Case No. 23-6128

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORENZO CLERKLEY, JR.,
Plaintiff/Appellee

vs.

KYLE HOLCOMB,
Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CIV-20-465-F
HONORABLE STEPHEN P. FRIOT, DISTRICT JUDGE

APPELLANT'S OPENING BRIEF

Stephen L. Geries, OBA No. 19101
Stacey Haws Felkner, OBA No. 14737
COLLINS ZORN & WAGNER, PLLC
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078
Email: slg@czwlaw.com; shf@czwlaw.com
ATTORNEYS FOR DEFENDANT/
APPELLANT KYLE HOLCOMB

November 13, 2023

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS .... i-ii

TABLE OF AUTHORITIES .... iii - vi

APPELLANT'S OPENING BRIEF 1

I. STATEMENT OF PRIOR OR RELATED APPEALS 1

II. JURISDICTIONAL STATEMENT 1

A. Subject Matter Jurisdiction of the District Court 1

B. Timeliness of Appeal 1

C. Appellate Jurisdiction 2

III. STATEMENT OF THE ISSUES 2

IV. STATEMENT OF THE CASE 3

V. STATEMENT OF RELEVANT FACTS 6

VI. SUMMARY OF THE ARGUMENT 14

VII. STANDARD OF REVIEW 20

VIII. ARGUMENT AND AUTHORITY 22

PROPOSITION I

APPELLANT HOLCOMB IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HOLCOMB'S USE OF DEADLY FORCE WAS REASONABLE UNDER THE FOURTH AMENDMENT 22

PROPOSITION II

APPELLANT HOLCOMB IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HOLCOMB'S USE OF DEADLY FORCE DID NOT VIOLATE CLEARLY ESTABLISHED LAW 38

IX. CONCLUSION 46

X. STATEMENT REGARDING ORAL ARGUMENT 47

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 48

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS 49

CERTIFICATE OF SERVICE 49

Attachment: August 14, 2023 Order (Doc. 90)

TABLE OF AUTHORITIES

CASES **PAGE**

A.M. v. Holmes, 830 F. 3d 1123 (10th Cir. 2016)..45

Anderson v. Delcore, 79 F. 4th 1153 (10th Cir. 2023) 3, 12, 20-23, 37, 46

Arnold v. City of Olathe, 35 F. 4th 778 (10th Cir. 2022)............................. 20, 21, 43

Blossom v. Yarbrough, 429 F.3d 963 (10th Cir. 2005)...2

City and County of San Francisco v. Sheehan, 575 U.S. 600,
135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)..27

City of Tahlequah v. Bond, 595 U.S. 9, 142 S. Ct. 9, 211 L.Ed. 170 (2021) ... 38, 47

Crane v. Utah Department of Corrections, 15 F. 4th 1296 (10th Cir. 2021)............40

Cummings v. Dean, 913 F. 3d 1227 (10th Cir. 2019)..45

Cunningham v. Shelby County, 994 F. 3d 761 (6th Cir. 2021)................................33

District of Columbia v. Wesby, 583 U.S. 48, 138 S. Ct. 577,
199 L.Ed.2d 453 (2018)...2, 3

England v. Hendricks, 880 F. 2d 281 (10th Cir. 1989)..44

Estate of Beauford v. Mesa County, 35 F. 4th 1248 (10th Cir. 2022) 21

Estate of Harmon v. Salt Lake City, 2023 WL 5334118
(D. Utah August 18, 2023)... 33, 34

Estate of Larsen ex rel. Sturdivan v. Murr,
511 F.3d 1255 (10th Cir. 2008)................................. 15-17, 22-24, 30-33, 35, 36, 47

Estate of Taylor v. Salt Lake City,
16 F. 4th 744 (10th Cir. 2021)....................................13, 20, 21, 23-32, 35-37, 42, 46

Estate of Valverde v. Dodge,
967 F. 3d 1049 (10th Cir. 2020)......................2, 21, 22, 25-28, 31, 32, 36, 37, 45, 46

Finch v. Rapp, 38 F. 4th 1234 (10th Cir. 2022).......................5, 18, 19, 38, 39, 41-43

Garza v. Briones, 943 F. 3d 740 (5th Cir. 2019) 30

Gonzales v. Duran, 590 F. 3d 855 (10th Cir. 2009) 45

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1769,
167 L.Ed. 2d 443 (1989) 15, 22, 24-26, 46

Grissom v. Roberts, 902 F. 3d 1162 (10th Cir. 2018)...41

Hansen v. Dailey, 2021 WL 5493058 (D. Kan Nov. 23, 2021) 31-33

Irizarry v. Yehia, 38 F. 4th 1282 (10th Cir. 2022)...40

Jiron v. City of Lakewood, 392 F. 3d 410 (10th Cir. 2004)....................................25

Kapinski v. City of Albuquerque, 964 F. 3d 900 (10th Cir. 2020)..................... 20, 37

King v. Hill, 615 Fed. Appx. 470 (10th Cir. 2015)... 39-41

Kisela v. Hughes, 584 U.S. ___, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018).........38

Lamont v. New Jersey, 637 F. 3d 177 (3rd Cir. 2011)..28

Lewis v. City of Edmond, 48 F. 4th 1193 (10th Cir. 2022) 38, 39, 43

Lutz v. Weld County School District, 784 F. 2d 340 (10th Cir. 1986),.....................44

Maestas v. Lujan, 351 F. 3d 1001 (10th Cir. 2003)...44

McKinney v. Trattles, 732 F. 2d 1320 (10th Cir. 1986)..44

Medina v. Cram, 252 F. 3d 1124 (10th Cir. 2001) 20

Miller v. City of Mission, 705 F. 2d 368 (10th Cir. 1983).......................................44

Mitchell v. Forsyth, 427 U.S. 511, 105 S. Ct. 2806,
86 L. Ed. 2d 411 (1985) 2, 45

Mullenix v. Luna, 577 U.S. 7, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) 20, 39

Palacios v. Fortuna, 61 F. 4th 1248 (10th Cir. 2023) 2, 24, 25

Pauly v. White, 874 F. 3d 1197 (2017) 22, 25

Plumhoff v. Rickard, 572 U.S. 765, 134 S. Ct. 2012,
188 L. Ed. 2d 1056 (2014). 22

Quinn v. Young, 780 F.3d 998 (10th Cir. 2015) 45

Redd v. City of Oklahoma City, ___Fed. Appx. ___,
2021 WL 3909982 .... 23, 25, 31, 32

Romero v. Board of County Commissioners, 60 F.3d 702 (10th Cir. 1995) 25, 26

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L.Ed. 2d 272 (2001) 23

Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L.Ed. 2d 686 (2007) 21, 37

Slattery v. Rizzo, 939 F. 2d 213 (4th Cir. 1991) 28

Tenorio v. Pitzer, 802 F. 3d 1160 (10th Cir. 2015) 23

Thomas v. Durastanti, 607 F. 3d 655 (10th Cir. 2010)..................................... 13, 27

Thomson v. Salt Lake County, 584 F. 3d 1304 (10th Cir. 2009) 22, 23

United States v. Mackin, 2016 WL 6678350 (N.D. Ind. November 14, 2016) 36

Walker v. City of Orem, 451 F. 3d 1139 (10th Cir.) 39-41

White v. Pauly, 580 U.S. 73, 137 S. Ct. 548, 196 L.Ed.2d 463 (2017) 47

Zia Trust Co. ex rel Causey v. Montoya, 597 F. 3d 1150 (10th Cir. 2010) 39, 40

Zuchel v. Spinharney, 890 F. 2d 273 (10th Cir. 1989) 39, 40

STATUTES

28 U.S.C. §1291 2

28 U.S.C. §1343 1

42 U.S.C. §1983 .... passim

21 O.S. §1438..25

21 O.S. §1760..25

RULES

Fed. R. App. P. 4(a)(1)(A) 2

Fed. R. App. P. 25(d)(1) 49

Fed. R. App. P. 30(b)(1) 4

Fed. R. App. P. 25(d)(2) 49

Fed. R. App. P. 32(a)(5)..48

Fed. R. App. P. 32(a)(6)..48

Fed. R. App. P. 32(a)(7)(B) 48

Fed. R. App. P. 32(f)..48

There are no prior or related appeals

APPELLANT'S OPENING BRIEF

Defendant/Appellant Kyle Holcomb ("Holcomb") appeals from the District Court's August 14, 2023 Order denying Holcomb's Motion for Summary Judgment, which asserted the defense of qualified immunity. The Order is attached to the Opening Brief as Attachment 1. References to Appellant's Appendix will be to App. Vol. __, p. ___. References to the August 14, 2023 Order will include both the original page number and the corresponding page of the Appendix.

I. STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

II. JURISDICTIONAL STATEMENT

A. Subject Matter Jurisdiction of the District Court

Plaintiff/Appellee Lorenzo Clerkley, Jr. ("Clerkley") sued Sgt. Kyle Holcomb under 42 U.S.C. §1983, alleging that Sgt. Holcomb violated Clerkley's Fourth Amendment rights by using excessive force. App. Vol. I, pp. 12-13, 22-23.[1] Therefore, the district court had subject matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343.

