

No. 17-3380

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**THERESA MASON-FUNK,
individually and in her capacity as the
Special Administrator of the Estate of
Michael L. Funk**

Plaintiff - Appellant,

v.

CITY OF NEENAH, ET AL,

Defendants - Appellees.

**Appeal From The United States District Court
For the Eastern District of Wisconsin
Case No. 16-C-978
The Honorable Judge William C. Griesbach, Presiding**

BRIEF OF THE DEFENDANTS-APPELLEES

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Appellate Court No.: 17-3380

Short Caption: Theresa Mason-Funk v. City of Neenah, et al.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

City of Neenah
Craig Hoffer
Robert Ross

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- I) Identify all its parent corporations, if any; and

None

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Date: 03/09/2018

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JURISDICTIONAL STATEMENT

Defendants-Appellees, City of Neenah, Craig Hoffer and Robert Ross (“Officers Hoffer and Ross”), acknowledge the accuracy of Plaintiff-Appellant’s, Theresa Mason-Funk’s (“Ms. Funk”) Jurisdictional Statement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do the undisputed material facts establish, as a matter of law, that an objectively reasonable police officer could have concluded there was probable cause to believe that when Michael Funk was first observed by Officers Hoffer and Ross in the alleyway, with gun drawn and apparently searching for targets, he likely was not a hostage, but rather a perpetrator, whether hostage-taker, accomplice or an “ambusher,” who had just attempted to kill Officers Hoffer and Ross, as well as their fellow officers?
2. Do the undisputed material facts establish, as a matter of law, that an objectively reasonable police officer could have concluded that an attempt to warn or issue commands to Mr. Funk in the three seconds they observed him with gun in hand, prior to his counterclockwise turn in their direction, was not “feasible,” i.e., that there was insufficient time for them to determine whether such a warning or command might increase the risk of harm to other officers and bystanders if Mr. Funk disregarded the warning/command and began shooting?
3. Do the undisputed material facts establish, as a matter of law, that an objectively reasonable police officer could have concluded there was probable cause to believe that Officers Hoffer and Ross, as well as other officers and bystanders, were at imminent risk of great bodily harm or death when Mr. Funk was turning counterclockwise in their direction, with gun in hand, even though Mr. Funk was approximately 90 degrees to their position when they opened fire?
4. Even if, *arguendo*, Officers Hoffer and Ross lacked probable cause in any of the above respects, are they entitled to qualified immunity from suit under 42 U.S.C. § 1983 as a

matter of law, meaning that Ms. Funk failed to establish that existing law clearly and unequivocally forbade the use of deadly force under the facts and circumstances in this case?

STATEMENT OF THE CASE

A. UNDISPUTED MATERIAL FACTS

1. Officers Hoffer and Ross were informed at various times before Mr. Funk's appearance in the alleyway that there was one hostage-taker, two or three hostages, that the hostage-taker had a "MAC-10 or MOC-10" gun, and, in various communications, the hostage-taker was wearing a plaid shirt, in others, a plaid jacket, and in others, a flannel shirt. In fact, it was later determined that the hostage-taker, Mr. Flatoff, was wearing a Carhartt-style jacket and stocking cap. (R. 31, Nos. 8, 9, 12, 14, 15; R. 44, Nos. 3, 17, 19, 20, 22)
2. No description of any hostages was provided to Officers Hoffer and Ross. (R. 31, No. 13)
3. Officers Hoffer and Ross were informed that all information concerning the hostage situation was coming from one of the hostages inside Eagle Nation Cycles. (R. 31, Nos. 12, 13, 25)
4. When the Hasty Team entered Eagle Nation, one of the members yelled, "Police!," and shortly before being shot at, someone yelled, "Get down, get down, get down on the ground right now," followed by "let me see your hands." (R. 31, No. 34; R. 44, No. 37)

5. Approximately 10 seconds after the first Hasty Team member entered the rear entrance to Eagle Nation, and approximately five seconds after Officer Hoffer entered, Flatoff began firing, striking Officer Hoffer in his helmet. (R. 31, No. 44)
6. When the Hasty Team entered the shop, motorcycles and other items were scattered in the rear shop areas. None of the officers could determine who was shooting at them, or how many shooters there were. (R. 31, No. 36; R. 44, Nos. 43, 44)
7. The first officers to enter the shop, O'Bre and Thompson, fell down a staircase upon entry. (R. 31, Nos. 35, 49)
8. After withdrawal, Officer Hoffer concluded that what they encountered was likely an ambush, rather than a hostage situation, based upon his perceiving that the purported hostages seemed to be spread-out behind positions of cover, did not behave as he would expect hostages to behave, and did not appear to respond immediately to police commands. These perceptions, and the large volume of gunfire, led Officer Hoffer to believe they likely encountered an ambush, and there was more than one shooter. (R. 31, Nos. 45, 46, 54, 56, 57, 58)
9. Upon withdrawing from Eagle Nation, some officers went near the Gord's Bar parking lot in the alley west of the shop's rear entrance, and others, including Officers Hoffer and Ross, went near Vicky's Beauty Salon at the east end of the alley. (R. 31, Nos. 55, 61, 62, 63)

10. Shortly after the officers disengaged from the shop, one of them yelled, “Anybody in the building...talk to me.” This was followed by gunfire from within the shop, directed at them. (R. 31, Nos. 52, 66)
11. Immediately before Mr. Funk appeared exiting the back door to Eagle Nation, captured on police dashboard cameras (squad 1 video), there was gunfire from inside Eagle Nation lasting approximately two seconds. (R. 31, 67)
12. The events following Mr. Funk’s exit from the rear door of Eagle Nation are captured on police squad cameras # 1 and # 8 (squad 1 and squad 8 video). Accordingly, these events are undisputed, even though the characterization of what is seen may differ. Officers Hoffer and Ross submit that the video, viewed in slow motion, captures the following: (a) At approximately 9:45:30, squad 1 video captures an individual coming out the back door of Eagle Nation; (b) At approximately 9:45:32, the video captures the individual lying face down near the left front side bumper of a pickup truck parked in the alley near the back door of the shop; (c) At approximately 9:45:33, the video captures the individual on his hands and knees, facing in an easterly direction; (d) At approximately 9:45:34, the video captures the individual on his feet, bent at the waist, crouching, facing easterly alongside the driver’s side of the pickup; (e) At approximately 9:45:35, the video captures the individual facing easterly with his right arm in the down position, removing a silver-colored handgun from a waistband holster. It is approximately at this time that Officer Hoffer and Ross first see the individual later known to be Mr.

Funk; (f) At approximately 9:45:36, the video captures the individual near the driver's side rear of the pickup, hunched over, facing in a southerly direction, scanning over the bed portion of the truck; (g) At approximately 9:45:37, the video captures the individual near the driver's side of the pickup, crouched, scanning in a southerly direction, with his handgun alongside his body; (h) At approximately 9:45:38, the video captures the individual scanning in a more southwesterly direction, with the handgun clearly visible at his right, beginning a counterclockwise turn west to east, moving closer to Officers Hoffer and Ross in doing so;¹ (i) At approximately 9:45:39, the video captures Officer Ross raising his rifle; (j) In the next second, at approximately 9:45:40, when Mr. Funk was approximately 90 degrees to Officer Hoffer, and beginning to step in a southerly direction, Officer Hoffer fires his weapon, followed by Officer Ross firing his weapon, with the camera capturing Mr. Funk buckling at the knees. Officer Hoffer and Ross both fired in this 9:45:39-9:45:40 time frame, hitting Mr. Funk.² (R. 24, No. 67)

13. Officer Hoffer described these critical seconds as follows:

“When I came around the corner there was a male subject - - actually, I shouldn't even say a male subject at that time. I would just say a subject with his back towards me, along the side of a pickup truck that was parked near the rear door. He was about halfway down the side of the pickup truck backing up towards me. And he was making a strange, strange movement where, to me, it appeared like he

¹ Ms. Funk states Mr. Funk looked “partly” to the west before beginning his counterclockwise turn. (Br. pp. 16, 39, 43).

² Ms. Funk states Mr. Funk looked momentarily in the direction of Officers Hoffer and Ross during his counterclockwise turn. (Br. pp. 16, 40, 43, 54).

was - - his head was moving back and forth and it appeared to me like he was scanning for targets to shoot at.

...

He would be facing - - the directions there are strange. I would say - - I would call it south down the alley, but I believe it's more of a southwesterly direction. Because the alley runs north and - - runs kind of - - southwest and northeast. So he's looking southwest down the alley

...

