No. 12-1117

In The Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her Mother Samantha Rickard as Parent and Next Friend,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Sixth Circuit properly affirmed the district court's denial of qualified immunity to police officers who chased a vehicle containing an unarmed man and woman from West Memphis, Arkansas across the Mississippi River bridge into Memphis, Tennessee and then killed both occupants with a total of fifteen gunshots fired into the vehicle (1) when there are disputes as to whether aggravated assaults claimed by the officers occurred and they do not show on the video (2) when there are disputes as to whether the officers reasonably perceived threats to themselves or others, and (3) when there are disputes as to whether their actions were ultimately objectively reasonable given that the video evidence demonstrates that the first three shots were fired by an officer from the passenger side of the vehicle, and the remaining twelve gunshots were fired by two other officers as the vehicle was passing and had passed the officers and was continuing to drive away from them down the street with no one in front of the vehicle (all of which is plainly demonstrated on the video).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Whitne Rickard respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, issued on November 14, 2012, reproduced in the Appendix to the Petition ("Pet. App.").

Ms. Rickard respectfully provides this Brief in Opposition to the Petitioners' Petition pursuant to the instructions contained in a letter received from William K. Suter, Clerk, dated May 8, 2013 directing this Court's request for a response in this case on or before June 7, 2013.

STATEMENT OF THE CASE

This is a case about the shooting death of Donald Rickard and Kelly Allen, two occupants of a car who died in July of 2004, after running from police in West Memphis, Arkansas.[1] At the end of a high speed chase across the Interstate 40 bridge from Arkansas

[1] Pursuant to Sup. Ct. R. 15.3, Ms. Rickard as Respondent respectfully notes a perceived factual misstatement presented by Petitioners, which presumably was not intentional. Specifically, at page 7 of their Petition, Petitioners state that Officer Forthman, who commenced the pursuit, was "joined by officers in four other vehicles" in pursuing Rickard. The actual number of other vehicles should be five, one each for Officers Plumhoff, Ellis, Gardner, Galtelli, and Evans (in addition to Forthman).

into Memphis, Tennessee, the driver of the vehicle, Donald Rickard, spun out and was partially cornered, but backed up, turned around and headed away from the pursuing officers eastbound on Jackson Avenue in Memphis. Three different officers fired a total of fifteen gunshots at or into the vehicle. Ms. Kelly Allen was a passenger in the vehicle. Both occupants of the vehicle, which crashed into a house shortly after the shooting, were killed. This lawsuit followed. The case was initially filed in state court in Tennessee and was then removed by the Petitioners to the district court for the Western District of Tennessee.

This case was stayed for a period of years (while the State of Tennessee pursued criminal charges against Officers Plumhoff, Gardner and Galtelli and those charges resulted in appellate proceedings). Two of the involved officers (Plumhoff and Forthman) were deposed in August of 2009, and the Petitioners filed their motion for summary judgment (the denial of which prompted the Petitioners' interlocutory appeal) on or about November 30, 2009. Although many claims and many defenses were raised and considered, principally at issue is the reasonableness of the pursuit itself and particularly the use of force in the form of fifteen gunshots at the vehicle. The issues were extensively briefed in the district court, and the district court issued its ruling on January 20, 2011. In its Order (Pet. App. at 17-62), the district court made a series of findings and rulings.

The findings and rulings of the district court

First, as pertinent to the Petitioners' appeal, the district court found that the Rickard excessive force claims were properly analyzed under the Fourth Amendment. Although the district court noted that there is a certain amount of built-in deference to the officers' on-the-scene judgment, the undisputed facts do not support the defense arguments that the officers' actions were objectively reasonable. The court noted that the first [three] shots were fired at the passenger side of the vehicle and the remaining [twelve] shots were fired while the vehicle was passing the officers or after it had already passed them. The court found that the officers did not believe the suspects were armed, the severity of the underlying crime was low, and there was little threat posed to the officers. The court added that the mere act of fleeing alone was insufficient to support a finding that deadly force was objectively reasonable. The court also found that whether the claimed aggravated assaults (claimed by the officers) occurred is disputed. The court observed that there was no contact between the vehicles on I-40 and the dashboard camera video shows only lane changes and swerving, and it is difficult to tell from the video what the proximity of the vehicles was to each other. The court further found that the conduct of the officers was not objectively reasonable, as the officers, who claimed Rickard

drove dangerously, could also be found to have driven dangerously under the circumstances.[2]

The district court noted, per this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), that it could adopt the version of the facts as shown on the video. From the court's observation of the video, the vehicles changed lanes and swerved. The court concluded that the aggravated assault claims made by the officers were not objectively reasonable, adding that Donald Rickard resisted arrest, but it was not clear that his evasion of arrest was dangerous enough to justify deadly force. Therefore, the court found that the use of deadly force was not objectively reasonable in this case and a constitutional violation occurred, as Donald Rickard had a clearly established right to be free from excessive force.

[2] The characterization of the Petitioners at page 7 of their Petition that Rickard sped "recklessly" through city streets is that of the Petitioners and not the court. The same is true of the Petitioners' characterization at page 10, FN.4 of their Petition of Mr. Rickard's driving as "speeding away recklessly" as he attempted to flee while the officers' final twelve gunshots were fired into the vehicle. Despite the statements of the Petitioners that they have accepted Ms. Rickard's version of the facts for purposes of the appeal, such characterizations demonstrate that Petitioners in reality have taken issue with several facts and have presented subjective perception as though it were fact in many instances, as they continue to do with this Court, even while attempting to provide grudging lip service to the idea that they have accepted Ms. Rickard's version of the facts for purposes of this appeal to meet a legal requirement.

In its analysis of the use of deadly force based upon *Tennessee v. Garner*, 471 U.S. 1 (1985), the district court duly noted the balance to be struck between the competing objectives of the government's interest in effective law enforcement and the unmatched intrusiveness of a seizure by means of deadly force. The district court quoted *Tennessee v. Garner* for the proposition that it is not better that all suspects die than that they escape. The district court noted that the intrusiveness of a seizure by means of deadly force is unmatched. Pet. App. at 35. The district court further found it to have been clearly established that Donald Rickard had a right to be free from excessive force. Pet. App. at 41-42. Therefore, the fundamental backdrop against which the district court found genuine issues of material fact can be summarized fairly succinctly: (1) There are disputes as to whether the claimed aggravated assaults occurred, and they do not show on the video; (2) there are disputes as to whether the officers reasonably perceived threats to themselves or others; and (3) there are disputes as to whether their actions ultimately were objectively reasonable. The district court properly took into account the fact that *fifteen total gunshots* were fired. The first three were fired by Sgt. Plumhoff while he was to the right of the Rickard vehicle on the passenger side (which is plainly demonstrated on the Unit 279 video), and the remaining twelve gunshots were fired by Officers Gardner and Galtelli *as the vehicle was passing and had passed the officers and was continuing to drive*

away from them down the street with no one in front of the vehicle.

These are the findings and rulings the Sixth Circuit affirmed. Pet. App. at 11-12.

REASONS FOR DENYING THE PETITION

Respectfully, this case does not present suitable issues for this Court's exercise of its discretion to accept an appeal. Some key arguments presented to this Court by Petitioners now were not presented to the Sixth Circuit. Additionally, notwithstanding the arguments of the Petitioners, the Sixth Circuit's analysis of the qualified immunity issues presented in this case does not represent a departure from appropriate analysis for this type of case. Fundamentally, decisions of the various federal circuits and indeed this Court itself make clear that the analysis of qualified immunity is necessarily case-dependent and fact-specific. The process over time has turned into a comparison of the facts and circumstances of different cases, with patterns that emerge but not necessarily ironclad rules.

However, the ultimate effect of the Petitioners' arguments is to advocate for a "one-size-fits-all" rule (an approach this Court rejected in *Scott v. Harris*), specifically to ask this Court to endorse the notion that a large number of close-range gunshots (fifteen

in total) is justified against an unarmed fleeing suspect *because the suspect has fled.*

ARGUMENT

The Sixth Circuit Court of Appeals did not err in affirming the district court's denial of qualified immunity. It did not err in its methodology, and it did not err in finding that it could not deem the force used in this case to be reasonable as a matter of law.

I. The Sixth Circuit did not err in its methodology of denying qualified immunity.

The Petitioners contend that the Sixth Circuit erred in its statement that it could not conclude that the force in this case was reasonable as a matter of law, as opposed to prohibited by clearly established law. Pet. at 11. They proceed to devote several pages in their Petition to arguments that the Sixth Circuit inverted qualified immunity analysis by failing to address whether the right to be free from excessive force was clearly established in this case, and argue that the Sixth Circuit skipped such a step (Pet. at 15) in violation of the "rigid order of battle" of *Saucier v. Katz*, 533 U.S. 194 (2001).

Respectfully, this is a new argument of the Petitioners, not previously made to the Sixth Circuit, and should therefore be deemed waived. On that basis alone the Petition should be denied. Moreover, the

effect of their argument is to rely upon the "rigid order of battle" formulation of this Court's opinion in *Saucier v. Katz*. However, they concede, as they must, the "relaxation" of *Saucier*'s "rigid order of battle" in *Pearson v. Callahan*, 555 U.S. 223 (2009), in which this Court indicated that the "rigid order of battle" should not be regarded as an inflexible requirement (noting that there are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases).

