Case No. 21-6081

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VICKI JO LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased; and TROY LEVET LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased,

Plaintiffs/Appellees,

v.

POLICE OFFICER DENTON SCHERMAN,

Defendant/Appellant.

APPELLANT DENTON SCHERMAN'S BRIEF IN CHIEF

Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable David L. Russell
District Court No. CIV-19-489-R

September 1, 2021

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellant is not required to file a disclosure statement. 10th Cir. R. 26.1.

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STATEMENT OF RELATED CASES

Pursuant to 10th CIRCUIT RULE 28.2(c)(1), Appellant states that there are no prior or related appeals.

I. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. On May 3, 2021, Defendants Sergeant Milo Box and Officer Denton Scherman moved for summary judgment on qualified immunity grounds. Aplt. App. Vol. I, 52-176. On July 6, 2021, the district court entered an order granting summary judgment to Sergeant Box and denying summary judgment to Officer Scherman. Aplt. App. Vol. III, 490-522. Officer Scherman timely filed his Notice of Appeal on July 7, 2021. Aplt. App. Vol. III, 522-524. This Court has jurisdiction under 28 U.S.C. § 1291.[1]

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Officer Scherman violated clearly established law in using deadly force on a mentally disturbed felon, who was set on avoiding capture, had just beat another larger officer unconscious despite being TASED three times, and had turned from the fallen officer and moved toward the much smaller shooting officer who stood between the felon and the exit.

[1] Certain district court orders are considered final and appealable, although clearly interlocutory, under the "collateral order" doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949). Under some circumstances, and order denying qualified immunity is one such order. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The denial of qualified immunity is immediately appealable if the district court's decision turns on an abstract issue of law. *Id.* An order denying qualified immunity because the plaintiff's version of the facts demonstrate a violation of clearly established law is an immediately appealable interlocutory order. *Medina v. Cram*, 252 F.3d 1124, 1130 (10th Cir. 2001).

III. STATEMENT OF THE CASE

Pursuant to the district court's statement of facts, police were called after a call was made that Mr. Lewis was "beating up a girl." Aplt. App. Vol. 3, p. 491. Mr. Lewis was acting strangely, and was nude, thus, visibly unarmed. *Id*.

Sergeant Box and Officer Scherman encountered Mr. Lewis outside a residence, 520 Gray Fox Run. *Id*. Sergeant Box identified himself and commanded Mr. Lewis to stop and get on the ground. *Id*. Instead of complying, Mr. Lewis forced his way into 520 Gray Fox Run – physically breaking through the front door. *Id*. Sergeant Box followed Mr. Lewis into the home and found Mr. Lewis attempting to exit through the back door. *Id*. Mr. Lewis physically engaged with Sergeant Box who TASERED Mr. Lewis three times (two deployments and a drive stun). *Id*., pp. 491-92.

Officer Scherman followed Mr. Lewis and Sergeant Box into 520 Gray Fox Run and reached the end of the hallway as it entered the living room just in time to see Mr. Lewis pummeling Sergeant Box, striking him about the head, face and neck. *Id*., p. 492. Officer Scherman also directly observed that multiple TASER deployments failed to subdue Mr. Lewis. *Id*. There is no dispute that after knocking Sergeant Box to the floor, Mr. Lewis turned toward Officer Scherman, and Officer Scherman drew his weapon. *Id*. The district court concluded that it was undisputed

that Mr. Lewis (1) evaded arrest, (2) trespassed, and (3) assaulted and battered Sergeant Box, a felony. *Id*., pp. 502-03.

Below, Appellees argued that when Mr. Lewis turned toward Officer Scherman, Officer Scherman "began yelling commands" and "drew his firearm" pointing his weapon at Mr. Lewis as Officer Scherman backed down the hallway. *See* Aplt. App. Vol. 2, pp. 203-04. According to Appellees, Mr. Lewis ultimately ended up trying to crawl out the front door after being shot. *Id*., p. 190. The district court concluded "the Plaintiffs do not dispute that after his fight with Box in the living room, Lewis turned toward Scherman and advanced in his direction as Scherman backed down the entry hallway toward the front door." Aplt. App. Vol. 3, p. 493. Moreover, Appellees asserted that while Mr. Lewis never made contact with, or attempted to grab, Officer Scherman's weapon, he nonetheless "was moving his arms in a windmill motion with his hands in fists." Aplt. App. Vol. 2, p. 193. It is uncontroverted that all of Officer's Scherman's shots hit Mr. Lewis in the front of his body. Aplt. App. Vol. 3, p. 493. The entire encounter between Sergeant Box, Officer Scherman and Mr. Lewis took a mere 32 seconds. Aplt. App. Vol. 1, p. 66.

IV. SUMMARY OF THE ARGUMENT

Because the law was not clearly established that Officer Scherman's actions would violate Mr. Lewis's Fourth Amendment rights, the district court erred in denying Officer Scherman's summary judgment. In determining whether the law is

clearly established, courts must look to the specific and particular facts of the case before them and find comparisons in prior case law arising from sufficiently similar circumstances.

The cases on which Appellees and the district court relied are not acceptable comparators for several reasons. First, the cases – both of which address whether an officer violates the Fourth Amendment by recklessly precipitating the need to use lethal force – give fair notice of a constitutional violation the district court concluded did not occur in this case.

Second, the cases are not factually sufficiently similar to circumstances of this case to give fair notice of a constitutional violation. The district court's formulation of the issue – the law is clearly established that it is unconstitutional to use lethal force on a mentally disturbed person who approaches officers because a reasonable officer would know such a person is not a sufficient threat – impermissibly omits uncontested compelling facts crucial to the inquiry. The district court wholly ignored Mr. Lewis's actions immediately prior to his encounter with Officer Scherman. Numerous Tenth Circuit cases explain the circumstances in which an officer, unless plainly incompetent or knowingly violating the law, would perceive an approaching felon as a sufficient and immediate threat to his or someone else's safety. Those cases demonstrate that Officer Scherman had no reason to believe that Mr. Lewis no longer posed a threat.

Finally, although no sufficiently similar case exists in the Tenth Circuit or the Supreme Court, the district court ignored an out-of-circuit case closely factually analogous to this case that holds that an officer in Officer Scherman's circumstances does not violate the constitution by utilizing deadly force on an unarmed man.

V. ARGUMENT

A. Standard Of Review.

The Court reviews the denial of a summary judgment asserting qualified immunity de novo, *Frasier v. Evans*, 992 F.3d 1003, 1014 (10th Cir. 2021), assuming the facts most favorable to the non-movant. *Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1164 (10th Cir. 2020). "The district court's findings and assumptions make up 'the universe of facts upon which [this Court] bases its legal review.'" *Perry v. Durborow*, 892 F.3d 1116, 1126 (10th Cir. 2018). That is, the Court is without "jurisdiction to review the district court's conclusions as to the facts the plaintiffs may be able to prove a trial." *Fancher v. Barrientos*, 723 F.3d 1191, 1194 (10th Cir. 2013). To the extent that plaintiff does not controvert facts presented by defendant at summary judgment, they are deemed undisputed and "conceded for purposes" of the Court's inquiry. *Walker v. City of Orem*, 451 F.3d 1139, 1155 (10th Cir. 2006).

B. Officer Scherman Did Not Violate Clearly Established Law.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Escondido v. Emmons*, – U.S. –, 139 S. Ct. 500, 503 (2019). "A government official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.'" *Frasier*, 992 F.3d at 1014 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (brackets omitted)).

1. Properly Framing The Question.

Shooting an unarmed man is not a clearly established violation of the Fourth Amendment in all circumstances. *Smart by Smart*, 951 F.3d at 1172. Rather, the law can be clearly established "in light of the specific context of the case, not as a broad general proposition." *Fraiser*, 992 F.3d at 1014 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). The plaintiff must identify a case where an officer was found to have violated constitutional rights under similar circumstances. *Perry*, 892 F.3d at 1123.

How the district court characterizes the facts of the case is crucial to the analysis. In *Mullenix*, the suspect, resisting arrest, initiated a high speed chase during which he threatened to shoot pursuing officers. Although officers set out tire spikes at several locations on suspect's route, Mullenix, located on an overpass under which

a fellow officer had just placed tire spikes, attempted to disable the fleeing vehicle with his service rifle. Mullenix fired six shots, none of which hit the vehicle's radiator, hood or engine block but four of which hit the suspect killing him.

The circuit court concluded that Mullenix did not act objectively reasonably essentially because neither Mullenix, another officer nor the general public faced a substantial and immediate threat of harm when Mullenix fired the shots. Consequently, Mullenix was not entitled to qualified immunity because the law was clearly established that an officer not utilize deadly force unless faced with such a threat. 577 U.S. at 11.

The Supreme Court determined that the circuit court erred in its general formulation of the qualified immunity question. *Id*. at 12. The question is not whether it is clearly established that an officer cannot use deadly force against a fleeing felon who does not pose a sufficient threat of harm. Rather the formulation must be tailored to the specific facts of the case; for example, "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id*. The formula must "address the *actual question* at issue." *Id*. at 13 (emphasis added).

Addressing high speed vehicle chases specifically, the Court noted the "hazy legal backdrop against which Mullenix acted." *Id*. at 14. In one case, the Court concluded that the officer did not violate clearly established law when she shot at a

fleeing suspect because she *believed* others were in the immediate area and others *might* be in his path. *Id*. (emphasis in the original). In another, the officer acted reasonably when he shot a fugitive 'intent on resuming' a chase that 'posed a deadly threat for others on the road.'" *Id*. Concluding that none of its precedent's "squarely govern[ed]" the facts before it, the Court stated, "we cannot say that only someone 'plainly incompetent' or who 'knowingly violates the law' would have perceived a sufficient threat and acted as Mullenix did." *Id*. at 15 (citation and brackets omitted).

Utilizing *Mullenix's* framework, this Court in *Smart by Smart*, dealt with gunshots fired on a street crowded with homebound concertgoers and bar patrons – including Smart, a black man – causing them all to start running. After one shot, a police officer (on the scene to provide crowd control) reported seeing a black man fire two more shots at the crowd. Officer Froese fired a shot at the fleeing Smart. According to witnesses, Smart fell to the ground with his arms outstretched and looked back. Ultimately, Smart was shot from behind five times, three after he had already fallen to the ground. Notwithstanding, the district court determined that though a jury could determine that while the officers violated Smart's constitutional right to be free from an unreasonable use of deadly force, they had not violated clearly established law by shooting an unarmed man who, it turned out, posed no threat to anyone.

