No. _____

In the Supreme Court of the United States

JOSE ELIZONDO and ALICIA ELIZONDO,
Individually and as Representatives of the
Estate of Ruddy Elizondo,
Petitioners,

v.

THE CITY OF GARLAND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2009, a Garland, Texas police officer shot and killed a teenager he knew to be suicidal. The officer claimed he felt threatened by the boy, who brandished a small knife and cursed at him. But before pulling the trigger, the officer kicked open the distraught teen's bedroom door, yelled at him, pointed a gun at him at close range, and prevented the boy from defusing the encounter by closing the door to his room. In the ensuing suit under 42 U.S.C. § 1983, the teen's parents claimed that this conduct needlessly escalated the confrontation and provoked their obviously disturbed son, making the shooting inevitable. They argued that the officer's actions should therefore be considered among the totality of circumstances dictating whether the use of deadly force violated the Fourth Amendment. But in granting and affirming summary judgment against the parents, the courts below asked only whether the officer was threatened *at the moment he fired*, and refused to consider his provocative actions before pulling the trigger. The questions presented, on which the circuits have persistently split, are:

1. When an officer precipitates a violent confrontation ending in his use of force, should his own conduct making that force necessary be considered among the totality of circumstances determining whether the force was constitutionally excessive?

2. Does an individual's obvious mental illness reduce the government's justification for using force against him during an encounter with police?

PARTIES TO THE PROCEEDING

The Petitioners are Jose Elizondo and Alicia Elizondo, individually and as representatives of the Estate of Ruddy Elizondo.

The Respondent is the City of Garland, Texas.

Officer W. M. Green was a Defendant/Appellee in the courts below but is not a party to this petition.

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Jose and Alicia Elizondo respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The majority and concurring opinions of the court of appeals are reported at 671 F.3d 506 and reprinted at App. 1a-8a and 9a-11a. The district court's decisions granting summary judgment against the Elizondos are unreported and reprinted at 12a-21a and 22a-35a.

JURISDICTION

The court of appeals entered judgment in this case on February 13, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

This case follows a pattern found repeatedly in the federal reporters as well as news stories: a relative of someone threatening suicide or exhibiting mental illness calls 911; police arrive, draw guns, confront the person aggressively, and escalate the encounter; the incident consequently turns dangerous or violent, and officers shoot the person his family originally set out to help.

Unsurprisingly, many of these episodes become § 1983 lawsuits, and plaintiffs often claim officers violated the Fourth Amendment not only because the shooting itself may have been unreasonable, but because officers also precipitated the confrontation, heightened its peril, and unreasonably created the circumstances later necessitating their own use of force. The Elizondos asserted this claim here and amply supported it with testimony from fact and expert witnesses.

This theory of liability has been accepted in three circuits and would likely succeed in a fourth that has yet to consider it directly. Courts and factfinders in these circuits evaluate an officer's conduct before he uses force in assessing whether that force is reasonable under the Fourth Amendment. It is deemed one of the "totality of circumstances" this

Court has indicated should determine the outcome. But in the Fifth and other circuits, the actions police take before the ultimate moment they shoot are excluded from the analysis as irrelevant to reasonableness. All that matters is whether they or others appear to be endangered at the moment they fire. Because this case was heard in the Fifth Circuit, the Elizondos lost on summary judgment.

The circuits have also split on how to weigh the mental illness of someone shot by police. In some circuits, a person's evident mental condition or acute emotional crisis weakens the government's interest in using force against him. He is perceived as less dangerous and in need of medical help rather than treatment like an inevitably violent criminal suspect. Courts inquire whether less forceful means were available to respond to him. In other circuits, including the Fifth, mental illness is typically seen as making a person more dangerous, and so strengthens the government's interest in applying force. Alternative tactics will not be considered.

As a result of these varying approaches, a case like Ruddy Elizondo's will be treated very differently if filed in Boston or Los Angeles than in Dallas or New York. The Court should now end this disparity. The Delphic guidance provided in two decades-old excessive force decisions has fostered inconsistency and left police, judges and juries uncertain about the limits of permissible force in a type of case that recurs all too often. Incredibly, this case was the second decided by the Fifth Circuit in only two months stemming from police shootings of mentally ill people in Garland, Texas. Judge Harold DeMoss concurred in both, feeling bound by circuit precedent. But he also

correctly called the state of the law in the Fifth Circuit "relatively primitive" and lamented the entirely preventable deaths of two troubled young people. This case is the ideal vehicle to address an entrenched conflict in an important area of Fourth Amendment law.

STATEMENT OF THE CASE

A. Officer Green's Shooting of Ruddy Elizondo

Because the district court dismissed the Elizondos' claims on summary judgment, the facts that follow are those in the record construed most favorably toward them. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).

Ruddy Elizondo arrived home around midnight on March 18, 2009. App. 2a. He had been drinking. Once in his bedroom, he began playing loud music and phoned his girlfriend. Ruddy's mother told him to go to sleep and Ruddy responded that he loved her, but she soon heard him crying. When she opened Ruddy's bedroom door, she found him holding a small kitchen knife to his stomach. Because Ruddy had attempted suicide weeks earlier, his mother pleaded with him to put the knife down, and Ruddy's sister called 911 for an ambulance. App 50a.

Garland Police Officer William Green received the bulletin and headed for the Elizondos' home. The dispatcher mistakenly reported that Ruddy had already stabbed himself and left the knife lodged in his abdomen, so Green expected to prepare the scene for paramedics. He arrived, entered a hallway leading to bedrooms, and asked Ruddy's sister where to find him.

She pointed to a bedroom Green was already standing beside, and Green kicked open the door. App. 3a, 46a.

Green then confronted Ruddy from a distance of six or seven feet. As Judge DeMoss described the scene: "Officer Green was a very large man highly trained in self defense and armed with a night stick, taser and firearm, while Ruddy was a short and obese teenager who was distraught, intoxicated, and contemplating suicide with a relatively small knife." App. 9a-10a. Green saw Ruddy holding the knife to his stomach with his right hand and talking on a phone with his left. App. 40a. Green drew his gun, pointed it at Ruddy, and began yelling at Ruddy in English and Spanish to drop the knife. *Id*.

Faced with an unfamiliar officer at his bedroom door suddenly pointing a pistol at him and yelling, Ruddy turned to him and said, "Fuck you." *Id*. Green claimed he stepped back and tried to "find some type of protective cover, to put some sort of solid object between us, but was unable to safely do so due to the architecture of the kitchen and hallway." *Id*. Actually, Ruddy was the one who moved to separate them by closing his bedroom door as Green was shouting at him, but Green extended his foot to kick it back open. *Id.*; App. 42a. Green also had a clear path back into the Elizondos' kitchen but chose to remain in the hallway confronting Ruddy in close quarters with his pistol. App. 54a. Green conceded that, at that point, Ruddy had not committed any crime or threatened him or anyone else he knew of. App. 43a-45a.

Once Green prevented Ruddy from shutting his bedroom door, Ruddy said "Fucking shoot me" and took a step toward Green. App. 40a. Green said he

would shoot Ruddy if he had to and if Ruddy came closer. *Id.* Ruddy said "man, fuck you" and took a second step toward Green. *Id.* Ruddy did not sound angry when he asked Green to shoot him, App. 52a, but his lack of cooperation evidently angered Green, who clenched his teeth and turned red. App. 49a.

Green stated that he then saw Ruddy raise the knife from his stomach to his right ear and point it at Green.[1] Green shot Ruddy three times, hitting him in the chest, abdomen and shoulder. Ruddy never crossed the threshold of his bedroom before Green fired his weapon. App. 47a. He died a short time later. Approximately five minutes had elapsed since the Elizondos called 911 for an ambulance.

B. The Elizondos' Suit in the District Court

The Elizondos sued Green and the City of Garland under 42 U.S.C. § 1983. They alleged that Green used excessive force in violation of the Fourth Amendment. They also sought recovery from Garland for municipal liability under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). Specifically, they alleged that Garland's policies, customs and practices governing officers' dealings with people exhibiting mental illness and suicidal behavior reflect deliberate indifference to their constitutional rights. These include foregoing basic de-escalation and delaying tactics when responding to people threatening suicide,

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[1] The district court recognized the existence of a factual dispute regarding whether Ruddy raised and pointed his knife at Green, App. 30a, but the Fifth Circuit concluded that no evidence contradicted Green's account of Ruddy doing so. App. 3a n. 1.

choosing not to employ specially trained teams used by departments nationwide to address people in crisis (often called "critical incident teams"), failing to train officers to handle mentally ill or suicidal subjects without provoking violent confrontations, placing officers in circumstances that could lead to the use of deadly force without necessary supervision or back-up, and failing to communicate and coordinate with mental health professionals in emergency or suicidal situations. The Elizondos alleged that these policies, customs and practices caused Ruddy's death.

Following discovery, Green and the city moved for summary judgment. The Elizondos opposed the motions with evidence relating to Ruddy's shooting, relevant Garland policies and practices, and several prior incidents of alleged excessive force by Garland officers involving both mentally ill people and routine criminal suspects. They also offered affidavits from two law enforcement experts, including a 29-year veteran and former second-in-command of the Dallas Police Department, who testified:

> Under even his own version, Green's behavior was an abomination. This homicide was completely unnecessary and avoidable…
>
> Rather than call for back-up, consult with a critical incident team, contact suicide prevention personnel, consult with the family, move away from the doorway, formulate a plan to calmly and safely remove the knife, or deploy non-lethal force, Green did exactly what no reasonable officer should ever do with a mentally unstable, suicidal person. He pulled out his gun, pointed it at Ruddy and began

> yelling at the distraught kid to drop the knife. How he could possibly assume that it was reasonable and appropriate to yell and make threats with a semi-automatic pistol against a teenager in his own bedroom – who posed only a minimal to moderate threat to only himself with a kitchen knife – is beyond reasonable comprehension.

App 37a-38a. Thus, the Elizondos argued that Green's use of force was objectively unreasonable in part because he provoked an emotionally disturbed teen into a confrontation almost certain to require the use of deadly force rather than taking the obvious measures described by their expert to defuse the situation.

Nonetheless, the district court granted summary judgment to Green and the city on the ground that Green did not use excessive force. The court cited Fifth Circuit precedent confining the reasonableness inquiry "'to whether the [officer] was in danger *at the moment of the threat*,'" rather than also examining his actions before the shooting and whether they created the need to use deadly force. App. 30a (quoting *Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001)) (emphasis in original). "While Plaintiffs suggest other, perhaps superior ways to deal with a suicidal teenager, those contentions are immaterial. This Court does not look to the circumstances leading up the fatal shooting." App. 30a-31a. The court therefore found that Green had not violated Ruddy's Fourth Amendment rights and, in a subsequent order, found there could be no basis for municipal liability under § 1983 against Garland in the absence of an underlying constitutional violation. App. 20a-21a.

C. The Fifth Circuit's Opinion

The Elizondos appealed to the Fifth Circuit, which affirmed.[2] The Elizondos complained that the district court gave inadequate consideration to Green's conduct leading up to the shooting while disproportionately focusing on Ruddy's supposed belligerence toward Green, but the court of appeals held that Green's force was reasonable because *"[a]t the time Green discharged his weapon*, Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer." App. 8a (emphasis added). The court specifically noted that Ruddy "seemed intent on provoking Green" but made no mention of Green's actions toward Ruddy before he fired as being relevant to reasonableness.

Judge DeMoss concurred in the decision but wrote separately to "express [his] disapproval of and disappointment with the actions of the City of Garland police department." App. 9a. He concluded that affirmance was required "under the current state of our law," but wrote "[e]ither law enforcement procedures or our law must evolve if we are to ensure that more avoidable deaths do not occur at the hands of those called to 'protect and serve.'"

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[2] The Elizondos did not preserve an appeal of the summary judgment favoring Green, but did appeal dismissal of the case against Garland. App. 5a-7a.