Again, as an important threshold matter, this specific argument was not presented to the Sixth Circuit itself, either in the Petition for Rehearing filed by the Petitioners in the Sixth Circuit on October 19, 2012 (Respondent's Appendix A), or in their Modified Petition for Rehearing in the Sixth Circuit filed on November 15, 2012 (Respondent's Appendix B). Despite two occasions in which the Petitioners could have presented such argument directly to the Sixth Circuit, the Sixth Circuit was not called upon by Petitioners to address the alleged analytical deficiency the Petitioners now contend this Court should address in its discretion.[3] Consequently, this entire

[3] The same is true of Petitioners' reliance upon cases such as *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), discussed at page 18 of their Petition, and *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). These cases were not argued to the Sixth Circuit by Petitioners.

line of argument should be deemed waived, and should be ample basis alone for this Court's exercise of its clear discretion to deny the Petition.

Additionally, since this Court decided in *Pearson v. Callahan* not to require *Saucier*'s "rigid order of battle" as an absolute, this issue would not provide a proper legal basis for this Court to review this case. Stated more simply, beyond the fact that it was not timely presented to the Sixth Circuit, there would be no precedential novelty to determining that *Saucier*'s rigid order of battle is not an absolute requirement of analyzing qualified immunity defenses. The Petition should therefore be denied on either of these bases.

However, in the alternative, responding to this new position of the Petitioners out of an abundance of caution, Ms. Rickard provides the following. The Petitioners' arguments fail to account for the overall procedural and substantive backdrop of the case, specifically the manner in which the case came to the Sixth Circuit and the rulings the Sixth Circuit affirmed. What the Sixth Circuit was affirming was not just a series of findings and analysis of the issue of whether the force at issue was excessive, but also a specific determination by the district court that the right to be free from excessive force was clearly established.

A brief procedural summary of the case is in order. The Petitioners (defendants below) moved for summary judgment and the district court granted summary judgment in certain respects (which are not

issue for purposes of the instant Petition) and denied summary judgment in part. The part of the ruling at issue for purposes of this appeal is the district court's denial of qualified immunity to the officers. In its ruling, the district court conducted extensive analysis of the issue of whether the Petitioners were entitled to qualified immunity. Pet. App. at 30-42. In denying qualified immunity to the officers, the district court found that a constitutional violation occurred. Pet. App. at 32-41. The district court also found it to be clearly established that Donald Rickard had a right to be free from excessive force. Pet. App. at 41-42. Therefore, qualified immunity was denied to the officers.

It was this ruling that the Sixth Circuit affirmed on appeal, but only after the Sixth Circuit had initially first dismissed the Petitioners' appeal based upon this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995) and had then vacated its own order dismissing the Petitioners' appeal and had granted the Petitioners a merits panel appeal. *See* Pet. App. at 7. Ms. Rickard had moved to dismiss the appeal on the basis that the interlocutory appeal of the officers was directed to disagreements with the district court's review of the facts and the district court's finding of the existence of factual disputes, which were questions of evidentiary sufficiency foreclosed by this Court's opinions in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Crawford El v. Britton*, 523 U.S. 574, 595 (1998) (declining to craft an exception to settled rules of interlocutory appellate jurisdiction and rejecting the argument that the policies behind the immunity

defense justify interlocutory appeals on questions of evidentiary sufficiency).

Although the Sixth Circuit initially dismissed the Petitioners' appeal, the Petitioners sought a panel hearing and were granted the merits panel appeal they sought and the Sixth Circuit reviewed the findings of the district judge and the video evidence. The Sixth Circuit also indicated, in a footnote in its November 2012 opinion, that the district court had made a number of findings of disputed fact which the Sixth Circuit was not repeating in its opinion, and which it could not say were "blatantly and demonstrably false." Pet. App. at 10, FN.3. This was a clear reference to a principle upon which the Sixth Circuit relied from this Court's opinion in *Scott*, enabling a reviewing court to rely on the video evidence in cases such as the instant case in assessing a qualified immunity defense.

Ultimately then, the Sixth Circuit, having initially dismissed this interlocutory appeal pursuant to *Johnson v. Jones*, indicated the following about its ruling:

> Usually, when we review an appeal from a denial of qualified immunity, we dismiss the appeal for lack of jurisdiction if the immunity was denied on the basis of genuine factual disputes. *Johnson, 515 U.S. at 307*. After *Scott*, however, it would appear that an interlocutory appeal of a denial of qualified immunity which makes a good faith *Scott* claim requires us to review the record. *Johnson,*

> *515 U.S. at 319* ("we concede that a court of appeals may have to undertake a cumbersome review of the record"). After this review if we reach the same conclusion as did the district judge, as we do here, it would seem that what we are doing is affirming that judgment. Whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same.

Pet. App. at 11-12.

In light of the procedural history of the case, the logic of *Johnson v. Jones*, and the district court findings the Sixth Circuit affirmed in its opinion, the belated arguments of the Petitioners fail. The Sixth Circuit affirmed a ruling that not only found a violation of constitutional rights, but also that the right to be free from excessive force was clearly established. That much has been clear since this Court's opinion in *Tennessee v. Garner*, 471 U.S. 1 (1985) (indicating it is constitutionally unreasonable to shoot an unarmed suspect dead from behind in order to prevent escape) and this Court's opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (approving the firing of one shot at a suspect attempting to flee in a vehicle as within the "hazy border" between acceptable and excessive force) did not alter that in the context of this case. Stated more simply, if *Brosseau v. Haugen* (decided in December of 2004, which was also after the events of this case, but is nevertheless argued by the Petitioners, *e.g.*, at page 21 of their Petition) found one gunshot to be in the "hazy border" between

acceptable and excessive force, *Brosseau* seemingly could not be authority for a determination that *fifteen* shots would be reasonable as a matter of law; yet, in effect, Petitioners argue that fifteen shots should be held reasonable as a matter of law, and therefore not a violation of clearly established law.

The Petitioners also contend that the Sixth Circuit erred in analyzing and distinguishing this Court's opinion in *Scott v. Harris* specifically because this Court's decision in *Scott* (2007) post-dated the events of this case (2004). The Petitioners contend at page 16 of their Petition that instead of focusing on the law at the time of Petitioners' conduct, "the Sixth Circuit chose instead to minutely examine *Scott*." Respectfully, this argument is misplaced for several reasons. First, the specific argument that the Sixth Circuit was in error for analyzing *Scott* because it post-dated the events of this case is another argument that was not presented to the Sixth Circuit by the Petitioners in either of their two Petitions for Rehearing, and as a new argument presented for the first time to this Court it should be deemed waived. Second, the right to be free from excessive force was clearly established before *Scott*. The district court so found, and it was this finding that the Sixth Circuit affirmed. This Court's opinion in *Tennessee v. Garner* clearly established the right to be free from excessive force, as it is unreasonable to seize an unarmed suspect by shooting him dead. 471 U.S. at 11. Third, as the opinion of the Sixth Circuit below notes, the Petitioners themselves urged *Scott* in the Sixth

Circuit. They did so in the district court as well, they urged *Scott* on its substance in their two Petitions for Rehearing in the Sixth Circuit, and their Petition reveals that they continue to urge *Scott* before this Court, even as they contend that it was error for *Scott* to have been addressed and distinguished by the Sixth Circuit.

This point is addressed additionally below because of the extent to which Petitioners have sought to rely on *Scott*, although they now claim the Sixth Circuit erred in considering *Scott*. However, regardless of the Petitioners' belated arguments about the timing of *Scott*, it was clearly established long before 2004 and long before *Scott* that under the Fourth Amendment, where a suspect poses no immediate threat to the officers and to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. *Tennessee v. Garner*.[4] This was a clearly established prohibition on the use of deadly force to stop an unarmed fleeing suspect, particularly the degree of force used in this case.

[4] Additionally, because the Petitioners attempt to rely upon Eighth Circuit precedent for a geographical argument that their conduct should be judged by Eighth Circuit precedent rather than the Sixth Circuit, it should be noted that the Eighth Circuit indicated in another alleged excessive force case involving the City of West Memphis and Officer Jimmy Evans, as Defendants, among others, that the right to be free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures. *Nance, et al. v. Sammis, et al.*, 586 F.3d 604, 611 (8th Cir. 2009), *cert. den.*, 131 S. Ct. 69 (2010).

II. The Sixth Circuit did not err in denying qualified immunity by finding the use of force was not reasonable as a matter of law.

As their second category of claimed error, the Petitioners contend that the Sixth Circuit erred in denying qualified immunity by finding the force was not reasonable as a matter of law. They specifically contend at page 23 of their Petition that the Sixth Circuit should have found the force to have *been* reasonable as a matter of law. Their arguments depend in large measure upon *Scott*, which they urged repeatedly in the Sixth Circuit, and continue to urge to this Court for its substance, even while they now insist the Sixth Circuit was in error to address it and distinguish it.

They have specifically relied upon *Scott* not only for the proposition that a court can review video evidence of events in evaluating a qualified immunity defense, but also to argue per *Scott* that their actions were permissible. Indeed, *Scott* was a significant reason for their urging the district court and the Sixth Circuit to review the video evidence in order to attempt to transfer *Scott*'s acceptance of the conduct at issue in *Scott* to this case. They even go so far in their Petition as to take a quotation from *Scott* and substitute Mr. Rickard's name in place of the suspect in *Scott* as though *Scott* can be applied to this case for its substance (*see* Pet. at 24). Therefore, their assertion that the Sixth Circuit Court of Appeals was in error for its resort to *Scott* should begin from a position of some skepticism.

