No. _____

IN THE
Supreme Court of the United States

LATRINA D. THOMAS, TUTRIX, ON BEHALF OF KA'DARY DA'SHUN THOMAS,
Petitioner,

V.

SCOTT NUGENT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER FOR THE CITY OF WINNFIELD,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Baron Pikes died after Respondent, a police officer, electroshocked him at least eight times with a "Taser." Petitioner sued Respondent on behalf of Mr. Pikes's minor son for violation of Mr. Pikes's Fourth Amendment rights. Respondent moved for summary judgment on the ground of qualified immunity. The district court denied the motion, but the court of appeals reversed. The Questions Presented are:

1. 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 and poses no threat to anyone's safety and no risk of flight but does not comply with the officer's orders to stand up?

2. On a motion for summary judgment, does the non-moving party bear the burden of disproving the moving party's affirmative defense of qualified immunity?

3. Does a court of appeals have subject-matter jurisdiction to hear an interlocutory appeal of a district court's decision that there is a genuine dispute over factual issues, where the district court does not decide any legal issue?

PARTIES TO THE PROCEEDING

Petitioner is Latrina D. Thomas, Tutrix, on behalf of Ka'Dary Da'Shun Thomas, the son of the decedent, Baron Pikes. Respondent is Scott Nugent, a former police officer for the City of Winnfield, Louisiana.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—Continued

REPORTS AND ARTICLES

GUIDELINES AND STANDARDS

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI

Latrina D. Thomas, Tutrix, on behalf of Ka'Dary Da'Shun Thomas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is unreported. The order of the court of appeals denying rehearing (App., *infra*, 60a-61a) is

unreported. The opinion of the district court (App., *infra*, 14a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2013. A petition for rehearing was denied on October 18, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

On January 17, 2008, five days after his twenty-first birthday, Baron Pikes[1] died after Respondent Scott Nugent, then an officer with the Winnfield, Louisiana police department, electroshocked him

[1] Mr. Pikes is also referred to in some of the evidentiary materials as "Baron Collins." Pikes was raised by his grandmother, JoAnn Collins. 9/1/11 SUMF for Def.'s Mot. Summ. J. Ex. 8 at 9, ECF No. 153-11 (Dist. Ct.).

with a "Taser" at least eight times. It is undisputed that at the time Nugent shocked him, Pikes was fully restrained in handcuffs, and posed no flight or safety risk. But Pikes did not get up when Nugent ordered him to.

Petitioner, the mother of Pikes's son and acting on her son's behalf, brought suit under 42 U.S.C. § 1983 (2006), alleging, *inter alia*, that Officer Nugent violated Pikes's Fourth Amendment right to be free from excessive force. Respondent moved for summary judgment on the ground of qualified immunity. The district court denied the motion, concluding that there was a genuine dispute over crucial factual issues. On Respondent's interlocutory appeal, the court of appeals reversed, holding that Petitioner had not carried the burden of proving that it was clearly established that repeatedly electroshocking a handcuffed suspect who poses no flight or safety risk violates the Fourth Amendment.

The court of appeals' decision creates a clear conflict in the circuit courts. This is an issue that arises repeatedly in lower courts, and will arise even more frequently as law enforcement agencies nationwide expand their use of "less-lethal" weapons to subdue criminal suspects or engage in "crowd control."

In addition, the court of appeals' decision that Petitioner bore the burden of disproving Respondent's affirmative defense of qualified immunity deepens an existing split among the circuits, which affects not just excessive force cases but any Section 1983 or *Bivens* action in which a

government official claims qualified immunity from suit.

This Court should therefore grant the petition to resolve these issues. Alternatively, the Court should summarily reverse because the court of appeals plainly lacked subject matter jurisdiction, as the district court's decision that there were genuine factual issues was not a "final decision" under 28 U.S.C. § 1291 (2006).

1. Electronic control weapons ("ECWs")—also known as conducted energy devices ("CEDs"), or, more colloquially, "Tasers" (after the name of the manufacturer of the most popular device)—have become nearly ubiquitous in law enforcement. Over the past ten years, the number of police departments in the United States that deploy Tasers has increased from around 4,300 to 16,500; over 91% of departments now use them. Noah Rayman, *Tase Me, Bro*, TIME, Aug. 15, 2013, http://nation.time.com/2013/08/15/tase-me-bro/. One of the most popular ECWs—and the kind Officer Nugent used on Mr. Pikes—is the X26 Taser, produced by Taser International, Inc.

ECWs like the X26 are "characterized by the infliction of excruciating pain." U.S. Dep't of Justice, Nat'l Inst. of Justice, *Study of Deaths Following Electro Muscular Disruption* 45 (2011). The X26—which delivers an electrical charge of 50,000 volts—can operate in two different modes. *Id.* at 52. In "probe" (or "dart") mode, the Taser shoots two nitrogen-propelled metal barbs attached to thin metal wires. Once these barbs penetrate an individual's skin, they deliver a powerful electric

shock that temporarily incapacitates the recipient through "significant, uncontrollable muscle contractions." *Harper* v. *Perkins*, 459 F. App'x 822, 826 (11th Cir. 2012). Use of an ECW in probe mode can also cause numerous strain-type injuries, as well as stress or compression bone fractures. See Stanford Crim. Justice Ctr., *Use of Tasers by Law Enforcement Agencies: Guidelines and Recommendations* 4-5 (2005). A probe-mode shock can also cause cardiac arrest. See Douglas P. Zipes, *Sudden Cardiac Arrest and Death Following Application of Shocks from a TASER Electronic Control Device*, 125 Circulation 2417, 2417-22 (2012).

In the second mode, commonly known as "drive-stun," an officer deploys the ECW by pressing its electrical barbs directly against the recipient's skin. This mode also causes "incapacitating pain." *McKenney* v. *Harrison*, 635 F.3d 354, 364 (8th Cir. 2011) (Murphy, J., concurring). In addition, it "can cause marks, friction abrasions, and/or scarring that may be permanent." 9/1/11 SUMF for Def.'s Mot. Summ. J. Ex. 9 at 4, ECF No. 153-12 (Dist. Ct.) (Taser Int'l, *Product Warnings—Law Enforcement* (2007)).

When used properly, electronic control weapons can serve legitimate law enforcement purposes, and can reduce the need to use lethal force. But they are also dangerous and potentially lethal: since 2001, over 540 people have died after being shocked by police Tasers. See Amnesty International, *The State of the World's Human Rights* 289 (2013).

Indeed, the product warnings for law enforcement that Taser issued in 2007 cautioned that Taser use

"involves a degree of risk that someone will get hurt or may even be killed due to physical exertion, unforeseen circumstances and individual susceptibilities." 9/1/11 SUMF for Def.'s Mot. Summ. J. Ex. 9 at 1, ECF No. 153-12 (Dist. Ct.). They also specifically warned against "prolonged or continuous exposure(s) to the TASER device's electrical discharge," as "extensive repeated, prolonged, or continuous application(s) of the TASER device may contribute to cumulative exhaustion, stress and associated medical risk(s)." *Id.* at 3; see also App., *infra*, 57a.

Since 2005, the Police Executive Research Forum ("PERF")[2] (working under a grant from the U.S. Department of Justice) has issued guidelines stating that electronic control weapons "should *only* be used against persons who are actively resisting or exhibiting active aggression, or to prevent individuals from harming themselves or others." U.S. Dep't of Justice, Office of Community Oriented Policing Services & the Police Executive Research Forum, *Conducted Energy Devices: Development of Standards for Consistency and Guidance* 23 (2006) (emphasis added). PERF has also cautioned that "multiple activations" of ECWs "appear to increase

[2] PERF is an organization of law enforcement chief executives "who collectively serve more than 50 percent of the U.S. population." See U.S. Dep't of Justice, Office of Community Oriented Policing Services & the Police Executive Research Forum, *Conducted Energy Devices: Development of Standards for Consistency and Guidance* 39 (2006).

the risk of death or serious injury and should be avoided where practical." *Ibid.*[3]

Similarly, a model policy issued by the International Association of Chiefs of Police in 2005 specifically prohibited the use of an electronic control weapon on a handcuffed suspect, except where there is "overtly assaultive behaviour that cannot be reasonably dealt with in any other less intrusive fashion." IACP National Law Enforcement Policy Center, *Electronic Control Weapons, Model Policy* 1 (Aug. 2005) ("IACP Model Policy"). It also prohibited shocking "any suspect who does not demonstrate an overt intention (1) to use violence or force against the officer or another person, or (2) to flee in order to resist or avoid detention or arrest." *Id*. at 1-2.

Consistent with these guidelines issued by two of the most prominent law enforcement organizations, the Winnfield Police Department's policy on Taser use in January 2008 expressly stated that "[t]he Taser shall only be deployed in circumstances where it is deemed reasonably necessary to control a dangerous or violent subject." App., *infra*, 62a. Moreover, it said that a Taser may be used only if "attempts to *subdue* the subject by other conventional tactics have been, or will likely be, ineffective in the situation at hand . . . or there is reasonable expectation that it will be unsafe for

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[3] The 2011 PERF guidelines strongly discourage the use of drive-stun mode as a "pain compliance technique." U.S. Dep't of Justice, Office of Community Oriented Policing Services & the Police Executive Research Forum, *2011 Electronic Control Weapons Guidelines* 19, 21.

officers to approach within contact range of the subject." *Id.* at 62a-63a (emphasis added). The policy further provided that "[a]fter a subject has received one Taser application the deploying officer . . . shall evaluate the subject's conditions and actions before administering a second application of the Taser (when safe and practical to do so)." *Id.* at 66a.

2. While on patrol in the early afternoon of January 17, 2008, Officer Nugent spotted Mr. Pikes walking along one of Winnfield's commercial thoroughfares. Pikes had two outstanding warrants for his arrest: one for possession of crack cocaine and one for possession of an open container of an alcoholic beverage. Both warrants stemmed from a previous incident in which police had found Mr. Pikes carrying a small amount of crack cocaine in an open beer bottle. See 9/6/11 Defs.' Mot. for Summ. J. on Absence of Med. Leave Ex.'s 1-30 at 107-08, ECF No. 167-2 (Dist. Ct.) ("Ex.'s 1-30, ECF No. 167-2 (Dist. Ct.)"). Aware of these warrants, Nugent decided to arrest Pikes and called for backup.

Two nearby officers—Officer Cargyle Branch and Detective Allen Marsden—responded to Nugent's request. Shortly thereafter, Officer Branch saw Mr. Pikes, pulled his car alongside him, stepped out, and said, "Scooter, I need to talk to you." 10/14/11 Pls. Mem. in Opp'n to Mot. for Summ. J. Scott Nugent Ex. 2 at 18, ECF No. 203-2 (Dist. Ct.) ("Ex. 2, ECF No. 203-2 (Dist. Ct.)"). According to Branch, Pikes responded that he had "nothing to say" and began to run. *Id.* at 19. After a three-minute chase, Branch caught up to Pikes, drew his weapon, told Pikes that he was under arrest, and ordered him to the ground.

Pikes immediately complied and lay down on his stomach. App., *infra*, 2a. Officer Nugent then arrived, and the two officers handcuffed Pikes. Branch would later recall that Pikes—who was 6'0", 247 pounds, and "mildly obese,"—was "out of breath." Ex.'s 1-30 at 3, ECF No. 167-2 (Dist. Ct.).

The officers then ordered the handcuffed Pikes to stand up and walk back to Branch's patrol car nearby. Pikes, however, did not stand up. Officer Nugent, who would later state that he thought Pikes was "just being passive resistant," pulled out his Taser and pressed it against Pikes's back. 10/14/11 Pls. Mem. in Opp'n to Mot. for Summ. J. Scott Nugent Ex. 25 at 3, ECF No. 203-5 (Dist. Ct.) ("Ex. 25, ECF No. 203-5 (Dist. Ct.)"). After warning Pikes that he would be shocked if he did not get up, Nugent electroshocked Pikes with his Taser in drive-stun mode. App., *infra*, 2a-3a. According to Nugent, while he was giving this shock, his Taser separated from Pikes's body and then deployed in probe mode, shooting two metal barbs into Pikes's back. Ex. 25 at 4, ECF No. 203-5 (Dist. Ct.).

The officers then helped Pikes up, but after walking about ten feet, he "fell to the ground." *Ibid.* Nugent warned Pikes that he would be shocked again if he did not get up. Pikes stayed on the ground, and, according to Nugent, "kept stating that he wanted us to leave him there to die and that he was going to die." See 6/8/09 Pls. Reply to Resp. to Mot. Ex.'s A-F at 3, ECF No. 59 (Dist. Ct.).

Nevertheless, after another warning, Nugent shocked Pikes for a second time in drive-stun mode, again for five seconds. Mr. Pikes still did not get up.

According to Officer Branch, Pikes did not act in any sort of aggressive, threatening, or excited manner during this time. Ex. 2 at 29, ECF No. 203-2 (Dist. Ct.). Rather, Pikes did nothing but "lay on the ground." *Id.* at 20. Nugent also said that Pikes "wasn't physically resisting us. He was just not, once he was given the verbal commands to do something, he wasn't doing it." Ex. 25 at 10, ECF No. 203-5 (Dist. Ct.).

Thirty seconds after the second shock, Nugent pressed his Taser into Pikes's back, gave another warning, and shocked Pikes for the third time. App., *infra*, 72a. By this point, Detective Marsden had joined Branch and Nugent and a fourth officer was nearby. 9/1/11 SUMF to Mot. for Summ. J. on Behalf of Detective Mardsen and Officer Carpenter Ex.'s A-B at 4, ECF No. 157-3 (Dist. Ct.) ("Ex.'s A-B, ECF No. 157-3 (Dist. Ct.)").

