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**CASE NO. 19-4085**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

THE ESTATE OF DILLON TAYLOR, CODY TAYLOR, JERRAIL  
TAYLOR, TEESHA TAYLOR, and ADAM THAYNE,

*Plaintiffs – Appellants,*

v.

SALT LAKE CITY, BRON CRUZ,

*Defendants – Appellees.*

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On Appeal from a Final Judgment Order Granting Summary Judgment

United States District Court, District of Utah, Central Division

The Honorable David Nuffer

D.C. No. 2:15-CV-00769-DN-BCW

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**APPELLANTS' BRIEF**

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Oral Argument Requested

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Dated: October 15, 2019

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## **PRIOR OR RELATED APPEALS**

None.

## **JURISDICTIONAL STATEMENT**

The district court properly exercised jurisdiction over this case involving violations of federal constitutional and statutory law. *See* United States Constitution; 28 U.S.C. § 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

On May 17, 2019, the district court entered written judgment granting Appellee's motion for summary judgment. *See* Memorandum Decision and Order Granting Motion for Summary Judgment, Aplt. App. at 842, attached hereto in Addendum A.<sup>1</sup> Appellants filed a timely notice of appeal from the district court's final judgment on June 16, 2019. *See* Notice of Appeal, Aplt. App. at 898, attached hereto in Addendum B.

This appeal is from a final judgment that disposes of all of Appellants' claims.

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<sup>1</sup> Pursuant to Local Rule 28.1, citations to the Appendix shall be Aplt. App. at xx.

## STATEMENT OF THE ISSUES

1. Whether the district court erred when it granted summary judgment after finding that the officer's conduct was objectively reasonable as a matter of law thereby entitling him to qualified immunity.
2. Whether the exclusionary rule applies to exclude evidence in 28 U.S.C. § 1983 cases.

## STATEMENT OF THE CASE AND RELEVANT FACTS

### A. Background

On August 11, 2014, Officer Bron Cruz (“Officer Cruz”) shot and killed Mr. Taylor after responding to a call that a Hispanic male was walking on the street and “looked suspicious.” Mr. Taylor had been walking to a 7-Eleven in Salt Lake City with his brother Jerrail Taylor (“Jerrail”) and his cousin Adam Thayne (“Adam”). (Aplt. App. at 14.) All three boys were peaceful and unarmed. The Taylor brothers are Hispanic.

Mr. Taylor had been walking away from Officer Cruz before the shooting. At one point he turned around to face Officer Cruz. Mr.

Taylor's hand made a movement to pull up his pants. He did not pull out a gun. In fact, Mr. Taylor did not have a gun in his possession. Officer Cruz shot him, and he died at the scene. (Aplt. App. at 15.)

Mr. Taylor had been wearing earphones at the time when the officer was telling him to put his hands in the air. Video evidence from the time of the shooting showed Officer Cruz finding the earphones on Mr. Taylor's body, unplugging them, and then throwing them to the side of Mr. Taylor's dead body. He later testified he had not seen the earphones at all. (Aplt. App. at 347-48.)

### **B. The Emergency Call**

At approximately 7:00 p.m. on August 11, 2014, a resident of a nearby retirement home, who refused to provide identifying information, called 911 and made a confused, incoherent, and unsubstantiated report that she had viewed some kids she considered suspicious. (Aplt. App. at 21, 846; Appellants' Ex. 2 filed conventionally in district court, Audio of 911 Call Dispatched to Officers – Unedited Version, exempted from electronic Appendix.) The caller sounded impaired, intoxicated, and compromised. The caller told the 911 operator she did not feel threatened and was not in danger. The caller

later admitted to drinking Vodka earlier that evening. The caller stated she saw young men walking down the street and that they appeared suspicious because of the way they looked. (Aplt. App. at 21-22, 846.)

It is undisputed that the caller made a “report of a man with a gun,” a “male Hispanic.” (Aplt. App. at 289-90.) It is undisputed that dispatch described the call as “no shots fired,” and “no one in danger.” (Aplt. App. at 388.) Dispatch stated the “suspect flashed a gun at the complainant but no threat was made.” (Aplt. App. at 846.) Officer Cruz testified he did not receive the information that no shots had been fired and that no one was in danger, despite other officers reading and hearing that information. (Aplt. App. at 471-72, 533.) Dispatch asked if there was “any unit coming clear to handle a check?” (Aplt. App. at 332, 846.) The call was not a “brandishing” call. (Aplt. App. at 847.)

### **C. Police Response to the Call**

Initially, Officer Cruz responded to the call. There are disputed facts as to whether Officer Cruz’s belief he was responding to a “brandishing” or not. (Aplt. App. at 290-91.) It is disputed as to which officer responded first, but ultimately two other officers responded to the call with Officer Cruz – Officer Uppsen Downes (“Officer Downes”),

and Officer Andrew Sylleloglou (“Officer Sylleloglou”). (Aplt. App. at 291.) All three officers were officers with the Salt Lake City Police Department. (Aplt. App. at 22.)

Officer Cruz saw Mr. Taylor have a conversation with a driver in a car stopped at an intersection. Officer Cruz described it as “some kind of distraction or disturbance.” (Aplt. App. at 333, 849.) Another city employee also witnessed the interaction in the intersection. He described seeing Mr. Taylor high-five the driver of a vehicle and then return to his friends on the sidewalk. (Aplt. App. at 334, 849.)

Officer Cruz then observed the young men enter 7-Eleven; the officers were waiting for them when they came out. (Aplt. App. at 22, 294.) Nothing unusual happened in the store – no crime or disturbance or report of a gun. Officer Cruz approached the young men with lights flashing immediately as they exited 7-Eleven; Officer Downes did not have his car lights on because “if it doesn’t meet the [department] circumstances to hit lights and sirens, we cannot.” (Aplt. App. at 613.)

Officer Cruz stated as the boys came out of 7-Eleven their hands were at their sides and his tension eased. (Aplt. App. at 337, 853.)

Officer Sylleloglou made first contact and directed them to raise their

hands. (Aplt. App. at 338, 855.) It is undisputed that Adam and Jerrail immediately stopped and raised their hands. (Aplt. App. at 301, 855.) Officer Cruz testified he believed there was a gun involved *because* of the speed at which Adam and Jerrail raised their hands. (*Id.*) Officer Downes testified Adam and Jerrail had their hands up “just from seeing [the officers’] presence,” and not necessarily as a result of a command. (Aplt. App. at 644-45.) Officer Downes stated it is not unusual for people to raise their hands when officers arrive, in fact, it happens “a lot of the time.” (Aplt. App. at 339, 645.) Officer Downes did not draw his gun, even after Adam began arguing with him. (*Id.*)

Officer Cruz immediately, or shortly after exiting his patrol car, drew his weapon. (Aplt. App. at 22, 316-17, Appellants’ Ex. 5, filed conventionally in the district court, Copy of the “Body Camera Video of Officer Bron Cruz – Unedited Version,” exempted from electronic Appendix.) Officer Cruz followed Mr. Taylor, who was already walking away from officers and the 7-Eleven. (Aplt. App. at 22, 857.)

#### **D. Mr. Taylor’s Behavior and the Shots Fired**

Officer Sylleloglou arrived on the scene at 7-Eleven first. (Aplt. App. at 852.) He got out and ran around the front of his car in pursuit of

Mr. Taylor, who had already started walking away. (Aplt. App. at 306.)

Mr. Taylor turned around to face the officers. Officer Sylleloglou had his gun trained on him at that time; Mr. Taylor's hands were at his sides.

(Aplt. App. at 308, Appellants' Ex. 5.) Officer Cruz had not yet exited his vehicle. (Aplt. App. at 310.) Mr. Taylor was wearing earbuds. (Aplt. App. at 870.)

Officer Cruz saw Mr. Taylor "calmly walk[ing] away." (Aplt. App. at 344.) He followed Mr. Taylor, who continued walking away from him. (Aplt. App. at 303.) The parties dispute as to whether Mr. Taylor looked at the officers before he walked away. (*Id.*) Mr. Taylor was wearing headphones. Officer Cruz followed Mr. Taylor with his gun drawn, finger on the trigger, trained squarely on Mr. Taylor. The parties dispute as to whether Officer Cruz told Mr. Taylor to "stop." (*Id.*) Video evidence shows Officer Cruz yelled at Mr. Taylor to get his hands up. In compliance, Mr. Taylor turned around, pulled up his hands, and showed them to Officer Cruz. (Aplt. App. at 23.)

During the time Officer Cruz was following Mr. Taylor, Officer Cruz said Mr. Taylor made eye contact with him and gave him a

“defiant look” and then turned and walked away. This is a disputed fact. (Aplt. App. at 297, 303.) Officer Cruz stated,

Um, and his eyes were just complete 100% defiance. He had this, this look on his face like, you know, like I, ah, hate? Um, like he was, he was not going to do anything that I said. Um, and it was just a horrible feeling, um, looking at him. Having him, you know, just the, it was horrible. Just hate, defiance, that he had in his eyes.

(Aplt. App. at 16.) This happened in a “split second,” despite Officer Cruz wearing heavy-duty, dark sunglasses. (Aplt. App. at 343.) It is also a disputed fact as to whether Officer Cruz told Mr. Taylor to stop, or whether he just said, “Get your hands out now. Get your hands out. Get your, get ‘em out.” (Aplt. App. at 298-99.)

After Mr. Taylor turned around toward the police officers, he made some type of movement involving his hands in the front waistband of his pants. Adam and Jerrail stated they saw Adam reach down and pull his pants up. (Aplt. App. at 869.) He was wearing a baggy shirt and baggy pants. (Aplt. App. at 349, 860.) Officer Cruz trained his weapon on Mr. Taylor. (Aplt. App. at 316.) Appellants dispute that Mr. Taylor’s hands remained inside the front of his waistband. (Aplt. App. 318.) The only fact that is not disputed is the command captured on Officer Cruz’s body camera to “Get your hands

out now. Get your hands out. Get your, get ‘em out.” (Aplt. App. at 308, 318.) Mr. Taylor turned around and faced Officer Cruz and showed him his hands. (Aplt. App. at 318.) It is undisputed Mr. Taylor did not have a gun. (Aplt. App. at 324.) Mr. Taylor’s hand never moved toward Officer Cruz. (Aplt. App. at 353, 866.)

Officer Cruz fired two rapid-succession shots – one slicing through Mr. Taylor’s heart and the other piercing his hand and abdomen. The body-cam captured it all in a graphic video. (Aplt. App. at Appellants’ Ex. 5.) Officer Cruz did not administer first aid other than to pull out a small gauze. He did not lift up Mr. Taylor’s shirt to identify where the wound was. (Aplt. App. at 15-16.) Neither of the other two officers on the scene fired shots. Officer Cruz requested medical attention. (Aplt. App. at 324.)

#### **E. After the Shot**

From the time Mr. Taylor turned around to the time he was shot was four seconds. (Aplt. App. at 868.) Approximately three minutes after Officer Cruz shot Mr. Taylor, video evidence shows that he straddled Mr. Taylor’s body. (Aplt. App. at 324, 870; Appellants’ Ex. 5.) It is undisputed that the earbuds were clearly visible. (Aplt. App. at

870.) Officer Cruz unplugged the earbuds from Mr. Taylor's cellphone and placed the earbuds on the ground. (*Id.*) Officer Cruz later stated he never saw the earbuds. (*Id.*)

#### **F. Witness Accounts**

Jerrail and Adam saw the police cars approaching them when they walked out of the 7-Eleven and raised their hands. (Aplt. App. at 301.) It is disputed whether Jerrail told Mr. Taylor to stop walking when Officer Cruz was following him. (Aplt. App. at 303-04.) Jerrail testified Mr. Taylor put his headphones in and walked away. (Aplt. App. at 304-05.) It is also disputed as to whether Officer Sylleloglou told Mr. Taylor to stop. (Aplt. App. at 305-06.) Jerrail and Adam saw Mr. Taylor reach down to pull his pants up. (Aplt. App. at 308.)

Adam's statement was succinct:

We went to 7-Eleven. We went in, we came out, the cops pulled their guns and um, my cousin started walking away and I look over and I seen him get shot. I see him, I see him, I think he tried to pull up his shorts or something and they thought he was reaching for a gun and so, all I know is a heard two gun shots and then the officer screaming at me to get down.

(Aplt. App. at 353.)

### **G. Police Detention of Jerrail and Adam**

Once Officer Cruz shot Mr. Taylor, Officer Downes drew his gun on Adam and Jerrail. (Aplt. App. at 325.) He then ordered them to lay on the ground in front of the 7-Eleven.

After the shooting, police detained Jerrail and Adam for more than five hours, much of it spent handcuffed in separate interrogation rooms. There were no charges against them; there was no probable cause that Jerrail and Adam had done anything other than walk along a city street on a hot, summer evening. (Aplt. App. at 17.)

### **H. Procedural History**

On June 12, 2015, the family members (“Appellants”) of Mr. Taylor filed a Notice of Claim. On October 28, 2015, Appellants filed this 28 U.S.C. § 1983 action on behalf of Mr. Taylor’s estate against multiple defendants, including the city of South Salt Lake, Salt Lake City, and various officers and government employees. (Aplt. App. at 14.) The claims remaining at the time of summary judgment included an action against Officer Cruz for excessive force and a claim of deliberate indifference in policies and training against Salt Lake City. (Aplt. App. at 843.)

Officer Cruz and Salt Lake City sought summary judgment on November 28, 2016. (Aplt. App. at 63.) They argued the Appellants' claims were barred by the defense of qualified immunity. In regards to the excessive force claim, Appellees argued Officer Cruz's use of lethal force was objectively reasonable. (Aplt. App. at 90.) They further argued the city was entitled to summary judgment because Officer Cruz's conduct did not violate a constitutional right. (Aplt. App. at 108.)

In a May 22, 2017 response to the motion for summary judgment, Appellants argued genuine issues of material fact precluded summary judgment. (Aplt. App. at 356.) They also argued Officer Cruz did not act as an objectively reasonable officer would act in his excessive force against Mr. Taylor. (*Id.*)

### **I. The District Court Order**

On May 17, 2019, the district court issued its Memorandum Decision and Order (the "Order") Granting Motion for Summary Judgment to Defendants/Appellees. (Addendum A; Aplt. App. at 842) The district court found that undisputed material facts demonstrated Officer Cruz's conduct was objectively reasonable and he was therefore entitled to qualified immunity. It also found that because Officer Cruz

did not violate a statutory or constitutional right, the city could not be liable for the officer's conduct. (*Id.*)

The district court made an additional finding in its Order regarding inadmissibility of the exclusionary rule to § 1983 cases. (Aplt. App. at 845.) It summarily found that although the Tenth Circuit has not yet ruled on this issue, the exclusionary rule does not apply in § 1983 cases. Therefore, Jerrail and Adam's statements to police while they were detained, in violation of their Fourth Amendment right, were admissible. (*Id.*)

### **SUMMARY OF THE ARGUMENT**

Three officers responded to a call of three young men walking down State Street on an early summer evening, their only crime being that they were Hispanic and young. There was report of a gun, but no danger, no threat, and no incident with any gun. As one of the young men appropriately questioned, "I can't walk in America and buy a goddamn drink and a beer?" (Aplt. App. at 340.) Despite the outsized police response, and despite the lack of any threat or even hint of an actual gun other than an anonymous, tipsy caller's unremarkable report

of “suspicious” Hispanic men, the young men’s walk to 7-Eleven ended in death for Mr. Taylor.

This appeal presents material facts in dispute regarding the objective reasonableness of an officer’s use of excessive force in violation of the Fourth Amendment. The district court’s apologetic opinion illustrates the seriousness of the issues involved. In effect, the district court decided, as a matter of law, that it was objectively reasonable for a police officer to shoot and kill a young man who had been reported as somehow suspiciously walking down a city street. There was no weapon involved. There was no violence or threat involved except on the part of one of the responding police officers. The other two officers on the scene acted reasonably at all times; they did not perceive a threat and did not shoot their weapons. Officer Cruz, though, shot first, and asked questions later.

Even the district court conceded that this case might help officers and others be “mindful of the past [in order to] guide future decisions and conduct to avoid similar unfortunate consequences.” (Aplt. App. at 843.) This concession illustrates the court’s own acknowledgment that

Officer Cruz did not act objectively reasonable, and that future officers should avoid similar mistakes.

Because material facts are in dispute, the district court should not have concluded, as a matter of law, that the officer acted objectively reasonable in this case. This Court's summary judgment standard requires that the Order be reversed and the case decided by a jury. Is it really enough that an officer feel threatened by a young, Hispanic man walking down a street after an unsubstantiated report of a gun but no indication of the actual gun or any threat associated with it?

There is one primary question in this appeal – did Officer Cruz act objectively reasonable when he shot and killed Mr. Taylor in front of his brother and cousin for walking along a street and being Hispanic. The answer is – a jury should decide.

The question turns on what a reasonable officer would have done in this situation. The other two officers at the scene exemplified perfectly what reasonable officers would have done – and neither of them shot at Mr. Taylor. Neither of them perceived a threat. Neither of them thought Mr. Taylor's movement at the top of his pants to pull up his baggy pants warranted being shot. That is the objectively

reasonable officer standard. Further, the standard should be scrutinized within the context of police shootings of unarmed, minority men across the nation that have become more and more objectively unreasonable. Police should know that they cannot shoot unarmed suspects walking away from them. This Court should put police on notice.

Finally, this Circuit has not decided the issue of whether the exclusionary rule applies in the context of a § 1983 claim. Section 1983 claims seek to hold the government accountable for egregious conduct. The protections that apply to protect suspects in criminal cases should apply here as well.

For these reasons, the Court should reverse the district court's Order granting summary judgment and remand for trial.

### **ARGUMENT**

The district court should not have granted summary judgment in this case because material issues of fact remain as to whether Officer Cruz acted objectively reasonable or not.

## I. STANDARDS OF REVIEW

This Court reviews a “grant of a summary judgment motion based on a qualified immunity defense” de novo. *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005).

“Summary judgment is appropriate if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Gwinn v. Awmiller*, 354 F.3d 1211, 1215 (10th Cir. 2004) (quoting Fed. R. Civ. P. 56(c)). “We view the record in the light most favorable to the nonmoving party.” *Id.* (citation omitted). Where “genuine issues of fact exist,” a court cannot grant summary judgment. *Flanagan v. Munger*, 890 F.2d 1557, 1572 (10th Cir. 1989); *see also Mick v. Brewer*, 76 F.3d 1127, 1134–35 (10th Cir. 1996) (“We review the district court's qualified immunity determination at the summary judgment stage de novo, viewing the evidence in the light most favorable to the nonmoving party.”).

## II. OFFICER CRUZ WAS NOT ENTITLED TO QUALIFIED IMMUNITY

“The doctrine of qualified immunity provides that government officials generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Dixon v. Richer*, 922 F.2d 1456, 1459 (10th Cir. 1991) (quotation omitted).

### A. Legal Standard

“In excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry.” *Dixon*, 922 F.2d at 1463. “The Fourth Amendment inquiry asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances.” *Id.* The law has long been settled that “law enforcement officers must be ‘objectively reasonable’ in their searches and seizures.” *Id.* at 1461.

“In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry.” *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (quotation omitted) (holding

officers not entitled to qualified immunity on claim of excessive force where officers hit plaintiff when he was not resisting). “The first asks whether the facts, taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a federal right.” *Id.* (quotations omitted) (cleaned up). “The second prong of the qualified-immunity analysis asks whether the right in question was clearly established at the time of the violation.” *Id.* (quotation omitted).

“Courts have discretion to decide the order in which to engage the two qualified immunity prongs.” *Id.* at 1045. (quotations omitted) (cleaned up). “But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.” *Id.* (quotation omitted); *see also Brewer*, 76 F.3d at 1136–37 (reversing summary judgment on qualified immunity in excessive force case where district court ignored testimony of eyewitnesses in favor of officer's disputed testimony).

### **B. The First Prong – Officer Cruz Violated a Constitutional Right**

The Fourth Amendment protects citizens from being free of excessive force by police. *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016). “We evaluate excessive force claims under an objective

reasonableness standard, which we judge from the perspective of a reasonable officer on the scene.” *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). “[T]he ‘reasonableness’ inquiry ... is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *McCoy*, 887 F.3d at 1045 (quotation omitted). “In other words, an officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” *Id.* (quotation omitted).

“To determine if an officer's actions were objectively reasonable, we carefully consider the totality of the circumstances, ‘including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’” *Perea*, 817 F.3d at 1202 (quoting *Graham*, 490 U.S. at 396). Facts are “taken in the light most favorable to the party asserting the injury.” *Gouskos v. Griffith*, 122 F. App’x 965, 975 (10th Cir. 2005) (quotation omitted)

(unpublished) (holding that analysis of whether party violated a constitutional right by relying solely on disputed testimony is “improper”); *see also Cardall v. Thompson*, 845 F.Supp.2d 1182, 1192 (D. Utah 2012) (finding summary judgment inappropriate where material facts in dispute).

## 1. Severity of the Crime

### a. Legal Standard

In the objective reasonableness analysis, the Court first considers the severity of the crime. In *Perea*, the victim’s family brought an action against police officers for excessive force. After an emergency call reported that the victim suffered from mental illness and was on drugs, the officers were asked to conduct a welfare check. “The officers were informed that they were responding to a verbal fight and that no weapons were involved.” *Perea*, 817 F.3d at 1201. The officers witnessed the victim pedal through a stop sign, and therefore commit a traffic violation. The officers ultimately forced the victim into a parking lot with the direction of their car, pursued on foot, and then pushed the victim off his bike. *Id.* After the victim thrashed and struggled against

the officer's attempt to seize him, the officer used a taser against him ten separate times. He died shortly thereafter. *Id.*

The officers moved for summary judgment based on qualified immunity, which the district court denied. On interlocutory appeal, this Court affirmed the denial. The Court held that “the first factor we consider, the severity of [the victim's] crime, weighs heavily against the use of anything more than minimal force.” *Id.* at 1202. “That the officers were performing a welfare check, and that they were not looking for him because they suspected he had committed a crime prior to finding him, weighs heavily against the use of significant force.” *Id.*

In *Casey v. City of Fed. Heights*, 509 F.3d 1278 (10th Cir. 2007), police officers accosted the plaintiff after he left the courthouse with a court file – a misdemeanor – to get money from this truck to pay a traffic citation. *Id.* at 1278. The plaintiff did not realize leaving the courthouse with his paperwork was a crime. The defendant police officers stopped the plaintiff on his way back inside, failed to explain they were arresting him, tackled him to the ground, and then tased him. The Court held the plaintiff's “conduct was not a severe crime – if

it amounted to a crime at all,” “which reduce[d] the level of force that was reasonable for [the officer] to use.” *Id.* at 1281.

Even more, “[t]he reasonableness of [the officers’] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officers’] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995). In *Sevier*, police officers entered the bedroom of a suicidal twenty-two-year-old in the middle of the night with their guns drawn. *Id.* at 698. The officers did not suspect the victim of any crime or have any reason to believe he posed a threat.

b. Facts in this Case

In this case, Officer Cruz was responding to a dispatch call that alerted officers to three male Hispanics, one of whom showed a gun but did not threaten anyone with it and did not brandish it. Dispatch made clear there was no current threat. The men were reported as “suspicious,” but there had been no report of any crime, and in fact Officer Cruz watched them enter and exit 7-Eleven without incident. As in *Perea*, the severity of the “crime” in this case “weighs heavily against

the use of significant force.” 817 F.3d at 1202. Indeed, Mr. Taylor’s “minor offense – at most – supported the use of minimal force.” *Id.* at 1203; *see also Fogarty v. Gallegos*, 523 F.3d 1147, 1160 (10th Cir. 2008) (“the amount of force used should have been reduced accordingly” for a petty misdemeanor).

The district court found that “Officer Cruz’s use of deadly force was objectively reasonable in light of the dispatch report of a man with a gun and the unknown motivations of the suspects.” (Aplt. App. at 874.) But the “unknown motivations of the suspects” is not a factor in any analysis of cases deciding these issues. Indeed, underlying intent or motivation is not part of the objective reasonableness test. *See McCoy*, 887 F.3d at 1045. An objectively reasonable officer will *never* know the unknown motivations of the suspect, and therefore that factor cannot be part of the analysis of whether an officer acted objectively reasonable. In reality, all we have in this case is that a man was seen with a gun. No threat was made; no crime was reported; there was no danger. An objective officer would not have escalated this situation as Officer Cruz did in this case upon such facts.

The district court argued that the crime of possessing a gun ranged from being no crime at all to a misdemeanor to a felony – for being a restricted person in possession of a crime. (Aplt. App. at 877.) But even the crime of being a felon in possession of a weapon is not inherently violent in its nature enough to warrant Officer Cruz’s violent response. A felon in possession of a gun simply does not tip the scale of severity of a crime – akin to a burglary or murder – in order to justify shooting Mr. Taylor.

Further, Officer Cruz’s *subjective* belief that he was responding to a possible brandishing was not objectively reasonable in this case where the dispatch clearly stated no threat had been made and no weapon brandished. The officer’s subjective belief that it was does not make his mistake objectively reasonable, especially in light of the fact that the other two officers on the scene both heard from dispatch that it was not a brandishing call.

In this case, as in *Sevier*, Officer Cruz created and exacerbated the situation that gave rise to Mr. Taylor’s disputedly-threatening actions. The officers were called out on a call of three “suspicious” young men, one of whom had a gun but who had made no threat. The officers

observed the men for some time, including their entrance and exit from a 7-Eleven without incident. The men were not bothering anyone, and there were no persons under threat. The officers had no reason to suspect the men would start a disturbance based on the call from an anonymous caller and their own surveillance of the men without incident. Instead of driving away, the officers escalated the situation by driving up quickly to the 7-Eleven in a tactical maneuver, with their lights flashing, and exiting their vehicles with guns drawn.

The first *Graham* factor weighs in Appellants' favor.

## 2. Immediate Threat to Safety

### a. Legal Standard

The second *Graham* factor also weighs in Appellants' favor in this case, as it did in *Perea*. In *Perea*, “[t]he officers do not argue that Perea was a danger to anyone other than himself *before they attempted to effect an arrest.*” 817 F.3d at 1203 (emphasis added). “After that point, any threat posed stemmed from Perea resisting arrest after the officers pushed him from his bicycle without warning or explanation.” *Id.* “Because the officers do not argue that Perea posed a threat before they

initiated the arrest, the second *Graham* factor weighs in Perea's favor.”

*Id.*

In an additional case that presents similar circumstances, the Second Circuit reversed a motion of summary judgment based on qualified immunity where the facts regarding the officer’s reasonableness were disputed. “Hemphill crouched, pivoted his body from left to right, and furtively reached toward his waist. Officer Schott then shot Hemphill four times.” *Hemphill v. Schott*, 141 F.3d 412, 415 (2d Cir. 1998). The plaintiff “made ambiguous motions rather than putting his hands up as commanded by [the officer].” *Id.* at 417. The plaintiff disputed such movements, and the court was required to accept the plaintiff’s version of the facts as true. *Id.* “Because summary judgment based ... on qualified immunity requires that no dispute about material factual issues remain, the district court erred by entering summary judgment in favor of [the officer].” *Id.* at 418.