B. Timeliness of Appeal

The Order denying Sgt. Holcomb's Motion for Summary Judgment was

[1]The lawsuit was originally filed by Cherelle Lee, who is Clerkley's mother. App. Vol I, p. 12. Clerkley was later substituted as the Plaintiff. App. Vol. II, p. 356.

entered on August 14, 2023. Order; App. Vol. II, pp. 498-523. Sgt. Holcomb's Notice of Appeal was filed on September 12, 2023. Therefore, the appeal is timely under Fed. R. App. P. 4(a)(1)(A).

C. Appellate Jurisdiction

A district court's denial of a summary judgment motion is subject to immediate appeal when the defendant is a public official asserting qualified immunity and the issue appealed is a matter of law. *Blossom v. Yarbrough*, 429 F.3d 963, 966 (10th Cir. 2005). Because the doctrine of qualified immunity provides immunity from suit, not just a defense to liability, an essential component of the protection of the doctrine is lost if summary judgment is improperly denied and the official is subjected to litigation. *Estate of Valverde by and through Padilla v. Dodge,* 967 F. 3d 1049, 1058 (10th Cir. 2020), citing *Mitchell v. Forsyth,* 427 U.S. 511, 527, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Therefore, this Court has jurisdiction under 28 U.S.C. §1291. *Mitchell* at 530.

III. STATEMENT OF THE ISSUES

Officers are entitled to qualified immunity unless they (1) violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. *Palacios v. Fortuna,* 61 F. 4th 1248, 1256 (10th Cir. 2023), citing *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577, 589, 199 L.Ed.2d

453 (2018). The reasonableness of an officer's use of force is a legal issue that the Court may resolve on an interlocutory appeal. *Anderson v. DelCore,* 79 F. 4th 1153, 1159 (10th Cir. 2023). Thus, the issues presented for review are:

I. Was Sgt. Holcomb's use of deadly force reasonable under the Fourth Amendment?

> This issue is addressed at Order, pp. 10-17; App. Vol. II, pp. 507-514.

II. Was Sgt. Holcomb's use of deadly force prohibited by clearly established law?

> This issue is addressed at Order, pp. 17-20; App. Vol. II, pp. 514-517.

IV. STATEMENT OF THE CASE

This appeal arises out of the March 10, 2019 non-fatal shooting of Plaintiff/Appellee Lorenzo Clerkley, Jr. by Defendant/Appellant Kyle Holcomb, who is an Oklahoma City Police Officer. On May 19, 2020, Clerkley sued Sgt. Holcomb under 42 U.S.C. §1983. App. Vol. I, pp. 12-26. The Complaint alleged that Sgt. Holcomb's use of deadly force violated Clerkley's Fourth and Fourteenth Amendment rights to be free from "objectively unreasonable seizure through excessive force." App. Vol. I, pp. 22-23. The lawsuit also included a §1983 municipal liability claim against the City of Oklahoma City, App. Vol. I, pp. 23-24, as well as a state law claim against the City for negligent use of excessive force by

its employee. App. Vol. I, pp. 24-25.

On December 29, 2023, Sgt. Holcomb filed a motion for summary judgment which asserted the defense of qualified immunity. See, App. Vol. I, pp. 118-266 and App. Vol. II, pp. 267-356. Clerkley filed a Response in Opposition to Defendant Holcomb's Motion for Summary Judgment on February 17, 2023. App. Vol. II, pp. 357-426. Sgt. Holcomb's Reply Brief was filed on February 24, 2023. App. Vol. II, pp. 487-497. The City also sought summary judgment on all claims against it. App. Vol. I, pp. 53-117.[2]

On August 14, 2023, the district court entered an order addressing the defendants' respective motions for summary judgment. Order; App. Vol. II, pp. 498-523. The court denied Sgt. Holcomb's motion for summary judgment. Order, p. 26; App. Vol. II, p. 523. With respect to the City, the court granted summary judgment on the §1983 municipal liability claim, but denied summary judgment on the claim for negligent use of excessive force. Order, pp. p. 20-26; App. Vol. II,

[2]In the interest of presenting a clear record, Sgt. Holcomb has included the City's motion for summary judgment, Clerkley's response, and the City's reply in the Appendix. See, App. Vol. I, pp. 53-117; App. Vol. II, pp. 427-480; App. Vol. II, pp. 481- 486. However, in the interest of brevity and in compliance with Fed. R. App. P. 30(b)(1), Sgt. Holcomb has excluded Exhibits 1 through 64 of the City's motion from the Appendix. These exhibits relate to the §1983 municipal liability claim and are not necessary to decide the issues presented in this appeal.

pp. 517-523. The claims against the City are not at issue in this appeal.

As the district court recognized, to overcome the presumption of immunity a plaintiff must show (1) that a reasonable jury could find facts supporting a violation of a constitutional right and that (2) the right was clearly established at the time of the violation. Order, p. 10; App. Vol II, p. 507. The court's order addressed both qualified immunity questions. First, the court held "a reasonable jury could conclude that a reasonable officer in Holcomb's position would not have reasonably believed Clerkley posed a mortal threat" and therefore "could find that Holcomb's use of deadly force was in violation of the Fourth Amendment." Order, p. 17; App. Vol. II, p. 514. However, the court "hasten[ed] to emphasize that this is a close question." Order, p. 17; App. Vol. II, p. 514. Second, relying primarily on *Finch v. Rapp*, 38 F. 4th 1234 (10th Cir. 2022), which was decided after the shooting in the instant case, the district court held "a reasonable jury could find a violation of Clerkley's Fourth Amendment rights by Holcomb and that the right was clearly established at the time of the violation." Order, p. 20; App. Vol. II, p. 517.

On September 12, 2023, Sgt. Holcomb filed his Notice of Appeal. App. Vol. II, p. 525. The objective reasonableness of the force used by Sgt. Holcomb is addressed in Proposition I of this Brief. Whether Sgt. Holcomb's use of deadly force was prohibited by clearly established law is discussed in Proposition II.

V. STATEMENT OF RELEVANT FACTS

1. Sgt. Kyle Holcomb has been an Oklahoma City Police Officer since 2009. On March 19, 2019, he was working an approved overtime shift as part of the VIPER program, which provides extra patrols in areas with high rates of crime and violence. Order, p. 2, App. Vol. II, p. 499; App. Vol. I, p. 162-165.

2. At approximately 5:43 p.m., Markisha Compton called 911 to report that "a whole bunch of dudes just got out of a car with guns" at a vacant house across the street from her house, and had gone into the house. Order, p. 2, App. Vol. II, p. 499; App. Vol. I, pp. 193-204; Exhibit 1, 911 Recording, at 00:08 to 00:22.[3] The caller's house and the vacant house were in the Oak Cliff neighborhood, which is recognized by the OCPD as an area with high crime and high violence. Order, p. 2, App. Vol. II, p. 499; App. Vol. I, p. 162.

3. Ms. Compton advised 911 that she saw one subject with a gun, whom she described as a black male with dreads in jeans and a gray hoodie. Her daughter saw at least two of the men with guns. Although Ms. Compton told 911 she was not sure if the guns were real or "play" guns, this information was not conveyed by dispatch. Order, p. 2; App. Vol. II, p. 499; Ex. 1 at 00:10 to 00:22 and 1:00 to 2:15;

[3]Conventionally filed pursuant to the Court's November 3, 2023 Order.

Exhibit 2, Santa Fe Radio Traffic at 00:05 to 1:00.[4]

4. Sgt. Holcomb heard over the radio that a "burg[lary] two [was] in progress and that "several black males" carrying guns went into the house across the street from the 911 caller's house. The call was classified as a Priority One call (danger to life or property) for Second Degree Burglary. Sgt. Holcomb did not know the ages of the suspects who went into the house. Order, p. 2-3; App. Vol. II, pp. 499-500; App. Vol. I, pp. 166-167, 182, 189 (Holcomb Deposition).

5. Sgt. Holcomb and Officer Carlon Tschetter were the first officers to arrive at the house. Both officers were in uniform and wearing body cameras. Order, p. 3, App. Vol. II, p. 500; App. Vol. I, pp. 208-209; Exhibit 3, Body Worn Camera Video of Holcomb at 00:35 to 1:00;[5] Exhibit 4, Body Worn Camera Video of Carlon Tschetter, at 00:25 to 1:05.[6] As Holcomb and Tschetter approached the house, Holcomb stated on the radio "they're back there" and "I think it is a cap gun, but they are shooting something off." Order, p. 3, App. Vol. II, p. 500; Ex. 3 at 00:52 to 00:54 and 1:13 to 1:16. Tschetter radioed "cap gun" and "could be paint ball." Order, p. 3, App. Vol. II, p. 500; Ex. 4 at 1:08 to 1:09 and 1:24 to 1:26.

[4] Conventionally filed pursuant to the Court's November 3, 2023 Order.
[5] Conventionally filed pursuant to the Court's November 3, 2023 Order.
[6] Conventionally filed pursuant to the Court's November 3, 2023 Order.