After another warning, Nugent electroshocked Pikes a fourth time for five seconds. The officers then helped Pikes get up and walk toward Branch's patrol car. But Pikes did not make it to the car before lying down on a concrete barrier nearby. After warnings, Nugent then delivered two more shocks.

These last three shocks were delivered in less than fifty-one seconds. By the end of this sequence, Nugent had electroshocked Pikes at least six times in slightly over three minutes, and five times in under eighty-five seconds. App., *infra*, 73a.

Although Nugent stated that he gave a warning before each electroshock, the Winn Parish coroner later noted that the extremely short time that

elapsed between most of the shocks indicated that "little time or effort [was] expended on verbal communication or persuasion." *Ibid.* The coroner also stated that Nugent's delivery of the shocks so closely together created a "very serious" health problem. *Ibid.* "No time is allowed between shots for normal neuromuscular recovery time." *Ibid.* For this reason, the coroner found, Mr. Pikes likely was *unable* to comply with Nugent's commands. "The subject . . . could not reasonably be expected to walk, certainly not with any stability after 2 electroshocks—statements indicate that he indeed tried—but muscles are too weak, no stability . . . . Six shots—300,000 volts in 190 seconds, five in 85 seconds—should be more than incapacitating." *Ibid.*[4]

According to Officer Nugent, Mr. Pikes was stating during this time "that he wanted to die" and that the officers should "leave him there so he could die." Ex. 25 at 5, ECF No. 203-5 (Dist. Ct.). A bystander who observed these events reported that while Pikes was not getting up, he also was not actively resisting. Ex.'s 1-30 at 225, ECF No. 167-2 (Dist. Ct.). Multiple bystanders also reported, variously, that Pikes was "groan[ing]" and "moaning" when Nugent shocked him, "hollering that his heart was hurting," "screaming not to be tased anymore," and "yelling for the police to just kill him and to drag him." *Id.* at 225-26; 9/1/11 SUMF for Def.'s Mot.

[4] See also IACP Model Policy at 2 (cautioning that a "subject may not be able to respond to commands during or immediately following exposure" to an ECW).

Summ. J. Ex. 8 at 10-11 & 13, ECF No. 153-11 (Dist. Ct.).

After the sixth tase, Officers Branch and Nugent helped Mr. Pikes up and walked him toward the patrol car. Pikes fell down again along the way. The officers then got him back up and to the patrol car. At the patrol car, Nugent pulled the Taser's metal barbs out of Pikes's back.[5]

The officers then placed Mr. Pikes in Officer Branch's patrol car, and Branch drove him the short distance to the police station. According to Branch, Pikes stated during the ride, "I'm dead anyway. I'm dead anyway." App., *infra*, 4a.

Nugent arrived outside the police station shortly after Branch. According to Nugent, Mr. Pikes stated "that he wanted to stay in the car so he could die." Ex. 25 at 7, ECF No. 203-5 (Dist. Ct.). Nugent again pulled out his Taser, placed it on Pikes's right upper chest, and warned him that he would be shocked if he did not get up and out of the car. *Ibid.* Nugent then shocked Pikes for a seventh time. Ex. 2 at 40, ECF No. 203-2 (Dist. Ct.); App., *infra*, 74a. According to the coroner, by this point, Pikes's condition had seriously deteriorated, to the point where he "does not move, likely cannot." App., *infra*, 74a.

Nevertheless, Nugent pulled Pikes out of the car and onto the pavement. *Ibid.* When Pikes did not

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[5] This violated Winnfield Police Department policy, which allowed only medical personnel to remove Taser barbs. App., *infra*, 67a.

get up after another warning, Nugent shocked him for the eighth time, again for five seconds. Ex. 25 at 7, ECF No. 203-5 (Dist. Ct.). This final electroshock occurred just fifty-one seconds after the previous shock, and only fourteen minutes after the first one back at the scene of the arrest. App., *infra*, 75a-76a.[6]

According to Nugent, this final shock "had no effect" on Mr. Pikes, who "didn't holler" like he had previously. Ex. 25 at 7, ECF No. 203-5 (Dist. Ct.). Nugent and another officer then carried Pikes into the police station. Nugent stated that Pikes at that point "was just dead weight." *Id.* at 8.

Inside the police station, Mr. Pikes repeatedly fell out of his chair, foamed at the mouth, and "started to flop around" on the floor. Ex.'s A-B at 10, 12, ECF No. 157-3 (Dist. Ct.). Yet, none of the officers rendered any medical assistance or attempted to assess Mr. Pikes's condition. App., *infra*, 38a. Officer Nugent eventually called for an ambulance. He then went outside to retrieve a camera to videotape Pikes so that he "would have some kind of evidence that [Pikes] was passive resistant and everything." Ex. 25 at 8, ECF No. 203-5 (Dist. Ct.). In the video that was taken, Pikes is shackled at the ankles and rolling on the floor, mumbling incoherently, and pleading "someone . . . please help me." App., *infra*, 38a.

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[6] There is record evidence that Nugent may have delivered a third shock to Pikes (making nine total) at the police station, either in the car or after Pikes was on the ground. See 9/1/11 SUMF for Def.'s Mot. Summ. J. Ex. 8 at 10, ECF No. 153-11 (Dist. Ct.); App., *infra*, 76a.

When an ambulance arrived a few minutes later, Mr. Pikes was unconscious. Despite the efforts of paramedics, Pikes stopped breathing. After being transported to the hospital, Mr. Pikes was pronounced dead. *Id.* at 5a. Mr. Pikes's death certificate listed his cause of death as: "Cardiac Arrest following nine 50,000 volt applications from a conductive electrical weapon. Manner of Death: Homicide." *Id.* at 79a.

3. The Winnfield City Police Department subsequently fired Nugent for his use of the Taser on Mr. Pikes, which the Winnfield City Police Chief described as involving "unnecessary force and violence." Ex. 2 at 41, ECF No. 203-2 (Dist. Ct.). The Police Chief testified at a civil service hearing that Nugent's use of the Taser plainly violated the written department policy on Taser use, since Pikes was clearly not "a dangerous or violent subject." *Id.* at 42. In the Police Chief's view, Nugent used the Taser like "a cattle prod" and ignored other pain-compliance techniques, such as "wrist locks" or other "soft-hand" methods, that fell below Tasers on the Department's use-of-force continuum and should have been used to gain Mr. Pikes's compliance. *Id.* at 46-47, 56-57.[7]

The State of Louisiana subsequently charged Officer Nugent with manslaughter. During the trial, defense witnesses theorized that the cause of Mr.

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[7] The coroner's report reached the same conclusion. App., *infra*, 77a. Nugent admitted that he did not attempt to use any methods involving lower levels of force to gain Pikes's compliance. Ex. 25 at 11, ECF No. 203-5 (Dist. Ct.).

Pikes's death was not the Taser shocks, but "exertional sickling due to sickle cell trait." Ex.'s 1-30 at 85, ECF No. 167-2 (Dist. Ct.). According to these witnesses, Mr. Pikes had "sickle cell trait" and his red blood cells sickled as a result of the exertion from the three-minute chase before the arrest. At least one of the defense witnesses testified that this sickling made Mr. Pikes physically unable to get up when Officer Nugent commanded him to. *Id.* at 93-97. The jury returned a verdict of not guilty.

4. Petitioner filed this lawsuit under 42 U.S.C. § 1983, alleging, *inter alia*, that Officer Nugent's repeated use of an electronic control weapon to shock Mr. Pikes constituted excessive force in violation of Mr. Pikes's Fourth Amendment rights. Officer Nugent moved for summary judgment on the basis of qualified immunity.

The district court denied the motion. The court found that there was a genuine dispute over facts critical to determining "whether a reasonable officer in Officer Nugent's position would believe he was violating Mr. Pikes' constitutional right." App., *infra*, 46a. The court pointed in particular to conflicting evidence concerning whether "Mr. Pikes was physically unable to comply with Officer Nugent's demands to stand up" or whether, instead, "Mr. Pikes was being passively resistant." *Ibid.* In addition, the court found a genuine dispute over

whether "Mr. Pikes was yelling in pain" or whether he was "yelling he did not want to go to jail." *Ibid.*[8]

The district court further noted, in another part of its opinion granting Taser International's motion for summary judgment on a state law claim, that "a trained police officer using his Taser X26 . . . nine times on a handcuffed individual is not a use 'reasonably anticipated' by TI as the manufacturer." App., *infra*, 56a. Thus, the company "had no indication Officer Nugent would use his ECD in a way that deviated from proper policy and procedures." App., *infra*, 56a-57a.

Officer Nugent filed an interlocutory appeal, and the Fifth Circuit reversed. The court of appeals did not address the factual dispute that was the basis for the district court's denial of Nugent's summary judgment motion. Instead, the court assumed that Pikes was *able* to comply with Nugent's orders but chose not to.

Based on this assumption, the court decided that Nugent was entitled to qualified immunity because Petitioner had not carried the burden of proving that the right to be free from such use of force was "clearly established" at the time of Nugent's actions.

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[8] Although there was a genuine dispute as to whether Mr. Pikes was capable of complying with Nugent's commands, the court found that "the record clearly indicates . . . Mr. Pikes exhibited some level of physical distress." App., *infra*, 36a. The court also found in another part of its decision that there was "a genuine dispute of material fact concerning whether Officer Nugent's use of force (multiple applications of his Taser X26) was a substantial factor in Mr. Pikes' death." App., *infra*, 55a.

App., *infra*, 13a. The court examined three cases that had found the use of a Taser to constitute excessive force—*Bryan* v. *McPherson*, 630 F.3d 805 (9th Cir. 2010), *Newman* v. *Geudry*, 703 F.3d 757 (5th Cir. 2012), and *Mattos* v. *Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc)—and concluded that all were distinguishable on the facts. App., *infra*, 9a-12a.[9] It therefore held that Nugent had qualified immunity.

This petition followed.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates A Circuit Split As To Whether The Use Of A Taser In These Circumstances Violated A Clearly Established Constitutional Right

This Court has held that a government official enjoys qualified immunity unless: (1) "the official violated a statutory or constitutional right," and (2)

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[9] In distinguishing these cases, the appellate court emphasized that "Officer Nugent testified that the Winnfield City Police Department authorized taser use in drive stun mode in the face of passive resistance." App., *infra*, 11a. The court made no mention of the Winnfield Taser policy itself, which expressly bars the use of Tasers except where "reasonably necessary to control a dangerous or violent subject," App., *infra*, 62a, or of the Police Chief's and coroner's testimony that Nugent had violated the policy. Instead, the court stated that, while the "numerous tasings . . . certainly raise[] suspicion as to the excessiveness of force, none of the evidence shows that the tasings were an unreasonable response under the circumstances reflected in the record before us." *Id.* at 12a-13a n.35.

"the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (citation omitted). In this case, the court of appeals addressed only the second prong of the test, finding that it was not clearly established in 2008 that Officer Nugent's repeated electroshocking of Mr. Pikes violated the Fourth Amendment.[10]

The touchstone of the "clearly established" analysis is whether the official had "fair notice" from existing case law or other sources that his conduct was unconstitutional. *Brosseau* v. *Haugen*, 543 U.S. 194, 198-99 (2004). In making that determination, courts should look to binding precedent from the Supreme Court or their own circuit, and, in the absence of such precedent, to a "consensus of cases of persuasive authority" from other circuits. *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999). Courts may also consider materials other than case law. See *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (examining state agency's regulations and report from the U.S. Department of Justice in determining whether defendants' conduct violated clearly established law).

While courts should not describe the right at issue at too high a level of generality, there need not be "a case directly on point" in order for a right to be clearly established. *al-Kidd*, 131 S.Ct. at 2083. Moreover, "a general constitutional rule already identified in the decisional law may apply with

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[10] In *Pearson* v. *Callahan*, 555 U.S. 223 (2009), this Court determined that courts may address either prong of this test first.

obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States* v. *Lanier*, 520 U.S. 259, 270 (1997) (citation omitted).[11]

The Fifth Circuit's decision in this case creates a clear conflict with the decisions of other circuits. Those circuits have held that even as of January 2008, it was clearly established that the use of an electronic control weapon or an analogous (or even lesser) use of force on a suspect who was already within an officer's control and posed no flight or safety risk was unconstitutional, *even if* the person failed to comply with an officer's commands.[12]

1. The test for determining whether police have engaged in constitutionally excessive force was set out by this Court in *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Under *Graham*, courts must consider "the severity of the crime at issue, whether the

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[11] See also *Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.'" (citation omitted)).

[12] It is beyond debate that no reasonable officer would believe that it is (or ever was) constitutional to electroshock a suspect who is handcuffed, poses no flight or safety risk, and is clearly physically *unable* to comply with a police officer's order to get up. Since the court of appeals assumed (erroneously) that Mr. Pikes *was* able to get up, the question presented here is whether it is clearly unconstitutional to electroshock a person in the exact same situation, except that the suspect is physically able to comply with the officer's command but does not.

suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.*

2. Applying the *Graham* factors, other circuits have held that it was clearly established at the time of Nugent's conduct that the use of an electronic control weapon or analogous (or an even lower level of) force on a fully restrained suspect who, at the time the force was applied, did not pose a safety threat to anyone, and was not attempting to flee, violated the Fourth Amendment, *even if* the suspect did not comply with commands from a police officer.

