CASE SURVEY OF
WALLACE V. CITY OF ALEXANDER
CASE NO. 15-32179

Presentation By:

-John L. Wilkerson, &

- Sara Teague

©2016 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2016 Mid-Year Seminar held April 15-18, 2016 in Washington D.C. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

FACTS:

- On September 8, 2012, Officer Nancy Cummings was patrolling the City of Alexander's streets with her daughter, who was doing an authorized ride-along.
- While Officer Cummings was driving north on Lindsey drive, she noticed Carlton Wallace walking west in the middle of Brookwood Drive.
- Since Wallace was obstructing traffic, Officer Cummings went to investigate.
- As Officer Cummings approached Wallace, she noticed a gun in his waistband.
- From her car, Officer Cummings asked Wallace what his name was and Wallace replied with "long drawn out answers." *For Example: "Wh-o-o?" and "Wha-at?"*

- Wallace had both hands in his pockets, and as Officer Cummings exited her patrol unit, she instructed him to "get [his] hands up."
- Wallace then pulled his hands out of his pockets, reached behind his back, and retrieved the handgun from his waistband, pointing it at Officer Cummings.
- Officer Cummings draws her duty weapon at the same time, while ordering Wallace to "drop the gun."
- After a brief "stand-off," Wallace throws his handgun into the woods nearby.
- Officer Cummings then ordered Wallace to "get on the ground," but Wallace "did nothing."
- Officer Cummings then approached Wallace, with her duty weapon still in hand, and grabbed Wallace by his right arm, leading him to the front of her police unit.
- At the front of the police unit, Officer Cummings ordered Wallace to place his hands behind his back, but he refused.

- Officer Cummings then reached for Wallace's left hand, to pull it behind his back, but Wallace "yanked [away], turning [her] with him."
- This action caused Officer Cummings to lose balance, and when she tried to grab Wallace, her gun fired.
- Officer Cummings was confused as to what happened, and her daughter too noticed Officer Cummings's shocked appearance.
- Wallace collapsed after taking only a few steps away from the from of the patrol unit.
- Two minor children witnessed the event.
- Both minor children state they heard the gunshot after Wallace was walking away from Officer Cummings, but their testimony varies on the location of Officer Cummings's duty weapon during the struggle.
- The medical examiner states the duty weapon was approximately five (5) to six (6) inches from Wallace's back.

- Manny Kapehlson, our firearm's expert, testified the shot was fired approximately three (3) to four (4) from Wallace's back.
- Blood was found approximately three-feet, eight-inches (3' 8") from the front of Officer Cummings's patrol unit.

  - The incident's scene →
  - The black dodge SUV is Officer Cummings's patrol unit.
  - The closest evidence marker (Marker 1) shows the location of the nearest blood stain.
  - The woods to the left of the scene is where Wallace's gun was thrown.



- The blood stains on the pavement are primarily consistent with "passive drip stains."
- The close proximity between each blood stain indicates that Wallace was moving very slowly as he moved through the area.



Forewarning, the next photograph shows Wallace's entry wound

- The entry wound was nineteen (19) inches from the top of Wallace's head, and two and three quarter (2 ¾) inches to the right of his posterior midline.
- A halo of yellow grains of powder and stippling surrounded the wound in an area measuring over two (2) inches in diameter.
- Based on the stippling, our expert concluded this was a "close range shot" from approximately three (3) to four (4) inches away.
- Direction of the wound path was from back to front and upward to the left.
- The toxicology report indicated Wallace had amphetamines, methamphetamines, and cannabinoids in his system.



- The red arrow indicates the approximate location of Wallace's thrown handgun, in reference to the front of the patrol unit.



- Wallace's handgun was found with traces of his DNA on the handle and trigger.
- His handgun had nine (9) live 9mm FMJ rounds in the magazine.
- The handgun was found with its safety in the off position.
- There was no chambered round in the handgun.
- Investigators could not determine whether Wallace had or had not pulled the trigger.





- Officer Cummings's .40 Cal. Glock was put through a battery of Glock Armorer's Inspections, all of which it passed.
- Her handgun was considered to be in a safe and serviceable condition.





- The ammunition used in this shooting was Remington brand, "Golden Saber" brass jacketed hollow-point ammunition.
- Considered a high-quality duty round.