The Petitioners state to this Court that the force at issue in this case is "similar to the force ruled permissible" in this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007). Pet. at i. Respectfully, that statement brings one of the single most important distinctions into focus: *Scott* involved a vehicular ramming and approved the ramming under the facts in that case.

However, this case, unlike *Scott*, involved gunfire – fifteen total shots. Therefore, the Petitioners' effort to obtain unilateral advantage by extrapolating what Petitioners are bound to perceive as the "good" from *Scott*, while ignoring what they must perceive as the "bad," must fail based upon the observations contained in this Court's *Scott* opinion itself: a shooting is quite different from a chase. It is also very important to emphasize (regrettably, perhaps to the point of repetition) that although events began with a chase, what occurred in this case was not the firing of just one shot, as was found to be within the "hazy border between excessive and acceptable force" in *Brosseau v. Haugen*, 543 U.S. 194 (2004). By noteworthy contrast in this case, officers fired *a total of fifteen gunshots at the vehicle*, most of which occurred as the vehicle was passing or had already gone past the officers. This was duly observed by the district court and the Sixth Circuit Court of Appeals. Pet. App. at 5-6, and 23-24. On this note, it is significant that the Petitioners nevertheless urge this Court, per *Brosseau*, to reverse the holding of the court below summarily, as though *Brosseau* can be transferred to

the facts of this case to justify the shooting in this case dispositively. Pet. at 6. As a matter of degree, Ms. Rickard respectfully submits that if one shot to stop a suspect from fleeing in a vehicle is within the "hazy border" between excessive and acceptable force, the firing of fifteen total shots at a fleeing vehicle should not be the basis for a summary reversal of a holding denying qualified immunity.

A. This Court's opinion in *Scott v. Harris* approved a police officer's ramming of a suspect vehicle but also distinguished ramming a vehicle from shooting a suspect.

In *Scott v. Harris*, this Court addressed the permissibility of ramming a suspect's vehicle from behind under the Fourth Amendment. This Court found, under the facts in that case, that the ramming did not violate the Fourth Amendment. As what may be one of the most significant "takeaway points" from the opinion, this Court noted the value of a videotape capturing the events in question in order to review the propriety of the actions of the police. 550 U.S. at 378. It is also very important to note that Petitioners are urging to this Court that the Sixth Circuit was in error for finding factual distinctions between this case and *Scott*, when the Petitioners themselves have argued *Scott* for the value the Petitioners perceive in the holding of *Scott* that it was constitutionally permissible for the police to ram the suspect's vehicle. However, *Scott* is a police "ramming" case and not a

police "shooting" case. Although both *Scott* and this case did have a chase in common, the force ultimately at issue in this case is not a ramming – it is gunfire. Because this case is a shooting case, the district court (appropriately) focused on *Tennessee v. Garner*, and that led to the findings which the Sixth Circuit ultimately affirmed.

This Court itself has noted the significance of the difference between ramming and shooting. In *Scott v. Harris*, this Court specifically rejected efforts to transfer the principles of *Tennessee v. Garner* to the fact pattern in *Scott* (again, a ramming):

> Whatever *Garner* said about the factors that *might* have justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person."

Scott v. Harris, 550 U.S. at 383, quoting *Adams v. St. Lucie County Sheriff's Department*, 962 F.2d 1563, 1577 (11th Cir. 1992) (italics emphasis in original).

This Court added that although the efforts of the Respondent in *Scott v. Harris* to craft an easy-to-apply legal test in the Fourth Amendment context were admirable (which is also ultimately what the Petitioners seek to do in this case), "in the end we must still slosh our way through the factbound morass of

'reasonableness.'" *Scott*, 550 U.S. at 383. This Court also noted that in determining the reasonableness of a Fourth Amendment seizure, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott*, 550 U.S. at 383. The Court noted that the Respondent in *Scott* posed a threat to others and to officers, and a risk of injury or death to himself, "though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head [citation to *Tennessee v. Garner* omitted], or pulling alongside a fleeing motorist's car and shooting the motorist." *Scott*, 550 U.S. at 384 (italics emphasis in original).

It is significant to note that for that particular proposition (the near certainty of death posed by shooting a motorist from alongside the vehicle), this Court cited *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). In *Vaughan*, the Eleventh Circuit affirmed the denial of qualified immunity to an officer who fired four shots at a vehicle whose driver was not submitting to a "rolling roadblock" on an Atlanta area interstate highway. Citing and applying *Tennessee v. Garner*, the Eleventh Circuit in *Vaughan* found that a reasonable jury could find that the officer acted unreasonably. 343 F.3d 1323, 1329-1330. The Eleventh Circuit specifically noted that a reasonable officer would have known that firing into the cab of a pickup truck at approximately 80 miles per hour on an interstate would transform the risk of an accident on the highway into a virtual certainty. *Id.* at

1332. Therefore, qualified immunity was denied in *Vaughan*.

B. The Petitioners' discussion of *Walker v. Davis* necessitates clarification and ultimately brings key factual distinctions between vehicular "ramming" cases and "shooting" cases into sharper focus, ultimately helping to show that this Court should not grant this Petition.

In support of their argument that the Sixth Circuit was in error for distinguishing *Scott v. Harris* because it was decided three years after the force utilized in this case, the Petitioners cite the case of *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), as an example of a Sixth Circuit case distinguishing *Scott* to deny qualified immunity for pre-2007 conduct. Specifically, the Petitioners state that the dissent in *Walker* indicates that the "Sixth Circuit stands alone in this analysis," as though the Sixth Circuit acknowledges a pattern of error in its cases. Petition, at i.

Respectfully, no such statement appears in the *Walker* opinion. Therefore, the Petitioners' efforts to fasten the *Walker* dissent to this case as if *Walker* contains some sort of admission by the Sixth Circuit that it has engaged in a pattern of "rogue" or "miscreant" qualified immunity analysis must be viewed as a significant stretch, particularly when the Petitioners attempt to apply it to the facts of this case.

There are several reasons for this, and those reasons help bring important distinctions into focus. First, like *Scott v. Harris* but unlike this case, the force at issue in the *Walker* case involved a *ramming* of a suspect's vehicle. Again, at the risk of unnecessary repetition, although this case began with a chase, the force at issue is not ramming by police, but police gunfire: fifteen total shots at close range. The district court in *Walker* denied the officers summary judgment, indicating based upon *Tennessee v. Garner* that it was clearly established (indeed "settled law for a generation") under the Fourth Amendment that where a suspect poses no immediate threat to the officer and to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. 649 F.3d 502, 503.

The dissent in *Walker* did address a series of ***ramming*** cases from three other circuits, affirming the grant of qualified immunity. The dissent also addressed, from "the other end of the spectrum," three other opinions of the Sixth Circuit, which Petitioners reference in a preliminary portion preceding their main body of argument at page 5 of their Petition referring to the difficulty of determining qualified immunity in deadly force cases with liability turning on the Fourth Amendment's reasonableness test. Those cases are *Murray-Ruhl v. Passinault*, 246 Fed.Appx. 338, 2007 U.S. Dist. LEXIS 21573 (6th Cir. August 29, 2007) (a later version of which is *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011)) and *Smith v. Kim*, 70 Fed.Appx. 818, 2003 U.S. App. LEXIS 14559

(6th Cir. July 17, 2003). The Petitioners urge these cases as being part of a pattern of "repeated error" by the Sixth Circuit.

An additional case not mentioned by the Petitioners but addressed by the Sixth Circuit in *Walker* is *Kirby v. Duva*, 530 F.3d 475 (6th Cir. 2008). *Smith v. Kim* involved a shooting, but not in conjunction with a vehicular chase, as occurred in this case. However, *Kirby* and *Murray-Ruhl* did specifically involve officers shooting at fleeing motorists rather than ramming, and are therefore worthy of additional discussion. The *Walker* dissent noted that in those [shooting] cases the Sixth Circuit had held that it was clearly established at the time of the shootings under *Tennessee v. Garner* that police officers may not fire at non-dangerous fleeing felons.

In *Kirby*, the suspect was pulled over by police but attempted to flee, using his car. Unarmed, he was shot multiple times by officers on the scene, and died. Closely paralleling the number of shots fired in this case, the opinion indicates a total number of thirteen shots, with Kirby being hit by nine of those shots. 530 F.3d 475, 480. Apparently, there was no video evidence available. Officers and independent witnesses gave conflicting accounts of whether the vehicle was moving in a threatening manner toward officers. *Id.* at 478-480. The district court found that a reasonable jury could find excessive force had been used and that Kirby had a clearly established right to be free from excessive force. On appeal to the Sixth Circuit, the officers argued that there was no violation of a clearly

established right because the officers would have feared for their safety. In reliance principally upon *Tennessee v. Garner*, the Sixth Circuit found that the Plaintiffs' version of events supported a holding that a Fourth Amendment violation had occurred, and that the right to be free from such force was clearly established. 530 F.3d 475, 482-484.

