No. _____

In the Supreme Court of the United States

GREG SANDEL, Officer, In His Individual and Official Capacity, ROBERT FULTZ, Officer, In His Individual and Official Capacity, and TREVOR WILKINS, Kentucky Vehicle Enforcement Officer, In His Individual Capacity,
Cross-Petitioners,

v.

TERRY WILLIAMS, JR.,
Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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December 12, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Questions Presented

1. Whether criminal proceedings that result in conviction preclude a federal civil rights claim for excessive use of force, under circumstances where the use of excessive force would provide a complete affirmative defense to an offense of conviction in the forum where the conviction is adjudged.

2. Whether a claim of excessive use of force is barred on grounds of qualified immunity to the extent such claim is premised upon allegations of fact that are conclusively rebutted by documentary video footage of the incident giving rise to the claim.

Parties to the Proceedings Below

Conditional Cross-Petitioners are Kenton County, Kentucky, Police Officers Greg Sandel ("Officer Sandel"), Robert Fultz ("Officer Fultz"), and Department of Kentucky State Police, Division of Commercial Vehicle Enforcement Officer Trevor Wilkins ("Officer Wilkins"). Officer Sandel, Officer Fultz, and Officer Wilkins were named as Defendants in the action before the United States District Court For the Eastern District Of Kentucky (Civil Action No. 2: 08-CV-0004-DLB), and were Appellants before the United States Court of Appeals for the Sixth Circuit in consolidated appellate actions (10-5220 and 10-5221). Cross-Respondent Terry Williams, Jr. ("Williams") was the Plaintiff before the District Court and the sole Appellee before the Sixth Circuit.

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Appendix

TABLE OF AUTHORITIES

Cases

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Other Authorities

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit dated July 13, 2011, which granted Cross-Petitioners' interlocutory appeal on grounds of qualified immunity, was not selected for full-text publication in Federal Reporter, and is cited as *Williams v. Sandel*, 433 Fed.Appx. 353 (6th Cir. 2011). The Sixth Circuit's opinion is reproduced in Cross-Respondent's Petition For Certiorari, Appendix A, 1a-24a. The Sixth Circuit denied Cross-Respondent's Petition for Rehearing on August 19, 2011. This denial is reproduced at Cross-Respondent's For Certiorari, Appendix D, 33a-34a.

The interlocutory minute entry order of the District Court dated December 10, 2009, which denied Cross-Petitioners' motions for summary judgment is unreported, and is reproduced at Cross-Respondent's Petition For Certiorari, Appendix C, 29a-32a. The interlocutory order of the District Court which denied Cross-Petitioners' motions for partial reconsideration of the order denying summary judgment, is unreported, and is reproduced at Cross-Respondent's Petition For Certiorari, Appendix B, 25a-28a.

Jurisdiction

The decision of the United States Court of Appeals for the Sixth Circuit was entered on July 13, 2011. Cross-Respondent's Petition was timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1, as it was filed within 90 days of the August 19, 2011, denial of Cross-Respondent's petition for rehearing. This Cross-Petition is timely submitted in accordance with Supreme Court Rules 12.5, and 13.4. This Court has

jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provision is 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

Statement of the Case

A. Introduction

This matter arises from a personal injury civil action filed by Williams against Officer Sandel, Officer Fultz, and Officer Wilkins, arising from Williams' arrest in Kenton County, Kentucky, on or about July 7, 2007. Williams' claims are asserted under the Fourth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983, as well as common law claims for battery and negligence asserted under the common law of the Commonwealth of Kentucky.

The District Court denied Cross-Petitioners' motions for summary judgment that asserted qualified immunity as well as sought judgment on the merits of Williams' claims. The United States Court of Appeals for the Sixth Circuit reversed, resulting in dismissal with prejudice of all of Williams' claims. Cross-Petitioners are not seeking broader relief from this Court than the relief granted by the Sixth Circuit. Rather, the purpose of this Cross-Petition is to ensure that alternate grounds for relief that were raised before the United States Court of Appeals for the Sixth Circuit, but which were not resolved either favorably or adversely to Cross-Petitioners by the Sixth Circuit, are brought to the attention of this Court should Cross-Respondent's Petition For Certiorari be granted.

