No. _____

In The
Supreme Court of the United States

JOANN COOPER, individually and as next friend of D.C.,

Petitioner,

vs.

RYAN BLACK, in his individual capacity,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a trial court's finding that a defendant's alleged intentional wrongdoing shocked the conscience so as to state a claim for a Fourteenth Amendment substantive due process violation by definition preclude a finding of qualified immunity for the same defendant's conduct?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joann Cooper, individually and as next friend of D.C., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' final decision, App. at 1a-12a, which vacated and superseded its prior opinion, is unpublished, but is available at 503 Fed.Appx. 672. The Eleventh Circuit's original opinion, App. at 13a-23a, is unpublished, but is available on Westlaw at 2012 WL 3553409. The district court's order, App. at 24a-47a, is unreported.

JURISDICTION

The final judgment of the Eleventh Circuit Court of Appeals was entered on October 12, 2012. Petitioner then timely petitioned the Eleventh Circuit Court of Appeals for rehearing *en banc* and the court denied petition for rehearing *en banc* on April 24, 2013. App. at 48a-49a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the interpretation of the Fourteenth Amendment to the Constitution of the United States, as well as 42 U.S.C. § 1983.

The Fourteenth Amendment provides, in pertinent part:

> No State shall . . . 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.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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. . . .

STATEMENT OF THE CASE

A. Basis for Jurisdiction Below

The court below had jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

B. Facts Material to Consideration of the Question Presented

This case arises from a tragic situation involving innocent victims who were shot and seriously injured by police attempting to stop a fleeing suspect. Of the four police officers who shot at Petitioners, only one, Respondent Ryan Black, remains in the case. The facts are deemed admitted because the case was decided on a motion to dismiss.

On March 26, 2010, several police officers of the City of Jacksonville, Florida, responded to a bank robbery. Upon arriving on scene, the officers observed the suspect running to a nearby fast-food restaurant with a gun still in hand. At the same time, Petitioner Joann Cooper, her two year old son, D.C., and her seven year old stepdaughter were waiting in their automobile in the drive-thru line. The suspect approached Ms. Cooper's car and attempted to force his way into the driver compartment of the vehicle, alongside Ms. Cooper.

Officers Jones and Black observed the suspect attempt to force Ms. Cooper from the driver's seat to the passenger seat, and also saw a child in the backseat. Ms. Cooper struggled with the suspect, forcing the gun to fall to the vehicle's floorboard, but no officer was aware of that fact.

At about this time, Officer York started what turned out to be a shooting spree. Officer York fired his shotgun twice towards the open driver's-side door with the robbery suspect alongside the door trying to

enter the vehicle. Respondent Black, hearing the initial gunshot, claimed that he believed that the suspect had fired his weapon and responded by firing into the vehicle. Officer Griffith, who had been dispatched to the scene, also fired into the vehicle. Officer York fired again. During this time, Officer Lederman moved for cover and saw children in the vehicle. Officer Lederman yelled, "Stop firing, cease fire, stop firing there is a kid in the car!" Officers Santoro, York, and Griffith all heard the order to stop firing because of the presence of a child.

Ms. Cooper's vehicle slowly moved forward through the drive-thru exit and into the oncoming gunfire. Respondent Black, having expended all the ammunition in his clip, reloaded his weapon and shot at the vehicle as it moved past him. Officers Lederman, Santoro, and Griffith also fired at the vehicle. Griffith and Black continued to fire until the suspect, who had attempted to exit the vehicle, fell to the ground.

In total, forty-two shots were fired by the officers at and into Ms. Cooper and her children's vehicle. Officer York fired his weapon four times; Officer Santoro fired his weapon four times; Officer Lederman fired his weapon four times; Officer Griffith fired his weapon six times; and Respondent Black fired his weapon twenty-four times, more than all of the other officers combined and four times more than the officer who fired the second most shots.

Unsurprisingly, Ms. Cooper and her son, D.C., were struck by bullets fired by the individual officers. Ms. Cooper was shot in the foot and underwent repeated surgeries. D.C. was shot in the chest and arm, and was rushed to the hospital with life threatening injuries, which included a collapsed lung and multiple fractures. Her stepdaughter was not struck by a bullet.

Ms. Cooper filed a lawsuit on behalf of herself and her son against the officers involved in the shooting in their individual capacities, asserting claims pursuant to 42 U.S.C. § 1983 for: (1) an unreasonable seizure by the individual officers, in violation of the Fourth and Fourteenth Amendments; and (2) a deprivation of liberty without due process of law, in violation of the Fourteenth Amendment. The officers moved to dismiss, asserting entitlement to qualified immunity, which the district court granted for all the officers except Black. In denying Respondent Black's motion to dismiss, the district court found that he was not entitled to qualified immunity because his actions were unreasonable and "shocked the conscience." App. at 34a-35a, 45a-46a.

On interlocutory appeal, asserting as error the denial of qualified immunity, the Eleventh Circuit on August 20, 2012, reversed the district court's denial of Respondent Black's motion to dismiss and held that he was entitled to qualified immunity on both the Fourth and Fourteenth Amendment claims against him. *Cooper v. Rutherford*, 2012 WL 3553409 (11th Cir. 2012); App. at 13a-23a. Petitioner thereafter

sought rehearing and rehearing *en banc*. On October 12, 2012, the Eleventh Circuit Panel vacated its prior opinion and issued a substitute opinion, which is the subject of the instant petition. That opinion reaffirmed the reversal of the district court's order and concluded that Respondent Black was entitled to qualified immunity as to both the Petitioner's Fourth and Fourteenth Amendment claims. *Cooper v. Rutherford*, 503 Fed.Appx. 672 (11th Cir. 2012); App. at 1a-12a. For both claims, the court assumed, without deciding, that Respondent Black committed a constitutional violation because his conduct "shocked the conscience," but granted Respondent Black qualified immunity because Petitioner did not demonstrate that Black's conduct violated clearly established law based solely upon law from the Eleventh Circuit and this Court. *Id*. at 674-75. Accordingly, the Eleventh Circuit remanded this case with directions that Respondent Black be granted qualified immunity and dismissed from this cause with prejudice. *Id*. at 677. On October 26, 2012, Petitioner again sought rehearing *en banc*. The Eleventh Circuit denied Cooper's petition for rehearing *en banc* on April 24, 2013. App. at 48a-49a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because important and recurring policy questions are shaped by the qualified immunity standard that applies to constitutional claims involving the "shocks the conscience" standard.

Public safety, the conduct of public officials, the public treasury, and the future development of civil rights law are all directly affected by the question of whether the determination that an official's intentional actions "shocked the conscience" precludes a finding of qualified immunity for those actions. For the reasons that follow, potential litigants and the public at large are best served by a qualified immunity standard in which the analysis merges into a single question of whether official conduct shocked the conscience.

I. A single-pronged qualified immunity analysis is appropriate for "shocks the conscience" claims arising under the Fourteenth Amendment.

The Eleventh Circuit granted Respondent Black qualified immunity as to Petitioner's substantive due process claim solely because it was not clearly established that Black's actions violated her substantive due process rights. *Cooper*, 503 Fed.Appx. at 676-77; App. at 11a. The court's refusal to consider that Black's firing of twenty-four shots at a vehicle occupied by a law-abiding mother and children, which the District Court concluded "shocked the conscience," in and of itself showed that the law forbidding such conduct was clearly established, was error and not justified by decisions of this Court. It also fails to take into account that cases involving conduct which shocks the conscience are almost always distinguishable from one another on their facts, with the result that a narrow reading of the clearly established law

standard in this context would assure that the constitutional law principles are never adjudicated and countless innocent victims like Petitioner will go uncompensated.

A. Current state of the law

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), "the district courts and the courts of appeals . . . [are] permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Nonetheless, a discussion of why the relevant facts do or do not violate clearly established law is "often beneficial" because it "may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Id*. Additionally, evaluating the constitutional issue "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id*.

This Court has not specifically decided whether a defendant's invocation of qualified immunity regarding their allegedly conscience-shocking conduct under the Fourteenth Amendment can be resolved solely by analyzing the plaintiff's constitutional claim. This Court has, however, addressed the issue in dicta. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) ("Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution."); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that the easiest cases don't even arise.") (internal quotation marks and citation omitted).

B. Rationale for a constitutional merits-based approach to evaluating qualified immunity in "shocks the conscience" claims.

The rationale for utilizing a one-step qualified immunity analysis with regard to Fourteenth Amendment "shocks the conscience" claims involving allegedly intentional wrongdoing is that, unlike a Fourth Amendment claim, where "objective reasonableness" is the standard, regardless of the intent or subjective state of mind of the defendant officer, the intent of the defendant officer matters in a Fourteenth Amendment substantive due process claim arising out of the use of force. *Johnson v. Breeden*, 280 F.3d 1308, 1321

(11th Cir. 2002). That was, until this case at least, the law of the Eleventh Circuit. *See also Skelly v. Okaloosa County Bd. of County Com'rs*, 456 Fed.Appx. 845, 847 (11th Cir. 2012) ("In Eighth and Fourteenth Amendment excessive force cases[,] . . . the subjective element required to establish [the constitutional violation] is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution[.]") (internal citation and quotation marks omitted); *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 n.6 (11th Cir. 2009) ("*Pearson* . . . has no application in a Fourteenth Amendment excessive-force claim because the qualified immunity analysis involves only the first [constitutional violation] prong."); *Danley v. Allen*, 540 F.3d 1298, 1310 (11th Cir. 2008) (conducting qualified immunity analysis for alleged Fourteenth Amendment violation by examining solely the first prong).

In such cases, the officer must apply force for the purpose of causing harm and it is this *subjective intent* that is "so extreme that every conceivable set of circumstances in which this [type of] constitutional violation occurs is clearly established. . . ." *Johnson*, 280 F.3d at 1321. *See also Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("the qualified immunity argument fails . . . because to the extent that the plaintiffs have made a showing sufficient to overcome summary judgment on the merits, they have also made a showing sufficient to overcome any claim to qualified immunity").

But in this case, which raised precisely the same kinds of claims as *Skelly, Johnson*, *Fennell*, and *Danley*, *supra*, the Eleventh Circuit refused to apply them. To be sure, those cases involved the application of force against pretrial detainees or state prisoners, yet the same standards apply to "shocks the conscience" substantive due process violations in other contexts, such as a high speed police chase. *See County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998) ("Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for a due process liability in a pursuit case."). Moreover, this Court also recognized in *Lewis* that, in some contexts, conduct falling within a middle range of culpability – that is, involving more than negligence but less than intentional conduct – can be shocking in the constitutional sense. "Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another[.]" *Id.* at 850.

By failing to follow the *Johnson* line of cases in this instance, the Eleventh Circuit has either sub silentio overruled those cases applying a single question approach to claims of qualified immunity when the defendant's conduct has been found to shock the conscience, or it has created a distinction, directly contrary to *Lewis*, treating pursuit cases differently from in custody cases. Either way, the Court of Appeals committed a serious error that created an

intra-circuit conflict or was in conflict with decisions of this Court.

C. The question presented by this Petition implicates significant, recurring, and timely issues involving public safety, the conduct of public officials, and public funds.

