

No. _____

**In the
Supreme Court of the United States**

TERRY WILLIAMS, JR.,
Petitioner,

v.

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,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether police officers' conduct is "objectively unreasonable" and therefore violates a clearly unarmed misdemeanor's right to be free from excessive force under the Fourth Amendment when the officers stunned the misdemeanor thirty-seven times with a Taser, without warning, and severely beat him with batons, while incapacitated, rather than securing him.

Whether a court errs when it fails to consider the second prong of *Saucier* if the plaintiff in a § 1983 action can establish that a particularized constitutional right is clearly established in other Circuits and its own, especially considering this Court's recent holding in *Pearson v. Callahan*, 555 U.S. 223 (2009) that the prongs need not be considered sequentially?

PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Sixth Circuit:

The Petitioner here and plaintiff-appellee below is Terry Williams, Jr. Because petitioner is an individual, no disclosures are required by Supreme Court Rule 29.6.

The Respondents here and defendants-appellants below are Officer Greg Sandel and Officer Robert Fultz, Kenton County, Kentucky, police officers, and Officer Trevor Wilkins, a Kentucky State Vehicle Enforcement Officer.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Introduction	3
1. Incident Giving Rise to the Case	6
2. District Court Proceedings	9
3. Decision of the Sixth Circuit Court of Appeals	9
REASONS FOR GRANTING THE PETITION ..	10
1. The Sixth Circuit's opinion holding, <i>as a matter of law</i> , that officers who utilized thirty-seven Taser deployments, multiple baton strikes, and chemical irritant against	

<p>a clearly unarmed, non-violent misdemeanant, without warning, were not acting in an objectively unreasonable manner, blatantly contradicts its own precedent and the precedent of other circuits.</p>	10
<p>2. The Sixth Circuit erred when it failed to consider the second prong of <i>Saucier</i> after petitioner established that the particularized constitutional right alleged to have been violated was clearly established in other circuits and its own.</p>	14
<p>3. The decision of the Sixth Circuit erodes the fundamental protections of the Fourth Amendment.</p>	18
<p>CONCLUSION</p>	19
<p>APPENDIX</p>	
<p>Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit (July 13, 2011)</p>	1a
<p>Appendix B: Order, United States District Court, Eastern District of Kentucky, Northern Division at Covington (February 1, 2010)</p>	25a

Appendix C:	Civil Minutes - General, Proceedings: Oral Argument; United States District Court, Eastern District of Kentucky, Northern Division at Covington (December 10, 2009)	29a
Appendix D:	Order, United States Court of Appeals for the Sixth Circuit (August 19, 2011)	33a
Appendix E:	Oral Argument, United States District Court, Eastern District of Kentucky, Northern Division at Covington (Excerpts - the ruling of the Court relevant to the issues) (December 8, 2009)	35a
Appendix F:	Appellee's Brief of Terry Williams, Jr. (Excerpts - the Statement of the Case with citations to the District Court record) (August 16, 2010)	41a

TABLE OF AUTHORITIES

Cases

<i>Adams v. Metiva</i> , 31 F.3d 375 (6th Cir. 1994)	11
<i>Amnesty Am. v. Town of West Hartford</i> , 361 F.3d 113 (2d Cir. 2004)	12
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	15
<i>Atkins v. Twp. of Flint</i> , 94 F. App'x 342 (6th Cir. 2004)	11
<i>Baker v. Hamilton</i> , 471 F.3d 601 (6th Cir. 2006)	11
<i>Casey v. City of Fed. Heights</i> , 509 F.3d 1278 (10th Cir. 2007)	12, 13
<i>Cavanaugh v. Woods Cross City</i> , 625 F.3d 661 (10th Cir. 2010)	16
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	10, 14, 17
<i>Grawey v. Drury</i> , 567 F.3d 302 (6th Cir. 2009)	11
<i>Jennings v. Jones</i> , 499 F.3d 2 (1st Cir. 2007)	16
<i>Jones v. Cincinnati</i> , 521 F.3d 555 (6th Cir. 2008)	11

<i>Landis v. Baker</i> , 297 F. App'x 453 (6th Cir. 2008)	16
<i>Monday v. Oullette</i> , 118 F.3d 1099 (6th Cir. 1997)	13, 14
<i>Oliver v. Fiorino</i> , 586 F.3d 898 (11th Cir. 2009)	13, 16
<i>Parker v. Gerrish</i> , 547 F.3d 1 (1st Cir. 2008)	12
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	i, 5, 15, 17
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001)	4, 5, 6, 10, 14, 15, 17
<i>Solomon v. Auburn Hills Police Dep't</i> , 389 F.3d 167 (6th Cir. 2004)	11
<i>Williams v. Ingham</i> , 373 F. App'x 542 (6th Cir. 2010)	13
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999)	15

Constitutional Provisions

U.S. Const. Amend IV	<i>passim</i>
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Statutes

28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	2, 5, 9, 15, 17

PETITION FOR A WRIT OF CERTIORARI

Terry Williams, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit Court of Appeal's opinion (App. 1a-24a) is an unpublished opinion, *Williams v. Sandel*, 2011 U.S. App. LEXIS 14419 (6th Cir. 2011). The Sixth Circuit's Order Denying Rehearing En Banc is not reported. App. 33a-34a.

The Order of the United States District Court for the Eastern District of Kentucky is not reported; the district judge ruled from the bench in denying summary judgment to the respondents. The minute order entered December 10, 2009 in accordance with the ruling from the bench is found at Appendix 29a-32a; the relevant portions of the transcript of the December 8, 2009 hearing are found at App. 35a-40a, and a subsequent order denying reconsideration is found at App. 25a-28a.

STATEMENT OF JURISDICTION

The opinion and judgment of the Sixth Circuit was entered July 13, 2011. App. 1a-24a. A timely motion for rehearing en banc was filed on July 27, 2011. On August 19, 2011, the Court of Appeals issued its order denying petition for rehearing en banc. App. 33a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend IV.

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.

42 U.S.C. § 1983.

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*, conflicts directly with similar precedent of this Court and every other circuit, and comes dangerously close to transforming qualified immunity into absolutely immunity.

The Sixth Circuit's opinion fails to consider that respondent officers did not give petitioner Williams warning that they planned to use their ECD's on him. Neither did the Sixth Circuit consider why respondents did not secure petitioner Williams after he became incapacitated immediately following an ECD strike.

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 misdemeanor 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.

It is well understood in the law enforcement community that the purpose of an ECD is to incapacitate a suspect so that he may be easily apprehended. After an ECD is deployed, officers are trained to detain the suspect. The petitioner is aware of no case that has held thirty-seven ECD deployments to be objectively reasonable force in the detention of an unarmed, non-violent suspect. The Sixth Circuit's decision, holding otherwise, is shocking, especially considering the respondents subjected the petitioner to a barrage of baton strikes and stream of chemical irritant in addition to the thirty-seven ECD strikes.

The Sixth Circuit deemed respondents' blatantly unreasonable conduct "objectively reasonable" for Fourth Amendment purposes and therefore stopped its analysis after the first prong of *Saucier v. Katz*, 533 U.S. 194 (2001). The petitioner contends this is error. Although the petitioner does not contend that it should be mandatory for the lower courts to analyze each *Saucier* prong, he does believe that an analysis in this case would have revealed the respondents' conduct to be in violation of clearly established rights in the Sixth Circuit and several others.

In particular, the rights to be free from excessive force, to be free from ECD deployment without a warning, and to be free from force that is above what is necessary to effectuate an arrest have all been clearly established in the Sixth Circuit and others. The intensely factual inquiry of the first *Saucier* prong, combined with the particularized types of

conduct prohibited by clearly established law, causes the prongs of *Saucier* to overlap in § 1983 use of force cases. Because the law must be “clearly established” not at a broad level, but at a more particular level so that officers will be put on notice that their conduct is unreasonable, it is possible that specific conduct in one circuit may clearly violate the established law in another.

Thus, a finding in favor of a plaintiff on the second *Saucier* prong may constitute a finding in favor of the plaintiff on the first, especially if the law of other circuits are considered. For example, if the use of a Taser on a misdemeanor without warning has been clearly established as a constitutional violation, satisfying the second prong of *Saucier*, and the facts are in dispute as to whether the officer gave plaintiff a warning (incorporating the first *Saucier* prong), should the officer be denied qualified immunity? The petitioner believes so.

The Court’s recent holding in *Pearson* no longer mandates the *Saucier* inquiry be sequential. In light of this ruling, petitioner believes that upon a showing that the particularized right alleged to have been violated has been clearly established in one circuit or another, summary judgment on qualified immunity should be precluded. By implementing this requirement, the highly versatile and factual manner in which the first *Saucier* prong is analyzed by courts, many of whom reach different decisions on similar fact patterns, will be balanced and steadied.

Such a requirement would not always mandate a sequence in which the *Saucier* prongs should be considered, contrary to the *Pearson v. Callahan*, 555

U.S. 223 (2009) holding, but rather would only be implemented when the plaintiff can clearly and sufficiently plead that the law is clearly established as to the right allegedly violated. In doing so, the Court can assure that matters in which clearly established, important constitutional rights are at stake are not summarily disposed of through the highly volatile first prong of *Saucier*.

1. Incident Giving Rise to the Case¹

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

¹ 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, is reproduced for this Court's reference in the Appendix at 41a-61a.

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.

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,² 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 Tasering, 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 rhabdomyolysis. In total, Terry spent three hours in intensive care and twenty three

² 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?"

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

2. District Court Proceedings

Petitioner Williams originally brought a civil complaint under § 1983 and related state claims in state court. That case was removed to the District Court for the Eastern District of Kentucky in August 2007. The respondent officers moved for summary judgment, asserting qualified immunity, but their motions were denied. The district judge based his ruling on contested issues of material fact surrounding the officers' actions.

3. Decision of the Sixth Circuit Court of Appeals

The respondents appealed the denial of summary judgment to Sixth Circuit. The Sixth Circuit reversed the decision of the trial court and granted the respondents qualified immunity. The petitioner moved for a rehearing en banc, highlighting inconsistencies between the panel's decision and Sixth Circuit case law, but the motion was denied.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because the Sixth Circuit erroneously concluded, as a matter of law, that the respondents' conduct was objectively reasonable. In addition, the Sixth Circuit failed to consider that the respondents' conduct violated clearly established constitutional rights in its own Circuit and various other circuits. Finally, the Court should grant this petition to resolve the question of which body of case law should be considered in determining whether a right is "clearly established" for *Saucier* purposes.

1. **The Sixth Circuit's opinion holding, as a matter of law, that officers who utilized thirty-seven Taser deployments, multiple baton strikes, and chemical irritant against a clearly unarmed, non-violent misdemeanor, without warning, were not acting in an objectively unreasonable manner, blatantly contradicts its own precedent and the precedent of other circuits.**

The Sixth Circuit misapplied the analysis set forth in *Graham v. Connor*, 490 U.S. 386 (1989) for deciding whether Terry's Fourth Amendment rights were violated under the first prong of *Saucier*, and the result is contrary to the precedent of the Sixth Circuit and every other circuit.

The Sixth Circuit opinion placed a heavy emphasis on the fact that the incident occurred on the side of a highway at night and that Terry appeared to be resisting arrest. However, the court failed to place the appropriate emphasis on the fact that Terry was unarmed, possibly guilty of only misdemeanor level

crimes, that a factual dispute existed as to whether Terry was told he was being arrested, whether he was warned prior to ECD deployment, and that Terry was not apprehended while incapacitated and thus the force used went above and beyond what was necessary to effectuate the arrest. Several circuits have held each of these factors alone establishes a constitutional violation; holding that a combination of all of them does not, as a matter of law, establish a constitutional violation is a serious error.

