No. 11-736

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

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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I. INTRODUCTION

Terry Williams, Jr. respectfully requests that this Court deny the Conditional Cross-Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case of petitioners Greg Sandel, Robert Fultz, and Trevor Wilkins.

II. COUNTER STATEMENT OF THE CASE

Introduction

This is a Fourth Amendment civil rights use of force case involving an unarmed, African American male who three white police officers beat viciously with batons, unleashed a barrage of chemical irritant upon him, and stunned thirty-seven times with multiple Electronic Control Devices (ECD's; also known commonly as Tasers). The Sixth Circuit's decision to overrule the district court and hold the officers' conduct objectively reasonable, *as a matter of law*, conflicted directly with similar precedent of this Court and every other circuit, and comes dangerously close to transforming qualified immunity into absolutely immunity.

The district court, the court most familiar with the facts of the case before it, found that petitioner Williams had alleged multiple, sufficient facts to show a constitutional deprivation. One of the more important factual disputes surrounded whether or not the respondent officers warned petitioner Williams that he would be subject to an ECD. Various circuits have held the use of an ECD device on a misdemeanant without warning is a constitutional

violation. In addition, many circuits have held the use of *unnecessary* force, force that goes beyond what is necessary in effectuating an arrest, is also a constitutional violation.

Although the Sixth Circuit incorrectly reversed the District Court's decision, it did not reach additional issues raised by the Cross-Petitioners. The Cross-Petitioners have now filed a Cross-Petition for Certiorari in an attempt to have those issues brought before the United States Supreme Court, should Mr. Williams' Petition for a writ of certiorari be granted.

In short, the Cross-Petitioners have raised two additional issues. First, they argue that because Mr. Williams entered an *Alford* plea during his criminal proceedings[1] rather than assert an affirmative defense of excessive force, he is now precluded from bringing a civil claim of excessive force. Second, the Cross-Petitioners argue that Mr. Williams' claim is conclusively rebutted by a video of the vicious and unlawful assault they subjected Mr. Williams to, and summary judgment should have been granted.

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[1] The Cross-Petitioners neglect to mention that Mr. Williams entered his plea under *North Carolina v. Alford*, 400 U.S. 25 (1970).

Factual Background[2]

The events in question began the night of July 7, 2007 when Terry Williams, Jr., an African-American male, met up with his cousin in Cincinnati to drive down to Lexington, Kentucky for a night out. On their way to Lexington, the cousins stopped at a liquor store in Covington, Kentucky. After purchasing a bottle of liquor, Terry decided to buy an ecstasy pill. Terry had never taken the drug before, nor was he aware of the drug's side effects.

As the cousins resumed their trip to Lexington, Terry took the pill and began to feel the side effects shortly thereafter. He became uncomfortable, hot, and thought it a better idea to return home rather than continue the trip. His cousin, however, made it clear that he would not turn around and return home, so Terry asked him to pull over so he could use the restroom. After his cousin complied, Terry left the vehicle and commenced his return to Cincinnati on foot.

Terry started to jog north along the inside median of the southbound lanes. The hot feeling inside of him persisted and he started to panic. Feeling extremely hot, Terry removed articles of clothing one by one until he was naked.

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[2] A copy of the petitioner's Statement of Facts from his Appellee's Brief in the Circuit Court, with the references to the record in the District Court, was reproduced in the Appendix to *Terry Williams, Jr. v. Greg Sandel, et al.,* case number 11-610, at 41a-61a.

Officer Sandel was the first to spot Terry jogging along the highway. When Terry saw the officer, he felt gratitude and relief that help had arrived. As Officer Sandel's dash camera clearly depicts, Terry did not flee nor act aggressively in response to the flashing lights of the officer's vehicle. Officer Sandel, however, exited his vehicle with his Taser gun drawn. Although unusual, the fact that Terry was in the nude clearly showed he was unarmed. The video shows Terry immediately placing his hands on his head and complying with the officer's orders to get down on his knees.

Terry remained on his knees for a minute and a half before Officer Fultz arrived on the scene. Officer Wilkins made his appearance very shortly thereafter. Terry, already in a panicked state, was startled when Officer Fultz suddenly blinded him with his flashlight. Then, without announcing that he was a police officer or that Terry was under arrest, Officer Fultz initiated the use of force by violently grabbing Terry's arm and twisting it behind his back. Terry, disoriented and confused, struggled to alleviate the strain on his shoulder and arm.