In a case in the Ninth Circuit, police shot and killed a man after pursuing him for speeding and other traffic infractions. *Aguirre v. City of W. Covina*, 187 F. App’x 755, 756 (9th Cir. 2006) (unpublished). “At issue was the officer’s objective reasonableness in believing the suspect

had a gun.” *Id.* The officer argued that the plaintiff had said he had a gun, but eyewitness accounts indicated they unequivocally did not hear the plaintiff say he had a gun. *Id.* at 757. The court held that the officer’s “subjective considerations” of whether a threat existed were irrelevant. *Id.* The undisputed facts showed the plaintiff had “neither threatened, nor accosted anyone on [the street].” *Id.*

“[T]he Supreme Court has said that an officer may use deadly force only when a fleeing suspect poses a threat of serious physical harm, not merely when a suspect potentially could pose such a threat.” *Id.* (citation omitted). The court denied summary judgment. “A jury must determine whether a reasonable police officer in the circumstances confronting [the officer] would have concluded that deadly force should be used against [the victim].” *Id.* at 758; *see also Withers v. City of Cleveland*, 640 F. App’x 416, 419 (6th Cir. 2016) (“Summary judgment is inappropriate where there are factual disputes regarding the reasonableness of an officer’s use of deadly force.”).

b. Facts in this case

Similarly, in this case, Mr. Taylor was minding his own business walking down the street, saying hi to friends and getting a drink inside

7-Eleven when police unexplainably started harassing him based on an emergency call made by an anonymous, tipsy caller. Even the dispatch relayed the information that there was no current threat. It is indisputable that before the officers arrived, there was no current threat to anyone around Mr. Taylor or to Mr. Taylor himself. Any disputed threat – and again, it is disputed – did not occur until the officers arrived, with their lights flashing and their guns drawn. An objectively reasonable officer cannot create the threat and then use deadly force to protect against it.

The fact that the district court found persuasive Mr. Taylor's interaction with the car at the intersection, which, when taken in the light most favorable to Mr. Taylor, was a high-five to a driver of a car, does not help turn Officer Cruz's subjective beliefs of present danger into objective reasonableness. (Aplt. App. at 876.) Officer Cruz was simply wrong that Mr. Taylor was causing a "scene" at the intersection. Regardless, that situation cleared before the young men went into and out of the 7-Eleven without incident. The short, innocuous interaction in the intersection did not and could not provide justification enough to increase Officer Cruz's heightened sensitivities to bring any perception

of an immediate threat from subjective mistake to objective reasonableness.

More importantly, Officer Cruz's statements as to what led him to believe Mr. Taylor posed a threat has changed over time. In his initial interview, Officer Cruz claimed when Adam and Jerrail raised their hands, that made him scared because suspects only do that when they have a weapon. (Aplt. App. at 301, 855.) On the other hand, Adam and Jerrail raising their hands was not "unusual" to Downes, and something that happens quite a lot. (Aplt. App. at 644-45.)

The district court cited *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008), to argue that the potential threat posed by Mr. Taylor justified Officer Cruz's use of force as objectively reasonable. (Aplt. App. at 879.) As the district court noted, *Murr* requires

a number of non-exclusive factors. These include (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 officers and the suspect; and (4) the manifest intentions of the suspect.

511 F.3d at 1260 (citations omitted). Taking the facts in the light most favorable to the Appellants in this case, the *Murr* factors require that the Court send the issue of objective reasonableness to the jury.

First, the officers in this case did not order Mr. Taylor to drop his weapon because they never saw a weapon, because Mr. Taylor did not have a weapon. Next, it is disputed as to whether Mr. Taylor took any “hostile motions” *with the weapon*, especially since the officers never saw a weapon. Third, the distance between the officers and Mr. Taylor allowed for space to protect against any threat. And finally, Mr. Taylor’s manifest intentions, taken in light favorable to him, were at best that he wanted to leave the scene as fast as possible, and that he needed to pull up his baggy pants.

Even more, the case circumstances in *Murr* are inapposite to this case. In *Murr*, like here, the officers shot and killed a man in the street. But that’s where the similarities end. In *Murr*, the officers encountered the following significant and numerous exacerbating factors:

- 1) Larsen had already threatened violence against himself and others;
- 2) the officers responded to an emergency call late at night;
- 3) when the officers arrived, they encountered a man armed with a knife;
- 4) both officers repeatedly told Larsen to put down the knife;
- 5) the knife was a large weapon with a blade

over a foot in length rather than a mere pocket knife or razor blade; (6) Larsen refused to cooperate with the officers' repeated orders to drop his weapon; (7) Larsen held the high ground vis-a-vis the officers; (8) Larsen raised the knife blade above his shoulder and pointed the tip towards the officers; (9) Officer Brase was also prepared to use force and was moving into position to be able to do so; (10) Larsen turned and took a step toward Officer Murr; (11) the distance between Murr and Larsen at the time of the shooting, though disputed, was somewhere between 7 and 20 feet.

*Id.* at 1260–61. And still the case went to trial.

In this case, though, there was no threat of violence, the call was early evening, while it was still light out, officers encountered three young men who were not creating any disturbances, and they saw no weapons on any of the young men. The *Murr* Court noted an earlier case, *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989), where summary judgment was improper because “disputed facts called into question the immediacy of the threat facing the officer.” *Murr*, 511 F.3d at 1262. In *Zuchel*, witnesses had differing accounts of how far apart the officer and the suspect were standing. “Other factual disputes involved whether the officers could reasonably think the decedent was armed when he in fact was holding fingernail clippers, whether the

decedent had made a stabbing motion, and whether the officers had warned the decedent to drop his weapon.” *Id.*

In this context, the district court again falls back on the fact that the dispatch issued a call of “a man with a gun.” (Aplt. App. at 879.) But the officers had watched the men for at least five minutes as they walked down the street and into the 7-Eleven and back out again without incident. There was no threat. They saw no weapons. No objective officer would have assumed a threat after watching the young men as they did.

Even more, the report was issued by an anonymous caller who refused to give more details and who sounded tipsy. It is just not enough, as a legal matter, to shield an officer from responsibility for acting in such an egregious way. It is not enough, as a legal matter, to allow an officer to presume probable cause and criminality when disputed facts say otherwise.

The district court also relied on *Jiron v. City of Lakewood* in its Order. (Aplt. App. at 894.) But in *Jiron*, the victim of the police shooting had already pled guilty to felony menacing of the officer in an earlier proceeding and was therefore estopped from arguing she had not

threatened to harm the officer. *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004). In this case, though, it is still very disputed whether it was objectively reasonable for the officer to consider Mr. Taylor as threatening or not. The facts in *Jiron* were undisputed. The facts here are highly disputed.

The most objectively unreasonable aspect of Officer Cruz's statements, though, is his position that when Jerrail and Adam quickly raised their hands, he got scared. Rather than Jerrail and Adam's compliance easing fears, Officer Cruz inexplicably allowed it to heighten alert that a gun was present. This is not an objectively reasonable reaction. It cannot be reasonable for police to ask a suspect to raise his hands, and then elevate the response if they refuse, *and* for police to ask a suspect to raise his hands, and then elevate the response if they comply. Such a standard would mean anything the police ever do is reasonable. It cannot be the case that a suspect calmly walking away would cause a reasonable officer to suspect that suspect more. (Aplt. App. at 861.)

Regardless, as in *Sevier*, "some evidence showed that [the suspect] did not lunge at [the officer] with a knife, and, thus, that highly

material fact [was] in dispute,” and summary judgment was therefore not appropriate. *Sevier*, 60 F.3d at 700–01.

When the facts are taken in the light most favorable to Appellants, Mr. Taylor did not pose a threat. In fact, Mr. Taylor was not looking to engage with the officers or threaten them in any way. He was trying to leave the scene. The second *Graham* factor therefore also weighs in Appellants’ favor.

### 3. Resisting Arrest

#### a. Legal Standard

The third *Graham* factor, resisting arrest, is arguably the most objectively reasonable for Officer Cruz in this case, as it was also in *Perea*. “The third factor, whether Perea resisted arrest, weighs in favor of the use of *some* force during the period in which Perea was resisting. However, the relevant inquiry is whether the taser use was reasonable and proportionate given Perea's resistance.” *Perea*, 817 F.3d at 1203 (emphasis in original). In *Perea*, the district court found that the officer’s violent response was objectively unreasonable because “a reasonable jury could find that [the officer] continued to use the taser

on Perea even after the point where it could be considered necessary or even debatably reasonable.” *Id.*

But the accusation that Mr. Taylor was resisting is not pre-determined. The district court should not have decided this prong based on disputed facts, which it did. In *Nosewicz v. Janosko*, the plaintiff brought an excessive force claim against an officer who slammed his head into a wall and fractured a rib. 754 F. App'x 725, 732 (10th Cir. 2018) (unpublished). While it is true that the plaintiff was refusing to obey commands, the Court held it did not equate, as a legal matter, to “active resistance.” *Id.* at 733. “Being irate and refusing to obey lawful commands” did not constitute resisting arrest. *Id.* “Because [the plaintiff’s version is not blatantly contradicted by the record, the judge was required to accept it at this stage of the proceedings.” *Id.* at 734 (quotation omitted).

b. Facts in this Case

As in *Perea* and *Nosewicz*, Mr. Taylor’s alleged resistance did not justify the officer’s severe and violent response. It is not reasonable for an officer to shoot and kill a man walking down a street, who had threatened no one and was not suspected in a crime or was suspected in

a very minor crime, and who posed no threat to bystanders or officers *until* police arrived on the scene. Even more, Officer Cruz did not shoot Mr. Taylor once – he shot him twice. Viewing the facts in the light most favorable to Mr. Taylor would require the Court consider his hand movement simply pulling up his pants as opposed to reaching for a weapon or failing to comply to orders to raise his hands.

In short, the facts are in dispute. The only command made on the bodycam is “show me your hands,” and Mr. Taylor eventually complied. No other commands are heard on the video evidence. As Mr. Taylor was unarmed, there were no hostile motions made towards the officers. Even more, Mr. Taylor was moving away from Officer Cruz, and Officer Cruz was inexplicably trying to close the distance.

Thus, viewing the facts in the light most favorable to Appellants, Officer Cruz’s actions were objectively unreasonable. The third *Graham* factor therefore also weighs in favor of Appellants.

**C. The Second Prong – The Constitutional Right was Clearly Established**

“To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Brewer*, 76 F.3d at 1134 (quotation

omitted). “It is clearly established that specific conduct violates a constitutional right when Tenth Circuit or Supreme Court precedent would make it clear to every reasonable officer that such conduct is prohibited.” *Perea*, 817 F.3d at 1204. Clearly established law “must be particularized to the facts of the case.” *McCoy*, 887 F.3d at 1044 (quotation omitted).

“[A] law enforcement official's liability under 42 U.S.C. § 1983 for a violation of an individual's constitutional rights through the use of excessive force in completing an arrest is well established.” *Brewer*, 76 F.3d at 1136 (quotation omitted). “The plaintiff carries the burden of convincing the court that the law was clearly established.” *Dixon*, 922 F.2d at 1460 (quotation omitted) (cleaned up). Summary judgment is not appropriate on the question of whether a constitutional right is clearly established where material facts are in dispute. *Nosewicz*, 754 F. App'x at 735.

Thus, Defendant Cruz's use of deadly force was a clearly established violation of Mr. Taylor's constitutional rights if Officer Cruz's actions were objectively unreasonable. As the above analysis concluded, Defendant Cruz's actions were objectively unreasonable.

“Indeed, there is no doubt that *Graham v. Connor* ... clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.” *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001) (citation omitted) (finding it objectively unreasonable for officers to train their weapons on subdued persons). “The display of weapons, and the pointing of firearms at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers and others, based upon what the officers know at that time.” *Id.* at 1192.

This Court held in *Perea* that it is “clearly established law in the Tenth Circuit that the use of disproportionate force to arrest an individual who is not suspected of committing a serious crime and who poses no threat to others constitutes excessive force.” 817 F.3d at 1204; *see also Casey*, 509 F.3d at 1281, 1285 (use of force, including a taser, against a suspect who committed only a nonviolent misdemeanor, and who did not struggle against officers until the officers employed force, was unlawful); *Arnold v. Curtis*, 243 F. App'x 408, 412 (10th Cir. 2007)

“At the time of the encounter, there is no question that the Fourth Amendment right to be free from excessive force clearly embraced the right of an innocent citizen to attend a movie without being seized by a self-identified law enforcement officer and thrown down a staircase.”); *Walker v. City of Orem*, 451 F.3d 1139, 1159-60 (10th Cir. 2006) (officers violated clearly established law under totality of circumstances by using excessive force in shooting man standing over twenty feet away who possessed a knife when man “posed a danger only to himself,” and “[t]he crimes at issue (theft of the vehicle, eluding the officers) were not particularly severe”).

Thus, it was clearly established in Tenth Circuit precedent in 2017 that a Hispanic man walking down the street without a weapon, who causes no public disturbances, who does not immediately respond when an officer tells him to put his hands up, but later complies, with additional officers within feet, who disputably gives an officer a “mean mug” and disputably makes a furtive gesture with his hand by his pants’ waistband, should not, as a matter of law, be subject to excessive and deadly force by police officers.

**D. Officer Cruz Did Not Act as an Objectively Reasonable Officer Should Have Acted**

Officer Cruz did not act as an objectively reasonable officer should have acted.

1. The Other Officers Acted Objectively Reasonable

The Court does not have to wonder what the objectively reasonable officer would have done in this case because there were two other officers at the scene who acted objectively reasonable. The *Graham* standard requires that the Court analyze Officer Cruz’s use of deadly force from “the perspective of a reasonable officer on the scene, recognizing that officers are often forced to make split-second decisions and should not be held to the exacting scrutiny of hindsight.” *Graham*, 490 U.S. at 396–97. Neither of the other two officers shot their weapons. Neither of the other two officers even turned on their lights when they approached Mr. Taylor, Adam, and Jerrail outside the 7-Eleven.

Officer Sylleloglou did not shoot Dillon. Indeed, Officer Sylleloglou did not fire his service revolver, even though he had it drawn, trained on Mr. Taylor, and his finger on the trigger. Leading up to Officer Cruz shooting Mr. Taylor to death, Officer Sylleloglou was listening to Officer Cruz make the repeated command “show me your hands” or something

similar. When Mr. Taylor did put his hands up to show Officer Cruz he did not have a weapon, Officer Cruz shot him. Taking the facts in the light most favorable to Appellants, Officer Cruz's actions were not objectively reasonable; Officer Sylleloglou's actions were.

In fact, it was objectively unreasonable to rely on the following facts that Officer Cruz relied on, which the other officers stated they did not similarly rely on or believe as true:

- Officer Cruz should not have relied on any information from the anonymous caller reported by dispatch. Anonymous sources are notoriously unreliable, and the caller was admittedly inebriated.
- Officer Cruz should have received the correct information from the dispatch call – namely, that the call was not a “brandishing” call and that there was no current threat. The other two officers did hear this information correctly.
- The episode in the intersection was not enough to “heighten Officer Cruz's caution” regarding the three suspects. (Aplt. App. at 876.)

- It was not objectively reasonable to consider Adam and Jerrail's compliance as indicative that a weapon was involved.

2. The District Court Impermissibly Weighed Evidence Regarding Officer Cruz's Objective Reasonableness

It is clear that the district court incorrectly weighed evidence in its determination of whether Officer Cruz acted objectively reasonable. For example, instead of assigning the facts in the light most favorable to Appellants, the district court weighed the facts relating to Mr. Taylor's interaction with the car at the intersection before he went into the 7-Eleven. (Aplt. App. at 876-77.) This was error. The district court argued:

The witness observed the exchange from an obstructed vantage point that was different than Officer Cruz's view. The witness also did not describe the actions of Jerrail and Adam during the exchange. And the witness was not viewing the exchange from the prospective of an officer responding to a dispatch report of a man with a gun.

(*Id.*) Even more, the district court concluded that "what actually occurred during the exchange is not material. Rather, it is Officer Cruz's observation of and reaction to the exchange that are material to determining whether his conduct was objectively reasonable." (*Id.*)

What actually occurred during the exchange is material, though, because it is reasonable to expect police officers not to create nefarious situations out of innocent contexts and then use that creation as justification to shoot and kill unarmed men. A reasonable officer would not have concluded from the incident in the intersection that Mr. Taylor had created any sort of disturbance, and therefore a reasonable officer would not be justified in using the situation to escalate a separate non-threatening situation.

A suspect not responding to a call from an officer to show his hands while the suspect is wearing headphones is also not enough to allow a reasonable officer to shoot and kill that suspect. A gesture of a hand to loose-fitting pants, where another officer has a gun drawn on the suspect, and no movement is ever made toward the officer, is not enough to allow an objectively reasonable officer, as a matter of law, to shoot and kill that suspect.

Regardless, the material facts are in dispute, and the district court erred in deciding the issue for itself. While the district court may have paid lip service to the “light most favorable” standard by admitting the emergency call was for a minor crime – or no crime at all, its

ultimate finding that it was still objectively reasonable for Officer Cruz to act with “heightened caution” because of what he thinks happened instead of what actually happened turns the standard on its head. (Aplt. App. at 877.) Such a solipsistic statement would apply in every case. In other words, any and every situation an officer could likely conceive, whether accurate or not, could create a reason to act with “heightened caution” for a reasonable officer. It is simply not enough to justify, as a legal matter, such excessive force.

### **III. DISPUTED ISSUES OF MATERIAL FACT REMAIN TO PRECLUDE SUMMARY JUDGMENT**

When the plaintiff meets the two-part qualified immunity test a defendant then bears the traditional burden of the movant for summary judgment—showing “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “This requires the defendant to show that there are no disputes of material fact as to whether his conduct was objectively reasonable in light of clearly established law and the information known to the defendant at the time.” *Brewer*, 76 F.3d at 1134; *see also Dixon*, 922 F.2d at 1460.

When “[t]he parties advance two irreconcilable versions of what occurred in the moments before the shooting, and because a *genuine* dispute of *material* fact regarding the reasonableness of [the officer’s] use of deadly force exists, we are compelled to reverse the District Court’s grant of summary judgment to [the officer].” *Withers*, 640 F. App’x at 420 (unpublished) (emphasis in original). “[A]n officer’s use of deadly force is not reasonable as a matter of law when the circumstances present a genuine question as to whether the situation compels a split-second decision to use lethal force.” *Id.* (quotation omitted) (cleaned up).

In this case, Mr. Taylor was either fishing in his pants for a weapon or pulling up his pants. Those are two irreconcilable differences, and the jury must be the ones to decide the issue. Two witness accounts contradict the officer’s statement that Mr. Taylor was fishing in his pants. Drawing all inferences in favor of Appellants, as the Court must, that is enough.

Appellees failed to show there is no genuine issue of material fact entitling them to summary judgment in this case. In fact, many issues of material fact are still in dispute. Of special interest are disputed facts

the district court erringly claimed as undisputed. Taken in the light most favorable to Appellants, the district court should not have decided these issues as undisputed.

**A. Whether Mr. Taylor Looked “Defiantly” at Officer Cruz is in Dispute**

The district court included the following in its statement of undisputed facts:

38. Mr Taylor appeared to look directly at Officer Cruz’s police vehicle approaching from the east with its lights flashing as it moved in front of the path of the three men.

39. Officer Cruz described that moment as: “He looks right at me for a split second he turned around and he starts walking off.”

41. Officer Cruz stated in his deposition that the first time he felt somewhere on the “spectrum of fear” was “when [he] looked into [Mr. Taylor]’s eyes.”

(Aplt. App. at 853.) The district court described the environment of this “undisputed fact” as starting in Officer Cruz’s vehicle. But then the recitation sounds as if it is happening after Officer Cruz is out of his car when he was telling Mr. Taylor to “stop” and Mr. Taylor looked at him and then walked away.

First, taking the facts in the light most favorable to Appellants, other witnesses and officers have already stated that Mr. Taylor was walking away when Officer Cruz got out of his car. Second, Cruz's own testimony is inconsistent – was he in his car or outside of his car? Within that same narrative of undisputed facts the district court jumps back to Mr. Taylor looking at Officer Syllelougrou's car approaching. But Officer Syllelougrou's car approached first and he got out first, so how could Officer Cruz have looked at Mr. Taylor so directly before Syllelougrou even got there? In fact, the district court then goes on in its narrative that both officers then exited their vehicles. (Aplt. App. at 855.) And, Officer Cruz later stated that after he was already out of his car “was when” he knew it would be bad because *that was when Mr. Taylor supposedly looked at him with defiance* and then put his hands down his pants. (Aplt. App. at 861.)

So did this “look” that the district court found as an undisputed fact occur between Officer Cruz and Mr. Taylor from across the street while Officer Cruz was driving up in his car, or did it happen when Officer Cruz got out of the car, or did it not even happen at all? The district court should have allowed the jury to decide.

Later in the narrative, the district court returns to the “look.” The district court quoted Officer Cruz’s statement that when Mr. Taylor looked at Officer Cruz defiantly, “[t]hat was when” he knew it would be bad because that was when Mr. Taylor supposedly looked at him with defiance and then put his hands down his pants. (*Id.*) The sequence, though, does not add up. According to the district court’s version of undisputed facts,

Mr. Taylor’s “look,” combined with his turning around and walking away led Officer Cruz to conclude that when Mr. Taylor’s hands went to his waistband: I was 100%, 100% convinced when I saw him turn around that it was gonna be a gunfight. I know he had that gun that he’d be trying to kill us there was nothing else he could be doing than going for a gun.

(*Id.*) In other words, the district court relied on disputed facts.

Appellants dispute this “look” happened this way, and the district court should not have considered it an undisputed fact. The district court should not have relied on it in its determination of whether Officer Cruz acted reasonably or not.

For some reason, though, the district court found Mr. Taylor’s “mean mug” as especially persuasive on the issue of Officer Cruz’s objective reasonableness. In fact, in its argument justifying the Order,

the district court repeated Officer Cruz’s description of Mr. Taylor’s “defiant” look as “come and get me. I’m gonna fricken kill you,” as if Mr. Taylor *actually said those words*. (Aplt. App. at 881.) Of course, Mr. Taylor did not say those words – Officer Cruz merely *thought* them.

In no way should the district court have used Officer Cruz’s *thoughts* about what Mr. Taylor meant by a disputed look to determine that he acted objectively reasonable in shooting him for that defiance. If the Court upholds the district court’s decision in this case, it will be holding, as a legal matter, that an officer is acting objectively reasonable if he shoots a man walking down the street who has made no threat, shown no weapon, caused no disturbance, but merely walked away from police with a mean look on his face. It is just not enough.

Just like an officer cannot arrest a suspect for derogatory language, he cannot shoot him for a “mean mug.” A suspect has a right to be hostile and defiant without getting shot. *See Thurairajah v. City of Fort Smith, Ark.*, 925 F.3d 979, 984 (8th Cir. 2019) (defendant’s expletive directed at police officer “may have been offensive, but it was not an unreasonable or excessive noise” under the public disturbance statute, and therefore officer violated established constitutional rights

by arresting without probable cause, and was not entitled to qualified immunity protection).

Contempt and disrespect are not reasons to escalate non-threatening situations, and do not justify creating probable cause where no current threat exists. Regardless, the fact is in dispute, and the district court should not have decided it.

**B. Whether Officer Cruz Told Mr. Taylor to Stop is in Dispute**

The district court also found the following undisputed fact: “As Mr. Taylor walked away, Officer Sylleloglou shouted several times: “Hey, you in the white shirt, stop.” (Aplt. App. at 857.) But Appellants made clear in their Response to the Motion for Summary Judgment that it was disputed whether any of the officers said “stop.” (Aplt. App. at 298, 306.) Importantly, the body camerae evidence did not register any officer ever saying “stop.”

**C. Whether Officer Cruz Approached Mr. Taylor to Shorten the Distance between them or Maintained the Distance between them is in Dispute**

The district court also included as an undisputed fact: “In his deposition, Officer Cruz explained: “I was maintaining distance at that

– yeah, I was not trying to close on somebody that I believed had a gun.” (Aplt. App. at 19.) Also, “Officer Cruz stated that closing the distance would not “make any sense.” (*Id.*) This inclusion of an alleged undisputed fact ignored Officer Cruz’s inconsistent earlier statements, and the video evidence, that he had actually been closing the distance between Mr. Taylor and himself. (Aplt. App. at 302.) The fact is in dispute.

**D. Whether Officer Cruz had his Gun Trained on Mr. Taylor from the Moment he Stepped out of his Vehicle is in Dispute**

The district court found the following undisputed fact:

“Mr. Taylor then put his hands inside the front waistband of his pants, and made digging motions with his hands, *at which point* Officer Cruz began training his weapon on Mr. Taylor.” (*Id.* (emphasis added).) But Appellants argued, the video evidence showed, and the facts are in dispute, that Officer Cruz had his gun drawn and aimed at Mr. Taylor from the moment he got out of his car. (Aplt. App. at 22, Appellants’ Ex. 5.) This is a material fact still in dispute.

**E. Whether Mr. Taylor Put his Hands in the Waistband of his Pants and Made “Digging Motions” is in Dispute**

The district court inexplicably included as undisputed fact the contention that Mr. Taylor made “digging motions” in his pants. The district court stated, “As Mr. Taylor faced Officer Cruz, he continued to walk backwards with both hands inside the loose waistband of his pants, concealing his hands down to his wrists, and moving them in a digging motion.” (Aplt. App. at 864.) This fact, though, is heavily disputed. (Aplt. App. at 317-18.) In fact, this dispute is basically the crux of the case.

Both Jerrail and Adam stated Mr. Taylor was pulling his pants up, not “digging” inside them. First the district court claims as an undisputed fact: “Jerrail was already on the ground when he heard the two gunshots and did not see what happened.” (Aplt. App. at 869.) But the very next undisputed fact includes Jerrail’s own statement that “[A]s I was going down on the ground, I seen [Dillon] grab his pants like this, and pull them up, you know pull his pants up.” (*Id.*)

How could the district court conclude the first statement if taking the facts in favor of Appellants, considering the second statement? The

district court should not have relied on Officer Cruz's singular testimony as undisputed, especially considering Jerrail's and Adam's eyewitness accounts included as undisputed facts a few paragraphs later. (*Id.*) Accepting Officer Cruz's version contradicts the mandate to consider the facts in favor of the nonmoving party.

**F. Whether Mr. Taylor's Movements of his Hands from his Waistband was "Suddenly" and "Without Notice" is in Dispute**

The district court also included in its recitation of undisputed facts the disputed fact that Mr. Taylor withdrew his hands from his pants "suddenly" and "without notice." (Aplt. App. at 320.) The district court, without explaining how or why, settled this disputed fact as undisputed. (Aplt. App. at 865.)

The district court made a big deal of Mr. Taylor's alleged "draw stroke" to argue Officer Cruz was objectively reasonable to shoot and kill Mr. Taylor. (Aplt. App. at 882.) But again, this fact is clearly disputed. Officer Cruz's version is contrasted with two witness accounts. The district court should not have weighed the evidence but should have considered this issue in the light most favorable to Appellants. The district court should have considered this issue as if

Mr. Taylor was merely holding up his pants, and not “digging” for some sort of weapon or drawing his hand out quickly.

It is clear that a jury should have been able to decide whether it was reasonable for Officer Cruz to consider Mr. Taylor’s movements as threatening or not. The district court noted that the proper inquiry was “whether a reasonable officer under the circumstances would believe that Mr. Taylor was making a hostile motion with a weapon towards the officers.” (Aplt. App. at 883.) But that issue was the jury’s to decide, especially in light of the fact that Officer Sylleloglou did *not* consider Mr. Taylor threatening enough to fire his weapon.

In fact, the district court’s opinion makes it seem like Officer Cruz would have been reasonable to shoot Mr. Taylor in the back. It argued Mr. Taylor’s back was toward the officer when he refused to submit to the officers’ orders and put his hands in his waistband. It was at this point Officer Cruz “was convinced Mr. Taylor had a gun.” “*But instead of firing his weapon at Mr. Taylor*, Officer Cruz continued to shout commands.” (Aplt. App. at 884 (emphasis added).) The district court’s standard is too low. It would not have been reasonable for Officer Cruz

to shoot Mr. Taylor at this point, as the district court suggests, and it was not reasonable for Officer Cruz to shoot Mr. Taylor when he turned around a few seconds later.

