IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANICE HUGHES BARNES, et al. Plaintiffs, v. ROBERTO FELIX JR., et al. Defendants.	Case No. 4:18-CV-725 The Honorable Alfred H. Bennett U.S. District Judge

PLAINTIFFS' OPPOSED MOTION FOR CLARIFICATION
OR, IN THE ALTERNATIVE, RULE 59(e) MOTION
TO AMEND THE COURT'S MARCH 31, 2021 ORDER

This is a deadly force case. It is about the shooting death of Ashtian Barnes by Harris County Deputy Constable Roberto Felix Jr. during a routine traffic stop in which Deputy Felix created the very danger that led to his blindly firing two shots at an unarmed Ashtian at point blank range as Ashtian drove, less than two-and-a-half minutes after initiating the stop.

This is also an excessive force case. It is about Deputy Felix's conduct leading up to his fatally shooting Ashtian—by drawing his firearm and pointing it directly at and inches away from Ashtian's head without any reasonable suspicion that Ashtian posed a threat—acts that are separately and independently unconstitutional.

On March 31, 2021, this Court granted complete summary judgment to Defendants and dismissed the case in its entirety, solely on the basis that Deputy Felix's use of *deadly force* was not objectively unreasonable. But Defendants never challenged—and therefore the Court never had before it or addressed in its Order—Plaintiffs' excessive force claim regarding Deputy Felix's conduct prior to his pulling of the trigger.

Plaintiffs' excessive force claim still lives. But, as discussed further below, the parties' summary judgment briefing should have more clearly outlined the contours of the claims at issue. Plaintiffs therefore ask this Court to clarify that its March 31 Order only disposed of Plaintiffs' deadly force claim, and left their excessive force claim—regarding Officer Felix's conduct prior to his use of deadly force—untouched.[1] Alternatively, Plaintiffs ask this Court, pursuant to Rule 59(e), to amend its March 31 Order to grant only partial summary judgment to Defendants on Plaintiffs' deadly force claim. This relief is necessary for Plaintiffs—Ashtian's mother and father—to ensure a "more robust examination" of Deputy Felix's conduct leading up to Ashtian's death in order to redress at least some of the force directed at their son. Dkt. 49 at 12. Lastly, if the Court disagrees with Plaintiffs' position, Plaintiffs minimally ask the Court to enter a final judgment in a separate document, in accordance with Rule 58(a).

I. Factual Background

Ashtian Barnes was fatally shot less than two-and-a-half minutes after Deputy Felix initiated a routine traffic stop for unpaid tolls on the rental car Ashtian was driving on April 28, 2016. He is survived by his mom, Janice, who he spoke to every day. He is survived by his dad, Tommy, who he consulted for guidance on manhood. He is survived by two younger sisters Anaya and Ale'dra who he lovingly protected. Plaintiffs' filed the instant Motion on the eve of what would have been Ashtian's 30th birthday.

In the months before Deputy Felix shot Ashtian as he drove along a toll road, Ashtian was building a successful future. In early 2016, he was enrolled in the Medical Assistant and Barber Programs at Remington College while also providing and caring for his girlfriend and her daughter.

[1] For ease of reference, Plaintiffs herein refer to this claim as their "pre-deadly force claim."

On April 28, 2016, Ashtian was driving to pick up his girlfriend's daughter from school in a car rented by his grandmother through the "On Time Car Rental" agency.

At approximately 2:40 p.m. the Harris County Toll Road Authority Dispatch made a general radio broadcast to the Harris County Constable Office, Precinct Five, informing that a vehicle had outstanding toll violations and was traveling southbound on the tollway. Deputy Constable Roberto Felix received the call, located the vehicle, and conducted the traffic stop. The instant that Deputy Felix turned on his lights and siren, Ashtian responded by immediately pulling his vehicle over to the left shoulder of the road.