As Terry made a movement, Officer Sandel shot him with his Taser. Terry's body tensed in response to the shock. Officers commanded him to roll over and resume the prone position; Terry complied. Officer Fultz again violently twisted Terry's arm behind his back, causing Terry to struggle in response to the immense pain. Officer Sandel shocked Terry again with his Taser after Terry only slightly raised his chest off the ground. Officer Fultz flipped Terry over and without warning Officer Sandel shocked Terry again.

Terry's body tensed and relaxed over the next minute as the three officers repeatedly stunned and beat him with batons despite *de minimis* resistance on Terry's behalf. Terry, now fearing for his life,[3] attempted to get away from the officers and stop the pain. He ran out of Officer Sandel's dash camera. Terry only made it a short distance before the officers caught up with him and resumed the Taserings, baton strikes, and subsequent deployment of chemical irritant. The officers did not stop their beating until Terry collapsed from exhaustion. Finally recognizing that Terry had suffered serious injuries, an ambulance was called to take Terry to the hospital.

Terry suffered serious and permanent injuries from the officers' brutal beating. While at the hospital, he was treated for a seven inch gash in his head, two severely broken fingers that required surgical realignment, multiple abrasions, bloody urine, acute kidney failure, and rhabdomyloysis. In total, Terry spent three hours in intensive care and twenty three days in the hospital, resulting in hospital costs of nearly $100,000.

A review of the Taser discharge records showed the officers shocked Terry a total of thirty-seven times from three different guns in a matter of eleven minutes. Officer Sandel used his ECD on Terry fourteen times. Officer Fultz used it on him twenty-two times. Terry was stunned an addition two times

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[3] Terry testified in his deposition that at some point in the encounter with the officers, one of them asked the others, "Does anyone have a rope?"

by another officer, not a party to this litigation, who arrived at the end of the ordeal.

III. SUMMARY ARGUMENT FOR DENYING THE WRIT

The Cross-Petition for a writ of Certiorari brings no novel issues for the United States Court to Consider. Rather, it simply recycles failed "backup" arguments considered and rejected by the District Court, and which are not dispositive of the cases, even if the Sixth Circuit had considered them. Even with an *Alford*[4] plea to resisting arrest, the cross-respondent is still entitled to bring an action for the use of excessive force in effecting that arrest. In addition, the District Court properly followed the applicable law in refusing to segment its analysis of the excessive force claim.

IV. ARGUMENT

A. Criminal Proceedings Concluded after a Defendant Enters an *Alford* Plea do not Preclude a Federal Civil Rights Claim for Excessive Force Regardless of the Existence of an Affirmative Defense of Excessive Force.

On September 25, 2008, a Kenton County jury found Mr. Williams guilty of disorderly conduct but was hung on the remaining charges of wanton endangerment and resisting arrest. Appendix 1a-6a. Incredibly, the Commonwealth sought to retry Terry on the remaining minor charges. Eventually, Terry

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[4] *North Carolina v. Alford*, 400 U.S. 25 (1970)

entered an *Alford* plea to the charges of resisting arrest and pled guilty to wanton endangerment. *Id.*

The Cross-Petitioners argue that Mr. Williams is precluded from bringing his Federal civil rights claim for excessive force. The basis for this argument is that Mr. Williams was found guilty of resisting arrest when, under Kentucky law, excessive force is an affirmative defense to a charge of resisting arrest.[5] However, the Cross-Petitioners neglect to mention that Mr. Williams entered an *Alford* plea prior to his conviction. An *Alford* plea is not the exact equivalent of a guilty plea, unlike a guilty plea the defendant does not admit the act and continues to assert his innocence.

The Sixth Circuit has clearly held that even a conviction for resisting arrest does not bar a § 1983 claim that the officers used excessive force in violation of the Fourth Amendment rights. *Donovan v. Thames*, 105 F.3d 291, 297 (6th Cir. 1997). The rationale of the Court's holding is premised upon the fact that the issue of excessive force is not litigated in the state court criminal proceedings and, therefore, there is no basis to apply issue preclusion under Kentucky law. *Id*. at 295. This Court has also held that a guilty plea to a criminal offense does not bar a later action. *Haring v. Prosise*, 462 U.S. 306 (1983). In *Eyer v. Reynoldsburg,* 756 F. Supp. 344 (S.D. Ohio 1991) the

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[5] *See* Ky. Rev. Stat. § 503.060(1). However, the Kentucky courts have interpreted this as meaning that there is no right to use self-defense during an arrest. *See Stopher v. Commonwealth*, 57 S.W.3d 787, 803 (Ky. 2001); *Baze v. Commonwealth*, 965 S.W.2d 817, 822 (Ky. 1997); *Hightower v. Commonwealth*, 2003 Ky. App. Unpub. LEXIS 214 (2003).

court found that the plaintiff's plea of guilty did not preclude a § 1983 action against the police largely because the state court did not determine legality of the police conduct and the conduct was not essential to the plea.