In *Murray-Ruhl v. Passinault*, 246 Fed.Appx. 338, 2007 U.S. Dist. LEXIS 21573 (6th Cir. August 29, 2007) summary judgment was affirmed for one officer (Jenkins), but qualified immunity was denied to another officer (Passinault, who fired a total of twelve shots at a truck as the truck passed him). The Court noted conflicting versions of events given by the parties, and among those were conflicts between the two officers, with Jenkins testifying that he was not in the truck's path, but Passinault indicating he fired at the truck after it passed him because he feared it was bearing down on Jenkins. 2007 U.S. App. LEXIS 21573 at *7. Discussing *Tennessee v. Garner*, and *Brosseau v. Haugen*, the Sixth Circuit noted the significance of the fact that "Passinault emptied his weapon at the vehicle, reloaded it, and fired at Murray perhaps as many as a dozen times even after the truck had passed him by," which was after he could reasonably have believed that the truck would have posed a threat to himself or Jenkins. *Id.* at *15. Distinguishing some of the same cases the district court in this case distinguished (*Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), and *Scott v. Clay County, Tennessee*, 205 F.3d 867 (6th Cir. 2000)),

the Sixth Circuit found that the Plaintiff's version of events presented a situation in which there was a question as to whether the officer could reasonably believe anyone's life was endangered by Murray as he attempted to flee, and a jury could find that no reasonably competent officer would have shot the victim. 2007 U.S. App. LEXIS 21573 at *19-22. As to whether the constitutional right at issue was clearly established, the Sixth Circuit also found that where the suspect poses no immediate risk of death or serious danger, *Tennessee v. Garner* provides a clearly established right to be free from excessive force.[5] 2007 U.S. Dist. App. LEXIS 21573 at *25.

[5] On the issue of whether Donald Rickard presented a sufficient degree of danger to others to justify the amount of force used as he attempted to flee while shots were being fired into the vehicle, in footnote 6 of their Petition, the Petitioners state that at 16:30-16:51 on Officer Forthman's video camera (which would not be the original time counter contained on the dashboard camera, but is apparently a digital time citation instead), Rickard "almost" hit another car head-on. Respectfully, as part of the ongoing pattern of disputing facts they claim to have conceded for purposes of appeal and as an inherently subjective means of describing an "almost" collision that did not occur, this is not borne out by the video, as a distance measurement between the vehicles is not apparent. A review of the video demonstrates that the other vehicle to which the Petitioners must be referring (the only other vehicle seen in that particular sequence of events) actually slowed down to a virtual standstill while the Rickard vehicle (then out of control most likely because the driver had been shot multiple times) went off to the side of and then past the other vehicle. This particular factual contention brings up the point noted by Justice Scalia in *Scott* from *Vaughan v. Cox*, addressing the "near certainty" of death of a

(Continued on following page)

The factual similarity of *Kirby* and *Murray-Ruhl* to this case (fifteen total shots, the last twelve of which were fired as the vehicle was passing and then beyond the officers) is obvious. Even the number of shots is similar, and the denial of qualified immunity for such a level of force is appropriate.

The above exercise, attempting to compare various cases by their fact patterns, and, to a certain extent, by category ("chase cases" or "ramming cases" versus "shooting cases") illustrates the inherent challenge in attempting to craft a one-size-fits-all rule. The default analysis must necessarily involve some degree of fact specificity, which of course is not a new concept. In fact, that basic notion emanates from and has been reiterated in opinions of this Court. *See, e.g., Scott*, indicating "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383. However, the ultimate effort of the Petitioners has to be viewed as seeking to convince this Court to accept this appeal for the purpose of adopting and formulating a one-size-fits-all rule. Their rule would presumably be that, as a matter of law, a vehicular chase justifies even as many as fifteen total gunshots at a suspect vehicle, the vast majority of the shots being fired while the vehicle is passing or has already passed the officers. As a matter of degree, this effort must be considered against the backdrop of *Brosseau v. Haugen*, finding just *one*

suspect from firing into a car, which resulted in a denial of qualified immunity by the Eleventh Circuit in *Vaughan*.

gunshot to stop a suspect from fleeing to be in the "hazy border between excessive and acceptable force."

On this note, a clarification is important: although the Petitioners state at page 21 of their Petition that Brosseau fired "shots" at Haugen from behind out of fear that he might drive menacingly and there might be others in his path, a review of *Brosseau* indicates that just one shot was fired, injuring Haugen but not killing him. That is certainly a far cry from the fifteen shots in this case which did kill both occupants of the vehicle.

Stated more simply, Petitioners appear to be attempting to convince this Court (1) to transfer principles from a body of ramming cases to shooting cases (an approach this Court specifically differentiated in *Scott*, 550 U.S. at 383), and (2) to be prepared to hold as a matter of law that the firing of fifteen shots cannot be constitutionally unreasonable, and that clearly established law would allow a reasonable officer to believe such a level of force would be authorized. Simply put, this would turn both *Tennessee v. Garner* and *Brosseau v. Haugen* on their heads, and goes too far.

The basic analysis on this point is not changed by the Petitioners' citation to *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011), itself a 2011 case which of course post-dates the events of this case well beyond *Scott*, but which Petitioners nevertheless urge to this Court. *Sykes* addresses whether fleeing may be treated as a violent felony for purposes of sentencing considerations (indicating that

it may). However, it should not be read (as the Petitioners seemingly would have this Court do) as authority for the proposition under Fourth Amendment jurisprudence that vehicular flight creates an automatic justification for the use of virtually unlimited deadly force by police. If that were so, elementary Fourth Amendment principles would be emasculated just because flight occurred. Indeed, taking the fact that Mr. Rickard was fleeing into account, the Sixth Circuit addressed the same basic arguments Petitioners make to this Court based upon *Sykes*:

> Nor does the Supreme Court's decision in *Sykes* compel a different result. *Sykes v. United States*, 131 S.Ct. 2267 (2011). The holding in *Sykes* that vehicular flight from an officer may categorically present "a serious potential risk of physical injury to another" so as to constitute a "violent felony" for purposes of sentencing under 18 U.S.C. § 924(e) addresses a question distinct from whether the force applied – including deadly force – to effect the seizure of a fleeing suspect in a given case was objectively reasonable as a matter of law under the Fourth Amendment.

Pet. App. at 11.

The Sixth Circuit's distinction of *Sykes* is appropriate, particularly to the extent the Petitioners seek to convert the act of fleeing into a carte blanche justification for the use of virtually any level or amount of deadly force to stop a fleeing suspect *because he has fled*. This is closely related to the issue about the disputes which exist as to whether aggravated

assaults occurred. Although the officers claimed assaults occurred, they do not show on the video and the district court so found. On review of the video evidence, the Sixth Circuit could not say the findings of the district court were blatantly and demonstrably false. Pet. App. at 10. However, the Petitioners seek to bootstrap their assertion that such assaults did occur (or their perception that they occurred) into an outright justification for the level of force that was used in this case. Respectfully, to take these factors (the act of fleeing, added to claimed aggravated assaults) and offer them as justifying the level of force used in this case goes too far.

This Court's opinion in *Graham v. Connor*, 490 U.S. 386 (1989), has long been authority for the proposition that courts must balance the nature and quality of the intrusion on the individual's Fourth Amendment rights against the countervailing governmental interests at stake. The Petitioners assert that the Sixth Circuit erred in failing to discuss this balancing, but ignore the fact that the district court, which the Sixth Circuit was affirming under the circumstances of this appeal, addressed the balancing thoroughly. Pet. App. at 32-41. It has long been understood that this necessitates an analysis of the facts and circumstances of each case because the test of reasonableness is not capable of precise definition or mechanical application. *Graham*, 490 U.S. 386, 396. For this reason, an approach denying qualified immunity in the face of genuine and material factual disputes is appropriate in excessive force cases. Invariably, therefore, courts wind up comparing the

facts and circumstances of various cases with the difficulty of attempting to formulate rules from such comparisons. The process is ultimately, as Justice Scalia observed in *Scott*, the navigation of a "fact-bound morass."

Nevertheless, a comparison of the cases does help illustrate ultimately that the Sixth Circuit did properly affirm the district court in denying qualified immunity in this case. From *Tennessee v. Garner* it is clear (and was clear long before the events of this case) that shooting an unarmed suspect dead from behind to prevent the suspect's escape is constitutionally unreasonable. Although this Court found the ramming of a suspect vehicle in a chase constitutionally permissible under the facts present in *Scott v. Harris*, this Court also made clear that shooting a suspect is different from a vehicular ramming. In *Scott*, this Court also noted the near certainty of death likely to result from the firing of shots into a moving suspect vehicle as in *Vaughan, supra*, an opinion of the Eleventh Circuit denying qualified immunity. In *Brosseau v. Haugen*, this Court found that it was permissible under the Fourth Amendment for an officer to fire just one shot (not "shots" as suggested by Petitioners at page 21 of their Petition) at a suspect attempting to flee, because under those circumstances it was within the "hazy border" between acceptable and excessive force.

This case is different, for all of the reasons noted above, and the Sixth Circuit appropriately affirmed the district court's denial of qualified immunity.

The Petition should be denied.

CONCLUSION

This Court should deny the Petition because it depends upon arguments that were not presented to the Sixth Circuit, despite the filing of an initial Petition for Rehearing and then a Modified Petition for Rehearing. This by itself would be ample basis for this Court to deny the Petition.

