IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF KENNETH GRIFFIN, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	
ISAAC HICKSON, et al.,	:	NO. 98-3805
Defendants.	:	

Memorandum and Order

YOHN, J. May ___, 2002

Presently before the court is defendants' motion for summary judgment. For the reasons that follow, the motion will be denied.

I Background[1]

This action stems from the September 26, 1997 shooting death of Kenneth Griffin ("Griffin") in Philadelphia, Pennsylvania. Griffin was paroled in 1994, but in April, 1995 he failed to report to his assigned parole agent, as he was required to do. Plaintiffs' One Page

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[1] The account contained in this section is comprised of both undisputed facts and plaintiffs' factual allegations. *See Skoczylas v. Atlantic Credit & Fin., Inc.*, 2002 WL 55298, at *2 (E.D. Pa. Jan. 15, 2002) ("When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party." (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))); *see also Brown v. Muhlenburg Township*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)). Although this account contains references to the Defendants' One Page Summary of Contentions, this is so only with respect to facts that are undisputed.

Summary of Contentions ("Pls.' Contentions").[2] On September 15, 1997, a robbery occurred at Friendly's restaurant in Flourtown, Pennsylvania, and during the investigation of this crime it was alleged that Griffin was involved. *Id.*; Defendants' One Page Summary of Contentions ("Defs.' Contentions"). On September 25, 1997, the detective investigating the case informed Isaac Hickson, a parole agent employed by the Pennsylvania Board of Probation and Parole ("PBP&P"), that no arrest warrant for Griffin would be issued in conjunction with the robbery. *Id.* However, the detective also informed Hickson of the possibility that Griffin was residing at the home of his mother, Hattie Hobson, located at 647 East Lippincott Street, Philadelphia, Pennsylvania. *Id.*; Defs.' Contentions.

Based on this information, Hickson, along with fellow PBP&P agents Robert Martinez, James Hines, Geraldine Daley, Frank Rooney and Michael Sander, arrived at Ms. Hobson's residence at approximately 6:00 a.m. on the following day to arrest Griffin for violating the terms of his parole. *Id.*; Defs.' Contentions. The agents were permitted by Ms. Hobson to enter and search the premises. *Id.*; Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment ("Response") at 2. Shortly after entering the Lippincott Street residence, agents Hickson, Martinez, Hines and Daley (with the exception of Daley "defendants" or "the agents")[3] entered the "dimly lit" basement of the home. *Id.*; Response at 2; *cf.* Defs.' Contentions (characterizing the basement as "pitch-black"). Prior to the PBP&P agents' arrival, Griffin had been asleep in a basement bedroom with his girlfriend, Melissa Bosworth, and their

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[2] I will omit page references when referring to Plaintiff's One Page Summary of Contentions and to defendants' corresponding pleading because, as might be expected, these documents each consist of only one page.

[3] Only agents Hickson, Martinez and Hines are defendants in this action.

two children. Response at 2. However, upon admitting the agents to her home, Hobson had called in the direction of the basement that the agents had arrived to arrest Griffin, Pls.' Contentions, and Griffin apparently was awakened by his mother's yells. Indeed, when the agents entered the basement they found Bosworth with her two children, but Griffin was not visible. *Id.*

In fact, Griffin was hiding, unarmed and naked, under a bed. *Id.* The agents demanded that he make his whereabouts known, and in response he emerged from his hiding place facing the agents, and placed his hands on the mattress as a means of supporting himself as he stood up. *Id.*; Response at 3. At this point, he remarked to the agents, who were roughly twelve or thirteen feet from him at the time, *see* Response at 12-13, that he "did not want to go back."[4] Response at 3; Defs.' Contentions. Plaintiffs assert that "[a]t that time, [d]efendants Hickson and Martinez[,] . . . in front of the minor children and Ms. Bosworth, repeatedly shot at . . . the decedent for the purpose of killing him and did, in fact, kill him." *Id.* Plaintiffs aver that Griffin never provoked the agents' use of force–in fact, they contend, he was surrendering to defendants at the time of his death–and that neither he nor anyone else in the basement (besides the agents) possessed a weapon at the time of the shooting. *Id.*

Although no gun, shell casing or projectile (again, other than those attributable to the agents) ever was found in the basement, and while neither Melissa Bosworth nor her children removed any weapon from the scene,[5] Pls.' Contentions, two particles of gunshot residue

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[4] Presumably, this statement was an indication of Griffin's desire not to return to jail.