PROCEDURAL HISTORY:

- Officer Cummings was charged with Reckless Manslaughter and Negligent Homicide, and was acquitted of both charges.
- Jacquelyn Wallace, brought this civil suit against Officer Cummings under 42 U.S.C. 1983, alleging excessive use of force in violation of the Fourth and Fourteenth Amendments.
- The district court denied Officer Cummings' motion for summary judgment, and this appeal to the 8th Circuit is pursuant to that denial.

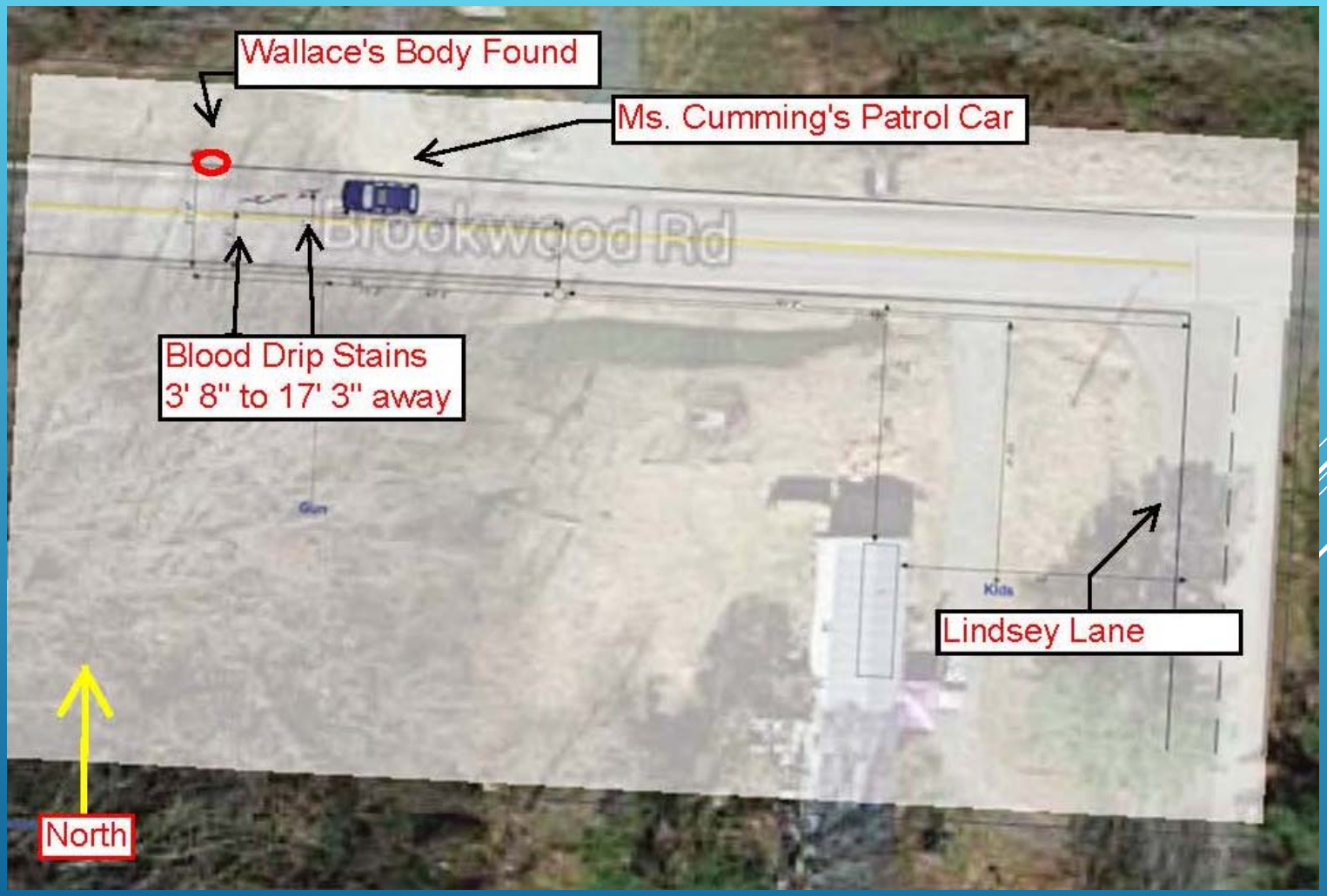
ISSUE 1: ACCIDENTAL V. INTENTIONAL

- **Here, we have 3 eye-witnesses:**
  - *Officer Cummings,*
  - *Minor 1, and*
  - *Minor 2.*
- ***Officer Cummings*** *asserts that the gun accidentally discharged during the scuffle when she attempted to grab Wallace's left wrist and he pulled away.*
