No. 15-1141

# United States Court of Appeals for the First Circuit

EURIE A. STAMPS, JR.,
Co-administrator of the Estate of Eurie A. Stamps, Sr.;

NORMA BUSHFAN-STAMPS,
Co-administrator of the Estate of Eurie A. Stamps, Sr.
Plaintiffs - Appellees

v.

TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department
Defendants - Appellants

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## CORRECTED BRIEF FOR THE PLAINTIFFS - APPELLEES EURIE A. STAMPS, JR. and NORMA BUSHFAN-STAMPS

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## REQUEST FOR ORAL ARGUMENT

Pursuant to First Circuit Rule 34, Plaintiffs-Appellees request oral argument. This case presents an issue of great importance involving whether the intentional seizure of a compliant bystander to the execution of a search warrant with a loaded rifle pointed at the individual's head, which results in his death after the rifle discharges, violates the Fourth Amendment and is sufficiently well-established as a violation so that qualified immunity can be denied.

## JURISDICTIONAL STATEMENT

Plaintiffs-Appellees have no objection to Defendants-Appellants' jurisdictional statement, but note that this Court has jurisdiction over a summary judgment denial of the qualified immunity defense "'only if the material facts are taken as undisputed and the issue on appeal is one of law.'" *Campos v. Van Ness*, 711 F.3d 243, 245 (1st Cir. 2013), quoting *Mlodzinski v. Lewis*, 648 F.3d 24, 27 (1st Cir. 2011). Thus, this Court will assume interlocutory appellate jurisdiction only when the "defendants have accepted as true all facts and inferences proffered by plaintiffs, and defendants argue that even on plaintiffs' best case, they are entitled to immunity." *Id.* at 28.

## STATEMENT OF THE ISSUES

1. Whether the District Judge correctly ruled that Officer Paul Duncan violated the Fourth Amendment when he engaged in the unnecessary and objectively unreasonable conduct of pointing a live weapon at Eurie Stamps' head with his finger on the trigger resulting in the unintended discharge of his rifle and the death of a compliant and nonthreatening bystander to the execution of a search warrant?

2. Whether the District Judge correctly ruled that Officer Duncan's violation of the Fourth Amendment was clearly established and thus mandated the denial of qualified immunity?

## STATEMENT OF THE CASE

Plaintiffs-Appellees accept Defendants-Appellants' statement of the procedural background of this case. Fed. R. App. P. 28(b).

## STATEMENT OF FACTS

### 1. Planning for Execution of the Warrant.

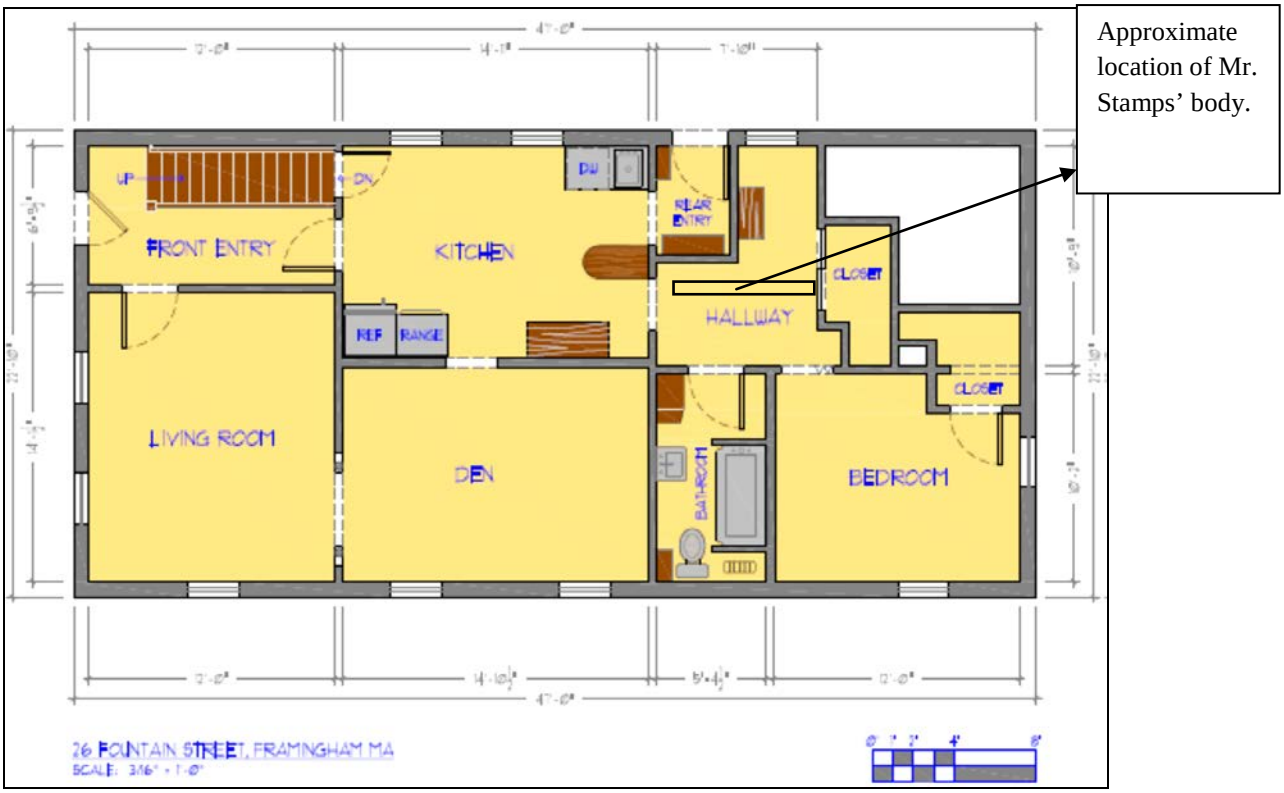
On January 4, 2011, detectives of the Framingham Police Department (FPD) obtained a search warrant for the first floor apartment of 26 Fountain Street, Framingham, Massachusetts based on probable cause to believe that crack cocaine was being sold there. (A. 608, 618). The police believed that the targets of the search warrant, Joseph Bushfan and Dwayne Barrett, had violent criminal histories and were dangerous. (A. 653).

That evening, Officer Paul Duncan and approximately 10 other members of the FPD SWAT team arrived at the Framingham police station to assist in executing the search warrant at the Stamps home. (A. 652). The SWAT team and Duncan were briefed that Eurie Stamps, Sr. was 68 years old and resided in the apartment with his wife, Norma Bushfan-Stamps, and her son, Joseph Bushfan.

(A. 620, 654, 685-686, 702). The SWAT team was told that Stamps was not suspected of any criminal activity, had no history of violent crime, did not own or possess a weapon, and posed no threat to the police during execution of the warrant. (A. 620, 653-654, 685-686, 702).

**2. <u>Execution of the Warrant and the Shooting and Killing of Mr. Stamps.</u>**

The following is a floor plan of Stamps' first floor apartment that Duncan confirmed as accurate at his deposition. (A. 652-653).




(A. 711).

Shortly after midnight on January 5, 2011, the SWAT team entered the "front entry" to the home that consisted of a common hallway. At the end of the common hallway was a door to the kitchen of Stamps' first floor apartment. On the right wall of the common hallway was a door to the "living room", which was being used as a makeshift bedroom. (A. 658, 714-715). The first team of officers consisting of Lt. Robert Downing, Officer Timothy O'Toole, and Officer Michael Sheehan planned to make entry into the kitchen through the door at the end of the common hallway. (A. 659, 714). A second team of officers, consisting of Duncan, Sergeant Vincent Stuart, and Officer James Sebastian, planned to breach the door on the right side of the common hallway into the living room. (A. 658-659).

After the order to execute the warrant was given, a "flash-bang" explosive diversionary device was deployed through the kitchen window to stun and shock the occupants. (A. 715-716, 755). The first team of officers then entered through the doorway into the kitchen, which was lighted. (A. 716). An open doorway separated the kitchen from a back hallway leading to a bathroom and a rear bedroom. (A. 711, 733, 740-741). O'Toole and Sheehan observed Stamps standing in the back hallway near the threshold between the kitchen and the hallway. (A. 711, 734, 741). The back hallway where Stamps was standing was dimly lit from ambient lighting from the bedroom and kitchen. (A. 663, 666, 711, 735-736, 741).