In *Wells* v. *City of Dearborn Heights*, No. 12-1051, 2013 WL 4504759 (6th Cir. Aug. 26, 2013) (unpublished), for instance, the Sixth Circuit held that it was clearly established prior to 2008 that it was unconstitutional to use a Taser in drive-stun mode *a single time* on a handcuffed suspect, even if that suspect was yelling profanities at the officers and "was not complying with the officers' orders to stop struggling and remain on the ground." *Id.* at *5 (internal quotation marks and citation omitted). The court found that "'prior opinions clearly establish that it is unreasonable to use significant force on a restrained subject *even if some level of passive resistance is presented.* This is especially true when the suspect is already handcuffed.'" *Ibid.* (citation omitted) (emphasis in original).[13] Furthermore, the

[13] The court in *Wells* noted, too, that "the use of a taser is an even more severe application of force than simply (Continued . . .)

court noted that while the handcuffed suspect "angrily" shouted profanities at the officers, he did not pose a "safety threat or a flight risk." *Ibid.* See also *Austin* v. *Redford Twp. Police Dep't*, 690 F.3d 490, 497-98 (6th Cir. 2012) (it was clearly established in 2005 that it was unconstitutional to use a Taser in drive-stun mode once on an individual who did not immediately comply with order to get fully into a police car, when there was no danger of the "potential escape of a dangerous criminal or the threat of immediate harm"); *id.* at 498-99 ("the use of non-lethal, temporarily incapacitating force on a handcuffed suspect who no longer poses a safety threat, flight risk, and/or is not resisting arrest constitutes excessive force" (citation omitted)); *Kijowski* v. *City of Niles*, 372 F. App'x 595, 600 (6th Cir. 2010) (holding that it was clearly established in 2006 that it was unconstitutional to use a Taser in drive-stun mode twice on a suspect where there was no apparent safety or flight risk, even though suspect was not handcuffed).

Similarly, the Eighth Circuit found a violation of a clearly established right, as of 2005, where a police officer used a Taser in drive-stun mode *once* on a suspect who disobeyed two orders to get off the phone but "posed at most a minimal safety threat . . . and was not actively resisting arrest or attempting to flee." *Brown* v. *City of Golden Valley*, 574 F.3d 491, 497-99 (8th Cir. 2009). Cf. *Hickey* v. *Reeder*, 12 F.3d 754 (8th Cir. 1993) (officer violated prisoner's Eighth

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knocking someone back to the ground." 2013 WL 4504759, at *6.

Amendment right to be free from cruel and unusual punishment when he used an electronic control weapon to compel compliance with an order in the absence of a security threat).

Likewise, the Fourth Circuit has explicitly held that "[i]t is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is *actively* resisting arrest." *Meyers* v. *Baltimore Cnty., Md.*, 713 F.3d 723, 734 (4th Cir. 2013) (emphasis added). In *Meyers*, the Fourth Circuit found no qualified immunity because it was clearly established as of March 2007, even in the absence of a case addressing the same context, that the "use of any 'unnecessary, gratuitous, and disproportionate force,' whether arising from a gun, a baton, a taser, or other weapon," constitutes excessive force "if the subject is unarmed and secured." *Id.* at 735 (citation omitted).

Similarly, in *Thomas* v. *Holly*, 533 F. App'x 208, 219 (4th Cir. 2013) (unpublished), the Fourth Circuit held that even where an "effectively secured" suspect "struggled in a squirming manner," it was clearly established prior to April 2009 that the repeated shocking of the suspect in drive-stun mode constituted excessive force. *Ibid.* (citing case law from 2007). See also *Orem* v. *Rephann*, 523 F.3d 442, 444, 448-49 (4th Cir. 2008) (it was clearly established in March 2005 that using a Taser on a suspect in drive-stun mode after she was handcuffed and in foot restraints but was yelling, jumping, and

banging around in the back seat of a police car was unconstitutional).[14]

3. Aside from cases specifically involving electronic control weapons, other circuits have also held that it was clearly established before 2008 that it was unconstitutional to use analogous, or even less serious, types of force against a subject who had been restrained and was not posing a safety or flight risk, even if that subject passively resisted an officer's commands. These cases are also relevant to the "clearly established" inquiry here,[15] and stand in

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[14] Other courts have found that it was unconstitutional to electroshock a subject who did not pose a serious safety or flight risk, but who engaged in passive resistance. These courts did not, however, have the occasion to decide whether the constitutional right was clearly established. See, *e.g.*, *Cyrus* v. *Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (reasonable jury could find that officers used excessive force when they used Taser in drive-stun mode on subject who could not or would not release his arms for handcuffing); *Parker* v. *Gerrish*, 547 F.3d 1, 5, 10 (1st Cir. 2008) (upholding jury's finding of excessive force where police used Taser while making an arrest, even though arrestee was "insolent or frustrated," had "flexed his muscles" and made "defiant" gestures, had "earlier harassed or resisted the officers," and had initially resisted efforts to handcuff him). See also *Everett* v. *Nort*, No. 13-1864, 2013 WL 6108053 (3d Cir. Nov. 21, 2013) (denying summary judgment on an Eighth Amendment excessive force claim where detainee was restrained in handcuffs and then shocked when he refused to open fists to allow fingerprinting).

[15] See, *e.g., Hope*, 536 U.S. at 742 (previous decisions regarding different forms of punishment gave defendants fair notice that their conduct was unconstitutional). See also *Landis* v. *Baker,* 297 F. App'x 453, 463 (6th Cir. 2008) ("Even without precise knowledge that the use of the taser would be a

(Continued . . .)

marked contrast to the decision of the Fifth Circuit here. See, *e.g., Meirthew* v. *Amore*, 417 F. App'x 494, 497, 499 (6th Cir. 2011) (it was clearly established in 2007 that "it is unreasonable to use significant force [an arm-bar] on a restrained subject, even if some level of passive resistance is presented"); *Richman* v. *Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008) (Posner, J.) (finding no qualified immunity for officers who, in 1997, had sat on the back of obese subject while handcuffing him after he had refused to comply with orders to leave courtroom, as "[t]here was no reason to endanger his life in order to remove him with such haste"); *Bultema* v. *Benzie Cnty.*, 146 F. App'x 28, 35-36 (6th Cir. 2005) (finding violation of clearly established right when police used pepper spray on handcuffed suspect who was not a threat to safety or a flight risk, even though he had resisted arrest and "put up a significant fight" and was "continu[ing] to struggle and squirm while handcuffed"); see also *Griffith* v. *Coburn*, 473 F.3d 650, 659 (6th Cir. 2007) (holding that use of choke hold on suspect who refused to follow officer's orders, but otherwise posed no safety threat, violated clearly established right); *Headwaters Forest Def.* v. *Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002) (use of pepper spray to subdue, remove, or arrest protesters engaged in passive resistance violated clearly established right in 1997).

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violation of a constitutional right, the officers should have known based on analogous cases that their actions were unreasonable." (citing cases involving pepper spray)).

4. The court of appeals' decision on this issue was also plainly erroneous. In light of the ample precedent discussed above, the Winnfield Police Department's own express rules regarding Taser use, Taser International's product warnings for law enforcement, the guidelines established by prominent law enforcement organizations,[16] and plain common sense, a reasonable officer would have known that it was unconstitutional to electroshock Mr. Pikes *multiple times* after he was already handcuffed, posed no safety threat, and was not attempting to flee. Even if a reasonable officer might have conceivably believed that it was constitutional to electroshock a person in these circumstances one, two, or three times in order to compel him to get up, no such officer would have continued to believe it was permissible to continue to deliver those shocks again, and again, and again, when the shocks were plainly not having the desired effect—and, in fact, were obviously making it even more difficult, if not impossible, for Mr. Pikes to walk on his own.[17]

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[16] This Court has previously relied on similar studies and guidelines issued by law enforcement groups in reviewing the constitutionality of the use of force by police. See, *e.g.*, *Tennessee* v. *Garner*, 471 U.S. 1, 19 (1985).

[17] Aside from Pikes's supposed failure to comply with Nugent's commands, the only factors that the court of appeals cited to justify the multiple electroshocks were that "Pikes was arrested pursuant to an active felony warrant, attempted to evade arrest, [and] was subdued only through the threat of deadly force." App., *infra*, 12a. But as the other circuits have held, none of these factors is relevant to the question of whether it was clearly unreasonable to electroshock Pikes multiple times

(Continued . . .)

This is not a case that requires the application of "20/20 hindsight" or the second-guessing of an officer's split-second decisions. The officers themselves acknowledged that Pikes posed no safety threat whatsoever. No one claimed that he was attempting to flee once he was handcuffed. There was no urgency requiring instant decisions in the face of dangerous or ambiguous circumstances. Nugent's sole justification for electroshocking Pikes *eight times* over fourteen minutes was that he believed Pikes was being passively resistant when he did not get up in response to Nugent's orders. A reasonable officer would have known that electroshocking Pikes in these circumstances constituted excessive force.[18]

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after he had been subdued, handcuffed, was not posing any safety threat, and was no longer attempting to flee. See, *e.g.*, *Meyers*, 713 F.3d at 733 ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." (quotation marks and citation omitted)); *Oliver* v. *Fiorino*, 586 F.3d 898, 906 (11th Cir. 2009) (while the "initial, single Taser shock to calm the suspect may have been justified," the multiple subsequent shocks were not, since the suspect no longer posed any immediate threat to the officers).

[18] Notably, the U.S. Department of Justice has taken the position in litigation that it is unconstitutional to use Tasers in drive-stun mode as a "pain compliance" measure against detainees who are not posing a threat to the safety of, or acting aggressively toward, officers or others. See United States' Complaint in Intervention Pursuant to 42 U.S.C. § 14141, *Shreve* v. *Franklin Cnty.*, *Ohio*, No. 2:10-cv-644 (S.D. Ohio Nov. 3, 2010), ECF No. 45-2, available at http://www.justice.gov/crt/about/spl/documents/franklin_complaint_11-8-10.pdf; see also Agreement Between the United States

(Continued . . .)

5. In sum, the Fifth Circuit's decision that Officer Nugent's repeated electroshocking of Mr. Pikes did not violate a clearly established right conflicts with the numerous decisions of other circuits that have examined this same question with regard to electronic control weapons or analogous forms of force. This Court should therefore grant certiorari to review this question.

B. The Circuits Are Deeply Split As To Which Party Bears The Burden Of Proof When A Defendant Pleads Qualified Immunity

Although a government defendant plainly bears the burden of *pleading* the defense of qualified immunity, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982), this Court has never addressed whether a defendant also bears the burden of *proving* that he is entitled to its application. Lacking clear guidance on the question,[19] the courts of appeals are deeply

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of America and the Sheriff of Franklin County, Ohio, *Shreve* v. *Franklin Cnty., Ohio*, No. 2:10-cv-644 (S.D. Ohio Feb. 4, 2011), ECF 94-1, also available at http://www.justice.gov/crt/about/spl/documents/franklin_settle_2-4-11.pdf.

[19] For example, although the decisions below all cite this Court's decision in *Harlow*, 457 U.S. 800, in discussing their allocation of the burden of proof, they reach exactly opposite conclusions. Compare *Lore* v. *City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012) (placing burden on defendant); *Reedy* v. *Evanson*, 615 F.3d 197, 223 (3d Cir. 2010) (same); *DiMarco-Zappa* v. *Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001) (same) with *Medina* v. *Cram*, 252 F.3d 1124, 1128-30 (10th Cir. 2001) (placing burden on plaintiff); *Whatley* v. *Philo*, 817 F.2d 19, 21-22 (5th Cir. 1987) (same).

and explicitly divided. See *Henry* v. *Purnell*, 501 F.3d 374, 378 & n.5 (4th Cir. 2007) (discussing Supreme Court precedent that leaves this issue open and the split among circuits as to who bears the burden of proof); Kenneth J. Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U. L.J. 135, 146 (2012) ("[T]he circuits are in disarray as to which party bears the burden of proof on the major steps in a qualified immunity inquiry.").

1. The courts of appeals fall into three distinct groups. See *id.* at 143-45. Courts in the first group—the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits—hold that the plaintiff bears the burden of disproving the availability of the qualified immunity defense, meaning that the plaintiff must demonstrate both that (1) the defendant violated the plaintiff's constitutional right, and (2) the constitutional right at issue was clearly established at the time of defendant's conduct. See, *e.g.*, *Brown* v. *Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) ("A qualified immunity defense alters the usual summary judgment burden of proof. Once an official pleads the defense, the burden then shifts to the plaintiff, who . . . bears the burden of negating qualified immunity." (citation omitted)); *Jackson* v. *Wilkins*, 517 F. App'x 311, 316 (6th Cir. 2013) ("[Plaintiff] has the burden of proving that the defendants should not receive qualified immunity. To do so, the [plaintiff] must show that the defendants violated Jackson's constitutional rights, and that those rights were clearly established."); *Purvis* v. *Oest*, 614 F.3d 713, 717 (7th Cir. 2010) ("Although qualified immunity is an affirmative defense, once raised, it becomes the plaintiff's burden

to defeat it."); *Smith* v. *McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013) ("[T]he plaintiff bears the 'heavy two-part burden' of showing both that (1) 'the defendant violated . . . [a] constitutional . . . right[ ],' and (2) the 'infringed right at issue was clearly established . . . .'" (citations omitted)); *Leslie* v. *Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013) ("[Plaintiffs] bear the burden to 'establish that the [defendants] violated [their] constitutional rights[] and . . . that the right involved was 'clearly established' at the time of the putative misconduct.'" (citations omitted)).