He's looking forward and scanning kind of that whole area in front of him, so back and forth right and left, towards the area where Gord's is at where our other officers had gone to is the direction that he's kind of scanning in, in my mind.

I believed at that time that he was scanning, like I said, for targets. And he would have been scanning in the direction of where I knew my fellow officers were located near Gord's, down in that area. Because if he's out away from the building, I thought he may have a view of where those officers had gone and staged at after we had left the rear door areas of the - - of Eagle Nation.

So he's backing up in that direction. I'm sorry. He's backing up towards us scanning that direction. The next thing I saw when he got to the rear of the vehicle was, clear as day, a silver handgun comes out to his right-hand side in his right hand - -

...

When I saw it [the gun], it had come from in front of him down to his side. And then he began to spin in a counterclockwise fashion towards my location. And at that time the gun came up in front of him as he was turning. And at that point I believed that he was the subject that had shot at us from inside the building. He had a firearm in his hand. I had isolation with no one directly behind him, and he was by himself in the alley. It's a weapon in his hand. So he had weapon, intent and delivery system, in my mind. And as he was spinning towards me, I know action beats reaction. And if I let him get all the way around and start shooting before I shoot, I'm putting all - - the lives of myself and all the other officers around me in danger. So I chose to start to fire at him while he was about 90 degrees to me.

...

He was running - - he had spun and started to make movements in our direction. I mean it's a narrow alleyway, so there really is only two places he can go, and that would be straight up the alley our direction or straight up the alley the other direction. Because, as I recall from that alleyway, there's fences all along there

and he doesn't have the ability to run that direction. So it would be, you know, east."

(A. 46-48; R. 34, Schoenfeld Exh. 1, pp. 57-63, 65-66)

14. Officer Ross described the events as follows:

"Right at the back quarter panel is the first time I saw him as he was moving backwards towards us facing away.

...

The individual was crouched over in what I would describe as a shooting position, kind of based off my training and experience.

...

So my impression of the individual is that they were kind of in a shooting position. They were faced back looking in the direction where the rest of my teammates on the Hasty Team had gone to [around Gord's].

From there he moved - - he's looking at that direction all the way from the quarter panel all the way to behind the truck. He was kind of doing a weird shuffling movement at that point. Turned, the handgun was visible in his right hand - -

...

From there the individual started to move, it would have been counterclockwise, back in our direction.

...

Basically from the moment I saw the handgun, I came up closer on target. My weapon was up. I came a little further up and started to watch through my reticles as well.

...

So I was watching through the scope with the reticle. I'm on the individual as he started to spin towards me. My impression was that this individual had - - was the same individual who fired at us from the inside based off the weapon.

...

But my impression is somebody coming out of a hostage situation with a weapon would be somebody who was involved in shooting....

...

He was spinning or kind of moving kind of in a counterclockwise motion to his left.

...

He was moving backwards in - - he started to spin moving left - - from my right to left moving left across - - across the alleyway and

then backwards towards us as the individual turned.

...

So basically you observe what's in front of you, orient yourself to what's in front of you, you make a decision, and you act. So in terms of orienting myself towards that individual, making a decision and acting upon it, it all happened in a split second. At that point I heard one - - I heard a gunshot go off and believed it to be the individual that was turning towards us with the gun in hand shooting at us.

...

I believed it to be coming from the individual. I've learned since that it was actually Officer Hoffer's first shot."

(R. 34, Schoenfeld Exh. 2, pp. 38-43)

15. Officer Ross testified he believed it was not feasible to issue any warning/command to Mr. Funk:

"I would say that [whether to give a warning] would be time dependent and then the totality of the circumstances. So, in this instance, for one, where warnings had been given on multiple occasions, and each time a warning had been given it was returned with gunfire, I'd say that giving a warning at that time would certainly put the officers at higher risk of being shot at again. But in this situation, I think time is really the biggest portion.

...

I believe that time was more a factor in terms of the reason we didn't give a warning."

(Id., pp. 28-29)

B. DISTRICT COURT OPINION

1. Excessive Force

The district court determined that under the particular facts and circumstances in this case, "a reasonable police officer could justifiably conclude that deadly force was warranted." (A. 9; R. 52, p. 8) The court's decision was based upon its finding that, like Officers Hoffer and Ross, a reasonable police officer could mistakenly conclude that Mr.

Funk was a perpetrator, who had tried to kill them just minutes before they saw him in the alley with his gun drawn. The court emphasized that it was Mr. Funk's drawn weapon that made the officers' mistaken belief objectively reasonable, whether they believed that there was no hostage situation, and Mr. Funk was an "ambusher," or, alternatively, whether they believed that if there were hostages, Mr. Funk was either the hostage-taker, or an accomplice acting in concert with the hostage-taker:

"Unfortunately, as we now know, the person who exited the shop minutes after Flatoff fired on police was not Flatoff or someone acting in concert with him. It was Funk, one of Flatoff's hostages. Officers Hoffer and Ross made a mistake, a tragic mistake, but it does not follow that they violated Funk's Fourth Amendment rights....

Here, of course, Funk was armed, which unfortunately led the officers to conclude that he must have been the person, or one of the persons, who had just attempted to kill them and may have since killed his hostages....

Only three to four minutes earlier, police had been met with a barrage of gunfire as they attempted to rescue the hostages that Flatoff had threatened to begin killing within minutes. Officer Hoffer had been struck in his helmet by a bullet. Officers Hoffer and Ross retreated behind the east wall of Vicky's Beauty Salon and only returned to the alley when they heard more shooting. By the time they arrived at the corner and saw him, Funk was already outside with his gun in hand and began turning counterclockwise in their direction as he moved across the alley. The last think they expected was that one of the hostages whose life Flatoff had been threatening for the last hour would be armed. In the split-second of time they had to make a decision before Funk was either out of their view or completely turned toward them, Officers Hoffer and Ross fired. Their mistake was tragic, but it was not unreasonable.

...

Finally, and more importantly, regardless of what Officer Hoffer may have thought about the hostages at the time he entered the shop, it was Funk's possession of a gun upon exiting the shop so soon after Hoffer and the other officers had been fired on that led Hoffer and Ross to conclude that Funk could not have been a hostage and was a threat to the safety of the officers."

(A. 9, 11-12; R. 52, pp. 8, 10-11)

After determining it was objectively reasonable for Officers Hoffer and Ross to conclude there was probable cause to believe Mr. Funk was a perpetrator rather than a hostage when they first observed him, i.e., that Mr. Funk was the hostage-taker, his accomplice, or an “ambusher,” the court then determined it was objectively reasonable for Officers Hoffer and Ross to conclude Mr. Funk posed an imminent threat of death or serious bodily injury to themselves and others when they fired during his counterclockwise turn in their direction:

“Having arrived at the tragically mistaken but reasonable conclusion that Funk was Flatoff or someone acting in concert with him, however, the officers needed to act quickly to prevent him from escaping or causing serious injury or death to others. In their view, he had already made clear that he was willing to use deadly force against police only minutes earlier when he fired on them repeatedly as they attempted to rescue the hostages that were being held in the shop.

...

Having returned to the alley at the sound of more shots being fired, and seeing the perpetrator turning in their direction or attempting to flee between the buildings across the alley from the shop, a reasonable police officer could justifiably conclude that deadly force was warranted.

...

Officers Hoffer and Ross obviously thought the fact that Funk had just come out of the shop where minutes earlier police had been met with a barrage of gunfire, and was turning in a counterclockwise motion in their direction with a gun in hand was ‘reliable evidence’ that he posed an imminent and deadly threat.

...

...In hindsight, we now know that Officers Hoffer and Ross were mistaken and that Funk was not the gunman who had shot at police. But as the courts have repeatedly emphasized, and as fairness demands, excessive force claims are not judged with the benefit of hindsight. Law enforcement officers are expected to act reasonably, not infallibly. Based on their mistaken but reasonable understanding

of the circumstances they were facing, I conclude that the force used by Officers Hoffer and Ross was reasonable within the meaning of the Fourth Amendment.”

(A. 8-9, 12-13, 15; R. 52, pp. 7-8, 11-12, 14)

Finally, with respect to Ms. Funk’s claim that Officers Hoffer and Ross should have shouted some warning or command in the three seconds preceding Mr. Funk’s counterclockwise move in their direction, the court found that a reasonable police officer could conclude that such a warning or command was not feasible under the circumstances:

“Officer Ross...thought any warning at the time was not feasible. In the view of Officers Hoffer and Ross, waiting longer would have put at risk their lives or the lives of others. Though they turned out to be wrong, in fact tragically wrong, their mistake was reasonable under the circumstances they confronted.”

