No. 13-862

In the Supreme Court of the United States

LATRINA D. THOMAS, Tutrix, on behalf of Ka'Dary Da'Shun Thomas,

Petitioner,

v.

SCOTT NUGENT,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the law was clearly established in January of 2008 that a police officer was constitutionally prohibited from employing an electronic control weapon in "drive-stun" mode as a pain compliance technique on a handcuffed but noncompliant arrestee to garner the arrestee's compliance with officer commands to walk to the police vehicle.

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INTRODUCTION

The decision below was an interlocutory appeal of the denial of a police officer's summary judgment assertion of qualified immunity. In early 2008 Winnfield police officer Scott Nugent, after a foot chase with two other officers, employed a Taser in drive-stun mode eight times over a fourteen-minute period to a handcuffed but noncompliant felony arrestee who refused to stand up and walk to the police vehicle. In between those drive-stun applications the arrestee was instructed to get up, warned that he would be tased if he did not comply, and given the opportunity to comply before being tased.

In between drive stuns, the arrestee repeatedly told Officer Nugent and the other officers that he was not going to get up and that he didn't want to go to jail. (He was wanted on a felony warrant for crack cocaine and was already on probation for a previous crime.) After arriving at the police station, the arrestee, Barron Pikes, began behaving bizarrely, collapsed to the floor, and after he was rushed to the hospital, was pronounced dead. The petitioner contends that the tasing caused the death, but the defendants have shown that Mr. Pikes suffered from sickle-cell trait and contend that he died of exertional sickling; the autopsy showed that his red blood cells had in fact sickled before death.

After his relatives filed this § 1983 suit asserting excessive force, Officer Nugent sought qualified immunity via summary judgment. The district court denied summary judgment on the basis of two disputed facts. On interlocutory review, the court of appeals for the Fifth Circuit reversed, holding *sub silentio* that the

disputed facts were not material and that none of the remaining undisputed facts demonstrated that the use of the Taser was unreasonable under the circumstances. Petitioner then filed the subject petition for writ of certiorari, primarily asserting that a circuit split warrants intervention.

As discussed below, there is no circuit split on the constitutionality of drive-stun tasing of an uncooperative handcuffed arrestee for pain compliance. If such a split does exist, cases supporting it have not been identified by the district court, or the court of appeals below, or the petitioner.

STATEMENT

A. Historical Background

Petitioner contends that Officer Nugent used excessive force when Pikes was tased eight times on the evening that Officer Nugent and another officer, Cargyle Branch, arrested Pikes. An active felony warrant for Pikes's arrest was outstanding when Officer Nugent spotted Pikes as he was walking along a sidewalk. Officer Nugent called for backup. He had prior dealings with Pikes and considered him a flight risk. Officer Branch arrived in a separate vehicle, and when Branch stepped out and tried to speak to Pikes, Pikes ran. The ensuing foot chase lasted approximately three minutes and ended when Officer Branch pointed his firearm at Pikes and ordered him to the ground. Pikes complied, and the officers handcuffed him. Pikes was breathing heavily.[1]

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[1] The petition states that "[i]t is undisputed that at the time Nugent shocked him, Pikes was fully restrained in handcuffs, and

The officers then directed Pikes, who was six feet tall and weighed 247 pounds, to stand up, but he refused to comply. A witness at a nearby business heard Pikes say, "oh, ya'll just drag me, take me, carry me." This witness heard the officers repeatedly ask Pikes to get up and walk, and when Pikes did not accede, the officers said that they would count to three, then tase him. They counted to three, and when Pikes did not arise, they again asked him to get up and walk and told him that they would count to three again, which they did. After counting to three a second time and yelling "taser, taser" without movement on Pikes's part, they then tased Pikes in "drive-stun" mode in the middle of Pikes's back. This mode of delivery is utilized as a compliance procedure because it causes temporary and localized pain, as opposed to "probe mode," which results in neuromuscular incapacitation.[2]

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posed no flight or safety risk." (Petition, p. 3). It is indeed disputed whether Pikes posed a flight risk, especially considering that the officers considered him to be a known flight risk from prior dealings, and, of course, the fact that he in fact fled when approached, leading them on a chase through the town and into the woods. He was not yet secured in the police vehicle and, for all the officers knew, could have taken off in handcuffs. It is also disputed whether he was a safety risk. Pikes was a very large man—*much* larger than Officer Nugent—and obviously very motivated to not go to jail. It is simply not accurate to assume that he could not have posed a physical threat simply because he was handcuffed.