6. Sgt. Holcomb and Officer Tschetter "split" the house, with Tschetter going to the front of the house and Sgt. Holcomb going to the side of the house, walking along a wooden fence. Order, p. 3, App. Vol. II, p. 500; App. Vol I, p. 190; Ex. 3 at 00:55 to 1:10; Ex. 4 at 1:05 to 1:30. Numerous shots, coming from either inside the house or the backyard, can be heard on both Sgt. Holcomb's and Officer Tschetter's body worn cameras as the officers approach the house. Ex. 3 at 00:55 to 1:10; Ex. 4 at 1:05 to 1:25.

7. Officer Tschetter loudly announced they were the police, stating "HEY, POLICE DEPARTMENT, COME ON OUT!" and "HEY, THIS IS THE POLICE DEPARTMENT! COME OUT NOW!" Order, p. 3, App. Vol. II, p. 500; Ex. 3 at 1:00 to 1:21; Ex. 4 at 1:10 to 1:30.

8. Sgt. Holcomb walked along the fence, stopping at a hole where he could see the back corner of the house and part of the backyard. The backyard contained overgrown dead foliage. Order, p. 3, App. Vol. II, p. 500; Ex. 3 at 1:10 to 1:25. The district court specifically determined that no reasonable jury could conclude the fence provided sufficient cover to protect Holcomb if Clerkley fired at him. Order, p. 16; App. Vol. II, p. 513.

9. From this vantage point, Sgt. Holcomb saw a black male in a gray hoodie (later identified as Clerkley) walking in his direction. Order, p. 3, App. Vol.

II, p. 500; App. Vol. I, pp. 210-212 (still shots and Zoom of still shot from Sgt. Holcomb's BWC); Ex. 3 at 1:25 to 1:28.

10. Sgt. Holcomb believed the suspect was pointing a black gun, which looked like a real gun, at Sgt. Holcomb or in his direction. App. Vol. I, pp. 161, 172-173, 175-176, 182-183, 190-191.

11. Sgt. Holcomb shouted "SHOW ME YOUR HANDS! DROP IT!" He then immediately fired four shots in quick succession at Clerkley. Order, p. 3, App. Vol. II, p. 500; Ex. 3 at 1:26 to 1:28. Holcomb then shouted "DROP THE GUN!" but did not fire any more shots because the suspect disappeared from his sight. Order, p. 3, App. Vol. II, p. 500; App. Vol. I, pp. 178-179, 184-185; Ex. 3 at 1:30 to 1:33.

12. Sgt. Holcomb reported on his radio "Shots fired. Shots fired. Black male with a gray hoodie had the gun." Order, pp. 3-4, App. Vol. II, p. 500-501; Ex. 2 at 2:10 to 2:15; Ex. 3 at 1:32 to 1:36.

13. Clerkley intentionally crawled back through the broken window that he had used to climb into the back yard. Order, p. 4, App. Vol. II, p. 501; App. Vol. I, pp. 254-255 (Clerkley Deposition). Sgt. Holcomb's shots hit Clerkley in the right hip and left leg, but Clerkley did not realize it until he was back in the house. Order, p. 4, App. Vol. II, p. 501. Clerkley and three other males walked out the front door of the house, where Clerkley and was taken into custody by Officer Tschetter. Order,

p. 4, App. Vol. II, p. 501; Ex. 4 at 3:25 to 3:40.

14. Sgt. Holcomb then continued to walk around the exterior of the fence, while Officer Jesse Reyes took over Sgt. Holcomb's original position. Order, p. 4, App. Vol. II, p. 501; Ex. 3 at 1:45 to 2:30; Exhibit 5, Body Worn Camera of Jesse Reyes, at 00:45 to 1:40.[7] Two other black males who had been in the house with Clerkley climbed out the back window. Sgt. Holcomb and Officer Reyes ordered the suspects to get on the ground and covered the suspects until it was possible for officers to get into the fenced back yard to take the suspects into custody. Order, p. 4, App. Vol. II, p. 501; Ex. 3 at 1:45 to 3:02.

15. While Officer Tschetter was handcuffing Clerkley, Sgt. Holcomb told Tschetter "That looks like the one I shot at. He was wearing a gray hoodie. *He's the one that had a gun.*" Order, p. 4, App. Vol. II, p. 501; Ex. 3 at 3:45 to 4:15.

16. Sgt. Holcomb asked dispatch to start Fire and EMSA. Clerkley was taken to the hospital for treatment of the gunshot wounds, and was discharged later that night. Order, p. 5, App. Vol. II, p. 502; Ex. 3 at 4:40 to 5:22.

17. Sgt. Jesse McRay, who was one of the officers who went into the backyard to take the suspects in the yard into custody, spotted a black handgun outside the window that Clerkley and the other two suspects came through. Order,

[7]Conventionally filed pursuant to the Court's November 3, 2023 Order.

p. 5, App. Vol. II, p. 502; App. Vol. II, pp. 280-284 (photographs of gun outside window); Exhibit 6, Body Worn Camera of Jesse McRay at 6:20 to 6:55, 8:05 to 8:10.[8] The gun was later identified as a TDP 45 BB pistol. Order, p. 5, App. Vol. II, p. 502. It did not have an orange tip or any other markings which would identify it as a cap gun, air pistol, BB gun, or anything other than a real handgun. App. Vol. I, pp. 280-284. In fact, it was specifically designed to look like a real firearm. App. Vol. I, pp. 224-225; App. Vol. II, p. 303.

18. After he was discharged from the hospital, Clerkley was interviewed by OCPD Detectives Ken Whitebird and Jonathon Davis. Order, p. 5, App. Vol. II, p. 502. Clerkley's mother, Cherelle Lee was present. Exhibit 7, March 10, 2019 Interview of Lorenzo Clerkley, Cherelle Lee and Andre King.[9] In this interview, Clerkley admitted he had fired a BB gun in the house, describing the gun as all black and as a Glock. Order, p. 5, App. Vol. II, p. 502; App. Vol. 1, pp. 245-246, Ex. 7 at 2:40 to 3:02; 6:40 to 6:55, 7:20-7:37. During this interview, Clerkley was asked by his mother if he had a gun in his hand when he was shot, and L.C. answered "I didn't have a gun in my hand. *Not that I know of.*" Ex. 7 at 10:15-10:30.

---

[8]Conventionally filed pursuant to the Court's November 3, 2023 Order.
[9]Conventionally filed pursuant to the Court's November 3, 2023 Order.

19. During this interview, Clerkley stated that he had the gun in his hand while he was in the bedroom just before he climbed out the window. He thought he dropped the gun before he went out the window, but could not remember if he dropped it inside or outside. App. Vol. II, p. 232. Ex. 7 at 13:08 to 13:43. When Clerkley was deposed 18 months later, he testified that the only place he handled and shot the BB gun was in the kitchen and that he was certain he did not have a gun when he went out the bedroom window. App. Vol. II, p. 412; Order, pp. 5-6, App. Vol. II, pp. 502-503.

20. As required by OCPD policy, the shooting was investigated by OCPD Homicide Investigators (Whitebird and Davis). They presented the case, including the BWC video and still shots discussed above, to then-District Attorney David Prater. Order, p. 7, App. Vol. II, p. 504. After viewing the BWC and still shots, the DA concluded Sgt. Holcomb was justified in using deadly force in defense of himself and other officers because Holcomb had a reasonable belief that he was about to be shot by Clerkley. Order, p. 7, App. Vol. II, p. 504.

The facts above, which are taken primarily from the district court's order denying summary judgment, are the starting point for the Court's legal review of whether Sgt. Holcomb is entitled to qualified immunity. See, *Anderson* at 1159, ("The District court's factual findings and reasonable assumptions comprise the

universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity.") However, the Court is not bound by the district court's ruling that the evidence presented would support a particular jury finding "to the extent there is clear contrary video evidence of the incident at issue." *Estate of Taylor v. Salt Lake City,* 16 F. 4th 744, 757 (10th Cir. 2021), quoting *Thomas v. Durastanti*, 607 F. 3d 655, 659 (10th Cir. 2010).

In the instant case, the district court held "the evidence, viewed in Clerkley's favor, indicates that he did not have a gun *or anything* in his hand." Order, p. 15, App. Vol. II, p. 15 (emphasis added). The court concluded "that a reasonable jury could conclude that the footage and the still-framed photographs do not show that Clerkley was holding *something black* in his hand." Order, p. 15, App. Vol. II, p. 15 (emphasis added). This finding is contrary to the video evidence because the zoomed still-frame from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand. App. Vol. I, p. 212. It may not be possible to determine from the BWC video exactly what this object is, although the shape is certainly consistent with a handgun, but the still-framed photograph clearly shows that Clerkley had *something* in his hand as he walked in Holcomb's direction.

VI. SUMMARY OF ARGUMENT

A defendant's assertion of qualified immunity in a §1983 case creates a presumption of immunity. When the issue of qualified immunity is raised, the reasonableness of an officer's use of force is a legal issue which may be resolved on an interlocutory appeal. While the Court generally does not review a district court's factual conclusions, the Court is not bound by a district court's ruling that the evidence presented would support a particular finding of fact when there is clear contrary video evidence of the incident. In the instant case, the district court held the evidence, viewed in Clerkley's favor, indicates that he did not have *anything* in his hand. This finding is contrary to the video evidence because the zoomed still-frame from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand.