(A. 14; R. 52, p. 13) ³

2. Qualified Immunity

Although the district court held, as a matter of law, that Officers Hoffer and Ross did not violate Mr. Funk’s Fourth Amendment rights, the court proceeded to address the issue of qualified immunity.⁴ The court first set forth the proof plaintiff must produce to overcome a qualified immunity defense:

“The doctrine shields government officials from civil liability

³ Notably, Ms. Funk presented no evidence that bystanders would not have been exposed to risk of death or severe bodily harm if Mr. Funk disregarded any warning/command and began firing. Indeed, Ms. Funk made no attempt to establish that Officers Hoffer and Ross had sufficient time to make this determination. *See infra*, pp. 29-31.

⁴ As the district court observed, this Court has held that once a public official raises the defense of qualified immunity, plaintiff bears the burden of proof to establish that the defense is inapplicable under the facts and circumstances in the case being litigated. (A. 15; R. 52, p. 15), citing Spiegel v. Cortese, 196 F.3d 712, 723(7th Cir. 1999). *See also*, Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996).

insofar as their conduct ‘does not violate clearly established statutory or constitutional rights which a reasonable person would have known’.... A right is clearly established when it is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’

...

...In order to overcome a defense of qualified immunity, the plaintiff’s allegations must describe a deprivation of a constitutional or statutory right and the right must be clearly established at the time of defendant’s conduct....Although a plaintiff is not required to present a case directly on point, ‘existing precedent must have placed the statutory or constitutional question beyond debate.’

...An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.”

(A. 15-17; R. 52, pp. 14-16)

The court then held Ms. Funk failed to satisfy her burden:

“With this guidance in mind, the court must determine whether a constitutional rule applies with such clarity such that it placed the officers in this case on notice that their conduct was unlawful....Although the cases relied upon by Plaintiff establish the contours of excessive force generally, none of the cases are factually similar to this case or define Funk’s Fourth Amendment right with the specificity required by the Supreme Court. Stated differently, no controlling case law exists involving sufficiently similar circumstances that would have put Officers Hoffer and Ross on notice that what they did violated a clearly established right.

...Plaintiff’s [cases] are insufficient to put the constitutional question in this case ‘beyond debate.’

...

...These cases [Plaintiff’s] do not squarely govern the factual circumstances present here.

...

...In short, the facts in this case are substantially different from those in Plaintiff’s collection of cases. Plaintiff’s cases are

‘inherently incapable of giving fair and clear warning’ to Officers Hoffer and Ross that they violated a clearly established right....For these reasons, Defendants are entitled to qualified immunity as to Plaintiff’s § 1983 claim for excessive force.”

(A. 19, 22, 24-25; R. 52, pp. 18, 21, 23-24)

SUMMARY OF ARGUMENT

A. EXCESSIVE FORCE

Ms. Funk’s claim that Officers Hoffer and Ross violated Mr. Funk’s Fourth Amendment rights raises three discrete issues: (1) Whether the officers had probable cause to believe Mr. Funk was a likely perpetrator, rather than a hostage, when they first observed him in the alley with gun in hand, apparently searching for targets; (2) If so, whether the officers had probable cause to believe that there was insufficient time (approximately three seconds) to determine whether issuing a warning or command might increase the risk of death or serious bodily harm to the officers on the scene, as well as bystanders, if the warning/command were disregarded, and Mr. Funk began shooting, as the officers reasonably believed he had done after prior commands; (3) If so, whether the officers had probable cause to believe Mr. Funk posed an imminent risk of death or serious bodily harm to themselves and others when he was moving counterclockwise in their direction with gun in hand, even though he was not directly facing the officers when deadly force was used.

Ms. Funk distorts the first issue, mischaracterizing it to be whether the officers had probable cause to believe there were no hostages - - that the scene was a planned ambush, and that all of the purported hostages, including Mr. Funk, were “ambushers.” According to Ms. Funk, whether the officers’ ambush conclusion was objectively reasonable is a jury

question, and the district court erred in holding otherwise. (Br. pp. 18-19, 24, 28-37).

But Ms. Funk has created a straw man. As the district court emphasized, the issue is whether a reasonable officer could have concluded that Mr. Funk was likely a perpetrator as opposed to a hostage, regardless of whether he was an “ambusher,” a “hostage-taker,” or an “accomplice,” when he appeared in the alley with gun in hand, apparently searching for targets. It is not the officers’ subjective belief at issue; rather it is whether, objectively, a reasonable police officer could conclude, under the unique facts and circumstances, that Mr. Funk was likely a perpetrator, as opposed to a hostage. The court correctly concluded that the answer is “yes;” a reasonable officer could conclude that Mr. Funk was likely a perpetrator, regardless of whether he was believed to be “the” hostage-taker, the hostage-taker’s accomplice, or an “ambusher.”

Furthermore, Ms. Funk makes no claim that giving a warning/command in the three seconds preceding Mr. Funk’s counterclockwise move in the officers’ direction, with gun in hand, would not have materially increased the risk of death or severe bodily harm to Officers Hoffer and Ross if the warning/command were disregarded, nor does she claim that the officers had sufficient time (three seconds) to ensure that the other officers, as well as bystanders, would not have been placed at greater risk if Mr. Funk disregarded the warning/command and began shooting. Instead, Ms. Funk claims that a warning/command must be given, i.e., it is “feasible,” unless a suspect previously opened fire upon the officers or others, or threatened others with a gun, and this did not occur here. (Br. pp. 20-21, 24, 40-42). But, of course, this begs the question. Here, as the district court correctly determined, Officers Hoffer and Ross reasonably believed Mr. Funk had shot at them after proper

commands. Thus, under the very authorities Ms. Funk relies upon, a warning/command was not “feasible” in the circumstances here. Because the officers reasonably believed Mr. Funk had attempted to kill them after proper warnings and commands, and because they did not have sufficient time to determine that others would not be placed at greater risk of death or serious bodily injury if Mr. Funk chose to disregard any warning/command, it was not “feasible” to provide such a warning/command, as that term has been defined by the courts.

Finally, Ms. Funk claims that an officer cannot reasonably conclude that a suspect poses an imminent threat of death or serious bodily injury unless the suspect is pointing a gun at the officers, which did not occur here, and that even if the law were otherwise, slow motion video shows that Mr. Funk had stopped his counterclockwise movement in the officers’ direction, and had begun to take a step south, perpendicular to the officers’ position, when they opened fire.(Br. pp. 19-20, 24, 37-40).⁵

Numerous courts, including this Court, have repeatedly held that an officer is not required to wait until a gun is pointed directly at him/her before using deadly force, especially where, as here, the officer reasonably believes the suspect has already shot at the officer or others after proper identification, warning and commands. With respect to Mr. Funk’s movements just prior to the officers’ use of deadly force, a perceived deadly threat is not viewed with the benefit of slow motion replay or hindsight. As the district court correctly determined, viewed in real time, Officers Hoffer and Ross reasonably believed Mr. Funk’s counterclockwise turn in their direction would bring him face-to-face with the

⁵ Ms. Funk characterizes this step in a southerly direction, viewed in slow motion, as a move “away” from Officers Hoffer and Ross. (Br. pp. 24, 40, 43). This is true only in the sense that “away” means he did not directly step in the officers’ direction, but perpendicular to them.

officers, with gun-in-hand, and made their decision to fire before this occurred - - when Mr. Funk was perpendicular to them. The fact that, when viewed in slow motion, Mr. Funk may have stopped his counterclockwise turn, and started to take a step in a southerly direction, is not material - - the issue is whether Officers Hoffer and Ross could reasonably perceive that Mr. Funk would continue his turn to bring him face-to-face with the officers.⁶ If so, it is well-established that the Officers did not have to wait for this to occur.⁷

B. QUALIFIED IMMUNITY

Ms. Funk effectively concedes Officers Hoffer and Ross are protected by qualified immunity - - expressly acknowledging in her brief that “a jury could conclude...that Officers Hoffer’s and Ross’s use of deadly force was objectively reasonable, [but] the jury would not be required to do so.” (Br. p. 42) That is, Ms. Funk acknowledges that the use of deadly force in this case was, at the very least, “reasonably debatable,” the litmus test for qualified immunity.

Even without her concession, Ms. Funk fails to identify any authority providing fair and clear warning to Officers Hoffer and Ross that deadly force in these or analogous circumstances is unequivocally forbidden - - that regardless of their subjective and good faith belief concerning Mr. Funk’s status as a perpetrator who had attempted to kill them, and that he posed an imminent threat of death or serious bodily harm to themselves and others when he began his counterclockwise turn, with gun in hand, the use of deadly force would

⁶ The fact that an umpire or referee ruling is overturned after slow-motion replay does not make the ruling objectively “unreasonable.”