The Sixth Circuit opinion conflicts with its own line of precedent in *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994); *Atkins v. Twp. of Flint*, 94 F. App'x 342 (6th Cir. 2004); *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167 (6th Cir. 2004); *Baker v. Hamilton*, 471 F.3d 601 (6th Cir. 2006); *Jones v. Cincinnati*, 521 F.3d 555 (6th Cir. 2008); and *Grawey v. Drury*, 567 F.3d 302 (6th Cir. 2009). Arrestees in these cases were generally confronted for a minor crime, were not told they were under arrest (or there was a factual dispute as to this fact), and did not forcefully resist arrest.

For example, in *Atkins* officers responded to a 911 call regarding a non-violent domestic argument. After officers entered the home, a confrontation with the plaintiff occurred and officers wrestled him to the ground. During the altercation, the officers sprayed the plaintiff twice with pepper spray and struck him three times with a baton. The Sixth Circuit denied the officers' qualified immunity, basing its decision on the fact that the plaintiff (1) was not told he was under arrest, (2) did not appear to start the physical altercation, and (3) the officers had no reason *not* to tell the plaintiff he was under arrest. *Atkins*, 94 F. App'x at 349.

Many other circuits have held force less than that applied to Terry to be excessive in similar circumstances.

The First Circuit held the use of *one* Taser deployment against an unarmed man who “never assaulted or attempted to assault the officers on the scene” despite the fact that the man “flexed his muscles and made gestures that were defiant” was not objectively reasonable as a matter of law, and thus were properly presented to the jury for their determination. *Parker v. Gerrish*, 547 F.3d 1, 5 (1st Cir. 2008).

In *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 123 (2d Cir. 2004), there were allegations that, in arresting passively resisting protestors, officers “press[ed] [plaintiffs’] wrists back against their forearms in a way that caused lasting damage,” threw one plaintiff “face-down to the ground,” dragged another face-down by his legs, “causing a second-degree burn on his chest,” placed a knee on another’s neck in order to tighten his handcuffs while he was lying face-down, and “ramming [plaintiff’s] head into a wall at a high speed.” As the Second Circuit stated, these “allegations are sufficient to create issues of fact as to the objective reasonableness of the degree of force used by the police officers.” *Id.*

The Tenth Circuit held that three Tasings, an arm-lock, tackling, and beating was excessive force for qualified immunity purposes in *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007). Important to the court’s analysis was the fact that the plaintiff was a nonviolent misdemeanant who, at the time the use of force was initiated, “was neither

‘actively resisting arrest’ nor ‘attempting to evade arrest by *flight*.’” *Id.* at 1282. Like this petitioner, the plaintiff in *Casey* was confused as to the officers’ actions, attempted to push by the officers to get away, and was Tased by another officer who arrived on the scene with Taser already drawn.

In a case with facts strikingly similar to this one, the Eleventh Circuit denied qualified immunity to an officer who Tased a suspect eight times in two minutes, causing the plaintiff’s death “as a result of ‘ventricular dysrhythmia in conjunction with Rhabdomyolysis’ as a result of ‘being struck by a Taser.’” *Oliver v. Fiorino*, 586 F.3d 898, 904 (11th Cir. 2009). This incident started in the median of a multi-lane roadway and then moved into the street, although the lane within which the Tasing occurred was blocked by the officers’ vehicles. In denying the officer qualified immunity, the court found the number of Tasings to be unreasonable, especially considering that the suspect, although mentally disturbed, was fairly compliant with officers, was not belligerent, did not make a substantial effort to flee, and that the officers *did not attempt to restrain him while he was incapacitated from the Taser.* *Id.*

The cases the Sixth Circuit did cite in support of a finding of reasonable force in this case involved materially different facts. *See Williams v. Ingham*, 373 F. App’x 542 (6th Cir. 2010); *Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997).

The *Williams* case involved a high speed chase through a neighborhood that ended in one stun gun deployment, two baton strikes to the thigh, and two closed fist blows to the back after the suspect fumbled

for what officers believed was a weapon. The *Monday* case involved a six foot tall, 300 pound suicidal man under the influence of six beers and possibly twenty Xanax pills who refused police orders to surrender and was sprayed *once* with pepper spray. Clearly, the facts and extent of force used in the cases cited by the Sixth Circuit do not support a finding of reasonable force in this case.

This case presents an unarmed, non-violent misdemeanor, who was not told he was being arrested, not warned that he would be Tased, and then viciously beaten and Tased thirty-seven times within an eleven minute period, causing serious injuries. The Sixth Circuit itself, and many other circuits, have held far less force to be excessive in similar circumstances. The Sixth Circuit placed far too much emphasis on the fact that the incident occurred on the side of the highway and in doing so failed to give the appropriate weight to the other factors articulated in *Graham*. The resulting decision represents a departure from the precedent of this Court, the Sixth Circuit, and many other circuits.

2. The Sixth Circuit erred when it failed to consider the second prong of *Saucier* after petitioner established that the particularized constitutional right alleged to have been violated was clearly established in other circuits and its own.

The Sixth Circuit held the conduct of the respondents to be objectively reasonable and thus stopped its qualified immunity analysis after the first prong of *Saucier*. Up until a few years ago, there is no question that a qualified immunity analysis could have

concluded after only an inquiry into the first prong of *Saucier*. However, this Court no longer mandated the lower courts to follow the *Saucier* inquiry in sequential order after its decision in *Pearson*. Thus, it is not as clear whether a failure to consider the second prong is permissible.

The purpose of *Saucier*'s second prong is to give officers notice as to whether their conduct violates a constitutional right. The prong mandates that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

Given the particularized nature of the "clearly established" prong, certain conduct may be a clear constitutional violation in one circuit but not another. If a plaintiff in a § 1983 action can establish that the conduct complained of has been clearly established as a constitutional violation in another circuit, should this weigh strongly against a finding of summary judgment for the defendant officers in the circuit within which the action was brought? To answer this question in the affirmative would promote uniform standards among the circuits as to which types of conduct have been clearly established as constitutional violations. Also, addressing this question gives this Court the opportunity to finally remedy the circuit split regarding what area of law should be looked to when determining whether a right is "clearly established" for *Saucier* purposes.

The constitutional right alleged in this case – the right of a non-violent, unarmed misdemeanant to be free from unnecessary Taserings, baton strikes, and chemical irritants without warning – has been clearly established with enough particularity in other circuits to make the respondents’ conduct in this case a constitutional violation.

The Tenth Circuit, for example, has held “it was clearly established on December 8, 2006 that [defendant officer] could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning.” *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 667 (10th Cir. 2010). The Eleventh Circuit has similarly held “[t]aser[ing] the plaintiff at least eight and as many as eleven or twelve times over a two-minute span without attempting to arrest or otherwise subdue the plaintiff...was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances.” *Oliver v. Fiorino*, 586 F.3d at 908 (11th Cir. 2009). The First Circuit has held the right to be free from “the increased use of force on a previously resisting but now non-resisting arrestee” was clearly established. *Jennings v. Jones*, 499 F.3d 2, 18 (1st Cir. 2007). Even the Sixth Circuit itself has held that the “gratuitous or excessive use of a taser would violate a clearly established constitutional right.” *Landis v. Baker*, 297 F. App’x 453, 463 (6th Cir. 2008).

The petitioner has certainly alleged facts to demonstrate the respondents’ conduct fell within the boundaries of clearly established law in the Sixth Circuit and many others. When a plaintiff can

establish that the defendants' conduct in a § 1983 action falls within clearly established law, the court should strongly consider this prong in its analysis. Such a showing establishes that the conduct complained of has already been considered in the home circuit or another and those circuits have held the law regarding the constitutionality of that specific right to be clearly established.

In making such a showing in this case, the petitioner strongly believes summary judgment for the respondents was in error. If the Sixth Circuit had considered appropriate precedent from its own circuit and others, it would have realized that the conduct complained of had previously been held to violate clearly established constitutional rights. Such a finding should have precluded summary judgment, especially in this case where the conduct clearly fell within the boundaries of clearly established law in other circuits in such a manner that would have made it a Fourth Amendment violation.

The *Pearson* decision no longer mandated the courts to consider the two prongs of *Saucier* sequentially. The *Graham* analysis in a Fourth Amendment use of force case is fact-specific and it is not always clear how the prongs of *Saucier* should be treated in such an analysis. However, in a case such as this, where a right has been clearly established in another circuit and similar conduct has been held unconstitutional, the Sixth Circuit should have considered the second prong in reaching their qualified immunity decision.

3. The decision of the Sixth Circuit erodes the fundamental protections of the Fourth Amendment.

In holding as they did, the Sixth Circuit has set a dangerous precedent in Fourth Amendment use of force cases, especially as it relates to Taser use. The Sixth Circuit held that multiple baton strikes and the use of chemical irritants, on top of thirty-seven uses of a Taser on an unarmed individual within an eleven minute period, and without warning, is reasonable force *as a matter of law*. The petitioner does not contend that such force is *per se* unreasonable, but he does struggle to comprehend how the Sixth Circuit deemed such force reasonable in this situation.

The decision of the Sixth Circuit seriously erodes the protections offered by the Fourth Amendment, and comes close to creating “The Naked Black Man on the Side of the Road Exception to the Fourth Amendment’s Prohibition Against Unreasonable Seizures.” Following its decision, officers can rest assured that they may initiate the use of force without any warning, deploy their Taser as often as they like, beat an unarmed man with their batons and chemical spray, as long as the assault occurs on a naked black man on the side of a highway by three white officers and the man passively resists arrest. There are simply no other factors present to justify the force used – clearly no gun, a misdemeanor crime at most, no threats or violence towards the officers, no warning of arrest or of Taser use, and no strong resistance to arrest.

This decision presents a dangerous development in excessive force law and severely erodes the critical Fourth Amendment protections every citizen is

supposed to enjoy. This Court should use its authority to correct such a blatant stray from precedent and prevent excessive force cases from marching into a new and dangerous territory.

CONCLUSION

For the reasons stated herein, Terry Williams, Jr. respectfully requests that the decision of the Sixth Circuit be summarily reversed, or alternatively, that the petition for writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX**TABLE OF CONTENTS**

Appendix A:	Opinion, United States Court of Appeals for the Sixth Circuit (July 13, 2011)	1a
Appendix B:	Order, United States District Court, Eastern District of Kentucky, Northern Division at Covington (February 1, 2010)	25a
Appendix C:	Civil Minutes - General, Proceedings: Oral Argument; United States District Court, Eastern District of Kentucky, Northern Division at Covington (December 10, 2009)	29a
Appendix D:	Order, United States Court of Appeals for the Sixth Circuit (August 19, 2011)	33a
Appendix E:	Oral Argument, United States District Court, Eastern District of Kentucky, Northern Division at Covington (Excerpts - the ruling of the Court relevant to the issues) (December 8, 2009)	35a

Appendix F:	Appellee's Brief of Terry Williams, Jr. (Excerpts - the Statement of the Case with citations to the District Court record) (August 16, 2010)	41a
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APPENDIX A

**NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 10-5220; 10-5221

[Filed July 13, 2011]

TERRY WILLIAMS, JR.,)
)
Plaintiff-Appellee,)
)
v.)
)
GREG SANDEL, Officer, In his)
Individual and Official Capacity;)
ROBERT FULTZ, Officer, In his)
Individual and Official Capacity;)
)
Defendants-Appellants.)
)
and)
)
TREVOR WILKINS, Kentucky)
Vehicle Enforcement Officer,)
In his Individual Capacity,)
)
Defendant-Appellant.)

