (ROA.147). The description of the suspect vehicle was a brown colored SUV—it was not known whether the suspects had any weapons or not. (ROA.147). Officer Trujillo was aware that there had been previous multiple aggravated robberies in the City of Brownsville, where the suspects had used a handgun and fired it during the robberies. (ROA.147, 161-162, 454-455). In those calls, the suspect vehicle was also a brownish or gold color older model SUV. (ROA.147, 161-162, 454-455). Officer Trujillo recalled that this information was relayed to the patrol officers on duty during their daily roll call, via daily lookouts. (ROA.147, 161-162, 454-455). Officer Trujillo's level of awareness was raised as this vehicle was very similar, it had two young male suspects, and was also a suspect to the current theft. (ROA.147, 161-162). As Officer Trujillo attempted to stop the suspect vehicle by activating his lights and siren and air horn, the suspect driver refused to stop—he did not immediately stop. (ROA.147-148, 449). Normally, a law abiding citizen would immediately pull over once a police unit activates its emergency lights and sirens. Officer Trujillo's level of awareness and concern for his safety again began to rise as the driver of the suspect vehicle was refusing to stop his vehicle, coupled with the information pertaining to previous aggravated robberies with a similar suspect vehicle

description. (ROA.148). As soon as the suspect vehicle finally stopped and Officer Trujillo began to walk up to the driver's side door, Officer Trujillo observed that the front passenger side door opened rapidly and a male suspect wearing a blue polo style shirt and pink shorts fled into a field. (ROA.148, 449). At this moment, Officer Trujillo's level of awareness and concern was again very high because a normal citizen would not flee from the police, especially in the middle of a traffic stop. (ROA.148). Further, Officer Trujillo did not know if the passenger suspect that fled had a weapon, or if he was going to come back to approach him from behind and cause harm to him. (ROA.148). This also created an increased heightened level of awareness and concern, and Officer Trujillo felt that this was a very dangerous situation for him as he had no back up. (ROA.148). Officer Trujillo did not have to physically manifest his level of concern, as he is trained to keep a calm demeanor. As Officer Trujillo was attempting to communicate with the suspect driver and give him commands, the suspect driver refused, closed the driver door on Officer Trujillo, was using his hand to grab something from the center console area, and Officer Trujillo lost sight of the suspect driver's hand. (ROA.149, 449, 764-768). At that moment, Officer Trujillo was facing a non-compliant suspect driver possibly involved in the recent theft at the 7-Eleven convenience store, the unknown of whether the other suspect (the passenger) that had fled the scene of which he had no visual of

would come back to harm Officer Trujillo, the knowledge that these two suspects could be the suspects who had committed previous aggravated robberies in Brownsville wherein deadly weapons had been used, and now he was facing the non-compliant suspect driver and had no visual of what he was doing with his hand inside the vehicle, and the possibility that the suspect was grabbing for a weapon. The suspect driver then began to rev his engine. At this point in time, the suspect driver was still non-compliant, could possibly use the vehicle as a weapon to strike Officer Trujillo—this was a dangerous situation Officer Trujillo was facing. Officer Trujillo then observed the suspect driver put his right hand into the center console, he lost visual of the hand, so he began to actively target the suspect with his weapon, and the suspect driver then had a large gray object that he quickly moved in the direction of Officer Trujillo—at that moment, Officer Trujillo believed that the suspect driver was going to use the large gray object to cause deadly harm to Officer Trujillo, so Officer Trujillo, out of fear for his own life and for his own safety, made the decision to use deadly force and fired his weapon at the suspect driver. (ROA.149-150).