The facts, taken in the light most favorable to Appellants, do not bear out the district court's assumption that Mr. Taylor "suddenly and without warning quickly raised his hands in a 'draw stroke' motion." (Aplt. App. at 885.) The district court's weighing of the video and other evidence is inappropriate in a motion for summary judgment. That job is a job for the jury.

**IV. THIS COURT SHOULD PROVIDE CLEAR DIRECTION TO THE DISTRICT COURTS THAT SHOOTING UNARMED MEN AND WOMEN OF COLOR WILL NOT BE OBJECTIVELY REASONABLE UNDER MOST CIRCUMSTANCES**

There is no question that the fact-intensive inquiry surrounding the decision of whether an officer is entitled to qualified immunity based on the objective reasonableness of his excessive force results in disparate treatment of similar circumstances in different courts within this jurisdiction. The Court should create a clear standard in light of the national concern and awareness surrounding police violence against unarmed men and women of color.

**V. THE EXCLUSIONARY RULE SHOULD APPLY TO EXCLUDE THE STATEMENTS OF JERRAIL AND ADAM DURING THEIR UNCONSTITUTIONAL SEARCH AND SEIZURE**

The Court should apply the exclusion rule to 28 U.S.C. § 1983 cases to exclude testimony received in violation of the Fourth Amendment. This Court has not yet ruled on this issue. The exclusionary rule prohibits the government from using evidence seized during an unlawful search as proof against the victim at criminal trial. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963). In this case, many of Adam and Jerrail’s statements used by Appellees against § 1983 liability were taken in violation of their constitutional rights resulting from their illegal detainment for five hours after committing no crime and being under no suspicion of any crime. The district court, though, despite its admission that “the Tenth Circuit has not weighed in on this precise issue,” found that the statements made by Jerrail and Adam, in violation of their rights, were nonetheless admissible against their claims of officer liability. (Aplt. App. at 845-46.)

The district court cited certain non-precedential authority from other jurisdictions that have decided this issue. *See Wolfe v. Gray*, Case No. 13-CV-286-JED-JFJ, 2018 WL 4964364, \*5 (N.D. Okla. Oct. 15,

2018) (quoting *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016)); *Vaughn v. Chapman*, 662 F. App'x 464, 467 (7th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016); *Machado v. Weare Police Dep't*, 494 F. App'x 102, 106 (1st Cir. 2012); *Townes v. City of New York*, 176 F.3d 138, 149 (2d Cir. 1999); *Wren v. Towe*, 130 F.3d 1154 (5th Cir. 1997).

In *Wolfe*, which the district court relied heavily on, the defendant officer had falsified a search warrant in order to steal money from her house and had excluded exculpatory evidence that a drug dealer had been in plaintiff's house when the officer allegedly found drugs in it. A court in a prior proceeding had vacated the conviction and guilty plea based on the officer's malfeasance. The officer argued the plaintiff could not prove that the prosecution lacked probable cause – an element of malicious prosecution – based on the fact that the evidence had been falsified for the search warrant. *Wolfe*, 2018 WL 4964364 at \*5. The court found the exclusionary rule did not apply because “the deterrence objective of the exclusionary rule has already been achieved here, since [the plaintiff's] 2007 convictions were vacated and the officers have faced criminal charges for related conduct affecting other individuals.”

*Id.* at \*6. “Because the exclusionary rule exacts a heavy toll on both the judicial system and society at large, the rule does not apply unless its deterrence benefits outweighs its substantial social costs.” *Id.* (citations and quotations omitted). Regardless, the court found there was probable cause to arrest the plaintiff in *Wolfe*; see also *Townes*, 176 F.3d at 149 (finding probable cause to arrest defeated § 1983 claim).

But in this case, Mr. Taylor is still dead, and there has been no deterrence effect from the actions that happened on the night of August 11, 2017. There would be a sufficient deterrence effect if Appellees were not able to use Adam and Jerrail’s statements taken in violation of their constitutional rights to shield them from liability now. Police held them for more than five hours without any probable cause or even reasonable suspicion that they had committed a crime. It was a clear violation of their rights, and there have been no consequences.

The district court argued that excluding their statements would not be fair because Appellants have used those very same statements to argue their case. But Appellants could have taken deposition testimony or other affidavit statements from Adam and Jerrail without using the

statements taken in violation of their Fourth Amendment rights. The Court should apply the exclusionary rule in this case.

**VI. THE ISSUE OF MUNICIPAL LIABILITY MUST BE REVIEWED AGAIN BASED ON WHETHER A JURY FINDS A VIOLATION OF A CONSTITUTIONAL VIOLATION OR NOT**

The district court found that since it found that Officer Cruz acted objectively reasonable, and therefore no constitutional violation had occurred, the city could not be liable. The issue must be reviewed again after a jury decides whether a constitutional violation occurred.

**CONCLUSION**

For the reasons stated above, this Court should reverse the Order granting summary judgment and remand for trial by jury.

**STATEMENT OF COUNSEL AS TO ORAL ARGUMENT**

Mr. Taylor requests oral argument in this case based on the national importance of the issues involved, the need for consistent decisions among the districts in this Circuit, and the importance of the objective reasonableness standard for claims of excessive force against police officers.

DATED: October 15, 2019.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation because it is 11,912 words, excluding those parts of the brief that are exempt by local rule.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 point Century Schoolbook font.

Date: October 15, 2019.

/s/ Mark J. Geragos

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents other than the parts of the Appendix exempted from the electronic filing requirement as per the Court's Order, dated October 15, 2019.
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Avast Security, last updated October 15, 2019, and according to the program are free of viruses.

/s/ Mark J. Geragos

## CERTIFICATE OF SERVICE

I hereby certify that this document was electronically filed on October 15, 2019, with the Clerk of the Court by using the ECF system, which will send a copy to all ECF system participants as of the time of the filing.

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# Addendum A

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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THE ESTATE OF DILLON TAYLOR,  
CODY TAYLOR, JERRAIL TAYLOR,  
TEESHA TAYLOR, and ADAM THAYNE,

Plaintiffs,

v.

SALT LAKE CITY, CITY OF SOUTH SALT  
LAKE, SALT LAKE COUNTY, BRON  
CRUZ, ANDREW SYLLELOGLOU;  
UPPEN DOWNES, CHRIS  
KOTRODIMOS, JAMES SPANGENBERG,  
CHIEF MIKE BROWN, VAUGHN  
DELAHUNTY, CRAIG HICKEN, CHASE  
HERMANSEN, JOE SUTERA, CHIEF  
JACK CARRUTH, and JOHN and JANE  
DOES 1-35,

Defendants.

**MEMORANDUM DECISION AND  
ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT**

Case No. 2:15-cv-00769-DN-BCW

District Judge David Nuffer

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This case arises from a police encounter with Dillon Taylor (“Mr. Taylor”), Jerrail Taylor (“Jerrail”), and Adam Thayne (“Adam”) on August 11, 2014.<sup>1</sup> The encounter resulted in the shooting death of Mr. Taylor and the detention of Jerrail and Adam.<sup>2</sup>

These events are a tragedy to everyone involved and to the community. The resulting impact undoubtedly remains deeply felt and weighs heavy on the hearts and minds of the parties and their families now several years later. On a broader scale, this case presents important issues to the community as a whole. The qualified immunity doctrine can lead to results that some may

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<sup>1</sup> Complaint for Damages (Violation of Civil Rights) (“Complaint”) ¶¶ 1-4, 10, [docket no. 2](#), filed Oct. 28, 2015.

<sup>2</sup> *Id.* ¶¶ 1-4, 10, 36-37, 41-42, 53-54, 65.

view as harsh or unjust, regardless of the outcome. But the law necessitates the doctrine's application to the facts of this case. There is no way to reset or change the past. Yet being mindful of the past can guide future decisions and conduct to avoid similar unfortunate consequences.

Plaintiffs' Complaint asserts several claims for violation of civil rights and wrongful death against multiple government entities and law enforcement officers.<sup>3</sup> Through a series of stipulations,<sup>4</sup> the only remaining claims are Plaintiffs' first cause of action against Officer Bron Cruz for use of excessive force<sup>5</sup> and Plaintiffs' fourth cause of action against Salt Lake City for deliberate indifference in its policies, training, and investigation relating to Officer Cruz's conduct.<sup>6</sup> Officer Cruz and Salt Lake City seek summary judgment on these claims, arguing that Officer Cruz is entitled to qualified immunity, and that Salt Lake City cannot be held liable because Officer Cruz's conduct did not violate a statutory or constitutional right.<sup>7</sup> Plaintiffs argue that genuine issues of material fact preclude summary judgment.<sup>8</sup>

Because the undisputed material facts demonstrate that Officer Cruz's use of deadly force in the August 11, 2014 encounter with Mr. Taylor was objectively reasonable under the circumstances, Officer Cruz did not violate a statutory or constitutional right and is entitled to qualified immunity as a matter of law. And because Officer Cruz's conduct did not violate a

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<sup>3</sup> *Id.* ¶¶ 105-170.

<sup>4</sup> Order Granting Stipulated Motion to Dismiss Certain Claims and Certain Defendants, [docket no. 33](#), filed Apr. 28, 2016; Order Granting Stipulated Motion to Dismiss Defendants Andrew Sylleloglou, Uppsen Downes and Chief Mike Brown With Prejudice, [docket no. 51](#), filed Feb. 10, 2017; Order Granting Stipulated Motion to Dismiss Certain Claims, [docket no. 61](#), filed Aug. 7, 2017.

<sup>5</sup> Complaint ¶¶ 105-113.

<sup>6</sup> *Id.* ¶¶ 129-137.

<sup>7</sup> Motion for Summary Judgment and Memorandum in Support ("Motion for Summary Judgement") at 21-34, 39, [docket no. 44](#), filed Nov. 28, 2016.

<sup>8</sup> Plaintiffs' Opposition to Defendants' Motion for Summary Judgment Pursuant to [Fed. R. Civ. P. 56\(a\)](#) ("Response") at 71-90, [docket no. 54](#), filed May 22, 2017.

statutory or constitutional right, Salt Lake City cannot, as a matter of law, be held liable for Officer Cruz’s conduct. Therefore, the Motion for Summary Judgment<sup>9</sup> is GRANTED.

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<sup>9</sup> [Docket no. 44](#), filed Nov. 28, 2016.

## EVIDENTIARY ISSUE

As a preliminary matter, Plaintiffs object to the admissibility of statements made by Jerrail and Adam while they were detained and interviewed by law enforcement officers on August 11, 2014.<sup>10</sup> Plaintiffs argue that because the statements were obtained in violation of Jerrail and Adam's Fourth Amendment right against unreasonable searches and seizures, the statements are inadmissible.<sup>11</sup>

“Although the Tenth Circuit has not weighed in on this precise issue, ‘federal courts of appeals have widely held that the exclusionary rule does not apply in § 1983 cases.’”<sup>12</sup> These “[c]ourts have been reluctant to extend the exclusionary rule beyond the criminal context because its purpose is to deter police misconduct and safeguard Fourth Amendment rights, rather than serve as [a] personal constitutional right of those aggrieved.”<sup>13</sup> “Application of the exclusionary rule in the civil context [also] comes at a significant cost: ‘officers could be forced to pay damages based on an overly truncated version of the evidence.’”<sup>14</sup> Indeed, “[r]ecognizing these substantial costs, the U.S. Supreme Court has ‘repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.’”<sup>15</sup>

These authorities are persuasive. Moreover, Plaintiffs repeatedly rely on Jerrail and Adam's statements to officers in support of their arguments and in attempting to establish

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<sup>10</sup> Response ¶¶18 at 19-20, ¶¶20-23 at 20-22, ¶¶41-42 at 37, ¶55-56 at 43-44, ¶59-60 at 44-46.

<sup>11</sup> *Id.*

<sup>12</sup> *Wolfe v. Gray*, Case No. 13-CV-286-JED-JFJ, 2018 WL 4964364, \*5 (N.D. Okla. Oct. 15, 2018) (quoting *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016)); see also *Vaughn v. Chapman*, 662 Fed. App'x 464, 467 (7th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016); *Machado v. Weare Police Dep't*, 494 Fed. App'x 102, 106 (1st Cir. 2012); *Townes v. City of New York*, 176 F.3d 138, 149 (2d Cir. 1999); *Wren v. Towe*, 130 F.3d 1154 (5th Cir. 1997).

<sup>13</sup> *Howl v. Alvarado*, Case No. 2:17-cv-00380-PJK-SMV, 2017 WL 4142588, \*2.

<sup>14</sup> *Id.* (quoting *Black*, 811 F.3d at 1268).

<sup>15</sup> *Wolfe*, 2018 WL 4964364, \*6 (quoting *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

genuine issues of material fact.<sup>16</sup> It would be improper to invoke the exclusionary rule to shield statements that Plaintiffs believe are unfavorable, while disregarding the rule for statements that Plaintiffs believe favorable. The exclusionary rule will not apply to the statements made by Jerrail and Adam while they were detained and interviewed by law enforcement officers on August 11, 2014. The statements are admissible.

### UNDISPUTED FACTS<sup>17</sup>

1. At approximately 7:00 p.m. on August 11, 2014, a 911 call was dispatched to Salt Lake City police officers by radio as a “report of a man with a gun” at 1900 South 200 East; “suspect flashed a gun at the complainant but no threat was made;” “male Hispanic wearing white shirt, red pants, red baseball cap; also another male Hispanic wearing a striped shirt; they were last seen southbound on 200 East.”<sup>18</sup>

2. The dispatcher also informed officers that no shots had been fired; no one was in danger; the complainant was not cooperative and hung up on the call taker; and the complainant refused to provide her identifying information.<sup>19</sup>

3. The dispatcher asked officers if there was “any unit coming clear to handle a check?”<sup>20</sup>

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<sup>16</sup> Response at 5-70.

<sup>17</sup> The following Undisputed Facts are taken from the parties briefing on the Motion for Summary Judgment. Motion for Summary Judgment ¶¶ 1-62 at 5-16; Response ¶¶ 1-100 at 49-70. Those facts, or portions thereof, identified in the parties’ briefing that do not appear in these Undisputed Facts are either disputed; not supported by the cited evidence; not material; or are not facts, but rather, are characterization of facts or legal argument. Additionally, these Undisputed Facts contain facts that are not material, but nevertheless provide a more complete background of the events and circumstances and give context to the parties’ arguments.

<sup>18</sup> Motion for Summary Judgment ¶ 1 at 5-6 (citing Dispatch Recording, [docket no. 55](#), filed conventionally May 22, 2017, attached as Ex. 2 to Declaration of Robert B. Cummings in Support of Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment Pursuant to [Fed. R. Civ. P. 56\(a\)](#) (“Cummings Declaration”), [docket no. 54-1](#), filed May 22, 2017).

<sup>19</sup> Response ¶ 1 at 49 (citing Dispatch Recording; Salt Lake Police Department CAD Call Hardcopy (“SLPD CAD Call”) at 6, attached as Ex. 1 to Cummings Declaration).

<sup>20</sup> *Id.* ¶ 2 at 49 (citing Dispatch Recording).

4. The call was not dispatched as a “brandishing” call.<sup>21</sup>
5. Officer Cruz was on patrol in the area and responded to the dispatch report to ensure that the suspects were not a threat to public safety and to determine whether any laws had been or were being violated, including a possible brandishing.<sup>22</sup>
6. Officer Cruz did not notice the comments “no shots fired” or “no one in danger.”<sup>23</sup>
7. Officer Uppsen Downes was the first (between Officers Andrew Sylleloglou, Cruz, and Downes) to respond to the dispatch call.<sup>24</sup>
8. The first officer to respond was Sergeant Charly Goodman. Officer Downes responded to the call approximately 10 seconds after it was dispatched and responded, “back 160,” which is the number for Sergeant Goodman. Officer Cruz responded approximately 47 seconds later. Then Officer Sylleloglou asked Officer Cruz if he wanted help or backup.<sup>25</sup>
9. Officer Cruz indicated that he wanted backup, and Officers Sylleloglou and Downes responded that they were en route.<sup>26</sup>
10. Officer Cruz believed the call was dispatched as to a group of men, one of whom had “brandished” a weapon.<sup>27</sup>

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<sup>21</sup> *Id.* ¶ 6 at 49 (citing SLCC CAD Call; Dispatch Recording).

<sup>22</sup> Motion for Summary Judgment ¶ 2 at 6 (citing Dispatch Recording; Declaration of Bron Cruz (“Cruz Declaration”) ¶ 3, [docket no. 44-2](#), filed Nov. 28, 2016).

<sup>23</sup> Response ¶ 3 at 49 (citing Deposition of Bron Cruz (“Cruz Deposition”) at 73:4-7, attached as Ex. 3 to Cummings Declaration), ¶ 4 at 49 (citing Cruz Deposition at 74:16-18).

<sup>24</sup> *Id.* ¶ 9 at 50 (citing Dispatch Recording).

<sup>25</sup> *Id.* ¶ 10 at 50 (citing Dispatch Recording).

<sup>26</sup> Motion for Summary Judgment ¶ 3 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 4).

<sup>27</sup> Response ¶ 5 at 49 (citing Cruz Deposition at 37:17-19; Interview of Officer Bron Cruz (“Cruz Interview”) at SLCC 001367, attached as Ex. 4 to Cummings Declaration)

11. Neither Officers Downes nor Sylleloglou ever used the term “brandish” to describe the call.<sup>28</sup>

12. Officer Downes did not believe the call warranted his emergency lights or siren when traveling to the area under department policy.<sup>29</sup>

13. Upon approaching the area in his police vehicle, Officer Cruz saw three men walking together, who were later identified as Mr. Taylor, Jerrail, and Adam. Two of the men generally matched the descriptions provided by the dispatcher. The three men were proceeding along 2100 South at approximately 150 East and heading west.<sup>30</sup>

14. Officer Cruz continued following the three men in his police vehicle while staying approximately a block away. He indicated to dispatch that he would wait for the arrival of backup officers before approaching the three men.<sup>31</sup>

15. Officer Cruz asked the dispatcher whether the report identified which of the three men flashed the gun, and was told that the log did not indicate which one.<sup>32</sup>

16. Officer Cruz was 50 to 75 feet away from the three men, and facing them, when he observed them walk west toward him and cross State Street at 2100 South.<sup>33</sup>

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<sup>28</sup> *Id.* ¶ 7 at 49 (citing Interview of Officer Uppsen Downes (“Downes Interview”), [docket no. 55](#), filed conventionally May 22, 2017, attached as Ex. 11 to Cummings Declaration; Deposition of Uppsen Downes (“Downes Deposition”), attached as Ex. 8 to Cummings Declaration; Declaration of Uppsen Downes (“Downes Declaration”), [docket no. 44-5](#), filed Nov. 28, 2016), ¶ 8 at 49 (citing Deposition of Andrew Sylleloglou (“Sylleloglou Deposition”), attached as Ex. 7 to Cummings Declaration; Interview of Officer Andrew Sylleloglou (“Sylleloglou Interview”), [docket no. 55](#), filed conventionally May 22, 2017, attached as Ex. 9 to Cummings Declaration; Officer Sylleloglou’s Bodycam Video (“Sylleloglou Bodycam Video”), [docket no. 55](#), filed conventionally May 22, 2017, attached as Ex. 10 to Cummings Declaration; Declaration of Andrew Sylleloglou (“Sylleloglou Declaration”), [docket no. 44-4](#), filed Nov. 28, 2016).

<sup>29</sup> *Id.* ¶ 26 at 54 (citing Downes Deposition at 21:3-7,16-21).

<sup>30</sup> Motion for Summary Judgment ¶ 4 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 5).

<sup>31</sup> *Id.* ¶ 5 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 6).

<sup>32</sup> *Id.* ¶ 6 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 7).

<sup>33</sup> Response ¶ 11 at 50 (citing Cruz Deposition 27:14-17; Aerial View of Intersection at 2100 South State Street, attached as Ex. 6 to Cummings Declaration).

17. As the three men reached the west side of the intersection, Officer Cruz observed the male in the white shirt, later identified as Mr. Taylor, walk up to a car stopped at the red light and interact with the driver, while the other two males were “throwing their hands in the air, kind of making a big scene.” This interaction lasted five to 10 seconds.<sup>34</sup>

18. Officer Cruz described the exchange as “some kind of distraction or disturbance” and possibly “harassing the driver.”<sup>35</sup> Officer Cruz stated the exchange was “not typical” and “unusual,” since “you don’t just walk up to people in a crosswalk, somebody that maybe you don’t know, and start engaging them while they are sitting in their car in traffic.”<sup>36</sup>

19. Salt Lake City Police Crime Scene Technician Benjamin Bender also witnessed the exchange and described it as:

A male in a white t-shirt and blue jeans approached a red sedan that was waiting at the northbound red light. This Technician’s view of the male was obstructed by passing vehicles, but the male appeared to high-five the driver of the vehicle and then jogged across the remainder of the intersection where he joined the other two males at the southwest corner.<sup>37</sup>

20. Officer Cruz then observed the three men as they entered the 7-Eleven convenience store on the corner of 2100 South and State Street, and decided to wait until they exited the 7-Eleven before approaching them.<sup>38</sup>

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<sup>34</sup> Motion for Summary Judgment ¶ 7 at 6-7 (citing Cruz Declaration ¶ 8).

<sup>35</sup> Response ¶ 12 at 50-51 (citing Cruz Interview at SLCC 001368).

<sup>36</sup> *Id.* (citing Cruz Deposition at 28:7-17).

<sup>37</sup> *Id.* ¶ 13 at 51 (citing Bender Statement at SLCC 001396). Though cited by Plaintiffs, the Bender Statement was not attached as an exhibit to the parties’ briefing. However, Officer Cruz and Salt Lake City did not dispute the content of the Bender Statement. Reply Memorandum in Support of Motion for Summary Judgment (“Reply”) at 70-71, [docket no. 59](#), filed Aug. 2, 2017.

<sup>38</sup> Motion for Summary Judgment ¶ 8 at 7 (citing Cruz Declaration ¶ 9).

21. While watching from across the street in a Subway parking lot, Officer Cruz expressed to Officer Downes that he really hoped “those guys don’t rob the store,”<sup>39</sup> and that he “hope[d] nothing bad is going to happen in the store.”<sup>40</sup> When asked what he meant by this, Officer Cruz stated in his deposition:

Well, it was a – it was a more personal conversation between Officer Downes and I. You go to – one of the first things you learn as an officer – you know, man with a gun calls, they are not uncommon. And when you are prepared, you run as many scenarios through your head as possible, just to be as prepared as possible. And one of those scenarios that had crossed my mind ever so briefly was something – you know, a convenience store robbery. They are very common. It’s just something that crossed my mind, just another scenario.<sup>41</sup>

22. Officer Downes noted at that time it was “[b]usiness as normal it appeared for the store.”<sup>42</sup>

23. Surveillance video from the 7-Eleven shows the three men entering the store, making a purchase, and then exiting the store a short time later.<sup>43</sup>

24. In the one or two minutes the three men were inside the 7-Eleven, they completed their purchases without incident and exited in a normal manner without having robbed the store, harassed any customers, or caused any disturbance.<sup>44</sup>

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<sup>39</sup> Response ¶ 14 at 51 (citing Cruz Interview at SLCC 001360).

<sup>40</sup> *Id.* (citing Cruz Deposition at 31:23-24).

<sup>41</sup> *Id.* (citing Cruz Deposition at 33:8-22).

<sup>42</sup> *Id.* ¶ 15 at 52 (citing Downes Deposition at 25:6-7).

<sup>43</sup> Motion for Summary Judgment ¶ 9 at 7 (citing 7-Eleven Surveillance Video (“7-Eleven Video”), [docket no. 45](#), filed conventionally Nov. 28, 2017, attached as Exhibit B to Declaration of Chase Hermansen (“Hermansen Declaration”), [docket no. 44-3](#), filed Nov. 28, 2016).

<sup>44</sup> Response ¶ 16 at 52 (citing 7-Eleven Video; Still Photos from 7-Eleven Surveillance Video (“7-Eleven Photos”), [docket no. 44-8](#), filed Nov. 28, 2016; Officer Cruz’s Bodycam Video (“Cruz Bodycam Video”), [docket no. 56](#), filed conventionally May 23, 2017, attached as Ex. 5 to Cummings Declaration).

25. The three men exited the 7-Eleven after Officer Downes arrived and as Officer Sylleloglou was arriving.<sup>45</sup>

26. Mr. Taylor exited the 7-Eleven a few feet behind Jerrail and Adam.<sup>46</sup>

27. Officer Cruz called out over the radio that the three men were leaving the 7-Eleven as Officers Downes and Cruz were already on their way across the street from where they were staged at the Subway parking lot.<sup>47</sup>

28. Officer Downes arrived at the 7-Eleven just ahead of Officer Cruz and drove his vehicle past the front of the store to cover the rear in case the three men ran away in that direction.<sup>48</sup>

29. In his interview, Officer Cruz stated:

[Officer] Downes and I both went across the street. I anticipated I, I had the south position and for reasons I can't explain, [Officer] Downes, he said, "I'm going out back." Um, as these three just walked straight out into the parking lot. Um, and so he just kept driving. He drove around the building but I felt, felt good when I saw [Officer Sylleloglou].<sup>49</sup>

30. At his deposition, Officer Cruz stated: "I – I don't remember hearing [Officer] Downes express that he would go around back."<sup>50</sup> And when asked how he felt when Officer Downes drove to the back, Officer Cruz stated: "It didn't make me feel – at the time, I don't

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<sup>45</sup> Motion for Summary Judgment ¶ 10 at 7 (citing Cruz Declaration ¶ 10; Sylleloglou Declaration ¶ 6).

<sup>46</sup> Response ¶ 17 at 52 (citing 7-Eleven Video; 7-Eleven Photos; Cruz Bodycam Video).

<sup>47</sup> *Id.* ¶ 18 at 52 (citing Dispatch Recording).

<sup>48</sup> Motion for Summary Judgment ¶ 11 at 7 (citing Cruz Declaration ¶ 11; Sylleloglou Declaration ¶ 7; Downes Declaration ¶ 6); *see also* Response ¶ 23 at 53 (citing Cruz Declaration ¶ 11), ¶ 28 at 54 (citing Cruz Bodycam Video).

<sup>49</sup> Response ¶¶ 19-20 at 52-53 (citing Cruz Interview at SLCC 001369).

<sup>50</sup> *Id.* ¶ 22 at 53 (citing Cruz Deposition at 36:19-20).

know that it made me feel anything. I was focused on the suspects in front of me;”<sup>51</sup> “I would not say it worried me; not at the time.”<sup>52</sup>

31. Neither Officers Sylleloglou nor Downes were concerned by Officer Downes’s decision to drive to the rear of the 7-Eleven, but rather saw it as a necessary move and standard procedure.<sup>53</sup>

32. In his interview, Officer Cruz stated that when he initiated his red and blue emergency lights, “for a split second, I felt a little bit better about the situation.”<sup>54</sup>

33. Although Officer Cruz had engaged the lights on his own vehicle, Officer Downes did not turn on his vehicle’s red and blue emergency lights at any time during the encounter.<sup>55</sup>

34. Officer Sylleloglou was the first to arrive on the scene at the 7-Eleven, pulling directly in front of Jerrail and Adam as they exited the store.<sup>56</sup>

35. Officers Cruz and Sylleloglou approached the men in their marked police vehicles from opposite directions. Officer Cruz approached from the east and Officer Sylleloglou approached from the west, forming a barricade or “V” blocking the path of the three men as they walked alongside each other in the 7-Eleven’s parking lot.<sup>57</sup>

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<sup>51</sup> *Id.* (citing Cruz Deposition at 39:20-23).