While a jury could determine that the officers unreasonably decided that Smart was the active shooter, his rights were not clearly established. *Id*. at 1172. This Court stated that "an analysis of the officers' 'particular conduct' requires taking into account the fact that they were apparently facing a chaotic active shooter situation, where the lives of bystanders may have depended on the officers' split-second judgment.'" 951 F.3d at 1172. Despite assuming that Smart was unarmed and that the officers were unreasonable to think otherwise, "[t]he state of the law ... did not provide fair warning ... that it was unconstitutional for [officers] to open fire on a fleeing person they (perhaps unreasonably) believed was armed in what they believed to be an active shooter situation." *Id*.[2]

Plaintiffs in *Smart by Smart* cited cases involving police shootings of persons police mistakenly believed to be armed and dangerous – *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989) and *King v. Hill*, 615 F. App'x 472 (10th Cir. 470) (unpublished). This Court refused to rely on these cases because they did not involve police identifying an active shooter, albeit one they arguably mistook for Smart. Moreover, in neither case were police faced with a "large, chaotic crowd of potential victims." *Id*. at 1173. This Court reasoned, "[t]hus, although *Zuchel* and *King* establish that officers *can* violate clearly established law by acting on a grossly

[2] Officers nonetheless violated clearly established law when they fired additional shots at Smart after he was already on the ground. *See* Prop.B.4, *infra* at 20.

mistaken belief that a suspect poses a deadly threat, neither case ... would have given fair notice to officers deciding whether to engage a perceived active shooter in a crowded area." *Id*.[3] The Court concluded that the case arose in a "uniquely fraught context" which differentiated it from other cases. *Id*.

Therefore, a properly formulated inquiry regarding whether the law is clearly established in a qualified immunity context is particularized, and courts must consider only cases that are sufficiently factually similar to the case at issue, not cases that generally address the use of lethal force.

2. *Allen* And *Estate of Ceballos* Do Not Give Fair Notice That Officer Scherman's Actions Violated The Fourth Amendment.

According to the district court, the evidence is controverted whether Officer Scherman should have perceived Mr. Lewis as a substantial and immediate threat after Officer Scherman fired the first shot. Aplt. App. Vol. 3, pp. 504-05. The district court determined that a jury could rely on certain facts to conclude that a reasonable officer would perceive that he faced the danger of serious bodily harm, but could rely on other disputed facts to determine that deadly force was not necessary at the

[3] The plaintiffs in *Smart by Smart* also argued that the officers violated Mr. Smart's constitutional rights by failing to warn him before shooting him. *Id*. at 1174. "[N]o clearly established law required such a warning in [the] situation (involving an active shooter in a crowd)." *Id*.

moment Officer Scherman fired his second shot. *Id*. The district court concluded that *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) and *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) gave notice that "using deadly force against a man that was 'acting crazy,' carrying a bat, and moving toward officers violated the Fourth Amendment." Aplt. App. Vol. 3, pp. 507-08. However, neither *Allen* nor *Estate of Ceballos* could give "fair notice" to Officer Scherman for several reasons.

First, neither *Allen* nor *Estate of Ceballos* turn on whether a reasonable officer could have perceived that he was in immediate danger at the time he used deadly force. Rather, both address whether the officers recklessly precipitated the need to use deadly force. The district court determined that "it was not reasonably foreseeable that Sergeant Box's conduct would lead to a deadly encounter," and he acted reasonably in "taking steps to prevent a fleeing suspect from escaping." Aplt. App. Vol. 3, pp. 499-500 (brackets omitted).[4]

[4] *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 607 (2015), the Court determined that "no precedent clearly established that there was not an objective need for immediate entry" into the plaintiff's room. *Id*. at 615 (quotation marks and citation omitted). There, the mentally ill plaintiff threatened her therapist and locked herself in her bedroom prompting a call to the police to aid in taking plaintiff into custody. When police identified themselves and entered plaintiff's room, she advanced on them with a knife. They retreated and shut the door. Concerned that plaintiff had more weapons or would attempt to escape, the officers quickly reentered the room. One officer pepper sprayed plaintiff to no effect. When she came within two feet of the second officer with a knife, he shot her. Plaintiff contended that the officers created the need to use deadly force. The Court concluded that "[b]ad tactics that result in a deadly confrontation that could have been avoided" are not, standing alone, sufficient to establish an excessive force case. *Id*. at 615.

Second, and importantly, contrary to the teachings of both *Mullenix* and *Smart by Smart*, the district court failed to consider Mr. Lewis's actions immediately prior to his encounter with Officer Scherman in determining whether the law was clearly established. Applying the *Mullenix* framework, the appropriate question is whether it is clearly established that it is unconstitutional for an officer to shoot a disturbed felon, set on avoiding capture, who had just beat another officer unconscious despite being TASED three times to no effect, and after which the felon turned from the unconscious officer and moved toward the much smaller shooting officer who stands between the felon and the exit.

a. *Allen* And *Estate of Ceballos* Show Only That The Law Is Clearly Established That Officers Are Liable When Their Reckless Actions Provoke The Need To Use Deadly Force.

In *Allen*, after an altercation with his family, officers were aware that Allen was armed, had threatened his family, and was threatening suicide. Officer Smith approached Allen who was sitting in his car with one foot out of the vehicle and the gun in his right hand resting on the console between the seats. After repeatedly telling Allen to drop his gun, Officer Smith then reached into the vehicle to grab the gun. Another officer held suspect's left arm. When a third officer opened the passenger door, Allen first pointed the gun at that officer, and then swung the gun toward the officers on his left prompting officers to shoot him.

The Court noted that disputes of fact precluded summary judgment on whether the officers acted reasonably focusing on the officers' actions immediately preceding Allen's threat of force. 119 F.3d at 840-41. According to the *Allen* Court, a reasonable jury could conclude that the officers' actions were reckless and precipitated the need to use deadly force since approaching a suicidal armed person to try to take the gun away was "likely to provoke a violent response...." *Id*. at 842. *See also Bond v. City of Tahlequah*, 981 F.3d 808 (10th Cir. 2020).[5]

Correspondingly, in *Estate of Ceballos*, the Court relied on *Allen* to hold that the law was clearly established that officers cannot recklessly create a situation in which the use of deadly force becomes necessary. Ceballos's wife called 911 to report that her husband was in the driveway, with two baseball bats, acting crazy, that he was likely drunk or on drugs, and that she was afraid of him. Police subsequently learned that Ceballos was not taking his anti-depression medications. After speaking to Ceballos's wife (who was safely located several houses down the

[5] As the *Bond* Court recognized, *Allen*, *Estate of Ceballos* and *Hastings v. Barnes*, 252 F. App'x 197 (10th Cir. 2007) (unpublished) all address situations in which although the use of force could be considered reasonable in the moment, it was nonetheless determined to be unreasonable because "the officers approached the situation in a manner they knew or should have known would result in the escalation of the danger." *Id*. at 816. In each case officers cornered impaired individuals in enclosed spaces blocking any exit. *Id*. at 823. In each case, officers aggressively advanced causing the impaired individuals to "pick[] up a handy implement to defend" themselves. *Id*. "[T]he arming and perceived offensive movements were in direct response to the officers' conduct." *Id*.

street), officers began to approach Ceballos who told officers to get back. When they were 100 yards away (knowing that no one else was near), the officers could see that Ceballos was swinging a bat, and acting strangely. While one officer left to get a beanbag shotgun from his vehicle, the other officers continued to approach. Ignoring officers' requests to drop the bat, Ceballos went into his garage, then emerged with a bat and started walking toward officers. Officers likewise continued to advance toward Ceballos. At some point, Officer Husk fired his gun.

As district court noted, the reasonableness of use of force depends not only on whether officers were in danger at the precise moment they used force, "but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force." *Id*. at 1214. "Officer Husk shot and killed an emotionally distraught Ceballos within a minute of arriving on the scene [and] approached Ceballos quickly, screaming at Ceballos ... and refusing to give ground as Ceballos approached the officers."[6] *Id*. at 1216. Because a reasonable jury could find that the

[6] The *Estate of Ceballos* Court also relied on *Hastings*, 252 F. App'x at 198-200, 203-07 noting that although the case did not create clearly established law, it "strengthen[ed] [the] conclusion that, in light of *Allen*, a reasonable officer in Husk's position would have known that his conduct (viewed in the light most favorable to Ceballos) violated his Fourth Amendment" rights. *Id*. at 1217. In *Hastings*, the Court determined that officers were not entitled to qualified immunity when they cornered a suicidal man in a small bedroom, where he picked up a sword to defend himself. The suspect moved toward the officers only after they pepper sprayed him. Up to that point, he had done nothing threatening. Thus, the officers' reckless actions improperly caused the need to use force.

officers acted recklessly precipitating the need to use deadly force, the officers were not entitled to qualified immunity on summary judgment. *Id*.

Allen and *Estate of Ceballos* do nothing more than provide the framework for considering whether an officer's actions in dealing with a mentally disturbed individual who had not presented a threat to anyone prior to encountering officers precipitated and *created* the need to use deadly force. In this case, the district court correctly determined that Sergeant Box did not improperly escalate, and Appellees have never argued that Officer Scherman created the need to use force.

Since *Allen* and *Estate of Ceballos* do not directly address whether the officers were justified in believing that they were in substantial danger when they used deadly force, neither case could have given Officer Scherman "fair notice" that it was not appropriate to use deadly force under the circumstances.

b. *Allen* And *Estate of Ceballos* Are Factually Distinct From This Case.

Pursuant to *Mullenix's* teachings, at issue is whether it is clearly established that deadly force is inappropriate in response to the entirety of the circumstances which Officer Scherman faced. Entirely absent from the district court's analysis is any consideration of Mr. Lewis's actions immediately prior to his encounter with Officer Scherman inside 520 Gray Fox Run.