The general law regarding deadly force is well-established. All excessive force claims, including deadly force claims, are governed by the objective reasonableness requirement of the Fourth Amendment. Reasonableness in the context of the Fourth Amendment requires determining whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The Fourth Amendment requires that an officer have *probable cause* to believe that there was a threat of serious physical harm to [himself] or others, but probable cause does not require

certainty. 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. A reasonable but mistaken belief that deadly force was necessary includes situations in which an officer is mistaken about whether a suspect has a gun.

The district court analyzed the reasonableness of the force by applying the three factors identified in *Graham* and the four factors set out in *Larsen*, but made several mistakes in its analysis. The district court correctly held the first factor of *Graham* weighed against Clerkley because second-degree burglary is a felony. However, the district court incorrectly held the third *Graham* factor favored Clerkley. Based on the 911 caller's information, the shots Sgt. Holcomb heard as he approached the house, and Clerkley's presence in the backyard immediately after another officer announced "Police" in front of the house, it was reasonable for Holcomb to believe Clerkley was trying to evade arrest.

The district court recognized that the second *Graham* factor is the most important factor in determining the objective reasonableness of an officer's use of force. However, the court erred in concluding that, if a reasonable jury could find Clerkley did not have a gun in his hand when he was shot, then that factual dispute precluded summary judgment. Even if it is undisputed a suspect was unarmed at the time of a shooting, that does not resolve whether the officer violated the suspect's

constitutional rights. The salient question is whether the officer's mistaken perception that the suspect was about to use a firearm was reasonable. Clerkley and his friends were shooting BB guns when Sgt. Holcomb arrived at the scene and approached the house. While Holcomb did have some suspicion that the shots he was hearing as he approached the house might be from a cap gun, he did not have any way to corroborate or dispel this suspicion in the less than twenty seconds between when he heard the shots and when he saw what he perceived to be a black gun pointed at him. There was no visual clue, such as an orange tip, that the gun was not real, and Sgt. Holcomb was not required to gamble his life to find out.

With respect to the first *Larsen* factor, the district court incorrectly focused on whether Clerkley *actually* ignored or deliberately disobeyed Holcomb's commands, rather than whether it was reasonable for Sgt. Holcomb to believe Clerkley refused to comply with the commands based on the information Holcomb had at the time of the shooting. With respect to the second *Larsen* factor, the district court's finding that a reasonable jury could conclude the BWC video and stills from the video "do not show that Clerkley was holding something black in his hand" is contrary to the video evidence. The zoomed still from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand. It may not be possible to determine from the BWC video exactly what this object is, although the shape is certainly consistent

with a handgun, but the zoom clearly shows that Clerkley had *something* in his hand as he walked in Holcomb's direction.

The district court correctly concluded the third *Larsen* factor favored Sgt. Holcomb because the fence did not provide sufficient cover to protect Holcomb if Clerkley fired at him. However, the district court erred in finding that the fourth *Larsen* factor favored Clerkley by focusing on whether Sgt. Holcomb knew Clerkley had climbed through the window rather than the totality of the information known to Sgt. Holcomb. While it is true Sgt. Holcomb's BWC video does not show Clerkley crawling out the window, Holcomb saw Clerkley in the fenced backyard of a house the 911 caller had identified as vacant, in clothing fitting the caller's description of the suspect with a gun, immediately after another officer had twice announced "HEY, POLICE DEPARTMENT, COME ON OUT!" from in front of the house. Therefore, it was reasonable for Sgt. Holcomb to assume Clerkley was trying to avoid the police and to perceive Clerkley's actions as hostile.

The question of whether Clerkley was *actually* holding a gun at the time he was shot is not the same question as whether it was reasonable for Sgt. Holcomb to *believe* Clerkley was holding a gun. The controlling issue with respect to qualified immunity is whether it was reasonable for Sgt. Holcomb to perceive that his life was in danger. The district court described the issue of whether a jury could find Sgt.

Holcomb's use of deadly force to violate the Fourth Amendment as a "close question." However, it is not a question which should go to the jury because the reasonableness of an officer's use of force is a legal issue which may be resolved on an interlocutory appeal.

Even if the question of whether Sgt. Holcomb's use of deadly force was in violation of the Fourth Amendment is a "close question," the second qualified immunity question, whether Sgt. Holcomb's actions violated clearly established law, is not close. The district court's analysis of qualified immunity is based on *Finch v. Rapp,* 38 F. 4th 1234 (10th Cir. 2022), which was decided more than three years after the March 10, 2019 shooting in the instant case. Cases decided after the alleged constitutional violation are of no use in the clearly established inquiry because a reasonable officer is not required to foresee judicial decisions that do not yet exist. The court held *Finch* was instructive because *Finch* relied on other deadly force cases decided before the shooting. However, none of those cases are factually similar enough to have placed a reasonable officer in Sgt. Holcomb's position that the use of deadly force was clearly prohibited *in the particular circumstances before him* because none of those cases involve an individual who has been observed with and reported to have a gun.

Even if *Finch* could be used as precedent, there are critical factual differences

between *Finch* and the instant case. None of the officers in *Finch* identified themselves as police officers, and the shooting officer was approximately forty yards away when he shot Finch. Additionally, Finch walked out on to his front porch when the police approached; he did not crawl out a window into the backyard. The most important distinction between *Finch* and the instant case is that Sgt. Holcomb was not relying solely on the information provided by dispatch or the 911 caller. Unlike the officers in *Finch,* Sgt. Holcomb personally heard shots as he approached the house. There is no Supreme Court or Tenth Circuit precedent which "squarely governs" the facts of this case and which would place every reasonable officer on notice that deadly force was inappropriate even when responding to a felony burglary call and facing an individual who met the description of an armed burglary suspect mere seconds after hearing shots fired. In the absence of such precedent, Sgt. Holcomb is entitled to qualified immunity.

Finally, the district court erred in suggesting the issue of whether the law was clearly established could or should be decided by a jury. This is contrary to Tenth Circuit precedent stating that whether the law is clearly established is a legal question that must be decided by a court rather than a jury. If the issue of whether Sgt. Holcomb's actions were barred by clearly established law is inappropriately left to the jury, even if the jury were to find in Sgt. Holcomb's favor, he will have lost the

right not to stand trial. Therefore, this Court should reverse the trial court and rule as a matter of law that Sgt. Holcomb's actions did not violate clearly established law.

VII. STANDARD OF REVIEW

This Court reviews *de novo* the district court's denial of summary judgment on qualified immunity grounds. *Anderson* at 1153, 1162 (10th Cir. 2023), citing *Medina v. Cram*, 252 F. 3d 1124, 1128 (10th Cir. 2001). The doctrine of qualified immunity shields officials from liability as long as their conduct "does not violate clearly established constitutional rights of which a reasonable person would have known." *Anderson* at 1162, quoting *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015). A defendant's assertion of qualified immunity in a §1983 case creates a presumption of immunity. *Anderson* at 1162; *Estate of Taylor v. Salt Lake City,* 16 F. 4th 744, 757 (10th Cir. 2021). Because of this presumption, the Court reviews summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions. *Anderson* at 1162; *Kapinski v. City of Albuquerque,* 964 F. 3d 900, 904 (10th Cir. 2020).

To overcome the presumption of immunity, the plaintiff bears the burden to establish that (1) the defendant violated his or her constitutional or statutory rights and (2) that the right was clearly established at the time of the defendant's conduct. *Anderson* at 1162; *Taylor* at 757; *Arnold v. City of Olathe,* 35 F. 4th 778, 788 (10th

Cir. 2022). The Court has discretion to decide the order in which to consider the two prongs of the qualified immunity standard, but must grant qualified immunity to the defendant if it concludes the plaintiff has failed to meet his burden as to either part of the two-prong inquiry. *Anderson* at 1163; *Arnold* at 788.

The Court's review is generally limited to the questions of (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, and/or (2) whether that law was clearly established at the time of the alleged violation. *Estate of Valverde by and through Padilla v. Dodge,* 967 F. 3d 1049, 1058 (10th Cir. 2020). While the Court generally does not review a district court's factual conclusions, the mere existence of controverted factual issues does not necessarily divest the Court of jurisdiction. *Valverde* at 1059. An appellate court is not bound by a district court's ruling that the evidence presented would support a particular finding of fact when there is clear contrary video evidence of the incident at issue. *Taylor* at 757; *Valverde* at 1059, citing *Scott v. Harris,* 550 U.S. 372, 127 S. Ct. 1769, 1776, 167 L.Ed. 2d 686 (2007); *Estate of Beauford v. Mesa County*, 35 F. 4th 1248, 1261 (10th Cir. 2022) ("We do not have to accept versions of the facts contradicted by objective evidence, such as video surveillance footage.")

