

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION**

**DEVON MODACURE**

**PLAINTIFF**

**V.**

**CIVIL ACTION NO. 3:20-CV-476-HTW-LGI**

**CITY OF JACKSON, MISSISSIPPI,  
JAMES E. DAVIS, individually and as Chief  
of Police City of Jackson, COBEY SMITH,  
individually and as an Officer of City of  
Jackson, and KENNEETH SHORT, II,  
individually and as an Officer of City of  
Jackson**

**DEFENDANTS**

---

**ORDER**

---

This case arises out of a shooting of Plaintiff Devon Modacure (“Plaintiff or “Modacure”) by law enforcement officers. Plaintiff’s lawsuit challenges the legitimacy and necessity of that shooting.

**I. PROCEDURAL POSTURE**

On November 12, 2020, Plaintiff filed his Amended Complaint [Docket no. 28] in this court against the following defendants: the City of Jackson, Mississippi (“the City”); James E. Davis, individually and as Chief of Police of the City<sup>1</sup>; Codey Smith, individually and as an Officer of the City (“Officer Smith”); and Kenneth Short, II, individually and as an Officer of the City (“Officer Short”) (hereinafter collectively referred to as “Defendants”).

---

<sup>1</sup> Defendant Chief James Davis was sued in both his official and individual capacities. On October 15, 2021, this Court dismissed Chief Davis in his individual capacity, leaving Davis as a defendant only in his official capacity [Docket no. 83]. This court notes that when an officer is sued in his official capacity, it is tantamount to suing the City itself. *See Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 87 L.Ed. 114 (1985).

Plaintiff, by way of his Amended Complaint, alleged that his constitutional rights had been violated under the Fourth<sup>2</sup>, Fifth<sup>3</sup>, Eighth<sup>4</sup>, and Fourteenth<sup>5</sup> Amendments to the United States Constitution, as guaranteed by 42 U.S.C. §§ 1983<sup>6</sup>: and 1988<sup>7</sup>. Accordingly, this court

---

<sup>2</sup> U.S. Const. amend. IV provides:

Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>3</sup> U.S. Const. amend. V provides:

Criminal actions-Provisions concerning-Due process of law and just compensation clauses. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>4</sup> U.S. Const. amend. XIII provides:

Excessive bail shall not be denied, nor excessive fines imposed, nor cruel and unusual punishment imposed.

<sup>5</sup> U.S. Const. amend. XIV provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>6</sup> Section 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C.A. § 1983 (West)

<sup>7</sup> Title 42 U.S.C. § 1988 provides in pertinent part:

Proceedings in vindication of civil rights. (a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

has subject matter jurisdiction over this matter by way of Title 28 U.S.C. 1331<sup>8</sup>, hailed as federal question jurisdiction.

Plaintiff's Amended Complaint also alleged State Law claims, to wit: Negligence; Negligent Training, Supervision and Retention; Intentional Acts under Mississippi State Law- Assault and Battery; and Negligent/Intentional Infliction of Emotional Distress. [Docket no. 28]. On March 28, 2022, however, this court dismissed Plaintiff's State Law claims, and allowed the lawsuit *sub judice* to proceed with federal claims only<sup>9</sup>. [Docket no. 117].

Before this court now are two motions for summary judgment pursuant to Rule 56<sup>10</sup> of the Federal Rules of Civil Procedure [Docket nos. 101 and 103] filed by the defendants. Plaintiff opposes the motions. [Docket nos. 108 and 110]. The defendants have filed rebuttal briefs [Docket nos. 112 and 115] and this matter is ready for review.

## II. THE SUBJECT INCIDENT

The background facts of this matter flow from an incident which occurred on October 27, 2017 (the "Subject Incident"). Plaintiff and Defendants present conflicting accounts as to what happened on this day.

