No. 20-1526

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

N.S., ONLY CHILD OF DECEDENT, RYAN, BY AND THROUGH HER NATURAL MOTHER AND NEXT FRIEND, BRITTANY LEE AND NARENE JAMES,

Plaintiffs/Appellants

vs.

THE KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS AND ITS INDIVIDUAL MEMBERS, MICHAEL RADER, LELAND SHURIN, ANGELA WASSON-HUNT, ALVIN BROOKS AND SLY JAMES; DARRYL FORTE (FORMER CHIEF OF THE KANSAS CITY, MISSOURI POLICE DEPARTMENT); RICHARD SMITH (CURRENT CHIEF OF THE KANSAS CITY, MISSOURI POLICE DEPARTMENT); AND WILLIAM THOMPSON,

Defendants/Appellees

Appeal from the United States District Court for the Western District of Missouri
District Court Case Number 4:16-cv-000843-BCW
Honorable Brian Wimes – United States District Court Judge

REPLY BRIEF OF APPELLANTS N.S. AND NARENE JAMES

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ARGUMENT

I. This Court on interlocutory appeal did not "reverse" the district court's denial of qualified immunity: it declined to do so. Instead, the 8th Circuit vacated the district court's decision and remanded it for a "second look" because the "plaintiff-friendly" version of the facts demonstrates that a constitutional violation occurred.

Appellees are incorrect about the ruling of this Court on interlocutory appeal. At page x of Appellees' Brief, Appellees state, "[f]ollowing *reversal* and remand from this Court. . ."; then later at page six state, "[o]n interlocutory appeal, this Court *reversed* the denial of immunities." (Emphasis added).

This Court on interlocutory appeal declined to reverse the district court on interlocutory appeal, though making it clear that was one "path" it could have taken. This Court also declined to affirm, though it could have done that as well. Instead, this Court found that "*[t]his case falls into a third category*." *N.S. v. Kansas City Board of Police Commissioners*, 933 F.3d 967, 969 (8th Cir. 2019). It was dissatisfied with the district court's analysis and vacated and remanded the case to allow the district court to correct its analysis.

The distinction between this Court's vacating, rather than reversing, the district court's denial of qualified immunity demonstrates this Court's belief in its opinion on the interlocutory appeal that the "plaintiff-friendly" facts at least "supports the family's account" of a constitutional violation. *Id*. Had the record not

supported such a constitutional violation, the "path" taken would have been reversal of the district court in the interlocutory appeal.

However, even with the admonition by this Court to identify and adopt the "plaintiff-friendly" version of the facts, the district court and Appellees failed to do so and have improperly and impermissibly credited Officer Thompson's version of the facts, ignoring the "plaintiff-friendly" version of the facts which squarely dispute Officer Thompson's myopic and legally wrong version of the facts.

II. Appellees have improperly adopted Officer Thompson's version of the facts, not the Appellants', and have sought to prop up the district court's impermissible findings, contrary to the explicit instructions of this Court.

Appellees rely solely on Thompson's version of the facts to argue that qualified immunity should be granted, pushing the district court's improper legal analysis even further. Primarily, Appellees state the facts are that 1) Thompson observed a gun in Ryan's right hand as he ran to the Monte Carlo, Appellees' Br. 3; 2) Ryan looked directly at Thompson as he ran to the Monte Carlo, *id*.; and 3) Thompson gave Ryan verbal commands that Ryan subsequently disobeyed. *Id*. However, their reliance on *their* facts – the moving party's facts – violates basic summary judgment law, as well as this Court's opinion on interlocutory appeal, directing the district court to find and credit the plaintiff's version of the facts.

A. Plaintiff-Friendly Version of the Facts: Ryan did not have a gun or any other weapon as he jogged to the Monte Carlo.

Contrary to Appellees' assertions, Appellants have unequivocally disputed a fact claimed by Thompson: the claim that Ryan had a gun in his right hand as he ran to the Monte Carlo, a central factual dispute that should have prevented the grant of qualified immunity by the district court. Despite Appellees' protestations to the contrary and clinging desperately to the only witness – Thompson – who claims to have seen a gun, the plaintiff-friendly version of this fact is that Ryan never had a gun at any time, which is substantiated by the record.

