

CASE NO. 09-10076

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

=====

CARMEN CEBALLOS, INDIVIDUALLY AND AS THE REPRESENTATIVE  
OF THE ESTATE OF JOSE PACHECO CEBALLOS, DECEASED, LUZ M.  
REYES INDIVIDUALLY AND AS GUARDIAN OF A.R., MINOR CHILD  
*Plaintiffs-Appellants,*

v.

WILLIAM BRIDGWATER, JOSE PORRAS,  
WILLIAM MULL, CHIEF OF POLICE  
*Defendants-Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION  
THE HON. SAM R. CUMMINGS, DISTRICT JUDGE

BRIEF OF APPELLEES  
WILLIAM BRIDGWATER, JOSE PORRAS, AND WILLIAM MULL

=====

MATT D. MATZNER  
Texas Bar No. 00797022  
CRENSHAW, DUPREE & MILAM, LLP  
1500 Broadway, 8th Floor  
Lubbock, Texas 79401  
Telephone: (806) 762-5281  
Facsimile: (806) 762-3510

Attorneys for Appellees William Bridgwater, Jose  
Porras, and William Mull

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Name of Party	Name of Counsel
1. Carmen Ceballos, Individually And As The Representative Of The Estate Of Jose Pacheco Ceballos, Deceased, Luz M. Reyes Individually And As Guardian Of A.R., Minor Child <i>Plaintiffs/Appellants</i>	Ronald T. Spriggs Law Offices of Ronald T. Spriggs 1011 South Jackson St. Amarillo, TX 79101
2. William Bridgwater, Jose Porras, William Mull, Chief Of Police <i>Defendants/Appellees</i>	Matt D. Matzner Texas Bar No. 00797022 Crenshaw, Dupree & Milam, L.L.P. P.O. Box 1499 Lubbock, Texas 79408-1499 Telephone: (806) 762-5281 Facsimile: (806) 762-3510
3. City of Plainview, Texas <i>Defendant (Not a party to                      this appeal)</i>	Matt D. Matzner Texas Bar No. 00797022 Crenshaw, Dupree & Milam, L.L.P. P.O. Box 1499 Lubbock, Texas 79408-1499 Telephone: (806) 762-5281 Facsimile: (806) 762-3510

---

**MATT D. MATZNER**  
 Texas Bar No. 00797022  
 Crenshaw, Dupree & Milam, LLP  
 1500 Broadway, 8<sup>th</sup> Floor  
 Lubbock, Texas 79401  
 Telephone: (806) 762-5281  
 Facsimile: (806) 762-3510  
  
*Attorneys for Appellees William  
 Bridgwater, Jose Porras, and William Mull*

**STATEMENT REGARDING ORAL ARGUMENT**

The Appellees believe that the trial court's orders and judgment adequately set forth the issues in this case and the judgment should be affirmed on appeal without the need for oral argument. The dispositive issues have been authoritatively decided by the trial court, and the facts and legal arguments are adequately presented in the Appellees' brief and in the record. FED. R. APP. P. 34(a)(2)(B), (C).

## TABLE OF CONTENTS

Table of Authorities .....	vi
Statement Of Jurisdiction & Standard of Review.....	1
Issues Presented For Review .....	1
I. Whether the district court properly granted summary judgment on the issue of qualified immunity as to Officer Bridgwater (the person who fired the shot), Sergeant Porras (who was simply the back-up officer on the scene who gave commands in Spanish), and Chief William Mull (who was not present during the shooting). Jose Ceballos, Jr. was shot after Officer Bridgwater arrived on the scene of a reported fight/domestic disturbance call and learned that Jose Ceballos, Jr. had locked a woman inside an apartment, heard her cry and scream, and after Officer Bridgwater kicked in the apartment door, was confronted by Jose Ceballos, Jr. with a knife at close range who refused to drop it. (Response to Appellants' Issue Nos. I-III). .....	1
II. Whether the district court properly applied Texas case law when it dismissed the state claims against the individual defendants because the Appellants made an irrevocable election to only sue the governmental entity pursuant to the Texas Tort Claims Act. (Response to Appellants' Issue No. IV). .....	2
Statement Of The Case .....	2
A. Nature of the Case .....	2
B. Procedural History .....	3
C. Statement of Facts .....	4
1. Overview .....	5
2. Details .....	7
Summary Of Argument.....	14
Argument.....	18
I. The district court properly granted summary judgment on the issue of qualified immunity as to Officer Bridgwater (the person who fired the shot), Sergeant Porras (who was simply the back-up officer on the scene who gave commands in Spanish), and Chief William Mull (who was not present during the	

shooting). Jose Ceballos, Jr. was shot after Officer Bridgwater arrived on the scene of a reported fight/domestic disturbance call and learned that Jose Ceballos, Jr. had locked a woman inside an apartment, heard her cry and scream, and after Officer Bridgwater kicked in the apartment door, was confronted by Jose Ceballos, Jr. with a knife at close range who refused to drop it. (Response to Appellants' Issue Nos. I-III). .....18

A. Summary of Appellants' Arguments & Why They Fail.....19

B. The District Court's Order Summarizes the Uncontested Evidence & Surrounding Circumstances Justifying Qualified Immunity Being Granted...23

C. Appellants' *Bazan* Argument Is Inapplicable to the Case; Also, their "Absence-of-an-Aggressive-Movement-Argument" Fails .....24

D. Summary Judgment Standard .....27

E. Overview of Excessive Force Claims, the Qualified Immunity Defense & Supervisory Liability.....30

F. The Audio Recordings and Statements Reveal That No Constitutional Rights Were Violated.....35

G. Commander Albert Rodriguez, Director of Training for the Texas Department of Public Safety, Finds that Officer Bridgwater & Sergeant Porras Acted Reasonably Under the Circumstances; Deadly Force Was Justified; and The Autopsy Report Confirms The Officers' Account Of The Events .....38

II. The district court properly applied Texas case law when it dismissed the state claims against the individual defendants because the Appellants made an irrevocable election to only sue the governmental entity pursuant to the Texas Tort Claims Act. (Response to Appellants' Issue No. IV). .....40

Conclusion .....42

CERTIFICATE OF SERVICE .....43

## TABLE OF AUTHORITIES

### Federal Cases

<i>Adams v. Travelers Indem. Co.</i> , 465 F.3d 156 (5th Cir. 2006).....	1
<i>Alton v. Texas A&amp;M Univ.</i> , 168 F.3d 196 (5th Cir. 1999).....	35
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	28, 29
<i>Atteberry v. Nocona General Hosp.</i> , 430 F.3d 245 (5th Cir. 2005).....	33
<i>Aujla v. Hinds County</i> , 61 Fed. Appx. 917, 2003 WL 1098839 (5th Cir. 2003).....	25
<i>Ballard v. Burton</i> , 444 F.3d 391 (5th Cir. 2006).....	26
<i>Bazan v. Hidalgo County</i> , 246 F.3d 481 (5th Cir. 2001).....	23, 24, 25
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004) .....	32
<i>Bush v. Viterna</i> , 795 F.2d 1203 (5th Cir. 1986).....	33
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	28, 29
<i>Doe v. Taylor Indep. Sch. Dist.</i> , 15 F.3d 443 (5th Cir. 1994) (en banc).....	33
<i>Douglass v. United Servs. Auto. Ass'n</i> , 79 F.3d 1415 (5th Cir.1996) (en banc).....	29
<i>Estate of Davis v. City of N. Richland Hills</i> , 406 F.3d 375 (5th Cir. 2005).....	34

<i>Eversley v. MBank Dallas</i> , 843 F.2d 172 (5th Cir.1988).....	29, 30
<i>Evelt v. Deep East Tex. Regional Narcotics Trafficking Task Force</i> , 330 F.3d 681 (5th Cir. 2003).....	14
<i>Forsyth v. Barr</i> , 19 F.3d 1527 (5th Cir.1994).....	30
<i>Graham v. Connor</i> , 490 U.S. 386 (1989) .....	passim
<i>Lafreiner v. Kinirey</i> , 550 F.3d 166, 168 (1st Cir. 2008) .....	25
<i>Mace v. City of Palestine</i> 333 F.3d 621 (5th Cir. 2003).....	19, 26, 36
<i>Meadours v. Ermel</i> , 483 F.3d 417 (5th Cir. 2007).....	31, 41
<i>Olabisiomotosho v. City of Houston</i> , 185 F.3d 521 (5th Cir.1999).....	28
<i>Ragas v. Tenn. Gas Pipeline Co.</i> , 136 F.3d 455 (5th Cir.1998).....	29
<i>Ramirez v. Knoulton</i> , 542 F.3d 124 (5th Cir. 2008).....	19, 26, 32, 37, 40
<i>Resolution Trust Corp. v. Starkey</i> , 41 F.3d 1018 (5th Cir.1995).....	29, 30
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001) .....	16, 17, 31
<i>SEC v. Recile</i> , 10 F.3d 1093 (5th Cir.1993).....	29
<i>Smith v. Brenoettsy</i> , 158 F.3d 908 (5th Cir. 1998).....	34
<i>State Farm Life Ins. Co. v. Gutterman</i> , 896 F.2d 116 (5th Cir.1990).....	28