The analysis for resolving qualified immunity claims in "shocks the conscience" cases under the Fourteenth Amendment implicates significant, recurring, and timely questions. In just the first five months of 2013, circuit courts have had to determine whether alleged acts of public officials which shock the conscience can be excused under a qualified immunity defense. *See Gonzalez v. City of Anaheim*, 715 F.3d 766 (9th Cir. May 13, 2013); *Andrews v. Monroe County Transit Auth.*, 12-2793, 2013 WL 1768014 (3d Cir. April 25, 2013); *James v. Chavez*, 11-2246, 2013 WL 600227 (10th Cir. February 19, 2013); *Barnes v. City of Pasadena*, 508 Fed.Appx. 663 (9th Cir. February 14, 2013); *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201 (8th Cir. February 8, 2013); *Bailey v. Gibbons*, 508 Fed.Appx. 136 (3d Cir. January 3, 2013).

Police conduct that arguably shocks the conscience can damage police/community relations and, in extreme cases, lead to widespread civil disorder. *See* Rob Yale, *Searching for the Consequences of Police*

Brutality, 70 S. Cal. L. Rev. 1841, 1843 (1997).[1] A primary cause of the American Revolution was excessive police force during the infamous March 5, 1770 Boston Massacre, when British officers shot and killed five Americans. *See* David S. Kidder & Noah D. Oppenheim, *The Intellectual Devotional: American History* (2008), p.23.

Likewise, the specific standard for determining whether qualified immunity applies to "shocks the conscience" claims affects public safety, the conduct of public officials, and public funds. Plaintiffs must surmount a high barrier to demonstrate that official conduct violated their substantive due process rights. This Court's "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846 (internal quotations marks and citation omitted). Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. *Id*. at 847. Because of this Court's reluctance to expand the reach of substantive due process, the official conduct "most likely to rise to the conscience-shocking level" is "conduct intended to injure in some way unjustifiable by any government

[1] For example, the 1992 Los Angeles riots following the acquittal of police officers accused of beating Rodney King caused 53 deaths and over 2,000 injuries. *Id*.

interest." *Id.* (internal quotation marks omitted). *See also Chavez v. Martinez*, 538 U.S. 760 (2003).

As a result of the difficulty in demonstrating that official conduct shocked the conscience, an officer who crosses the Fourteenth Amendment's due process threshold can be entitled to qualified immunity if he is permitted to argue that the constitutionality of his specific actions – here knowingly firing twenty-four shots into a car with a mother and children present – had not been adjudicated to be unconstitutional in a prior case. Because shock the conscience cases typically widely differ from one another in their facts, the assertion of qualified immunity in response to such a claim has a far greater chance of prevailing than it would for other constitutional claims, such as Fourth Amendment claims, which have been found to be unlawful in prior cases. Moreover, courts may now avoid the constitutional question entirely by granting qualified immunity based upon the lack of clearly established law. Therefore, the risk this Court described in *Camreta v. Greene*, 131 S. Ct. 2020, 2031-32 (2011) is particularly acute with regard to constitutional torts subject to the "shocks the conscience" standard:

> [O]ur regular policy of [constitutional] avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Consider a plausible but unsettled constitutional claim

> asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. See, *e.g.*, *ibid.*; *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior. *Pearson v. Callahan*, 555 U.S. 223, 237, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

This case is an extreme example of why these concerns led the Court to focus on the merits in some cases. The Eleventh Circuit's failure to address the constitutional issue typified an approach that circuit courts have increasingly utilized since *Pearson*.[2]

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[2] Post-*Pearson*, nearly twenty-five percent of circuit courts dismissing on qualified immunity grounds did so on the "clearly established" prong, as opposed to just over six percent during the *Saucier* era. *See* Colin Rolfs, *Comment, Qualified Immunity after* Pearson v. Callahan, 59 UCLA L. Rev. 468, 491 (2011).

It is one that, when applied in the substantive due process context, inadequately accounts for the "*contemporary* conscience." *See Lewis*, 523 U.S. at 847 (emphasis added). It also supports the perverse result of immunizing public officials from the most egregious – and thus relatively uncommon – constitutional violations, where public officials apply force with intentional disregard for the likelihood that it will cause serious bodily harm. The one-step approach to qualified immunity the Eleventh Circuit previously espoused in *Skelly*, *Johnson*, *Fennell*, and *Danley*, *supra*, presents a cogent solution to this increasingly prevalent dilemma. While "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity," *Pearson*, 555 U.S. at 242-43, the cases in which conduct "shocks the conscience" do not lend themselves to establishing the kind of constitutional standards that can supply a basis for civil liability in other contexts. *See Camreta*, 131 S. Ct. at 2043-44 (Kennedy, J., dissenting). This amplifies the need to define its contours in the qualified immunity context.

A one-question approach to Fourteenth Amendment due process "shocks the conscience" claims involving intentional wrongdoing, or its equivalent in cases like this, also is likely to make qualified immunity litigation less time-consuming and expensive for public officials. Currently, plaintiffs and defendants are relegated to debate not only the merits and immunity, but also the question of whether the merits should be reached. In addition, the difficulty of

pursuing novel claims encourages civil rights plaintiffs to press custom, policy, or practice claims against local governments – claims as to which there is no qualified immunity. This type of claim is often intrusive, time-consuming, and expensive to defend, even if the defense proves successful. It thus defeats a core objective of sovereign immunity – to preclude liability that could overdeter public officials and unjustifiably invade the public treasury. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

Further, combining the two qualified immunity prongs in the "shocks the conscience" context avoids difficult questions involving what it means for a right to be "clearly established." Because *Pearson* did not address this issue in depth, the circuits have devised their own tests, and these tests conflict. The Ninth Circuit has taken an expansive approach, looking first to binding authority from the Supreme Court or Ninth Circuit. In the absence of such authority, however, the Ninth Circuit will look to "whatever decisional law is available to ascertain whether the law is clearly established,"[3] "including decisions of state courts, other circuits, district courts,"[4] and even unpublished district court opinions.[5] The First, Fifth, Seventh,

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[3] *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

[4] *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995)) (internal quotation marks omitted); *see Capoeman*, 754 F.2d at 1514.

[5] *See Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

Eighth, and Tenth Circuits apply similar standards.[6] These expansive approaches contrast with the methods of the Sixth[7] and D.C. Circuits,[8] which take a narrower view of the relevant law, and the Second[9] and Eleventh[10] Circuits, which do not consider other circuits' decisions in the analysis.

Of course, *Pearson* "continue[d] to recognize that [a two-step protocol] is often beneficial." 555 U.S. at 236. And *Pearson* explicitly addressed the situation where the body of constitutional law is thin or

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[6] *See Order of Analysis*, 123 Harv. L. Rev. 272, 279 (2009) (internal citation omitted).

[7] *See Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (noting that "it is only in extraordinary cases that [the Sixth Circuit] can look beyond Supreme Court and Sixth Circuit precedent to find 'clearly established law' "), *superseded by statute on other grounds as recognized by Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 407-08 (6th Cir. 2007).

[8] *See Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004) (noting that "[t]he law of other circuits may be relevant to qualified immunity, but only in the event that no cases of 'controlling authority' exist in the jurisdiction where the challenged action occurred"), *rev'd on other grounds*, 547 U.S. 250 (2006).

[9] *See Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit.").

[10] *See Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) ("Our Court looks only to binding precedent – cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose – to determine whether the right in question was clearly established at the time of the violation.").

non-existent: "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent *and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable*." *Id.* (emphasis added). *Pearson* could therefore be read to "encourage and support continued development of the constitutional law using a more targeted approach in small subsets of qualified immunity cases, such as police-pursuit cases, where the body of law still needs fattening." *Jones v. Byrnes*, 585 F.3d 971, 978 (6th Cir. 2009) (Martin, J., concurring).

However, the Eleventh Circuit's decision in the instant case illustrates the pitfalls of placing emphasis on clearly established violations with regard to substantive due process claims. It enabled the court to immunize a public official from conduct that was demonstrably in disregard of the rights of innocent citizens and was in no way justified. Even worse, it will continue to immunize this type of shocking conduct by granting qualified immunity in every case involving remotely similar conduct based solely upon the lack of clearly established law.

Therefore, Petitioner respectfully submits that this Court should grant review and refine its precedent in *Pearson* as it applies to qualified immunity in "shocks the conscience" claims involving intentional misconduct under the Fourteenth Amendment. When an officer has committed a civil rights violation with the highest level of culpability, neither the public nor

public officials are well-served by a qualified immunity standard that allows courts to indefinitely avoid the question of whether the alleged act is unconstitutional. A single-pronged standard, under which official conduct that shocks the conscience by definition violates a clearly established right, presents an appropriate solution to this problem.[11]

D. Under a single-pronged qualified immunity standard for "shocks the conscience" claims, Petitioner alleged facts sufficient to preclude a finding of qualified immunity for Respondent Black.

Under the single-pronged qualified immunity standard described above, Petitioner would have been required only to allege that Black's conduct was virtually certain to injure her and her children in some way unjustifiable by any government interest. *See Skelly*, 456 Fed.Appx. at 847; *Lewis*, 523 U.S. at 849. And Petitioner did so. The Complaint alleged that the *conduct of Black* "in firing into a civilian vehicle, either with knowledge or in willful ignorance of the fact that persons other than the suspect were inside, *was intended to cause harm unjustifiable by any*

[11] Of course, a jury could still find disputed facts in the defense's favor so as to merit a finding of no liability. *See, e.g., Littrell v. Franklin*, 388 F.3d 578, 584-86 (8th Cir. 2004); *Swain v. Spinney*, 17 F.3d 1, 9-10 & n.3 (1st Cir. 1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1487-88 (11th Cir. 1996); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992).

government interest. . . ." App. 66a at ¶83 (emphasis added). Black's conduct consisted of firing 24 shots into and at the car despite his knowledge and awareness of Ms. Cooper and her children being inside. App. 56a at ¶44, 58a-59a at ¶¶59, 67. Additionally, the number of shots fired by Black were four times greater than the officer who fired the second most shots and Black fired so many shots that he had to reload his gun. App. 58a-59a at ¶¶56, 67. Black kept firing at the car and even reloaded after two other officers yelled for him to stop firing because children were in the car. App. 57a at ¶¶50, 52. Had the Eleventh Circuit considered whether there was a constitutional violation, it would have found that Black's actions as alleged in Petitioner's Complaint shocked the conscience and constituted a Fourteenth Amendment substantive due process violation, thereby necessitating affirmance of the trial court's denial of Black's motion to dismiss as to the substantive due process count.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF APPENDICES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14722

D. C. Docket No. 3:10-cv-00695-HES-TEM

JOANN COOPER,
individually and as next friend of D.C.,

Plaintiff-Appellee,

versus

JOHN RUTHERFORD,
in his official capacity as Sheriff of the
Consolidated City of Jacksonville and
Duval County, Florida, et al.,

Defendants,

RYAN BLACK,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 12, 2012)

ON PETITION FOR REHEARING

Before DUBINA, Chief Judge, JORDAN and ALARCÓN,* Circuit Judges.