⁷ The district court also concluded that deadly force is justified to prevent the escape of a suspect where the officer reasonably believes the suspect has attempted to murder others. (A. 8-9; R. 52, pp. 7-8) See also, Smith v. Freland, 854 F.2d 343 (6th Cir. 1992).

necessarily violate Mr. Funk's Fourth Amendment rights. The cases Ms. Funk relies upon are patently insufficient to put the constitutional issue "beyond any reasonable debate," i.e., that no reasonable officer could possibly conclude that deadly force was justified under the facts and circumstances confronting Officers Hoffer and Ross.

ARGUMENT

I. As A Matter Of Law, Officers Hoffer's And Ross's Use Of Deadly Force Was Objectively Reasonable.

A. Governing Law

A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness standard," that is, whether an objectively reasonable police officer, under all of the material facts and circumstances, would believe there is probable cause to effect a seizure:

"The test of reasonableness under the Fourth Amendment...requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight...The question is whether the totality of the circumstances justifies a particular sort of seizure.

...

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested..., nor by the mistaken execution of a valid search warrant on the wrong premises...With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers'...violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often faced with split second judgments - - in

circumstances that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”

Graham v. O'Connor, 490 U.S. 386, 395-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

See also, Plumhoff v. Rickard, 134 S. Ct. 2012, 2020, 188 L. Ed. 2d 1056 (2014); Tennessee v. Garner, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546-47, 198 L. Ed. 2d 52 (2017).

Most recently, in District of Columbia v. Wesby, 583 U.S. ___, 138 S. Ct. 577 (2018), the Supreme Court emphasized that the issue under the Fourth Amendment is probable cause - - a seizure is reasonable “if the officer has probable cause to believe that the suspect committed a crime in the officer’s presence.” (138 S. Ct. at 586.) The Court then identified the critical elements for making this probable cause determination:

“To determine whether an officer had probable cause...we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectionably reasonable police officer, amount to probable cause....Because probable cause deals with probabilities and depends on the totality of the circumstances, it is ‘a fluid concept’ that is not readily, or even usefully, reduced to a neat set of legal rules....It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity...Probable cause ‘is not a high bar.’

...

...The ‘totality of the circumstances’ requires courts to consider the whole picture....Our precedents recognize that the whole is often greater than the sum of its parts - especially when the parts are viewed in isolation....The totality-of-the-circumstances test precludes this sort of divide-and-conquer analysis.

...

...[P]robable cause does not require officers to rule out a

suspect's innocent explanation for suspicious facts....[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts....Thus, [courts] should ask whether a reasonable officer could conclude - considering all of the surrounding circumstances,....[whether] there was a substantial chance of criminal activity." (emphasis added)

See also, Hill v. California, 401 U.S. 797, 803-04, 91 St. Ct. 1106, 28 L. Ed. 2d 484 (1971)

(holding that when police have probable cause to arrest one party, and reasonably mistake a second party for the first, the arrest of the second party is valid).

With respect to the exercise of deadly force, the same principles govern:

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." (emphasis added)

Tennessee v. Garner, supra, 471 U.S. at 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1. *See also, Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 1777-78, 167 L. Ed. 2d 686 (2007) ("Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable . . . [W]e must consider the threat to the public that Scott was trying to eliminate It is clear from the videotape that respondent posed an actual and imminent threat to the lives of pedestrians and to officers."); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775, 191 L. Ed. 2d 856 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when,

judged with the benefit of hindsight, the officers may have made some mistakes.”).

Applying the above principles, courts in this circuit have held that what is critical “is the amount and quality of information known to the officer at the time he fired his weapon When an officer believes that a suspect’s actions place him, or those in the immediate vicinity, in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force. ...” Weinmann v. McClone, 787 F.3d 444, 449 (7th Cir. 2014). *See also*, Scott v. Edinburg, 346 F.3d 752, 756 (7th Cir. 2003) (“The fact-specific nature of whether an officer used excessive force depends on the totality of the circumstances surrounding the encounter... Where the officer has reasonable cause to believe the suspect poses a threat of serious physical harm, either to the officer or others, it is not unreasonable to prevent escape by using deadly force.... Consequently, when an officer believes that a suspect’s actions place him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force.”); Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988) (under the objective reasonableness standard, if it appears that an individual poses a serious threat of death or significant bodily harm, deadly force may be used if any misinterpretation of what appeared to be the case was reasonable under the particular facts and circumstances); Henning v. O’Leary, 477 F.3d 492, 495 (7th Cir. 2007) (“Deadly force...is reasonable where an officer has probable cause to believe the suspect poses a danger of serious bodily harm, such as when the officer believes the suspect has a weapon or has committed a violent crime.”); Sherrod v. Berry, 856 F.2d 802, 805-06, (7th Cir. 1988) (en banc) (the fact the suspect was unarmed was irrelevant to excessive force claim where officer reasonably believed he was

armed); Maravilla v. US, 867 F. Supp. 1363, 1370, 1375 (N.D. Ind. 1994), *aff'd* 60 F.3d 1230 (7th Cir. 1995) (“In determining the reasonableness of the officer’s conduct, the focus is on the very moment when the officer makes the ‘split-second judgment’ that leads to the use of deadly force. . . . [I]n a 1983 action based on a police shooting, a reasonable belief that danger exists may be formed by reliance on appearances [B]ecause reasonableness in excessive force cases is determined by reference to the situation as it appears to the officer at the very second that the officer decides to use force . . . any dispute over whether the agents had a wrong impression [of the plaintiff] is not material to the propriety of the agent’s response. . . .”).

B. As A Matter Of Law, Officers Hoffer And Ross Had Probable Cause To Believe The Armed Individual They Observed In The Alley Was Likely A Perpetrator - - Not A Hostage.

In her brief, Ms. Funk creates a straw man, falsely claiming the central issue in this case is whether Officers Hoffer and Ross had probable cause to believe Mr. Funk was an “ambusher,” rather than a hostage, when they first observed him in the alleyway with gun drawn, apparently searching for targets. (Br. pp. 18-19, 24, 28-37) According to Ms. Funk, this was the basis for the district court’s finding that Officers Hoffer and Ross reasonably concluded Mr. Funk was not a hostage, i.e., that it “was reasonable as a matter of law for Hoffer and Ross to believe Michael was an ambusher.” (*Id.*, at p. 32) The district court held no such thing. Even a cursory reading of the court’s opinion discloses it actually held Officers Hoffer and Ross had probable cause to believe Mr. Funk was a likely perpetrator, regardless of whether he was “the” hostage-taker, his accomplice, or an ambusher - - that it was reasonable for Officers Hoffer and Ross to conclude that these combined possibilities

were more likely than the possibility Mr. Funk was a hostage. The court's determination was based upon Mr. Funk's appearance in the alley with gun drawn, immediately after shots were fired in the shop, and scant minutes after the officers had been subjected to a fusillade of gunfire from within the shop:

“Finally, and more importantly, regardless of what Officer Hoffer may have thought about the hostages at the time he entered the shop, it was Funk's possession of a gun upon exiting the shop so soon after Hoffer and the other officers had been fired on that led Hoffer and Ross to conclude that Funk could not have been a hostage and was a threat to the safety of the officers.”

(A. 12; R. 52, p. 11; emphasis added).⁸

Notably, in the District Court proceedings, Ms. Funk simply ignored the significance of Mr. Funk's drawing his gun in the alleyway; now she claims there is an “innocent” explanation for this critical fact, which a reasonable police officer would have taken into account - - that Wisconsin is a “concealed-carry” state, so that “a jury could reasonably conclude that because Wisconsin recognizes such a right, and because both officers had been informed that there was one hostage-taker and multiple hostages..., a reasonable officer would not have assumed that a person exiting the shop and carrying a gun could only be a hostage-taker or an ambusher.” (Br. p. 31) (emphasis added).