In *Estate of Ceballos*, Officer Husk argued that Allen posed a threat even before officers approached. The Court disagreed observing that Ceballos's conduct

in the driveway before the police arrived – pacing his driveway, swinging a bat and yelling – was not harming anyone. *Id*. at 1217-18. Ceballos became violent only after police forced him to retreat into his garage after approaching him directly in his own driveway yelling at him.[7] *Id*. at 1217-18.

It is this fact that most clearly distinguishes *Estate of Ceballos* from the case before the Court. Nothing in this case is similar to *Estate of Ceballos* except that Mr. Lewis apparently had some mental issues, and he approached Officer Scherman. Unlike Ceballos, Mr. Lewis became aggressive toward officers long before he encountered Sergeant Box and Officer Scherman. The district court found that Mr. Lewis willfully and repeatedly ignored police commands and evaded arrest. Aplt. App. Vol. 3, p. 499. He physically broke into a house that did not belong to him. *Id*., p. 491. He feloniously assaulted Sergeant Box as Officer Scherman watched. *Id*., pp. 502-03. Mr. Lewis remained unfazed and continued to assault Sergeant Box despite Sergeant Box's use of non-lethal means to subdue him. *Id*., pp. 491-92.

Unlike Ceballos, Mr. Lewis's conduct immediately prior to his encounter with Officer Scherman **WAS** harming someone: Sergeant Box was lying unconscious on the floor when, in Appellees' telling, Mr. Lewis turned toward Officer Scherman and began to approach. The much smaller Officer Scherman stood between Mr. Lewis and freedom. That Officer Scherman continued to back away is clear because

[7] *Allen* involves a similar fact pattern.

all of his shots hit the front of Lewis' body, and the incident, although starting in the living room, concluded near the front door. Ceballos did not pose a threat to begin with. The same cannot be said for Mr. Lewis at the time he approached Officer Scherman.

The context is highly important as the Court in *Mullenix* and *Smart by Smart* makes clear. As the *Smart v. Smart* Court concluded, the unique situation in which Officer Scherman found himself must give context to whether Officer Scherman was "plainly incompetent" or "knowingly violate[d] the law" perceiving Mr. Lewis as a sufficient threat. *Mullenix*, 577 U.S. at 15.

3. In the Absence Of Similar Cases In The Tenth Circuit, The District Court Erred In Refusing To Consider Applicable Out-Of-Circuit Authority.

A case the district court refused to analyze, albeit from the Fifth Circuit, is much more factually similar to those on which the district court relied and unequivocally shows that the law was not clearly established when Officer Scherman shot Mr. Lewis. In *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997), video[8] confirmed that Colston had disobeyed officers (as had Mr. Lewis, repeatedly),

[8] The district court apparently concluded that since the entire altercation in *Colston* was videotaped, it was beyond debate that the suspect attacked both officers, not just the one who was down. By contrast, the incident with Mr. Lewis was not videotaped and what happened after Officer Scherman fired his first shot was contested. Regardless, the district court determined that Mr. Lewis attacked Sergeant Box and

violently and forcefully resisted attempts to subdue him (as had Mr. Lewis), Colston had knocked both officers to the ground (Mr. Lewis knocked Sergeant Box to the ground), the other officer was down near Colston (Sergeant Box was down near Mr. Lewis), and earlier attempts to control Colston with non-deadly force had failed (Sergeant Box TASED Mr. Lewis several times without subduing him). The court concluded that when Barnhart fired his first shot, Colston was in a position to inflict harm on both officers "with or without a weapon." *Id*. at 99-100.

However, unlike Mr. Lewis in this case, after the first shot, Colston had turned and taken two steps *away* from both the downed officer and Barnhart and toward Barnhart's patrol car – thus Colston was shot twice in the back of his body. Colston asserted that he was attempting to flee. *Id*. However, Barnhart testified that he feared Colston would retrieve the weapon Barnhart kept in his patrol car. Thus, "Barnhart had no way to know whether Colston intended to flee or inflict further injury...." *Id*. at 100. The court stated, "[w]e cannot say that a reasonable officer in Barnhart's place would not have believed that Colston posed an immediate danger of serious bodily harm or death to Barnhart or Langford. As a result, Barnhart's decision to use deadly force was objectively reasonable." *Id*.

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that Officer Scherman witnessed the felonious assault and battery. Thus, the lack of videotape is immaterial insofar as the encounter with Sergeant Box.

There is no distinction between Officer Scherman and Barnhart who both observed the respective suspects physically overcome colleagues. The distinction between Barnhart and Officer Scherman is that Barnhart shot the suspect when he was moving *away* from the officer, shooting him in the back. Officer Scherman, by contrast, shot Mr. Lewis as he was moving toward Officer Scherman and, according to Appellees, windmilling his arms. The district court erred in refusing to consider *Colston*. In neither *Allen* nor *Estate of Ceballos* did the suspect physically engage with police immediately prior to the shooting. Even in a case in which the suspect stepped away allegedly in retreat from both the downed officer and the shooting officer, the court concluded that the shooting officer acted objectively reasonably. *Colston* demonstrates to Officer Scherman that his actions in this case were likewise reasonable.

4. Cases Involving Whether An Officer Could Reasonably Perceive That He, Another Officer Or The General Public Faced A Substantial And Immediate Threat Of Harm Would Not Give Fair Warning To Officer Scherman That Using Deadly Force Violated Mr. Lewis's Constitutional Rights.

As a general proposition, "officers are prohibited from using deadly force against a person when it is apparent that the person poses no physical threat to the officers or others." *Huff v. Reeves*, 996 F.3d 1082, 1090 (10th Cir. 2021). Also as a general proposition, it is clearly established that the use of deadly force is

unreasonable when a reasonable officer would have perceived that the threat had passed. *Reavis v. Frost*, 967 F.3d 978, 989 (10th Cir. 2020).

The district court determined that *Allen* and *Estate of Ceballos* gave fair notice to Officer Scherman that Lewis was not a substantial and immediate threat. While it is true that the decedents in those cases had not posed a threat up to the time officers provoked them, and, ultimately, they were not a substantial or immediate threat to anyone, the cases do not address the salient issue directly. Yet, cases are legion describing when an officer could have objectively perceived he was in immediate danger at the moment he fired his weapon.

In *Smart by Smart*, for instance, the Court agreed that a jury could determine that Smart no longer posed a threat after the first shot because he was on his stomach, on the ground, attempting to surrender. 951 F.3d at 1175. Moreover, a jury could find that officers had time to ascertain that Smart was no longer a threat before shooting him in the back as he lay prone. *Id*.[9]

[9] *See also McCoy v. Meyers*, 887 F.3d 1034, 1051-52 (10th Cir. 2018) (holding that it was clearly established that "the Fourth Amendment prohibits the use of force without legitimate justification, as when a subject" is lying on the ground, face down, handcuffed, with his legs zip-tied leaving officers sufficient time to recognize the change in circumstances and the diminished need for force"); *Zuchel*, 890 F.2d at 274 (holding that it was clearly established that the officers' conduct would violate the Fourth Amendment when they shot the suspect from ten to twelve feet away when the suspect was not approaching the officer, but instead, had stopped and was trying to explain what was going on); *King*, 615 F. App'x at 472 (concluding that the officers violated the decedent's rights when they shot him from twenty-five to seventy-five yards away and he had raised his hands in a non-threatening manner in

As another example, in *Fancher*, 723 F.3d at 1194, after struggling with the officer and attempting to grab the officer's weapon, the suspect broke free and got behind the wheel of the officer's cruiser where the officer kept two more guns. As the officer grabbed for the keys still in the ignition, the suspect put the car in reverse, prompting the officer to shoot him. Though the suspect was incapacitated, the officer stepped away from the vehicle (where he testified he felt safer), and fired more shots. The district court determined, and the Court agreed, that firing the first shot at a violent, fleeing felon, was objectively reasonable, but that a jury could find that firing the remaining shots after the suspect had slumped – and was therefore neither capable of controlling the vehicle nor using the officer's long gun – and after the officer stepped away from the vehicle was unreasonable. *Id*. at 1198, 1201. After firing the first shot and seeing the suspect slump, the officer had "enough time to recognize and react to the changed circumstances ...." *Id*. (citation, quotation marks and ellipses omitted).[10]

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response to police commands and when he was not making any threatening moves toward police even though officers suspected he had a gun).

[10] *See also Reavis*, 967 F.3d at 995 (concluding that it was clearly established "that an officer may not use deadly force to stop a fleeing vehicle [driven by a suspect] when a reasonable officer would have perceived he was in no immediate danger at the time he fired" because the officer had stepped out of the way of the vehicle as it approached, and it had passed him as he shot at the vehicle hitting the suspect from behind); *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010) (determining that it was clearly established that shooting the unarmed and mentally disturbed driver of a known disabled van from fifteen feet away was

As well-established precedent reveals, cases in which officers should have known that the threat had passed are distinct from the facts of this case. In those cases the suspect was lying face down arms outstretched on the ground or slumped in the driver's seat of a police vehicle unable to control the vehicle or reach for a weapon in the vehicle, or shot in the back in a fleeing vehicle after the officer had already stepped aside. Even accepting that Mr. Lewis did not "barrel" toward Officer Scherman after he fired the first shot as the Court must, there is nothing in the record to suggest that Mr. Lewis took any action after knocking Sergeant Box unconscious that would have indicated that he had abandoned his desire to flee, to resist arrest, or to otherwise submit to police.

Instead, Officer Scherman was faced with a large, violent individual who had proven repeatedly unwilling to be brought under control by officers. Mr. Lewis had already knocked Sergeant Box to the ground, had turned and moved toward Officer Scherman. In the circumstances, existing case law would not have alerted Officer Scherman that, although Mr. Lewis moved toward Officer Scherman, he no longer posed a threat sufficient to merit the use of deadly force. Mr. Lewis's movement

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unconstitutional); *Weigel v. Broad*, 544 F.3d 1143, 1153-54 (10th Cir. 2008) (noting that because there was no valid argument that suspect/driver still posed a threat after being handcuffed and bound, law enforcement violated the driver's constitutional rights because it is clearly established that officials cannot apply force when "unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself").

toward Officer Scherman after he fired the first shot – even if only a step or two – is a crucial distinction between this case and cases in which officers should have known that the threat was contained.