According to Ollie Outley, the owner of the gun Thompson claims to have found on the driver's seat of Ollie's car, Ryan was *never* armed that night because Ollie's gun never left Ollie's car. Appellants' Br. pp. 10-11. This very Court, in its opinion in the interlocutory appeal, underscored Ollie's testimony when it highlighted some of the "plaintiff-friendly" facts in the record, saying, "[s]ome evidence supports the family's account… The car's owner… claimed that the gun recovered from the car belonged to him and that *it had been there all night*." *N.S.*, 933 F.3d at 969 (emphasis added).

Ollie's testimony that his gun never left his car that night makes it impossible that Ryan *ever* had it in his right hand, which is far from "irrelevant," as Appellees describe it. It is difficult to imagine a more *relevant* fact – the fact Ryan never possessed Ollie's gun the entire night – when considering the constitutionality of

Thompson's use of deadly force, the fulcrum of which he consistently has said is Ryan's possession of a gun. How could Thompson "see" a gun in Ryan's right hand that never left the gun's owner's car that night?

The only mention of Ollie's damning testimony is contained in a single, dismissive sentence at footnote 6 of Appellees' Brief. "Similarly irrelevant is the testimony of Ollie Outley… as to where he *believes* he left the firearm earlier in the evening." Appellee's Br. 24 (emphasis added). Ollie's testimony about where he left his gun before he and Ryan got out of the red Monte Carlo together and went to the Power & Light District – and where it stayed the entire night – is well beyond his mere "belief." Appellants' Br. 10-11. He is and has been rock-solid about where he left it, between the driver's seat and the center console. *Id*. He was with Ryan in the red Monte Carlo on the way to the Power & Light District, they got out of the car together, they stayed together the entire time, no one ever went back to the car to get the gun and the gun never left Ollie's car. *Id*. It remained between the driver's seat and console, until someone – the identity of whom the jury must decide – moved it.

The other witnesses who testified they did not see a gun in Ryan's hands that night, *see* Appellants Br. pp. 11-12, and the other officers' testimony regarding what they observed about Ryan as he ran to the Monte Carlo, *see id*. at pp. 18, 21, all substantiate that Ryan never had a gun as he ran to the door of Ollie's Monte Carlo.

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And if Ryan never *had* a gun, Thompson never *saw* a gun, rendering his *subjective* belief that he did, or might have, unreasonable.

Importantly, Officer Tamara Jones, Thompson's partner, did not see a gun in Ryan's hands, although Appellees want this Court to believe she did not see Ryan's hands and, therefore, could not have seen a gun. Appellees may have been correct if Jones did not clarify her own testimony on the issue of seeing Ryan's hands in her deposition.

Later in her deposition, when her deposition moved outside to the parking lot where Ryan was shot, Jones further explained her testimony about seeing Ryan's right hand when being questioned by one of the attorneys for Appellees: "Q: The way we see Brian now is this what you saw as far as his hands, his arms, his leg, his head, his body of Ryan Stokes? A: Can you move him a little bit farther forward. Q: Okay. [Spoken by Jones]: And more hunched. [Spoken by Jones]: About that. Q: [Spoken by Attorney Peters]: About that? A: Yeah. Q: And did he continue to move towards his car in that same body position? A: Yes. Q: Okay. Were you able to see his hands ever? A: *I could see the back. I could see the back.* Q: Of what hand? A: This hand. Q: *The back of his right hand?* A: *Yeah.* Q: *Did he have any – could you see anything in his hands?* A: *No.*" J.A. 1288, 13:43:45 – 13:44:44.

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J.A. 1288, still capture from Jones's videotaped deposition at 13:44:44, showing that Jones could see the back of Ryan's right hand.

Jones testified she never saw a gun in Ryan's hand from her perspective. J.A. 1288, 13:43:45 – 13:44:44. She also testified she never believed deadly force was justified from her perspective. J.A. 1256; 1257; 1265. It is for the jury to determine what weight to give her testimony – including the audiovisual recording on location in the parking lot – when considering whether or not Jones had the opportunity to see anything in Ryan's right hand when he was moving toward the Monte Carlo, particularly a gun of the size described by Thompson, which was a "[b]lack semiautomatic handgun, bigger than [his] Glock 23." J.A. 2457.