[2] The petition cites the coroner's report, stating that "no time is allowed between shots for normal neuromuscular recovery time", and that "the subject could not reasonably be expected to walk." (Petition, p. 11). The fact that Pikes undisputedly *in fact* got up and walked negated the coroner's speculation, which is probably why neither the district court nor the court of appeals mention the

Pikes rolled away from the first administration of the Taser in stun mode, and that caused the Taser device to then be deployed "at point blank range." Thomas contends that the probes pierced Pikes's flesh and that he received a "probe mode" shock, though Thomas concedes that all Taser shocks except for this one were in drive-stun mode.

Pikes then got up and walked about ten feet before falling to his knees. Officer Nugent gave another verbal warning and administered another drive-stun (the second stun) to the middle of Pikes's back. Officer

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report, and why petitioner understandably did not rely on it for those facts below.

It is probably worth noting at this point that much of the opinion-laden facts found in the petition have their source in the report of Dr. Randolph Williams, the parish coroner (who, importantly, did not perform the autopsy himself). Petitioner's counsel in the trial and appellate court did not rely much at all on this report, and certainly not for the "facts" referenced in the petition. And there's a very good reason for it: His medical opinions and factual speculations *were utterly eviscerated* in his videotaped deposition, taken over the course of two days, wherein he: (1) admitted that he was not an expert in forensic pathology, cardiology, cardiac pathology, electrophysiology, or sickle cell trait, (2) admitted that he does not have the knowledge, training, or skill to say that the Taser caused ventricular tachycardia or any other cardiac arrhythmia; (3) admitted that he had no opinion as to whether the electrical charge from the Taser ever affected Pikes's heart, and, perhaps most poignant, (4) admitted that he was not an expert on the flow effects of the electricity of a Taser on the human body. (Depo. of Williams, pps. 259-61, 270, 331). So the opinions of Dr. Williams cited in the petition regarding what Mr. Pikes could and could not do after tasings may have been more appropriately relegated to the cutting room floor, where petitioner's trial counsel left it.

Nugent told Pikes that if he did not get up, Officer Nugent would tase him again. Pikes did not comply, and Officer Nugent tased Pikes a third time in drive-stun mode. Officer Nugent and Branch then tried to lift Pikes, but he refused to get up and told the officers that he would not go with them. After ordering Pikes to get up several more times, and issuing another verbal warning, Officer Nugent tased Pikes for a fourth time in drive-stun mode.

Pikes then stood up and walked as far as a concrete barrier but stopped at that barrier and laid across it, asking the officers to leave him there so that he could die. The officers ordered him to get up so that they could get him into a law enforcement vehicle and, after warning him, tased him a fifth time in drive-stun mode. He did not comply, and the officers repeated this sequence, stunning Pikes a sixth time in drive-stun mode. At that point, Pikes said that he would go, the officers helped him up, and he walked until he came to a parking lot, at which point he fell down. Pikes asked for help to get up, the officers assisted him, and he was placed into Officer Branch's vehicle. Approximately twelve minutes had expired since Pikes was handcuffed.

During the drive to the police department, Pikes told Branch, "I'm dead anyway, I'm dead anyway." Upon arrival at the police department, Pikes would not exit the vehicle, saying that he "wanted to stay in the car so he could die." Officer Nugent performed a spark test on the stun gun device thinking that it might motivate Pikes. When Pikes did not exit, Officer Nugent warned him that he would tase him and did so, in drive-stun mode, to Pikes's upper right chest, by his

shoulder. While being tased (for the seventh time), Pikes said that he would get out, and Officer Nugent stopped the shock after two seconds rather than allowing the device to complete an automatic five second cycle.

Officer Nugent helped Pikes out of the vehicle, and Pikes dropped to the ground. Officer Nugent asked Pikes to get up, and Pikes responded that he would not. Officer Nugent again warned him and then administered another, the eighth and last, shock in drive-stun mode to the middle of Pikes's back.