B. Factual Background

The undisputed material facts relevant to this Cross-Petition are set forth in the Sixth Circuit's opinion, and are reproduced at the Cross-Respondent's Petition For Certiorari Appendix A, 2a-10a. A

summary of the facts most relevant to this Cross-Petition are as follows:

In the late evening hours of July 7, 2007, Officer Sandel responded to a "911" report involving a nude pedestrian on Interstate 75 in Kenton County, Kentucky. Officer Sandel observed Williams, who was completely nude, proceeding on foot in a northerly direction, in the interior emergency lane adjacent to the center concrete dividing barrier, on the southbound-side of Interstate 75.

Officer Sandel was driving a marked police vehicle equipped with a dash-mounted video camera. Officer Sandel positioned his vehicle with its camera facing Williams. The camera was operational, and approximately 2 minutes and 33 seconds of the events that subsequently transpired were captured on video. A copy of this video recording was made part of record in the action below, and is referenced by the Sixth Circuit in its opinion.

As depicted on the video, no officer utilized any force against Williams, until Williams became non-compliant and refused to submit to being placed in handcuffs by Officer Fultz -- pulling away from Officer Fultz after only one handcuff had been placed upon one of his wrists.

As further depicted on the video, southbound Interstate 75 traffic, which consisted of three travel lanes in the area, continued to flow at highway speeds in very close proximity to Williams and the officers during the officers' efforts to restrain Williams. Finally, the video clearly depicts Williams' active resistance to being taken into custody -- culminating

with Williams running into the travel lanes of Interstate 75 -- with the video documenting vehicles continuing to pass even after Williams ran into traffic. While the remainder of the incident occurred outside of camera view, it is undisputed that no officer used any force against Williams after Williams was restrained and taken into custody.

Other specific facts documented in the record below which are of direct relevance to this Cross-Petition concern the criminal convictions adjudged against Williams as result of his conduct related to the July 7, 2007, incident giving rise to his claim for excessive force. Attached to this Cross-Petition, and reproduced in the Appendix at Appendix A, 1a-5a, is a copy of the Final Judgment entered in the case of *Commonwealth v. Williams*, Commonwealth of Kentucky, Kenton Circuit Court, Criminal Action No. 07-CR-00538.

As set forth in the attached state court judgment, Williams was convicted upon jury trial of the offense of Disorderly Conduct in the Second Degree (*Ky.Rev.Stat.Ann.* 525.060[1]), and was the subsequently

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[1] *Ky.Rev.Stat.Ann.* 525.060 provides in relevant part:

> (1) A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:
> (a) Engages in fighting or in violent, tumultuous, or threatening behavior;
> (b) Makes unreasonable noise;
> (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency; or

convicted (upon pleas) of the following offenses: Resisting Arrest (*Ky.Rev.Stat.Ann.* 520.090[2]), and Wanton Endangerment in the Second Degree (*Ky.Rev.Stat.Ann.* 508.070[3]). Of particular note to this Cross-Petition, Williams' conviction upon voluntary pleas for the offenses of resisting arrest and wanton endangerment in the second degree were adjudged *after* he initiated the civil action against Cross-Petitioners.

> (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

Id.

[2] *Ky.Rev.Stat.Ann*. 520.090 provides in relevant part:

> (1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:
> (a) Using or threatening to use physical force or violence against the peace officer or another; or
> (b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another .

Id.

[3] *Ky.Rev.Stat.Ann.* 508.070 provides in relevant part:

> (1) A person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person.

Id.

C. Procedural History Of Action Below

Williams initially filed his civil action against Cross-Petitioners in the Commonwealth of Kentucky, Kenton County Circuit Court. The action was subsequently removed to the United States District Court for the Eastern District Of Kentucky.

The matter proceeded through discovery, and Cross-Petitioners filed motions for summary judgment. While the primary argument in support of summary judgment raised in the action below was premised upon qualified immunity, two alternate arguments were raised before the District Court which -- if resolved adversely to Williams -- would have disposed of his underlying claims in whole or in part.

Specifically, the argument was presented to the District Court that Williams' criminal convictions arising from the July 7, 2007, incident collaterally estop his claims that the officers used excessive force to effect his arrest. The second alternative argument presented to the District Court concerned the fact that a substantial portion of events underlying Williams' claims was captured on video. Therefore, the argument was presented that, at minimum, Williams could not proceed with an excessive force claim premised upon the portion of the incident captured on video.