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY**

**BEFORE: MARTIN, SUHRHEINRICH and
KETHLEDGE; Circuit Judges.**

SUHRHEINRICH, Circuit Judge. Plaintiff-Appellee, Terry Williams, Jr. (“Williams”), brought a § 1983 excessive force claim and several related state law claims against the Defendants-Appellants, Greg Sandel, Robert Fultz, and Trevor Wilkins (“Defendants”), after they arrested him on July 8, 2007, in Kenton County, Kentucky. The district court denied Defendants qualified immunity on the federal and state law claims. Because Defendants’ conduct was not objectively unreasonable, we **REVERSE**.

I. BACKGROUND

A. Facts

On July 7, 2007, Williams, an African-American male, planned to accompany his cousin to Lexington, Kentucky, to spend an evening out on the town. They began their trip by visiting a liquor store in Covington, Kentucky, to purchase some vodka; Williams also purchased a blue pill, which he believed to be ecstasy. With his cousin driving, the two men headed south on Interstate 75 (“I-75”). Williams took the pill and drank some of the vodka. At some point thereafter, Williams claims that he began to feel extremely hot, and as a result, he decided not to continue to Lexington. After requesting that his cousin pull over on the interstate, Williams exited the vehicle and started walking north in an attempt to return home. Now traveling by foot,

Williams, who was still feeling hot, began to remove his clothing “little by little” until he was completely naked. Fully nude, Williams continued to jog north along southbound I-75.

At approximately 11:54 p.m., a motorist traveling on I-75 called 9-1-1 to report seeing a naked man in the southbound lanes of traffic. Kenton County Police Sergeant Greg Sandel (“Sandel”) was the first officer to respond to the call. At approximately 12:05 a.m., while driving southbound on I-75, Sandel spotted Williams jogging north in the emergency median strip next to the high-speed lane of the interstate. The highway was not lit, and the only sources of light were the headlights of the police cruiser and passing motorists and, eventually, the officers’ flashlights.

Passing Williams, Sandel activated his emergency flashing lights, executed a U-turn into the emergency median strip, and approached Williams from behind (such that the police cruiser faced north in the southbound emergency lane, next to the center median). Williams turned to face the police vehicle and Sandel exited his vehicle to approach Williams. Events beginning at this point are recorded on video (“the video”) from a dash-mounted camera in Sandel’s police cruiser. The video recorded sound audible inside the unattended cruiser including communication from the police radio, a satellite radio comedy program playing on the cruiser’s radio, and occasional, muffled yelling from the officers and Williams. Some recorded portions of the satellite radio program had racial overtones.

As Sandel walked toward Williams, he removed his electronic control device (“ECD”) or Taser and held it in his right hand. Williams raised his hands and

initially got down onto his knees. Continuous traffic passed by them in the southbound lanes.

Kenton County Officer Robert Fultz (“Fultz”) then arrived on the scene from northbound I-75 and had to scale the concrete median to join Sandel and Williams. As Fultz came over the median, Williams stood up and then resumed a kneeling position. From this kneeling position, Williams then adopted the prone position. Laying in the prone position, Williams looked up at Fultz, and initially refused to allow Fultz to grab his left hand. Fultz attempted to grab Williams’s left hand again, which Williams allowed. Fultz handcuffed Williams’s left hand.

At this point, Kentucky Vehicle Enforcement Officer, Trevor Wilkins (“Wilkins”), reached the scene, also arriving on northbound I-75 and scaling the median to join Williams and the officers. Fultz, holding Williams’s left handcuffed hand behind his back, knelt on Williams’s back in an apparent attempt to finish securing him. Williams (who at the time of the incident weighed over 200 lbs, appeared to be quite physically fit, and stood between five-feet eight-inches and six-feet tall) used his free right arm to push himself up from a prone position into a seated position. This movement also caused Fultz to lose hold of Williams’s left arm. Following Williams’s movement, Sandel appears to use the ECD device for the first time. Fultz then appears to direct Williams to resume the prone position. Williams complied. Fultz grabbed Williams’s left arm again, at which point Wilkins and Fultz attempted to secure Williams. Williams, however, successfully pushed himself up from a prone position again, preventing Fultz and Wilkins from securing him. In response, Sandel employed his ECD. Also at

this point, the off-duty officer riding with Wilkins becomes visible, standing on the northbound side of the median.

Following the ECD charge, Williams laid on his back. Fultz attempted to grab his left arm and to pull him into prone position. Williams did not permit himself to be rolled over and ended up in a seated position again. Fultz then gestured to Williams to resume prone position. Sandel appears to wait a few seconds for compliance before using the ECD again. Following the ECD charge, Williams again laid on his back. He did not resume prone position, and Fultz appears to strike Williams with his baton. Williams then resumed prone position. Fultz secured something in his own belt, possibly his flashlight or ECD, and attempted again to grab Williams's left hand. Williams looked up at Fultz and prevented his hand from being grabbed. In response, Fultz struck Williams on the legs and it appears that Williams was subject to an ECD charge. Following the ECD activation, Williams again laid on his back. Fultz gestured that he should resume prone position. Williams initially complied. However, when Fultz grabbed his left arm, Williams rolled up into a seated position. Fultz struck him on the leg with the baton and it appears that Williams was again subjected to an ECD. All the while, the oncoming traffic did not cease.

Fultz then gestured to Williams, again laying on his back, to resume prone position. Instead, Williams sat up. Wilkins appears to strike Williams on the legs with a baton. Fultz followed with another baton strike to the legs. Fultz then appears to use his baton to strike Williams's right arm. Williams responded by scooting away from the officers toward the travel lanes

of the interstate, while maintaining a seated position. The officers continued to gesture toward the ground. Wilkins appears to strike Williams's leg. Williams scooted closer to the travel lanes of the interstate. Just as he reached the yellow line of the high-speed travel lane, it appears that Williams is again subject to an ECD, which caused him to fall from the seated position onto his back such that his head was within the high-speed lane. Fultz grabbed his legs in order to pull him from the travel lane back into the emergency lane.

Again fully in the emergency lane, Williams resumed his seated position and then stood up. Both Wilkins and Fultz appear to strike him with the baton. Rather than complying, he ran into the travel lanes of the interstate. Sandel employed his ECD and Williams dropped onto his stomach in the high-speed lane. Sandel and Fultz tried to remove him from the lane and Wilkins attempted unsuccessfully to stop a vehicle that was simultaneously passing the group. At this point, the off-duty officer scaled the median. Williams stood up, unsecured, and moved further south in the traveled portion of the interstate. The off-duty officer entered the travel lanes in an attempt to stop traffic. Wilkins then followed Williams, Sandel, and Fultz south on the interstate. From this point onward, the group is no longer in view of the video.

In Williams's version of the above events, he was fully compliant with the officers. Williams also maintains that when Fultz first attempted to handcuff him, Fultz asked the other officers "does anyone have a rope." Williams alleges that this statement caused him to fear for his life and, thus, to refuse Fultz's attempt to secure him in handcuffs. Williams also asserts that the officers took turns discharging their

ECDs on him, but the ECD download sheets for Sandel and Fultz indicate this assertion is inaccurate and that Fultz did not begin to use his ECD until after Sandel's final ECD activation.

Williams claims that he "attempted to escape" the encounter with the officers by heading south on the interstate. An eyewitness at the scene observed:

[The officers] were all following [Williams] or chasing after him more or less, and he just, he was running across I-75, running back and forth, zigzagging, trying to dodge the cops And they actually, they finally got a hold of him I believe one of them tackled him or something and then they did hit him with their billy club to try and get his arms locked like this, backwards, like holding himself up. And one of them was hitting him in the elbow, but it wasn't, it wasn't phasing him at all. So, then after that, I believe he got up and they tased him and that didn't stop him. He just ripped the taser right out of himself, and then kept running down the road. And I believe they caught him down the road again, but I could, I could barely see that far. That was probably another eighth of a mile to a quarter mile down the road that he ran from them, all in the same side of the median though on I-75.

Williams claims that during this portion of the encounter he continued to be beaten, tased, and sprayed with chemical irritant spray, and we accept his assertion. Fultz and Wilkins admit to spraying him with pepper spray and maintain that it had no effect on Williams.

Ultimately, Fultz, Sandel, and Wilkins were able to corner Williams such that his back was against the concrete median separating the north- and southbound portions of the interstate. Fultz asserts that Williams attempted to scale the median to escape onto the northbound side.

While Williams was backed against the median, Fultz acknowledged that the officers continued to use their batons to try and gain compliance from him. During this period, Williams also sustained an injury to his head.

Williams claims that he ultimately collapsed from exhaustion and at that point was placed in handcuffs and leg shackles. Boone County Deputy Sheriff Scotty Hill ("Hill"), who was not named as a defendant, arrived at the scene at approximately 12:15 a.m. He reported that Williams and the officers were several hundred yards south of where traffic was stopped. He ran south toward the group. Hill stated that:

The officers were giving [Williams] verbal commands to get on the ground. The officers would pause and give him an opportunity to comply with their verbal command. When he refused to comply, he was struck in the thigh with an expandable baton. I heard and observed this sequence several times.

I also noticed that taser probes were still in the male subject but the leads were gone. In my experience, it is not unusual for subjects who have been tased to try and pull the probes out and disconnect the leads. Once this occurs, the probes are disconnected from the taser device

and it will no longer be effective to subdue an individual.

I also noticed that the officers who were around him were exhausted from the physical confrontation. Since the subject was noncompliant with the officers' efforts to arrest him, I discharged my taser into his back. I squeezed and released the taser trigger and it cycled for five (5) seconds. The subject fell face down on the ground while the taser cycled for the five (5) seconds. After the first five (5) second cycle ended, the subject started to push up from the ground, so I squeezed and released the trigger again while the probes and leads still had a good connection. The taser cycled for another five (5) seconds.

After the second taser cycle ended, one of the officers was able to secure the second handcuff on the subject.

It is undisputed that once the officers secured Williams, there was no additional force used against him.

During the encounter, Sandel requested emergency medical services. The emergency medical team put Williams on a stretcher. Because he was "combative and screaming" and had "chewed-up" two non-rebreather masks, the team ultimately secured him to the stretcher. So secured, he was transported by ambulance to St. Luke's Hospital. Dr. Paul Spellman, the treating physician, indicated that Williams arrived with a scalp laceration, two fractured fingers, contusions on his torso and extremities, and abrasions

on his feet. The initial drug and alcohol screens were both negative. Dr. Spellman found that Williams had an elevated white blood cell count, which could be attributable to general stress on the system as well as physical exertion. Given Williams's urinalysis findings and elevated creatinine levels, there was a concern that he was experiencing a condition known as rhabdomyolysis, "which is when there has been a muscle injury which causes products from within the muscle cells to be released into the circulation; it can result in damage to the kidneys"; Williams ultimately had to undergo a series of dialysis treatments after his release from the ER.

In addition to rhabdomyolysis, a psychological exam conducted on January 15, 2009 indicated that Williams suffered Post Traumatic Stress Disorder as a result of the events of July 7 and 8, 2007.

B. Procedural History

On September 25, 2008, a Kenton County jury convicted Williams of disorderly conduct, but a mistrial was declared for the charges of resisting arrest, fleeing, and wanton endangerment. The matter was reset for trial on March 17, 2009, but before trial, Williams entered a plea agreement with the Commonwealth. He pled guilty to wanton endangerment and entered an Alford plea on the resisting arrest charge.