<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985) .....	passim
<i>Thompkins v. Belt</i> , 828 F.2d 298 (5th Cir. 1987) .....	18
<i>Thompson v. Upshur County</i> , 245 F.3d 447 (5th Cir. 2001) .....	33, 34
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985) .....	27, 37
<i>Waltman v. Payne</i> , 535 F.3d 342 (5th Cir. 2008) .....	1, 31
<i>Williams v. Luna</i> , 909 F.2d 121 (5th Cir. 1990) .....	14, 18
<i>Young v. City of Killeen</i> , 775 F.2d 1349 (5th Cir. 1985) .....	27, 37
<u>State Cases</u>	
<i>City of Lancaster v. Chambers</i> , 883 S.W.2d 650 (Tex. 1994) .....	27, 31
<i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008) .....	18, 40, 41, 42
<i>Univ. of Houston v. Clark</i> , 38 S.W.3d 578 (Tex. 2000) .....	31
<u>Federal Statutes</u>	
28 U.S.C. § 1441 .....	1
42 U.S.C. § 1983 .....	passim

State Statutes

TEX. CIV. PRAC. & REM. CODE § 101.106.....4, 18, 40, 41  
TEX. PEN. CODE ANN. § 9.32.....14, 16, 17  
TEX. PEN. CODE ANN. § 9.51.....14, 16, 17

Federal Rules

FED. R. APP. P. 32.....1  
FED. R. APP. P. 34.....iii  
FED. R. CIV. P. 56.....1, 28  
FED. R. CIV. P. 7.....3  
FED. R. EVID. 403.....34

## STATEMENT OF JURISDICTION & STANDARD OF REVIEW

The Appellants asserted federal and state claims against the police officer-Appellees. This Court's jurisdiction is based upon 28 U.S.C. § 1441 because the Appellants asserted a civil rights lawsuit under 42 U.S.C. § 1983.

This Court reviews the district court's grant of summary judgment *de novo*, applying the same standards as the district court. *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 163 (5th Cir. 2006). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

"Once a government official acting with discretionary authority raises qualified immunity as a defense against a § 1983 claim, the burden shifts to the plaintiff to rebut the qualified immunity defense." *Waltman v. Payne*, 535 F.3d 342, 346 (5th Cir. 2008).

## ISSUES PRESENTED FOR REVIEW

**I. Whether the district court properly granted summary judgment on the issue of qualified immunity as to Officer Bridgwater (the person who fired the shot), Sergeant Porras (who was simply the back-up officer on the scene who gave commands in Spanish), and Chief William Mull (who was not present during the shooting). Jose Ceballos, Jr. was shot after Officer Bridgwater arrived on the scene of a reported fight/domestic disturbance call and learned that Jose Ceballos, Jr. had locked a woman inside an apartment, heard her cry and scream, and after Officer Bridgwater kicked in the apartment door, was confronted by Jose Ceballos, Jr. with a knife at close range who refused to drop it. (Response to Appellants' Issue Nos. I-III).**

**II. Whether the district court properly applied Texas case law when it dismissed the state claims against the individual defendants because the Appellants made an irrevocable election to only sue the governmental entity pursuant to the Texas Tort Claims Act. (Response to Appellants' Issue No. IV).**

### STATEMENT OF THE CASE

#### **A. Nature of the Case**

This is a police shooting case where Officer William Bridgwater responded to a domestic disturbance call at an apartment complex in Plainview, Texas and encountered a quickly evolving chaotic scene.<sup>1</sup> After initially receiving a call that a fight was in progress, Officer Bridgwater learned that Jose Ceballos, Jr.,<sup>2</sup> was inside the apartment refusing to open the door. Ceballos refused to open the door; a scream occurred inside the apartment immediately after Ceballos disappeared behind curtains; this happened after Ceballos refused the officer's command to open the apartment door. Officer Bridgwater immediately began kicking on the apartment door to open it. Sergeant Jose Porras arrived at this time. Ceballos advanced toward the door with a knife after it was kicked open. After repeatedly being told to drop the knife—something he refused to do—and due to concern that a woman was hurt inside the apartment (not to mention Ceballos was close enough to stab Officer Bridgwater), he was shot one time after making an aggressive movement toward the officers. Officer Bridgwater later learned that Ceballos had

---

<sup>1</sup> Many of the facts are summarized in the Texas Rangers' Report at ¶¶ 1.50-1.52. (R.342-44).

<sup>2</sup> The deceased is Jose Pacheco Ceballos, Jr. Throughout this brief he is referred for as both "Jose Ceballos" and "Jose Ceballos, Jr." Whenever his father is referenced, he is referred to as "Jose Ceballos, Sr."

psychiatric issues which contributed to his behavior. After the shooting, the Appellants filed this civil rights lawsuit pursuant to 42 U.S.C. § 1983 and also asserted state law claims.

## **B. Procedural History**

After the Appellants filed their complaint, Defendant John C. Anderson filed a motion to dismiss (R. 45-47). The district court then ordered a Rule 7(a) Reply, *see* FED. R. CIV. P. 7, to be filed. (R. 63-64). Afterwards, the district court entered an order and judgment which, *inter alia*, dismissed the claims against Defendant John C. Anderson in his individual capacity. (R. 83-86). No timely appeal from that judgment was taken.

The district court ordered the filing of motions for summary judgment on this issue of qualified immunity as to the remaining individual defendants. (R. 84). Three (3) different motions for summary judgment on the issue of qualified immunity were filed:<sup>3</sup> (i) Officer William Bridgwater, the shooter, filed his summary judgment motion/brief and appendix on November 19, 2008. (R. 146-47; 148-199; 312-852); (ii) Sergeant Jose Porras, the back-up supervising officer on site, filed his summary judgment motion/brief and appendix on November 19, 2008. (R. 200-252; 312-852); (iii) Chief William Mull, who was not present

---

<sup>3</sup> There were three identical appendixes filed for each individual. However, the appellate record only contains the appendix filed by Officer Bridgwater.

during the shooting incident, filed his summary judgment motion/brief and appendix on November 19, 2008. (R. 253-54; 255-311; 312-852).

Additionally, a motion to dismiss all state claims against the individual defendants pursuant to the Texas Tort Claims Act, *see* TEX. CIV. PRAC. & REM. CODE § 101.106(e), was filed. (R. 96-104; 105-145).

Appellants responded to the summary judgment motions/briefs, (R. 886-1087; 1088-1136; 1137-1186; 1187-88), and to the motion to dismiss the state tort claims. (R. 853-869).

On September 5, 2008 the district court entered an Order and Judgment finding qualified immunity for each Appellee and dismissed the state tort claims against the individual defendants pursuant to Texas substantive law and Texas Supreme Court precedent. (R. 1192-1207; 1208-09). This appeal followed.

### **C. Statement of Facts<sup>4</sup>**

This lawsuit arises out of the shooting of Jose Ceballos, Jr. by Officer William Bridgwater on September 11, 2006 in Plainview, Texas.

---

<sup>4</sup> The events surrounding the shooting are set forth in (i) Officer Bridgwater's deposition, and report (R.475-501); (ii) the Texas Rangers' independent report (which includes several audio recordings) (R.316-473); (iii) Officer Porras' report and deposition testimony (R. 599-645); (iv) eye-witness testimony (which is included in the audio recordings attached to the Texas Rangers' independent report); (v) deposition testimony of Carmen Ceballos; (vi) deposition testimony of Andres Pacheco; (vii) deposition testimony of Luz Maria Reyes; (viii) deposition testimony of Chief William Mull (R. 647-675); (ix) deposition testimony of Ranger Marshall Thomas (R. 565-598); and (x) the Affidavit of Commander Albert Rodriguez, which includes his interview of Officer Bridgwater and Chief Mull (R. 693-717). There were only two police officers present as the events unfolded, first Officer Bridgwater, and later Sgt. Porras arrived as backup. (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64); (R. 316-473) (Texas Rangers' Investigation). The Police Chief, William Mull, was not present. (R. 848) (Decl. of Chief William Mull).

## 1. Overview

Officer Bridgwater responded to a domestic disturbance call at an apartment complex. (R. 316-473; 476-495). Later, Sergeant Jose Porras arrived as back-up. (R. 316-473; 476-495). The person whom they encountered holding a knife was Jose Ceballos, Jr., a person with a history of mental problems. (R. 507; 514) (Dep. of Carmen Ceballos); (R. 535; 538) (Dep. of Luz Maria Ceballos at 15-16; 26); *see also* ECF No. 14-2 (Pls.' First Amend. Facts at ¶¶ 12-15). Unbeknownst to Officer Bridgwater, Jose Ceballos, Jr. was a paranoid schizophrenic who had been off of his medication<sup>5</sup> for several weeks prior to the 911 call which requested that the police show up to the apartment complex where Jose Ceballos, Jr. was living with his parents. (R. 508-511) (Dep. of Carmen Ceballos at 14;16-19; 24-25; 27).