It is also for the jury to decide if what Jones saw from her perspective is the same thing Thompson saw from his perspective: that Ryan never had a gun when he was moving to the Monte Carlo and that deadly force was, therefore, never justified. As this Court held in *Wealot v. Brooks*, 865 F.3d 1119, 1126 (8th Cir. 2017), just because "officers all witnessed the events from different angles does not imply they could not have witnessed the same events." In that case, two officers on the scene saw the victim throw his gun along the side of the house from one angle, but two different shooting officers claimed not to have seen the victim throw his gun along the side of the house from a different angle. This Court reversed the district court's grant of qualified immunity because it made an "impermissible inference of fact" that because the officers viewed the events from different angles, they did not see the same thing.

Jones's testimony that she never saw a gun and never believed deadly force was justified – when coupled with the testimony of Ollie that his gun never left his car that night and the testimony of other witnesses who saw Ryan without a weapon while he was at the Power & Light District – puts Thompson's testimony that he saw a gun in Ryan's right hand as he moved toward the Monte Carlo in obvious dispute, necessitating the denial of qualified immunity.

The questions of whether or not Ryan had a gun and whether or not there was probable cause to believe he posed a threat of death or serious physical harm to the

officers are questions for the *jury* because they are disputed facts. The *jury* must decide who is telling the truth, *not* the district court or the Appellees at the summary judgment stage by improperly crediting the testimony of the movant.

B. Plaintiff-Friendly Version of the Facts: Ryan had his head down as he ran to the Monte Carlo and never looked directly at Thompson.

Throughout their brief and prior briefings, Appellees try to sell the idea that Ryan looked directly at Thompson as he ran to the Monte Carlo. For example, Appellees state at page three of their Brief, "[w]hen they were less than fifteen feet apart, Stokes looked directly at Officer Thompson. . ." As they have done since their original opposition to Appellees' motion for summary judgment, Appellants have soundly disputed this idea with record evidence to the contrary, as well as the impeachment of Thompson in his deposition on the same issue.

Nowhere in his official four-page investigative statement to the detective did Thompson mention that Ryan "looked directly at Officer Thompson," though he admits that such a fact would be important information to provide at that time. Incredulously disclosed for the very first time in his deposition nearly four years after he gave his official statement to a detective, this "new" testimony was the subject of substantial cross-examination challenging the credibility of that revelation. J.A. 2098; 2455 - 2459. "Q: Did you want to give them as much information as possible? A: Correct. Q: Did you want them to understand as clearly as they could what you experienced? A: Yes. Q: You understand if Ryan Stokes

looked at you at any point in time and the two of you made eye contact that would be important information to provide to the officers? A: It would have been yes. Q: And the investigative unit would want to know that, is that correct? A: Yes. Q: And there is nowhere in this particular exhibit [the investigative statement] where you describe that moment of having eye contact with Ryan is that true? A: Yes. Q: And so here we are nearly four years later and you are telling us that you remember being kind of eye to eye with him? A: Yes." J.A. 2098; 2455 – 2459.

Instead, the plaintiff-friendly version of the facts is that Ryan jogged straight to the Monte Carlo with his head down and his eyes looking at the ground and the Monte Carlo in front of him, never looking at Thompson. In that position, it was impossible for Ryan to "look directly at" Thompson. This is confirmed in Jones and Thompson's depositions. J.A. 1288, 13:43:00-13:45:15; J.A. 2147, 13:38:00-13:43:30. Each of the following stills from the videotaped depositions of Jones and Thompson demonstrate this fact:

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J.A. 1288, still capture from Jones's videotaped deposition at 13:44:30, showing Ryan's head position as he moved to the Monte Carlo.

J.A. 2147, still capture from Thompson's videotaped deposition at 13:40:12, showing Ryan's head position as he moved to the Monte Carlo. (At no time during Thompson's videotaped deposition did Thompson demonstrate that Ryan looked directly at him.)

Appellees' made-up idea that Ryan looked directly at Thompson is done to prop up their fallacious – and evidence-lacking – argument that Ryan was a non-compliant, disobedient suspect who did not respond appropriately to Thompson, a police officer. But looking closely at the testimony of Jones and Thompson, Ryan could never have seen Thompson, let alone look directly at him. Appellees cannot make up facts that are not contained in the record and cannot argue unsupported justifications for the use of deadly force that Thompson never considered when making the decision to deploy deadly force. Likewise, Thompson's *post hoc*

additions cannot be blindly accepted as truth at the summary judgment stage. In fact, at the summary judgment stage, the law requires his claimed version of the facts be *ignored* when disputed by competent evidence.