Once again, Ms. Funk misstates the issue - - the issue is not whether a reasonable police officer could conclude that Mr. Funk could only be the hostage-taker, his accomplice,

⁸ Indeed, as the Court observed in Wesby, 138 S. Ct. 577, 584, n. 2, because probable cause is an objective standard, the officers' subjective belief underlying the taking a particular action is irrelevant if there was any objectively reasonable basis for taking that action. In other words, if there was probable cause to believe Mr. Funk was a likely perpetrator, as opposed to a hostage, that is sufficient for Fourth Amendment purposes, regardless of whether they believed him to be an “ambusher.” See also, Ashcroft v. al-Kidd, 563 U. S. 731, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011). (Fourth Amendment regulates conduct not thoughts.)

or an ambusher, i.e., a perpetrator. Rather, the issue is whether a reasonable police officer could conclude that there was a “a probability or substantial chance” that he was a perpetrator, rather than a hostage:

“[P]robable cause does not require officers to rule out a suspect’s innocent explanation for suspicious facts....The relevant inquiry is not whether particular conduct is ‘innocent or guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts...Thus, [the issue is] whether a reasonable officer could conclude - considering all of the surrounding circumstances, including the plausibility or the [innocent] explanation itself - that there was a substantial chance of criminal activity....A factor viewed in isolation is often more ‘readily susceptible to an innocent explanation’ than one viewed as a part of a totality.”

Wesby, 138 S. Ct. 577, 589.

Here, as the district court correctly determined, Officers Hoffer and Ross had probable cause to believe there was a “substantial chance,” indeed, a likelihood, Mr. Funk was a perpetrator rather than a hostage when he was first observed in the alleyway with drawn gun, apparently searching for targets. As Wesby holds, whether it was “possible” that Mr. Funk was a hostage carrying a concealed weapon, permissible under Wisconsin law, i.e., whether there was an “innocent” explanation for what Officers Hoffer and Ross perceived, is a red herring. Mr. Funk’s tragic shooting occurred because Officers Hoffer and Ross reasonably perceived him to be a likely perpetrator, who had just attempted to kill them, rather than a likely hostage, who possessed a gun throughout the entirety of the hostage scenario, and then drew that weapon after exiting the shop.

Ms. Funk next argues that Mr. Funk’s having drawn his gun in the alleyway, apparently searching for targets, could not provide a reasonable basis for Officers Hoffer and

Ross to conclude he was a likely perpetrator, as opposed to a hostage, because: (1) as her expert testified, Officers Hoffer and Ross failed to comply with standard police practices and procedures used in determining whether there was an ambush, as well as in distinguishing hostages from hostage-takers; and (2) Officers Hoffer and Ross were informed that there was a single hostage-taker, who possessed a MAC-10 or MOC-10 gun, and was dressed in a plaid or flannel shirt or jacket, whereas Mr. Funk possessed a hand-gun, and was wearing a black and yellow shirt. (Br. pp. 31-32, 35-37)

With respect to Ms. Funk's reliance on generalized "standard police practices and procedures," the district court first determined, correctly, that "the standards cited by Plaintiff provide little guidance in this particular situation....What is 'reliable evidence' that a person is a suspect? Most of the standards do not speak to the specific situation when the potential suspect is armed...." (A. 12; R. 52, p. 11) Indeed, neither the expert testimony proffered by Ms. Funk, nor the referenced standard police practices and procedures, comes close to addressing the specific fact situation confronting Officers Hoffer and Ross, or the split second decision they had to make in determining the threat posed by Mr. Funk.

Second, as the district court recognized, "Whether Officers Hoffer and Ross complied with general police standards is not the issue." (A. 13; R. 52, p. 12) The court observed that both this Court and the U.S. Supreme Court have held that such standards are irrelevant in Fourth Amendment cases where the issue of probable cause, and officer judgment, is involved in the use of deadly force:

"[I]n Thompson v. City of Chicago, the Seventh Circuit said that such [police] standards are irrelevant: 'What's more, this Court has consistently held that 42 U.S.C. § 1983 protects plaintiffs from

constitutional violations, not violations of state laws or, in this case, departmental regulations and practices...In other words, the violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established. 472 F.3d 444, 454 (7th Cir. 2016)...;’ see also Whren v. United States, 517 U.S. 806, 815, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (holding that internal police department rules are an unreliable guide to measuring the reasonableness of police conduct); Scott v. Edinburg, 346 F.3d 752, 760 (7th Cir. 2003) (holding that § 1983 ‘protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices’).”

(Id.); See also, Davis v. Sherer, 468 U.S. 183, 194-96, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

Ms. Funk attempts to distinguish Thompson, claiming it simply holds that police regulations and practices are inadmissible only to the extent they specify what use of force is “reasonable,” which is an ultimate issue of fact for the jury, and, here, Ms. Funk’s expert identified certain police practices and procedures, and opined whether Officers Hoffer’s and Ross’s conduct complied with those standards, not whether their conduct was “reasonable.” (Br. p. 37) Ms. Funk mischaracterizes the holding of Thompson; that case, as well as Scott, Whren, and Davis, holds that standard police practices, procedures, and rules are inadmissible where, as here, the constitutional issue is whether a reasonable police officer could have concluded there was probable cause to employ a particular level of force, or whether that level of force was excessive under all of the relevant facts and circumstances.

As the Court held in Thompson:

“What constitutes ‘reasonableness’ with regard to an officer’s actions in apprehending a suspect under the Fourth Amendment is ‘not capable of precise definition or mechanical application, but requires careful attention to the facts and circumstances of each particular

case, including the severity of the crime at issue, whether the suspect poses an imminent threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight...' The fact is that excessive force is 'not capable of precise definition' necessarily means that, while the CPD General Orders may give police administration a framework whereby commanders may evaluate officer conduct and job performance, it sheds no light on what may or may not be considered 'objectively reasonable' under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter..."

472 F.3d at 453-55, 457-58. *See also*, Scott v. Edinburg, 346 F.3d 752, 760 (7th Cir. 2003)

("However, 42 U.S.C. § 1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices.").

Additionally, Ms. Funk relies on two decisions from this Court, Abdullahi v. City of Madison, 423 F.3d 763, 772 (7th Cir. 2005), and Jiminez v. City of Chicago, 732 F.3d 710, 721-22 (7th Cir. 2013), as purportedly holding that standard police practices are admissible in cases involving the determination of probable cause. Ms. Funk mischaracterizes those cases. Jiminez is not an excessive force case; rather, the issue in that case was whether the City and a former police detective violated plaintiff's constitutional right to due process, and were guilty of malicious prosecution, when they allegedly suppressed evidence of plaintiff's innocence. The issue in Jiminez was whether standard police investigation practices are admissible insofar as they concern proper murder investigation practices and procedures. This Court held that the defendants waived the issue of admissibility, but even if they had not, the evidence was admissible vis-a-vis the issue of whether the defendant detective "deliberately failed to comply with his obligations under Brady v. Maryland and the Due Process Clause of the Fourteenth Amendment. That's why his [the expert's] testimony was

relevant....Expert testimony regarding relevant professional standards can give a jury a baseline to help evaluate whether a defendant's deviations from those standards were merely negligent or were so severe or persistent to support an inference of intentional or reckless conduct that violated a plaintiff's constitutional rights." Id., at 719-21.

Jiminez is inapposite - - it does not involve the issue of whether an officer had probable cause to believe an individual posed a deadly threat to the officer and others, such that the use of deadly force was justified to eliminate that threat. In making that determination, the subjective intent of Officers Hoffer and Ross is irrelevant; the issue is whether the officers' determination of probable cause was "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Graham v. O'Connor, supra, 490 U.S. at 394. *See also*, Wesby, supra, at 586; Ashcroft, supra, 131 S. Ct. at 2080.

The other case relied upon by Ms. Funk, Abdullahi, is also inapposite because, like Jiminez, it did not involve the issue of whether an officer had probable cause to believe an individual posed an imminent threat when deadly force was employed. Rather, the issue was whether an officer used excessive force once a suspect had already been arrested and was in custody; the suspect posed no threat at that time, and the defendant officer's judgment was not at issue. Because there was no issue involving the exercise of judgment, or probable cause, in taking a particular action, police restraint practices and procedures were admissible:

"In the present case the excessive force claim is narrowly defined - it concerns only defendant Brooks' conduct during the arrest, and specifically his kneeling on Mohamed's back/shoulder area after he was already lying prone with this hands behind him. Plaintiff does not contest the reasonableness of attempting to restrain Mohamed, or

of placing him on the ground in a prone position....No one contends that deadly force was justified once Mohamed was lying prone on the ground with his arms behind him...., and yet the record supports an inference that Brooks knelt on Mohamed with enough force to inflict lethal injuries....There remains a question of fact as to whether Brooks knelt at the location and in the restrained manner he claims.”

Id., at 768-70, 773.