2. Courts in the second group—the First, Second, Third, and D.C. Circuits—place the burden of proof as to both elements of the qualified immunity defense on the defendant, meaning that the defendant must demonstrate that either (1) he did not violate the plaintiff's constitutional right, or (2) that the infringed right at issue was not clearly established at the time of the defendant's conduct. See, *e.g.*, *DiMarco-Zappa*, 238 F.3d at 35 ("Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-appellants."); *Coollick* v. *Hughes*, 699 F.3d 211, 219 (2d Cir. 2012) ("[A]n official has [the] burden [of] demonstrating that no rational jury could conclude '(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.'" (citation omitted)); *Kopec* v. *Tate*, 361 F.3d 772, 776 (3d Cir. 2004) ("A defendant has the burden to establish that he is entitled to qualified immunity."); *Reuber* v. *United States*, 750 F.2d 1039, 1057 n.25 (D.C. Cir. 1984) ("Qualified immunity is an affirmative defense based

on the good faith and reasonableness of the actions taken and the burden of proof is on the defendant officials.").

3. Courts in the third group—the Fourth and Eighth Circuits—split the burden of proof. But the two circuits split the burden in different ways. The Fourth Circuit requires that the plaintiff bear the burden of establishing the constitutional violation, while the defendant bears the burden of demonstrating that the law was not "clearly established." See *Henry*, 501 F.3d at 378; see also *Scarbro* v. *New Hanover Cnty.*, 374 F. App'x 366, 371 (4th Cir. 2010) ("[Plaintiff] has met her burden as to the first prong . . . . [Defendant] bears the burden proving that the right at issue here was not clearly established.").

In contrast, the Eighth Circuit puts the burden of proving qualified immunity on the defendant, but usually holds that the plaintiff must prove that the law is clearly established. See, *e.g.*, *Wagner* v. *Jones*, 664 F.3d 259, 273 (8th Cir. 2011) ("Qualified immunity is an affirmative defense for which the defendant carries the burden of proof. The plaintiff, however, must demonstrate that the law is clearly established." (quotation marks and citation omitted)); *Harrington* v. *City of Council Bluffs*, 678 F.3d 676, 679 (8th Cir. 2012) (same). But see *Shockency* v. *Ramsey Cnty.*, 493 F.3d 941, 948 (8th Cir. 2007) ("Defendants bear the burden of proving that the law was not clearly established."); *Burnham*

v. *Ianni,* 119 F.3d 668, 674 (8th Cir. 1997) (en banc) (same).[20]

4. As the cases cited above demonstrate, the split in the circuits on the burden-of-proof issue is entrenched and longstanding. The allocation of the burden of proof on the qualified immunity question, as with any question, can easily determine the outcome of a case. See *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." (citations omitted)); see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 69-70 (1997) (which party bears the burden of persuasion on a claim of qualified immunity is "critical").

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[20] The Ninth Circuit has not adopted a consistent rule. Compare *Moss* v. *U.S. Secret Serv.*, 711 F.3d 941, 951 (9th Cir. 2012) ("[A] plaintiff has the burden of demonstrating not only a constitutional violation, but also a violation of clearly established law." (quotation marks and citation omitted)) and *Alston* v. *Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) ("[Plaintiff] bears the burden of showing that the right at issue was clearly established.") with *Moreno* v. *Baca*, 431 F.3d 633, 638 (9th Cir. 2005) ("[T]he moving defendant bears the burden of proof on the issue of qualified immunity."), *Munger* v. *City of Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000) ("[I]t is the defendants' burden to show that 'a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right.'" (citations omitted)) and *Benigni* v. *City of Hemet*, 879 F.2d 473, 479-80 (9th Cir. 1989) ("It is clear that qualified immunity is an affirmative defense, and we think it equally clear that the burden of proving the defense lies with the official asserting it." (citations omitted)).

Moreover, this issue is relevant to every case in which a government official pleads qualified immunity, not just those involving excessive force. The question presented here is therefore of exceeding importance to both government officials and citizens who have been wronged by some governmental action, and warrants this Court's review.

C. The Court Of Appeals Lacked Jurisdiction To Review This Case

The district court denied Respondent's motion for summary judgment solely on the ground that there was a genuine dispute concerning whether "Mr. Pikes was physically unable to comply with Officer Nugent's demands to stand up" or was instead being "passively resistant," and whether "Mr. Pikes was yelling in pain" or "was yelling he did not want to go to jail." App., *infra*, 46a. This Court has squarely and repeatedly said that a decision of this sort is not appealable prior to a final judgment on the merits. Petitioner respectfully submits that the court of appeals' error is so glaring that summary reversal is warranted. Alternatively, the Court should grant certiorari to address this issue along with the other issues addressed in this petition.

Federal courts of appeals have jurisdiction to hear appeals only from "final decisions" of district courts. 28 U.S.C. § 1291 (2006). However, this Court has held that, "[u]nder the collateral-order doctrine a limited set of district-court orders are reviewable 'though short of final judgment.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 671 (2009) (quoting *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996)). A district court decision denying a government official's assertion of

qualified immunity can fall within this "narrow class" of appealable orders even in the absence of a final judgment, *but only if it "'turns on an issue of law.'"* *Iqbal*, 556 U.S. at 672 (quoting *Mitchell* v. *Forsyth*, 472 U. S. 511, 530 (1985)).

This Court has made clear that a defendant invoking qualified immunity "may *not* appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson* v. *Jones*, 515 U.S. 304, 319-20 (1995) (emphasis added). In other words, a defendant may immediately appeal a decision by a district court about what law is "clearly established," or how clearly established law applies to a given set of facts. But a defendant may not immediately appeal a district court decision that "determines only a question of 'evidence sufficiency,' *i.e.,* which facts a party may, or may not, be able to prove at trial." *Id.* at 313; see also *Iqbal* 556 U.S. at 674 ("[O]nly decisions turning *on an issue of law* are subject to immediate appeal.") (emphasis added) (citations and internal quotation marks omitted).[21]

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[21] This Court noted in both *Johnson* and *Iqbal* that "determining whether there is a genuine issue of material fact at summary judgment" is a fact-intensive inquiry that may require a court of appeals "to consult a 'vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.' That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment." See *Iqbal* 556 U.S. at 647 (quoting *Johnson*, 515 U.S. at 316).

This Court reiterated this rule in *Ortiz* v. *Jordan*, 131 S. Ct. 884 (2011):

> We clarified in *Johnson* v. *Jones* that immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue," illustratively, the determination of "what law was 'clearly established'" at the time the defendant acted. However, instant appeal is not available, *Johnson* held, when the district court determines that factual issues genuinely in dispute preclude summary adjudication.

Id. at 891 (citations omitted).

The district court's decision here was precisely the type that this Court has said may not be appealed before a trial judgment. The court did not decide what law was clearly established. Nor did it decide any other "'neat abstract issue[] of law.'" *Johnson*, 515 U.S. at 317 (quotation marks and citations omitted). It simply decided that there was a genuine dispute over facts that would be of obvious importance to a jury's determination of whether Nugent had acted unreasonably. The district court's determination was therefore not a final decision within the meaning of 28 U.S.C. § 1291, and the court of appeals lacked subject matter jurisdiction. See *Iqbal*, 556 U.S. at 671 ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." (citations omitted)); see also *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have

an independent obligation to determine whether subject-matter jurisdiction exists . . . .").[22]

CONCLUSION

For the reasons stated above, this Court should grant the petition.

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[22] The court of appeals did not even mention this issue, even though Petitioner asserted the lack of jurisdiction below. See 10/15/12 Amend. Brief of Appellee L. Thomas at 12-14, No. 12-30527 (5th Cir.). Indeed, the court of appeals compounded its error by assuming the truth of *Nugent's* view of the very facts that were in dispute. It is axiomatic, of course, that when facts are in dispute, a court must view the facts in the light most favorable to the non-moving party—here, the Petitioner. But rather than assume that Mr. Pikes was unable to comply, the court assumed that he *could* comply, but was choosing to engage in passive resistance. App., *infra*, 2a-3a, 11a-12a. If the court of appeals properly had jurisdiction, this would be reversible error in itself. See *Ryburn* v. *Huff*, 132 S. Ct. 987, 991 (2012) (per curiam) (summarily reversing in part because court of appeals' determination regarding qualified immunity "rested on an account of the facts that differed markedly from the District Court's finding"); *Brosseau*, 543 U.S. at 195 n.2 ("Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party . . . ."); see also *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (citation omitted)).

Respectfully submitted,

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APPENDIX

Appendix Table of Contents

Page

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30527

F I L E D
August 28, 2013

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

Plaintiff–Appellee,

v.

SCOTT NUGENT, individually and in his official capacity as police officer for the City of Winnfield,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:08-CV-1167

Before JOLLY, GARZA, and OWEN, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Latrina D. Thomas brought suit on behalf of her minor son seeking damages for the death of her son's father, Baron Pikes. The district court denied Officer Scott Nugent's assertion of qualified immunity as to Thomas's excessive force claim. We reverse and remand for dismissal of the claims against Nugent.

I

Thomas contends that Officer Nugent used excessive force when Pikes was tased eight times on the evening that 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. 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.

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 incapacitation.

The officers contend that Pikes rolled away from the first administration of the taser in stun mode and that the taser device then 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. We accept Thomas's version of the facts as true.[1] Pikes then got up and walked about ten feet before falling to his knees. Nugent gave another verbal warning and administered another drive stun (the second stun) to the middle of Pikes's back. Nugent told Pikes that if he did not get up, Nugent would tase him again. Pikes did not comply, and Nugent tased Pikes a third time in drive stun mode. Nugent and Branch then tried to lift Pikes, but he refused to get up and told the officers that he would not go with

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[1] *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013) (citing *Haggerty v. Tex. S. Univ.,* 391 F.3d 653, 655 (5th Cir.2004) ("In an interlocutory appeal in which the defendant asserts qualified immunity, to the extent that the district court found that genuine factual disputes exist, we accept the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true.")).

them. After ordering Pikes to get up several more times, and issuing another verbal warning, 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." Nugent performed a spark test on the stun gun device thinking that it might. motivate Pikes. When Pikes did not exit, 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 Nugent stopped the shock after two seconds rather than allowing the device to complete an automatic five second cycle.

Nugent helped Pikes out of the vehicle, and Pikes dropped to the ground. Nugent asked Pikes to get up and Pikes responded that he would not. 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 Nugent and another officer picked him 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 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 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 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. However, the cause of Pikes's death is not at issue.

Thomas sued Officer Nugent, 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. Officer Nugent now appeals this denial of summary judgment.

II

"The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine 'to the extent that it turns on an issue of law.'"[2] This means that when "the district court finds that genuinely disputed, material fact issues preclude a qualified immunity determination, this court can review only their materiality, not their genuineness."[3] "Whether there are material issues of fact is reviewed *de novo*."[4]

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[2] *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

[3] *Manis v. Lawson*, 585 F.3d 839, 842 (5th Cir. 2009); *see also White v. Balderama*, 153 F.3d 237, 240 (5th Cir. 1998) (per curiam) ("[W]e possess jurisdiction to hear an interlocutory appeal challenging the materiality of the fact issues that led the district court to deny summary judgment but . . . we lack jurisdiction to hear interlocutory appeals challenging the genuineness of those fact issues.").

[4] *Manis*, 585 F.3d at 843.

III

"The doctrine of qualified immunity serves to shield a government official from civil liability for damages based upon the performance of discretionary functions if the official's acts were objectively reasonable in light of then clearly established law."[5] This privilege "is an *immunity from suit* rather than a mere defense to liability;" accordingly, "it is effectively lost if a case is erroneously permitted to go to trial."[6]

The qualified immunity defense has two prongs: (1) whether an official's conduct violated the plaintiff's clearly established constitutional rights, and (2) whether the government official's conduct was objectively reasonable in light of clearly established law.[7] Once a defendant pleads qualified immunity, the plaintiff has the burden to rebut this defense by establishing genuine issues of fact as to both prongs.[8] The plaintiff must offer more than "mere allegations" in order to negate the defense of qualified immunity.[9] "A court may rely on either

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[5] *Thompson v. Upshur Cnty., TX*, 245 F.3d 447, 456 (5th Cir. 2001).

[6] *Mitchell*, 472 U.S. at 526.

[7] *Thompson*, 245 F.3d at 457.

[8] *See, e.g.*, *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

[9] *Manis*, 585 F.3d at 843 (internal quotation marks omitted).

prong of the defense in its analysis" and may conduct its inquiry in any sequence.[10]

We consider only the second prong of the qualified immunity analysis because it resolves this appeal. Thomas did not raise a material dispute as to whether Officer Nugent's actions were objectively reasonable in light of clearly established law.

The "clearly established" standard "does not mean that officials' conduct is protected by qualified immunity unless 'the very action in question has previously been held unlawful.'"[11] But neither does an official lose qualified immunity "merely because a certain right is clearly established in the abstract."[12] In other words, the fact that the abstract right to be free from excessive force is clearly established does not categorically negate qualified immunity. "Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'"[13] The "central concept" is "fair warning,"[14] which means that an officer is

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[10] *Brown*, 623 F.3d at 253 (citing *Manis*, 585 F.3d at 843); *see also Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

[11] *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[12] *Id.*

[13] *Manis*, 585 F.3d at 846 n.4 (5th Cir. 2009) (quoting *Anderson*, 483 U.S. at 639).

entitled to qualified immunity unless "all but the plainly incompetent or those who knowingly violate the law" would have known that the conduct at issue violated constitutional rights.[15]

Thomas relies on *Bryan v. McPherson*[16] and *Newman v. Guedry*[17] to show that Officer Nugent's use of force was unreasonable. *Bryan* and *Newman*, however, are distinguishable from the circumstances of this case. In *Bryan*, the Ninth Circuit described the impact of a taser as paralyzing the muscles throughout the body and causing excruciating pain.[18] In light of that holding, Thomas asserts that Officer Nugent's repeated tasering was "grossly disproportionate to the nature of the threat." However, in *Bryan* the officer had stopped a driver for failing to wear a seatbelt and while the driver, Bryan, was standing beside his vehicle, the officer

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[14] *Kinney*, 367 F.3d at 350 (internal quotation marks omitted).