The following took place in less than two-and-a-half minutes: After both vehicles pulled over to the shoulder of the tollway, Deputy Felix stepped out of his vehicle and approached Ashtian's driver's side window. Ashtian rolled down the window at the outset of the stop. Deputy Felix then asked Ashtian for his driver's license and insurance, prompting Ashtian—in compliance with Felix's direction—to attempt to look for his identification in a stack of papers on the passenger side of the vehicle, while simultaneously explaining to Deputy Felix that the vehicle he is driving is a rental car. After stating he "understand[s]" that the vehicle is rented, Deputy Felix again asks Ashtian for his driver's license. As Ashtian continues looking for his papers, Deputy Felix states "I smell marijuana, is there marijuana in your vehicle?" Felix's right hand then quickly moves to his holstered firearm as he exclaims, "stop digging around" several times, despite having already asked Ashtian to produce his identification twice. Deputy Felix then asks Ashtian a third time if he has any identification. Ashtian informs Deputy Felix that he thinks his driver's license is in his trunk. At Felix's command, Ashtian then opens the trunk for Officer Felix.

Rather than proceed to the rear of the car to inspect the trunk, Deputy Felix opens the driver-side door of the vehicle and instructs Ashtian to step out. Approximately five seconds after

Deputy Felix opens the door, he pulls his gun and points it within a few inches of Ashtian's head. Deputy Felix later testified that he drew his gun because after opening the driver's side door, Felix was positioned in "a more open area where [Ashtian] could do something to me . . . easier. . . . So when he started reaching down is when I drew my weapon." Dkt. 44-3 at 10:14-20. In other words, Deputy Felix claimed to be afraid of the vulnerable position he had placed himself in of his own volition. Deputy Felix pointed his weapon at Ashtian's head and, at the same time, shouted "Don't fucking move!"

With a gun pointed toward his head in point blank range, Ashtian begins driving away. In that moment, Deputy Felix makes the bad situation he created even worse. With his gun still pointed at Ashtian, Deputy Felix springs fully up onto the door frame of the vehicle with both feet and grips the roof of the car with his left hand as the car accelerates.

Deputy Felix then briefly pulls his gun out of the open driver's door frame before sticking it back inside towards Ashtian and firing twice, blindly and in rapid succession. Both shots strike Ashtian. Somehow, despite being mortally wounded, Ashtian manages to stop his car and place it in park. And though he clearly presents no threat at that time, neither Deputy Felix nor anyone else even attempt to render aid to Ashtian until at least five minutes after other officers arrive on the scene. By that time, it is too late to save Ashtian's life. Ashtian had already succumbed to his gunshot wounds.

II. Procedural History

Plaintiffs—Ashtian's mother Janice, individually and as representative of Ashtian's estate, along with his father Tommy—filed this action in Harris County District Court on December 29, 2017. Dkt. 1-2. In their petition, Plaintiffs advanced distinct Fourth Amendment harms under a single claim for relief. *Id.* ¶¶ 35–42. They alleged that specifically enumerated instances of Deputy

Felix's conduct "resulted in and *independently amounted to* excessive force and/or unreasonable seizure" in violation of Ashtian's Fourth Amendment rights. *Id.* ¶ 38 (emphasis added). Plaintiffs therefore styled this claim for relief as an "Unconstitutional Use of Excessive *and* Deadly Force" by Deputy Felix. *Id.* at page 24 (of 59) (emphasis added). Simply put, Plaintiffs alleged distinct Fourth Amendment violations beyond just Deputy Felix's use of deadly force.

Several months after filing, Defendants Felix and Harris County removed the case to this Court, on March 7, 2018. Dkt. 1. After a period of discovery, on July 30, 2019, Defendants filed a Consolidated Motion for Summary Judgment. In their motion, Defendants asserted that they were entitled to summary judgment on three core bases: (1) "Deputy Felix's use of deadly force against Barnes on April 28, 2016 was justified and did not violate Barnes' Fourth Amendment rights[;]" (2) that Deputy Felix was entitled to qualified immunity irrespective of any constitutional violation; and (3) because Deputy Felix did not violate the Fourth Amendment, Harris County was not municipally liable under any of the theories Plaintiffs advanced. *See* Dkt. 15 at 10; 18–29; 29–40 (of 42). Defendants' briefing also explicitly acknowledged the existence of other live Fourth Amendment claims, but Defendants opted not to develop any argument challenging those claims. *Id.* at 29.