PER CURIAM:

Before the court is Appellees' petition for rehearing. We grant the petition, vacate our previous opinion in *Cooper v. Rutherford*, ___ F. App'x ___ (11th Cir. 2012), and substitute the following opinion in lieu thereof:

This case arises from a tragic situation involving innocent bystanders caught in the middle of a police chase of an armed suspect. Appellees Joann Cooper ("Cooper") and her son (collectively "Appellees") were seriously injured when an armed bank robber attempted to elude the police by attempting to steal the car in which they were riding. Rather than allow the armed bank robber to escape with hostages, the officers on the scene fired their weapons at the suspect until he was neutralized. Unfortunately, Cooper and her son were both hit by bullets intended for the bank robber. Appellant Officer Ryan Black was one of the officers on the scene. He appeals the district court's order finding that he is not entitled to qualified immunity for his actions stemming from this tense confrontation. Despite our sympathy for the Appellees, we reverse the district court's order

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

denying Officer Black qualified immunity, and remand this case with directions that Officer Black be granted qualified immunity and dismissed from this case with prejudice.

I.

On March 26, 2010, the Jacksonville Sheriff's Office dispatched officers to respond to the robbery of a Wachovia Bank and informed the officers that the suspect was armed. Officers arrived on the scene and observed the suspect running to a nearby Wendy's with a gun still in his hand. At the same time, Cooper was in her automobile with her two children waiting in the Wendy's drive-thru lane. The suspect approached the car and forced Cooper into the passenger seat to gain control of the vehicle.

Multiple police officers, including Officer Black, arrived at the Wendy's restaurant and observed the attempted carjacking. The officers ordered the suspect to stop and show his hands. Though Cooper successfully wrenched the gun from the suspect's hand, the officers continued to believe the suspect to be armed. Officer Black also observed the children in the back seat of the car.

Officer Jessie York fired his shotgun twice at the open car door. Upon hearing these gunshots, officers on the scene concluded, albeit incorrectly, that the suspect had begun to fire upon the officers. Officer Black, along with Officers Darries Griffith and York, began to fire at the car. After firing all of the

ammunition in his gun's magazine, Black reloaded his weapon and continued firing as Cooper's car began to move past him. The suspect then attempted to exit the car. In total, Officer Black, who continued to fire his weapon until the suspect was neutralized, fired 24 shots – four times as many shots as the officer who fired the second most bullets.

Unfortunately, Cooper and her son were struck by bullets during this confrontation. Cooper was hit in the right foot and required surgery. Her son was shot in the arm and upper torso. He was rushed to the hospital with critical injuries, including a collapsed lung and multiple fractures.

Cooper filed a lawsuit on behalf of herself and her son against the officers involved in the shooting in their individual capacities, asserting claims premised upon liability pursuant to 42 U.S.C. § 1983 for: (1) an unreasonable seizure by the individual officers, in violation of the Fourth and Fourteenth Amendments; and (2) a deprivation of liberty without due process, in violation of the Fourteenth Amendment.[1] The officers moved to dismiss on the basis of qualified immunity, which the district court granted for all officers save Officer Black. The district court denied Officer Black's motion to dismiss, finding that he was not entitled to qualified immunity because his

[1] Cooper and her son also brought claims against Sheriff John Rutherford in his official capacity as Sheriff of Jacksonville. Those claims are not a part of this appeal.

actions, firing 24 shots compared to six or four, were unreasonable and "shocked the conscience."

II.

When a defendant raises the defense of qualified immunity in a motion to dismiss, this court "review[s] the denial of [the] motion . . . *de novo* and determine[s] whether the complaint alleges a clearly established constitutional violation, accepting the facts alleged in the complaint as true, drawing all reasonable inferences in [Appellees'] favor, and limiting our review to the four corners of the complaint." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (citation omitted).

III.

When faced with a question of qualified immunity, this court conducts a two-step analysis to determine whether Appellees carried their burden of "establishing both that [Black] committed a constitutional violation and that the law governing the circumstances was already clearly established at the time of the violation." *Youmans v. Gagnon*, 626 F.3d 557, 562 (11th Cir. 2010) (per curiam) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815-816 (2009)). We may consider "the two prongs of the qualified immunity analysis" in any order, at our discretion. *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818.

With regard to both the unreasonable seizure claim and the substantive due process claim, discussed *infra*, our analysis begins and ends with the clearly established prong. Assuming, without deciding, that Officer Black committed a constitutional violation, Appellees have not demonstrated that Black's conduct violated clearly established law. A plaintiff can "demonstrate that his right was clearly established in a number of ways." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). He can show "a materially similar case has already been decided, giving notice to the police." *Id.* Or he can "show that a broader, clearly established principle should control" his situation. *Id.* Finally, the case may fit "within the exception of conduct which so obviously violates the [C]onstitution that prior case law is unnecessary." *Id.* In the Fourth Amendment context, where cases are very fact-specific, "pre-existing, factually similar cases are – not always, but (in our experience) usually – needed to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights." *Willingham v. Loughnan*, 321 F.3d 1299, 1303 (11th Cir. 2003). *See also Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 990 (2012) (per curiam) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case."). Appellees have not provided us with any cases suggesting that Black's alleged conduct violated the Fourth or Fourteenth Amendments. Therefore, Appellees have not carried their burden of showing that the alleged constitutional violations were clearly

established under prevailing United States Supreme Court, Florida Supreme Court, or Eleventh Circuit law. *See Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) ("[O]nly Supreme Court cases, Eleventh Circuit caselaw, and [state] [s]upreme [c]ourt caselaw can 'clearly establish' law in this circuit.").

A.

Regarding the Fourth Amendment unreasonable seizure claim, Appellees point to two cases, *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400 (2007) and *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), that they believe clearly establish that the events on March 26, 2010, amount to a seizure for the purposes of the Fourth Amendment. However, the facts underpinning those cases are not materially similar to the case at bar and neither clearly establishes that a Fourth Amendment seizure occurred. In *Brendlin*, the Supreme Court merely held that when officers stop a car during a routine traffic stop, the driver and passengers alike are seized. 551 U.S. at 251, 127 S. Ct. at 2403. The Supreme Court never mentioned the use of deadly force, hostages, innocent bystanders, or any other facts that are remotely similar to the case at bar. Therefore, even if the Supreme Court intended *Brendlin* to apply to the events that took place in this case, it could not have provided Officer Black with fair notice that a seizure was taking place and thus cannot be used to satisfy the requirement that the law be clearly established. *See Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011).

Meanwhile, this court in *Vaughan* certainly clearly established that if a passenger-suspect is shot by a bullet intended to stop his fleeing during a chase with police officers, then he is seized for purposes of Fourth Amendment analysis. 343 F.3d at 1329 (holding a seizure occurs when a passenger of a car "[is] hit by a bullet *that [is] meant to stop him*") (emphasis added). However, this court just as clearly acknowledged the difference between the events in *Vaughan* and the exact situation in this case-when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect. *Vaughan*, 343 F.3d at 1328 n.4 (noting that the innocent bystander and hostage cases from other circuits were unhelpful in deciding *Vaughan* because the passenger shot during the chase was also a suspect that the police officers were trying to apprehend). Therefore, preexisting case law does not clearly establish that Appellees were seized when Officer Black's bullet accidentally struck them during the confrontation with the armed bank robber.

Nor is this a case involving an instance in which "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question[.]" *See United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997); *see also Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919 (11th Cir. 2000) ("When . . . 'the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official,

notwithstanding the lack of caselaw,' the official is not entitled to the defense of qualified immunity."). The existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations. Compare *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (no seizure), *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998) (no seizure), *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998) (no seizure), *Rucker v. Harford Cnty.*, 946 F.2d 278 (4th Cir. 1991) (no seizure), *and Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (no seizure), *with Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000) (seizure).

Moreover, even if we determine that it is clearly established that Appellees were seized for the purposes of the Fourth Amendment, we are unaware of any case that clearly establishes that Officer Black's actions were constitutionally unreasonable. The district court determined that the other officers who fired their weapons acted reasonably because the use of deadly force against the fleeing armed bank robber was appropriate, *see Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005), and they only fired between four and six times. However, the district court also found that Officer Black was unreasonable for firing 24 times. We agree that deadly force against the armed robber was appropriate, but we cannot find a single case in this circuit or from the Supreme Court that clearly establishes that a large number of

shots fired makes a reasonable use of deadly force unreasonable. In fact, this court recently held that "[a] police officer is entitled to continue his use of force until a suspect thought to be fully armed is 'fully secured.'" *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 822-23 (11th Cir. 2010) (quoting *Crenshaw v. Lister*, 556 F.3d 1283, 1293 (11th Cir. 2009)).

Once the car started moving forward, Officer Black was faced with the choice of either allowing the suspect to escape with multiple hostages and perhaps leading police on a high speed chase through the busy streets of Jacksonville or ensuring that the suspect could not leave the Wendy's parking lot. We cannot say that it is clearly established he made the wrong choice and committed a constitutional violation. Because "preexisting law [did not] provide [Black] with fair notice that" firing 24 shots was unreasonable in these circumstances, he is entitled to qualified immunity as to Appellees' Fourth Amendment claim for unreasonable seizure. *See Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011).

B.

For the same reasons Officer Black is entitled to qualified immunity for Appellees' Fourth Amendment claims, he is also entitled to qualified immunity for the Fourteenth Amendment substantive due process claims. If Officer Black's actions did not constitute a seizure of Appellees, then the non-custodial nature of the interaction precludes liability unless Officer

Black's actions were "arbitrary or conscience shocking." *White v. Lemacks*, 183 F.3d 1253, 1257 (11th Cir. 1999) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 1070 (1992)). Again, assuming without deciding that Officer Black violated Appellees' constitutional rights, we conclude that it was not clearly established that his actions violated Appellees' substantive due process rights under the Fourteenth Amendment. "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716 (1998) (quoting *Collins*, 503 U.S. at 129, 112 S. Ct. at 1070). When officers are forced to make immediate, hasty decisions, "even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates . . . [the Constitution]. . . . [A] purpose to cause harm is needed . . . for due process liability in a pursuit case." *Id.* at 853-54, 118 S. Ct. at 1720. There is no case law from this circuit or the Supreme Court that clearly established that Officer Black's actions shock the conscience. Therefore, we conclude that he is entitled to the defense of qualified immunity as to Appellees' substantive due process claim.

IV.

For the aforementioned reasons, we reverse the district court's order finding that Officer Black is not entitled to qualified immunity as to Appellees' Fourth and Fourteenth Amendment claims and remand this case with directions that Officer Black be granted

qualified immunity and dismissed from this cause with prejudice.

REVERSED and REMANDED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14722

D. C. Docket No. 3:10-cv-00695-HES-TEM

JOANN COOPER,
individually and as next friend of D.C.,

Plaintiff-Appellee,

versus

JOHN RUTHERFORD,
in his official capacity as Sheriff of the
Consolidated City of Jacksonville and
Duval County, Florida, et al.,

Defendants,

RYAN BLACK,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 20, 2012)

Before DUBINA, Chief Judge, JORDAN and ALARCÓN,* Circuit Judges.