The general rule is that a party is precluded from relitigating an issue if (1) the issue is the same as that involved in a prior judicial proceeding; (2) the issue was actually litigated in the prior proceeding; (3) there was a final determination on the merits in the prior proceeding; and (4) the issue was necessary to the judgment in the prior proceeding. *Moore v. Commonwealth*, 954 S.W.2d 317 (Ky. 1997); *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988).

A conviction does not preclude the offender from bringing a later action under § 1983 alleging excessive use of force for the same offense since the offender's guilt and the constitutionality of the force involve different issues. The issue of the Officers' use of excessive force was not essential to Terry's conviction and *Alford* plea and because there is no evidence the issue was actually litigated in the criminal proceeding, issue preclusion does not restrict Terry's claim.

B. A segmented analysis of an excessive force claim should not be used to grant qualified immunity to that excessive force claim where the interpretation of video evidence is hotly contested, and there is no clear demarcation between excessive use of force on video and off.

The District Court ruled:

> *At its core, Wilkins' motion to reconsider is simply an attempt to have two bites at the same summary judgment apple. At oral argument on his motion for summary judgment, Wilkins urged the Court to segment its analysis of Williams' use of force claims. The Court considered—and—denied Wilkins' request on the grounds that the disputed nature of the conduct in the video, coupled with the video's lack of audio, rendered segmentation impractical and inappropriate in this case.*[6]

Segmentation is only proper if the facts are truly undisputed and there is a clear demarcation between the excessive uses of force. The District Court quoted *Howser v. Ander,* 150 Fed. Appx. 533, 536 n.3 (6th Cir. 2005) when discussing segmentation: "It is true . . . that segmentation is appropriate in many excessive force claims. In this case, however, because material disputes of fact exist . . . segmentation would serve no useful purpose."

The Cross-Petitioners rely on *Russo v. Cincinnati*, 953 F.2d 1036 (6th Cir. 1992) to support segmentation. In *Russo*, there were in fact "three distinct" excessive force uses plead and because of the arrestee's death the facts were largely "undisputed". *Id*. In *Russo* the arrestee was shot once with a Taser and then sometime later shot a second time. Because of the undisputed facts and the clear delineation between

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[6] *Terry Williams, Jr. v. Greg Sandel, et al.,* case number 11-610, Appx. at 26a-27a.

each taser use the court was easily able to segment the claims. The Cross-Petitioners follow *Russo* with a string of inapplicable case cites in support of segmentation. All of these cases involved clearly distinct demarcations in the use of force. *See Bing v. Whitehall*, 456 F.3d 555 (6th Cir. 2006), *Claybrook v. Birchwell,* 274 F.3d 1098 (6th Cir. 2001).

Here, there is no clear demarcation between the on-camera and off-camera beatings. With less than a second between some tasing cycles, and a mixture of nightstick strikes, tasing and pepper spraying, the Cross-Petitioners can make no real argument that the portion of on-camera beating is separate and clearly delineated from the off-camera portion of the beating. One can assume the Cross-Petitioners seek qualified immunity for its contents separately because its documentation is most damaging to their case.

Additionally, the events depicted on the video including the unrecorded audio are hotly disputed. The Cross-Petitioners' ruthless and racially-motivated beating of Mr. Williams was visually recorded, true. However, at every stage of the proceedings, the Cross-Petitioners' interpretation of that video has been directly contradicted by Mr. Williams. To state that the video "conclusively" shows anything is simply untrue.

V. CONCLUSION

The Cross-Petition for a writ of Certiorari brings no novel issues for the United States Court to Consider. Rather, it simply recycles failed "backup" arguments rejected by the District Court. The only issue fit for consideration by the Supreme Court is the Sixth

Circuit's decision to dismiss Mr. Williams' case on immunity grounds. A decision that effectively grants police the power administer beatings to citizens at will, with no fear of repercussion. The Cross-Petition should be denied.

Respectfully Submitted:

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