[15] *Manis*, 585 F.3d at 845 (internal quotation marks omitted); *see also Thompson v. Upshur Cnty., TX*, 245 F.3d 447, 460 (5th Cir. 2001) ("[W]hen the defendant moves for summary judgment based on qualified immunity, it is the plaintiff's burden to demonstrate that all reasonable officials similarly situated would have then known that the alleged acts of the defendants violated the United States Constitution.").

[16] 590 F.3d 767 (9th Cir. 2009), *withdrawn and superseded*, 608 F.3d 614 (9th Cir. 2010), *withdrawn and superseded*, 630 F.3d 805 (9th Cir. 2010).

[17] 703 F.3d 757 (5th Cir. 2012).

[18] *Bryan*, 590 F.3d at 772-73.

aimed the taser device at Bryan's bare chest in probe mode and, without any warning, tasered Bryan when he took "one step" toward the officer.[19] One of the metal probes lodged in Bryan's arm, and it had to be surgically removed.[20] The electrical current delivered during the tasing paralyzed Bryan and caused him to fall face-first onto pavement.[21] Four of his teeth were broken as a result.[22] In the present case, there is no indication that Nugent intended for the taser device to discharge in probe mode. Moreover, Pikes thereafter failed to comply with the officers' numerous requests to get up and walk with them to the police vehicle. The Ninth Circuit's decision in *Bryan* does not clearly establish that tasering Pikes under the circumstances of this case would constitute excessive force. With regard to tasering in drive stun mode, the Ninth Circuit, in *Brooks v. City of Seattle*,[23] granted qualified immunity in part because unlike probe mode,[24] drive stun mode caused only temporary, localized pain and was authorized by the Seattle Police Department's use of force

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[19] *Bryan*, 590 F.3d at 771.

[20] *Id.* at 773.

[21] *Id.*

[22] *Id.*

[23] 599 F.3d 1018 (9th Cir. 2010), *aff'd on reh'g sub nom. Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc). The final iteration of *Bryan* acknowledges this distinction as well. 630 F.3d 805, 820 (9th Cir. 2010).

[24] Referred to as "dart mode" by the Ninth Circuit.

guidelines as a compliance mechanism.[25] Likewise here, Officer Nugent testified that the Winnfield City Police Department authorized taser use in drive stun mode in the face of passive resistance.[26]

In *Newman*, we considered an excessive force claim against an officer who had repeatedly tasered the plaintiff.[27] The officer asserted he had no reasonable warning that tasering a suspect multiple times was a constitutional violation because "there was then no binding caselaw on the appropriate use of tasers."[28] Although we agreed with the officer, we held also that "in an obvious case, the *Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law."[29] These factors aid in assessing the reasonableness of the force used by considering (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."[30]

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[25] *Brooks*, 599 F.3d at 1026.

[26] *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 448-49 (5th Cir. 1998) (noting that a memo reminding officers of the prohibition of a particular police practice was material to assessing the objective reasonableness of the officer's conduct).

[27] *Newman v. Guedry*, 703 F.3d 757, 760 (5th Cir. 2012).

[28] *Id.* at 763.

[29] *Id.* at 764 (internal quotation marks omitted).

[30] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Thomas asserts that just as in *Newman*, the *Graham* excessive-force factors clearly establish the answer in this case such that a body of relevant case law is unnecessary. But as with *Bryan*, *Newman* is also distinguishable from the facts of this case. In *Newman*, the suspect had committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command.[31] In fact, the plaintiff claimed he was tasered repeatedly despite never being given any command by the officers.[32] The facts in another recent decision of this court, *Ramirez v. Martinez*,[33] are somewhat similar to those in *Newman*.[34] In contrast, Pikes was arrested pursuant to an active felony warrant, attempted to evade arrest, was subdued only through the threat of deadly force, and did not comply with the officers' repeated requests to cooperate in effectuating the arrest. Thus, this case does not provide an "obvious" example of excessive force such that Thomas satisfied her burden to demonstrate that Officer Nugent's use of force was unreasonable under clearly established law.[35]

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[31] *Newman*, 703 F.3d at 764.

[32] *Id.* at 763.

[33] 716 F.3d 369 (5th Cir. 2013).

[34] *Ramirez*, 716 F.3d at 378.

[35] *See Poole v. City of Shreveport*, 691 F.3d 624, 625-26, 629 (5th Cir. 2012) (holding that police officer's use of force and tasering the plaintiff during an arrest was not objectively excessive or clearly unreasonable when the plaintiff resisted arrest and did not comply with requests). Essentially the only

(Continued . . .)

Because *Bryan* and *Newman* are distinguishable from the circumstances in this case, Thomas has presented no law to support the unreasonableness of Officer Nugent's actions. Thomas has not met her burden to show that Officer Nugent's use of force was unreasonable such that qualified immunity would not apply.[36]

* * *

For the foregoing reasons, we REVERSE the district court's denial of summary judgment and REMAND for dismissal of Thomas's claims against Officer Nugent.

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evidence in the record about the reasonableness or unreasonableness of the force applied comes from the arresting and jail officers. Consequently, although there were numerous tasings, which certainly raises suspicion as to the excessiveness of force, none of the evidence shows that the tasings were an unreasonable response under the circumstances reflected in the record before us.

[36] *See Sama v. Hannigan*, 669 F.3d 585, 591 (5th Cir. 2012) (citing *Kovacic v. Villarreal*, 628 F.3d 209, 211-12 (5th Cir. 2010)) ("Once raised, the burden shifts to the plaintiff . . . .").

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

LATRINA D. THOMAS

-vs-

CITY OF WINNFIELD, et al.

CIVIL ACTION NO. 08-1167

JUDGE DRELL

MAGISTRATE JUDGE KIRK

April 13, 2012

RULING

Before the Court are three Motions in Limine to exclude expert testimony and five Motions for Summary Judgment filed by various Defendants. The City of Winnfield ("City"), Chief of Police Johnny Ray Carpenter ("Chief Carpenter"), Mayor Deano

Thornton ("Mayor Thornton"), police officer Alan Marsdin[1] ("Officer Marsdin"), police officer Raymond Carpenter ("Officer Carpenter"), police officer Scott Nugent[2] ("Officer Nugent"), and Taser International, Inc. ("TI") (collectively "Defendants")[3] jointly filed Motions in Limine to exclude the testimony of the following expert witnesses: Dr. Michael Baden ("Dr. Baden") (Doc. 151), Dr. Anthony Storace ("Dr. Storace") (Doc. 154), and Larry Alan Smith ("Mr. Smith") (Doc. 158).

In addition, we address the pending Motions for Summary Judgment filed by the City, Mayor Thornton, and Chief Carpenter (Doc. 152); by TI based on the Louisiana Products Liability Act ("LPLA" or "the Act") (Doc. 153); by Officer Nugent

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[1] Alan Marsdin's last name occasionally appears as "Marsden" in the record. This opinion uses the spelling "Marsdin" found in his answer. (Doc. 34).

[2] Scott Nugent's last name occasionally appears as "Nuent" in the record. This opinion uses the spelling "Nugent" found in his answer. (Doc. 52).

[3] Winnfield Police Department, Winnfield City Council, and police officer Cargyle Branch, Jr. were also named as defendants in Plaintiff's Complaint. We discuss the Police Department and City Council *infra.* The Court entered a stay as to Officer Branch as a result of bankruptcy proceedings. (Docs. 80 & 90). The stay is still in place, and we do not address the claims against Officer Branch in this ruling and accompanying judgment. We do consider his actions during the incident as it relates to the claims against Chief Carpenter, Mayor Thornton, and the City for failure to train and/or supervise under Section 1983 and vicarious liability under state law.

(Doc. 156); by Officers Carpenter and Marsdin (Doc. 157); and by multiple Defendants based on an absence of medical causation (Doc. 167). We have considered the arguments by the parties contained in their briefs and those made at a hearing on January 4, 2012, and we are prepared to rule on the pending motions in turn.

I. Procedural Background

Plaintiff alleges on January 17, 2008, Officer Nugent repeatedly shocked Baron D. Pikes ("Mr. Pikes")[4] with a TASER X26 Electronic Control Device ("ECD") manufactured by TI.[5] Specifically, Plaintiff alleges Mr. Pikes was shocked at least nine times at 50,000 volts each while he was handcuffed and in police custody. Upon being transported to the police department, Mr. Pikes showed signs of physical distress and had difficulty breathing. He was transported to the hospital where he was pronounced dead shortly thereafter. Plaintiff asserts the following claims for relief against all Defendants (except TI): wrongful death, survival, and loss of consortium under 42 U.S.C. § 1983 based on the use of excessive force and deprivation of medical attention in violation of Mr. Pikes' constitutional

[4] Mr. Pikes is also referenced in pleadings by his nickname "Scooter" and a different last name "Collins." This opinion uses "Baron D. Pikes" as it is the name listed on his birth certificate.

[5] The term "ECD" will be used to refer to these devices in general. When reference is made to the specific ECD used on Mr. Pikes, it will be referred to as "Officer Nugent's Taser X26."

rights; general tort liability pursuant to Louisiana Civil Code Article 2315; Louisiana state law intentional torts of assault and battery; and negligence under Louisiana state law.[6] Plaintiff also asserts products liability actions based in negligence and strict liability against TI as the manufacturer of Officer Nugent's Taser X26.[7]

Officer Nugent was criminally charged with an offense resulting in Mr. Pikes' death in the Louisiana 8th Judicial District in Winn Parish. The case proceeded to trial in the fall of 2011, and Officer Nugent was acquitted. Portions of the testimony from the criminal trial have been attached as exhibits to motions before us. The parties presented evidence on the Motions in Limine at a hearing on January 4, 2012.

II. Motions in Limine to Exclude Expert Testimony

A. Daubert Standard

The Motions in Limine to exclude expert testimony are evaluated in accordance with the Federal Rules of Evidence and governing jurisprudence. Federal Rule of Evidence 702 states:

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[6] The Court is aware La. C.C. art. 2315 encompasses negligence, but Plaintiff differentiated La. C.C. art. 2315 and negligence as separate claims for relief in her complaint. (Doc. 1).

[7] The LPLA provides Plaintiff's exclusive theory of recovery against TI as the manufacturer of Officer Nugent's Taser X26 and does not differentiate between negligence and strict liability. La. R.S. 9:2800.52.

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 (1993), trial courts act as "gatekeepers," making a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." The gatekeeping function is meant to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but [also] reliable." Id. at 589.

The party offering expert testimony is not obligated to prove the testimony is correct. Rather, the party bears the burden of establishing "by a preponderance of the evidence that the testimony is reliable." Moore v. Ashland Chemical, Inc., 151 F.3d 269, 276 (5th Cir. 1998), *cert. den.,* 526 U.S. 1064

(1999). In analyzing reliability, the trial court must assess whether the reasoning or methodology supporting the expert's testimony is valid. The point is to exclude expert testimony based solely on subjective belief or unsupported speculation. See Daubert, 509 U.S. at 590. "Both the determination of reliability itself and the factors taken into account are left to the discretion of the district court consistent with its gatekeeping function under Fed. R. Evid. 702." Munoz v. Orr, 200 F.3d 291, 301 (5th Cir. 2000).

Daubert provides an illustrative (but not exhaustive) list of factors district courts may use to evaluate the reliability of expert testimony. These factors include whether the expert's theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community. Daubert, 509 U.S. at 593-94.

Subsequently, in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999), the Supreme Court emphasized the Daubert analysis is a "flexible" one, and "the factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Id. (emphasis omitted.) The Kumho Tire Court further explained the district court's responsibility is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level

of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 152. The Fifth Circuit has clarified that "not every Daubert factor will be applicable in every situation; and a court has discretion to consider other factors it deems relevant." Guy v. Crown Equipment Corp, 394 F.3d 320, 325 (5th Cir. 2004).

As Judge Vance noted in Kirkland v. Marriott International Inc., 416 F.Supp.2d 480, 484 (E.D. La. 2006), the Advisory Committee Note to Rule 702 of the Federal Rules of Evidence explains testimony from an expert whose reliability is based mainly on the expert's personal observations, professional experience, education, and training may be admissible. Specifically, the Committee Note provides:

> Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.

Additionally, in Pipitone v. Biomatrix, 288 F.3d 239 (5th Cir. 2002), an expert's testimony was found to be reliable even though he did not perform any experiments to test his conclusions. Rather, he simply reviewed the available literature, applied his knowledge to the situation, and ruled out other explanations because they were not probable under the facts of the plaintiff's case. Likewise, in Martin v. Mobil Exploration and Producing, 224 F.3d 402 (5th

Cir. 2002), an ecologist's expert testimony was deemed reliable when it was based upon his observations of a flooded marsh and his expertise in marshland ecology.

1. Dr. Michael Baden (Doc. 151)

Plaintiff offers Dr. Michael Baden to testify as to the cause of Mr. Pikes' death. To begin, we find Dr. Baden's training, education, and experience are more than adequate to qualify him as an expert in the field of forensic pathology. However, for the following reasons, his testimony will be limited to this specific field and the associated methodologies (including a critique of Dr. Joel Carney's procedure in performing or analyzing the autopsy findings). Plaintiff argues, and we agree, Dr. Baden's method of "eliminating all other causes of death" is reliable for determining a cause of death. Although the Fifth Circuit has not specifically ruled on the issue, there is federal jurisprudence for the proposition that "differential diagnosis is a common scientific technique, and federal courts, generally speaking, have recognized that a properly conducted differential diagnosis is admissible under *Daubert*." Clausen v. M/V New Carissa, 339 F.3d 1049, 1057 (9th Cir. 2003) (citations omitted) (italics in original). See also, Pick v. American Med. Sys., Inc. 958 F. Supp. 1151, 1162-63 (E.D. La. 1997).