Not only that, Appellees concede that Mr. Lewis did more than simply move several steps closer to Officer Scherman. Appellees also acknowledge that Officer Scherman backed down the hallway toward the front door, and that Mr. Lewis ended up at the front door of 520 Gray Fox Run. Aplt. App. Vol. 2, pp. 203-04; Aplt. Vol. 3, p. 493. Appellees themselves claim that Mr. Lewis approached Officer Scherman "moving his arms in a windmill motion with his hands in fists."[11] Aplt. App. Vol. 2, p. 193. Clearly, Mr. Lewis took more than a few steps toward Officer Scherman and his demeanor while moving forward could reasonably be perceived as aggressive. Mr. Lewis's actions are a far cry from the actions of the suspects in *Smart by Smart*, *Zuchel*, *King*, *Fancher*, or *Weigel*.

The extant law prior to Officer Scherman's encounter with Mr. Lewis would not have alerted Officer Scherman that Mr. Lewis – a nude, unarmed man who had just knocked Officer Scherman's partner to the ground who had turned toward Officer Scherman, windmilling his arms and moving forward – was attempting to surrender, or at least not to engage further with Officer Scherman. Therefore, the

[11] The use of the term "windmilling" evokes an image of Mr. Lewis wildly swinging his arms in broad circular motions with closed fists.

district court erred in refusing to find that Officer Scherman was entitled to qualified immunity.

VI. CONCLUSION

The law was not clearly established that, considering the entire circumstances with which Officer Scherman was presented before and during his encounter with Mr. Lewis at 520 Gray Fox Run, Officer Scherman violated Mr. Lewis's Fourth Amendment rights by using lethal force to protect himself and his partner, Sergeant Box. Consequently, the district court erred in denying Officer Scherman summary judgment.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument will assist in this Court's consideration of the significant constitutional question presented.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Because this Brief contains 6128 words, it complies with the applicable type-volume limitations of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B). This certification was prepared in reliance on the word count of the word-processing system (Microsoft Word 2016) used to prepare the Brief.

This Brief complies with the typeface requirements of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(5) and the type style requirements of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 14 font.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that a virus check was performed on the PDF version of this Brief using Security Manager AV Defendant version 7.2.1.72, and that no virus was indicated on September 1, 2021.

CERTIFICATION OF PRIVACY REDACTIONS

I certify that this Brief meets the requirements of FEDERAL RULE OF APPELLATE PROCEDURE 25(a)(5) and 10th CIR. R. 25.5 concerning privacy and redactions of sensitive personal data.

CERTIFICATE REGARDING COPIES SUBMITTED

I certify that the hard copies of this Brief to be submitted are exact copies of the version submitted electronically.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2021, the foregoing Brief was filed and served on all counsel of record via the ECF system.

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I further certify that on September 1, 2021, seven printed copies of the foregoing and one printed copy of the Appellant's Appendix will be sent via Federal Express for overnight delivery to the Clerk of the Court.

s/Catherine L. Campbell
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

VICKI JO LEWIS, individually and as co-Personal Representative of the ESTATE OF ISAIAH MARK LEWIS, deceased; and TROY LEVET LEWIS, individually and as co-Representative of the ESTATE OF ISAIAH MARK LEWIS, deceased,	)	
Plaintiff,	)	
v.	)	**Case No. CIV-19-489-R**
CITY OF EDMOND, an Oklahoma Municipal Corporation; POLICE SGT. MILO BOX and POLICE OFFICER DENTON SCHERMAN, individually,	)	
Defendants.	)	

ORDER

Before the Court are motions for summary judgment filed by Defendant City of Edmond ("Edmond"), Doc. No. 64, Officer Denton Scherman and Sergeant Milo Box, Doc. No. 65. Plaintiffs, representatives of the Estate of Isaiah Lewis, filed responses to both motions in Doc. Nos. 82 and 83, to which Defendants filed replies in Doc. Nos. 87 and 88. The Court finds as follows.

I. Background

Isaiah Lewis arrived at his girlfriend's house around 10:30 a.m. on April 29, 2019, and she immediately noticed he was acting strangely. Doc. No. 83-11, p. 5. Lewis "seemed troubled by something[,]" and asked to look at his girlfriend's cell phone. *Id.* Lewis's request led to a confrontation between the two. *Id.* Meanwhile, a food delivery driver

waiting outside heard the altercation, ran down the street to a neighbor's house, and asked the neighbor to call the police. *Id.* p. 6. The caller stated that a young man was "beating up" a girl, even though Lewis's girlfriend later explained that the two "were fine" and that neither "needed medical treatment." Doc. Nos. 65, p. 6 ¶ 1 & Doc. No. 82, p. 7 ¶ 1.

In response to the 911 call, "Edmond police officers were sent by radio dispatch" to the neighbor's home around 1:04 p.m. Doc. No. 64, p. 9 ¶ 5. While the officers headed to the neighbor's home, Lewis removed his clothing and fled the area on foot. *Id.* ¶ 6. According to the Plaintiffs, Lewis continued "intermittently running naked around the neighborhood and hiding, and generally behaving strangely" for about one hour. Doc. No. 82, p. 8 ¶ 9.

Officer Denton Scherman and Sergeant Milo Box assisted in the search for Lewis and eventually spotted him in a yard in a nearby neighborhood. Doc. Nos. 65, p. 7 ¶ 11 & Doc. No. 82, p. 9 ¶ 11. As the officers "drove past Lewis, Box exited the vehicle, identified himself as a police officer," and commanded Lewis to stop and get on the ground. *Id.* ¶ 17. Rather than comply, Lewis turned toward the front door of the nearest home and "forced his way into a residence located at 520 Gray Fox Run, Edmond, Oklahoma." *Id.* ¶¶ 18, 21.

After watching him physically break through the front door, Box ascertained that Lewis did not live at 520 Gray Fox Run, and thus, followed Lewis into the home. *Id.* ¶¶ 22, 30. As Box moved down the entry hallway, he observed Lewis attempting to exit the back door and again commanded him to stop and get on the ground. *Id.* ¶¶ 30–32. In response, Lewis turned toward Box and charged at him. *Id.* ¶ 33. As he charged, "Box

deployed his taser." *Id.* ¶ 34. Lewis and Box then fought in the living room. *Id.* ¶ 42. Box deployed his taser once again, but the taser had no effect. *Id.*

Around this time, Scherman walked down the entry hallway into the living room of the home and observed "Lewis pummeling Box." *Id.* ¶¶ 38, 40, & 41. Lewis "continued to strike Box in the head, face and neck," and Box attempted to use his taser to "drive stun" Lewis. *Id.* ¶¶ 43–44. The taser failed to subdue Lewis and Box disappeared from Scherman's line of sight. *Id.* ¶ 48. Lewis then turned toward Scherman and Scherman drew his firearm. *Id.* ¶¶ 48, 51.

From this point, the parties' factual assertions diverge. Scherman asserts that Lewis charged toward him "like a football player" and that in response, Scherman "discharged his firearm." Doc. No. 65, p. 14 ¶¶ 51–54. Scherman alleges that he then "backed toward the entryway and front door while continuing to give Lewis commands to stop and get on the ground[,]" but that Lewis "continued to barrel toward [him] managing to punch [him] once in the face […]." *Id.* ¶¶ 55–56. Scherman explains he then shot Lewis four more times "with all four shots hitting Lewis in the front of his body" and that "Lewis did not stop attacking Scherman until the fifth shot was fired." *Id.* ¶¶ 58–60.

According to the Plaintiffs, however, "Scherman's account of the shooting is contradicted by physical, forensic evidence as analyzed by [expert] Dr. Filkins, and the other circumstances surrounding Scherman's deadly force." *Id.* ¶ 54. The Plaintiffs dispute i) that Lewis charged Scherman in a tackling position, ii) that Lewis punched Scherman in the face, and iii) any assertion by Scherman "meant to imply [Lewis] was continuing to charge and punch Scherman while/after [Lewis] was being shot and fatally wounded by

Scherman." *Id.* ¶ 56. In his report, Plaintiffs' expert Dr. James Filkins explains that Lewis's gunshot wounds are inconsistent with Scherman's testimony that he shot Lewis from close range, that Lewis charged him in a tackling position, and that Lewis was close enough to land a punch on Scherman's face. Doc. No. 62-1, p. 7. Plaintiffs also dispute that Scherman verbally commanded Lewis to "stop" and "get on the ground" by arguing that "Box, who was within earshot in the adjacent room, did not hear Scherman say anything at any time in the home." Doc. No. 82, p. 13 ¶ 50. The officers argue in response that Lewis rendered Box "temporarily unconscious[,]" and that therefore, Box could not have heard Scherman's warnings. Doc. No. 88, p. 3 ¶ 50.

Still, the Plaintiffs do not dispute that after his fight with Box in the living room, Lewis turned toward Scherman and advanced in his direction as Scherman backed down the entry hallway toward the front door. Doc. No. 88, p. 5 ¶ 11. Four gunshot wounds in the front of Lewis's body and the bullet casings recorded in the Edmond police department's crime scene sketch confirm this account. Doc. No. 65, p. 10. Instead of arguing that Lewis did not advance toward Scherman, the Plaintiffs state that Lewis "mov[ed] his arms in a windmill motion" rather than in a tackling position and that Lewis was more than one and a half to two feet away from Scherman when Scherman discharged his firearm four times. Doc. No. 82-8, p. 9. The parties agree that the incident ended at the front door when Lewis fell to the ground. Doc. No. 65, p. 15 ¶ 62.

Following the deadly encounter, Plaintiffs filed suit against Edmond, Officer Scherman and Sergeant Box. Doc. No. 1. Plaintiffs brought a state law negligence action against Edmond, in addition to claims under 42 U.S.C. § 1983 alleging a failure to train its

police officers and a violation of the equal protection clause. *Id.* Plaintiffs also filed claims for excessive use of force against Box and Scherman. *Id.* In anticipation of trial, Plaintiffs and Defendants retained experts. Edmond retained Steve Ijames, whose proposed testimony supports the adequacy of the Edmond police officers' training and response in Box and Scherman's encounter with Lewis. Doc. No. 64, p. 27. However, Plaintiffs' expert Gregory Gilbertson plans to testify that the "City's deficient training and policies 'contributed to [Lewis's death], specifically the weapons policy and the policies and training pertaining to mental health and people in crisis.'" Doc. No. 83, p. 19 (citing Doc. No. 83-11, p. 25 ¶ 76.).