- ***Minor 1*** *asserts that Officer Cummings placed her duty weapon on the hood of her patrol vehicle, there was a scuffle, then, as Wallace was walking away, Officer Cummings grabbed her gun off the hood and turned to shoot Wallace in the back.*
- ***Minor 2*** *asserts that Officer Cummings holstered her duty weapon, there was a scuffle, then, as Wallace was walking away, Officer Cummings unholstered her duty weapon and turns to shoot Wallace in the back.*
- ***Our Experts*** have evidence and conducted tests that tend to corroborate Officer Cummings account of the shooting.
- ***Of these statements and beliefs, who do we believe?***

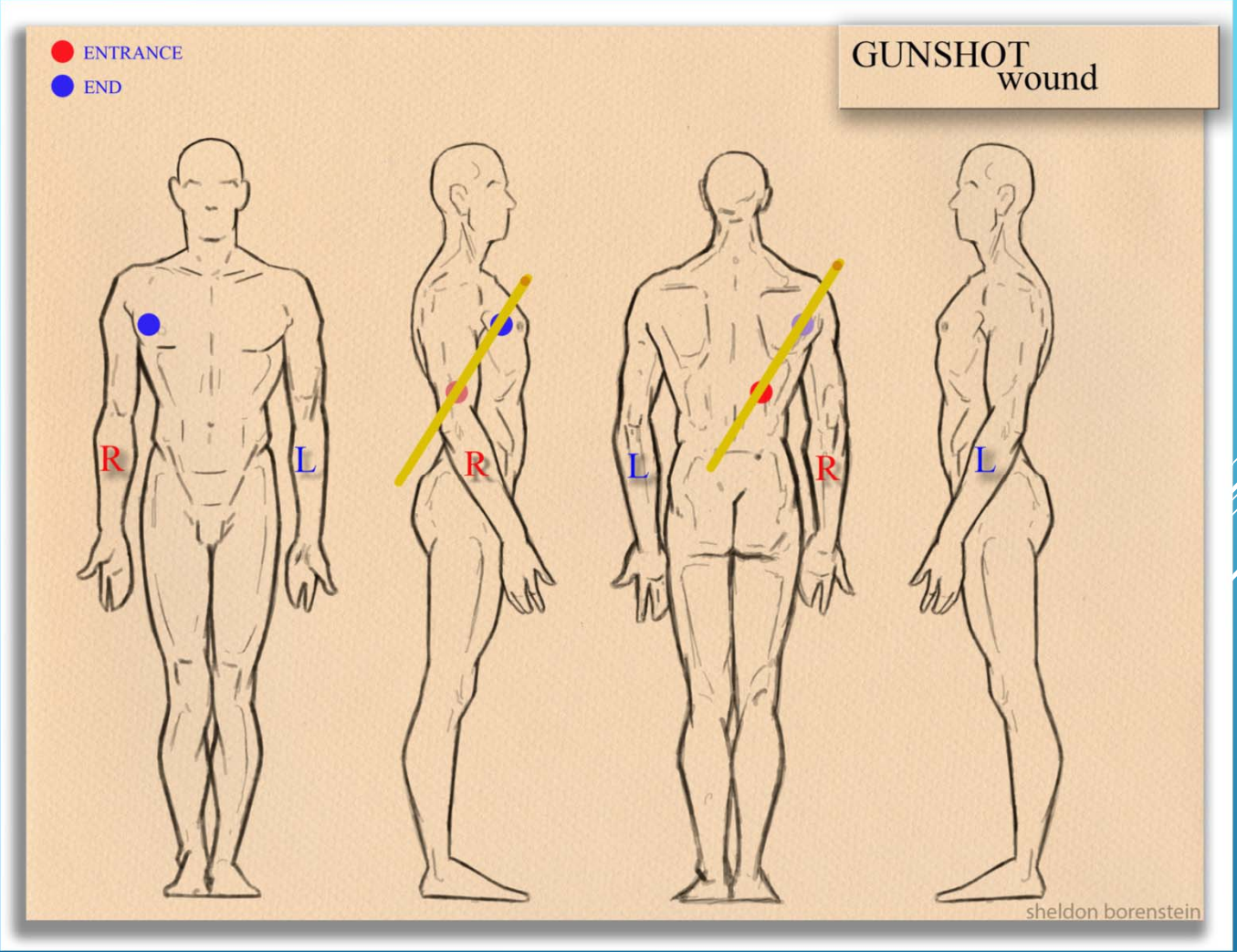
- This is taken from the nearest approximate vantage point of the two minor eye witnesses.
- The red arrow denotes the location of Officer Cummings's police unit.
- Only Officer Cummings' patrol unit, denoted by the red arrow, was present at the time of the shooting. The other police units arrived when the investigation began.