Pikes did not respond, and no more drive- stuns were used. At all times before the last Taser drive-stun application, Pikes appeared fully conscious, was talking to the officers and affirmatively verbalizing his intent to remain noncompliant, did not communicate any inability to comply with instructions, and did not appear to be suffering from any medical condition. He appeared to simply be a non-compliant arrestee.

When the final drive-stun did not elicit a response from Pikes as the others had, Officer Nugent holstered the Taser, and he and another officer picked Pikes up and "had to drag him" into the police department building. They placed him in a chair, but Pikes fell off the chair more than once. When Officer Nugent asked Pikes what drugs he had taken, Pikes said that he had taken PCP and crack, but subsequent analysis showed only marijuana in his system. Pikes was "breathing kind of heavy," and Officer Nugent immediately requested an ambulance.

Paramedics arrived and found Pikes on the floor, unresponsive. After being administered a sternum rub,

Pikes regained consciousness and mumbled a few words. Paramedics attached heart monitor leads, but Pikes stopped breathing while the paramedics were placing blood pressure cuffs on him. Paramedics began resuscitation efforts and continued them as Officer Nugent drove the ambulance to the hospital. Pikes was "flat lining" at this point. After treatment at the hospital for about an hour, Pikes was pronounced dead. An autopsy revealed that Pikes's red blood cells had sickled before his death. The officers did not know that Pikes had sickle cell anemia. The cause of death remains an issue in the case, but is not an issue in this appeal.

B. Procedural Background

Thomas sued Officer Nugent and others, alleging that he violated Pikes's constitutional rights under the Fourth and Fourteenth Amendments by using excessive force and because he was deliberately indifferent to Pikes's need for medical attention. Officer Nugent moved for summary judgment on the ground of qualified immunity. Although the district court granted the motion as to the deliberate indifference claim, it denied summary judgment as to excessive force.

The interlocutory ruling denying summary judgment on qualified immunity was appealed by Nugent to the Fifth Circuit. The court of appeals held that the case law was not clear regarding the use of a Taser under those circumstances and awarded qualified immunity. In a footnote, it noted that the Taser use was not unreasonable according to the facts in the record. Petitioner then filed the subject petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Circuit Split is Not Real.

The underlying legal issue here is whether the law clearly prohibited a peace officer from employing a Taser in *drive-stun mode* on a handcuffed arrestee who repeatedly disobeyed officer commands to stand and walk to the police vehicle, where each application of the Taser was preceded with a warning that was usually met with a verbal response from the arrestee that he was not going to get up. In other words, was there a clearly established constitutional prohibition against employing this particular quantum of force (equal or analogous to a Taser in drive-stun mode) solely for pain-compliance on a handcuffed but noncompliant, physically able arrestee?

None of the cases cited by petitioner in support of a circuit split bear squarely on that issue; each of them have material factual differences which may have resulted in different outcomes.

A. Probe Mode Deployment Cases Are Not Analogous

One of the most fundamentally dissimilar characteristics of some of the cases cited by petitioner is that they involved the use of a Taser in probe mode, rather than drive-stun mode. As briefly discussed in the petition, the nature of the force effected by a Taser differs significantly depending on the mode in which it is used. In probe mode, two wired prongs are ejected from the weapon which attach to the target, causing neuromuscular incapacitation such that the target will typically lose the ability to control his or her body during the stun. When used in drive-stun mode,

however, no probes are deployed, and the Taser is pressed directly against the target, causing only localized pain without neuromuscular incapacitation—it is used for pain compliance, not incapacitation.