On August 2, 2007, Williams filed a civil complaint in Kenton Circuit Court. The case was removed to federal court and thereafter Sandel and Fultz filed for summary judgment arguing that the force used was not objectively unreasonable, and even if it were, they

were entitled to qualified immunity. Wilkins also filed a motion for summary judgment, asserting qualified immunity. Additionally, Wilkins argued Williams's state, arrest-related criminal convictions collaterally estopped him from asserting an excessive force claim.

Williams opposed the summary judgment motions. He argued that there was sufficient evidence to create a genuine issue of material fact regarding his claims and that the officers should not receive qualified immunity because they used excessive force in violation of clearly established rights.

On December 8, 2009, the district court held oral argument on the motions for summary judgment. Ruling from the bench, the court denied the officers' request for summary judgment:

My job is, are there factual issues which preclude summary judgment on the excessive force claim. I answer that "yes." At this stage I think there are a number of disputed issues of material fact which preclude summary judgment on the Fourth Amendment claim.

There has been sufficient facts to allege constitutional depravity under the Fourth Amendment. So then for the same reasons under the plaintiff's version of facts, I cannot say that the officers – If the jury were to believe plaintiff's version of what occurred, I am unable to say that an officer would not know what they did was unreasonable under the facts and circumstances of the case.

So the request for the Court to uphold the officers' use of force in this case under the theory of qualified immunity analysis is denied at this point, and that includes the motions filed by Sandel and Fultz and the motion filed by Defendant Wilkins.

. . . .

The Court is denying – I want to make sure the record is painstakingly clear. The denial of the motion for summary judgment with qualified immunity is based on facts that the Court finds are in dispute. The qualified immunity motion was made at the end of discovery. There are – And I'm not going to go into all the issues of disputed fact. [Williams's counsel] has highlighted many of those in his brief . . . [and] . . . during oral argument this afternoon.

Additionally, the district court denied Wilkins's argument that collateral estoppel barred Williams from asserting an excessive force claim. The court also retained Williams's state-law battery and negligence claims: "The two battery and negligence claims, in the Court's view, those rise and fall with the same considerations, analysis of the federal law claims." Finally, it rejected the request to compartmentalize or segment the excessive force analysis into the force used on and off the video.

Two days later, on December 10, 2009, the district court issued an order on its decision, stating only that summary judgment was denied on the excessive force,

battery, and negligence claims “for the reasons stated and the findings made on the record.”

On December 16, 2009, the officers moved for partial reconsideration. Citing the video, they argued that there were no disputed issues of fact with respect to the force shown and that, accordingly, they were entitled to judgment as a matter of law. The motion also argued that the district court, per the precedent of the Sixth Circuit, should segment the analysis for purposes of qualified immunity. On February 1, 2010, the district court denied the motion for reconsideration, explaining that the “disputed nature of the conduct depicted in the video, coupled with the video’s lack of audio, rendered segmentation impractical and inappropriate.”

This appeal followed.

II. Analysis

A. Jurisdiction

The officers file this interlocutory appeal pursuant to 28 U.S.C. § 1291. Williams challenges jurisdiction, arguing that the officers raise questions of fact that preclude this court’s review.

An appellate court may hear an interlocutory appeal for the “denial[] of summary judgment motions based on qualified immunity to the extent that the appeal raises issues of law.” *Grawey v. Drury*, 567 F.3d 302, 310 (6th Cir. 2009) (citations omitted). Applying Kentucky immunity law, we also have jurisdiction to review the denial of qualified immunity for the state law claims. *See Livermore ex rel Rohm v. Lubelan*, 476

F.3d 397, 407 (6th Cir. 2007); *Haney v. Monsky*, 311 S.W.3d 235, 239-40 (Ky. 2010).

We review de novo the district court's denial of qualified immunity for federal and state law claims. *Id.* (federal standard); *Estate of Clark, ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003) (state standard). This de novo review is based on the facts viewed in the light most favorable to the plaintiff, or in other words, we presume the plaintiff's version of the facts is correct if the facts are disputed. *Grawey*, 567 F.3d at 310.

B. Qualified Immunity: § 1983 Excessive Force Claim

The officers claim that they are entitled to qualified immunity because the force used was reasonable given the circumstances they faced: a naked man on the interstate in the middle of the night, who was unwilling to allow himself to be secured. They also maintain that even if the force was not objectively reasonable, they are entitled to qualified immunity because the force used did not violate clearly established law. Sandel and Fultz assert qualified immunity for their ECD, police baton, and pepper spray usage. Wilkins asserts qualified immunity for his baton and pepper spray usage. Williams argues that in effecting his arrest, the officers violated his Fourth Amendment right to be free from excessive force by their repeated usage of the ECD, police batons, and pepper spray.¹

¹ In his brief, Williams also asserts that Wilkins is responsible for his failure to intervene to stop the allegedly excessive number of

Stating a claim for excessive force under 42 U.S.C. § 1983 requires a plaintiff to establish “the deprivation of a right secured by the Constitution or laws of the United States” that is “caused by a person acting under color of state law.” *Marvin v. City of Taylor*, 509 F.3d 234, 243 (6th Cir. 2007) (internal citations and quotation marks omitted). The doctrine of qualified immunity operates to shield government officials performing discretionary functions from civil liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Determining the applicability of qualified immunity involves a two-step analysis. First, the court asks whether the officers’ conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).² If no constitutional violation exists, the inquiry stops, the § 1983 claim fails as a matter of law, and the officers do not need qualified immunity. *Marvin*, 509 F.3d at 244. But if the court finds a potential constitutional violation, it then asks whether the right was clearly established in light of

ECD activations by Sandel and Fultz. Wilkins accurately points out that Williams failed to include a failure to intervene allegation in his complaint and explicitly informed the district court that this type of claim was not at issue. Because this claim was not raised before or considered by the district court, Williams forfeited this claim. *See Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194 (6th Cir. 1992) (stating that appellate court generally “will not address issues on appeal that were not raised and ruled upon below”).

² While *Saucier* held that the sequence of this analysis, as it is portrayed here, was mandatory, the Supreme Court has since stated that conducting the analysis in this order, while beneficial, is not required. *Pearson v. Callahan*, 555 U.S. 223 (2009).

the specific circumstances of the case. *Saucier*, 533 U.S. at 201.³ When the law is not sufficiently clear such that a reasonable officer would be on notice that his conduct is clearly unlawful, qualified immunity is appropriate. *Id.* at 202.

1. Constitutional Violation

Williams’s claim of excessive force is “properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.” *Graham v. Connor*, 490 U.S. 386, 388 (1989). In considering whether the officers’ conduct is objectively reasonable, this court must look at the facts and circumstances of the case from the perspective of a reasonable officer at the scene and not using 20/20 hindsight. *Grawey*, 567 F.3d at 310. With this perspective, the court must balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (internal citations and quotation marks omitted). The most important factors to consider include: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396.

³ A third step considering whether a “plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional right” is used by some courts, but is redundant in an excessive force analysis that already considers whether the conduct was objectively unreasonable. *Grawey*, 567 F.3d at 309.

a. Severity of the Crime

As Wilkins points out, Williams's behavior might have given rise to several violations under state law, including: public intoxication, indecent exposure in the second degree, disorderly conduct in the second degree, and impermissibly walking on the highway. *See* Ky. Rev. Stat. § 525.100 (public intoxication); Ky. Rev. Stat. § 222.202 (alcohol intoxication); Ky. Rev. Stat. § 510.150 (indecent exposure); Ky. Rev. Stat. § 525.060 (disorderly conduct); Ky. Rev. Stat. § 189.570(14), (16) (walking on or along a highway). Although not the most serious of criminal violations, surely Williams's bizarre conduct, jogging naked on the interstate in the earliest hours of the morning, provided several reasons for the officers to stop and detain him.

b. Immediate Safety Threat

Considering first the portion of the encounter recorded on the video, it is clear that Williams posed an immediate threat to the safety of himself and the officers, as well as passing motorists. Williams's nudity clearly conveyed to the officers that Williams was unarmed. Yet Williams created a risk of serious harm by virtue of the location and his actions. In fact, in the initial seconds of Sandel's interaction with Williams, before he began resisting the officers' attempts to secure him, eleven vehicles passed on the travel lanes of southbound I-75. Granted, Sandel and Williams remained in the emergency lane next to the median, but even so, there is some risk inherent in standing alongside traffic moving at such high speeds, especially when there is an individual involved who has been engaging in bizarre and highly erratic behavior.

Once Williams began resisting Fultz's attempts to secure him in handcuffs, the risk dramatically increased for all involved: Williams, the officers, and the passing motorists. As seen on the video and described above, Williams's movements became erratic and he repeatedly moved toward the travel lanes of the interstate. Correspondingly, the officers were forced to move closer to the travel lanes as well. Approximately nineteen more vehicles passed while the officers attempted to secure Williams in the emergency median. At least one vehicle passed while Williams and the officers were *in* the high-speed and middle travel lanes of the interstate. As Williams exited the view of the camera and headed south in the travel lanes of the interstate, up to three additional vehicles passed before traffic was stopped. Obviously, the risk of serious bodily injury or death is great when encountering the high-speed traffic present on an interstate. *See generally Scott v. Harris*, 550 U.S. 372, 384 (2007) (acknowledging the risk of serious bodily injury or death present in a pedestrian and high-speed motorist crash). This risk was further heightened by the darkness and limited visibility.

The record indicates that the encounter ultimately returned to the emergency lane next to the median dividing the southbound and northbound portions of I-75. The officers' testimony indicates that Williams attempted to scale the median. Even though southbound traffic remained stopped,⁴ it was

⁴ The stoppage of traffic certainly diminishes the threat of a fatal or seriously injurious accident. In this case, the traffic was stopped by an off-duty officer wearing civilian clothes and carrying a flashlight. And while the video indicates that the officer effectively and continuously stopped traffic, from the perspective

reasonable for the officers, given Williams's behavior and position next to a scalable median, to worry about the risk he might pose to motorists on the northbound side of I-75. Plainly, Williams's conduct from the beginning of the encounter until he was secured posed an immediate threat of injury or death to himself, the officers, and other motorists by virtue of the circumstances.

c. Actively Resisting Or Attempting To Evade

Again, the video demonstrates that Williams actively resisted the officers' efforts to secure him. Although Williams insists that he was compliant with the officers, the video makes clear that he repeatedly refused to allow himself to be secured by the officers and he attempted to evade the officers by traveling south on the interstate (out of view of the camera). *See Scott*, 550 U.S. at 380-81 (holding that a court should rely on the video record when the plaintiff's version of the facts blatantly contradicted it). Even after he was cornered against the median, he refused to submit to being secured until two final ECD activations allowed the officers to handcuff him.

It is against this backdrop that we must weigh the officers' conduct. Although Williams's offenses were arguably not of extreme severity, law enforcement surely has an interest in efficiently securing a suspect. And that interest was heightened under the

of an officer on the scene, a question may have remained whether a single officer, so dressed and so equipped, would be able to halt interstate traffic until Williams was secured.

circumstances presented here; the officers had a strong interest in securing Williams for his own protection as well as theirs and the protection of passing motorists. As a result, the force used, which ceased once the government's interests were realized, weighs in favor of a finding of reasonableness.

Admittedly, Williams's claim of being subject to baton strikes, pepper spray, and thirty-seven ECD activations,⁵ taken alone and out of context, makes the officers' conduct seem somewhat unreasonable. But even under Williams's version of the facts, despite the first thirty-six ECD activations, all of the baton strikes, and the repeated pepper spray usage, Williams remained unsecured and unwilling to comply with the officers' attempts to secure him for his own safety as well as the officers' and motorists'. As a result, his interests do not outweigh the government's.