C. Plaintiff-Friendly Version of the Facts: Thompson never gave any commands before shooting and killing Ryan Stokes.

Thompson claims to have shouted specific commands five to 10 times before shooting Ryan. The "plaintiff-friendly" version of the facts is that Thompson never shouted any commands at Ryan, which is based upon Jones and Straub's testimony that they never heard Thompson shout "drop the gun" or "show me your hands." Their testimony puts Thompson's testimony that he shouted those commands in his "loudest command voice" five to 10 times in dispute.

Furthermore, Thompson emphatically denies giving the one single command Jones attributes to Thompson – "get on the ground"[1] – leaving the reasonable inference that Jones heard that command from another officer on the scene and, importantly, *not* Thompson. Thompson testified there was absolutely no reason Jones should not have heard the commands he claims to have shouted five to 10 times. J.A. 1252-1256; 2110; 2119; 2120.

The fact Thompson never shouted any commands in the parking lot before shooting Ryan is further supported by the record evidence that Straub drew his

[1] J.A. 2119, 2120.

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weapon and aimed it at Thompson, not knowing it was a police officer who had shot Ryan. J.A. 2055; 2064. Had Thompson yelled "drop the gun" or "show me your hands" as he claims, Straub – hearing that command – would have been able to communicate with Thompson *not* to shoot because Ryan did not have a gun, Straub was taking Ryan into custody, and Straub was in Thompson's backdrop.

Instead of following the law at the summary judgment stage, "believing" and crediting Straub and Jones's testimony that – standing within 25 feet of Thompson – they never heard the shouted commands Thompson claims to have given before he shot Ryan from behind, the district court and the Appellees make an impermissible credibility determination, *disbelieve* the testimony of Straub and Jones, and credit Thompson's testimony that he "shouted" commands five to 10 times to "drop the gun" and "show me your hands."[2] One need only listen to Thompson's deposition, on location in the parking lot, when he shouted the commands he claimed to have given Ryan, J.A. 2147, 13:43:56–13:44:10, to appreciate that it would have been impossible for Straub and Jones *not* to hear those

[2] Appellees' state in footnote 5 on page 21 of their brief: "Regardless, the important thing is that Appellants do not dispute than an officer gave a command and that Stokes disobeyed it." Appellees' statement is puzzling, as Appellants continually dispute that Ryan was given any command that he subsequently disobeyed. Furthermore, the sole issue is whether *Thompson* gave Ryan commands, which he did not, and whether Ryan disobeyed the commands "given" to him by Thompson, which he did not.

commands if they were given. As with the other facts in dispute, whether commands were ever given by Thompson is a question for the *jury*.

As Thompson never gave commands, even though it was feasible to give commands, Ryan was never given any commands to obey. J.A. 1260. The fact Ryan returned in the direction from which he had come after going to the Monte Carlo is further evidence Thompson gave no commands, particularly since Ryan began to voluntarily raise his hands to his waist level upon seeing Straub, less than 10 yards away from Thompson, illuminated by the headlights of the Monte Carlo. Contrary to Appellees' arguments, Ryan was complying with the commands of the only officer that he received commands from: Officer Straub. J.A. 2645, 10:16:50; 2053; 2070.

D. This Court must do what the district court and Appellees have failed to do: identify the plaintiff-friendly version of the facts.

Thompson is the sole witness who (a) claims to have seen Ryan with a gun, (b) claims Ryan looked directly at him, and (c) claims to have given Ryan verbal commands that Ryan "disobeyed," but under the law of these summary judgment proceedings, all of those claims must be ignored and the evidence to the contrary must be believed. At the summary judgment stage, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). "In qualified immunity

cases, this usually means adopting… the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Appellees have done the opposite, as did the district court: Both ignored record evidence disputing Thompson's account of the incident, both "adopted" Thompson's version of the facts about the gun, the commands, and the *post hoc* addition by Thompson that Ryan looked "directly at" Thompson, even though disputed by substantial, competent, material record evidence. Both the Appellees and the district court even inexplicably failed to take into account what this Court found to be evidence supporting the "family's account." *N.S.*, 933 F.3d at 969.