While the Court generally defers to the district court's factual determinations, the reasonableness of an officer's use of force is a legal issue which may be resolved

on an interlocutory appeal. *Anderson* at 1159. As *Valverde* recognizes, "deciding legal issues of this sort is a core responsibility of appellate courts." *Valverde* at 1059, quoting *Plumhoff v. Rickard,* 572 U.S. 765, 773, 134 S. Ct. 2012, 2019, 188 L. Ed. 2d 1056 (2014). If the rule were otherwise, and the Court could not consider whether the district court's factual findings were sufficient to sustain a lawful verdict, many if not most qualified immunity summary judgment appeals would be foreclosed and the promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be irretrievably lost. *Valverde* at 1059.

VIII. ARGUMENT AND AUTHORITY

PROPOSITION I

APPELLANT HOLCOMB IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HOLCOMB'S USE OF DEADLY FORCE WAS REASONABLE UNDER THE FOURTH AMENDMENT

The general law regarding deadly force is well-established. All excessive force claims, including deadly force claims, are governed by the objective reasonableness requirement of the Fourth Amendment. *Pauly v. White*, 874 F. 3d 1197, 1214 (2017), citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1769, 167 L.Ed. 2d 443 (1989). See also, *Estate of Valverde v. Dodge*, 967 F. 3d 1049*,* 1060 (10th Cir. 2020); *Thomson v. Salt Lake County*, 584 F. 3d 1304, 1313 (10th Cir. 2009); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008).

Like other Fourth Amendment issues, deadly force claims are evaluated for objective reasonableness based on the information the defendant officer had at the time of the shooting. *Estate of Taylor v. Salt Lake City*, 16 F. 4th 744, 759 (10th Cir. 2021), citing *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L.Ed. 2d 272 (2001). Reasonableness in the context of the Fourth Amendment requires determining whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Thomson* at 1313; *Redd v. City of Oklahoma City,* ___Fed. Appx. ___, 2021 WL 3909982. The reasonableness of an officer's use of force is a legal issue that this Court may resolve on interlocutory appeal. *Anderson* at 1159.

As the district court recognized, the Fourth Amendment requires that an officer have "*probable cause* to believe that there was a threat of serious physical harm to [himself] or others." Order. p. 11, App. Vol. II, p. 508, quoting *Larsen* at 1260. But probable cause does not require certainty. 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." Order. p. 11, App. Vol. II, p. 508, quoting *Larsen* at 1260. "The belief need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable." Order. p. 11, App. Vol. II, p. 508, quoting *Tenorio v. Pitzer*, 802 F. 3d 1160, 1164 (10th Cir. 2015). A reasonable

but mistaken belief that deadly force was necessary includes situations in which an officer is mistaken about whether a suspect has a gun, as the Tenth Circuit recognized in *Taylor*. "[T]he Fourth Amendment is clear: officers need not wait until they see the gun's barrel or the knife's blade before using deadly force to protect themselves or those around them." *Taylor* at 747, citing *Larsen* at 1260. While, the district court cited the Tenth Circuit precedents establishing that an officer who makes a reasonable mistake regarding the need for deadly force is entitled to qualified immunity, the court improperly applied those precedents in denying Sgt. Holcomb's motion for summary judgment.

The district court analyzed the reasonableness of the force by applying the three factors identified in *Graham* and the four factors set out in *Larsen*, see Order, pp. 11-17, App. Vol. II, pp. 507-514, but made several mistakes in its analysis. With respect to the first factor of *Graham,* the severity of the crime at issue, the court correctly found this factor weighed against Clerkley because second-degree burglary is a felony and any felony is considered to have a high degree of severity under Tenth Circuit precedent. See, Order. p. 12, App. Vol. II, p. 509, citing *Palacios v. Fortuna,* 61 F. 4th 1248, 1256 (10th Cir. 2023). However, with respect to the third factor, the district court incorrectly held there was no evidence from which a reasonable jury could conclude Clerkley was trying to evade arrest by climbing out the back window

because there was no evidence Sgt. Holcomb had probable cause to arrest Clerkley. See, Order, p. 13, App. Vol. II, p. 510, citing *Taylor* at 764. The combination of the 911 caller's information that armed men had gone into a vacant house with guns, combined with the shots Sgt. Holcomb heard as he approached the house, created probable cause to believe some crime was being committed; if not burglary, then illegal entry under 21 O.S. §1438 and/or malicious mischief under 21 O.S. §1760.

While the first and third *Graham* factors may be significant in specific cases, the second factor, whether the suspect posed an immediate threat, is undoubtedly the most important factor in determining the objective reasonableness of an officer's use of force. *Pauly* at 1215-1216; *Palacios* at 1256; *Taylor* at 763; *Redd* at *11; *Valverde* at 1061. This is particularly true in cases where the issue is whether it was reasonable for an officer to believe he faced a threat of serious physical harm. *Valverde* at 1061. If it reasonably appears to the officer that an individual is about to shoot at close range, it becomes insignificant whether the individual was originally suspected of a minor crime or even no crime at all. *Taylor* at 763; *Valverde* at 1061. Similarly, anyone who appears to be ready to shoot an officer certainly appears to be ready to resist arrest. *Valverde* at 1061. As the Tenth Circuit has consistently recognized, "an officer's use of deadly force in self-defense is not constitutionally unreasonable." *Jiron v. City of Lakewood*, 392 F. 3d 410, 415 (10th Cir. 2004) quoting *Romero v.*

Board of County Commissioners, 60 F.3d 702, 703-04 (10th Cir. 1995).

In the instant case, the district court recognized that the second *Graham* factor is the most important factor in determining the objective reasonableness of an officer's use of force. Order, p. 13, App. Vol. II, p. 510, citing *Valverde* at 1060-1061. However, the court erred in concluding that, if a reasonable jury could find Clerkley did not have a gun in his hand when he was shot, then that factual dispute precludes summary judgment. See, Order p. 13, App. Vol. II, p. 510. *Taylor* holds otherwise. Even if it is undisputed that a suspect was unarmed at the time of a shooting, that does not resolve whether the officer violated the suspect's constitutional rights. See, *Taylor* at 764-765. Instead, the salient question is whether the officer's mistaken perception that the suspect was about to use a firearm was reasonable. *Id.* at 765. It is somewhat surprising that the district court cites both *Valverde* and *Taylor,* but does not discuss the facts of either case, both of which strongly support Sgt. Holcomb's position.

In *Valverde*, the suspect reached into his shorts and pulled out a gun at waist level. *Valverde* at 1057. Less than a second later, without giving any verbal warning or command, the defendant officer fired five shots in rapid succession. *Id.* The district court initially denied summary judgment because, construing the video evidence in the light most favorable to plaintiff, Valverde had discarded his firearm

and was in the process of raising his hands when he was shot. *Id.* The Tenth Circuit reversed and granted the officer's motion for qualified immunity, stating the district court "failed to consider that allowance needs to be made for the fact that the officer must make a split-second decision" and "failed to appreciate that the facts must be viewed from the perspective of the officer." *Id.* at 1062.

As *Valverde* recognizes, an officer does not violate the Fourth Amendment even when in retrospect it is clear that the officer made a mistake in shooting someone who did not pose a threat at the precise moment of the shot. *Id.* at 1064; *Thomas v. Durastanti*, 607 F. 3d 655, 666 (10th Cir. 2010) (An officer may be found to have acted reasonably even if he has a mistaken belief as to the facts establishing the existence of exigent circumstances.) The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm. *Taylor* at 66; *Valverde* at 1064. It is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. The Constitution is not blind to the fact that police officers are often forced to make split-second judgments. *Valverde* at 1060, quoting *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1775, 191 L. Ed. 2d 856 (2015). This is true even when, judged with the benefit of hindsight, the officer may have made some mistakes or used force that in retrospect seems unnecessary. Therefore, courts are, and should be,

particularly deferential to the split-second decisions police must make in situations involving deadly threats. *Taylor* at 762; *Valverde* at 1060.

While the suspect in *Valverde* was armed, several of the decisions cited by *Valverde* to illustrate this principle involve suspects who were not. These include *Slattery v. Rizzo*, 939 F. 2d 213, 214-217 (4th Cir. 1991) (officer was justified in shooting a suspect who turned towards the officer with his hands partially closed around an object that, although suspected to be a gun, was actually a beer bottle); and, *Lamont v. New Jersey,* 637 F. 3d 177, 179 (3rd Cir. 2011) (officers reasonably used deadly force against a suspect who suddenly pulled his right hand out of his waistband as if drawing a gun, even though it turned out the object he was holding was a crack pipe). If it is reasonable to mistake a beer bottle or a crack pipe for a gun, it is certainly reasonable to mistake a BB gun for a real firearm. This is particularly true for BB guns like those in the instant case which were designed to look like real firearms. See, App. Vol. I, pp. 224-225; App. Vol. II, p. 303.

In *Taylor*, someone called 911 to report a suspect "had flashed a gun." *Taylor* at 747. The defendant officer heard a radio transmission from dispatch that a man located at a particular intersection had "flashed a gun" but did not make a threat. Dispatch stated the man was accompanied by an associate, described the two suspects and what they were wearing, and stated they were moving west. *Id.* at 748.