Also unknown to the police officers who responded to the 911 call, the Ceballos family often used the police as a threat to scare Jose Ceballos, Jr. to try and get him to do things such as behave, eat, and take a bath. (R. 538) (Dep. of Luz Maria Ceballos at 28-29); (R. 681-82) (Dep. of Andres Pacheco at 14-15; 19-21). Consequently, Jose Ceballos, Jr. irrationally believed that the police were present to harm him when they arrived at the apartment complex.

---

<sup>5</sup> The mother of Jose Ceballos testified that the prescription medication that Jose Ceballos had been taking for his mental illness were drugs obtained from a doctor in Mexico and then transported across the border by the Ceballoses into the United States. (R. 508-09; 511) (Dep. of Carmen Ceballos at 16-19; 27). However, Jose Ceballos stopped taking the Mexican drugs several weeks before the shooting. *Id.* Therefore, he was off of his mental health drugs on the day of the shooting.

After initially receiving a call that a fight was in progress, Officer Bridgwater learned that Jose Ceballos, Jr. was inside the apartment refusing to open the door. (R. 476-495). Ceballos refused to open the door; a scream occurred inside the apartment immediately after Ceballos disappeared behind curtains; this happened after Ceballos refused the officer's command to open the apartment door. (R. 316-473; 476-495). Officer Bridgwater immediately began kicking on the apartment door to open it. (R. 476-495). Sergeant Jose Porras arrived at this time. Ceballos advanced toward the door with a knife after it was kicked open. (R. 316-473; 476-495). After repeatedly being told to drop the knife—something he refused to do—and due to concern that a woman was hurt inside the apartment (not to mention Ceballos was close enough to stab Officer Bridgwater), he was shot one time after making an aggressive movement toward the officers. (R. 316-473; 476-495).

Below is a detailed explanation of the facts as they unfolded on September 11, 2006. As explained in greater detail in the brief, audio recordings made part of the Texas Rangers report also provide important information concerning what was observed by the officers during the chaotic events. Albert Rodriguez, the Commander of the Training Academy for the Texas Department of Public Safety, examined the audio recordings and summarized them in his affidavit to the district court. (R. 693-717).

## 2. Details

On September 11, 2006, Luz Maria Reyes (“Luz”) was at her house located at 801 East 34<sup>th</sup> Street in Plainview, Texas. She was there with her brother Andres Pacheco and Israel Gutierrez. Luz had been talking to her mother, Carmen Ceballos, on the telephone. Ms. Ceballos informed Luz that they were having trouble with Jose Ceballos, Jr. Ceballos Jr. is Ms. Ceballos’ son and Luz’s brother. (R. 693-96) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 10); (R. 316-473) (Texas Rangers’ Investigation); (R. 531-63) (Dep. of Luz Maria Ceballos).

At one point, Luz gave the phone to her brother Andres Pacheco (“Pacheco”). Pacheco, after speaking to Ms. Ceballos, drove to Ms. Ceballos’ apartment located at 1601 North Date, #33C, in Plainview, Texas. Ms. Ceballos lived in the apartment with her husband and Jose Ceballos, Jr. On the way to Ms. Ceballos’ apartment, Pacheco met up with his aunt, Apolinar Pacheco Lopez, and they both went to Ms. Ceballos’ apartment. (R. 693-96) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 11); (R. 316-473) (Texas Rangers’ Investigation); (R. 677-691) (Dep. of Andres Pacheco).

Pacheco called Luz via telephone from Ms. Ceballos’ apartment and Luz ultimately spoke to Ms. Ceballos. While on the phone with her mother, Luz could hear Pacheco and Jose Ceballos, Jr. fighting in the background. Ms. Ceballos also informed Luz that Pacheco and Jose Ceballos, Jr. were fighting. Luz called the

911 operator and reported that her brother was being beat up at 1601 North Date, #33C. After reporting the fight, Luz hung up the phone on the 911 operator. Luz and Israel Gutierrez (“Israel”) drove to her mother’s apartment. (R. 693-96) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 12); (R. 316-473) (Texas Rangers’ Investigation); (R. 531-63) (Dep. of Luz Maria Ceballos).

As a result of Luz’s report of domestic violence, police were dispatched to the apartment. Officer Bridgwater was dispatched at approximately 11:40 a.m., to 1601 North Date Street, Apartment # 33C. Officer Bridgwater arrived at the apartment and observed a Hispanic male, later identified as Andres Pacheco, and a Hispanic female, later identified as Luz Reyes, at the front door of the apartment. Officer Bridgwater asked them if there was a fight inside the apartment. He used hand gestures and the English language because he believed that they could not speak English. Officer Bridgwater based his assumption on their lack of response to his initial question about the fight. They both indicated that there was no fight occurring. They informed Officer Bridgwater that Jose Ceballos, Jr. did not want to open the door and at one point, Luz ordered Jose Ceballos, Jr. to control himself and to open the door. (R. 693-96) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 13); (R. 316-473) (Texas Rangers’ Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Officer Bridgwater listened for sounds coming from inside the apartment and heard crying from what he believed to be a female, later identified as Carmen Ceballos. Officer Bridgwater became concerned because of the reported fight and the female crying coming from within the apartment. Officer Bridgwater knocked on the door to the apartment and in a loud voice announced, “Police.” No one opened the door. Officer Bridgwater’s concern increased. (R. 693-97) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 14); (R. 316-473) (Texas Rangers’ Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Officer Bridgwater contacted Sergeant Jose Alfredo Porras via police radio and requested assistance. Sergeant Porras, prior to Officer Bridgwater’s request, had overheard on the police radio the reported disturbance and was en route to Officer Bridgwater’s location prior to Officer Bridgwater calling him. (R. 693-97) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 15); (R. 316-473) (Texas Rangers’ Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Luz and Israel continued to knock on the apartment door in an attempt to get someone from the inside to open the door. At this point, Officer Bridgwater observed a Hispanic male, later identified as Jose Ceballos, Jr., move the window curtain and look out of the apartment window. Officer Bridgwater using hand

gestures instructed Ceballos, Jr. to open the door. Ceballos, Jr., refused by shaking his head indicating that he would not open it. Officer Bridgwater observed Ceballos, Jr. step away from the window. Shortly thereafter, Officer Bridgwater heard a female, later identified as Carmen Ceballos, screaming from inside the apartment. Officer Bridgwater instructed Luz and Israel to step back and that he was going to kick the door in. He asked them to step back to remove them from any possible danger that might be coming from the inside of the apartment. Officer Bridgwater kicked the door several times. (R. 693-97) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 16); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Officer Bridgwater kicked the door open. Sergeant Porras arrived right after Officer Bridgwater had kicked the door open. Officer Bridgwater unholstered his handgun as did Sergeant Porras. Ceballos, Jr. charged into the entry area of the apartment. The entry area is approximately five feet wide by five feet long.<sup>6</sup>

Officer Bridgwater noticed that Ceballos, Jr. was holding a knife in his right hand and a cigarette in his left hand. Officer Bridgwater, using the English language, immediately instructed Ceballos, Jr. to get down on the ground and to put the knife down. Sergeant Porras, *in Spanish*, also instructed Ceballos, Jr. to get down on the floor and to put the knife down. Officer Bridgwater and Sergeant

---

<sup>6</sup> A diagram of the apartment is set forth in the Texas Rangers' Report. (R. 467-70).

Porras repeated their commands numerous times. Ceballos, Jr. would not comply and told them that they needed to leave. (R. 693-97) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 17); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Ceballos, Jr., standing with the knife in his right hand, would bring the cigarette to his mouth by raising his left hand, inhaling, and then lowered his hand down to his side. Officer Bridgwater and Sergeant Porras continued to instruct Ceballos, Jr. to get down on the ground and to drop the knife. These instructions were repeated numerous times in English and in Spanish. Ceballos, Jr. would not comply. (R.693-97) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 18); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Officer Bridgwater noticed that the expression on Ceballos, Jr.'s face and body language changed. Officer Bridgwater observed Ceballos, Jr. stand straighter, appear more rigid, his facial expressions appeared tense, and his movements were more deliberate. Officer Bridgwater, as a result of Ceballos, Jr.'s change in body language, believed that Ceballos Jr. was planning on attacking Sergeant Porras and/or himself. Ceballos, Jr. raised his left hand that held the cigarette and inhaled. Ceballos, Jr. then aggressively threw the cigarette in Officer Bridgwater and Sergeant Porras' direction. (R. 693-96; 698) (Aff. of Commander

Albert Rodriguez at ¶¶ 1-9; 19); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Officer Bridgwater stated to Ceballos, Jr., "Don't do it." Officer Bridgwater repeated these instructions twice because he believed Ceballos, Jr. was planning on charging at them and wanted to keep him from doing so. Ceballos, Jr. took a step toward Officer Bridgwater with his right foot and simultaneously raised his right hand that held the knife. Ceballos, Jr. was approximately three to four feet away from Officer Bridgwater and Sergeant Porras. Officer Bridgwater feared for his and Sergeant Porras' life and fired one shot at Ceballos, Jr. The shot struck Ceballos, Jr. in the left front side of the chest area. Ceballos stopped and fell backwards to the floor. (R. 693-96; 698) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 20); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Sergeant Porras contacted the Plainview dispatcher and reported that a shooting had occurred. Officer Bridgwater entered the apartment's entry area and took possession of the knife. Officer Bridgwater immediately scanned the interior of the immediate area and observed Ms. Ceballos in a wheelchair and Mr. Ceballos, Sr. standing next to her. Officer Bridgwater noticed that they did not appear injured and turned his attention to Ceballos, Jr. Ceballos, Jr. was rotated

and positioned on his back. Officer Bridgwater monitored his pulse and remained with Ceballos until Emergency Medical Services arrived. (R. 693-96; 698) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 21); (R. 316-473) (Texas Rangers' Investigation); (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64).