---

<sup>8</sup> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331 (West)

<sup>9</sup> Plaintiff's Notice of Claim was filed with Defendant City of Jackson on November 21, 2017. Plaintiff's suit concerning an alleged injury was filed July 21, 2020, more than two and one-half years after the Notice of Claim, a time period in excess of the period allowed by the Mississippi Tort Claims Act. Accordingly, this court dismissed Plaintiff's state law claims, and allowed Plaintiff to pursue his federal claims against the Defendants.

<sup>10</sup> Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part: Summary Judgment.

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

***A. Subject Incident According to Plaintiff***

Plaintiff contends that on October 27, 2017, Officers Short and Smith of the Jackson Police Department (“JPD”), along with another JPD Officer, Sergeant Marie Hampton, encountered several individuals, including Plaintiff, in or around Fontaine Avenue in Jackson, Mississippi. Plaintiff acknowledges that the JPD Officers had been called to the subject area in response to an earlier shooting incident. Plaintiff states that he was not present in the area at the time of the alleged shooting incident, and that he was unaware of, and uninvolved in the shooting incident. Plaintiff even claims that he was not a suspect in the shooting incident, to which the JPS Officers had responded.

Plaintiff states that the Defendants were aggressive as soon as they arrived on the scene. Plaintiff claims that he became “paranoid” due to Defendants’ aggressiveness (the tone of their voice, body language, and hands on their guns), and attempted to avoid contact with Defendants and Sergeant Hampton.

Plaintiff asserts that because of Defendants’ alleged aggressive behavior, he began to run away as soon Sergeant Hampton asked him to “Come Here”.

The following are excerpts from Plaintiff’s Deposition [Docket no. 101-3]:

Q. So her [Sergeant Hampton’s] tone of voice scared you to where you began to run?

A. All of them scared me to the point I wanted to run. I wasn't just focused on her when she said it like that. I was already paranoid when -- when Short and Smith was aggressive. And when she got aggressive with it, that's when I got really paranoid.

[Docket no. 101-3, p. 33, ln. 14-21].

Q. And "aggressive" meaning their tone of voice was aggressive?

A. Yeah. Hands on guns, too.

[Docket no. 101-3, p. 34, ln.1-3].

A. When she told me to "Come here," that's when I took off running....

Q. "... [Y]ou're saying that she never even got close enough to even try to pat you down?

A. No.

Plaintiff asserts that "...[he] had just got out of being incarcerated, and...had just seen a lot of people get shot by the police, [and that he] was really running to avoid what happened." Plaintiff alleges that "[he] didn't think I would get shot because of [his] running." [Docket no. 103, p. 35, ln 18- 23].

Plaintiff claims that he did not have a gun, knife, or any other weapon in his possession.

Q. Did you have a weapon on your person at the time?

A. No.

Q. So you had no gun on you at the time?

A. No, no weapon, no firearm, no knife, no nothing.

[Docket no. 101-3, p. 35, ln. 20-25].

Q. Okay. So on that day, you did not have a Glock model .22, .40-caliber pistol?

A. Not on this day, I didn't.

[Docket no. 101-3, p. 37, ln. 21-23].

Plaintiff submitted an Affidavit from Montrell Vernell, an alleged witness to the Subject Incident. Vernell stated that "the officers briefly followed [Plaintiff] on foot and then fired three shot[s] in [Plaintiff's] back as he was running. The subject officers that shot [Plaintiff] acted out of anger, stating that they were going to kill him. The same officers herein have routinely harassed individuals throughout the neighborhood." [Docket no. 108-2, pp. 1-2].

Plaintiff agrees that Defendants fired three gunshots towards Plaintiff as he was running away from the Officers, and that he was shot three times in the back as a result of the Officers' gunfire.

Plaintiff finally says that subsequent to the shooting, Defendants failed to provide him immediate medical assistance. Plaintiff contends that the Defendants transported him to the University of Mississippi Medical Center ("UMMC"), but with delay. He remained there, he adds, for several days in "stable but critical condition" until he was charged with aggravated assault<sup>11</sup>. Plaintiff opines that this delay exacerbated his injuries.