Judge DeMoss strongly criticized both Green's conduct and the municipal policies and procedures giving rise to it. As for Green, he observed: "Officer Green had only been on the scene for a few seconds, backup was on the way, and emergency medical personnel was waiting outside when the shooting occurred. Deadly force should have been Officer Green's very last resort rather than his first reaction." In Judge DeMoss's view, "[f]orcing Ruddy's bedroom door open, yelling orders at him, and immediately drawing a firearm and threatening to shoot was a very poor way to confront the drunk, distraught teenager who was contemplating suicide with a knife."

As for the city, Judge DeMoss wrote: "I firmly believe that Officer Green should have been trained to use better judgment in [his] approach to volatile and unfortunate situations such as this one." Judge DeMoss "focus[ed] [his] criticism specifically at the City of Garland police department's training and tactical response programs," and noted that "[t]here must be effective ways for police officers to resolve volatile situations that avoid threatening or using deadly force." He posited several such methods. App. 10a n. 1.

Judge DeMoss's concurrence expressed particular urgency because, remarkably, this was the second Fifth Circuit decision in only eight weeks arising from the Garland police's fatal shooting of a suicidal person in his home after family members called 911 for medical help. App. 9a-10a (citing *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011)). In *Rockwell*, officers shot a psychotic man in 2006 when he rushed at them with knives after they kicked in his bedroom door to extract and arrest him against the wishes of his parents. *See*

664 F.3d at 988-90. The court rejected the Rockwells' request – which was based "on case law from other circuits" – to "examine the circumstances surrounding the forced entry, which may have led to the fatal shooting, in evaluating the reasonableness of the officers' use of deadly force." *Id.* at 992-93. Instead, the court reaffirmed Fifth Circuit precedent holding that officers need only reasonably feel threatened at the precise moment they fire. *Id.*

As in this case, Judge DeMoss concurred in *Rockwell* but wrote "that the state of the law in these particular circumstances remains relatively primitive." *Id*. at 996. He "express[ed] disapproval of and disappointment with the officers' actions" because they "provoked a man they knew to be mentally ill into a violent reaction." *Id*. at 996-97. "In my opinion," Judge DeMoss concluded, "the officers should have been trained to use better judgment in their approach to volatile and unfortunate situations such as this one. This entire case should have been avoided. Scott should be alive today – perhaps in a medical facility or under court supervision, but alive nonetheless." *Id*. at 997.

REASONS FOR GRANTING THE PETITION

I. Circuit Courts Are Divided Over Whether to Consider an Officer's Conduct Precipitating the Use of Force in Deciding Whether That Force was Excessive.

In three and likely four circuits, action by a police officer creating the conditions requiring him to use force later in an encounter will be evaluated when determining if the use of force was reasonable. In five

circuits, including the Fifth, such conduct is deemed completely irrelevant and will not be considered. The Court should now resolve this split – expressly recognized by courts and commentators – which stems from opaque language in the two leading decisions of this Court on the subject.

1. This Court set the parameters governing excessive force cases in two decisions in the 1980's. *Tennessee v. Garner* established that an officer who shoots a suspect effects a "seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. 1, 8 (1985). The constitutionality of the seizure depends on balancing the nature and quality of the intrusion on an individual's Fourth Amendment interests against the importance of the governmental interests offered to justify the intrusion. *Id.*; *accord Scott*, 550 U.S. at 383. The Court surveyed prior Fourth Amendment decisions and concluded: "In each of these cases, the question was whether the totality of the circumstances justified a particular sort of search or seizure." *Id*. at 8-9.

Four years later, the Court reiterated *Garner's* balancing test and observed that lower courts should pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connnor*, 490 U.S. 386, 396 (1989). The Court described a standard of "reasonableness at the moment," allowing "for the fact that police officers are often forced to make split-second judgments – in

circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." 490 U.S. at 396-97.

The Court more recently considered an excessive force claim in *Scott*. But beyond instructing that *Garner* "did not establish a magical on/off switch that triggers rigid preconditions" dictating the outcome, and that "in the end we must still slosh our way through the factbound morass of 'reasonableness,'" 550 U.S. at 382-83, *Scott* offers little guidance to lower courts. Nor does it speak at all to whether an officer's conduct before the ultimate moment he uses force is relevant to determining excessiveness.

2. Following *Garner's* teaching that seizures be justified by the "totality of the circumstances," three circuits have held that actions taken by an officer preceding his use of force should be considered in deciding reasonableness. A fourth would probably do so if confronted by the question, based on its prior holdings.

For example, the Tenth Circuit has rejected the approach of the Fifth Circuit in cases almost identical to this one. In *Sevier v. City of Lawrence*, parents saw their son with a knife after he had been drinking and called 911 because he had previously attempted suicide. *See* 60 F.3d 695, 696 (10th Cir. 1995). Police officers arrived, drew their guns, and ordered him to drop the knife, but he cried "I love you, Mom" and either lunged at the officers (according to police) or stood with the knife at his side (according to his parents). *See id.* at 698. Officers shot and killed him. *See id.*

Citing *Garner* on the duty to "ask whether the 'totality of the circumstances' justified the use of force," the Tenth Circuit held: "The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Id.* at 699. The court declined to disturb the denial of summary judgment for the officers, not only because a factual dispute existed as to whether the man lunged at them with a knife, but also because "there was conflicting evidence as to whether the officers precipitated the use of deadly force by their own actions during the course of the encounter immediately prior to the shooting." *Id*. at 700-01.

Similarly, in *Hastings v. Barnes*, officers reported to the house of a suicidal man who called 911. *See* 252 Fed. Appx. 197, 198-200; 2007 WL 3046321 at ** 1-2 (10th Cir. 2007). The man produced a sword and ignored orders to drop it, moved toward the officers despite being pepper-sprayed, and was shot dead. *See id*. It was agreed officers acted reasonably when they fired, but that was not enough: "The reasonableness of the use of force depends… also on whether the officers' own conduct during the seizure unreasonably created the need to use such force." *See id*. at 203, 2007 WL 3046321 at * 5. "Rather than attempt to help" someone pondering suicide, police "crowded themselves in [his] doorway (leaving no room for retreat), issued loud and forceful commands at him and pepper-sprayed him, causing him to become even more distressed." *Id.* A jury could therefore find officers "unreasonably escalated the situation to the point deadly force was required," rendering the

shooting unreasonable. *Id.*; *see also Thomas v. Durastanti*, 607 F.3d 655, 667 (10th Cir. 2010) (pre-seizure conduct relevant).

The First Circuit also mandates consideration of officers' provocations before their ultimate use of force. Recognizing that "[t]he various circuits have taken somewhat different positions on the question of how conduct leading up to a challenged shooting should be weighed in an excessive force case," that court holds:

> The rule in this circuit is that once it is clear that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure. Thus, police officers' actions for our purposes need not be examined solely at the "moment of the shooting." This rule is most consistent with the Supreme Court's mandate that we consider these cases in the "totality of the circumstances."

Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005) (quotations and citations omitted) (affirming plaintiff's § 1983 verdict in part because officer's abandonment of cover increased likelihood of shooting); *accord St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (scrutinizing officers' actions only at "moment of the shooting" is "inconsistent with Supreme Court decisions").

Just months ago, the Ninth Circuit reversed a summary judgment in favor of officers who shot a suicidal teen and reiterated that circuit's rule that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be

held liable for his otherwise defensive use of deadly force." *Glenn v. Washington County*, 673 F.3d 864, 879 (9th Cir. 2011) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)). In *Glenn*, officers shot beanbags at the teen, prompting him to run toward his house – movement that then led police to shoot him with live ammunition. *See id.* at 867-69. Even assuming "deadly force was a reasonable response to Lukus' movement toward the house," the court held, a jury could still "find that the beanbag shots provoked Lukus' movement and thereby precipitated the use of lethal force," creating liability for the later fatal shooting. *Id.* at 879 (quoting in part *Billington*, 292 F.3d at 1189). *Billington*, on which *Glenn* relied, recognized that the circuits had rendered "inconsistent" judgments on the question but held that an officer's "provocation may render [his] otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." 292 F.3d at 1187-88, 1190-91 (emphasis in original); *accord Espinosa v. City and County of San Francisco*, 598 F.3d 528, 538-39 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 1089 (2012).

The Third Circuit also declines to look only at the moment force is used. *See Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004). While that court has not specifically resolved a claim that the officer's own conduct necessitated the use of force, *see Grazier v. City of Philadelphia*, 328 F.3d 120, 127 (3d Cir. 2003), it holds that all facts contributing to the use of force are relevant, based on "ordinary ideas of causation." *Abraham v. Raso*, 183 F.3d 279, 291-92 (3d Cir. 1999). As the court remarked in *Abraham*:

> We reject the reasoning [of decisions excluding evidence of pre-seizure events] because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the "totality of the circumstances" with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. "Totality" is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Id. at 291.[3]

3. On the other hand, the Second, Fourth, Fifth, Sixth and Eighth Circuits hold that events preceding the use of force, including provocations by police giving rise to the incident, are irrelevant to whether the force exceeded constitutional limits. In *Fraire v. City of Arlington*, for instance, the Fifth Circuit rejected plaintiff's suggestion that police conduct "manufactur[ing] the circumstances that gave rise to the fatal shooting" should factor into the reasonableness determination, instead restricting the inquiry to whether the officer reasonably felt

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[3] The Eleventh Circuit has similarly observed that police could be found liable under the Fourteenth Amendment for shooting an arrestee, though such force might be reasonable in itself, if "any fear on the officer's part was a fear of retaliation against own unjustified physical abuse… [A] moment of legitimate fear should not preclude liability for a harm which resulted largely from his own improper use of his official power." *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). That court has not otherwise clearly decided the relevance of police conduct leading up to a use of force.

threatened "at the moment of the shooting." 957 F.2d 1268, 1275-76 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992). A contrary view, the court feared, would risk holding officers liable for negligent police work. *See id.* at 1276; *see also Bazan*, 246 F.3d at 493. The Fifth Circuit restated this position in *Rockwell*, 664 F.3d at 992-93, and the district court in this case cited *Fraire* and *Bazan* in refusing to look beyond the moment Green shot Ruddy when analyzing excessiveness. App. 30a. The court of appeals likewise focused solely on "the time Green discharged his weapon" and ignored his earlier actions. App. 8a.

Other circuits have followed the same course, often in cases very similar to this one. In *Schulz v. Long*, the Eighth Circuit considered an excessive force claim arising from a police shooting of a mentally ill man who approached them with a hatchet after his parents called 911. *See* 44 F.3d 643, 645-46 (8th Cir. 1995). Quoting *Graham* at length, the court concluded that this Court's "use of the phrases 'at the moment' and 'split-second judgment' are strong indicia that the reasonableness inquiry extends only to those facts known to the officer at the precise moment the officers effectuate the seizure.... [E]vidence that [officers] created the need to use force by their actions prior to the moment of seizure is irrelevant." *Id.* at 648-49; *accord Lacy v. City of Bolivar*, 416 F.3d 723, 727 (8th Cir. 2005).

In a case involving the attempted arrest and shooting of a mentally ill man who charged at police with a knife in his home, the Fourth Circuit rejected the argument that "the 'totality of the circumstances' approach in the excessive force context should include consideration of the fact that [officers]... provoked and

precipitated the violent confrontation with [the man]. Although circuits differ on the question of how pre-shooting conduct should be weighed in an excessive force case, this circuit has repeatedly held that such conduct is generally not relevant and is inadmissible." *Waller v. City of Danville*, 212 Fed Appx. 162, 171; 2006 WL 3716579 at * 7 (4th Cir. 2006); *see also Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005).

The Sixth Circuit has specifically disagreed with the Ninth Circuit's reasoning in *Billington* and declined to examine "whether it was reasonable for the police to create the circumstances" leading to the application of deadly force, focusing instead "on the 'split-second judgments' made immediately before the officer used allegedly excessive force." *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (quotation omitted). The Second Circuit does likewise. *See*, *e.g.*, *Nimely v. City of New York*, 414 F.3d 381, 390-91 (2d Cir. 2005).[4]

4. In the last several years, the courts of appeals have repeatedly recognized this circuit split. *See Rockwell,* 664 F.3d at 992-93; *Livermore*, 476 F.3d at

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[4] The Seventh Circuit has suggested both that officers' pre-seizure conduct is irrelevant, *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994), and that "officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force." *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993); *accord Catlin v. City of Wheaton*, 574 F.3d 361, 369 n. 7 (7th Cir. 2009); *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir.) ("The totality of the circumstances cannot be limited to the precise moment when Deering discharged his weapon"), *cert. denied*, 528 U.S. 1021 (1999).