[5] Plaintiffs allege that although Carolyn Griffin, the decedent's sister, attempted to enter the basement after the shooting, she was prevented by the agents from approaching her

("GSR") were found on Griffin's right hand. This indicates that "Griffin either [had] discharged a weapon, handled a firearm or was in close proximity to a firearm when it discharged." *Id.*; Defs.' Contentions. Yet plaintiffs contend that this does not establish that these particles came from a gun fired by Griffin. Instead, they posit that the weapons of the agents who shot him are the sources of the GSR found on Griffin's hand, as these guns were capable of projecting gunshot residue over a distance exceeding twenty feet.[6] *Id.*

The complaint in this action features two claims, both of which are brought pursuant to 42 U.S.C. § 1983. The first is raised by the estate of Kenneth Griffin, which asserts that defendants violated Griffin's Fourth Amendment right to be free from excessive force. The second is brought by Amy Griffin (Griffin's estranged wife), Kenneth Kalil Griffin (the son of Kenneth and Amy Griffin), Sapphira and Shameer Griffin (the children of Kenneth Griffin and Melissa Bosworth who were in the basement when Griffin was shot) and Hattie Hobson. It advances a Fourteenth Amendment substantive due process claim, alleging that "defendants have deprived plaintiffs of their own constitutionally protected rights in their relationships with decedent." Consolidated Amended Complaint ¶ 25.

Defendants have moved for summary judgment dismissing plaintiffs' claims, contending that they are entitled to qualified immunity as a matter of law. The agents advance

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brother's body, and was forced to return upstairs by agent Daley. Pls.' Contentions. Accordingly, plaintiffs imply, Carolyn Griffin could not have removed any weapon from the scene.

[6] This contention is supported only by the results of the "Holmesburg experiments," which are the subject of a motion in limine filed by defendants. Because these results are inadmissible, I will not consider either the Holmesburg experiments or any contention based thereupon in evaluating the instant motion.

two different arguments in support of their motion. In brief these are 1) that Griffin fired a gun at them, thereby rendering their return of his fire reasonable; and 2) that even if Griffin did not fire a gun at them, they nonetheless acted reasonably, though mistakenly, given the circumstances with which they were confronted.[7]

II Legal Standards

A. Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court is not to resolve disputed factual issues, but rather should determine whether there are genuine, material factual issues that require a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In order to determine whether summary judgment is appropriate in this particular case, all of the facts delineated above are stated in the light most favorable to the plaintiffs as the non-moving parties. *See Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001).

B. Qualified Immunity

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[7] Defendants' argument as to their entitlement to qualified immunity focuses exclusively on the excessive force claim brought by Griffin's estate. They do not separately address the different set of legal issues that surround the question of whether they are qualifiedly immune with respect to the substantive due process claim brought by Griffin's survivors. Accordingly, I will assume that defendants have opted not to seek qualified immunity as to this claim.

The standard by which courts are to determine whether an executive officer is entitled to qualified immunity was recently clarified by the Supreme Court in *Saucier v. Katz*, 121 S. Ct. 2151, 2156-59 (2001). The Court indicated that the first issue to be resolved in the qualified immunity inquiry is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show [that] the officer's conduct violated a constitutional right . . . ." *Id.* at 2156. If so, the court must next determine whether that right was clearly established at the time of the alleged violation. *See id.* Yet it is not enough to decide merely that–as is relevant to this case–the abstract right to be free from excessive force was clearly established. Indeed, as the Court indicated in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and reaffirmed in *Saucier*, plaintiffs must demonstrate that the contours of this right were sufficiently established at the time of its alleged usurpation that a reasonable parole officer in defendants' position would have "underst[ood] that what he [was] doing violate[d] that right." *Saucier*, 121 S. Ct. at 2156 (quoting *Anderson*, 483 U.S. at 640). In other words, the relevant question is whether it was clearly established on the morning of September 26, 1997–again, assuming plaintiffs' factual account to be accurate–that the fatal shooting of an unarmed, naked man violates that man's Fourth Amendment right to be free from excessive force.[8]

If plaintiffs are able to demonstrate that it was clearly established at the time of the shooting that defendants' actions–as described by plaintiffs–violate this right, there remains a

[8] Notably, these determinations–like that made pursuant to the first step of the *Saucier* analysis–are purely legal in nature. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (describing the question of "'whether the facts alleged . . . support a claim of violation of clearly established law'" as one that is "purely legal" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985))).

third inquiry in which the court must engage.[9] Specifically, I must determine whether the agents have established that they mistakenly but reasonably believed that their actions were constitutionally permissible. This question must be answered affirmatively if the agents 1) "correctly perceive[d] all of the relevant facts but ha[d] a mistaken understanding as to whether [the] amount of force [employed was] legal in those circumstances"; or 2) had "reasonable, but mistaken, beliefs" that facts warranting the use of lethal force existed.[10] *Saucier*, 121 S. Ct. at 2158-59. If there is no genuine issue as to whether defendants acted with such a reasonable but mistaken belief, then they are entitled to qualified immunity regardless of whether their actions actually were constitutional.[11] *Id.* at 2159.