Plaintiffs responded on August 20, 2019, directly addressing the substance of Defendants' challenges. Dkt. 18. They asserted that Deputy Felix's deadly force was objectively unreasonable under the circumstances and was therefore not qualifiedly immune, and that Harris County could be held municipally liable. *Id.* at 14–26; 26–40. Defendants filed their reply on August 27, 2019. The Court then held a hearing on the motion on January 24, 2020.

At the hearing, the Court ordered supplemental briefing as to any applicable policies of the Constable regarding fleeing suspects. Defendants then submitted a policy not previously produced

in discovery—despite its clear relevance and applicability to Plaintiffs' discovery requests—describing Constable Precinct 5 "guidelines for fresh pursuit[.]" Dkt. 31 at 1. Plaintiffs responded to Defendants' supplemental briefing on February 7, 2020, Dkt. 33, and several days later, on February 11, 2020, moved for sanctions based on Defendants' failure to disclose the Fresh Pursuit policy. Dkt. 36.

On February 26, 2020, the Court held a hearing on the Motion for Sanctions, in which it "confirmed" Defendants had not timely produced evidence that "could affect the evidentiary posture of this case and the parties' legal positions[.]" Dkt. 39 at 2. The Court accordingly granted additional interrogatories to Plaintiffs and denied Defendants' pending Motion for Summary Judgment, with leave to re-file after the newly re-opened discovery period closed.

On July 31, 2020, Defendants moved anew for summary judgment, filing a motion identical to their original July 30, 2019 Consolidated Motion for Summary Judgment. *Compare* Dkt. 42 *with* Dkt. 15. Defendants once again only sought summary judgment on Plaintiffs' deadly force claim, while briefly nodding at, but declining to develop, arguments against Plaintiffs' other Fourth Amendment claims. *See id.* at 26, 29. Plaintiffs responded to the substance of Defendants' challenge on August 20, 2020, Dkt. 44, and Defendants replied, Dkt. 45.

On March 31, 2021, the Court entered summary judgment for Defendants and dismissed this case. Dkt. 49. In its Order, the Court focused solely on resolving whether Deputy Felix's use of deadly force amounted to a constitutional violation. At the heart of that question, according to the Court, was whether the Court could take into account "the officer's conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside—in determining whether the officer used excessive force in violation of the Fourth Amendment." Dkt. 49 at 1. Answering in the negative, the Court concluded that Fifth Circuit precedent foreclosed

the consideration of conduct predicate to a use of deadly force because, in deadly force cases, the objective reasonableness inquiry is limited to examining "whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer's use of deadly force." Dkt. 49 at 7 (quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)) (emphasis in original).

Applying this precedent, the Court held that Deputy Felix's use of deadly force was objectively reasonable because at the "moment of the threat"—the moment after "Felix jumped onto the door sill of Ashtian's car" as it began to move—Felix's safety was objectively at risk. *Id.* at 9-10. And because Fifth Circuit precedent narrows the reasonableness inquiry to foreclose the consideration of any conduct other than what was happening at that precise moment, the Court held Deputy Felix's use of deadly force to be "presumptively reasonable[.]" *Id.* at 11 (quoting *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009)). The Court granted Defendants' motion for summary judgment and dismissed the case, Dkt. 49 at 12, but its analysis only disposed of the deadly force claim.

Initially believing the Court's Order to be a "final decision[] of the district court[,]" 28 U.S.C. § 1291, Plaintiffs timely noticed an appeal to the Fifth Circuit on April 5, 2021, Dkt. 50. Then, on May 20, 2021, the Texas Civil Rights Project joined Fomby Law Firm as counsel for Plaintiffs. Upon further review and contemplation of the Court's Order, Plaintiffs' counsel determined that it was unclear whether or not the Court's Order actually constituted a "final decision" because a live claim had not been formally disposed, and therefore the Court's Order potentially lacked the finality of a judgment appealable as of right. Separately, Plaintiffs also noticed that following the grant of summary judgment the Court did not enter a final judgment on a separate document as required by Rule 58.