Williams also attempts to emphasize the allegedly excessive nature of the force by highlighting his injuries. Even assuming that the rhabdomyolysis was tied to the ECD activations, the injury itself does not dictate a finding of excessive force. *See Miller v. Sanilac Cnty.*, 606 F.3d 240, 252 (6th Cir. 2010) (explaining that the existence of a constitutional violation turns on "not the extent of the injury inflicted but whether an officer subjects a detainee to

⁵ Williams's claim of thirty-seven ECD activations is based on downloads recorded from Sandel's ECD (fourteen total activations) and Fultz's ECD (twenty two activations) as well as one activation from Deputy Hill. We note that Deputy Hill's deposition indicates that he used his ECD on Williams twice, which would bring the total ECD activations in the record to thirty-eight.

gratuitous violence” per the *Graham* analysis (citation and internal quotation marks omitted)).

Nor does Williams’s allegation about a racially charged comment transform the officers’ force into excessive force. See *Hudson v. Goob*, No. 07-1115, 2009 WL 789924, at *12 (W.D. Penn. Mar. 24, 2009) (“The rule is that if the physical force used is not itself excessive, i.e., is reasonable, then merely adding verbal threats or racial epithets cannot transform an otherwise non excessive use of force into an unconstitutional use of excessive force.”); *Johnson v. City of Ecorse*, 137 F. Supp. 2d 886, 892 (E.D. Mich. 2001) (“Policemen’s use of slurs and racial epithets is not a search or seizure, and thus cannot sink to the level of violating the Fourth Amendment’s prohibition of excessive force.”); see also *Giese v. Wichita Police Dep’t*, 69 F.3d 547, 1995 WL 634173, at *2 (10th Cir. 1995) (unpublished table opinion) (“Verbal threats during questioning also do not constitute the use of excessive force.”).

Although the reasonableness of force is often a question of fact, on several occasions we have determined that force is objectively reasonable. In a case quite similar to this one, we held that the use of “closed-fist blows” and ECD activation during an officer’s attempt to effect the arrest of a potentially armed, non-compliant suspect did not amount to a constitutional violation. *Williams v. Ingham*, 373 F. App’x 542 (6th Cir. 2010). This court found that it was objectively reasonable for an officer to use pepper spray to force a non-compliant individual to follow police orders. *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997). *Kijowski v. City of Niles*, 372 F. App’x 595 (6th Cir. 2010) is not to the contrary. There we

held that the beating and use of an ECD against a nonresisting subject was not objectively reasonable. *Id.* at 600. However, central to the court's conclusion was the suspect's non-resistance. The *Kijowski* court was careful to distinguish case law which held that use of physical force against a resisting suspect is not objectively unreasonable. *Id.* (citing *Casey v. City of Federal Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007) (emphasizing that the use of physical and ECD force against an individual actively resisting arrest could be a reasonable use of force)).

Finally we note that other circuits have likewise recognized the danger posed by proximity to a busy roadway in finding the use of force against a non-compliant individual objectively reasonable. See *Buckley v. Haddock*, 292 F. App'x 791, 796 (11th Cir. 2008) (holding that repeated ECD usage on a non-compliant suspect during an arrest on the side of a busy highway at night was objectively reasonable); *Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007) (holding that pepper spray usage on a non-compliant suspect was objectively reasonable when the "encounter played out on the narrow shoulder of a busy interstate highway" with "high speed traffic" nearby).

Accordingly, we conclude the officers use of ECDs, batons, and pepper spray was not objectively unreasonable on the facts presented and did not amount to a violation of Williams's Fourth Amendment rights. Although the lack of video capturing the entire interaction between the officers and Williams makes this a slightly more difficult question, the evidence, even taken in the light most favorable to Williams,

still supports a conclusion that the officers' conduct did not amount to a constitutional deprivation.⁶

D. Qualified Immunity: State Law Claims

Williams also brought state-law claims of battery and negligence against the officers. State-law qualified immunity protects officers from liability for discretionary acts, taken in good faith, within their scope of authority. *See Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Bad faith can be demonstrated by objective unreasonableness or by a subjective intention to harm (i.e., a "corrupt motive"). *See id.* at 523. As with federal qualified immunity, it is Williams's burden to establish that the officers' actions were not performed in good faith. *James v. Wilson*, 95 S.W.3d 875, 905 (Ky. Ct. App. 2002).

Without authority or even any description of the negligence claim's elements, Williams alleges that a reasonable juror could conclude that the "officers exceeded the bounds of force reasonably needed to affect the arrest and thereby were negligent[.]" Arguably, his negligence claim is waived. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997). In any event, the claim merely alleges a breach of the "duty not to use excessive force." *Jones v. Kentucky Bd. of Claims*, No. 2006-002157, 2007 WL 2812612, at *3 (Ky. Ct. App. 2007). This claim thus follows the excessive-force analysis.

⁶ Because we conclude that the officers' conduct was not objectively unreasonable, we decline to address the district court's decisions on collateral estoppel and segmentation.

We have already concluded that the officers used reasonable force. Therefore, Williams's state law claims survive only if the officers acted with a subjective intent to harm him. Williams says that Fultz's reference to a rope, a racial radio broadcast, and the "abuse . . . despite his compliance" establish the requisite subjective intent. None of these allegations support Williams's claim. As we have explained, Williams was non-compliant. The "racial radio broadcast" is irrelevant: a radio comic's remarks, broadcast 15 minutes after Sandel exited his police vehicle, say nothing about the officers' motives. Finally, even assuming Fultz made the rope comment, we find that the comment is insufficient as a matter of law to defeat the presumption that Fultz acted in good faith with respect to his attempts to subdue Williams in the extraordinary circumstances presented here. *See Rowan Cnty v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) ("once the material facts are resolved, whether a particular defendant is protected by official immunity is a question of law, which we review de novo" (internal citation omitted)). We thus hold that the officers are entitled to qualified immunity on Williams's state-law claims.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's denial of summary judgment on federal and state-law qualified immunity.

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON**

CIVIL ACTION NO. 08-4-DLB

[Filed February 1, 2010]

TERRY WILLIAMS, JR.)
PLAINTIFF)
)
vs.)
)
GREG SANDEL, ET AL.)
DEFENDANTS)
)

* * * * *

ORDER

This matter is before the Court on Defendant Wilkins' Motion to Partially Alter, Amend, or Vacate Order Denying Motion for Summary Judgment (Doc. #110).¹ Wilkins requests the Court partially reverse its previous denial of summary judgment as to Williams'

¹ In addition, Defendants Sandel and Fultz have moved to join Wilkins' motion (#111), and Wilkins has requested oral argument on his motion. (Doc. #116).

use of force claims (Doc. #109), and grant qualified immunity to Wilkins as to his use of force depicted in the videotape retrieved from Defendant Sandel's police cruiser. The motion has been fully briefed (Docs. #113, 115), and is now ripe for review. Because the Court's decision on the pending motion would not be significantly aided by oral argument, the Court will decide the motion on the parties' written submissions.

For the reasons set forth below, because Wilkins' motion is nothing more than a rehashing of arguments previously considered and rejected by the Court, his Motion to Partially Alter, Amend, or Vacate Order Denying Motion for Summary Judgment (Doc. #110) is **denied**.

I. DISCUSSION

Wilkins contends that the Court erred in failing to grant him qualified immunity as to his use of force captured by the video camera in Sandel's police cruiser. Specifically, Wilkins argues that the Court should have segmented its analysis of Williams' use of force claims, and contends that Wilkins' use of force on the video – “a minimal attempted number of baton strikes directed towards Plaintiff's lower body” – did not violate Williams' clearly established constitutional rights of which a reasonable person should have known. Because Wilkins' arguments have already been rejected by the Court, their reiteration is not well-taken.

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 depicted in the video, coupled with the video's lack of audio, rendered segmentation impractical and inappropriate in this case. *See, e.g., Howser v. Anderson*, 150 F. App'x 533, 536 n.3 (6th Cir. 2005) ("It is true ... that segmentation is appropriate in many excessive force claims. In this case, however, because material disputes of fact exist with respect to both the striking of the decedent and the fatal shooting, segmentation would serve no useful purpose at this stage of the proceedings because a fact-finder will have to resolve factual ambiguities with respect to both the striking and the shooting."). Therefore, the Court declined to "slice and dice" its analysis of Williams' use of force claims.

Although Wilkins' motion and reply total more than fifteen pages, neither document raises issues, or presents arguments, which have not been previously presented to the Court. Consequently, Wilkins' motion is denied. *See Hence v. Smith*, 49 F. Supp. 2d 547, 550 (E.D. Mich. 1999) (holding that a motion for reconsideration which presents issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted).

II. CONCLUSION

Accordingly, **IT IS ORDERED** as follows:

1. Defendant Wilkins' Motion to Partially Alter, Amend, or Vacate Order Denying Motion for Summary Judgment (Doc. #110) is hereby **DENIED**;

2. Defendants' Sandel and Fultz's Motion for Joinder in Defendant Trevor Wilkins' Motion to Partially Alter, Amend or Vacate Order Denying Motion for Summary Judgment (Doc. #111) is hereby **GRANTED**. So joined, their motion is **DENIED**;
3. Defendant Wilkins' Motion for Oral Argument (Doc. #116) is hereby **DENIED**;

This 31st day of January, 2010.

Signed By:



David L. Bunning /s/DB

United States District Judge

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APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION at COVINGTON
CIVIL MINUTES - GENERAL**

CASE NO. 2:08-4-DLB At COVINGTON

December 8, 2009

**Style: Terry Williams, Jr. vs. Officer Greg
Sandel, et al.**

Present: Hon. DAVID L. BUNNING, JUDGE

**Linda Tierney Shandy Ehde Candace Smith
(Deputy Clerk) (Court Reporter) (Law Clerk)**

ATTORNEY FOR PLAINTIFF:

Eric C. Deters

**ATTORNEYS FOR DEFENDANTS SANDEL,
FULTZ:**

Christopher Nordloh

ATTORNEY FOR DEFENDANT WILKINS:

Roger G. Wright

PROCEEDINGS: Oral Argument

On December 8, 2009, the above-styled case was called for Oral Argument on pending motions. Counsel present as noted. Having reviewed the parties' filings and having heard from counsel, for the reasons stated and the findings made on the record, **IT IS ORDERED HEREIN AS FOLLOWS:**

(1) Defendant Trevor Wilkins' Motion to Dismiss official capacity claims [49] is **GRANTED AS UNOPPOSED** per the separate order filed at the conclusion of the Oral Argument.

(2) Defendants Sandel and Fultz's Motion for Sanctions [77] is **DENIED**.

(3) Plaintiff's Motion for Extension of Time to Respond [90] is **DENIED AS MOOT**.

(4) Plaintiff's Motion to Stay [95] is **DENIED AS MOOT**.

(5) Plaintiff's Motion to Supplement Rule 11 Defense [99] is **DENIED AS MOOT**.

(6) Plaintiff's Motion for Hearing Regarding Motion for Sanctions [100] is **GRANTED** by way of this hearing.

(7) Plaintiff's Motion to Withdraw Malicious Prosecution Claim [96], construed by the Court as Plaintiff's Motion to Withdraw his Motion to Amend/Correct, is **GRANTED**. Said Motion to Amend/Correct [60] is **DENIED AS WITHDRAWN**.