We note further Dr. Baden was admitted as an expert in the field of forensic pathology in the criminal trial of Scott Nugent for the death of Mr. Pikes, and he was allowed to opine as to the cause of death. The Louisiana Second Circuit Court of Appeals did not overturn the district court's Daubert

decision allowing Baden to testify. Finally, Dr. Baden has been admitted as an expert in the field of forensic pathology in numerous other federal courts.

However, we find Dr. Baden is not qualified to testify regarding the physiological effect of an Electronic Control Device ("ECD") on a human being because he lacks education, training, or experience in electricity or its effects on people. By his own admission, Dr. Baden is not an expert in cardiology, electrophysiology, electricity, and a number of other fields which involve electricity and its effect on the human body. In their brief, Defendants reference a number of persuasive federal district court cases in which experts had their testimony excluded because they were not experts in any "electricity specific" field. We agree with and adopt the reasoning of our sister courts:

In Wilson v. City of Lafayette, 2010 WL 728336, *10 (D. Colo. 2010), the district court excluded the expert opinion of the forensic pathologist (who conducted the autopsy) because the expert lacked a basis for connecting the use of the TASER to the decedent's death. Of note: "the Court finds that [the expert] may testify about how she conducted the autopsy of [decedent] and the process by which she ruled out certain causes of death." Id. However, "because [the expert's] opinion regarding the nature and effect of a TASER is based solely on the temporal sequence of events and on a limited amount of post-autopsy research on TASERs, she may not offer her opinion regarding the specific nature of the possible impact of the TASER charge." Id. It should be noted

the decedent in Wilson was found to have a pre-existing heart condition.

The District of Nevada confronted a case with facts very similar to this case in Neal-Lomax v. Las Vegas Metropolitan Police Dep't, 574 F. Supp. 2d 1193 (D. Nev. 2008). The Neal-Lomax court excluded the opinion of a forensic pathologist who would have testified that the use of the TASER was a "significant contributing factor to the deceased's ultimate expiration." Id. at 1203. The Neal-Lomax court decided: "While [the expert] is qualified by his experience, training, and education to be a forensic pathologist generally, [the expert] has little to no knowledge, training, experience, education, or expertise related to electronic control devices generally or the Taser specifically." Id. The court also found the expert lacked "some objective basis from which to derive an opinion that the Taser causes the physiological effects [the expert] ascribes to the Taser." Id. at 1204.

In Wackman v. Rubsamen, 602 F.3d 391 (5th Cir. 2010), the Fifth Circuit allowed a qualified forensic pathologist (who did not conduct the autopsy) to opine as to the cause of death by relying on the autopsy report, medical records, and *reliable* scientific literature. The Fifth Circuit also stated in Wells v. Smithkline Beecham Corp., 601 F.3d 375, 379 (5th Cir. 2010) that the literature upon which an expert bases his opinion must provide the "necessary 'scientific knowledge.'" The Wells court confronted the issue of whether a medication used to treat Parkinson's disease was the *cause* of plaintiff's compulsive gambling. The Fifth Circuit in Wells

rejected an expert who relied on "anecdotal evidence" as opposed to evidence with "statistical significance." Id. The Wells court focused on the publication and peer-review of the literature and whether the nature of the studies relied upon proved "a statistically valid reproducible result which could be used to establish causation." Id. at 381, n.29. Plaintiff has not identified and we have found nothing in the record to suggest Dr. Baden used reliable scientific literature to develop his opinions about the effect of ECDs on the human body and on Mr. Pikes in particular.

In short, Dr. Baden lacks experience, education, or training in electricity and he is unable to reference reliable scientific literature to support his opinion that Officer Nugent's Taser X26 caused Mr. Pikes' death. Accordingly, Defendants' motion in limine to exclude Dr. Baden's testimony will be **GRANTED IN PART** and **DENIED IN PART.**

2. Dr. Anthony Storace (Doc. 154)

Plaintiff offers Dr. Anthony Storace to testify as to electrical design and engineering and safety engineering. Dr. Storace holds a Ph.D. in mechanical engineering and has been qualified as an expert in this field in multiple cases. A review of Dr. Storace's education, experience, and expert testimony reveals his expertise in the field of mechanical engineering in general. However, Dr. Storace lacks any qualifications regarding ECDs or the Taser X26 model in particular. He has received no education or training concerning the function of ECDs; he has no experience with researching the physiological effect of ECDs on the human body; and he has no

foundation for forming an opinion about police procedures or use of force.

Based on the threshold requirement in Fed. R. Evid. 702 concerning Dr. Storace's knowledge, skills, experience, and training, we will admit his testimony insofar as it relates to the basic principles of electricity which form part of the curriculum for mechanical engineering. Dr. Storace will also be permitted to testify generally as to the use of electricity in relation to the human body. For the same reasons, his testimony will be excluded insofar as it relates to ECDs of any type including Officer Nugent's Taser X26. His testimony will also be excluded as concerns the use and application of electricity in ECDs, the effects of ECDs on the human body, safety procedures, warnings, and the use of ECDs in law enforcement situations. In short, Dr. Storace will not be allowed to testify about anything specific to ECDs given his lack of qualifications regarding the devices. Accordingly, Defendants' Motion in Limine to Exclude the Testimony of Dr. Anthony Storace (Doc. 154) will be **GRANTED IN PART and DENIED IN PART** as detailed above.

3. Larry Alan Smith (Doc. 158)

Plaintiff offers Larry Alan Smith as an expert in law enforcement policy and procedure, use of force, and use of ECDs in law enforcement situations. Mr. Smith has extensive training and experience in law enforcement as a police officer and investigator. Mr. Smith has obtained numerous certifications concerning the standards and continuum of force used by police officers in situations similar to the

incident involving Mr. Pikes. Mr. Smith has consulted or testified on the use of force in many cases, and his testimony regarding force used by Officer Nugent would be helpful to the trier of fact. However, Mr. Smith's testimony would not be helpful as it relates to the officers' alleged violations of Winnfield Police Department procedures and Taser safety warnings and procedures because these standards speak for themselves. The trier of fact does not require assistance from an individual with expertise to determine whether the officers did or did not follow procedures which are clearly set forth in admissible documentary evidence. Furthermore, Mr. Smith's personal opinions concerning the behavior of the officers will also be excluded. We specifically note his reported conclusions that the officers "illegally tortured Mr. Pikes" and their "lack of character and integrity" are not grounded in any training or experience.

Regarding the use of ECDs, Mr. Smith's testimony is limited to standards of police conduct for when an ECD should be used in law enforcement situations and the incident involving Mr. Pikes. Mr. Smith's certification as a Taser instructor does not include special medical knowledge about the effects of an ECD on the human body, and his testimony insofar as it relates to physiological effects of ECDs will be excluded.

In his report, Mr. Smith provides a number of opinions about the policies and procedures of the Winnfield Police Department. He recommends rather drastic measures for the future management of the department, including that the police department

"should be taken over by the chief law enforcement officer" in Winn Parish and the "department should be disbanded." Despite his law enforcement experience, Mr. Smith's opinions in this regard are not relevant to the liability of any Defendant and will be excluded. By his own admission, Mr. Smith has no knowledge or experience in developing or implementing policies and procedures for entities whose personnel use ECDs, i.e., police departments; therefore, his conclusions about the propriety of the standards established by the Winnfield Police Department will be excluded. In addition, his opinions about the training and supervision of officers who use ECDs will also be excluded given his lack of training and experience about those standards.

In summary, Mr. Smith's testimony will be limited to the continuum of force standards applicable to law enforcement situations, and he may opine about the force used by Officers Nugent, Carpenter, and Marsdin against Mr. Pikes and the standards for providing medical attention during the incident. Accordingly, Defendants' Motion in Limine to Exclude the Testimony of Larry Alan Smith (Doc. 158) will be **GRANTED IN PART** and **DENIED IN PART.**

III. Motions for Summary Judgment

A. Summary Judgment Standard

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although Rule 56 was amended effective December

1, 2010, "the amended rule contains no substantive change to the standard." Seacor Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675, 680, n.8 (5th Cir. 2011). Accordingly, we equate the word "issue" in the old language of Rule 56 with "dispute" in the amended version. An issue as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). We consider all "evidence in the light most favorable to the party resisting the motion." Trevino v. Celanese Corp., 701 F.2d 397, 407 (5th Cir. 1983). It is important to note the standard for a summary judgment is two-fold: (1) there is no genuine dispute as to any material fact, *and* (2) the movant is entitled to judgment as a matter of law.

1. City Council of Winnfield and Winnfield Police Department

To begin, the City, Chief Carpenter, and Mayor Thornton correctly point out in their Motion for Summary Judgment (Doc. 152) that the City Council of Winnfield ("City Council") and the Winnfield Police Department ("Police Department") lack the capacity to be sued as independent entities. The City Council and Police Department were named defendants in the complaint, but Plaintiff has not presented argument in support of maintaining the entities as defendants in the suit. For the sake of brevity, we refer to a separate ruling we issued on a similar matter in which we describe the lack of procedural capacity to be sued applicable to these entities. Steele v. Police Dep't of Oakdale, 2010 WL 816177, *2-3 (W.D. La. 2010).

B. 42 U.S.C. § 1983 Standards

The gravamen of this suit is 42 U.S.C. § 1983 ("Section 1983"), which provides:

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

To state a viable claim under 42 U.S.C. § 1983, "'a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.'" James v. Tex. Collin County, 535 F.3d 365, 373 (5th Cir. 2008) (quoting Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir. 2000)). Because Section 1983 contemplates violations of both constitutional and statutory mandates, "'a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*.'" Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697, 702 (5th Cir.

2007) (quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997) (emphasis in original)).

Plaintiff alleges the conduct of Officers Nugent, Carpenter, and Marsdin, the City; Mayor Thornton, and Chief Carpenter violated Mr. Pikes' constitutional rights by the use of excessive force and their deliberate indifference toward Mr. Pikes' need for medical attention. On the merits, to establish personal liability in a Section 1983 action, it is enough to show the official, acting under color of state law, caused the deprivation of a federal right. See Monroe v. Pape, 365 U.S. 167 (1961). Whether the official caused the deprivation depends on the status of the official, i.e., supervisor or subordinate, and will be discussed *infra.* The claims against Officers Nugent, Carpenter, and Marsdin, Mayor Thornton, and Chief Carpenter as officials of the City are "another way of pleading an action against an entity of which an officer is an agent," and are duplicative of the suit against the City. Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quotations and citations omitted). Accordingly, the claims against these individuals in their official capacities will be **DISMISSED.**

Regarding the violation of constitutional rights, to state successfully an excessive force claim under 42 U.S.C. § 1983, "a plaintiff must show (1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." Manis v. Lawson, 585 F.3d 839, 843 (5th Cir. 2009) (quoting Ontiveros v. City of Rosenberg, 564 F.3d

379, 382 (5th Cir. 2009)).[8] The relevant inquiry relates to the "objective reasonableness" of the officer's conduct, rather than his subjective intent, "and an officer's conduct must be judged in light of the circumstances confronting him, without the benefit of hindsight." Id. The Fifth Circuit has described the "objective reasonableness" standard in this way:

> An injury is generally legally cognizable when it results from a degree of force that is constitutionally impermissible-that is, objectively unreasonable under the circumstances. The objective reasonableness of the force, in turn, depends on the facts and circumstances of the particular case, such that the need for force determines how much force is constitutionally permissible. The test for reasonableness must consider whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

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[8] Excessive force claims are governed by the Fourth Amendment: "'*[A]ll* claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard.'" Goodman v. Harris County, 571 F.3d 388, 397 (5th Cir. 2009) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (emphasis in original).

Collier v. Montgomery, 569 F.3d 214, 218-19 (5th Cir. 2009) (internal footnotes and quotations omitted).

To reemphasize, "[e]xcessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009) (quoting Graham, 490 U.S. at 396). Moreover, arguments by a nonmovant which amount to "conjecture arising from undisputed facts" do not raise genuine issues of material fact in an excessive force case, but discrepancies between an officer's version of events and the accounts of eyewitnesses, for example, may be sufficient to justify a denial of summary judgment. See Ontiveros, 564 F.3d at 385 (citing Bazan v. Hidalgo County, 246 F.3d 481 (5th Cir. 2001)).

Deliberate indifference is also a cognizable theory of liability under § 1983. See, e.g., Longoria v. Texas, 473 F.3d 586 (5th Cir. 2006). As a pretrial detainee, Mr. Pikes' "constitutional right to medical care . . . flows from the procedural and substantive due process guarantees of the Fourteenth Amendment." Wagner v. Bay City, et al., 227 F.3d 316, 324 (5th Cir. 2000) (citations omitted). Plaintiff must show the police officers "acted with deliberate indifference to a substantial risk of serious medical harm and that injuries resulted." Id. Further "'deliberate indifference' requires that the official have *subjective* knowledge of the risk of harm." Id. (citations omitted) (emphasis in original). The Fifth Circuit reasoned in Hare v. City of Corinth, 74 F. 3d 633,

643 (5th Cir. 1996): "constitutional liability to pretrial detainees for episodic acts or omissions should be measured by a standard of subjective deliberate indifference as enunciated by the Supreme Court in *Farmer*." (citing Farmer v. Brennan, 511 U.S. 825 (1994)). In Farmer, the Supreme Court parsed the phrase "deliberate indifference" and found a prison official to be deliberately indifferent when he "knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837.

