

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

MARITZA AMADOR, INDIVIDUALLY	§	
AND AS REPRESENTATIVE OF THE	§	
ESTATE OF GILBERT FLORES AND	§	
AS NEXT FRIEND OF MINOR R.M.F.,	§	
VANESSA FLORES, MARISELA	§	
FLORES, CARMEN FLORES AND	§	
ROGELIO FLORES	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.5:15-CV-00810RP
V.	§	
	§	
BEXAR COUNTY, GREG VASQUEZ	§	
Individually and in his Official Capacity	§	
and ROBERT SANCHEZ, Individually	§	
and in his Official Capacity	§	
Defendants,	§	

**PLAINTIFFS' RESPONSE TO DEFENDANTS DEPUTIES GREG VASQUEZ AND
ROBERT SANCHEZ' MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE ROBERT L. PITMAN:

COMES NOW Plaintiffs Maritza Amador, Individually and as Representative of the Estate of Gilbert Flores and as Next Friend of Minor R.M.F., Vanessa Flores, Marisela Flores, Carmen Flores and Rogelio Flores, and files this their Response to Defendants Deputies Greg Vasquez and Robert Sanchez' Motion for Summary Judgment, and in support thereof would show the Court the following:

**I.
SUMMARY OF THE ARGUMENT**

Defendants Deputies Gregory Vasquez ("Vasquez") and Robert Sanchez ("Sanchez") are not entitled to qualified immunity on Plaintiffs' excessive-force claims under 42 U.S. § 1983. Vasquez

and Sanchez violated Gilbert Flores's Fourth Amendment constitutional right to be free from unreasonable seizure. Vasquez and Sanchez' use of deadly force against Gilbert Flores was clearly excessive to the need and objectively unreasonable because Gilbert Flores did not pose an immediate threat of death or bodily injury to Vasquez, Sanchez or anyone else at the time Vasquez and Sanchez shot and killed Gilbert Flores in the driveway of his home on August 28, 2015. In August 2015, the law was clearly established that a police officer violates the Fourth Amendment by shooting a suspect who was surrendering and posing no immediate threat to the officers or others.

II.

Plaintiffs incorporate into their Response to Defendants Deputies Greg Vasquez and Robert Sanchez' Motion for Summary Judgment for all purposes the following exhibits:

- | | |
|----------------|---|
| (1) Exhibit A | Flash drive containing the video of the shooting of Gilbert Flores; |
| (2) Exhibit B | Incident Detail Report (BC 70886) |
| (3) Exhibit C | Bexar County CID Investigative Report; |
| (4) Exhibit D | Deposition of Deputy Greg Vasquez; |
| (5) Exhibit E | Affidavit of Expert Dr. Ron Martinelli; |
| (6) Exhibit F | Affidavit of Forensic Video Analyst Grant Fredericks; |
| (7) Exhibit G | Deposition of Deputy Robert Sanchez; |
| (8) Exhibit H | Bexar County's Use of Force Policy |
| (9) Exhibit I | Sgt. Baeza PSI Investigative Report – No Policy Violations |
| (10) Exhibit J | Deposition of Bexar County PSI Sgt. Baeza |
| (11) Exhibit K | Deposition of Sgt. Pedraza |
| (12) Exhibit L | FlashdriveForensic Video Analyst Grant Fredericks's Still Frames of Video |
| (13) Exhibit M | Arcadian Ambulance Records |
| (14) Exhibit N | Bexar County Schematic |

The above Exhibits A through N are hereby incorporated by reference for all purposes.

III. DETAILED FACTUAL BACKGROUND

On August 28, 2015, the decedent, Gilbert Flores, was at the residence located at 24414 Walnut Pass in San Antonio, Bexar County, Texas¹. There was a domestic disturbance at the residence and a call to 911 for assistance was made². Defendants Vasquez and Sanchez were dispatched to the residence located at 24414 Walnut Pass, while in the course and scope of their employment with the Bexar County Sheriff's Department, where they encountered the decedent³. Defendant Vasquez was the first to arrive at the scene and went to the front door of the residence⁴. Prior to arriving, both officers had been told by Sheriffs' dispatch that Mr. Flores was upset and had indicated that he wanted to commit "suicide by cop"⁵. There was an initial altercation between Mr. Flores and Deputy Vasquez⁶. Thereafter, Deputy Sanchez arrived on the scene⁷. During the altercation, the deputies reported that Mr. Flores was going back into the house⁸. At that point, Deputy Sanchez fired a shot at Mr. Flores but missed⁹. Ultimately, the deputies radioed that Mr. Flores was attempting to enter Deputy Vasquez's patrol car¹⁰. Gilbert Flores then proceeded to move away from Deputy Vasquez's patrol vehicle and walk towards the edge of his driveway¹¹. Gilbert Flores is observed to stop, turn to his right and pull the knife out of his waistband and walk away from Deputies Sanchez and Vasquez¹². Flores then exchanged the knife from his right hand to his left hand while his hands were down at his side¹³. At this moment, Deputy Vasquez was holding his ballistic shield and pointing his handgun at Flores while approximately 12'10" from

¹ Exhibit B; Incident Detail Report (BC 70886); Exhibit C; Bexar County CID Investigative Report P.5