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[9] Indeed, this is the import of the *Saucier* holding. The plaintiff in that case argued that there is no meaningful distinction between the excessive force and qualified immunity analyses, i.e., that if there exists a genuine issue of fact as to whether the force exerted by a defendant law enforcement officer in a given case was excessive, then that official is not entitled to qualified immunity. The Court disagreed, holding that "[t]he inquiries for qualified immunity and excessive force remain distinct . . . ." 121 S. Ct. at 2158. Specifically, the Court held that even if a law enforcement officer did use an unreasonable amount of force, he is entitled to qualified immunity if he reasonably believed that the amount of force employed was reasonable. *See id.* at 2159;*Bennett v. Murphy* , 274 F.3d 133, 137 (3d Cir. 2002) ("The decision in *Saucier* clarified what was not apparent before–that the immunity analysis is distinct from the merits of the excessive force claim.").

[10] In this case, only the second possibility is conceivable.

[11] Because the court currently is confronted with defendants' motion for summary judgment, the determination of whether defendants acted reasonably but mistakenly must be made considering the facts in the light most favorable to plaintiffs. If, upon undertaking this analysis, it is revealed that a genuine factual issue exists regarding the reasonableness of defendants' belief that the use of deadly force was warranted under the circumstances, defendants are not entitled to qualified immunity. *See Bennett*, 274 F.3d at 137 ("*Saucier*'s holding regarding the availability of qualified immunity at the summary judgment stage does not mean that an officer is precluded from arguing that he reasonably perceived the facts to be different from those alleged by the plaintiff. An officer may still contend that he reasonably, but mistakenly, believed that his use of force was justified by the circumstances as he perceived them; this contention, however, must be considered at trial.").

Notably, the allocation of the burden of proof shifts during the course of this analysis. As stated by the Third Circuit:

> Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the objective reasonableness of the defendant's belief in the lawfulness of his actions. This procedure eliminates the needless expenditure of money and time by one who justifiably asserts a qualified immunity defense from suit.

Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citations omitted).

When the above-delineated summary judgment and qualified immunity standards are amalgamated, the question ultimately to be resolved by the court is whether "as a matter of law, the evidence would . . . support a reasonable jury finding that the police officers' actions were objectively unreasonable." *Groman v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995). If not, then the agents will be entitled to summary judgment on the ground of qualified immunity.

III Discussion

A. Taken in the Light Most Favorable to Plaintiffs, Do the Facts Alleged Show that Defendants Violated a Constitutional Right Possessed by Griffin?

Distilled to its essence, plaintiffs' factual account is as follows: When the agents demanded that Griffin surrender to them, Griffin emerged, unarmed and naked, from under the bed that had concealed him. Pls.' Contentions. He was facing the agents, and as he was standing up, Griffin placed his hands on the bed for support and remarked that "he did not want to go

back." Response at 3. He was then shot to death by the officers.[12] Pls.' Contentions.

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[12] Because this case is presented at the summary judgment stage, it is not enough for plaintiffs merely to allege these facts. Indeed, to establish the existence of constitutional violations, Griffin's estate and survivors must present evidence of such "on which the jury could reasonably find for [them]." *Anderson*, 477 U.S. at 252.

Plaintiffs have presented such evidence in this case. Preliminarily, the deposition testimony of Agent Hickson corroborates plaintiffs' assertions that the agents demanded that Griffin surrender, and that he emerged naked from underneath a bed. 3/1/01 Deposition of Isaac Hickson ("Hickson Dep.") at 38. Hickson also confirms that immediately before he was shot, Griffin made comments to the effect that he was unprepared to return to jail. *See id.* (indicating that Griffin's precise words were: "I can't go back"). In fact, there are only two significant–indeed, seminal–respects in which plaintiffs' and defendants' factual accounts differ. These concern the position of Griffin's body in the moments immediately preceding the shooting and whether he was armed and fired at defendants.

