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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2023-SC-0248

JAIME MORALES

APPELLANT

v. ON APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2021-CA-0852-MR

JOSEPH ENRICO, *et al.*

APPELLEES

BRIEF OF APPELLEE, JOSEPH ENRICO
(Filed Electronically)

Respectfully submitted,

/s/ Jeffrey C. Mando

Jeffrey C. Mando, Esq. (#43548)

Jennifer L. Langen, Esq. (#87690)

ADAMS LAW, PLLC

40 West Pike Street

Covington, KY 41011

859.394.6200 | 859.392.7200 - Fax

jmando@adamsattorneys.com

jlangen@adamsattorneys.com

Attorneys for Appellee, Officer Joseph Enrico

CERTIFICATE OF SERVICE

I hereby certify that on the 5th of January, 2024, I filed the foregoing Brief of Appellee, Joseph Enrico, with the Clerk of Court using the CourtNet/ECF system. I further certify that a true and correct copy of the foregoing has been served via electronic mail and/or U.S. Mail, postage prepaid, upon the following: Kate Morgan, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Brian Privett, Judge, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, KY 40324; Thomas W. Miller, Esq., and Elizabeth C. Woodford, Esq., Miller, Griffin & Marks, PSC, 271 West Short Street, Suite 600, Lexington, KY 40507, twm@kentuckylaw.com, ewoodford@kentuckylaw.com, emiller@kentuckylaw.com; Jason Bell, Esq., Bell, Hess & Van Zant, PLLC, 2819 Ring Road, Suite 101, Elizabethtown, KY 42702, jbelle@bhvzlaw.com; L. Scott Miller, Esq. and Maureen C. Malles, Esq., Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507; D. Barry Stiliz, Esq. and John G. Irvin, Jr., Esq., Kinkead & Stiliz, PLLC, 301 East Main Street, Suite 800, Lexington, KY 40507, bstiliz@ksattorneys.com, jirvin@ksattorneys.com; and, Devon Elise Golden, Esq., City of Georgetown, 100 North Court Street, Georgetown, KY 40324, devon.golden@georgetownky.gov. I further certify that the record was not withdrawn for purposes of the preparation and filing of this Brief.

/s/ Jeffrey C. Mando
Jeffrey C. Mando, Esq.

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INTRODUCTION

In the midst of a tense and rapidly evolving confrontation, an armed and dangerous fugitive bank robber drew a firearm and pointed it at Georgetown Police Officer Joey Enricco, Scott County Sheriff's Deputy Jaime Morales, and Scott County Deputy Sheriff Jordan Jacobs. All three made the justifiable decision to use deadly force to protect themselves and their fellow officers by discharging their firearms. Unfortunately, a bullet accidentally struck Deputy Morales, leaving him paraplegic. Morales alleges Officer Enricco negligently fired the shot that struck him and seeks to hold him liable in damages.

The lower courts correctly ruled that Officer Enricco is entitled to qualified official immunity from liability for negligence in connection with the shooting recognizing that a police officer's decision to deploy deadly force under the circumstances that confronted Officer Enricco is discretionary. To hold otherwise, as Morales advocates, would eviscerate an officers' qualified official immunity, promote passive law enforcement, and render Kentucky communities less safe.

STATEMENT CONCERNING ORAL ARGUMENT

Officer Enrico respectfully requests oral argument because a robust discussion of his right to qualified immunity would aid the Court in the disposition of Morales' appeal.

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COUNTERSTATEMENT OF THE CASE

At 10:16 p.m. on September 11, 2018, United States Marshal Roger Daniel (“Daniel”) contacted the Georgetown/Scott County 911 Center to request assistance from local law enforcement authorities in apprehending Edward Reynolds. (R.1872 - 1884 at KSP 115 - 118; R.1885) Daniel explained that Reynolds was wanted by federal authorities for several bank robberies in Florida; that federal authorities had tracked Reynolds to a rest area off of Exit 127 from Northbound Interstate 75; that he believed Reynolds was armed; and, that Daniel had “eyes on” Reynolds, who was sleeping in a silver Ford Mustang convertible that was parked at the rest area. (R.1872 - 1884 at KST 115-118)

The dispatcher contacted Georgetown Police Sergeant Nick Lodal (“Lodal”), who alerted Georgetown Police Sergeant Gary Crump (“Crump”) and Georgetown Police Lieutenant James “Mike” Wagoner (“Wagoner”) to the situation. (R.1116 - 1146, p. 29) Wagoner went to the dispatch office to get more information from the dispatcher who was still on the phone with Daniel and to confirm the existence of open warrants for Reynolds’ arrest. (R.116 - 1146, p. 31)

After conferring with his supervisor, Wagoner decided to assemble those members of the Georgetown-Scott County Special Response Team (“SRT”) who were on duty at the time – including Wagoner himself, Lodal, and Officer Joey Enricco (“Enricco”) from the Georgetown Police Department, as well as Deputies Jaime Morales (“Morales”) and Jordan Jacobs (“Jacobs”), and Sergeant Devon Brinegar (“Brinegar”), from the Scott County Sheriff’s Office – to handle the request for assistance. (R.1116 - 1146, p. 32; R.1228 - 1329, p. 67 - 68) In addition, Wagoner directed Crump, who, as a hostage negotiator, supported the SRT, to join the effort. (R.1116 - 1146, p. 33; R.1256 - 1287, p. 22) All were instructed to meet in the rear parking lot of a nearby Cracker Barrel restaurant to stage for Reynolds’ apprehension. (R.933 - 1051, p. 79 - 80; R.1116 - 1146, p. 33; R.1147 - 1181, p. 28 - 31, 69; R.1182 - 1255, p. 44; R.1288 - 1329, p. 48; R.1330 - 1403, p. 22)