Plaintiffs therefore dismissed their pending appeal and acted to pursue the instant relief in order 1) to preserve their ability to advance a live claim; 2) to reconcile their own lack of clarity regarding the Court's Order, which also had jurisdictional implications for the then-pending appeal, given that a final order is appealable while an interlocutory order is, generally speaking, not, *see* 28 U.S.C. §§ 1291, 1292; or, as a minimal alternative, 3) to ask the Court to cure the lack of entry of a final judgment on a separate document. *See Hanson v. Flower Mound*, 679 F.2d 497, 502 (5th Cir. 1982) ("If an appellant realizes that a final judgment has not been entered, or that there may be some doubt about it, he should take steps to obtain the entry of a certain final judgment, and then file a new notice of appeal."). Plaintiffs filed this motion to clarify or amend the Court's March 31, 2021 Order without delay.

The relief Plaintiffs seek is limited. This motion does not address or seek to disturb this Court's ruling on Plaintiffs' deadly force claim. However, a live "pre-deadly force" claim has not yet been briefed by the parties or resolved by the Court so Plaintiffs should be allowed to continue advancing that remaining claim. Plaintiffs did their best to distinguish these claims in their Original Petition and response to Defendants' Consolidated Motion for Summary Judgment—focusing on the "unreasonableness" of Deputy Felix's conduct which precipitated his killing Ashtian, *see* Dkt. 1-2 at ¶¶ 35–38; Dkt. 44 at 18–21, 23–25 (of 41)—but Plaintiffs admit now that they could have highlighted this delineation more explicitly in their briefing. Plaintiffs hope to rectify that confusion through this motion while the Court is still empowered to take corrective action. The interest of justice counsels in favor of granting the motion. Ashtian's family should be permitted to continue seeking relief on their live pre-deadly force Fourth Amendment claim because Defendants never challenged that claim and because Plaintiffs never abandoned it.

III. Legal Standard

Rule 59(e) of the Federal Rules of Civil Procedure authorizes a "motion to alter or amend a judgment" if it is "filed no later than 28 days after the entry of the judgment." The motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). To prevail on a Rule 59(e) motion, movants "must clearly establish either a manifest error of law or fact or must present newly discovered evidence[.]" *Wright v. Spindletop Films, L.L.C.*, 845 F. Supp. 2d 783, 786 (S.D. Tex. 2012) (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003)).

Though it is true that reconsideration "is an extraordinary remedy that should be used sparingly," *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004), "[a] district court has considerable discretion to grant or deny a motion under Rule 59(e)." *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632, 633 (S.D. Tex. 2012) (quoting *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993)). Indeed, "Rule 59 gives the trial judge ample power to prevent what the judge considers to be a miscarriage of justice." 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2803 (3d ed.); *see Lekas v. Briley*, 405 F.3d 602, 614 n.8 (7th Cir. 2005) (Rule 59 is proper vehicle for "salvag[ing]" unchallenged claims dismissed in error).

IV. The Court Should Amend Its Summary Judgment Order in the Interest of Justice.

Because Plaintiffs pled an independent pre-deadly force claim that has not been briefed by either party or addressed by this Court, Plaintiffs respectfully request the Court clarify or, in the alternative, to amend pursuant to Rule 59(e), its March 31, 2021 Order to reflect a grant of partial summary judgment limited only to the deadly force claim. This result is necessary to prevent a miscarriage of justice for Ashtian's family: the inability to advance a live Fourth Amendment claim that was never challenged by Defendants, never addressed in the Court's order granting total

summary judgment, and, candidly, not well-delineated by Plaintiffs' counsel in focusing their summary judgment briefing on refuting the explicit arguments around deadly force advanced by Defendants' motion.