III. Appellees have impermissibly attempted to put words in Thompson's mouth beyond Thompson's own testimony to expand Thompson's articulated justification for using deadly force.

On July 28, 2013, just a few hours after shooting Ryan, Thompson gave his official four-page investigative statement to a detective. Thompson told the detective his justification for his use of deadly force was twofold: (a) Ryan's possession of a gun in his right hand[3] as he was going *to* the Monte Carlo, then Thompson's inability to see Ryan's hands afterward, when Ryan began to move *away* from the Monte Carlo and toward other officers coming into the parking lot (thinking Ryan still possessed the gun Thompson claims to have seen and was about

[3] Thompson's claim that Ryan had a gun is squarely disputed by record evidence, discussed at length in the Brief of Appellants and in this Reply.

to use that gun to ambush the other officers); and (b) Ryan's failure to follow commands shouted at Ryan five to 10 times in his "loudest command voice" when Ryan was just 15 feet away from him.[4] J.A. 2102; 2455; 2457.

Thompson's two-fold justification for the use of deadly force did not change when Thompson was deposed almost four years later on June 29, 2017. "Q: What were the objective facts which supported your conclusion that you had to use deadly force against Ryan? If you could list each one. A: He had a weapon running towards me. His lack of cooperation on verbal commands. Running back towards the officers put them in danger, again wasn't following verbal commands, wouldn't show me his hands, kept his hands in the same spot." J.A. 2089. "A: Okay. His lack of following the verbal commands, the fact that he had a gun in his hand. Q: Those are the objective facts you used to use deadly force? A: I believe so. Q: Were there others? A: *Not that I can remember*." J.A. 2090 (emphasis added). "Q: After a short break, we are back on the record. And I want to go back to the issue of verbal commands. Because, if I understand your experience and your testimony, it is the verbal commands and the failure to obey those commands that really led to the shooting. A: And him not showing me his hands, yes. Q: Exactly. So it is the combination of the verbal commands and the failure to obey those commands that

[4]Whether Thompson yelled any commands before shooting Ryan is also squarely disputed by the record evidence, discussed at length in the Brief of Appellants and in this Reply.

led to the shooting of Ryan Stokes? A: And he had a gun in the beginning, yes." J.A. 2019.

Appellees try to expand Thompson's two-fold justification for using deadly force to include the amount of time Ryan was at the Monte Carlo, Appellees' Br. 22, which was maybe a second or two at most, J.A. 1269; the amount of time it took for the entire situation to unfold, Appellees' Br. 22-23; the "unnatural" position that Ryan was moving in as he went to the Monte Carlo, *id*. 19; Ryan being inside of the Monte Carlo, *id*. 22; and Ryan looking directly at Thompson and thereby knowing that Thompson was actually there and a police officer, *id*. 29, which Appellants have addressed, *supra*.

But Thompson never included any of these other "things" into his decision to use deadly force. While the review of this Court may be a *de novo* review, that review must be based upon the record evidence, not the musings of counsel. Appellees cannot add facts or arguments that never formed *Thompson's* reasoning and justification for his use of deadly force. His reasoning and justification for using deadly force is the two-fold reasoning and justification he articulated in his investigative statement and his deposition, not what Appellees wish, speculate, or argue it could have been.

IV. The "officers on the scene" standard applies – not the Appellees' misleadingly stated standard – so Straub and Jones's observations and perspectives must be credited under the law.

Appellees blatantly misstate the law regarding the "objective reasonableness" standard applicable in excessive use of force cases. That misstatement of the law permeates their entire brief, as it applies a legally inaccurate standard of viewing the evidence only through the eyes of Thompson. Although citing *Graham v. Conner*, 490 U.S. 386 (1989), the Appellees quote *Graham* out of context, while supplying their own substitute language to suit their own needs – a forced viewing of the facts *only* through the myopic lens of Thompson – instead of properly quoting the applicable standard in excessive use of force cases in the context intended by the *Graham* Court.