Sheehan and O'Toole ordered Stamps to get down on the floor and to show his hands. (A. 735, 742-743). Stamps complied by lying down on the floor on his stomach with his hands up near his head. He was not free to move and was seized. (A. 101, 734-735, 742-744). Stamps' head was near the kitchen/hallway threshold and his feet were near the far end of the back hallway. (A. 101, 736-737, 742). Sheehan and O'Toole then stepped over Stamps' prone body, turned their backs to him, and entered the back hallway and bathroom to look for other occupants. (A. 662-663, 737, 745, 748-749).[1]

Immediately after hearing the "flash-bang" and simultaneously with the first team entering the kitchen, Duncan breached the door to the living room with a battering ram. (A. 659, 714-716). When Duncan entered the living room, he intentionally set his weapon to "off-safe" and on the semi-automatic setting. (A. 660). He never changed his rifle from that setting. (A. 660-662, 666). Duncan and Stuart scanned the living room and the adjacent den and found no persons or threats. (A. 659-661, 717-718).

While in the den, Duncan and Stuart heard O'Toole and Sheehan in the kitchen commanding someone to "get down" and calling for trailers to assist them.

[1] Officer Langmeyer also stepped over Stamps' prone body and entered the rear bedroom where he encountered, seized, and handcuffed Devon Talbert with the assistance of Officer Sheehan. (A. 749-750).

Stuart then ordered Duncan into the kitchen for the sole purpose of assisting O'Toole and Sheehan. (A. 661-662, 719, 755).

Duncan entered the kitchen and observed Sheehan and O'Toole leave the back hallway where Stamps was lying and enter the adjacent bathroom. (A. 662-663). Riley, Sebastian and Downing were also in the kitchen within feet of Duncan guarding a door leading to the cellar.[2] (A. 693, 766, 769-770). As Duncan moved toward the threshold between the kitchen and the back hallway, he observed Stamps lying on his stomach with his elbows on the floor and his hands up near his head, the position ordered by Sheehan and O'Toole. Stamps lifted his head and looked at Duncan standing in the kitchen. Duncan could see Stamps' eyes looking at him. (A. 663-666). Duncan said nothing to Stamps and issued no commands. (A. 102, 666).

While standing in the kitchen within several feet of Stamps, who remained on the floor with his hands in the air:

- Duncan intentionally kept his rifle "off-safe" in a semi-automatic mode. (A. 102, 666-667);
- Duncan intentionally placed his finger inside the trigger guard and on the trigger of his loaded and live rifle. (A. 103, 196, 337-342, 786, 806); and,
- Duncan intentionally pointed his rifle at Stamps' face from a distance of no more than 36 inches. (A. 102, 229-236, 666).

[2] The door to the cellar is depicted in the floor plan at the upper left corner of the kitchen. *See* p. 3, *supra*.

Duncan admitted that he pointed his live rifle at Stamps' head as a show of force for the purpose of preventing him from moving. (A. 102-104, 657-658, 666-667, 758, 786). Stamps was not free to move and was seized. (A. 101-102, 657-658, 666-667, 758). Although Riley, Sebastian and Downing were in the kitchen within feet of Duncan when he pointed his rifle at Stamps (A. 692-693, 766, 769-770), Duncan never asked them for assistance. (A. 676, 678, 690-691).

While standing in the kitchen with the muzzle no more than 36 inches away from Stamps' head, Duncan unintentionally pulled the trigger, fatally shooting Stamps in the face while he was lying on the floor with his hands in the air. (A. 102-103, 182-185, 229-236, 786). Because Stamps was lying on his stomach with his head up and looking at Duncan, the bullet entered his left cheek, exited the left upper neck, and then re-entered his body at the lower neck/clavicle area. (A. 242). Immediately after the gun discharged, Sebastian and Downing observed Duncan standing in the kitchen and walking away from Stamps. (A. 602, 766, 786).[3]

[3] The defendant argues that there is no evidence that Duncan intentionally placed his finger on the trigger. (Def. Brief at 12). The question whether the evidence is sufficient to support a particular factual finding is not reviewable on an appeal from a denial of the qualified immunity defense. *Cady v. Walsh*, 753 F.3d 348, 359 (1st Cir. 2014). Nevertheless, there is no evidence that something occurred while Duncan was standing in the kitchen that caused him to unintentionally place his finger on the trigger. In the absence of such evidence, a jury can rationally infer that Duncan intentionally placed his finger on the trigger

***– footnote cont'd –***

Plaintiffs' experts conducted a forensic investigation to determine Duncan's position when the rifle fired and the angle of the rifle in relation to Stamps' body. (A. 237-244, 773-787). Based upon the trajectory of the bullet into Stamps' body, Plaintiffs' forensic experts depicted the shooting in the following graphic:


(A. 229).

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from the following facts: his rifle discharged; the rifle could not discharge unless Duncan pulled the trigger (A. 672); the gun was functioning properly (A. 778); Duncan was standing in front of Stamps with nothing physically hindering or effecting him (A. 662-666, 829-830); and two officers testified that immediately after the gun discharged, they saw Duncan standing and walking away from Stamps, indicating that he was fully upright and not physically disturbed when the gun fired. (A. 766, 786). *Commonwealth v. Longo*, 402 Mass. 482, 487 (1982)(because intent to do an act is often not susceptible to direct proof, it may be proven by a rational inference drawn from all the evidence and circumstances). Further, Plaintiffs' experts have concluded that Duncan violated FPD procedures because he placed his finger on the trigger when he approached Stamps. (A. 354-358). Lastly, the defendants have admitted that Duncan "had his finger on the trigger." (A. 103).

### 3. Duncan's Violation Of Established Police Procedures.

Duncan received specific training on how to protect non-suspects and innocent people, such as Stamps, that he might encounter during execution of a search warrant. (A. 656-657). FPD firearms and weapons procedures in effect at the time of the Stamps' shooting required an officer to keep his weapon "on-safe" until he "perceives a threat" or the officer is "actively clearing a room" (A. 720, 799-801, 803); to keep his "finger outside of the trigger guard until ready to engage and fire on a target" (A. 629-630, 697, 824); and to "point the weapon's muzzle in a safe direction at all times" unless an officer intends to fire on a target. (A. 697, 824). Duncan was trained multiple times on each of these procedures. (A. 103, 624, 629-630, 656-657, 697, 720-721, 727, 757, 791). Duncan knew that each of these established police procedures is designed for the very purpose of protecting compliant, innocent, and nonthreatening citizens from a risk of accidental death or serious bodily harm during the execution of a search warrant. (A. 656-657, 689).

Stamps did not pose a threat to the police. He was lying on his stomach with his hands held up near his head; he complied with all police commands, was unarmed, was not resisting, was not fleeing, made no furtive movements, had not committed nor was suspected of committing any crime, and had no criminal record. (A. 101, 755, 757, 759, 620, 622, 624, 685-686, 722, 803).

Sergeant Stuart, Lt. Downing, and Deputy Chief Craig Davis, the individuals responsible for training Duncan, all testified that Duncan violated FPD procedures and his training by failing to place his rifle "on-safe" because Stamps posed no perceived threat and Duncan was not actively clearing a room. (A. 620-624, 722, 755-759, 803). Duncan also violated FPD procedures and his training by placing his finger on the trigger and aiming the muzzle of his rifle at Stamps' head when he had no intent or reason to engage and fire on a target. (A. 103-104, 666, 679, 758, 760, 786).

Stamps was shot and killed as a direct result of Duncan's violations of FPD protocols and his training. (A. 729-730, 758, 760). Plaintiffs' liability expert, Kim Widup, has opined that Duncan's conduct of intentionally placing his rifle "off-safe", intentionally placing his finger on the trigger, and intentionally pointing his weapon at Stamps' head was objectively unreasonable and reckless—and that his conduct toward Stamps, culminating in Stamps' killing, constituted excessive force. (A. 757-760). Defendants have not offered any expert opinion to refute Widup's opinion.

Duncan was removed from his position on the SWAT team the day after the shooting because his violations of police training and FPD procedures caused the unjustified killing of Mr. Stamps. (A. 626-627, 699). Police Chief Carl testified

that Duncan was discharged from the SWAT team because "he killed an innocent man." (A. 797).