² *Id.*

³ Exhibit C; Bexar County CID Investigative Report P.6

⁴ Exhibit B; Incident Detail Report (BC 70886)

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Exhibit D; Deposition of Deputy Vasquez P.51-52

⁹ Exhibit B; Incident Detail Report (BC 70886)

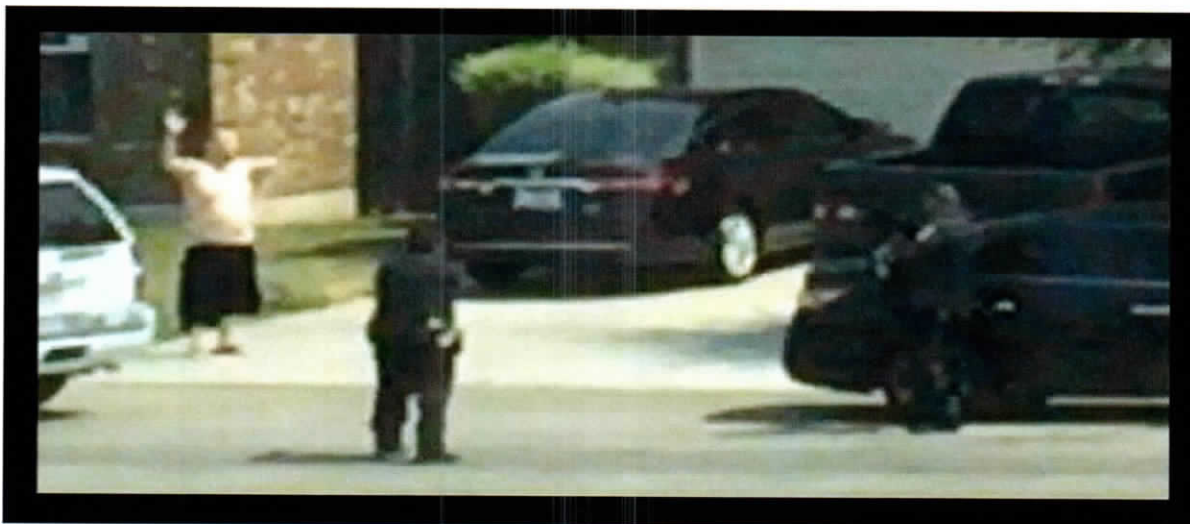
¹⁰ *Id.*

¹¹ Exhibit A; Eyewitness Fleming Video of the Shooting of Gilbert Flores

¹² *Id.*

¹³ *Id.*

the curb and between 21' and 29'2" away from Flores¹⁴. Vasquez was standing next to a black sedan parked on the curb and using said sedan as cover and an obstruction¹⁵. Deputy Sanchez was standing at the West apex of a "tactical triangle" with his handgun pointed at Flores and positioned approximately 14 feet to the left of Deputy Vasquez; 29 feet West of the curb and between 23 and 29 feet away from Gilbert Flores¹⁶. There was nothing behind Deputies Vasquez and Sanchez and they had plenty of room to move back and retreat¹⁷. Deputies Vasquez and Sanchez had their guns drawn and pointed directly at Gilbert Flores when Gilbert Flores raised both of his hands directly above his head with the knife "palmed" in his left hand¹⁸. Mr. Flores, still in the front yard in the driveway, gave up all resistance and proceeded to place both of his hands above his head, surrendering to the will of the deputies¹⁹.



Flores stands still with no forward motion or movement for nearly 5 seconds²⁰. Flores's hands are in the air and motionless prior to the shooting²¹. Moments after Flores's hands stopped moving above his head, Sanchez begins to turn his face in the direction of Vasquez²². Sanchez looks to

¹⁴ *Id.* and Exhibit E; Affidavit of Expert Dr. Ron Martinelli (29'2"); Exhibit N (Bexar County Schematic 21')

¹⁵ *Id.*

¹⁶ *Id.* and Exhibit E; Affidavit of Expert Dr. Ron Martinelli (29'2"); Exhibit N (Bexar County Schematic 21')

¹⁷ Exhibit A; Eyewitness Fleming Video of the Shooting of Gilbert Flores

¹⁸ *Id.* and Exhibit E; Affidavit of Expert Dr. Ron Martinelli

¹⁹ Exhibit A; Eyewitness Fleming Video of the Shooting of Gilbert Flores

²⁰ Exhibit F; Affidavit of Forensic Video Analyst Grant Fredericks

²¹ Exhibit A and Exhibit F

²² *Id.* and Exhibit L; Grant Fredericks Still Frames of Video

Deputy Vasquez and both Deputies testified that they talked moments before shooting Gilbert Flores and agreed that they were going to end this/this had gone on too long²³. Prior, Sanchez was facing in the direction of Flores as he raised his hands and held them in the air and then remained motionless²⁴. Sanchez then faced toward Flores and then turned his head to Vasquez and away from Flores after Flores had remained motionless²⁵. Deputy Vasquez fires the first shot at Flores while Flores is not in motion, his feet have been stationary for nearly 5 seconds and there is no forward momentum by Flores²⁶. Flores' hands were in the air and not in motion at the time of the first shot by Deputy Vasquez²⁷. Deputy Sanchez fired at Gilbert Flores immediately after Deputy Vasquez fired the first shot²⁸. Gilbert Flores collapsed to the pavement where he succumbed to the fatal gunshot wounds from Deputies Vasquez and Sanchez²⁹. Moments before Deputies Vasquez and Sanchez shoot Gilbert Flores, Deputy Estrada arrives on the scene as back-up, as his siren can be heard in the background of the video of the shooting³⁰.