(8) Magistrate Judge's REPORT AND RECOMMENDATION [88] is **REJECTED AS MOOT.**

(9) Plaintiff's Motion for Hearing on Motion to Amend [93] is **DENIED AS MOOT.**

(10) Motions for Summary Judgment of Defendants Sandel and Fultz [57] and Defendant Wilkins [66] are **GRANTED IN PART as to Counts II (Intentional Infliction of Emotional Distress) and VIII (Fourteenth Amendment Due Process) of the Second Amended Complaint [8], and DENIED as to all other remaining counts.** Plaintiff may tender an Agreed Entry of Partial Dismissal of any of the remaining state-law claims that he subsequently chooses to voluntarily dismiss.

(11) **With respect to Count VI, Abuse of Process** - the stay on discovery previously imposed is **lifted**, and the discovery deadline is extended to **January 31, 2010**, with dispositive motions due by **February 28, 2010** (responses and replies due as provided by the Local Rules).

(12) A **Status Conference** is set for **March 31, 2010, at 10:00 a.m.**, at which time a final pretrial and trial date will be set.

This 10th day of December, 2009.

Signed By:



David L. Bunning /s/DB

United States District Judge

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Deputy Clerks Initials: lst

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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 10-5220/5221

[Filed August 19, 2011]

TERRY WILLIAMS, JR.,)
)
Plaintiff-Appellee,)
)
v.)
)
GREG SANDEL, OFFICER, IN HIS)
INDIVIDUAL AND OFFICIAL)
CAPACITY, ET AL.,)
)
Defendants-Appellants,)
)
TREVOR WILKINS, KENTUCKY)
VEHICLE ENFORCEMENT OFFICER,)
IN HIS INDIVIDUAL CAPACITY,)
)
Defendant-Appellant.)

O R D E R

BEFORE: MARTIN, SUHRHEINRICH, and
KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON**

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

[Filed May 27, 2010]

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

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

[p.2]

P R O C E E D I N G S

Tuesday, December 8, 2009

1:00 p.m.

* * *

[p.67]

* * *

THE COURT: Well, I certainly understand and acknowledge that it's neither the Court nor a jury's job to look at what occurred with the clear vision of hindsight of what the officers did in this case. Looking at the applicable legal standard that applies, and I'm not going to distinguish each and every case cited, one thing that is clear to the Court in reviewing all of these excessive force claims in cases and the motions for summary judgment which were either granted or

denied and the request for the application of qualified immunity under the applicable standards, that each case is unique to its own facts.

I bring that up because it's hard to -- I could probably find a nugget in each and every one of these cases to

[p.68]

say that a blow here, use of a taser there under the circumstances of that particular case or this particular case is not excessive under these facts or based upon what occurred here and no reasonable officer would believe what he did violated a clearly established constitutional right.

I only say all of that because I believe that under the facts and circumstances here, and the written briefs are voluminous and there is quite a bit of reliance with defendant's standpoint on reported undisputed facts, on whether a jury believes the plaintiff as to what he says occurred once they left the lenses of the video camera, they may think he's a completely unbelievable person. Who else walks along the interstate buck naked in the middle of the night, covered with sweat?

That's not my job at this point. My job is, are there factual issues which preclude summary judgment on the excessive force claim. I answer that "yes." At this stage I think there are a number of disputed issues of material fact which preclude summary judgment on the Fourth Amendment claim.

There has been sufficient facts to allege constitutional depravity under the Fourth Amendment. So then for the same reasons under the plaintiff's version of facts, I cannot say that the officers -- If the jury were to believe plaintiff's version of what occurred, I am unable to say that an officer would not know what they did was unreasonable under

[p.69]

the facts and circumstances of the case.

So the request for the Court to uphold the officers' use of force in this case under the theory of qualified immunity analysis is denied at this point, and that includes the motions filed by Sandel and Fultz and the motion filed by Defendant Wilkins.

* * *

The Court is denying -- I want to make sure the record

[p.70]

is painstakingly clear. The denial of the motion for summary judgment with qualified immunity is based on facts that the Court finds are in dispute. The qualified immunity motion was made at the end of discovery. There are -- And I'm not going to go into all the issues of disputed fact. Mr. Deters has highlighted many of those in his brief. He emphasized some of those during oral argument this afternoon.

* * *

[p.72]

* * *

MR. WRIGHT: I would ask for some clarification with respect to the summary judgment. Are you saying there are issues of fact with respect to the part of use of force that appears on video as well as off video?

THE COURT: Yes, and I understand the general rule is to compartmentalize but that is --

MR. WRIGHT: Well, I would --

[p.73]

THE COURT: It is difficult for the Court to -- To me, that makes it difficult for a jury to consider the totality of what occurred on this evening.

* * *

[p.74]

* * *

THE COURT: The Court -- Respectfully the request for clarifications is going to be denied, Mr. Wright. I think that with the totality of what occurred I would be remiss if I were to compartmentalize the case.

This part, he's not being charged with unlawful arrest or is not being -- this isn't a lack of probable cause to arrest claim, this is an excessive force claim. Viewing the totality of what occurred from when the

various individuals were involved and the amount of time that occurred, the injuries that occurred, the evidence that the plaintiff has brought to bear during this oral argument is emphasized for my consideration.

[p.75]

I just believe that there are -- Even if a jury were to find that your client, Officer Wilkins, did not, his conduct wasn't excessive for the one minute he was there before the video, what occurred after that is -- there are enough factual issues there that would preclude the Court from granting summary judgment in total so --

MR. WRIGHT: Your Honor, what --

THE COURT: I don't know if -- and, frankly, I would be shocked if the circuit decided -- Well, under 1292, I'm going to go ahead and review that limited portion.

* * *

41a

APPENDIX F

**CASE NO. 10-5220
CONSOLIDATED WITH CASE NO. 10-5221**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

[Filed August 16, 2010]

**TERRY WILLIAMS, JR.
PLAINTIFF-APPELLEE**

v.

**GREG SANDEL, et. al.
DEFENDANTS-APPELLANTS**

**On Appeal from the United States District Court
For the Eastern District of Kentucky
Civil Case No. 2:08-CV-0004-DLB**

APPELEE'S BRIEF OF TERRY WILLAMS, JR.

**Eric C. Deters
ERIC C. DETERS & ASSOCIATES
5247 Madison Ave.
Independence, Kentucky 41015
Phone: 859-363-1900**

42a

Fax: 859-363-1444

Counsel for Appellee Terry Williams, Jr.

* * *

STATEMENT OF THE CASE

As a Law Enforcement Officer, my fundamental duty is to serve mankind: to safeguard lives and property; to protect the innocent against deception, the weak against the oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional right of all men to liberty, equality and justice...I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence...

Law Enforcement Code of Ethics
(RE 73, Exhibit X)

The underlying action in this case arises from the personal and permanent injuries Terry Williams, Jr. (Terry), an African American male, suffered as a result of being tased roughly thirty-seven times, repeatedly sprayed with chemical irritants and severely beaten with nightsticks, at the hands of four white police officers. The encounter with the police began on the night of July 7, 2007 and extended into the early morning hours of July 8, 2007. The night began when Terry was a passenger in a car being driven by his cousin; the two were headed to a club in Lexington, Kentucky. (RE 57, Exhibit 3, Williams Dep., p. 6)

Terry and his cousin headed south on I-75 between 9:30 or 10:00 p.m. (*Id.* p. 7)

Prior to the trip, Terry and his cousin stopped at a Covington liquor store and bought some Grey Goose vodka. (*Id.* p. 13-14) While in Covington, Terry also purchased an ecstasy pill. (*Id.* 70-71) Terry had never purchased or taken ecstasy and he took the pill with the understanding that the substance would only enhance his sexual performance. (RE 60, Exhibits to Proposed Amended Complaints, Police Interviews, Gilvin Interview with Terry #2) As Terry and his cousin headed south on the interstate Terry consumed one drink and took the pill. (RE 57, Exhibit 3: Williams Depo p. 17) Unaware of the side effects of ecstasy Terry began to feel hot, so hot that he felt like he was boiling from the inside. (*Id.* p 10) At this point Terry just wanted to return home, aware that his cousin would not turn around, Terry asked his him to pull over on the emergency strip so that he could “pee”. (*Id.* p. 7, 14-16)

Terry left the car and began traveling home on foot. (*Id.* p. 13) At some point Terry crossed from the emergency lane on the side of the road to the emergency lane in the median of the road. (*Id.* p. 26) As he jogged north on the southbound lanes, Terry continued to feel extremely hot. (*Id.* p. 22, 27) When describing the overwhelming feeling of heat, Terry stated, “I was...hot like- -well, I was extremely hot, extremely hot...Yeah, I didn’t feel- - I mean, I didn’t feel right. I just got- -I was like- -I never felt so hot like that.” (*Id.*) As Terry was jogging he began taking off his clothes “little by little”. (*Id.* p 26-27) At some point Terry had removed all of his clothing and his shoes. (*Id.*)

Officer Sandel found Terry walking in the center emergency lane; he performed a U-turn on the three lane expressway, turned his lights on and pulled into the emergency lane. (RE 60, Response, Exhibit C, Report of Officer Sandel) What transpired next was recorded on Officer's Sandel's dash mounted video camera. (RE 9, Video) When Officer Sandel pulled up behind Terry, Terry did not flee nor did he act aggressively. (*Id.*, 00:01-1:00) Terry just turned around and faced the police cruiser. (*Id.*) Terry describes his initial feelings as gratitude that the Police had arrived; "The only thing I wanted was help...[t]hat's all I wanted was to go to the hospital, get help and that was it[,] just wanted to go home." (RE 57, Exhibit 3: Williams Depo. p. 15)

Although unusual, being naked allowed anyone to clearly see that Terry was unarmed. (RE 9 Video) With no indication that Terry would attempt to flee or that he was a threat, Officer Sandel exited his cruiser with his Taser gun already drawn. (RE 9, Video 00:17; RE 73, Response, Exhibits T,U,V,W) As Officer Sandel approached Terry he immediately put his hands up in a position indicating surrender. (RE 9 Video 00:18) Terry then immediately complied with the Officer's orders and got down on his knees. (*Id.* at 00:24) Terry remained on his knees for almost half a minute, at which point Officer Fultz arrived on the scene. (*Id.* at 00:22-00:45). Officer Fultz arrived from the southbound lane. (*Id.*) The highway was divided by a concrete median. (*Id.*) Terry was completely compliant and lying flat on his belly with his hands on the ground in a prone position when Officer Fultz jumped the median. (*Id.* at 00:52) Terry briefly stood up but immediately resumed the prone position. (*Id.*)

Simultaneously, a third Officer, Officer Wilkins arrived on the scene. (*Id.*)

Officer Fultz then shined his flashlight directly in Terry's eyes which blinded Terry. (RE 73, Response, Exhibit N p. 8) Without announcing that he was an officer and that Terry was under arrest Officer Fultz violently grabbed Terry's arm and twisted it behind his back. (RE 9: Video; RE 57 Exhibit 3, Williams Depo p 45-46) Terry didn't realize that Officer Fultz was going to attempt to handcuff him. (*Id.* 34-40) Terry struggled repeatedly to lift his chest off the ground in an attempt to alleviate the strain on his shoulder, wrist and fingers. (RE 9, Video 00:58-1:12) Officer Fultz held his arm there for some twenty seconds and then finally slammed his knee into the back of Terry's head and neck. (RE 9; Video 58-1:12) At this point Terry was still completely compliant, laying on his belly, on the highway. (*Id.*)

What transpired next escalated the unusual events of a naked man walking down the highway into a brutal beating. As Officer Fultz was placing handcuffs on Terry he made a remark to the other officers about lynching Terry. Officer Fultz asked the other officers, "does anyone have a rope." (RE 57, Exhibit 3, Williams Depo p. 36; 115-116) Conveniently, Officer Sandel's microphone was "not working" to record this statement or any others made during the beating. (RE57, Motion for Summary Judgment, Gilvin Depo. p 10) Even more conveniently Officer Fultz completely failed to turn his microphone on. (*Id.*) Not surprisingly, no record was produced that Officer Sandel attempted to have his "malfunctioning" microphone fixed.