a. Plaintiffs' Rule 59 Motion is Timely

As an initial matter, Plaintiffs' Rule 59 motion is timely because the Court did not contemporaneously set out its judgment dismissing the case in a separate document under Federal Rule of Civil Procedure 58(a). As a result, its judgment is not deemed "entered"—starting the clock for purposes of Rule 59, which requires a motion be filed "no later than 28 days after the entry of the judgment," Fed. R. Civ. P. 59(e)—until "150 days have run from the entry in the civil docket." *Id.* at Rule 58(c)(2)(B); *see Craig v. Lynaugh*, 846 F.2d 11, 13 (5th Cir. 1988) (motion filed five months after order deemed timely); *United States v. Redd*, 652 F. App'x 300, 303 & n.4 (5th Cir. June 20, 2016); *Britt v. Whitmire*, 956 F.2d 509, 515-16 (5th Cir. 1992); *cf. Freudensprung v. Offshore Tech. Servs., Inc.* 379 F.3d 327, 337 (5th Cir 2004) (an order lacking a required separate document was not deemed "entered" under Federal Rule of Appellate Procedure 4 and Federal Rule of Civil Procedure 58(b), and thus time to file notice of appeal did not begin to run until expiration of 150-day period); *United States v. Mtaza*, --- F. App'x ---, 2021 WL 911959, at *2 (5th Cir. Mar. 9, 2021). The Court entered the order setting out its judgment on March 31, 2021, and Plaintiffs filed the instant motion on August 13, 2021, which is well within this 150-plus-28-day timeframe. *See* Dkt. 49. This Court has jurisdiction over the instant motion.

b. Plaintiffs' Original Petition Raised Distinct Fourth Amendment Harms That Were Not Challenged by Defendants

Plaintiffs' petition alleged distinct Fourth Amendment harms separate from Deputy Barnes' ultimate use of deadly force. *See* Dkt. 1-2 at ¶¶ 35–42. They alleged that specifically enumerated instances of Deputy Felix's conduct "resulted in and *independently amounted to*

excessive force and/or unreasonable seizure" in violation of Ashtian's Fourth Amendment rights. Dkt. 1-2 at ¶ 38 (emphasis added). That conduct included, for example, "[a]ggressively and dangerously drawing and pointing his weapon at Ashtian Barnes because the suspect was not complying, especially in close proximity to the suspect and members of the public." *Id.* ¶ 38, page 26 (of 59).

Plaintiffs' allegations track the Fifth Circuit's analytical approach to Fourth Amendment excessive force violations because "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar Cty.*, 560 F.3d 404, 413 (5th Cir. 2009). In other words, courts are frequently tasked with analyzing mere instants in time to determine whether an officer's conduct was objectively reasonable. *See id.* at 414 (material fact dispute over whether "three to ten seconds" was enough time for officer "to perceive that the threat to him had ceased"); *see also Waterman v. Batton*, 393 F. 3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.").

Plaintiffs therefore identified and enumerated each of these Fourth Amendment "moments" under a claim for relief styled as an "Unconstitutional Use of Excessive *and* Deadly Force" by Deputy Felix. Dkt. 1-2 at page 24 (of 59) (emphasis added). Under this claim, Plaintiffs would be entitled to relief if they could establish that any individual act or collection of acts by Deputy Felix amounted to *either* Excessive Force or Deadly Force. Plaintiffs thus pleaded a claim that was not constrained solely to Deputy Felix's use of deadly force, but also included distinct excessive force claims based on Deputy Felix's conduct leading up to the actual deadly act. *See County of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1548 (2017) ("The harm proximately caused by these two torts may overlap, but the two claims should not be confused."); *cf.* 10 CHARLES A. WRIGHT,

ARTHUR R. MILLER, AND MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2657 (4th Ed.) ("[I]f the claims factually are separate and independent, then multiple claims clearly are present.").