As the Fifth Circuit succinctly articulated in a case on appeal from this Court: "'To 'know of' a risk, an official must be 'subjectively aware' of the risk: that is, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference*.'" Anderson v. Wilkinson, 550 Fed. Appx. 379, 2011 WL 3965667, *2 (5th Cir. 2011) (citing Farmer, 511 U.S. at 837) (emphasis added). Further, "even if a prison official was subjectively aware of the risk, he may be found free from liability if he 'responded reasonably to the risk, even if the harm ultimately was not averted.'" Anderson, 2011 WL 3965667 at *2 (citing Farmer, 511 U.S. at 844). As applied to this case, Plaintiff must show there exist some facts suggesting Officers Nugent, Marsdin, and/or Carpenter drew the inference of the risk of substantial harm to Mr. Pikes in order to survive summary judgment on the deliberate indifference claim.

The conduct of Mayor Thornton and Chief Carpenter as supervisors is also considered under a deliberate indifference standard, but their actions

are evaluated under a slightly different analysis.[9] Vicarious liability, or respondeat superior, is not available for recovery against supervisors for the actions of their employees under Section 1983. Atteberry v. Nocona General Hosp., 430 F.3d 245, 254 (5th Cir. 2005); see also, Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994). However, "supervisors may be liable for constitutional violations committed by subordinate employees when supervisors act, or fail to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates." Id. (citations omitted) (emphasis in original).

The supervisor's deliberate indifference is also considered under a subjective standard, and "'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment.'" Atteberry, 430 F.3d at 255 (citing Farmer, 511 U.S. at 838). The Fifth Circuit determined in Atteberry that two supervisors' knowledge about dangerous drugs missing from the hospital inventory, plus significantly increased death rates, created the possibility of the supervisors' being deliberately indifferent toward a subordinate nurse injecting patients with the drug. Id. at 256. To survive a motion for summary judgment, there must be some evidence suggesting the supervisors "had

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[9] Plaintiff asserts Mayor Thornton and Chief Carpenter are in supervisory roles vis-a-vis Officers Nugent, Marsdin, and Carpenter. Defendants have not argued otherwise and we proceed on this assumption.

subjective knowledge of a serious risk of harm." Id. at 255.

It is undisputed the City of Winnfield qualifies as a municipality under federal law. The liability of the City under Section 1983 is evaluated according to the standards set forth in Monell v. Dep't of Soc. Servs. of the City of New York, et al., 436 U.S. 658 (1978). As is the case with the Mayor and Chief, the City is not liable under a theory of vicarious liability. Id. at 694.

The Supreme Court decided in Monell :

> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694-95. The violation of constitutional rights must be attributable to the City's policy, practice, or custom in order for the City to be liable for the officers' actions. The custom need not have "received formal approval through the [City's] official decisionmaking channels" in order for the municipality to be liable under Section 1983. Id. at 690-91.

The City could also be liable under a "failure to train" theory. City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989). This requires a showing that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 388. Such a standard is similar to the deliberate indifference required for

the Mayor and Chief in that some manner of subjective intent is necessary. As the Supreme Court described in City of Canton, "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality--a 'policy' as defined by our prior cases--can a city be liable for such a failure under § 1983." Id. at 389.

1. Officer Nugent

Although the details are in dispute, the record clearly indicates Officer Nugent used his Taser X26 on Mr. Pikes multiple times and Mr. Pikes exhibited some level of physical distress prior to receiving medical treatment. As described above, the right to be free from excessive force and to receive medical attention are grounded in the Fourth and Fourteenth Amendments respectively of the U.S. Constitution. Goodman, 571 F.3d at 397; Wagner, 277 F.3d at 324. As a threshold matter, there is a genuine dispute as to the material facts establishing a constitutional violation against Mr. Pikes and the summary judgment analysis will continue. Therefore, for the purposes of this ruling only, we proceed on the assumption that such violation of constitutional rights was effected by Officer Nugent. As an additional matter, there is no dispute Officers Nugent, Marsdin, and Carpenter are considered state actors who were acting under the color of state law during the incident involving Mr. Pikes.

Under Kentucky v. Graham, the claims against Officer Nugent in his official capacity will be dismissed. 473 U.S. at 165. With regard to the Section 1983 use of force claim in his personal capacity, we find numerous sufficient facts in the

record to create a genuine dispute concerning the objective reasonableness of Officer Nugent's use of force on Mr. Pikes. Officer Nugent used his Taser X26, by drive stun or deployed cartridge, on Mr. Pikes at least eight different times. Plaintiff asserts Mr. Pikes was crying out for help during this time. Officer Nugent argues Mr. Pikes was resisting arrest and failing to comply with commands from police officers. Among other disputed facts, the behavior of Mr. Pikes and the threat posed to Officer Nugent during the incident are certainly material to determining Officer Nugent's objective reasonableness in considering his use of force.[10] Accordingly, Officer Nugent's motion for summary judgment will be **DENIED** as to this issue.

The second Section 1983 claim against Officer Nugent in his personal capacity is for deliberate indifference to Mr. Pikes' need for medical attention. At the motions hearing on January 4, 2012, Plaintiff introduced into evidence a video of Mr. Pikes taken by Officer Nugent at the Winnfield Police

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[10] Officer Nugent relies on Poole v. City of Shreveport, 2011 WL 202116 (W.D. La. 2011) in support of his argument that his use of force was objectively reasonable. The facts before Judge Stagg in Poole are distinguishable from those here. Most importantly, the record in Poole contained a video of the use of force by the officers unlike the incident with Mr. Pikes. The district judge had clear evidence of the plaintiff in Poole resisting arrest such that the judge was able to determine the objective reasonableness of the use of force. We have disputes in facts presented by officers and eyewitnesses and are not in a position at this stage to determine the objective reasonableness of Officer Nugent's actions.

Department. The video depicts Mr. Pikes after being tasered and prior to being transported to the hospital. In the video, Mr. Pikes is shackled at the ankles and rolling around on the floor. He occasionally uses his arms to prop himself on his side then rolls alternately from his front to his back. He mumbles incoherently, but at one point he asks for "someone . . . please help me."

Unidentified voices in the background order him to sit up, and they indicate an ambulance is coming and they (the individuals speaking in the video) will let the EMTs handle Mr. Pikes since he appears to be "dead weight." The voices also relay to each other they believe Mr. Pikes is on PCP and/or cocaine. No voice in the video indicates he or she possesses a subjective belief about Mr. Pikes being at risk for serious harm; rather, the voices suggest they believe Mr. Pikes to be uncooperative by not sitting up and following directions. We also note no one in the video actually renders any medical assistance to Mr. Pikes nor do they attempt to assess his condition, but Mr. Pikes is conscious for the duration of the video.

In his interview with the Winn Parish District Attorney's Office, Officer Nugent stated Mr. Pikes repeatedly said he wanted the officers to "leave him there to die" at the scene where he had been tased. (Doc. 203-5 at p. 5). However, Officer Nugent denies having knowledge that Mr. Pikes was injured or otherwise in physical distress. Rather, he states he thought Mr. Pikes was being "passive resistant," uncooperative, and did not want to go to jail. (Doc. 203-5 at pp. 3-5, 8, 13). Plaintiff argues it was Winnfield Police Department policy for officers to

seek medical attention for an individual after having been tased, and Officer Nugent knew of the policies for taser use but failed to follow this one. (Doc. 203-5 at p. 10).

The failure to follow policies is not, by itself, grounds for liability under the deliberate indifference standard required under Farmer and Fifth Circuit jurisprudence. Such policies indicate the inference of substantial risk of harm could be drawn after Mr. Pikes was tased, but Plaintiff has not submitted any evidence which indicates a genuine dispute of fact concerning Officer Nugent's actually having drawn the inference that Mr. Pikes was at risk for serious harm if the policy was not followed.

Plaintiff correctly points out Officer Nugent called for an ambulance at the police department after Mr. Pikes told him he had asthma and he had taken PCP and/or cocaine. This is the first indication Officer Nugent made the inference Mr. Pikes was at risk for medical harm, and Officer Nugent sought medical attention once he made such an inference. Seeking professional medical attention is a reasonable response to the risk of medical harm which Officer Nugent believed existed at the time. Plaintiff has failed to identify in the record and our independent search reveals no genuine dispute of material fact concerning Officer Nugent's alleged deliberate indifference to Mr. Pikes' need for medical attention. Accordingly, Officer Nugent's motion for summary judgment will be **GRANTED** as to the issue of deliberate indifference to providing medical attention.

2. Officers Marsdin and Carpenter

Under Kentucky v. Graham, the claims against Officers Marsdin and Carpenter in their official capacities will be dismissed. 473 U.S. at 165. Plaintiff identifies the acts of Officer Nugent in using his Taser X26 on Mr. Pikes as the only source for alleged excessive force. The record is void of any reference to excessive force used by either Officers Marsdin or Carpenter, and their motion for summary judgment will be **GRANTED** as to this issue.

The same standard for deliberate indifference to the need for medical attention applied to Officer Nugent applies to Officers Marsdin and Carpenter as well. The record shows both Officers Marsdin and Carpenter first learned of facts giving rise to Mr. Pikes' risk for serious medical harm *and they actually made such inference* when Mr. Pikes arrived at the police station and said he was on PCP and/or cocaine and had asthma. An ambulance was dispatched once Mr. Pikes was at the station. Plaintiff has failed to identify in the record any time earlier during the incident when either officer had subjective knowledge of Mr. Pikes being at risk for serious medical attention such that they were deliberately indifferent to his needs. Plaintiff's argument to the contrary is based solely on conclusory allegations using objective standards. As described above with Officer Nugent, calling for professional medical help upon learning such information is a reasonable response. Officers Marsdin and Carpenter's motion for summary judgment as to this issue will be **GRANTED.**

3. The City, Mayor Thornton, and Chief Carpenter

The claims against Mayor Thornton and Chief Carpenter in their official capacities will be dismissed. Kentucky v. Graham, 473 U.S. at 165. With regard to the personal capacity Section 1983 claims, Plaintiff must show Mayor Thornton and Chief Carpenter acted with deliberate indifference toward Mr. Pikes' constitutional rights in their failure to train and/or supervise Officers Nugent, Marsdin, Carpenter, and Branch. In the training and supervision of the officers, it is undisputed Mayor Thornton and Chief Carpenter are considered state actors acting under color of state law for the purposes of the Section 1983 action. As described above, there is no evidence supporting the deliberate indifference to medical attention claims against Officers Nugent, Marsdin, and Carpenter. In the police unit on the way to the station, Officer Branch told Mr. Pikes he would be receiving medical attention and Officer Branch bypassed a hospital on the way to the station. Despite this action, there is no indication Mayor Thornton or Chief Carpenter actually knew this instance occurred or knew if it was a common practice. Lacking any evidence of subjective knowledge, Mayor Thornton and Chief Carpenter cannot be found to be deliberately indifferent.

With regard to the excessive force claim, there exists nothing in the record which suggests either Mayor Thornton or Chief Carpenter possessed subjective knowledge of Officer Nugent's alleged use of excessive force. Plaintiff asserts Officer Nugent had prior instances of misconduct, but such acts are not identified in the record and we are unable to find any evidence the city officials knew Officer Nugent

(or any of the other officers named as defendants) were or had the propensity to use excessive force against persons in custody. Without such subjective knowledge, neither the Mayor nor the Chief could be deliberately indifferent toward Mr. Pikes' constitutional rights. Accordingly, the motion for summary judgment concerning the Section 1983 claims against Mayor Thornton and Chief Carpenter will be **GRANTED.**

Similarly, Plaintiff has failed to produce any evidence to support deliberate indifference of the City and/or its officials in failing to train the officers which resulted in the violation of Mr. Pikes' constitutional rights. Canton, 489 U.S. at 387. There is no indication of any "conscious choice" by the municipality of an intentional failure to train its officers in proper use of force or assess and address the need for medical attention. Plaintiff incorrectly asserts "the officers' response from beginning to end reflects how poorly they were trained (or lack of training [sic]), and how dangerous they were when these Defendants put them on the street." (Doc. 200 at p. 19). Plaintiff lacks any action on the part of the City or its officials to support this conclusory allegation.

However, the City's liability warrants a different result under Monell based solely on the conduct of Officer Branch. Monell, 436 U.S. at 694-95. The testimony of Officers Branch and Angel Carter from Officer Nugent's criminal trial was submitted in connection to these summary judgment motions. Such testimony reveals a City policy, custom, or practice that the officers "transport the individual (in

custody) to the station as soon as possible for safety reasons" related to the formation of a crowd. (Doc. 152-4). Such practice is suggested as the reason for Officer Branch's failure to seek medical attention for Mr. Pikes immediately after being tased tased and for Officer Branch's bypass of the hospital on the way to the station.

By way of reminder, the claims against Officer Branch individually are not addressed as described *supra* at n.3, but the liability of the City relates to Officer Branch's failure to provide Mr. Pikes with medical attention. The City policy resulted in Officer Branch's bypassing a medical facility when he had knowledge of Mr. Pikes' medical harm (repeated tasing and requests for help). As noted in Monell, such practice by the officers need not have "received formal approval" by the City in order for the City to be found liable. Monell, at 690-91. Our determination of this issue stems from our discussion of the constitutional right to medical care for persons in police custody. At the summary judgment stage, we do not comment on the likelihood of success as to this claim, but we do find such practice creates a genuine dispute of material fact concerning the City's liability under Monell; therefore, Defendants' motion is **DENIED** as to this issue.

C. Qualified Immunity

To begin, "a qualified immunity defense alters the usual summary judgment burden of proof." Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010) (citing Michalik v. Hermann, 422 F.3d 252, 262 (5th Cir. 2005)). Because Officers Nugent, Carpenter, and Marsdin, Chief Carpenter, and Mayor Thornton as

officials have pled the defense, Plaintiff now bears the burden to "rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law. . . . but all inferences are drawn in [Plaintiff's] favor." Brown, 623 F.3d at 253.