Sergeant Porras maintained control of family members and other persons that were in the area. Family members were questioning the shooting and were extremely verbal. (R. 693-96; 698) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 22); (R. 316-473) (Texas Rangers' Investigation).

Texas Ranger Marshall Thomas arrived at the scene at 11:53 a.m. When he arrived Ceballos, Jr. was being taken out of the apartment via stretcher. Plainview Police Department Captain Michael Carroll asked Ranger Thomas to conduct the investigation. The Texas Rangers' investigation discovered that Ceballos, Jr.'s mother, Carmen Ceballos, and Ceballos' father, Jose Ceballos, Sr., were inside the apartment at the time Jose Ceballos, Jr. confronted Officer Bridgwater and Sergeant Porras with the knife. The knife was described as being a white handle boning knife with a blade long enough to cause serious bodily injury or death. (R. 693-96; 698-99) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 23); (R. 316-473) (Texas Rangers' Investigation).

Jose Ceballos, Jr. was transferred to Covenant Hospital Plainview. He was pronounced dead at the hospital. The autopsy report indicates that the shot struck Ceballos in the left chest area. The overall path of the wound was front to back, slightly right to left and very slightly downward. (R. 693-96; 699) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 24); (R. 454-59) (Autopsy Report).

The case was referred to the Hale County District Attorney's office. The Hale County Grand Jury reviewed the case and "No Billed" Officer Bridgwater. (R. 693-96; 699) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 25); (R. 316-473) (Texas Rangers' Investigation).

### **SUMMARY OF ARGUMENT**

The district court properly granted summary judgment on the issue of qualified immunity.

1. The Appellants—who carry the burden of proof of overcoming the qualified immunity defense, *see Waltman v. Payne*, 535 F.3d 342, 346 (5th Cir. 2008)—presented no competent summary judgment evidence that: (i) Jose Ceballos, Jr. suffered a constitutional violation by any of the defendants (which is the *sine qua non* for a § 1983 claim). *Williams v. Luna*, 909 F.2d 121, 124 (5th Cir. 1990);<sup>7</sup> (ii)

---

<sup>7</sup> Jose Ceballos' constitutional rights were not violated because Officer Bridgwater reasonably believed that Jose Ceballos posed a threat of serious harm when he came at Officer Bridgwater with a knife. (R. 476-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64); (R. 695-713) *see* App. Ex. I (Aff. of Commander Albert Rodriguez at ¶¶ 9-59). *See also* [TEX. PEN. CODE ANN. § 9.32](#) (setting forth when deadly force in defense of a person is justified); [TEX. PEN. CODE ANN. § 9.51](#) (setting forth when deadly force is justified in making an arrest); *Saucier v. Katz*, 533 U.S. 194, 204 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985).

the police officers were deliberately indifferent<sup>8</sup> to the rights of Jose Ceballos, Jr.;<sup>9</sup> (iii) there is any type of causal connection between Jose Ceballos, Jr.'s alleged violation of his constitutional rights and Chief Mull, a person who was not present at the time of the shooting; *see, e.g., Roberts v. City of Shreveport*, 397 F.3d 287 (5th Cir. 2005); and (iv) Sergeant Porras and Officer Bridgwater were improperly trained and/or that Sergeant Porras failed to protect Jose Ceballos, Jr. from Officer Bridgwater.

2. The Appellants incorrectly focus on the "factual dispute" arguments vis-à-vis whether Jose Ceballos, Jr. made an aggressive movement toward Officer Bridgwater prior to being shot. The summary judgment evidence shows that he did. However, as the three (3) motions/briefs for summary judgment explained, qualified immunity was proper even if Jose Ceballos, Jr. had not made the aggressive action while in close proximity to the officers. Even assuming *arguendo* that Jose Ceballos, Jr. had not made an aggressive move toward Officer Bridgwater with the knife, Officer Bridgwater's actions were reasonable in light of his perception that a woman inside of the apartment with Jose Ceballos, Jr. had previously been harmed, *e.g.*, the crying and the scream. Officer Bridgwater

---

<sup>8</sup> *Thompson v. Upshur County*, 245 F.3d 447(5th Cir. 2001)("deliberate indifference" standard is higher than gross negligence).

<sup>9</sup> Generally, "[a] supervisory official is held to a standard of 'deliberate indifference', which requires proof that a supervisor 'disregarded a known or obvious consequence of his action.'" *Evetts v. Deep East Tex. Regional Narcotics Trafficking Task Force*, 330 F.3d 681, 689 (5th Cir. 2003) (quoting *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997)). The U.S. Supreme Court has noted that the standard for deliberate indifference is high, holding that "[a]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Alton v. Texas A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999).

believed that the woman continued to be in danger once Officer Bridgwater encountered Jose Ceballos, Jr. holding a knife at the front door, Jose Ceballos refusing to drop it,<sup>10</sup> and the general circumstances surrounding the incident. (R. 693-713) (Aff. of Commander Albert Rodriguez). Therefore, Officer Bridgwater is entitled to qualified immunity. Officer Bridgwater's actions would have been considered reasonable if he would have shot Jose Ceballos, Jr. under three different circumstances that existed before Jose Ceballos, Jr. lunged/moved forward. Law enforcement officers are trained to understand and evaluate the use of force and/or deadly force pursuant to *Graham v. Connor*, 490 U.S. 386 (1989). (R. 693; 707; 708-10) (Aff. of Commander Albert Rodriguez at ¶¶ 42; 46; 51). The three different facts (pre-lunge/move forward) which would have justified Officer Bridgwater using deadly force (and hence Sergeant Porras' actions)<sup>11</sup> were as follows:

---

<sup>10</sup> Instructions to Jose Ceballos, Jr. were given in English and Spanish by Sergeant Porras. (R. 600; 636) (Dep. of Jose Porras at 87); (R. 475; 494-95) (Dep. of Officer William Bridgwater at 63-64); (R. 693; 697-98; 704; 705-06) (Aff. of Commander Albert Rodriguez at ¶¶ 17-18; 26-27; 36; 38-39) (having reviewed the audio recordings and deposition testimony of the witnesses and confirming that instructions in Spanish were given).

<sup>11</sup> Sergeant Porras did not use any force against Jose Ceballos. (R. 600-39) (Dep. of Officer Jose Porras at 1; 5; 46-52; 60-89; 103); (R. 704) (Aff. of Commander Albert Rodriguez at ¶ 36). The Appellants wrongly claim that he violated Jose Ceballos, Jr.'s constitutional rights by failing to supervise Officer Bridgwater and to protect Jose Ceballos from the actions of Officer Bridgwater. He is entitled to qualified immunity because the events surrounding the shooting show that not only were his actions reasonable, but also those of Officer Bridgwater. (R. 476-95) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64); (R. 695-713) (Aff. of Commander Albert Rodriguez at ¶¶ 9-59). *See also* [TEX. PEN. CODE ANN. § 9.32](#) (setting forth when deadly force in defense of a person is justified); [TEX. PEN. CODE ANN. § 9.51](#) (setting forth when deadly force is justified in making an arrest); *Saucier v. Katz*, 533 U.S. 194, 204 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985). In fact, both Sergeant Porras and Officer Bridgwater believed that deadly force was necessary. (R. 600-39) (Dep. of Sergeant Jose Porras at 1; 5; 46-52; 60-89; 103); (R. 476-95) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64) (R. 704-13) (Aff. of Commander Albert Rodriguez at ¶¶ 36-59). Therefore, there was no need to protect Jose Ceballos, Jr. from Officer Bridgwater. It was Officer Bridgwater and Sergeant Porras who needed protection from Jose Ceballos, Jr.