Based upon these particular facts and circumstances, i.e., there being no probable cause issue, but simply an issue of whether a post-seizure act constituted an excessive, unreasonable use of force, this Court concluded that expert testimony was admissible. In contrast to the issues in this case, Abdullahi did not involve the objective determination whether deadly force was justified under the particular facts and circumstances confronting Officers Hoffer and Ross. Accordingly, the admissibility of the expert testimony concerning standard police practices and procedures is governed not by Jiminez or Abdullahi, but by Thompson, Scott, Whren, and Davis.

The other grounds advanced by Ms. Funk in her attempt to subvert the district court’s probable cause holding are equally unavailing. First, she points to the fact that Officers Hoffer and Ross were informed by dispatch that according to one of the hostages inside Eagle Nation, there was a single hostage-taker, that he had a MAC-10 or MOC-10 gun, and was dressed in either a plaid or flannel shirt or jacket, which did not match Mr. Funk’s shirt, or the gun he drew in the alley. (Br. pp. 30-32, 39, 43) ⁹

⁹ Ms. Funk disingenuously represents that the officers knew there was one hostage-taker, knew there was a single shooter, and knew he was wearing a plaid or flannel shirt. (Br. pp. 32-34, 42-43) It is undisputed that the officers did not “know” any of these things; the information had been relayed by dispatch, and was being provided by an individual in Eagle Nation, claiming to be a hostage. The fact is, not surprisingly, some of the information was inaccurate, i.e., the description of Flatoff’s clothing.

As an initial matter, even if Officers Hoffer and Ross could rely on information that there was a single hostage-taker and/or a single-shooter, they were not required to bet their lives, as well as the lives of their fellow officers and bystanders, on the accuracy of second-hand descriptions of the clothing worn by the purported hostage-taker, which not only varied between plaid and flannel, but was, in fact, inaccurate. Mr. Flatoff was wearing a Carhartt-style coat and stocking cap. (R. 31, Nos. 8, 9, 12, 14, 15; R. 44, Nos. 3, 17, 19, 20, 22). As Officer Hoffer testified, a layperson's description of a suspect is often unreliable:

“[W]hen it comes to descriptions given by witnesses, to some degree, we have to take them with a grain of salt. Because oftentimes witnesses' descriptions...that they give us are quite often not completely accurate. And, in fact, in this case that's very clear that the description that you keep going back to ended up being inaccurate. He was not wearing a flannel shirt when we go back and look at the videos and the photographs. The suspect in this case was not wearing what was described by the witness in this situation. So it affirms what my thought process was throughout this incident is, I'm looking for subjects that have things that can harm me or the hostages, which is weapons and not descriptions. I would say at the time I took the shots, my belief was if somebody came out of that business and had a weapon in their hand, they were a suspect, not a hostage.”

(A. 47; R. 34 Schoenfeld Exh. 1, pp. 61-62)¹⁰

Not only was it objectively reasonable for Officers Hoffer and Ross to question the accuracy of the alleged hostage-taker's clothing, but it was objectively reasonable for Officers Hoffer and Ross to consider the distinct possibility that the hostage-taker had an accomplice, which would have rendered the type of weapon described, as well as the

¹⁰ Also, even if the officers were required to accept as accurate the information indicating a single hostage-taker, and the information that he had a MAC-10 or MOC-10 gun, this would hardly rule out his possession of a handgun, like the one drawn by Mr. Funk.

description of clothing worn by “the hostage-taker,” of even less significance. An accomplice might possess any type of weapon, and might be dressed precisely as Mr. Funk was dressed. Additionally, there was a distinct possibility that this was an ambush, not a hostage situation, which, again, would render the description of the clothing purportedly worn by the hostage-taker, and the description of his weapon, of little or no value.

In sum, while Officers Hoffer and Ross incorrectly concluded Mr. Funk was a perpetrator, and not a hostage, that is not the issue. This issue is whether the Officers’ mistake was objectively reasonable under all of the facts and circumstances known and perceived by the Officers. As the district court held, “Officers Hoffer and Ross made a mistake, a tragic mistake, but it does not follow that they violated Funk’s Fourth Amendment rights.” (A.9; R. 52, p. 8) Although mistaken, the Officers had probable cause to believe Mr. Funk was a likely perpetrator, as opposed to a hostage, when he appeared in the alleyway with gun drawn, apparently searching for targets, immediately after an eruption of gunfire from Eagle Nation, and minutes after being exposed to a hail of gunfire from a person or persons inside Eagle Nation: “In this case, police were confronting a dangerous hostage crisis in which they had just been met with a barrage of gunfire only moments before Funk emerged from the same location with, by the time Officers Hoffer and Ross saw him, his gun at the ready.” (A. 15; R. 52, p. 14).¹¹

¹¹ Ms. Funk relies upon Craighead v. Lee, No. Civ. 02-943, 2004 WL 190290 (D. Minn, Jan. 27, 2004), aff’d 399 F.3d 954 (8th Cir. 2005), as supporting the proposition that Officers Hoffer and Ross could not reasonably conclude that Mr. Funk was a likely perpetrator when they fired at him. (Br. pp. 33-34) As an initial matter, it should be noted that this case was not provided to the district court in the summary judgment proceedings, and thus Ms. Funk waived reliance on that authority. In any event, the case is inapposite. There, an officer was informed that the suspect was a black male, saw two black males struggling for possession of a gun, and shot both parties. The court held that a reasonable police officer would have known that he was likely to hit both the

C. As A Matter Of Law, Officers Hoffer And Ross Had Probable Cause To Believe That A Warning Or Command To Mr. Funk Was Not Feasible In The Three Seconds Preceding His Counterclockwise Turn In Their Direction.

In cases involving the use of deadly force, the Supreme Court has repeatedly held that if there is probable cause to believe that a suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, or if he has threatened an officer with a weapon, “deadly force may be used if necessary to prevent escape, and, if, when feasible, some warning has been given.” Tennessee v. Garner, *supra*, 471 U.S. at 11-12 (1985); *see also*, White v. Pauly, 137 S. Ct. 548, 551 196 L. Ed. 2d 463 (2017); Scott v. Edinburg, 346 F.3d 752, 756 (7th Cir. 2003). Courts have held that a warning is “feasible” only if prior to an otherwise justifiable use of deadly force, the officer has time to issue a verbal warning or command without increasing the risk of harm the suspect poses to the officer or those in his/her immediate vicinity, including bystanders. A warning is not required when it might increase the likelihood an armed suspect would be able to target the officer or others nearby, especially where, as here, the officer reasonably believes the suspect has already intentionally fired on officers after proper warnings and commands. *See e.g.* Maravilla v. U.S., 867 F. Supp. 1363, 1370, 1378-79 (N.D. Ind 1994), *aff’d* 60 F.3d 1230

perpetrator and the victim if he shot, and that the use of deadly force was unjustified in any event because no one had threatened the officer, and the individual with the gun was not in a position to shoot the other when the officer discharged his gun. The court distinguished Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001) (relied upon by the district court in this case, A. 9-12, 14; R. 52, pp. 8-11, 13), emphasizing that in Milstead, as here, the officer had probable cause to believe the individual running toward him was the shooter, and thus, unlike Craighead, the officer did not know, nor should he have known, that using deadly force was likely to harm or kill an innocent.

Here, Officers Hoffer and Ross had reasonable cause to believe the only person they were shooting at was likely a perpetrator, not an innocent, who had just attempted to kill them in a hail of gunfire - - that the use of deadly force would not likely harm an innocent, but would prevent harm to innocents.

(7th Cir. 1995) (“‘Feasible’ means capable of being performed without prolonging or compounding the threat presented by the suspect. Given the fact the next second could have brought death to ... agents on the ground or second floor, warning [the suspect] before shooting him was not feasible so as to be constitutionally mandatory”); Liebenstein v. Crowe, 826 F. Supp. 1174, 1186-87 (E.D. Wis. 1992) (“Where it is unclear whether a warning would result in further violence and perhaps bloodshed, it is not apparent that a warning would have been feasible.”); *See also*, Ridgeway v. City of Woolwich Twp. Police Dept., 924 F. Supp. 653, 659-60 (D.N.J. 1996), (Warning not feasible if suspect knew of police presence, and if “officer reasonably believes, based on suspect’s prior conduct, that such a warning could provoke suspect to engage in violent and life-threatening behavior, or to increase his or her effort to flee ... In the split-second reality of a deadly police chase, that warning ... might permit the suspect to turn and fire a weapon ... putting at risk innocent police and civilians ... Ladd could have reasonably concluded that the issuance of a warning could cause [the suspect] to turn and use his weapon in a manner that would threaten the officer or others.”) Accordingly, where a reasonable police officer could conclude that a warning or command might increase the risk of harm to himself and/or others, a warning is not required.