Additionally, Defendants retained expert Thomas C. Kupiec to testify regarding the levels of THC in Lewis's body at the time of the accident, arguing that the level of narcotics in his body is relevant to support the officers' perception of Lewis's mental state. Doc. No. 76, p. 6. Lastly, as discussed above, Plaintiffs plan to utilize expert Filkins to dispute Scherman's testimony.

Edmond, Box, and Scherman now seek summary judgment on each of Plaintiffs' claims. Doc. Nos. 64 & 65.

II. Summary Judgment Standard

"The 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). "The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th

Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). While the Court construes all facts and reasonable inferences in the light most favorable to the non-moving party, *Macon v. United Parcel Serv., Inc.*, 743 F.3d 708, 712–13 (10th Cir. 2014), "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III. Excessive Force Claims

Sergeant Box and Officer Scherman assert that qualified immunity precludes Plaintiffs' claim for excessive force against them. Doc. No. 65, p. 15. If a court finds that qualified immunity applies to claims against officers, the finding of qualified immunity "preclude[s] the imposition of municipal liability" against the city. *Jiron v. City of Lakewood*, 392 F.3d 410, 419 n.8 (10th Cir. 2004). Thus, if Box and Scherman are entitled to summary judgment here, the municipal liability claims against Edmond fail. For this reason, the Court first addresses whether Box and Scherman are entitled to summary judgment.

Qualified immunity "protect[s] officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). When a defendant asserts qualified immunity at summary judgment, the plaintiff must establish that the defendant violated a constitutional right and that the right was clearly established at the time of the constitutional violation. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009); *see also Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015) ("[B]y asserting the qualified-

immunity defense, Sheriff [ ] triggered a well-settled twofold burden that [plaintiff] was compelled to shoulder: not only did she need to rebut the Sheriff's no-constitutional-violation arguments, but she also had to demonstrate that any constitutional violation was grounded in then-extant clearly established law."). Ordinarily, "[i]n this circuit, to show that a right is clearly established, the plaintiff must point to 'a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Garcia v. Escalante*, 678 F. App'x 649, 653–54 (10th Cir. 2017) ((citing *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 427 (10th Cir. 2014))).

The Court is free to address either prong of the qualified immunity analysis first. Here, Plaintiffs allege Box and Scherman violated the Fourth Amendment by employing excessive force. Specifically, Plaintiffs argue that Box utilized excessive force when he "created and escalated the situation […] that Defendants have now used to justify their use of force" and that Scherman employed excessive force when he fatally shot Lewis while Lewis was "unarmed, in crisis and never posed an imminent threat." Doc. No. 82, p. 21. The Tenth Circuit has explained that when appropriate, courts may "analyze[ ] the conduct of each officer individually in excessive force cases at the summary judgment" stage. *Pauly v. White*, 814 F.3d 1060, 1071 (10th Cir. 2016), *cert. granted, rev'd on other grounds*, 137 S. Ct. 548 (2017). In light of the strong distinction between Box's conduct—announcing his presence and commanding Lewis to "get down"—and Scherman's—discharging his

firearm five times—the Court addresses the excessive force claim against each officer separately.

A) Sergeant Box

The Plaintiffs allege that Sergeant Box violated Lewis's Fourth Amendment rights when he shouted commands after exiting his vehicle because it "created and escalated the situation […] that Defendants [ ] used to justify their use of force." Doc. No. 82, p. 21.

To be sure, the fact that Box did not employ deadly force does not, by itself, immunize him from liability under § 1983. *See, e.g.*, *Diaz v. Salazar*, 924 F. Supp. 1088, 1097 (D.N.M. 1996) (citing *Starks v. Enyart,* 5 F.3d 230 (7th Cir. 1993); *Gutierrez–Rodriguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989); *Grandstaff v. Borger,* 767 F.2d 161 (5th Cir. 1985); and *Strachan v. City of Federal Heights,* 837 F. Supp. 1086 (D. Colo. 1993)). In determining whether an officer employed excessive force, the Tenth Circuit has considered "'whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'" *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (citing *Allen v. Muskogee,* 119 F.3d 837, 840 (10th Cir. 1997)) (quoting *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995)). In *Medina*, the Tenth Circuit explained that "in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence." *Medina*, 252 F.3d at 1132; *see also Sevier,* 60 F.3d at 699 n. 7 ("Mere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983.").

In *Pauly v. White*, the Tenth Circuit explained how courts should analyze whether a nonshooting officer's conduct was reckless:

> [the nonshooting officers] may be [ ] liable if their conduct immediately preceding the shooting was the but-for cause of [the suspect's] death, and if [the suspect's] pointing a gun at the officers was not an intervening act that superseded the officers' liability. Foreseeable intervening forces are within the scope of the original risk, and ... will not supercede the defendant's responsibility.

Pauly, 814 F.3d at 1072 (internal quotation marks and citation omitted). In *White*, officers approached the home of Samuel and Daniel Pauly after a 911 caller alleged that Daniel appeared to be driving intoxicated. *Id.* at 1065–66. Despite agreeing that "there was not enough evidence or probable cause to arrest [Pauly]," multiple officers approached Daniel and his brother's home at night, in the rain, and without turning on any warning lights or announcing themselves as police officers. *Id.* Believing the officers to be intruders, the Pauly brothers retrieved their own guns, fired warning shots, and pointed a handgun at an officer. *Id.* at 1066-67. Two of the officers then shot at Samuel, and one officer's shot killed him. *Id.* at 1067. In assessing the conduct of the nonshooting officer, the Tenth Circuit explained that fact questions remained precluding summary judgment as to whether an officer could reasonably foresee that shouting "we got you surrounded. Come out or we're coming in[ ]" would cause the brothers to "defend their home with deadly force." *Id.* at 1074.

Conversely, the Tenth Circuit affirmed the district court's grant of summary judgment for the officers in *Thomson v. Salt Lake County*. 584 F.3d 1304, 1320 (10th Cir. 2009). In *Thomson*, the Plaintiffs alleged that releasing a police dog without warning and

failing to negotiate with an armed, agitated suspect running through a neighborhood did not "recklessly create[ ] the need for deadly force." *Id.* Specifically, the court explained that "it was objectively reasonable for the officers to take the steps that they did to locate an armed man who was agitated and running through a neighborhood." *Id.* at 1321; *see also Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004) (finding reasonable an officer's decision to coax "an armed and agitated" suspect from a locked room).

Here, the Court finds Sergeant Box's conduct was objectively reasonable. While Plaintiffs argue that Lewis was not "consciously evad[ing]" officers, the record is clear that Lewis did not comply with commands from police as he continued to flee from officers by "running through yards and hiding in a wooded area[.]" Doc. No. 82, p. 8 ¶ 8. Further, prior to spotting Lewis, Box and Scherman knew that a call referencing a domestic disturbance triggered the officers' original dispatch, and that Lewis had been running through neighborhoods naked for the last hour. Doc. No. 65, pp. 6 ¶¶ 6, 9. Construing the facts in the Plaintiffs' favor, after spotting Lewis, Box then "jumped from the vehicle before it came to a complete stop, shouted commands at [Lewis] and pointed his taser at [him]." Doc. No. 82, p. 9 ¶ 10. In *Thomson*, the Tenth Circuit found it objectively reasonable when officers released a police dog without warning and failed to negotiate with an armed and agitated suspect running through a neighborhood. 584 F.3d at 1320. Similarly, here, it was objectively reasonable for Box to exit his vehicle, announce his presence, and point a taser at Lewis.

Further, it was not reasonably foreseeable that Box's conduct would lead to a deadly encounter. Unlike in *Pauly*, where officers approached Pauly and his brother's home at

night, in the rain, and without turning on any warning lights, Box stepped outside of his vehicle in the middle of the afternoon and announced his presence, and commanded the naked Lewis to "get down." 814 F.3d at 1075–76. The Court must "evaluate the officer's reasonableness from the on-scene perspective, not with the advantage of 20/20 hindsight." *Jiro,* 392 F.3d at 418. Even though Lewis was unarmed, he had been fleeing officers for over an hour after the police received report of a domestic disturbance. As the court explained in *Thomson*, Box "adequately performed his duties as a reasonable law enforcement officer by taking steps to prevent [a fleeing] suspect from escaping." *Id.* Accordingly, the Court finds that as a matter of law, Box did not violate Lewis's constitutional rights by announcing his presence and commanding him to "get down." For this reason, Box is entitled to summary judgment on Plaintiffs' excessive force claim against him.[1]

B) Officer Scherman

When an "excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The Tenth Circuit has "held [that] the *Graham* framework allows the use of deadly force where "a reasonable officer ... would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others." *Estate. of Smart v. City of Wichita*, 951 F.3d 1161, 1171 (10th Cir. 2020) (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir.

[1] Because Box did not violate Lewis's Fourth Amendment rights, the Court need not address whether the law was clearly established.

1995)). Courts analyze whether an officer's use of force was excessive by asking whether it was "objectively reasonable" in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent. *Id.* at 388. The Tenth Circuit has explained that

> [t]o state an excessive force claim under the Fourth Amendment, plaintiffs must show *both* that a seizure occurred and that the seizure was unreasonable. In assessing reasonableness, this court looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment. The inquiry is an objective one, and one that considers the totality of the circumstances. Furthermore, reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1169 (10th Cir. 2021) (internal citations and quotation marks omitted). In *Graham*, the Supreme Court outlined the applicable factors for evaluating excessive force claims: "[i] the severity of the crime, [ii] whether the suspect poses an immediate threat to the safety of the officers or others, and [iii] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. The Court addresses each factor in turn.