a) Severity of the crime being committed by Jose Ceballos, Jr.= Officer Bridgwater reasonably believed that Ceballos, Jr. had seriously injured and/or killed someone inside the apartment when he presented himself in the entry area with a boning knife in his hand and that Ceballos, Jr. was in the process of attempting to kill him and/or Sergeant Porras. *Id.*; (R. 475-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64). *See also* TEX. PEN. CODE ANN. § 9.32 (setting forth when deadly force in defense of a person is justified); TEX. PEN. CODE ANN. § 9.51 (setting forth when deadly force is justified in making an arrest); *Saucier v. Katz*, 533 U.S. 194, 204 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985).

b) Whether Ceballos, Jr.'s actions presented a threat to Officer Bridgwater and Sergeant Porras = Officer Bridgwater reasonably believed Ceballos, Jr. presented a threat of serious bodily injury or death not only to himself and Sergeant Porras but also to the person(s) inside the apartment as well as the persons outside. *Id.*; (R. 475-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64). *See also* TEX. PEN. CODE ANN. § 9.32 (setting forth when deadly force in defense of a person is justified); TEX. PEN. CODE ANN. § 9.51 (setting forth when deadly force is justified in making an arrest); *Saucier v. Katz*, 533 U.S. 194, 204 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985).

c) Whether Ceballos, Jr. was actively resisting and/or attempting to evade arrest = Officer Bridgwater believed and witnessed Ceballos, Jr. resist the officers' law commands of drop the knife and get down on the ground, and when Officer Bridgwater instructed Ceballos, Jr. "Don't do it" on two occasions in an attempt to prevent him from charging at them. *Id.*; (R. 475-495) (Dep. of Officer William Bridgwater at 37, 38, 39, 40, 41, 43, 44-54, 62-64). *See also* TEX. PEN. CODE ANN. § 9.32 (setting forth when deadly force in defense of a person is justified); TEX. PEN. CODE ANN. § 9.51 (setting forth when deadly force is justified in making an arrest); *Saucier v. Katz*, 533 U.S. 194, 204 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985).

3. The autopsy report reveals that Jose Ceballos, Jr. was in the process of moving forward at the time he was shot, something that justifies the actions of Sergeant Porras and Officer Bridgwater, particularly because it is uncontroverted

that Jose Ceballos, Jr. was holding a knife. (R. 316-473) (Texas Rangers' Investigation which includes the autopsy report); (R. 695-701; 701-10) (Aff. of Commander Albert Rodriguez at ¶¶ 9-27; 49). Therefore, Jose Ceballos, Jr.'s constitutional rights were not violated by any of the police officers.

4. Chief William Mull is not the policy maker for the City of Plainview. He was not present during the events leading up to the shooting. (R. 848-49) (Decl. of Chief William Mull). He is entitled to qualified immunity. There is no vicarious or *respondeat superior* liability of supervisors (including Sergeant Porras and Chief Mull) under section 1983. *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987).

5. The trial court was required by Texas law to dismiss the state tort claims against the individual defendants. (R. 1197-99). *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008); TEX. CIV. PRAC. & REM. CODE § 101.106.

## ARGUMENT

**I. The district court properly granted summary judgment on the issue of qualified immunity as to Officer Bridgwater (the person who fired the shot), Sergeant Porras (who was simply the back-up officer on the scene who gave commands in Spanish), and Chief William Mull (who was not present during the shooting). Jose Ceballos, Jr. was shot after Officer Bridgwater arrived on the scene of a reported fight/domestic disturbance call and learned that Jose Ceballos, Jr. had locked a woman inside an apartment, heard her cry and scream, and after Officer Bridgwater kicked in the apartment door, was confronted by Jose Ceballos, Jr. with a knife at close range who refused to drop it. (Response to Appellants' Issue Nos. I-III).**

**A.**  
**SUMMARY OF APPELLANTS' ARGUMENTS & WHY THEY FAIL**

The Appellants improperly invite this Court to: (1) slow down the chaotic events of September 11, 2006 and analyze the actions of Officer Bridgwater and Sergeant Porras in isolation, with the benefit of hindsight from a judge's chamber;<sup>12</sup> (2) offer up a false choice for the officers on the scene, *i.e.*, suggesting that Officer Bridgwater should have waited until the man wielding the knife approached closer even after he had refused commands to drop it, with a screaming woman inside an apartment;<sup>13</sup> and (3) almost ignore the audio recordings and Officer Bridgwater's and Sergeant Porras' perception of the unfolding events. In reality, the surrounding circumstances of a quickly evolving dangerous situation allowed for Officer Bridgwater to fire one shot to stop a dangerous situation from escalating.

The Appellants argue that Chief Mull is not entitled to qualified immunity because he failed to properly train/supervise Officer Bridgwater. The Appellants argue that *irrelevant traffic violations* of Officer Bridgwater demonstrate this and

---

<sup>12</sup> The U.S. Supreme Court and the Fifth Circuit have cautioned that this is improper. An officer's use of deadly force is presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others. *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). The reasonableness of the use of deadly force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). It is a question of objective reasonableness "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Id.* See also *Ramirez v. Knoulton*, 542 F.3d 124, 130 (5th Cir. 2008) (stating that a "magistrate judge's focus on the timing of the incident ignores that police officers often make decisions in situations that are 'tense, uncertain, and rapidly evolving.'" (quoting *Graham*, 490 U.S. at 397)).

<sup>13</sup> The reasonable belief of an officer on the scene, however, is given great deference considering the totality of the circumstances. See *Ramirez*, 542 F.3d at 129 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

show that he was a “menace to society”, and suggest that Chief Mull allowed officers such as Bridgwater to be “above the law”. (App.s’ Br. at 19).

First, the traffic violations are not relevant to this case. Second, the summary judgment evidence reveals that proper training and departmental policies were in place such that the Appellants presented no competent summary judgment evidence that Chief Mull acted with deliberate indifference to the rights of Jose Ceballos, Jr. (R. 388-89)[Aff. of Commander Albert Rodriguez at ¶¶ 54-55]; (R. 718-846)[City of Plainview Departmental Policies].

Albert Rodriguez, the Commander of the Training Academy for the Texas Department of Public Safety, examined the City of Plainview’s policies and procedures, and the training received by the officers involved in the shooting. With respect to the training they received, he stated:

Officer Bridgwater and Sergeant Porras on September 11, 2006 were licensed law enforcement officers. They had been licensed by the Texas Commission on Law Enforcement Officers Standards and Education (TCLEOSE). TCLEOSE establishes the rules and regulations for law enforcement officers regarding initial training and continuing education. Officer Bridgwater and Sergeant Porras had met and had continued to meet all of the State Training requirements established by law to become licensed peace officers and had continued to meet the established rules and regulations on September 11, 2006. December 13, 2005. Officer Bridgwater and Sergeant Porras were adequately trained. The evidence indicates that Officer Bridgwater and Sergeant Porras had received training on numerous law enforcement topics to

include the following relevant law enforcement subjects but not limited to:

1. Patrol Procedures
2. Criminal Investigations
3. Texas Penal Code
4. Texas Code of Criminal Procedure
5. Family Law
6. Arrest, Search, and Seizure
7. Use of Force
8. Firearms
9. Arrest and Control Strategies
10. U.S. and Texas Constitution
11. Crowd Management
12. Problem Solving and Critical Thinking
13. Interpersonal Communication/Report Writing
14. Recognizing and Interaction with Persons with Mental Illness and Mental Retardation

Officer Bridgwater and Sergeant Porras successfully completed the mandated training on each and every one of the TCLEOSE mandated topics. TCLEOSE issued Officer Bridgwater and Sergeant Porras their Texas Peace Officer Licenses upon successfully passing the State Licensing Examination. In my thirty-one (31) years of law enforcement experience, there has never been an allegation insinuating and/or alleging that the TCLEOSE State Training Standards are deficient, unreasonable, illegal, and/or unconstitutional. There should be no question as to the adequacy of Officer Bridgwater and Sergeant Porras' training in that they met the State Training Standards that are established as a matter of law.

(R. 388-89) [Aff. of Commander Albert Rodriguez at ¶¶ 54-55].

The relevance of their state-mandated training is evident when examining Fifth Circuit case law. All that is required to prevail in a claim based on inadequate training is compliance with state-mandated training standard for its officers. *Brown v. Bryan Co.*, 53 F.3d 1410, 1424-25 (5th Cir. 1995). Therefore,

the Appellants cannot show that Chief Mull was deliberately indifferent to the right of Jose Ceballos, Jr. Consequently, Chief Mull is entitled to qualified immunity.

The Appellants' arguments concerning Sergeant Porras are perhaps the weakest against the three individual defendants. This is because like the arguments vis-à-vis Chief Mull, the Appellants not only raise *irrelevant traffic violations* of Officer Bridgwater as "smoking gun" evidence that he was not properly supervised by Sergeant Porras, (App.s' Br. at 17), but they also argue that Sergeant Porras is guilty of deliberate indifference because he "did not question any of Bridgwater's violent actions that led to the death of Jose [Ceballos]", (App.s' Br. at 18), something that could have only been done *after* the incident due to how quickly the events unfolded.<sup>14</sup> This too raises irrelevant issues.