The District Court rejected these alternate arguments. (See Discussion of procedural history of action set forth in the Sixth Circuit's opinion, Cross-Respondent's Petition For Certiorari, Appendix A, 10a-13a). The Sixth Circuit noted that these arguments had been raised on appeal, but did not reach their merits due to the fact that it disposed of the appeal on

grounds of qualified immunity. (See Sixth Circuit's opinion, Cross-Respondent's Petition For Certiorari, Appendix A, 23a, fn. 6: "[B]ecause we conclude that the officers' conduct was not objectively unreasonable, we decline to address the district court's decisions on collateral estoppel and segmentation.").

Reasons For Granting The Cross-Petition

I. Williams' Criminal Convictions Preclude His Claim For Excessive Force

This Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), establishes that state criminal court convictions are given preclusive effect in federal civil rights actions to the extent such preclusive effect would be recognized under the laws of the jurisdiction in which the conviction was adjudged. In the action below, it was conclusively established that Williams was convicted of the Kentucky criminal offenses of disorderly conduct in the second degree, resisting arrest, and wanton endangerment in the second Degree.

Kentucky courts have long recognized the doctrine of collateral estoppel. *See, e.g., Sedley v. City of West Buechel,* 461 S.W.2d 556, 559 (Ky. 1970); *Godbey v. Univ. Hosp. of Albert B. Chandler Med. Ctr., Inc.*, 975 S.W.2d 104 (Ky. App. 1998). Kentucky courts further permit a defendant in a civil action to invoke collateral estoppel principles against a plaintiff convicted of a criminal offense that is relevant to the civil proceedings. *See Gossage v. Roberts*, 904 S.W.2d 246 (Ky. App. 1985). *See also Ray v. Stone*, 952 S.W.2d 220 (Ky. App. 1997) (holding doctrine of collateral estoppel prohibits a plaintiff who has pled guilty to a criminal

offense from re-litigating the issue of his innocence in a later civil proceeding).

The District Court rejected the argument that Williams' criminal convictions preclude his excessive force claim. The District Court's holding in this regard was based upon the Sixth Circuit's holding in *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997) which allowed an excessive force claim to proceed in spite of a conviction for resisting arrest under Kentucky law.[4] Specifically, Donovan held that the absence of excessive force is not an element of the offense of resisting arrest under Kentucky law, and therefore a determination as to the issue is not necessary to sustain a conviction under Kentucky law. *Id.* at 295.

The problem with the holding of *Donovan* is that it fails to take into account that Kentucky law provides a statutory justification defense to defendants under circumstances where an officer is alleged to use unreasonable force to effect an arrest.[5] Under

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[4] The District Court did not enter a written opinion denying the motions for summary judgment. However, the District Court referenced *Donovan* in oral argument held on December 8, 2009, in reference to the motions. The relevant portion of the oral argument transcript is reproduced at Appendix B, 6a-7a.

[5] *Ky.Rev.Stat.Ann.* 503.060(1) provides:

> Notwithstanding the provisions of KRS 503.050 [use of physical force in self-protection] the use of physical force by a defendant upon another person is not justifiable when: (1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably

Kentucky law, only active resistance to arrest is punishable under the offense of resisting arrest.[6] Thus, Williams' waived a statutory affirmative defense to the charge of resisting arrest in spite of the fact that his argument in this case is that his actions were wholly precipitated by the officers' use of unreasonable force to effect his arrest. S*ee Baze v. Parker*, 371 F.3d 310, 327 (6th Cir. 2004) (citing Kentucky Crime Commission Commentary to *Ky.Rev.Stat.Ann*. 503.050 for the proposition: "If the police are using 'more force than is reasonably necessary to effect the arrest' then a suspect who resists arrest can validly claim he acted in self-defense."). *See also Ball v. Commonwealth*, 2010 WL 1005944, at *5, fn. 7 (Ky. 2010) (unpublished) (holding defendant who pulled knife and tackled police officer was not entitled to imperfect self-defense theory where defendant was using no more force than

---

> necessary to effect the arrest, although the arrest is unlawful;

Id.

[6] The Official Commentary to *Ky.Rev.Stat.Ann* 520.090 for the offense of resisting arrest under Kentucky law provides: "The offense of resisting arrest includes only forcible resistance and excludes other forms of nonsubmission to authority. Neither flight from arrest nor passive resistance is punishable under this section since a peace officer has the available remedy of use of reasonable force to effect the arrest. Criminal sanctions are therefore, needed only when interference with arrest poses a direct threat to the safety of the officer or another person." *See also Blair v. Commonwealth*, 2007 WL 1720133, at *6 (Ky. App. 2007) (unpublished) (holding the act of pulling away from an officer who was trying to effect the defendant's arrest constitutes active resistance: "Greg again evidenced that he was actively resisting being arrested when he wrenched himself from the grip of Officer Huddleston.")

necessary to effect arrest, but notes as follows: "An arrestee would, under [KRS 503.060(1)], of course be privileged to defend himself during an arrest against, for example, gratuitous and unjustifiable brutality.").