<sup>52</sup> *Id.* (citing Cruz Deposition at 40:4-5).

<sup>53</sup> *Id.* ¶ 21 at 53 (citing Downes Deposition at 26:2, 27:16-20; Sylleloglou Deposition at 26:23-25, 27:1, 28:21-25).

<sup>54</sup> *Id.* ¶ 24 at 53-54 (citing Cruz Interview at SLCC 001369).

<sup>55</sup> *Id.* ¶ 25 at 54 (citing Scene Photos, [docket no. 45](#), filed conventionally Nov. 28, 2016, attached as Exhibit A to Cruz Declaration).

<sup>56</sup> *Id.* ¶ 27 at 54 (citing 7-Eleven Photos).

<sup>57</sup> Motion for Summary Judgment ¶ 12 at 7-8 (citing Cruz Bodycam Video; Still Photos from Officer Cruz’s Bodycam Video (“Cruz Bodycam Photos”), [docket no. 45](#), filed conventionally Nov. 28, 2016, attached as Ex. 7 to Motion for Summary Judgment, [docket no. 44-7](#); 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 12; Sylleloglou Declaration ¶ 8); *see also* Response ¶ 29 at 54 (citing Cruz Interview at SLCC 001369).

36. Officer Cruz was wearing his dark tinted, department-issued, “duty Oakleys” throughout the encounter with the three men.<sup>58</sup>

37. As the three men exited the 7-Eleven, Officer Cruz believed that all three of them looked at him and the other officers, and he stated in his interview:

But what eased tensions in my mind, slightly, because they all lined up perfectly for us. They were all perfectly lined up and that just made me feel so good inside. All their hands were just down at their sides. I could see their hands and the tensions just, I just felt it go down for a split second.<sup>59</sup>

38. Mr. Taylor appeared to look directly at Officer Cruz’s police vehicle approaching from the east with its lights flashing as it moved in front of the path of the three men.<sup>60</sup>

39. Officer Cruz described that moment as: “He looks right at me for a split second he turned around and he starts walking off.”<sup>61</sup>

40. Officer Cruz also stated in his interview:

Um, and as soon as [the two men raised their hands] it was pretty much simultaneous in my mind. They did this and again, he looked dead at me and I looked dead at him and as soon as they did that, he turns around and this is what I see.<sup>62</sup>

41. Officer Cruz stated in his deposition that the first time he felt somewhere on the “spectrum of fear” was “when [he] looked into [Mr. Taylor]’s eyes.”<sup>63</sup>

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<sup>58</sup> Response ¶ 52 at 60 (citing Cruz Interview; Cruz Deposition at 45:20-21; Citizen Cell Video Still, [docket no. 55](#), filed conventionally May 22, 2017, attached as Ex. 12 to Cummings Declaration; Photos of Bron Cruz, attached as Ex. 13 to Cummings Declaration).

<sup>59</sup> *Id.* ¶ 30 at 54 (citing Cruz Interview at SLCC 001369).

<sup>60</sup> Motion for Summary Judgment ¶ 13 at 8 (citing Cruz Bodycam Video; Cruz Bodycam Photos); *see also* Response ¶ 51 at 59-60 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

<sup>61</sup> Response ¶ 51 at 59-60 (citing Cruz Interview at SLCC 001370), *see also id.* ¶ 53 at 60 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

<sup>62</sup> *Id.* ¶ 49 at 59 (citing Cruz Interview at SLCC 001375).

<sup>63</sup> *Id.* ¶ 46 at 58 (citing Cruz Deposition at 35:9-12).

42. In his interview, Officer Cruz explained:

Q: Um, you said on first contact two of them complied. Put their hands up just when you said the word, “Stop”?

A: Yes.

Q: But the third one looked at you – in the white shirt?

A: In the white shirt.

Q: And kept walking?

A: He looked directly at me and ah, he turned around and walked off with – and his hands, his hands is what, his hands is what did it.

Q: You said that he, ah, looked at you with defiance?

A: Yeah. He looked at me like, ah, he, I mean I don’t know how to explain it. Um, you know but you can tell when you look into somebody’s eyes when you’re working with them. Um, that’s when you know it’s, it’s, it’s ah, it’s one of the clues that we have when we’re dealing with people. Um their eyes can tell you a lot. Um, and his eyes were just complete just 100% defiance. He had this, this, this look on his face like you know? Like I, ah, hate? Um, um, and ah, like he was, he was not going to do anything that I said. Um, and it was just a horrible feeling. Um, looking at him. Having him, you know just the, it was just horrible. Just hate, defiance, that he had in his eyes.

Q: And you’ve seen this kinda look before you’re saying with, with work-related circumstances?

A: I’ve seen, ah, I don’t know that I’ve seen it like that. I mean, I’ve seen a type of it before. I’ve seen it when people aren’t gonna comply and they look at you like, “I’ll fight you first.”

Q: Umm, hmm.

A: “I’ll do whatever I need to do but you’re not, you’re not taking me down.”

Q: Okay.

A: Um, and, and that’s yeah, it was an extreme version of that.<sup>64</sup>

43. Mr. Taylor also appeared to look at Officer Sylleloglou’s police vehicle approaching from the west as it moved in front of the three men.<sup>65</sup>

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<sup>64</sup> *Id.* ¶ 48 at 58-59 (citing Cruz Interview at SLCC 001374-75).

<sup>65</sup> Motion for Summary Judgment ¶ 14 at 8 (citing 7-Eleven Video; 7-Eleven Photos).

44. Officers Cruz and Sylleloglou, wearing their patrol uniforms, exited their vehicles and gave commands to the three men to stop and show their hands.<sup>66</sup>

45. Because one of the men was reportedly armed, Officer Sylleloglou drew his gun in a low ready position, but did not aim at the three men.<sup>67</sup>

46. Two of the men, later identified as Jerrail and Adam, immediately stopped and raised their hands.<sup>68</sup>

47. In his deposition, Officer Cruz described the initial encounter:

I exited my police car and all I did was tell the individuals to stop. I had already gotten that look of defiance from [Mr. Taylor]. The other two immediately put their hands in the air. . . . Right when I'm stopping my car.<sup>69</sup>

48. Officer Cruz explained in his interview that when he saw the two men with their hands in the air:

[I]t scared the crap out of me when those two raised their hands. Like they knew there was a gun or weapon was involved, that's the only time they do that. They never put their hands up like that. Those two put their hands straight up in the air and that confirmed to me, even more, there was a gun involved.<sup>70</sup>

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So, the other two put their hands out, just like this. Um, and, and without any, without any prompting that, this is what they did. Which, again, was very, it was even more concerning. Uh, because people don't do this when we contact them unless we believe they have a gun. Or they're armed.<sup>71</sup>

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<sup>66</sup> *Id.* ¶ 15 at 8 (citing Cruz Bodycam Video; 7-Eleven Video; Cruz Declaration ¶ 13; Sylleloglou Declaration ¶ 9); *see also* Response ¶ 32 at 55 (citing Sylleloglou Deposition at 33:16-34:1; Cruz Interview at SLCC 001370).

<sup>67</sup> Motion for Summary Judgment ¶ 16 at 8 (citing Sylleloglou Declaration ¶ 9).

<sup>68</sup> *Id.* ¶ 17 at 8 (citing Cruz Bodycam Video; Cruz Bodycam Photos; 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 14; Sylleloglou Declaration ¶ 10); *see also* Response ¶ 33 at 55 (citing Cruz Bodycam Video; Cruz Interview at SLCC 001370; Sylleloglou Deposition at 29:20-23).

<sup>69</sup> Response ¶ 50 at 59 (citing Cruz Deposition at 45:4-7, 13).

<sup>70</sup> *Id.* ¶ 34 at 55 (citing Cruz Interview at SLCC 001370).

<sup>71</sup> *Id.* ¶ 35 at 55 (citing Cruz Interview at SLCC 001375).

49. Officer Downes stated in his deposition that in his experience the presence of officers makes people put their hands up “a lot of the time.”<sup>72</sup>

50. Jerrail and Adam acknowledged that they both saw the marked police vehicles approaching from opposite directions and uniformed police officers approaching the three men and giving commands to stop and show their hands.<sup>73</sup>

51. The third man, wearing a white shirt and later identified as Mr. Taylor, looked at the officers, but did not stop, and instead turned and walked in the opposite direction away from the officers and Jerrail and Adam, moving back towards the entrance of the 7-Eleven.<sup>74</sup>

52. When Jerrail was asked if he thought there was any possible way that Mr. Taylor could not have seen the three police vehicles and the officers approaching with their guns drawn, he stated: “I don’t know how he didn’t see them.”<sup>75</sup>

53. Immediately upon his arrival, Officer Sylleloglou exited and ran around the front of his vehicle in a south/west diagonal in pursuit of Mr. Taylor, who was walking away.<sup>76</sup>

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<sup>72</sup> *Id.* ¶ 36 at 56 (citing Downes Deposition at 39:21-40:13).

<sup>73</sup> Motion for Summary Judgment ¶ 18 at 9 (citing Video Recording of Jerrail Taylor Interview (“Jerrail Taylor Interview”) at 11:04, [docket no. 45](#), filed conventionally Nov. 28, 2016, attached as Exhibit A to Declaration of Joe Sutera (“Sutera Declaration”), [docket no. 44-9](#), filed Nov. 28, 2016; Video Recording of Adam Thayne Interview (“Adam Thayne Interview”) at 11:43, [docket no. 45](#), filed conventionally Nov. 28, 2016, attached as Exhibit A to Hermansen Declaration); *see also* Response ¶ 40 at 56 (citing Jerrail Taylor Interview at 11:03:55).

<sup>74</sup> Motion for Summary Judgment ¶ 19 at 9 (citing Cruz Bodycam Video; Cruz Bodycam Photos; 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 15; Sylleloglou Declaration ¶ 11); *see also* Response ¶ 44 at 57 (citing Jerrail Taylor Interview at 11:05:06; Cruz Bodycam Video; 7-Eleven Photos).

<sup>75</sup> Motion for Summary Judgment ¶ 22 at 9 (citing Jerrail Taylor Interview at 11:10-11:11).

<sup>76</sup> Response ¶ 31 at 55 (citing 7-Eleven Photos; Cruz Bodycam Photos); ¶ 58 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

54. Officer Sylleloglou stated in his interview that he could not see Mr. Taylor clearly at first:

[Mr. Taylor] was kinda covered by the red truck . . . cause he was kind of, sort of, behind it.<sup>77</sup>

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I didn't, I don't remember seeing anything in his hands. Like I said, he was partially obstructed by the red truck.<sup>78</sup>

55. Mr. Taylor was already walking away from Officer Cruz before Officer Cruz had fully exited his vehicle and cleared its door.<sup>79</sup>

56. Officer Cruz initially followed some distance behind Mr. Taylor and Officer Sylleloglou.<sup>80</sup>

57. After turning his attention to Mr. Taylor, Officer Cruz “wish[ed he] had another couple guys to watch the other two [men,]” except that “their eyes looked harmless.”<sup>81</sup>

58. Mr. Taylor can be seen on the 7-Eleven surveillance video and still photos walking back toward the 7-Eleven, and around the front of a red truck before heading west along the front of the store.<sup>82</sup>

59. As Mr. Taylor walked away, Officer Sylleloglou shouted several times: “Hey, you in the white shirt, stop.” Mr. Taylor did not stop or show his hands.<sup>83</sup>

60. Jerrail saw that Mr. Taylor was walking away and told him to “stop.”<sup>84</sup>

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<sup>77</sup> *Id.* ¶ 88 at 67 (citing Sylleloglou Interview at 4:35)

<sup>78</sup> *Id.* (citing Sylleloglou Interview at 5:18).

<sup>79</sup> *Id.* ¶ 56 at 61 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

<sup>80</sup> *Id.* ¶ 58 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

<sup>81</sup> *Id.* ¶ 68 at 63 (citing Cruz Interview at SLCC 001370).

<sup>82</sup> *Id.* ¶ 57 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

<sup>83</sup> Motion for Summary Judgment ¶ 24 at 10 (citing Sylleloglou Declaration ¶ 12).

<sup>84</sup> *Id.* ¶ 20 at 9 (citing Jerrail Taylor Interview at 11:18-11:19).

61. When Jerrail saw Mr. Taylor walking away, he figured that Mr. Taylor was avoiding contact with the officers. He stated in his interview: “I don’t know if he was ignoring the cops, like, ‘Fuck it, I’m gonna cut through here and walk to the Trax.”<sup>85</sup>

62. Jerrail described the situation:

In my head, I’m thinking, my, my head’s, my adrenaline’s running, I’m thinking, “What the fuck did I just do? I can’t walk in America and buy a goddamn drink and a beer?” like, “What am I doing wrong here.” I’m all, “What the hell?” And [Dillon] was like, “Ah shit,” you know what I’m saying? Like, “What the fuck did we do.” So he was, “alright, y’all, fuck this.” He put his headphones in, walked away, the next thing you know the cop was all, “Hey, stop, stop.” But he’s got his headphones in, he can’t hear him.<sup>86</sup>

63. Jerrail saw Mr. Taylor’s headphones were in and was concerned Mr. Taylor could not hear what the officers were saying behind him as he walked away. He stated in his interview: “I was like, ‘What the fuck,’ and as I’m getting on the ground, I see [Dillon] walking, I’m like, ‘Oh fuck, here we go.’ I’m like, ‘Dude, just fuck stop,’ but he had his headphones in.”<sup>87</sup>

64. As Officer Downes arrived on the east side of the 7-Eleven parking lot, he saw Jerrail and Adam standing by the police vehicles and that Officers Cruz and Sylleloglou were pursuing Mr. Taylor as he walked away along the sidewalk next to the 7-Eleven.<sup>88</sup>

65. Officer Downes approached Jerrail and Adam where they were stopped and detained them.<sup>89</sup>

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<sup>85</sup> Response ¶ 42 at 57 (citing Jerrail Taylor Interview at 11:04:20).

<sup>86</sup> *Id.* ¶ 41 at 57 (citing Jerrail Taylor Interview at 11:03:55-11:04:34); *see also* Motion for Summary Judgment ¶ 21 at 9 (citing Jerrail Taylor Interview at 11:04).

<sup>87</sup> Response ¶ 43 at 57 (citing Jerrail Taylor Interview at 11:05:06); Motion for Summary Judgment ¶ 23 at 10 (citing Jerrail Taylor Interview at 11:05).

<sup>88</sup> Motion for Summary Judgment ¶ 52 at 14 (citing Downes Declaration ¶ 8).

<sup>89</sup> *Id.* ¶ 53 at 14 (citing Downes Declaration ¶ 9).

66. Jerrail and Adam began arguing with Officer Downes, asking him what was happening and why the police were “hassling” them. The “back and forth” continued until Officer Downes heard Officer Cruz fire his weapon.<sup>90</sup>

67. Officer Downes did not draw his gun on the two men. He explained in his deposition: “Because I could see their hands, and they were – those two individuals were essentially compliant. They were not fighting with me. We were just investigating. So, at that point, it was not a threat.”<sup>91</sup> He noted further:

For me, the factors were we had information there was a possible weapon. The two that I was dealing with did not present as an initial threat. They were not playing with their waistband. They didn’t take a fighting stance. They stopped as if I were to stop you, kind of questioning why. So that doesn’t register to me as an initial threat.

Still we know there was a possible weapon. We don’t know if it was them or not because a lot of criminals will hide that fact and act like everyone else. So there was still caution.

I wanted to be close enough where I would be able to control the situation better because [Officer] Cruz was going towards the other individual, and there were civilians all around us, non-law enforcement personnel. So if they decided to produce a weapon, there is no telling where those rounds are going to go. If I’m standing too far back, I cannot maintain positive control.<sup>92</sup>

68. As Mr. Taylor walked away with Officers Cruz and Sylleloglou in pursuit, Officer Downes remained with Jerrail and Adam. As the “backing officer,” he directed 20% of his attention toward Officer Cruz and 80% of his attention toward Jerrail and Adam.<sup>93</sup>

69. Officer Downes continued to bounce back and forth between the two men and looking in the direction of Officer Cruz, but with his focus on Mr. Taylor.<sup>94</sup>

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<sup>90</sup> Response ¶ 37 at 56 (citing Downes Deposition at 41:24-42:7).

<sup>91</sup> *Id.* ¶ 38 at 56 (citing Downes Deposition at 39:5-9), ¶ 67 at 63 (citing Downes Deposition at 39:5-9).

<sup>92</sup> *Id.* ¶ 38 at 56 (citing Downes Deposition at 59:17-60:10), *see also id.* ¶ 39 at 56 (citing Downes Deposition at 44:19-21).

<sup>93</sup> *Id.* ¶ 66 at 63 (citing Downes Deposition at 45:5-9).

<sup>94</sup> *Id.* ¶ 69 at 63 (citing Downes Deposition at 45:5-6, 17-18, 46:12-13).

70. Based on his understanding that one of the three men had a gun, Officer Cruz believed that the gun was very likely in the possession of Mr. Taylor, who was walking away and, unlike Jerrail and Adam, was not complying with the officers' commands to stop.<sup>95</sup>

71. In his deposition, Officer Cruz explained: "I was maintaining distance at that – yeah, I was not trying to close on somebody that I believed had a gun."<sup>96</sup>

72. Officer Cruz stated that closing the distance would not "make any sense."<sup>97</sup>

73. Officer Cruz's body camera shows that Mr. Taylor was wearing a baggy t-shirt and baggy pants.<sup>98</sup>

74. As Mr. Taylor walked along the side of the 7-Eleven away from Officers Cruz and Sylleloglou with his back to them, he can be seen raising his hands to the sides of his waist.<sup>99</sup>

75. Mr. Taylor then put his hands inside the front waistband of his pants, and made digging motions with his hands, at which point Officer Cruz began training his weapon on Mr. Taylor.<sup>100</sup>

76. Officer Cruz believed Mr. Taylor's hands were concealed in his waistband area due to the position of his elbows when viewed from behind.<sup>101</sup>

77. As Mr. Taylor continued walking along the sidewalk in front of the 7-Eleven, Officer Cruz followed directly behind him, and Officer Sylleloglou walked south and west

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<sup>95</sup> Motion for Summary Judgment ¶ 30 at 10-11 (citing Cruz Declaration ¶ 16).

<sup>96</sup> Response ¶ 60 at 61-62 (citing Cruz Deposition at 55:8-13).

<sup>97</sup> *Id.* ¶ 61 at 62 (citing Cruz Deposition at 55:8-13).

<sup>98</sup> *Id.* ¶ 82 at 66 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

<sup>99</sup> *Id.* ¶ 81 at 65-66 (citing Cruz Bodycam Video).

<sup>100</sup> Motion for Summary Judgment ¶ 33 at 11 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 19; Sylleloglou Declaration ¶ 19); *see also* Response ¶ 89 at 67-68 (citing Cruz Interview at SLCC 001370).

<sup>101</sup> Response ¶ 83 at 66 (citing Cruz Deposition at 49:7-14).

towards him, both shouting commands to “stop, you in the white shirt,” and “get your hands out.”<sup>102</sup>

78. Mr. Taylor did not stop but continued walking west along the sidewalk.<sup>103</sup>

79. In his interview, Officer Cruz stated:

That was when I knew something was gonna be bad. Um, cause he looked right at me, um, with complete, total defiance in his eyes. Um, and when his hands disappeared that’s when I drew my gun. Because I knew his hands, they were like this through his waistband.

And the way he looked at me? And then turned around? There was no doubt in my mind what he was doing with his hands.<sup>104</sup>

80. Mr. Taylor’s “look,” combined with his turning around and walking away led

Officer Cruz to conclude that when Mr. Taylor’s hands went to his waistband:

I was 100%, 100% convinced when I saw him turn around that it was gonna be a gunfight. I know he had that gun that he’d be trying to kill us there was nothing else he could be doing than going for a gun.<sup>105</sup>

81. Mr. Taylor “calmly walk[ing] away” and “creating distance” also heightened

Officer Cruz’s distress at the situation:

Um, and it scared me even more that he wasn’t running away. He was buying time. He was buying time and he was creating distance. That’s all he was doing. Very calmly walked away. With his hands right in his waist band.<sup>106</sup>

82. Officer Sylleloglou also began training his gun on Mr. Taylor when he saw that

Mr. Taylor appeared to put his hands inside the front waistband of his pants.<sup>107</sup>

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<sup>102</sup> Motion for Summary Judgment ¶ 31 at 11 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 17; Sylleloglou Declaration ¶ 18; Adam Thayne Interview at 11:44; Downes Declaration ¶ 10).

<sup>103</sup> *Id.* ¶ 32 at 11 (citing Cruz Declaration ¶ 18).

<sup>104</sup> Response ¶ 47 at 58 (citing Cruz Interview at SLCC 001370).

<sup>105</sup> *Id.* ¶ 54 at 60 (citing Cruz Interview at SLCC 001370-71).

<sup>106</sup> *Id.* ¶ 59 at 61 (citing Cruz Interview at SLCC 001370; 7-Eleven Video; 7-Eleven Photos).

<sup>107</sup> Motion for Summary Judgment ¶ 26 at 10 (citing Sylleloglou Declaration ¶ 14).

83. Officer Sylleloglou was north of Mr. Taylor in the 7-Eleven parking lot and walked in Mr. Taylor's direction but staying perpendicular to Mr. Taylor as he walked westward, while shouting repeated commands to Mr. Taylor to stop and show his hands.<sup>108</sup>

84. Mr. Taylor looked directly at Officer Sylleloglou with a "mean mug" look on his face, meaning that it appeared he heard Officers Sylleloglou and Cruz shouting commands and was deliberately ignoring their commands. Officer Sylleloglou described the look on Mr. Taylor's face as hostile and defiant.<sup>109</sup>

85. At this point, Mr. Taylor was no more than 15 feet in front of Officer Sylleloglou, looking at him, but still walking away.<sup>110</sup>

86. Officer Sylleloglou was 100% certain that Mr. Taylor saw him, heard his commands, and deliberately chose to ignore them.<sup>111</sup>

87. Jerrail recalled hearing Mr. Taylor say something along the lines of "what did we do" in response to the officers' commands.<sup>112</sup>

88. At some point during the interaction, Mr. Taylor said something to Officer Sylleloglou about "shooting him." When asked if he remembered exactly what Mr. Taylor said, Officer Sylleloglou responded: "He said, 'What are you gonna do, shh, I think it was – this is as close to verbatim as I can get – 'What are you gonna do, shoot me? What are you gonna do? You gonna shoot me? You gonna shoot me?'"<sup>113</sup>

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<sup>108</sup> *Id.* ¶ 35 at 11 (citing Cruz Declaration ¶ 21; Sylleloglou Declaration ¶ 18).

<sup>109</sup> *Id.* ¶ 25 at 10 (citing Sylleloglou Declaration ¶ 13).

<sup>110</sup> *Id.* ¶ 28 at 10 (citing Sylleloglou Declaration ¶ 16).

<sup>111</sup> *Id.* ¶ 29 at 10 (citing Sylleloglou Declaration ¶ 16).

<sup>112</sup> *Id.* ¶ 41 at 12 (citing Jerrail Taylor Interview at 11:06); *see also* Response ¶ 65 at 62-63 (citing Jerrail Taylor Interview at 11:05:42, 11:16:10).

<sup>113</sup> Response ¶ 62 at 62 (citing Sylleloglou Interview at 6:00:00); *see also* Motion for Summary Judgment ¶ 27 at 10 (citing Sylleloglou Declaration ¶ 15).

89. Officer Cruz never reported hearing this exchange. Instead, he only reported hearing Mr. Taylor saying something about, “Make me,” after he turned around just before he was shot.<sup>114</sup>

90. Officer Cruz continued to yell repeated commands to Mr. Taylor. “get your hands out now, get your hands out, get your . . . get ‘em out!”<sup>115</sup>

91. Officer Sylleloglou stated in his interview, “[a]nd then I know I yelled at him too . . . ‘let me see your . . . I think I may have just said, ‘Hands! Hands! Hands!’” When the interviewer asked whether he remembered anything else Officer Cruz said, Officer Sylleloglou responded: “No, I couldn’t, you know, I just . . . we were both kinda, I was just listening to him, and then I would say something, I would say ‘hands,’ and he would yell ‘hey, hey, get your hands! Get your hands out of your pock’ . . . I mean he was yelling at him to get his hands out of there.”<sup>116</sup>

92. Mr. Taylor did not respond and continued walking away from Officers Cruz and Sylleloglou with his hands remaining inside the front waistband of his pants.<sup>117</sup>

93. As Mr. Taylor reached the end of the sidewalk and began walking across the parking lot of the 7-Eleven with Officer Cruz telling him to “get your hands out,” Mr. Taylor turned around to directly face Officer Cruz, and Officer Cruz trained his weapon directly at Mr. Taylor.<sup>118</sup>

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<sup>114</sup> Response ¶ 63 at 62 (citing Cruz Interview at SLCC 001371).

<sup>115</sup> Motion for Summary Judgment ¶ 34 at 11 (citing Cruz Bodycam Video; Cruz Declaration ¶ 20); *see also* Response ¶ 84 at 66 (citing Sylleloglou Interview at 2:34).

<sup>116</sup> Response ¶ 85 at 66 (citing Sylleloglou Interview at 2:34).

<sup>117</sup> Motion for Summary Judgment ¶ 36 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 22; Sylleloglou Declaration ¶ 19).

<sup>118</sup> *Id.* ¶ 37 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 23; Sylleloglou Declaration ¶ 20); *see also* Response ¶ 86 at 66 (citing Cruz Deposition at 55:14-17).

94. Officer Downs heard Officer Cruz give Mr. Taylor the command, “Show me your hands,” and saw Mr. Taylor continuing to walk backward.<sup>119</sup>

95. As Mr. Taylor faced Officer Cruz, he continued to walk backwards with both hands inside the loose waistband of his pants, concealing his hands down to his wrists, and moving them in a digging motion.<sup>120</sup>

96. When asked to describe the action of Mr. Taylor’s hands, Officer Cruz remarked about Mr. Taylor’s “baggy” pants. The investigator asked, “Baggy?” and Officer Cruz responded:

Like they usually are with people that we deal with when they’re concealing things. But, ah, his hands were buried like this in his pants. Buried. . . . And when they’re buried way, wrists deep and his sh – you know, he’s clawing at something then he’s this. This is what I see. This is what I see in his baggy pants. This.

They’re not just sitting there. They’re just digging, digging and he has this look on his face like, you, “Come and get me. I’m gonna fricken kill you.”<sup>121</sup>

97. While facing Officer Cruz, and as Officer Cruz continued to shout repeated commands to “get your hands out,” Mr. Taylor said something which sounded like “what fool” or “nah fool” on Officer Cruz’s bodycam video.<sup>122</sup>

98. Officer Cruz’s recollection was that Mr. Taylor said something at that moment along the lines of “come and make me.”<sup>123</sup>

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<sup>119</sup> Response ¶ 70 at 63 (citing Downes Deposition at 49:1-6).

<sup>120</sup> Motion for Summary Judgment ¶ 38 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 24; Sylleloglou Declaration ¶ 21).

<sup>121</sup> Response ¶ 91 at 68-69 (citing Cruz Interview SLCC 001376-77).

<sup>122</sup> Motion for Summary Judgment ¶ 39 at 12 (citing Cruz Bodycam Video); *see also* Response ¶ 64 at 62 (citing Cruz Bodycam Video).

<sup>123</sup> Motion for Summary Judgment ¶ 40 at 12 (citing Cruz Declaration ¶ 25); *see also* Response ¶ 90 at 68 (citing Cruz Interview at SLCC 001375).