406; *Waller*, 212 Fed. Appx. at 171, 2006 WL 3716579 at * 7; *Young*, 404 F.3d at 22 n. 12; *Rivas*, 365 F.3d at 198; *Grazier,* 328 F.3d at 127; *Billington*, 292 F.3d at 1187-88; *Abraham*, 183 F.3d at 291; *Schulz,* 44 F.3d at 649 n. 3. Chief Justice Burger acknowledged it as long ago as 1986, though the division was not then entrenched by decisions in most circuits, as it is today. *See Sampson v. Gilmere*, 476 U.S. 1124, 1125 (1986) (Burger, C.J., dissenting from denial of certiorari).

Commentators have also taken notice. One observer cites the "widely disparate" approaches of the circuit courts due to "uncertainty as to what constitutes the 'totality of the circumstances,' a phrase largely unelaborated upon in *Garner* and *Graham*." Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 424 (2008). A "'frozen' time frame model" based on *Graham's* "at the moment" language opposes a broader "totality of the circumstances" model acknowledging the relevance of pre-seizure conduct. *See id.* Another commentator notes "the struggle that courts face in applying the conflicting principles involved in pre-seizure cases," writing:

> Some U.S. circuit courts of appeals have determined that pre-seizure conduct is not part of the totality of the circumstances of the use of force and cannot be used to resolve the reasonableness of the use of force. Other circuits have looked at the same precedents and concluded that this conduct is relevant to that determination.

Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 652, 675 (Dec. 2004). A third cites the "substantial doctrinal confusion" arising from the circuit split. Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 331 (Spring 2003).

The Court should now resolve the inconsistency among lower courts regarding whether a police officer's conduct creating his own later need to use force should be taken into account when deciding if the force was excessive.

II. Courts of Appeals Have Split on Whether an Individual's Obvious Mental Illness Reduces the Government's Interest in Using Force Against Him.

The circuits have also divided on how to weigh the evident mental illness of someone killed or injured by police when balancing that person's Fourth Amendment interests against those of the government.

1. The Ninth Circuit recognizes that, "when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). The court in

Deorle reversed a summary judgment for an officer alleged to have used excessive force against a mentally ill person who threatened police, shouted "kill me" to officers blocking his path, brandished a hatchet and crossbow at times, and was closing in on the officer who then shot him with a beanbag gun. *Id*. at 1276-78. The court observed that the officer "could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating…. Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle." *Id.* at 1282. The court also held that "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Id.* at 1281. In sum, "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Id*. at 1283.

Glenn is in the same vein. The court treated the decedent's status as a suicidal teen and the existence of less intrusive alternatives as circumstances demonstrating the excessiveness of the shooting. *See* 673 F.3d at 875-77. Like the Elizondos, the plaintiff in *Glenn* proffered expert testimony from a longtime law enforcement officer establishing that the defendant acted unreasonably by escalating the encounter, yelling at the teen to drop his knife, failing to begin a dialogue, and shooting beanbag rounds at him only four minutes after arrival. *See id.* at 877. And in *Bryan v. McPherson*, the court observed that if an officer believed a man he tasered "was mentally disturbed he should have made greater effort to take

control of the situation through less intrusive means." 630 F.3d 805, 829 (9th Cir. 2010). Since "the purpose of detaining a mentally ill individual is not to punish him, but to help him," government's interest in subduing him by force is reduced. *Id*.

Other circuits also take a subject's mental illness and the existence of alternative approaches into account when examining reasonableness. In *Hastings*, the Tenth Circuit pointed out that a man shot by police "was not a criminal suspect. He was a potentially mentally ill/emotionally disturbed individual who was contemplating suicide and had called for help." 252 Fed. Appx. at 203, 2007 WL 3046321 at * 5. Although the man held a sword, the court held that "an officer acts unreasonably when he aggressively confronts an armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching him in a threatening manner." *Id.* at 206; *see also Giannetti v. City of Stillwater*, 216 Fed. Appx. 756, 764; 2007 WL 441887 at * 8 (10th Cir. 2007) ("We agree that a detainee's mental health must be taken into account when considering the officer's use of force and it is therefore part of the factual circumstances the court considers under *Graham*"). The Sixth Circuit also considers a subject's obvious mental illness. *See Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).

2. By contrast, the Fifth Circuit does not differentiate between the force warranted against mentally ill people threatening suicide but not suspected of any crime, and the force required to subdue violent offenders. This case is typical. The court viewed Ruddy as hostile and seemingly intent on

provoking Green, App. 8a, but utterly ignored his patent emotional disturbance and even his apparent desire to carry out his suicide attempt by having Green shoot him. App. 3a ("Fucking shoot me"). The court acted similarly in *Ramirez v. Knoulton*, another police shooting case involving a mentally ill person. *See* 542 F.3d 124 (5th Cir. 2008). One factor in the court's finding of reasonableness in *Ramirez* was that the "officers were already on notice that [the man] was armed, emotionally unstable, and potentially suicidal." *Id*. at 131. As here, the *Ramirez* court apparently treated mental illness as justifiably increasing the government's interest in using force. Nor will the Fifth Circuit consider whether less intrusive alternatives to the use of deadly force were available to officers. *See Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003).

Other circuits also treat mental illness as an "aggravator" this way, rather than a "mitigator." As the Eighth Circuit held in one case, the fact that the shooting victim "may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers. 'Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual.'" *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) (*quoting in part Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000)); *accord Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007) ("stress[ing]" among other factors that decedent was "mentally unstable" and calling him "psychotic"); *Kerman v. City of New York*, 261 F.3d 229, 239 (2d Cir. 2001) ("A forced entry into the apartment of an emotionally

disturbed man possibly wielding a firearm cannot be dealt with by half measures").

The Court should also grant certiorari to define how an individual's mental illness factors into determining the reasonableness of a police officer's use of force against him.

III. Because Police Encounters with the Mentally Ill Are Recurrent and Often Lead to Litigation, the Court Should Clarify the Standards Applicable to Such Cases.

Violent police interactions with suicidal or mentally ill people are regrettably common and routinely generate litigation. Given the frequency and importance of cases like this one, the Court should clarify the applicable law.

Beginning in the 1960's, the number of people with mental illnesses living in institutions dropped dramatically. As one Department of Justice Office of Community Oriented Policing Services ("COPS") guide found: "After deinstutionalization, many people with serious mental illnesses were returned to the community, but adequate community-based services were not established. Predictably, calls to the police about crimes and disorder involving people with mental illness increased." Gary Cordner, *People With Mental Illness* 8 (2006), *available at* www.cops.usdoj.gov/Publications/e04062003.pdf.

Today, "[t]he police are typically the first and often the sole community resource called on to respond to urgent situations involving persons with mental illness…. As a result, law enforcement officers may

have assumed the role of 'street-corner psychiatrist' by default." H. Richard Lamb, Linda E. Weinberger, Walter J. DeCuir, *The Police and Mental Health*, 53 PSYCHIATRIC SERVICES 1266 (Oct. 2002); *accord, e.g., Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997) (noting finding that "it was common for officers to have to deal with mentally ill or emotionally disturbed people"), *cert. denied*, 522 U.S. 1148 (1998). One "three-city study found that 92 percent of patrol officers had at least one encounter with a mentally ill person in crisis in the previous month, and officers averaged six such encounters per month." Cordner, *supra*, at 1.

While police interactions with the mentally ill are usually uneventful, a significant number end in violence.[5] "Encounters with police are more likely to be dangerous for people with mental illness than for the police.... It is estimated that people with severe mental illness are four times more likely to be killed by police." Cordner, *supra*, at 5. Moreover, the potential for violence dramatically increases when untrained officers use aggressive tactics known to provoke people in crisis. Courts have repeatedly recognized this, *see, e.g.*, *Glenn*, 673 F.3d at 876-77; *Deorle*, 272 F.2d at 1282-83; *Allen,* 119 F.3d at 842; *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995), as have popular

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[5] Studies cited in the COPS guide found several police shootings of mentally ill people each year in New York, Los Angeles and the United Kingdom. Cordner, *supra*, at 5. The mental health group Treatment Advocacy Center has documented hundreds of such shootings through news accounts since 1987, with most "researched and included since 2000." Treatment Advocacy Center, http://www.treatmentadvocacycenter.org/problem/preventable-tragedies-database.

media. *See, e.g.*, M.J. Stephey, *De-criminalizing Mental Illness*, TIME, Aug. 8, 2007, *available at* www.time.com/health/article/0,8599,1651002,00.html ("In these cases, normal police procedures often increase the chances of violence, confusion and even death").

There is also the widely recognized phenomenon of disturbed people who try to goad officers into killing them, called "suicide by cop." *See, e.g.*, Rahi Azizi, *When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects*, 41 GOLDEN GATE U. L. REV. 183 (Winter 2011); *see also Boyd v. City and County of San Francisco*, 576 F.3d 938, 945-46 (9th Cir. 2009) (discussing suicide by cop). "A study conducted by the Los Angeles Sheriff's Department… indicates that roughly 10% of officer-involved shootings end in suicide by cop…. An alarming 59% [of people killed] ask the police to kill them." *Id*. at 189. Ruddy's shooting had elements of suicide by cop.

Given the frequent contact between officers and mentally ill people and the potential for violence during their encounters, § 1983 litigation arising from incidents like Ruddy's is common. Every circuit has decided many such cases, as witnessed by the several cited in this petition. *See also, e.g.,* Avery, *supra* at 273-87, 299-320 (discussing decisions involving police use of force against mentally ill people). These cases also tend to attract popular attention and therefore contribute disproportionately to the public perception of law enforcement, further heightening their importance. Still, this "Court has not yet decided a

case involving the reasonableness of a police seizure of an emotionally disturbed person." *Id.* at 273.

This silence is hindering development of the law in an active and important field. It also deprives law enforcement officials of a clear understanding of the boundaries of permissible behavior. The Court has recognized the essential role decisions in § 1983 actions play in expounding the law from case to case and demarcating constitutional rights with the requisite specificity. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Saucier v. Katz*, 533 U.S. 194, 206-07 (2001). Yet *Garner* and *Graham* remain all there is to go on – a void all the more unfortunate considering *Scott's* insight that judicial decisions in one factual setting may "have scant applicability" to others. 550 U.S. at 383. This makes it all the more important the Court address at least those scenarios shown to recur and confound police, judges and jurors. These regular travelers through the system may have no choice but to "slosh [their] way through the factbound morass of reasonableness," *id*., but they should not also have to do so in darkness.

IV. This Case is an Ideal Vehicle to Resolve the Uncertainty Surrounding Excessive Force Claims Involving the Mentally Ill.

The Court should use this case to address the persistent conflict and confusion in this area.

1. First, the Fifth Circuit's decision is erroneous. It is a product of circuit precedent dictating that pre-seizure circumstances have no place in the Fourth Amendment calculus. The Elizondos' claims rested in part on Green's conduct escalating the incident and

making the eventual shooting inevitable, but neither lower court grappled with this facet of their allegations. The Fifth Circuit's approach strays far from the admonition in *Garner* to consider *the totality* of the circumstances. *See Thomas*, 607 F.3d at 667 (officer's pre-seizure conduct "relevant because it is a particular application of the 'totality of the circumstances' inquiry"). It also disregards *Scott's* central lesson that deciding reasonableness calls for a broad, fact-intensive examination unconstrained by "rigid preconditions." 550 U.S. at 382. "[A]ll that matters is whether [the officer's] actions were reasonable," *id.* at 383, but the Fifth and other circuits impose a rigid precondition artificially restricting the analysis to the moment force is applied. This myopia deprives the factfinder of essential context without which the use of force cannot be fully understood or its reasonableness fairly judged. *See, e.g., Abraham*, 183 F.3d at 291 (condemning "rigid rule that excludes all context and causes prior to the moment" of seizure).