The Appellants raise a similar argument to the one asserted against Officer Bridgwater, namely, the shooting was not justified, and as to Sergeant Porras, he failed to protect Jose Ceballos, Jr. from Officer Bridgwater. (App.s' Br. at 17). Because Sergeant Porras would have been authorized to shoot, he is entitled to qualified immunity.

The Appellants also argue that because two witnesses disagree that Jose Ceballos, Jr. made an aggressive move, a factual dispute exists which precludes summary judgment being granted. (App.s' Br. at 9; 11). In support of this, they

---

<sup>14</sup> To the extent that they argue Sergeant Porras should have stopped Officer Bridgwater as he was kicking in the door due to exigent circumstances, their argument fails the "straight fact" test.

rely upon *Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001). However, as explained below: (i) *Bazan* is inapplicable to this lawsuit; (ii) even if Jose Ceballos, Jr. had not made the aggressive move toward the two officers, deadly force was justified based upon the surrounding circumstances, *e.g.*, the domestic disturbance call, a woman trapped inside the apartment, Jose Ceballos, Jr. refusing to open the door, a woman screaming inside, and then Ceballos confronting the officers in close proximity with a deadly weapon after the door had been kicked in; and (iii) independent evidence—the autopsy report and the audio recordings—is consistent with the officers’ testimony. Furthermore, Officer Bridgwater was not the only police officer on the scene. At the time that he began kicking the door to the apartment in Sergeant Porras arrived on the scene. Therefore, the Appellants’ attempt to attack the credibility of Officer Bridgwater is undercut, if not totally eliminated, by (a) the testimony of Sergeant Porras, (b) the audio recordings, (c) the Texas Rangers’ Report, and (d) the autopsy report. Consequently, the district court correctly found that there was no constitutional violation and that the officers’ conduct was objectively reasonable.

**B.**  
**THE DISTRICT COURT'S ORDER SUMMARIZES THE UNCONTESTED EVIDENCE &  
SURROUNDING CIRCUMSTANCES  
JUSTIFYING QUALIFIED IMMUNITY BEING GRANTED**

The district court’s order properly found the following with respect to the qualified immunity issues before the court:

Defendants present uncontested evidence that Officers Bridgwater and Porras were at the scene in response to a call reporting a fight or domestic disturbance occurring at the apartment. Defendants also present uncontested evidence that upon entering the apartment, Officers Bridgwater and Porras saw the decedent holding a knife that was large enough to inflict serious bodily injury. The Court also finds that the officers had probable cause to believe that the suspect posed an immediate threat to the safety of the officers and the decedent's family members because the suspect was standing in close proximity to the officers and the decedent's family members and had been unresponsive to any orders by the officers or family members. Finally, the Court finds that the suspect had actively resisted arrest by refusing to open the door or immediately drop the weapon upon the officers' orders. These facts do not show that the use of force was objectively unreasonable.

...

Even if the Court were to find that Plaintiffs alleged a constitutional violation, Defendants would be entitled to qualified immunity. ... Plaintiffs have failed to show that all reasonable officers would understand that Defendants' actions violated Plaintiffs' constitutional rights.

*See* District Court's January 14, 2009 Order (R. 1203-05).

### C.

#### **APPELLANTS' *BAZAN* ARGUMENT IS INAPPLICABLE TO THE CASE; ALSO, THEIR "ABSENCE-OF-AN-AGGRESSIVE-MOVEMENT-ARGUMENT" FAILS**

On one page of their brief, without much discussion, Appellants cite to *Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001)—a case questioning qualified immunity when the only witness is a police officer—in support of their argument that a factual dispute precluded summary judgment because the case

turns on the credibility of witnesses. (App.s' Br. at 11). However, *Bazan* is inapplicable to this case and its holding has been narrowly applied. See *Lafreiner v. Kinirey*, 550 F.3d 166, 168 (1st Cir. 2008) (noting that the Fifth Circuit has applied *Bazan* narrowly to situations where the only evidence of a shooting comes from the *uncorroborated* testimony of a police officer who is the *sole survivor* of a shooting and that sole witness' credibility is cast in doubt) (citing *Aujla v. Hinds County*, 61 Fed. Appx. 917, 2003 WL 1098839, at \* 4 (5th Cir. 2003)). In fact, *Bazan* admits its extremely narrow application when it states:

We emphasize the narrow factual situation which this case addresses—one in which *the sole surviving witness* to the central events is the defendant himself, an interested witness.

See *Bazan*, 246 F.3d at 493 (emphasis original).

Here, there were two officers present, an audio recording of the event, an independent investigation of the shooting by the Texas Rangers, and physical evidence, *e.g.*, the knife and the autopsy report, corroborating the testimony of Officer Bridgwater and Sergeant Porras. Therefore, the Appellants' attempt to bootstrap *Bazan* into this case, simply because family members assert that Ceballos did not move toward Officer Bridgwater before he was shot does not preclude summary judgment having been granted properly. The surrounding circumstances justified the shooting and entitle Officer Bridgwater, Sergeant Porras, and Chief Mull to qualified immunity.

A recent Fifth Circuit case is illustrative of the *absence* of an aggressive movement by the suspect still justifying qualified immunity due to the reasonable belief of the officer on the scene that the suspect posed a threat of serious physical harm. *See Ramirez v. Knoulton*, 542 F.3d 124, 129-30 (5th Cir. 2008).

In reversing a magistrate judge's denial of qualified immunity is a case where a suspect held a gun, but never raised the weapon nor aimed it at the officers, but was nonetheless shot, the Fifth Circuit rejected the "absence-of-an-aggressive-movement-argument" when it stated the following:

It appears to us that the magistrate judge has largely employed 20/20 hindsight in reaching this conclusion. First, the magistrate judge found that Ramirez made no threatening gestures toward the officers. The magistrate judge cited *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006), and *Mace*, 333 F.3d 621, for examples of facts justifying the use of deadly force against an emotionally unstable individual brandishing a weapon. In *Ballard*, the individual fired a rifle into the air and aimed it in the general direction of multiple police officers. 444 F.3d at 395. In *Mace*, the individual waved a sword at police officers and raised it in a threatening manner. 333 F.3d at 622-23. The magistrate judge reasoned that, unlike in *Ballard* and *Mace*, Ramirez never raised his weapon nor aimed it at the officers.

This position, however, fails to consider the reasonable belief of an officer at the scene. The issue before us is whether, in considering the totality of the circumstances, Knoulton had "probable cause to believe that the suspect pose[d] a threat of serious physical harm." *Garner*, 471 U.S. at 11. We conclude that he did.

Second, the magistrate judge improperly criticized Knoulton's failure to consider the use of non-lethal force or to employ a crisis negotiator. "A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Sharpe*, 470 U.S. 675, 686-87, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id.* at 687. Even where an officer acts negligently and contrary to police procedure, this court has failed to recognize a constitutional claim where a police officer used deadly force in response to a reasonable belief that an individual posed a threat of serious harm. *See Young v. City of Killeen*, 775 F.2d 1349, 1350-53 (5th Cir. 1985).

*See Ramirez*, 542 F.3d at 129-30 (footnote omitted).

The Appellants' similar "absence-of-an-aggressive-movement-argument" should also be rejected by this Court and the judgment of the district court affirmed. The police officers' actions were reasonable and authorized under federal law and Texas law. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994); *see also* TEX. PEN. CODE ANN. § 9.32 (setting forth when deadly force in defense of a person is justified); TEX. PEN. CODE ANN. § 9.51 (setting forth when deadly force is justified in making an arrest).

#### **D. SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any,” when viewed in the light most favorable to the non-moving party, “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. An actual controversy of fact exists only where both parties have submitted evidence of contradictory facts. *Olabisiotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir.1999). The contradictory facts must be relevant, because disputed fact issues which are irrelevant and unnecessary will not be considered by the court when ruling on a summary judgment. *Anderson*, 477 U.S. at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255 (emphasis added).

Once the moving party has initially shown “that there is an absence of evidence to support the nonmoving party's case,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir.1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial.

*Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir.1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir.1993).

To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* Absent such a showing, a properly supported motion for summary judgment should be granted. *See Eversley v. MBank Dallas*, 843 F.2d 172, 173-74 (5th Cir.1988); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1022-23 (5th Cir.1995). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

If no factual showing is made in opposition to a motion for summary judgment, the district court is not required to search the record sua sponte for some genuine issue of material fact. In reviewing the summary judgment evidence, “Rule 56 does not impose upon this Court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.” *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998) (emphasis added). Rather, the Court need rely only on those portions of the submitted documents to which the nonmoving party directs the Court's attention. *Id.*; *see also Forsyth v.*

*Barr*, 19 F.3d 1527, 1536-37 (5th Cir.1994) (finding that two volumes of summary judgment evidence were insufficient to preclude summary judgment when plaintiffs failed to identify specific portions which supported their claims). This is because Rule 56(e) of the Federal Rules of Civil Procedure requires the party against whom the motion is made to “set forth specific facts showing that there is a genuine issue for trial,” and absent such a showing, a properly supported motion for summary judgment should be granted. See *Eversley v. MBank Dallas*, 843 F.2d 172, 173-74 (5th Cir.1988); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1022-23 (5th Cir.1995).