Plaintiff has submitted a five-minute video footage<sup>12</sup> of the Subject Incident [Exhibit 108-4], which shows the following: (1) an African American male (Modacure) running away from Officers in JPD Uniforms; (2) JPD Officers running after/towards Modacure with firearms in their hands, and their hands extended forward while in pursuit; (3) shots being fired by the Officers; and (4) several officers entering and exiting the frame. [Docket no. 119]. This court notes that a vehicle blocks the viewer's sight once the shots have been fired.

Plaintiff has also submitted an "expert report" [Docket no. 108-3] from Tina L. Wells ("Wells"), a consultant with a consulting firm, Austin Security and Crime Prevention Consulting, LLC. Wells' report states that she is a retired JPS Deputy Chief, and has experience in patrol operations, investigation, policy, and training. Wells' report states, *inter alia*, that "failure to properly train is a contributing factor that mimics the behavior of Officers Short and Smith."

---

<sup>11</sup> Plaintiff's aggravated assault charge was later dismissed. On June 18, 2019, Plaintiff pled guilty to the charge of Felon in Possession of a Firearm in this court. This charge stemmed from an unrelated May 12, 2018, incident. This court sentenced Plaintiff to 37 months imprisonment with the Federal Bureau of Prisons, to be followed by a 3-year term of supervised release. Plaintiff was released from prison in April 2021.

<sup>12</sup> On March 3, 2022, the Clerk of Court filed a "Notice of Conventional Filing" [Docket no. 113]. This court, upon reviewing the Exhibit, noted that the Compact Disk ("CD") placed in the Clerk's office did not reflect "video footage of the subject incident", as stated in Plaintiff's Response. The video, instead, showed Deposition Testimony of Officer Kenneth Short, II. On September 2, 2022, Plaintiff filed a "Corrected Notice of Conventional Filing". [Docket no. 119].

Also, claims Wells, “failure to supervise Jackson Police Department employees (especially those that may have a history of violating policy and procedure on a regular basis) is a direct cause of the violation of the Plaintiff’s constitutional rights.” [See Docket no. 108-3]. Defendants object to Wells’ expert testimony, alleging a conflict of interest and bias on Wells’ part.

***B. Subject Incident According to Defendants***

Defendants allege that on October 27, 2017, JPD received a call about a shooting in the area of Memphis Street in Jackson. Officer Short, and Sergeant Barry Hale<sup>13</sup> responded to that call. Defendants assert that Plaintiff, along with other individuals, was detained by the JPD officers. Defendants claim that Plaintiff fit the description of the suspect in the incident shooting. According to the Defendants, the suspect was described as a black male, around 150 pounds with black hair, and wearing a maroon shirt. [Docket no. 101-2, p. 25, ln 9-11]. At the time of the Subject Incident, Plaintiff claims that he was wearing a burgundy shirt with jeans, and burgundy shoes. [Docket no. 101-3, p. 18, ln 15-18].

Defendants state that Sergeant Hale was patting Plaintiff down for weapons when Plaintiff took off running. The officers allegedly then chased Plaintiff on foot while ordering him to stop. According to the Defendants, Plaintiff grabbed a gun from the waist-band of his pants and began turning towards the officers. [Docket no. 102, p. 1].

Officer Smith says he told Plaintiff multiple times to stop reaching for his weapon. Despite being told to stop, say Defendants, Plaintiff pulled out a gun and began running towards the officers. The Officers, allegedly believing that they were in immediate danger of bodily injury, claim that they fired three shots, and that one of those shots hit Plaintiff near his hips. Defendants say that Plaintiff was then placed in handcuffs for security reasons, and the Officers

---

<sup>13</sup> Although the Defendants’ Motion for Summary Judgment refers to Sergeant Barry Hale, the deposition testimony from Officers Short and Smith, along with the submitted Investigative Report refers to a “Sergeant Marie Hampton” as being the third JPD Officer on the scene.

then called for medical services. The gun, which the Defendants contend was on Plaintiff's person, was recovered on the scene. [Docket no. 102, p. 3].