## SUMMARY OF THE ARGUMENT

Officer Paul Duncan shot and killed an unarmed, already seized and compliant bystander to the execution of a search warrant. The decedent, Eurie Stamps, Jr., complied with all police commands and had surrendered to police control by lying on his stomach with his elbows on the floor and his hands in the air. Without any reason to believe that the circumstances demanded any type of force directed at the prone Stamps, Duncan aimed a loaded fire-ready semi-automatic rifle with his finger on the trigger at Stamps' head. That he did not intend to pull the trigger does not change the Fourth Amendment analysis and does not entitle him to qualified immunity.

The Fourth Amendment protects citizens from unreasonable police conduct during a seizure or arrest that results in unnecessary harm that has no legitimate law enforcement justification. Defendants appeal the decision to deny them qualified immunity, which is unavailable when the officer violates a clearly established statutory or constitutional right. Here, the violation of the Fourth Amendment is both palpable and well-established. Such a violation occurs when there exists "governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo,* 489 U.S. 593, 597 (1989). Once

a seizure is established, the question then becomes whether the means utilized was objectively unreasonable, which is evaluated in light of the facts and circumstances confronting the officer "without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

An officer's decision to point a fire-ready gun at the head of an unarmed civilian who objectively poses no threat to the officer or the public violates the Fourth Amendment and is sufficient to sustain a claim of excessive force. Decisions of sister Circuits dating back to 1981, and acknowledged in decisions of this Court, establish that pointing a gun in those circumstances constitutes a Fourth Amendment violation. Not only do these cases establish the fair notice that a reasonable officer must be aware of, but the tragic and unnecessary death of Stamps would have been avoided if Duncan followed any one of several Framingham Police Department (FPD) protocols designed to prevent the very type of accidental discharge of a weapon that killed Mr. Stamps. These procedures and Duncan's training mandated that—throughout his encounter with Mr. Stamps—Duncan place his weapon "on-safe", place his finger outside the trigger guard, and aim the muzzle of his fire-ready weapon away from Mr. Stamps. A reasonable officer in Duncan's position would have known that his handling of his rifle was wrong, which is why Duncan was removed from the SWAT team the next day.

That Duncan did not intend to pull the trigger or intend to kill does not negate liability under controlling precedents. As established in *Brower*, if the manner in which Duncan used his rifle leading up to its unintentional discharge was objectively unreasonable, the consequences of his actions give rise to Fourth Amendment liability. Following *Brower* and *Graham*, this Court has acknowledged that Fourth Amendment liability may result from unintended action, such as when a police officer accidentally causes more severe harm than intended during an intentional seizure. *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 & n.9 (1st Cir. 1990). Consistent with *Brower* and *Landol*, the overwhelming weight of authority from eight sister Circuits recognizes that the unintentional shooting of a person during the course of an intentional seizure results in Fourth Amendment liability if the officer's conduct leading up to the infliction of harm was objectively unreasonable.

To accept Defendants' contrary argument would establish an unworkable and fundamentally unfair standard in the First Circuit for plaintiffs in Fourth Amendment excessive force cases. It would allow a police officer to escape liability when he knowingly violates established Fourth Amendment rights, as well as police procedures designed to prevent the killing of innocent persons, simply by claiming that he did not intend to cause the harm inflicted—no matter how excessive the force or unreasonable or reckless his conduct. Such a standard

would undermine the Fourth Amendment right to be free from excessive force and can only be viewed as contrary to precedent and public policy.

The District Court correctly denied qualified immunity on Defendants' motion for summary judgment, and that determination should be affirmed.

## ARGUMENT

To determine whether a police officer is entitled to qualified immunity, the court must decide: (1) whether the officer has violated the plaintiff's constitutionally protected right; and (2) whether the particular right that the officer violated was clearly established at the time of the violation. *Raiche v. Pietroski*, 623 F.3d 30, 35-36 (1st Cir. 2010). When applying the second prong in Fourth Amendment excessive force cases, the court also considers the law's clarity to determine whether a reasonable officer in the defendant's shoes would have understood that his conduct violated the plaintiff's constitutional right to be free from excessive force. *Id.* This Court's review of the District Court's denial of qualified immunity is *de novo.* *Id.* at 35. Here, the District Judge correctly ruled that Duncan is not entitled to qualified immunity under these standards.

## I. UNDER THE FIRST PRONG OF THE QUALIFIED IMMUNITY STANDARD, DUNCAN VIOLATED STAMPS' FOURTH AMENDMENT RIGHT TO BE FREE FROM EXCESSIVE DEADLY FORCE

"The 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting the officer, without regard to their underlying intent or motivation." *Graham v. Conner*, 490 U.S. 386, 397 (1989). To assess the reasonableness of an officer's conduct, a court must balance the safety risk to the public and the police posed by the person being seized against the risk and degree of bodily harm that the officer's conduct posed to the person. *Scott v. Harris*, 550 U.S. 372, 383-384 (2007).

Here, Stamps was a compliant and nonthreatening 68 year-old bystander to the execution of the warrant. Nevertheless, Duncan created an unnecessary risk of death by intentionally placing his rifle "off-safe", intentionally placing his finger on the trigger, and intentionally pointing his live weapon at Stamps' head while Stamps was lying motionless on the floor with his hands in the air in compliance with police commands. All of Duncan's actions culminating in the unintentional discharge of his rifle were in direct violation of FPD police protocols and training designed for the specific purpose of preventing the very type of foreseeable accidental shooting that occurred in this case. More importantly, Duncan's very act of pointing a weapon at the head of a non-threatening individual "was

constitutionally proscribed" and "objectively unreasonable … in the alleged absence of any danger." *McDonald v. Haskins,* 966 F.2d 292, 294 (7th Cir. 1992), citing *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981). There is no mystery that pointing a loaded, fire-ready semi-automatic rifle at someone can result in a deadly discharge.

Despite his clearly unreasonable conduct, Duncan seeks to escape liability because he did not intend to pull the trigger and had no subjective intent to kill Stamps. According to Duncan, because the last act in the sequence that resulted in the killing was unintentional, i.e., the pulling of the trigger, all of his prior intentional conduct concerning the mishandling of his rifle in violation of rules and training cannot support Fourth Amendment liability—no matter how excessive, unnecessary, objectively unreasonable, reckless, and dangerous his preceding actions were to Stamps' personal safety.

Duncan's subjective intent standard too narrowly defines the full scope of the Fourth Amendment's protection against *unreasonable* police actions. As the Supreme Court stated in *Graham*, "the reasonableness of a particular seizure depends on … *how* it is carried out." *Id.* at 395 (emphasis in original). This standard strikes the proper balance between protecting compliant citizens from excessive force and the interest of the police in ensuring public safety. Under the Fourth Amendment, the public and the police have reciprocal obligations: public

safety requires that a citizen, even an innocent one, must at times submit to police control and relinquish his or her freedom of movement, and the officer, once in control of a compliant citizen, must act reasonably to avoid unnecessary harm. The Fourth Amendment protects compliant citizens intentionally seized by the police not just from harm deliberately inflicted, but also from unreasonable police conduct resulting in unintended harm. If Duncan's standard were adopted, every police officer that engages in objectively unreasonable and even reckless conduct causing injury or death could escape liability by simply proclaiming that he did not intend the harmful or deadly consequences of his actions.

As one court explained in a case involving an accidental discharge of a firearm during an intentional seizure:

> [I]f police conduct is unreasonable under the Fourth Amendment, the plaintiff can recover the damages caused by such conduct. It is not required that the police specifically intend to cause such damages. The word "accident" is not a talisman for releasing an officer from liability. … In emphasizing the accidental nature of the shooting defendants focus too narrowly on the end result of the alleged conduct. … Where a shooting occurs, an inquiry into reasonableness requires scrutiny of the conduct leading up to the shooting. The relevant time frame that the court considers is broader than the moment the gun went off. … A firearm does not discharge in a vacuum. The critical question is how the shooting came about. If the cause of the shooting was prior police conduct that was unreasonable under the Fourth Amendment, the accident is compensable.

*Johnson v. City of Milwaukee*, 41 F.Supp.2d 917, 928-929 (E.D.Wis. 1999).