To begin with, the Plaintiffs argue that the severity of the crime favors Lewis because he had not committed any crime, "let alone a severe one." Doc. No. 82, p. 26. Further, the Plaintiffs urge that the officers did not have probable cause to arrest Lewis or take him into custody because rather than exhibiting criminal conduct, it was "apparent [his] conduct was attributable to the crisis he was experiencing." *Id.* p. 27. Scherman disagrees, arguing that the severity of the crime weighs against Lewis for several reasons. First, the initial 911 call involved allegations of domestic abuse, prompting the dispatch of

officers to Lewis's girlfriend's neighborhood. Doc. No. 65, p. 16. Second, prior to spotting Lewis, Scherman argues he was aware Lewis had trespassed in multiple yards and indecently exposed himself. Doc. No. 65, p. 17; Doc. No. 88, p. 6. Lastly, Scherman states that "Lewis physically assaulted and battered Box" and "[a]ssault and battery on [a] police officer is a felony." Doc. No. 65, p. 18.

Courts in the Tenth Circuit recognize a distinction between misdemeanors and felonies when evaluating the severity of the crime at issue. *K-9 Unit Deputy Sanders*, 989 F.3d at 1170. Initially, officers were dispatched on a call alleging a domestic disturbance, which somehow contributed to Lewis's flight. Then, it is unclear where Lewis went after the officers' initial dispatch into his girlfriend's neighborhood, but it is undisputed that Lewis then embarked on a one-hour period of naked flight through the woods and neighborhoods eventually leading to Scherman and Box spotting him in the yard at 520 Gray Fox Run. Thus, the first undisputed "crime at issue" was indecent exposure, a misdemeanor, which weighs against the use of force. *See Lee v. Tucker*, 904 F.3d 1145, 1149 (10th Cir. 2018).

It is also undisputed that once Sergeant Box commanded Lewis to "get on the ground" in the yard at 520 Gray Fox Run, Lewis evaded arrest, trespassed, intentionally broke into and entered the home,[2] and assaulted and battered Sergeant Box. Though his

[2] "Every person who, without the intention to commit any crime therein, shall willfully and intentionally break and enter into any building, trailer, vessel or other premises used as a dwelling without the permission of the owner or occupant thereof, except in the cases and manner allowed by law, shall be guilty of a misdemeanor." Okla. Stat. tit. 21 § 1438(B).

initial undisputed crime was a misdemeanor, when Lewis turned to face Scherman after "pummeling Box," he had engaged in felonious activity.[3] Accordingly, taken together, the first factor weighs in favor of Officer Scherman employing some force.

The second *Graham* factor is whether the officer faced an immediate threat. The Tenth Circuit has previously explained that when "evaluating this factor, [courts] must look at whether the officers [or others] were in danger at the precise moment that they used force." *K-9 Unit Deputy Sanders*, 989 F.3d at 1170 (internal quotation marks and citations omitted). Weighing whether the officer faced an immediate threat "is undoubtedly the most important and fact intensive factor in determining the objective reasonableness of an officer's use of force," *Bond v. City of Tahlequah, Okla.*, 981 F.3d 808 (10th Cir. 2020). In reviewing the degree of threat, the court considers:

> (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.

Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008).

Here, though the parties dispute the exact timing and sequence of events, the undisputed facts reveal that Scherman's interaction with Lewis began when he witnessed Lewis physically burst through the front door of 520 Gray Fox Run. Doc. Nos. 65, pp. 8–

[3] "Every person who, without justifiable or excusable cause knowingly commits battery or assault and battery upon the person of a police officer, sheriff, deputy sheriff, highway patrolman, corrections personnel, or other state peace officer employed or duly appointed by any state governmental agency to enforce state laws while the officer is in the performance of his or her duties, upon conviction, shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections of not more than five (5) years or county jail for a period not to exceed one (1) year, or by a fine not exceeding Five Hundred Dollars ($500.00), or by both such fine and imprisonment." Okla. Stat. tit. 21 § 649 (B).

9 ¶¶ 18, 21 & Doc. No. 82, pp. 8–9 ¶¶ 18, 21. Next, Scherman walked into the entry hallway of the home to provide Box with backup and witnessed Lewis "pummeling Box" until Box disappeared from Scherman's line of sight. *Id.* ¶¶ 38, 40, & 41. Then, Lewis turned and advanced towards Scherman. Doc. No. 88, p. 5 ¶ 11. Scherman backed down the entry hallway toward the front door and employed deadly force at some disputed distance. Doc. No. 88, p. 5 ¶ 11.

The first two elements cut in Lewis's favor—the fact that he was unarmed is undisputed, and therefore, Scherman could not have ordered him to drop any weapon. Further, without a weapon, Lewis could not have made hostile motions with a weapon towards Scherman. However, the third factor weighs in Scherman's favor, because even accepting the Plaintiffs' expert's conclusion that Scherman and Lewis were further than two feet apart, the two were still confined in a small space in the entry hallway of 520 Gray Fox Run. Finally, the fourth element is unclear. While a reasonable jury could arguably conclude that when Lewis "mov[ed] his arms in a windmill motion[,]" he did not pose a level of danger requiring deadly force, Lewis had just pummeled Box, and a reasonable, undersized officer without the benefit of hindsight could have believe he faced danger of serious bodily harm. Ultimately, the Court finds that material fact disputes preclude the immediate threat factor from favoring either party.

The final *Graham* factor addresses whether Lewis actively resisted arrest or attempted to evade arrest by flight. This factor clearly favors Scherman. Here, the genesis of the encounter between Lewis and Scherman is based on Lewis's evasion and resistance of multiple officers. Lewis actively evaded officers for over an hour as he ran through

neighborhoods naked. Doc. No. 82, p. 8 ¶ 9. Further, Lewis resisted arrest when Box gave him multiple commands to "stop and get on the ground." Accordingly, Lewis's evasion weighed in favor of the use of force.

After weighing the *Graham* factors, the Court finds that when construing the facts in the light most favorable to the Plaintiff, a reasonable jury could conclude that though force was clearly necessary, *deadly force* was not justified against the naked, unarmed Lewis "at the precise moment[s]" Scherman discharged his firearm. *See, e.g.*, *Estate of Harmon v. Salt Lake City*, 471 F. Supp. 3d 1203, 1219 (D. Utah 2020) (explaining that the court "analyze[s] these factors at the precise moment that the officer used force.") (emphasis added). Construing the facts in Plaintiffs' favor, after Scherman first shot Lewis, Lewis no longer "continued to barrel toward [him] managing to punch [him] once in the face […]." Doc. No. 82, p. 14 ¶ 56. A reasonable jury could conclude that, after Scherman discharged his firearm once, Lewis no longer presented a "threat of serious physical harm." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Fancher v. Barrientos*, No. CIV. 11-118 LH/LAM, 2012 WL 12838429, at *9 (D.N.M. June 13, 2012), ("[C]ircumstances may change within seconds eliminating the justification for deadly force.") (internal citations omitted), *aff'd*, 723 F.3d 1191 (10th Cir. 2013). Accordingly, whether the officer faced an immediate threat "is undoubtedly the most important and fact intensive factor" and here, genuine factual disputes preclude the Court from finding that the factor favors either party. *See Bond*, 981 F.3d at 820. The Court now turns to whether the law was clearly established as to Scherman.

When evaluating whether the law is clearly established, prior cases need not be factually identical to the scenario facing the officer but must provide "fair warning to the defendants that their alleged [conduct] was unconstitutional." *Bond,* 981 F.3d at 824–25 (internal citations and quotation marks omitted); *see also City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 613 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."); *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019) ("The Supreme Court has warned against defining clearly established rights at a high level of generality.") (internal citations and quotation marks omitted).

Plaintiffs argue that Tenth Circuit decisions clearly established at the time of the encounter between Lewis and Scherman provided notice to Scherman that deadly force would violate Lewis's Fourth Amendment rights. Doc. No. 82, pp. 29–34. Specifically, Plaintiffs cite *Allen v. Muskogee,* 119 F.3d 837 (10th Cir. 1997), *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019), *Hastings v. Barnes*, 252 F. App'x 197 (10th Cir. 2007) (unpublished), and *Bond v. City of Tahlequah, Okla.*, 981 F.3d 808 (10th Cir. 2020). *Bond*, a 2020 decision, had not been decided at the time of the encounter, and is therefore inapplicable. However, *Estate of Ceballos* is instructive. In *Ceballos*, officers were dispatched to a home where the suspect allegedly carried a baseball bat and was "acting crazy." 919 F.3d at 1209. After repeatedly ordering the suspect to drop his bat, one officer drew a taser and another drew a gun. *Id.* at 1210–1211. The suspect then moved towards the officers, and one officer fired his gun, killing Ceballos. *Id.* at 1211. The Tenth Circuit found that *Allen v. Muskogee* would have placed "an objective officer in [the shooting

officer's] position" on notice that his conduct violated the Fourth Amendment. *Id.* at 1215. Accordingly, the court affirmed the district court's decision to deny the officer qualified immunity. *Id.* at 1218.

In *Allen v. Muskogee*, a woman requested police assistance at her home because her brother was armed, threatened family members, and parked outside in her driveway. 119 F.3d at 839. The officers arrived on the scene, knowing the suspect was armed and suicidal, and proceeded to surround the vehicle. *Id.* Two officers reached into the vehicle, one grabbing the suspect's arm and another "attempt[ing] to seize [the suspect's] gun." *Id.* Meanwhile, a third officer opened the passenger door, at which point the suspect pointed his gun at an officer and "swung the gun toward" two other officers. *Id.* Two of the officers quickly fired back twelve shots, striking the suspect four times. *Id.* The Tenth Circuit reversed the district court's grant of summary judgment for the officers because the court reasoned that a reasonable jury could conclude "the officers' actions were reckless and precipitated the need to use deadly force" when upon the officers' arrival, they aggressively approached and surrounded an armed, dangerous individual. *Id.* p. 841 (citing *Sevier*, 60 F.3d at 699).

Construing the facts in the light most favorable to Plaintiffs, a reasonable jury could conclude that no reasonable officer could have believed that the use of lethal force was lawful when Scherman encountered Lewis at 520 Gray Fox Run. *See Estate of Ceballos*, 919 F.3d at 1220. Even if *Allen* did not provide Scherman with "fair warning" that his conduct could violate Lewis's constitutional rights, *Estate of Ceballos* surely did. In *Ceballos*, the Court explained that an objective officer should have been on notice that

using deadly force against a man that was "acting crazy," carrying a bat, and moving towards officers violated the Fourth Amendment. 919 F.3d at 1209–1211. Here, it is undisputed Lewis was unarmed, and even though Lewis was approaching Scherman, an objective officer would have been on notice that employing deadly force in that "precise moment" violated the Fourth Amendment. Accordingly, the Plaintiffs have met their burden on the clearly established prong against Scherman, and therefore, summary judgment is inappropriate on Plaintiffs' excessive force claim against Officer Scherman.