Here is what Appellees misleadingly say in their brief: "Reasonableness must be evaluated based on those facts *known to Officer Thompson*, "rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396; . . ." Appellees' Br. 18 (emphasis added). That is not what the *Graham* Court held. Here is what the *Graham* Court actually held, with the entire quotation from the decision in *Graham*, properly quoted in context: "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 (emphasis added).

What the Appellees ***wish*** the law could be – a viewing of the evidence only through the lens of the officer accused of excessive force – would result in one-sided grants of qualified immunity for accused officers in excessive use of force cases, particularly use of deadly force cases resulting in the death of the victim. Without the deceased victim's testimony, the accused officer will be free to spin the evidence his or her way 100% of the time, without consideration of testimony from other "officers on the scene" who may have been present. If Appellees' standard did apply, scores of cases would have been decided a different way and qualified immunity would have applied if the testimony from other "officers on the scene" and other non-law enforcement eyewitnesses was not considered in the Fourth Amendment analysis.

Thankfully, the standard posited by Appellees does not apply. *Wealot v. Brooks*, 865 F.3d 1119 (Grant of qualified immunity by district court reversed because testimony of other officers on the scene rebutting testimony of shooting officers.); *Wallace v. City of Alexander, Arkansas, et al.*, 843 F.3d 763 (8th Cir. 2016). (Denial of qualified immunity by district court affirmed because testimony of eyewitnesses to shooting, rebutting testimony of shooting officer.)

V. Appellees and the district court errantly rely on cases that are completely dissimilar to the case at bar.

Appellees and the district court rely on cases which are inapposite, stating they are "similar" to the case at bar for the proposition that they are "more

particularized to this case than any of those cited by Appellants" and support the grant of qualified immunity, even though the shooting victims were found to be unarmed. Appellees' Br. 43. The following cases were inappropriately relied upon by the district court with a skewed "Thompson-friendly" version of the facts and were further inappropriately buttressed by Appellees in their brief.

In *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002), an off-duty officer caught a man in the act of breaking and entering a neighbor's house and attempting to steal a purse. "Officer Pfeffer, with his service revolver drawn, informed Billingsley he was a police officer, to halt, and put his hands up. Billingsley had a purse in his left hand, but Pfeffer could not observe his right hand. Despite Officer Pfeffer's warning, Billingsley stepped to the side and ran out the back door onto the deck. . . Pfeffer ran to the railing with his gun drawn and repeated the earlier warning. . . Billingsley landed in a crouched position and then rotated his left shoulder. Officer Pfeffer fired a shot that struck Billingsley. . . Billingsley was found to be unarmed." *Id*. at 992. *Billingsley* is not similar at all to the case at bar. Two warnings were given in that case, while none were given in the case at bar. The officer identified himself to Billingsley as police, Thompson never did to Ryan. And Billingsley made a movement toward Pfeffer that was perceived by Pfeffer as threatening, while Ryan was actually surrendering to Straub, within view of Thompson.

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In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), a drunk man, Cassidy Loch, had a gun in his truck and was trying to leave his home during an argument with his wife and her brother. Police were called, were told Cassidy had a gun, and Officer Rueckert responded. Rueckert pointed his firearm at Cassidy and ordered everyone to get on the ground. Cassidy ignored Rueckert and began walking toward Rueckert. Rueckert repeatedly ordered Cassidy to the ground and Cassidy repeatedly ignored the orders. Rueckert heard Cassidy say something that included the word "kill" and Cassidy continued toward Rueckert. Cassidy fell in a snowbank and his hand moved toward his side. Rueckert shot Cassidy. Cassidy was found to be unarmed. *Loch* is not at all similar to the case at bar. The officer rolled up to the house in a police car and identified himself to Cassidy as police, but Ryan did not know of Thompson's presence in the parking lot, let alone that he was a police officer. Rueckert gave numerous commands to Cassidy which Cassidy ignored, while none were given to Ryan. And Cassidy made a hand movement to his side which Rueckert perceived as threatening, while Ryan was actually surrendering to Straub, within view of Thompson.