The officer observed three individuals whom he believed matched the description given by dispatch, approximately two blocks west of the original reported location and began to follow them while waiting for backup. *Id.* Once backup arrived, the officers ordered the men to stop and show their hands. Two complied but Taylor turned and walked away. He appeared to be digging in his waistband, and then turned to face the officers. *Id.* at 749-750. The defendant officer told the suspect three times to remove his hand from his waist band. Taylor then rapidly removed his left hand from his waistband, lifting his shirt and exposing his torso, and simultaneously withdrew his right hand from his waistband in a motion that was "consistent with the drawing of a gun." *Id.* at 750. In response, the defendant officer shot Taylor twice, firing in quick succession. *Id.* at 752. When he was subsequently searched, no gun was found on Taylor's body. *Id.* at 751.

However, the fact that the suspect was "actually unarmed" was irrelevant because the officer "did not and could not have known this." *Taylor* at 775. Despite the absence of a weapon, the Tenth Circuit found the defendant officer's use of deadly force was reasonable, stating:

> Tragically, Officer Cruz's perception that Mr. Taylor posed a mortal threat was mistaken. But Officer Cruz's perception was nevertheless reasonable. An officer's split-second decision to use deadly force against the suspect was reasonable in light of the officer's well-founded, though mistaken, belief that the suspect was reaching for a handgun. (Citations and quotations omitted) *Taylor* at 776.

In the instant case, Clerkley and his friends did more than "flash" their BB guns. They were actually shooting the guns when Sgt. Holcomb arrived at the scene and approached the house. Sgt. Holcomb did have some suspicion that the shots he was hearing as he approached the house might be from a cap gun. Order, p. 3, App. Vol. II, p. 500; Ex. 3 at :0052 to 00:54 and 1:13 to 1:16. However, he did not have any way to corroborate or dispel this suspicion in the less than twenty seconds between when he heard the shots and when he saw what he perceived to be a black gun pointed at him. There was no visual clue, such as an orange tip, that the gun was not real and, as the Fifth Circuit recognized in *Garza v. Briones*, 943 F. 3d 740, 745-746 (5th Cir. 2019), a mistaken assumption that the gun was "only a BB gun" could have been dangerous or even deadly. *Taylor* is the most recent in a long line of Tenth Circuit cases confirming the well-established principle that an officer has a right to act in self-defense even in circumstances where, with benefit of hindsight, it may appear the suspect did not pose a threat of serious physical harm to the officer or others.

In determining whether Clerkley posed an immediate threat to Sgt. Holcomb, the district court considered the four factors outlined in *Larsen*. These are (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with

the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect. Order, p. 12, App. Vol. II, p. 508, citing *Larsen* at 1260. While the *Larsen* factors are important, no one factor is controlling; they are intended as "aids" in making the ultimate determination of reasonableness from the perspective of an officer on the scene. *Valverde* at 1061. If a suspect is drawing a gun to fire at an officer, the second, third and fourth factors "would obviously be satisfied." *Id. Taylor, Valverde* and *Redd* demonstrate the flaws in the district court's application of the four *Larsen* factors.

With respect to the first *Larsen* factor, Sgt. Holcomb gave the command "SHOW ME YOUR HANDS! DROP IT!" immediately prior to firing. Order, p. 3, App. Vol. II, p. 500; Ex. 3 at 1:26 to 1:28. Under *Redd,* whether or not an officer gave a suspect a reasonable amount of time to comply must be considered in light of the officer's reasonable perception that the suspect was drawing a pistol on him. *Redd* at *12. Where an officer's delay could result in his own death or serious injury, his decision to file without allowing a suspect further time to comply is reasonable. *Id.* See also, *Hansen v. Dailey*, 2021 WL 5493058 (D. Kan Nov. 23, 2021) affirmed at 2023 WL 7212155 (10th Cir. November 2, 2023), which granted summary judgment to an officer who fired his first shot approximately 0.17 seconds after warning a driver to stop, "because there was no time to give further warnings and

still use force to prevent potential injury" to another officer. *Id.* at *4, *13. The officer "gave all the warning the circumstances reasonably permitted." *Id.* at *13. The warning time was short in the instant case, but as in *Redd* and *Hansen,* Sgt. Holcomb gave all the warning the circumstances reasonably permitted when he saw a suspect with what appeared to be a gun pointed in his direction. As *Taylor, Valverde,* and *Tucker* recognize, Sgt. Holcomb was not required to gamble his life on a bet that he could wait longer but still pull the trigger more quickly than Clerkley.

The relevant issue for purposes of qualified immunity is not whether Clerkley actually "ignored or deliberately disobeyed Holcomb's commands," see Order, pp. 14-15, App. Vol. II, pp. 511-512, but whether it was reasonable for Sgt. Holcomb to believe Clerkley refused to comply with the commands. See, *Taylor* at 748, n.1 (disregarding information that the decedent may have been wearing earphones which prevented him from hearing the defendant officers' commands because this information was not available to the officers). While Clerkley may have "told the investigators" after the fact that he held his hands up after the shooting, see, Order, p. 15, App. Vol. II, p. 512, this action is not visible on Holcomb's BWC. See, Ex. 3 at 1:26 to 1:33. Thus, if it occurred, it was not part of "the information [Sgt. Holcomb] had at the time of the encounter." For these reasons, the district court erred in concluding that the first *Larsen* factor favored Clerkley.

The district court also erred in finding the second *Larsen* factor favored Clerkley. The finding "that a reasonable jury could conclude that the footage and the still-framed photographs do not show that Clerkley was holding something black in his hand," see Order, p. 15, App. Vol. II, p. 15, is contrary to the video evidence because the zoomed still-frame from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand. App. Vol. I, p. 212. It may not be possible to determine from the BWC video exactly what this object is, although the shape is certainly consistent with a handgun, but the still-framed photograph clearly shows that Clerkley had *something* in his hand as he walked in Holcomb's direction. Sgt. Holcomb perceived this black object in the suspect's hand to be a gun pointed at him or in his direction. App. Vol. I, pp. 161, 172-173, 175-176, 182-183, 190-191.

While the still and zoom shots are helpful, it is important to remember that Sgt. Holcomb did not have the time the Court and the parties have to view and review the scene to identify the black object. As *Cunningham v. Shelby County*, 994 F. 3d 761, 767 (6th Cir. 2021) recognizes, Sgt. Holcomb's "perspective did not include leisurely stop-action viewing of the real-time situation [he] encountered." See also, *Hansen* at *15 (It is one thing to replay videos of the incident in slow-motion "in the peace of a judge's chambers;" it is another matter to consider the real-world judgment the officer was forced to make.) *Estate of Harmon v. Salt Lake City,* 2023

WL 5334118 (D. Utah August 18, 2023) recently granted qualified immunity based on still frame shots from the defendant officer's BWC video very similar to the images from Sgt. Holcomb's BWC, stating:

> Plaintiffs point out that in the bodycam footage, a knife is not visible in Mr. Harmon's hand and Mr. Harmon cannot be heard threatening the officers. But the bodycam footage is dark and grainy and at many points throughout the videos Mr. Harmon's voice cannot be clearly heard. Further, the bodycam footage shows Mr. Harmon in a position that looks very much like an individual brandishing a knife, and while it does not clearly show that he was holding a knife, it also does not clearly show that he was *not* holding a knife. Rather, the footage is simply too dark and grainy to make out what, if anything, Mr. Harmon has in his hand. And the bodycam footage clearly does show a knife next to Mr. Harmon's right arm after he had been shot and fallen to the grass. Regardless of whether the bodycam footage, standing alone, conclusively establishes that Mr. Harmon was holding a knife, it thus does not contradict the officers' testimony or provide evidence that could support reasonable jury findings that Mr. Harmon was not holding a knife or that he did not threaten the officers. *Harmon* at *6.

Similarly, in the instant case, Sgt. Holcomb's BWC video shows Clerkley in a position where he is facing Holcomb, with his right hand pointed forward. See, App. Vol. I, pp. 211-212; Ex. 3 at 1:25 to 1:28. In other words, Clerkley is "in a position that looks very much like" an individual pointing or raising a gun. Even if the BWC video "does not clearly show that he was holding a [gun], it also does not clearly show that he was *not* holding a [gun.]" Even if the BWC standing alone does not conclusively establish Clerkley was holding a gun, it does not contradict Sgt. Holcomb's testimony or "provide evidence that could support reasonable jury

findings that [Clerkley] was not holding a [gun]." Therefore, the district court erred in concluding that the second *Larsen* factor favored Clerkley.

With respect to the third *Larsen* factor, the district court correctly concluded this factor favored Sgt. Holcomb. While Holcomb was behind a fence, the fence was wooden with holes. Therefore, no reasonable jury could conclude the fence provided sufficient cover to protect Sgt. Holcomb if Clerkley fired at him. Order, p. 16; App. Vol. II, p. 513.