Beyond the fact that the Petition depends upon new arguments, and beyond the subjective characterizations of facts and events offered by the Petitioners, several principles still stand. The analysis is necessarily fact-based and case-specific, as the collective body of case law demonstrates. That presumably is not going to change and this case would not present this Court with a vehicle for articulating new precedent in that regard. This Court should deny the Petition because there is already case law (*Scott*) indicating the value of video evidence to assess the validity of a defense of qualified immunity. Moreover, this case is not a ramming case like *Scott*. It is a shooting case. With that important distinction in mind, this Court should deny the Petition because it is not necessary to articulate the point that *one* shot fired at a suspect attempting to flee in a vehicle can be constitutionally permissible as being within the hazy border between acceptable and excessive force. This Court's opinion in *Brosseau v. Haugen* is authority for that point under the facts of *Brosseau*, but this

case is very different because of the circumstances and particularly the degree of force used. Presumably this Court is understandably hesitant to develop blanket rules for the "factbound morass" of Fourth Amendment reasonableness cases. Ms. Rickard respectfully submits that this Court should certainly not accept this appeal upon Petitioners' invitation to formulate a blanket rule that fifteen shots would be acceptable force, but that is what Petitioners ask, in effect. Their Petition should be denied.

Respectfully submitted,

Whitne Rickard, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her Mother Samantha Rickard as Parent and Next Friend

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, Deceased; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; CLAYTON DAVID ALLEN

Plaintiffs-Appellees Cross-Appellants

and

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard as Parent and Next Friend

Plaintiff-Appellee

v. **No. 11-5266**

CITY OF WEST MEMPHIS

Defendant

and

VANCE PLUMHOFF, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JOHN BRYAN GARDNER, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; TONY GALTELLI, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; LANCE ELLIS, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JIMMY EVANS, Officer, in his

personal and official capacity as a police officer of the West Memphis Police Department; JOSEPH FORTHAM, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department

Defendants – Appellants Cross-Appellees

(Filed Oct. 19, 2012)

DEFENDANTS' PETITION FOR REHEARING OR REHEARING EN BANC OF PANEL OPINION AND JUDGMENT

Come now the Separate Defendants, Officers Galtelli, Gardner, Ellis, Evans, Forthman, and Plumhoff, in their personal and official capacities, by and through counsel, and for their Petition for Rehearing or Rehearing En Banc of Panel Opinion and Judgment, state:

I. Introduction: Statement pursuant to F.R.A.P. 35.

The panel decision conflicts with a decision of the U.S. Supreme Court and prior decisions of the Sixth Circuit Court of Appeals. Specifically, the Panel failed to address the applicability of *Sykes v. United States,* 131 S. Ct. 2267 (2011), which ruled that felony fleeing is a dangerous felony. Thus, under *Graham v. Connor*, this factors into the calculus of a force analysis. The Panel failed to conduct the appropriate force analysis under the Fourth Amendment because it failed to consider the dangerous felony caused by Mr. Rickard during his flight. Rather, the Panel merely described

what Mr. Rickard did as driving away from a lawful traffic stop. That is simply a misapprehension of the undisputed facts below; when considered along with the other *Graham* factors it is clear that the three officers who used deadly force – Officers Plumhoff, Gardner, and Galtelli – did so in an objectively reasonable manner and are entitled to qualified immunity. Further, because qualified immunity for police officers is at issue, this case is one of exceptional importance and must be reviewed by the Panel or the Court *en banc.*

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to consider the defense of qualified immunity as it applied to three officers who used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force in this case. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger of the Rickard car. Rather,

those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden improperly on the Appellants. Again, while the Panel's decision conflicts with *Davenport* and *Chappell* above, the failure to properly consider each Appellant's entitlement to qualified immunity involves an issue of exceptional importance which this Court must review.

Finally, the Panel erred in claiming that the Appellants conceded that Tennessee law applied regarding the state law claims and the Appellants' assertion of immunity. Rather, as is clear from Appellants' initial brief, both Arkansas and Tennessee law pertaining to immunity from state torts was argued. Furthermore, irrespective of which State's immunity law applied, an issue of exceptional importance was raised by Appellants. That is, the Appellants argued that because they were in hot pursuit across state lines, the Uniform Law on Fresh Pursuit adopted by both Arkansas and Tennessee should grant the officers in this case immunity from State torts.

Thus, the two bases for rehearing under Fed. R. App. P. 35 are met.

For the purposes of this appeal, in the Appellants' Response to the Plaintiffs' Motion to Dismiss the Appellants conceded the facts as purported by the

Plaintiffs, for purposes of appeal only. Such a concession is a requirement of this Circuit and the Appellants have complied; nonetheless, the Panel appears to have made another error of law in failing to address *Molodawn* [sic] *v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) as it regards the Court's ability to consider the qualified immunity defense when the Appellants agree to concede the facts in the light most favorable to the Appellees for appeal purposes only.

However, the Appellants' version of events does not significantly vary from any other version – by watching the videos and reviewing the undisputed affidavit and deposition testimony provided by the officers in this case, anyone can see for themselves the events that led to the shooting. The Court is in possession of the videos and the Appellants urge the Court en banc to review the videos and the undisputed testimony below and reverse and dismiss the case.

II. Argument

A. The Panel erred In Failing to Consider *Sykes* applicability to the instant case.

The panel improperly found a factual dispute when no dispute to the material facts had been asserted by the Appellants because the Appellants were willing to concede any alleged disputes for the purpose of the appeal. *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009). The videos speak for themselves and therefore this Court has jurisdiction

to determine whether a reasonable officer could have acted as the Appellants here acted. If on the basis of the uncontested and incontrovertible facts this Court makes a legal conclusion that the car shown on the videos *did* pose a risk to the officers, then the officers are entitled to qualified immunity.

This Court's ability to resolve any apparent dispute has its roots in the U.S. Supreme Court's 2007 decision of *Scott v. Harris*. *Id.* (citing *Scott v. Harris,* 550 U.S. 372 (2007)). In 2009, this Court wrote:

> In *Scott v. Harris,* however, the Supreme Court recognized an apparent exception to this jurisdictional limitation when it considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts. In reaching that conclusion, and without addressing the issue of jurisdiction, the Court found that a video of the incident rendered the plaintiff's version *of the facts* 'so utterly discredited by the record that no reasonable jury could have believed him.'

Id. at 371 (internal citation omitted) (emphasis added).

On June 13, 2011, the Appellants notified the Court (via a 28(j) letter) of a newly decided United States Supreme Court case that appears to have particular bearing on this appeal. The decision is *Sykes v. United States,* 131 S. Ct. 2267 (2011). The Supreme Court held that felony fleeing, as defined in

an Indiana statute, is a violent felony. *Id.* at 14. In Arkansas, where the fleeing began, fleeing from the officers in a vehicle in the manner shown on the videos is a felony. Ark. Code Ann. § 5-54-125(d)(2). In Tennessee, where the shooting in this case occurred, fleeing from officers via a motor vehicle is also a felony. Tenn. Code Ann. § 39-16-603(b)(3). The Supreme Court stated:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others.

Sykes. at 6.

Based upon the *Sykes* case, that Mr. Rickard was engaged in a violent felony is now a matter of law that is controlling in this case and should have assisted the panel in deciding the appeal. However, this case and its application to the present appeal was not discussed in the panel's opinion. If, by operation of law, the car driven the [sic] manner shown on the videos is deemed a violent felony, then "police

will, in a legitimate and lawful manner . . . use force to bring him within their custody." *Id.* This is a question of law that is answered by viewing the video tapes. Mr. Rickard dangerously fled from a lawful traffic stop; he did not merely drive away as the Panel characterized it. His actions captured on video clearly showed a lack of concern for the safety of property and persons of pedestrians and other drivers. These are not facts in dispute, they are merely facts from which this court has jurisdiction to draw legal conclusions.

Apart from the felony committed by Mr. Rickard's driving, and his actions immediately before he was shot further demonstrates his indifference to the collateral consequences which in fact had violent and even lethal consequences for others. (The front of Rickard's car was in contact with the front of one of the police cars and the video shows, and the Plaintiffs' admit, that although his car was stopped at that moment, his front wheels continued to spin forward – until he put the car in reverse after being shot and pulled off backwards going 180 degrees with officers around him on foot and in cars.) For the panel to fail to address the *Sykes* case demonstrates that its order conflicts with the decision of the Supreme Court. As a result, a rehearing is proper.

Indeed, under *Graham* the first factor articulated is the "severity of the crime at issue." *See Graham,* 490 U.S. at 396. Plaintiffs have alleged that the initial stop was for an inoperable headlight. R. No. 54, *SUMF* ¶¶ 2,7. Officer Forthman's suspicions were

heightened as he initially approached the suspect's vehicle after the stop, because of Rickard's behavior and because Officer Forthman noticed a broken windshield that appeared was possibly caused by a collision with a pedestrian. R. No. 54, *SUMF* ¶¶ 14-16, 18. The video and audio evidence demonstrates the officers perceived felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed.