Wagoner drove himself, Lodal, Enricco and Crump in a specially-equipped SRT truck to the Cracker Barrel, where they met with Morales, Jacobs, Brinegar, and other officers, including Scott County Sergeant Jeremy Nettles (“Nettles”) and Georgetown Police Sergeant Kevin Wallace (“Wallace”). (R.1116 - 1146, p. 34 - 35; R.1375 - 1403, p. 26 - 28) They arrived at approximately 10:37 p.m. (R.1901) Wagoner advised the group that Reynolds was wanted for bank robbery, that he was armed and dangerous, that he was potentially a fight-or-flight risk, and that he was parked at the rest area in a silver Mustang – information most of the group already knew from either having spoken with the dispatcher or from reading the mobile data transmitters (MDTs) in their vehicles prior to meeting at Cracker Barrel. (R.1116 - 1146, p. 34 - 36; R.1147 - 1181, p. 30 - 31; R.1182 - 1255, p. 40-41; R.1256 - 1287, P. 32, 34 - 35; R.1288 - 1329, p. 37 - 41; R.1330 - 1374, p. 21 - 22, 32 - 33)

At Cracker Barrel, Wagoner also discussed a plan to apprehend Reynolds. There was a sense of urgency because they did not want Reynolds to leave the rest area and cause a situation where he would have to be apprehended while on the move. (R.1182 - 1255, p. 53) The plan was to drive the SRT truck to the rest area and park it behind Reynolds’ Mustang, blocking him in; for the SRT to exit the passenger side of the SRT truck, line up behind Reynolds’ Mustang, and attempt to “call him out” voluntarily; and, if that did not work, to have Crump negotiate Reynolds’ surrender. (R.1116 - 1146, p. 34 - 36; R.1147 - 1181, p. 36 - 37; R.1256 - 1287, p. 43 - 44; R.1288 - 1329, p. 58 - 59)

At approximately 10:59 p.m., Wagoner, Enricco, Lodal, Crump, Jacobs, Morales and Brinegar got into the SRT truck and headed to the rest area, with Wagoner driving and everyone else in the rear compartment of the truck. (R.1116 - 1136, p. 40 - 41; R.1147 - 1181, p. 40 - 41; R.1288 - 1329, p. 67 - 68; R.1901) Within a few minutes, they arrived at the rest area to find Reynolds’ vehicle parked in the northernmost space in the westernmost aisle of parking spaces. (R.1901)

Wagoner parked the SRT truck behind and at an angle to Reynolds' Mustang, with the driver's side of the SRT truck facing the rear of the Mustang. (R.1901) Nettles and Wallace pulled up and parked their marked police SUVs near, and at an angle to, the driver's side of the Mustang. (R.1375 - 1403, p. 39 - 41; R.1901) At that point, Reynolds' Mustang was blocked in its parking space. (R.993 - 1051, p. 106; R.1901)

At 11:04:53 p.m., an officer advised dispatch that "we're getting out" of the SRT truck. (R.1901) Jacobs, Morales, Enrico, Brinegar, Crump, Lodal and Wagoner exited the SRT truck through a door on the truck's passenger side and went to their right and around the truck. (R.993 - 1051, p. 106; R.1147 - 1181, p. 42 - 44; R.1182 - 1255, p. 62 - 64; R.1288 - 1329, p. 42 - 44; R.1330 - 1374, p. 40 - 43) But, instead of forming a line behind Reynolds' Mustang as Enrico had expected, Jacobs and Morales approached the driver's side of the Mustang, with Jacobs in the lead and Morales behind him. (R.993 - 1051, p. 107; R.1147 - 1181, p. 42 - 44; R.1182 - 1255, p. 63 - 64) To provide cover, Enrico followed them, and Brinegar followed him, so that the four of them were lined up along the driver's side of the Mustang. (R.1330 - 1374, p.44 - 45)

With Jacobs, Morales, Enrico and Brinegar lined up along the driver's side of the Mustang, and Nettles on the passenger side, they yelled for Reynolds to get out of the vehicle and show his hands. (R.993 - 1051, p. 118; R.1147 - 1181, p. 48; R.1182 - 1255, p. 68; R.1288 - 1329, p. 76; R.1330 - 1374, p. 49; R.1375 - 1403, p. 44) Startled, Reynolds fumbled for his keys, started the Mustang, and put it in reverse before apparently realizing he was blocked in. (R.993 - 1051, p. 119 - 121; R.1288 - 1329, p. 77, 106; R.1330 - 1374, p. 45, 50; R.1375 - 1403, p. 48 - 49)