IV. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

A district court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56. “A court considering a motion for summary judgment must consider all facts and evidence in the light most favorable to the nonmoving party.” *Haverda v. Hays Cty.*, 723 F.3d 586, 591 (5th Cir.2013). The court must accept as true the evidence of the nonmoving party and

²³ Exhibit G; Deposition of Deputy Robert Sanchez P. 170-188; Exhibit D; Deposition of Deputy Vasquez P.87-89; 158

²⁴ Exhibit A; Eyewitness Fleming Video of the Shooting of Gilbert Flores; Exhibit F; Affidavit of Forensic Video Analyst Grant Fredericks; Exhibit L; Grant Fredericks Optimized Still Frames of Video of Shooting

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Exhibit C; Bexar County CID Investigative Report;

³⁰ Exhibit B and Exhibit F

draw all justifiable inferences in that party's favor. *Mason v. Lafayette City-Par. Consol. Gov't*, No. 14-30021, 2015 WL 6988739, at *5 (5th Cir. Nov. 10, 2015). “However, to avoid summary judgment, the non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial.” *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir.2007). Furthermore, “when there is video evidence available in the record, the court should ‘view the facts in the light depicted by the videotape.’” *Harris v. Serpas*, 745 F.3d 767, 771 (5th Cir.2014) (quoting *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)), *cert. denied*, — U.S. —, 135 S.Ct. 137, 190 L.Ed.2d 45 (2014).

B. Qualified Immunity Standard

Defendants Deputies Vasquez and Sanchez have alleged that they are entitled to qualified immunity in this matter. In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, “[t]aken in the light most favorable to the party asserting the injury show the officer's conduct violated a [federal] right[.]” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The inquiry into whether this right was violated requires a balancing of “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.” *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see Graham, supra*, at 396.

The second prong of the qualified-immunity analysis asks whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Freeman v. Gore*, 483 F.3d 404, 410–411 (5th Cir. 2007). “[T]he salient question... is whether the state of the law at the time of the incident

provided “fair warning” to the defendants “that their alleged [conduct] was unconstitutional.” *Id.* at 741. In cases alleging unreasonable searches or seizures, the Supreme Court has instructed that courts should define the “clearly established” right at issue on the basis of the “specific context of the case.” *Saucier, supra*, at 201; *see also Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). Under either prong, courts may not resolve genuine issues of fact in favor of the party seeking summary judgment. *See Brosseau v. Haugen*, 543 U.S. 194, 195 n. 2 (2004) (per curiam); *Saucier, supra*, at 201; *Hope, supra*, at 733, n.1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a “judge’s function” at summary judgment is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249.

1. Defendants Deputies Vasquez and Sanchez Violated Plaintiff’s Fourth Amendment Constitutional Right to Be Free From Unreasonable Seizure

It is undisputed that Deputies Vasquez and Sanchez intentionally used deadly force against Gilbert Flores by shooting him in the driveway of his residence on August 28, 2015³¹. This act was clearly a seizure, implicating Flores’s Fourth Amendment rights. *Graham*, 490 U.S. at 394; *Bazan ex rel. Bazan v. Hidalgo County*, 246 F. 3d 481, 490 (5th Cir. 2001) (“apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment”) (quoting *Garner*, 471 U.S. at 7).

“For an excessive-force claim, a plaintiff clears the first prong of the qualified-immunity analysis at the summary-judgment stage by showing a genuine dispute of material fact that he sustained: ‘(1) an injury (2) which resulted from the use of force that was clearly excessive to the need and (3) the excessiveness of which was objectively unreasonable.’” *Clayton v. Columbia*

³¹ Ex. A; Video of the shooting of Gilbert Flores; Exhibit B; Incident Detail Report (BC 70886); Exhibit C; Bexar County CID Investigative Report P.6

Cas. Co., 547 Fed. Appx. 645, 649 (5th Cir. 2013) (quoting *Ramirez v. Martinez*, 716 F.3d 369, 377 (5th Cir. 2013)).

It is undisputed that Flores suffered an injury, to wit, two bullet wounds which caused his death, as a result of Vasquez and Sanchez' intentional use of deadly force against him³². Accordingly, the court need only consider whether the summary judgment evidence creates a genuine issue of fact as to whether Vasquez and Sanchez' use of deadly force was appropriate to the need, and thus, objectively reasonable, or clearly excessive and objectively unreasonable under the circumstances.