In their Consolidated Motion for Summary Judgment, Defendants challenged *only* Plaintiffs' claim that Deputy Felix's use of *deadly* force violated the Fourth Amendment. *See* Dkt 42 at 10 (of 42) ("Deputy Felix's use of deadly force against Barnes on April 28, 2016 was justified and did not violate Barnes' Fourth Amendment rights"); 18–20 (addressing the legal standard for deadly force claims); 22–29 (only defending Deputy Barnes' use of deadly force); 30 (arguing against municipal liability for Harris County in part on the basis that Deputy Barnes' "use of deadly force was entirely justified"). Defendants' motion acknowledges Deputy Barnes's conduct leading up to his shooting of Ashtian in passing, and solely for the purpose of arguing that Ashtian was the first to instigate any danger by attempting to flee—a material factual contention over which there was a genuine dispute. *Id.* at 28–29; *compare* Dkt. 42 at 29 (of 42) ("It was Barnes, the fleeing driver, who intentionally placed himself, Deputy Felix, and the public in danger and which produced the choice that Deputy Felix had to make.") *with* Dkt. 44 at 5 (of 41) ("Shortly after Felix drew his weapon and thrust it toward Barnes' head, Felix claims that Barnes grabbed his keys and began the process of fleeing.") *and* Dkt. 44-3 at 10:16–20 (Deputy Felix grand jury testimony that after opening the driver-side door to Ashtian's car, Felix drew his weapon "when [Ashtian] started reaching down.").

Even though the substance of Defendants' summary judgment challenge to Plaintiffs' Fourth Amendment claims focused exclusively on the deadly force claim, Defendants' motion nonetheless explicitly acknowledged—albeit mischaracterized—the separate pre-deadly force claims Plaintiffs alleged. In a throwaway line at the conclusion of their argument against the merits of Plaintiffs' deadly force claim, Defendants added "[t]o the extent that Plaintiffs allege that

Deputy Felix stopped Barnes in violation of the Fourth Amendment, that claim must fail, as the stop was based on reasonable suspicion." *Id.* at 29 (of 42); *see also id.* at 26 ("Plaintiffs also contend that Deputy Felix engaged in other conduct which violated Barnes' Fourth Amendment rights."). Of course, a routine traffic stop is not rendered *per se* constitutional merely because an officer possessed reasonable suspicion at the outset—"a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18 (1968) (citing *Kremen v. United States*, 353 U.S. 346 (1977)). But merits of that argument aside, Defendants explicitly conceded the existence of other Fourth Amendment claims and declined to advance arguments in opposition to those claims in their motion.

In response, Plaintiffs directly addressed the substance of Defendants' challenge to Plaintiffs' deadly force claim. They asserted that Deputy Felix's deadly force was objectively unreasonable under the circumstances because Ashtian's conduct did not give Deputy Felix reason to believe Ashtian was a threat to him or others, and that Deputy Felix's conduct leading up to and including firing his weapon at Ashtian disqualified Defendants from summary judgment. Dkt. 44 at 17–25 (of 41). Two important conclusions about the objective reasonableness of Deputy Felix's actions were central to Plaintiffs' rebuttal—(1) that Ashtian's own behavior did not independently provide justification for Deputy Felix's use of deadly force, *id.* at 17–18; and (2) that Deputy Felix himself "unreasonably created the danger" that gave rise to Deputy Felix firing his gun blindly at Ashtian. *Id.* at 19–25; *see also id.* at 4–7.

Plaintiffs' response therefore aligned with the theory of constitutional harm alleged in their Original Petition—that Deputy Felix's independently unreasonable conduct leading up to firing his weapon at Ashtian and killing him also made Deputy Felix's use of deadly force objectively unreasonable. As Plaintiffs emphasized in their briefing, "[w]hile an officer merely creating a risky

situation is not sufficient to overcome qualified immunity, it is sufficient when an officer's actions 'unreasonably created' the danger." *Id.* at 18 (of 41) (quoting *Edmond v. City of New Orleans*, 20 F.3d 1170 (5th Cir. 1994)). Underscoring that point, Plaintiffs explained that "[t]he actions by Officer Felix, first in pulling his service weapon during a simple traffic stop and then jumping into and onto a vehicle he knew was preparing to leave the scene, unreasonably created the very danger that he relied upon to justify his use of deadly force." *Id.* at 19 (of 41); *see also* Ex. 1, Transcript, Hearing on Motion for Summary Judgment, Jan. 24, 2020, at 19:12-21 (the Court noting that Deputy Felix's actions prior to firing his weapon could have been unreasonable); *id.* at 36:3-9 ("Barnes was driving away because he was afraid of something, an action by Mr. Felix pulling his service weapon. . . . [T]here is no reason for the officer to have pulled his gun, in the first place, because there was no serious crime at foot at all."). Though this response was addressed to Defendants deadly force argument, Plaintiffs also viewed these as legally distinct moments for purposes of establishing the separate Fourth Amendment harms alleged in their Petition.