Defendants have submitted a report from the JPS Internal Affairs Division [Docket no. 103-1], which states the following in reference to the Subject Incident:

On October 27, 2017, Officers Cody Smith and Kenneth Short were dispatched to a shooting at 3363 Lampton Street. While on scene, they received information that the suspect in the shooting was possibly at a nearby house that is a known hangout for drug users.

The officers, along with Sgt. Marie Hampton went to investigate and encountered an individual matching the description of the suspect (Devon Modacure) who fled on foot from the officers.

Officers Smith and Short chased the suspect to 3361 Fontaine Avenue, where he ***pointed a handgun at the officers***. Both officers fired their weapons at Modacure and he was struck at least one time.

An investigation was conducted into the incident.

[Docket no. 103, p. 1] (emphasis added).

The Internal Affairs report found that the officers responded in accordance with General Order 600-10, Section IV, Deadly Force<sup>14</sup>, which states:

Officers of the Jackson Police Department may use deadly force only when the action is in defense of human life, including the officer's own life, or in defense of any person in immediate danger of serious bodily harm.

A. Rule:

1. All discharge of firearm is deadly force.
2. An officer may use deadly force only when he/she has probable cause to believe that:
  - a. Deadly force is necessary to prevent imminent death or seriously bodily harm to himself/herself or others, or
  - b. The person to be arrested is a fleeing felon who presents an imminent threat of death or the infliction of serious bodily harm to the officer or any other person.

[Docket no. 103-1].

---

<sup>14</sup> This court notes that although the JPD Internal Affairs Department cleared the Officers of any wrongdoing, the Department's findings are not binding upon this court.

### III. 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, 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.” *Fed. R. Civ. P. 56(c)*; *Copeland v. Nunan*, 250 F.3d 743 (5<sup>th</sup> Cir. 2001); see also *Wyatt v. Hunt Plywood Company, Inc.*, 297 F.3d 405, 408–09 (2002). In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); rather, “it is the province of the jury to assess the probative value of the evidence.” *Dennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5<sup>th</sup> Cir.1980). “Summary judgment can be granted only if everything in the record demonstrates that no genuine issues of material facts exist.” *Id.*

Summary judgment is improper where the court merely believes it is unlikely that the non-moving party will prevail at trial. *National Stream Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5<sup>th</sup> Cir.1962). Facts that are irrelevant or unnecessary to a decision are “non-material” and do not prevent summary judgment. *Anderson*, 477 U.S. at 242; *Phillips Oil Co. v. O.C. Corp.*, 812 F.2d 265 (5<sup>th</sup> Cir.1987).

Summary judgment is mandated in any case where a party fails to establish the existence of an element essential to the case and on which the party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Rule 56(c) further requires that the court enter summary judgment if the evidence favoring the non-moving party is not sufficient for the trier of fact to enter a verdict in the non-moving party's favor. See *Anderson*, 477 U.S. at 252; *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1297 (5<sup>th</sup> Cir.1993).

When the moving party has challenged the non-movant's case under Rule 56(c), the opposing party must present more than a metaphysical doubt about the material facts in order to preclude the grant of summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In response to a motion for summary judgment, the non-moving party is required to respond with specific proof demonstrating a triable issue of fact as to each of the elements required for establishment of the claim or claims asserted. *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122-23 (5th Cir.1988). That said, the court must resolve all reasonable doubts about the existence of a genuine issue of material fact against the movant. *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 87 (5th Cir.1982).