PER CURIAM:

This case arises from a tragic situation involving innocent bystanders caught in the middle of a police chase of an armed suspect. Appellees Joann Cooper ("Cooper") and her son (collectively "Appellees") were seriously injured when an armed bank robber attempted to elude the police by attempting to steal the car in which they were riding. Rather than allow the armed bank robber to escape with hostages, the officers on the scene fired their weapons at the suspect until he was neutralized. Unfortunately, Cooper and her son were both hit by bullets intended for the bank robber. Appellant Officer Ryan Black was one of the officers on the scene. He appeals the district court's order finding that he is not entitled to qualified immunity for his actions stemming from this tense confrontation. Despite our sympathy for the Appellees, we reverse the district court's order denying Officer Black qualified immunity, and remand this case with directions that Officer Black be granted qualified immunity and dismissed from this case with prejudice.

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

I.

On March 26, 2010, the Jacksonville Sheriff's Office dispatched officers to respond to the robbery of a Wachovia Bank and informed the officers that the suspect was armed. Officers arrived on the scene and observed the suspect running to a nearby Wendy's with a gun still in his hand. At the same time, Cooper was in her automobile with her two children waiting in the Wendy's drive-thru lane. The suspect approached the car and forced Cooper into the passenger seat to gain control of the vehicle.

Multiple police officers, including Officer Black, arrived at the Wendy's restaurant and observed the attempted carjacking. The officers ordered the suspect to stop and show his hands. Though Cooper successfully wrenched the gun from the suspect's hand, the officers continued to believe the suspect to be armed. Officer Black also observed the children in the back seat of the car.

Officer Jessie York fired his shotgun twice at the open car door. Upon hearing these gunshots, officers on the scene concluded, albeit incorrectly, that the suspect had begun to fire upon the officers. Officer Black, along with Officers Darries Griffith and York, began to fire at the car. After firing all of the ammunition in his gun's magazine, Black reloaded his weapon and continued firing as Cooper's car began to move past him. The suspect then attempted to exit the car. In total, Officer Black, who continued to fire his weapon until the suspect was neutralized, fired 24

shots – four times as many shots as the officer who fired the second most bullets.

Unfortunately, Cooper and her son were struck by bullets during this confrontation. Cooper was hit in the right foot and required surgery. Her son was shot in the arm and upper torso. He was rushed to the hospital with critical injuries, including a collapsed lung and multiple fractures.

Cooper filed a lawsuit on behalf of herself and her son against the officers involved in the shooting in their individual capacities, asserting claims premised upon liability pursuant to 42 U.S.C. § 1983 for: (1) an unreasonable seizure by the individual officers, in violation of the Fourth and Fourteenth Amendments; and (2) a violation of the Substantive Due Process Clause of the Fourteenth Amendment.[1] The officers moved to dismiss on the basis of qualified immunity, which the district court granted for all officers save Officer Black. The district court denied Officer Black's motion to dismiss, finding that he was not entitled to qualified immunity because his actions, firing 24 shots compared to six or four, were unreasonable and "shocked the conscience."

[1] Cooper and her son also brought claims against Sheriff John Rutherford in his official capacity as Sheriff of Jacksonville. Those claims are not a part of this appeal.

II.

When a defendant raises the defense of qualified immunity in a motion to dismiss, this court "review[s] the denial of [the] motion . . . *de novo* and determine[s] whether the complaint alleges a clearly established constitutional violation, accepting the facts alleged in the complaint as true, drawing all reasonable inferences in [Appellees'] favor, and limiting our review to the four corners of the complaint." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (citation omitted).

III.

When faced with a question of qualified immunity, this court conducts a two-step analysis to determine whether Appellees carried their burden of "establishing both that [Black] committed a constitutional violation and that the law governing the circumstances was already clearly established at the time of the violation." *Youmans v. Gagnon*, 626 F.3d 557, 562 (11th Cir. 2010) (per curiam) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815-816 (2009)). We may consider "the two prongs of the qualified immunity analysis" in any order, at our discretion. *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818.

With regard to both the Fourth Amendment unreasonable seizure claim and the substantive due process claim, discussed *infra*, our analysis begins and ends with the clearly established prong. Assuming, without deciding, that Officer Black committed a

constitutional violation, Appellees have not provided this court with a preexisting case with facts that are "materially similar" to the events leading to their injuries and the alleged constitutional violations. *See Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1032-33 (11th Cir. 2001) (en banc). Therefore, Appellees have not carried their burden of showing that the alleged constitutional violations were clearly established under prevailing United States Supreme Court, Florida Supreme Court, or Eleventh Circuit law. *See Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) ("[O]nly Supreme Court cases, Eleventh Circuit caselaw, and [state] [s]upreme [c]ourt caselaw can 'clearly establish' law in this circuit.").

A.

Regarding the Fourth Amendment unreasonable seizure claim, Appellees point to two cases, *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400 (2007) and *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), that they believe clearly establish that the events on March 26, 2010, amount to a seizure for the purposes of the Fourth Amendment. However, the facts underpinning those cases are not materially similar to the case at bar and neither clearly establishes that a Fourth Amendment seizure occurred. In *Brendlin*, the Supreme Court merely held that when officers stop a car during a routine traffic stop, the driver and passengers alike are seized. 551 U.S. at 251, 127 S. Ct. at 2403. The Supreme Court never mentioned the use of deadly force, hostages, innocent

bystanders, or any other facts that are remotely similar to the case at bar. Therefore, even if the Supreme Court intended *Brendlin* to apply to the events that took place in this case, it could not have provided Officer Black with fair notice that a seizure was taking place and thus cannot be used to satisfy the requirement that the law be clearly established. *See Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011).

Meanwhile, this court in *Vaughan* certainly clearly established that if a passenger-suspect is shot by a bullet intended to stop his fleeing during a chase with police officers, then he is seized for purposes of Fourth Amendment analysis. 343 F.3d at 1329 (holding a seizure occurs when a passenger of a car "[is] hit by a bullet *that [is] meant to stop him*") (emphasis added)). However, this court just as clearly acknowledged the difference between the events in *Vaughan* and the exact situation in this case – when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect. *Vaughan*, 343 F.3d at 1328 n.4 (noting that the innocent bystander and hostage cases from other circuits were unhelpful in deciding *Vaughan* because the passenger shot during the chase was also a suspect that the police officers were trying to apprehend). Therefore, preexisting case law does not clearly establish that Appellees were seized when Officer Black's bullet accidentally struck them during the confrontation with the armed bank robber.

Nor is this a case involving an instance in which "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question[.]" *See United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997); *see also Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919 (11th Cir. 2000) ("When . . . 'the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw,' the official is not entitled to the defense of qualified immunity."). The existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations. Compare *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (no seizure), *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998) (no seizure), *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998) (no seizure), *Rucker v. Harford Cnty.*, 946 F.2d 278 (4th Cir. 1991) (no seizure), *and Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (no seizure), *with Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000) (seizure).

Moreover, even if we determine that it is clearly established that Appellees were seized for the purposes of the Fourth Amendment, we are unaware of any case that clearly establishes that Officer Black's actions were constitutionally unreasonable. The district court determined that the other officers who

fired their weapons acted reasonably because the use of deadly force against the fleeing armed bank robber was appropriate, *see Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005), and they only fired between four and six times. However, the district court also found that Officer Black was unreasonable for firing 24 times. We agree that deadly force against the armed robber was appropriate, but we cannot find a single case in this circuit or from the Supreme Court that clearly establishes that a large number of shots fired makes a reasonable use of deadly force unreasonable. In fact, this court recently held that "[a] police officer is entitled to continue his use of force until a suspect thought to be fully armed is 'fully secured.'" *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 822-23 (11th Cir. 2010) (quoting *Crenshaw v. Lister*, 556 F.3d 1283, 1293 (11th Cir. 2009)).

Once the car started moving forward, Officer Black was faced with the choice of either allowing the suspect to escape with multiple hostages and perhaps leading police on a high speed chase through the busy streets of Jacksonville or ensuring that the suspect could not leave the Wendy's parking lot. We cannot say that it is clearly established he made the wrong choice and committed a constitutional violation. Because "preexisting law [did not] provide [Black] with fair notice that" firing 24 shots was unreasonable in these circumstances, he is entitled to qualified immunity as to Appellees' Fourth Amendment claim for unreasonable seizure. *See Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011).

B.

For the same reasons Officer Black is entitled to qualified immunity for Appellees' Fourth Amendment claims, he is also entitled to qualified immunity for the Fourteenth Amendment substantive due process claims. If Officer Black's actions did not constitute a seizure of Appellees, then the non-custodial nature of the interaction precludes liability unless Officer Black's actions were "arbitrary or conscience shocking." *White v. Lemacks*, 183 F.3d 1253, 1257 (11th Cir. 1999) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 1070 (1992)). Again, assuming without deciding that Officer Black violated Appellees' constitutional rights, we conclude that it was not clearly established that his actions violated the Substantive Due Process Clause of the Fourteenth Amendment. "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716 (1998) (quoting *Collins*, 503 U.S. at 129, 112 S. Ct. at 1070). When officers are forced to make immediate, hasty decisions, "even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates . . . [the Constitution] . . . [A] purpose to cause harm is needed . . . for due process liability in a pursuit case." *Id.* at 853-54, 118 S. Ct. at 1720. There is no case law from this circuit or the Supreme Court that clearly established that Officer Black's actions shock the conscience. Therefore, we conclude

that he is entitled to the defense of qualified immunity as to Appellees' substantive due process claims.

IV.

For the aforementioned reasons, we reverse the district court's order finding that Officer Black is not entitled to qualified immunity as to Appellees' Fourth and Fourteenth Amendment claims and remand this case with directions that Officer Black be granted qualified immunity and dismissed from this cause with prejudice.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JOANN COOPER, individually, and as next friend of D.C.,

Plaintiff,

v.

JOHN RUTHERFORD, in his official capacity as Sheriff of the Consolidated City of Jacksonville and Duval County, Florida, et al.,

Defendants. /

Case No. 3:10-cv-695-J-20TEM

ORDER

(Filed Sep. 29, 2011)

This cause is before this Court on Defendant Sheriff Rutherford's Motion to Dismiss Counts II and IV of Plaintiff's Complaint with Prejudice and Supporting Memorandum of Law (Dkt. 7), Defendants' Sheriff's Officers York, Lederman and Santoro's Dispositive Motion to Dismiss Plaintiff's Complaint with Prejudice (Dkt. 8). Defendants Sheriff's Officers Ryan Black and Darries Griffiths' Motion to Dismiss and Supporting Memorandum of Law (Dkt. 9), and Plaintiffs' Consolidated Response to Defendants' Motions to Dismiss Plaintiffs' Complaint (Dkt. 21).

Plaintiffs bring this action against the individual and official capacity defendants for the alleged wrongful injuries they sustained during a police shooting. The Complaint, filed on August 10, 2010, alleges four counts, all premised on 42 U.S.C. § 1983 liability. Count I asserts a claim against the individual officers for an unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Count II alleges an unreasonable seizure by Sheriff Rutherford and his agents and employees acting under color of state law. Count III alleges a substantive due process violation against the individual defendants. Whereas, Count IV asserts a substantive due process violation against the Sheriff for municipal liability.