Just then, Morales and Nettles tried to gain entry into the Mustang by pulling on the door handles and by trying to break the windows on each side of the vehicle. (R.993 - 1051, p. 120 - 122; R.1147 - 1181, p. 48; R.1182 - 1255, p. 68 - 69; R.1288 - 1329, p. 77 - 79; R.1330 - 1374, p. 53 - 54; R.1375 - 1403, p. 48 - 49) As Morales succeeded in breaking the driver's window, Reynolds reached near

the center console, took out a handgun and pointed it at the officers standing on the driver’s side of his vehicle. (R.993 - 1051, p. 122 - 129; R.1147 - 1181, p. 72 - 74; R.1182 - 1255, p. 73, 84 - 85; R.1330 - 1374, p. 54; R.1375 - 1403, p. 49)

Simultaneously, someone yelled “gun.” To defend themselves, Morales, Jacobs and Enricco immediately opened fire on Reynolds, who was killed. (R.993 - 1051, p. 129 - 132; R.1147 - 1181, p. 70 - 74; R.1182 - 1255, p. 84 - 85; R.1288 - 1329, p. 80 - 82; R.1330 - 1374, p. 54) In the process, Morales stepped to his right to get a better look at the inside of the vehicle and was shot, rendering him paraplegic. (R.993 - 1051, p. 132 - 133)

At 11:05:29 p.m., multiple persons on the scene radioed dispatch to report shots fired, meaning that *the entire encounter between the officers and Reynolds lasted no more than 36 seconds.* (R.1901) The encounter was extremely tense and rapidly evolving, requiring each officer to make split-second decisions based on what other officers were doing and Reynolds’ actions. (R.993 - 1051, p. 136 - 137; R.1147 - 1181, p. 76; R.1182 - 1255, p. 146 - 147; R.1288 - 1329, p. 106 - 107; R.1330 - 1374, p. 101, 113, 125)

On September 6, 2019, Morales filed suit against Officer Enricco, Lt. Wagoner, and the City of Georgetown. As against Enricco, Morales asserts a single count of negligence alleging he negligently fired the shot that struck Morales. (R.14 - 149 at Count II)

Following thorough discovery, defendants filed motions for summary judgment. Officer Enricco’s motion was based on qualified official immunity. (R.1848 - 1901) After briefing and oral argument, the trial court issued a sound, well-reasoned, and detailed Opinion granting summary judgment to Officer Enricco. (R.2869 - 2906) The Court of Appeals affirmed. (Opinion, p. 29 - 32)

This Court granted discretionary review.

ARGUMENT

I. ENRICO IS ENTITLED TO QUALIFIED OFFICIAL IMMUNITY

When sued in their individual capacities, public officers and employees enjoy qualified official immunity, which affords them protection from damages liability for good faith judgment calls made in a legally uncertain environment. *Schell v. Young*, 640 S.W.3d 24 (Ky. App. 2021), citing *Ritchie v. Turner*, 559 S.W.3d 822 (Ky. 2018). See also *O'Connell v. Thieneman*, 2020 Ky. App. LEXIS 96,¹ citing *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The purpose of qualified official immunity is to protect government officials exercising discretion from the second-guessing of their good faith decisions made in difficult situations. *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011). An official sued in his individual capacity is not liable for bad guesses in gray areas. *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006); *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009).

Qualified official immunity applies to the negligent performance by a public officer or employee (1) of discretionary acts or functions; (2) made in good faith; and, (3) made within the scope of the employee's authority. *Rowan, id.* Discretionary acts are those that involve the exercise of discretion and judgment, and personal deliberation, decision and judgment. *Id.* Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. *Id.*, citing *Haney v. Monskey*, 311 S.W.3d 235 (Ky. 2010).

Conversely, a government official is not afforded immunity from tort liability for the negligent performance of a ministerial act. *Id.* Ministerial acts or functions are those that require

¹ Appendix I.

simple obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving mere execution of a specific act arising from fixed and designated facts. *Id.*

Once a public officer or employee has shown that the act in question was discretionary and within the scope of his or her employment, the burden shifts to the plaintiff to prove that the act was not performed in good faith. *Benningfield v. Fields*, 584 S.W.3d 731 (Ky. 2019). In the context of qualified official immunity, bad faith can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee’s position presumptively would have known was afforded to a person in the plaintiff’s position, i.e., objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. *Id.* Bad faith is the opposite of good faith, and it is not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive. *Wagers v. Barber*, 2020 Ky. App. Unpub. LEXIS 353,² citing *Sloas*, *supra*.

In light of these parameters, the lower courts correctly ruled that Officer Enricco is entitled to qualified official immunity from liability for Morales’ injuries.

A. ENRICCO’S DECISION TO USE DEADLY FORCE WAS DISCRETIONARY

1. A police officer’s decision to use deadly force by discharging his firearm is discretionary.

Under Kentucky law, a police officer’s decision to use deadly force by discharging his firearm is discretionary.

In *Reich v. City of Elizabethtown*, 945 F.3d 968 (6th Cir. 2019) (interpreting Kentucky law), a man escaped his girlfriend’s vehicle while they were en route to a mental health care facility to seek help for his schizophrenic condition. While carrying a three-inch knife with the blade open, the man walked through traffic and wandered into a residential neighborhood, where he removed

² Appendix 2.

his shirt and began pacing between houses. The man's girlfriend called police for assistance in getting him back into her vehicle. When officers ordered the man to drop the knife, he took a step toward them with his knife raised in his right hand in a stabbing position and said, "you're gonna have to kill me mother f*cker." Next, the man moved at a fast pace toward one of the officers with the knife in his hand. Two of the officers fired their weapons, killing him. The man's girlfriend filed suit.