Taken to its logical endpoint, refusing to consider pre-seizure police behavior also invites lawlessness. If an officer can recklessly or deliberately start an altercation and then "constitutionally shoot his way out of it," there is little meaningful restraint on his behavior in such situations. *Billington*, 292 F.3d 1185-86. "Just as some decedents in police shooting cases appear to commit 'suicide by cop,' it is conceivable that some police officers could commit 'homicide by self-defense' by unconstitutionally and intentionally provoking an attack so they could respond to it with deadly force." *Id*. at 1191.

The importance of pre-seizure context is especially crucial in cases involving police shootings of the

mentally ill. Suicidal or emotionally disturbed people pose a very different challenge to police than do ordinary suspects. *See Bryan*, 630 F.3d at 829; *Deorle*, 272 F.3d at 1282-83. Consequently, "standard... police procedure regarding emotionally disturbed persons differs greatly from that regarding emotionally stable persons." *Ludwig*, 54 F.3d at 472. As noted above, it has long been agreed that confronting such people with the aggressive and threatening tactics used on typical offenders is counterproductive and far more likely to produce a violent or suicidal response. *See Glenn*, 673 F.3d at 875-77; *Deorle*, 272 F.3d at 1282-83. By the same token, it is widely understood that strategies emphasizing de-escalation, establishing rapport, proceeding slowly, waiting for cover and backup, speaking softly, avoiding threats, and using specially trained critical incident teams will more frequently avoid the need to use force. *See id.*; *Ludwig*, 54 F.3d at 472; App. 37a-38a; Avery, *supra*, at 290-96, 325-27. The International Association of Chiefs of Police recommended these basic steps *in 1979*. *See* Avery, *supra*, at 295. Judge DeMoss is undoubtedly correct that the Fifth Circuit's precedent, by which he felt bound in this case and *Rockwell*, is "relatively primitive" in light of these well established realities. *Rockwell*, 664 F.3d at 996.

Moreover, using the plaintiff's mental illness to justify the officer's use of force is particularly unfair if the officer's provocation is disregarded. *See, e.g., Boyd*, 576 F.3d at 945-46 (affirming admission of expert testimony on suicide by cop to justify use of force). Here, for instance, the Fifth Circuit saw Ruddy as hostile and intent on provoking Green but completely ignored Green's antecedent provocation of Ruddy. After all, Green knew full well Ruddy was suicidal.

But he "did exactly what no reasonable officer should ever do with a mentally unstable, suicidal person. He pulled out his gun, pointed it at Ruddy and began yelling at the distraught teen to drop the knife." App. 38a. The Fifth Circuit willfully blinded itself to this fundamental point and examined only half the story.

Nor is the position of the Fifth and other circuits justified by the rule proscribing negligence liability in § 1983 cases. The circuits that permit consideration of pre-seizure events require that police conduct be reckless or intentional to be included in the reasonableness analysis. *See*, *e.g*, *Billington*, 292 F.3d at 1189; *Sevier*, 60 F.3d at 699 and n. 7. They also exclude circumstances too "attenuated by time or intervening events" to shed light on whether the use of force was reasonable. *Sevier*, 60 F.3d at 699 n. 8; *accord Abraham*, 183 F.3d at 292 ("Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred"). The Ninth Circuit further requires any provocation to be an independent violation of the Fourth Amendment. *See Billington*, 292 F.3d at 1189-90.

2. This case is also an appropriate vehicle to review the question of how to determine excessiveness in cases involving pre-shooting conduct and the mentally ill because the question of qualified immunity is inapplicable, as the Elizondos appeal only the judgment in the city's favor. *See Pearson*, 555 U.S. at 242 (qualified immunity unavailable in cases against municipalities). There is no question of needlessly grappling with the existence of a violation only to acknowledge that the right is not clearly established

anyway, rendering the endeavor "an essentially academic exercise." *Id*. at 237. Based on the material facts not in dispute, the Court may conclude Green violated Ruddy's Fourth Amendment rights by creating the circumstances leading inexorably to his death. In that case, a remand will be required to consider issues relating to municipal liability, as occurred in *Garner*. *See* 471 U.S. at 22.[6] Alternately, the Court need only hold that Green's pre-shooting conduct should have been considered along with the other aspects of the incident, leaving it to the factfinder to determine on remand if the totality of the circumstances indicates the shooting was unreasonable, and if so, to consider municipal liability. Such a holding in itself would be a vitally important step "promot[ing] the development of constitutional precedent," especially since the question arises here in a case "in which a qualified immunity defense is unavailable." *Pearson*, 555 U.S. at 236.

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[6] The Elizondos presented considerable evidence supporting municipal liability that was not considered by the lower courts, and other cases have demonstrated the viability of such claims for excessive force against mentally ill subjects founded on police policies, customs and training. *See*, *e.g.*, *Allen*, 19 F.3d at 841-45; *Horton v. City of Harrisburg*, 2009 WL 2225386 at ** 4-5 (M.D. Pa., July 23, 2009).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-11177

[Filed February 13, 2012]

JOSE ELIZONDO; ALICIA ELIZONDO, Individually and as Representatives of the Estate of Ruddy Elizondo,
Plaintiffs - Appellants

v.

W. M. GREEN, Officer,
Defendant - Appellee

Cons w/ No. 11-10309

JOSE ELIZONDO; ALICIA ELIZONDO, Individually and as Representatives of the Estate of Ruddy Elizondo,
Plaintiffs - Appellants

v.

THE CITY OF GARLAND,
Defendant - Appellee

Appeals from the United States District Court
for the Northern District of Texas

Before DeMOSS, CLEMENT, and ELROD,
Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Jose and Alicia Elizondo (the "Elizondos"), individually and on behalf of the estate of Ruddy Elizondo ("Ruddy"), appeal from two separate district court orders granting summary judgment to Officer W.M. Green and the City of Garland, Texas (the "City"), on their claims pursuant to 42 U.S.C. § 1983 that Greenused excessive force against Ruddy in violation of the Fourth Amendment. We affirm.

FACTS AND PROCEEDINGS

The material facts are not in dispute. On March 18, 2009, Ruddy Elizondo, a 17-year-old, came home at around midnight after a night out with friends. Ruddy had been drinking and was emotional. He began playing loud music in his bedroom, called a friend on the phone, and went out to the front porch. Ruddy's mother, Alicia Elizondo, who had been asleep, got up and told Ruddy to go to bed. After Ruddy had returned to his room, his mother heard him crying. She went to check on him and found him holding a knife to his abdomen. Ruddy had attempted suicide by stabbing himself just over a month earlier, so Alicia was understandably concerned. She began to cry and plead with Ruddy. The commotion woke Claudia Elizondo, Ruddy's sister, who called 911 because she was afraid Ruddy might hurt their mother, who was trying to take the knife away from Ruddy.

Green, who was on patrol nearby, received a dispatch that a man had stabbed himself and needed medical attention. The dispatcher mistakenly informed Green that Ruddy had already stabbed himself and the knife was still lodged in his abdomen. On this information, Green went to the house to clear and secure the scene for the paramedics. When he arrived at the house, Alicia directed Green to Ruddy's room, where he found Ruddy unhurt and still holding the knife to his stomach. Green drew his weapon, backed out of Ruddy's room, and repeatedly ordered him to put down the knife. Ruddy refused to comply. He tried to close the door on Green, but Green did not let him. Several times, Ruddy cursed at Green and yelled, "Fucking shoot me." Green told Ruddy that he did not want to shoot him, but that he would be forced to if Ruddy came any closer. Despite Green's warning, Ruddy moved closer to Green and raised the knife in a threatening motion.[1] Green fired his gun three times, hitting Ruddy in the chest, shoulder and abdomen. Green immediately called in the paramedics, who had been waiting outside, but Ruddy died from his wounds.

The Elizondos brought suit against Green and the City[2] in Texas state court, asserting an excessive force claim under § 1983 and various state law tort claims. Green removed the case to federal district court. The

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[1] The Elizondos argue in their appellate briefs that Ruddy never raised the knife, but they fail to cite any record evidence that contradicts Green's statements on this fact. Neither Alicia nor Claudia saw whether Ruddy raised the knife or not.

[2] The Elizondos originally named the Garland Police Department as a defendant, but later amended its complaint to properly name the City.

district court eventually dismissed all of the state law claims against both defendants, and the Elizondos have not appealed those dismissals. After limited discovery, Green moved for summary judgment on the ground that he was entitled to qualified immunity on the Elizondo's excessive force claim. On October 18, 2010, the districtcourt granted Green's motion, based on its determination that Green had not committed a constitutional violation, and dismissed all claims against the officer. At that time, the City had not yet moved for summary judgment. The Elizondos filed a notice of appeal on November 17, 2010, seeking review of the district court's October 18 summary judgment order.

Thereafter, the City filed its own motion for summary judgment. On March 9, 2011, while the Elizondos' first appeal was pending, the district court granted summary judgment in favor of the City. On March 23, 2011, the Elizondos filed a second notice of appeal, specifying the order granting summary judgment in favor of the City, and shortly thereafter filed a motion to consolidate the two appeals, Nos. 10-11177 and 11-10309, which we granted on March 29, 2011.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo*, applying the same standard as the district court. Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and shows that the moving party is entitled to judgment as a matter of law. *See Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 377 (5th Cir. 2010).

DISCUSSION

Before considering the merits, we must address our jurisdiction to hear these appeals. The parties agree that the Elizondo's March 23, 2011 notice of appeal was timely and effective, meaning that the district court's grant of summary judgment in favor of the City is properly before us. The parties do not agree, however, on the effect of the Elizondos' November 17, 2010 notice of appeal, which sought review of the district court's grant of summary judgment in favor of Green.

Green argues that the district court's grant of summary judgment in his favor on qualified immunity grounds was not immediately appealable because it was not a final order. An order is final and appealable when it ends the litigation and leaves nothing for the court to do but execute the judgment. *United States v. Garner*, 749 F.2d 281, 285 (5th Cir. 1985); 28 U.S.C. § 1291. A dismissal of claims against some, but not all, defendants is not a final appealable judgment unless, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court concludes that there is no justification for delaying an appeal and specifically directs entry of judgment. Green is correct that the district court's October 18, 2010 order did not bring an effective end to the litigation and was not final and appealable. *See Dillion v. Miss. Military Dep't*, 23 F.3d 915, 917 (5th Cir. 1994).

Nor was the October 18 order subject to the collateral order doctrine. "Pursuant to the collateral order doctrine, a litigant may immediately appeal a collateral order if the order (1) conclusively determines

the disputed question, (2)resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *In re Bradford*, 660 F.3d 226, 228 (5th Cir. 2011) (internal quotation marks omitted). An order *denying* qualified immunity in a § 1983 action is immediately appealable under the collateral order doctrine to the extent that it turns on a question of law rather than a factual dispute, *Short v. West*, 662 F.3d 320, 325 (5th Cir. 2011), but the same does not hold for an order *granting* qualified immunity. An order granting immunity can be fully and fairly reviewed after a final judgment. *See Thompson v. Betts*, 754 F.2d 1243, 1246 (5th Cir. 1985); *Terrell v. City of El Paso*, 176 F. App'x 623, 624 (5th Cir. 2006) (per curiam) (unpublished). The Elizondos' first notice of appeal therefore failed to give this court jurisdiction to consider the district court's order granting summary judgment to Green.

There is arguably some support for the contention that the Elizondos' second notice of appeal brought both of the district court's summary judgment orders under our review, even though it specifically designated only the district court's March 9, 2011 order granting summary judgment to the City. Rule 3(c) of the Federal Rules of Appellate Procedure requires the appellant to "designate the judgment, order, or part thereof being appealed" in the notice of appeal, but we have previously stated that

> [w]hile the requirements of Rule 3(c) are jurisdictional, and noncompliance is fatal to an appeal, ... [a] mistake in designating orders to be appealed does not bar review if the intent to appeal a particular judgment can be fairly

> inferred and if the appellee is not prejudiced or misled by the mistake.