Likewise, the Sixth Circuit has recognized that a claim of excessive force cannot proceed under circumstances where excessive force is an affirmative defense to a charged crime. *Schreiber v. Moe*, 596 F.3d 323, 334 (6th Cir. 2010). Based upon the foregoing discussion of Kentucky law, it is clear that Williams waived the affirmative defense of excessive force that he could have raised in his criminal proceedings.[7]

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[7] *Donovan, supra,* held that Kentucky law of issue preclusion requires an issue to have actually been litigated, and resolved on the merits. Donovan therefore allowed an excessive force claim to proceed in spite of a conviction for resisting arrest because the issue of excessive force had not been litigated in the plaintiff's criminal proceedings. *Id*, at 296. However, Kentucky appellate authority issued subsequent to *Donovan* suggests that issue preclusion principles may apply if an issue could have been litigated in prior proceedings, and the party to be estopped had a full and fair opportunity to litigate the issue. *See Jellinick v. Capitol Indem. Corp.*, 210 S.W.3d 168 (Ky. App. 2006). In *Jellinick,* the court applied issue preclusion in a context of claims that could have been asserted in a prior action: "[A]lthough. . . .not part of the previous actions, the claim against him is barred by issue preclusion. . . . Here, the issues raised. . .. are identical to those which were raised or could have been raised in previous actions concerning the same controversy." *Id.* at 172-3. Likewise, Kentucky recognizes the doctrine of judicial estoppel which precludes a party from asserting inconsistent positions in judicial proceedings. *See Hisle v. Lexington-Fayette Cnty. Urban Gov't*, 258 S.W.3d 422, 434-5 (Ky. App. 2008) cited below. As such, the fact that the issue of excessive force was not decided on the merits in Williams' criminal proceedings should not preclude application of recognized estoppel principles in this matter.

In the action below, Williams initiated his civil action against Cross-Petitioners prior to resolution of his criminal proceedings. Williams therefore had every incentive and opportunity to litigate his allegation of excessive force in his criminal proceedings. In spite of this incentive, Williams voluntarily accepted criminal convictions -- upon favorable plea terms -- for offenses that he now seeks to disavow on justification grounds in a civil action for money damages. Proper application of estoppel principles consistent with this Court's holding in *Allen*, *supra*¸ should militate against the tactical waiver of an affirmative defense in criminal proceedings by a plaintiff who seeks to establish an action for money damages using a version of facts inconsistent with his voluntary pleas and resultant convictions. *See, e.g., Hisle v. Lexington-Fayette Cnty. Urban Gov't*, 258 S.W.3d 422, 434-5 (Ky. App. 2008) (noting doctrine of judicial estoppel prohibits a party from taking inconsistent positions in judicial proceedings when the party would derive an unfair advantage or impose an unfair detriment upon an opposing party if not estopped). Williams cannot establish that Cross-Petitioners utilized excessive force to effect his arrest.

II. Williams Excessive Force Claim Fails To The Extent It Is Premised Upon The Portion Of Events Documented On Video

As set forth above, approximately 2.5 minutes of the events surrounding Cross-Petitioners' efforts to effect Williams' arrest were captured on Officer Sandel's video camera. The video conclusively establishes that no force was utilized against Williams until *after* Williams pulled away from Officer Fultz while being handcuffed. The video further conclusively

establishes that these events occurred directly adjacent to fast-moving interstate traffic in dark conditions.

In the action below, Williams asserted that all of the officers used excessive force against him during the portion of events captured on the video. In *Scott v. Harris*, 550 U.S. 372 (2007) this Court refused to give credence to a plaintiff who attempted to advance a version of events in support of a use of force claim that was facially inconsistent with video evidence of a vehicle pursuit.