Based on the totality of circumstances that Officer Trujillo was facing at the time of the incident in question, Officer Trujillo's actions were objectively reasonable and any reasonable law enforcement officer facing the same or similar circumstances as Officer Trujillo faced at the time of the incident in question, would have acted

justifiably in the same manner as Officer Trujillo did. (ROA.149-150, 158, 283, 317-319, 744). The Texas Department of Public Safety Texas Rangers Division, an independent law enforcement agency separate and apart from the Brownsville Police Department and Cameron County District Attorney's Office, conducted an impartial investigation of this officer-involved shooting and the actions of Officer Trujillo. (ROA.283). Two (2) Texas Rangers, Ranger Patrick O'Connor and Ranger Antonio Rocha, Jr., who are reasonable law enforcement officers and conducted an independent and impartial investigation into this officer-involved shooting, testified that Officer Trujillo's actions under the circumstances he was facing at the time were objectively reasonable. (ROA.283, 744). Further, law enforcement expert Danny Defenbaugh concluded that Officer Trujillo's use of deadly force was justified, and further concluded "that any reasonable law enforcement officer who would face the same or similar conditions and factually tangible circumstances as Police Officer Trujillo encountered would respond and have the same rational response or equivalent reaction." (ROA.317-319).

"A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir.1996) (citing *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985)); *see also Cox v. County of Prince William*, 249 F.3d

295, 299 (4th Cir. 2001). “[T]he Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect’s intent to cause them harm—the Constitution does not require that certitude precede the act of self protection.” *Elliott*, 99 F.3d at 644.

Thus, the need to apprehend Rodriguez was significant as he was evading a lawful traffic stop, possibly involved in the recent theft and other aggravated robberies that had recently occurred, and of most significance, Rodriguez resisted arrest and posed a significant, imminent threat to Officer Trujillo’s safety. Viewing these undisputed facts and circumstances—from the point of view of an objective, reasonable, experienced police officer on the scene—it is clear that, particularly in darkness, a reasonable officer could have concluded Rodriguez posed an immediate threat to Officer Trujillo’s safety, and therefore, that shooting Rodriguez was reasonable under the totality of the circumstances. *See Graham*, 490 U.S. at 396, 109 S.Ct. at 1872.

3. Whether Rodriguez Might Have Been Reaching Toward the Center of the Vehicle to Manipulate the Vehicle’s Gear Selector in an Attempt to Flee When He Was Shot is Irrelevant to the Material Issue Before the Court

According to the Appellees’ argument, albeit without evidence, Rodriguez

never reached into the vehicle's center console area and never grabbed a screwdriver or object of any kind; instead, they claim he was only reaching toward the center of the vehicle to manipulate the vehicle's gear selector in an attempt to flee, and according to Appellees, Rodriguez first tried to shift the selector to drive, mistakenly put it in neutral, tried again, and finally put the car in drive; and Appellees further contend that the events described in the record by Officer Trujillo could not have occurred within the time of the incident, so Officer Trujillo must be lying about his account of events. However, none of these unsubstantiated allegations are supported by any record evidence and, in fact, are disproved by it.

Moreover, even if true, most of these arguments still would provide no basis for denying Officer Trujillo's qualified immunity. Whether Rodriguez was manipulating the gear shift or not is not material to resolution of the relevant questions before the Court related to the reasonableness of Officer Trujillo's perception of the threat Rodriguez posed. The Court is not being called upon to evaluate the reasonableness of Rodriguez's subjective perceptions of the events. The Court, instead, is called upon to determine whether a law enforcement officer could reasonably have believed, based upon a reasonable officer's perception of the events supported by the record showing Rodriguez's undisputed conduct; that Rodriguez posed an imminent threat of serious harm to Officer Trujillo.

“No right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts.” *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985). This Court has now been called upon to conduct an objective analysis of how a reasonable law enforcement officer could have evaluated the facts supported by the record; not to conduct a subjective inquiry into what Rodriguez wanted to do during the few seconds in which “tense, uncertain, and rapidly evolving circumstances” were occurring which required Officer Trujillo to make a life and death judgment about whether to fire in self defense in the situation with which he was confronted. *See Graham*, 490 U.S. 396; *Pierce v. Smith*, 117 F.3d 866, 871 n. 5 (5th Cir. 1997).

The Fifth Circuit has analyzed situations in which the shooting officer was the only witness to the events and situations wherein the shooting officer lost sight of the suspect’s hands and feared the suspect was reaching for a weapon. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383-84 (5th Cir. 2009); *Small ex rel. R.G. v. City of Alexandria*, 622 F. App’x 378, 382 (5th Cir. 2015); *see also Francis v. Garcia*, 702 F. App’x 218, 223 (5th Cir. 2017); *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991); *Mace v. City of Palestine*, 333 F.3d 621, 622-23 (5th Cir. 2003).