In *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001), Officer Hubbard responded to a scene after a report of shots fired after an armed robbery. Hubbard saw a man, Thompson, who fit the description of the suspect – a black man wearing a blue and gold jacket – and apprehended him. Thompson appeared to surrender at

first, but then tried to flee and Hubbard grabbed his coat but failed to secure Thompson. Thompson ran in between some buildings, climbed a fence, got up from the ground, looked at Hubbard and moved his arms as though reaching for a weapon. Hubbard couldn't see Thompson's hands. Hubbard ordered Thompson to "stop" and Thompson's hands continued to move. Hubbard shot Thompson in the back, below his shoulder blade. Thompson died. He was found to be unarmed. *Thompson* is not similar at all to the case at bar. Thompson escaped Hubbard's grasp after a violent armed robbery, while Ryan was going to a car in a parking lot, suspected of stealing and no indication that he was armed at all. Thompson knew he was being apprehended by police, even escaping from Hubbard, and was given warnings to "stop," ignoring them, while Ryan was given zero warnings. And Thompson made a movement toward his waist with his hands which was perceived by Hubbard as threatening, while Ryan was actually surrendering to Straub, had not been accused to be threatening at all, and never possessed a weapon at any time.

Finally, in *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), the 5th Circuit reversed the denial of qualified immunity and held that a police officer was justified in using deadly force to defend himself and others around him from a suspect in a convenience store robbery. The suspect/shooting victim repeatedly reached down below the officer's sight line in defiance of the officer's orders to raise his hands, thus the officer reasonably believed that the suspect had retrieved a gun and was

about to shoot. The suspect fled police in a high-speed car chase. After the car wrecked, officers gave multiple orders to the occupants to raise their hands. The suspect continually raised and lowered his hands several times. The officer shot him in the head from 10 feet away, killing him. *Reese* is likewise not at all similar to the case at bar. The shooting officer was defending himself from a man suspected of robbery of a convenience store after he had fled in a high-speed chase, while Ryan was surrendering to Straub on foot, beginning to raise his hands. Multiple orders were given to the suspects to raise their hands which were disobeyed, while Ryan was given no commands at all. The suspect knew he was being chased by police, while Ryan had no idea Thompson was even in the parking lot, let alone that he was a police officer.

VI. The district court's conclusion and the Appellees' argument that Thompson's mistake that Ryan was armed with a gun was "objectively reasonable" is flawed and does not support the grant of qualified immunity.

Thompson could have made an "objectively reasonable" mistake about Ryan's possession of a gun as he was moving *away* from the Monte Carlo and toward the other officers coming into the parking lot *only* if Thompson is improperly given the "Thompson-friendly" fact of Ryan's possession of a gun as he was moving *toward* the Monte Carlo. Put another way, the only way Thompson can win the argument of an "objectively reasonable" mistake is if Thompson's testimony about

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the Ryan's possession of the gun going *to* the Monte Carlo is credited, which is improper at the summary judgment stage. When the "plaintiff-friendly" version of the facts is instead credited, as it must be, there is a dearth of evidence supporting an "objectively reasonable" mistake on the part of Thompson, especially when only Thompson's two-fold justifications for his use of deadly force are properly considered. The cases relied upon by the district court and the Appellees have no weight and are distinguishable. The facts always have been and still remain: Unarmed, accused of a low-level crime, surrendering, and not a threat to anyone, Ryan was wrongfully shot in the back by Thompson and killed. "Officers may not seize such unarmed, nondangerous suspect[s] by shooting [them] dead." *Wallace*, 843 F.3d at 769 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

VII. The law was "clearly established" that Thompson could not shoot and kill an unarmed, non-dangerous, surrendering, suspected misdemeanant in the back.

When the "plaintiff-friendly" facts are properly credited, the clarity of the "clearly established" law which is "beyond debate" is palpable, even more palpable than the law established in *Tennessee v. Garner* and the cases relied upon by Appellants in their Brief. Here is what Thompson knew: Thompson was placed on patrol in the parking lot to assist patrons to their cars when the bars closed. The bars closed. A radio call indicated a foot chase had ensued and a low-level crime of stealing was alleged. Ryan was a patron. Ryan had no gun or any other weapon the

entire night. He was never a threat to anyone. He was jogging to his friend, Ollie's car. The headlights of the car came on and Ryan went to the car, then started back in the direction he came from. Thompson never said a word to Ryan. Ryan never knew Thompson was there. When Ryan saw Straub, he began to put up his hands in view of Thompson. As he was raising his hands, Ryan was shot in the back by Thompson.