However, the district court erred in concluding the fourth *Larsen* factor, the manifest intentions of the suspect, favored Clerkley. As *Taylor* recognizes, the term "manifest" is of central importance to the understanding and application of this factor. The term is consonant with the oft-stated, objective nature of the Fourth Amendment reasonableness analysis. *Taylor* at 770. The focus of the inquiry is not on what a suspect *subjectively* intended"—be it "with his hand movements" or otherwise, but on how a reasonable officer on the scene would have assessed the manifest indicators of the suspect's intentions--that is, the suspect's actions. *Id.*

The district court erred by focusing solely on whether Sgt. Holcomb knew Clerkley had climbed through the window, see Order, p. 16; App. Vol. II, p. 513, rather than the totality of the information known to Sgt. Holcomb. While it is true Sgt. Holcomb's BWC video does not show Clerkley crawling out the window,

Holcomb did see Clerkley in the fenced backyard of a house the 911 caller had identified as vacant. Clerkley fit the 911 caller's description of the suspect with a gun, which was a black male in a gray hoodie. Sgt. Holcomb knew Officer Tschetter had just given the commands "HEY, POLICE DEPARTMENT, COME ON OUT!" and "HEY, THIS IS THE POLICE DEPARTMENT! COME OUT NOW!" from in front of the house. Ex. 3 at 1:00 to 1:21; Ex. 4 at 1:10 to 1:30. Regardless of Clerkley's explanation that he just "wanted to see what was in the backyard," see Order, pp. 5-6, App. Vol. II, pp. 502-503, the most logical assumption, in the split-second Sgt. Holcomb had to assess and react to Clerkley's presence in the backyard, is that Clerkley was trying to avoid the police. See, *United States v. Mackin,* 2016 WL 6678350 (N.D. Ind. November 14, 2016) at *3 (It was reasonable to believe that a man who quickly exited the back door was trying to evade the police officer coming to the front door.). Whatever Clerkley's subjective intentions were for "exploring" the back yard it was reasonable for Sgt. Holcomb to perceive Clerkley's actions as hostile. Therefore, the district court erred in concluding that the fourth *Larsen* factor favored Clerkley.

As *Taylor* and *Valverde* make clear, the appellate court is not bound by a district court's ruling that the evidence presented would support a particular finding of fact when there is clear contrary video evidence of the incident at issue. *Taylor* at

757; *Valverde* at 1059, citing *Scott* at 1776. Additionally, in reviewing the facts shown in the video, the Court is not required to accept a plaintiff's *interpretation* of those facts. *Kapinski* at 905. See also, *Cunningham* at 765 (When the events in a case are recorded on video, the facts are viewed in the video's light, not in a light favorable to the plaintiff, to determine whether the officer's perception of danger was consistent with the video viewed in real time.)

As *Taylor* also makes clear, the question of whether Clerkley was *actually* holding a gun at the time he was shot is not the same question as whether it was reasonable for Sgt. Holcomb to *believe* Clerkley was holding a gun. The controlling issue with respect to qualified immunity is whether it was reasonable for Sgt. Holcomb to perceive that his life was in danger. The district court described the issue of whether a jury could find Sgt. Holcomb's use of deadly force to violate the Fourth Amendment as a "close question." Order, p. 17, App. Vol. II, p. 515. However, it is not a question which should go to the jury. The reasonableness of an officer's use of force is a legal issue which may be resolved on an interlocutory appeal. *Anderson* at 1159. Consistent with *Anderson, Taylor, Valverde* and the other authority discussed above, this Court should reverse the trial court and rule as a matter of law that Sgt. Holcomb's use of deadly force actions did not violate the Fourth Amendment.

PROPOSITION II

APPELLANT HOLCOMB IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HOLCOMB'S USE OF DEADLY FORCE DID NOT VIOLATE CLEARLY ESTABLISHED LAW

Whether Sgt. Holcomb's use of deadly force was in violation of the Fourth Amendment may be a "close question." See, Order, p. 17, App. Vol. II, p. 514. The question of whether Sgt. Holcomb's actions violated clearly established law is not. The district court's analysis of this issue is based on *Finch v. Rapp,* 38 F. 4th 1234 (10th Cir. 2022). However, *Finch* was decided more than three years after the March 10, 2019 shooting in the instant case. As the Tenth Circuit case reaffirmed in *Lewis v. City of Edmond*, 48 F. 4th 1193 (10th Cir. 2022), another deadly force case decided shortly after *Finch,* cases decided after the alleged constitutional violation are of "*no use* in the clearly established inquiry." *Id.* at 1199, quoting *City of Tahlequah v. Bond*, 595 U.S. 9, 142 S. Ct. 9, 12, 211 L.Ed. 170 (2021) (emphasis by Court). A reasonable officer is not required to foresee judicial decisions that do not yet exist. *Lewis* at 1199, citing *Kisela v. Hughes*, 584 U.S. ___, 138 S. Ct. 1148, 1154, 200 L. Ed. 2d 449 (2018).

The district court recognized that *Finch* by itself could not establish Sgt. Holcomb's use of deadly force violated clearly established law because the case was decided after the shooting in this case. Nevertheless, the court held *Finch* was

instructive because *Finch* relied on cases decided before the shooting. Order, p. 18, App. Vol. II, p. 515, citing *Finch* at 1243. The district court identified the Tenth circuit cases relied upon in *Finch* as *Zuchel v. Spinharney,* 890 F. 2d 273 (10th Cir. 1989), *Zia Trust Co. ex rel Causey v. Montoya,* 597 F. 3d 1150 (10th Cir. 2010); *Walker v. City of Orem,* 451 F. 3d 1139, 1157 (10th Cir.) and *King v. Hill*, 615 Fed. Appx. 470 (10th Cir. 2015). See, Order, p. 19, n. 10, App. Vol. II, p. 515. However, the district court failed to explain how or why any of these cases would have placed a reasonable officer in Sgt. Holcomb's position that the use of deadly force was clearly prohibited *in the particular circumstances before him.*

Claims of excessive force turn "very much on the facts of each case," and a police officer is entitled to qualified immunity unless existing prior precedent "squarely governs" the specific facts at issue. *Lewis* at 1198. Specificity is particularly important in the context of excessive force claims, where police officers must make "split-second judgments" in circumstances that are "tense, uncertain and rapidly evolving." *Id.* This is because, in the Fourth Amendment context, it is sometimes difficult for an officer to determine how the relevant legal doctrine of excessive force will apply to the factual situation the officer confronts. *Bond* at 12, citing *Mullenix* at 12. Precedent is considered on point if it involves materially similar conduct or applies with obvious clarity to the conduct at issue. *Irizarry v.*

Yehia, 38 F. 4th 1282, 1294 (10th Cir. 2022). Clearly established law must remain moored in a specific set of facts. *Crane v. Utah Department of Corrections,* 15 F. 4th 1296, 1303 (10th Cir. 2021).

While the precise degree of factual similarity necessary to determine whether a case "squarely governs" the circumstances faced by an officer may be difficult to pinpoint, at a bare minimum the enquiry should be limited to deadly force cases in which an officer shoots an individual who has been observed with or reported to have a gun. *Zuchel, Zia Trust, Walker* and *King* do not meet even this minimal degree of similarity.

In *Zuchel,* the defendant officer approached a man involved in a confrontation with a group of teenagers. Zuchel pulled something out of his pocket which the teenagers believed it was a knife, and they yelled to the officers that Zuchel had a knife; the "knife" turned out to be a pair of fingernail clippers. *Zuchel* at 274. In *Zia Trust,* the defendant officer responded to a family dispute. While dispatch reported there were firearms at the residence, the use of deadly force was predicated upon the officer's belief that the suspect was trying to drive his van into the officer. *Zia Trust* at 1153. In *Walker,* the decedent was reported to be suicidal, but not to be threatening anyone else, and was holding a small knife to his wrist. Although the defendant officer thought he saw a gun immediately prior to the shooting, dispatch

had reported the suspect was unarmed and witnesses at the scene were yelling to the officer that Walker did not have a gun. *Walker* at 1160. Finally, in *King,* the suspect was mentally ill and the 911 caller had specifically stated there were no weapons in the residence. The defendant deputy did not see a gun in the suspect's hands, which were visible according to eyewitnesses, but thought the suspect might have a long gun concealed under a jacket draped over his arm. *King* at 471-472.[10]

Even if *Finch* could be used as precedent, there are critical factual differences between *Finch* and the instant case. Unlike Officer Tschetter in the instant case, none of the officers in *Finch* identified themselves as police officers when they approached Finch's residence. *Finch* at 1239. And because Finch was in his own home and committing no crime when police arrived in response to a hoax "swatting" call, *Id.* at 1238, Finch, unlike Clerkley, had no reason to immediately recognize the person or persons yelling commands, such as "show your hands," was a police officer. Officer Rapp was approximately forty yards away when he shot Finch. *Id.* at 1239. Additionally, Finch walked out on to his front porch when the police approached, rather than crawl out a window as Clerkley did. *Id.*

---

[10]Additionally, as an unpublished opinion, *King* "provides little support for the notion that the law is clearly established" on an issue. See, *Grissom v. Roberts,* 902 F. 3d 1162, 1168 (10th Cir. 2018).