#### IV. LAW AND APPLICATION

##### *A. Deprivation of Constitutional Rights under Section 1983*

Plaintiff claims that Officers Short and Smith failed to exercise reasonable force in approaching him, that, instead, they exercised excessive force in violation of the Fourth Amendment by shooting him. “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). Its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9, 105 S.Ct., at 1699-1700 (the question is “whether the totality of the circumstances justify[s] a particular sort of ... seizure”). *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

This inquiry on reasonableness invites several unanswered questions, to wit: (1) why Plaintiff was shot in the back; (2) whether he actually suffered three gunshot wounds, and (3) why testimony differed as to Plaintiff's possession of a firearm; (4) why a portion of the video seems to show a fleeing Plaintiff being shot at by chasing officers, instead of an armed Plaintiff charging the police. Based upon the presence of these fact questions, and others, this court concludes that plaintiffs' Fourth Amendment claims regarding excessive use of force, as well as Plaintiff's Fourteenth Amendment claims regarding deprivation of Plaintiff's due process rights, survive summary judgment.

This court next looks at Plaintiff's claim under the Fifth Amendment's due process clause<sup>15</sup>. "The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor". *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000) (granting summary judgment in favor of two law enforcement officers on the plaintiff's Fifth Amendment claim because the Plaintiff never alleged that two officers were acting under authority of the federal government).

Plaintiff herein does not contend that Officer Smith and Officer Short were federal actors; rather, the record before this court indicates that Officer Short and Officer Smith were both working as police officers for the City of Jackson, Mississippi. Plaintiff's Fifth Amendment claim, therefore, fails as a matter of law.

Plaintiff also alleges a claim under the Eighth Amendment to the United States Constitution. The Eighth Amendment protects against the infliction of "cruel and unusual punishments". The underlying principle is that it prohibits unnecessary and wanton inflictions of pain. *Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Gregg v. Georgia*, 428 U.S. 153 (1976).

---

<sup>15</sup> See Footnote 3.

The Defendants argue that the “cruel and unusual punishment” clause of the Eighth Amendment applies only in criminal actions following a conviction. *Palermo v. Rorex*, 806 F.2d 1266, 1272 (5th Cir. 1987). The United States Supreme Court has held that the Eighth Amendment limits the kinds of punishment that can be imposed on those convicted of crimes; proscribes punishment that’s grossly disproportionate to the severity of the crime, and imposes substantive limits on what can be made criminal and punished as such. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

Plaintiff, in June 2019, pled guilty to being a felon in possession of a firearm<sup>16</sup>. This charge, and resulting sentence, stemmed from a May 2018 incident. The circumstances of the 2018 indictment are unrelated to the Subject Incident. Plaintiff has made no allegations that his sentence and/or time served in prison as a result of this court’s sentence on the 2018 charge was cruel or unusual. Defendants correctly point out that Plaintiff has not alleged that the punishment given to him by the federal courts was disproportionate to the crime committed, and that Plaintiff has not claimed that the crime of “felon in possession of a firearm” is unconstitutional. Accordingly, Plaintiff’s Eighth Amendment claim fails as a matter of law. Defendants’ motion for summary judgment as to Plaintiff’s Eighth Amendment claim, therefore, is granted.

***B. Qualified Immunity of the Officers under Section 1983***

Officers Short and Smith allege that they are entitled to qualified immunity as a shield from liability in this case. “Qualified immunity shields government officials from civil damages liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Raju v. Rhodes*, 7 F.3d 1210, 1215 (5th Cir.1993).

---

<sup>16</sup> See Footnote 11.

The following two (2) step analysis in analyzing a qualified immunity claim is the appropriate analysis in determining qualified immunity:

To defeat a claim of qualified immunity, a plaintiff must show that (1) the plaintiff has alleged that the defendant has violated a clearly established constitutional or statutory right, and (2) a reasonable person would have known of that clearly established right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). When analyzing the second prong, the court must ‘consider whether the defendant’s actions were objectively unreasonable in light of clearly established law at the time of the conduct in question.’ *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007). ‘To make this determination, the court applies an objective standard based on the viewpoint of a reasonable official in light of the information then available to the defendant and the law that was clearly established at the time of the defendant’s actions.’ *Id.* While the question of reasonableness is intensely factual, the United States Supreme Court has held that the question of reasonableness is a question of law to be reached by the court, not a jury. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

*Cruz v. Miss. Dep’t of Human Servs.*, 9 F. Supp. 3d 668 (S.D. Miss. 2014).