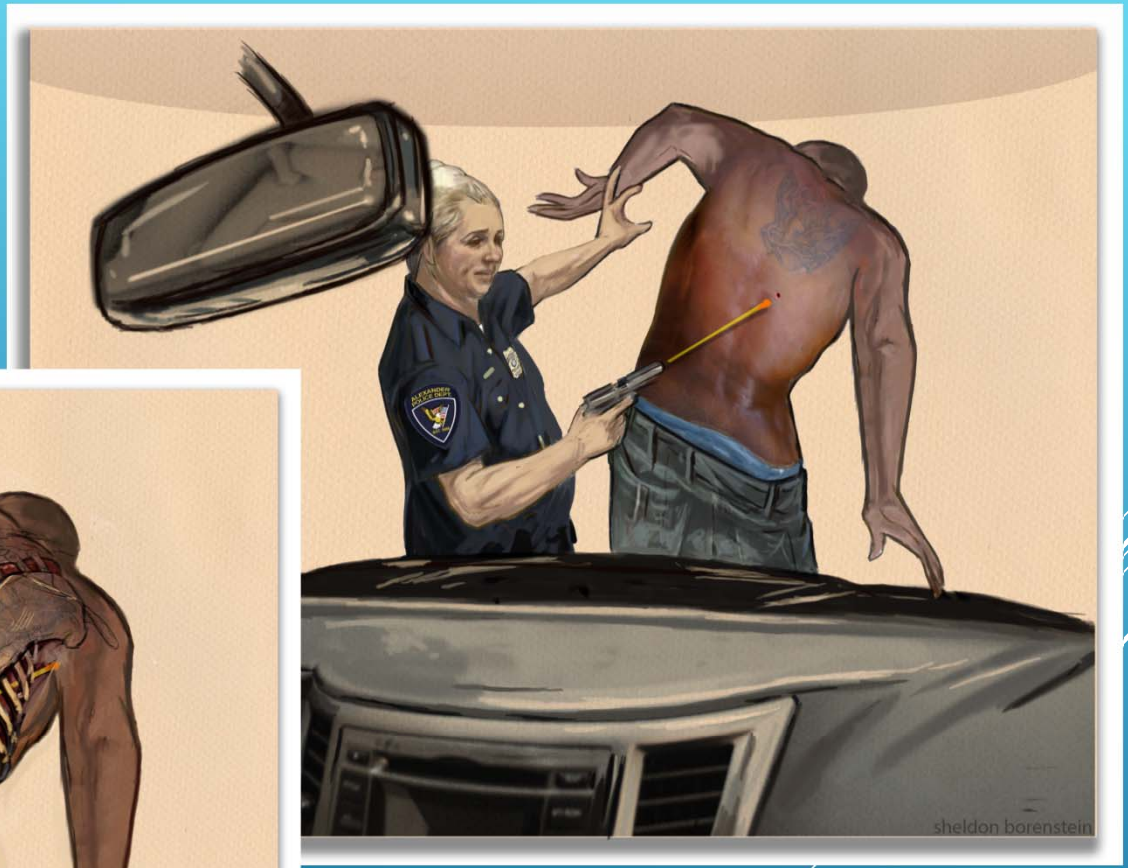
- We do not know exactly where the minor witnesses were located.
- But our expert states the sound waves traveling the distance between the shooting and the minor witnesses may account for the minor witnesses believing Wallace was shot when walking away.
- As stated earlier, Officer Cummings was traveling North on Lindsey Lane when she saw Wallace traveling West on Brookwood Drive.