In *Ontiveros*, the plaintiffs had attempted to show a genuine dispute of material fact by questioning the officer’s credibility. *Ontiveros v. City of Rosenberg*, 564

F.3d 379, 383 (5th Cir. 2009). The Fifth Circuit found, though, that other officers were able to corroborate his version of events and that *the plaintiffs had failed to produce evidence contradicting his testimony*. *Id.*; (emphasis added). Next, the plaintiffs suggested that Ontiveros did not present a threat because the evidence showed he was kneeling at the time of his death. *Id.* at 385. Even if Ontiveros were kneeling, “a reasonable officer could have interpreted the totality of his actions as a refusal to comply with orders[,]” and the *evidence* did not contradict the officer’s account that Ontiveros appeared to be reaching for a weapon, so the court found that qualified immunity was proper. *Id.*

In *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991), Waco police officer Steve Anderson shot a suspect who was later discovered to be unarmed at the time of the shooting and who was surrounded by police officers following a vehicular pursuit. The *Reese* Court discussed the relevant objective facts, including the suspect’s action of reaching below Officer Anderson’s line of sight. Considering the facts in the light most favorable to the suspect, the *Reese* Court determined Officer Anderson could reasonably have believed the suspect was reaching for a weapon. Properly, the *Reese* Court did not delve into the wholly irrelevant possible reasons why the suspect refused to obey the law enforcement officers’ commands or speculate as to what the suspect was possibly thinking, feeling, or trying to accomplish by his

own acts because the suspect's subjective thoughts or unknown intentions obviously cannot inform an officer's consideration of whether, or how much, force is needed. Instead, the *Reese* Court properly analyzed the objective circumstances, as this Court must do, from the viewpoint of a reasonable police officer performing law enforcement duties. In so doing in *Reese*, the Court discussed "[t]he sad truth is that [the decedent's] actions alone could cause a reasonable officer to fear imminent and serious physical harm." *Id.*

In *Mace v. City of Palestine*, 333 F.3d 621, 622-23 (5th Cir. 2003), police officers encountered an intoxicated suspect who was brandishing a sword. The officers attempted to negotiate with the suspect without success and ultimately shot him when he raised his sword at a distance of 8-10 feet of the officers. Judge Jolly, writing for the *Mace* Court observed that the officer faced an intoxicated, violent and uncooperative armed individual within a few feet of police officers. The *Mace* Court determined "[i]t is not objectively unreasonable for an officer in that situation to believe that there was a serious danger to himself and the other officers present. *Id.* at 625.

Consistent with the holdings of the Fifth Circuit on this issue, in *Blanford v. Sacramento County*, 406 F.3d 1110, 1115-16 (9th Cir. 2005), law enforcement officers were held immune after they shot a saber-wielding mentally disturbed man

who seemingly refused to obey the officers' commands to disarm. After the shooting, the officers determined the disturbed man may not have heard the warnings because he wore music headphones which were not apparent to the officers, the man was on medication which may have affected his behavior and judgment, and there was no actual threat to others because the man lived at the location of the shooting and no one else was home at the time. *Blanford*, 406 F.3d at 1116. The *Blanford* Court specifically analyzed the officers' perceptions of the events – properly disregarding hindsight or speculation – and concluded that, from the perspective of a reasonable officer on the scene, the officer's perceptions were reasonable, albeit ultimately determined incorrect in light of the apparent threat the suspect posed. *Id.*

Likewise, in *Bell v. Irwin*, 321 F.3d 637, 639-40 (7th Cir. 2003), a plaintiff argued the court could not resolve whether use of a certain law enforcement tool was unreasonable because a colorable argument could be made both for and against the view the police officer acted appropriately. However, the *Bell* Court rejected the plaintiff's request to essentially equate the question of reasonableness of a use of force under the constitution to a simple negligence standard. *Id.* The *Bell* Court discussed that, “[u]nder the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, not how they appear in the courtroom to a cross-section of the civilian community.” *Id.* As the *Bell* Court

explained, when enough material facts to justify the challenged conduct are undisputed, there is nothing left for a fact finder “to do except second guess the officers, which *Graham* held must be prevented.” *Id.*