**2. Vasquez and Sanchez' Use of Force Against Gilbert Flores
Was Clearly Excessive to the Need and Objectively Unreasonable When Flores
Posed No Immediate Threat**

Whether Vasquez and Sanchez' use of deadly force was reasonable or clearly excessive under the Fourth Amendment is determined from the perspective of a reasonable officer on the scene, rather than with "the 20/20 vision of hindsight." *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008). To "gaug[e] the objective reasonableness of the force used by a law enforcement officer, [the court] must balance the amount of force used against the need for force." *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996) (citing *Spann v. Rainey*, 987 F.2d 1110, 1115 (5th Cir. 1993)). This balancing "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 he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). However, when an officer uses deadly force, the "objective reasonableness" balancing

³² Ex. M; Arcadian Ambulance Records

test is constrained. *Flores v. City of Palacios*, 381 F. 3d 391, 399 (5th Cir. 2004). It is objectively unreasonable to use deadly force “unless it is necessary to prevent [a suspect’s escape] and the officer has probable cause to believe that the suspect poses an immediate, significant threat of death or serious physical injury to the officer or others. *Garner*, 471 U.S. at 3.

It is also true that the United States Supreme Court has held that courts must look at the “totality of the circumstances” when assessing the reasonableness of a police officer’s use of force. *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9). The Fifth Circuit, however, has narrowed that test, holding that “[t]he excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer’s use of deadly force].” *Rockwell v. Brown*, 664 F. 3d 985, 993 (5th Cir. 2011) (quoting *Bazan*, 246 F.3d at 493) (emphasis in original). The Court in *Rockwell* emphasized that “[w]e need not look at any other moment in time.” *Id.* (emphasis added)

Just because deadly force may be appropriate at one point in time does not give an officer free reign to use deadly force at any time thereafter. This principle was illustrated by the Fifth Circuit in *Lytle v. Bexar County, Tex.*:

An exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased. *See Abraham*, 183 F.3d at 294 (“A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect.”); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (“When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.”); *see also Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) (“We therefore hold that force justified at the beginning of an encounter is not justified *even seconds later* if the justification for the initial force has been eliminated.”). Thus, even were we to assume that shooting at the Taurus was reasonable at the moment it was backing up toward O'Donnell, that does not necessarily make his firing at the vehicle when it was driving away from him equally reasonable. 560 F.3d 404, 413 (5th Cir. 2009).

As the court stated in *Cullum v. Siemens*, 2013 WL 5781203, (U.S. Dist.- W.D. Texas, San Antonio Div., 2013), quoting *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993), “When an officer

faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.” The court makes a clear distinction between using deadly force while the threat is still present and using deadly force after the threat has dissipated. *Cullem v. Seimens*, 2013 WL 5781203, (U.S. Dist.- W.D. Texas, San Antonio Div., 2013).

In *Cullem*, the suspect and the police were involved in a high speed chase where the suspect had a gun. At several times during the chase the suspect pointed the gun at the officers. Finally, at the end, the suspect dropped his motorcycle, did not advance towards the officer and even though he did not drop the gun he did not threaten them with it. The court concluded that even though there were times throughout the encounter that the offices were facing an imminent threat, that at the time of the shooting a reasonable factfinder could conclude that that threat had passed. The court denied the officer’s claim of qualified immunity and saw the suspect’s actions as a sign of surrender. *Cullem v. Seimens* 2013 WL 5781203, (U.S. Dist.- W.D. Texas, San Antonio Div., 2013).

Thus, assuming as Vasquez and Sanchez allege that “Deadly Force Scenario Nos. 1-6”³³ may have justified Vasquez and Sanchez’ use of deadly force, this force was no longer justified when any such threat had passed. Immediately prior to the shooting, evidence shows that Gilbert Flores had walked away from Deputy Vasquez’s Tahoe, raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members or neighbors were outside or in the vicinity³⁴. At the moment the deadly force was used, there was no imminent threat to justify it. Accordingly, Defendants Deputies Vasquez and Sanchez are not entitled to qualified immunity for a shooting

³³ Dkt. #110 Deputies Vasquez and Sanchez’ Motion for Summary Judgment

³⁴ Ex. A; Video of the shooting of Gilbert Flores; Exhibit F; Affidavit of Grant Fredericks; Exhibit L; Still Frames of Video Compiled and Utilized by Forensic Video Analyst Grant Fredericks in his Affidavit

that occurred after Flores was not escaping and posed no imminent threat of harm or death to the Defendant Deputies or a third party.

a. At the Time of the Shooting, Gilbert Flores Posed No Immediate Threat that Would Justify Vasquez or Sanchez' Use of Deadly Force

Viewing the facts in the light most favorable to Flores, and as seen on the video recording of the events leading up to and the shooting of Gilbert Flores, as the court must at the summary judgment stage, there is no doubt that Plaintiffs have shown that a genuine issue of material fact exists as to whether Vasquez and Sanchez' use of deadly force was clearly excessive and objectively unreasonable. At the moment Vasquez and Sanchez fired their shots at Flores, evidence shows that Flores was standing more than 20 feet away from the Deputies³⁵, Gilbert Flores had walked away from Deputy Vasquez's Tahoe, raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members or neighbors were outside or in the vicinity³⁶. In addition, the undisputed facts are that Sanchez and Vasquez made the decision to shoot Gilbert Flores by deciding that they were going to "end this" in the minutes before the shooting³⁷.