It is therefore inaccurate to lump together probe mode cases with drive-stun cases in an effort to show a circuit split, as the mechanism and quantum of force in those two modes are not at all analogous. Doing so is tantamount to lumping together cases in which a pistol is used as a bludgeoning instrument with cases in which the trigger was pulled (though both modes of the Taser are non-lethal). This distinction alone takes two of petitioner's cases out of the supposed circuit split equation. *See Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993) (prison inmate "shot" with Taser in probe mode when he refused to sweep his cell); *Wells v. City of Dearborn Heights*, 538 F. App'x. 631 (6th Cir. 2013) (handcuffed, prone arrestee shot with Taser in probe mode after rolling over when gunshot was heard).[3]

Moreover, *Hickey* was not even a Fourth Amendment case; it was an Eighth Amendment case in which the issue was whether the use of the Taser amounted to "cruel and unusual punishment." *See Hickey*, 12 F.3d 754 (8th Cir. 1993) ("When J.B. Hickey refused to sweep his cell at the Pulaski County Jail in Little Rock, Arkansas, jail officials shot him with a stun gun. The district court determined that this did

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[3] That probe mode was used rather than drive-stun mode is confirmed in the district court opinion. *See Wells v. City of Dearborn Heights*, 2011 WL 6740743 (E.D.Mich. 12/22/2011) ("Plaintiff specified that the taser probes entered his body on the side of his right hip.").

not violate his Eighth Amendment right to be free from cruel and unusual punishment. We disagree and remand for a determination of damages.").

B. Cases In Which The Arrestee is Not Already Restrained Are Not Analogous

In petitioner's first Question Presented, she highlights and relies heavily on the fact that the arrestee here, Mr. Pikes, was "already handcuffed" when the Taser was employed, presumably to emphasize the perceived unconstitutionality of the force when such is the case. *See* Petition, p. i ("Was it clearly established in 2008 that a police officer violates the Fourth Amendment when he uses a Taser to electroshock a person eight times, *where that person is already handcuffed*…" (emphasis added)). One would presume, then, that the petition supporting that issue would be rife with citations to cases in which circuit courts are struggling over the constitutionality of tasings where the arrestee has already been placed in handcuffs at the time of the tasing. Those who would make that presumption after reading that Question Presented are sure to be disappointed.

Half of the Taser cases cited in the petition—four of the eight—do not even involve tasings after the arrestee had been fully restrained. This is a peculiar statistic considering the emphasis placed on that presumably crucial fact throughout the petition.

In *Thomas v. Holly*, 533 F. App'x 208, 219 (4th Cir. 2013), the unconstitutional drive-stuns were deployed at a time when the arrestee had not been fully secured, where several officers were sitting atop him, and where he was actively attempting to avoid the arrest. Thus,

the unconstitutional force was employed while the officers were still engaged in efforts to apply the handcuffs.

In *Kijowski v. City of Niles*, 372 F. App'x 595 (6th Cir. 2010), "police officers dragged [Kijowski] from a truck, threw him to the ground, shocked him twice with a Taser, and kicked him repeatedly." *Id*., at 595. Although the versions of the facts surrounding the event differed greatly as is typically the case, both versions acknowledged that the tasings occurred before handcuffs were in place. *See Kijowski*, 372 F. App'x at 596 ("Officer Aurilio's affidavit indicates that he proceeded to 'assist[ ] Warren police officers in subduing a man who was extremely combative and resisting the attempts of the Warren officers to handcuff him.' To do so, Officer Aurilio 'deployed [his] Taser in drive stun mode on [the] suspect male which allowed Warren officers to handcuff him.'").

In *Brown v. City of Golden Valley*, 574 F.3d 491, 497-99 (8th Cir. 2009), the passenger of a stopped vehicle was subjected to a drive-stun tasing when she refused to get off of her cellular phone. She was forcibly removed from the car, escorted to the police vehicle, *then* handcuffed. While the drive-stun was used for pain compliance (without warning, however), it was not used after restraint.

In *Meyers v. Baltimore Cnty., Md.*, 713 F.3d 723, 734 (4th Cir. 2013), the excessive seven drive-stuns (without warnings and allowing time to comply) came at a time when the arrestee "was '[s]tiffening up and keeping his body rigid and keeping his hands underneath of his body'" to prevent cuffing, all while

several officers sat atop him, until the arrestee ultimately fell unconscious. *Meyers*, 713 F.3d at 729.

The instant case is presented by petitioner as being the vehicle with which the constitutional line can be drawn between the permissible force employed to get the arrestee under control (i.e., handcuffed) and the permissible force that can be employed thereafter to complete the remainder of the arrest until the arrestee is fully secured. But half the cases cited involve only the former, and they therefore do not support the supposed circuit split as to the permissible quantum of force that can be employed after handcuffing.