In the instant case, Texas Rangers Patrick O’Connor’s and Antonio Rocha’s testimony and report undeniably show that, after making a thorough and independent investigation of the shooting and considering a Texas Peace Officer’s training, Officer Trujillo’s decision to shoot Rodriguez under the circumstances was objectively reasonable. Further, the Texas Rangers concluded the objective evidence shows Officer Trujillo’s account of the events is accurate, uncontroverted, and establishes that his actions were justified. Under the circumstances, Officer Trujillo could reasonably have suspected that Rodriguez was reaching for a firearm or weapon inside the center console area of the vehicle and if Rodriguez had been holding a gun and he chose to fire it before Officer Trujillo fired, or as Officer Trujillo described, yielded a long, dull gray object towards Officer Trujillo’s direction, an officer would likely have been shot or severely injured. Officer Trujillo was, thus, called upon to make a decision within less than a second that, although reasonable when made, has now—in hindsight—been (impermissibly) second guessed. Accordingly, regardless of whether Rodriguez’s actions were intended to be threatening or whether ultimately determined to be actually threatening, Officer Trujillo was entitled to act upon his

reasonable perception that a serious threat existed when he fired. Thus, whether Rodriguez was trying to manipulate the gear shift in an attempt to flee is simply not material to resolution of the relevant questions before the Court—the reasonableness of Officer Trujillo’s perception of the need to fire—and the summary judgment record establishes that a competent law enforcement officer could reasonably have believed that shooting Rodriguez was not clearly excessive to the need under the circumstances, and the Appellees’ contentions regarding Rodriguez’s subjective perceptions and actions are immaterial in resolving the issue before the Court. *See Graham*, 490 U.S. at 397; *Young*, 775 F.2d at 1353.

4. Appellees’ Conjecture that All of the Events Could Not Have Occurred Within the Time of the Incident is Not Material to the Resolution of the Question Before the Court and is Refuted by the Record

The Appellees’ counsel also speculates that the reported events could not have occurred because, according to the prognostic conclusion of Appellees’ counsel, it is impossible for “all” of the reported events to have occurred during the short time period between the officer’s arrival at Rodriguez’s vehicle and the firing of the shots. The Appellees identify this as the assertion that discredits Officer Trujillo’s account of events. Of course there is absolutely no evidence, revealed by an obvious failure by the Appellees to provide any citation to the record, supporting this wholly speculative time impossibility theory and the record evidence disproves this

contention. Appellees' criticism of Officer Trujillo's actions fails to acknowledge the fact that Officer Trujillo was merely reacting to decisions Rodriguez made and actions Rodriguez took; therefore, Rodriguez—not Officer Trujillo—controlled the timing of the relevant events.

Furthermore, the relevant inquiry is not whether all of the events Officer Trujillo described occurred within a proscribed time period. Instead, the question for this Court is whether those events which prompted Officer Trujillo to fire occurred as he reported, and *no evidence* within the record calls his report of the significant facts into dispute. To the contrary, the physical evidence and pathologist/autopsy report tend to substantiate his report of the relevant events, not refute it. Accordingly, the short time assertion by the Appellees does not overcome Officer Trujillo's qualified immunity.

II. The District Court erroneously denied Officer Trujillo's motion for summary judgment as to qualified immunity because the record establishes he is entitled to qualified immunity even if, *arguendo*, Rodriguez's rights were violated.

A. Appellees Fail to Establish that All Reasonable Officers Would Have Known that Firing in Self Defense was Prohibited by Clearly Established Law Under the Totality of the Circumstances

Not all reasonable law enforcement officers encountering the circumstances supported by the factual record before the Court would have been on notice that firing in self defense was prohibited by clearly established law; therefore, the District Court

erroneously denied Officer Trujillo's qualified immunity.