Deputy Vasquez testified:

2 A. I believe that we both decided, you know, it's
3 getting worse, and we're going to go, you know, get him,
4 as far as try to get him into custody.
5 Q. All right. So that's what I'm trying to figure
6 out. When you-all were back there by that third car,
7 did you have a conversation like you just told me, "Hey,
8 it's getting worse, we need to go get him now"?
9 A. Yes, sir. I told him, I said, you know, that
10 "My AR is in the car. We have to go get him."³⁸

³⁵ Ex. A; Video of the shooting of Gilbert Flores; Exhibit E; Affidavit of Dr. Ron Martinelli;

³⁶ Ex. A; Video of the shooting of Gilbert Flores; Exhibit E; Affidavit of Dr. Ron Martinelli; Exhibit F; Affidavit of Grant Fredericks; Exhibit L; Still Frames of Video Compiled and Utilized by Forensic Video Analyst Grant Fredericks in his Affidavit

³⁷ Exhibit G; Sanchez Depo; Exhibit D; Vasquez Depo

³⁸ Exhibit D; Deposition of Deputy Vasquez P.87-89

6 You and Officer Sanchez had a conversation
7 that you were going to have to end this situation;
8 correct?
9 A. It was after -- I want to say after he started
10 going towards our Tahoe -- my Tahoe³⁹.

Deputy Sanchez similarly testified:

10 Q. Okay. So regardless of what he's doing,
11 regardless of where he is, regardless of where you are,
12 the mere fact that he has a knife and he's not complying
13 you believe justifies killing him?
14 A. I believe that as long as he is not putting
15 down the knife and surrendering, he is -- I am in fear
16 of my life.
17 Q. And based on your training on -- just because
18 of that, you think you could -- he -- you're in
19 immediate threat and in immediate threat to where you
20 could legally shoot him?
21 A. As long as I'm in fear for my life, yes, sir⁴⁰.

14 Q. Okay. But I'm talking about before this. You
15 guys are closing in on him?
16 A. Right.
17 Q. Had you-all had conversation in the past
18 saying, "This guy is not -- he's not listening to us" --
19 A. Right. He's not.
20 Q. -- "We need to end this thing"?
21 A. Right⁴¹.

This is additionally evidenced by the fact that Sanchez looks over to Vasquez seconds before they both fire and shoot Gilbert Flores⁴². The mere fact that Vasquez and Sanchez discussed "ending this" before the shooting of Gilbert Flores takes away the Defendant Deputies' argument as to the immediate threat of harm at the moment of the shooting. Flores never lunged at Vasquez or

³⁹ *Id.* at P.158

⁴⁰ Exhibit G; Deposition of Deputy Sanchez P.122

⁴¹ *Id.* at P.170

⁴² Exhibit A; Video of the shooting of Gilbert Flores; Exhibit F; Affidavit of Forensic Video Analyst Grant Fredericks; Exhibit L; Still Frames of the video of the shooting of Gilbert Flores compiled by and referenced in Grant Fredericks's Affidavit

Sanchez, advanced towards them or made any furtive movements at the moment the Deputies made the decision to shoot and kill Gilbert Flores⁴³.

Despite what is clearly shown in the video, the Defendant Deputies have given statements and testimony that contradict this video evidence and claim their actions were justified. For example, Vasquez states that Gilbert Flores was 6-8 feet away from him, advancing towards him⁴⁴. The video clearly shows that Flores was farther than 6-8 feet away, in reality, more than 21 feet away at 29 feet⁴⁵. The video also shows that Gilbert Flores was not moving and certainly not advancing towards Deputy Vasquez⁴⁶. Sanchez says he feared Flores was going to get into the patrol car, however, the video shows Flores was away from the patrol car at the rear of the patrol vehicle⁴⁷. Thus, there is a dispute in the evidence between what the video shows and what these officers claim was occurring therefore, creating a genuine issue of material fact.

Further, there is a dispute between the reasonable interpretation of Flores's actions at the time of the shooting even though there is video evidence as to what was occurring. According to the Deputies and to the Defendants' Expert Mr. Rodriguez, these actions were aggressive and amount to pre attack indicators⁴⁸. According to the Plaintiffs and their expert Dr. Martinelli, these are not aggressive actions and a reasonable officer would conclude that there was no aggression which would justify the shooting⁴⁹. Dr. Martinelli states:

- At the moments immediately preceding and at the time of firing upon decedent Gilbert Flores; Deputies Vasquez and Sanchez lacked sufficient objective probable cause to believe that Flores's actions in standing still and

⁴³ Exhibit A; Video of the shooting of Gilbert Flores; Exhibit F; Affidavit of Forensic Video Analyst Grant Fredericks; Exhibit L; Still Frames of the video of the shooting of Gilbert Flores compiled by and referenced in Grant Fredericks' Affidavit

⁴⁴ Exhibit D; Deposition of Deputy Vasquez

⁴⁵ Exhibit A; Video of Shooting and Exhibit E; Affidavit of Dr. Ron Martinelli; Exhibit; Exhibit N; Bexar County Schematic

⁴⁶ Exhibit A; Video of Shooting and Exhibit F; Affidavit of Forensic Video Analyst Grant Fredericks

⁴⁷ Exhibit A; Video of Shooting

⁴⁸ Exhibit D P.92-94; Exhibit G P.179-180; Exhibit I of Deputies MSJ

⁴⁹ Exhibit E; Affidavit of Dr. Ron Martinelli

slowly raising his hands above his head while holding a knife, constituted an imminent threat of serious bodily harm or death to themselves or any third persons.