I. FACTS

This Court's use of the word "facts" is solely for purposes of deciding the motion and are not necessarily the actual facts. *Kelly v. Curtis*, 21 F.3d 1544, 1546 (l1th Cir. 1994) (citation omitted). It is only the allegations in the complaint that are operative at this stage in the proceeding and they must be viewed in the light most favorable to Plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232 (1974) *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984); *Hawthorne v. MacAdjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998).

The Complaint alleges that on March 26, 2010, at least seventeen Jacksonville Sheriff's Office ("JSO")

officers responded to a bank robbery dispatch in Jacksonville, Florida. Dkt. 1, ¶12-13, The robbery occurred at a Wachovia Bank on Baymeadows Road. *Id.* ¶12. The suspect, who fled the scene on foot, was described as a "black male, wearing black clothing and armed with a gun." *Id.*

At least four officers observed the suspect as he moved through a Home Depot parking lot. *Id.* ¶ 18. Officer York arrived at the scene and followed the suspect through the parking lot into a nearby Wendy's restaurant drive-thru line. *Id*. ¶ 15. During this pursuit, Officer York observed a gun in the suspect's hand, and he reported this with his radio. *Id.* ¶ 20.

Once in the Wendy's restaurant parking lot, Officer York observed another officer approach and shout. "Gun, gun, the suspect is armed." *Id.* ¶ 23. As other JSO officers arrived, they surrounded the scene and several officers engaged in "traffic control." *Id.* ¶ 14, 61.

Plaintiffs Cooper and D.C. were in Cooper's vehicle at the Wendy's drive-thru window. *Id*. ¶25. The suspect attempted to force his way into Plaintiff's vehicle. *Id.* ¶25. Officer York observing this shouted, "Stop!", "Police, don't move!" and "I will shoot you!" *Id.* ¶26. Officer York was aware that Cooper was in the car because he could hear her screaming. *Id.* ¶29-30.

Both Officers Jones and Black observed the suspect attempt to force Cooper to the passenger seat. *Id.* ¶33-34. Both officers also saw a child in the backseat.

Id. Unbeknownst to the officers, Copper struggled with the suspect causing the gun to fall to the vehicle's floorboard. *Id.* ¶36. No officer was aware that the suspect had dropped his weapon, so Officer Black concluded an armed carjacking had occurred. *Id.* ¶37.

It was then that Officer York started, what turned out to be, a shooting spree. Officer York fired his shotgun twice towards the open car door. *Id.* ¶38. Officer Black, hearing the gunshot, concluded that the suspect had fired his weapon "because he did not see the suspect wince." *Id.* ¶41. Officer Black responded by firing into the vehicle. *Id.* ¶44. Officer Griffith, who had been dispatched to the scene, also fired into the vehicle. *Id.* ¶45. Officer York fired again. *Id.* ¶46.

During this time, Officer Lederman moved for cover and saw children in the vehicle. *Id.* ¶51. Officer Lederman yelled, "Stop firing, cease fire, stop firing there is a kid in the car!" *Id.* ¶52. Officers Santoro, York, and Griffith all heard an officer give an order to stop firing because of the presence of a child. *Id.* ¶53-55.

Despite the gunfire, Cooper's vehicle moved forward, in spite of two other vehicles in its path. *Id.* ¶57, 60, Officer Black reloaded his weapon and shot at the vehicle as it moved past him, *Id.* ¶56, 59, Officers Lederman, Santoro and Griffith also fired at the vehicle. *Id.* ¶64-66. Griffith and Black continued to fire until the suspect, who had attempted to exit the vehicle, fell to the ground. *Id.* ¶62, 66.

In total, forty-two shots were fired by the officers at Cooper's vehicle. Officer York fired his weapon four times; Officer Santoro fired his weapon four times; Officer Lederman fired his weapon four times; Officer Griffith fired his weapon six times; and Officer Black fired his weapon twenty-four times. *Id.* ¶67.

Not surprisingly, Cooper and her son, D.C., were struck by bullets fired by the individual officers. *Id.* ¶68. Cooper was shot in the foot and underwent repeated surgeries. *Id.* ¶69. D.C. sustained a serious injury to his upper torso, and was rushed to the hospital with life threatening injuries; which included a collapsed lung and multiple fractures. *Id.* ¶70.

This is not the first incident, according to the Complaint, of unwarranted JSO shootings of citizens. The Complaint alleges a widespread practice of unjustifiable police shootings in Jacksonville. *Id.* ¶71. These shootings includes [sic]: two in January 2007; seven in 2008; one in 2009; and one in 2010. *Id.* ¶71. In the 2007 shootings, the Complaint states that only six out of the twenty-nine officers involved were ordered to attend additional training, and none of the incidents were the subject of additional investigations. *Id.* at ¶74. The additional training, moreover, was nothing more than the officer meeting with a superior. *Id.*

II. STANDARD OF REVIEW

In deciding a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the district

court is required to construe the complaint broadly, *Levine v. World Financial Network National Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006), and the allegations in the complaint must be viewed in the light most favorable to the plaintiff. *Scheuer*, 416 U.S. at 237; *Hawthorne*, 140 F.3d at 1370. "A court's review on a motion to dismiss is "'limited to the four corners of the complaint.'" *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002)). "A court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims." *Id.*

However, as the Supreme Court ruled, "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). Although Rule 12(b)(6) allows a well-pleaded complaint [to] proceed even if it strikes a savvy judge that actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.; Watts v. Florida Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007).

The Supreme Court explained in *Twombly* that a complaint must contain "enough factual matter (taken as true) to suggest" the required element. 127 S.Ct. at 1965. The rule "does not impose a probability requirement at the pleading stage," but "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of the necessary element. *Id.* It is adequate if the complaint succeeds

in "identifying facts that are suggestive enough to render [the element] plausible." *Id.*

Therefore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quotations and citations omitted), "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. "[B]are assertions" which "amount to nothing more than a 'formulaic recitation of the elements' of a claim, should therefore be rejected as "conclusory and not entitled to be assumed true." *Id.* at 1951.

III. ANALYSIS

Three motions to dismiss have been filed, one by the Sheriff and two by individual Defendants. The arguments in the motions are similar and a determination on one of the motions will impact the others.

A. SHERIFF

The Sheriff alleges that the Complaint fails to assert a Constitutional violation in Counts II and IV, and, therefore, must be dismissed. As to Count II, the Sheriff contends that no Fourth Amendment violation

was alleged. The Sheriff maintains that "a bystander/ hostage suffers no violation of his or her constitutional rights when injured in the course of a police response to a rapidly developing crime in the absence of an intent by the police to harm the person who is injured." (Dkt. 7, pg. 6).

Plaintiff retorts, that under the events outlined in the Complaint, "Defendants were not firing at the suspect, rather they fired intending to stop Ms. Cooper's car and seize everyone inside." (Dkt. 21, pg. 2). Plaintiffs were, therefore, seized for Fourth Amendment purposes.

The Fourth Amendment addresses only "searches and seizures." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). A Fourth Amendment seizure is not created every time there is a "'governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.'" *Id.* at 844 (emphasis in original) (citing *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989)).

It is only intervention "'directed at a specific individual that furnishes the basis for a Fourth Amendment claim.'" *Troupe v. Sarasota County*, 419 F.3d 1160, 1167 (11th Cir. 2005) *cert. denied*, 547 U.S. 1112 (2006) (quoting *Landol-Rivera v. Cruz Cosme*,

906 F.2d 791, 796 (1st Cir.1990)). "Force regardless of the form directed to a driver of a vehicle – particularly one attempting to flee – does not give rise to a due process deprivation claim unless it was exercised with a purpose to cause harm unrelated to the legitimate object of arrest." *Id.* (internal quotations removed). Nevertheless, the Supreme Court has made clear that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

In *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000), the Sixth Circuit addressed a circumstance similar to the one facing this Court and concluded the Fourth Amendment was implicated. In *Fisher*, a police officer was forced, along with two others, to take evasive action to avoid being run-over by a vehicle. *Id.* at 315. In response, the officer fired his weapon at this vehicle and hit the passenger. *Id.*

In deciding the case, the Court reiterated that a "violation of the Fourth Amendment requires an intentional acquisition of physical control" and that "a seizure occurs even when an unintended person or thing is the object of the detention or taking, so long as the detention or taking itself is willful." *Id.* at 318. The car, in which the plaintiff was a passenger, was the "intended target" of the officer's "intentionally applied exertion of force, and by shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the Plaintiff." *Id.* at 318-19. The Court held "because

the [officer] 'seized' the Plaintiff by shooting at the car, the district court did not err in analyzing the [the officer's] actions under the Fourth Amendment." *Id.*

On a motion to dismiss this Court must view the allegations from the Complaint in the light most favorable to the Plaintiffs and must stay within the four corners of the Complaint. The Complaint alleges: "the suspect started to force his way into her car" Dkt. 1, ¶ 25; "Defendant York observed the suspect trying to get into Cooper's car at the drive through window . . . " *id.* at ¶ 29; "As the suspect tried to force his way into the car, Defendant York heard the driver screaming and heard the suspect state: 'I'm going to shoot you.'" *id.* at ¶ 30; "Defendant Black heard someone say: 'He's taking the car, he's taking the car.'" *id.* at ¶ 31; "Officer Jones saw the suspect attempt to force a woman over to the automobile's passenger seat . . . " *id.* at ¶ 33; "Ms. Cooper successfully struggled to take the gun away from the suspect and the gun fell to the floorboard of her car." *id.* at ¶ 36; "Defendant Black concluded the suspect was still armed and had carjacked a citizen." *id.* at ¶ 37; "Defendant York fired his shotgun twice toward the open car door." *id.* at ¶ 38; "Plaintiff Cooper could clearly see an officer aiming a gun at her car from her seat-belted position in the driver's seat of the car." *id.* at ¶ 43; "Ms. Cooper's car began moving forward." *id.* at ¶ 57; "The suspect attempted to exit the vehicle." *id.* at ¶ 62.

Taking these allegations as true, the officers fired into Plaintiff's vehicle with the intent of detaining

everyone inside, not simply the armed suspect. The officers were aware of the presence of Plaintiff and her child, yet fired their weapons into the entire vehicle, not simply at the suspect. The officers were intentionally firing to stop the vehicle and they actually shot Cooper and her minor child. The Plaintiff and her son were seized when the officers targeted their vehicle and when they were shot. Accordingly, Plaintiff has alleged a violation of her Fourth Amendment rights, *see Garner*, 471 U.S. at 7; *Fisher*, 234 F.3d at 315, and the Sheriff's motion will be denied as to this claim.

As to Count IV, the Sheriff contends that no Fourteenth Amendment violation has been alleged. An actionable claim could only be alleged if the Complaint asserted "that the officers involved purposefully intended to injure the Plaintiff and/or her son," according to the Sheriff. Dkt. 7, pg. 11. Plaintiffs retort that the inactions of the Sheriff "were the moving force behind the deprivation of Plaintiffs' constitutional rights. . . ." Dkt. 21, pg. 8.