Surrounded by three Officers, one who just referenced lynching him, Terry feared for his life, he testified that he thought he was going to die and he moved away from Officer Fultz because he was scared. (RE 57, Exhibit 3, Williams Depo p 49, 115-116; RE 9 Video 1:12) As soon as Terry moved Officer Sandel shot him with his stun gun. (RE 9 Video 1:12-1:14) Terry collapsed onto his back with his hands in the air and his knees pulled up to his chest, his body tensed and released. (*Id.* at 1:14) When Terry's body relaxed he laid perfectly still on his back, the Officers then commanded him to roll over and resume prone position, Terry immediately complied. (*Id.* 1:20-1:22)

No sooner than when Terry had resumed prone position, Officer Fultz violently twisted Terry's arm behind his back again. (*Id.* at 1:20-1:24) When Terry barely raised his chest off the ground, he was shot a second time with the taser by Officer Sandel. (*Id.* at 1:24-1:26) Again, Terry locked up with his hands in a defensive position, his body tensed, shook and without waiting for compliance, Officer Fultz grabbed Terry by the wrist and flipped his body over. (*Id.* at 1:24-1:29) Terry was just sitting there with his legs crossed when he was shot yet again with the taser. (*Id.* at 1:29-1:36)

Officer Fultz then proceeded to remove from his belt his taser and he too shot Terry. (RE 9, Video 1:36-1:38) At this point Officer Fultz was tasing Terry with his right hand and then beating him with his left. (*Id.* at 1:38) Terry lay on the ground on his back with his knees to his chest and his hands in the air in a defensive position. (*Id.*) Again, Terry rolled over and laid on his stomach in prone position, Terry barely lifted his chest off the ground when Officer Sandel shot him again. (*Id.* at 1:38-1:51) While Terry's body was

stiff and convulsing Officer Fultz proceeded to beat Terry yet again with his nightstick. (*Id.*) When Terry pulled back from Officer Fultz both he and Officer Sandel took turns tasing Terry, then Officer Fultz followed up the tasing with another beating. (*Id.* 1:51-2:00) Terry again was lying on his back; he tried to sit up and all the while held his hands in a pleading defensive position. (*Id.*)

Officer Fultz then reared back his nightstick extending it over his head while the officers completely surrounded Terry. (RE 9, Video 2:00-2:11) While surrounded Terry didn't move, he just cradled himself in a slightly upright fetal position. (*Id.*) Then Officer Wilkins took his turn, he hit Terry with his nightstick followed shortly by Officer Fultz, his strike coming dangerously close to Terry's head. Officer Wilkins then hit Terry yet again with his nightstick, while Officer Fultz and Officer Sandel took another turn tasing him. (*Id.* at 2:21-2:23) Terry was still flat on his back when his body went rigid and again limp from the continuous tasing. (*Id.* at 2:23) Officer Fultz then dragged Terry across the road on his back closer to the median, Terry's arms just flailed. (*Id.* at 2:23-2:26) Terry was still just sitting there when Officer Fultz struck him again, not to be left out Officer Wilkins took another turn and hit him again. (*Id.* at 2:29)

At this point Terry managed to get to his feet and stumble towards the highway. (RE 9, Video at 2:29-2:34) Officer Fultz then hit him again with his nightstick and Officer Sandel shot him again with the taser. (*Id.*) When Terry's body went rigid from the electric shock he fell. (*Id.* at 2:34-2:47) Officer Fultz again attempted to drag Terry's naked body across the pavement. (*Id.*) For three long minutes, the officers

had repeatedly beat and tased Terry even though his body never left a ten by ten area of pavement. (RE9; Video) After compliance was ineffective, Terry attempted to escape the brutal beating. (RE 9; Video 2:47) Terry testified in his deposition, “I wasn’t trying to get away from them; I just didn’t know why they was doing what they was doing. I really didn’t.” (RE 57 Exhibit 3, Williams Depo p. 19) Although Terry and the officers moved off camera the beating and continuous tasing continued. The majority of the sound was unrecorded but at one point you actually hear another brutal nightstick blow followed by Terry’s cry, “PPPLLEEEAASEEEEE SSSTTTTOOOOPPPPP.” (RE 9; Video 3:08-3:10)

The Officers claim that Terry zigged and zagged across the interstate until he was finally trapped while standing against the concrete median. (RE 60, Gilvin Interview Sandel, p. 8) Terry continued to be beaten, tased and sprayed with chemical irritant spray. (RE 73, Response, Gilvin Interview Fultz) With his back against the concrete median Terry was being hit over the head with nightsticks, it was at this point that he noticed the blood from a large gash on his head. (RE 57, Exhibit 3, Williams Depo. p 38, 54) Despite repeated denials of hitting Terry anywhere but his thighs the wound occurred after Terry was hit in the head with a nightstick. (*Id.* at p. 16, 38, 54-55) After Terry all but collapsed from exhaustion he was placed in handcuffs and leg shackles. (RE 60, Gilvin Interview with Fultz p. 9)

Terry was tased ***thirty-seven*** times. (RE 73 Exhibit- Exhibit Z, Taser Downloads) Officer Sandel tased Terry fourteen times, Officer Fultz tased Terry twenty two times, and an assisting officer who arrived

at the end of the beating tased Terry for the final time. (*Id.*) The large majority of the tases pulsed electricity into Terry for five seconds and the Officer's tased Terry with little or no time between each tasing. (*Id.*) Officer Sandel shot Terry with his taser, eight seconds later he shot him again, twenty seconds later he shot him again, four seconds later again, eighteen seconds later again, three seconds later again, two seconds later again, another two seconds later again, four seconds later again and a second later again, and that series of tases was only the first eleven. (*Id.*)

Only minutes after Officer Sandel took a break from his serial tasing, Officer Fultz joined in. (*Id.*) Officer Fultz tased Terry, nine seconds later he tased him again, six seconds later he tased him again, four seconds later again, three seconds later again and with no time in between again, twenty four seconds later again, six seconds later again, fifteen seconds later again, nine seconds later again, five seconds later again, eight seconds later again, four seconds later again, three seconds later again, a second later again, three seconds later again, two seconds later again, and a second later again and again and thirteen seconds later again. (*Id.*) Terry's body was subject to an electrical current flowing through it for nearly five minutes. The average tase cycle pulses electrical current for five seconds; Terry received a thirty times the average. (*Id.*)

After Terry collapsed from exhaustion he was handcuffed, shackled and the ambulance arrived and took him to St. Luke Hospital. (RE 73, Response, Exhibit R Hospital Records RE 60, Gilvin Interview with Fultz p. 9) The gash in Terry's skull caused by a nightstick blow was seven centimeters in length, the

gash was closed with staples. (*Id.*) Terry's left hand which Officer Fultz repeatedly wrenched and twisted behind Terry's back contained two severely broken fingers. (*Id.*; RE 9 Video) Attempts were made to realign these fingers; however, the bony injury was so severe that the deformity would immediately reoccur. (*Id.*) His deformed fingers ultimately required surgical realignment. (*Id.*) He suffered multiple abrasions on his legs, torso and feet. (*Id.*) Pictures of Terry in the hospital reveal the appearance of blistering on his skin which may have resulted from the repeated tasing, his arms, back and legs were covered in whip marks. (RE 73; Response, Exhibit Q Photographs) Some of the strikes appear to have actually split the skin wide open. (*Id.*)

Additionally, Terry had drag marks and road rash that spread over his entire body and one of his large toes was grossly swollen. (*Id.*) Terry had blood in his urine and ultimately developed rhabdomyolysis or acute kidney failure. (RE 73, Response, Exhibit R Medical Records) Dr. Anil Agarwal, a licensed practicing nephrologist, testified that the acute kidney failure resulted from the repeated taser exposure and violent altercation with the police. (RE 73, Response, Exhibit V, Expert Affidavit) Terry spent three hours in intensive care, and twenty three days in the hospital. (*Id.*; RE 57, Exhibit 3, Williams Depo p. 22) He was on dialysis five hours a day, every day for a month. (*Id.*) His hospital costs were near \$100,000.00. (RE 57, Exhibit 3, Williams Depo, p. 23 and RE 73 Response, Exhibit S Medical Bill)

Terry also suffered mental trauma which he struggles to deal with on a regular basis. (RE 57, Exhibit 3, Williams Depo. p 24-26) Terry continues to

think about what happened to him every day and he no longer participates in his regular social activities. (*Id.*) Dr. Robert Kaplan performed a psychological evaluation of Terry following the beating. Upon completion of the exam Dr. Kaplan concluded that as a result of being beaten by the police Terry suffered chronic post traumatic stress disorder which should be remedied with five years of psychological counseling and psychiatric treatment with medications; however, Terry was unable to afford the after care. (RE 73, Response, Exhibit W, Expert Affidavit)

During the entire twenty minute ordeal Officer's Sandel's cruiser camera picked up in the background the radio show that the Officer was listening to. Not surprisingly, the radio show was filled with racist, derogatory and lewd remarks. Although there were many to pick from the following is a transcription of some of the more vile remarks made on the broadcast.

...walk into Klan meetings (inaudible)...were paranoid about racism today, we gotta calm down (inaudible) Oprah Winfrey (inaudible)... fight over if Santa Clause was black, how fucked up do race relations have to be in this country if we're arguing over the color of a fictitious character. He doesn't exist, who gives a shit, I'll tell you what, I'm speaking to my white friends on this one, will give you that one, Santa Clause is black. I'm okay with that one. It gives the phrase ho-ho-ho a whole new meaning. I really think you're going to have a hard time convincing some of these dumb rednecks in the south that a black guy is going to break into their house late at night and actually leave them shit. (RE 9; Video 15:10-17:02)

NIGGER, NIGGER, I probably shouldn't have said it twice, the first time (inaudible) might have thought they were hearing things but the second time confirmed it. And I didn't say it in the coy way Nelly says it with an A at the end like NIGGA it was that real goofy white way where the ER's are real pronounced like ***NIGGEEEEERRRRRR, NIGGEEEEERRRRRRRR***, in case you didn't hear me back there ***NIGGEEEEERRRRRR, Nigger, Nigger***. (RE 9; Video 17:58-18:59)

Who's going to tell a cave man not to jack off, If we evolved from apes and your mother sitting there licking her asshole whose going to tell you not to jack off. (RE 9-22:00-24:00)

Expert James F. Marsh, a Chicago police officer and trainer, commented on the racial commentary coming from the police cruiser,

...this is not the accepted norm within the police profession, allowing citizens the opportunity to hear this negative dialog coming from a police cruiser. When a supervisor displays this type of behavior suggest acceptable behavior and a possible unwritten policy for subordinate officers. This type of behavior should not be condoned by Kenton County command personnel. If this is not a violation of Kenton County Police department policy to play a radio in a squad with racial language, then a reasonable and prudent person could have the impression this was a department wide custom or practice of racism and or racial profiling. (RE 73, Response to Motion for Summary Judgment, Exhibit T. Marsh Affidavit)