Calling the encounter between the man and police "tense, uncertain, and rapidly evolving," the Sixth Circuit ruled that the officers were entitled to qualified official immunity from liability for the plaintiff's state-law negligence claim. *Id.* at 982. For purposes of qualified official immunity analysis, the Court said: "The determination of the amount of force required, including the decision to use deadly force, is a discretionary act. ... And, the use of deadly force plainly falls within the scope of a police officer's authority. ... Because the officers performed discretionary acts within their authority, the burden shifts to [the plaintiff] to establish by direct or circumstantial evidence that the discretionary acts were not performed in good faith." *Id.* at 982 - 983. *See also* *Fakhri v. Louisville-Jefferson County Metro Govt.*, 2020 U.S. Dist. LEXIS 76267 (W.D.Ky.)³ (interpreting Kentucky law) (an officer was entitled to qualified official immunity from plaintiff's Kentucky state-law negligence claim after officer made decision to fire his weapon at a man who was threatening his wife with a knife); *Nichols v. Bourbon County Sheriff's Dept.*, 26 F.Supp.3d 634 (E.D.Ky. 2014) (interpreting Kentucky law) ("The determination of the amount of force required to effect an arrest is a discretionary act"); *Casey v. Sanders*, 2018 U.S. Dist. LEXIS 103949 (E.D.Ky.)⁴ (interpreting Kentucky law) (holding that trooper who shot and killed a suspect was entitled to qualified official immunity from liability for Kentucky state-law battery claim because he "was

³ Appendix 3.

⁴ Appendix 4.

engaged in a discretionary act within the scope of his authority when he used force against” the man); *Gambrel v. Knox Co.*, 2018 U.S. Dist. LEXIS 47898 (E.D.Ky.)⁵ (interpreting Kentucky law) (holding that officers who shot and killed a suspect were entitled to qualified official immunity from liability for Kentucky state law claims because “there can be no argument that the Defendants’ actions were anything other than discretionary”); *Hartman v. Thompson*, 2018 U.S. Dist. LEXIS 19761 (W.D.Ky.)⁶ (interpreting Kentucky law) (“Given that Kentucky law recognizes that officers are privileged under certain circumstances to use reasonable force to make an arrest, determining the amount of force required to effect an arrest is a discretionary act.”).

Kentucky is not an outlier. Other states also wisely recognize immunity from liability for the good faith performance of a police officer’s official duties, and that an officer’s decision to use deadly force by discharging his firearm is a discretionary function. *Vasquez v. Hernandez*, 844 S.W.2d 802 (Tex. App. 1992); *Henderson v. Montgomery Cty. Bd. of Commrs*, 461 P.3d 64 (Kan. App. 2020); *Russell v. Barrett*, 673 S.E.2d 623 (Ga. App. 2009); *Kidd v. Coates*, 518 S.W.2d 124 (Ga. 1999); *Lancaster v. Bd. of Police Comm’rs*, 2015 U.S. Dist. LEXIS 196726 (W.D.Mo.) (interpreting Missouri law);⁷ *Seiner v. Drenon*, 304 F.3d 810 (8th Cir. 2002) (interpreting Missouri law); *Presnall v. Huey*, 657 Fed. Appx. 508 (6th Cir. 2016) (interpreting Michigan law); *James v. City of New York*, 2019 N.Y. Misc. LEXIS 551 (Sup. Ct. N.Y.);⁸ *Moore v. City of Selma*, 2015 U.S. Dist. LEXIS 87138 (S.D. Ala.) (interpreting Alabama law);⁹ *Cabrera v. Lawlor*, 2011 Conn. Super LEXIS 597.¹⁰

⁵ Appendix 5.
⁶ Appendix 6.
⁷ Appendix 7.
⁸ Appendix 8.
⁹ Appendix 9.
¹⁰ Appendix 10.

2. Because it involved split second personal deliberation and the exercise of professional judgment in a rapidly evolving dangerous situation, Enrico's decision to use deadly force was discretionary.

Controlling Kentucky precedent uniformly hold that discretionary acts involve the exercise of discretion and judgment, personal deliberation, and the selection of one way among multiple alternatives to accomplish a particular goal. *E.g.*, *O'Connell, supra*; *Haney, supra*. These authorities also take into account the constraints under which the discretion, deliberation and selection must be made. *E.g.*, *Reich, supra*; *Vasquez, supra*; *Henderson, supra*; *Hall, supra*; *Miller, supra*; *James, supra*.