"[G]overnment officials violate the substantive due process rights of a person not in custody only by conduct 'that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)); *Nix v. Franklin County Sch. Dist.*, 311 F.3d 1373, 1375 (11th Cir. 2002). It is "conduct intended to injure in some way unjustifiable by any government interest" that is "most likely to

rise to the conscience-shocking level," not merely negligently inflicted harm. *Lewis*, 523 U.S at 849. The Eleventh Circuit has characterized the standard in the following manner:

> a showing of mere negligence is insufficient to make out a constitutional due-process claim. . . . The Court has, however, pointed out that actions "intended to injure in some way unjustifiably by any government interest" are those "most likely to rise to the conscience-shocking level." Acts that fall between the poles of negligence and malign intent require courts to make "closer calls," in which the determination of what shocks the conscience is context-specific.

311 F.3d at 1375-76 (internal citations omitted).

The Complaint states a claim for a substantive due process violation. The Complaint alleges deliberate acts, not merely negligent ones, on behalf of the individual officers which placed Cooper's life and that of her minor son in jeopardy. These purposeful and deliberate actions shock this Court's conscience. What is particularly offensive is the excessive number of bullets – forty-two – that were fired at Cooper's vehicle. The Complaint reads like a military action report rather than an attempt by police officers to detain a fleeing bank robbery suspect in a populated area of Jacksonville. It is a minor miracle that only the suspect was killed. More troubling, the officers fired their weapons when most, if not all, were aware of the presence of a child in the backseat. Accordingly,

Plaintiff has alleged a Fourteenth Amendment violation, and the motion will be denied as to Count IV.

Finally, the Sheriff contends that the Complaint inadequately alleges that the City had a policy or custom that violated Plaintiffs' Constitutional rights. The Sheriff maintains the allegations are merely that his officers "have wrongly shot suspects a number of times since 2007, that the City of Jacksonville has a 'higher incidence of police shootings' than other cities in Florida, and that 'only' 6 of the 29 of the officers involved in these shootings over the years received any form of discipline." (Dkt. 7, pgs. 17-18).

Count IV alleges that the Sheriff, and his employees, "instituted customs, practices, and/or policies that violated fundamental fairness. . . ." (Dkt. 1, ¶ 87). It is, further, alleged that the Sheriff failed to "adequately discipline his officer [sic] for their actions and inactions," thereby ratifying those decisions. *Id.* And this ratification, ultimately, became a "custom, practice and/or policy." *Id.*

Alternatively, Plaintiffs maintain that the Sheriff "failed to adequately train his agents and employees with respect to use of deadly force in and around civilians and in situations involving vehicles. . . ." *Id.*[1] This failure, according to Plaintiffs, amounts to deliberate indifference to Plaintiffs' Constitutional

[1] This Court need not reproduce all of Plaintiff's allegations regarding the alleged unjustifiable shootings.

rights, and amounts to a "custom, practice and/or policy." *Id.* It was these customs, practices and policies that were the "moving force of the constitutional deprivations suffered by Plaintiffs." *Id.*

The "touchstone" of a § 1983 claim against a local authority "is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution. . . ." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). A local authority may also be sued for constitutional violations pursuant to a "custom" even when that "custom has not received formal approval through the body's official decision-making channels." *Id.* at 690-91.

In order to impose local government liability, a plaintiff "must prove that 'action pursuant to official municipal policy' caused their injury." *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011) (citing *Monell*, 436 U. S. at 691). This official policy can include the actual policy, the acts of the policymaking officials, and "practices so persistent and widespread as to practically have the force of law," *Id.* It is these actions for which the local government will be held responsible. *Id.* In "limited circumstances" a local government may be liable under § 1983 for its affirmative decision "not to train certain employees about their legal duty to avoid violating citizens' rights." *Id.* at 1359. However, a local authority's "culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Id.* To satisfy § 1983, in a failure to train context, this failure "must amount to deliberate indifference to the rights of

persons with whom the [untrained employees] come into contact. Only then can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* (internal citations and quotations omitted). The "stringent standard" of deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* When policymakers have "actual or constructive notice" that an omission in a training program causes employees to violate citizens' constitutional rights, "the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Id.* A "policy of inaction" can be the "functional equivalent of a decision by the city itself to violate the Constitution." *Id.*

The Complaint alleges that JSO officers unjustifiably shot citizens eleven times in four years. (Dkt. 1, ¶71). The Complaint also maintains: only 21% of the officers involved in those shootings were required to attend additional training; there were no further investigations of the incidents; and the additional training simply consisted of meeting with a superior officer. (Dkt. 1, ¶69). Despite the allegations of unjustified shootings, the Sheriff failed to provide adequate training to his officers regarding the use of deadly force around civilians. The Sheriff's decision, or lack thereof, not to conduct additional training is a policy of inaction that is the functional equivalent of a decision by the Sheriff to violate the Constitution. Accordingly, the Sheriff's motion will be denied as to this count.

B. INDIVIDUAL OFFICERS

Like the Sheriff, the individual officers assert the Complaint fails to allege constitutional rights. That argument is denied for the reasons discussed above.

The individual officers, additionally, argue they are entitled to qualified immunity. They maintain they were involved in a fluid, emergency situation that required to [sic] split-second decisions. With the benefit of twenty-twenty hindsight, it may seem they overreacted, but their decisions ultimately saved lives, and their actions were not contrary to existing law. They are, therefore, entitled to the protections of qualified immunity.

"The defense of qualified immunity may be raised and addressed on a motion to dismiss and will be granted if the complaint fails to allege the violation of a clearly established constitutional right." *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325, 1327 (11th Cir. 2003) (internal quotation omitted). The defense of qualified immunity "'ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Youmans v. Gagnon*, 626 F.3d 557, 562 (11th Cir. 2010) (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)).

In assessing the individual officers claims for qualified immunity, this Court should engage in a "two-step process: once a defendant raises the defense, the plaintiff bears the burden of establishing both that the defendant committed a constitutional violation and that the law governing the circumstances

was already clearly established at the time of the violation." *Youmans*, 626 F.3d at 562. Following *Pearson*, these elements can be considered at the discretion of the court. *Id.*

"'Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.'" *Id.* (citing *Lassiter v. Ala. A&M Univ., Bd. of Trs.*, 28 F.3d 1146, 1149 (11th Cir.1994) (en banc)). The salient question therefore is whether the state of the law at the time of the actions in question gave the individual officers fair warning that their alleged actions were unconstitutional. *Id.* "Qualified immunity protects government officials performing discretionary functions from liability if their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id* (quoting *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002)).

In this circuit, rights are "clearly established" by decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state in which the case arose, in this case Florida. *Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996). "A judicial precedent with materially identical facts is not essential for the law to be clearly established, but the preexisting law must make it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue." *Youmans*, 626 F.3d at 562. Essentially, the law must give the

individual defendants "'fair warning' that [their] conduct violated the Fourth Amendment." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011). This inquiry must be made "'in light of the specific context of the case, not as a broad general proposition.'" *Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

There may, however, be situations when "'[a] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Coffin*, 642 F.3d at 1014-15 (quoting *United States v. Lanier*, 50 U.S. 259, 271 (1997)). In such a circumstance, "cases with 'fundamentally similar' or 'materially similar' facts are not necessary for a finding that the law was clearly established, but preexisting law must provide the officers with fair notice that their conduct is unconstitutional." *Id.* at 1015 (citing *Hope*, 536 U.S. at 741).

Such a determination will not occur frequently. In order to find that general principles of law give clear guidance "to a specific set of facts, 'it must do so 'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *Id.* (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002)). Court must, therefore, be hesitant to employ "obvious clarity" cases because they cannot hold

public officials "'to a higher level of knowledge and understanding of the legal landscape than [that] displayed by judges whose everyday business is to decipher the meaning of judicial opinions.'" *Id.* (quoting *Denno v. Sch. Bd. of Volusia, County*, 218 F.3d 1267, 1274 (11th Cir. 2000)).

Turning now to the question of appropriate force, a Sheriff's officer is entitled to "qualified immunity for use of force during an arrest if an objectively reasonable officer in the same situation could have believed the use of force was not excessive." *Brown v. Huntsville*, 608 F.3d 724, 738 (11th Cir. 2010). The "[u]se of force must be judged on a case-by-case basis 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (internal quotation and citations omitted).

In *Brosseau*, 543 U.S. 194, 197-98 (2004), the Supreme Court explained, "where [an] officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 543 U.S. 194, 197-98 (internal quotations omitted).

According to the Eleventh Circuit, deadly force is "reasonable" under the Fourth Amendment:

> when an officer (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction

> of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible.

Id. at 1255 (quoting *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (11th Cir. 2003)) (internal quotations omitted).

The use of deadly force can be reasonable in a variety of circumstances. In *Brosseau*, an officer chased a suspect until the suspect jumped into a vehicle and locked the door. 543 U.S. at 196. When the suspect refused to exit the vehicle, the officer broke the driver's side window, unsuccessfully attempted to grab the keys, and struck the suspect on the side of the head with a gun. *Id.* Despite this, the suspect started the vehicle and it began to move. *Id.* The officer jumped away from the vehicle and shot the suspect in the back through the rear driver's side window. *Id.* The Court concluded the law was not clearly established that the officer's actions violated the Fourth Amendment. *Id.* at 201.

In *Robinson*, an officer attempted to arrest a suspect in a car that was stopped behind another vehicle at a traffic light. *Id.* The officer, who was on foot, was there to assist in the arrest of the suspect. *Id.* at 1254. The officer stood between the car containing the suspect and the vehicle in front of it and directed the suspect put up his hands. *Id.* Rather than comply, the suspect grinned at the officer and began to drive the vehicle toward him at a speed of one to two miles per hour. *Id.* While attempting to get

out of the way of the vehicle, the officer shot the suspect through the windshield. *Id.* The Court concluded the shooting was reasonable. *Id.* at 1256.

In *Troupe*, a SWAT team attempted to execute an arrest warrant on a suspect who was released on bond for attempted murder. 419 F.3d at 1163. When the officers arrived at the scene, the suspect and two other individuals locked themselves in a vehicle. *Id.* at 1164. The suspect refused to exit the vehicle and, in fact, started to drive the vehicle toward the officers around it. *Id.* As the vehicle passed an officer, the suspect was shot. *Id.* Despite the wound, the suspect was able to drive over 0.3 miles before the vehicle collided with a concrete wall. *Id.* at 1165. The suspect and the other front seat passenger were pronounced dead at the scene, and the backseat passenger sustained blunt force trauma injuries. *Id.* However, the suspect was the only one who was hit by a bullet. *Id.* at 1164 n. 2. Ultimately, the officers were held to be entitled to qualified immunity because they could have thought the suspect was "attempting to escape and could potentially endanger more lives. . . ." *Id.* at 1169.

The critical inquiry, here, is whether the individual officers' actions violated clearly established laws. Generally, the answer is no. The case law that establishes the use of deadly force in this case was not unreasonable to most of the officers who fired shots. The individual officers responded to a bank robbery dispatch where the suspect was armed – a fact confirmed at the scene. Once on the scene, the officers

observed this armed suspect attempt to carjack a vehicle with passengers inside. It was reasonable for the officers to believe that deadly force, within limits, was permitted to detain the armed suspect who was in the process of carjacking a vehicle with passengers that could lead to potential hostages or escape. Accordingly, this Court concludes the individual officers, except for Officer Black, are entitled to qualified immunity.