Here, the District Court correctly ruled that Duncan is subject to liability for his excessive use of deadly force because: (1) he intentionally seized Stamps by pointing his live rifle at Stamps' head; and (2) his conduct leading up to the unintended discharge of his rifle was objectively unreasonable. This ruling and the Fourth Amendment standard applied by the District Court are dictated by the Supreme Court decisions in *Graham*, *Brower v. County of Inyo*, 489 U.S. 593 (1989), statements made by this Court in *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), and the overwhelming weight of authority from other Circuits.

### A. Under *Brower*, Only The Seizure Must Be Intentional, Not The Resulting Harm.

The Supreme Court's *Brower* decision identified the two elements of a Fourth Amendment claim of excessive force that control the outcome of this case. First, a seizure must occur "through means intentionally applied"; that is, the officer must specifically intend his actions that terminate a citizen's freedom of movement. 489 U.S. at 597. Second, once an intentional seizure occurs, an officer is liable for unintended harm if the officer acted unreasonably in the *manner* in which the seizure was carried out. *Id.* at 599.

Brower was killed when a stolen car he was driving crashed into a police roadblock set up for the purpose of stopping and seizing him. The roadblock consisted of an 18-wheel tractor-trailer placed behind a curve across a two-lane

highway and a police car with its headlights positioned between Brower's approaching vehicle and the truck. *Id.* at 594.

The Supreme Court first determined that the roadblock was a sufficient show of police authority to constitute an intentional seizure. *Id.* at 598-599. On the issue of the officers' liability for excessive force, the Court acknowledged that the officers did not intend to kill Brower. The Court stated that "[i]t may well be that [the police] here preferred, and indeed earnestly hoped, that Brower would stop on his own, without striking the barrier …." *Id.* at 598. This lack of intent to kill did not, however, negate Fourth Amendment liability. Rather, the Court remanded the case to the District Court for a determination whether the *manner* in which the roadblock was set up to seize Brower was objectively unreasonable. *Id.* at 599-600. The Court explained what the plaintiff needed to prove to establish Fourth Amendment liability:

> This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. "Seizure" alone is not enough for § 1983 liability; the seizure must be "unreasonable." *Petitioners can claim the right to recover for Brower's death only because the unreasonableness they allege consists precisely of setting up the roadblock in such manner as to be likely to kill him. …* Thus, the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case.

*Id.* at 598-599 (emphasis added).

Under *Brower*, the liability of the police depended upon whether they acted unreasonably in setting up the roadblock in a dangerous manner likely to cause harm. It was "the circumstances of the roadblock" that determined liability for excessive force, not the officer's intent to kill. *Id.* Because the police never intended to kill the suspect, "*Brower* could have exempted all accidents from the Fourth Amendment. But instead, the Court remanded the case to consider whether the roadblock was reasonable and preserved the objective standard." *Henry v. Purnell*, 652 F.3d 524, 533 n.14 (4th Cir. 2014).[4]

Thus, *Brower* establishes that when a police officer intentionally seizes a person and, during the course of the seizure, engages in objectively unreasonable conduct causing more harm than intended, the injured person has a viable Fourth Amendment excessive force claim. *See Seekamp v. Michaud*, 109 F.3d 802, 806 (1st Cir. 1997), quoting *Brower* (in the absence of an intent to kill, "the potential for recovery by Brower arose 'only because the unreasonableness alleged consisted precisely of setting up the roadblock in such a manner as to be likely to kill him'").

Here, Duncan intentionally placed his finger on the trigger of his rifle, intentionally placed his weapon "off-safe", and intentionally pointed his loaded

[4] On remand, the Ninth Circuit Court of Appeals held that a question of material fact existed whether the use of the roadblock was objectively unreasonable because "there remains the question whether such force was necessary to prevent the escape." *Brower v. County of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989). The Ninth Circuit made no mention of an intent to kill Brower.

fire-ready rifle at Stamps' head as a show of force to intentionally seize him. (A. 101-103, 196, 337-342, 658, 666-667, 758, 786, 806). It is firmly established that an officer's display of a weapon constitutes a seizure if a reasonable person would believe he was not free to leave. *United States v. Mendenhall,* 446 U.S. 544, 554 (1980). Because Duncan used his rifle as the sole means to intentionally seize Stamps, if the very use of his rifle or the *manner* in which he handled his rifle was objectively unreasonable, Plaintiffs, just like the plaintiff in *Brower,* "can claim the right to recover for [Stamps'] death." *Brower,* 489 U.S. at 599.[5]

### B. This Court Has Acknowledged That Unintended Harm Does Not Negate Fourth Amendment Liability For Unreasonable Conduct.

Following *Brower,* this Court in *Landol-Rivera v. Cruz Cosme,* 906 F.2d 791 (1st Cir. 1990), expressly stated that Fourth Amendment consequences may result from "unintended action." *Id.* at 796.

> A further instance of unintentional conduct triggering Fourth Amendment liability may occur when a police officer accidentally causes more severe harm than intended to an individual, such as when a suspect is injured 'by the accidental discharge of a gun with which

[5] Defendants rely heavily on *Brower*'s statement that the Fourth Amendment does not "address accidental effects of otherwise lawful government conduct." *Id.* at 596. This statement "stands for nothing more than the unremarkable proposition that intent can be a precondition for whether a Fourth Amendment seizure occurred *in the first place,*" not to whether the officer intended to inflict the degree of force and resulting harm that actually occurred. *Henry v. Purnell,* 652 F.3d at 533 n.14. In this case, it is undisputed that Duncan used his rifle to intentionally seize Stamps. (A. 666-667).

> he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.'

*Id.* at 796 n.9, quoting *Brower*, 489 U.S. at 599-600.

These statements directly refute Defendants' contention that Fourth Amendment liability cannot arise from unintended action. The officer in the *Brower* gun hypothetical accidentally pulled the trigger when using the gun as a bludgeon to seize the suspect. This Court observed that the officer's unintentional discharge of the gun may trigger Fourth Amendment liability when the officer accidentally caused more harm than intended during the course of an intentional seizure.

For purposes of Fourth Amendment liability, the circumstances here are no different than the *Brower* gun example. Although Duncan did not bludgeon Stamps with his rifle, he intentionally pointed his fire-ready rifle at Stamps' head to seize him. (A. 102, 666-667). When Duncan's rifle discharged in the direction he was aiming, he violated the Fourth Amendment and caused harm for which liability attaches, whether the harm was intended or not. (A. 104, 679, 758). In both the *Brower* gun hypothetical and Duncan's shooting of Stamps, the unintentional act of pulling the trigger did not negate Fourth Amendment liability.

Rather, just as in *Brower*, Duncan's liability depends on the factual question whether his conduct preceding the killing was objectively unreasonable.[6]

### C. The Overwhelming Weight Of Authority Holds That Unintended Harm Does Not Negate Fourth Amendment Liability For Unreasonable Conduct.

Since *Brower* and *Graham* were decided in 1989, all five Federal Circuit Courts of Appeals that have considered the issue have held that an accidental firearm discharge during an intentional seizure constitutes a Fourth Amendment violation if the officer's actions leading up to the shooting were objectively unreasonable. *See Watson v. Bryant*, 532 Fed. Appx. 453, 457-458 (5th Cir. 2013)(an accidental shooting during an intentional arrest violates the Fourth Amendment if the officer acted unreasonably by not holstering his weapon before

[6] Defendants attempt to distinguish *Landol* by arguing that the gun-bludgeoning example does not apply because Duncan did not intend to cause any physical harm. This argument should be summarily rejected. The very act of "pointing … a firearm directly at persons inescapably involves the immediate threat of deadly force." *Holland v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001). *See Mlodzinski v. Lewis*, 648 F.3d 24, 37-39 (1st Cir. 2011)(although there is no physical contact, the pointing of a gun at a bystander to the execution of a search warrant may constitute excessive force). These holdings are consistent with the principle that an unreasonable restraint of freedom of movement is a compensable injury even in the absence of any physical contact or harm. *See Albright v. Oliver*, 510 U.S. 266, 289-290 (1994)(Souter, concurring)(collecting cases). *See also Grass v. Johnson*, 322 Fed.Appx. 586, 589-590 (10th Cir. 2009)(proof of physical injury or contact is not an essential element of an excessive force claim); *Flores v. City of Palacios*, 381 F.3d 391, 397-398 (5th Cir. 2004)(same).