Defendants contend that when Griffin emerged from under the bed his back was toward them. Defs.' Contentions. They further aver that Griffin spun suddenly to face them, said "I can't go back," and then repeatedly fired a handgun at them, and that this was the impetus for their decision to shoot him. In support of the assertion that Griffin fired at them, defendants submit their own deposition testimony and that of Agent Daley. *See* Hickson Dep. at 40-41 (indicating that he heard multiple popping sounds and saw muzzle flashes); 2/26/01 Deposition of Robert Martinez ("Martinez Dep.") at 155-56 (same); 6/30/99 Deposition of James Hines ("Hines Dep.") at 85-86 (same); 6/17/99 Deposition of Geraldine Daley ("Daley Dep.") at 173-74 (multiple popping sounds). They also emphasize heavily that two particles of GSR were found on Griffin's right hand. *See* Defs.' Motion at 5-9. They claim that, when amalgamated, this evidence establishes conclusively that Griffin fired a gun at them, and thus that their decision to shoot him was objectively reasonable. *See id.* at 9. Defendants alternatively aver that they reasonably but mistakenly believed that Griffin "had a gun and was shooting at them." *Id.* at 4.

In support of their contrary assertion, i.e., that Griffin actually was unarmed and unthreatening when he was shot–and, as a corollary of this argument, that the agents' testimony that they actually heard gunshots and saw muzzle flashes are simply fabrications–plaintiffs point first and foremost to the fact that no gun other than those belonging to the agents ever was found in the basement. *See* Response at 13-14 (citing Martinez Dep. at 281-86). The record similarly is devoid of any indication that a projectile or shell casing not attributable to the agents' weapons ever was recovered in the basement. Although plaintiffs also cite the testimony of firearms expert Luis Szojka in support of their argument that the GSR found on Griffin's hand actually was projected by the agents' weapons, I will not consider this argument in the context of the instant determination because, as discussed *supra*, it is based upon an inadmissible experiment.

While I express no opinion as to what actually transpired in the basement at 647 East Lippincott Street on the morning of September 26, 1997, it seems clear that a jury could reasonably find plaintiffs' version of the facts to be the more credible of the competing empirical accounts in this case. The fact that no weapon belonging to anyone other than the agents ever was found in the basement is quite powerful (though not conclusive), objective evidence that

Griffin did not possess a gun. The effect of this evidence is reinforced by the lack of any indication in the record that a projectile or shell casing other than those attributable to the agents' weapons ever was found in the basement. Moreover, contrary to defendants' assertions, the presence of GSR on Griffin's hand does not conclusively establish that Griffin fired at the agents. While such might indicate that Griffin discharged a weapon at defendants, the presence of the particles establishes conclusively only that Griffin had handled, or was in close proximity to, a discharging firearm within "a few hours" of the time of the shooting. *See* 6/28/99 Deposition of Luis J. Szojka at 68 (answering affirmatively when asked whether the GSR on Griffin's hand "confirms that [he] was in an environment with the materials collected within a few hours preceding the collection of the sample"). Thus, while a jury could reasonably find the agents' accounts to be credible, it would be equally reasonable for a jury to conclude, based on the lack of a weapon or projectile, that the agents' accounts are not credible, and that Griffin was naked and unarmed when he was shot, as plaintiffs contend. As such, the quantum of evidence needed to satisfy the summary judgment standard has been presented by plaintiffs. *See generally Saucier*, 121 S. Ct. at 2164 (Ginsburg, J., concurring in the judgment) ("[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. . . . [A] trial must be had."); *Groman*, 47 F.3d at 634 (finding the existence of a genuine issue of fact as to the reasonableness of the force used by the defendant officer); *DiJoseph v. City of Philadelphia*, 947 F. Supp. 834 (E.D. Pa. 1996) (same).