The first aggravated assault was on Interstate 40 in Arkansas when officers believed the Plaintiffs' [sic] tried to ram Officer Plumhoff. R. No. 54, *SUMF* ¶ 47. Mere moments later, the Plaintiffs' vehicle can be seen crossing the interstate lanes and almost colliding with Officer Evans' vehicle. R. No. 54, *SUMF* ¶ 53. Officer Evans provided affidavit testimony that this nearly caused him to wreck his patrol car. R. No. 54, *SUMF* ¶ 55. Then as the pursuit was on the Mississippi River bridge, Officer Plumhoff reported that the Honda had committed another aggravated assault against him, when the suspects' vehicle moved dangerously close to his patrol car and almost came into contact with his vehicle. R. No. 54, *SUMF* ¶¶ 64-65. Once in Memphis, Tennessee, the vehicle collided with Officer Plumhoff's vehicle after spinning out into a parking lot. R. No. 54, *SUMF* ¶¶ 82-88. Plumhoff has testified that he believed Rickard turned toward his car and intentionally hit it and the video appears to confirm this account. Moments later, the Honda then accelerated forward and crashed into Officer Gardner's vehicle, where the Honda's tires can

be seen spinning as the Honda rams the police vehicle several times. R. No. 54, *SUMF* ¶¶ 100-102. The Plaintiffs admit in their response to SUMF that the tires of the Honda were spinning at the time Plumhoff began firing. It was also around this time that the Honda may have struck Officer Evans' hand. R. No. 54, *SUMF* ¶ 109. Thus, the driver of the Honda was using it as a deadly weapon, while officers were on foot and in extremely close proximity.

Beyond the aggravated assaults[1] against the officers and felony fleeing, there were other actions by the Plaintiffs that would cause a reasonable officer to think that the Plaintiffs were an immediate threat to the officers' safety as well as a threat to other civilians' safety. The video from Unit #279, Officer Forthman's vehicle, clearly shows that in an attempt to quickly exit off I-40 at Danny Thomas Blvd., the Plaintiff's vehicle dangerously crossed lanes of traffic and turned in front of a vehicle pulling a boat, which caused that vehicle to slam on its brakes. R. No. 54, *SUMF* ¶¶ 69-70. Under *Scott v. Harris,* this fact is weighed heavily in the force calculus. 550 U.S. at 384. The white Honda and its driver,

[1] Ark. Code Ann. § 5-13-204 (2004) states "(a) A person commits aggravated assault if under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

> (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person . . . (b) Aggravated assault is a Class D Felony."

Mr. Rickard, indisputably posed a serious immediate threat to the officers and to others based on the numerous attempts to force the officers off the interstate by swerving in front of them while traveling at a high rate of speed, the disregard for the safety of others, including civilians, and colliding with two different police vehicles. It is also indisputable that the events transpired quickly and split-second decision making was required by the West Memphis Police Officers. R. No. 54, *SUMF* ¶ 120. Furthermore, the officers have testified they felt threats to their own lives, the lives of fellow officers, and the public in general immediately prior to any use of force, and the record demonstrates the reasonableness of these fears. R. No. 54, *SUMF* ¶¶ 104-106, 113-114, 116. Further, the Plaintiffs offered no admissible evidence to dispute these fears.

The proper question is: could these officers reasonably conclude probable cause for those offenses occurred? Indisputably Rickard committed dangerous felony fleeing and this was not considered by the Panel in its discussion of the reasonableness of force used. However, under *Graham* this is one of the most relevant considerations and the failure to plug this fact into the force analysis led to an error of law.

Further, the events in the present case provide ample evidence to support the third factor articulated by the Supreme Court that the suspect actively resisted arrest by affirmatively dangerous conduct and flight. *See Graham,* 490 U.S. at 396. In the most astonishing act of defiance, Mr. Rickard, even after

shots were fired, reversed the vehicle onto Jackson Ave. in order to continue his flight from the police, where he almost ran over Officer Lance Ellis, who can be seen quickly moving out of the way. R. No. 54, *SUMF* ¶ 111. In the process, the Honda arguably struck Officer Evan's hand, R. No. 54, *SUMF* ¶ 109, and then almost backed into Officer Ellis. R. No. 54, *SUMF* ¶ 111.

The Panel discussed *Scott v. Harris,* 550 U.S. 372 (2007), and noted the similarity between the facts of that case and the facts of the present case. It correctly stated that the U.S. Supreme Court reversed an earlier denial of qualified immunity under these similar facts. The Panel's opinion seemingly distinguishes this case from *Scott* but failed to explain how these factually similar cases require opposite results. In *Scott,* the fleeing suspects were still driving away from the officers and posed no immediate risk of harm to the officers when the alleged constitutional violation occurred. Here, Mr. Rickard's car was bucking up against one of the police cars with his car's wheels still spinning forward and with officers on foot around his car attempting to restrain him. When he flung his car in reverse, it is clear that there was some immediate risk to the officers on foot. Unlike in *Scott,* in the present case there are not three versions of what happened that night: the plaintiff's; the defendants'; and the video. Here there is one version of the events: the video. Mr. Rickard's actions portrayed on the video at the moment shots were first fired were certainly as dangerous as the actions of the

driver in *Scott,* yet the Panel decided that there was not a requisite degree of danger posed by Mr. Rickard.

The Panel also cited *Austin v. Redford Twp. Police Dep't,* 690 F.3D [sic] 490 (2012) for support of affirming the denial of qualified immunity after reviewing the video of the incident. In *Austin,* the suspect was not resisting and was effectively restrained and that was supported by the video. In that case, you ruled that it is unreasonable to use force on a restrained subject absent some compelling justification. *Austin,* 690 F.3d 490 (2012). Here, there was compelling justification – the same justification present in the *Scott* case.

When viewed from a perspective of a reasonable officer on the scene, the officers' actions were "objectively reasonable" because of the high severity of the crime, suspicious vehicle (inoperable headlight with a broken windshield) plus the numerous aggravated assaults, felony fleeing, the numerous attempts by the driver to injure the officers, and the refusal to submit to police authority, while endangering the citizenry. Any alternatives posed by the Plaintiffs would contradict the video record of the events, and such a version should not be adopted by the Court for the purposes of deciding this appeal. *See Scott v.* Harris, 550 U.S. 372, 380 (2007). *See also Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); see also, *Williams v. City of Grosse Point Park,* 496 F.3d 482 (6th Cir. 2007); *Scott v. Clay County, Tennessee,* 205 F.3d 867 (6th Cir. 2000). In the *Freland* case, a suspect was shot and killed by police after a high-speed

chase. *Id.* at 344. There, as in the case here, the suspect fled after the police tried to stop the suspect for violating a minor traffic law.

In this case, as a matter of law, the Defendants [sic] actions were "objectively reasonable" and within the standards of the Fourth Amendment. *See Scott v. Clay County,* 205 F. 3d 867, 878 (6th Cir. 2000). Consequently, there was no constitutional violation and the denial of qualified immunity must be reversed.

B. The Panel Failed to Properly Consider the Qualified Immunity Defense Raised by Officers Ellis, Forthman, and Evans.

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). Furthermore, the Court held that, in the qualified immunity analysis, it gives a "measure of deference" which "carries great weight" when all parties agree that the events happened rapidly and the officer is required to make split-second decisions. *Id.* at 552. An officer's reasonable, but mistaken, belief regarding the amount of force necessary in a given decision does not make out a constitutional violation simply because it was mistaken. *Id.* The facts are considered

at the time of the events in question, not in hindsight. *Id.* The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to consider the defense of qualified immunity as it applied to three officers who used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force in this case. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger of the Rickard car. Rather, those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden on the Appellants where prior Panels of this Court have held that the burden is on the Plaintiff to show that officers are not entitled to qualified immunity. Thus, in the least these three officers were entitled to qualified immunity.

D. The Panel Erred as a Matter of Law Regarding Appellants' State Immunity Defenses.

First, contrary to the statement in the Panel's opinion that the Appellants conceded Tennessee law

applied, the Appellants did in fact argue their entitlement to immunity under Ark. Code Ann. § 21-9-301. App. Brief, pp. 23-24. Thus, the Panel committed an error of law and the Appellants' argument that they were entitled to immunity at least from state law negligence claims pursuant to Arkansas law must be addressed.

Further, the Appellants are alternatively entitled to state law immunity under Tennessee law and the Panel erred in finding otherwise. The Tennessee Governmental Tort Liability Act (hereinafter TGTLA), Tenn. Code Ann. §29-20-101 et seq., establishes that local government entities have immunity for certain acts of its employees except when the General Assembly explicitly retains liability. *Sallee v. Barrett,* 171 S.W.3d 822, 826 (Tenn. 2005). Specifically, TGTLA states:

> Immunity from suit of all governmental entities is **removed** for injury proximately caused by a negligent act or omission of any employee within the scope of his employment **except** if the injury arises out of: [*inter alia*]
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

Tenn. Code Ann. §29-20-205 (emphasis added)

The Appellants should have been granted immunity pursuant to the Interstate Fresh Pursuit Act, known in Tennessee as the "Uniform Law on Fresh Pursuit," in conjunction with Ark. Code Ann. § 21-9-301 and Tenn. Code Ann. § 29-20-205. Tenn. Code Ann. § 40-7-201. This act offers protection to officers pursuing "a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed." Tenn. Code Ann. § 40-7-202. The Tennessee Uniform Law on Fresh Pursuit expressly gave these Arkansas police officers the same authority as a Tennessee officer when in fresh pursuit of a person "who is believed to have committed a felony" in Arkansas. Tenn. Code Ann. § 40-7-203. As noted above, Mr. Rickard's actions captured on the videos were reasonable grounds for believing he was feloniously fleeing in Arkansas and in Tennessee. This is exactly the situation that such laws are designed for. As such, the officers are entitled to the same immunity as would a Tennessee policeman. If that were not the case, there is no reason to have such a uniform law enacted throughout the entire nation and the Appellants would merely be private citizens, which is contrary to the policy of the Fresh Pursuit Act.