99. When asked in his deposition how Mr. Taylor responded to his commands,

Officer Cruz recounted:

He didn't. He responded by continually showing me that he was manipulating or retrieving something from his pants, from his waistband. That is how he responded. . . . And he – sorry. He also responded with the look of defiance. He also responded verbally.<sup>124</sup>

100. Suddenly and without warning, while facing Officer Cruz, Mr. Taylor quickly raised his left hand from inside the loose waistband of his pants, lifting his shirt and exposing his lower torso.<sup>125</sup>

101. Mr. Taylor simultaneously brought his right hand out of his loose waistband of his pants, but lower than his left hand.<sup>126</sup>

102. At that moment, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz and 12 to 15 feet away from Officer Sylleloglou.<sup>127</sup>

103. Officer Downes saw Mr. Taylor lifting up his shirt but could not make anything out.<sup>128</sup>

104. In Officer Cruz's interview, the investigator asked whether Mr. Taylor had manipulated his shirt. Officer Cruz responded:

I mean yeah, his shirt was you know eh, you know, his shirt was raising with his pants. You know? It was this, this tugging motion. This drawing motion, whatever . . . you know, I'm not sure what to call it.<sup>129</sup>

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<sup>124</sup> Response ¶ 87 at 67 (citing Cruz Deposition at 57:4-8,11-12).

<sup>125</sup> Motion for Summary Judgment ¶ 43 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 26; Sylleloglou Declaration ¶ 22).

<sup>126</sup> *Id.* ¶ 44 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 26; Sylleloglou Declaration ¶ 22).

<sup>127</sup> *Id.* ¶ 45 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 27; Scene Photos; Scaled Drawing of Scene, attached as Exhibit B to Cruz Declaration; Sylleloglou Declaration ¶ 23).

<sup>128</sup> Response ¶ 71 at 63 (citing Downes Deposition at 49:7-11).

<sup>129</sup> *Id.* ¶ 92 at 69 (citing Cruz Interview at SLCC 001379-80).

105. Believing that Mr. Taylor’s movements indicated he was “drawing” or reaching for a gun, and that Mr. Taylor intended to fire on the officers, Officer Cruz acted in self-defense by firing two shots in rapid succession, striking Mr. Taylor in the torso.<sup>130</sup>

106. According to the medical examiner, two rounds hit Mr. Taylor. one in his “upper central chest” and a second one in the “right upper quadrant of [the] abdomen” which also grazed the third and fourth fingers of his left hand.<sup>131</sup>

107. When asked by the investigator if Mr. Taylor’s hand ever came toward him, Officer Cruz responded, “I could not – no, it didn’t because I could not wait that long.”<sup>132</sup>

108. When the investigator asked Officer Cruz if he thought Mr. Taylor might have had a gun that could have caused harm to him or another, Officer Cruz responded:

I was convinced, 100% there was nothing else he was doing. Nothing else he could have been doing then getting a gun t-t-to try and kill one of us. To try and kill somebody. Nothing else. There was zero; nothing else made sense. Nothing else.<sup>133</sup>

109. The investigator then asked how that made Officer Cruz feel. Officer Cruz responded:

I was scared to death. The last thought I had go through my mind when I pulled the trigger; and I’ll never forget this. Was uh, was that “I was too late. I was too late. And because of that I was gonna get killed. Worse, my officer was gonna get killed” . . . . And that was the shittiest feeling. . . . And I was like, “I’m gonna get us killed.”<sup>134</sup>

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<sup>130</sup> Motion for Summary Judgment ¶ 46 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 28); *see also* Response ¶ 96 at 69 (citing Cruz Deposition at 60:12-17).

<sup>131</sup> *Id.* ¶ 57 at 15 (citing Office of the Medical Examiner State of Utah Report of Investigation (“Medical Examiner’s Report”) at 1, 5-6, [docket no. 44-10](#), filed Nov. 28, 2016).

<sup>132</sup> Response ¶ 97 at 70 (citing Cruz Deposition at 60:1-3, 7-8).

<sup>133</sup> *Id.* ¶ 93 at 69 (citing Cruz Interview at SLCC 001377).

<sup>134</sup> *Id.* ¶ 94 at 69 (citing Cruz Interview at SLCC 001377).

110. Officer Cruz described the events to investigators:

I heard [Officer Sylleloglou], five to seven feet off to my right, I could see him in my peripheral. He was yelling at him too. “Show us your hands. Stop. Show us your hands.”

Um, and he turned around. He didn’t stop. He never stopped. He turned around. Um, and it was only worse because his hands they were dove in his pants. They were just completely wrist-deep in his pants and he wasn’t just warming up his pants, his hands on a cold day. It wasn’t even cold.

Um, he wasn’t just hiding his hands. He was, he was digging at something. He was manipulating something. I knew there was a gun in those pants. And, ah, at that point I mean, my gun I’ve had it center-massed, trained on him and I was yelling at him and he was looking directly at me, directly at my eyes. And I looked directly in his eyes. And he looked at me like, “You’re not gonna. You’re not gonna stop me.” Um, and, “I’m gonna kill you guys.”

And I think he said something. I don’t remember what he was saying. He was yelling, “You make me.” Or, “you can’t make me,” or some crap. I, I can’t remember. But we yelled at him. I yelled at him with every, as loud as I could. “Let me see your hands. Let me see your hands.” And he looked down the barrel of my gun. It just felt like an eternity. Um, and he, he didn’t. He kept digging. He kept digging. Digging. Manipulating something in his pants.

And I knew he, he was ju – he’d already made up his mind and he just – I was just giving him time to just kill one of us. I don’t know if the gun was caught or it if was falling down? Or I, I don’t know. He was taking off the safety? I don’t know what he was manipulating, something.

And I knew it was a deadly force situation. No doubt in my mind, no doubt in my mind. I needed to see his damn hands. I couldn’t take the chance of him shooting my officer or shooting me.

And, ah, and after I yelled at him for what felt like an eternity with my gun trained right on him he did nothing but keep digging at that gun in his pants or whatever the hell it was. Without any hesitation. Without any reservation in the world I fired at him. And I would have kept firing until that deadly threat had stopped.<sup>135</sup>

111. After firing his weapon, Officer Cruz called “shots fired” over the radio and immediately requested medical attention.<sup>136</sup>

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<sup>135</sup> *Id.* ¶ 89 at 67-68 (citing Cruz Interview at SLCC 002371-72).

<sup>136</sup> Motion for Summary Judgment ¶ 48 at 14 (citing Cruz Bodycam Video; Dispatch Recording; Cruz Declaration ¶ 29).

112. Officer Cruz then handcuffed Mr. Taylor, searched his pockets looking for a gun, and rendered first aid.<sup>137</sup>

113. No gun was found.<sup>138</sup>

114. Mr. Taylor died at the scene.<sup>139</sup>

115. From the time Mr. Taylor turned around and came face-to-face with the officers until he was shot is approximately four seconds.<sup>140</sup>

116. Minutes after Mr. Taylor was shot, Officer Sylleloglou explained to another officer what had happened:

And uh, what happened was we found these two guys that are in our cars. The dude in the white over here, he kept walking, and then he ignored us. So [Officer Cruz] and I went up to him kind of, kind of cornered him like this. And he starts doing this and he starts backing up like digging into his pock – like this, and then he, and then he’s like, “get your hands out of your, get your hands out, get your hands out, get your hands out,” and then as soon as he made an overt movement to, to pull something we didn’t see it, and he just – he got a couple shots on him. And he’s got his camera on.<sup>141</sup>

117. Officer Sylleloglou indicated that if Officer Cruz had not fired his weapon, he likely would have fired his weapon in self-defense under the circumstances.<sup>142</sup>

118. From his position, Officer Downes heard gunshots but he did not see who fired the shots. Officer Downes was more than 50 feet away from Officers Cruz and Sylleloglou at that moment.<sup>143</sup>

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<sup>137</sup> *Id.* ¶ 49 at 14 (citing Cruz Declaration ¶ 30).

<sup>138</sup> *Id.* ¶ 50 at 14 (citing Complaint ¶ 60).

<sup>139</sup> *Id.* ¶ 51 at 14 (citing Complaint ¶ 54).

<sup>140</sup> Response ¶ 95 at 69 (citing Cruz Bodycam Video).

<sup>141</sup> *Id.* ¶ 98 at 70 (citing Sylleloglou Bodycam Video at 3:09).

<sup>142</sup> Motion for Summary Judgment ¶ 47 at 14 (citing Sylleloglou Declaration ¶ 25).

<sup>143</sup> *Id.* ¶ 54 at 14 (citing Downes Declaration ¶¶ 11-12; Scene Photos; Scaled Drawing of Scene).

119. Jerrail was already on the ground when he heard the two gunshots and did not see what happened.<sup>144</sup>

120. When Jerrail was asked what he saw just before Mr. Taylor was shot, he commented:

[A]s I was going down on the ground, I seen [Dillon] grab his pants like this, and pull them up, you know pull his pants up, you know . . . we, we wear baggy ass clothes, you can see that. He's pullin' his pants up, like, 'shit what's up nigga, what'd we do?' Or something to that effect.<sup>145</sup>

121. When Adam was asked what he saw just before Mr. Taylor was shot, he stated:

We went to 7-Eleven. We went in, we came out, the cops pulled their guns and um, [Dillon] started walking away and I look over and I seen him get shot. I see him, I see him, I think he tried to pull up his shorts or something, and they thought he was reaching for a gun and so, all I know is I heard two gun shots and then the officer screaming at me to get down.<sup>146</sup>

122. Adam also stated to officers that based on Mr. Taylor's movements, he could see why the officers thought that Mr. Taylor might have had a gun.<sup>147</sup>

123. When asked by investigators why Mr. Taylor failed to respond and what he might have been doing with his hands, Jerrail responded that Mr. Taylor had a cell phone he used to listen to music, and that "maybe [his hands were] in his pockets to get his damn phone, to change the song on his phone." When asked if Mr. Taylor had headphones, Jerrail answered, "Yeah, that's what he had when the cops were pulling their guns out and shot him."<sup>148</sup>

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<sup>144</sup> *Id.* ¶ 55 at 15 (citing Jerrail Taylor Interview at 11:06).

<sup>145</sup> Response ¶ 99 at 70 (citing Jerrail Taylor Interview at 11:05:42).

<sup>146</sup> *Id.* ¶ 100 at 70 (citing Adam Thayne Interview at 11:38:30).

<sup>147</sup> Motion for Summary Judgment ¶ 56 at 15 (citing Adam Thayne Interview at 11:58).

<sup>148</sup> Response ¶ 72 at 64 (citing Jerrail Taylor Interview at 11:03:06).

124. Mr. Taylor's cell phone can be seen protruding from his pocket in a photo taken during the investigation following the shooting.<sup>149</sup>

125. After Mr. Taylor was shot, he initially fell to the ground on his left side and back. Earbuds were still in his ears. After Officer Cruz had handcuffed Mr. Taylor and rolled him to his back, the earbuds were visible next to Mr. Taylor's head.<sup>150</sup>

126. During this process, for approximately the first three minutes after Officer Cruz shot Mr. Taylor, Officer Cruz did not place on or otherwise wear any gloves.<sup>151</sup>

127. Officer Cruz straddled Mr. Taylor's body looking north. In this position, Officer Cruz bent his right knee forward, and reached his right arm behind his knee. His right arm and hand appear to manipulate Mr. Taylor's right pocket, where Mr. Taylor's phone and earbud cord were located.<sup>152</sup>

128. In this position which partially blocked the body camera view of Officer Cruz's right arm reaching, Officer Cruz appears to have laid or thrown the earbuds onto the ground next to Mr. Taylor's body.<sup>153</sup>

129. When Officer Cruz was asked during his interview if he saw the earbuds, he stated: "I never saw any during the whole time when I was kneeling down by him I never once say any kind of headphones."<sup>154</sup>

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<sup>149</sup> *Id.* ¶ 80 at 65 (citing Photo, attached as Ex. 15 to Cummings Declaration).

<sup>150</sup> *Id.* ¶ 73 at 64 (citing Cruz Bodycam Video).

<sup>151</sup> *Id.* ¶ 74 at 64 (citing Cruz Bodycam Video).

<sup>152</sup> *Id.* ¶ 75 at 64 (citing Cruz Bodycam Video; Still Bodycam Photos, attached as Ex. 14 to Cummings Declaration).

<sup>153</sup> *Id.* ¶ 76 at 64-65 (citing Cruz Bodycam Video; Still Bodycam Photos).

<sup>154</sup> *Id.* ¶ 77 at 65 (citing Cruz Interview at SLCC 001374).

130. In his deposition, Officer Cruz was asked about the earbuds, and stated:

Q: When you first pulled up, had you seen the white cord, the earphones anywhere on him?

A: No.

Q: And maybe I can limit the number of questions. At any point—

A: No. I did not.<sup>155</sup>

### STANDARD OF REVIEW

Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>156</sup> A factual dispute is genuine when “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way”<sup>157</sup> or “if a reasonable jury could return a verdict for the nonmoving party.”<sup>158</sup> A fact is material if “it is essential to the proper disposition of [a] claim.”<sup>159</sup> And in ruling on a motion for summary judgment, the factual record and all reasonable inferences drawn therefrom are viewed in a light most favorably to the nonmoving party.<sup>160</sup>

The moving party “bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.”<sup>161</sup> The movant “need not negate the nonmovant’s claim, but need only point out . . . that there is an absence of evidence to support the nonmoving party’s case.”<sup>162</sup> If the moving party carries this

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<sup>155</sup> *Id.* ¶ 78 at 65 (citing Cruz Deposition at 50:6-17).

<sup>156</sup> Fed. R. Civ. P. 56(a).

<sup>157</sup> *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

<sup>158</sup> *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (internal quotations omitted).

<sup>159</sup> *Adler*, 144 F.3d at 670.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 670-71.

<sup>162</sup> *Universal Money Ctrs., Inc.*, 22 F.3d at 1529 (internal quotations omitted).

initial burden, the nonmoving party “may not rest upon mere allegations or denials of [the] pleading[s], but must set forth *specific facts* showing that there is a *genuine issue* for trial as to those dispositive matters for which it carries the burden of proof.”<sup>163</sup> “The mere existence of a scintilla of evidence in support of the [nonmovant’s] position will be insufficient to defeat a properly supported motion for summary judgment.”<sup>164</sup>

## DISCUSSION

### **Officer Cruz is entitled to qualified immunity on Plaintiffs’ excessive force claim because his use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right**

Plaintiffs claim Officer Cruz used excessive force when he employed deadly force during the August 11, 2014 encounter with Mr. Taylor.<sup>165</sup> Office Cruz argues he is immune from suit under the qualified immunity doctrine.<sup>166</sup>

“Public officials are immune from suit under [42 U.S.C. § 1983](#) unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.”<sup>167</sup> “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>168</sup> “The protection of qualified immunity applies regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”<sup>169</sup>

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<sup>163</sup> *Id.* (internal quotations and citations omitted; emphasis in original).

<sup>164</sup> *Id.* (internal quotations omitted).

<sup>165</sup> Complaint ¶¶ 105-113.

<sup>166</sup> Motion for Summary Judgment at 21-34.

<sup>167</sup> *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (internal quotations omitted).

<sup>168</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>169</sup> *Id.* (internal quotations omitted).

Thus, “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal question,” and “protects all but the plainly incompetent or those who knowingly violate the law.”<sup>170</sup>

“Because qualified immunity is an immunity from suit rather than a mere defense to liability it is effectively lost if a case is erroneously permitted to go to trial.”<sup>171</sup> “[T]he driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery.”<sup>172</sup> And for this reason, the U.S. Supreme Court has repeatedly “stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”<sup>173</sup>

“[A] plaintiff seeking to avoid summary judgment on qualified immunity grounds must satisfy a ‘heavy’ two-part burden.”<sup>174</sup> The plaintiff must show: “(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.”<sup>175</sup> The two prongs of qualified immunity may be analyzed in any sequence based on the circumstances of the particular case.<sup>176</sup> In this case, it is necessary to address only the first prong, *i.e.*, whether Officer Cruz’s use of deadly force in the August 11, 2014 encounter with Mr. Taylor violated a statutory or constitutional right.

Claims of excessive force are analyzed under the Fourth Amendment’s objective reasonableness standard “judged from the perspective of a reasonable officer on the scene, rather

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<sup>170</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal quotations omitted).

<sup>171</sup> *Pearson*, 555 U.S. at 231 (internal quotations and punctuation omitted).

<sup>172</sup> *Id.* (internal quotations and punctuation omitted).

<sup>173</sup> *Id.* at 232 (internal quotations omitted).

<sup>174</sup> *Mecham v. Frazier*, 500 F.3d 1200, 1204 (10th Cir. 2007).

<sup>175</sup> *Ashcroft*, 563 U.S. at 735 (internal quotations omitted).

<sup>176</sup> *Pearson*, 555 U.S. at 236.

than with the 20/20 vision of hindsight.”<sup>177</sup> The objective reasonableness standard applies to any use of force by a law enforcement officer “in the course of an arrest, investigatory stop, or other seizure.”<sup>178</sup>

“[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”<sup>179</sup> “[I]ts proper application requires careful attention to the facts and circumstances of each particular case”<sup>180</sup> to determine “whether the totality of the circumstances justified the use of force.”<sup>181</sup> “[R]elevant factors include the crime’s severity, the potential threat posed by the suspect to the officer’s and others’ safety, and the suspect’s attempts to resist or evade arrest.”<sup>182</sup> And “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>183</sup> Where the material facts are not in dispute, the objective legal reasonableness of the officer’s use of force is a question of law.<sup>184</sup>

**Officer Cruz’s use of deadly force was objectively reasonable in light of the dispatch report of a man with a gun and the unknown motivations of the suspects**

The first factor to consider in determining whether an officer’s use of force was objectively reasonable is the crime’s severity.<sup>185</sup> Officer Cruz’s August 11, 2014 encounter with

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<sup>177</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>178</sup> *Id.* at 395 (internal quotations omitted).

<sup>179</sup> *Id.* at 396 (internal quotations omitted).

<sup>180</sup> *Id.*

<sup>181</sup> *Estate of Larsen ex rel. Studivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2009) (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)).

<sup>182</sup> *Mecham*, 500 F.3d at 1204 (internal quotations omitted).

<sup>183</sup> *Graham*, 490 U.S. at 396-97.

<sup>184</sup> *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003).

<sup>185</sup> *Mecham*, 500 F.3d at 1204.

Mr. Taylor arose from a dispatch “report of a man with a gun.”<sup>186</sup> The dispatcher informed officers the “suspect flashed a gun at the complainant but no threat was made;” no shots had been fired; no one was in danger; the complainant was not cooperative and hung up on the call taker; and the complainant refused to provide her identifying information.<sup>187</sup>

The nature of the dispatch report could have led to a number of potential crimes, ranging from misdemeanor to felony.<sup>188</sup> In Utah, the crimes of carrying a concealed firearm, including an unloaded firearm, and openly carrying a loaded firearm on a public street are class B misdemeanors.<sup>189</sup> But if the individual in possession of the firearm is a Category I or II restricted person, the crime is a second or third degree felony.<sup>190</sup> The dispatch report could have also led to no crime being committed because in Utah, individuals may openly transport unloaded firearms.<sup>191</sup> This wide range of possibilities necessitated the dispatcher asking for any officers “coming clear” to “check” the situation.<sup>192</sup>

Officer Cruz mistakenly believed the dispatch report was for a group of men, one of whom had “brandished” a weapon.<sup>193</sup> But he ultimately responded to ensure the suspect was not a threat to public safety and to determine whether any laws had been or were being violated, including a possible brandishing.<sup>194</sup> This necessarily required Officer Cruz, and the other

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<sup>186</sup> *Supra* Undisputed Facts ¶ 1.

<sup>187</sup> *Id.* ¶¶ 1-2.

<sup>188</sup> UTAH CODE ANN. §§ 76-10-500 through -532.

<sup>189</sup> *Id.* § 76-10-504(1), -505(1)(b), (4).

<sup>190</sup> *Id.* § 76-10-503(2)(a), (3)(a).

<sup>191</sup> *Id.* § 76-10-500(1).

<sup>192</sup> *Supra* Undisputed Facts ¶ 3.

<sup>193</sup> *Id.* ¶¶ 4, 10.

<sup>194</sup> *Id.* ¶ 5.

responding officers, to determine whether any of the suspects were armed, and if so, whether their reason for carrying a firearm was innocent or nefarious.

Officer Cruz's response to the unknowns of these circumstances was heightened caution.<sup>195</sup> When he arrived in the area, he observed three men—Mr. Taylor, Jerrail, and Adam—two of whom generally matched the descriptions provided by the dispatcher.<sup>196</sup> He requested backup and decided to wait for that backup to arrive before approaching the suspects.<sup>197</sup> He asked the dispatcher whether the report identified which of the three men flashed the gun, and was told that the log did not indicate,<sup>198</sup> which added another unknown to the situation. Officer Cruz also observed the three men and ran scenarios through his mind to be as prepared as possible for the encounter with them.<sup>199</sup>

While observing the three men, Officer Cruz saw Mr. Taylor walk up to a car stopped at a red light and interact with the driver, while Jerrail and Adam were “throwing their hands in the air, kind of making a big scene.”<sup>200</sup> Officer Cruz was unsure of what occurred in the exchange and described it as “some kind of distraction or disturbance,” possibly “harassing the driver,” and “not typical” and “unusual” since “you don't just walk up to people in a crosswalk, somebody that maybe you don't know, and start engaging them while they are sitting in their car in traffic.”<sup>201</sup> The exchange further heightened Officer Cruz's caution regarding the three suspects.

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<sup>195</sup> Officers Sylleloglou and Downes also approached the situation with heightened caution because the suspect was reportedly armed. *Id.* ¶¶ 45, 67.

<sup>196</sup> *Id.* ¶ 13.

<sup>197</sup> *Id.* ¶¶ 9, 14.

<sup>198</sup> *Id.* ¶ 15.

<sup>199</sup> *Id.* ¶¶ 14, 16-17, 20-21.

<sup>200</sup> *Id.* ¶ 17.

<sup>201</sup> *Id.* ¶ 18.

A witness also viewed the exchange and indicated that it appeared Mr. Taylor gave the car's driver a high-five.<sup>202</sup> This differing description of the exchange does not create a genuine issue of material fact or render Officer Cruz's reaction to the exchange unreasonable. The witness observed the exchange from an obstructed vantage point<sup>203</sup> that was different than Officer Cruz's view. The witness also did not describe the actions of Jerrail and Adam during the exchange. And the witness was not viewing the exchange from the perspective of an officer responding to a dispatch report of a man with a gun. Moreover, what actually occurred during the exchange is not material. Rather, it is Officer Cruz's observation of and reaction to the exchange that are material to determining whether his conduct was objectively reasonable.

Viewing the undisputed material facts in a light most favorable to Plaintiffs, the dispatch report was for a minor crime or no crime at all. The complainant, being unidentified and non-cooperative with the call taker,<sup>204</sup> also casts doubt regarding whether a crime had been committed.<sup>205</sup> And prior to making contact with the suspects, Officer Cruz did not observe anything suggestive of a more serious crime. But even so, a reasonable officer in the same circumstances would approach the situation with heightened caution—just as Officer Cruz did—based on the potential threat to safety posed by a firearm's presence and a suspect's unknown motivations. When this heightened caution is considered in the totality of the circumstances—and particularly in light of Mr. Taylor's conduct after the officers made contact—the severity of

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<sup>202</sup> *Id.* ¶ 19.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* ¶ 2.

<sup>205</sup> *Florida v. J.L.*, 529 U.S. 266, 270 (1999) (“Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity[.]”) (internal citations and quotations omitted).

the crime factor weighs in favor of a finding that Officer Cruz's use of deadly force was objectively reasonable.

**Officer Cruz's use of deadly force was objectively reasonable in light of the potential threat of serious physical harm posed by Mr. Taylor**

The second factor to consider in determining whether an officer's use of force was objectively reasonable is the potential threat posed by the suspect to the officer and others' safety.<sup>206</sup> Specific to the use of deadly force, a defendant's conduct is justified if a reasonable officer in the defendant's position would have probable cause to believe that the suspect poses a potential threat of serious physical harm, either to the officer or to others.<sup>207</sup> "[E]ven if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back the officer would be justified in using more force than in fact was needed."<sup>208</sup> "A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often . . . too late to take safety precautions.'"<sup>209</sup>

In assessing the degree of threat facing an officer in deadly force cases, the following nonexclusive factors are considered: "(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 officers and the suspect; and (4) the manifest intentions of the suspect."<sup>210</sup> Each of these factors supports a finding that a reasonable officer on the scene would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

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<sup>206</sup> *Mecham*, 500 F.3d at 1204.

<sup>207</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Murr*, 511 F.3d at 1260.

<sup>208</sup> *Murr*, 511 F.3d at 1260 (internal quotations and punctuation omitted).

<sup>209</sup> *Id.* (quoting *People v. Morales*, 603 N.Y.S.2d 319, 320 (N.Y. App. Div. 1993)).

<sup>210</sup> *Id.*

*Mr. Taylor refused to comply with the officers' repeated commands that he stop and show his hands*

Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor was aware of the officers' interest in him and whether he could hear their commands because he was wearing headphones.<sup>211</sup> Plaintiffs' argument lacks merit. Viewing the undisputed material facts in a light most favorable to Plaintiffs, it cannot be reasonably questioned that Mr. Taylor was aware of the officers' presence; that he heard and verbally responded to the officers' commands; and that he deliberately refused to comply with their commands. And regardless, the qualified immunity analysis does not focus on Mr. Taylor's subjective understanding of the situation. Nor does it turn on whether Officer Cruz was aware that Mr. Taylor was wearing headphones.<sup>212</sup> Rather, the focus of the inquiry is whether a reasonable officer under the circumstances would believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply.<sup>213</sup>

Officers Cruz, Sylleloglou, and Downes never saw a firearm in Mr. Taylor's possession,<sup>214</sup> and no gun was found at the scene.<sup>215</sup> However, the officers were responding to a dispatch "report of a man with a gun."<sup>216</sup> The suspects—Mr. Taylor, Jerrail, and Adam—were in the area of the report and two of them generally matched the descriptions provided by the

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<sup>211</sup> Response at 83-84; *supra* Undisputed Facts ¶¶ 62-63, 123-125.

<sup>212</sup> Officer Cruz indicated that he did not see Mr. Taylor wearing headphones, but the video and photographic evidence shows that after Mr. Taylor was shot, Officer Cruz appeared to have laid or thrown the headphones onto the ground while he searched Mr. Taylor. *Supra* Undisputed Facts ¶¶ 124-130. This potential inconsistency is not material.

<sup>213</sup> *Garner*, 471 U.S. at 11; *Murr*, 511 F.3d at 1260.

<sup>214</sup> *Supra* Undisputed Facts ¶¶ 54, 103, 107, 110, 116.

<sup>215</sup> *Id.* ¶ 113.

<sup>216</sup> *Id.* ¶ 1.

dispatcher.<sup>217</sup> When the officers made contact, Jerrail and Adam immediately stopped and raised their hands.<sup>218</sup> Mr. Taylor, on the other hand, turned around, put his headphones in, and began walking away from the officers towards the entrance of the 7-Eleven.<sup>219</sup>

Officer Cruz believed that Mr. Taylor looked directly at him and the other officers when they approached in their police vehicles as he exited the 7-Eleven.<sup>220</sup> But Officer Cruz was wearing dark-tinted sunglasses,<sup>221</sup> which arguably might have obscured his ability to determine whether Mr. Taylor looked at him as Officer Cruz approached in his vehicle. However, the video and photographic evidence show that Mr. Taylor appeared to look directly at Officer Cruz's police vehicle as it approached—with its red and blue emergency lights flashing—and blocked his path.<sup>222</sup> Mr. Taylor also appeared to look directly at Officer Sylleloglou's police vehicle as it moved in front of the three men.<sup>223</sup> And when Jerrail was asked if he thought there was any possible way that Mr. Taylor could not have seen the police vehicles and the officers approaching with their guns drawn, he stated: "I don't know how he didn't see them."<sup>224</sup>

By immediately turning and walking away when the police vehicles blocked his path,<sup>225</sup> Mr. Taylor's conduct would suggest to a reasonable officer that Mr. Taylor was aware of the police presence, and that he was attempting to evade the officers. Officers Cruz and Sylleloglou

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<sup>217</sup> *Id.* ¶ 13.