The Sixth Circuit has previously recognized that, in appropriate cases, a claim for excessive force can be chronologically segmented for purposes of qualified immunity analysis. *See, e.g.*, *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992) (considering qualified immunity on three distinct use of force claims arising from one incident by segmenting claim into two separate taser uses and use of a firearm); *Claybrook v. Birchwell*, 274 F.3d 1098 (6th Cir. 2001) (applying segmenting analysis to use of deadly force claim that involved distinct demarcations in use of force); *Bing v. City of Whitehall, Ohio*, 456 F.3d 555 (6th Cir. 2006) (segmenting use of force claims involving one incident including separate deployment of flash bang grenades and eventual use of deadly force -- and granting qualified immunity for some but not all excessive force allegations). Cross-Respondent's therefore submit as an argument in the alternative, that if this Court were to grant review and vacate the holding of the Sixth Circuit -- that at minimum Williams' claim for excessive force should be precluded on qualified immunity grounds to the extent his claim is rebutted by the video evidence of record in the action below.

Conclusion

For all of the foregoing reasons, Cross-Petitioners respectfully requests that their cross-petition for writ of certiorari be granted should the Court grant Cross-Respondent's petition.

Respectfully submitted,

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Counsel for Cross-Petitioners
Greg Sandel and Robert Fultz

APPENDIX

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APPENDIX A

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
THIRD DIVISION

CASE NO. 07-CR-00538

[Filed March 25, 2009]

COMMONWEALTH OF KENTUCKY	)
PLAINTIFF	)
	)
vs.	)
	)
TERRY WILLIAMS	)
DEFENDANT	)
	)

FINAL JUDGMENT

* *

At arraignment on September 4, 2007, the Defendant appeared with his counsel and entered a plea of Not Guilty to the following charges contained in the Indictment: Count I - First Degree Fleeing or Evading the Police, a Felony; Count II - Resisting Arrest, a Misdemeanor; and, Count III - Disorderly Conduct, a Misdemeanor, which offenses were committed on or about July 7, 2007. At arraignment on September 22, 2008, the Defendant appeared with his

counsel and entered a plea of Not Guilty to the following charge contained in Count IV of the Indictment: Wanton Endangerment in the First Degree, a Felony, which offense was committed on or about July 7, 2007. The Defendant's date of birth is

From September 23, 2008 through September 25, 2008, the Defendant appeared in open Court with his attorneys, Eric C. Deters and Dennis C. Alerding. The case was tried before a jury, which returned the following verdict as to Count III: Guilty of the charge of Disorderly Conduct, a Class B Misdemeanor, and fixed the punishment for the Defendant at fourteen (14) days in the county jail and/or a fine of $250.00. The jury was unable to reach a verdict as to the charges contained in Counts I, II and IV of the Indictment. Accordingly, a mistrial was declared as to those Counts.

By Final Judgment entered on October 8, 2008, the charge contained in Count III was formally adjudicated. On March 17, 2009, having appeared in open court with his attorneys, Eric C. Deters and Dennis C. Alerding, by agreement with the attorney for the Commonwealth, and pursuant to the decision in North Carolina v. Alford, the Defendant entered a plea of Guilty to the amended charge of Resisting Arrest, a Class A Misdemeanor. In addition, the Defendant entered a plea of guilty to the amended charge of Wanton Endangerment in the Second Degree, a Class A Misdemeanor. Upon motion of the Commonwealth, the charge contained in Count I of the Indictment, Fleeing or Evading Police, First Degree, a Class D Felony, was dismissed.

Finding that the Defendant understands the nature of the charges against him including the possible penalties; that the Defendant knowingly and voluntarily waives his right to plead innocent, to be tried by a jury, to compel the attendance of witnesses in his behalf and to confront and cross examine witnesses and to appeal his case to a higher court; and finding further that the Defendant understands and voluntarily waives his right not to incriminate himself; and finding that the plea is voluntary, the Court accepts the plea and finds the Defendant guilty of Resisting Arrest, a Class A Misdemeanor; and, Wanton Endangerment in the Second Degree, a Class A Misdemeanor.

On March 17, 2009, the Defendant appeared in open Court with his attorneys, Eric C. Deters and Dennis C. Alerding. The Court inquired of the Defendant and his counsel whether they had any legal cause why Judgment should not be pronounced, and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment. Having given due consideration to nature and circumstances of the crime, and to the history, character and condition of the Defendant, **IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT** that the Defendant is guilty of the crime of Resisting Arrest, a Class A Misdemeanor, and he shall be confined in the Kenton County Detention Center for a maximum term of sixty (60) days, conditionally discharged for a period of two (2) years from the date of Judgment, subject to the conditions set forth in the Order of Conditional Discharge.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT that the Defendant is guilty of the crime of Second Degree Wanton Endangerment, a Class A Misdemeanor, and he shall be confined in the Kenton County Detention Center for a maximum term of sixty (60) days, conditionally discharged for a period of two (2) years from the date of Judgment, subject to the conditions set forth in the Order of Conditional Discharge. This sentence shall be served concurrently with the sentence imposed above.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT that the Defendant shall pay the court costs and the jury service fees in the amount of $775.00 to the Kenton Circuit Court Clerk prior to July 20, 2009 at 1:30 p.m.