As explained in this brief and at the trial court, all of the police officers are entitled to qualified immunity.

**E.**  
**OVERVIEW OF EXCESSIVE FORCE CLAIMS, THE QUALIFIED IMMUNITY DEFENSE  
& SUPERVISORY LIABILITY**

"To prevail on an excessive force claim, a plaintiff must establish: '(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.'" *Freeman*, 483 F.3d at 416 (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)).

There is no dispute that Jose Ceballos, Jr. suffered an injury. The relevant question in this case is whether the force was "clearly excessive" or "clearly unreasonable." In deciding this question, this Court, guided by Fifth Circuit and

Supreme Court precedent, must determine whether "the totality of the circumstances justified" the particular use of force. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). A review of the surrounding circumstances, including the audio recordings, shows that the police officers are entitled to qualified/official immunity.<sup>15</sup> "Once a government official acting with discretionary authority raises qualified immunity as a defense against a § 1983 claim, the burden shifts to the plaintiff to rebut the qualified immunity defense." *Waltman v. Payne*, 535 F.3d 342, 346 (5th Cir. 2008).

The United States Supreme Court has cautioned that "[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham [v. Connor]*, 490 U.S. 386 (1989)]." *See Saucier v. Katz*, 533 U.S. 194, 204 (2001). "Thus, the relevant immunity issue is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. Further, the purpose of immunity is to protect "all but the plainly incompetent or those who knowingly violate the law." *Id.* (citations omitted). Thus, in any § 1983 case alleging a police officer's use of excessive or lethal force, the objective reasonableness of the force used is a separate question from the immunity question

---

<sup>15</sup> Official immunity is an affirmative defense in Texas that protects government employees from liability. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). The Texas Supreme Court has stated that government employees are entitled to official immunity from suit arising from performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Official immunity in Texas is substantially the same as qualified immunity under federal law. *Meadours v. Ermel*, 483 F.3d 417, 424 (5th Cir. 2007). The main difference, however, is that official immunity does not incorporate the requirement that the plaintiff show the violation of a clearly established right; official immunity hinges on whether the official's activities were undertaken in "good faith," *i.e.*, whether they were objectively reasonable. *Id.* (citing *Lancaster*, 883 S.W.2d at 656-57).

whether no reasonable officer could have believed that she was not using excessive force.” *See Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997).

“Where . . . the officer reasonably believe[s] [that the suspect] posed a threat, courts should not second guess the timing of that realization.” *See Ramirez*, 542 F.3d at 130 (emphasis added).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. It is a question of objective reasonableness "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Id.*<sup>16</sup> This test "allow[s] 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." *Id.* The test for reasonableness also must consider "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting

---

<sup>16</sup> On this point the Fifth Circuit, in *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 (5th Cir. 2009), stated:

Even if the plaintiffs established that the officer used excessive force (and thus performed an unreasonable seizure under the Fourth Amendment), the court would perform an entirely separate inquiry applying a different reasonableness standard. In order to evaluate the "clearly established law" prong of the qualified immunity test, the court must ask whether, at the time of the incident, the law clearly established that such conduct would violate the right. This inquiry focuses not on the general standard—when may an officer use deadly force against a suspect?—but on the specific circumstances of the incident—could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force? *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004).

*See id.*

arrest or attempting to evade arrest by flight." *Id.* at 396 (emphasis added).

Supervisory liability is not, and cannot be, a mask for vicarious liability, *respondeat superior*, or common law negligence. *See Bush v. Viterna*, 795 F.2d 1203, 1206 (5th Cir. 1986). *See also, Atteberry v. Nocona General Hosp.*, 430 F.3d 245, 254 (5th Cir. 2005) (mere negligence not standard); *Thompson v. Upshur County*, 245 F.3d 447 (5th Cir. 2001) (standard is higher than gross negligence).

A review of the Appellants' brief reveals that they are trying to impose vicarious liability and/or *respondeat superior* theories in this case as they apply to Sergeant Porras and Chief Mull. This is inappropriate under federal law. Furthermore, the Appellants have failed to demonstrate that Sergeant Porras and Chief Mull acted with deliberate indifference.

The same standards of fault and causation apply to an individual supervisor's liability and the liability of a municipality for failure to supervise. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994) (en banc). Therefore, this Court must analyze the Appellants' claims against Sergeant Porras and Chief Mull in their individual capacities and their claims against the City of Plainview together. To succeed on their claim, the Appellants must show that: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of [Jose Ceballos, Jr.'s]

rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998).

With respect to the third prong, the Fifth Circuit has stated that: "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (quoting *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410 (1997)). "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* Proof of more than a single instance of lack of supervision causing a violation of constitutional rights is required before such lack of training can constitute deliberate indifference. *Thompson v. Upshur County*, 245 F.3d 447, 458 (5th Cir. 2001). Instead, the plaintiff must generally demonstrate that the municipality or supervisor had notice of a pattern of prior acts "fairly similar to what ultimately transpired." *Estate of Davis*, 406 F.3d at 383; *see also Thompson*, 245 F.3d at 458.<sup>17</sup>

"Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Alton v. Texas A&M Univ.*, 168 F.3d 196, 201

---

<sup>17</sup> The Appellants have no evidence of a pattern of conduct. They improperly attempt to interject an incident post-dating September 11, 2006 into this lawsuit in their Complaint. However, events *subsequent* to the Ceballos shooting are not relevant and are not evidence of deliberate indifference. *See* [FED. R. EVID. 403](#).

(5th Cir. 1999). The Appellants' summary judgment evidence failed to meet this high burden. Therefore, qualified immunity was appropriate for Sergeant Porras and Chief Mull under this supervisor theory of liability. Because Officer Bridgwater had probable cause to use the force he did, and considering the surrounding circumstances, he is entitled to qualified immunity as well.

**F.**  
**THE AUDIO RECORDINGS AND STATEMENTS REVEAL THAT NO CONSTITUTIONAL RIGHTS WERE VIOLATED**

Officer Bridgwater and Sergeant Porras' patrol cars were equipped with in-car cameras. The in-car cameras did not capture the video of the incident because of the direction that the cameras were directed but the in-car cameras did record the audio. Commander Rodriguez is able to speak and understand the Spanish language which assisted him in interpreting what was said in Spanish. (R. 376).<sup>18</sup> The audio recordings revealed the following important elements of the circumstances that existed:

- a) Officer Bridgwater arrived at the scene and asked the persons that were in front of the apartment door if there was a fight inside the apartment
- b) Luz knocked on the door of the apartment and there was no response
- c) Officer Bridgwater knocked on the door and announced "Police" and there was no response
- d) A female is heard crying from inside the apartment in the audio recording in which caused Officer Bridgwater's concern to increase

---

<sup>18</sup> Sergeant Porras, a person who speaks Spanish, and Officer Bridgwater confirm that instructions to Jose Ceballos, Jr. were given in English and Spanish by Sergeant Porras. (R. 600; 636) (Dep. of Jose Porras at 87); (R. 475; 494-95) (Dep. of Officer William Bridgwater at 63-64).

- e) Officer Bridgwater asked Ceballos, Jr. to open the door when Ceballos looked out the window
- f) Ceballos, Jr. refused to open the door and left the window area
- g) A female scream is heard coming from within the apartment on the audio recording shortly after Ceballos, Jr. left the window area
- h) Officer Bridgwater kicked the door open
- i) Officer Bridgwater and Officer Porras instructed Ceballos, Jr. to get on the ground and to drop the knife numerous times in English and Spanish
- j) Officer Bridgwater instructed Ceballos, Jr. at least on two occasions, "Don't do it"
- k) Officer Porras in Spanish after the shooting informed Luz Reyes that Ceballos, Jr. had lunged/moved forward then stated "se le fue" meaning "he came at him".

(R. 693-96; 699) (Aff. of Commander Albert Rodriguez at ¶¶ 1-9; 26); (R. 476-495) (Texas Rangers' Investigation).

Consequently, the surrounding circumstances reveal that Officer Bridgwater had probable cause to shoot Jose Ceballos, Jr. under the circumstances that he perceived at the time, as corroborated by Sergeant Porras and the audio recordings.

As the Fifth Circuit recently stated:

"Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others." *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores*, 381 F.3d at 399 (internal quotation marks and citations omitted).

\* \* \*

"A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police

might have been accomplished." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985). "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id.* at 687. Even where an officer acts negligently and contrary to police procedure, this court has failed to recognize a constitutional claim where a police officer used deadly force in response to a reasonable belief that an individual posed a threat of serious harm. *See Young v. City of Killeen*, 775 F.2d 1349, 1350-53 (5th Cir. 1985).<sup>19</sup>

*See Ramirez v. Knoulton*, 542 F.3d 124, 129-30 (5th Cir. 2008).