The sole exception is Officer Black. Black's actions, in comparison to the other officers, make clear he acted unreasonably. The Complaint alleges that before any weapons were fired Officer Black saw a child in the backseat of Cooper's vehicle. Despite this knowledge, Officer Black fired into the vehicle twenty-four times. The twenty-four bullets fired from Officer Black's weapon required Black to reloaded; something no other officer did. Ultimately, Officer Black fired his weapon four times more than Officer Griffith who fired the second most shots – six. While everyone except for Officer Black exhibited restraint in the amount of force used, Officer Black exhibited a blatant disregard for the life of Ms. Cooper and her son by continuing to fire so many times.

Accordingly, based on the allegations of the Complaint, Officer Black used deadly force unreasonably when he fired into Cooper's vehicle twenty-four times. Officer Black's conduct went far beyond what the controlling precedent in this circuit allows, and is [sic] should have been clear to him that his conduct was "obviously wrong, in the light of pre-existing

law." *Youmans*, 626 F.3d at 563. Unlike the other officers who showed some restraint, Officer Black knew of the presence of innocent bystanders in the vehicle, yet completely disregarded their safety. In fact, his actions greatly increased the serious threat of physical harm to Plaintiff and her child. It is this escalation of danger that separates Officer Black's actions from those in *Brosseau, Robinson* and *Troupe.* Accordingly, Officer Black will not be protected by qualified immunity at this stage of the proceedings.

Accordingly, it is hereby **ORDERED**:

1. Defendant Sheriff Rutherford's Motion to Dismiss Counts II and IV of Plaintiff's Complaint with Prejudice and Supporting Memorandum of Law (Dkt. 7) is **DENIED**;

2. Defendants' York, Lederman and Santoro's Dispositive Motion to Dismiss Plaintiff's Complaint with Prejudice (Dkt. 8) is **GRANTED**; and

3. Defendants Ryan Black and Darries Griffiths' Motion to Dismiss and Supporting Memorandum of Law (Dkt. 9) is **GRANTED in Part** as to Defendant Darries Griffith, but is **DENIED in Part** as to Defendant Ryan Black.

DONE AND ENTERED at Jacksonville, Florida, this 28th day of September, 2011.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14722-FF

JOANN COOPER,
individually and as next friend of D.C.,

Plaintiff-Appellee,

versus

JOHN RUTHERFORD,
in his official capacity as Sheriff of the Consolidated City of Jacksonville and Duval County, Florida, et al.,

Defendants,

RYAN BLACK,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed April 24, 2013)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA, Chief Judge, JORDAN and ALCARCON,* Circuit Judges.

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JOANN COOPER, individually and as next friend of D.C.,[1]

Plaintiff,

vs.

JOHN RUTHERFORD, in his official capacity as Sheriff of the Consolidated City of Jacksonville and Duval County, Florida; RYAN BLACK, individually; DARRIES GRIFFITH, individually; JESSIE YORK, individually; JASON LEDERMAN, individually; and RICHARD SANTORO, individually

Defendant(s).

Case No.: 3:10-cv-695-J-12TEM

COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed Aug. 10, 2010)

Plaintiffs bring this action seeking monetary damages, attorney's fees, and costs against the Defendants and allege as follows:

[1] Plaintiff is designated by a pseudonym to protect the privacy of the minor child pursuant to Fed.R.Civ.P. 5.2(a).

1. This is a civil action for monetary damages pursuant to 42 U.S.C. §§1983 and 1988 for damages, attorney's fees, and costs for the deprivation of Plaintiffs' rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

JURISDICTION AND VENUE

2. Plaintiffs invoke the jurisdiction of this Court pursuant to 42 U.S.C. §§1983 and 1988 and 28 U.S.C. §§1331 and 1343.

3. Venue in this district is proper pursuant to 28 U.S.C. §1391, in that the cause of action arose in this district.

PARTIES

4. Plaintiff, Joann Cooper, is an adult resident of Jacksonville, Duval County, Florida.

5. Plaintiff, D.C., is a minor and is the son of Joann Cooper and a resident of Jacksonville, Duval County, Florida.

6. Defendant, John Rutherford, in his official capacity as Sheriff of the Consolidated City of Jacksonville and Duval County, Florida, was, at all times relevant, responsible for the supervision, training, instruction, discipline, control, and conduct of police officers of the Jacksonville Sheriff's Office ("JSO"), and further makes policy for JSO with respect to the

use of force. At all times relevant, Defendant John Rutherford had the power, right and duty to train and control his officers, agents, and employees to conform with the Constitution of the United States and to ensure that all orders, rules, instructions and regulations promulgated for JSO were consistent with the Constitution of the United States. At all times relevant to this Complaint, Defendant Sheriff Rutherford, his agents, and employees acted under color of State law.

7. Defendant Ryan Black, was at all times relevant, a member of JSO. At all times relevant to this cause, Black acted in conformance with the policy of Defendant Sheriff Rutherford and acted under color of State law.

8. Defendant Darries Griffith, was at all times relevant, a member of JSO. At all times relevant to this cause, Griffith acted in conformance with the policy of Defendant Sheriff Rutherford and acted under color of State law.

9. Defendant Jessie York, was at all times relevant, a member of JSO. At all times relevant to this cause, York acted in conformance with the policy of Defendant Sheriff Rutherford and acted under color of State law.

10. Defendant Jason Lederman, was at all times relevant, a member of JSO. At all times relevant to this cause, Lederman acted in conformance with the policy of Defendant Sheriff Rutherford and acted under color of State law.

11. Defendant Richard Santoro, was at all times relevant, a member of JSO. At all times relevant to this cause, Santoro acted in conformance with the policy of Defendant Sheriff Rutherford and acted under color of State law.

FACTUAL ALLEGATIONS

12. On Friday, March 26th, 2010, at approximately 3:09 p.m., JSO dispatched its officers to respond to a report of a bank robbery at the Wachovia Bank at 8715 Baymeadows Road in Jacksonville, Florida, by a suspect described as a black male, wearing black clothing and armed with a gun.

13. Approximately sixteen officers, and one off-duty officer who was performing a secondary job in his police uniform, Defendant York, responded.

14. From 3:09 until 3:26 p.m., at least six more officers were dispatched to various areas surrounding the scene for "traffic control" purposes.

15. Defendant York arrived at the scene and followed the suspect on foot through an Office Depot parking lot to a Wendy's restaurant located at 8625 Baymeadows Road.

16. Officer Sciandra, also of JSO, from his motorcycle, saw the suspect in the Office Depot parking lot and transmitted a description over the police radio.

17. Officer Jones, also of JSO, saw the suspect in the Office Depot parking lot and transmitted over the police radio that he saw the suspect.

18. As the lone suspect moved through the Office Depot parking lot, he was witnessed by at least four officers, Defendant York, Officer Jones, Defendant Santoro, and Officer Sciandra.

19. Defendant York took a shooting stance and shouted to the suspect: "Police, don't move!" and "I will shoot you!"

20. The suspect ran and Defendant York saw a gun in the suspect's hand and reported this fact on his police radio.

21. Defendant Santoro drove his car into the Wendy's parking lot to "try and intercept the suspect" and then parked the car.

22. Defendant York followed the suspect to Wendy's.

23. Defendant York observed another officer running towards the location and shouted: "Gun, gun, the suspect is armed!"

24. Defendant Lederman arrived at the scene and parked behind another police car in the Wendy's parking lot.

25. Plaintiffs Joann Cooper and D.C, were in Ms. Cooper's automobile at the drive-through window at the Wendy's restaurant when the suspect started to force his way into her car.

26. Defendant York, who had been following the suspect, shouted: “Stop!”, “Police, don’t move!” and “I will shoot you!”

27. Defendant Black and Defendant Griffith heard about the robbery through the police dispatch and parked their patrol car near the Wendy’s.

28. As Defendant Black exited his vehicle, he saw an officer with his gun drawn, but not firing, and another officer pointing a shotgun toward the drive through lane.

29. Defendant York observed the suspect trying to get into Cooper’s car at the drive through window and yelled: “Stop!” and “Show me your hands!”

30. As the suspect tried to force his way into the car, Defendant York heard the driver screaming and heard the suspect state: “I’m going to shoot you.”

31. Defendant Black heard someone say: “He’s taking the car, he’s taking the car.”

32. Defendant Black asked Officer Jones, whom he was standing next to, “what car the suspect was taking since [he] did not have a visual yet.”

33. Officer Jones saw the suspect attempt to force a woman over to the automobile’s passenger seat and Officer Jones saw a child in the backseat.

34. Defendant Black was standing next to Officer Jones and saw what Defendant Jones saw.

35. Officer Jones observed people in the car in addition to the suspect and held his fire, but did not speak to Defendant Black.

36. Ms. Cooper successfully struggled to take the gun away from the suspect and the gun fell to the floorboard of her car.

37. Defendant Black concluded the suspect was still armed and had carjacked a citizen.

38. Defendant York fired his shotgun twice toward the open car door.

39. As Defendant Santoro exited his car, he heard gunshots.

40. As Defendant Lederman exited his vehicle, he heard shots fired, and heard an officer over the police radio say "shots fired."

41. Defendant Black heard a single gunshot and concluded the suspect had shot his weapon because he did not see the suspect wince.

42. Officer Jones, standing in a similar position to Defendant Black, realized that Defendant York had fired his weapon and that the suspect had not fired a weapon.

43. Plaintiff Cooper could clearly see an officer aiming a gun at her car from her seat-belted position in the driver's seat of the car.

44. Defendant Black fired into the car.

45. Defendant Griffith fired into the car.

46. Defendant York fired at the car.

47. Defendants Santoro and Lederman and Officers Sciandra and Dingler saw two officers firing into the car.

48. Despite his awareness of persons other than the suspect in the car, Officer Jones did not tell Defendant Black to stop firing into the vehicle.

49. Officers Dingler, Jones, Santoro, Sciandra, and Lederman did not fire their weapons.

50. Defendant York yelled "Don't shoot, there are hostages in the car!"

51. As Defendant Lederman moved for cover, he saw the children in the car through the window.

52. Defendant Lederman yelled, "Stop firing, cease fire, stop firing there is a kid in the car!"

53. Defendant Santoro heard an officer yell: "Stop firing, cease fire, stop firing there is a kid in the car!"

54. Defendant York heard an officer yell: "Stop firing, cease fire, stop firing there is a kid in the car!"

55. Defendant Griffith heard an officer yell: "Stop firing, cease fire, stop firing there is a kid in the car!" and stopped firing.

56. Defendant Black, having expended all rounds of ammunition in the magazine of his gun, reloaded his gun.

57. Ms. Cooper's car began moving forward.

58. Officer Dingler did not fire at the car because he could not see who was inside.

59. Defendant Black shot at the car while it was moving past him.

60. Two other vehicles were in front of Ms. Cooper's car as it started to move forward.

61. More than ten other JSO officers were located in the immediate vicinity of Ms. Cooper's car and several more nearby were engaged in traffic control.