Defendants' reply provides further evidence—in addition to their explicit acknowledgment of the existence of other Fourth Amendment claims, *id.* at 22—that they understood Plaintiffs to be contending that Deputy Felix's conduct prior to the shooting was unreasonable in Fourth Amendment terms. In asking the Court to "scrutinize" Plaintiffs' contention that Deputy Felix's conduct leading up to the shooting was unreasonable, Defendants essentially asked the Court for a legal determination—based on a disputed factual narrative cast in a light favorable to Defendants—that Ashtian's conduct in fleeing upon having a gun pointed at his head—and not Deputy Felix's conduct in drawing his weapon and pointing it at Ashtian's head because he saw Ashtian "start reaching down"—was reckless. Dkt. 45 at 4 ("[L]egally it is the fleeing driver and not the officer who has engaged in the reckless conduct."). This cuts to the core of Plaintiffs'

claims regarding Deputy Felix's conduct: that his own independently unreasonable actions in drawing his weapon and pointing it at Ashtian's head while alongside the vehicle presented its own Fourth Amendment violation *and* "set the stage for what followed[.]" *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001); *see* Dkt. 44 at 19 (of 41).

The distinction between Plaintiffs' Fourth Amendment challenge to Deputy Felix's use of deadly force versus Deputy Felix's unreasonable conduct *prior* to his use of deadly force reflects Supreme Court precedent. In *County of Los Angeles, California v. Mendez*, a unanimous Supreme Court struck down the Ninth Circuit's "provocation rule," which permitted Fourth Amendment excessive force claims to proceed "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." 137 S. Ct. 1539, 1546 (2017) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)). Rejecting the notion that an independent Fourth Amendment violation can be used to bootstrap an excessive force claim that could not "succeed on [its] own terms[,]" the Court held that Fourth Amendment claims "should be analyzed separately[,]" and that *Graham v. Connor*, 490 U.S. 386 (1989) was the sole "framework for analyzing excessive force claims[.]" *Id.* at 1547.

Plaintiffs' intent from the beginning has been to advance these separate Fourth Amendment claims—both for excessive force prior to the use of deadly force and for the use of deadly force itself—individually and on their own (admittedly overlapping) merits. Because Defendants' Consolidated Motion for Summary Judgment only presented a frontal attack on the issue of Deputy Felix's use of deadly force, Plaintiffs' response addressed only that question, while drawing continued attention to the unreasonableness of Deputy Felix's pre-deadly force conduct. Candidly, Plaintiffs' counsel should have highlighted for the Court the separation between their two categories of claims and their belief that their excessive force claims remained live notwithstanding

Defendants' motion. It was only after the Court entered its Order granting complete summary judgment to Defendants that Plaintiffs realized the effect their lack of clarity had on the issues addressed by the Court in resolving the motion for summary judgment. It is not too late for this Court to take corrective action and get this case on the proper course. And it is in the interests of justice to do so.

c. The Court Should Clarify or Amend its March 31, 2021 Order to Only Reflect a Grant of Partial Summary Judgment.

On March 31, 2021, this Court granted summary judgment to Defendants on the question of deadly force and dismissed the case in its entirety. Dkt. 49 at 12. It did so without addressing Plaintiffs' pre-deadly force claims. This is unsurprising in hindsight, given the scope of the summary judgment briefing as outlined above, and because Plaintiffs' attempt in that briefing to distinguish their two categories of claims was not as clear as it could have been.

However, as the Court correctly recognized in the first paragraph of its Order, the key dispositive question in the summary judgment briefing was "whether the Court can consider the officer's conduct precipitating the shooting . . . in determining whether the officer used excessive force in violation of the Fourth Amendment." In the context of deadly force claims, the Court's answer was 'no.' But the Court also recognized that "limiting the focus of the judicial inquiry" in this way "stifle[s] a more robust examination of the Fourth Amendment's protections when it comes to encounters between the public and the police." Dkt. 49 at 1, 12.