Scherman also cites to cases from the Fifth and Sixth Circuits for the proposition that he is entitled to qualified immunity. The problem with Scherman's assertion, however, is that in each of his cited cases—*Schlabach*, *Colston*, and *Davenport*—the district court and the circuit court relied on video evidence to corroborate the testimonies of the defendant officers. *Mitchell v. Schlabach*, 864 F.3d 416 (6th Cir. 2017); *Davenport v. Causey*, 521 F.3d 544 (6th Cir. 2007); *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997). Here, the Court lacks video evidence in the record. Further, because Plaintiffs' expert Dr. Filkins provides forensic evidence that contradicts Scherman's testimony, a genuine fact dispute precludes summary judgment.

For this reason, Scherman is not entitled to qualified immunity on Plaintiffs' excessive force claim against him. Therefore, Scherman's motion for summary judgment is DENIED, and the Court now turns to Plaintiffs' claims against Edmond.

IV. Municipal Liability Claim

To hold a municipality liable under § 1983, a plaintiff must "prove (1) the entity executed a policy or custom (2) that caused the plaintiff to suffer deprivation of

constitutional or other federal rights." *Cox v. Glanz*, 800 F.3d 1231, 1255 (10th Cir. 2015) (internal quotation marks and citation omitted). The Tenth Circuit has explained that

> [a] municipal policy or custom may take the form of (1) a formal regulation or policy statement; (2) an informal custom amoun[ting] to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (internal citations omitted).

Here, Edmond argues summary judgment is appropriate on Plaintiffs' failure to train claim because all Edmond Police Department officers complied with CLEET training requirements and Edmond's expert Steve Ijames concluded that Edmond adequately trained its officers. Doc. No. 64, pp. 25–27. Plaintiffs respond that expert Gregory Gilbertson's report precludes summary judgment because a reasonable jury could conclude that Edmond failed to adequately train its officers and such failure to train caused Lewis's constitutional deprivation. Doc. No. 83, pp. 14–19.

To succeed against a municipality on a § 1983 claim for failure to train police officers in the use of force, Plaintiffs must first prove that the training was in fact inadequate. *Carr v. Castle*, 337 F.3d 1221, 1228 (10th Cir. 2003) (internal citations omitted). Then, the plaintiff must satisfy the following requirements:

> (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and

> recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training.

Brown v. Gray, 227 F.3d 1278, 1286 (10th Cir. 2000) (quoting *Allen v. Muskogee,* 119 F.3d 837, 841-42 (10th Cir. 1997) (citing *City of Canton,* 489 U.S. 378, 389–91 (1989))). While "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train[,]" *Connick v. Thompson*, 563 U.S. 51, 61 (2011), it is possible that "the need for more or different training is so obvious […] that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. In *City of Canton*, the Supreme Court further explained that if the need for different training is so obvious, "the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Id.*

Here, the Plaintiffs' evidence meets the first two requirements. With regard to the first factor, at the summary judgment stage, a reasonable jury could find Scherman exceeded the constitutional limitation on the use of force by unreasonably employing deadly force against Lewis, as discussed above. As to the second element, the Tenth Circuit has explained that encounters with mentally ill people qualify as a usual and recurring circumstance that police officers must deal with. *Brown v. Gray*, 227 F.3d 1278, 1288 (10th Cir. 2000) (citing *Allen,* 119 F.3d at 842)); *see also Simpson v. Little*, 500 F. Supp. 3d 1255, 1267 (N.D. Okla. 2020) (finding that the plaintiff satisfied the second element because

"[t]the highly predictable and patently obvious [consequence] of not having regular shoot don't shoot training is an officer using deadly force when not constitutionally authorized to do so.") Thus, the Court need only address whether Plaintiffs provided evidence of Edmond's deliberate indifference or a direct causal link between the failure to train and the alleged Fourth Amendment violation.

Deliberate indifference requires a showing that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonably be said to have been deliberately indifferent to the need." *Brown*, 227 F.3d at 1288 (citing *City of Canton*, 489 U.S. at 390).

Summary judgment is inappropriate when a plaintiff identifies and provides evidence of specific training that is "out of synch with the entire United States in terms of what police are being trained to do." *See Allen*, 119 F.3d 837, 843 (10th Cir. 1997). In *Allen*, the Tenth Circuit reversed the district court's grant of summary judgment for the defendant City of Muskogee because there was "evidence presented […] that the officers received inadequate training on how to deal with mentally ill or emotionally upset persons who [were] armed with firearms." *Id.* at 842. The court reasoned that the plaintiff's expert provided evidence that, when viewed in the light most favorable to the plaintiff, created a genuine fact dispute precluding summary judgment. *Id.* at 843.

However, summary judgment is appropriate when a plaintiff only provides evidence of an "*absence* of specific training for [officers] that [ ] could have helped them during the encounter." *See Carr v. Castle*, 337 F.3d at 1230 (emphasis in original). In *Castle*, the

Tenth Circuit upheld the district court's grant of summary judgment for the city on the failure to train claim asserted against it because, unlike in *Allen*, the plaintiffs failed to provide evidence of improper training rising to a level of a constitutional violation. *Id.* Specifically, the plaintiff argued that the city had trained its officers to use deadly force, rather than to wound. *Id.* The court explained that

> [i]f the City had actually trained its Officers to "shoot until dead," Carr would have been able to survive summary judgment, for the City would obviously have been on notice of, and nonetheless consciously disregarded, the potential harm. But Carr's contention distorts not only the Officers' testimony but, more importantly, the nature of the training at issue.
>
> What the Officers' testimony really reveals is their understanding that they were ordered to shoot to kill only when they were confronted with situations that required the use of deadly force as discussed in *Tennessee v. Garner:* self-defense or the fleeing felon rule. In those situations officers are allowed to shoot to kill because the imminent danger to themselves or the community necessitates it. And such rules were meticulously described in the City's training materials.

Id. The court distinguished *Castle* from *Allen* when it explained that offering evidence "that well-trained officers would have performed differently under pressure does not rise to the legal standard of deliberate indifference on the part of the City[.]" *Id.* at 1230. Further, the Court found that the plaintiff did not show a "direct causal link" because while the plaintiff had been repeatedly shot in the back, there was no evidence that the officers were "trained by the City to shoot [someone] repeatedly in the back after he no longer posed a threat." *Id.* at 1232. The Court now turns to each of Edmond's alleged deficiencies in its training of officers.

The Court first notes that Professor Gilbertson's report is contradictory in certain important respects. Gilbertson begins his report by lauding the training of Box and

Scherman but ultimately condemns their actions as failing to comport with such training. Doc. No. 83-11, p. 14. His report states that "[n]either Sergeant Box nor Officer Scherman can claim they were unfamiliar with mental illness or Excited Delirium as they […] both had been trained to recognize and respond to the same as part of the CLEET Academy training and additional mental health crisis intervention training through the Edmond Police Department." Doc. No. 83-11, p. 14. However, later in Gilbertson's analysis, he condemns Edmond because it did not have a "written policy on responding to persons experiencing Excited Delirium." Doc. No. 83-11, p. 26. As discussed above, when a plaintiff only provides evidence of the "*absence* of specific training for [officers] that [ ] could have helped them during the encounter[,]" summary judgment is appropriate. *Castle,* 337 F.3d at 1230. Thus, even assuming Gilbertson's latter account controls—that a written policy is preferable to actual in-person training—Plaintiffs fail to show that Edmond was deliberately indifferent in this regard.

Further, Gilbertson states that Edmond's policy was deficient because "it does not require the involvement of CIT-certified officers in" calls involving persons in crisis. Doc. No. 82, p. 26 ¶ 73. This fails to establish a "direct causal link" between the city's alleged deficiency and the encounter with Lewis because, as Gilbertson states, Sergeant Box "had completed specialized Crisis Intervention Team (CIT) training through the Edmond Police Department." Doc. No. 82-11, p. 16, ¶ 45. Thus, a CIT-certified officer *was on the scene* of the deadly encounter. *Id.* Further, Gilbertson stated that "[i]f either Scherman or Box had employed the verbal de-escalation they had been trained to utilize […] no force whatsoever may have been necessary." Doc. No. 83-11, p. 19. With this assertion,

Gilbertson admits that the absence of training was not "the moving force" behind the alleged constitutional violation. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). For this reason, summary judgment is appropriate in regard to Plaintiffs' contention that not requiring the involvement of CIT-officers directly caused Lewis's death.

Finally, the Court addresses Plaintiffs' contention that Edmond's intermediate force policy was deficient, and that the deficiency establishes a *Monell* failure to train claim.[4] Edmond's Weapons Policy and Procedure #07-02 states that "[o]fficers while in uniform shall at minimum carry less lethal options of authorized baton, O.C. or an electronic control device on their duty belt during any patrol assignment."[5] Plaintiffs, through Professor Gilbertson, argue that Edmond's policy is deficient because it fails to "*require*[] its officers [to] carry *all issued intermediate force weapons on their person.*" Doc. No. 83-11, p. 26 (emphasis added). Specifically, Professor Gilbertson opines that

> [b]y not requiring officers to carry less lethal department-issued use of force weapons/tools, [Edmond] knowingly limits the use of force its officers can employ. An officer who carries only one less lethal weapon only has deadly force in the form of their firearm available as a weapon if the one other less lethal weapon is unusable for any reason. That is precisely what happened according to Officer Scherman.

Id. Edmond responds that Plaintiffs "ignore the undisputed fact that three (3) attempts at using non-lethal force to detain [ ] Lewis failed." Doc. No. 87, p. 7. However, Professor

[4] The Court notes that though the Plaintiffs couch their allegations in terms of a "failure to train" claim, the Plaintiffs actually allege that the City's policy is deficient, rather than that the officers were inadequately trained.

[5] Edmond Police Department Weapons Policy and Procedure #07-02, p. 7 ¶ IV(A).