N.Y. Life Ins. Co. v. Deshotel, 142 F.3d 873, 884 (5th Cir. 1998) (internal citationsandquotation marks omitted). It is questionable whether the Elizondos' failure to designate the district court's October 18 order in their second notice of appeal constitutes the type of non-prejudicial "mistake" discussed in *Deshotel*, but we need not decide that question. The Elizondos, adamant that their first notice of appeal was proper, do not argue that their second notice of appeal succeeded in bringing the district court's October 18 order within our appellate jurisdiction, and any such argument is therefore forfeited. *See, e.g.*, *United States v. Banks*, 624 F.3d 261, 264 (5th Cir. 2010). Thus, we consider only the district court's grant of summary judgment to the City.

Turning to the merits of the appeal, the only issue before us is whether, viewing the evidence in the light most favorable to the Elizondos, Green used excessive force against Ruddy. Excessive force claims are analyzed under the reasonableness standard of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). The district court based its grant of summary judgment in favor of the City on the conclusion that Green's actions were reasonable and that, as a result, no constitutional violation occurred.

To establish the use of excessive force in violation of the Constitution, a plaintiff must prove: "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Collier v. Montgomery*, 569 F.3d 214, 218 (5th Cir. 2009). The

use of deadly force is constitutional when the suspect poses a threat of serious physical harm to the officer or others. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In analyzing the reasonableness of the specific use of force, courts must consider the totality of the circumstances surrounding the officer's decision. *See Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008).

We agree with the district court's conclusion that Green's use of deadly force was not clearly unreasonable. Ruddy ignored repeated instructions to put down the knife he was holding and seemed intent on provoking Green. At the time Green discharged his weapon, Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer. Considering the totality of the circumstances in which Green found himself, it was reasonable for him to conclude that Ruddy posed a threat of serious harm. Finally, in the absence of a constitutional violation, there can be no municipal liability for the City. *See, e.g.*, *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009).

CONCLUSION

For the reasons stated above, we affirm the district court's grant of summary judgment to the City.

Judge Harold R. DeMoss, Jr., specially concurring:

I join the majority opinion in full because, under the current state of our law, the panel is correct in its legal judgments with respect to jurisdiction and liability. However, I once again feel compelled to write separately to express my disapproval of and disappointment with the actions of the City of Garland police department.

We decide this case less than two months after a separate panel on which I sat issued similar opinions in the equally tragic case of *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. Dec. 15, 2011) (DeMoss, J., specially concurring). In *Rockwell*, six City of Garland police officers responded to a domestic disturbance where Scott Rockwell, a diagnosed bipolar schizophrenic who had previouslyattempted suicide, was ranting and raving alone in his room. *Id.* He had threatened—but not harmed—his parents earlier that night, and was barricaded in his room when the officers arrived. *Id.* Yet in less than 30 minutes the officers armed themselves, ignored the parents' request to give Scott time to calm down, broke down his bedroom door, provoked a knife attack, and shot him four times. *Id.* It was the officers' job to prevent violence or suicide, yet they quickly escalated the situation to the point where they were legally justified to use deadly force against a mentally ill person who obviously needed help. *Id.*

Sadly, Ruddy Elizondo's case is very similar to *Rockwell*. I firmly believe that Officer Green "should have been trained to use better judgment in [his] approach to volatile and unfortunate situations such as this one." *Id.* Officer Green was a very large man

highly trained in self defense and armed with a night stick, taser, and firearm, while Ruddy was a short and obese teenager who was distraught, intoxicated, and contemplating suicide with a relatively small knife. Moreover, Officer Green had only been on the scene for a few seconds, backup was on the way, and emergency medical personnel was waiting outside when the shooting occurred. Deadly force should have been Officer Green's very last resort rather than his first reaction.

Presumably Officer Green followed standard police protocol for domestic disturbances where a knife is involved, so I focus my criticism specifically at the City of Garland police department's training and tactical response programs. There must be effective ways for police officers to resolve volatile situations that avoid threatening or using deadly force.[1]Forcing Ruddy's bedroom door open, yelling orders at him, and immediately drawing a firearm and threatening to shoot was a very poor way to confront the drunk, distraught teenager who was contemplating suicide with a knife.

Either law enforcement procedures or our law must evolve if we are to ensure that more avoidable deaths do not occur at the hands of those called to "protect

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[1] In *Rockwell* I suggested several options including those less-than-lethal tactics currently used in prisons and with wild animals. In Ruddy'scase it seems thattrying to defuse the situation by talking calmly, clearing the house, and waiting for backup may have been even more effective, especially since there is no indication that Ruddy had committed a crime or was threatening violence to others such that he needed to be taken into custody immediately.

and serve." Saving lives remains job number one for every law enforcement agency, and it is imperative that they have better procedures in place to deal with those persons who are young, intoxicated, mentally ill, or otherwise likely to react poorly in already volatile situations. I firmly believe that the light of public concern must be shined on tragic cases such as Scott Rockwell's and Ruddy Elizondo's if more deaths are to be prevented. Hopefully publication of this opinion will help to compel the City of Garland police department—and all law enforcement agencies—to re-evaluate their training and response procedures so that the use of deadly force remains the last resort in every situation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:09-CV-1103-O

[Filed March 9, 2011]

JOSE ELIZONDO AND ALICIA ELIZONDO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF RUDDY ELIZONDO, Plaintiffs,	)
v.	)
THE CITY OF GARLAND AND OFFICER W. M. GREEN, Defendants.	)

SUMMARY JUDGMENT ORDER

Before the Court is Defendant City of Garland's Motion for Summary Judgment (ECF No. 60), Brief in Support (ECF No. 61), and Appendix in Support (ECF No. 62), Plaintiffs' Response (ECF No. 66), Brief in Support (ECF No. 67), and Appendix in Support (ECF No. 68), Defendant's Reply (ECF No. 70), and Plaintiffs' Unopposed Motion to Stay (ECF No. 72).

Having considered the motions, briefs, and applicable law, the Court finds that Defendant's Motion for Summary Judgment should be and is hereby **GRANTED**, and Plaintiffs' Unopposed Motion to Stay should be and hereby is **DENIED**.

Defendant City of Garland ("City") seeks summary judgment dismissing Plaintiffs' claims against the municipality. *See* Def.'s Mot. Summ. J. 1, ECF No. 60. City contends that there is no constitutional violation upon which to rest municipal liability. *See* Br. Supp. Def.'s Mot. Summ. J. 8, ECF No. 61. City further contends that, even assuming a constitutional violation, Plaintiffs have failed to establish that an unconstitutional practice or custom of the municipality was the moving force behind such violation. *Id.* at 8-9. Plaintiffs respond that Officer Green's conduct constituted a constitutional violation and City's unconstitutional custom or practice of using deadly force against the mentally ill was the moving force behind that violation. *See* Pls.' Resp. Def.'s Mot. Summ. J. 1-18, ECF No. 66. Plaintiffs request that this Court stay the instant action until the Court of Appeals for the Fifth Circuit rules on Plaintiffs' appeal of the Court's Order granting Defendant Officer W.M. Green's Motion for Summary Judgment. *See* Pls.' Unopposed Mot. Stay 1-2, ECF No. 72; *see also* Order, Oct. 18, 2010, ECF No. 57. The Court declines to stay the instant action pending resolution of Plaintiffs' appeal. Accordingly, the Court **DENIES** Plaintiffs' Motion to Stay.

I. FACTUAL BACKGROUND[1]

Ruddy Elizondo returned to his house around midnight on March 18, 2009. *See* Order 2, Oct. 18, 2010, ECF No. 57. When Ruddy returned to his room his mother, Alizia Elizondo, saw him holding a phone to his ear and a knife to his stomach. *Id.* Alicia signaled for Ruddy's sister, Claudia, to call 9-1-1. *Id.* Claudia told the 9-1-1 operator that her brother had stabbed himself and that an ambulance was needed. *Id.* Officer W.M. Green of the City of Garland Police Department, on patrol investigating an unrelated burglary in the neighborhood, was the first officer to arrive at the Elizondo home. *Id.* Officer Green walked through the living room and asked Claudia where Ruddy was located. *Id.* Claudia pointed to Ruddy's bedroom. *Id.* Officer Green stopped approximately four feet from Ruddy's door with his gun drawn and ordered Ruddy to put down the knife in both English and Spanish. *Id.* at 3. Ruddy rebuked the officer for yelling at him, cursed at the officer, and then attempted to close his bedroom door. *Id.* Officer Green, however, prevented Ruddy from closing the door. *Id.* At this point, Ruddy cursed at Officer Green,

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[1] In its Order granting in part and denying in part Defendant Green's Motion for Summary Judgment, the Court laid out the facts of the instant case in the light most favorable to the nonmovant Plaintiffs. *See* Order 2-3, Oct. 18, 2010, ECF No. 57. The Court incorporates by reference the factual recitation contained in its prior Order and will only briefly restate the relevant facts.

The Court notes that the facts are presented in the light most favorable to the nonmoving party on this Motion for Summary Judgment. *See, e.g. Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

telling the Officer to shoot him. *Id.* Officer Green told Ruddy that he would shoot him if he had to and Ruddy responded by again cursing at Officer Green. *Id.*

Plaintiffs contend that Officer Green shot Ruddy right after Ruddy cursed at Officer Green, without Ruddy making any further movement. *Id.* Defendant contends that Ruddy raised his knife up to ear level and stepped towards Officer Green. *Id.* The undisputed evidence shows that Officer Green then fired three shots at Ruddy, who fell onto his back into his room. *Id.* The undisputed evidence also shows that other police officers and the paramedics then took over the scene, as EMS was already at the Elizondo home. *Id.* Ruddy was taken to the hospital, where he was pronounced dead. *Id.*

The City of Garland is governed by the City Charter. *See* Br. Supp. Pls.' Resp. Def.'s Mot. Summ. J. 6, ECF No. 67. The Charter vests all final policymaking authority in the City Council. *Id.* "[T]he general laws of the state of Texas control and become final policy of the City" in all matters not specifically covered by the Charter or by City ordinances. *Id.*

II. PROCEDURAL BACKGROUND

Plaintiffs filed this action in the 298th Judicial District Court of Dallas County, Texas on May 12, 2009 against Officer Green and the City of Garland Police Department. *See* Pls.' Original Pet., ECF No. 1-4. The Defendants removed the action to this Court on June 10, 2009. Notice of Removal 1, ECF No. 1. After the City of Garland replaced the City of Garland Police Department in this action, the City filed a Rule 12(b)(1) Motion to Dismiss Plaintiffs' claims against

Officer Green. *See* ECF No. 37. This Court dismissed the state law claims against Officer Green, but declined to dismiss Plaintiffs' federal claims against Officer Green. *See* ECF No. 56. On October 18, 2010, this Court dismissed the federal claims against Officer Green pursuant to his Motion for Summary Judgment. *See* ECF No. 57. Plaintiffs have appealed that Order. *See* ECF No. 58.

On January 3, 2011 Defendant City filed its Motion for Summary Judgment. The motion has been fully briefed and is now ripe for determination.

III. LEGAL STANDARDS

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Fed. R. Civ. P. 56; *see also Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Rule 56 provides that "[t]he 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."[2] Fed. R. Civ. P. 56(a); *see also Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). "[T]he substantive law will identify which facts are material." *Anderson*, 477 U.S. at 248. A genuine issue of material fact exists "if the evidence is such that a

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[2] This language reflects the amendments to the Federal Rules which came into effect on December 1, 2010. As the Committee Note to Rule 56 makes clear, the new language "carries forward the summary-judgment standard expressed in former subdivision (c)." *See* Fed. R. Civ. P. 56(a) advisory committee's note (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party bears the burden of showing that summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Id.*; Fed. R. Civ. P. 56. The Court must review the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

When reviewing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Id.* at 250.

B. Municipal Liability

"Section 1983 provides for liability to be imposed upon any person who, acting under color of state law, deprives another of rights or privileges secured by the constitution." *Worsham v. City of Pasadena*, 881 F.2d 1336, 1339 (5th Cir. 1989). "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,

690 (1978); *see also Worsham*, 881 F.2d at 1339 ("It is well settled that local government units are 'persons' within the meaning of this statute."). "The principles of municipal liability under § 1983 are well-established." *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009). "A municipality is not liable under § 1983 on the theory of respondeat superior." *Id.* "The constitutional deprivation . . . must have its origin in what can fairly be said to be a policy of the municipality." *Worsham*, 881 F.2d at 1339.