C. The Non-Taser Cases Cited Do Not Involve Comparable Quantums of Force

While it is true that cases involving different forms of force (i.e., employing different weapons) can be sufficiently analogous to put all officers on notice that a particular quantum of force is unconstitutional under particular circumstances, the cases cited in the petition that do not involve tasings do not involve analogous quantums of force.

In *Meirthew v. Amore*, 417 F. App'x 494, 497 (6th Cir. 2011), a female arrestee was being booked, and while standing facing a wall in the police station with her hands cuffed behind her back, refused to spread her legs. The female officer told the arrestee that she would "take her to the ground" if she refused to comply. When she refused, the officer grabbed her handcuffed arms and face-slammed her into the booking room floor, causing six skull fractures and "profuse" bleeding. The quantum of force realized by face-slamming a handcuffed arrestee (who cannot protect her face) onto

a hard indoor floor is in no way similar to the localized, temporary pain experienced by the recipient of a drive-stun tasing. Other than the fact that this arrestee was handcuffed, *Meirthew* bears no factual resemblance to this case and warrants no further comment other than it is a curious case to include in the petition.

In *Bultema v. Benzie Cnty.*, 146 F. App'x 28, 35-36 (6th Cir. 2005), a security guard and sheriff's deputy knocked on the door of condo owner at 2:00 a.m. regarding a trespassing complaint. There was a dispute as to how the condo door was ultimately opened, but after the arrestee was told he was under arrest, he struggled and resisted and was therefore pepper sprayed *before* he could be handcuffed. After he was handcuffed, he supposedly mouthed off at the deputy, who allegedly responded by hitting him on the side of the head with his flashlight, and qualified immunity was denied.

The use of force presented by the pepper spray in *Bultema* is not analogous to this case because it was employed in order to subdue the arrestee to get him handcuffed, not as here where force was used solely to gain compliance with post-handcuffing orders to allow the remainder of the arrest to be accomplished. And the use of force presented by the flashlight-to-the-head is, of course, nowhere near analogous to a drive-stun, not only in terms of quantum and mechanism and lasting effect, but also because it was gratuitous and not in an effort to gain compliance with orders. *Bultema* is another curious addition to petitioner's arsenal of circuit split authority.

In *Griffifth v. Coburn*, 473 F.3d 650, 659 (6th Cir. 2007), police were allowed in the home by the arrestee's

mother to execute an arrest warrant. He was sitting on the couch, denying the warrant was for him, and when the officer reached for his arm, the arrestee put it behind him. The offending officer then "all of a sudden" jumped on the arrestee and placed him in a choke hold for "minutes", and then "threw" his limp, lifeless body onto the ground and handcuffed him. He literally choked him to death without so much as a warning or further opportunity to comply.

This case is quite easily distinguishable not only because it is yet another case cited in the petition in which the force was applied *before* handcuffing (cutting against the Question Presented), but it is also inapposite because the unremitting choking of an arrestee to death without warning and an opportunity to comply is nowhere near the short, discontinuous and localized pain accompanied by a Taser in drive-stun mode, used only after warnings and an opportunity to comply each time. The inclusion of this case in the petition is a red flag demonstrating the weakness of petitioner's circuit split argument.

In *Headwaters Forest Def. v. Cnty. Of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), environmental activists chained themselves together to peacefully protest logging activities. Law enforcement were called to remove them. Pepper spray was applied directly to the protesters' eyes with a Q-tip, and water to flush out the pepper spray was withheld until they complied by releasing their link to other protesters.

While these protesters were "restrained" in the technical sense, they were self-restrained, as opposed to restrained by police in the act of arrest. Consequently this is another case in which the force

was applied *before* handcuffing or police-initiated restraint. In any event, petitioners assume, without authority or discussion, that applying pepper spray directly to the eyes via Q-tip, and the persisting pain that remains after the Q-tip is removed, is synonymous to the temporary pain caused by a drive-stun that ceases once the Taser is removed or the trigger released.