<sup>218</sup> *Id.* ¶¶ 40, 42, 47.

<sup>219</sup> *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

<sup>220</sup> *Id.* ¶¶ 37, 39-42.

<sup>221</sup> *Id.* ¶ 36.

<sup>222</sup> *Id.* ¶¶ 32-33, 35, 38.

<sup>223</sup> *Id.* ¶ 43.

<sup>224</sup> *Id.* ¶ 52.

<sup>225</sup> *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

pursued Mr. Taylor,<sup>226</sup> shouting repeated commands that he stop and show his hands.<sup>227</sup> But Mr. Taylor continued walking away from the officers and placed his hands “wrist-deep” inside the front waistband of his pants, moving them in a digging motion.<sup>228</sup>

Then, as Mr. Taylor continued walking away from the officers while they shouted commands for him to stop and show his hands,<sup>229</sup> he looked directly at Officer Sylleloglou with a “mean mug” look on his face and verbally responded.<sup>230</sup> It is unknown exactly what Mr. Taylor said. But it is undisputed that he was speaking to Officer Sylleloglou and said something along the lines of “what did we do?”<sup>231</sup> and “what are you gonna do, shoot me? What are you gonna do? You gonna shoot me? You gonna shoot me?”<sup>232</sup> Officer Sylleloglou described the look on Mr. Taylor’s face as hostile and defiant.<sup>233</sup> Mr. Taylor also later turned around to directly face Officer Cruz,<sup>234</sup> indicating that he was aware of Officer Cruz’s presence behind him. Officer Cruz described the look on Mr. Taylor’s face as defiant, like “come and get me. I’m gonna fricken kill you.”<sup>235</sup>

Plaintiffs argue that Officer Cruz’s description of Mr. Taylor’s look is not credible because Officer Cruz was looking in the direction of the sun.<sup>236</sup> But this argument lacks merit

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<sup>226</sup> *Id.* ¶¶ 53, 56, 64.

<sup>227</sup> *Id.* ¶¶ 50, 59, 77; 83, 90-91, 93-94, 97, 110, 116.

<sup>228</sup> *Id.* ¶¶ 59, 70, 75, 78, 92, 94-96, 99, 110, 116.

<sup>229</sup> *Id.* ¶¶ 59, 77, 83.

<sup>230</sup> *Id.* ¶¶ 84, 87-88.

<sup>231</sup> *Id.* ¶ 87.

<sup>232</sup> *Id.* ¶ 88.

<sup>233</sup> *Id.* ¶ 84.

<sup>234</sup> *Id.* ¶¶ 89, 93-94, 97-98.

<sup>235</sup> *Id.* ¶¶ 96, 99.

<sup>236</sup> Response at 76; Cruz Bodycam Video.

based on the undisputed material facts. Officer Cruz was wearing dark-tinted sunglasses,<sup>237</sup> which would have ameliorated the effect of the sun. Moreover, Officer Sylleloglou described the look on Mr. Taylor's face as being hostile and defiant just seconds before Mr. Taylor turned to face Officer Cruz.<sup>238</sup> And after turning to face Officer Cruz, while continuing to walk backwards away from the officers, Mr. Taylor verbally responded to Officer Cruz in a defiant tone.<sup>239</sup> It is undisputed that he said something to Officer Cruz which sounded like "what fool" or "nah fool."<sup>240</sup> It is also undisputed that during the verbal exchanges with Officers Sylleloglou and Cruz, Mr. Taylor continued walking away from the officers with his hands concealed in the front waistband of his pants, moving them in a digging motion.<sup>241</sup>

Officers Cruz and Sylleloglou both believed that Mr. Taylor heard their commands and deliberately chose to ignore them.<sup>242</sup> A reasonable officer under these circumstances would also believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply. This supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

*Mr. Taylor made a sudden and hostile "draw stroke motion" with his hands while refusing to comply with the officers' commands, and while directly facing Officer Cruz*

Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor made a hostile motion towards the officers.<sup>243</sup> Plaintiffs rely on Jerrail and Adam's statements that they

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<sup>237</sup> *Supra* Undisputed Facts ¶ 36.

<sup>238</sup> *Id.* ¶ 84; Cruz Bodycam Video.

<sup>239</sup> *Supra* Undisputed Facts ¶ 97; Cruz Bodycam Video.

<sup>240</sup> *Supra* Undisputed Facts ¶ 97.

<sup>241</sup> *Id.* ¶¶ 75, 78, 84, 86, 92, 94-99, 110, 116.

<sup>242</sup> *Id.* ¶¶ 84, 86, 99, 110.

<sup>243</sup> Response at 82-83.

believed Mr. Taylor was pulling up his pants,<sup>244</sup> or that Mr. Taylor's hands could have been in his pockets manipulating his phone.<sup>245</sup> Plaintiffs also argue that Mr. Taylor could have been attempting to comply with the officers' commands that he show his hands.<sup>246</sup> However, the focus of the inquiry is not on what Jerrail and Adam believed Mr. Taylor was doing with his hands, or what Mr. Taylor subjectively intended with his hand movements. Rather, the focus is whether a reasonable officer under the circumstances would believe that Mr. Taylor was making a hostile motion with a weapon towards the officers.<sup>247</sup> The undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers.

Based on his understanding that one of the three men had a gun, Officer Cruz reasonably believed that the gun was very likely in the possession of Mr. Taylor, who was walking away from the officers and, unlike Jerrail and Adam, was not complying with the officers' commands to stop.<sup>248</sup> As Mr. Taylor walked along the side of the 7-Eleven away from Officers Cruz and Sylleloglou with his back to them, he raised his hands to the sides of his waist.<sup>249</sup> It is clear from the video and photographic evidence that when Mr. Taylor did this, he was pulling up his baggy pants.<sup>250</sup>

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<sup>244</sup> *Supra* Undisputed Facts ¶¶ 120-121, 123.

<sup>245</sup> *Id.* ¶ 123.

<sup>246</sup> Response at 78, 82-83.

<sup>247</sup> *Garner*, 471 U.S. at 11; *Murr*, 511 F.3d at 1260.

<sup>248</sup> *Supra* Undisputed Facts ¶ 70.

<sup>249</sup> *Id.* ¶ 74.

<sup>250</sup> *Id.* ¶¶ 73-74.

However, Mr. Taylor then made a separate, distinct movement with his hands: he put his hands inside the front waistband of his pants, and made digging motions with them.<sup>251</sup> Officer Cruz reasonably believed Mr. Taylor’s hands were concealed in his waistband area due to the position of his elbows as he viewed Mr. Taylor from behind.<sup>252</sup> It was not until this point—when Mr. Taylor concealed his hands in the front waistband of his pants—that Officers Cruz and Sylleloglou began training their weapons on Mr. Taylor.<sup>253</sup> It was also at this point that Officer Cruz was convinced that Mr. Taylor had a gun, and that Mr. Taylor was “buying time” by “calmly walk[ing] away” and “creating distance” before a “gunfight” ensued.<sup>254</sup> But instead of firing his weapon at Mr. Taylor, Officer Cruz continued to shout commands, along with Officer Sylleloglou, for Mr. Taylor to stop and show his hands.<sup>255</sup>

Mr. Taylor continued walking away from the officers with his hands “wrist-deep” in the front waistband of his pants, moving them in a digging motion.<sup>256</sup> Viewing the undisputed material facts in a light most favorable to Plaintiffs, Mr. Taylor’s hands could have been manipulating his phone at this time.<sup>257</sup> But the officers were responding to a dispatch report of a man with a gun.<sup>258</sup> And they were faced with a suspect that was aware of their presence and interest in him, and who was not complying with their commands that he stop and show his hands.<sup>259</sup> Under these circumstances, a reasonable officer would believe that Mr. Taylor was in

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<sup>251</sup> *Id.* ¶ 75.

<sup>252</sup> *Id.* ¶ 76.

<sup>253</sup> *Id.* ¶¶ 75, 79, 82.

<sup>254</sup> *Id.* ¶¶ 79-81.

<sup>255</sup> *Id.* ¶¶ 77; 83, 90-91, 93-94, 97, 110, 116.

<sup>256</sup> *Id.* ¶¶ 92, 95-96, 99.

<sup>257</sup> *Id.* ¶¶ 123-124.

<sup>258</sup> *Id.* ¶ 1.

<sup>259</sup> *Supra* Discussion at 37-41.

possession of a weapon and a reasonable officer would take measures to be prepared to act in self-defense or the defense of others—just as Officers Cruz and Sylleloglou did by training their weapons on Mr. Taylor.<sup>260</sup> As Officer Downes noted, “there were civilians all around us, non-law enforcement personnel. So if they decided to produce a weapon, there is no telling where those rounds are going to go.”<sup>261</sup>

Mr. Taylor’s conduct at this point further escalated the situation. He looked at Officer Sylleloglou with a “mean mug” look on his face, which Officer Sylleloglou described as hostile and defiant.<sup>262</sup> He also verbally responded to Officer Sylleloglou in a defiant manner.<sup>263</sup> He then turned around to directly face Officer Cruz and, with a hostile look on his face, verbally responded to Officer Cruz in a defiant tone.<sup>264</sup>

While facing Officer Cruz, Mr. Taylor suddenly and without warning quickly raised his hands in a “draw stroke” motion.<sup>265</sup> His left hand moved from inside the waistband of his pants, lifting his shirt and exposing his lower torso,<sup>266</sup> while simultaneously he brought his right hand out of his waistband but lower than his left hand.<sup>267</sup> It was at this point, believing that Mr. Taylor’s movements indicated he was “drawing” or reaching for a gun, and that Mr. Taylor intended to fire on the officers, Officer Cruz acted in self-defense by firing two shots in rapid succession, striking Mr. Taylor in the torso.<sup>268</sup>

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<sup>260</sup> *Supra* Undisputed Facts ¶¶ 75, 79, 82

<sup>261</sup> *Id.* ¶ 67.

<sup>262</sup> *Id.* ¶ 84.

<sup>263</sup> *Id.* ¶¶ 87-88.

<sup>264</sup> *Id.* ¶¶ 93, 96-97, 99; Cruz Bodycam Video.

<sup>265</sup> *Supra* Undisputed Facts ¶¶ 100-101, 104-105, 116.

<sup>266</sup> *Id.* ¶ 100.

<sup>267</sup> *Id.* ¶ 101.

<sup>268</sup> *Id.* ¶¶ 105, 110.

It is clear from the video and photographic evidence that the “drawing” motion of Mr. Taylor’s hands is not similar to when Mr. Taylor earlier put his hands on his waist to pull up his pants.<sup>269</sup> That one of Officer Cruz’s rounds struck Mr. Taylor in the “right upper quadrant of [the] abdomen” also grazing the third and fourth fingers of his left hand is also inconsistent with the theory that Mr. Taylor was pulling up his pants.<sup>270</sup> Moreover, although Jerrail suggested Mr. Taylor was pulling up his pants,<sup>271</sup> it is undisputed that Jerrail was already on the ground when he heard the two gunshots and did not see what happened.<sup>272</sup> Adam also stated to officers that based on Mr. Taylor’s movements, he could see why the officers thought Mr. Taylor might have had a gun.<sup>273</sup> And Officer Sylleloglou indicated that he likely would have fired his weapon in self-defense under the circumstances, if Officer Cruz had not fired.<sup>274</sup>

The undisputed material facts also do not reasonably suggest that Mr. Taylor abruptly decided to become compliant with the officers’ commands that he stop and show his hands. To the contrary, the undisputed material facts demonstrate that less than four seconds before he was shot,<sup>275</sup> Mr. Taylor turned to directly face Officer Cruz and, with a hostile look on his face, verbally responded to Officer Cruz in a defiant tone.<sup>276</sup> He then made a sudden motion with his

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<sup>269</sup> Compare *id.* ¶ 74, with *id.* ¶ 100; Cruz Bodycam Video.

<sup>270</sup> *Id.* ¶ 106.

<sup>271</sup> *Id.* ¶ 120.

<sup>272</sup> *Id.* ¶ 119.

<sup>273</sup> *Id.* ¶ 122.

<sup>274</sup> *Id.* ¶ 117.

<sup>275</sup> *Id.* ¶ 115.

<sup>276</sup> *Id.* ¶¶ 93, 96-97, 99.

hands that from the video and photographic evidence is consistent with a “draw stroke.”<sup>277</sup> And when he was shot, Mr. Taylor was continuing to walk backwards away from the officers.<sup>278</sup>

Although Mr. Taylor’s hand did not ever come toward Officer Cruz,<sup>279</sup> and no gun was found in Mr. Taylor’s possession,<sup>280</sup> the confirmed presence of a weapon is not required before a reasonable officer takes self-protective action.<sup>281</sup> Given all the facts now known, it could be assumed that Mr. Taylor was pulling up his pants, manipulating his phone with his hands, or attempting to comply with the officers’ commands that he show his hands. But “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>282</sup> Officers are “justified in using more force than in fact was needed” if the officers “reasonably, but mistakenly, believed that a suspect was likely to fight back[.]”<sup>283</sup>

A reasonable officer under the circumstances of this case would believe that Mr. Taylor’s sudden “draw stroke” motion with his hands was a hostile motion made with a weapon towards the officers. And this supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

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<sup>277</sup> *Id.* ¶¶ 100-101, 104-105, 116.

<sup>278</sup> *Id.* ¶ 95.

<sup>279</sup> *Id.* ¶ 107.

<sup>280</sup> *Id.* ¶ 113.

<sup>281</sup> *Murr*, 511 F.3d at 1260 (quoting *Morales*, 603 N.Y.S.2d at 320).

<sup>282</sup> *Graham*, 490 U.S. at 396-97.

<sup>283</sup> *Murr*, 511 F.3d at 1260 (“[E]ven if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back the officer would be justified in using more force than in fact was needed.”) (internal quotations and punctuation omitted).

*Mr. Taylor and Officers Cruz and Sylleloglou were in close proximity during the encounter*

Officers Cruz and Sylleloglou arrived at the scene in their police vehicles forming a barricade or “V” in the 7-Eleven parking lot blocking the path of Mr. Taylor, Jerrail, and Adam.<sup>284</sup> Officer Sylleloglou immediately exited and ran around the front of his vehicle in a south/west diagonal in pursuit of Mr. Taylor, who was walking away.<sup>285</sup> Officer Cruz initially followed some distance behind Mr. Taylor and Officer Sylleloglou, but was closing the distance.<sup>286</sup> This was because Mr. Taylor was already walking away from Officer Cruz before he had fully exited his vehicle and cleared its door.<sup>287</sup> Officer Cruz then maintained his distance from Mr. Taylor after Mr. Taylor concealed his hands in the front waistband of his pants.<sup>288</sup>

When Mr. Taylor looked at Officer Sylleloglou with a “mean mug” look on his face and verbally responded to Officer Sylleloglou, the distance between the two was no more than 15 feet.<sup>289</sup> Officers Cruz and Sylleloglou were five to seven feet apart when Mr. Taylor turned around to face Officer Cruz.<sup>290</sup> And at the moment he was shot, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz, and 12 to 15 feet away from Officer Sylleloglou.<sup>291</sup> Officer Downes was detaining Jerrail and Adam in the parking lot in front of the 7-Eleven approximately 50 feet away from Officers Cruz and Sylleloglou.<sup>292</sup>

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<sup>284</sup> *Supra* Undisputed Facts ¶ 35.

<sup>285</sup> *Id.* ¶ 53.

<sup>286</sup> *Id.* ¶ 56; Cruz Bodycam Video.

<sup>287</sup> *Supra* Undisputed Facts ¶ 55.

<sup>288</sup> *Id.* ¶ 71; Cruz Bodycam Video.

<sup>289</sup> *Supra* Undisputed Facts ¶ 85

<sup>290</sup> *Id.* ¶ 110.

<sup>291</sup> *Id.* ¶ 102.

<sup>292</sup> *Id.* ¶¶ 65, 118.

The close proximity of Mr. Taylor and Officers Cruz and Sylleloglou further demonstrates that a reasonable officer would believe that Mr. Taylor was aware of the officers' presence and could hear their commands that he stop and show his hands.<sup>293</sup> The close proximity also demonstrates that Officers Cruz and Sylleloglou were close enough to Mr. Taylor to observe his movements and facial expressions as they pursued him. And the close proximity demonstrates that Officer Cruz was faced with a split-second decision when Mr. Taylor made the sudden "draw stroke" motion with his hands.<sup>294</sup> In that split-second, Officer Cruz fired his weapon,<sup>295</sup> and Officer Sylleloglou likely would have fired his weapon had Officer Cruz not fired.<sup>296</sup> Given these circumstances, the close proximity of Mr. Taylor and Officers Cruz and Sylleloglou supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

*Mr. Taylor manifested hostile and defiant intentions in relation to the officers*

From the moment the officers arrived at the 7-Eleven parking lot until the time he was shot, Mr. Taylor's conduct demonstrated an intention to be hostile and defiant in relation to the officers. He immediately turned and walked away when the police vehicles blocked his path.<sup>297</sup> He then continued to walk away while Officers Cruz and Sylleloglou pursued him shouting commands that he stop and show his hands.<sup>298</sup> Despite being aware of the officers' presence and interest in him, and hearing their commands, Mr. Taylor refused to comply.<sup>299</sup> He defiantly

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<sup>293</sup> *Supra* Discussion at 37-41.

<sup>294</sup> *Id.* at 41-47.

<sup>295</sup> *Supra* Undisputed Facts ¶¶ 105, 110.

<sup>296</sup> *Id.* ¶ 117.

<sup>297</sup> *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

<sup>298</sup> *Id.* ¶¶ 50, 59, 70, 77-78, 83, 90-95, 99, 110, 116.

<sup>299</sup> *Supra* Discussion at 37-41.

concealed his hands in the front waistband of his pants, moving them in a digging motion;<sup>300</sup> he looked at the officers with a hostile and defiant look on his face while the officers pursued him;<sup>301</sup> he verbally responded to the officers in a defiant manner and tone;<sup>302</sup> and he continued walking away from the officers.<sup>303</sup> Finally, when directly facing Officer Cruz, being no more than 12 feet away and with Officer Cruz's weapon trained on him, Mr. Taylor made a sudden and hostile "draw stroke" motion with his hands.<sup>304</sup>

A reasonable officer under these circumstances would believe that Mr. Taylor's manifest intentions were hostile and defiant in relation to the officers. This supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

*Conclusion: Mr. Taylor posed a potential threat of serious physical harm to the officers or others*

A reasonable officer on the scene of the August 11, 2014 encounter with Mr. Taylor would believe that: (1) Mr. Taylor was aware of the officers' presence and interest in him, heard the officers' commands that he stop and show his hands, and refused to comply;<sup>305</sup> (2) Mr. Taylor's sudden "draw stroke" motion with his hands was a hostile motion made with a weapon towards the officers;<sup>306</sup> (3) the close proximity of Mr. Taylor and Officers Cruz and Sylleloglou necessitated a split-second decision by the officers when Mr. Taylor made the sudden "draw

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<sup>300</sup> *Supra* Undisputed Facts ¶¶ 75-76, 79-82, 84, 86, 92, 95-65, 99, 110, 116.

<sup>301</sup> *Id.* ¶¶ 84, 96, 99, 110.

<sup>302</sup> *Id.* ¶¶ 87-88, 97, 99, 110.

<sup>303</sup> *Id.* ¶¶ 92, 94-95.

<sup>304</sup> *Id.* ¶¶ 93, 100-102, 104-105, 116.

<sup>305</sup> *Supra* Discussion at 37-41.

<sup>306</sup> *Id.* at 41-46.

stroke”;<sup>307</sup> and (4) Mr. Taylor’s manifest intentions were hostile and defiant in relation to the officers.<sup>308</sup> Because of this, a reasonable officer under the circumstances would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others. Therefore, this factor weighs in favor of a finding that Officer Cruz’s use of deadly force was objectively reasonable.

**Officer Cruz’s use of deadly force was objectively reasonable in light of Mr. Taylor’s attempts to resist or evade arrest**

The third factor in determining whether an officer’s use of force was objectively reasonable is the suspect’s attempts to resist or evade arrest.<sup>309</sup> Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor was resisting or evading arrest.<sup>310</sup> Plaintiffs argue that Mr. Taylor could not hear the officers’ commands that he stop and show his hands because he was wearing headphones.<sup>311</sup> Plaintiffs also argue that Mr. Taylor was not threatening or actively resisting arrest because he was slowly and calmly walking away from the officers.<sup>312</sup> But these facts cannot be viewed in isolation. They must be considered in the totality of the circumstances “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>313</sup>

Viewing the undisputed material facts in a light most favorable to Plaintiffs, it cannot be reasonably questioned that Mr. Taylor was aware of the officers’ presence; that he heard and verbally responded to the officers’ commands; and that he deliberately refused to comply with

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<sup>307</sup> *Id.* 46-47.

<sup>308</sup> *Id.* 48-49.

<sup>309</sup> *Mecham*, 500 F.3d at 1204.

<sup>310</sup> Response at 83-85.

<sup>311</sup> *Id.*; *supra* Undisputed Facts ¶¶ 62-63, 123-125.

<sup>312</sup> Response at 84; *supra* Undisputed Facts ¶ 81.

<sup>313</sup> *Graham*, 490 U.S. at 396; *Murr*, 511 F.3d at 1259.

their commands.<sup>314</sup> A reasonable officer under the circumstances would believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply.<sup>315</sup> Mr. Taylor immediately walked away from the officers when the police vehicles blocked his path.<sup>316</sup> When Jerrail saw Mr. Taylor walking away, he told Mr. Taylor to "stop," and figured that Mr. Taylor was avoiding contact with the officers.<sup>317</sup> Mr. Taylor continued walking away from the officers despite their pursuit and commands that he stop and show his hands, even when directly facing Officer Cruz with Officer Cruz's weapon trained on him.<sup>318</sup> Mr. Taylor's manifest intentions were hostile and defiant in relation to the officers throughout the encounter.<sup>319</sup> And Mr. Taylor made a sudden and hostile "draw stroke" motion with his hands while directly facing Officer Cruz in close proximity.<sup>320</sup> A reasonable officer under these circumstances would believe that Mr. Taylor was attempting to resist or evade arrest. Therefore, this factor weighs in favor of a finding that Officer Cruz's use of deadly force was objectively reasonable.

**Officer Cruz's use of deadly force was objectively reasonable under the totality of the circumstances**

Viewing the totality of the circumstances, Officer Cruz's use of deadly force during the August 11, 2014 encounter with Mr. Taylor was objectively reasonable. He approached the situation with heightened caution based on the dispatch report of a man with a gun and the unknown motivations of the suspects.<sup>321</sup> He reasonably believed that Mr. Taylor was in

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<sup>314</sup> *Supra* Discussion at 37-41.

<sup>315</sup> *Id.*

<sup>316</sup> *Supra* Undisputed Facts ¶¶ 39-40, 42, 51, 58, 62-63.

<sup>317</sup> *Id.* ¶¶ 60-61.

<sup>318</sup> *Id.* ¶¶ 50, 59, 70, 77-78, 83, 90-95, 99, 110, 116.

<sup>319</sup> *Supra* Discussion at 48-49.

<sup>320</sup> *Id.* at 41-47.

<sup>321</sup> *Id.* at 32-36.

possession of a firearm, and that Mr. Taylor posed a potential threat of serious physical harm to the officers or others.<sup>322</sup> And he reasonably believed that Mr. Taylor was attempting to resist or evade arrest.<sup>323</sup>

Plaintiffs argue that Officer Cruz unreasonably believed and acted as though the dispatch report was for a more serious crime; was overly fearful before and during the encounter; and that rather than taking cover or creating distance, Officer Cruz's conduct exacerbated the situation.<sup>324</sup> But Plaintiffs' argument relies on statements Officer Cruz made after the encounter and their own selected facts,<sup>325</sup> while ignoring the totality of the circumstances. Viewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs, Officer Cruz's conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force.

The undisputed material facts demonstrate that Officer Cruz requested backup, and waited for backup to arrive before approaching Mr. Taylor, Jerrail, and Adam.<sup>326</sup> He asked the dispatcher whether the report identified which of the three men flashed the gun, and he ran scenarios through his mind to prepare himself for the encounter.<sup>327</sup> And upon initiating contact, Officer Cruz ensured the three men were aware of the police presence and interest in them by activating the emergency lights on his police vehicle, blocking the men's path with his vehicle, and giving commands that the men stop and show their hands,<sup>328</sup>.

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<sup>322</sup> *Id.* at 36-48.

<sup>323</sup> *Id.* at 48-50.

<sup>324</sup> Response at 74-83.

<sup>325</sup> *Supra* Undisputed Facts ¶¶ 6, 10, 18, 21, 29, 32-33, 37, 41-42, 48, 56-57, 71, 79-81, 96, 107-110.

<sup>326</sup> *Supra* Undisputed Facts ¶¶ 9, 14.

<sup>327</sup> *Id.* ¶¶ 15, 21.

<sup>328</sup> *Id.* ¶¶ 32-33, 35, 38, 44.

Then, as Mr. Taylor walked away, Officer Cruz pursued while continually shouting commands that Mr. Taylor stop and show his hands.<sup>329</sup> He initially followed some distance behind Mr. Taylor, but was closing the distance.<sup>330</sup> However, after Mr. Taylor concealed his hands in the front waistband of his pants, Officer Cruz maintained his distance from Mr. Taylor and readied himself to take self-protective measures by drawing his weapon and training it on Mr. Taylor.<sup>331</sup>

Officer Cruz was convinced at this point that Mr. Taylor was armed and “creating distance” before engaging in a “gunfight,” but he continued shouting commands for Mr. Taylor to stop and show his hands.<sup>332</sup> It was not until after Mr. Taylor turned around to directly face him, verbally responded in a defiant tone and with a hostile look on his face, and made an sudden “draw stroke” motion with his hands, that Officer Cruz employed deadly force.<sup>333</sup> It is neither helpful nor relevant to undergo a “retrospective inquiry” to suggest that “[p]erhaps the situation might have been more peacefully resolved” had Officer Cruz acted differently.<sup>334</sup> Officer Cruz’s conduct must be evaluated “from the on-scene perspective, not with the advantage of 20/20 hindsight.”<sup>335</sup> And the totality of the circumstances demonstrate that Officer Cruz adequately performed his duties as a reasonable law enforcement officer by taking steps to prevent a potentially armed suspect from causing serious physical harm to the officers or others.

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<sup>329</sup> *Id.* ¶¶ 50, 90-91, 93-94, 97, 110, 116.

<sup>330</sup> *Id.* ¶ 56; Cruz Bodycam Video.

<sup>331</sup> *Supra* Undisputed Facts ¶¶ 71, 75, 79; Cruz Bodycam Video.

<sup>332</sup> *Supra* Undisputed Facts ¶¶ 78-81, 90-91, 93-94, 97, 110, 116.

<sup>333</sup> *Id.* ¶¶ 93, 96-97, 99, 100-101, 104-105, 100, 116; Cruz Bodycam Video.

<sup>334</sup> *Jiron v. City of Lakewood*, 392 F.3d 410, 418 (10th Cir. 2004).