I note finally that to the extent that the agents argue as a fallback position that Griffin may in fact have been unarmed, but that they reasonably believed him to have possessed a weapon, summary judgment is especially inapplicable in the context of this assertion based on the agents' collective state of mind. *See generally Harter v. GAF Corp.*, 967 F.2d 846, 851-52 (3d Cir. 1992) (citing *EEOC v. City of Lebanon, Pa.*, 842 F.2d 1480, 1487 (3d Cir. 1988)); *Metzger v. Osbeck*, 841 F.2d 518, 521 (3d Cir. 1988). This is especially so in this case for two reasons. First, if the jury were to reach the reasonable conclusion that Griffin was unarmed at the time of the shooting (as would be necessary to render defendants' fallback position relevant), it would similarly be reasonable for the jury to determine that defendants' contrary assertions were fabrications. As such, the jury might justifiably be disinclined to afford credence to the agents' accounts of their own perceptions. *See generally Armour v. County of Beaver*, 271 F.3d 417, 433 n.6 (3d Cir. 2001) (holding that "'at the summary judgment stage, a court may not . . . make credibility determinations; th[is] task[is] left to the factfinder'" (quoting *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998))). Second, by both parties' accounts, the basement was at least "dimly lit," Pls.' Contentions, if not "pitch-black." Defs.' Contentions. As such, if Griffin did not actually fire a gun (and the agents, by definition, could not actually have heard gunshots or perceived muzzle flashes) or verbally indicate that he was armed, it is at least questionable whether defendants could reasonably have believed him to possess a weapon. A reasonable jury certainly could find that such a belief was unreasonable under the circumstances.

In *Graham v. Connor*, the Supreme Court clarified that "*all* claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. 386, 394 (1989); *see also United States v. Johnstone*, 107 F.3d 200, 204-05 (3d Cir. 1997). The *Graham* Court then proceeded to set forth the analytical framework to be employed in determining whether the amount of force used in a particular case was reasonable. It stated:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation.
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> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation . . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

490 U.S. at 396-97 (citations omitted).

This objective reasonableness standard has been applied on numerous occasions by our Court of Appeals in the context of the use of lethal force. When considered together, these holdings yield the following test: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the

suspect posed a significant threat of death or serious physical injury to the officer[s] or others?" *Abraham v. Rosso*, 183 F.3d 279, 289 (3d Cir. 1999).

Viewed objectively, plaintiffs' factual account depicts circumstances under which the agents could not reasonably have believed either that deadly force was necessary to prevent Griffin's escape or that Griffin posed a significant threat of death or serious physical injury to them or others. Indeed, an individual who is standing still, naked and unarmed with his hands placed either on a mattress or in the air[13] poses no threat to anyone. Accordingly, numerous courts have declared unreasonable the use of deadly force by law enforcement officers under analogous factual circumstances. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where 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."); *Bennett*, 274 F.3d at 136 ("If, as the plaintiff's evidence suggested, [the decedent] had stopped advancing and did not pose a threat to anyone but himself, the force used against him, i.e. deadly force, was objectively excessive."); *Hemphill v. Schott*, 141 F.3d 412, 417 (2d Cir. 1998) ("That [the o]fficer . . . may reasonably have suspected [the defendant] to be armed would not render shooting him reasonable if, as [the defendant] alleges, he stopped and raised his hands in the air

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[13] Plaintiffs set forth slightly different factual allegations regarding the placement of Griffin's hands at the time of the shooting. In their summary of contentions, they assert that "Griffin used the bed as support to stand up and he began to raise his hands and surrender himself" and was then shot. Pls.' Contentions. By contrast, in their response to defendants' motion for summary judgment, plaintiffs aver that Griffin's hands were on the mattress when the shooting occurred. Response at 3.

when commanded."); *Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997) ("Examining [the decedent's] actions from the perspective of a reasonable law enforcement officer faced with the need to make on-the-spot decisions, it is plain to us that his actions were not objectively reasonable. *Graham* 's totality of the circumstances test does not permit the use of deadly force to kill a suspect who is running [away from the officer] and who makes no threatening movement of any kind, even though the suspect had engaged in a shoot-out with law enforcement officers on the previous day and may have been the person responsible for the death of one of the officers.").

As such, plaintiffs' factual allegations, if proven, are sufficient to show that defendants violated Griffin's Fourth Amendment right to be free from excessive force. *See generally Saucier*, 121 S. Ct. at 2156. Griffin's estate accordingly has overcome the first obstacle posed by the qualified immunity inquiry insofar as its excessive force claim is concerned.

B. Assuming Plaintiffs' Factual Account to be True, Was it Clearly Established at the Time of the Shooting that Defendants' Specific Actions Violated Griffin's Fourth Amendment Right to be Free From Excessive Force?

As indicated above, the second question that the court must answer is whether it was clearly established at the time of the shooting that specific actions undertaken by the agents[14] violated Griffin's Fourth Amendment right to be free from excessive force. The Supreme Court has clarified that "'clearly established' for purposes of qualified immunity means that '[t]he

[14] Again, because this is a summary judgment motion filed by defendants, I will assume plaintiffs' account of the agents' actions to be accurate.