attempting to handcuff the suspect); *Pleasant v. Zaminski*, 895 F.2d 272, 275-276 (6th Cir. 1990)(if the officer's failure to holster his gun before attempting to intentionally seize a suspect is objectively unreasonable, a Fourth Amendment violation occurs even though the officer unintentionally fired his weapon); *Tallman v. Elizabethtown Police Department*, 167 Fed. Appx. 459, 463-464 (6th Cir. 2006)(although the officer did not intend to shoot the suspect, a Fourth Amendment violation occurs if the officer's conduct in intentionally pointing his gun at the suspect through a car window was objectively unreasonable); *Bleck v. City of Alamosa*, 540 Fed. Appx. 866, 874-876 (10th Cir. 2013)(under *Brower*, Fourth Amendment liability exists where a police officer unintentionally fires his weapon while going "hands-on" with a suspect during an intentional seizure if the officer's conduct was objectively unreasonable); *Torres v. City of Madera*, 524 F.3d 1053 (9th Cir. 2008)(where the officer intended to draw her Taser, but mistakenly drew and fired her pistol, the court held that despite no intent to kill, "the relevant inquiry was whether the officer's mistake in using the Glock rather than the Taser was objectively unreasonable"); *Henry v. Purnell*, 501 F.3d 374, 379-383 (4th Cir. 2007)(where the officer unintentionally shot a fleeing suspect when he mistakenly fired his pistol believing that he had pulled his Taser, the

officer's liability turned on whether his conduct leading up to the accidental shooting was objectively unreasonable).[7]

In addition to these five Court of Appeals decisions, the district courts in the Seventh, Eighth, and Eleventh Circuits have permitted Fourth Amendment excessive force claims when an accidental shooting occurs during an intentional seizure—if the conduct leading up to the gun's discharge was objectively unreasonable. *See Johnson v. City of Milwaukee*, 41 F.Supp.2d 917, 928-929 (E.D.Wis. 1999); *Patterson v. Fuller*, 654 F.Supp. 418, 427 (N.D.Ga. 1987); *Speight v. Griggs*, 13 F.Supp.3d 1298, (N.D.Ga. 2013); *Sorensen v. McLaughlin*, 2011 WL 1990143 at *5 (D.Minn.).

Defendants rely on one Federal appellate court decision, *Dodd v. City of Norwich*, 827 F.2d 1 (2d Cir. 1987), to claim support for their position. Defendants read too much into that decision. In *Dodd*, an arresting officer, in a scuffle while handcuffing a robber with his gun in one hand, accidentally shot and killed the suspect. *Id*. at 3. Thus, like so many other cases, the gun was not aimed at the suspect and was not the instrumentality being used to seize the suspect. To

[7] Contrary to the defendant's argument, the Fourth Circuit in *Culosi v. Bullock*, 596 F.3d 195 (4th Cir. 2010), did not hold that an accidental shooting during an intentional seizure cannot support Fourth Amendment liability. The court held that it had no jurisdiction on an interlocutory appeal to evaluate the evidence supporting the trial court's summary judgment ruling because a material issue of fact existed on whether the officer intended to shoot the suspect. *Id*. at 202-203.

the *Dodd* Court, this was at worse an act of negligence and, possibly not even that, as the officer conformed to police procedures. *Id*. at 4.

Further, the District Judge correctly ruled that *Dodd* was inapplicable for the obvious reason that it was decided before *Graham* and *Brower* and is directly contrary to the Supreme Court's holdings in those cases. *Graham* held that all Fourth Amendment excessive force claims are to be analyzed under an "objective reasonableness" standard, and *Brower* held that an accidental killing during an intentional seizure supports Fourth Amendment liability if the seizure was carried out in an objectively unreasonable manner. [8]

The District Judge also properly rejected Defendants' suggestion that he follow three district court decisions from the Third Circuit, each ruling that an accidental shooting during a seizure does not give rise to Fourth Amendment liability. *See Brice v. City of York*, 528 F.Supp.2d 504 (M.D.Pa. 1992); *Clark v. Buchko*, 936 F.Supp. 212 (D.N.J. 1996); *Troublefield v. City of Harrisburg*, 789

[8] The magistrate's decision in *Green v. City of Hammond*, 2007 WL 3333367 (Nov. 6, 2007, N.D.Ind.), falls into the same category as *Dodd*. Further, *Green* has not been cited by any other court and is contrary to the more recent decision in *Knight v. Thomas*, 2008 WL 1957905 (May 2, 2008, N.D.Ind.), decided within the same circuit. There, the officer unintentionally hit the suspect in the head with his flashlight when he intended to hit him in the leg. The court ruled that because the flashlight caused more harm than the officer intended, the officer violated the plaintiff's Fourth Amendment right to be free from excessive force if a further development of the record showed that his conduct was objectively unreasonable. *Id.* at *12 n.4 & *14.

F.Supp. 160 (M.D.Pa. 1992). As the District Judge correctly concluded, these cases are wrongly decided because they follow *Dodd* and impose an element of subjective intent into the Fourth Amendment inquiry—directly contrary to *Graham* and *Brower*. The Second Circuit's outdated decision in *Dodd* and the district court rulings from the Third Circuit that follow it are all contrary to the holdings of the Courts of Appeals in five Circuits, the rulings of district courts in three additional Circuits, and to the comments of this Court in *Landol*.

Moreover, the Third Circuit district court cases relied upon by Defendants involved qualitatively different situations. Unlike here, in each case, the officers' guns were not used as the method to seize the suspect, but went off incidentally while the officers attempted to physically bring the suspect under control. Thus, as *Brower* makes plain, there is a difference between a police vehicle that slips its brake and pins a serial murderer against a wall without intent to seize him (no Fourth Amendment violation) and one where the police vehicle attempts to trap him in an alley but accidentally strikes him as "governmental termination of freedom of movement *through means intentionally applied"* (violating the Fourth Amendment). *See Brower,* 489 U.S. at 596-597 (emphasis in original).[9]

[9] Defendants also misplace reliance on *Powell v. Slemp,* 585 Fed. Appx. 427 (9th Cir. 2014). There, in a short, unpublished memorandum opinion, the court concluded that because no case law existed finding liability on the specific facts of the case, the officer's violation was not clearly established. The court did not hold

***– footnote cont'd –***

Defendants' reliance on *Guitierrez v. MBTA*, 437 Mass. 396 (2002), is also fundamentally wrong. This Supreme Judicial Court ruling squarely supports the Plaintiffs' position. In *Guitierrez*, the court held that the trial judge erroneously instructed the jury that the officer's conduct resulting in excessive force "must be intentional." *Id.* at 400-401. Following *Graham*, the court correctly held that once an intentional seizure occurs, "it is immaterial whether the officer had a subjective intent to harm." *Id.* at 402.[10]

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that an accidental shooting cannot give rise to Fourth Amendment liability as ruled by the district court in *Powell v. Slemp*, 2013 WL 1723215 (E.D. Wash., April 22, 2013), *rev'd*, 585 F. Appx. 427 (9th Cir. 2014). Moreover, the situation in *Powell* did not involve pointing a gun at the suspect and the court did not discuss the Ninth Circuit's decision in *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002)(en banc), involving pointing a gun at a suspect. Thus, the facts in *Powell* are materially different from the case before this Court. As the *Powell* District Court stated, the officer, "concerned that Plaintiff might flee or destroy evidence . . . [w]ith his weapon still in his right hand, . . . reached out to pull Plaintiff back from the window. At some point after making physical contact with Plaintiff, Defendant's weapon discharged. The bullet struck Plaintiff in the upper back, causing non-life threatening injuries." *Powell v. Slemp*, 2013 WL 1723215, at *1. Thus, *Powell*, too, involved a struggle without the gun being used to seize the suspect by pointing it at her and the bullet that struck her was not a foreseeable consequence of the use of that instrumentality to seize her.

[10] Although the defendants rely on *Parker v. Swansea*, 310 F.Supp.2d 356 (D. Mass. 2004), that case actually supports Plaintiff's position. There, an officer intentionally and repeatedly fired his weapon at a noncompliant suspect who he believed to be armed. The officer argued that he cannot be held liable under the Fourth Amendment "because he did not intend for the force he used to be excessive." The court disagreed, citing the *Landol* language that the "Fourth Amendment is triggered when [a] police officer accidentally causes more severe harm than intended." *Id.* at 367.