IV. Conclusion

The officers in this case acted objectively reasonably and are entitled to qualified immunity.

Respectfully submitted,

Vance Plumhoff, Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, in their individual capacities
SEPARATE DEFENDANTS

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, Deceased; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; CLAYTON DAVID ALLEN
Plaintiffs-Appellees Cross-Appellants

and

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard as Parent and Next Friend
Plaintiff-Appellee

v. **No. 11-5266**

CITY OF WEST MEMPHIS
Defendant

and

VANCE PLUMHOFF, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JOHN BRYAN GARDNER, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; TONY GALTELLI, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; LANCE ELLIS, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JIMMY EVANS, Officer, in his

personal and official capacity as a police officer of the West Memphis Police Department; JOSEPH FORTHAM, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department

Defendants – Appellants Cross-Appellees

(Filed Nov. 15, 2012)

DEFENDANTS' MODIFIED PETITION FOR REHEARING EN BANC OF AMENDED PANEL OPINION AND JUDGMENT

Come now the Separate Defendants, Officers Galtelli, Gardner, Ellis, Evans, Forthman, and Plumhoff, in their personal and official capacities, by and through counsel, and for their Modified Petition for Rehearing En Banc of Amended Panel Opinion and Judgment, state:

I. Introduction: Statement pursuant to F.R.A.P. 35.

The amended panel decision[1] conflicts with a decision of the U.S. Supreme Court and prior decisions of the Sixth Circuit Court of Appeals. Specifically, the Panel has still failed to apply *Sykes v. United States,* 131 S. Ct. 2267 (2011), which ruled that felony fleeing is a dangerous felony, to the facts of this case

[1] 6 Cir. I.O.P. 35(d) permits a party to modify within 14 days, its petition for rehearing after the Panel changes its decision, or to file a new petition. Appellants herein have chosen to modify their petition following the Panel's Amended Opinion.

in the proper force analysis under *Graham v. Connor,* 490 U.S. 386 (1989). In the amended opinion, the Panel has still failed to conduct the appropriate force analysis because it failed to consider the severity of the crime at issue along with the other *Graham* factors and the undisputed video and affidavit evidence. The police "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary." *Id.* at 397. In this case, the Appellants respectfully submit that there were no legitimate or material factual disputes below and the Panel and the District Court have impermissibly employed 20/20 hindsight to a rapidly evolving, dangerous set of circumstances caused by Mr. Rickard and the Appellants are entitled to qualified immunity.

The United States Supreme Court found felony fleeing is a dangerous felony; here that was exhibited by Mr. Rickard during his flight and must be plugged into the force calculus as it represents the severity of the crime at issue. The Panel merely described what Mr. Rickard did as driving away from a lawful traffic stop. That is simply a misapprehension of the undisputed facts below; when considered along with the other *Graham* factors it is clear that the three officers who used deadly force – Plumhoff, Gardner, and Galtelli – did so in an objectively reasonable manner. Further, because qualified immunity for police officers is at issue, this case is one of exceptional importance and must be reviewed by the Court *en banc.*

Additionally, the amended Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel has still refused to consider the defense of qualified immunity raised by three officers who used no force and had no opportunity to intervene given the rapidly escalating events. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger. Rather, those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden improperly on the Appellants. Further, those Appellants have consistently interposed the defense of qualified immunity at the District Court level (R. 54-1, pp. 7, 10, 14, 20-25) and on appeal, and very thoroughly described the

undisputed facts demonstrating three officers used deadly force and three did not, and it was the Plaintiffs burden to demonstrate each was not entitled to qualified immunity.

While the Panel amended its opinion, including a footnote regarding this issue, and the concurrence addresses this issue, neither addresses *Davenport* or *Chappell* and the Appellants argument herein. Again, while the Panel's decision conflicts with *Davenport* and *Chappell* above, the failure to properly consider each Appellant's entitlement to qualified immunity involves an issue of exceptional importance.

Finally, the Panel erred in claiming that the Appellants conceded that Tennessee law applied regarding the state law claims and the Appellants' assertion of immunity. Rather, both Arkansas and Tennessee law pertaining to immunity from state torts was argued. Furthermore, irrespective of which State's immunity law applied, an issue of exceptional importance was raised by Appellants. That is, the Appellants argued that because they were in hot pursuit across state lines, the Uniform Law on Fresh Pursuit adopted by both Arkansas and Tennessee should grant the officers in this case immunity from State torts. Thus, the two bases for rehearing under Fed. R. App. P. 35 are met.

For the purposes of this appeal only, the Appellants conceded the facts as purported by the Plaintiffs. Such a concession is a requirement of this

Circuit and the Appellants have complied; nonetheless, the Panel appears to have made another error of law in failing to address *Molodawn v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) regarding an undisputed factual record.

However, the Appellants' version of events does not significantly vary from any other version – by watching the videos and reviewing the undisputed affidavit and deposition testimony provided by the officers in this case, anyone can see for themselves the events that led to the shooting. The Court is in possession of the videos and the Appellants urge the Court *en banc* to review the videos and the undisputed testimony below and reverse and dismiss the case.

II. Argument

A. Appellants' actions were reasonable based on controlling case law

This Court's ability to resolve this case is based on the U.S. Supreme Court's 2007 decision of *Scott v. Harris. Id.* (citing *Scott v. Harris,* 550 U.S. 372 (2007)). In 2009, this Court wrote:

> In *Scott v. Harris,* however, the Supreme Court recognized an apparent exception to this jurisdictional limitation when it considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts. In reaching that conclusion, and without addressing the issue of

> jurisdiction, the Court found that a video of the incident rendered the plaintiff's version *of the facts* 'so utterly discredited by the record that no reasonable jury could have believed him.'

Id. at 371 (internal citation omitted) (emphasis added).

The Panel recognized that *Scott* was factually similar, on the one hand, but that details made this case distinguishable. However, the Panel's factual distinctions between the cases result from improperly characterizing what is shown on the videos. The Panel states, "In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and cars although some effort to elude capture was still being made." Mr. Rickard was not "essentially stopped" in the sense that the pursuit had ended. He had not given himself up to the police. At the time the first shots were fired, the video shows his car violently bucking against one of police cars with its tires spinning freely. Immediately after the first shots he continued his escape. He was never "captured" by the police, despite the valiant efforts shown on the video. Mr. Rickard's car may have been impeded momentarily, but the video shows that his dangerous conduct never stopped. The three officers who used deadly force did so in a tense, rapidly evolving situation where Mr. Rickard was using his car as a deadly weapon. The difference in speed exhibited by Mr. Rickard as he rams a police car and almost runs over Officer Ellis as compared to *Scott* does not make

Rickard's car less deadly and the undisputed facts compel one conclusion: the Appellants' actions were reasonable.

B. The Panel erred in failing to consider *Sykes* applicability to the instant case.

The decision in *Sykes v. United States,* 131 S. Ct. 2267 (2011) has particular bearing on this case. The Supreme Court held that felony fleeing, as defined in an Indiana statute, is a violent felony. *Id.* at 14. In Arkansas, where the fleeing began, fleeing from the officers in a vehicle in the manner shown on the videos is a felony. Ark. Code Ann. § 5-54-125(d)(2). In Tennessee, where the shooting in this case occurred, fleeing from officers via a motor vehicle is also a felony. Tenn. Code Ann. § 39-16-603(b)(3). The Supreme Court stated:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others.

Sykes. at 6.

Based upon *Sykes,* that Mr. Rickard was engaged in a violent felony is now a matter of law that is controlling in this case. However, *Sykes* and its application to the present appeal were not discussed in the panel's original opinion. Even after amending the opinion to address *Sykes,* the Panel has failed to discuss *Sykes'* application under the *Graham* factors as it represents in this case the severity of the crime at issue. If, by operation of law, the car driven the manner shown on the videos is deemed a violent felony, then "police will, in a legitimate and lawful manner . . . use force to bring him within their custody." *Id.* This is a question of law that is answered by viewing the video tapes and reviewing the undisputed testimony below. Mr. Rickard dangerously fled from a lawful traffic stop; he did not merely drive away as the Panel characterized it. His actions captured on video clearly showed a lack of concern for the safety of property and persons of pedestrians and other drivers. These are not facts in dispute; they are merely facts from which this court has jurisdiction to draw legal conclusions.

Apart from the felony committed by Mr. Rickard's driving, his actions immediately before he was shot further demonstrates his indifference to the collateral consequences which in fact had violent and even lethal consequences for others. (The front of Rickard's

car was in contact with the front of one of the police cars and the video shows, and the Plaintiffs' admit, that although his car was stopped at that moment, his front wheels continued to spin forward – until he put the car in reverse after being shot and pulled off backwards going 180 degrees with officers around him on foot and in cars.) The Panel's failure to address the *Sykes* case as representing an important *Graham* factor – the severity of the crime at issue – demonstrates that its order conflicts with the decision of the Supreme Court. As a result, a rehearing *en banc* is proper.