So ORDERED, March 17, 2009.

/s/ Gregory M. Bartlett
GREGORY M. BARTLETT, JUDGE
KENTON CIRCUIT COURT
THIRD DIVISION

STATE OF KENTUCKY
COUNTY OF KENTON

I, JOHN C. MIDDLETON, Clerk of the Circuit/ District Courts, do hereby certify that the foregoing is a true and correct copy of the original as recorded in my office
This 1st day of April 2009
JOHN C. MIDDLETON
BY: JCH D.C.

Distribution:
Original - Kenton Circuit Clerk's Office
One Copy - Commonwealth Attorney's Office - JR
One Copy - Kenton Co. Prob/Parole
One Copy - Kenton Co. Pretrial Services
One Copy - Eric C. Deters/Dennis C. Alerding

Judgment entered and notice of entry served upon the Defendant by mailing a true copy to Defendant's counsel of record, Eric C. Deters and Dennis C. Alerding, postage pre-paid, on this 25th day of March, 2009.

JOHN C. MIDDLETON, CLERK

BY: /s/ A. Ferguson , D.C.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil No. 08-4-DLB

[Dated December 8, 2009]

TERRY WILLIAMS,	)
	)
Plaintiff,	)
	)
Vs.	)
	)
OFFICER GREG SANDEL,	)
OFFICER ROBERT FULTZ,	)
TREVOR WILKINS,	)
	)
Defendants.	)
	)

Civil No. 08-4-DLB
Tuesday, 1:00 p.m.
December 8, 2009

- - -
ORAL ARGUMENT
JUDGE DAVID L. BUNNING
- - -

APPEARANCES:

FOR THE PLAINTIFF:
Eric Deters, Esq.

FOR DEFENDANTS SANDEL AND FULTZ:
Christopher Nordloh, Esq.

FOR DEFENDANT WILKINS:
Roger G. Wright, Esq.

COURT REPORTER: Shandy Ehde, RPR

* * *

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With respect to a couple of particular arguments raised, the Donovan v. Thames case, 105 F.3d 291, 6th Circuit, 1997, the Court believes that the -- or finds as a matter of law that the collateral estoppel argument raised in the brief is unavailing, relying upon the 6th Circuit, the decision in Donovan additionally, because any potential recovery to alleged emotional distress is consumed by other claims surviving summary judgment.

* * *

CERTIFICATE OF COMPLIANCE

No. _____

GREG SANDEL, Officer, in his individual and official capacity, ROBERT FULTZ, Officer, in his individual and official capacity, and TREVOR WILKINS, Kentucky Vehicle Enforcement Officer, in his individual capacity,

Cross-Petitioners,

v.

TERRY WILLIAMS, JR.,

Cross-Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Conditional Cross-Petition for Writ of Certiorari contains 3,122 words, excluding the parts of the Conditional Cross-Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2011.

Sarah R. Miller
Becker Gallagher Legal Publishing, Inc.
8790 Governor's Hill Drive, Suite 102
Cincinnati, OH 45249
(800) 890-5001

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: _____

_____
Notary Public

[seal]

CERTIFICATE OF SERVICE

I, Sarah R. Miller, hereby certify that 40 copies of the foregoing Conditional Cross-Petition for Writ of Certiorari of *Greg Sandel, Officer, in his individual and official capacity, Robert Fultz, Officer, in his individual and official capacity, and Trevor Wilkins, Kentucky Vehicle Enforcement Officer, in his individual capacity v. Terry Williams, Jr.*, were sent via 3-Day Service to The U.S. Supreme Court, and 3 copies were sent via 3-Day Service to the following parties listed below, this 12th day of December, 2011:

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Counsel for Cross-Respondent

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on December 12, 2011.

_____

Sarah R. Miller
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Cincinnati, OH 45249
(800) 890-5001

Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: _____

_____
Notary Public

[seal]