Questions of fact remain regarding whether the Officers were threatened by Plaintiff’s conduct at the time of the incident, so as to justify the Officers shooting Plaintiff. Since fact questions remain regarding the constitutional violations and the reasonableness of the Officers’ conduct in relation to those claims, this court finds that the issue of qualified immunity, too, survives summary judgment.

### ***C. Qualified Immunity of the City Under Section 1983***

Plaintiff has also sued the City of Jackson for use of excessive force and violations of due process under § 1983. Plaintiff specifically alleges that his injuries were the result of the City’s failure to train, monitor and/or supervise its employees, including Officers Short and Smith. Plaintiff’s Amended Complaint states that “The actions involved in this case are the result of the practices, policies and/or customs of Defendant City of Jackson (Jackson Police

Department) employees including the Police Chief, Police officers, other supervisory officials, and/or other employees of the police department.” [Docket no. 28, ¶ 10].

While this court has concluded that Officer Smith and Officer Short are not entitled to summary judgment based on qualified immunity, this court finds that the qualified immunity defense asserted by the City of Jackson is meritorious for the following reasons.

Any unconstitutional conduct alleged by the plaintiffs must be directly attributable to the City of Jackson through some sort of official action or imprimatur. *Piotrowski v. City of Ouston*, 237 F.3d 567, 578 (5th Cir.2001). Isolated unconstitutional actions by municipal employees will almost never trigger liability. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3 (5th Cir.1984), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). Three attribution principles assist the court in the process of distinguishing individual violations perpetrated by local government employees from violations that can be fairly identified as actions of the government itself—a policymaker; an official policy; and the “moving force” of the policy. *Piotrowski*, 237 F.3d at 578.

**1. Who was the Policymaker?**

The United States Court of Appeals for the Fifth Circuit has defined an “official policy” for the purposes of § 1983 liability to be either: (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's law-making officers *or by an official to whom the lawmakers have delegated policy-making authority* (emphasis added); or (2) a persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *Williams v. Kaufman County*, 352 F.3d 994, 1013 (5th Cir.2003).

Plaintiff herein has failed to identify an official policymaker who promulgated the alleged unconstitutional policy. Plaintiff attempts to identify Chief Davis as the policymaker responsible; however, Chief Davis was not the Chief of Police at the time of this incident. [Docket. No. 103-1, 5]. Rather, the late Lee Vance was the Police Chief and Chief Davis was the Deputy Chief over Patrol Operations. *Id.* Plaintiff further fails to demonstrate that the final policymaking official for the municipality had actual or constructive knowledge of the policy. The City argues that although Plaintiff alleges that Chief Davis improperly trained and supervised the Defendant Officers, Plaintiff fails to “connect the dots” and demonstrate how Chief Davis allegedly promulgated an unconstitutional policy.

This court agrees. Plaintiff failed to depose any policymaker within the City of Jackson. Further, this court has before it no evidence that Chief Davis implicitly or explicitly adopted an unconstitutional policy. Finally, this court notes that the record before it is devoid of any evidence that Chief Davis had knowledge that Defendant Officers were alleged “known threats to members of the public and therefore improperly retained.”

## ***2. What was the Official Policy Relating to Plaintiff's Claims?***

Next, the City may only be held liable in this case if the constitutional harm claimed to have been suffered was the result of an “official policy, custom, or pattern.” *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 2035–37, 56 L.Ed.2d 611 (1978). Municipalities, such as the City, may not be held liable under either a theory of *respondeat superior* or vicarious liability. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817, 105 S.Ct. 2427, 2433, 85 L.Ed.2d 791 (1985); *Monell*, 98 S.Ct. at 2036; *Doe v. Taylor Independent School District*, 15 F.3d 443, 452 (5th Cir.) (en banc), *cert. denied*, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994). A City may not be held liable under § 1983 for mere negligence in

oversight. *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir.1992), citing *City of Canton v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). So, in order to hold the City of Jackson liable in this case, Plaintiff must show that his constitutional deprivation was caused by the City's adoption of (or failure to adopt) the particular policy in question. *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir.1996). Moreover, any alleged inadequacy in a municipal policy must amount to an intentional choice to adopt or not to adopt a particular policy, and not merely an unintentionally negligent oversight. *Id.*