Thus, even if the cases cited by Defendants are good law, rather than there being "two distinct lines of reasoning" about whether an accidental discharge gives rise to Fourth Amendment liability, as Defendants contend (Defendants' Br. at 15), there is a single, consistent line of reasoning in the relevant precedents that distinguishes situations where weapons are not being used to seize a person but accidentally cause injury and those in which the weapon is intentionally and unreasonably used to seize a person. The latter consistently entails Fourth Amendment liability for all of the consequences that follow the intentional use. This case fits in the latter category and Fourth Amendment liability attaches.

### D. The District Court Correctly Held That A Question Of Material Fact Exists Whether Duncan's Conduct Leading Up To The Unintended Discharge Of His Rifle Was Objectively Unreasonable.

Under *Graham v. Conner*, 490 U.S. 386 (1989), the relevant factors to determine whether the force used to effect a seizure is reasonable are: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the person is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. *See Jarrett v. Town of Yarmouth*, 331 F.2d 140, 148-149 (1st Cir. 2003).

Here, the evidence shows that Stamps did not pose a threat to the police. When Duncan encountered Stamps, he was lying on his stomach with his hands up

near his head as ordered, he complied with all police commands, was unarmed, did not resist being seized, was not fleeing, made no furtive movements, and had not committed nor was suspected of committing any crime. (A. 101, 755, 757, 759, 620, 622, 624, 653, 685-686, 722, 803). Duncan knew that Stamps resided in the apartment, had no criminal record, and would likely be present during the execution of the search warrant. (A. 654, 620, 685-686, 701-703). When Duncan entered the kitchen and observed Stamps, three other police officers were also in the kitchen and were available to assist Duncan had he requested. (A. 766, 769-770, 690-691, 693).

Under these facts, the danger posed by Stamps to the police was virtually nonexistent. On the other hand, Duncan's conduct toward Stamps and his mishandling of his rifle—in direct violation of established FPD protocols and Duncan's training—was highly intrusive and created a substantial, unreasonable, and unnecessary risk of death. (A. 102-103, 337-342, 666-667, 786, 806).

Under the *Graham* factors, Kim Widup, one of Plaintiff's liability experts, has opined that Duncan acted unreasonably and recklessly when he pointed his live weapon at Stamps' head when he posed no threat to the police. (A. 757-760). This opinion stands uncontroverted on the record since Defendants have offered no liability expert or police officer testimony to defend the reasonableness of Duncan's conduct.

Further, it is settled law in this Circuit that evidence of a violation of police training and procedures is directly relevant and probative of whether an officer acts reasonably under the Fourth Amendment. *Jennings v. Jones*, 499 F.3d 2, 19-20 (1st Cir. 2007); *Raiche v. Pietroski*, 623 F.3d 30, 37 (1st Cir. 2010). *See also Henry v. Purnell*, 501 F.3d 374, 383 (4th Cir. 2007)(in determining whether an unintentional shooting is objectively unreasonable, the court considered the nature of the training the officer received to prevent similar incidents and whether the officer acted in accordance with that training); *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011)(same). Here, Duncan's pointing of his fire-ready weapon at Stamps' face with his finger on the trigger in violation of FPD procedures created the very risk of death that those procedures were designed to prevent. (A. 103, 629-630, 656-657, 666, 689, 697, 727, 757-758, 786, 824). Clearly, whether Duncan acted unreasonably presents a jury question.

## II. THE VIOLATION OF STAMPS' RIGHT TO BE FREE FROM EXCESSIVE FORCE WAS CLEARLY ESTABLISHED

Under the second prong of the qualified immunity test, the court must decide "whether the particular right that the official has violated was clearly established at the time of the violation." *Raiche v. Pietroski*, 623 F.3d 30, 35-36 (1st Cir. 2010). In excessive force cases, a defendant's claim to qualified immunity fails if: (1) prior case law or general Fourth Amendment principles gave the officer fair

warning that the amount of force used was excessive, or (2) by showing that the force used was so plainly or obviously excessive that, as an objective matter, a reasonable officer would not have required prior case law to be put on notice that the force used was excessive. *Id.* at 38-39.

The "clearly established" inquiry is comprised of two subparts: first, whether "the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right," and second, "whether in the specific context of the case, 'a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights.'" *Mosher v. Nelson,* 589 F.3d 488, 493 (1st Cir. 2009), quoting *Maldonado v. Fontanes,* 568 F.3d 263, 269 (1st Cir. 2009). Both inquiries lead ineluctably to the conclusion that the Fourth Amendment violation here was clearly established.

### A. Duncan Is Not Entitled To Qualified Immunity Because It Was Clearly Established That His Conduct Of Pointing A Live Rifle At Stamps' Head With His Finger On The Trigger Was Objectively Unreasonable And Excessive.

The justification for the qualified immunity defense is that public officials performing discretionary functions should be free to act without fear of liability, "except when they fairly can anticipate that their conduct will give rise to liability for damages." *Savard v. Rhode Island,* 338 F.3d 23, 28 (1st Cir. 2003). Police officers are not entitled to qualified immunity if they had "fair warning that their

conduct violated the plaintiff's constitutional rights." *Jennings v. Jones*, 499 F.3d 2, 16 (1st Cir. 2007). *See Henry v. Purnell*, 652 F.3d 524, 535 (4th Cir. 2011)("[t]he question is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he encountered").

Stamps would have survived if Duncan had not intentionally and unjustifiably pointed his loaded fire-ready rifle at Stamps' head with his finger on the trigger. The pointing of the weapon at Stamps' head was an essential and integral part of the sequence of events foreseeably leading to his death. Thus, the dispositive question is whether it was clearly established that it was objectively unreasonable for Duncan to seize Stamps, a nonthreatening and compliant man, by intentionally pointing his fire-ready rifle at Stamps' face with his finger on the trigger. *Leisure City of Cincinnati*, 267 F.Supp.2d 848, 855 (S.D. Ohio 2003)(under the second prong of the qualified immunity analysis, the critical question was whether it was clearly established that it was unreasonable for the officer to pursue the plaintiff with his gun out and his finger on the trigger, resulting in his accidental shooting); *Johnson v. City of Milwaukee*, 41 F.Supp.2d 917, 930 (E.D.Wis. 1999)(in an accidental shooting case, qualified immunity did not apply where the officer had fair warning that it was unreasonable to hold a gun on a suspect who had surrendered and was standing still with his hands in the air, to push the suspect against a fence, and to strike him in the face with the gun).

Prior to the date of the Stamps' shooting, and as early as 1981, numerous Circuits had recognized that the act of pointing a gun at a person's head who poses no danger is an unreasonable and unconstitutional use of excessive force. *See Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982). Since then, the cases have multiplied. In fact, by the time the Seventh Circuit took up the issue a decade later, it recognized that *Black* was the leading case, chose to follow it, and determined that "no case has since [*Black*] held to the contrary." *McDonald*, 966 F.2d at 294. *See Baker v. Monroe Township*, 50 F.3d 1186, 1193-1194 (3d Cir. 1995)(detention at gunpoint violated the Fourth Amendment as there was "simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used"); *Jacobs v. City of Chicago*, 215 F.3d 758, 774 (7th Cir. 2000)(holding police officers "are not shielded by qualified immunity" when they point a loaded weapon at an unarmed, cooperating individual not suspected of any crime); *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002)(en banc)(officer not entitled to qualified immunity where he pointed a gun at the head of a suspect from a distance of three to four feet); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir.1986)("A police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause physical injury, but he has certainly laid the building blocks for a section 1983 claim against him"); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179,

1193 (10th Cir. 2001)("Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use").

This Court has also held it well-established that a "reasonably competent officer also would not have thought that it was permissible to point an assault rifle at the head of an innocent, non-threatening, and handcuffed fifteen-year-old girl for seven to ten minutes, far beyond the time it took to secure the premises and arrest and remove the only suspect." *Mlodzinski v. Lewis*, 648 F.3d 24, 38 (2011).

In fact, this Court in *Mlodzinski* cited *McDonald* for the proposition that pointing a gun at a person seized who is not a suspect, is not a threat, and has complied with all commands constitutes excessive force and violates the Fourth Amendment. This Court held that "[e]ven without a First Circuit case presenting the same set of facts, defendants would have had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive." *Id*. at 38. *Mlodzinski's* holding thus answers both subparts of the clearly established inquiry in favor of the decision below. Seizure by live rifle where no exigent circumstances exist violates the Fourth Amendment, as precedent has established for more than three decades.