Here, Officer Enrico had to make quick decisions about whether, when, and how to use force, and he had to make those decisions in a tense, uncertain and rapidly evolving scenario that spanned no more than 36 seconds. (R. 993 - 1051, p. 136 - 137, 140 - 141; R. 1147 - 1181, p. 76; R. 1182 - 1255, p. 146 - 147; R. 1288 - 1329, p. 106 - 107; R. 1330 - 1374, p. 101, 113, 125) In that 36-second span, Officer Enrico had to constantly reevaluate his decisions and adjust his own actions as others - including the other members of the SRT and Reynolds - acted. When Jacobs and Morales led the apprehension team out of the SRT truck and stacked up along the driver's side of the Mustang, instead of lining up behind the SRT truck as Officer Enrico had been expecting, Officer Enrico had to reevaluate and adjust. When Reynolds threw the Mustang in reverse and attempted to back up, presumably to flee, Officer Enrico had to reevaluate and adjust. As Morales broke out the driver's window, Officer Enrico had to reevaluate and adjust. And, when Reynolds produced a gun and aimed it at the officers, Officer Enrico had to reevaluate and adjust to protect his fellow officers and himself from the clear and present danger of death or serious physical injury. It was in that moment that he made the decision to discharge his weapon.

Without question, Officer Enrico's decision required split-second personal deliberation, professional judgment, and consideration of multiple other alternatives; it was a quintessential

discretionary act. E.g., *Reich, supra*; *Vasquez, supra*; *Henderson, supra*; *Hall, supra*; *Miller, supra*; *James, supra*.

3. **An officer’s awareness of fellow officers’ locations is a factor encompassed within an officer’s deliberation about whether or not to discharge his firearm; there is no separate ministerial duty to be aware of other officers’ locations before pulling the trigger.**

Morales purports not to dispute the discretionary nature of Officer Enrico’s decision to discharge his firearm. Instead, he attempts to reframe the issue, positing that once Officer Enrico decided to discharge his firearm, he had a separate, ministerial duty to ascertain the locations of his fellow officers before pulling the trigger. (Appellant’s Brief, p. 27 - 31) Legally, there is no support for that proposition. Practically, it is completely unrealistic.

Morales’ attempt to view a singular aspect of a deadly force encounter - a police officer’s awareness of his surroundings - fails to appreciate the totality of the circumstances in which police officers have to act. While Morales has the benefit of hindsight in advancing his argument, police officers do not have that luxury. They have to act in real time. Morales erroneously suggests that ascertaining the location of the other officers is a separate process in which an officer engages after making the decision to use deadly force. Morales’ theory is pure fantasy on the street when a police officer is called upon, as Enrico was here, to make a split-second decision, under enormous pressure, to use deadly force. In the context of such a decision, a police officer’s awareness of his surroundings, or his lack of such an awareness, is necessarily one of many considerations he must take into account in making the decision to use deadly force. Indeed, he has to take all of those considerations into account in a split-second. Make no bones about it – all of the considerations are part of the singular decision to use deadly force. It would be completely unrealistic, and would gut the purpose of qualified official immunity, to view the location of other

officers in isolation and frame the “discretionary” element of qualified official immunity as dependent on that consideration alone.

Courts should not flyspeck a police officer’s decision to use deadly force in the manner Morales advocates. Instead, courts should examine an officer’s entitlement to qualified official immunity from liability for state-law negligence holistically and objectively, framing the issue as whether the decision itself - rather than one component of that decision - is discretionary, as courts have always done. *See Reich, supra; Fakhri, supra; Nichols, supra; Casey, supra; Gambrel, supra; Hartman, supra; Vasquez, supra; Henderson, supra; Russell, supra; Hall, supra; Hart, supra; Kidd, supra; Lancaster, supra; Seiner, supra; McBride, supra; Teasley, supra; Miller, supra; Presnall, supra; Johnson, supra; James, supra; Moore, supra; Cabrera, supra.*

Morales offers several authorities in support of his contrived view of qualified official immunity, but his reliance on those decisions is misplaced. Morales points to a trilogy of cases involving the operation of motor vehicles i.e., *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), *City of Brooksville v. Warner*, 533 S.W.3d 688 (Ky. App. 2017); *Speck v. Bowling*, 892 S.W.2d 309 (Ky. App. 1995). (Appellants’ Brief, p. 27, 29) All three addressed the operation of police cruisers, not the decision to discharge a firearm when confronted with an armed and dangerous suspect reaching for a weapon. *Id.* Thus, as the Court of Appeals rightly concluded, *Jones* and *Speck* (and by extension *Warner*) are so factually distinct from the present circumstances that they cannot be read to show that Officer Enrico’s duties here were ministerial. The Court of Appeals keenly observed: “[A]n obvious difference exists between an officer driving his cruiser and Enrico’s discharge of his weapon in the present case. Using deadly force during the apprehension of a criminal suspect is not, as we stated in *Speck*, ‘an activity normally undertaken by private individuals in the course of

their everyday lives[.]’ ... In fact, such activity is entrusted specifically to law enforcement, and its exercise is foreclosed to private individuals.” (Court of Appeals Opinion, p. 31)

Morales takes issue with the distinction the Court of Appeals drew, arguing that “there are any number of circumstances in which a private individual has the right to and does use a firearm: when defending against an attack, when one’s home is invaded, while hunting with a proper license, or while shooting at a gun range.” (Appellant’s Brief, FN 11) First, that is sleight of hand. The Court of Appeals observed that *using deadly force during the apprehension of a criminal suspect* was not something entrusted to private citizens, a proposition that cannot honestly be disputed. Morales has cleverly replaced “using deadly force during the apprehension of a criminal suspect” with the use of a firearm in non-law enforcement scenarios to better fit his narrative. Second, the emphasis in *Speck* was on the regularity (i.e., in “their everyday lives”) with which the task at issue in those cases, i.e., driving a vehicle, is performed by private individuals, and driving a vehicle is, as the Supreme Court has noted, “clearly one of the most intensely regulated, trained, tested, and supervised activities that an individual may perform.” *Haney, supra*. It is not every day that a private individual must use a firearm to defend himself from attack, to protect his home from invasion, to hunt, or to shoot at a gun range. And, while the *purchase* of a firearm is subject to regulation, the *use* of a firearm by private citizens for protection, hunting or recreation is not subject to the same level of government regulation, training, testing, and supervision as is driving a vehicle. Thus, Morales’ criticism of the Court of Appeals’ reasoning is unfounded.