"Municipal liability under § 1983 requires proof of 1) a policymaker; 2) an official policy; 3) and a violation of constitutional rights whose 'moving force' is the policy or custom." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). "To hold a municipality liable under § 1983 for the misconduct of an employee, a plaintiff must show, in addition to a constitutional violation, that an official policy promulgated by the municipality's policymaker was the moving force behind, or actual cause of, the constitutional injury." *James*, 577 F.3d at 617. "Official policy can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *Id.* (quoting *Piotrowski*, 237 F.3d at 579).

"A policy is official only 'when it results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject matter of the offending policy.'" *Id.* (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737

(1989)). "[A] plaintiff must show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." *Id. (*quoting *Piotrowski*, 237 F.3d at 580). "A plaintiff must also show that, where the official policy itself is not facially unconstitutional, it was adopted 'with deliberate indifference' as to its known or obvious consequences." *Id.* (quoting *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004)). "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight.'" *Id.* (quoting *Rhyne v. Henderson Cnty.*, 973 F.2d 386, 392 (5th Cir. 1992)).

IV. ANALYSIS

As a precursor to a finding of municipal liability, Plaintiffs must establish a "constitutional deprivation." *Worsham*, 881 F.2d at 1339. Plaintiffs have alleged that Officer Green unreasonably used excessive force against Ruddy Elizondo. The Fourth Amendment reasonableness standard governs analysis of excessive force claims. *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[*A*]*ll* claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . . ") (citing *Tennessee v. Garner*, 471 U.S. 1, 5 (1985)) (emphasis in original). "To prevail on an excessive-force claim, [the plaintiff] must establish: '(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Collier v. Montgomery*, 569 F.3d 214, 218 (5th Cir.

2009) (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)). Deadly force is a subset of excessive force. *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 487-88 (5th Cir. 2001).

The Court confronted this very issue in its Order on Officer Green's Motion for Summary Judgment. *See* Order 6-11. Oct. 18, 2010, ECF No. 57. The Court stated that "[i]n this case, deciding all factual disputes in favor of the Plaintiffs, the Court finds that Officer Green did not act unreasonably in light of clearly established law."[3] *See id*. at 8. Highlighting the dispositive inquiry, the Court noted that "'[t]his Court does not look to the circumstances leading up to the fatal shooting.'" *Id.* (quoting *Bazan*, 246 F.3d at 493). Officer Green responded to a 9-1-1 distress call that a person had stabbed himself. *Id.* Upon arrival he was confronted with a hostile, suicidal teenager in close range holding a knife. Officer Green could have reasonably believed there was an immediate threat to himself or the others in the house. The Court incorporates by reference its prior Order, discussing the objective reasonableness of Officer Green's actions. *Id.* Pursuant thereto, the Court finds that Officer

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[3] The Court's October 18, 2010 Order differs from the instant insomuch as the Court analyzed the reasonableness of Officer Green's conduct through the prism of qualified immunity jurisprudence. *See* Order 4-6, Oct. 18, 2010, ECF No. 57. "The qualified immunity defense has two prongs: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation." *Brown v. Callahan*, 623 F.3d 249, 251 (5th Cir. 2010) (citing *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)). While an important jurisprudential distinction, the Court's prior Order clearly holds that Officer Green acted reasonably in light of the circumstances immediately preceding the fatal shooting.

Green acted reasonably and did not use excessive force in violation of the Fourth Amendment and, therefore, Plaintiffs have failed to establish a constitutional violation. Establishing a constitutional violation is an essential element of Plaintiffs' claim against City of Garland. Accordingly, Plaintiffs have failed to establish the existence of a genuine issue of material fact on an essential element of their claim.

V. CONCLUSION

The Court finds, based on the extant summary judgment evidence, that Officer Green acted reasonably. Accordingly, Plaintiff has failed to establish a constitutional deprivation. Therefore, Defendant City of Garland's Motion for Summary Judgment is hereby **GRANTED**. The claims against the City of Garland are **DISMISSED** with prejudice.

SO ORDERED on this **9th** day of **March, 2011.**

/s/_____
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:09-CV-1103-O

[Filed October 18, 2010]

JOSE ELIZONDO AND	)
ALICIA ELIZONDO, INDIVIDUALLY	)
AND AS REPRESENTATIVES OF	)
THE ESTATE OF RUDDY ELIZONDO,	)
Plaintiffs,	)
	)
v.	)
	)
THE CITY OF GARLAND AND	)
OFFICER W. M. GREEN,	)
Defendants.	)

SUMMARY JUDGMENT ORDER

Before the Court is Defendant Officer W.M. Green's ("Officer Green") Motion for Summary Judgment on the Issues of Qualified and Official Immunity (ECF No. 38), Defendant's Brief in Support (ECF No. 39), Plaintiffs' Response (ECF No. 43), Plaintiffs' Brief in Support (ECF No. 44), and Defendant's Reply (ECF No. 53). The Court finds that Defendant's Motion

should be and hereby is **GRANTED** in part and **DENIED** in part.

Officer Green seeks summary judgment with respect to Plaintiffs' federal claims based on the defense of qualified immunity. *See* Def.'s Mot. Summ. J. 2, ECF No. 38. Officer Green contends that he did not violate a clearly established constitutional right of Ruddy Elizondo and that his use of force was not objectively unreasonable. *Id.* Officer Green also moves for summary judgment on Plaintiffs' state law claims on the basis of official immunity. *Id.* The Court has already dismissed Plaintiffs' state law claims against Officer Green pursuant to Defendant City of Garland's Motion to Dismiss. *See* Order, October 7, 2010, ECF No. 56. As such, that portion of Defendant's Motion is **DENIED** as moot, leaving only Plaintiffs' federal claims against Officer Green.

I. FACTUAL BACKGROUND

The Court presents the below facts in the light most favorable to the non-movant Plaintiffs.[1] Ruddy Elizondo returned to his house around midnight on March 18, 2009. *See* Pls.' Resp. Def.'s Mot. Summ. J. ¶ 4, ECF No. 43. Upon returning home, Ruddy played music on his computer and spoke to a girl on the phone. *Id.* When Ruddy returned to his room, Alicia Elizondo, Ruddy's mother saw him holding a phone to

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[1] These facts are drawn from the factual recitations in the the parties' respective motions and are largely undisputed. Where the parties may dispute an event or characterization of that event the Court will so note. This section briefly summarizes the relevant events leading to this litigation, and does not resolve any disputed issues of law or fact.

his ear and a knife to his stomach. *Id.* Alicia became concerned, as Ruddy had attempted suicide the previous month. *Id.* at ¶ 6. Ruddy kept telling Alicia that he loved her and saying goodbye. *Id.* at ¶ 4. Alicia signaled for Ruddy's sister, Claudia, to call 9-1-1. *Id.* at ¶ 7. Claudia told the 9-1-1 operator that her brother had stabbed himself and that an ambulance was needed. *Id.* at ¶ 7-8.

Officer W.M. Green of the City of Garland Police Department, on patrol investigating an unrelated burglary in the neighborhood, was the first officer to arrive at the Elizondo home. *Id.* at ¶ 9. Alicia met Officer Green on the front porch and directed him inside. *Id.* at ¶ 10. Officer Green walked through the living room and asked Claudia where Ruddy was located. *Id.* Claudia pointed to Ruddy's bedroom. *Id.* at ¶ 12. The parties dispute whether Officer Green kicked open Ruddy's bedroom door, or whether the door was already open. *Id.*; *but see* Def.'s Mot. Summ. J. 8, ECF No. 38. The parties do not dispute what Officer Green saw once the door was open: Ruddy Elizondo standing up and holding a knife to his stomach with one hand while holding a cell phone in his other hand. Pls.' Resp. Def.'s Mot. Summ. J. ¶ 13, ECF No. 43.

Officer Green backed up approximately four feet from Ruddy's door with his gun drawn and ordered Ruddy to put down the knife in both English and Spanish. *Id.* at ¶ 12. Ruddy rebuked the officer for yelling at him, cursed at the officer, and then attempted to close his bedroom door. *Id.* at ¶ 17. Officer Green, however, prevented Ruddy from closing the door. *Id.* at ¶ 18. At this point Ruddy cursed at Officer Green, telling the Officer to shoot him. *Id.* at

¶ 19. The undisputed evidence from both Officer Green and Claudia Elizondo shows that Ruddy then moved closer to Officer Green. *See* Aff. in Fact Claudia Elizondo Pls.' App. 3, ECF No. 45-1; Aff. Claudia Elizodo Pls.' App. 6, ECF No. 45-3; Dep. Claudia Elizondo Pls.' App. 61, ECF No. 45-7. At this point Ruddy and Officer Green were only three or four feet apart. Pls.' Resp. Def.'s Mot. Summ. J. ¶ 61-62, ECF No. 43; *see also* Dep. Claudia Elizondo Def.'s App. 303-04, ECF No. 40-8. Officer Green told Ruddy that he would shoot him if he had to and Ruddy responded by again cursing at Officer Green Pls.' Resp. Def.'s Mot. Summ. J. ¶ 19, ECF No. 43.

Plaintiffs contend that Officer Green shot Ruddy right after Ruddy cursed at Officer Green, without Ruddy making any further movement. Pls.' Resp. Def.'s Mot. Summ. J. ¶ 19, 21, ECF No. 43. Defendant contends that Ruddy raised his knife up to ear level and stepped towards Officer Green. Def.'s Mot. Summ. J. ¶ 9, ECF No. 38. The undisputed evidence shows that Officer Green then fired three shots at Ruddy, who fell onto his back into his room. Pls.' Resp. Def.'s Mot. Summ. J. ¶ 23, ECF No. 43. The undisputed evidence also shows that other police officers and the paramedics then took over the scene, as EMS was already at the Elizondo home. *Id.* at ¶ 27. Ruddy was taken to the hospital, where he was pronounced dead. *Id.* at ¶ 28.

II. PROCEDURAL BACKGROUND

Plaintiffs filed this action in the 298th Judicial District Court of Dallas County, Texas on May 12, 2009 against Officer Green and the City of Garland Police Department. Pls.' Original Pet., ECF No. 1-4.

The Defendants removed the action to this Court on June 10, 2009. Notice of Removal 1, ECF No. 1. After the City of Garland replaced the City of Garland Police Department in this action, the City filed a Rule 12(b)(1) Motion to Dismiss Plaintiffs' claims against Officer Green. *See* ECF No. 37. This Court granted the motion, in part, dismissing the state law claims against Officer Green, but declining to dismiss Plaintiffs' federal claims against Officer Green. *See* Order, October 7, 2010, ECF No. 56.

Currently before the Court is Defendant Officer Green's Motion for Summary Judgment on the issues of Qualified and Official Immunity. ECF No. 38.

III. LEGAL STANDARD

Summary judgment is appropriate where the competent summary judgment evidence demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008); *see* Fed. R. Civ. P. 56(c). The moving party bears the burden of showing that summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court must review the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co v. Zenith Radio*, 475 U.S. 574, 587 (1986).

"A qualified immunity defense alters the usual summary judgment burden of proof." *Brown v. Callahan*, __ F.3d __, No. 09-10843, 2010 WL 3912361, at *2 (5th Cir. Oct.7, 2010). "Qualified immunity protects public officials from suit unless their conduct violates a clearly established constitutional right."

Mace v. City of Palestine, 333 F.3d 621, 623 (5th Cir. 2003). While the defendant official must initially plead the defense, "[o]nce the defendant has done so the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law." *Brumfield*, 551 F.3d at 326 (quoting *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001)). "We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs." *Pierce v. Smith*, 117 F.3d 866, 872 (5th Cir. 1997). Thus, because Officer Green raised the defense of qualified immunity in his Motion, the burden lies with Plaintiffs even on summary judgment. *See, e.g. Brumfield*, 551 F.3d at 326.