A "more robust examination" is obtainable by permitting review of Deputy Felix's conduct prior to his use of deadly force. Accordingly, Plaintiffs ask the Court to recognize that Deputy Felix's actions in unreasonably drawing his weapon and pointing it at Ashtian's head independently amounted to a freestanding claim of excessive force. This is precisely in line with what Plaintiffs alleged in their Original Petition and what they attempted to delineate in their

summary judgment briefing. *See Mendez*, 137 S. Ct. at 1547-48; *Lytle*, 560 F.3d at 413 (the reasonableness of an officer's conduct may change from moment to moment); *see also Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect"); *Amador v. Vasquez*, 961 F.3d 721, 730 (5th Cir. 2020) (same) (quoting *Abraham*).

Plaintiffs respectfully submit that amending the Court's Order to permit live pre-deadly force claims to proceed not only permits a "robust examination" to continue, but also reconciles the Court's Order with controlling Supreme Court and Fifth Circuit precedent that authorizes the examination of Deputy Felix's conduct prior to his use of deadly force as independently violative of the Fourth Amendment. This outcome additionally prevents manifest injustice to Ashtian's family by allowing them to press a claim for relief that was never addressed or disposed of by the Court nor properly challenged by Defendants. *See Pounds v. Katy Indep. Sch. Dist.*, 739 F. Supp. 2d 636, 641 (S.D. Tex. 2010) (granting a Rule 59 motion and amending summary judgment order because plaintiffs' motion "sharpened" the court's understanding of a claim the court previously disposed of in a footnote); *see also Cty. of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 819 (7th Cir. 2006) (when a defendant "does not challenge one of plaintiff's claims and the district court dismisses the unchallenged claim in error, a Rule 59(e) motion may be an appropriate vehicle for correcting that error" if plaintiff minimally made a "'passing reference' to the overlooked claim in his response" (quoting *Lekas v. Briley*, 405 F.3d 602, 615 n.8 (7th Cir. 2005)); *Lone Mountain Processing, Inc. v. Bowser Morner, Inc.*, 94 F. App'x 149, 151-52, 158-59 (4th Cir. Apr. 8, 2004) (reviving contractual indemnification claim "unaddressed" by district court in grant of complete summary judgment to defendant and subsequently rejected when raised in Rule 59(e) motion); *cf.*

Danow v. Borack, 197 F. App'x 853, 856 (11th Cir. Sept. 19, 2006) (sua sponte dismissal of unchallenged claim was reversible error).

d. The Relief Plaintiffs Seek Is Narrow.

Plaintiffs do not ask the Court to disturb any portion of its March 31, 2021 Order, other than to amend the grant of full summary judgment to a grant of partial summary judgment. This motion is limited to the live claims that were never formally challenged or disposed of, and is geared towards the remaining path and sliver of justice for their son. Finally, if the Court disagrees with Plaintiffs' motion, then Plaintiffs minimally ask the Court to enter a separate document setting out the judgment in the Court's March 31, 2020 Order, in accordance with Rule 58(a).

Conclusion

For the foregoing reasons, Plaintiffs respectfully ask the Court to clarify that its March 31 Order only disposed of Plaintiffs' deadly force claim and left their excessive force claim—regarding Officer Felix's conduct prior to his use of deadly force—untouched. Alternatively, Plaintiffs ask this Court, pursuant to Rule 59(e), to amend its March 31 Order so it reflects a grant of only partial summary judgment to Defendants on Plaintiffs' deadly force claim. Finally, if the Court declines to take either of those steps, Plaintiffs request the Court enter a separate document setting out the judgment in the Court's March 31, 2020 Order, in accordance with Rule 58(a).

Date: August 13, 2021

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

I certify that on August 13, 2021, I conferred with counsel for Defendants regarding the instant motion. Defendants are opposed.

/s/ Peter Steffensen
Peter Steffensen

CERTIFICATE OF SERVICE

I certify that on August 13, 2021 a true and correct copy of this document was properly served on counsel of record via electronic filing in accordance with the USDC, Southern District of Texas Procedures for Electronic Filing.

/s/ Peter Steffensen
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