Thus, the District Court judge here correctly ruled that it was clearly established "that the unsafe handling of a firearm during a seizure could constitute unreasonable conduct." (Def.'s Add. at 15-16). Therefore, it was well-established that Duncan's conduct violated the Fourth Amendment.

### B. The District Judge Correctly Ruled That It Was Clearly Established That The Accidental Discharge Of A Firearm During An Intentional Seizure Gives Rise To Fourth Amendment Liability If The Officer's Conduct Leading Up To The Shooting Was Objectively Unreasonable.

Although Plaintiffs submit that the act of pointing a fire-ready gun at Stamps' head was a well-established violation of Stamps' Fourth Amendment rights sufficient to deny qualified immunity, the District Judge ruled that "it was clearly established as of January 5, 2011, that an unintentional shooting during an intentional seizure can constitute excessive force if the officer's conduct leading to the accident was objectively unreasonable." (Def. Add. at 15-16). This ruling provides an additional ground for upholding the District Judge's denial of qualified immunity.

A principle of Fourth Amendment law is clearly established if there exists similar cases of controlling authority binding within the circuit or "a consensus of cases of persuasive authority" from outside the circuit such that a reasonable officer could not have believed that his conduct was lawful. *Bergeron v. Cabral*, 560 F.3d 1, 11 (1st Cir. 2009). The plaintiff is not required to show that the police

officer's precise conduct has previously been held to be unlawful. *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003). *See United States v. Lanier*, 520 U.S. 259, 269-270 (1997)(defeating qualified immunity does not "demand precedents that applied the right at issue to a factual situation that is 'fundamentally similar'" to the factual situation at bar).

The law is also clearly established if "general Fourth Amendment principles" gave the officer fair warning that it was unconstitutional to use the degree of physical force applied. *Jennings v. Jones*, 499 F.3d 2, 16 (1st Cir. 2007). In this context, Supreme Court dictum is as binding as the court's holdings. *Bleck v. City Alamosa*, 540 Fed. Appx. 866, 872-873 (10th Cir. 2013). Examples provided by a court of specific police conduct that violates the Fourth Amendment are also sufficient. *Tallman v. Elizabethtown Police Dept.*, 167 Fed.Appx. 469, 473 (6th Cir. 2006). In the end, "the salient question is whether the state of the law at the time of the action gave the defendant *fair warning* that [his] alleged treatment of the plaintiff was unconstitutional." *Suboh v. District Attorney's Office of Suffolk County*, 298 F.3d 81, 94 (1st Cir. 2002)(emphasis added).

Here, the controlling decisions of the Supreme Court, this Court, and a consensus of the circuits all establish that Duncan had fair notice at the time of the incident that his conduct toward Stamps was an unlawful violation of Stamps' Fourth Amendment right to be free from Duncan's excessive use of force.

As fully discussed at pages 14-24, in *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Supreme Court plainly indicated that the plaintiff could recover under the Fourth Amendment for Brower's unintentional death if the officer's manner of setting up the roadblock was objectively unreasonable. *Id.* at 598-599. In *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 n.9 (1st Cir. 1990), this Court, following *Brower*, stated that "Fourth Amendment consequences may … result from unintended action." *Id.* at 796. This statement gave fair warning to all police officers in the First Circuit that "unintended action" resulting in unintended harm during the course of an intentional seizure may result in Fourth Amendment consequences.

This Court in *Landol* reinforced this principle by referring to the *Brower* gun example. This Court stated that "[a] further instance of unintentional conduct triggering Fourth Amendment liability may occur when a police officer accidentally causes more severe harm than intended to an individual, such as when a suspect is injured 'by the accidental discharge of a gun with which he was meant only to be bludgeoned. …'" *Id.* at 796 n.9. This example provided fair warning to Duncan that Fourth Amendment liability may result from his "unintended action" of pulling the trigger that "accidentally cause[d] more severe harm than intended to an individual." *Id.*

Similarly, in *Bleck v. City of Alamosa*, 540 Fed.Appx. 866 (10th Cir. 2013), the court held that the *Brower* gun example clearly established that when a police officer "intended to stop the victim solely by the use of his gun", and the gun accidentally discharged, a Fourth Amendment violation occurs if the officer's conduct leading up to the shooting was objectively unreasonable. *Id.* at 873. Here, it is undisputed that Duncan used his rifle as the sole means to seize Stamps (A. 666-667), and the court correctly ruled that it is a jury question whether Duncan's manner of using his weapon was objectively unreasonable without regard to Duncan's subjective intent. (A. 666-667).[11]

Further, in *Guitierrez v. MBTA*, 437 Mass. 396 (2002), the Massachusetts Supreme Judicial Court agreed with the trial judge that, under *Graham*, excessive force need not be "intentional" and the officer's careless conduct in the manner he intentionally seized the suspect is actionable. *Id.* at 400-402. This holding clearly put Duncan on notice that unreasonable conduct resulting in unintended harm can support a Fourth Amendment claim. *See McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007)(decisions of the highest court of the pertinent State can clearly establish the law).

[11] In *Bleck*, the court held that the *Brower* gun-bludgeoning example did not provide fair notice to the officer because he seized the non-compliant plaintiff by pushing him down and, therefore, the gun was not the sole means used to effectuate his seizure. (A. 101-104, 666-667).

Although the controlling authority of *Brower, Graham, Landol* and *Guitierrez* clearly established the law in this Circuit, a consensus of persuasive authority from other circuits existing at the time of the shooting also gave fair warning to Duncan that his unintentional killing of Mr. Stamps exposed him to Fourth Amendment liability. Between 1989, the year *Brower* and *Graham* were decided, and January 5, 2011, the date of the Stamps shooting, three Federal Circuit Courts of Appeals considered the issue at bar. All three of these courts held that the unintentional discharge of a firearm during an intentional seizure can give rise to Fourth Amendment liability if the officer's conduct leading up to the shooting was objectively unreasonable. *Pleasant v. Zaminski,* 895 F.2d 272, 275-276 (6th Cir. 1990); *Tallman v. Elizabethtown Police Department*, 167 Fed. Appx. 459, 463-464 (6th Cir. 2006); *Torres v. City of Madera*, 524 F.3d 1053 (9th Cir. 2008); *Henry v. Purnell,* 501 F.3d 374, 379-383 (4th Cir. 2007). In this same time period, not a single Court of Appeals has held that an accidental discharge of a gun during an intentional seizure cannot support Fourth Amendment liability.

Thus, at the time of the Stamps shooting, the combined controlling authority of *Brower, Graham* and *Landol* and the persuasive authority of three sister Circuit Courts of Appeals, all establish that Duncan had fair notice at the time of the incident that unreasonable conduct resulting in an unintended shooting during the course of an intentional seizure creates Fourth Amendment liability.

Moreover, to the extent Duncan relies on district court rulings to cloud the clarity of *Brower, Graham, Landol* and the rulings of Courts of Appeals in three Circuits, see argument at 14-24, *supra*, the Supreme Court has expressly cautioned that "district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards …" *Camreta v. Greene*, 131 S.Ct. 2020, 2033 n.7 (2011). For this reason, "[m]any Courts of Appeals … decline to consider district court precedent when determining if constitutional rights are clearly established for qualified immunity." *Id.* *See Hanarahan v. Doling*, 331 F.3d 93, 98 & n.6 (2nd Cir. 2003)(court doubted whether the defendants could rely on district court decisions to establish that a right was *not* clearly established); *Doe v. Delie*, 257 F.3d 309, 321 (3d Cir. 2001)(for purposes of qualified immunity, district court decisions do not establish the law of the circuit and are not binding on other courts within the district). *See also Kalka v. Hawk*, 215 F.3d 90, 100 (D.C. Cir. 2000)(collecting cases); *Marsh v. County of San Diego*, 680 F.3d 1148, 1159 (9th Cir. 2012).[12]

[12] While Duncan relies on three district court decisions, *Brice, Clark,* and *Troublefield*, all from the Third Circuit, it is worth noting that district court rulings in the Seventh, Eighth, and Eleventh Circuits prior to the Stamps shooting clearly ruled that an accidental shooting can give rise to Fourth Amendment liability if the officer's actions preceding the shooting were objectively unreasonable. *See Johnson v. City of Milwaukee*, 41 F.Supp.2d 917, 928-929 (E.D. Wis. 1999); *Patterson v. Fuller*, 654 F.Supp 418, 427 (N.D.Ga. 1987); *Sorensen v. McLaughlin*, 2011 WL 1990143, at *5 (D.Minn.).