Importantly, in *Haney*, the Kentucky Supreme Court rejected the same logic that Morales employs here. In that case, as in this one, the plaintiff cited *Jones* for the proposition that a camp counselor during a night hike was subject to a ministerial duty to conduct the hike safely. The

Supreme Court easily rejected that notion and refused to give *Jones* such an expansive reading, explaining:

Driving a motor vehicle is clearly one of the most intensely regulated, trained, tested, and supervised activities that an individual may perform. See generally KRS Title XVI (motor vehicles). Aside from the basic instructions to Night Hike and its brief demonstration to the counselors, there can be no legitimate argument that even vaguely similar regulatory, training, testing, or supervisory systems were in place here so as to limit or define Haney's decision-making in supervising the children's activity.

Id. In other words, the Supreme Court in *Haney* construed the result in *Jones* (and by extension *Speck* and *Warner*) to be the product of the intense regulation surrounding the operation of motor vehicles, rather than any broadly applicable principle of qualified official immunity. Clearly, Officer Enrico's decision to use lethal force in apprehending Reynolds was not subject to the same complex scheme of motor vehicle regulations that the officers in *Jones*, *Speck*, and *Warner* were subject to while driving their police cruisers. Thus, for the reasons this Court set out in *Haney*, *Jones*, *Speck*, and *Warner* do not apply here and do not support Morales' argument that Officer Enrico had a ministerial duty to ascertain the location of fellow police officers and bystanders prior to discharging his firearm.

Likewise, the extra-jurisdictional cases Morales cites are inapposite. For example, Morales cites *McGrew v. Duncan*, 333 F.Supp.3d 730 (E.D. Mich. 2018) for the proposition that "When an officer makes a decision concerning what type of action to take, 'e.g., to make an arrest, issue a warning, or wait for assistance, [it] is a discretionary act entitled to immunity. However, the execution of that decision is merely a ministerial act." (Appellant's Brief, p. 30) In *McGrew*, officers entered the plaintiff's home to execute a search warrant, threw her to the ground, handcuffed her, and refused to loosen the handcuffs when the plaintiff complained they were too tight, which caused the plaintiff to have bruises requiring medical care. The officers handcuffed the plaintiff

not because of anything she had done, but because handcuffing all occupants of the home was part of the plan the officers formulated for executing the warrant before they ever entered the home. The issue was whether the officer was immune from liability on the plaintiff's state-law claims for assault and battery for the manner in which he handcuffed the plaintiff. Because handcuffing the plaintiff was a "normal circumstance" that involved no resistance on the plaintiff's part, the court ruled that handcuffing was ministerial. The federal district court noted that "handcuffing an individual under normal circumstances incident to an arrest without resistance may be a ministerial act" under state law. *Id.* at 741. That decision makes sense: The handcuffing of a non-resistant individual requires nothing more than the routine placement of handcuffs on the individual's wrists. Therefore, when a police officer decides to handcuff a non-resistant subject, the officer is not required to make any life and death decisions about how to accomplish that task. Rather, he simply follows a prescribed procedure. And, when a police officer does no more than follow a prescribed procedure, his actions are ministerial.¹¹

By contrast, there is no prescribed procedure for a police officer to follow in deadly force encounters. Nor could there be. The handcuffing of a non-resistant subject lends itself to a prescribed procedure because one simple variable is involved: If the subject does not resist, handcuffs must be applied in the prescribed manner. Deadly force encounters do not lend themselves to prescribed procedures because so many variables are involved, there is no way to account for every combination of variables, and there is not always one correct course of action in a given set of circumstances. An officer must weigh each variable and use his own judgment in determining how to respond in a deadly force encounter. Consequently, *McGrew* does not support

¹¹ *McGrew* has limited application, even in the realm of handcuffing. When a subject resists the application of handcuffs, the execution of the decision to apply handcuffs is no longer ministerial. As the *McGrew* court noted: "When an individual does something that might require the officer to use her discretion to determine the appropriate method to handcuff the individual, the act of handcuffing may become discretionary." *Id.*

Morales' argument that Officer Enrico had a ministerial duty to ascertain the location of fellow police officers and bystanders prior to discharging his firearm.