62. The suspect attempted to exit the vehicle.

63. Defendants Santoro, Lederman, Black and Griffith saw the suspect's left hand was empty, but could not see the suspect's right hand, and did not see a gun in his possession because the gun was on the floorboard of the car.

64. Defendant Lederman fired four times at the vehicle.

65. Defendant Santoro fired four times at the vehicle.

66. Defendants Griffith and Black fired until the suspect fell.

67. In all, Defendant York fired four times, Defendant Santoro fired four times, Defendant Lederman fired four times, Defendant Griffith fired six times, and Defendant Black fired twenty-four times.

68. Plaintiff Joann Cooper and her son Plaintiff D.C. were struck by bullets fired from JSO firearms.

69. As a result of the police shooting described above, Joann Cooper was shot in the right foot and has had repeated surgery on her foot including the installation of a metal plate.

70. As a result of the police shooting described above, D.C. was shot in the arm and upper torso and was rushed to the hospital in critical condition with life threatening injuries including a collapsed lung and multiple fractures.

71. There exists a widespread practice of members of the Jacksonville Sheriff's Office shooting citizens under circumstances where such shootings were unjustified, for example:

a. On January 15, 2007, JSO fatally shot mentally ill Vietnam War veteran Harry Shuler. The then State Attorney stated of the events: "[i]t appear[ed], since he exited unarmed and was moving peacefully to the large number of police, he was surrendering . . . If police had taken no aggressive actions, it appears very clear the confrontation would have ended without anyone firing a weapon."

b. On January 27, 2007 undercover JSO officers posing as drug dealers shot and killed Issac

Singletary in front of his home as Mr. Singletary attempted to prevent drug dealing on his property. Mr. Singletary believed the officers to be drug dealers and it was not until after the officers shot Mr. Singletary, did the officers discover Mr. Singletary had a gun. The then State Attorney stated Mr. Singletary's death "could have been avoided." The JSO officers involved were not disciplined nor required to undergo additional training.

c. On February 21, 2008, despite not seeing a weapon, JSO shot Kenneth Bernard Marion, who was unarmed at the time he fled from an encounter with members of JSO. Shooting Marion was clearly unnecessary as other suspects were stopped without being shot.

d. On March 25, 2008, JSO fatally shot Sierra White, a mentally ill person, in an incident that caused the then State Attorney to state "many questions exist as to whether or not this severely mentally ill non-criminal had to die." The officers involved were responding to a mental health worker's request for help administering medicine, not to a crime scene.

e. On June 23, 2008, despite not seeing a weapon, JSO fatally shot Artavious Debose who had just crashed and flipped the vehicle in which he was traveling. Debose was unarmed at the time and had stopped fleeing from police when he was shot.

f. On July 29, 2008, despite not seeing a weapon, JSO fatally shot Brian T. Brock as he fled. Police did not find a gun at the scene.

g. On October 26, 2008, despite not seeing a weapon, JSO shot seventeen year old Dutch Stafford as he lay on the ground after the car in which he was traveling crashed into a culvert.

h. On October 27, 2008, despite not seeing a weapon, JSO shot nineteen year old Jerrick Hall, as he was entering a residence for which he had permission to enter at the time of the shooting, was unarmed, and had one arm paralyzed from a prior incident.

i. On October 28, 2008, despite not seeing a weapon, JSO shot sixteen year old Tyron Taylor as he was scaling a fence. Taylor did not have a gun nor did police find a gun at the scene. The JSO officer who shot Mr. Taylor was not disciplined nor required to undergo any additional training.

j. On June 15, 2009, JSO officers shot Kiko Battle nine times after tasering him. JSO initially approached Battle to give him a citation for walking in the middle of the street and did not observe Battle to have a weapon at the time of the shooting. The JSO officers involved were not disciplined nor required to undergo additional training.

k. On July 16, 2010, JSO officers fatally shot Michael Blakeney. The vehicle in which Blakeney was traveling was reported stolen approximately one

and a half hours prior to the shooting. After JSO chased the vehicle, the vehicle came to a stop. Thereafter, JSO officers fired multiple times into the stopped vehicle despite the fact that no shots were fired from the vehicle.

72. Furthermore, the Jacksonville Sheriff's Office has a higher incidence of police shootings than many cities of comparable size. For example, since 2007, Jacksonville has more than double the police shootings than Miami, Tampa and Orlando. *See* "Police Shootings Rise: Some are Asking Why So Many," by Matt Galnor, *Florida Times-Union*, published Sunday, April 6, 2008.

73. Specifically, from 2007 until April 2008 Jacksonville had 27 police shootings, while the other three cities combined had 23.

74. Also, of the 29 officers involved in the 2007 shootings, only six were ordered for additional training, and none of the cases were tagged for investigation. The training simply consisted of meeting with a superior officer.

COUNT I
UNREASONABLE SEIZURE
(Individual Defendants)

75. Paragraphs 1 through 74, above, are hereby adopted and incorporated by reference herein.

76. The conduct of Defendants Black, Griffith, York, Lederman, and Santoro in firing into a civilian

vehicle constituted an unreasonable seizure of JoAnn Cooper's and D.C.'s persons, which is actionable under 42 U.S.C. § 1983, as a violation of Fourth and Fourteenth Amendments to the Constitution of the United States.

77. The actions or inactions alleged above were undertaken with Defendants' willful, wanton, callous, and knowing disregard to the clearly established rights of JoAnn Cooper and D.C. to be free from unreasonable seizures.

78. As a direct and proximate cause of the Defendants' actions and inactions, JoAnn Cooper and D.C. suffered damages, including, but not limited to, loss of enjoyment of life, severe pain and suffering, physical injuries, monetary losses, severe emotional and psychological distress, and other damages.

WHEREFORE, Plaintiffs demand judgment against Defendants Black, Griffith, York, Lederman, and Santoro for:

(a) Actual and compensatory damages;

(b) Punitive damages;

(c) An award of attorney's fees and costs; and

(d) Any other relief that this Court deems just and proper.

COUNT II
UNREASONABLE SEIZURE
(Municipal Liability)

79. Paragraphs 1 through 74, above, are hereby adopted and incorporated by reference herein.

80. Defendant Sheriff Rutherford, his agents and employees, acting within their authority and under color of State law, instituted and followed customs, practices and policies which directly resulted in the unreasonable seizure of Joann Cooper's and D.C.'s persons, which is actionable under 42 U.S.C. § 1983, as a violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Additionally, by failing to adequately discipline his officers for their actions and inactions, Defendant has ratified his officers' decisions and their reasons for those decisions, thus constituting a policy, custom, or practice. Alternatively, the officers acting on the scene were the final policymakers for Defendant Sheriff Rutherford as their decisions were not immediately or effectively reviewable. Additionally, Defendant Sheriff Rutherford failed to adequately train his agents and employees with respect to the use of deadly force in and around civilians and in situations involving vehicles, despite a clear and obvious need for such training, reflecting a deliberate indifference to the constitutional rights of Plaintiffs JoAnn Cooper and D.C., thus constituting a policy, custom, or practice. Additionally, there exists a widespread practice by which members of JSO shoot citizens under circumstances where such shootings

were unjustified. The afore mentioned customs, practices and polices [sic] were the moving force of the constitutional deprivations suffered by Plaintiffs.

81. As a direct and proximate result of the Defendant Sheriff Rutherford's actions and inactions, Joann Cooper and D.C. suffered damages, including but not limited to, loss of enjoyment of life, severe pain and suffering, physical injuries, monetary losses, severe emotional and psychological distress, and other damages.

WHEREFORE, Plaintiffs demand judgment against Defendant Sheriff Rutherford in his official capacity for:

(a) Actual and compensatory damages;

(b) An award of attorney's fees and costs; and

(c) Any other relief that this Court deems just and proper.

COUNT III
DEPRIVATION OF LIBERTY
WITHOUT DUE PROCESS
(Substantive Due Process – Individuals)

82. Paragraphs 1 through 74, above, are hereby adopted and incorporated by reference herein.

83. The conduct of Defendants Black, Griffith, York, Lederman, and Santoro in firing into a civilian vehicle, either with knowledge or in willful ignorance

of the fact that persons other than the suspect were inside, was intended to cause harm unjustifiable by any government interest, shockingly offends a universal sense of justice and conscience, and deprived JoAnn Cooper and D.C. of their liberty without due process of law, which is actionable under 42 U.S.C. § 1983, as a violation of the Fourteenth Amendment to the Constitution of the United States.

84. The actions or inactions alleged above were undertaken with Defendants' willful, wanton, callous, and knowing disregard to the clearly established rights of JoAnn Cooper and D.C. not to be deprived of liberty without due process of law.

85. As a direct and proximate cause of the Defendants' actions and inactions, JoAnn Cooper and D.C. suffered damages, including, but not limited to, loss of enjoyment of life, severe pain and suffering, physical injuries, monetary losses, severe emotional and psychological distress, and other damages.

WHEREFORE, Plaintiffs demand judgment against Defendants Black, Griffith, York, Lederman, and Santoro for:

(a) Actual and compensatory damages;

(b) Punitive damages;

(c) An award of attorney's fees and costs; and

(d) Any other relief that this Court deems just and proper.

COUNT IV
DEPRIVATION OF LIBERTY
WITHOUT DUE PROCESS (Substantive Due Process – Municipal Liability)

86. Paragraphs 1 through 74, above, are hereby adopted and incorporated by reference herein.

87. Defendant Sheriff Rutherford, his agents and employees, acting within their authority and under color of State law, instituted customs, practices, and/or policies that violated fundamental fairness, shocking to the universal sense of justice and conscience, which directly resulted in serious bodily injury and in the deprivation of Joann Cooper and D.C.'s liberty without due process of law, which is actionable under 42 U.S.C. §1983, as a violation of the Fourteenth Amendment to the Constitution of the United States. Additionally, by failing to adequately discipline his officers for their actions and inactions, Defendant Sheriff Rutherford has ratified the officers' decisions and their reasons for those decisions, thus constituting a custom, practice and/or policy. Alternatively, the officers acting on the scene were the final policymakers for Defendant Sheriff Rutherford as their decisions were not immediately or effectively reviewable. Additionally, Defendant Sheriff Rutherford failed to adequately train his agents and employees with respect to use of deadly force in and around civilians and in situations involving vehicles, despite a clear and obvious need for such training, reflecting deliberate indifference to the constitutional rights of Plaintiffs JoAnn Cooper and D.C., thus constituting a

custom, practice and/or policy. Additionally, there exists a widespread practice by which members of JSO shoot citizens under circumstances where such shootings werer [sic] unjustified. The aforementioned customs, practices and policies were the moving force of the constitutional deprivations suffered by Plaintiffs.

88. As a direct and proximate result of the Defendant Sheriff Rutherford's actions and inactions, Joann Cooper and D.C. suffered damages, including but not limited to, loss of enjoyment of life, severe pain and suffering, physical injury, monetary losses, severe emotional and psychological distress, and other damages.

WHEREFORE, Plaintiffs demand judgement against Defendant Sheriff Rutherford for:

(a) Actual and compensable damages;

(b) An award of attorney's fees and costs; and

(c) Any other relief that this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury on all issues so triable.

Respectfully submitted,

/s/ Matthew R. Kachergus
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