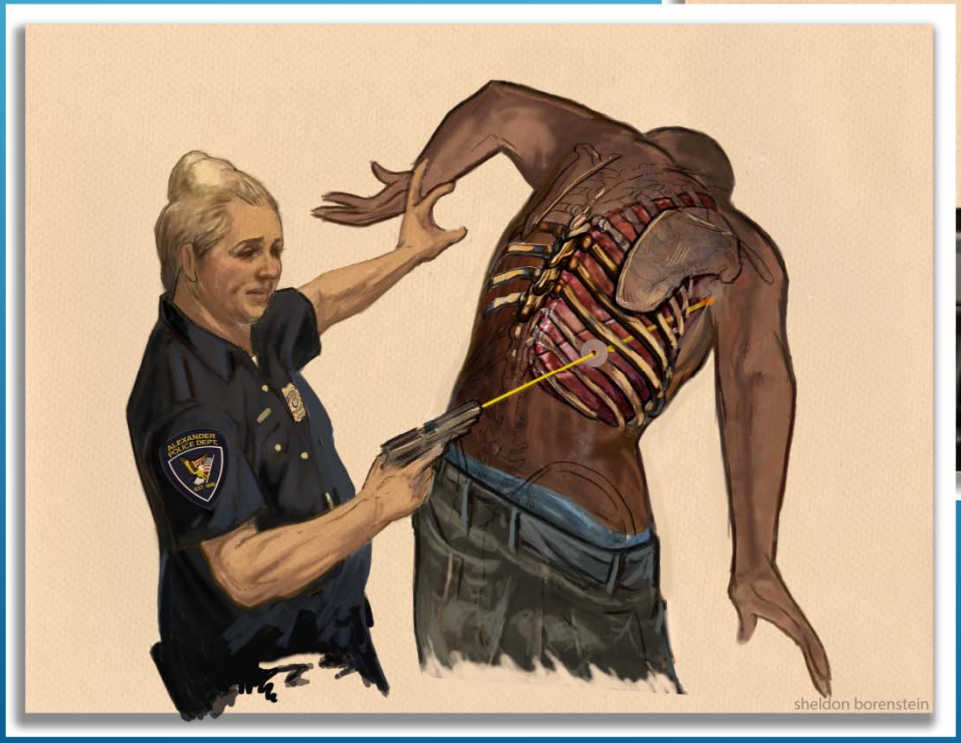


- Our experts believe that Officer Cummings may have accidentally shot Wallace while the two were scuffling in front of her police unit, because of a phenomenon called involuntary muscular contraction ("IMC").
- Our experts believe that the startle effect, loss of balance, or inter-limb interaction, all possibly caused by the scuffle in front of Officer Cummings' police unit, could have resulted in an unintentional discharge under the circumstances.



- The bullet's path through Wallace's body further serves as evidence that Officer Cummings shot Wallace at a very close distance, and not as Wallace was running away.





BUT…

- One of our experts states "*I believe this shooting, which Officer Cummings has testified was unintentional(accidental), **may have** resulted from a phenomenon called involuntary muscular contraction (IMC).*"
  - Based on the phrasing alone, the expert never takes an affirmative stance that IMC **was** the cause of the shooting.
- Further, the same expert states "*While my late engagement to work in this case and the resulting time constraints have prevented me from reading or reviewing [all of the case material provided to me,] I am confident that I have reviewed those portions of the material necessary for the formulations of my opinions with the requisite degree of certainty.*"
  - Based on the large amount of relevant facts in this case, and the case's importance, it would be best for an expert to read all of the material before providing an opinion. Not doing so could cause an expert to prematurely opine a hypothesis without reviewing possibly contradicting facts.

OUR ARGUMENT FOR ISSUE 1:

- Here, the reviewing court is not bound by a district court's findings of fact, because the allegedly disputed facts presented by the two minor witnesses are clearly contradicted by the physical evidence.
- **Law:**
  - Where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff, the physical facts must control.
    - *Born v. Osendorf*, 329 F.2d 669 (8th Cir. 1964).
  - Testimony wholly contradicted by the physical evidence in the record cannot create a genuine dispute of fact.
    - *Scott v. Harris*, 550 U.S. 372 (2007).