It is therefore not at all clear that the quantum of force in *Headwaters* was constitutionally analogous to that at issue in this case. Moreover, qualified immunity was denied in Headwaters in part because the police could have moved the protesters "in minutes" by grinding the chains apart. Here, Mr. Pikes could not have been moved via alternate means; they asked him to get up and walk and he refused each time, and they even attempted to lift him with the help of other officers (one of whom was recovering from a heart procedure) but were unsuccessful. It was not until he was drive-stunned that he stopped telling them he was not going anywhere and complied. The facts are so different that *Headwaters* can in no way be said to conflict with the 5th Circuit's opinion.

D. The Two Post-Handcuffing Drive-Stun Cases Are Factually & Legally Distinguishable

In *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490 (6th Cir. 2012), a handcuffed arrestee, who was disoriented from two *probe-mode* tasings and an attack from a police dog, was seated in the back seat of the police vehicle but refused to put his legs in the car. The officer warned him that he would be tased if he did not comply. The arrestee replied that he was "unable to

breathe and asked [the officer to] put the car window down." *Id*., at 495. The officer then administered two separate *drive-stuns*, after which the arrestee complied.

The district court found that, even though a warning was given, the disoriented arrestee was not given sufficient time to comply with the order before the force was used. It denied qualified immunity based on, inter alia, the fact that the arrestee "was already placed in the patrol car leaving only his feet outside; and he did not have time to comply with [the officer's] order before he used his Taser." *Id*., at 498. The court of appeals concluded that that factual finding was "not blatantly and demonstrably false," and therefore accepted them on appeal and affirmed the denial of qualified immunity. *Id*., at 497.

In stark contrast to the reasons why qualified immunity was denied in *Austin*, Mr. Pikes here was not "already placed in the patrol car", and, more importantly, Officer Nugent provided warnings each and every time before he applied each drive-stun, and there is no evidence or argument that Mr. Pikes was not given sufficient time to comply. Considering that these two critical component facts were not present in *Austin*, it cannot seriously be argued that *Austin*'s holding is truly at odds with that of the court of appeals below.

The final case in the petition, *Orem v. Rephann*, 523 F.3d 442, 444, 448-449 (4th Cir. 2008), is not a Fourth Amendment excessive force case. The court of appeals classified the fully detained plaintiff-arrestee as a pre-trial detainee, and therefore employed the excessive force standard applicable to that category of persons under the Due Process Clause of the Fourteenth

Amendment, *see id*., at 446 ("To succeed on an excessive force claim under the Due Process Clause of the Fourteenth Amendment, Orem must show that Deputy Rephann 'inflicted unnecessary and wanton pain and suffering.'" (quoting *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir.1998)), rather than the reasonableness-under-the-totality-of-circumstances test applicable to Fourth Amendment excessive force claims, *see Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989) ("[T]he question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

While there are undoubtedly certain factual similarities between *Orem* and this case—both arrestees were handcuffed when they were drive-stunned—it remains that these cases cannot be said to be conflicting when the alleged constitutional injuries stemmed from different constitutional provisions and were consequently analyzed against different constitutional standards.

The cases cited by petitioner cannot be labeled as ones in which there are precise legal disagreements over factually analogous events. If the issue presented is whether post-handcuffing use of Tasers in drive-stun mode for pain compliance constitutes excessive force under the Fourth Amendment, the cases cited do not show that the Circuits are confused on that narrow issue: half of the cited cases do not involve Taser use after handcuffing; two do not involve drive-stuns; four do not involve Tasers at all and address noncomparable quantums of force (face slamming onto the floor, choking to death without warning, applying pepper

spray via Q-tip to the eyes, and using a flashlight as a baton to the head); and two do not even involve Fourth Amendment excessive force claims.

Petitioner's argument is really that she believes the court of appeals incorrectly applied the correct standard of review to the facts of the case—that is, that it employed the *correct* Fourth Amendment excessive force standard but reached the wrong conclusion. But that is not an error considered cert-worthy. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). As a consequence, the petition for certiorari should be denied.

II. The Reasoning in the Petition is Internally Inconsistent.

The petition argues that the court of appeals' decision granting qualified immunity was "plainly erroneous" (Petition, p. 25), but also argues that that decision "creates a clear conflict with the decisions of other circuits." (Petition, p. 19). But, as shown below, the very fact that such a Circuit split exists (assuming *arguendo* that one does) necessarily means that qualified immunity was properly granted.