Indeed, under *Graham* the first factor articulated is the "severity of the crime at issue." *See Graham,* 490 U.S. at 396. Plaintiffs have alleged that the initial stop was for an inoperable headlight. R. No. 54, *SUMF* ¶¶ 2,7. Officer Forthman's suspicions were heightened as he initially approached the suspect's vehicle because of Rickard's behavior and because Forthman noticed a broken windshield that appeared was possibly caused by a collision with a pedestrian. R. No. 54, *SUMF* ¶¶ 14-16, 18. The video and audio evidence demonstrates the officers perceived felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed.

The first aggravated assault was on Interstate 40 in Arkansas when officers believed the Plaintiffs' [sic] tried to ram Officer Plumhoff. R. No. 54, *SUMF* ¶ 47. Moments later, the Plaintiffs' vehicle can be seen crossing the interstate lanes and almost colliding

with Officer Evans' vehicle. R. No. 54, *SUMF* ¶ 53. Officer Evans provided affidavit testimony that this nearly caused him to wreck. R. No. 54, *SUMF* ¶ 55. On the Mississippi River bridge, Officer Plumhoff reported that the Honda had committed another aggravated assault against him, when the suspects' vehicle moved dangerously close to his patrol car and almost struck it. R. No. 54, *SUMF* ¶¶ 64-65. Once in Memphis, Tennessee, the vehicle collided with Officer Plumhoff's vehicle after spinning out into a parking lot. R. No. 54, *SUMF* ¶¶ 82-88. Plumhoff has testified that he believed Rickard turned toward his car and intentionally hit it and the video confirms this account. Moments later, the Honda then accelerated forward and crashed into Officer Gardner's vehicle, where the Honda's tires can be seen spinning as the Honda rams the police vehicle several times, which Plaintiffs admitted below. R. No. 54, *SUMF* ¶¶ 100-102. It was also around this time that the Honda may have struck Officer Evans' hand. R. No. 54, *SUMF* ¶ 109. Thus, the driver of the Honda was using it as a deadly weapon, while officers were on foot and in extremely close proximity.

Beyond the aggravated assaults[2] against the officers and felony fleeing, there were other actions by

[2] Ark. Code Ann. § 5-13-204 (2004) states "(a) A person commits aggravated assault if under circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person . . . (b) Aggravated assault is a Class D Felony."

the Plaintiffs that would cause a reasonable officer to think an immediate threat to the officers' safety and civilians' safety existed. The video from Unit #279, Officer Forthman's vehicle, clearly shows that in an attempt to quickly exit off I-40 at Danny Thomas Blvd., the Plaintiffs vehicle dangerously crossed lanes of traffic and turned in front of a vehicle pulling a boat, which caused that vehicle to slam on its brakes. R. No. 54, *SUMF* ¶¶ 69-70. Under *Scott v. Harris,* this fact is weighed heavily in the force calculus. 550 U.S. at 384. Mr. Rickard indisputably posed a serious immediate threat to the officers and to others.

It is also indisputable that the events were rapidly evolving. R. No. 54, *SUMF* ¶ 120. Furthermore, the officers have testified they felt threats to their own lives, the lives of fellow officers, and the public in general immediately prior to any use of force. R. No. 54, *SUMF* ¶¶ 104-106, 113-114, 116. The Plaintiffs offered no admissible evidence to dispute these fears.

The proper question is: could these officers reasonably conclude probable cause for those offenses occurred? Indisputably Rickard committed dangerous felony fleeing and this was not considered by the Panel in its discussion of the reasonableness of force used. However, under *Graham* this is one of the most relevant considerations.

Further, the events in the present case provide ample evidence to support the third factor articulated by the Supreme Court that the suspect actively

resisted arrest by affirmatively dangerous conduct and flight. *See Graham,* 490 U.S. at 396. In the most astonishing act of defiance, Mr. Rickard, even after shots were fired, reversed the vehicle onto Jackson Ave. in order to continue his flight from the police, where he almost ran over Officer Lance Ellis, who can be seen quickly moving out of the way. R. No. 54, *SUMF* ¶ 111. In the process, the Honda arguably struck Officer Evan's hand, R. No. 54, *SUMF* ¶ 109, and then almost backed into Officer Ellis. R. No. 54, *SUMF* ¶ 111.

The Panel discussed *Scott v. Harris,* 550 U.S. 372 (2007), and noted the similarity between the facts of that case and the facts of the present case. It correctly stated that the U.S. Supreme Court reversed an earlier denial of qualified immunity under these similar facts. The Panel's opinion seemingly distinguishes this case from *Scott* but failed to explain how these factually similar cases require opposite results. In *Scott,* the fleeing suspects were still driving away from the officers and posed no immediate risk of harm to the officers when the alleged constitutional violation occurred. Here, Mr. Rickard's car was bucking up against one of the police cars with his car's wheels still spinning forward and with officers on foot around his car attempting to restrain him. When he flung his car in reverse, it is clear that there was some immediate risk to the officers on foot. Mr. Rickard's actions portrayed on the video at the moment shots were first fired were certainly as dangerous as the actions of the driver in *Scott,* yet the Panel

decided that there was not a requisite degree of danger posed by Mr. Rickard.

The Panel also cited *Austin v. Redford Twp. Police Dep't*, 690 F.3D 490 (2012) for support of affirming the denial of qualified immunity after reviewing the video of the incident. In *Austin,* the suspect was not resisting and was effectively restrained and that was supported by the video. In that case, the court ruled that it is unreasonable to use force on a restrained subject absent some compelling justification. *Austin,* 690 F.3d 490 (2012). Here, there was compelling justification – the same justification present in the *Scott* case.

When viewed from a perspective of a reasonable officer on the scene, the officers' actions were "objectively reasonable" because of the high severity of the crime, suspicious vehicle (inoperable headlight with a broken windshield) plus the numerous aggravated assaults, felony fleeing, the numerous attempts by the driver to injure the officers, and the refusal to submit to police authority, while endangering the citizenry. Any alternatives posed by the Plaintiffs would contradict the video record of the events, and such a version should not be adopted by the Court for the purposes of deciding this appeal. *See Scott v.* Harris, 550 U.S. 372, 380 (2007). *See also Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); see also, *Williams v. City of Grosse Point Park,* 496 F.3d 482 (6th Cir. 2007); *Scott v. Clay County, Tennessee,* 205 F.3d 867 (6th Cir. 2000). In the *Freland* case, a suspect was shot and killed by police after a high-speed chase.

Id. at 344. There, as in this case, the suspect fled after the police tried to stop the suspect for violating a minor traffic law.

In this case, as a matter of law, the Defendants actions were "objectively reasonable" and within the standards of the Fourth Amendment. *See Scott v. Clay County,* 205 F. 3d 867, 878 (6th Cir. 2000). Consequently, there was no constitutional violation and the denial of qualified immunity must be reversed.

C. The Panel failed to properly consider the qualified immunity defense raised by Officers Ellis, Forthman, and Evans.

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). Furthermore, the Court held that, in the qualified immunity analysis, it gives a "measure of deference" which "carries great weight" when all parties agree that the events happened rapidly and the officer is required to make split-second decisions. *Id.* at 552. The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled

to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to evaluate, even in the amended opinion, the defense of qualified immunity as it applied to three officers who indisputably used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force. Specifically, the Panel recognized that Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden on the Appellants where prior Panels of this Court have held that the burden is on the Plaintiff to show that officers are not entitled to qualified immunity. Thus, in the least these three officers were entitled to qualified immunity and have interposed the defense from the outset of this case.

D. The Panel erred as a matter of law regarding Appellants' state immunity defenses.

First, contrary to the Panel's opinion, the Appellants did in fact argue their entitlement to immunity under Ark. Code Ann. § 21-9-301. App. Brief, pp. 23-24. Thus, the Panel committed an error of law and the Appellants' argument that they were entitled to immunity at least from state law negligence claims pursuant to Arkansas law must be addressed.

Further, the Appellants are alternatively entitled to state law immunity under Tennessee law. The Tennessee Governmental Tort Liability Act (hereinafter TGTLA), Tenn. Code Ann. §29-20-101 et seq., establishes that local government entities have immunity for certain acts of its employees except when the General Assembly explicitly retains liability. *Sallee v. Barrett,* 171 S.W.3d 822, 826 (Tenn. 2005). Specifically, TGTLA states:

> Immunity from suit of all governmental entities is **removed** for injury proximately caused by a negligent act or omission of any employee within the scope of his employment **except** if the injury arises out of: [*inter alia*]
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

Tenn. Code Ann. §29-20-205 (emphasis added)

The Appellants should have been granted immunity pursuant to the Interstate Fresh Pursuit Act, known in Tennessee as the "Uniform Law on Fresh Pursuit," in conjunction with Ark. Code Ann. § 21-9-301 and Tenn. Code Ann. § 29-20-205. Tenn. Code Ann. § 40-7-201. This act offers protection to officers pursuing "a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed." Tenn. Code Ann.

§ 40-7-202. The Tennessee Uniform Law on Fresh Pursuit expressly gave these Arkansas police officers the same authority as a Tennessee officer when in fresh pursuit of a person "who is believed to have committed a felony" in Arkansas. Tenn. Code Ann. § 40-7-203. Mr. Rickard committed felony fleeing in Arkansas and in Tennessee. As such, the officers should be entitled to the same immunity as would a Tennessee policeman. If that were not the case, there is no reason to have such a uniform law enacted throughout the entire nation and the Appellants would merely be private citizens, which is contrary to the policy of the Fresh Pursuit Act.

Respectfully submitted,

Vance Plumhoff, Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, in their individual capacities
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