It cannot be seriously questioned that the law governing this case was clearly established and gave ample warning to Duncan that he violated Stamps' Fourth Amendment rights before he shot and killed him. Following *Brower*, this Court's statement in *Landol* that Fourth Amendment liability may arise from "unintended action," including "when an officer causes more severe harm than intended," clearly indicated to any police officer that the controlling law of this Circuit was consistent with the holdings of the Courts of Appeals in the Fourth, Sixth, and Ninth Circuits. These three Circuits, the Supreme Court's decisions in *Graham* and *Brower*, and this Court's statements in *Landol* clearly established, as of the date of Stamps' shooting, that an officer is liable under the Fourth Amendment for unreasonable conduct resulting in unintended harm.[13]

[13] In *Powell v. Slemp*, 585 Fed.Appx. 427 (9th Cir. 2014), the Ninth Circuit held that because no case law existed finding liability on the specific facts of the case (attempting to restrain a suspect with a gun drawn), the officer's violation was not clearly established. The court's requirement for a specific case with the same facts is directly contrary to the law of this Circuit. In *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) this Court held that "overcoming the qualified immunity defense does not require the plaintiff to show that either the particular conduct complained of or some materially indistinguishable conduct has previously been found unlawful."

### C. Duncan Is Not Entitled To Qualified Immunity Because It Was Clearly Established That The Deadly Force He Used Was Excessive, Whether Intended Or Not.

The Fourth and Ninth Circuits have held that the plaintiff must only show that it was clearly established that the *force actually used*, whether intended or unintended, was excessive. Unlike the standard applied by the District Judge in this case, these Circuits did not require the plaintiff to show that it was clearly established that an accidental infliction of harm supports Fourth Amendment liability. *See Henry v. Purnell*, 652 F.3d 524, 534 (4th Cir. 2011)(plaintiff was not required to prove that it was clearly established that the unintentional use of his pistol instead of his Taser resulting in the accidental shooting of a suspect violates the Fourth Amendment; rather the plaintiff must show only that the force actually used was excessive); *Torres v. City of Madera*, 648 F.3d 1119, 1127-1129 (9th Cir. 2011)(in an unintentional shooting case, the "clearly established right" inquiry focuses "not on what the officer *intended* to do, but on the level of force actually used")(emphasis in original); *Kanda v. Longo*, 484 Fed.Appx. 103, 105 (9th Cir. 2012)("Given that the officers used substantially more force than intended, for purposes of the [clearly established] inquiry we ask whether a reasonable officer could have believed that the force that was *actually used* was lawful under the circumstances").

Case law prior to January 5, 2011, clearly established that, in the circumstances where Stamps was lying on his stomach with his hands up, was not fleeing or resisting police control, had not committed a crime, and posed no immediate threat to the police, the use of deadly force was excessive. In fact, it is unlawful and excessive to shoot even a *fleeing* unarmed burglary suspect. *Tennessee v. Garner*, 471 U.S. 1, 3-4, 11 (1985)(police officer used unreasonable and excessive deadly force when he shot an unarmed fleeing burglary suspect in the head as he climbed a fence); *Whitefield v. Melendez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005)(it was clearly established that the police shooting of an arson suspect fleeing the scene constituted an unreasonable use of deadly and excessive force).

### D. The District Judge Correctly Ruled That A Reasonable Officer In Duncan's Shoes Would Have Understood That His Conduct Violated Stamps' Right To Be Free From Excessive Force.

Not only was the law "generally clear" that Duncan's conduct violated Stamps' right to be free from an unreasonable seizure, an "objectively reasonable officer" would have believed that Duncan's mishandling of his semi-automatic rifle violated the Fourth Amendment. *Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010). This portion of the analysis "addresses the specific factual context of the case to determine whether a reasonable official in the defendant's place would have understood that his conduct violated the asserted constitutional right." *Mosher*, 589 F.3d at 493.

To make this determination, it is fair to take into consideration police regulations and training. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court considered police standards to determine the reasonableness of the officer's actions. *Id*. at 18-19. In fact, it specifically held that "actual departmental policies are important." *Id*. at 19. Thus, they are regularly considered. *See Jennings v. Jones*, 499 F.3d 2, 19-20 (1st Cir. 2007)(evidence of a violation of police training and procedures is directly relevant and probative of whether an officer acts reasonably under the Fourth Amendment); *Raiche v. Pietroski*, 623 F.3d 30, 37 (1st Cir. 2010)(same).

As previously argued, it is undisputed that the threat posed by Stamps was virtually non-existent and that Duncan's mishandling of his firearm created an unnecessary danger to Stamps without any law enforcement justification. The clarity of Duncan's unreasonable conduct is enhanced by the fact that his intentional conduct before the shooting violated FPD protocols and Duncan's training, which were intended to prevent an accidental shooting.

It is undisputed that Duncan violated his training and the FPD's policy on Firearms and Weapons # 50-4, which was in effect on January 5, 2011, by failing to point his rifle's muzzle in a safe direction at all times, by failing to place his weapon "on-safe" in circumstances where Stamps posed no threat and Duncan was not actively clearing a room, and by placing his finger on the trigger of his loaded,

fire-ready rifle when he did not intend to engage and fire on a target. (A. 629-630, 666, 697, 720, 786, 799-801, 803, 824).

Duncan was fully aware of and was trained on all of these procedures. (A. 103, 624, 629-630, 697, 720-721, 727, 757, 791). He was also fully aware that the procedures were designed to prevent the very type of accidental killing of an innocent, nonthreatening, and compliant elderly man that occurred in this case. (A. 656-657). Therefore, he had fair notice that his conduct of pointing a live weapon at Stamps' head with his finger on the trigger—where Stamps was fully compliant and posed no threat—was objectively unreasonable and excessive. *See Hope v. Pelzer,* 536 U.S. 730, 743-745 (2002) (a police officer's training and the police protocols governing his conduct may provide notice that the amount of force used was unconstitutionally excessive). The fact that Duncan was removed from his position on the SWAT team the day after the Stamps' shooting because he violated his training and FPD procedures and caused the unjustified killing of Mr. Stamps also speaks to the unreasonableness of his actions as compared to other officers. (A. 626-627, 699, 797).

In addition, in *Commonwealth v. Wallace,* 346 Mass. 9 (1963), the Supreme Judicial Court provided fair warning to police officers in this Commonwealth that pointing a loaded and fire-ready firearm at a person constitutes reckless conduct sufficient to support criminal responsibility for involuntary manslaughter in the

event of an accidental discharge of the firearm. In *Wallace*, the defendant pointed a shotgun at an innocent person and it accidentally discharged. In holding that the evidence was sufficient to warrant a finding that the defendant's handling of the gun was wanton and reckless, the court reasoned:

> The defendant was in control of a highly lethal weapon which, because of the attendant danger, called for a correspondingly high degree of care in its handling. At the time of the shooting the safety was off and the gun was ready to fire. The defendant knew this and he also knew that a person was nearby who was headed in his direction. He had ample time to put his gun in the safe position before Pringle came within close range, or so the triers of fact could have found.

*Id.* at 12-13.

Because police protocols and training, as well as the law, were "generally clear" that Duncan's conduct violated Stamps' right to be free from an unreasonable seizure, an "objectively reasonable officer" would have believed that Duncan's conduct in mishandling his rifle violated the Fourth Amendment. *See Raiche*, 623 F.3d at 39. As correctly held by the District Court, "an objectively reasonable officer would have known that the combination of the lack of a serious threat posed by the subject, the extremely high risk of harm from the firearm, and the unnecessary and unjustified nature of the police action rendered the officer's conduct unreasonable." (Def. App. at 18).

## CONCLUSION

For all the above reasons, the judgment of the District Court on Plaintiffs' Fourth Amendment claims should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 11,429 words excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced using Times New Roman font.

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**CERTIFICATE OF SERVICE**

I certify that this document has been served on the defendants through the Electronic Filing System and that a copy of this document was served on the Defendant-Appellants on September 21, 2015.

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