<sup>335</sup> *Id.*

Ultimately, Officer Cruz was in close proximity and directly facing Mr. Taylor—an individual whom a reasonable officer on the scene would believe is a potentially armed suspect that is noncompliant, hostile, and defiant.<sup>336</sup> Officer Cruz was then forced to make a split-second decision to take self-protective action when Mr. Taylor made a sudden and hostile “draw stroke” motion with his hands.<sup>337</sup> Although it is now clear that Mr. Taylor was not armed,<sup>338</sup> Officer Cruz’s decision to employ deadly force was objectively reasonable under the totality of the circumstances. Therefore, Officer Cruz’s use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right as a matter of law. Officer Cruz is entitled to summary judgment on Plaintiffs’ excessive force claim.

**Salt Lake City cannot be held liable on Plaintiffs’ municipal liability claim  
relating to Officer Cruz’s conduct**

“A municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff.”<sup>339</sup> Rather, “[t]o establish municipal liability, a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged.”<sup>340</sup> “But [a municipality] cannot ‘be held liable where there was no underlying constitutional violation by any of its officers.’”<sup>341</sup> Therefore, “a finding of qualified immunity . . . based on a conclusion that the officer has committed no constitutional violation . . . preclude[s] the imposition of municipal liability.”<sup>342</sup>

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<sup>336</sup> *Supra* Discussion at 33-51.

<sup>337</sup> *Id.* at 41-47.

<sup>338</sup> *Supra* Undisputed Facts ¶ 113.

<sup>339</sup> *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (citing *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 694 (1978)).

<sup>340</sup> *Jenkins v. Wood*, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing *city of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Hinton*, 997 F.2d at 782).

<sup>341</sup> *Allen v. Lang*, 738 Fed. App’x 934, 943 (10th Cir. 2018) (quoting *Hinton*, 997 F.2d at 782).

<sup>342</sup> *Jiron*, 392 F.3d at 419 n. 8 (citing *Hinton*, 997 F.2d at 782-83).

Because Officer Cruz's use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right, Salt Lake City cannot be held liable on Plaintiffs' municipal liability claim relating to Officer Cruz's conduct as a matter of law. Salt Lake City is entitled to summary judgment on Plaintiffs' municipal liability claim relating to Officer Cruz's conduct.

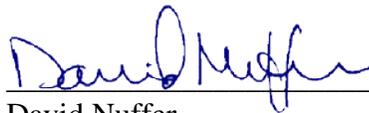
### ORDER

IT IS HEREBY ORDERED that Officer Cruz and Salt Lake City's Motion for Summary Judgment<sup>343</sup> is GRANTED. Plaintiffs' first cause of action<sup>344</sup> against Officer Cruz and Plaintiffs' fourth causes of action<sup>345</sup> against Salt Lake City relating to Officer Cruz's conduct are DISMISSED WITH PREJUDICE.

The Clerk is directed to close the case.

Signed May 17, 2019.

BY THE COURT



\_\_\_\_\_  
David Nuffer  
United States District Judge

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<sup>343</sup> [Docket no. 44](#), filed Nov. 28, 2016.

<sup>344</sup> Complaint ¶¶ 105-113.

<sup>345</sup> *Id.* ¶¶ 129-137.

# Addendum B

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---

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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THE ESTATE OF DILLON TAYLOR; *et al.*;

Plaintiffs,

v.

SALT LAKE CITY; *et al.*,

Defendants.

**NOTICE OF APPEAL**

Case No. 2:15-cv-00769-DN

Judge David Nuffer

Magistrate Brooke C. Wells

---

NOTICE IS HEREBY GIVEN that Plaintiffs The Estate of Dillon Taylor, Cody Taylor, Jerrail Taylor, Teesha Taylor, and Adam Thayne, by and through undersigned counsel, hereby appeal to

the United States Court of Appeals for the Tenth Circuit from the Court's Memorandum Decision and Order Granting Motion for Summary Judgment, entered May 17, 2019 (Dkt. 64).

RESPECTFULLY SUBMITTED this 16th day of June, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2019, I caused to be served the foregoing Plaintiffs'

**NOTICE OF APPEAL** upon the following:

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**CASE NO. 19-4085**

---

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

**THE ESTATE OF DILLON TAYLOR, CODY TAYLOR, JERRAIL TAYLOR,  
TEESHA TAYLOR, and ADAM THAYNE,**

*Plaintiffs – Appellants,*

v.

**SALT LAKE CITY, BRON CRUZ,**

*Defendants – Appellees.*

---

On Appeal from a Final Judgment Order Granting Summary Judgment  
United States District Court, District of Utah, Central Division  
The Honorable David Nuffer  
D.C. No. 2:15-CV-00769-DN-BCW

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**NOTICE OF ERRATA RE TABLE OF CONTENTS –  
APPELLANTS' BRIEF**

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Dated: October 30, 2019

## **NOTICE OF ERRATA**

Please take notice that Appellants hereby submit this Errata sheet along with a corrected Table of Contents as part of the previously filed Appellant's Brief. Due to an oversight, the previously filed Appellant's Brief's Table of Contents did not include and identify Addendums A & B. Appellants have accordingly filed a revised Table of Contents which do include and identify Addendums A and B along with this Notice of Errata.

## CERTIFICATE OF SERVICE

I hereby certify that this document was electronically filed on October 30, 2019, with the Clerk of the Court by using the ECF system, which will send a copy to all ECF system participants as of the time of the filing.

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for Summary Judgment

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**Case No. 19-4085**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

**THE ESTATE OF DILLON TAYLOR, CODY TAYLOR, JERRAIL  
TAYLOR, TEESHA TAYLOR, and ADAM THAYNE,**

Plaintiffs-Appellants,

v.

**SALT LAKE CITY, BRON CRUZ**

Defendants-Appellees.

---

Appeal from the U.S. District Court, Central Division, District of Utah,  
The Honorable David Nuffer, District Judge  
District Court Case No. 2:15-cv-00769-DN-BCW

---

**BRIEF OF APPELLEES SALT LAKE CITY AND BRON CRUZ**

---

**ORAL ARGUMENT NOT REQUESTED**

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## **PRIOR OR RELATED APPEALS**

There are no prior or related appeals.

## **STATEMENT OF THE ISSUES**

- I. Is Officer Cruz entitled to qualified immunity where the undisputed material facts show that a reasonable officer facing these circumstances could conclude that Mr. Taylor was drawing a gun and intended to shoot at the officers?
- II. Should witness statements obtained during a wrongful detention be excluded where the witnesses have never denied the truth of their statements and could have been deposed?

## **STATEMENT OF THE CASE**

The City submits the following statement of undisputed facts that are material to the issues presented for review:

### **Dispatch report of 911 call and initial contact by the officers.**

At approximately 7:00 p.m. on August 11, 2014, a 911 call was dispatched to Salt Lake City police officers by radio as a priority one call of a “report of a man with a gun” at 1900 South 200 East, “suspect flashed a gun at the complainant but no threat was made,” “male Hispanic wearing white shirt, red pants, red baseball cap; also another male Hispanic wearing a striped shirt; they were last seen southbound on 200 East.” (Conventional Appx. at Ex. 2, “Audio of 911 Call Dispatched to Officers – Unedited”; Aplt. Appx. 418-19.)<sup>1</sup> The dispatcher asked,

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<sup>1</sup> Appellants filed certain Appendix materials conventionally pursuant to the Court’s order granting an exemption from the electronic filing requirement. These

“anyone coming clear to handle check?” The dispatcher then added “both suspects now going westbound on 2100 South from 200 East, there is nothing further, complainant hung up on the call taker.” (Conventional Appx. at Ex. 2.) Officer Bron Cruz advised he was on patrol in the area and could respond. (*Id.*) Officer Cruz also received information from dispatch through his mobile terminal (MDT) that the caller reported “they are ‘looking for trouble.’” (Aplt. Appx. 383, 419.)

Upon approaching the area in his police vehicle, Officer Cruz saw three men walking together, two of them matching the descriptions provided by dispatch, who were later identified as 20-year-old Dillon Taylor (“Mr. Taylor”), his brother, Jerrail Taylor (“Jerrail”) and his cousin, Adam Thayne (“Adam”). (Conventional Appx. at Ex. 2; Aplt. Appx. 117, 422.) Officer Cruz continued following the three men in his police vehicle while staying about a block away. (Aplt. Appx. 423.) Officer Cruz advised dispatch he would “hold off” until the arrival of backup officers before approaching the three men. (Conventional Appx. at Ex. 2.) Officer Cruz asked, “does it say which individual flashed the gun?” Dispatch replied, “it doesn’t indicate in the log.” (Conventional Appx. at Ex. 2.) Officer Cruz radioed that he saw the three men enter into a 7-Eleven convenience store. (Conventional

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materials will be cited herein by reference to “Conventional Appx.” followed by the exhibit number reflected in the DVD and flash drive materials submitted by Appellants. References to “Aplt. Appx.” refers to the Appellants 4 volume appendix.

Appx. at Ex. 2.) He decided to wait for them to come out before approaching them. (Aplt. Appx. 118.) Officers Sylleloglou and Downes also responded to the call as backup officers. (Aplt. Appx. 428-29.) Officer Downes arrived and spoke with Officer Cruz. (Aplt. Appx. 630.) Officer Sylleloglou arrived and reported via radio that he would stage west of the 7-Eleven at the Greek restaurant. (Conventional Appx. at Ex. 2.) Surveillance video from the 7-Eleven store shows the three men entering the store, making a purchase and then exiting the store a short time later without causing any disturbance. (Conventional Appx. at Ex. 3B, “Video file of 7-Eleven surveillance video.”)<sup>2</sup>

**The officers confront the three men.**

As shown in the bodycam video of Officer Cruz and partially shown on the 7-Eleven surveillance video, the three men exited the 7-Eleven and proceeded into the parking lot with Jerrail (wearing a red shirt) and Adam (wearing a striped shirt) walking a few feet ahead of Mr. Taylor (wearing a white shirt). (Conventional Appx. at Exs. 3B, Ex. 5 “Body Camera Video of Officer Bron Cruz,” and Ex. 7 “Still photos from Officer Cruz’s body cam video,” Aplt. Appx. 144-184.) Officer Cruz radioed to Officers Sylleloglou and Downes “that’s them, walking out right now.” (Conventional Appx. at Ex. 2.) Officer Downes drove his marked police

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<sup>2</sup> Instructions for viewing the 7-Eleven surveillance video are included in the Conventional Appendix at “Exhibit 3B Instructions to Access and View Video.”

vehicle into the 7-Eleven parking lot first and proceeded towards the rear of the 7-Eleven. (Aplt. Appx. 636.) With overhead lights flashing, Officer Cruz and Officer Sylleloglou approached the men in their marked police vehicles from opposite directions – Officer Cruz from the east and Officer Sylleloglou from the west – forming a barricade blocking the path of the three men as they proceeded from the 7-Eleven entrance into the parking lot. (Conventional Appx. at Exs. 2B “Scene Photos,” 3B, 5, 7; Aplt. Appx. 124, 144-71, 436-39, 537-38.) From the perspective of Officer Cruz, Mr. Taylor appeared to look directly at Officer Cruz’s police vehicle. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 439-42.) Officer Cruz and Officer Sylleloglou, wearing their patrol uniforms, exited their vehicles and gave multiple commands to the three men to stop. (Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 443-44, 541, 545.) Both Officer Cruz and Officer Sylleloglou drew their firearms in a low ready position. (Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 203- 214, 449, 541-43.) Jerrail and Adam immediately stopped walking and raised their hands. (Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 144-71, 444, 547.) Officer Sylleloglou perceived that Mr. Taylor looked directly at him as he exited his vehicle. (Aplt. Appx. 548.)

**Mr. Taylor does not comply with officers’ commands.**

As the police vehicles blocked his forward path, Mr. Taylor immediately made a 180- degree turn and walked back toward the door of the 7-Eleven.

(Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 144-84, 445, 548.) Then, Mr. Taylor walked along the sidewalk, proceeding past the entrance to 7-Eleven and headed west. (Conventional Appx. at Exs. 2B, 3B, 5, 7; Aplt. Appx. 144-203, 453, 548-49.) Officer Sylleloglou, who was closer to Mr. Taylor, shouted “hey, you in the white shirt, stop” several times. (Aplt. Appx. 548.) As Officer Sylleloglou proceeded west in the 7-Eleven parking lot in pursuit of Mr. Taylor, he gave commands to Mr. Taylor to “let me see your hands.” (Aplt. Appx. 548-50.) He observed Mr. Taylor concealing his hands inside the front waistband of his pants and he began training his gun on Mr. Taylor. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 549-52, 555.) At this point, about 15 feet separated Mr. Taylor and Officer Sylleloglou. (Conventional Appx. at Exs. 5, 7.) Mr. Taylor turned his head to the right making visual contact with Officer Sylleloglou who had his weapon trained on him. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 550-51.) Mr. Taylor stated to Officer Sylleloglou something along the lines of “what are you going to do, come on mother-f-----, shoot me.” (Aplt. Appx. 551, 553.) Officer Sylleloglou perceived that Mr. Taylor saw him and heard his commands based on Mr. Taylor’s verbal interaction with him and because Mr. Taylor was looking at him. (Aplt. Appx. 594.)

Officer Cruz pursued Mr. Taylor from behind along the sidewalk. (Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 453.) Based on the report that

one of the three men had a gun, Officer Cruz concluded that the gun was likely in the possession of Mr. Taylor, who was walking away, and unlike the other two men, was not complying with police commands to stop. (Aplt. Appx. 118.) Officer Cruz explained that he was “maintaining distance” and “not trying to close on somebody that I believed had a gun.” (Aplt. Appx. 453.) The bodycam video, which shows Mr. Taylor from behind, shows that as Officer Cruz pursued Mr. Taylor, Mr. Taylor’s hands initially were at his sides and his long baggy t-shirt hung loose and down over his buttocks. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 447.) From this angle, Mr. Taylor briefly appeared to be pulling up his pants by reaching his hands down on either side of his pants and tugging upwards before continuing his path along the sidewalk. (Conventional Appx. at Exs. 5, 7.) Mr. Taylor then raised his hands to waist level with the position of his elbows extended on either side and his long baggy t-shirt raised to waist level, at which point both Officer Cruz began training his weapon on Mr. Taylor. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 447, 449.) Officer Cruz continued to yell repeated commands to Mr. Taylor “get your hands out now.” (Conventional Appx. at Ex. 5; Aplt. Appx. 447.)

**Mr. Taylor turned to face Officer Cruz while walking backwards.**

As reflected in the bodycam video, as Mr. Taylor reached the end of the sidewalk and began walking across the parking lot of the 7-Eleven, Mr. Taylor

turned around to directly face Officer Cruz who was approximately 10-12 feet away with his weapon trained on him. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 453, 555, 594.) Mr. Taylor continued walking backwards with both hands inside the loose waistband of his pants concealing his hands down to his wrists. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 453-54, 555.) Officer Cruz perceived that Mr. Taylor was moving his concealed hands in a digging motion. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 455-56.) The video reflects that Officer Cruz shouted at Mr. Taylor to “get your hands out, now” to which Mr. Taylor responded, “nah fool” as he continued to backpedal. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 567.) Officer Cruz recalled that Mr. Taylor verbally responded with a statement to the effect that he was not going to comply. (Aplt. Appx. 455.) Mr. Taylor gave no indication that he intended to stop or submit to the authority of the officers. (Conventional Appx. at Exs. 3B, 5, 7; Aplt. Appx. 455-56, 593-94.)

**Mr. Taylor’s “draw stroke.”**

As shown in the bodycam video, Mr. Taylor suddenly raised his left hand from inside his loose waistband, lifting his shirt and exposing his lower torso and simultaneously brought his right hand out of his loose waistband but lower than his left hand. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 458-59, 557, 562, 565.) Officer Cruz perceived that Mr. Taylor was “drawing” or reaching for a gun and

Officer Cruz fired two shots in rapid succession striking Mr. Taylor in the torso. (Conventional Appx. at Exs. 5, 7; Aplt. Appx. 458-60.) At the same moment, Officer Sylleloglou saw Mr. Taylor's draw stroke, put his finger on the trigger of his firearm (for the only time in his career) because he had made the decision to fire and was a split second from firing his weapon when he heard Officer Cruz fire and saw Mr. Taylor falling. (Aplt. Appx. 561-73, 592-93, 595-603.) Mr. Taylor died at the scene. (Aplt. Appx. 24.) No gun was found. (Aplt. Appx. 23.)

**Statements of Jerrail and Adam.**

Adam saw the marked police vehicles with lights flashing approaching from opposite directions, saw uniformed police officers approaching the three of them, and heard the officers give initial commands to "stop" and "put your hands above your head." (Conventional Appx. at Exhibit 3A, "Video recording of Adam Thayne interview" (3:34-35).) After he and Jerrail stopped and raised their hands, Mr. Taylor turned and walked away when Adam heard an officer shout "hey, you in the white shirt, stop." (Ex. 3A (3:35-36).) Adam heard Mr. Taylor say something to the officers as they pursued him, but he was not sure exactly what Mr. Taylor said. (Ex. 3A (3:49).) Adam saw the officers pursuing Mr. Taylor as he walked down the sidewalk and "heard them yelling for him to stop." (Ex. 3A (3:38-39, 3:51-52).) Adam told investigators "he could see why the officers thought that he might have had a gun." (Ex. 3A (3:49-50).)

Jerrail saw the three marked police vehicles with lights flashing approaching from opposite directions and saw uniformed police officers approaching the three of them. (Conventional Appx. at Exhibit 9A, “Video recording of Jerrail Taylor interview” (1:35-36).) Jerrail saw that the officers pulled their guns and heard them give commands like get on the ground. (Conventional Appx. at Ex. 9A (1:36).) Jerrail heard Mr. Taylor say something along the lines of “what did we do” to the officers. (Conventional Appx. at Ex. 9A (1:38).) Jerrail was already on the ground when he heard the two gunshots and did not see what happened. (Conventional Appx. at Ex. 9A (1:37).)

**Medical examiner’s report.**

According to the medical examiner, two rounds hit Mr. Taylor: one in his “upper central chest” and a second one in the “right upper quadrant of abdomen” which also grazed the third and fourth fingers of his left hand. (Aplt. Appx. 238.) The toxicology report showed Mr. Taylor’s blood alcohol content at the time of his death to be 0.18%. (Aplt. Appx. 238.)

**Evidence of Mr. Taylor’s mental state.**

Adam told investigators that Mr. Taylor indicated to him earlier that day that he expected “to be violated” shortly by his parole officer. (Conventional Appx. at Ex. 3A (3:42-43, 3:50).) Adam also told investigators that Mr. Taylor had been affiliated with the “FPS” (Familia Por Siempre), which is a set of the Norteno

gang, since he was 14 years old. (Conventional Appx. at Ex. 3A (3:41).) On August 7 (four days before the incident), Mr. Taylor posted the following on his Facebook page:

SHITS GETTING HEATED EVERYWHERE, I feel my time is coming soon, my nightmares are telling me. Im gonna have warrnts out for my arrest soon. ALL my family has turned and snitched on me. Ill die before I go do a lot of time in a cell. Im trying to strive and live but Im done I litterly cant stand breathing and dealing with shit. I feel like god cant even save me on this one . At my fiancé house in delta my lovley sister and my fiancé saved me but this time coming its me and the demons im fighting

(Aplt. Appx. 127.) On August 9 (two days before the incident), Mr. Taylor posted the following on his Facebook page:

I finely realize I hit rock bottem. Im homeless I havnt slept in two days, yesterday all I ate was a bag of chips and today a penute butter an jelly sanwitch. I cant go to my brothers witch I know he cares cuz of drama and got kicked out, I aint welcomed att any family members house or they call the cops. Ill kick it with a friend until they go to bed and I have to leave. As I walk thrw this vally of shadow of death I am freeing evil. Its about my time soon

(Aplt. Appx. 127.)

### **SUMMARY OF THE ARGUMENT**

This case arises from the tragic shooting death of Dillon Taylor (“Mr. Taylor”), a 20 year old man, on August 11, 2014, outside a 7-Eleven convenience store located at 2100 South and State Street in Salt Lake City. Appellants assert a § 1983 claim for excessive force against Officer Cruz and a claim for municipal liability against the City. Officer Cruz asserted the defense of qualified immunity.

The district court correctly concluded that the material facts were undisputed and that at the moment that Officer Cruz employed deadly force, he had probable cause to believe that Mr. Taylor posed a threat of death or serious physical harm to himself or to the other officers, and no Fourth Amendment violation occurred. Accordingly, the Court should affirm the district court's grant of summary judgment to Officer Cruz and the City.

On appeal, Appellants contend disputed facts preclude summary judgment. However, Appellants have not presented admissible evidence to genuinely dispute the testimony of Officer Cruz and Officer Sylleloglou, the bodycam video, the 7-Eleven surveillance video and the uncontroverted report of the Medical Examiner. For example, Appellants contend the evidence supports a finding that Mr. Taylor was "pulling up his pants" rather than engaged in a threatening draw stroke motion, as both Officer Cruz and Officer Sylleloglou perceived. Appellants rely only on selected excerpts from the video interview of Jerrail Taylor, Mr. Taylor's brother, who was at the scene. But when Jerrail's interview is viewed in its entirety, the statements, descriptions, and physical demonstrations of Jerrail of Mr. Taylor's movement in "pulling up his pants" conflict with the undisputed bodycam video evidence of the encounter. There is no genuine dispute regarding the position and the sudden movements of Mr. Taylor's arms and hands in the instant before the shooting – and the position of Mr. Taylor's left hand was confirmed by the

report of the Medical Examiner. Viewing this evidence in the light most favorable to the Plaintiffs, no reasonable jury could find that in the moment just before Officer Cruz fired, that Mr. Taylor reasonably appeared from the officers' perspective to be "pulling up his pants" or merely "showing his hands" in an attempt to comply with the officers' commands.

Appellants' other claimed fact disputes are similarly unsupported or immaterial. Although Appellants claim it is disputed whether the officers told Mr. Taylor to "stop," Mr. Taylor's cousin, Adam Thayne, described officers giving commands to "stop" and "you in the white shirt, stop" in his video interview, corroborating rather than disputing the testimony of Officer Cruz and Officer Sylleloglou. Appellants' contention that Officer Cruz had his gun trained on Mr. Taylor from the moment he "stepped out of his vehicle" is also belied by both the bodycam video (which captured the moment that Officer Cruz began pointing his weapon at Mr. Taylor) and the 7-Eleven video (which depicts Officer Cruz following Mr. Taylor initially with his firearm held at the "low ready" position). Appellants' remaining contentions about the specific timing of Mr. Taylor's "defiant look" and whether Officer Cruz was closing or maintaining distance are resolved by the bodycam video, and moreover, irrelevant to the determination of objective reasonableness.

Viewed from the perspective of a reasonable officer on the scene, and considering the totality of the circumstances, the use of deadly force by Officer Cruz was objectively reasonable. In the tense, rapidly-evolving circumstances, Officer Cruz was forced to make a difficult split-second decision in ascertaining the threat posed by Mr. Taylor. Mr. Taylor's death, while tragic and unfortunate, was not the result of a constitutional violation. Accordingly, Officer Cruz is entitled to qualified immunity, and the remaining claims in this case should be dismissed.

## ARGUMENT

### **I. STANDARD OF REVIEW.**

A grant of summary judgment on the basis of qualified immunity is reviewed *de novo*.<sup>3</sup> But “[b]ecause of the underlying purposes of qualified immunity, [the Court] review[s] summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions.”<sup>4</sup> “When a defendant asserts qualified-immunity, the burden shifts to the plaintiff to establish (1) a violation of a constitutional right (2) that was clearly established.”<sup>5</sup> “This is a ‘heavy, two-part burden’” and “[f]ailure on either element is fatal to [a] plaintiff’s claims.”<sup>6</sup> In determining if a plaintiff has met this burden, a court

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<sup>3</sup> *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015) (citation simplified).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

construes the facts in the light most favorable to the plaintiff.<sup>7</sup> However, at the summary judgment stage of a qualified immunity case:

[T]he objective is *not* to determine whether a plaintiff survives summary judgment because plaintiff's evidence raises material issues that warrant resolution by a jury. Instead, the principal purpose is to determine whether plaintiff's factual allegations are sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for answering the *legal* question before the court.<sup>8</sup>

“As with any motion for summary judgment, ‘[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts.’”<sup>9</sup> In this case, the undisputed facts establish that Officer Cruz's use of deadly force was objectively reasonable under the circumstances and, as such, no constitutional violation occurred. Accordingly, the Court should affirm the district court's grant of summary judgment to Officer Cruz and the City.

## II. THE MATERIAL FACTS ARE UNDISPUTED.

The Court must view the facts “in the light depicted by the [bodycam, 7-Eleven and interview] videos” and cannot adopt a party's version of the facts where “clear contrary video evidence” demonstrates that no reasonable jury could

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<sup>7</sup> *Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011).

<sup>8</sup> *Cox v. Glanz*, 800 F.3d 1231, 1243 (10th Cir. 2015) (citation simplified) (emphasis in original).

<sup>9</sup> *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1312 (10th Cir. 2009) (citation simplified) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

believe the party's factual assertions.<sup>10</sup> Here, a vast gulf exists between the district court's findings regarding undisputed facts and Appellants' selective factual allegations and corresponding statement of the case. Appellants ignore and/or fail to explain these differences and – instead of offering record evidence supporting their version of events – Appellants largely cite the complaint, their own memorandum opposing summary judgment, or the district court's ruling itself. Furthermore, even when Appellants do cite actual record evidence, many of their assertions are blatantly contradicted by the dispatch recording, the bodycam video, the 7-Eleven video and the unchallenged findings of the Medical Examiner.<sup>11</sup> Moreover, two of the Appellants (Mr. Taylor's brother, Jerrail Taylor, and his cousin, Adam Thayne) were eyewitnesses, and their video interview statements further corroborate the officers' description of events. In short, Appellants' claimed factual disputes are simply not supported by the evidence, as explained more fully below.

First, citing only to Jerrail's video interview, Appellants claim a dispute of fact exists as to whether Mr. Taylor was "fishing" for a weapon or simply pulling

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<sup>10</sup> *Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010); *Estate of Ronquillo ex rel Estate of Sanchez v. City & Cty. of Denver*, 720 F. App'x 434 (10th Cir. 2017) (unpublished) (disregarding plaintiff's allegations that were directly contradicted by the surveillance video); *Borneman v. Rozier*, 398 F. App'x 415 (10th Cir. 2010) (concluding no reasonable juror could view the video evidence and believe plaintiff's allegations).

<sup>11</sup> Conventional Appx. at Exs. 2, 3B, 5, 7; Aplt. Appx. 238.

up his pants. This claim is contradicted by Jerrail himself who told interviewers he was “already on the ground” and “did not see” what happened when he heard the gunshots.<sup>12</sup> In addition, the 7-Eleven video shows Jerrail clearly not looking in the direction of Mr. Taylor when the shots were fired.<sup>13</sup> More critically, the draw stroke movements of Mr. Taylor depicted on the bodycam video are entirely inconsistent with the “pulling up pants” motion Jerrail demonstrated during his video interview. The interview video shows Jerrail placing his left hand in the area of his crotch, grabbing his loose pants in the crotch area and tugging upwards for approximately two inches.<sup>14</sup> In contrast, the bodycam video shows Mr. Taylor’s left hand and forearm moving across and in front of his abdomen some 6 inches or more above his waistband. His left hand is pulling his white t-shirt up to expose his bare torso and does not touch or otherwise come in contact with his pants. The position of Mr. Taylor’s left hand is corroborated by the Medical Examiner’s report, which notes that one bullet struck Mr. Taylor’s upper left abdomen and also grazed his left hand.<sup>15</sup> Similarly, Mr. Taylor pulled his right hand out from inside his waistband and did not move his right arm or elbow in any way consistent with a “pulling up pants” motion.