The Officers' testimony and reports are riddled with inconsistencies. Despite the Taser report indicating no pause between some tasing cycles Officer Sandel claims that he and the other officers had to wait five seconds between tasing shots. (RE 73, Sandel Trial Testimony p. 41) At Terry's criminal trial and in his deposition Officer Fultz testified that he was sure he told Terry that he was under arrest for disorderly conduct, however, during his first interview with Officer Gilvin only a few hours after the beating he was unclear whether or not he informed Terry that he was under arrest, "it's kind of a blur I believe I told him he was under arrest." (RE 73, Response, Fultz Trial Transcript p. 43; RE 60, Gilvin Interview with Fultz p. 3) Terry completely denies ever being told that he was under arrest and Officer Sandel admits to never informing Terry that he was being placed under arrest. (RE 57, Exhibit 3 Williams Depo. p. 45-46; Exhibit 9 Sandel Depo p. 10) The Officer's reports and testimony repeatedly claim that Terry *only* yelled "fight, fight, fight" despite video evidence of Terry's plea of "PLEASE STOP". (RE 60, Sandel Report p. 2, Video 3:10)

Officer Sandel completely lied during the grand jury proceedings on Terry's criminal charges. Officer Sandel testified that when he approached Terry he had his Taser hidden behind his back, a direct contradiction to the video evidence and his deposition testimony. (RE 73, Exhibit O: Grand Jury Testimony p. 4) Additionally, he testified that cars "veer[ed] off the road" in an attempt not to hit anyone, the video evidence shows no cars in close enough proximity to have "veered" off the road and no mention of this was made in any reports and no further evidence can be found of any accidents. (*Id.* 5) Further, he testified

that while Terry was in the emergency strip that he “reach[ed] up and just pull[ed] the wires out of the gun” after being tased, not surprisingly no video evidence exists to corroborate this. (*Id.* p. 6) Officer Fultz also testified that Terry *never* obeyed the commands of the officers, in direct contradiction to his statements to Gilvin, his deposition, and his report. (*Id.* p. 7, RE 57, Exhibit 5, Sandel Depo). Finally, despite reports that Terry admitted to using “blow” when asked by a juror whether or not he was drug tested at the hospital, Officer Sandel claimed that the Officers were leaning towards LSD use but that “the hospital didn’t check for any of it.” (*Id.* p. 9, RE 57, Exhibit 7, Depo of Fultz; RE 60, Exhibit Gilvin Interview with Fultz p. 11)

Officer Wilkins was unaware that the beating was recorded by Officer Sandel’s cruiser cam until shortly before his deposition; this may explain why his version of events in his police report is largely a lie. (RE 57, Exhibit Wilkins Deposition; RE 60, Exhibit Wilkins Report) Officer Wilkins report states that Terry was kicking the officers, assaulting the officers, and that he was swinging the handcuff attached to one wrist at the officers like a weapon. (*Id.*) He also wrote that none of his strikes “landed on the subject”. (*Id.*) After watching the cruiser video shortly before his deposition Officer Wilkins made little to no mention of the above fabrications. (RE 57, Exhibit 8, Wilkins Depo)

Officer Fultz was no more consistent than Officer Wilkins, or Sandel. At Terry’s criminal trial Fultz testified that he had no idea how Terry got the gash on his head; however, during his deposition and interview with Gilvin he was sure that Terry had fallen against

the concrete median. (RE 73, Response, Fultz Trial Testimony p. 109; RE 60, Gilvin Interview p. 8) Terry remembers that his head started to bleed after he was hit in the head with a nightstick. (RE 57, Exhibit 3 Williams Depo p. 38, 54) Officer Fultz made no mention of striking Terry anywhere other than his legs or buttocks in his interview with Officer Gilvin despite Terry's whip marks and injuries indicating that he was repeatedly struck across his arms, legs, back and head. (RE 60 Exhibit, Gilvin Interview p. 6) Officer Fultz also informed Gilvin that Terry admitted to using "blow" even though the drug screen at the hospital was completely clean. (*Id.* p. 11).

Despite video evidence and later contradictions the officers tried to cover by fabricating acts of aggression by Terry. Officer Fultz claimed during his interview with Gilvin that Terry charged him; Officer Sandel in his interview with Gilvin claimed that Terry had pushed Officer Fultz and had also reached out for him. Officer Wilkins repeatedly claimed that Terry was aggressive and would get up, clench his fist and get in a "fighting stance". (RE 60 Exhibits Gilvin Interview with Fultz p. 3, 7; Gilvin Interview with Sandel p. 3; Sandel Arrest Report; Gilvin Interview Wilkin p 4) The Officers later made repeated admissions that Terry was not aggressive, Officer Sandel testified at the criminal trial that, "[h]e turned and faced us once or twice, but he was all passive...[h]e never actually threw a punch or anything." (RE 73, Response, Sandel Trial Testimony pg. 53) Officer Sandel admits that Terry never used force towards him, and he never saw Terry use it against others. (*Id.*, p. 89) Additionally the video evidence completely forecloses any claims that Terry was aggressive or pushed, "reached" or clinched his fist in a fighting stance. (RE 9; Video)

The Appellants rely heavily on the fact that the “in-house” use of force investigation by Gilvin cleared the Officers. (RE 57, Exhibit 4, Use of Force Investigation) The report is largely incomplete and solely adopt the contested Officers’ version of events.(*Id.*) The report fails to acknowledge that Officer Sandel exited the cruiser with his stun-gun already drawn. (*Id.*) The report states that Terry was told by Officer Fultz that he was under arrest without any acknowledgment that Terry completely denies he was told that he was under arrest and that Officer Fultz’s own statements are inconsistent.(*Id.*) The report cursorily disposes of the fact that Terry was tased thirty-seven times and makes zero reference that the Officers failed to allow compliance between tasing cycles. (*Id.*) Additionally, the report states that the tasing had minimal effects, despite the fact that Terry’s body is seen on the video repeatedly going rigid.(*Id.*; RE 9 Video) Further, it makes no mention that a large portion of the beating and tasing occurred while Terry lay in a defensive position on the ground.(*Id.*)

Additionally, the report states that the Officer’s were striking Terry in the thigh area even though the video, the pictures and his injuries clearly show that he was beaten across his arms, chest, back and head. (*Id.*; RE 73 Exhibit Q). It makes no mention of the racial radio broadcast. (*Id.*; RE 9 Video). It makes no mention of the lynching reference.(*Id.*) Finally, the report downplays Terry’s extreme injuries, stating that, “Mr. Williams injuries were mostly to his arms and legs...”(*Id.* p. 3) The report makes little to no mention of Terry’s acute kidney failure nor his dialysis which was caused by the beating and tasing.(RE 57, Response Exhibit Medical Records) And despite visiting Terry just an hour after his beating while he

was in the hospital the report makes no mention of his condition, his inability to physically finish the interview and his repeated pleas of, "they beat me." (RE 60, Exhibit Gilvin Interview with Terry #1) Although, the report repeatedly admits that Mr. Williams complied with police orders it clears the Officers of any and all wrongdoing.

Despite the Officers contentions and the lackluster use-of-force reports, expert Ken Katsaris reached quite a different conclusion about the Officer's actions. (RE 73; Response Exhibit U, Expert) Mr. Katsaris has been and is a law enforcement officer, instructor and consultant with over thirty years of experience. (*Id.*) In his expert opinion Mr. Katsaris concluded that the escalation of force by the Officers readily became excessive and objectively unreasonable. (*Id.*) Mr. Katsaris continues that Terry was both complying and cooperating. (*Id.*) He states the proper course of action when dealing with someone who appears to be experiencing an episode of mental illness or responding to drugs or alcohol use, requires a calm, deliberate, approach where the subject is kept calm with explanations that the officer is there to help. (*Id.*) Mr. Katsaris states,

[p]ointing a firearm, or in this case a TASER exacerbates and escalates the situation, and does not act to calm the individual. Sandel, however, not only approaches presenting his TASER, he testified "I don't care what Mr. Williams had to say, he was being removed from the interstate." It was this exact philosophy which is contrary to accepted police practices...[w]ith the addition of Wilkins, the three Officers had a clear physical advantage

for safely controlling Williams without escalation to numerous baton strikes, application of OC spray, and repeated TASER applications...This escalation of force, to the unnecessary, and clearly objectively unreasonable level, was against a man who is largely on the ground and not being assaultive or aggressive towards the officers. (*Id.*)

Expert James F. Marsh, a Chicago police officer and trainer testified that Officer Sandel's positioning of his squad car facing the wrong way on interstate I-75 created a danger to all parties concerned. (RE 73, Exhibit T) He also testified that,

Williams displayed no assaultive behavior or intent to flee therefore [he had] no need to point his electronic control weapon at Williams...[t]he video cam documented Williams was a victim of excessive force in the presence of Officer Sandel...[t]hey participated in the excessive force, failed to intervene and allowed it to continue. The squad video cam did not capture any assaultive or aggressive actions by Williams towards any officers to justify the repeated baton strikes and/or Taser deployment. William's actions on the video towards the excessive force, were passive/active resistance and/or evasive movement to avoid injury. (*Id.*)

Officer Sandel has a history of being aggressive and using excessive force against minorities. (RE 73, Response, Exhibit CC Personnel File) Officer Sandel's personnel file includes comments that he is an "aggressive" officer and that multiple times he has been heard making judgmental comments about

suspects, which caused the suspects to be more hostile. (*Id.*) Additionally, his file notes that he has a tendency to stir up situations with suspects and that he often makes situations worse instead of diffusing them. (*Id.*) In 1998 Officer Sandel was alleged to have used excessive force against a Hispanic suspect. (*Id.*) This conduct was reported by a fellow Officer. (*Id.*) As a result Officer Sandel was referred to Employee Assistance Program who referred him to forensic psychologist for counseling. (*Id.*) Ironically, despite tasing Terry mercilessly over and over again, Officer Sandel refused to be tased even once in TASER training because he was required to sign a release not to sue if he died or was injured. (RE 73, Exhibit Personnel Files, RE 57 Sandel Depo. p 48)

Officer Fultz also has a history of being aggressive and has no record of being trained to properly use a Taser. (RE 73, Exhibit Issues Personnel Files) In 2001 Officer Fultz asked to return to patrol because he didn't have the opportunity to arrest people as often as he liked. (*Id.*) Officer Fultz's file contained the following descriptions of his conduct: that he is aggressive, needs to gear down self-induced activity, needs to narrow his focus, and fails to look for non-arrest alternatives. (*Id.*) In 1998 Officer Fultz's file noted that he was failing to get along with his co-workers and his supervisor. (*Id.*)

The actions of the Officers were in contradiction to the TASER International, Taser Certification lesson plan. (RE 73, Response to Motion for Summary Judgment, Exhibit Z) TASER International warns of repeated TASER device applications. (*Id.*) TASER writes,

avoid extended or repeated TASER device applications where practicable, the application of the TASER device is a physically stressful event, especially when dealing with persons in a health crisis such as excited delirium, it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible...TASER applications directly across the chest may cause sufficient muscle contractions to impair normal breathing patterns. While this is not a significant concern for short (5 sec) exposure, it may be a more relevant concern for extended duration or repeated applications. If circumstances require extended duration or repeated discharges, the operator should take care to observe the breathing patterns of the subject and provide *breaks* in the TASER stimulation when practicable. (*Id.*, emphasis added.)

The three officers involved in this action mercilessly and sadistically beat Terry Jr. without justification. Terry was tased over thirty-seven times; he was beaten with nightsticks and repeatedly sprayed with chemical irritants. His head was split open, his body was covered in road rash and whip marks, his fingers were bent completely back, and ultimately his kidneys shut down. The physical injuries he suffered were severe, permanent and debilitating, the mental scars will likely never heal. We cannot license police officers to violently beat and repeatedly tase individuals merely because they remain unhandcuffed, or they don't take a reference to their lynching, a knee to back of the head, or a wrenching of the arm and shoulder, without lying perfectly still.

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