BUT…

- The *Born v. Osendorf* inquiry is not a question of whether the physical facts ***better conform*** with our theory, as to how the accident occurred; rather, the physical facts must make our theory **so physically impossible** that a verdict for Wallace **could not be sustained**.
  - *In Born, the court concluded that the dispute as to how fast the plaintiff was driving may conform better with the defendant's theory as to how the traffic accident occurred, but the court refused to overturn the trial court's finding because the physical facts were not so clear and irrefutable so as to render plaintiff's testimony incredible.*
- Further, although testimony wholly contradicted by the physical evidence in the record cannot create a genuine dispute of fact, our facts do not compare to the facts in *Scott v. Harris.*
  - *In Scott, the court stated that the record, including a video which captured the event unfolding, blatantly contradicted the plaintiff's version of the events which the lower courts relied, and determined the lower courts errored by relying on them because plaintiff's version was so utterly contradicted. Here, we have more of a he-said-she-said type of dispute.*

DISCUSSION: 10 MINUTES



ISSUE 2: APPROPRIATE STANDARD FOR ACCIDENTAL SHOOTING

- The circuits are split as to how we approach the analysis of an accidental shooting.
- Neither Arkansas nor the Eighth Circuit has decided what analysis we apply when an accidental shooting occurs.
- The 2nd Circuit supports the proposition that where there is an accidental shooting, there is no Fourth Amendment Violation, and the officer's conduct prior to the shooting is not relevant.
- The 1st, 4th, 5th, 6th, and 10th Circuits have focused on the officer's actions leading up to the unintentional discharge of a weapon and consider whether the actions create conditions likely to cause harm.



OUR ARGUMENT FOR ISSUE 2:

- Officer Cummings accidentally shot Wallace while the two where scuffling in front of her police unit. Since the shooting was accidental, and not intentional, there is no Fourth Amendment violation.
- **Law:**
  - A Fourth Amendment violation requires an unreasonable act. Only when there is a governmental termination of freedom of movement through means intentionally applied, can a seizure impose a Fourth Amendment violation.
    - *Brower v. County of Inyo*, 125 U.S. 593 (1983).
  - To violate the Fourth Amendment, a restraint in liberty must be effectuated through means intentionally applied. A Fourth Amendment seizure requires an intentional act by a governmental actor.
    - *McCoy v. Monticello*, 342 F.3d 842 (8th Cir. 2003).

BUT…

- How can we argue that no Fourth Amendment violation occurred here when we do not know the appropriate standard to apply?
- **Law:**
  - As aforementioned, there is no binding decision that tells us what approach we need to take.
    - Do we need to consider Officer Cummings' acts prior to the accidental shooting? Or is that analysis unnecessary?
- **Analysis:**
  - Here, if we need to analyze Officer Cummings' acts prior to the shooting we have conflicting evidence.
    - On one hand, we have one Agent Moss who determined that Officer Cummings acted recklessly when she tried to handcuff Wallace with her finger on the trigger.
    - On the other hand, as stated earlier, one of our experts did not even read all the materials before he provided his expert opinion that "it is not unreasonable for Officer Cummings to stop and question Wallace, and then try to arrest him after he pointed his handgun at her."

DISCUSSION: 10 MINUTES



ISSUE 3: QUALIFIED IMMUNITY FOR THE INTENTIONAL SHOOTING

- This issue only arises if the Jury decides against us on the previous two issues:
  - The Jury would need to decide in favor of the minor witness testimony, &
  - That the shooting was not negligent; rather, that the shooting was intentional.



The issues herein may have not been issues at all had Officer Cummings' dash cam functioned.

OUR ARGUMENT FOR ISSUE 3:

- If the shooting was intentional, Officer Cummings is entitled to qualified immunity because officers may shoot fleeing felons who have committed a violent felony.

- **Law:**
  - "[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape…"
    - *Tennessee v. Garner*, 471 U.S. 1 (1985).

BUT…

- It is well known that modern police forces are trained not to shoot a fleeing felon unless that fleeing felon poses an immediate and significant threat of death or serious injury to the officer or to bystanders.
  - *Thompson v. Murray*, 800 F.3d 979 (8th Cir. 2015).
- **Analysis:**
  - Here, if the jury believes the minor witness' testimony, we have Wallace running away from the two minor witnesses; away from Officer Cummings and her daughter; and not running in the direction of his firearm, which he threw into the woods. How can there be any significant threat of death or serious injury to the officer or bystanders?
  - Further, although Wallace had committed a felony, there should have been a de-escalation of force on behalf of Office Cummings since Wallace no longer was wielding a handgun.

DISCUSSION: 10 MINUTES



FINAL THOUGHTS?