- While there is no doubt that Flores was certainly a potential threat to the safety of the involved deputies and any third persons in the residence or on the street; the threat he posed when shot was not imminent.
- In the moments immediately preceding the deputies shooting Flores, the subject had stopped his forward movement. While Flores had not obeyed the deputies' orders to drop his knife; he was complying with their directions for him to raise his hands. This level of resistance would be classified as menacing, non-verbal semi-compliance.
- The deputies' own statements that Flores posed a deadly threat to at least Dep. Vasquez at some points in the confrontation (before he moved to the deputy's patrol unit); when reconciled with their failure to use deadly force during those moments; undercuts their inferred representation that Flores somehow posed a greater threat to them when he was standing still with his hands clearly raised at some distance, when they ultimately shot and killed him.

Plaintiffs' Forensic Video Analyst Grant Fredericks states⁵⁰:

Paragraph 111 of Defendant's expert Mr. Albert Rodriguez' report states "Martinelli's report corroborates that Deputies Vasquez and Sanchez' decision to shoot was made as he was moving the hands to the overhand knife slashing position and not when he was holding them above his head.". This statement in Mr. Rodriguez' report is not an accurate representation of what was written by Dr. Martinelli. In fact, the video shows intermediate responses and reactions by the officers after Flores' hand motion above his head stopped and before the shots were fired. Specifically, after Flores raised his hands and then stopped moving his hands, Sanchez turned away from Flores to face Vasquez. The video also shows that Sanchez took two steps to his right. He then turned back toward Flores; he crouched, raised his weapon, and then fire at Flores. He fired the shot at Flores as Flores was falling to the ground at 1.9 seconds after Flores' hands had been motionless above his head and while his feet were stationary on the ground.

For further evidence showing that Vasquez and Sanchez' use of deadly force against Gilbert Flores was clearly excessive, and thus, objectively unreasonable, the court should consider

⁵⁰ Exhibit F; Affidavit of Grant Fredericks

the opinions of the Plaintiffs' expert witnesses. Dr. Ron Martinelli, Plaintiffs' retained police policy and procedures expert, opines that Vasquez and Sanchez' use of deadly force, at the moment they shot and killed Gilbert Flores as viewed on the video recording of the shooting, was clearly excessive and objectively unreasonable under the circumstances, given that at the time of shooting, Gilbert Flores did not pose a threat of imminent death or harm to Vasquez, Sanchez or any third party⁵¹.

Thus, Defendants' allegation that it is an "undisputed" fact that Deputies Vasquez and Sanchez were in reasonable fear of immediate death or bodily injury from Gilbert Flores at the time they used deadly force is unfounded and contrary to the evidence and facts of the case. In fact, the reasonableness of the force in light of the threat at the time of the shooting is very much in dispute. A rational jury could find that Flores was surrendering and not posing an imminent threat and that Vasquez and Sanchez' use of deadly force was excessive and that they are not entitled to qualified immunity. *Reyes*, 362 Fed. Appx. at 408 (reversing summary judgment where the plaintiff's version of events did not include any act justifying deadly force).

In *Ceballos-Reyes v. Bridgwater*, two officers arrived at an apartment where Ceballos and his mother were. Ceballos was in the entryway with a knife in one hand and a cigarette in another. The officers told Ceballos numerous times in both Spanish and English to put the knife down. Ceballos did not comply. It was undisputed that Ceballos threw down his cigarette, Bridgwater told him, "Don't do it!" twice and then shot and killed Ceballos. The version of events as seen by Reyes and Mrs. Ceballos differ from those of Bridgwater. Bridgwater testified that just before the shooting, Ceballos appeared more aggressive, threw his cigarette at the officers, stepped forward toward the officers and raised the knife he was holding. Mrs. Ceballos stated that he flicked his

⁵¹ Exhibit E; Affidavit of Dr. Ron Martinelli

cigarette in a nonaggressive manner, did not step forward towards the officers, that he was swaying side to side and never raised his knife. The court found that a genuine issue of material fact existed regarding whether the officer's use of deadly force was authorized by actions of the person inside the apartment holding the knife. The court denied the officer's motion for summary judgment on qualified immunity grounds based upon the aforementioned genuine issue of fact. *Ceballos-Reyes v. Bridgwater*, 362 Fed.Appx. 403 (2010).

The case law recited by the Defendants and relied upon them to justify their actions are distinguishable. These cases have significant factual differences regarding the suspect's actions at the time deadly force was used which raised the level of the threat posed. Those facts are not present in regard to Mr. Flores' physical actions at the time of the shooting.

Defendants attempt to compare this case to *Mullinex v. Luna*, where the Supreme Court reversed the denial of a summary judgment for an officer. 136 S.Ct. 305 (2015). However, the cases have significant factual differences; *Mullenix* confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. *Id.* at 309. The Court in *Mullenix* quotes and states that it would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase and that excessive force cases involving car chases reveal the hazy legal backdrop against which *Mullenix* acted. *Id.* We have none of those fact patterns in this case. Gilbert Flores was not intoxicated, was not in a vehicle, was not attempting to avoid capture in a high speed vehicle chase, did not have a gun, did not threaten to shoot Deputies Vasquez or Sanchez and was not moments away from encountering the Deputies while in the unpredictable position of being involved in high speed vehicle chase.