"The qualified immunity defense has two prongs: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation." *Brown*, __ F.3d __, No. 09-10843, 2010 WL 3912361, at *2 (citing *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)). Courts may rely upon either prong of the analysis. *See Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). Thus, the absence of a genuine issue of material fact on either element means that the defendant is entitled to summary judgment. *See, e.g. Pearson*, 129 S. Ct. at 821.

Qualified immunity is appropriate if an official's actions were "'objectively reasonable' in the light of 'law which was clearly established at the time of the disputed action.'" *Brown*, __ F.3d __, No. 09-10843, 2010 WL 3912361, at *2 (quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004)). "To be clearly established for purposes of qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Whether an official acted reasonably is a question of law, for the Court to decide. *Id.* "'The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *Brumfield*, 551 F.3d at 326-27 (quoting *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000)).

Since the parties dispute the circumstances immediately preceding the shooting, the Court must decide whether any of those factual disputes are material. *Bazan*, 246 F.3d at 48889. A fact is material if it "'*might affect* the outcome of the suit under the governing law.'" *Id.* at 489 (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)). Thus, "summary judgment is inappropriate unless the plaintiff's version of the violations does not implicate clearly established law." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 739 (5th Cir. 2000).

IV. ANALYSIS

Summary judgment is appropriate if Officer Green would be entitled to qualified immunity under Plaintiffs' version of events, because then the disputed facts would be immaterial. *See, e.g. Goodson*, 202 F.3d

at 739. Plaintiffs have alleged that Officer Green unreasonably used excessive force against Ruddy. The Fourth Amendment reasonableness standard governs analysis of excessive force claims. *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[*A*]*ll* claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . . ") (citing *Tennessee v. Garner*, 471 U.S. 1, 5 (1985)). "To prevail on an excessive-force claim, [the plaintiff] must establish: '(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Collier v. Montgomery*, 569 F.3d 214, 218 (5th Cir. 2009) (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)). Deadly force is a subset of excessive force. *Bazan*, 246 F.3d at 487-88.

"When an officer has probable cause to believe that the suspect poses an imminent threat of serious physical harm to the officer or others, deadly force is reasonable." *Estate of Shaw v. Sierra*, 366 F. App'x 522, 523-24 (5th Cir. 2010); *see also Bazan*, 245 F.3d at 488. In assessing objective reasonableness, the Court must consider the officer's use of "deadly force in the light of the facts and circumstances confronting him at the time he acted, without regard to his underlying intent or motivation." *Mace*, 333 F.3d at 624. As the Supreme Court noted in *Graham*, the Court's reasonableness analysis "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. Moreover, "[t]he excessive force

inquiry is confined to whether the [officer] was in danger *at the moment of the threat*" *Bazan*, 246 F.3d at 493, without regard to an officer's "negligence in creating a situation where the danger of such a mistake would exist." *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985). Thus, the Court should not judge the reasonableness "of what had transpired up until the shooting itself," but only whether at the moment the officer shot "there was a threat of physical harm." *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992).

In the instant case the parties dispute whether Ruddy raised his knife and took a step towards Officer Green, prompting the officer to shoot. Plaintiffs contend that Ruddy stood motionless before Officer Green, and simply cursed at him. Pls.' Resp. Def.'s Mot. Summ. J. ¶ 19, 21, ECF No. 43. Construing the facts in favor of the nonmovant Plaintiffs, the Court must decide whether Officer Green's actions were objectively reasonable assuming that Ruddy did not raise his knife or take *another* step towards Officer Green immediately before the fatal shots were fired. *See, e.g. Goodson*, 202 F.3d at 739.

In this case, deciding all factual disputes in favor of the Plaintiffs, the Court finds that Officer Green did not act unreasonably in light of clearly established law. Ruddy Elizondo was armed with a knife. He was known to be suicidal. Ruddy defiantly refused to put down his knife, moved closer to Officer Green during the confrontation, and cursed at Officer Green several times. At the time of the shooting, Officer Green and Ruddy were only three to five feet apart. With Officer Green's arms outstretched pointing the gun, the actual distance between the two was far less. While Plaintiffs

suggest other, perhaps superior ways to deal with a suicidal teenager, those contentions are immaterial. This Court does not look to the circumstances leading up to the fatal shooting. *See, e.g. Bazan*, 246 F.3d at 493; *Young*, 775 F.2d at 1353. Moreover, the Court must resist the temptation to judge an officer's use of force "with the 20/20 vision of hindsight" from the "peace of a judge's chambers." *Graham*, 490 U.S. at 396-97. Rather, this Court must judge an officer's use of force from the perspective of the officer on the scene. *Id.* Officer Green responded to a 9-1-1 distress call that a person had stabbed himself. Upon arrival he was confronted with a hostile, suicidal teenager in close range holding a knife. Officer Green could have reasonably believed there was an immediate threat to himself or the others in the house.

Plaintiffs predominantly rely upon *Buchanan v. City of Milwaukee*, 290 F. Supp.2d 954 (E.D. Wis. 2003) and *Reyes v. Bridgewater*, 362 F. App'x 403 (5th Cir. 2010),[2] in attempting to characterize Officer Green's actions as unreasonable in light of clearly established law. Both cases, however, are distinguishable in critical respects. In *Buchanan*, the court did not address "almost identical facts" as claimed by Plaintiffs. Rather, after having been in close contact with the suspect/plaintiff, the officers in *Buchanan* retreated outside of the subject's apartment. *Buchanan*, 290 F. Supp.2d at 958. While outside, the

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[2] The Court notes that *Reyes* is an unpublished opinion and is thus not precedent except in the limited circumstances set out in 5th CIR. R. 47.5.4. The Court discusses *Reyes* not as the basis for legal standards and conclusions, but only to the extent necessary to analyze Plaintiffs' contentions that *Reyes*'s factual situation controls the instant case.

suspect/plaintiff "appeared on the second floor balcony outside his apartment" holding a knife. *Id.* Standing below the plaintiff, the officer estimated that he was "about ten feet" away from the plaintiff. *Id.* Thus, in *Buchanan*, the suspect/plaintiff was on a completely different floor, standing on his balcony looking down on the officers outside when he was shot. *Id.* In contrast, in the instant case, Officer Green and Ruddy Elizondo were face to face through the door of Ruddy's bedroom. Officer Green and Ruddy were in immediate and close contact, drastically altering the objective reasonableness of using deadly force. As such, *Buchanan* is not analogous to the facts in the instant case.

Plaintiffs next rely upon the Fifth Circuit's recent decision in *Reyes v. Bridgewater*. 362 F. App'x 403 (5th Cir. 2010). While *Reyes* gives excellent guidance on the proper analysis for courts confronting deadly force claims against police officers, the facts of that case are distinguishable from the instant case. In *Reyes*, the Fifth Circuit noted that "the risk presented by a man armed with a kitchen knife at his side is far less than that of a man armed with a gun." *Reyes*, 362 F.App'x at 407. However, in *Reyes* the plaintiff was a "safe distance away" from the officers. *Id.* As such the threat from the plaintiff was "latent" rather than "immediate." *Id.* at 408. In the instant case, Officer Green and Ruddy Elizondo were standing face to face, mere feet apart. In the second before the fatal shooting, the undisputed evidence shows Ruddy Elizondo advanced to within striking distance of Officer Green. Ruddy was certainly not a "safe distance away." Indeed, in attempting to highlight Officer Green's negligence in creating the situation leading up to the shooting, Plaintiffs painstakingly

highlight the short distance between the two. *See* Pls.' Resp. Def.'s Mot. Summ. J. ¶ 61-64, ECF No. 43. Ruddy Elizondo, armed, suicidal, belligerent, and standing only a few feet from Officer Green, posed what an objectively reasonable officer could view as an immediate threat—far more immediate than the threat in *Reyes*.

Moreover, in *Reyes*, prior to the shooting the plaintiff had refused to drop his knife, asked the officers to leave his home, and flicked his cigarette. *Reyes*, 362 F.App'x at 407. at 405. In the instant case, it is undisputed that Ruddy cursed at Officer Green several times, refused to drop his knife and advanced on Officer Green. *See, e.g.* Pls.' Resp. Def.'s Mot. Summ. J. ¶ 19, ECF No. 43. Indeed, as the testimony of both Claudia and Alicia Elizondo illustrate, Ruddy was confrontational and belligerent in his dealings with Officer Green. In close range, dealing with a belligerent suicidal teen, Officer Green faced a substantially more immediate threat than the one present in *Reyes*. As such, Plaintiffs' reliance upon *Reyes* is misplaced. Indeed, the facts of the instant case are far more analogous to the situation confronted by the Fifth Circuit in *Ramirez v. Knoulton*, 542 F.3d 124 (5th Cir. 2008). In that case, officer Knoulton was dispatched to the home of an armed, suicidal suspect. *Id.* at 126-27. The suspect did not comply with the officer's demands to raise his hands and exit his vehicle. *Id.* at 127. The magistrate judge denied the officer's motion for summary judgment on the issue of qualified immunity. *Id.* The *Ramirez* court held that the fact that the suspect/plaintiff "made no threatening gestures" and that the officer failed "to consider the use of non-lethal force" did not make the use of deadly force per se unreasonable. *Id.* at 129-30.

Rather, considering that the suspect "repeatedly ignored the officer's warnings" and his "conduct could reasonably be interpreted as defiant and threatening," a reasonable officer could have found that there was an immediate threat to himself or others. *Id.* at 130. As in the instant case, the plaintiff in *Ramirez* was "armed, emotionally unstable, and potentially suicidal" and as such the officer's "decision to use deadly force was therefore not objectively unreasonable." *Id.* at 130-31.

Accordingly, the Court finds that Officer Green acted reasonably by using deadly force in the face of an immediate threat, in light of clearly established law.

Plaintiffs, in the alternative, attempt to create a genuine issue of material fact on the issue of whether Officer Green shot at Ruddy Elizondo after he had already fallen to the ground. *See* Pls.' Resp. Def.'s Mot. Summ. J. ¶ 39-42. Despite Plaintiffs attempt to characterize the evidence from Claudia and Alicia Elizondo as bearing out that Officer Green shot Ruddy when he was on the floor, the testimony simply does not bear out that contention. Both Claudia and Alicia Elizondo testified in their depositions that they could not see Ruddy when he was shot. *See* Dep. Claudia Elizondo Def.'s App. 338-42, ECF No. 40-8; *see also* Dep. Alizia Elizondo Pls.' App. 41, ECF No. 45-6. Taken in the light most favorable to Plaintiffs, their testimony at best indicates a two second hesitation between Officer Green's first and last shots. As the evidence from the Medical Examiner's report clearly illustrates, all three bullets fired by Officer Green traveled either downward or straight through Ruddy Elizondo's body, directly contradicting Plaintiffs' preferred inference that Ruddy was on the floor at the

time of the second and third shots. Autopsy Report Pls.'s App. 143, ECF No. 45-10. As such, Plaintiffs have presented no competent summary judgment evidence to support their allegation that Officer Green shot Ruddy Elizondo when he was already down.

Lastly, both parties in their briefings raised evidentiary issues. *See* Pls.' Resp. Def.'s Mot. Summ. J. ¶ 78-79; *see also* Def.'s Reply 10, ECF No. 53. Since the Court did not refer to the evidence either party seeks to strike, the parties' evidentiary objections are hereby **DENIED** as moot.

V. CONCLUSION

The Court finds, based on the extent summary judgment evidence, that Officer Green acted reasonably in light of clearly established law. Accordingly, Officer Green is entitled to qualified immunity on Plaintiffs' federal claims. Therefore, Defendant Officer Green's Motion for Summary Judgment is hereby **GRANTED** in part and **DENIED** in part. The federal claims against Officer Green are **DISMISSED** with prejudice.

SO ORDERED on this 18th day of October, 2010.

/s/_____
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:09-CV-1103

JOSE ELIZONDO AND ALICIA ELIZONDO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF RUDDY ELIZONDO, Plaintiffs,	)
v.	)
THE CITY OF GARLAND AND OFFICER W. M. GREEN, Defendants.	)

AFFIDAVIT OF HAROLD WARREN
EXCERPT

Before me, the undersigned authority, personally appeared Harold Warren, who, being by me duly sworn, deposed as follows:

"My name is Harold Warren. I am above the age of 18 and am competent to make this affidavit and have personal knowledge regarding the following facts, which I swear and affirm to be true.