Only those claims based upon the implementation or execution of a policy or custom which was officially adopted by the City of Jackson will give rise to liability under § 1983. *Krueger v. Reimer*, 66 F.3d 75, 76 (5th Cir.1995); *Johnson v. Moore*, 958 F.2d 92,93 (5th Cir.1992). Plaintiff in the instance case has presented no evidence of any official policy regarding these matters.

### ***3. Is the City of Jackson the Moving Force Behind the Alleged Violations?***

In order to recover against a municipality for a claim under §1983, a plaintiff must establish that the policy was the "moving force" behind the violation. That is, there must be a "direct causal link" between the policy and the violation. *Piotrowski*, 237 F.3d at 580 (citing *Monell*, 436 U.S. at 694). This requires "more than a mere 'but for' coupling between cause and effect." *Fraine*, 957 F.2d at 1281 (5th Cir. 1992) (citations omitted). The Fifth Circuit has emphasized that the moving-force element of municipal liability "must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'" *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 415, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)). But if a policy is found to have a "known or obvious"

consequence of infringing on federally protected rights in the first step of the test (which may be found in failure to train cases), it is difficult to see how such a policy could fail to be a "moving force " behind these known or obvious harms when they finally come to fruition, as is required by this third step. *See Bryan Cnty.*, 520 U.S. at 409-10 ("The high degree of predictability may also support an inference of causation — that the municipality's indifference led directly to the very consequence that was so predictable.")

In the case at bar, Plaintiff has not produced evidence that the City's alleged failure to train, supervise and retain resulted in the deprivation of Plaintiff's constitutional rights. That is, Plaintiff has not presented any evidence that the use of (deadly) force would not have occurred if different steps in training or supervision had been taken. Plaintiff, further, has provided no evidence that the alleged poor quality of training and supervision was known to any supervisors and policymakers. This court, therefore, cannot point to a "moving force" behind a violation of a constitutional right. Finally, Plaintiff did not depose any training officer from the JPS training academy and did not explore the issue of training during discovery. This court, accordingly, finds insufficient evidence to support Plaintiff's contention that he possesses a valid claim for the City's failure to train, supervise and retain the Officers.

This court finds that the evidence presented by Plaintiff fails to establish any triable issue of fact as to whether: (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing a violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy." *See Valle v. City of Houston*, 613 F.3d 536, 544 (5th Cir. 2010). The Plaintiff cannot establish these essential elements of a failure to train claim, and the Plaintiff certainly has not demonstrated a pattern of

violations that were likely to result in a constitutional violation. *See Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009).

This court, therefore, finds that because Plaintiff cannot establish an officially enacted and executed policy or custom by the City that caused Plaintiff's injuries, Plaintiff's § 1983 claims against the City of Jackson (and Chief James Davis) must be dismissed as a matter of law.

#### V. CONCLUSION

Based upon the foregoing discussion, this court hereby **DENIES** the defendants' motion for summary judgment [**Docket no. 101**] attacking Plaintiff's § 1983 claims against Officers Smith and Short, contending that they deprived Plaintiff of his Fourth and Fourteenth Amendment rights. This court, however, dismisses Plaintiff's claims under the Fifth and Eighth Amendments against Officers Smith and Short for the reasons stated *supra*.

This court **GRANTS** the City of Jackson's Motion for Summary Judgment [**Docket no. 103**] because Plaintiff has failed to establish municipal liability pursuant to 42 U.S.C. § 1983.

SO ORDERED, this the 12th day of September, 2022.

/s/HENRY T. WINGATE  
UNITED STATES DISTRICT JUDGE