This Court has explained on at least three occasions that qualified immunity should be granted where a Circuit split on the relevant issue exists, because "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Lane*, 526 U.S. 603, 618, 119 S.Ct. 1692, 1701 (1999). *See Reichle*

v. Howards, 132 S.Ct. 2088, 2096 (2012) (same); *Pearson v. Callahan*, 555 U.S. 223, 245, 129 S.Ct. 808, 823 (2009) ("where the divergence of views on the [relevant legal issue] was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.").

If a Circuit split exists, as petitioner argues, then the court of appeals necessarily correctly held that qualified immunity should be granted.

III. The Circuit Split Regarding the Parties' Respective Burdens on Qualified Immunity Is Real, But Not Relevant to This Case.

Assuming *arguendo* that there is a split in circuit authority over which party bears the burden once qualified immunity is raised by the defense, such a split is irrelevant to the outcome of this case, as the record shows that respondent would have satisfied the burden even if it was his to bear.

In the district court, petitioner cited only one case involving a Taser in support of her position that the law was clearly established, *Autin v. City of Baytown*, 174 F. App'x 183, 186 (5th Cir. 2005), an unpublished case in which an officer repeatedly drive-stunned an elderly woman, who was not under arrest, without warning or need when she simply attempted to knock on the door of a house. Petitioner cited no other cases attempting to show that a Taser in drive-stun mode or analogous forms of force were clearly unconstitutional after handcuffing. The only other cases cited by her were Supreme Court cases noting only generally that excessive force violates the Fourth Amendment.

Respondent's motion for summary judgment, on the other hand, culled nationwide jurisprudence, both state and federal, pointing out and summarizing the status of the law on post-handcuffing use of drive-stuns. It examined the jurisprudence before 2008 showing that such Taser use was not clearly unconstitutional, and it discussed pre- and post-2008 cases showing that such Taser use has in fact been held constitutional. *See*, e.g., *Buckley v. Haddock*, 292 F. App'x 791 (11th Cir. 2008) (deeming constitutional the drive-stun tasing of handcuffed arrestee three times when he refused to get up and walk to the police vehicle, and holding that qualified immunity nonetheless applied because the law was not clear); *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010) (*per curiam*), reversed in part, *Mattos v. Agarano*, 661 F.3d 4332 (9th Cir. 2011) (holding that state of the law on Taser use as of 2004 was not clear, entitling officer to qualified immunity).

For this case, it therefore does not matter whether the initial burden rested with the petitioner or respondent. Either way, the petitioner failed to show that the law was clearly established, and the respondent demonstrated that it was not. The outcome, therefore, would not have changed even if the initial "burden" correctly lay with the respondent. The Fifth Circuit's ruling was correct as a matter of law, based on the facts in the record and the existing authorities, regardless of who bore the initial burden.

IV. Petitioner Conceded Below That the Disputed Facts Were Immaterial, and the Court of Appeals Applied the Correct Legal Standard to the Remainder of Undisputed Facts.

The district court denied qualified immunity on summary judgment because it found a dispute as to (1) whether Mr. Pikes's refusal to stand up was because he was physically unable to (as "asserted" by petitioner in brief only), or because he was intentionally being resistant (as shown by respondent), and (2) as to whether Mr. Pikes was yelling because he was in pain (as "asserted" by petitioner in brief only), or because he did not want to go to jail (as shown by the respondent).

On appeal, respondent noted that interlocutory jurisdiction was proper because qualified immunity should be granted even when petitioner's version of the facts were accepted as true (thus making qualified immunity turn on an issue of law), and alternatively, that the two "disputed" facts mentioned by the district court were immaterial. In her appeal brief, petitioner conceded that the two disputed facts were not material. *See* Appellee's Brief, p. 14 ("Other issues, such as whether Pike[s] cried out in pain or was unable to physically to comply with Officer Nugent's orders to stand up are not material fact issues to the constitutional violation inquiry on summary judgment.").

Consequently, the court of appeals applied the correct Fourth Amendment reasonableness standard to the remaining undisputed facts, without weighing any evidence or overturning any facts found by the district

court. Subject matter jurisdiction was therefore proper in the court of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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