Ms. Funk does not take issue with this well-established feasibility standard, but relies upon Halstead v. City of Scottsdale, 884 F. Supp. 2d 972, 998 (D. Ariz. 2012), for the proposition that “there is only a narrow class of cases where a warning is not feasible, such as where the suspect has opened fire, or pointed a gun at vulnerable targets, or where lives are in immediate danger and every second matters.” (Br. pp. 20-21, 24, 40-41) But that is

precisely the situation here - - Officers Hoffer and Ross reasonably believed that Mr. Funk had just attempted to kill them and their fellow officers after proper warnings and commands, and had threatened to kill the hostages. When they first viewed Mr. Funk in the alley with gun drawn, seeming to search for targets, Officers Hoffer and Ross reasonably believed that “lives were in immediate danger and every second mattered.” It is the reasonableness of the officers’ perceptions that determines the feasibility of a warning or command.

It is also significant that Ms. Funk does not take issue with Officer Ross’s feasibility assessment - - that there was insufficient time, approximately three seconds, to determine whether the officers at Gord’s, as well as bystanders, might be exposed to gunfire if Mr. Funk chose to disregard a warning or command and, instead, opened fire in an attempt to escape, as the officers reasonably believed Mr. Funk had done previously after appropriate warnings/commands.¹² Ms. Funk does not claim that Officers Hoffer and Ross had sufficient time to make that determination, nor does she claim that the lives of Officers Hoffer and Ross, of their fellow officers, and bystanders would not have been at increased risk if a warning/command were ignored by the person the officers saw in the alley with gun drawn.¹³

¹² Officer Ross testified as follows: “I would say that [whether a warning is feasible] would be time dependent and then the totality of the circumstances. So, in this instance, for one, where warnings had been given on multiple occasions, and each time a warning had been given it was returned with gunfire, I’d say that giving a warning at that time would certainly put the officers at higher risk of being shot at again. But in this situation, I think time is really the biggest portion ... I believe the time was a factor in terms of the reason we didn’t give a warning ... From the moment I saw the subject in the alleyway, to the moment when we engaged the subject, it was a matter of seconds....” (R. 43, Schoenfeld Exh. 2, pp. 28-29).

¹³ Ms. Funk does claim that in a “large majority of cases” a suspect will obey an order to drop his gun, so that a jury could conclude a warning/command in this case might not increase the risk of death or harm to the officers and bystanders. (Br. p. 42) But this would mean a warning is always feasible. Also, it ignores the fact that the officers reasonably believed Mr. Funk had already disobeyed warnings and commands and shot at them.

In short, Ms. Funk failed to establish a prima facie case for the proposition that a warning or command was feasible under the circumstances, as that term has been defined by the courts.

D. As A Matter Of Law, Officers Hoffer And Ross Had Probable Cause To Believe Mr. Funk Posed An Imminent Threat Of Death Or Serious Bodily Harm To Themselves And Others When He Began His Counterclockwise Turn In Their Direction.

It is undisputed that the issue of whether Officers Hoffer and Ross had probable cause to use deadly force when they fired at Mr. Funk is chronicled on video from squad # 1, and encompasses approximately three seconds, beginning when Mr. Funk drew his gun after exiting Eagle Nation. In those three seconds, it is undisputed that Mr. Funk did not point his gun at anyone, that he looked “momentarily” in the general direction of the officers near Gord’s, that as he was crouching behind the truck in the alley, his head was swiveling back and forth along the back side of Eagle Nation, and that approximately 1-2 seconds before being fired upon, Mr. Funk began a counterclockwise movement bringing Mr. Funk and his gun in the officers’ direction. It is also undisputed that as Mr. Funk turned counterclockwise toward the officers’ position, he briefly glanced toward Officers Hoffer and Ross, and that his turning movement brought him closer to their position. Finally, it is undisputed that at the time Officers Hoffer and Ross fired their weapons, Mr. Funk had turned approximately 180°, and was perpendicular, or 90°, from Officers Hoffer and Ross.

When the squad # 1 video is viewed in slow motion, it appears Mr. Funk stopped his counterclockwise rotation when he was facing south, and began to take a step in that direction before being shot. Although Mr. Funk’s weapon had moved in an upwards direction during his counterclockwise turn, the video, viewed in slow motion, shows it was

not pointed at Officers Hoffer and Ross when they opened fire. (Br. pp. 14-16, 24, 39-40, 43)¹⁴.

The issue is whether a reasonable police officer, having probable cause to believe Mr. Funk was a perpetrator who, minutes earlier, had attempted to kill the police officers on scene, after they had properly identified themselves, had probable cause to believe Mr. Funk posed an imminent threat of death or great bodily harm to themselves, other officers, and bystanders, when he was moving counterclockwise in their direction, with gun in hand.

As an initial matter, it must be emphasized that the officers did not view the critical three seconds in slow motion - - what is critical is what a reasonable officer would perceive was happening in real time. In real time, in the seconds that elapsed after Mr. Funk began his counterclockwise movement in the officers' direction, with gun in hand, and the officers' decision to use deadly force, it appeared to the officers that absent their taking such action, Mr. Funk likely would end up facing them with his weapon - - and, by that time, they would be unable to prevent his firing at them and others in their location, which would not only put themselves and the other officers at grave risk, but also bystanders in the street adjoining the alley. Given their reasonable belief that Mr. Funk had already attempted to kill them, Officers Hoffer and Ross did not need to wait until his gun was pointed at them, ready to fire.

As this Court recently made clear, officers are not required to wait until an armed suspect is facing them, and they are looking down the barrel of his gun before using deadly

¹⁴ Ms. Funk repeatedly and disingenuously claims Mr. Funk was moving "away" from Officers Hoffer and Ross when he was fired upon. (Br. pp. 24, 40, 43) This is true only in the sense that a slow motion review of Mr. Funk's turn discloses that as he stopped his turn he was beginning to take a step south, essentially perpendicular to the officers. Of course, Officers Hoffer and Ross were not viewing Mr. Funk's turn in slow motion.

force:

“A police officer’s use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment We evaluate the reasonableness of the officer’s action not through ‘the 20/20 vision of hindsight’ but from ‘the perspective of a reasonable police officer on the scene.’ If an officer is threatened with a weapon, it is reasonable for that officer to use deadly force....

Because Miller saw Conley-Eaglebear draw a gun and begin to point it in his direction, he acted reasonably under the circumstances. The undisputed facts show that Conley-Eaglebear, while running away from Miller, drew a gun from his waistband and looked back over his shoulder toward Miller Miller saw the gun’s barrel moving in his direction and shot Conley-Eaglebear twice. Miller did not need to wait for Conley-Eaglebear to face him or point the gun directly at him before acting to protect himself and the community.” (Citations omitted.)

Eric S. Conley-Eaglebear v. Miller, No. 16-3065, 2017 WL 7116973 (7th Cir. 2017).

Although it is now known that Mr. Funk was not a perpetrator, and that, in making his counterclockwise move, he may have intended to run south to escape from Flatoff, Officers Hoffer and Ross reasonably perceived he would be facing them with gun in hand in the split-second before they opened fire. Indeed, in real time, as opposed to slow motion, the officers did not perceive any curtailment of his turn in their direction. By the time Mr. Funk was 90° to the officers, still in the process of making his counterclockwise move, Officers Hoffer and Ross reasonably determined that the use of deadly force was necessary to save their own lives, as well as the lives and well-being of other officers and bystanders in their immediate vicinity.¹⁵ It is the reasonableness of the officers’ perception that they,

¹⁵ As Officer Hoffer testified: “...At the time the gun came up in front of him as he was turning...I believed that he was the subject that had shot at us from inside the building. He had a firearm in his hand....And if I let him get all the way around and start shooting before I shoot, I’m putting the lives of myself and the other officers around me in danger. So I chose to start to fire at him while he was about 90° to me.” (A. 46-48; R. 34, Schoenfeld Exh. 1, pp. 57-63, 65-66). Officer Ross also testified that, “My impression was that this individual was the same individual who fired at us from inside based off the weapon....My impression is somebody coming out of a hostage situation

and others, were threatened with death or serious bodily harm when they fired that matters in a constitutional sense, not whether, in hindsight, they were mistaken. *See e.g. Sheehan, supra*, 135 S. Ct. at 1775; *Hill, supra*, 401 U.S. at 803-04; *Maravilla, supra*, 867 F. Supp. at 1370, 1375, *aff'd* 60 F.3d 1230 (7th Cir. 1995); *Childers, supra*, 855 F.2d at 1275; *Sherrod, supra*, 856 F.2d at 805-06; *Milstead, supra*, 243 F.3d at 160-61, 163-65.

II. Officers Hoffer And Ross Are Entitled To Qualified Immunity Even If There Were A Fourth Amendment Violation.

A. Governing Law

In its recent discussion of qualified immunity, the Court in *Wesby* made it abundantly clear that officers enjoy qualified immunity from suit unless existing case law unequivocally informs them that under the same or analogous facts and circumstances, use of deadly force is categorically prohibited, i.e., the violation of the Plaintiff's Fourth Amendment rights is "beyond debate":

"Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time' 'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful In other words, existing law must have placed the unconstitutionality of the officer's conduct 'beyond debate' This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' ... which means it is dictated by 'controlling authority' or a robust 'consensus of cases' of persuasive authority.... It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule that

with a weapon would be somebody who was involved in shooting." (R. 34, Schoenfeld Exh. 2, pp. 38-43).

plaintiff seeks to apply....Otherwise, the rule is not one that ‘every reasonable official’ would know....

The ‘clearly established’ standard also requires that the legal principle clearly prohibit the officer’s conduct in the particular circumstances before him. The rule’s contours must be so well defined that it is ‘clear to a reasonable officer that his conduct was unlawful in the situation he confronted’This requires a high degree of specificity....We have repeatedly stressed that courts must not ‘define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced’A rule is too general if the unlawfulness of the officer’s conduct ‘does not follow immediately from the conclusion that the rule was firmly established....’

We have stressed that the ‘specificity’ of the rule is ‘especially important in the Fourth Amendment context’Probable cause ‘turns on the assessment of probabilities in particular factual contexts’ and cannot be ‘reduced to a neat set of legal rules.’ ... It is ‘incapable of precise definition or quantification into percentages.’Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in ‘the precise situation encountered’ Thus, we have stressed the need to ‘identify a case where an officer acting under similar circumstances...was held to have violated the Fourth Amendment’ While there does not have to be ‘a case directly on point,’ existing precedent must place the lawfulness of the particular arrest ‘beyond debate.’ ...”

Wesby at 589-590. *See also*, Plumhoff, *supra*, 134 S. Ct. at 2023; White v. Pauly, *supra*, 137 S. Ct. at 551-552 (2017) (“This is not a case where it was obvious there was a violation of clearly established law...The majority [of the Court of Appeals] did not conclude that White’s conduct - such as the failure to shout a warning - constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that this case presents a unique set of facts and circumstances... This alone should have been an important indication to the majority that White’s conduct did not violate a ‘clearly established right.’”); Mullenix v. Luna, 136 S. Ct. 305, 308-10, 193 L. Ed. 2d 255 (2015) (“We cannot say that only someone plainly incompetent or who knowingly violates the law would have perceived a sufficient threat and acted as [defendants] did.”); Sheehan, *supra*, 135 S. Ct. at 1774, 1777 (“This exacting

standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.”); Saffel v. Crews, 183 F.3d 655, 658 (7th Cir. 1999) (“A right is not clearly established if officers of reasonable competence could disagree on the issue....Qualified immunity is not forfeited unless no reasonable officer could have mistakenly believed that the conduct was unlawful.”); Upton v. Thompson, 930 F.3d 1209, 1211-12 (7th Cir. 1991) (“Immunity should be applied unless it has been authoritatively decided that certain conduct is forbidden....”).

B. Ms. Funk Has Effectively Conceded That Officers Hoffer And Ross Are Protected By Qualified Immunity Even If, Arguendo, They Violated Mr. Funk’s Fourth Amendment Rights.

In her brief, Ms. Funk summarizes her Fourth Amendment argument as follows:

“In sum, although a jury could conclude after weighing the evidence (as did the District Court) that officers Hoffer’s and Ross’s use of deadly force was objectively reasonable, the jury would not be required to do so.

....

Based on this [plaintiff’s] view of the evidence, a jury could find that a reasonable officer would not have concluded Michael was an ambusher or an imminent threat, would have given a warning, and would not have used deadly force against Michael....It is for the jury... to determine which view of the evidence is correct and whether Officer Hoffer’s and Ross’s use of deadly force was constitutionally excessive.”

(Br. pp. 42-44) (emphasis in original).

Ms. Funk’s concession that “a jury could conclude....that Officer Hoffer’s and Ross’s use of deadly force was objectively reasonable,” necessarily means that the issue of whether there was a violation of Mr. Funk’s Fourth Amendment rights is, at the very least, “reasonably debatable,” the litmus test for qualified immunity. Where a Fourth Amendment violation is “reasonably debatable” the officer is protected by qualified immunity.

Wholly apart from Ms. Funk's concession that the Officers' alleged Fourth Amendment violation was "reasonably debatable," the district court correctly characterized her authorities purportedly undermining Officer Hoffer's and Ross's qualified immunity:

"Plaintiff relies on a collection of cases to demonstrate that the officers violated Funk's clearly established Fourth Amendment rights to be free from excessive force. Although the cases relied upon by plaintiff establish the contours of excessive force generally, none of these cases are factually similar to this case or define Funk's Fourth Amendment right with the specificity required by the Supreme Court. Stated differently, no controlling case law exists involving sufficiently similar circumstances that would have put Officers Hoffer and Ross on notice that what they did violated a clearly established right."

(A. 19, R. 52, p. 18)

The district court discussed Ms. Funk's cases in detail (A. 19-25, R. 52, pp. 18-24), and Officers Hoffer and Ross submit no further elaboration is necessary. However, in her brief in this Court, Ms. Funk relies upon additional cases that were not brought to the attention of the district court in resolving the officers' motion for summary judgment, i.e., Idaho v. Horiuchi, 253 F.3d 359, 373 (9th Cir. 2001), vacated as moot 266 F.3d 979 (9th Cir. 2001), and Craighead v. Lee, No. Cir. 02-943, 2004 WL 190290 (D. Minn. Jan. 27, 2004), aff'd 399 F.3d 954 (8th Cir. 2005). (Br. pp. 47-50) Not only did Ms. Funk waive any right to rely on these cases to support her qualified immunity argument, they are inapposite. In Horiuchi, much like the other case relied upon, Craighead, which was addressed earlier, *see* p. 28, n.11, supra, an officer shot in the direction of two individuals, one of whom the officers knew posed no threat. The court held that qualified immunity did not apply because the officer knew that there was a 50/50 chance his bullets would strike someone other than the perpetrator. The officer had no probable cause to believe that the innocent individual he

shot was a perpetrator, and that fact was not subject to reasonable debate. The courts in Horiuchi and Craighead held that in such a case, a warning or command must be given, so that a person known to be an innocent is not inadvertently killed or injured.

The facts in Horiuchi and Craighead are wholly unlike those here. As previously established, Officers Hoffer and Ross did not know or believe that the use of deadly force was likely to injure or kill an innocent. None of the authorities relied upon by Ms. Funk put Officers Hoffer and Ross on notice that the use of lethal force was forbidden in circumstances remotely similar to those they faced.¹⁶ As Ms. Funk has conceded, and as the district court found, at the very least, the propriety of using deadly force in the particular circumstances posed in this case was “reasonably debatable.” Stated differently, no controlling case law exists involving sufficiently similar circumstances, that would have put Officers Hoffer and Ross on notice that the use of deadly force in the unique circumstances present in this case was flatly and unequivocally prohibited. Officers Hoffer and Ross are entitled to qualified immunity, as the district court correctly determined.

¹⁶ Ms. Funk fails to provide a single authority standing for the proposition that the Fourth Amendment prohibits the use of deadly force unless the officer actually knows that an individual has actually shot at police or others, or threatened them with a weapon. No case stands for the proposition that such actual knowledge is required. Rather, the relevant authorities establish that a good faith belief that the individual is a perpetrator who poses an imminent risk of death or serious bodily harm to the officers or others triggers qualified immunity, unless only an incompetent or homicidal officer could have arrived at such a conclusion.

CONCLUSION

For each of the above reasons, Officers Hoffer and Ross, and the City of Neenah, respectfully ask the Court to affirm the district court's dismissal of Ms. Funk's federal claims, with prejudice, and to affirm the district court's dismissal of her state law claims without prejudice.

Respectfully submitted this 9th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Pursuant to Fed. R. App. P. 32(a)(5), the undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect in 12-point font, Times New Roman typeface.

Dated: March 9, 2018

/s/ Thomas Armstrong

Thomas Armstrong

Attorney for Defendants-Appellees

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