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). However, “*Garner* did not establish a magical on/off switch that triggers rigid pre-conditions whenever an officer's actions constitute ‘deadly force.’” *Scott v. Harris*, 550 U.S. 372, 382 (2007). Whether [an officer's] actions constituted application of ‘deadly force,’ all that matters is whether [the officer's] actions were reasonable.” *Id.* at 383. “If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.” *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The immunity inquiry acknowledges that officers can make reasonable mistakes as to the legal constraints on specific instances of police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is justified under the law in those circumstances. If the officer's mistake as to what is required of him is reasonable, however, the officer is entitled to the immunity defense. *Saucier*, 533 U.S. at 205.

“Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Saucier*, 533 U.S. at 206; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (1994). “Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.” *Saucier*, 533 U.S. at 207. The Supreme Court, thus, has provided the guidance required for resolution of Appellees’ claims against Officer Trujillo.

“At the summary judgment stage, facts must be viewed in the light most favorable to the non-moving party only if there is a ‘genuine’ dispute as to those facts.” *Scott*, 550 U.S. at 380. “When 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.” *Id.* A court cannot ignore uncontroverted proof on material issues simply because there are differing versions of immaterial facts. *Gibson v. Rich*, 44 F.3d 276, 277-78 n.7 (5th Cir. 1995); *Frquire*, 957 F.2d at 1273.

Officer Trujillo has pleaded and submitted evidence supporting his qualified

immunity so the burden remains with the Appellees to overcome his immunity but they have failed to do so. *See Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 304-06 (5th Cir. 1992); *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987). To overcome Officer Trujillo's immunity, the Appellees were required to identify *competent* summary judgment evidence within the record which showed that no reasonable police officer could have believed Officer Trujillo's conduct was lawful in light of only the information he possessed at the time measured against the clearly established law and, the Appellees have undeniably failed in overcoming that burden. *Saucier*, 533 U.S. at 202; *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

In this case, the District Court hinged its decision that a fact issue remains that prevents a finding of objective reasonableness, solely on what the dash-cam video at issue did not show, failed to take into account the remaining competent summary judgment evidence submitted by the Appellant that supported Officer Trujillo's perception and accounting of Rodriguez's actions on the night of the incident in question, and further, failed to acknowledge that the Appellees did not submit any specific facts supported by the record that would contradict Officer Trujillo's testimony. (ROA.880-881). Further, the District Court relied on the Appellees'

unsubstantiated and speculative conclusory allegations and theories in concluding that a fact issue remains. The Appellees must allege substantiated facts, not conclusory allegations or speculation, by which a reasonable inference can be drawn. This is something the Appellees have failed to do, and simply cannot do, and the District Court incorrectly relied on such unsubstantiated and speculative conclusory allegations in concluding that a fact issue remains. Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). Conjecture and unverified assertions are not a specific showing of solid evidence to shield one from summary judgment. *Nowlin v. Resolution Trust Corporation*, 33 F.3d 498, 505 (5th Cir. 1994). Here, the Appellees' allegations only imply a speculative scenario that has no factual support whatsoever. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009). Hindsight and speculation create no genuine, material fact issue as to how a reasonable officer could have interpreted Rodriguez's actions. *Id.* at 384. Accordingly, the District Court's denial of Officer Trujillo's qualified immunity was in error and should be reversed.

CONCLUSION AND PRAYER

The District Court erred in denying Officer Trujillo's summary judgment on the issue of qualified immunity. The summary judgment record disproves Appellees'

allegations and shows that Rodriguez was not subjected to deprivation of any right, privilege or immunity protected by the Constitution or laws of the United States. Moreover, even if Rodriguez had been subjected to a constitutional deprivation, Officer Trujillo is still entitled to dismissal of the claims against him in light of his entitlement to qualified immunity. Appellant, therefore, respectfully requests that this Court reverse the District Court's denial of Officer Trujillo's qualified immunity, render that Appellees take nothing on their claims, and grant Appellant all other relief to which he is justly entitled in law and equity.

Respectfully submitted,

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

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) because this brief contains **9,858** words, excluding the parts exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that this document was e-filed with the U.S. Court of Appeals for the Fifth Circuit and served on opposing counsel by electronic mail on February 27, 2018.

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