These are the properly-credited, plaintiff-friendly facts that must be presented to a jury. When viewed in the light of these properly credited facts, the law was clearly established as of July 28, 2013 such that a reasonable officer in Thompson's position in the parking lot would have ***absolutely*** known that he could not use deadly force to seize Ryan. Jones knew this and Straub knew this. They did not use deadly force. And a jury must therefore determine whether Thompson is accountable for his use of deadly force in light of these facts.

VIII. Contrary to Appellees' assertions, Appellants have offered sufficient evidence demonstrating Thompson intended to injure Ryan when he shot him in the back and killed him.

During their discussion of official immunity, the Appellees accuse Appellants of using a "distorted factual record" and appear to argue Thompson did not intend to cause Ryan injury, or at the very least that Appellants have not pointed to any record evidence of Thompson's intent to injure Ryan. Appellees' Br. 50. This flies in the face of page i of Appellants' Brief where it states: "Ryan was shot in the back

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by Officer William Thompson" and "Ryan as shot and killed from behind." From the start of Appellants' brief and throughout all briefings, Appellants have consistently pointed to facts demonstrating Thompson shot an unarmed, non-threatening, and surrendering Ryan without giving him any verbal commands or announcing his presence as a police officer prior to shooting Ryan, even though it was feasible to do so.

Clearly, Thompson intended to injure – even kill – Ryan when he pulled the trigger three times and struck Ryan twice, in violation of Ryan's constitutional rights. J.A. 2099. There can be no other explanation. Consider Thompsons own testimony: "Q: It was your intent when you fired your weapon at Ryan Stokes to kill him? A: Yes. Q: Why? A: To stop the threat. Q: To stop the threat but your intent was to kill him? A: Stop the threat, yes. Q: So your intent was to kill him? A: Yes." J.A. 2099.

Here, when considered in the light of the plaintiff-friendly version of the facts, which remain ignored by the Appellees and the district court, a jury could reasonably infer Thompson acted with malice when he shot Ryan, killing him, contrary to his training and the policies and procedures of the KCPD. Just because it is the version of the facts that Appellees want, it does not make the plaintiff-friendly version of the facts "false," a "stretch," a "tired tactic," or "distorted." Appellees' Br. 46, 47, 49.

Appellees' attempts to mask the intentional behavior of Thompson should be rejected.

It bears repeating: "Malice requires intent, and to act with malice the officer must do that which a man of reasonable intelligence would know to be contrary to his duty and intend such action to be injurious to another." *Thompson v. Dill*, 930 F.3d 1008, 1015 (8th Cir. 2019) (internal brackets omitted). An officer of reasonable intelligence would know that it was improper and impermissible to use deadly force on Ryan, who was unarmed, was not disobeying commands that were never given to him, and who was not a threat to Thompson or others. *This is consistent with Jones' testimony*. J.A. 1256-1257; 1265. Shooting Ryan was contrary to Thompson's duty, *Dill*, 930. F.3d at 1015, was done in "reckless indifference to the rights of [Ryan]", *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 (Mo. 1986), and was intended to cause significant injury to Ryan. *Davis v. White*, 794 F.3d 1008, 1013 (8th Cir. 2015). At the very least, a *jury* should have the opportunity to decide whether Thompson acted with malice.

CONCLUSION

For all of the foregoing reasons, the district court's grant of qualified and official immunity on Counts I and III of Appellants' Amended Complaint must be reversed. Similarly, the district court's judgment in favor of Appellees on Count II of Appellants' Amended Complaint must be reversed. Upon its *de novo* review, this

honorable Court should deny Thompson's qualified and official immunity defenses, reinstate Appellants' *Monell* claims and remand the case to the district court, with instructions that the district allow a jury trial on all issues on all counts of Appellants' Amended Complaint.

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September 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App P. 32(a)(7)(B) because the brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typedface using Microsoft Word 2016 in 14-point Times New Roman font.

3. This brief complies with the requirement of 8th Cir. R. 28A(h)(2) because it has been scanned for viruses and is virus-free.

September 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, I electronically filed the foregoing Reply Brief of the Appellants with the Clerk of the Court for the United States Court of Appeals for the 8th Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

September 9, 2020

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