Gilbertson asserts that had Edmond required officers to carry all intermediate force weapons and had Scherman complied with such policy, Scherman would have had additional less lethal options to subdue Lewis than first resorting to his firearm if his taser failed. Doc. No. 83-11, p. 26.

Though the Plaintiffs do not point to a pattern of excessive force employed by Edmond, the Supreme Court has "left open the possibility that, in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Connick*, 563 U.S. at 63. As the Court explained above, this pattern is unnecessary when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that the municipality can be charged with being "deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. In *City of Canton*, the Supreme Court explained that training officers on the use of deadly force can be said to be "so obvious, that the failure to do so could properly be characterized as deliberate indifference." *Id.* at 390 n.10 (internal quotation marks and citations omitted). Thus, the question for the Court is whether it is "so obvious" that Edmond's intermediate force policy—requiring an officer to carry only one less lethal tool—is so likely to be inadequate that Edmond can be charged with being "deliberately indifferent."

"In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *City of Canton*, 489 U.S. at 392. In *City of Canton*, the Supreme Court explained, however, that federal courts are "ill suited

to undertake" an "endless exercise of second-guessing municipal employee-training programs." *Id.* Rather, the role of the district court is to identify whether the municipality had actual or constructive notice of its purported failure to train or whether the alleged failure to train is one of the "rare cases" in which the necessity of the training is "so patently obvious" that the municipality could only avoid notice if it was deliberately indifferent to the necessity of the training. *See Connick*, 563 U.S. at 64.

In *Davis v. City of Tulsa, Oklahoma*, 380 F. Supp. 3d 1163, 1175 (N.D. Okla. 2019), the plaintiff's expert argued both that "the City of Tulsa failed to provide proper scenario-based deadly force training or 'shoot-don't shoot' training" and "that the City should have required [its officers to be equipped] with less-lethal weapons such as Tasers." 380 F. Supp. 3d at 1175. The court, relying on the Tenth Circuit's decision in *Castle*, explained that the failure to "provide particular 'shoot/don't shoot' training where officers are confronted with non-lethal weapons" did not provide evidence of "how the City had notice that its actions (or failures to act) were likely to result in constitutional violations" nor "illustrated how the City consciously chose to disregard the risk of harm." *Id.*, quoting *Carr v. Castle*, 337 F.3d at 1221. Similarly, here, the Plaintiffs have not provided any evidence of a pattern of constitutional violations or any other indication that Edmond was, or should have been, on notice that its intermediate force policy was constitutionally deficient. Further, Plaintiffs' expert's assertion that the policy was deficient, by itself, does not establish that the intermediate force policy is one of the "rare cases" where the training's necessity is "so

patently" obvious that Edmond must have been deliberately indifferent to the need for amending its policy.[6]

Thus, the Court finds that Plaintiffs have not shown Edmond was deliberately indifferent in the adoption of its intermediate force policy.[7] Accordingly, Edmond's motion for summary judgment is hereby GRANTED on the failure to train claim.

V. Equal Protection Clause

Edmond also seeks summary judgment on Plaintiffs' equal protection claim. Under the Fourteenth Amendment, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In *Village of Willowbrook v. Olech*, the Supreme Court explained that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v.*

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[6] In *Davis v. City of Tulsa, Oklahoma*, 380 F. Supp. 3d 1163, 1177 (N.D. Okla. 2019), the Court analyzed other appellate decisions and explained that

> Some of the federal appellate courts have rejected the less-lethal weapons theory of municipal liability. *See, e.g., Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("we have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons"); *Plakas v. Drinski*, 19 F.3d 1143, 1150-51 (7th Cir. 1994) (rejecting claim that a county violated a suspect's constitutional rights by failing to equip its police officers with alternatives to deadly force, stating "we think it is clear that the Constitution does not enact a police administrator's equipment list"); *see also generally Salas v. Carpenter*, 980 F.2d 299, 309-310 (5th Cir. 1992) (determining that the Constitution does not "mandate that law enforcement agencies maintain equipment useful in all foreseeable situations"); *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018) ("The Fourth Amendment does not require 'the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Tennessee v. Garner* and *Graham v. Connor*....") (quoting *Plakas*, 19 F.3d at 1149).

380 F. Supp. 3d at 1175.

[7] The Court need not address whether the Plaintiffs met the "direct causal link" element of a failure to train claim because the Court finds that Plaintiffs have not shown Edmond was deliberately indifferent.

Olech, 528 U.S. 562, 564 (2000) (internal citation omitted). Thus, to prevail under *Olech*, Plaintiffs must show that the police intentionally treated Lewis differently from others similarly situated. *See id.*

Plaintiffs argue that Lewis, a black 17-year-old, "was treated differently from others not of his race who were similarly situated to him in other encounters with the City's police officers." Doc. No. 83, p. 20. Specifically, Plaintiffs point to an encounter in June of 2019 between one Edmond police officer, two University of Central Oklahoma officers, and a 19-year-old white suspect. *Id.* The Plaintiffs argue that Lewis was "wrongfully treated" differently because in June of 2019, the officers successfully tased, restrained and took into custody the 19-year-old white suspect without resorting to deadly force while the Defendants encounter with Lewis ended in his death. Doc. No. 83, p. 21.

Edmond argues that summary judgment is appropriate because the June 2019 encounter is not "evidence of others who were similarly situated." Doc. No. 87, p. 8. "The Equal Protection Clause does not forbid differential treatment per se; rather, '[i]t simply keeps governmental decision makers from treating differently persons *who are in all relevant respects alike*.'" *Wheeler v. Perry*, No. CIV-15-198-F, 2015 WL 5672607, at *8 (W.D. Okla. Aug. 21, 2015) (citing *Taylor v. Roswell Ind. Sch. Dist.*, 713 F.3d 25, 53–54 (10th Cir. 2013) (internal quotation marks omitted), *report and recommendation adopted*, 2015 WL 5686587 (W.D. Okla. Sept. 24, 2015)) "Inevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of the case." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004).

In *Jennings*, the Tenth Circuit explained the practical application of the Supreme Court's decision in *Olech* by stating that

> Plaintiffs will have an easier time stating a claim where there are few variables in play and the set of potentially similarly situated individuals is well-defined. This is the key to understanding *Olech.* There, the village asked for a standard fifteen-foot easement from everyone (other than the Olechs) who had requested a hookup to the municipal water supply, without regard to differences in cost or circumstance. When the village demanded a larger easement from the Olechs, with no apparent legitimate reason for the difference, the Court was willing to recognize an equal protection claim.
>
> When multiple variables are in play, however, the difference in treatment can be the product of a number of considerations, conscious or otherwise, many of them legitimate. That is why the Supreme Court has imposed a substantially more "demanding" pleading burden on plaintiffs bringing claims of selective law enforcement. *United States v. Armstrong*, 517 U.S. 456, 463–64, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1995).

383 F.3d at 1214.

Here, Plaintiffs argue that the 19-year-old white suspect was similarly situated to Lewis because both individuals were in an altered mental state, broke through the door of a home, and ignored commands from officers. Doc. No. 83, pp. 20–21. However, the undisputed facts reveal the individuals were not similarly situated for several relevant reasons. First, two of the three responding officers were not Edmond police officers. Second, the parties do not dispute that Sergeant Box's multiple attempts at deploying his taser did not affect Lewis. Doc. No. 65, pp. 12–13 ¶¶ 39, 42, & 44; Doc. No. 82, p. 12, ¶¶ 39, 42, & 44. Conversely, the second taser deployment successfully subdued the suspect in

the June 2019 incident. Doc. No. 64, pp. 9–10 ¶ 7.[8] Lastly, while Lewis "continued to strike Box to the point where Box" felt he may go unconscious, there is no evidence any officer engaged in close combat with the suspect in June of 2019.

Further, the Plaintiffs fail to include any evidence of discriminatory intent. The Plaintiffs state that the failure to use de-escalation or other techniques with Lewis also "occurred on other occasions involving individuals experiencing a mental health crisis." Doc. No. 83, pp. 8–9.

Thus, even construing the facts in favor of the non-movant, Plaintiffs fail to allege that Lewis was treated differently than other similarly situated suspects because Plaintiffs do not identify other persons who were *in all relevant aspects like him*. *See Roswell*, 713 F.3d at 53. Nor do Plaintiffs offer evidence of discriminatory intent towards Lewis. For these reasons, there is insufficient evidence of race discrimination to withstand Edmond's summary judgment motion. Accordingly, Edmond is entitled to summary judgment on Plaintiffs' equal protection claim.

VI. State Law Negligence Claim

In regard to the state law negligence claim, Edmond argues that it is entitled to summary judgment because "when a court finds that an officer's actions were 'objectively reasonable' in granting summary judgment on a § 1983 excessive force claim based on qualified immunity, summary judgment should likewise be granted in favor of a

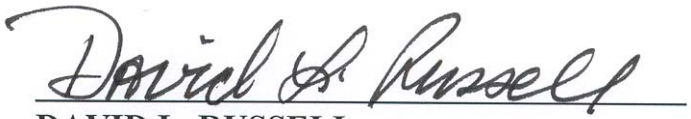
[8] The evidence offered by the Plaintiffs states that a second taser deployment successfully subdued the 19-year-old white suspect. *See* Josh Dulaney, *Some see race at play in Edmond police tactics*, The Oklahoman (June 25, 2019), https://www.oklahoman.com/article/5634694/some-see-race-at-play-in-the-difference-with-edmond-police-tactics.

municipality on a state law negligence/excessive force claim." Doc. No. 64, p. 35 (citing *Hodge v. Keene*, No. CIV-10-1283-D, 2013 WL 372460, at *10 (W.D. Okla. Jan. 30, 2013)). However, as discussed above, the Court declines to grant summary judgment on the Plaintiffs' excessive force claim against Officer Scherman. Accordingly, the Court also declines to grant summary judgment on the state law negligence claim against Edmond.

VII. Conclusion

In summary, Sergeant Box's motion for summary judgment is GRANTED, Officer Scherman's motion for summary judgment is DENIED, and Edmond's motion for summary judgment is GRANTED IN PART and DENIED IN PART, as set forth herein.

IT IS SO ORDERED on this 6th day of July 2021.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE