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No. 67628-8

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

David R. Gallegos, Appellant

v.

**Jeremy Freeman, Whatcom County,
Washington, Respondents**

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BRIEF OF APPELLANT

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A. INTRODUCTION

On a very dark evening, February 10, 2005, Whatcom County Sheriff Deputy Jeremy Freeman, while holding his 40 caliber Glock pistol and standing at a position five to eight feet to the side of a narrow dirt road (CP 713, 17-19) located on private property, switched on his police flashlight to light up the interior of a Chevy Beretta as it was being driven along the road at a low speed. Immediately thereafter, he fired three shots in rapid succession. All three bullets struck the Beretta's driver and sole occupant, David Gallegos, causing him serious injuries. (CP 284, 7-24; 290)

Freeman claims that he shot Gallegos in self-defense. He has stated in a declaration, "I fired my weapon because I believed he [Gallegos] was trying to run me over with his car." (CP 81, 10-11)¹ Gallegos, on the other hand, maintains that he made no attempt to strike or harm Freeman, or any other person, with his vehicle and that he had not seen Freeman or any other person standing on or alongside the road as he approached the location where the shooting occurred and was unaware that anyone was in the immediate area until just an instant before he was shot when heard someone yell and then almost simultaneously a bright light coming from the left of the vehicle was shining in his face. (CP 256, 5-14; 284, 7-12)

¹ Many of Freeman's statements about what occurred just prior to the shooting are set forth in the Statement of the Case below.

As a consequence of the shooting, and after his criminal trial² was concluded, Gallegos filed a lawsuit (CP 1-14) in Skagit County Superior Court seeking damages against Freeman, Deputy Steven Cooley,³ and Whatcom County. His complaint, based in part upon 42 USC § 1983, alleges that the shooting constituted lethal force and that Freeman's use of such force was, under the circumstances which existed at the time the shooting happened, a violation of his Fourth Amendment right to be free from an unreasonable seizure because the force used by Freeman was excessive and unnecessary.⁴

In the fall of 2007 Freeman filed a motion for summary judgment (CP 22) seeking dismissal of all causes of action against him. In his supporting memorandum, Freeman argued, in essence that shooting Gallegos was reasonable under the circumstance and, therefore, there was no constitutional violation and the case "should be dismissed, not on qualified immunity grounds, but on the fact that there was no Constitutional violation." (CP 30, 14-16)

A review of Freeman's 2007 memorandum (CP 23-32) reflects that he presented no argument that he made a reasonable mistake of law when he shot Gallegos or that the law relating to shooting Gallegos under

² Based primarily upon Freeman's version of the shooting incident, Gallegos was charged with first degree assault for allegedly attempting to run him over with his Beretta. At the ensuing trial a jury found Gallegos not guilty of this charge. (CP 286, 21-23)

³ Cooley has been dismissed from the lawsuit by agreement between the parties. (CP 376-378) The action against him was based, in essence, on the claim that Cooley was negligent in his failure to properly supervise Freeman.

⁴ Gallegos also alleged in his complaint that Freeman is liable to him for damages because the shooting constituted an assault, or in the alternative, that in shooting Gallegos, Freeman negligently caused him injuries. (CP 1-14)

the circumstances he confronted was not *clearly established*. The trial court, per Judge John Meyer, denied the first summary judgment motion, finding that there were genuine issues of material fact. (CP 348-349)

Then, on May 31, 2011 a second summary judgment motion (CP 379-381) was filed by Freeman, again seeking dismissal of all of the Gallegos claims against him “on the basis that there are no genuine issues of material fact with respect to any of his [Gallegos] claims, and therefore the claims must fail as a matter of law.” (CP 379, 16-18) In his Memorandum in support of the 2011 summary judgment motion, Freeman again asserted that shooting Gallegos was objectively reasonable and “...therefore he had no reason to believe that his actions were in violation of Plaintiff’s [Gallegos’] constitutional rights.” (CP 413, 4-5; 416, 18-19) The court, per Judge Susan Cook, granted summary judgment in favor of Freeman and thereby dismissed, in their entirety, all of the claims comprising the Gallegos lawsuit.

Through this appeal, Gallegos requests a de novo review of the 2011 summary motion, and further requests that this court reverse the court’s ruling (CP 742-744) granting the summary judgment and remand the case to Skagit County Superior Court for trial.

Gallegos submits, as argued below, that the trial court was provided with abundant evidence, as well as expert opinions, to establish that, at a minimum, there are genuine issues of material fact as to whether Freeman’s use of deadly force - shooting Gallegos - was “objectively reasonable”, in light of the facts and circumstances that preceded the shooting and that existed at the moment it happened. Much of that evidence is in the form of excerpts from the testimony presented at the Gallegos criminal trial.

It is also Gallegos' position that given the nature of the facts in this case, Freeman is not entitled to qualified immunity on the ground that the law at the time of the events was not clearly established thereby excusing him from recognizing that Shooting Gallegos was unlawful.

In his second summary judgment motion Freeman claims he is entitled to qualified immunity, which raises the issue as to whether the right or law he is alleged to have violated was *clearly established*. This issue is addressed by determining whether a hypothetical, reasonable officer would know that using deadly force under the particular circumstances that existed was unlawful.

Notwithstanding that this issue, i.e. whether a police officer is entitled to qualified immunity, is considered a question of law, its resolution is also analytically dependent upon the facts of the particular case in order to ascertain what circumstances the officer encountered when he engaged in deadly force. Not surprisingly, the nature of the circumstances and the facts are often in dispute with respect to § 1983 excessive force claims and, at this stage of the proceedings, the facts are to be viewed in the light most favorable to Gallegos. Hence, just as with the issue as to whether the use of deadly force was "objectively reasonable", if the evidence submitted at the summary judgment stage of proceedings reflects that it is not clear what facts and circumstances the officer confronted when he utilized deadly force, the court should refrain from dismissing this action on the basis of qualified immunity.

With respect, it is submitted that it is not entirely clear whether, in granting the summary judgment motion, the court decided that no violation of a constitutional right occurred because Freeman's use of deadly force was "objectively reasonable" or whether it was based on the

grounds that the law which he allegedly violated was not “clearly established”.

The court order itself simply states that “This Court FINDS that Defendant Freeman is entitled to qualified immunity under federal and Washington state law and therefore entry of judgment as matter of law in favor of Defendant Freeman is appropriate.”⁵ (CP 743, 14-16)

Unless the concept of “qualified immunity” is understood to refer only to the situation in which the law was not clearly established, and not inclusive of cases in which it has been determined no right was violated because the force was objectively reasonable, then the court’s “finding” is ambiguous insofar as it does not articulate the reason that Freeman is entitled to qualified immunity.

The court’s letter decision (CP 796) denying the Gallegos motion for reconsideration is more informative in stating that, “Based on the uncontested facts presented, it is clear that a reasonable officer in Deputy Freeman’s position could have believed his conduct was justified.” This comment by the court does not resolve the ambiguity as to the specific factual and legal basis for granting summary judgment. This comment by the court could be interpreted to mean that the court concluded that the law was not clearly established and, consequently Freeman could not be expected to know what level of force he could utilize or it could mean that the court concluded that Freeman’s conduct in shooting Gallegos was “objectively reasonable” under the circumstances in that he may have reasonably, even though mistakenly, believed that he was in danger.

⁵ What is described as a “finding” in the court’s order is more in the nature of a conclusion of law.

Because of the ambiguity, and because the court's ruling is reviewed de novo, Gallegos will address both prongs of the qualified immunity analysis: (1) whether Freeman violated a Constitutional right, i.e. whether his use of deadly force was objectively reasonable and (2) whether the law relating to the circumstances that existed was "clearly established" in that a reasonable officer would have known that shooting Gallegos was an unlawful use of deadly force.

B. ASSIGNMENT OF ERROR

1. The Skagit County Superior Court erred when it granted the summary judgment motion of defendant Jeremy Freeman.⁶

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. What is the standard of review with respect to an order granting summary judgment dismissing an excessive force claim brought under 42 U.S.C. § 1983?

2. By shooting Gallegos, did Freeman effect a *seizure* subject to Fourth Amendment analysis?

3. When Freeman shot Gallegos, did he employ deadly force?

4. What is the proper analysis for determining whether a police officer is entitled to qualified immunity?

5. What is the proper standard to be applied in evaluating whether the use of deadly force is objectively reasonable?

⁶ The court also erred when, by letter (CP 804), it denied the Gallegos' timely filed Motion for Reconsideration (CP 771-781) of the ruling granting summary judgment.

6. Was the use of deadly force by Deputy Freeman objectively reasonable?

D. STATEMENT OF THE CASE

As the Clerk's Papers herein reflect, in response to Freeman's first summary judgment motion, Gallegos presented a lengthy and detailed summary of the facts and circumstances surrounding the shooting and the events preceding the shooting. (CP 101-111) These facts, as described in his memorandum, were supported by sworn declarations, excerpts of the criminal trial testimony of various witnesses, an investigator's declaration, field diagrams and photographs depicting the scene of the shooting and the Chevy Beretta. In addition, the expert opinion of a qualified police practices expert, Edward O. Mott, along with his relevant curriculum vitae, was submitted through a declaration.

To avoid the burden of duplicating what had previously been filed in response to the second summary judgment motion, Gallegos incorporated by reference all of the above-described materials⁷ and, furnished a supplemental declaration of David Gallegos, as well as the respective declarations and attached curriculum vitae (CP 710-723; 610-638) of a forensics scientist, Gaylan Warren and a police practices expert, D. P. Van Blaricom. Additional excerpts of trial testimony were also presented as were portions of the narrative report of Freeman (CP 703) and Cooley (CP 704) and the report, including a reduced version of the

⁷ Although Judge Meyer considered and made the ruling denying the first summary judgment motion, Judge Cook confirmed, through a supplemental order (CP 808-809), that she had considered all of the materials Gallegos had previously submitted and to which reference was made in his memorandum in opposition to the second summary judgment motion.

Total Station Diagram, prepared by Bellingham Police Officer Paul Tillman. (CP 705-709) Additional materials were submitted in support of the Motion for Reconsideration by Gallegos. These materials included a declaration of Skyla McKee (CP 768-770) and more excerpts of her trial testimony. (CP 747-767)

For purposes of this brief, Gallegos hereby sets forth the following description of the facts pertaining to the events of February 10, 2005:

Temporary Protection Order & Events at the Van Dyk Residence

On February 8, 2005, the Whatcom County Superior Court issued an ex parte “Temporary Order for Protection and Notice of Hearing” (CP 128-131) which had been requested in a petition submitted by Emma Gallegos,⁸ the wife of David Gallegos.

This order prohibited David Gallegos from contacting Emma or any of their three minor children (CP 129) and, in addition, prohibited him from entering the residence located at 1490 Van Dyk Road in Lynden, Washington (CP 130) where Emma and the children resided and where David Gallegos had been living up until the date the order was entered. (CP 280, 8-9)

In violation of the protection order, on the evening of February 10, 2005 sometime after 7 p.m., Gallegos drove his 2002 red Chevy Beretta to the Van Dyk house to retrieve some of his personal property. (CP 280, 1-3; 311) Gallegos exited the vehicle and then opened the unlocked front door of the residence and walked inside. (CP 136, 18-22)

⁸ Excerpts of her trial testimony are under the name of Alanis-Vera, the name by which Emma was known at the time of trial.

Inside the residence at the time were Emma, the three minor Gallegos children and two adult acquaintances of Emma. (CP 137, 11-13) Gallegos told Emma that he had come to get some of “his stuff”, which Emma assumed to mean his guns.⁹ (CP 138, 14-20) They spoke with each other briefly and then Gallegos picked up a kitchen knife¹⁰ from the counter (CP 139, 22-24; 143, 10-14), held it against his body (CP 140, 12-14) and walked toward an interior wall. (CP 140, 9-14) Upon reaching the wall, he slumped to the floor (CP 140, 24-25) pretending to stab himself (CP 141, 18-25; 143, 22-23) in order to, as Gallegos put it, “get attention.” (CP 143, 24-25) Upon observing this event, Kimberly Gallegos, who was 16 years old at the time and one of the Gallegos children (CP 129) called 911 because she was concerned about her father. (CP 147, 9-15)

Emma, expecting to see blood on the floor went to check on him. (CP 144, 8-11). She observed that he was just lying on top of the knife (CP 144, 14-15) and asked him what he was doing. (CP 144, 17-18) Gallegos then stood up, holding the knife pointed down, made some remarks and walked out the door, taking the knife with him (CP 144, 17-25; 145, 11-7) and then drove to his parents’ residence located nearby. (CP 281, 1)

After Gallegos departed, Emma spoke with the 911 operator. (CP 145, 14-17) During their conversation Emma told the operator that Gallegos would likely return to his “family residence” and provided the 1778 E. Pole Road address for that residence. (CP 145 13-17 & 22-25)

⁹ At the time of the events, Mr. Gallegos legally owned a .22 rifle and a 9 mm. handgun. (CP 136, 8-14)

¹⁰ Gallegos had bought the knife a couple of years before. (CP 143, 15-19)

Gallegos did not take any firearms from the residence. (CP 175, 20-23; 176, 17-20)

At no time while he was in the Van Dyk residence that evening did Gallegos harm, threaten to harm or verbally harass any of the persons who were present. (CP 148, 20-25; 149, 1-3; 150, 18-22; 280, 26-30) At no time did he point the knife at any other person in the residence. (CP 141, 8-14) Kimberly Gallegos estimated that the entire time he was in the residence was eight minutes or less. (CP 150, 15-17)

The Scene of the Shooting

The road on which the shooting occurred traversed a large field located on property located near Everson, Washington and belonging to Gallegos' father, Sylvestre Gallegos (CP 321, 3-5; 323, 4) At the time of the shooting the surrounding area was very dark, described as pitch-black. (CP 159, 19-225; 160, 1-3; 276, 19-20; 321, 30; 322, 1-3) It was cold out and the grass was wet and slippery although it was not raining. (CP 199, 19-25; 160; 322; 4-5) Gallegos had problems with the traction of his vehicle due to these conditions. (CP 282, 18-20)

The field still had the berms and furrows characteristic of a commercial raspberry farm¹¹ which it been a few years prior to this incident. (CP 323 1-8; 295, 3-10; 303) The road was described by Santos Gallegos as "just an old road like a dirt road. There is grass all over the

¹¹ See photographs (CP 303-306, 309-31, 319) and the diagram (CP 298) prepared by investigator, Joe Dozal.

place. Rocks sticking out. Just an old farm road.”¹² (CP 173, 1-3) It has an estimated length of 150 to 200 yards, depending on what is considered the beginning of the road at the south end of it (CP 323, 22-23; 298) and is virtually straight over its entire length. (CP 323, 7-8; 295, 3-4, 12-13; 297; 298; 303; 304; 305; 306; 309)

Gallegos took five different measurements of the width of the road at various intervals along the route that he drove on the night he was shot. His measurements ranged between 64” at the very far north end, where the road begins, to one point at about half way down the road where it measured 80”. (CP 282, 21-26) He was also asked to take measurements of the width of the Berretta, measured from the outside left tire to the outside right tire. The width was measured to be 64”. (CP 282, 28-29)

An investigator, Joe Dozal, was asked to take measurements of distances between various features of the property as well as take photographs (See CP 299-319) and make sketches of the property.¹³ (294, 1-4; 297-298) Dozal measured the entire distance of the dirt road to be 529 feet from a post on the northwest corner of a fenced area immediately adjacent to the south end of the road to a position just beyond the north end of the field where Gallegos had parked before being contacted by McKee. (CP 298) The distance of 529 feet is the sum of the distance (409 feet) from the back of the field to the incline, just north of the position where the vehicle was located when the shooting occurred and the distance from the incline to the fence (120 feet).

¹² The road was used as a tractor lane to pick up flats when the raspberry farm was in operation. (CP 323, 6-7)

¹³ The sketches prepared by Joe Dozal and some of the photographs he took, including one of the Beretta on the field road, are included in the Appendix at pages 2-6.

The edges of the road are bordered by berms. Although somewhat bumpy, the road is flat for its entire length except at a point near the south where there is an upward north to south incline measured to be a grade of 5% to 6% (CP 245, 1-3) by Bellingham Police Officer Paul Tillman who was in charge of the Total Station Unit within the Bellingham Police Department Traffic Division (CP 2412-4). With the assistance of other Bellingham police officers Tillman participated in an inspection of the scene of the shooting the night it happened and again the next morning around 10 a.m. when it was light.¹⁴ (CP 242, 10-25; 243, 244, 1-17). Investigator Dozal, retained on behalf of Gallegos, measured this small incline to be 409 feet from the north end of the field. (CP 295, 11-4; 297; 306)

As reflected by the measurements set forth above, the road is only slightly wider than the Beretta. (CP 295, 22)¹⁵ Therefore, even a modest deviation from the road by the Beretta, while being driven on the road, would cause it to run up on one of the berms (CP 295, 22-24) and because the clearance of the Beretta is only 7 inches (CP 295, 25-27; Photograph Exhibit at CP 318), if Gallegos had deviated even slightly off the road, the Beretta, would, in all likelihood, have become stuck, especially in the wet conditions. (CP 295, 28-30; CP 181, 3-110)

Gallegos / McKee Interaction

When Gallegos arrived at his parents' house, he went inside. (CP 281, 13) Visiting his parents at the time was Skyla McKee (CP 156, 19-

¹⁴ See Tillman's report and the reduced version of his Total Station Diagram at CP 705-709 and included in the Appendix at pages 7-11.

¹⁵ See also the Appendix Photograph at A3 and other photographs at CP 310-317.

20), who resided on the property. (281, 24-25) She recognized that Gallegos was upset when she saw him. (CP 156, 25; 157, 1-10) She observed him grab some pills (CP 158, 21-25) and then saw him go outside, get into the Beretta and drive toward the back of the field. (CP 157 12-25; 158, 1-4) McKee then went quickly out into the field on foot to contact him. (CP 159, 12-18) She had a flashlight with her because it was pitch black outside. (CP 159, 19-24; 160, 3-4) Upon reaching Gallegos' vehicle, McKee saw that he had taken a handful of pills. (CP 160, 18-21) She attempted to speak with Gallegos whom she described as being upset because he felt Emma Gallegos was going to take his children away from him. (CP 161, 4-6)

McKee observed that Gallegos had a knife in the car and was worried that he would hurt himself, although she knew he would not hurt her. (CP 161, 22-24) When she reached him on the driver's side door, she observed that he had many pills in his hand. She entered the vehicle on the driver's side and sat on his lap to speak with him. (CP 161, 12-16) At some point, Gallegos persuaded her to get out and go around to the other side of the vehicle. As she was doing so, he locked the doors so that she could not get in. (CP 163, 12-22; 282, 1-7) While she was outside the car, McKee saw Gallegos hold the knife up to his throat once. (CP 164, 2-5) After she was locked outside the car, she called 911 on the cell phone she had brought with her. (CP 164, 13-19) McKee was in cell phone communication with the 911 operator and intermittently spoke with both the operator and spoke loudly with Gallegos from her position outside the vehicle and remained in cell phone contact with the operator

until after Gallegos was shot.¹⁶ (CP 164, 22-24; 165, 3-13) At no time during the entire encounter with McKee did Gallegos harm or threaten to harm her. (CP 162, 19-20)

McKee did not see anyone she could identify as a police officer. (CP 769, 18-19; 22-23) She never saw anybody on the path of the road as he drove away nor did she see the vehicle swerve. (CP 770, 2-3) Some of the audio recording is difficult to understand but just before Gallegos began driving away from her, it sounds like McKee said, “If they are here and they look back, they can see his lights.” (CP 350-358) This statement was made 5 minutes and 12 seconds after McKee initially contacted 911. (See CP 350-355; Track 12 at 5:11 of the CD audio recording.) The transcript submitted by Freeman, states “ – here you look back, you can see his lights.” (CP 531)

McKee was asked by the 911 operator if Gallegos had been drinking and she responded that she did not smell alcohol. (CP 524, 20, 23; 525, 2) Meanwhile, after Gallegos had driven to the back of the field and McKee had followed after him, his brother, Santos Gallegos, arrived at the property. (CP 321, 22-23)

Freeman & Cooley Arrive at the Property

After McKee had called 911 on her cell phone, Sgt. Cooley arrived at the property. (CP 321, 25-28) He spoke with Santos Gallegos and mentioned that there had been a report of a man in a field on the property. (CP 321, 29-30) At first Santos Gallegos did not know who the “man in the field” was but then realized that Cooley was referring to his brother,

¹⁶ An audio recording of the McKee communications with 911 can be heard on Track 12 of Exhibit 9 attached to the Declaration of Sarah Mack at CP 424-426))

David Gallegos. (CP 322, 6-110) Moments later Deputy Freeman arrived and made face-to-face contact with Cooley. (CP 322, 12-18)

Freeman was not at all familiar with the property. (CP 170, 4-7) Both Freeman and Cooley were wearing olive drab uniforms with no reflective materials. (CP 192 2-4; 193, 2-11; 323, 29-30) At all times after Freeman and Cooley arrived at the property and up until the moment the shooting occurred, they were in radio communication with dispatch. (CP 188, 13-17; 189, 4-11; 190, 4-12; 274, 1-14; 275, 6-8)

At some point, while Cooley was speaking with Santos Gallegos, it became apparent to Cooley, through information being relayed by dispatch, that McKee was out in the field with Gallegos and that he had a knife, which he was holding to his throat. (CP 167, 18-23; 168, 1-8) Cooley received this information while standing with Freeman, who also became aware of this information. (CP 168, 19-21; 169, 13-20)

Next, Freeman told Cooley that he had heard what he referred to as a woman “scream” from somewhere out in the field. (CP 171, 6-14) However, Cooley did not hear a scream. (CP 168, 19-23; 172, 10-13) Santos Gallegos heard Ms. McKee yelling “David, David” over the open police radio while he was standing next to Cooley. (CP 173, 14-16; 322, 24-25) Freeman could not really describe the sound of the “scream” or what the woman said. (CP 171, 6-10; 174, 1-2) When asked about the nature of the scream, Freeman stated, “It was a woman scream, that’s all I could – I couldn’t articulate what she said or if it was a sound.”¹⁷ (CP 171, 22-24)

¹⁷ On Track 12 of the 911 audio recording of McKee’s 911 call she can be heard yelling loudly at some point while in the back of the field with Gallegos.

Upon hearing the “scream”, Freeman assumed that Gallegos had just killed the woman [McKee] in the back of the field. (CP 692, 18-21) He had no information which would tend in any way to confirm that McKee had been killed or injured by Gallegos. (CP 692, 23-25; 692, 1) Freeman had been advised that the woman in the field was a friend of Gallegos. (CP 180, 6-9)

Events Immediately Preceding the Shooting

After hearing what he described as the “scream”, Freeman, without any instructions from Cooley, took off jogging north in the direction of the sound.¹⁸ (CP 176, 11-12; 183, 14-16) Before doing so, he made no attempt to check through dispatch on the welfare of McKee after he began jogging into the field (CP 179, 5-9) although he was still able to communicate with the dispatcher and McKee was in contact with 911 when Freeman set off in her direction. (CP 189, 4-11) Cooley acknowledged that they could have contacted McKee directly through dispatch. (CP 190, 4-9)

Freeman had been informed that Gallegos had not taken any firearms from the Van Dyk residence (CP 174, 17-20) and he had not received any information that Gallegos was armed with a gun. (CP 176, 21-24) Dispatch had not reported that Gallegos had assaulted anyone at the Van Dyk residence (CP 177, 25; 178, 1-3) or that Gallegos had

¹⁸ Freeman testified that he “made sure” it was “Okay to go off into the field to the direction where ‘we’ heard the scream.” (CP 182, 2-6) However, Cooley, who had recently been promoted to the position of sergeant, testified that Freeman just “took off” without any instructions to do so. (CP 183, 3-16)

harm or threatened to harm any other person, including any police officer, his brother or father, or McKee. (CP 175, 17-19; 271, 2-4; 273, 6-10)

When Freeman began jogging toward the field, Cooley followed but quickly lost sight of Freeman in the darkness after they entered the field and began moving toward the north. (CP 183, 17-25) Freeman did not turn on his flashlight because he did not want to “give them out in the field our position.” (CP 184, 17-21; 185, 2-6; 186, 16-18; 188, 8-12) According to Freeman, the only time he turned on his flashlight, after he heard the “scream” was when he shined it on the Beretta as it moved south on the road and had reached a position about 50 feet away from him. (CP 179, 10-18; 187, 3-5)

Santos Gallegos initially followed Cooley up to the point where the raspberry field began but then stopped because he was instructed to stay out of the situation. (CP 323, 24-26) He observed the officers enter into the field and then lost sight of them but he did see them move to opposite sides of the road. (CP 323, 27-31, 324, 23-29) He did not hear them discuss any strategy or plan as to what they intended to do. (CP 324, 1-2) Within a short time after the officers entered the field, Santos Gallegos noticed the vehicle’s headlights come on (CP 324, 4-6) and then watched it continuously as it moved in a southward direction along the road. (CP 324; 28-30) He estimated that the time that elapsed from the moment the lights came on until the shooting was less than a minute. (CP 324, 28-29)

Dispatch, meanwhile, was in continuous communication with McKee. Freeman and Cooley both acknowledged that, through dispatch, they could have obtained information from and communicated directly

with McKee. (CP 188, 13-21; 189, 4-11; 190, 4-9) McKee reported to dispatch at one point that Gallegos was holding a knife to his throat but at no time did she report seeing him holding a gun or that she had seen a gun in the car. (CP 522-536 – Transcript of communications between McKee and the 911 operator.)

Freeman had been moving north through the field for “just a few seconds” when he saw the headlights of the vehicle illuminate. (CP 194, 12-14) The lights appeared to be pointing south and west, a little bit to the left of Freeman (CP 194, 18-20) and at that moment, according to Freeman, he was about 200 yards away from the vehicle. (CP 196, 22-24) The car was not moving when the lights came on. (CP 186, 4-6) He did not hear the car start but could hear the engine revving after the lights came on.¹⁹ (CP 197, 1-2) Freeman says it was “some time” after he heard the engine rev until the car started moving. (CP 186, 9-10)

As soon as he saw the headlights illuminate, Freeman drew his pistol (CP 195, 12-14) and held it at what he referred to as the “low ready” position. (CP 197, 7-18) He continued jogging in the direction of the vehicle after he saw the lights come on (CP 194, 25) by advancing from a position “off toward the east side of the pathway.” (CP 198 15-19) He assumed that Gallegos had a firearm. (CP 189, 18- 20)

The headlights were on low beam. (CP 199, 2-4; 324, 16) Cooley acknowledged that, even in the extreme darkness, the headlights “were showing a beam that was directly ahead of the vehicle“(CP 200, 23-25) and “It would not illuminate a whole lot that was outside of that.” (CP 200, 30; 201, 1)

¹⁹ Gallegos testified that the engine was idling while he was in the back of the field with the heater running during the entire time that McKee was in the back trying to talk to him. (CP 695, 23-25; 696, 1-4)

According to Santos Gallegos, “The headlights illuminated the dirt road a ways in front of the car but did not really illuminate any portion of the field on the sides of road.” (CP 324, 14-16)

Gallegos recalls that the “. . . headlights illuminated the road just fine but very little of the field beyond the sides of the road, perhaps a couple of feet in the area very close to the front of my car.” (CP 283, 8-11) Gallegos is sure that if “anyone had been standing within the road within 50 feet of the front of my car, I would have seen him and most likely would have seen anyone standing in the road as far as 100 feet from the front of my car.” (CP 283, 1-13)

Speed of the Chevy Beretta

There are conflicting statements regarding the speed of the vehicle as Gallegos drove along the road before he was shot. Freeman testified that the vehicle was going 35 to 40 miles per hour as it moved down the road in his direction. (CP 264, 22-24) Cooley estimated its speed as about 30 to 35 miles per hour. (CP 253, 20-22) Gallegos testified that he was going at a much slower speed. He estimated his speed around 10 miles per hour. (CP 324, 17-23; 554; 282 12-14) Santo Gallegos testified that the vehicle was going between 10 and 20 miles per hour and was going at a constant speed. (CP 251, 10-12; 324, 22-23)

As reflected by Officer Tillman’s report and his testimony, he and other Bellingham officers conducted tests with the Beretta to determine its speed at the moment the shooting occurred and concluded that it was going an estimated 16 to 17 miles per hour when the shooting happened. (CP 246, 18-25; 113, 1-18; 265, 15-19; 265, 15-19; 705) The portion of the road where the vehicle was positioned when the shots were fired was

determined by noting the location where the bullet casings from Freeman's pistol were found during the investigation. (CP 247, 17-25, 248, 1-15)

Path of the Chevy Beretta

Tillman, and the others who assisted him, saw tire impressions on the road. (CP 244, 1-17) As depicted on the Total Station Diagram, they observed that from a point located at the far north end of the road up until the location where Gallegos was shot, the tire impressions were entirely between the edges of the road. At the point where Gallegos was shot the tire impressions deviated slightly to the right and then went up the incline to the left and ended at the location where the car had come to rest after the shooting. (CP 244, 245, 6-21; 267, 4-13). There were no reported observations of tire impressions or any other evidence located prior to the point of the shooting to indicate that the vehicle had at any time been driven upon or over either of the berms along the edges of the road. (CP 705-709)

There was no physical evidence found in the form of tire impressions to indicate that any swerving or deviation to the left (east) of the road had occurred prior to the shooting, although there were some visible tire marks to indicate that, just before the shots were fired the vehicle had moved slightly to the right, away from the left side of the road and away from the position where Freeman was located. (CP 245, 13-16; CP 705-709)

Cooley confirmed that the vehicle appeared to be "traveling straight down the path" (CP 252, 11-13) and further testified that, "I did not see any divergences after the initial fishtailing at the beginning." (CP 14-17) At trial he was asked, "So it [the vehicle] never really

substantially deviated then off to the east of that pathway as far as you could tell; isn't that correct?" (CP 253, 3-5) and he answered: "Correct. Until after the shots were fired." (CP 253, 6)

From his vantage point, Santos Gallegos observed that the Beretta had remained continuously on the dirt road from the position where Gallegos started out at the north end of the field up until he reached the position where the shooting occurred. (CP 251, 15-22; 324, 17-21; 326, 15)

Although he was watching the Beretta, at no time did Santos see either officer in the beam of the headlights (CP 257, 4-7; 326, 13-19 & 25-30) nor see it swerve at anyone (CP 226, 25-30) or swerve at all until the shooting occurred. (CP 257, 4-7; 326, 12-29)

Gallegos denies that he ever swerved in the direction of Freeman. (CP 283, 24-25; 284, 27-29; 285, 1-4)

The vehicle had remained continuously on the dirt road from the position where Gallegos started out at the north end of the field up until he reached the position where the shooting occurred. (CP 251, 15-22; 324, 17-21)

The Shooting

Gallegos was unaware that any other person was in the field as he drove down the road until, just before he reached the location where Freeman shot him, he heard someone shout from his left, and when he turned his head in that direction, he saw what he thought was a dark figure. (CP 283, 26-29; 284, 12-14; 255, 6-9; 284 9-11) Then suddenly a bright light came on. (CP 284, 9-12) He reflexively raised his left hand to shield his eyes (CP 284, 2-13) and almost immediately thereafter was

shot. (CP 284, 15-18) Cooley immediately observed, upon contacting Gallegos after the shooting, that Gallegos had a gunshot wound to his left hand and another gunshot wound in his left upper arm. (CP 383; 24-25; See photograph exhibit at CP 290)

Freeman reported that as the vehicle moved south along the road he continued “side-stepping” and had moved about “twenty feet” off to the east of the road (CP 699, 25; 700, 1; 703) because the vehicle was tracking him. He stated, “Every time I stepped to the right, the headlights adjusted to where I was stepping.” (CP 250, 20-21). He said the vehicle was “tracking” him. (CP 197, 22-24; 202, 24-25; 254, 21-24; 264, 12-17; 699, 21-24) Freeman stated that he [Gallegos] “continually tracked me while I was trying to get out of his headlights.” (CP 81, 1-12) He claims that he was illuminated by the headlights before he turned on his flashlight (CP 187, 6-8) and that the headlights had been illuminating him for “Pretty much the whole way as the vehicle came down from where it started.” (CP 187, 9-11)

Freeman testified that when the car reached a position “about” 50 feet away, he could see in the darkness that it was a red car. (CP 266, 16-17; 700 8-24; 703) It was at that point, according to Freeman, that the Beretta swerved at him and that he then yelled something like “sheriff” (CP 187, 14-23), turned on his flashlight for the first time (CP 45, 17-18) and shined it into the car, (CP 202, 8-9; 187, 14-23) and upon seeing the silhouette of the driver, pointed his firearm at the silhouette and fired. (CP 202, 7-19)

In his narrative report (CP 703, Appendix A5) Freeman stated: “[a]s the car came closer, I saw it swerve directly at me to the east side of the pathway, and the car’s headlights illuminated me as I continued to move to my right.” (CP 703) “I had my flashlight in my left hand with

the dog lead loop around my left middle finger. I illuminated the interior of the car with my flashlight, and I yelled ‘Sheriff K-9 stop’” (Appendix 25) He has stated that he could see the interior of the car “through the windshield”. (CP 703) At trial he testified that he could see “the silhouette of just the driver in the vehicle.” (CP 202, 8-11)

Santos Gallegos recalls hearing someone yell “Sheriff” and then immediately thereafter the light [Freeman’s flashlight] came on and immediately thereafter he heard repeated gunshots. (CP 325, 1-6) Santos Gallegos further observed that the light came from a position off to the side of the road. (CP 325, 6-8) He says, based on his personal observations, that the vehicle did not swerve at Freeman or anyone else. (CP 326, 24-26)

Freeman says he fired because “he [Gallegos] was threatening to take his own life, and I was fearful that he wanted to take mine as well. It crossed my mind that he was trying to take out as many others with him as he could...” (CP 81, 12-14)

All three bullets were fired in rapid succession from an angle essentially perpendicular to the vehicle. All three entered the vehicle from the driver’s side and struck Gallegos. Two of them went through the driver’s side window and one struck the driver’s side door, penetrated the vehicle, and struck Gallegos.²⁰ (CP 292; 332, 28-30; 333, 1-3)

Freeman also stated: “I gave him [Gallegos] every chance to stop and waited as long as I could. I did not want to shoot, but his actions left me no choice. I felt that if I did not shoot I would be killed or seriously injured, I was concerned not only for myself but for the other people in

²⁰ See Appendix 1 for a photograph depicting the angle from which the bullet that hit the driver’s side door was fired.

the area as well.” (CP 81, 14-18) No evidence was presented by Freeman as to how long the flashlight was on before he started shooting. He could not remember whether it was on when he actually started shooting. (CP 698, 19-24)

Cooley says he heard Freeman yell before he saw him in the headlights and only very briefly. (CP 259, 1-7 & 12-13) Cooley testified that he did not see Freeman’s flashlight go on at any time. (CP 260, 21-25)

Forensic Analysis of Gaylan Warren²¹

Gaylan Warren, a forensic scientist with an extensive knowledge of ballistics, (CP 203-204) viewed the scene where the shooting occurred, viewed a re-enactment video, examined the Beretta, the casings ejected from Freeman’s pistol, and the bullets found in the vehicle after the shooting. He also reviewed the Total Station Diagram and the reports of the officers who investigated the shooting and looked at photographs. (CP 712, 1-4)

Warren’s expert analysis confirms that all three shots were fired from an angle of approximately 90 degrees to the left side of the Beretta and all three struck Gallegos. (CP 713, 15-16; 722; Appendix 12-14)²² He calculated that the vehicle was traveling at about 10 miles per hour

²¹ Expert opinions may be presented both in support of and in opposition to summary judgment motions. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979); { TA \l "Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 588 P.2d 1346 (1979)" \s "Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 588 P.2d 1346 (1979)" \c 1 } They may testify in § 1983 excessive force cases. See *Glenn v. Washington County*, 661 F.3d 460, 472 (2011) in which the court alluded to the expert testimony of D.P. Van Blaricom, who is the expert hired by Gallegos in this case.

²² See Gaylan Warren’s report at CP 721-723 and in the Appendix at pages 12-14.

when the shots were fired. (CP 713, 20-23; 722) It was concluded that one of the bullets had passed through the door, not only due to the visible hole in the door, but due to the detection of rubberized weatherproofing lining from the window frame on one of the bullets. (CP 207, 1-18; 713, 11-15)

The bullets respectively struck Gallegos in his left hand, his left arm, and below his left armpit. (CP 284, 15-24; Photograph at CP 290)

Based upon the physical evidence at the scene, including the location of the shell casings, Warren calculated that the distance between Freeman and the vehicle when the shots were fired was five to eight feet. (CP 232, 3-9; 713, 17-19; 721)

Warren agrees with Dozal that the Beretta, due to its low clearance, would not have been capable of driving over the berms on the side of the road (CP 714, 15-17) and that the physical evidence supports the conclusion that the Beretta did not depart from the road until the shooting occurred (CP 714, 19-21) at a location measured by Joe Dozal to be 409 feet from the back of the field where Gallegos had started out. (CP 714, 20)

It was Warren's opinion that Freeman's claim that the vehicle swerved at him just before he shot Gallegos is inconsistent with the physical evidence relating to the direction of the vehicle [remaining on the road], its speed and the location of Freeman when he fired the shots. (CP 715, 4-9) He further concluded that Freeman was not at risk of being struck by the vehicle when he fired the shots. (CP 715, 11-14)

Expert Opinion of Edward Mott

With respect to the 2007 summary judgment motion, a declaration from police practices expert Edward Mott was submitted. (CP 328-335) In this declaration Mott described the evidence he reviewed and observed that he had difficulty accepting Freeman's version of the events based mainly on the fact that the bullets entered the vehicle from a perpendicular angle. (CP 332, 28-30; 1-3) He further based his conclusion on that it does not appear from the evidence that Freeman was at any point in danger of being run over by Mr. Gallegos as he drove out of the field. (CP 334, 24-25) As Mott stated, "If it is assumed that Mr. Gallegos did not swerve at any time in the direction of Deputy Freeman, then there was absolutely no reason for Deputy Freeman to shoot Mr. Gallegos." (CP 334, 25-28)

Also, Mott was asked to render an opinion on whether, assuming Freeman made a mistake in employing lethal force, such a mistake on his part was reasonable and whether it would be clear to a reasonable officer in his position that his conduct in the situation he confronted was unlawful. Mott stated that, in his opinion, a reasonable officer would know that employing lethal force against Gallegos under the circumstances presented was unlawful. (CP 3-10)

Expert Opinion of D.P. Van Blaricom

D.P. Van Blaricom became involved in this case due to health issues which precluded Edward Mott from continuing. A review of Van Barroom's report²³ (CP 624 – 633) reflects that he did an extensive review

²³ Van Blaricom's 10 page report pertaining to this case has also been included in the Appendix (pages 15-24) His curriculum vitae materials (CP 634-648) include a lengthy list of the cases in which he has testified at trial or by deposition as a police practices expert from 2007 through 2011.

of the available evidence in this case. (CP 624-625) In addition he visited the shooting scene (CP 625) and examined the Beretta which, on that date, the bullet hole in the door where one of Freeman's shot struck the vehicle was still visible. (CP 9-13)

Van Blaricom was asked to evaluate the "reasonableness" of Freeman's use of deadly force against Gallegos. (CP 618, 25-28) Among other conclusions, it was the opinion of Van Blaricom that "Deputy Freeman could not have reasonably believed that David Gallegos posed a significant threat of death or injury to himself [Freeman] or others prior to or at the time that he shot David Gallegos." (CP 618, 29-30; 619, 1-2) He stated this another way by saying, in essence there was no rational basis for Freeman to conclude or form probable cause that Gallegos posed a significant threat of death or injury to Freeman or to others such that the use of deadly force was reasonable. (CP 619, 3-6)

Van Blaricom noted that, as demonstrated by Gaylan Warren, "the physical evidence refutes the claim by Jeremy Freeman that David Gallegos was tracking him in any manner with his vehicle or had swerved in his direction." (CP 619, 29-30, 620, 1)

Van Blaricom was aware that there had been claims that Gallegos may have known that police were on his property as he drove down the road. However, it is Van Blaricom's opinion that even if it were true that Gallegos knew police were on the property and he did not want to have contact with them, it nevertheless was still not "objectively reasonable for Freeman to use deadly force because the physical evidence refutes the claim that Gallegos attempted to run over Freeman." (CP 622, 11-19)

E. SUMMARY OF ARGUMENT

The two questions to be addressed in this appeal are: Has Freeman established on the basis of undisputed facts and other evidence that: (1) his use of deadly force in shooting Gallegos was objectively reasonable in light of the circumstances he encountered and the information or facts known to him at the moment the shooting occurred? and (2) he is entitled to qualified immunity for using deadly force because the law on whether it was constitutionally permissible to employ deadly force against Gallegos under the existing facts and circumstances was not clearly established in the sense that a reasonable officer would not have understood or known that shooting Gallegos under those facts and circumstances was unlawful?

Because the analysis of both inquiries must take the facts and circumstances into account, they both beg the same questions: What were the facts and circumstances that Freeman encountered? Addressing this question entails a thorough review of the “facts and circumstances” as established by the evidence viewed in the light most favorable to Gallegos and the reasonable inferences that may be drawn from those facts in favor of Gallegos.

The evidence which Gallegos has presented leads to the conclusion that, at a minimum, a genuine dispute exists as to whether, preceding the shooting and at the moment the shooting occurred, Gallegos posed a significant threat of death or significant harm to Freeman or any other person. Therefore, *a fortiori*, a genuine issue exists on whether Freeman’s use of deadly force was objectively reasonable.

The same genuine dispute over material facts also precludes a ruling at this stage of the proceedings that Freeman is entitled to qualified immunity because, accepting the Gallegos version of the events, and the reasonable inference derived therefrom that at no time he posed a

significant risk to Freeman or others, a reasonable officer would have understood that the use of deadly force would be unlawful.

F. ARGUMENT

Standard of Review

It is fundamental that a party whose excessive force claim brought under 42 USC § 1983 is dismissed on a summary judgment motion is entitled to a de novo review. *Blanford v. Sacramento County*, 406 F.3d 1110, 1114 (9th Cir.2005). *Estate of Lee v. City of Spokane*, 101 Wn.App. 158, 2 P.3d 979 (2000). A dismissal of an excessive force claim on the basis of qualified immunity also deserves a de novo review. *Deorle v. Rutherford*, 272 F.3d 1272, 1278 (9th Cir.2001).

In reviewing an order granting summary judgment, the court must determine whether, viewing the evidence in the favor of the non-moving party, “there are any genuine issues of material fact and whether the court granting summary judgment correctly applied the substantive law.” *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 532 (9th Cir.2010).

On a motion for summary judgment, all reasonable inferences are drawn in favor of the non-moving party. *Price v. Sery*, 513 F.3d 962, 965 (9th Cir.2008); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). “If conflicting inferences may be drawn from the facts, then the case must go to the jury.” *Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (9th Cir.1996)

“Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or

judgment as a matter of law in excessive force cases should be granted sparingly.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002). (Cited in *Smith v. Hemet Police Department*, 394 F.3d 689, 701 (9th Cir.2005)).

Therefore, as discussed below, if the evidence, reviewed in the light most favorable to Gallegos, could support a finding that the use of deadly force by Freeman was not “objectively reasonable” and that a reasonable officer would have known that the use of deadly force under the circumstances encountered by Freeman was constitutionally impermissible, then Freeman is not entitled to summary judgment.

“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Seizure / Fourth Amendment

The case law cited below establishes unequivocally that Freeman’s shooting Gallegos constitutes a seizure for purposes of legal analysis.

“. . . there can be no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

As stated in *Brower v. City of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), a Fourth Amendment seizure occurs “when there is a governmental termination of freedom of movement through a means intentionally applied.” *Id.*, at 596-97.

Likewise in *Hoy v. Reed*, 909 F.2d 324 (9th Cir.1990) the court, recognizing that the “objective reasonableness” standard with respect to police use of force is only to be applied in the context of a Fourth Amendment seizure, held that a “seizure” occurred when the shooting occurred. The *Hoy* court went on to specifically reject the argument that *Garner* is limited to situations in which deadly force is utilized in effecting an arrest and observed that the Supreme Court’s “language in *Garner*, and particularly in *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.ED.2d 628 (1989)” suggests that it takes a broader view of what constitutes a seizure. *Hoy, Id.*, at 329.

The foregoing authority establishes that the shooting of Gallegos by Freeman was a use of deadly force and implicates the Fourth Amendment right of Gallegos not to be subjected to an unreasonable seizure.

Deadly Force

While it may seem obvious that the shooting of an individual three times from close range constitutes the use of deadly or “lethal” force, it is important, for the purpose of analyzing the issues presented in this case, to eliminate any doubt about this proposition, which is based upon unequivocal decisional law. Confirming that Freeman’s act of shooting Gallegos constitutes the use of deadly force is significant because it is now well established and comports with common sense that the legal considerations relating to the use of deadly force are different than what they are for non-lethal or force that, for whatever reason, causes injury but does not qualify as deadly force. The explanation why the courts have had occasion to devote discussion to the parameters of what constitutes deadly force is that the phrase was not defined in the *Garner* opinion

which involved the shooting of a fleeing felony suspect, and in which the Court, in all likelihood, assumed that it was axiomatic that deliberately shooting a human being constitutes the use of deadly force.

It was not until 2005 in *Smith v. Hemet Police Department*, 395 F.3d 689 (9th Cir.2005) that the 9th Circuit Court of Appeals, reconsidered the definition of deadly force it had adopted in *Cruz v. Escondido*, 139 F.3d 659 (9th Cir.1998) as “force reasonably likely to kill.” *Id.*, at 660. The 9th circuit, as well as other jurisdictions, now considers deadly force as force which “creates a substantial risk of death or serious injury.” *Smith, Id.*, at 705

There can be no doubt that Freeman’s conduct in aiming his pistol at Gallegos and then intentionally firing three shots at him from a distance determined by physical evidence to be 5 to 8 feet, and from an angle perpendicular to the vehicle Gallegos was driving, is conduct which “created a substantial risk of death or serious injury” and, hence, is to be considered deadly force.

It is important to establish at the outset that the force used by Freeman constituted deadly force because in § 1983 excessive force cases involving deadly force, the objective reasonableness framework described in *Garner* comes into play. In other words, the analysis of whether conduct by a police officer was “objectively reasonable” will proceed differently in a deadly force case than in one involving non-deadly force which nevertheless amounts to a seizure.

In *Garner* the Supreme Court held a Tennessee statute to be unconstitutional insofar as it authorized the use of deadly force against fleeing felony suspects. The court, in placing limitations on the use of deadly force held that “Where the 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. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that 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.” *Garner, Id.*, at 11; cited in *Blanford v. Sacramento County*, 406 F.3d 1110, 1115 (9th Cir.2005); *McCaslin v. Wilkins*, 183 F.3d 775, 779 (1999).

In *Blanford* the holding in *Garner* placing limitations on the use of deadly force was characterized as a “more particularized version of the Fourth Amendment’s objective reasonableness analysis for assessing the reasonableness of deadly force.” *Id.*, at 1115.

In reliance on *Garner*, the court in *McCaslin* determined that because there were genuine issues of material fact as to what had happened after a truck went over an embankment following a chase involving speeds exceeding 100 miles per hour, and because there were issues of fact as to whether McCaslin posed a threat or whether force was necessary to prevent escape, the court was “in no position to assess the reasonableness of the force used.” *McCaslin Id.*, at 779.

Qualified Immunity

In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) the Supreme Court, in a case involving a § 1983 excessive force claim addressed the issue “whether the requisite analysis to determine qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact.” *Id.*, at 197. Katz, the claimant, alleged that

while lawfully protesting at the scene of a speech by Vice President Albert Gore, he was arrested by a military officer (Saucier) who employed excessive force during the course of the arrest by shoving or throwing him into a police van. *Id.*, at 197.

The Court considered the 9th Circuit's approach, i.e. treating the qualified immunity inquiry and the merits of the excessive force claim as identical, was inconsistent with the notion of qualified immunity as discussed in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) and consequently, the *Saucier* decision held, inter alia, that “. . .the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest.” *Id.*, at 197.

The court further noted that treating an excessive force claim as merely a determination whether the force utilized by a police officer was excessive and leaving the matter entirely up to a jury “could undermine the goal of qualified immunity ‘to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.’” *Id.*, at 202 (quoting *Harlow v. Fitzgerald*, 457 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

In deciding that, in an excessive force case, addressing the issue of qualified immunity is not “merely duplicative” of the inquiry as to whether a constitutional right has been violated, the *Saucier* opinion prescribed a two-step process comprised of two questions to be considered by the court when there is a claim of qualified immunity. The questions the court must consider in such a case are: (1) Taken in the light most favorable to the moving party, do the facts alleged show the officer's conduct violated a constitutional right? and (2) Was the right allegedly violated a right which was clearly established? *Id.*, at 201.

Pursuant to the protocol enunciated in *Saucier*, the questions were required to be addressed in the order set forth above. With respect to the threshold question as to whether a Constitutional right has been violated, the Court acknowledged that “there is no doubt that *Graham v. Connor*, clearly establishes the general proposition that the use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* ‘...that the right the official is alleged to have violated must have been clearly established in a more particularized, and hence, more relevant, sense.’ The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” [*Anderson*] 483 U.S. at 640, 107 S.Ct. 3034, *Saucier*, at 201-202.

With respect to the second question as to whether the “right” was *clearly established* the decision explained that “If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.*, at 202.

To the extent that an assertion of qualified immunity in response to an excessive force claim triggers a judicial determination of the two questions presented, *Saucier* continues to be a viable precedent although, as modified by *Pearson v. Callahan*, 555 US 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009),²⁴ it is no longer required that the questions be addressed in the order mandated by *Saucier* or that both be addressed if a ruling on one results in a dismissal.

It is important to recognize that, like the inquiry as to whether the force used violated a constitutional right, i.e. was excessive under the circumstances, the inquiry “must be undertaken in light of the specific

²⁴ *Pearson* involved allegations of an unconstitutional search.

context of the case, not as a general proposition.” *Id.*, at 599 (quoting *Saucier*, at 201.)

It was made clear in *Anderson v. Creighton*, 483, U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) that an official is not entitled to qualified immunity merely because the very action in question has not been ruled unlawful. *Id.*, at 64. Otherwise, as noted in *Deorle*, “officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of misconduct. When the “defendant[’s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.” *Mendoza v. Block*, 27 F.3d 1357, 1361, (9th Cir.1994) (quoting *Casteel v. Pieschek*, 3 F.3d 1050 (7th Cir.1193)). *Id.*, at 1286.

Notwithstanding the cautionary note sounded above in *Deorle* and other cases that the shield of qualified immunity is not so wide as to include violations simply because the facts of a given case are unique, it is submitted that, at the time that Gallegos was shot by Freeman, the law was clearly established, and a reasonable officer certainly would know, that using deadly force under the circumstances encountered by Freeman would be unlawful. In this connection, it must be emphasized that “the circumstances”, facts and inferences pertaining to what actually occurred must be construed in the light most favorable to Gallegos.

The *Cowan* decision, rendered more than two years before Gallegos was shot, provides an excellent analysis of the interplay between the prongs set forth in *Saucier*. *Cowan* is especially instructive with respect to the instant case because the facts are so similar. The case

involved a fatal shooting of the driver (Cooper) of a Camaro which the officer (Breen) claimed, in essence, was bearing down on him with its headlights on. Breen testified that as the vehicle approached, he waved his arms but when the vehicle failed to stop, he believed his life was in danger and fired two shots in response to the situation. One bullet struck the hood, the other went through the driver's side window and hit Cooper, killing her.

An investigation by the Connecticut State Police showed that the officer was approximately 11 feet to the side when the shots were fired. The plaintiff offered evidence raising an inference that Breen was not in danger when he fired the shots.

Ultimately the court, following the *Saucier* two-step protocol, concluded that on the issue as to whether a constitutional right had been violated, the officer's decision to use deadly force was objectively reasonable only if "the officer had probable cause to believe that the suspect (Cooper) posed a significant threat of death or serious physical injury to Breen or others." citing *O'Bert v. Vargo*, 331 F.3d 29, 36 (2nd Cir.2003) and *Garner, Id.*

The court held that the resolution of whether a constitutional violation occurred centered on whether Breen's belief that his life was in danger was a *reasonable belief* and deciding whether the belief was reasonable would compel the court to accept, as a matter of fact, that, indeed, the Camaro was bearing down on Breen. In other words, one would have to accept Breen's account of the events. The court perceived that although Breen "purports to rely only on the undisputed evidence in demonstrating that there was no constitutional violation, his brief is replete with his own version of the events." *Cowan, Id.*, at 762.

The same can be said in this case. That is, one has to accept Freeman's version of the shooting to conclude that his belief that he was in danger was reasonable. The physical evidence alone demonstrates that his purported belief was not reasonable, or not credible, in that the lack of visible tire impressions off the roadway prior to the location of the shooting directly contradicts his claim that the Beretta "swerved" in his direction.

The court commented that it was required to consider Cowan's version and make all permissible inferences in her favor. Like Gallegos, Cowan presented evidence that the vehicle was traveling slowly, that Breen was not in front of it, but instead was off to the side, and that the vehicle made no sudden turns along the roadway. The court held that looking *only* at Cowan's version of the events, no reasonable officer in Breen's position would have believed that "at the crucial moment use of deadly force was necessary." *Id.*, at 763. It is submitted herein that no reasonable officer standing off the roadway at the Gallegos property and observing the Beretta moving straight down the road at a slow speed would not understand it would be unlawful to light up the car with a flashlight as it drew near and then immediately thereafter fire three shots into the vehicle from a perpendicular angle.

Turning to the qualified immunity analysis, the *Cowan* court reasoned that Breen would be entitled to qualified immunity if he reasonably believed that at the moment he fired, his life was in danger. In acknowledging that "this is the very question upon which we found there are issues of material fact", the court held that "Because in this case genuine material, factual disputes overlap both the excessive force and qualified immunity issues, summary judgment must be denied. *Id.*, at 764.

In a footnote (7) in *Cowan* it was noted that “From this analysis, it appears that at least in some excessive force cases the various parts of the *Saucier* analysis converge on one question: Whether in the particular circumstances faced by the officer, a reasonable officer would believe that the force employed was lawful.” *Cowan, Id.*, at 764.

Cowan has been discussed at great length herein, not only because the case has so many factual similarities to the instant case, but, also, because the opinion boldly distills some of what are often arcane or confusing opinions which attempt to undertake both of the *Saucier* inquiries.

Suffice to say that, accepting the facts as presented in this case by Gallegos, one can infer that Freeman was not in danger when he shot Gallegos nor did Freeman have probable cause to believe that he or any other person was in danger and, therefore his conduct was objectively unreasonable and violated a constitutional right of Gallegos.

Consistent with the analysis in *Cowan*, it is only logical that because genuine issues of material fact exist with respect to the issue as to whether Freeman had probable cause, i.e. a reasonable belief that he or some other person was in danger of being killed or seriously harmed, it cannot be concluded that his use of deadly force was objectively reasonable, at least not on a summary judgment motion, and therefore he, like Breen, is not entitled to qualified immunity.

For Freeman to avail himself of qualified immunity he must establish that the law regarding his response to the situation he encountered was not clearly established. However, if the Gallegos version of events and the reasonable inferences derived from those facts are accepted as true, as they must be for this appeal, then the law was clearly established.

Moreover, there existed a sufficient precedent at the time of the events to put Freeman on notice that shooting Gallegos was constitutionally impermissible.

Reasonableness Standard

As stated in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), "...apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.*, at 7

In expounding upon the notion of the reasonableness requirement, the Court in *Garner* held that determining the constitutionality of a seizure requires "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."²⁵

Just a few years after *Garner*, the Supreme Court decided *Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989) which came before the Court as a § 1983 action involving non-deadly force which was claimed to be excessive. The court in *Graham* emphasized that all excessive force claims must be analyzed by applying the "reasonableness" standard of the Fourth Amendment, rather than the more general notion of substantive due process. *Id.*, at 395.

The *Graham* opinion is also important for explicitly establishing the analytical principle that the "reasonableness" of an officer's use of force, deadly or otherwise, requires "careful attention to the facts and circumstances of each particular case" *Id.*, at 396, and suggested various

²⁵ *Id.*, at 8, citing *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

criteria or factors to be taken into consideration in determining whether the use of force in a given situation is reasonable.²⁶ Because the Court held that the “inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of all the facts and circumstances confronting them, without regard to their underlying intent or motive.” *Id.*, at 397.

The Court further observed that because the test of reasonableness is not capable of precise definition or mechanical application, it 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 officers and others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham*, *Id.*, at 396.

As a consequence of the decisions in *Garner* and *Graham*, all § 1983 excessive force actions in which the court addresses the issue as to whether a constitutional right was violated must entail a careful consideration of the “totality of the circumstances” for purposes of applying the reasonableness standard, i.e. whether the officer’s use of force was objectively reasonable.

Subsequent to the decisions in *Garner* and *Graham* the courts have continued to adhere to the principle which emerged from those cases, i.e. that a police officer’s use of force is violative of the Fourth Amendment unless the use of the force is “objectively reasonable”. See, e.g. *Scott v. Harris*, 550 U.S. 372, 381, 172 S.Ct. 1769, 167 L.Ed.2d 686

²⁶ However, the factors discussed in *Graham* are not intended to be exclusive. See *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir.2010).

(2007). *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed. 583

(2004)

“We have held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury.” *Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir.1997). This is because such cases almost always turn on a jury’s credibility determinations. This case is no different. *Smith v. Hemet Police Department*, 384 F.3d 689 (9th Cir.2005).

“Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and *whether it should have been apparent to officers that the person they used force against was emotionally disturbed.*” *Glenn*, at 467. [emphasis added] See *Bryan*, 630 F.3d 805, 831 (9th Cir.2010); *Deorle*, 272 F.3d at 1282-83”.

As stated in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir.2001), “Even when an emotionally disturbed individual is ‘acting out’ and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.” *Deorle, Id.*, at 1283.

With respect to the use of deadly force, the “most important” factor is whether the individual poses an “immediate threat to the safety of the officers or others”. See, e.g., *Bryan v. MacPhearson*, 630 F.3d at 826.

In the recent case of *Glenn v. Washington County*, 661 F.3d 460 (9th Cir.2011) the 9th Circuit Court of Appeals, overruled the decision by the U.S. District Court for the District of Oregon granting summary judgment to certain defendant police officers by holding that no constitutional violation occurred when they shot an individual, Lukus, with beanbags and later shot and killed him as he fled after being struck with the beanbags. The District Court had held that the officers were justified in using less-than-lethal force in shooting Lukus with beanbags rounds to prevent him from committing suicide.

In overruling a summary judgment dismissing the § 1983 claim the court stated: “The district court also held that the officers were justified in shooting Lukus with the beanbag gun because he posed immediate threat of harm to officers and bystanders. In coming to this conclusion the court relied primarily on the fact of Lukus’ possession of a knife. Although there is no question that this is an important consideration, it too is not dispositive. Rather the court must consider the totality of the facts and in the particular case”; otherwise, that the person was armed would always end the inquiry. *Glenn, Id.*, at 468, citing *Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1115 (9th Cir.2005).

In *Glenn*, the court cited other factors which, depending on the circumstances, could be relevant in considering whether the use of force was objectively reasonable. These factors include: “The availability of less intrusive alternatives to the force employed, whether proper warnings were give and whether it should have been apparent to officers that the

person they used force against was emotionally disturbed.” *Glenn Id.*, at 468.

With respect to whether warnings should be given before deadly force is used, the *Deorle* court determined that “. . . warnings should be given, when feasible, if the use of force may result in serious injury, and the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test.”

Ultimately, in *Deorle* the court held that even though the officer had used force that was less than deadly, the force was excessive compared to the governmental issues at stake.

With respect to qualified immunity, the court in *Deorle* stated that “Every police officer should know that it is objectively unreasonable to shoot---even with lead shot rapped in a cloth case---an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officers or other individuals.” *Deorle, Id.*, at 1285.

In *Glenn* the court also considered whether there were less intrusive means of force that might have been used before the officers resorted to the beanbag shotgun. Officers “need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable”. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994).

Based upon the evidence presented, was the conduct of Freeman in shooting the plaintiff indisputably “objectively reasonable”?

In deadly force cases, “[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.” *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

In attempting to determine whether Freeman’s use of deadly force was “objectively reasonable”, it is imperative to review the facts in order to ascertain, as far as possible, what circumstances Freeman was encountering at the time he employed deadly force. When the facts are viewed in the light most favorable to Gallegos and the logical inferences from those facts are considered, they are as follows²⁷ for purposes of addressing the legal issues presented by this appeal:

- (1) Before the shooting occurred, Gallegos had not harmed or threatened to harm any other person;
- (2) He was not attempting to escape or avoid being taken into custody;
- (3) He posed no threat of harming anyone with his vehicle at the time he was shot;
- (4) He was not attempting to strike anyone with his vehicle at the time he was shot in that he was traveling at a low speed, in a straight line, and had no knowledge that any other persons were in the vicinity;
- (5) After Gallegos entered onto the dirt road at the north end, he stayed on the road continuously up to the location where he was shot;

²⁷ The list of facts and reasonable inferences set forth is not intended to be an exhaustive list.

- (6) He was given no meaningful warning to surrender or comply with any commands from Freeman or Cooley before the shooting began;
- (7) The only crime known to Freeman that he had allegedly committed that evening was the misdemeanor violation of the protection order. Assuming that “pretending” suicide is not a crime.
- (8) He had not retrieved any firearms from the Van Dyk residence and he was not in possession of a firearm at the time of the shooting;
- (9) He had not had any earlier contact with the police and, accordingly, had not defied any instructions or orders from any police officers;
- (10) He was not aware that police officers were present on the property as he was driving toward the location where he was shot and was not aware anyone was in the vicinity before a very brief instant before he was shot;
- (11) The bullets which hit Gallegos seemed to be well placed, not indicative of having been fired by someone who was jumping or scrambling out of the way of an oncoming car when the shots were fired.
- (12) At no time did Gallegos swerve his vehicle in the direction of Freeman or engage in “tracking” him;
- (13) Freeman was safely off the roadway as Gallegos drove south on the road and continued to remain safely off the roadway up to the time he fired the shots;

- (14) Any perception or belief on the part of Freeman that he was in danger of being run over or struck by the vehicle was unreasonable; and
- (15) At no time was Freeman, or any other person, in danger of being struck by the Gallegos vehicle.

The above facts and circumstances indicate that a genuine issue of material fact exists on whether, among other things, Freeman's use of deadly force was objectively reasonable.

Because neither Freeman nor anyone else was put at risk by Gallegos, a reasonable officer would have known that using deadly force under the above circumstances would have been unreasonable.

G. Conclusion

It is worth repeating, as quoted above and stated in *Harlow v. Fitzgerald*, that the goal of qualified immunity is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow, Id.*, at 818. While this may be a laudable objective designed to decongest the courts of meritless and insignificant complaints, it is respectfully submitted that a claim for damages as a result of being shot three times by a police officer without good cause should by no means be considered insubstantial.

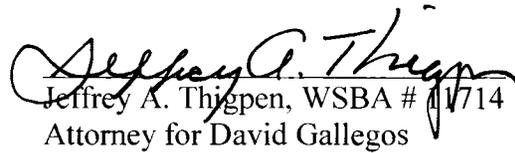
It should also be remembered as noted above, that dismissal of a § 1983 claim on summary judgment should only be granted sparingly. *Santos v. Gates, Id.*, at 853.

The evidence that has been accumulated with respect to this matter and which has been presented in response to the motions for dismissal by Deputy Jeremy Freeman overwhelmingly establishes that there exist

genuine issues of material fact in this case which, as a matter of law, should be determined by a jury at trial.

DATED this 3rd day of February, 2012

Respectfully submitted,

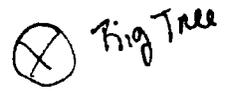

Jeffrey A. Thigpen, WSBA # 11714
Attorney for David Gallegos

APPENDIX



A-1

Note - Car width
APPRX 64"



↑
This point
APPRX 409'
From Pole Road

409'

Width of Road
APPRX. 6'

120'

15' APPRX.
Location
where car
stopped

POST

Fence

Fence

Grass Area

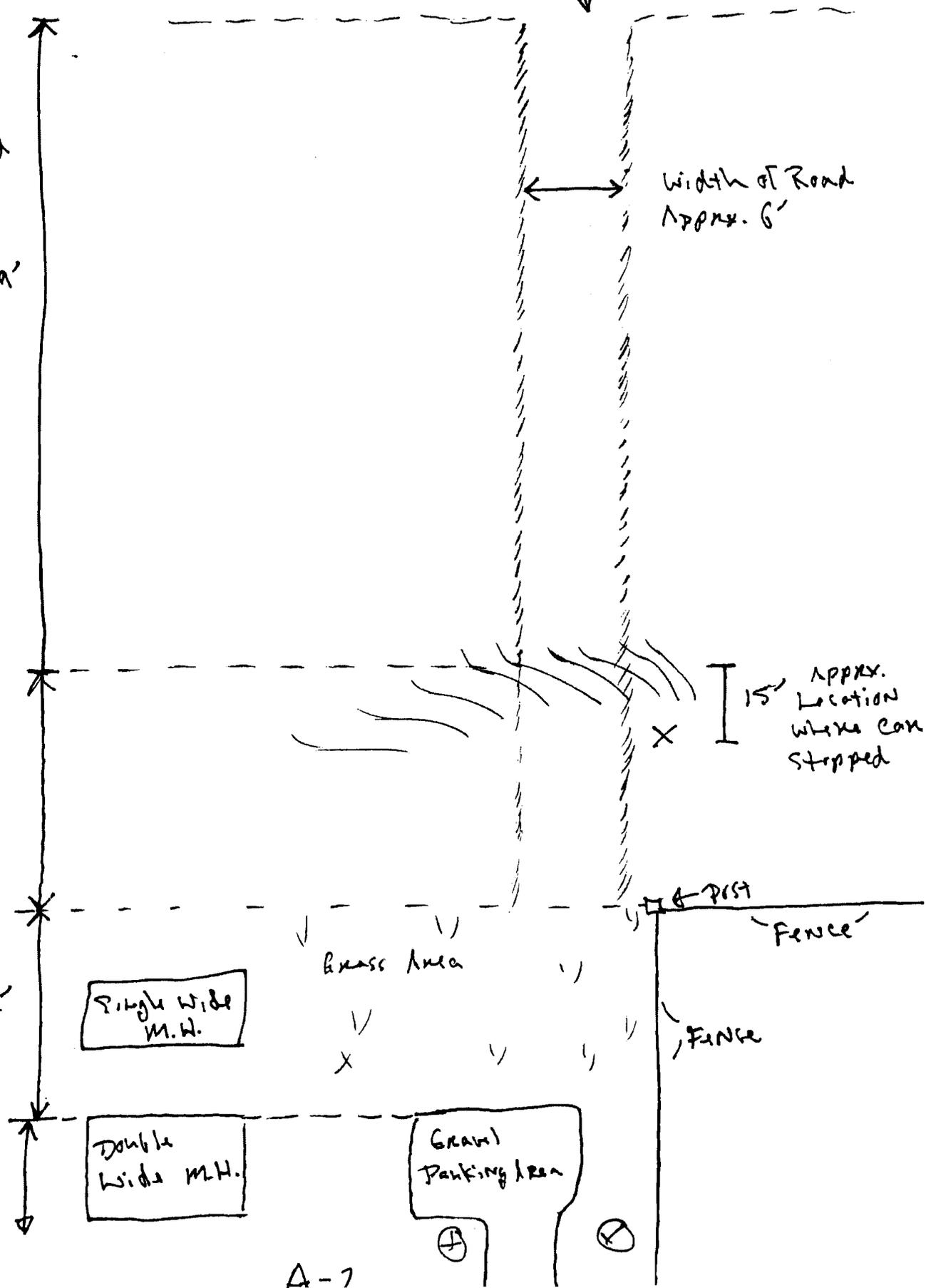
Single Wide
M.H.

Double
Wide M.H.

Gravel
Parking Area

568' From
Here to
Pole Rd.

A-7



(⊗ = trees)
* Not to scale

Single Wide M.H.

Double Wide M.H.

Gravel Parking Area

148' = to end of Gravel Parking Area

House (Tan Color)

SMALL SHED

Parking → Gravel

97'

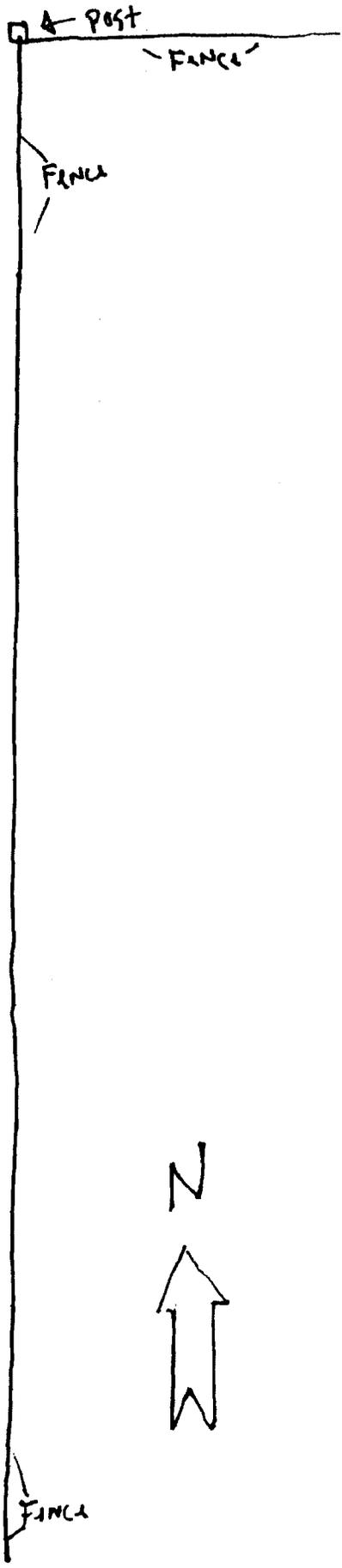
GARAGE SHED

67'

HOUSE

Parking

56'

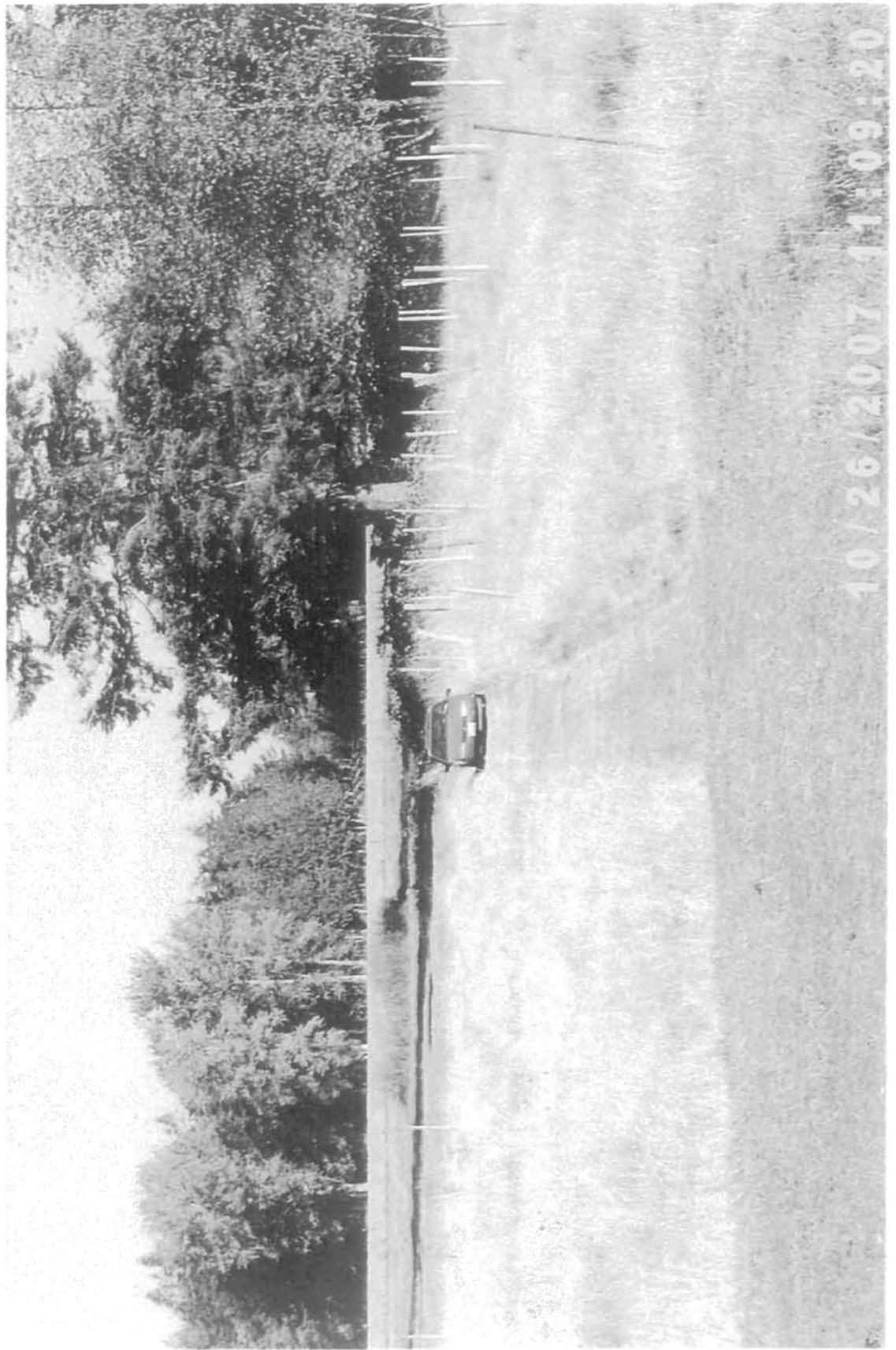


Appx. 368 Feet

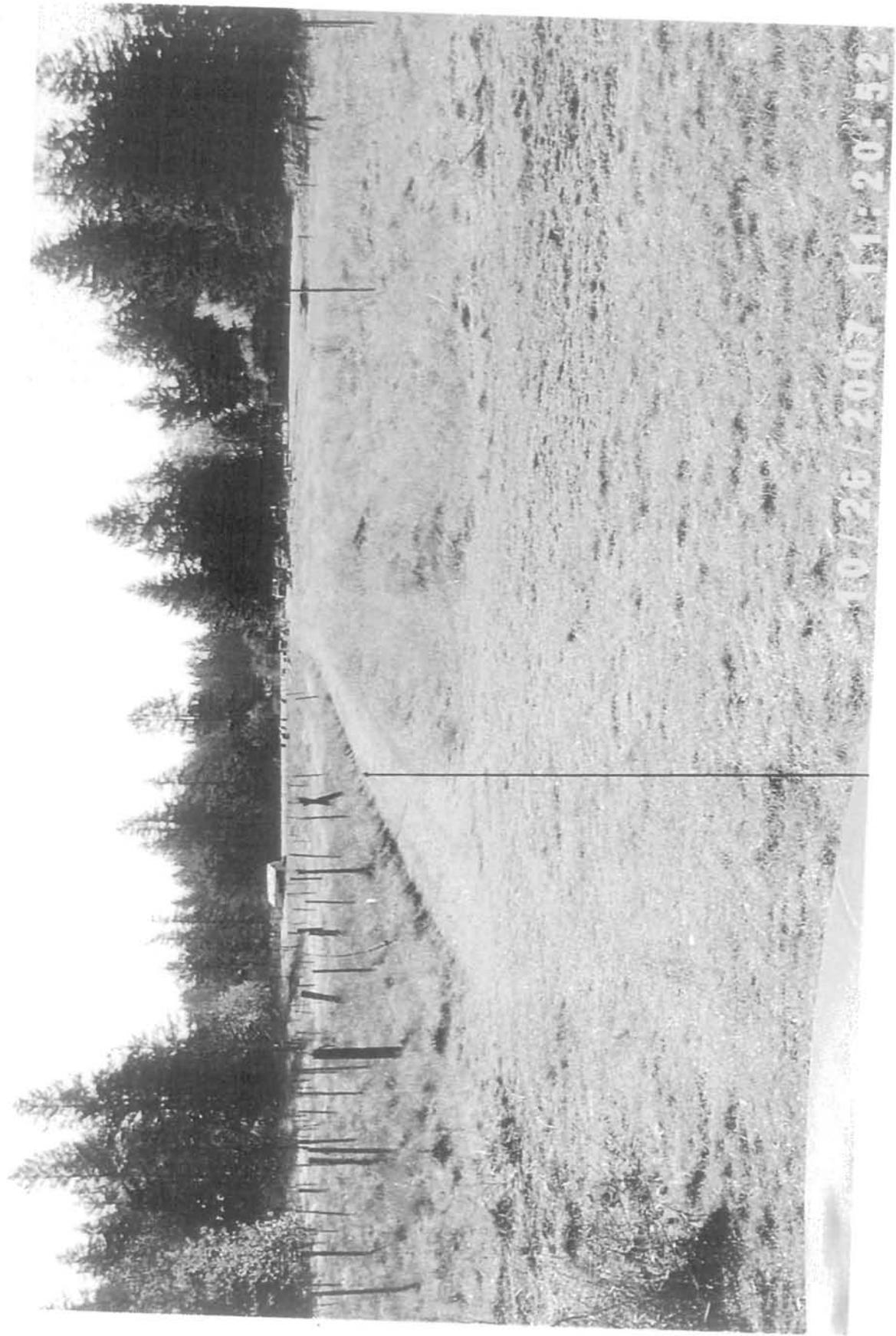
Pole Road

23'

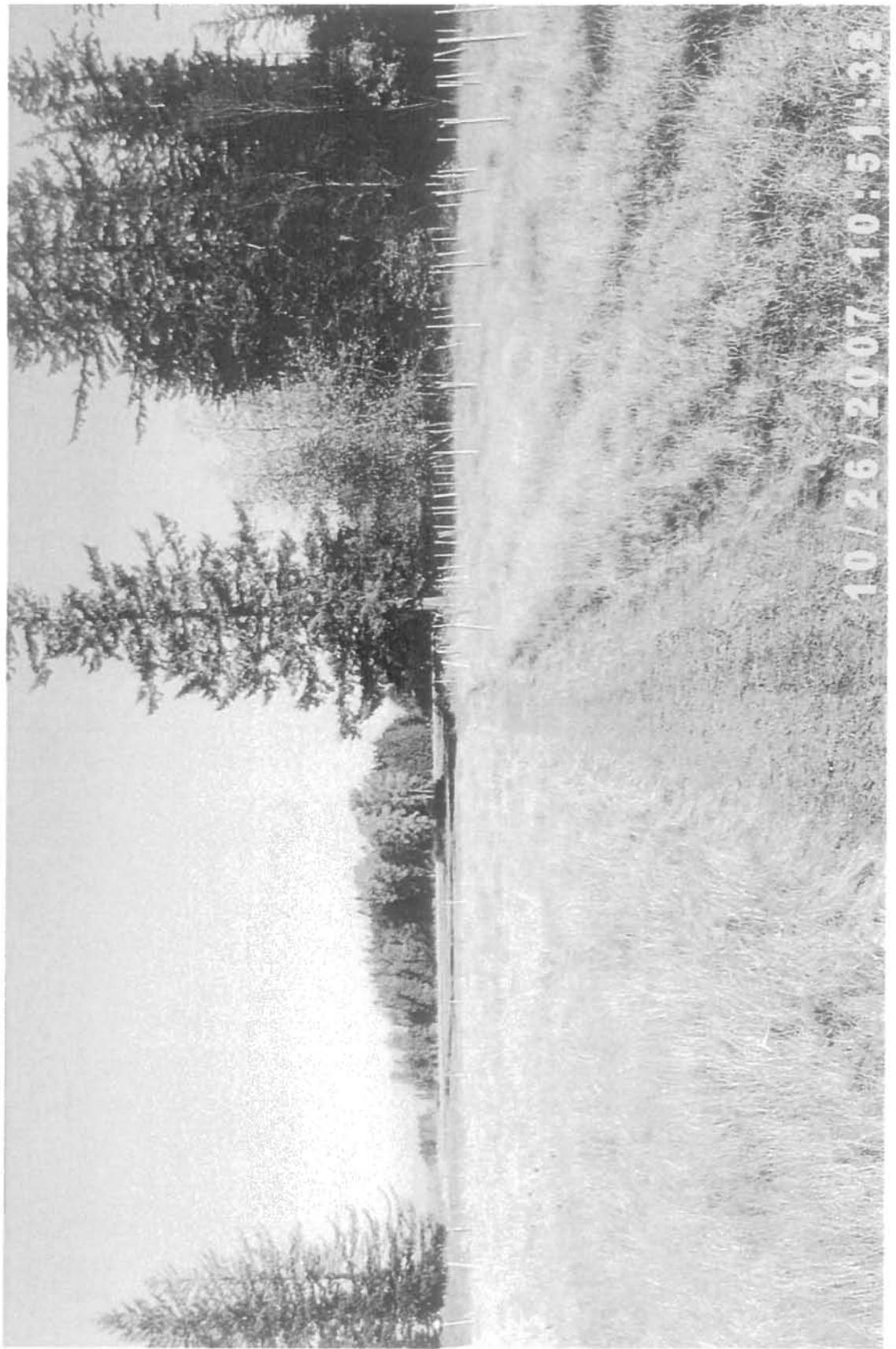
A-3



A-4



A-5



A-6

5B05865 ASSIST OTHER AGENCY **NARRATIVE**

FOLLOW-UP Author: **TILLMAN, PAUL** Rpt date: **Feb 14, 2005 8:00 AM** Appvd: **111**

completed a scale drawing of the scene using the information gathered with the total station.

was requested by Det Hutchings to do a speed estimate of the suspect vehicle at Point # 8. From the total station information I was able to determine that the distance from # 8 to # 5 was 57.264' with a grade of 1.7% and from # 5 to the left rear wheel of the suspect vehicle was 53.139' with a grade of 1.8%. Calculations were done using a COF of .01 and .02 indicating a vehicle coasting in gear with the motor running as there were no obvious signs of braking over the distance indicated. Calculations were done using standard velocity formulas with a resultant speed range of 16-17 mph for the suspect vehicle at point # 8 on the diagram. This should be considered a rough estimate as there are numerous other factors that could have affected the speed of the vehicle.

B05865 ASSIST OTHER AGENCY

NARRATIVE

OLLOW-UP

Author: TILLMAN, PAUL

Rpt date: Feb 11, 2005 9:00 AM

Appvd: 111

Myself, Sgt. Richards, Traffic Officer Wright and Traffic Officer Miller returned to the scene about 1000 hrs. The scene had been secured through the night by WCSO units. The Trimble TTS-500 Total Station was set up over the same reference points we had established the night before using the printed operating instructions kept with the unit.

While walking through the scene Myself and Traffic Officer Wright found that the tire marks we had seen the night before extended much further north of the scene to an area behind several patches of brush. We were also able to see tire marks that extended south to the area where the suspect vehicle had come to rest. These tire marks were forensically mapped along with two brush patches the tiremarks went around. Berms on either side of the tire marks were mapped along with 2 sections of Berry fencing. Det Hutchings requested that we map the area of several debris piles just south and west of the scene as witnesses had used them in reference to their location at the time of the incident. These were mapped along with all the buildings on the property. A third shell casing had been located, this was mapped as item 10.

We completed mapping of the scene at about 1500 hrs and returned to the station.

05B05865 ASSIST OTHER AGENCY**NARRATIVE****FOLLOW-UP**Author: **TILLMAN, PAUL**Rpt date: **Feb 10, 2005 8:00 PM**Appvd: **111**

was contacted by phone and requested to come to the station to assist other BPD officers in an investigation of a shooting involving a WCSO deputy at the Pole Road location. I was met at the station by Sgt. Richards, Traffic Officers Wright and Miller. The Total Station equipment was loaded in the traffic car and the four of us responded to the scene.

Once the scene had been photographed and video'd by the Crime Scene Unit, we did a walk through with Supervisor Hayes and Inv. Wong. They pointed out items of possible evidentiary value that had been marked through the use of pieces of yellow plastic with numbers on them. Numbers used were 1-9. The Trimble TTS-500 Total Station was set using the printed operating instructions that are kept with the unit. The evidentiary items were forensically mapped along with the location of the suspect vehicle and a WCSO vehicle at the scene. As it was very cold and dark it was determined to quit for the night and return in the daylight to complete mapping of the scene. We left the scene at about 0230 hrs and returned to the station.

5B05865 ASSIST OTHER AGENCY

NARRATIVE

FOLLOW-UP

Author: **TILLMAN, PAUL**

Rpt date: **Feb 16, 2005 5:00 PM**

Appvd: **111**

Myself, Traffic Officer Miller, Sgt. Richards, several Detectives a prosecutor and a cameraman returned to the location of the incident. Miller drove the suspects vehicle. The purpose being to try and determine the speed of the suspect vehicle at the time of the incident.

Miller drove the path taken by the suspect on the night of the incident at speeds of 15, 20, 25 30 and 35 mph. Speeds of the vehicle were verified through the use of a Laser SMD. Miller was instructed to maintain the speed to the point where it appeared the suspect braked, brake briefly and then allow the vehicle to coast to the position of final rest as identified the night of the incident. The only speed that allowed Miller to come close to the position was 20 mph. Once the speed had been determined, several runs were made and video taped. The camera man was in the vehicle with Miller for several of the runs. Lt. Ambrose was stationed at the approximate position of JEREMIAH FREEMAN (R1) with a flashlight or several of the runs with the cameraman in the vehicle. The speed of the vehicle during the filmed runs were verified with the Laser SMD.

Columbia International Forensics Laboratory

Gaylan Warren Forensic Microscopist

202 Casey Court, Newport, Washington 99156-9363

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Gallegos, David

05-1-00248-7

September 27, 2005

CIFL#a5.0727

Items/exhibits examined, basis for the above conclusion:

- 01) Affidavit of Probable cause determination 05-1-00248-7
- 02) Interview Synopsis
- 03) Complaint report 227 pages, starts 1 of 30. Etc.
- 04) Photos marked "Hospital Wounds"
- 05) photos marked "scene path & car"
- 06) photos marke "deputy in uniform w/dog"
- 07) CD of photos
- 08) floppy disk of photos
- 09) DVD re-Enactment .
- 010) Medical records, David R. Gallegos
- 011) Bellingham Police Department Traffic division plan view of site.
- 012) Cursory view of evidence 09/21/05
- 013) Cursory view of scene and car 09/21/05.

Conclusion / Report:

Bullet path through the drivers window sill/door and the locations of cartridge cases position the shooter in the furrow, 5 to 8 feet off the road. There is a berm, then furrow, another berm and so on across the field next to the road. If the shooter were next to the road on the berm the slope would be greater. On the next berm away is inconsistent with the location of cartridge cases (It should be noted that ejection patterns were not done with this specific gun and shooter). If the Officer were standing in the road he should contact the car, and/or at least have made contact shots.

Review of the re-enactment video shows more than adequate time to step

out of the roadway. This road is the only access for a vehicle to the back of the property and is clearly used for that purpose. If one wishes to walk their dog there is more than an acre available without being in the roadway. The re-enactment video has the shooter out of harm's way in both perspectives, driver's and shooter's.

The physical evidence and the injuries are consistent with the shots being fired at about 90 degrees to the side of the car (fits arm injury). Second, slightly back to front (the damage to the sill/door and left side under arm injury). Finally the injury to the hand going even more back to front. That the three bullets fired all hit David Gallegos is consistent with their physical condition and terminal ballistic characteristics. The arm and the left side under arm injury injuries can be lined up but is inconsistent with the terminal ballistic evidence. The terminal ballistic evidence is consistent with each of the three wounds made by each of three shots respectively.

On average, the time interval for multiple rapidly fired shots is about 0.2 seconds between shots or about 0.4 seconds from first shot to third shot.

The vehicle is traveling at a rate of 1.47 feet per second per mile an hour or 14.7 feet at 10 miles per hour in one second, 51.45 feet at 35 miles per hour in one second.

The target (Drivers position) is reasonably going to move about six to eight feet forward during the shooting sequence (about ½ second) or the car moving at about 10 miles per hour.

The trace evidence on the bullets and their paths associate the shots with these injuries respectively.

Property item 40571 "*While removing the coat a bullet fragment fell out of the coat.*" went through the window sill/door and fits with the bullet impact and bruise at the left side under arm injury. This bullet has glass, black polymer, and a lack of tissue consistent with this path and injury. The coat has powdered glass, bits of metal, fibers from the inside door panel and a lack of tissue consistent with this path.

Property item 40574 has two bullets with it; one labeled "L arm pit" and one labeled "Passenger seat".

"L arm pit" bullet has associated with it tissue, tan fibers, black fibers, blue/grey fibers, glass and is consistent with passing through the arm striking the humerus.

"Passenger seat" bullet has considerable damage, tissue and glass and is consistent with the shot that injures the hand.

The exact sequence of the shots could not be determined. The trace evidence most consistent with first shot is the bullet item 40571 but there is

associated black polymer with this shot. The black polymer material supports the window in the path and could contribute to this shot being characterized incorrectly. The other two bullets sustained additional damage and their character with respect to their sequence through the window cannot be determined.

Respectfully submitted,

Gaylan Warren

D.P. VAN BLARICOM, Inc.
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REPORT OF PLAINTIFF'S POLICE PRACTICES EXPERT
April 22, 2011

1. My name is D.P. Van Blaricom and I make this report on behalf of plaintiff in the Skagit County Superior Court 07 00226 2 filing of ***Gallegos v. Whatcom County, et al.*** under my file 10-1618.

2. My law enforcement career has spanned over fifty-four years of active employment to date:

- a. Twenty-nine years of continuous police service, during which I was the Chief of Police of Bellevue, Washington for the last eleven of those years;
- b. Thereafter, I have been engaged as a police practices consultant for an additional twenty-five years.

3. A detailed statement of my qualifications, experience, training and a list of all of my publications are attached hereto as Exhibit "A". Both my fee schedule for services and a list of my deposition and trial testimony for the preceding four years are attached hereto as Exhibits "B" and "C" respectively. My areas of expertise in the police arts and sciences include but are not limited to: police administration, policies, practices, procedures and standards of care; police use of force; less-lethal alternative to deadly force in both equipment and tactics; internal investigation and discipline. As a police practices expert, I have testified in state and federal courts for both plaintiffs and defendants throughout the United States.

4. Jeffrey Thigpen retained my services on December 3, 2010 to review the facts and circumstances of the officer-involved shooting (OIS) of David Gallegos (plaintiff) by Whatcom County Sheriff's Office (WCSO) Deputy Jeremy Freeman (shooter) on February 10, 2005 (Thursday) at approximately 1904 hours (7:04 PM). I have discussed the matter with plaintiff's counsel and this report was prepared in reliance upon my review of the following documents:

- a. Complaint;
- b. Answer;
- c. *Wiederspohn v. Whatcom County* Special Verdict form (I was plaintiff's police practices expert in that litigation, incidentally, which resulted in a jury verdict against this shooter in the amounts of \$ 100,000 compensatory and \$ 150,00 punitive);
- d. Defendants' Motion for Summary Judgment (MSJ);
- e. Plaintiff's Opposition to MSJ;
- f. Order Denying MSJ;
- g. WCSO reports 05-A-02788;

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- h. Shooter's statement (5 days post shooting);
- i. Scale diagram of OIS scene;
- j. Transcripts of 911 communications;
- k. Expert report of Gaylan Warren;
- l. Plaintiff's medical records;
- m. Transcript of trial testimony:
 - 1) Shooter,
 - 2) WCSO Sergeant Steven Cooley
 - 3) Skyla McKee,
 - 4) Plaintiff,
 - 5) Bellingham Police Department (BPD) Detective Paul Tillman,
 - 6) BPD Sergeant Joe Hayes
 - 7) Gaylan Warren,
 - 8) Albert Rodriguez,
 - 9) Private Investigator Michael Grant;
- n. Deposition of Gaylan Warren;
- o. Declarations:
 - 1) Shooter,
 - 2) Plaintiff,
 - 3) Joe Dozal;
- p. WCSO Rules and Regulations Chapter 22 Use of Force;
- q. National Law Enforcement Policy Center (NLEPC) model policies:
 - 1) #01 Use of Force,
 - 2) #76 Investigation of Officer-Involved Shootings;
- r. Shooting Incident Reconstruction © 2006 Academic Press;
- s. Additionally, I will visit the shooting scene with plaintiff's counsel on April 25, 2011.

5. It is my customary practice to evaluate the objective reasonableness of police conduct on a case-by-case basis from the perspective of a former Chief of Police, career law enforcement officer and nationally recognized police practices expert (see Exhibit "A"). In conducting that evaluation I apply:

- a. My training and experience as a police officer, who was required to apprehend suspects attempting to flee in vehicles in the performance of my law enforcement duties;
- b. My training and experience as a police supervisor, who was assigned to conduct internal investigations;
- c. My training and experience as a police supervisor and commander, who was assigned to train police officers on use of force, patrol procedures and firearms;
- d. My training and experience as a police supervisor and commander, who had to evaluate the performance of my subordinate police officers;
- e. My training and experience as a chief of police, who had to hire, train, assign, administer and, as may be necessary, discipline and/or terminate police officers;

- f. My training and experience as a chief of police, who had to develop and administer policies and procedures for directing police officers under my command;
 - g. My training and experience as a chief of police, who had to review internal investigations and make the final administrative decision on whether to sustain or not sustain allegations of misconduct;
 - h. My service as an elected city council member, after my retirement as chief of police;
 - i. My continuing training, as is supplemented by an ongoing review of professional publications, that addresses contemporary developments in my areas of expertise (see Exhibit "A" Continuing Training);
 - j. Although police practice expertise is not generally susceptible to and/or likely to be affected by a *Daubert* analysis, I compare the facts of each matter that I review to recognized professional standards of care:
 - 1) State and federal appellate court decisions, such as *Graham v. Connor* and similar citations,
 - 2) National Law Enforcement Policy Center model policies and similar publications,
 - k. Additionally, I have served as a police practices expert in 1,500+ matters of police-related litigation (see Exhibit "A"), wherein I have testified at deposition or trial in hundreds of cases (see Exhibit "C") on whether or not a particular fact pattern was objectively reasonable under the totality of circumstances.
6. My specific training to review officer-involved shootings, includes the following:
- a. U.S. Marine Corps small arms repairman (MOS 2111);
 - b. U.S. Marine Corps "*expert rifleman*";
 - c. Death investigation by the King County, WA Coroner;
 - d. Police and medical investigation of death by the Dade County, FL Medical Examiner;
 - e. International Association of Chiefs of Police (IACP):
 - 1) Management Controls on Police Use of Deadly Force,
 - 2) Investigation of Excessive Force Incidents,
 - 3) Active Shooter;
 - f. *Deadly Force and the Police Officer* by Northwestern University;
 - g. *Lethal and Less-Lethal Force* by the Americans for Effective Law Enforcement;
 - h. Shooting reconstruction by Northwestern University's Center for Public Safety;
 - i. American Academy of Forensic Sciences:
 - 1) Shooting Reconstruction,
 - 2) Recognition, Detection and Significance of Gunshot Residue,
 - 3) Gunshot Wounds Theory and Practice;
 - j. Forensics Certificate from the University of Washington;
7. Additional experience, as a career police officer, in the prevention and investigation of shootings, included:

- a. Police firearms instructor for over ten years;
 - b. Fired a rare “possible” score on the FBI practical pistol course (PPC);
 - c. Detective commander in shooting investigations, including a freeway sniper who shot two victims in motor vehicles;
 - d. Incident commander in the deployment of SWAT units during critical incidents;
 - e. Designed prototype of Detonics MkVII .45 ACP semi-auto pistol.
8. As a police practices expert retained in over 1,500 matters, for both plaintiffs and defense, I have:
- a. Reviewed 344 OIS to date;
 - b. Served as the prevailing party’s expert in the following OIS appellate decisions:
 - 1) 9th Cir. *Reed v. Douglas County*, OR 1989,
 - 2) 1st Cir. *Roy v. City of Lewiston*, ME 1994,
 - 3) ID S. Ct. *Kessler v. Payette County*, ID 1997,
 - 4) WA App. *Lee v. City of Spokane*, WA 2000,
 - 5) 9th Cir. *Haugen v. City of Puyallup*, WA 2003,
 - 6) 9th Cir. *Wilkins v. City of Oakland*, CA 2003,
 - 7) 9th Cir. *Herrera v. City of Las Vegas*, NV 2004,
 - 8) 8th Cir. *Craighead v. City of St. Paul*, MN 2005,
 - 9) 9th Cir. & US S. Ct. *Lehman v. Robinson*, 2007/2009,
 - 10) 9th Cir. *Kiles v. City of North Las Vegas*, NV 2008,
 - 11) 9th Cir. *Tubar v. City of Kent*, WA 2008,
 - 12) AZ App. *Celaya v. City of Phoenix*, AZ 2008,
 - 13) 9th Cir. *Bryan v. City of Las Vegas*, NV 2009,
 - 14) 6th Cir. *Jefferson v. City of Flint*, MI 2010;
 - c. Lectured on Investigation of Officer-Involved Shootings at the Henry C. Lee Institute of Forensic Science;
 - d. Co-authored *INVESTIGATION and PREVENTION of OFFICER-INVOLVED DEATHS* © 2011 CRC Press and includes chapters on:
 - 1) Reducing and Preventing Deaths by Training and Policy Guidance;
 - 2) Officer-Involved Shootings,
 - 3) “Suicide-by-Cop”;
 - 4) Emotionally Disturbed Persons (EDP);
 - e. Testified in state and federal courts throughout the United States in OIS-related litigation;
 - f. Served to reconstruct OIS for my recommendation on whether or not the shooting officer should be criminally charged:
 - 1) Rapides Parish, LA District Attorney, wherein I recommended a criminal charge and the shooter was charged and convicted,
 - 2) City and County of San Francisco District Attorney, wherein I recommended no criminal charge and the shooter was not charged.
9. My use of certain terms (i.e. – “negligent”, “reasonable suspicion”, “probable cause”, “objectively reasonable”, “deliberately indifferent”, “ratified”,

"unconstitutional", etc.) merely reflects my training and experience, in applying reasonable standards of care to police officers' conduct, and does not presume or imply a statement of any legal opinion.

10. Similarly, my use of certain terms (i.e. – *"cyanosis"*, *"petechiae"*, *"apnic"*, *"excited delirium"*, *"carotid"*, *"hyoid"*, *"asphyxia"*, *"mucosal"*, etc.) merely reflects my training and experience in reviewing triage and/or autopsy reports and does not presume or imply a statement of any medical opinion.

11. Based upon my training, experience and a careful evaluation of the totality of circumstances in this matter, it is my considered professional opinion that the following facts appear to be undisputed in the record:

- a. The shooter was called to apprehend plaintiff and was accompanied by his K-9 and Sergeant Steven Cooley;
- b. The shooter knew that plaintiff:
 - 1) Had violated a no contact order,
 - 2) Was reportedly suicidal,
 - 3) Was armed with a knife,
 - 4) Was in his vehicle:
 - a) At the end of an 8 feet wide and berm-sided road through a dark field,
 - b) In contact with a female, who was in active telephone contact with 911,
 - c) That 911 information was or should have been relayed to the shooter;
- c. When plaintiff decided that he wanted no further contact with the female and *"want(ed) to be alone"*, he turned on his vehicle headlights and returned down the same road, by which he had previously driven into the field;
- d. As plaintiff drove past him, the shooter fired 3 shots into plaintiff's vehicle and he was struck by 2 of those bullets.

12. Based upon my training, experience and a careful evaluation of the totality of circumstances in this matter, it is my considered professional opinion that the shooter could not have reasonably believed that plaintiff posed a significant threat of death or serious injury to himself or others at the time he shot him. In reaching that conclusion I was especially mindful of the following information from the record:

- a. All of the information previously described herein;
- b. Plaintiff's trial testimony explained:
 - 1) He expected law enforcement officers were *"probably on their way"*, because of his estranged wife's 911 call, but he had no idea that they were already on the scene,
 - 2) His first awareness of the shooter was when he *"heard someone shout"*, followed by *"a light in my face and then I was shot"*, all of which *"was just really fast"*,
 - 3) In reaction thereto, he *"braked"* and *"tried to cover my face"*, because the light *"caught me off guard"*;

- c. The forensic analysis of the physical evidence, which is to be fundamentally believed over the commonly encountered misperceptions of witnesses, has conclusively established:
- 1) The maximum speed of plaintiff's vehicle was between 16 and 20 mph;
 - 2) All 3 shots were fired at approximately 90° to the direction of travel from the left side of the vehicle and at or through the driver's side window,
 - 3) The shooter was positioned 5 to 8 feet off the road and to the left of the vehicle,
 - 4) The vehicle did not swerve until after plaintiff was shot;
- d. After consulting with his union representative and attorney, the shooter made a written statement 5 days later (he was apparently never interviewed or, if he was, that Q and A transcript has not been produced), wherein he described:
- 1) *"The vehicle accelerated to approximately thirty-five to forty miles per hour",*
 - 2) *"I had moved about **TWENTY FEET** to the east side of the (**8 FEET WIDE**) pathway" (emphases supplied)*
 - 3) *"I was side stepping to my right (east) so I could watch the vehicle as I moved",*
 - 4) *"The vehicle was about fifty feet from me" and, "As the car came closer I saw it swerve directly at me to the east side of the pathway",*
 - 5) *"As the vehicle came within ten to fifteen feet from me, I pointed my firearm at the driver through the windshield",*
 - 6) *"I continued to move away to my right to somehow avoid being struck by the vehicle",*
 - 7) *"I fired three shots at the driver",*
 - 8) *"The car passed by me with about five feet between the car and me";*
- e. The shooter's trial testimony was consistent with his report, except that he further:
- 1) Acknowledged that he had moved *"off the pathway"*, as plaintiff's vehicle was approaching,
 - 2) He shined his flashlight into the vehicle just before firing to light up the driver and, admittedly, all that plaintiff could have probably seen was that bright light in his eyes, which plaintiff's testimony confirmed,
 - 3) Instead of rushing toward the female he heard *"scream"*, he could have simply determined what was happening by communicating through his dispatcher to her ongoing call with the co-located 911 operator,
- f. Additionally, all 3 eyewitnesses were consistent with the physical evidence and, consequently, all of them placed the shooter out of the vehicle's path:

- 1) Sergeant Steven Cooley:
 - a) *"The vehicle's headlight suddenly illuminated Deputy Freeman, who was attempting to pull K-9 'Deuce' to the east and out of the path of the vehicle",*
 - b) *"I lost sight of Deputy Freeman and K-9 'Deuce' for less than a second, and virtually simultaneously heard several gunshots",*
 - c) In his trial testimony, Sergeant Cooley further explained that plaintiff's vehicle never swerved and the shooter had *"disappeared from view out of the headlights"* and then, *"within the space of seconds"*, he *"heard the shots"*, which is entirely consistent with the physical evidence that all 3 shots were fired as plaintiff's vehicle was harmlessly passing by and presenting no risk to the shooter,
 - d) Although the Prosecuting Attorney attempted to elicit testimony that plaintiff may have been attempting *"suicide-by-cop"* (SBC), that theory was effectively refuted by Sergeant Cooley's further testimony that plaintiff was mightily and repeatedly making the complaint, *"You fuckers shot me!"*
 - e) Additionally, as regards an SBC theory, it is undisputed that plaintiff did not want to have any contact with the deputies whatsoever and his female friend had relayed that fact to the 911 operator,
- 2) Santos Gallegos (plaintiff's brother):
 - a) *"The deputy that shot was on the driver's side and shooting at an angle",*
 - b) *"The deputy started shooting as the car went by him",*
 - c) *"The car was a few feet away from the deputy",*
- 3) Skyla McKee (plaintiff's female friend):
 - a) *"It appeared the officer stepped off to the side of the driveway and she heard three shots",*
 - b) *"After she heard the shots she saw David's car go off the driveway and come to a stop",*
 - c) She further testified at trial, *"there was nobody in front of the car and that flashlight was off to the side"*, which is consistent with the shooter's testimony that he shined his flashlight into the vehicle just before firing,
 - d) Additionally, she had remembered seeing *"brake lights"* at *"about the same time the shots were fired"*, which is also consistent with plaintiff's testimony that he *"braked"* just before he was shot, in reaction to the shooter's sudden flash of a light into his eyes;

- g. There are both consistencies and inconsistencies between the physical evidence and eyewitness description versus the shooter's description, however, the following facts are inescapable:
- 1) If the shooter was ever in the vehicle's path, he had moved out of the way,
 - 2) If he was in the vehicle's path "*within ten to fifteen feet from me*", when he "*pointed my firearm at the driver through the windshield*":
 - a) At the shooter's estimated furthest distance of "*fifteen feet away*" and lowest speed of "*thirty-five miles per hour*", the vehicle would have been traveling at 51.45 feet per second and would have crossed that "*fifteen feet*" in .0343 second;
 - b) Further and during that remarkably short time, the shooter would have had to have continuously adjusted his aim by tracking the vehicle as it drove past him to shoot through the driver's side window;
 - 3) Obviously, the shooter's self-serving description of what he would have believed could not have occurred;
- h. Noted shooting reconstructionist Lucien C. Haag published Shooting Incident Reconstruction, wherein he concludes that authoritative text with the following observations:
- 1) Conduct an "*evaluation of the physical evidence with the purpose of determining what did and did not occur*",
 - 2) Because, "*participants in a shooting incident may have strong motives to misrepresent the facts*";
- i. The WCSO Rule and Regulation of Use of Force is appropriately based upon a "*totality of circumstances*" analysis:
- 1) Force may only be used when "*necessary*",
 - 2) Only that amount of force may be used that is "*reasonable*",
 - 3) Deputies may fire at a moving vehicle "*only under very extreme circumstances*";
- j. A similar use of force policy has been adopted by the Seattle Police Department (SPD), which further addresses firing at the occupant(s) of a moving vehicle and reflects contemporary law enforcement policy on that issue
- 1) "*Firing at a moving vehicle can often only increase the risk of harm*",
 - 2) "*Firing at a moving vehicle will have very little impact on stopping the vehicle*"
 - 3) "*Disabling the driver will most likely only result in an uncontrolled vehicle*",
 - 4) "*An officer **SHALL NOT** discharge a firearm at the driver, occupants, or a moving vehicle unless deadly physical force is being used against the officer or another person by means **OTHER** (emphasis supplied) than a moving vehicle*",

- 5) *"Officers shall not intentionally place themselves in a vehicle's path, to either the front or the rear" and "if they find themselves in danger from a moving vehicle, they shall attempt to move out of the way, if possible, rather than discharging their firearm",*
- k. Consistent with the foregoing SPD use of force policy, the NLEPC model policy #01 on Use of Force provides the following relevant direction for analyzing an OIS, in which the alleged "weapon" was a moving vehicle:
- 1) *"In many cases involving the discharge of firearms at a moving vehicle, it is based on the contention that the driver was intentionally attempting to run the officer down",*
 - 2) *"One of the simplest alternatives to the use of a firearm in this instance is to move out of the vehicle's path and seek cover";*
- l. Obviously, the shooter followed the foregoing good advice and "move(d) out of the vehicle's path" (if he was ever therein) but, thereafter shot anyway;
- m. The NLEPC model policy #76 on Investigation of Officer-Involved shootings requires:
- 1) *"Conduct separate tape recorded interviews with each officer involved" and that, of course, includes the shooter,*
 - 2) *"Interviews with involved officers and others at the scene should be conducted as soon as possible following the incident" and "an officer can be compelled to respond to questioning",*
 - 3) *"Only by asking the 'tough questions' can all of the facts and circumstance surrounding the shooting event be compiled":*
 - a) *"Claims by an officer that he/she believed the suspect was armed, was in the process of drawing a firearm or was otherwise posing a threat of death or serious bodily harm cannot always be taken at face value",*
 - b) *"Careful collection and examination of physical evidence in conjunction with witness statements will generally prove sufficient to support or refute those claims and thereby focus the investigation",*
- n. The shooter did not make a written statement until 5 days after the shooting but was apparently never required to submit to an interview and, accordingly:
- 1) There are certainly no indications of any "tough questions" having been asked of the shooter,
 - 2) Obvious discrepancies between the shooter and the independent witnesses appear to have been simply ignored,
 - 3) Nor, is there any indication that the shooter's version of this OIS was compared with or corroborated by any of the irrefutable physical evidence;
- o. After another similar OIS (*Tubar v. City of Kent*, US District Western WA at Seattle 05-01154-JCC), wherein the shooter fired directly into the driver's side window of a passing vehicle, the federal judge stated

on the record, as I had earlier testified, "*The officer (shooter) was clearly not in danger at the time he fired*";

p. As the physical evidence has indisputably established and, under the totality of circumstances previously described herein, Deputy Jeremy Freeman "*was clearly not in danger*", when he shot plaintiff, and therefore:

1) His use of force was not "*necessary*",

2) The amount of force that he used was "*unreasonable*";

q. Furthermore, any suggestion that plaintiff had attempted SBC, a topic on which I have both published and reviewed actual real-life examples, is baseless but, even he had attempted SBC, it was not the shooter's role to fulfill some supposed death wish.

13. I am prepared to testify to these opinions at deposition or trial, if called upon to do so.

14. If I am provided with further documentation for my review, I may have additional opinions.

/s/ D.P. VAN BLARICOM

OFFENSE DESCRIPTION:		DATE:	EVENT NUMBER:
OFFICER INVOLVED SHOOTING		<input checked="" type="checkbox"/> CONT. NARRATIVE <input type="checkbox"/> FOLLOW-UP	02-10-05 05A02808
1. Reconstruct incident and describe investigation. 2. Victim's injuries - details and where medical exam occurred. 3. Property damaged - describe and indicate amount of loss. 4. If significant, describe vehicle.		5. Identify undeveloped leads. 6. List statements taken. 7. List persons from whom statements need to be taken later. 8. Physical evidence - detail what and where found, by whom, and disposition.	
05A-2788			
ADDITIONAL COPIES TO:			

NARRATIVE:

hear her scream again. When I did not hear the woman again, it increased my fear that she had been killed.

At that point I told Sergeant Cooley that I was going to make my way back to where I thought I heard the scream come from. My K-9 Deuce and I started to jog along the wheel rut pathway north into the field. As we started to jog, the two people Sergeant Cooley was speaking with started to come with us. I stopped, and almost in unison, Sergeant Cooley and I ordered them to stay back where they were. They stopped, and K-9 Deuce and I continued to jog into the field with Sergeant Cooley following us.

After running approximately one hundred yards into the field I saw vehicle headlights come on pointing south toward us. What-Comm gave another update that Mr. Gallegos was out in the field inside of his car. I radioed What-Comm that we were about to contact him, and I asked for emergency traffic. Another unit walked over my radio traffic, but 2 Sam 10 relayed my request to What-Comm. What-Comm confirmed my request for emergency traffic.

requested emergency traffic because we were about to contact an individual who was now in my mind a suicidal criminal suspect who may have just murdered or seriously hurt the woman who screamed. The situation appeared to be a serious officer and public safety situation, and I wanted the radio open so we could communicate and relay information without being interrupted.

I continued to move north toward the vehicle and where the scream came from, but I moved to my right (east) out of the direct light from the headlights. As I moved, I drew my primary handgun because I believed Suspect Gallegos to have firearms with him, and I feared he was just using his vehicle lights to illuminate us so he could shoot at us.

The vehicle engine started revving while I was still about two hundred yards away, and then it appeared the driver put the vehicle into gear as it rapidly accelerated south toward us on the wheel rut path. The vehicle accelerated to approximately thirty-five to forty miles per hour, and I had moved about twenty feet to the east side of the pathway. I was side stepping to my right (east) so I could watch the vehicle as I moved.

The vehicle was now about fifty feet from me, and I could see it was a red car. There was nothing for me to hide behind that would shelter me from the impact of the car, and there was no way for me to outrun the car in the open field either. As the car came closer I saw it swerve directly at me to the east side of the pathway, and the car's headlights illuminated me as I continued to move to my right. I had my flashlight in my left hand with the dog lead loop around my left middle finger. I illuminated the interior of the car with my flashlight, and I yelled, "Sheriff K-9 stop." I could see the interior of the vehicle through the windshield, and it appeared to be

REPORTING OFFICER:	REVIEWING OFFICER:
J. Freeman	7A146