The Fifth Circuit, quoting a Fourth Circuit case, stated the following with respect to a police officer's need to make split second decisions:

The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. The court's comment that the officers could have moved away from the car is, unfortunately, a suggestion more reflective of the "peace of a judge's chambers" than of a dangerous and threatening situation on the street.

*See Ramirez*, 542 F.3d at 130 (quoting *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996)).

Officer Bridgwater acted reasonably because he "used deadly force in response to a reasonable belief that [Jose Ceballos, Jr.] posed a threat of serious harm." *See Young*, 775 F.2d at 1353. Consequently, his actions, as well as those

---

<sup>19</sup> In *Young*, a police officer observed Young engaged in a drug transaction, and the officer blocked Young's path as he attempted to flee by car. 775 F.2d at 1351. When the officer approached the car on foot, Young reached under the seat of his car. *Id.* The officer, believing Young was reaching for a weapon, shot and killed Young. *Id.* The court held that "[i]f Young's movements gave [the officer] cause to believe that there was a threat of serious physical harm, [the officer's] use of deadly force was not a constitutional violation." *Id.* at 1353 (emphasis added).

of Sergeant Porras reveal that they did not violate the constitutional rights of any of the Appellants. Therefore, they, as well as Chief Mull, are entitled to qualified immunity.

**G.**

**COMMANDER ALBERT RODRIGUEZ, DIRECTOR OF TRAINING FOR THE TEXAS DEPARTMENT OF PUBLIC SAFETY, FINDS THAT OFFICER BRIDGWATER & SERGEANT PORRAS ACTED REASONABLY UNDER THE CIRCUMSTANCES; DEADLY FORCE WAS JUSTIFIED; AND THE AUTOPSY REPORT CONFIRMS THE OFFICERS' ACCOUNT OF THE EVENTS**

Commander Albert Rodriguez has been the Commander, Director of Training, for the Texas Department of Public Safety since 1993. (R. 714). His training and experience is extensive. (R. 693-95; 714-717). Commander Rodriguez not only examined all of the records and audio recordings in the case, but he also interviewed Officer Bridgwater and Chief Mull. (R. 695). Based upon his training and experience, a review of the record, and his interviews, Commander Rodriguez stated the following in his affidavit:

In my professional opinion, the audio recordings, witness statements, and the evidence corroborates Officer Bridgwater and Sergeant Porras' version of the events. It is important to note that the autopsy report indicates that the shot struck Ceballos, Jr. in the left chest area. The overall path of the wound was front to back, slightly right to left and very slightly downward. The overall path of the bullet is consistent with Ceballos, Jr. lunging/moving forward with his right foot as indicated by Officer Bridgwater. Ceballos, Jr. stepping forward would have created a slightly right to left path of the bullet and the slightly downward path would have been created by Ceballos, Jr. leaning slightly forward as he moved

towards Officer Bridgwater and Sergeant Porras. If Ceballos, Jr. would have been shot as he stood squared up to Officer Bridgwater and standing straight up, the expected path would have been front to back, no deviation from right to left or left to right, and straight across the body.

In my expert opinion, the evidence indicates that Officer Bridgwater had no other reasonable alternative but to protect himself and Sergeant Porras by stopping Ceballos, Jr.'s life threatening actions. It is a well known fact that persons can move faster while moving in a forward direction than persons that are backing up. Officer Bridgwater, backing up in an attempt to avoid Ceballos, Jr.'s lethal attack, could have resulted in Ceballos, Jr. stabbing him and/or Sergeant Porras with the boning knife. The timely application of the use of deadly force was critical in order to prevent Ceballos' Jr. from seriously injuring or killing Officer Bridgwater and/or Sergeant Porras.

In my professional opinion, the allegation that Officer Bridgwater violated Ceballos, Jr.'s constitutional rights and/or was negligent and/or grossly negligent in stopping Ceballos' life threatening actions is unsubstantiated. First of all, it is incredulous that such allegations would be made considering the undisputed facts and circumstances of this case. The evidence does indicate that Officer Bridgwater exhibited a high degree of restraint in that he fired only one shot at Ceballos, Jr. when he charged forward with the boning knife. Officer Bridgwater quickly evaluated and determined that there was no further need to continue shooting and did not shoot any additional shots. Officer Bridgwater's use of deadly force was limited to one shot in an extremely dangerous and life threatening situation. Officer Bridgwater's actions were consistent with the actions of a reasonable and prudent law enforcement officer in light of the totality of the circumstances.

(R. 709-10) (Aff. of Commander Albert Rodriguez at ¶¶ 49-51).

All of the surrounding circumstances reveal that Officer Bridgwater acted reasonably, deadly force was justified, no constitution rights were violated, and he, Sergeant Porras, and Chief Mull are therefore entitled to be dismissed from this lawsuit on the basis of qualified immunity. *See Ramirez*, 542 F.3d at 129-30.

**II. The district court properly applied Texas case law when it dismissed the state claims against the individual defendants because the Appellants made an irrevocable election to only sue the governmental entity pursuant to the Texas Tort Claims Act. (Response to Appellants' Issue No. IV).**

The district court properly dismissed the state court claims asserted against the individual defendants. (R. 1197-99). In fact, substantive Texas law—including a Texas Supreme Court opinion—required those claims to be dismissed. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008); TEX. CIV. PRAC. & REM. CODE § 101.106.

The Appellants state tort claims arose out of the shooting incident giving rise to the lawsuit. Therefore, Appellants' state tort claims against the individual defendants had to be immediately dismissed because the Appellants and their attorney made an “irrevocable election” to only sue the Appellees' employer, the City of Plainview, for the tort claims once the lawsuit was filed. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a),(e). Section 101.106(e) provides: “If a suit is filed...against a governmental unit and any of its employees, the employees shall

immediately be dismissed on the filing of a motion by the governmental unit”. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e) (emphasis added).

Appellants argue, without supporting legal authority, that the case *sub judice* is distinguishable from *Garcia* because there are multiple plaintiffs here and the action of one plaintiff should not bind the others. (App.s’ Br. at 22-23). However, their argument is unconvincing. First, all of the Appellants are represented by the same attorney. Second, *Garcia* does not prohibit some plaintiffs from suing a municipality only, while other plaintiffs sue the individual only. Third, and perhaps most important, the Appellants’ argument does not match their procedural situation, *i.e.*, each plaintiff has alleged the same causes of action and they are not antagonistic to each other (at least not until they raised this argument at the trial level, which raises a new question as to whether the same attorney can still represent all of the Appellants with their “self-proclaimed conflict inspired by the application of *Garcia*”).

Section 101.106(e) applies to *all* tort claims asserted against the individual defendants, including those in which the Texas Tort Claims Act does not waive immunity. *See Garcia*, 253 S.W.3d at 658-59. Prior to the Texas Supreme Court’s March 28, 2008 opinion, some courts had only applied § 101.106(e) to causes of action in which the Texas Tort Claims Act waived immunity. *See, e.g., Meadours v. Ermel*, 483 F.3d 417, 424 (5th Cir. 2007)(a pre-*Garcia* case addressing §

101.106). The Texas Supreme Court squarely addressed this and concluded that those cases had incorrectly interpreted the Texas Tort Claims Act and case law. *See Garcia*, 253 S.W.3d at 658-59. Consequently, the district court properly dismissed all of the state tort claims against the Appellees.

### CONCLUSION

For the reasons set forth above, Appellees William Bridgwater, Jose Porras, and William Mull contend that the trial court's judgment should be affirmed.

WHEREFORE, PREMISES CONSIDERED, Appellees William Bridgwater, Jose Porras, and William Mull respectfully pray that the Court affirm the judgment of the trial court.

Respectfully submitted,

---

MATT D. MATZNER  
Texas Bar No. 00797022  
CRENSHAW, DUPREE & MILAM, LLP  
1500 Broadway, 8th Floor  
Lubbock, Texas 79401  
Telephone: (806) 762 5281  
Facsimile: (806) 762 3510  
*Attorneys for Appellees William  
Bridgwater, Jose Porras, and  
William Mull*

## **CERTIFICATE OF SERVICE**

I certify that on the 25<sup>th</sup> day of June, 2009, I served two true and correct copies in paper form by certified mail return receipt requested, and one copy in electronic form of Appellees William Bridgwater, Jose Porras, and William Mull's brief to the following person addressed and listed below.

Ronald T. Spriggs  
Law Offices of Ronald T. Spriggs  
1011 South Jackson St.  
Amarillo, TX 79101  
*Counsel for Appellants*

---

Matt D. Matzner

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 11,464 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) in the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared using Word with a proportionally spaced typeface with Times New Roman 14 point font.

Respectfully submitted,

---

MATT D. MATZNER  
Texas Bar No. 00797022  
CRENSHAW, DUPREE & MILAM, LLP  
1500 Broadway, 8th Floor  
Lubbock, Texas 79401  
Telephone: (806) 762 5281  
Facsimile: (806) 762 3510  
*Attorneys for Appellees William  
Bridgwater, Jose Porras, and  
William Mull*