Nor does *Brown v. City of Bloomington*, 706 N.W.2d 519 (Minn. App. 2005) support Morales' argument that Officer Enrico had a ministerial duty to ascertain the location of fellow police officers and bystanders prior to discharging his firearm. (Appellant's Brief, p. 30) In *Brown*, a police officer had intended to shoot a plaintiff with less-lethal ammunition, but mistakenly fired lethal ammunition at her after mistakenly loading his less-lethal weapon with lethal ammunition. The court concluded that because the act of loading ammunition into a less-lethal weapon was ministerial, the officer was not entitled to Minnesota's version of qualified official immunity. It was pivotal to the court's decision that a departmental policy existed for making a transition from lethal to less-lethal ammunition, and that the officer failed to follow that policy. *Id.* at 524 ("[T]he existence of a department procedure for loading the shotgun underscores that Officer Duerksen's actions in this instance were ministerial. Officer Duerksen admitted in his deposition that he did not follow a Bloomington Police Department procedure for making the transition from lethal to less-lethal ammunition and because a narrow standard on how to load less-lethal ammunition existed, we conclude that Officer Duerksen was performing a ministerial duty and is not entitled to the protection of official immunity from civil liability.") Here, there was no department policy or other prescribed procedure that defined the steps Officer Enrico was to take in discharging his firearm. *Brown* does not help Morales.

Finally, Morales' reliance on *Smith v. Yono*, 613 F.Supp. 50 (E.D. Mich. 1985), is misplaced. (Appellant's Brief, p. 30) Under Michigan law, the duty to execute an arrest is ministerial, such that the arrest must be made without excessive force. *Id.*, citing *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1985). For this reason, the officer's immunity from liability from torts arising

from the use of force in the course of an arrest turns on whether or not the force was reasonable. *Id.*, citing *Brewer v. Perrin*, 349 N.W.2d 198 (Mich. App. 1984). In *Yono*, there were questions of fact as to the reasonableness of the force the officers used in arresting the plaintiff. Consequently, the federal district court ruled that the officers were not entitled to summary judgment on the issue of immunity from state-law tort. *Id.* at 54. That holding has no relevance here, since there is no dispute that the officers who used deadly force against Reynolds – including Morales – acted reasonably.

4. Assuming *arguendo* Enricco had a separate duty to ascertain the location of others before pulling the trigger on his firearm, that duty was also discretionary.

Furthermore, assuming *arguendo* the propriety of parsing Officer Enricco’s decision to deploy deadly force into components and considering whether each component was discretionary or ministerial, Officer Enricco would still be entitled to qualified official immunity.

First, a ministerial duty typically arises from specific commands in law, policy, training or directives from supervisors. *Haney, supra; Yanero, supra*. But, no such directive for Officer Enricco to be aware of his surroundings exists anywhere in the record. It was not stated in policies. It was not referenced in training manuals. It was not set out in any directives from Officer Enricco’s supervisors. In short, it was not a directive that Officer Enricco ever received and was not a “known rule” to which he was subject.

The only person who testified that Enricco had such an obligation was not a fact witness, but rather Morales’ retained expert witness, Chief Kevin Sutton. (Appellant’s Brief, p. 26 - 27) Sutton, however, did not rely on any training or directives that Officer Enricco had actually been given. Rather, Sutton testified that it was his opinion based on *his* experience and training - not Officer Enricco’s. Sutton’s testimony is therefore insufficient both factually and legally to set a

ministerial duty for Officer Enricco. More importantly, that is not what Sutton was testifying about. Sutton's testimony focuses on whether Officer Enricco violated the standard of care. (R. 2524 - 2563, p. 30) That is a completely different issue - and one Officer Enricco conceded below only for purposes of resolving his dispositive motion (R. 1848 - 1901, p. 6) - than whether his conduct violated a ministerial duty. The issue as advocated by Morales is whether Officer Enricco violated a clear mandate when he allegedly failed to be aware of his surroundings. Sutton offers no proof that any such mandate actually exists; rather, he offers only his personal opinion. For these reasons, Morales cannot use Sutton's testimony to manufacture a ministerial duty for Officer Enricco.

Second, the duty that Morales claims Officer Enricco was subject to is laced with discretion. *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011) (immunity appropriate for the violation of a mandatory obligation if there is still room for the use of discretion in determining whether the obligation applies in the first place). Morales suggests that the alleged ministerial duty to which Officer Enricco was subject is the obligation to forebear from firing a shot if he does not know the location of all officers in the vicinity. (Appellant's Brief, p. 27 - 31) That, of course, is not the only duty to which Officer Enricco was subject when he fired shots at an armed bank robber who was about to shoot at a line of police officers. Officer Enricco observed a man reported to be armed and dangerous reaching for a weapon in the vicinity of several other officers and pointing that weapon at the officers. Based on these observations, Officer Enricco had a duty to act to prevent harm to himself, to his fellow officers, and to any bystanders who might have been injured by Reynolds, had Reynolds fired his weapon. Even if Enricco had a duty to forebear from firing when he did not know the location of all officers, he had to balance that duty against his duty to protect himself and others from the clear and present threat from an armed and dangerous subject.

such force is necessary to protect himself against death[] or serious physical injury”. *See also* *Woosley v. City of Paris*, 591 F. Supp.2d 913 (E.D.Ky. 2008) (interpreting Kentucky law) (“Police officers generally have a privilege to use reasonably necessary force to preserve order.”); *Nichols, supra* (interpreting Kentucky law) (“The determination of the amount of force required to effect an arrest is a discretionary act and was within the scope of Graves’ authority as a School Safety Officer.”).