Next, Defendants attempt to rely on *Manis v. Lawson*, which also have significantly different fact patterns than this case. In *Manis*, the subject was in a vehicle, acting erratically, reaching under his seat, not obeying officers' commands to show his hands and after reaching under his seat, where his hands were out of the officers' sight, officers thought he could be grabbing a weapon and when he straightened up the officers shot him. *Manis v. Lawson*, 585 F.3d 839, 842 (5th Cir. 2009). In our case, Flores was in plain sight of Vasquez and Sanchez, standing with his hands in the air, not in vehicle where he could erratically drive off. Flores was over 20 feet away from the Deputies with a knife in his hand in plain sight. The Deputies knew that the weapon was a knife, could see the knife and Flores' hands in plain view and there was no concern the weapon might be a gun.

Next, Defendants rely on *Mendez v. Poitevent*; another case with facts entirely different from the facts in our case. 823 F.3d 326 (5th Cir. 2016). In *Mendez*, the Court found a reasonable officer in Poitevent's situation could have believed that Mendez posed a serious threat of harm. *Id.* at 332. In the moments leading up to the shooting, Mendez had struggled violently and aggressively against Poitevent. *Id.* During that altercation, Mendez proved to be a dangerous opponent. *Id.* Poitevent's initial attempts to subdue Mendez, including repeatedly striking Mendez with his baton, failed. *Id.* Mendez then disarmed Poitevent of his baton and prevented him from calling for backup by repeatedly pulling away his radio. The strap on Poitevent's pistol holster came undone, leading him to believe that Mendez was attempting to grab the pistol. *Id.* Mendez was physically strong enough to stand up with Poitevent on his back and to escape his grasp several times.

Moments before Poitevent shot Mendez, Mendez struck Poitevent in the temple, hard enough to concuss him. In that moment, it was reasonable for Poitevent—concussed, disoriented,

weakened, suffering a partial loss of vision, and fearing that he might lose consciousness in the presence of a violent suspected felon—to believe that Mendez might attempt to take advantage of his weakened or unconscious state to overpower and seriously injure or kill him. Mendez, an aggressive opponent who had proven his dangerousness, might—as Poitevent feared—have located the baton or another weapon, grabbed Poitevent's unsecured gun, or simply attacked Poitevent in an effort to secure his own escape or to conclude the fight. Poitevent also testified that at the time he shot Mendez, he saw only “Mendez's silhouette,” even though Mendez was a mere 15 feet away, which is consistent with his testimony that after Mendez struck him, he “saw black ... and feared that [he] was losing consciousness.” Poitevent's disorientation may have prevented him from discerning whether Mendez was fleeing, regrouping, going for the baton, or even whether Mendez was in fact running away from him.

None of these facts are remotely similar to the case at bar. Gilbert Flores never disarmed the Deputies, never struck them or concussed them to the point that they could not observe or view Flores's actions, there was no fear that the Deputies might lose consciousness and be in a weakened position to which Flores could overpower them. Additionally, Poitevent had no back-up. Vasquez and Sanchez were both on the scene backing one another up and Officer Estrada arrived on the scene moments before Gilbert Flores was shot. Gilbert Flores was not aggressively attacking the Deputies moments before they shot and killed him, unlike the facts of Pointvent.

Defendants next allege that the case of *Joe Anthony Guerra v. Sgt. Bellino*, is analogous to our case. 2017 W.L. 2643951 (June 19, 2017) (not published). In *Bellino*, Guerra was clearly intoxicated, swinging his arms back and forth aggressively and clinching his fists. *Id.* at *1. Bellino could not determine whether Guerra had a weapon in his hands and there was an eyewitness video

of the shooting which showed that Guerra moved rapidly in Bellino's direction at the time Bellino shot Guerra. Deputies Vasquez and Sanchez could see the knife in Flores's hand when he hands were raised above his head standing still. Flores made no aggressive, rapid moves towards the Deputies, in fact, he was standing still making no movements⁵².

In the next case that Defendants allege to be strikingly similar to the facts in the case at bar, *Clayton v. Columbia Casualty*, the subject was continually aggressively approaching the officer with a knife while yelling at the officer and came within 5 feet of the officer at the time he was shot. 547 Fed.Appx. 645, 647-48 (5th Cir. 2013). Gilbert Flores was not advancing the Deputies or making any aggressive movements at the time the Deputies shot and killed him. Flores was standing still and making no movements at a distance of over 20 feet from the Deputies. Defendants reliance on one particular quote from *Clayton*, citing *Thompson v. Salt Lake*, is misguided and misconstrued. The Court in *Thompson* reasoned that the fact that Thompson was out of view of the officers up until seconds before he was shot, he was armed with a gun, was pointing the gun at the officer moments before he was shot, and the entire incident occurred within a ten second time frame, that the officers acted reasonably. *Thompson v. Salt Lake County*, 584 F.3d 1304, 1318 (10th Cir. 2009). Again, none of these facts are remotely congruent to the facts presented in our case.

b. On August 28, 2015, It Was Clearly Established That a Police Officer Violates Fourth Amendment Rights by Shooting and Killing a Suspect Who Poses No Immediate Threat of Harm

For the second prong at the summary-judgment stage, Plaintiff must similarly show a genuine dispute of material fact for two distinct, but intertwined, elements: "whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so,

⁵² Exhibit F; Affidavit of Grant Fredericks

whether Vasquez and Sanchez' conduct was objectively unreasonable in the light of that then clearly established law." *Clayton*, 547 Fed. Appx. at 649-50 (quoting *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998)).