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (quoting *Anderson*, 483 U.S. at 640). The Third Circuit also has specified that the decisional law on which the court must focus is its own precedent and that of the Supreme Court, although the court of appeals has further noted that holdings of other federal appellate tribunals and district courts also "may be relevant to the determination of when a right was clearly established for qualified immunity analysis." *Doe*, 257 F.3d at 321 & n.10.

As applied to the instant facts as alleged by plaintiffs, I conclude that the incompatibility of the agents' actions with Griffin's Fourth Amendment right to be free from excessive force was clearly established on the morning of September 26, 1997. Indeed, numerous cases from each level of the federal judiciary had, at the time of the shooting, indicated in the most certain of terms that the use of deadly force against a nondangerous person violates that individual's constitutional right to be free from excessive force. *See, e.g., California v. Hodari D.*, 499 U.S. 621, 644 (1991) ("'A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'" (quoting *Garner*, 471 U.S. at 11); *Garner*, 471 U.S. at 11; *In re City of Philadelphia Litig.*, 49 F.3d 945, 978 (3d Cir. 1995); *Marley v. City of Allentown*, 774 F. Supp. 343, 345 (E.D. Pa. 1991); *Edwards v. City of Allentown*, 1996 WL 117453, at ** 3-4 (E.D. Pa. Mar. 12, 1996); *Walker v. Townsend*, 1994 WL 530161, at *4 (E.D. Pa. Sept. 29, 1994); *see also Johnson v. Rosemeyer*, 117 F.3d 104, 111 (3d Cir. 1997) (discussing by reference the *Garner* standard, and referring to that case as "establish[ing] the circumstances

in which a state may authorize a police officer to use deadly force to effectuate an arrest").

C. Have Defendants Demonstrated that No Genuine Issue of Fact Exists Concerning the Objective Reasonableness of Their Actions?

As indicated above, once a civil rights plaintiff has surmounted the obstacles imposed by the first two components of the qualified immunity inquiry, the burden shifts to the law enforcement officers to demonstrate that "the evidence [will] not support a reasonable jury finding that [their] actions were objectively unreasonable." *Groman*, 47 F.3d at 634; *see also* Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 8:1 (4th ed. 1999) ("The defendant should have the burden of proving this qualified immunity by a preponderance of the evidence, at least in those situations where evidentiary considerations are relevant."). Stated differently, if the evidence supports a reasonable finding that agents' actions were objectively unreasonable, they are not entitled to qualified immunity.

As delineated, *supra*, the legal proposition that it is objectively unreasonable–and thus a Fourth Amendment violation–to use deadly force against an unarmed, unthreatening person is well settled and uncontroversial. *See, e.g.*, *Garner*, 471 U.S. at 11. In this case, as explained in *supra* note 10, the record evidence would support both a reasonable finding that Griffin did not possess a gun at the time of the shooting and a similarly reasonable finding that the agents did not reasonably believe that Griffin possessed a gun. Nothing within defendants' pleadings or argumentation establishes contrarily. Moreover, the agents advance no contention as to the reasonableness of their actions other than the assertion that Griffin either actually or

apparently was holding or fired a gun.[15] Accordingly, insofar as plaintiffs' excessive force claim is concerned, defendants have not demonstrated that "the evidence [will] not support a reasonable jury finding that [their] actions were objectively unreasonable." *Groman*, 47 F.3d at 634.

IV Conclusion

Based on the foregoing analysis, defendants' motion will be denied with respect to the excessive force claim brought by Griffin's estate.

An appropriate order follows.

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[15] For example, the agents do not contend that Griffin moved toward them such that he would be able to physically harm them with either his fists or a non-projectile weapon, for example a knife. Thus, by the agents' own account, the only circumstance under which they could have acted reasonably in shooting Griffin is if he possessed–or if they reasonably believed that he possessed–a gun.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF KENNETH GRIFFIN et al., Plaintiffs, v. ISAAC HICKSON et al., Defendants.	:	CIVIL ACTION NO. 98-3805

Order

And now, this ____ day of May, 2002, upon consideration of defendants' motion for summary judgment (Doc. # 139), plaintiffs' response in opposition thereto (Doc. # 143), defendants' reply brief in support of their motion for summary judgment (Doc. # 149) and plaintiffs' sur-reply in response thereto (Doc. # 150), it is hereby ORDERED that defendants' motion is DENIED. Counsel shall advise the court by letter within 10 days of the date hereof as to their suggestions as to a feasible trial date.

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William H. Yohn, Jr., Judge