There is no dispute that in deciding to employ deadly force against Reynolds, Officer Enrico was acting within the scope of his authority as a police officer. Morales does not allege otherwise in his Complaint, has not argued otherwise below, and does not argue otherwise in his Brief.

III. THERE IS NO EVIDENCE THAT ENRICO ACTED IN BAD FAITH WHEN HE FIRED HIS WEAPON

Since Officer Enrico has demonstrated that he was engaged in a discretionary function and was acting pursuant to his authority as a police officer when he fired his weapon at Reynolds, the burden shifts to Morales to demonstrate that Officer Enrico acted in bad faith to defeat Officer Enrico’s immunity. Morales cannot meet that burden. More importantly, Morales does not even allege in his Complaint, and has never subsequently argued, that Officer Enrico acted in bad faith.

In the context of qualified official immunity, bad faith can be established when a person in the public employee’s position should have known that his actions violated the plaintiff’s rights; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. *Hicks v. Young*, 2019 Ky. App. Unpub. LEXIS 426,¹² citing *Yanero, supra*. Bad faith is

¹² Appendix II.

the opposite of good faith, and it is not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive. *Wagers, supra*, citing *Sloas, supra*.

Morales cannot establish that Officer Enrico acted in bad faith in electing to deploy deadly force to stop the lethal threat Reynolds presented. Under the circumstances Officer Enrico faced in seeing Reynolds with a gun aimed in his direction, it was not objectively unreasonable for him to fire his weapon at Reynolds. Indeed, Morales fired his weapon at Reynolds for the same reason. Nor did Officer Enrico act willfully, maliciously, or with a corrupt motive, in firing upon Reynolds. In short, Morales cannot carry his burden of establishing that Officer Enrico acted in bad faith.

IV. THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AFFECTING MORALES’ CLAIM AGAINST ENRICO

Based on his conclusion that certain questions are “for the jury – not the Court,” Morales attempts to convince this Court that it was error to grant summary judgment to Officer Enrico due to the existence of genuine issues of material fact. (Appellant’s Brief, 26)

In making this argument, the only evidence Morales references pertains to the existence of a duty on Officer Enrico’s part. (Appellant’s Brief, p. 26) The existence of a duty, of course, is not a question of fact for a jury. It is a legal question for the court to determine. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992); *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003); *Floyd v. Parkview Council of Co-Owners, Inc.*, 664 S.W.3d 726 (Ky. App. 2023), citing *Bramlett v. Ryan*, 635 S.W.3d 831 (Ky. 2021). Morales does not point to any competing evidence on an issue of *material fact*.

Moreover, for the limited purpose of his motion for summary judgment, Officer Enrico conceded negligence, such that any dispute with respect to the elements of negligence (such as the existence of duty) did not preclude the court from deciding qualified official immunity as a

matter of law. And, where negligence is assumed, the application of immunity is a question of law for a court to decide. *Meinhart v. Louisville Metro Govt.*, 627 S.W.3d 824 (Ky. 2021); *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006); *Patton v. Bickford*, 529 S.W.3d 717 (Ky. 2016).

In sum, there simply is no merit to Morales' assertion that it was error to grant summary judgment to Officer Enrico due to the existence of disputed facts.

CONCLUSION

What happened at the Georgetown rest stop on September 11, 2018 was truly tragic. Tragedy, however, does not trump well-reasoned principles of law. Qualified immunity was designed to protect a law enforcement officer under the facts and circumstances of this case. In protecting our communities, police officers often face dangerous, swiftly changing, and unpredictable situations in which they must use their expertise and judgment to determine whether, when, and how best to use force. They place themselves at risk for our benefit. That is part of the job. But, where police officers face difficult, life-threatening situations and have to make quick decisions, and they do their jobs without evidence of willfulness, malice or a sinister motive, they must be protected from liability for any accidental injuries that may result. To hold otherwise would neuter the defense and prompt law enforcement officers to avoid risk, endangering public safety and giving the bad guys a win.

When he and the other officers confronted Reynolds at the rest stop on September 11, 2018, Officer Enrico faced an extremely dangerous, swiftly changing, and unpredictable situation in which he was called upon to exercise his discretion and judgment in determining whether, when, and how to use lethal force to protect himself, other officers, and any members of the public who were in the vicinity. There is no evidence that Officer Enrico harbored any willfulness, malice or other sinister motive when, under those circumstances, he elected to discharge his firearm at Reynolds. Indeed, Morales made the same decision for the same reason. Officer Enrico must be

protected from liability for the injuries that resulted from his decision, regardless of the identity of the injured party or the severity of his injuries.

For all these reasons, Officer Joey Enricco respectfully requests that this Court uphold the lower courts' rulings that he is entitled to qualified official immunity from liability on Morales' negligence claim.

Respectfully submitted,

/s/ Jeffrey C. Mando

Jeffrey C. Mando, Esq. (#43548)
Jennifer L. Langen, Esq. (#87690)
ADAMS LAW, PLLC
40 West Pike Street
Covington, KY 41011
859.394.6200 | 859.392.7200 - Fax
jmando@adamsattorneys.com
jlangen@adamsattorneys.com

Attorneys for Appellee, Officer Joseph Enricco

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 43(C)(2)(b) because, excluding the parts of the document exempted by RAP 15(E), this document contains 7,173 words.