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<sup>12</sup> Conventional Appx. at Ex. 9B (1:37).

<sup>13</sup> Conventional Appx. at Ex. 3B.

<sup>14</sup> Conventional Appx. at Ex. 9B (1:37).

<sup>15</sup> Aplt. Appx. 238.

Next, Appellants claim a dispute of fact exists as to whether any of the officers told Mr. Taylor to “stop.” This contention is presumably premised on the fact that the 7 seconds of audio captured on the bodycam video prior to shots being fired did not contain any indicia of an officer commanding Mr. Taylor to “stop.” However, Appellants appear to ignore Adam’s statements in his video interview, specifically his confirmation that he repeatedly heard officers say “stop” and “you in the white shirt, stop,”<sup>16</sup> In addition, Appellants offer no evidence to dispute the testimony of Officer Sylleloglou (who testified he gave commands to “stop” and “you in the white shirt, stop” to Mr. Taylor) or Officer Cruz (who testified he commanded Mr. Taylor to “stop”).

Additionally, Appellants’ contention that Officer Cruz had his gun trained on Mr. Taylor from the moment he “stepped out of his vehicle” is also belied by both the bodycam video (which captured the moment that Officer Cruz began pointing his weapon at Mr. Taylor) and the 7-Eleven video (which depicts Officer Cruz following Mr. Taylor initially with his firearm held at the “low ready” position). Appellants neither fully explain this alleged dispute nor do they cite to record evidence in support of their assertion.

The remainder of Appellants’ claimed “disputes” are not material to the determination of qualified immunity. For example, whether Mr. Taylor appeared to

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<sup>16</sup> Conventional Appx. at Ex. 3A (3:34-36).

“look defiantly” at Officer Cruz while he was still inside his police vehicle or whether the look occurred after Officer Cruz exited the vehicle and told Mr. Taylor to “stop” is irrelevant to whether a reasonable officer in Officer Cruz’s position could conclude fifteen seconds later that Mr. Taylor was attempting to draw a gun and intended to fire at the officers. Similarly, whether Officer Cruz was “closing” or “maintaining distance” is likewise immaterial and the relative position of Officer Cruz with respect to Mr. Taylor is evident from the bodycam video.

Finally, Appellants’ claim that the district court improperly weighed evidence when it determined a reasonable officer would have heightened caution after viewing the exchange between Mr. Taylor and the car at the intersection is misplaced because Officer Cruz clearly testified that the brief exchange “did not affect [his] level of suspicion of the three men” or “heighten” his level of awareness.<sup>17</sup> In sum, Appellants have not shown the existence of a genuine dispute of material fact that precludes summary judgment.

### **III. OFFICER CRUZ IS ENTITLED TO QUALIFIED IMMUNITY.**

#### **A. The Fourth Amendment reasonableness standard.**

It is axiomatic that claims of excessive force (whether occurring during an arrest, investigatory stop, or other seizure) are analyzed under the Fourth Amendment’s “objective reasonableness” standard and judged “from the

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<sup>17</sup> Aplt. Appx. 427-28.

perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>18</sup> The Court must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”<sup>19</sup> As explained in *Graham v. Connor*, “[t]his balancing test requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”<sup>20</sup> “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.”<sup>21</sup>

The use of deadly force is only reasonable where the officer has probable cause to believe the suspect poses a threat of death or serious physical harm to the officer or to others.<sup>22</sup> In assessing the degree of threat facing an officer in deadly force cases, this Court set forth the following non-exclusive factors: “(1) whether

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<sup>18</sup> *Graham v. Connor*, 490 U.S. 386, 395-96 (1989).

<sup>19</sup> *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017), cert. denied, 138 S. Ct. 2650 (2018) (citation simplified).

<sup>20</sup> *Id.* (citing *Graham*, 490 U.S. at 396) (applying the *Graham* and *Larsen* factors).

<sup>21</sup> *Graham*, 490 U.S. at 396–97.

<sup>22</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

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 officers and the suspect; and (4) the manifest intentions of the suspect."<sup>23</sup> Ultimately, however, "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."<sup>24</sup> Where, as here, the material facts are not in dispute, the objective legal reasonableness of the officer's use of force is a question of law.<sup>25</sup>

**B. The use of deadly force by Officer Cruz was objectively reasonable considering the totality of the circumstances.**

**1. Application of the *Graham* and *Estate of Larsen* factors shows the use of deadly force by Officer Cruz was objectively reasonable.**

**a. First *Graham* factor.**

The first *Graham* factor is the severity of the crime. In this instance, given the entirety of the information known to Officer Cruz, he and the other officers had reasonable suspicion to investigate whether any of the suspects were armed in violation of the law or whether no laws were broken, thus ending their stop. As

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<sup>23</sup> *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2009).

<sup>24</sup> *Graham*, 490 U.S. at 396.

<sup>25</sup> *Mechem v. Frazier*, 500 F.3d 1200, 1203 (10th Cir.2007) (stating "the question of objective reasonableness is not for the jury to decide where the facts are uncontroverted."); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003).

noted by the district court, the nature of the dispatch report – including “report of a man with a gun,” “suspect flashed a gun at the complainant but no threat was made,” the suspects were reportedly “looking for trouble” and where the suspects were last seen walking on a public street – provided indicia of a number of potential crimes (ranging from misdemeanors to felonies),<sup>26</sup> as well as the possibility no crime had been committed at all. Although the fact the complainant was unidentified and non-cooperative may have given rise to some doubt as to whether a crime had been or was in the process of being committed, a reasonable officer responding to the report of a man “flashing” a firearm would approach the situation with heightened caution. This factor weighs in favor of a finding of objective reasonableness.

**b. Second *Graham* factor and *Larsen* considerations.**

The second – and most critical – *Graham* factor focuses on whether the suspect posed an immediate threat to the safety of the officers or others. Application of the *Larsen* considerations establishes that this factor weighs in favor of a finding of objective reasonableness. First, Mr. Taylor did not comply with police commands to stop or show his hands, despite appearing to Officer Cruz to

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<sup>26</sup> See, e.g., Utah Code §§ 76-10-504(1), -505(1)(b)(4) (carrying a concealed firearm and openly carrying a loaded firearm on a public street are class B misdemeanors); Utah Code §§ 76-10-503(2)(a), (3)(a) (possession of firearm by Category I or II restricted person is second or third degree felony).

be well aware that the officers sought to stop him for questioning. Mr. Taylor's visual contact with Officer Cruz (and recognition that Officer Cruz was training his weapon on him) and his verbal response to Officer Cruz's commands would lead a reasonable officer to conclude that Mr. Taylor deliberately disregarded the commands. Officer Cruz also observed that, upon seeing the police cars approach, Mr. Taylor immediately turned and walked away even as his two companions stopped and raised their hands in compliance with officer requests.

Second, with regard to hostile motions, Mr. Taylor appeared to intentionally conceal his hands "wrist-deep" inside his waistband before suddenly making a "draw stroke" motion while facing Officer Cruz. Even though Officer Cruz did not see a firearm in Mr. Taylor's possession and no firearm was found at the scene, he was responding to a report of a man with a gun and Mr. Taylor and his companions were in the area and matched the reported description of the suspects. Officer Cruz's conduct must be evaluated "from the on-scene perspective, not with the advantage of 20/20 hindsight."<sup>27</sup> Based on the indisputable evidence shown in bodycam video, as corroborated by the Medical Examiner's report indicating the location of Mr. Taylor's hand when it was grazed by a bullet, Mr. Taylor's motions were not in any way consistent with "pulling up his pants." Nor was there any indication based on Mr. Taylor's body language, posture, demeanor, verbal

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<sup>27</sup> *Jiron v. City of Lakewood*, 392 F.3d 410, 418 (10th Cir. 2004).

responses, facial expressions or movement that Mr. Taylor was attempting to submit to the authority of the officers. Mr. Taylor never stopped walking backwards, never indicated verbally that he intended to comply, and did not freeze or slowly raise his hands in the air. Thus, a reasonable officer could conclude that Mr. Taylor was drawing a gun and intended to fire on the officers. When Mr. Taylor made sudden movements to withdraw his concealed hands from inside the waistband of his pants, Officer Cruz was forced to make a split-second decision on whether to defend himself. While Mr. Taylor did not extend an arm towards Officer Cruz, “a reasonable officer need not await the ‘glint of steel’ before taking self-protective actions; by then, it is ‘often . . . too late to take safety precautions.’”<sup>28</sup>

Third, with regard to proximity, the bodycam video shows that only 12-15 feet separated Mr. Taylor from Officer Cruz and Officer Sylleloglou at the moment of Mr. Taylor’s “draw stroke” movement. If Mr. Taylor did produce a firearm with the intent to use it, the officers would be at great risk and have no ability to take cover. Thus, Officer Cruz’s perception that Mr. Taylor was an immediate threat to officer safety was objectively reasonable.

Fourth, with regard to Mr. Taylor’s manifest intentions, this consideration also weighs in favor of objective reasonableness. Mr. Taylor’s choice to conceal

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<sup>28</sup> *Estate of Larsen*, 511 F.2d at 1260 (citation simplified).

his hands inside his waistband and mimic a “draw stroke” while being aware of and facing Officer Cruz’s trained firearm would appear to a reasonable officer in Officer Cruz’s position to be a hostile and threatening act that jeopardizes officer safety. Mr. Taylor’s verbal responses to commands also displayed his hostile intent. While Mr. Taylor’s mental state prior to the shooting was not known to the officers, evidence related to his motivation puts Mr. Taylor’s actions in context and helps to explain his refusal to comply with officers’ commands and his perplexing decision to mimic drawing a gun (despite being unarmed) that are shown in the bodycam video.<sup>29</sup> For example, Adam told investigators that Mr. Taylor had expressed concern earlier that day that he was likely to be arrested for violating his parole and returned to jail.<sup>30</sup> Mr. Taylor’s Facebook posts just days before this incident also mention an arrest warrant and reflect his despair at his current life circumstances.<sup>31</sup> In addition, the Medical Examiner reported that Mr. Taylor’s blood alcohol content at the time was 0.18%, well beyond the legal limit for

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<sup>29</sup> *Cordova v. City of Albuquerque*, 816 F.3d 645, 654-55 (10th Cir. 2016) (admitting evidence of plaintiff’s actions and psychological state prior to a police encounter where it could help explain officers’ contention that he acted aggressively when they encountered him and that he raised a gun at them before they fired).

<sup>30</sup> Conventional Appx. at Ex. 3B (3:42-43, 3:50).

<sup>31</sup> Aplt. Appx. 127.

driving of 0.08%.<sup>32</sup> In sum, the second *Graham* factor weighs in favor of a finding of objective reasonableness.

**c. Third *Graham* factor.**

The third *Graham* factor is the suspect's attempts to resist or evade arrest. As noted, Officer Cruz observed Mr. Taylor immediately turn and walk away when he made eye contact with the approaching police vehicles. Adam stated he heard the officers give multiple commands to "stop" and "you in the white shirt, stop." The bodycam video shows that Mr. Taylor verbally scoffed at police commands despite being aware of and facing Officer Cruz holding a weapon trained on him. A reasonable officer would believe Mr. Taylor was intentionally attempting to resist or evade the investigatory stop. Therefore, this factor also weighs in favor of a finding of objective reasonableness.

Although this Court does not appear to have considered a case similar to the facts at issue here, the weight of authority in other circuits supports a finding that Officer Cruz's use of deadly force was objectively reasonable. In each of these cases, the suspect refused to comply with commands and then made a sudden movement that the officer in question (akin to Officer Cruz here) reasonably interpreted as reaching for or about to fire a weapon.<sup>33</sup> Like Officer Cruz, the

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<sup>32</sup> Aplt. Appx. 238.

<sup>33</sup> See *Salazar-Limon v. City of Houston*, 97 F. Supp. 3d 898 (S.D. Tex. 2015), aff'd, 826 F.3d 272 (5th Cir. 2016), as revised (June 16, 2016) (finding officer's

officers in each case were forced to make a split-second decision regarding the threat posed by the suspect.<sup>34</sup> In each case, the court concluded that the officers' use of deadly force was objectively reasonable, even though the suspect later turned out to be unarmed.<sup>35</sup>

For example, in *Salazar-Limon*, as the officer detained the suspect for suspected drunk driving, the suspect pulled away and walked toward his vehicle. Although the officer pulled out his weapon and ordered the suspect to stop and

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use of deadly force justified by reasonable belief that suspect was reaching for a weapon and turning to shoot him); *Pollard v. City of Columbus*, 780 F.3d 395, 403-04 (6th Cir. 2015) (finding use of deadly force objectively reasonable where suspect did not comply with officers' commands to show his hands and instead extended his arms and clasped his hands into a shooting posture); *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001) (affirming finding that officer's use of deadly force was objectively reasonable where suspect matched the description of fleeing armed robbery suspect, refused to comply with commands, obscured his hands from view and appeared to be reaching for a weapon at waist level); *McDonald v. City of Tacoma*, No. 11-CV-5774-RBL, 2013 WL 1345349, at \*4 (W.D. Wash. Apr. 2, 2013), *aff'd*, 578 F. App'x 686 (9th Cir. 2014) (finding use of deadly force objectively reasonable where suspect extended his hands in front of his body in what appeared to be a shooting stance while holding a dark object that turned out to be a wallet); *Lamont ex rel. Estate of Quick v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) (finding no constitutional violation for initial shots fired at a suspect reaching for a crack pipe in his waistband and noting that officers may protect themselves when the person they have stopped reaches for an unknown object); *Anderson v. Russell*, 247 F.3d 125, 130-32 (4th Cir. 2001) (finding officer's split-second decision to use deadly force was objectively reasonable where the suspect ignored officer's orders and was lowering his hands in the direction of a bulge near his waistband)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

raise his hands, the suspect did not comply and continued to walk away.<sup>36</sup> As the suspect turned and walked back towards the officer, he suddenly reached for his waistband (which was covered by a long shirt), causing the officer to fire a single shot that injured the suspect, who turned out to be unarmed.<sup>37</sup> The court rejected the argument that the officer should have refrained from shooting until he actually saw a visible gun and concluded the officer's conduct was objectively reasonable.<sup>38</sup>

Here, the entire sequence of relevant events (beginning from when Officer Cruz exited his vehicle and ending when he fired his weapon) occurred in about 25 seconds in circumstances that were tense, uncertain and rapidly evolving. Officer Cruz was forced to make a split-second decision in ascertaining the threat posed by Mr. Taylor when he concealed his hands and engaged in the draw stroke motion. Considering the totality of the circumstances, the use of deadly force by Officer Cruz was objectively reasonable.

**2. Officer Sylleloglou's independent decision that lethal force was warranted further supports a finding of objective reasonableness.**

Officer Sylleloglou's independent decision that Mr. Taylor posed an immediate threat to the safety of both he and Officer Cruz shows that the

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<sup>36</sup> *Salazar-Limon*, 97 F. Supp. 3d at 905-06.

<sup>37</sup> *Id.* at 906.

<sup>38</sup> *Id.* at 907.

perception of Officer Cruz was reasonable. Where officers perceiving the same circumstances each reach the independent decision to use lethal force, this evidence supports a finding of objective reasonableness by the officer who was the first to fire his weapon.<sup>39</sup> Officer Sylleloglou decided to use lethal force against Mr. Taylor at the same time Officer Cruz fired his weapon but was a split-second slower to pull the trigger.<sup>40</sup> However, the fact Officer Sylleloglou was a split-second slower and did not fire his weapon does not show that Officer Cruz's perception was unreasonable.<sup>41</sup> For one thing, their relative positions were different. As Officer Sylleloglou testified, Officer Cruz had a better "straight on" view and could see Mr. Taylor's whole body and both arms, whereas he could only see Mr. Taylor at a side angle.<sup>42</sup> Moreover, Mr. Taylor was directly facing and

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<sup>39</sup> See *Wood v. Farmington City*, 910 F. Supp. 2d 1315, 1326-27 (D. Utah 2012) (finding that independent decision of three separate officers to use lethal force supported the determination of objective reasonableness by the officer who was the first to fire his weapon); *Thomson v. Salt Lake Cty.*, No. 2:05-CV-352 TS, 2006 WL 3254471, at \*5 (D. Utah Nov. 7, 2006), aff'd, 584 F.3d 1304 (10th Cir. 2009) (unpublished) (stating "the fact that the two officers able to see Thomson felt the need to use deadly force during the confrontation supports that Morrical's actions using deadly force were reasonable and were in self-defense").

<sup>40</sup> Aplt. Appx. 561-73, 592-93, 595-603.

<sup>41</sup> See *Estate of Elkins v. California Highway Patrol*, No. 1:13-CV-1483 AWI SAB, 2016 WL 3648944, at \*13 (E.D. Cal. July 7, 2016) (finding that non-shooting officer with side view was split second slower than officer who had better view of suspect's front and arms/hands did not undermine credibility of shooting officer or show that the suspect was not a threat).

<sup>42</sup> Aplt. Appx. 563.

more engaged with Officer Cruz.<sup>43</sup> Although Officer Sylleloglou moved his index finger onto the trigger of his firearm (the only time in his career in which he has done so), which he testified indicated he had “made the decision to shoot,” Officer Cruz fired first.<sup>44</sup> Officer Sylleloglou heard the shot and simultaneously saw Mr. Taylor begin to fall, and thus did not fire his own weapon.<sup>45</sup> According to Officer Sylleloglou, he would have fired: “I was not going to wait to see exactly what he had in his hand, given that we make split-second decisions that involve life and death.”<sup>46</sup> Appellants’ argument that Officer Sylleloglou was the reasonable officer is a misplaced assertion that is simply not supported by (and is in fact irreconcilable with) his testimony.

**3. Officer Cruz did not recklessly create the need to use deadly force.**

By drawing his firearm, Officer Cruz did not engage in reckless action that unreasonably created the need to use deadly force. As Appellants point out, the reasonableness inquiry also considers whether the officer’s own reckless or deliberate conduct unreasonably created the need to use force where the conduct is “immediately connected” to the suspect’s threat of force.<sup>47</sup> But courts have

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<sup>43</sup> Aplt. Appx. 563.

<sup>44</sup> Aplt. Appx. 561-73, 592-93, 595-603.

<sup>45</sup> Aplt. Appx. 561-73, 592-93, 595-603.

<sup>46</sup> Aplt. Appx. 567.

<sup>47</sup> *Pauly*, 874 F.3d at 1219-20.

repeatedly rejected the assertion that police officers act recklessly, or unreasonably, by approaching a suspect instead of “taking cover.”<sup>48</sup> Likewise, officers are not required to take unnecessary risks in performing their duties.<sup>49</sup> The use of firearms in connection with an investigative or “*Terry*”<sup>50</sup> stop is permissible where the officer reasonably believes a weapon is necessary for protection.<sup>51</sup> And, as this Court held, a citizen does not have a Fourth Amendment right to be free of police contributing to the use of deadly force *by the citizen*.<sup>52</sup> Here, the threat posed by Mr. Taylor was not precipitated because Officer Cruz pursued Mr. Taylor as he walked down the sidewalk. Rather, Officer Cruz pursued Mr. Taylor because,

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<sup>48</sup> See *Medina v. Cram*, 252 F.3d 1124, 1132-3 (10th Cir. 2001) (rejecting plaintiff’s argument that defendant police officers acted recklessly when they failed to remain under cover and instead approached and attempted to physically apprehend an armed suspect).

<sup>49</sup> *United States v. Perdue*, 8 F.3d 1455, 1462 (10<sup>th</sup> Cir. 1993).

<sup>50</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>51</sup> *Perdue*, 8 F.3d at 1462 (holding that effectuating an investigative detention by pointing guns at an individual was reasonable where the officers had reason to fear for their safety and noting officers need not be absolutely certain the individual is armed because the issue is whether reasonably prudent persons in the circumstances would be warranted in the belief that their safety is at risk); see also, *United States v. Perea*, 374 F. Supp. 2d 961, 975 (D.N.M. 2005) (finding that it was reasonable for the police to order an occupant of a vehicle out of the car at gun point because the officers had identified the vehicle as being used in an illegal narcotics transaction and the officers believed, although incorrectly, that the driver was possibly wanted in reference to a murder investigation).

<sup>52</sup> *Clark v. Bowcutt*, 675 Fed. Appx. 799 (10th Cir. 2017) (unpublished) (citing *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (rejecting plaintiffs’ argument that the officer’s shooting was unreasonable because by commanding the suspect to show his hands, the officer “caused” the final confrontation)).

from the point of view of a reasonable officer, Mr. Taylor appeared to be aware that uniformed police officers were approaching him and – unlike his two companions – was deliberately disregarding their commands to stop. Mr. Taylor’s “draw stroke” motion occurred as Mr. Taylor faced Officer Cruz’s weapon and after he verbally derided and refused to comply with Officer Cruz’s commands. Simply put, in direct contrast to Mr. Taylor’s behavior, nothing about Officer Cruz’s conduct was reckless.

Although Appellants have never before argued that the officers lacked reasonable suspicion to conduct an investigative stop (for example, no unlawful detention claim regarding Mr. Taylor has ever been raised at any point), they now contend for the first time that the officers should have just “driven away” from the 7-Eleven and abandoned any effort whatsoever to investigate the reported 911 call. However, an excessive force claim is premised upon an alleged discrete constitutional violation relating to the manner in which an arrest was carried out and is independent of whether law enforcement had the power to detain.<sup>53</sup> As for the assertion that the call was inherently unreliable, Appellants’ argument falls short. While Appellants claim the caller was “tipsy,” no record evidence

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<sup>53</sup> *Cortez v. McCauley*, 478 F.3d 1108, 1127 (10th Cir. 2007).

demonstrates this information was accurate, let alone known to Officer Cruz.<sup>54</sup>

Moreover, the information dispatched to Officer Cruz showed the 911 caller had an eyewitness basis for the report, provided a detailed description of the suspects and their initial location, noted they were “looking for trouble” and then described the whereabouts of the suspects in real time as the call progressed. These details – all of which were confirmed by Officer Cruz’s observations – are sufficient indicia of reliability.<sup>55</sup> Other than suggesting Officer Cruz should not have confronted Mr. Taylor at all, Appellants do not explain what reckless conduct of Officer Cruz set in motion Mr. Taylor’s apparently intentional refusal to comply with commands, and actions to conceal his hands, verbally deride Officer Cruz (and Officer Sylleloglou), and engage in a sudden “draw stroke” motion.<sup>56</sup>

Accordingly, Appellants have not demonstrated a violation of a constitutional right, and Officer Cruz is entitled to qualified immunity on their excessive force claim.

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<sup>54</sup> The alleged “tipsy” state of the caller appears to be based on information uncovered when the caller was identified through caller-ID and interviewed in person in the hours after this incident.

<sup>55</sup> See *Navarette v. California*, 572 U.S. 393, 404 (2014) (finding sufficient indicia of a 911 caller's reliability).

<sup>56</sup> See *Gonzales v. Adson*, No. 12-CV-495-JED-PJC, 2019 WL 1795937, at \*8 (N.D. Okla. Apr. 24, 2019) (finding officer did not recklessly create need for use of deadly force noting that plaintiff does not explain what Brown should have done when Gonzales refused to comply with his commands and then produced a weapon and attacked him, “other than suggest the officers should not have searched for Gonzales at all”).



**C. No clearly established law shows Officer Cruz violated Mr. Taylor’s Fourth Amendment rights.**

Appellants likewise cannot meet the second prong of the qualified immunity analysis – that the constitutional right was clearly established at the time of the challenged conduct. “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>57</sup> For a right to be “clearly established,” the contours of the right must be sufficiently clear so as to give officials fair warning that their conduct is unconstitutional.<sup>58</sup> This means that “every reasonable official would have understood that what he is doing violates that right.”<sup>59</sup> Qualified immunity gives governmental officials “breathing room to make reasonable but mistaken judgments,” and “protects all but the plainly incompetent or those who knowingly violate the law.”<sup>60</sup> Thus, qualified immunity operates “to protect officers from the sometimes ‘hazy border between excessive and acceptable force.’”<sup>61</sup> Although the law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or

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<sup>57</sup> *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

<sup>58</sup> *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

<sup>59</sup> *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (citation and internal quotation omitted).

<sup>60</sup> *Id.* at 743 (citation omitted).

<sup>61</sup> *Saucier*, 533 U.S. at 202.

constitutional question “beyond debate.”<sup>62</sup> The Supreme Court has instructed that clearly established law should not be defined at a high level of generality.<sup>63</sup>

Appellants offer no precedent supporting a conclusion that the use of deadly force in circumstances similar to those faced by Officer Cruz places the constitutional question at issue beyond debate. Thus, Officer Cruz was presented with circumstances in which no applicable caselaw would have alerted him that his conduct would be unconstitutional. Appellants cannot meet their burden to show that *every* reasonable officer would have known that the use of deadly force in circumstances similar to those faced by Officer Cruz here represents a violation of the Fourth Amendment. Therefore, Officer Cruz is entitled to qualified immunity as a matter of law.

#### **IV. THE EXCLUSIONARY RULE DOES NOT APPLY IN A § 1983 CASE.**

Appellants assert statements made by Jerrail and Adam during their post-incident interviews should be subject to the exclusionary rule used in criminal cases, notwithstanding their own reliance on statements from these interviews as evidentiary support for their position. Appellants argue that prohibiting the officers from relying on these statements would serve to deter illegal searches and seizures much as the suppression rule operates in the criminal context. But in a § 1983 suit,

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<sup>62</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citation simplified).

<sup>63</sup> *Id.*

the need for deterrence is minimal,<sup>64</sup> particularly here where the witnesses were parties who could have been deposed, negating any effect of an “exclusion.”

Notably, Jerrail and Adam do not dispute the truth of their statements. Application of the exclusionary rule here would prevent state actors from defending themselves against a claim for monetary damages.<sup>65</sup> Rather than remove the incentive to seize evidence unlawfully, such a rule would increase state actors' financial exposure in tort cases, allowing § 1983 plaintiffs to receive a windfall.<sup>66</sup> Appellants offer no contrary authority or reasoning challenging the conclusions of numerous circuits that have held that the exclusionary rule is inapplicable in a § 1983 case and the Court should likewise reject Appellants' arguments.<sup>67</sup>

**V. WHERE NO CONSTITUTIONAL VIOLATION IS SHOWN, THERE IS NO BASIS FOR MUNICIPAL LIABILITY.**

As the district court correctly observed, a finding of qualified immunity based on a conclusion that the officer did not commit a constitutional violation precludes the imposition of municipal liability.<sup>68</sup> Because the undisputed facts

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<sup>64</sup> *Lingo v. City of Salem*, 832 F.3d 953, 958 (9th Cir. 2016).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See e.g., *Lingo*, 832 F.3d at 959; *Vaughn v. Chapman*, 662 F. App'x 464, 467 (7th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016); *Machado v. Weare Police Dep't*, 494 F. App'x 102, 106 (1st Cir. 2012); *Townes v. City of New York*, 176 F.3d 138 (2d Cir. 1999); *Wren v. Towe*, 130 F.3d 1154 (5th Cir. 1997).

<sup>68</sup> *Jiron*, 392 F.3d at 419 n.8.

show that the use of deadly force by Officer Cruz was objectively reasonable and no constitutional violation occurred, the City is correspondingly entitled to summary judgment.

**CONCLUSION**

Appellants cannot satisfy their burden under either prong of the qualified immunity analysis and their claims should be dismissed. As such, the district court's grant of summary judgment to Officer Cruz and the City should be affirmed.

DATED this 22<sup>nd</sup> day of November, 2019.

          /s/          Catherine L. Brabson  
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