I have thirty years of progressive law enforcement experience, including a long tenure in the top management of the Dallas Police Department, the eighth largest municipal law enforcement agency in the nation. From 1958 to 1987, I served in the Dallas Police Department and received several promotions, including my one final as Executive Assistant Chief of Police where from 1983 to 1987 I was the second in command of 3,300 member police department. From 1987 to 1990, I continued to serve as a consultant to the litigation department to Dallas City Attorneys' office in excessive force cases in state and federal court.

From 1990 to the present, I have served as an expert witness and consultant to plaintiffs and defendants in civil litigation in state and federal court cases involving crime

* * *

Because of the substantial testimonial differences between Green and the Elizondos, I will connect them to the account made by each witness in the instances where they differ. I will consider Green's version first.

Under even his own version, Green's behavior was an abomination. This homicide was completely unnecessary and avoidable. Green made several choices that placed himself on a collision course with Ruddy Elizondo. Though he should have entered the home with a back-up officer, his first inexcusable error occurred when he first laid eyes on Ruddy.

Rather than call for back-up, consult with a critical incident team, contact suicide prevention personnel,

consult with the family, move away from the doorway, formulate a plan to calmly and safely remove the knife, or deploy non-lethal force, Green did exactly what no reasonable officer should ever do with a mentally unstable, suicidal person. He pulled out his gun, pointed it at Ruddy and began yelling at the distraught kid to drop the knife. How he could possibly assume that it was reasonable and appropriate to yell and make threats with a semi-automatic pistol against a teenager in his own bedroom—who posed only a minimal to a moderate threat to only himself with a kitchen knife—is beyond reasonable comprehension.

Officer Green tried to explain away his conduct, appearing to blame either the 9-1-1 operator, the call notes or Claudia Elizondo, saying that he had expected to see an incapacitated person on the floor with a knife inside him. His excuse is unreasonable, because he had all of the information before him when he saw Elizondo in his bedroom. At that moment in time, Elizondo was not a criminal suspect and was not a threat to any third party. He had several options—that did not include force—but instead immediately pointed his gun at the teen.

No less alarming was Green's ignorance and his contemptuous attitude about the Texas Penal Code forbidding the use of deadly force when confronting suicidal individuals. There was no reasonable basis for what Green did. As an officer, he is supposed to help victims not threaten them.

APPENDIX E

City of Garland
POLICE DEPARTMENT
AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, W.A. ELLSTROM, a Notary Public in and for said County, State of Texas, on this day personally appeared W.M. GREEN. Who, after being by me duly sworn, on oath deposes and says:

On March 19, 2009, I Officer W.M. Green Badge No. 6763 was on duty in full uniform on my normal shift. I was driving a marked squad car. At approximately 12:24 a.m. there was a call regarding a stabbing at 4101 Windsor Drive. Dispatch notes advised that a male inside the location had intentionally stabbed himself and that the knife was still in his stomach. I was near the location and was the first officer to arrive. I believed that the male was seriously injured and would need immediate medical attention. I knocked on the door which was answered by an older Hispanic female. The female was visibly upset and crying. I asked where he was in English and in Spanish. She responded in English that he was in the bedroom and pointed inside the house. I entered the house and observed a female teenager standing at the end of the hall. I asked her "Where is he?' and she pointed to the bedroom I was standing directly beside.

I turned and looked into the open door of the bedroom and saw a large Hispanic male standing inside the room. He was holding a knife in one hand against his rib cage as if he were going to stab himself. The male was holding a telephone in his other hand and talking to an unknown person. I drew my weapon and loudly yelled for the male, who was standing less than five feet from me, to drop the knife. I didn't know if he spoke English so I repeated the warning in Spanish "sueltalo cuchillo". The male turned and faced me and said "Fuck you." I repeated the order to drop the knife several times. I attempted to find some type of protective cover, to put some sort of solid object between us, but was unable to safely do so due to the architecture of the kitchen and hallway. The male who was still holding the tip of the knife to his ribcage attempted to close the bedroom door. I pushed the door with my foot to keep him from closing the door. l ordered him not to close the door and to drop the knife. He responded "Fucking shoot me" and took one step towards me. I told him that if he came any closer that I would have to. He pulled the knife away from his ribs and raised the knife up to ear level with the blade pointed at me as if to stab me. He again said "Fucking shoot me." He took another step towards me. I was in fear of my life and I fired my weapon at his chest. He fell to the floor still holding the knife. I advised dispatch that I had fired shots and asked for EMS. The family members were hysterical and I advised dispatch that I needed back up officers immediately. When Officers Voelz and Allen arrived they placed handcuffs on the male for everyone's safety. Paramedics arrived and transported him to Parkland.

/s/_____

SUBSCRIBED AND SWORN TO BEFORE ME THIS
19 DAY OF MARCH A.D. 2009.

OFFICIAL SEAL
W.A. Ellstrom
State of Texas
My Commission Expires
March 5, 2009

/s/_____
NOTARY PUBLIC,
DALLAS COUNTY, TEXAS

APPENDIX F

EXCERPT
DEPOSITION TRANSCRIPT OF
WILLIAM M. GREEN
MAY 14, 2010

[Page 98]

testimony.

A. No, I did not jam my foot into the door, sir.

Q. (By Mr. Henley) Okay. "I pushed the door with my foot to keep him from closing the door." Is that right?

A. Yeah. He smacked it to shut it. I put a foot there, popped it back.

Q. Okay. And that's what you did? There's no -- and that's what you swear to doing, right?

A. Yes, sir.

Q. "I ordered him not to close the door and to drop the knife." Right?

A. Correct.

Q. Now, earlier you had stated that you wanted some protective cover --

A. Yes, sir.

Q. -- from him, whether it was a refrigerator or an oven?

A. Uh-huh.

Q. And at this point in time, he hasn't made any threats to you, has he?

A. No, sir.

Q. And he tries to shut the door?

A. Yes, sir.

Q. After all, it is his bedroom, right?

* * *

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Q. And he's still got the knife against his rib cage, right?

A. Yes.

Q. He's still holding it like this against his rib cage?

A. No, sir. He's holding --

Q. Show --

A. As you mentioned before, he had -- he was rotund.

Q. Right.

A. He was bouncing it more off -- say there was something here like this (indicating.)

Q. Okay. All right. And was he still bouncing it through this conversation?

A. More or less. He wasn't -- not constantly, but a little. He was making little motions with the knife, but nothing that at that point made me feel an immediate threat to me. It was still pointed towards him.

Q. And had you seen him penetrate his own skin at that time?

A. No, sir, and there was no indication, nothing I could see, no blood, nothing to indicate a wound at that time.

Q. And also, too, he's a -- he has a thick stomach, right?

* * *

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and wait and call for somebody else to help you wait him out or anything like that, right?

A. They were already en route, sir. I wasn't en route to the call alone. I just arrived first.

Q. Okay. But as opposed to waiting for somebody else to come here, you immediately started yelling at him to drop the knife?

A. Yes, sir. The knife is a threat. It has to be taken care of.

Q. But at -- but at that point in time, he was only threatening himself and no one else, right?

A. Not necessarily. That can change in any second. He could have been threatening anyone who was in the room that I didn't know about. He could have been a threat to me, anybody in the house at all. You don't know.

Q. But you didn't see him threatening anybody else with that knife except himself at that point; isn't that right?

A, I had not seen him threatening anybody, no.

Q. You had just seen him, as you say -- and I'll use your term -- bouncing the knife against his gut, his abdomen?

A. Yes, I'll agree to that.

Q. And that's the only thing that you had observed?

A. No, sir.

APPENDIX G

EXCERPT
DEPOSITION TRANSCRIPT OF
CLAUDIA ELIZONDO
APRIL 28, 2010

[Page 105]

before that?

A. It was broken before that.

Q. Okay. So the doorjamb to the door to the room was already broken when the officer got there?

A. Yes.

Q. And what you're telling me, just so I understand, is he didn't turn the knob and then open the door with his hand, he literally kicked in the door?

A. Yes.

Q. Okay. And you're telling me that the door was not locked?

A. No, it wasn't.

Q. Okay. If the door, wasn't locked -- let me see if I understand this. Are you saying the officer could have turned the knob and opened the door with his hand?

A. Yes.

Q. Okay. But he chose to turn the knob, and then he let go of the knob and kick the door?

A. No, he was -- like had his hand on the knob and kicked -- pushed the door with his foot.

Q. Well, did he push the door, or did he kick the door?

MR. HENLEY: Do you want to show him?

THE WITNESS: Yes.

MR. HENLEY: Do you want her to show you

* * *

[Page 161]

going on, you might not have seen everything as clearly as you think?

A. Possible.

Q. And so you're not here testifying that, in fact, your brother wasn't getting closer to the officer, you're just testifying you didn't see it?

A. He didn't pass the doorway. I didn't see that.

Q. You didn't see him pass the doorway?

A. No.

Q. It's possible he hadn't passed the doorway, but he was still getting closer to the officer, fair?

A. Yes.

Q. Now -- and when I say that, I mean at the time he shot that he hadn't crossed the doorway, but he was still getting closer to the officer, that's fair?

A. Yes.

Q. Okay. Now, how many times did you see Officer Green fire his gun?

A. Three -- well, that I see -- that I saw?

Q. Yes.

A. Two.

Q. You saw him fire his gun twice?

A. Yes.

Q. Okay. And the first time Officer Green fired his gun, he was standing right where you drew that X,

* * *

[Page 292]

Q. Okay. Did -- over the time that Officer Green was telling your brother to drop the knife, did he become increasingly angry about the fact that your brother had failed to comply?

MR. LEVINE: Objection. calls for speculation.

MR. GLAZER: Same objection.

A. He thought -- I could tell that he got angry or pissed off when my brother told him, man, fuck you. That's when I saw the facial expression on Mr. -- on Officer Green.

Q. Okay. And when you were describing this facial expression to Mr. Levine you described it as I guess clenching of the teeth and his face turned red. Are those the characteristics that you recall?

A. Yes.

Q. Is there anything else about his face, his body, his neck, his eyes, that you recall?

A. That -- no, that's the only thing I remember.

Q. Okay. Let's go to those photographs that -- the ones toward the very end. Exhibit 4Q -- and I guess -- I guess that was it. Oh, no, there it is. 4Q and 4R. Do you remember those photographs now?

A. Yes.

Q. Okay. Is that the way your brother was

* * *

APPENDIX H

Handwritten Affidavit of Claudia Elizondo Excerpt

* * *

brother not to do it again. And she was trying to get the knife from him and I was scared that she was going to get hurt because it was dark the only light that was on was the one from his computer and the lamp from the living room. I told my mom not to try and get the knife from him. But she wouldn't listen so I go back to my room and grabbed my phone and dialed 911. And asked for an ambulance not for a cop. I was telling the lady that my brother was hurt and that he needed an ambulance quick. And not even 5 mins later this cop shows up by himself. He comes inside my house and asks my mom where was my brother and my mom told him that my brother was in his room. And I was in the hallway and the cop asks me where my brothers room

* * *

APPENDIX I

EXCERPT
DEPOSITION TRANSCRIPT OF
ALICIA ELIZONDO
APRIL 30, 2010

* * *

[Page 74]

evening, cursing and yelling at the police officer and telling him to shoot him?

MR. HENLEY: Objection, compound question.

Q. Okay. I'll break that down. Did it concern you that your son was yelling at the police officer?

A. No.

Q. Did it concern you that he was cursing at the police officer?

A. Yes.

Q. Why?

A. Because in front of us, he wouldn't say bad words.

Q. Was your son -- did he sound angry that evening as he was yelling at the police officer?

A. I don't know.

Q. You don't know if he sounded angry when he told the police officer, fuck you?

A. I don't know.

Q. How did he sound to you when he told the police officer to shoot him?

A. Not angry. Not angry. He just said, shoot me.

* * *

APPENDIX I

PHOTOGRAPH EXHIBIT