For the law to be clearly established, there is no requirement of a case with the exact same factual scenario. *Reyes v. Bridgewater*, 362 Fed.Appx. 403, 408 (5th Cir. 2010). Instead, the question is whether the law clearly set parameters under which an objectively reasonable officer would know what is permissible and what is excessive. *See Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) ("The central concept is that of fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " (quoting *Hope*, 536 U.S. at 740)).

Prior to this shooting, it had long been established that wounding or killing a suspect by shooting him constitutes a seizure. *Flores*, 381 F. 3d 391 at 400 (clearly established that shooting toward a person is a use of physical force and physical force that succeeds in stopping a fleeing suspect constitutes a seizure). The law was also clear that it was objectively unreasonable to use deadly force against a suspect who was standing still, with his hands in the air, more than 20 feet away from the officers and posed no immediate threat to the officers. In fact, the Court in *Fraley*, summarized the law on deadly force before this shooting by stating that the relevant conduct in *Fraley* occurred on April 23, 2007, but it was clearly established well before that date that "deadly force violates the Fourth Amendment *unless* 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others,' " *Bazan*, 246 F.3d at 488 (quoting *Garner*, 477 U.S. at 11), and that the threat of serious physical harm must be "immediate," *Garner*, 477 U.S. at 11. *Sanchez*, 376 Fed.Appx. at 452-53.

In this case, the facts show (in viewing the video recording of the shooting) that Flores was not moving at the time of the shooting, was not advancing the Deputies, was in plain sight, with the knife in his hand to where the Deputies could observe and see it and was more than twenty feet away. Plaintiffs' expert witnesses testify to the fact that the video shows Flores was not moving at the time he was shot and killed by Deputies Vasquez and Sanchez and that Gilbert Flores was not an immediate threat of death or serious bodily injury to the Deputies and that the Deputies use of deadly force at that moment, even based upon the totality of the circumstances, was objectively unreasonable⁵³. Deputies Sanchez and Vasquez, as well as their proffered Expert Albert Rodriguez, state that Flores was moving at the time they shot and killed him and that he posed an immediate threat to the Deputies⁵⁴. Plaintiffs contend that Defendants have not proven as a matter of law that Gilbert Flores posed an immediate threat of death or serious injury to them at the time they shot and killed him and that they have not proven as a matter of law that they acted objectively reasonable in using excessive force against Gilbert Flores. Plaintiffs have presented genuine issues of material fact, which preclude the granting of Defendants' Motion for Summary Judgment.

Moreover, the reasonableness of an officer's conduct under the Fourth Amendment is often a question that requires the input of a jury. This is not only because the jury must resolve disputed fact issues but also because the use of juries in such cases strengthens our understanding of Fourth Amendment reasonableness. *Lyle v. Bexar County, Tex.* 560 F.3d 404, 411 (5th Cir. 2009). Reasonableness under the Fourth Amendment should frequently remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of "reasonableness" is itself reasonable and widely shared.

⁵³ Exhibit F; Affidavit of Grant Fredericks and Affidavit of Dr. Ron Martinelli

⁵⁴ Exhibit G; Exhibit D and Exhibit I to Dkt #110

Lytle v. Bexar County, Tex. 560 F.3d 404, 411 (5th Cir. 2009) (quoting *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir.1999)).

V .
CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiffs pray that Defendants Deputies Greg Vasquez and Robert Sanchez' Motion for Summary Judgment be denied in its entirety, and for all other relief to which they are justly entitled.

WHEREFORE, premises considered, Plaintiffs respectfully requests that this Court DENY Defendants Deputies Greg Vasquez and Robert Sanchez' Motion for Summary Judgment and ask for any and all such further relief to which Plaintiffs show themselves justly entitled.

Respectfully Submitted,

LAW OFFICES OF THOMAS J. HENRY
521 Starr Street
Corpus Christi, Texas 78401
Phone: (361)-985-0600
Fax: (361)-985-0601

By: 

Thomas J. Henry
SBN: 09484210
Robert P. Wilson
SBN: 21718575
rwilson@thomasjhenrylaw.com


ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of July 2017 a true and correct copy of the above Plaintiffs' Response to Defendants Deputies Greg Vasquez and Robert Sanchez' Motion for Summary Judgment was electronically served with a copy to the following:

Charles Frigerio
Law Offices of Charles S. Frigerio
A Professional Corporation
111 Soledad, Suite 840
San Antonio, Texas 78205
csfrigeriolaw@sbcglobal.net
frigeriolaw1995@sbcglobal.net

Albert Lopez
Law Offices of Albert Lopez
14310 Northbrook Drive
Suite 200
San Antonio, Texas 78232
alopezoffice@gmail.com


Thomas J. Henry