Crawling out a back window immediately following an announcement that police are in front of the house is potentially suspicious behavior. While it is true Sgt. Holcomb did not see Clerkley crawl out the window, see, Order, p. 16, App. Vol. II, p. 517, Holcomb did see Clerkley in the fenced backyard of a house the 911 caller had identified as vacant. And Clerkley fit the 911 caller's description of the suspect with a gun, which was a black male in a gray hoodie. See, Order, pp. 2-3, App. Vol. II, pp. 499-500. Even if Clerkley had no malevolent intentions, see, Order, p. 16, App. Vol. II, p. 517, Clerkley's subjective intent is not relevant. See, *Taylor* at 770. The focus of the Court's inquiry is not on what Clerkley subjectively intended, but on "how a reasonable officer on the scene would have assessed the manifest indicators" of Clerkley's actions. *Id.* There was no innocent or benign explanation for Clerkley's presence in the yard, and therefore it was reasonable for Sgt. Holcomb to perceive his actions as hostile.

The most important distinction between *Finch* and the instant case is that Sgt. Holcomb was not relying solely on the information provided by dispatch or the 911 caller. Unlike the officers in *Finch,* Sgt. Holcomb and Officer Tschetter personally heard shots as they approached the house. See, Order, p. 13, App. Vol. II, p. 500; Ex. 3 at 00:55 to 1:10; Ex. 4 at 1:05 to 1:25. The reasonableness inquiry is always whether, from the perspective of a reasonable officer on the scene, the totality of

circumstances justified the use of force. *Lewis* at 1200, quoting *Arnold* at 789. The circumstances in the instant case are that Sgt. Holcomb was facing an individual who matched the description of an armed suspect shortly after hearing shots fired.

Both Clerkley and the district court rely on the general rule that an officer, even when responding to a dangerous reported situation, may not shoot an unarmed and unthreatening suspect. See, App. Vol. II, p. 381; Order, p. 19, App., Vol II, p. 517. But defining clearly established law at this level of generality "contravenes the settled principles the Supreme Court has instructed [courts] to apply." *Lewis* at 1199. Neither Clerkley nor the district court cited, and Appellant Holcomb has not found, any Supreme Court or Tenth Circuit precedent which "squarely governs" the facts of this case and which would place every reasonable officer on notice that deadly force was inappropriate even when responding to a felony burglary call and facing an individual who met the description of an armed burglary suspect mere seconds after hearing shots fired. In the absence of such precedent, Sgt. Holcomb is entitled to qualified immunity.

Finally, the district court erred in suggesting the issue of whether the law was clearly established could or should be decided by a jury. Quoting *Finch,* the court held "a reasonable jury could conclude that Holcomb shot Clerkley 'even when a reasonable officer would have known [Clerkley] was unarmed and posed no threat'

and thus, Holcomb 'violated clearly established law.'" Order, p. 20, App. Vol. II, p. 517. The court concluded its analysis by stating "[t]he record, viewed in Clerkley's favor, discloses facts from which a reasonable jury could find a violation of Clerkley's Fourth Amendment rights by Holcomb *and that the right was clearly established at the time of the violation*." Order, p. 20, App. Vol. II, p. 517 (emphasis added). This was reversible error because it is well-established in the Tenth Circuit that whether the law is clearly established is a legal question that must be decided by a court rather than a jury.

In *Lutz v. Weld County School District,* 784 F. 2d 340 (10th Cir. 1986), this Court held "We do not believe a jury is competent to decide the 'state of the law.'" *Lutz* at 343, quoting *McKinney v. Trattles,* 732 F. 2d 1320, 1323 (10th Cir. 1986). Instead, "[w]hether the law in question was clearly established when the conduct complained of occurred is a legal issue to be resolved by the court." *Lutz* at 343, quoting *Miller v. City of Mission,* 705 F. 2d 368, 375 n. 6 (10th Cir. 1983). See also, *England v. Hendricks,* 880 F. 2d 281, 284 (10th Cir. 1989) ("The court is to determine what the current applicable law is and whether that law was clearly established at the time the official's action occurred.")

Maestas v. Lujan, 351 F. 3d 1001, 1007 (10th Cir. 2003) recognized that there are exceptional circumstances in which historical facts are so intertwined with the

law that a jury question may be presented regarding the reasonableness of a defendant's actions. But even under such special circumstances, "whether plaintiff's claim asserts a violation of a constitutional right and whether this right was clearly established at the time remain questions of law. *Id.* at 1008. Legal questions are reserved to the courts. *Gonzales v. Duran,* 590 F. 3d 855, 860 (10th Cir. 2009). Under *Gonzales,* the approach taken by the district court in the instant case, of "allow[ing] the jury to determine what the clearly established law is, what the defendant actually did, and whether the defendant's conduct was objectively reasonable in the light of the clearly established law found by the jury," is "clearly inappropriate." *Id.*

The doctrine of qualified immunity is intended to protect public employees not only from liability, but also from the burdens of litigation. *Cummings v. Dean*, 913 F. 3d 1227, 1239 (10th Cir. 2019); *A.M. v. Holmes*, 830 F. 3d 1123, 1134 (10th Cir. 2016); *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015). Therefore, an essential component of the protection afforded by the doctrine, the right not to *stand trial,* is lost if summary judgment is improperly denied and the official is subjected to litigation. *Valverde* at 1058, citing *Mitchell* at 527. If the issue of whether Sgt. Holcomb's actions were barred by clearly established law is inappropriately left to the jury, even if the jury were to find in Sgt. Holcomb's favor, he will have lost the right not to stand trial.

As *Anderson, Taylor,* and *Valverde* recognize, Sgt. Holcomb was, and still is, entitled to a presumption of immunity. To overcome this presumption, Clerkley was required to establish not only that (1) Sgt. Holcomb violated his constitutional right by using deadly force but also that (2) the right was clearly established at the time of the shooting. While the district court had discretion to decide *the order* in which to consider the two prongs of the qualified immunity standard, the court did not have the discretion to decide *not* to consider the latter issue and instead leave it to the jury to decide "what the clearly established law is." Consistent with the authority discussed above, this Court should reverse the trial court and rule as a matter of law that Sgt. Holcomb's actions did not violate clearly established law.

IX. CONCLUSION

Over thirty years ago, the Supreme Court recognized the cold reality 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." *Taylor* at 747, citing *Graham* at 397. In those circumstances, the Fourth Amendment is clear that officers need not wait until they see the barrel of a gun before using deadly force to protect themselves or others. *Taylor* at 747, citing *Larsen* at 1260. The Fourth Amendment did not require Sgt. Holcomb to gamble his life on the possibility that the black object he saw in Clerkley's hand,

seconds after hearing shots fired, might be something other than a gun. The force used by Sgt. Holcomb was objectively reasonable under the circumstances he faced. For the reasons discussed above, this Court should reverse the district court and hold Sgt. Holcomb is entitled to summary judgment on the grounds of qualified immunity.

X. STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellant Kyle Holcomb requests oral argument. He believes oral argument is necessary to ensure that the legal determination of whether his use of deadly force was prohibited by clearly established law is considered with the degree of specificity required by *City of Tahlequah v. Bond,* 595 U.S. 9, 142 S.Ct. 9, 211 L.Ed. 2d 170 (2021) and *White v. Pauly,* 580 U.S. 73, 137 S. Ct. 548, 196 L.Ed.2d 463 (2017). The determination of whether Sgt. Holcomb is entitled to qualified immunity should be made at the earliest possible stage of litigation; oral argument will help this Court make that determination.

Respectfully submitted,

s/ Stacey Haws Felkner
Stephen L. Geries, OBA No. 19101
Stacey Haws Felkner, OBA No. 14737
COLLINS, ZORN & WAGNER, PLLC
429 N.E. 50th, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078
Email: slg@czwlaw.com; shf@czwlaw.com

ATTORNEYS FOR DEFENDANT/
APPELLANT KYLE HOLCOMB

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 11,830 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

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 2016 in 14 point Times New Roman font.

s/ Stacey Haws Felkner
Stacey Haws Felkner

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that all required privacy redactions have been made and, with the exception of those redactions, the digital submission is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with Trend Micro Security Agent, updated November 13, 2023, and, according to the program, is free of viruses.

s/ Stacey Haws Felkner
Stacey Haws Felkner

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that on November 13, 2023, the foregoing Opening Brief was filed electronically the CM/ECF system with the Court and that the requisite number of true and correct copies of the Opening Brief will be forwarded by Federal Express to the Court within five business days of the Court issuing notice that the electronic Opening Brief has been accepted:

Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Further, pursuant to Fed. R. App. P. 25(d)(1), I hereby certify that on November 13, 2023, which caused the following parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

Daniel E. Smolen, email at: danielsmolen@ssrok.com
Bryon D. Helm, email at: bryonhelm@ssrok.com
SMOLEN & ROYTMAN
701 Cincinnati Avenue
Tulsa, OK 74119
Attorneys for Appellee Lorenzo Clerkley, Jr.

Richard N. Mann, email at: Richard.mann@okc.gov
Katie Goff, email at: Katie.goff@okc.gov
Assistant Municipal Counselors
200 North Walker, Suite 400
Oklahoma City, OK 73102
Attorney for Defendant City of Oklahoma City

s/ Stacey Haws Felkner
Stacey Haws Felkner