Regarding the applicable standard, "the first step in qualified immunity analysis is to determine whether the plaintiff has alleged the violation of a clearly established federal constitutional (or federal statutory) right." Thompson v. Upshur County, TX, 245 F. 3d 447, 457 (5th Cir. 2001) (citing Hare v. City of Corinth, 135 F. 3d 320, 325 (5th Cir. 1998)). Because we determined Plaintiff has not shown a genuine dispute of material fact of a violation of Mr. Pikes' constitutional right to medical care, we do not address the second step of the qualified immunity analysis as to this alleged violation in the Section 1983 claim against any of the defendants asserting the defense. Nor do we continue the analysis concerning the excessive force claim against Officers Carpenter or Marsdin, Chief Carpenter, or Mayor Thornton.

We refer to our discussion *supra* wherein we proceeded on the presumption, for the purposes of this ruling only, that Plaintiff has established a genuine dispute of material fact of a violation of Mr. Pikes' Fourth Amendment right to be free from excessive force based on Officer Nugent's repeated use of his Taser X26. We base this presumption on the disputed material facts of Mr. Pikes' behavior at the time he was being tased by Officer Nugent. We proceed to the second step only as to the excessive

force claim against Officer Nugent. The City as a municipality is not entitled to assert the defense; therefore, our conclusions concerning Officer Branch's failure to render medical attention are inapplicable to our qualified immunity analysis.

If the plaintiff satisfies the first step and alleges a violation of a clearly established federal constitutional or statutory right, "the Court must then assess whether the defendant's conduct was objectively reasonable in light of clearly established law." Thompson, 245 F.3d at 457.[11] To determine whether Officer Nugent's conduct was "objectively reasonable," we understand "'clearly established' [to mean] that the 'contours of the right must be sufficiently clear that a reasonable official would

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[11] The Supreme Court determined in Pearson v. Callahan, 555 U.S. 223, 242 (2009) that the district court is not required to determine first if there has been a violation of an established constitutional right. Rather, Pearson "simply recognizes that those [lower] courts should have the discretion to decide whether that procedure is worthwhile in particular cases." Id. (noting a withdrawal from Saucier v. Katz, 533 U.S. 194 (2001) which implemented the two-step analysis for qualified immunity). We find the two-step analysis applicable in this case at the summary judgment stage. Specifically, our determination of the alleged violations by each (of the many named) Defendants narrows our analysis of the remaining issues. If there exists no genuine dispute of material fact that a particular Defendant did not violate Mr. Pikes' constitutional right, we find it unnecessary to address the objective reasonableness of the individual Defendant's conduct. Our goal in ruling on each pending motion in a single document is to decide those genuine disputes of material fact which remain and will proceed to trial.

understand that what he is doing violates that right.'" Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). However, the Supreme Court has held "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002).

At the summary judgment stage, we find a genuine dispute of material facts concerning whether a reasonable officer in Officer Nugent's position would believe he was violating Mr. Pikes' constitutional right. Plaintiff asserts Mr. Pikes was physically unable to comply with Officer Nugent's demands to stand up. Officer Nugent alleges Mr. Pikes was being passively resistant. Plaintiff has also asserted Mr. Pikes was yelling in pain, but Officer Nugent argues Mr. Pikes was yelling he did not want to go to jail. The "clearly established" law governing Officer Nugent's use of force and his objective reasonableness turn on the facts surrounding Mr. Pikes' behavior during the application of Officer Nugent's Taser X26. Accordingly, Officer Nugent's motion for summary judgment is **DENIED** as to the issue of qualified immunity.

D. Louisiana State Law Intentional Torts

In her Complaint, Plaintiff alleges Defendants assaulted and battered Mr. Pikes, thereby causing his death. The legal standard for the state law intentional torts of assault and battery hinge on the determination of excessive force used by the officers. It is undisputed a valid warrant existed for Mr.

Pikes' arrest; therefore, the arrest itself was lawful. Despite the lawfulness of the arrest, the use of "excessive force transforms ordinarily protected use of force into an actionable battery, rendering the defendant officer and his employer liable for damages." Zerbe v. Town of Carencro, 884 So.2d 1224, 1228 (La. App. 3 Cir. 2004) (quoting Penn v. St. Tammany Parish Sheriff's Office, 843 So.2d 1157, 1161 (La. App. 1 Cir. 2003)).

1. Officer Nugent

As discussed above, there is a genuine dispute of material facts concerning whether Officer Nugent used excessive force against Mr. Pikes. Accordingly, Officer Nugent's motion for summary judgment will be **DENIED** as to this issue.

2. Officers Marsdin and Carpenter

We have determined no facts exist to support the claim that either Officer Marsdin or Carpenter used excessive force against Mr. Pikes. Their motion for summary judgment will be **GRANTED** as to this issue.

3. The City, Mayor Thornton, and Chief Carpenter

There is no indication either Mayor Thornton or Chief Carpenter came into any physical contact with Mr. Pikes, and their motion for summary judgment will be **GRANTED** on the assault and battery claims. However, the City as the employer of Officer Nugent may be held vicariously liable for his acts against Mr. Pikes. Zerbe, 884 So.2d at 1228; see also, LeBrane v. Lewis, 292 So.2d 216 (La. 1974) (holding an employer vicariously liable for the intentional tort

of an employee when the tortious conduct is closely connected to the time, place, and causation of employment duties). Therefore, we will **DENY** the City's motion for summary judgment on the issue.

E. Louisiana State Law Negligence

Plaintiff asserts Defendants are liable under La. C.C. art. 2315 for an alleged use of excessive force against Mr. Pikes and alleged failure to provide medical attention. Article 2315 is the cornerstone for Louisiana tort liability. The intentional torts alleged were discussed above, and our analysis now proceeds to alleged negligent acts of the Defendants. The negligence of Officers Nugent, Carpenter, and Marsdin is based on excessive force and failure to provide medical attention. The negligence of Mayor Thornton and Chief Carpenter is based on their failure to supervise and/or train the officers properly. The City's negligence is asserted to be both vicarious (based on the acts of the officers as its employees) and direct (based on its alleged failure to supervise and/or train properly).

The Louisiana Supreme Court defines "negligence" as "conduct which falls below the standard of care established by law for the protection of others against an unreasonable risk of harm." Dobson v. La. Power and Light Co., 567 So.2d 569, 574 (La. 1990). The standard of care applicable to the officers' use of force is governed by the Louisiana Code of Criminal Procedure and jurisprudence. Article 220 provides an officer "may use reasonable force to effect [an] arrest and detention." La. C.Cr.P. art. 220. The reasonableness of the force depends on

the totality of the circumstances surrounding the situation. Such factors include:

> the known character of the arrestee, the risks and dangers faced by the officers, the nature of the offense involved, the chance of the arrestee's escape if the particular means are not employed, the existence of alternative methods of arrest, the physical size, strength, and weaponry of the officers as compared to the arrestee, and the exigencies of the moment.

Kyle v. City of New Orleans, 353 So.2d 969, 973 (La. 1977) (citations omitted). As with the assault and battery claims, the facts underlying the negligence state law use of force claim turns on the same facts as those considered for the Section 1983 excessive force claims.

Concerning the medical attention claim, "a police officer owes a duty to a person while in his custody to protect him from injury and to care for his safety." Evans v. Hawley, 559 So.2d 500, 504 (La. App. 2 Cir. 1990) (citing Griffis v. Travelers Ins. Co., 273 So.2d 523 (La. 1973). However, "this means that the officer must do only what is reasonable under the circumstances, and he is only liable for a certain category of risks to which his [arrestee] may be subjected." Griffis, 273 So.2d at 526. In addition, the officer must "see to it that reasonable medical service is provided to such person *if and when* his mental and/or physical condition discloses the need of such services." Evans, 559 So.2d at 505 (quoting Cobb v. Jeansonne, 50 So.2d 100, 106 (La. App. 2 Cir. 1951)) (emphasis added). The state law negligence action

for medical attention requires an objective standard as compared to the Section 1983 deliberate indifference analysis which employs a subjective standard.

The police officers were employees of the City at the time of the incident, and negligence of the officers will result in vicarious liability of the City. In addition to this theory, Plaintiff also asserts the City, Mayor Thornton, and Chief Carpenter are directly negligent for their failure to train and/or supervise properly and in negligent hiring of the officers.

1. Officer Nugent

Officer Nugent's motion for summary judgment will be **DENIED** as to the negligence claim for use of force because genuine disputes of material fact exist concerning Mr. Pikes' behavior as the arrestee. Further, Plaintiff asserts Mr. Pikes showed signs of physical distress throughout the incident. In light of this alleged behavior combined with the Winnfield Police Department policy to seek medical attention immediately after a subject has been tased, we find Officer Nugent's failure to provide medical attention to Mr. Pikes earlier in time may be objectively unreasonable and we will **DENY** his motion for summary judgment as to this issue.

2. Officers Marsdin and Carpenter

We have already determined Officers Marsdin and Carpenter did not use any measure of physical force on Mr. Pikes that could be considered "unreasonable;" therefore their motion for summary judgment as to this negligence claim will be **GRANTED.** Officer Carpenter was not involved in

the incident until all parties were at the police station, and medical attention was sought shortly thereafter. Officer Carpenter's actions were reasonable in this regard. Officer Marsdin also was not present for the entire incident and Mr. Pikes was never actually in his custody. Rather, Officer Marsdin only assisted Officers Branch and Nugent by verbally ordering Mr. Pikes to stop running at the beginning of the incident and moving Mr. Pikes to Officer Branch's car. Officers Marsdin's and Carpenter's behavior did not fall below a reasonable standard of care for officers who were not present on the scene, did not take Mr. Pikes into custody or transport him, and did not have information about Mr. Pikes' physical distress, unlike Officers Nugent and Branch.

3. The City, Mayor Thornton, and Chief Carpenter

No City administrator directly used any force on Mr. Pikes. Further, the City (not Mayor Thornton or Chief Carpenter) is the employer of Officers Nugent and Branch. In addition, "public officers such as mayors and police chiefs are not liable under the doctrine of respondeat superior [vicarious liability] for the actions of their subordinates." London v. Ryan, 349 So.2d 1334, 1342 (La. App. 1 Cir. 1977), *writ denied* 351 So.2d 171 (La. 1977). Rather, the City could be liable under respondeat superior for the negligent actions of the officers as described above. Because we find a genuine dispute of material fact concerning the negligence of Officers Nugent and Branch, the City's motion for summary judgment

will be **DENIED** as to the issue of vicarious liability for their negligence.

Regarding the claim for direct negligence for failure to train, supervise, and/or hire, Plaintiff asserts no facts to support the argument that Mayor Thornton's actions fell below the standard of care. In short, the Mayor had no knowledge and played no part in this incident. Chief Carpenter, on the other hand, was in the position of a supervisor and had a duty to ensure the officers were trained and prepared. The record shows Officer Branch had undergone heart surgery within a short period of time before the incident. During the Civil Service Hearing of Officer Nugent, Officer Branch stated he was unable to assist Officer Nugent fully in the pursuit and arrest of Mr. Pikes because he (Officer Branch) was tired and out of breath. (Doc. 200-1 at p. 22).

We find a genuine dispute of material fact concerning Officer Branch's ability to perform the physical requirements of his position, and this could result in direct negligence for improper supervision or hiring of officers on the part of Chief Carpenter. The Chief of Police is held to a duty to place individuals in a position which they are able to perform, and Chief Carpenter may have fallen short in this regard. Accordingly, Chief Carpenter's motion for summary judgment will be **DENIED** as to the state law claim for negligent training, hiring, and/or supervision.

For the same reason, we find a genuine dispute of material fact concerning the City's liability for negligent supervision or hiring. It is unclear from the

record whether Officer Branch was placed in his position as a result of Chief Carpenter's actions or City policy. In addition, we refer to our discussion *supra* where we denied the City's motion for summary judgment on the Section 1983 municipal liability based on Officer Branch's failure to seek medical attention due to his training to transport the arrestee to the station as soon as possible for safety reasons. If true, such training appears to controvert the policy of seeking medical attention for subjects immediately after being tased. This is a material fact concerning the state law negligence claim for Mr. Pikes' medical care. Finding a dispute of fact, we will **DENY** the City's motion for summary judgment as to this issue.

F. Medical Causation

For the sake of clarity, we note we have found no action by Officer Raymond Carpenter, Officer Alan Marsdin, or Mayor Thornton which would result in liability on any basis. We bear this in mind as we address the next motion.

All Defendants (except Officer Branch) timely filed a Motion for Summary Judgment Based on an Absence of Medical Causation. (Doc. 167).[12] In order for Plaintiff to sustain her burden on the wrongful

[12] In her response (Doc. 198), Plaintiff asserts Defendants' motion should be denied because it was untimely. Defendants' motion is timely because it was filed by September 1, 2011 in accordance with the Plan of Work. (Doc. 129). September 6, 2011 was the date Defendants were granted leave to file the excess pages associated with the motion.

death claim, she must show a genuine dispute of material fact that Defendants' actions caused Mr. Pikes' death. La. C.C. art. 2315.2 ("if a person dies due to the fault of another"). Defendants incorrectly assert an absence of medical causation would require Plaintiff's survival claims (La. C.C. art. 2315.1) to be dismissed. Plaintiff's survival claim is brought on behalf of the deceased and is for the pain and suffering allegedly caused by Defendants' acts prior to the death. Article 2315.1 does not require the tortfeasor's acts to have caused decedent's death. Accordingly, our determination of medical causation would not affect Plaintiff's survival claims against Officer Scott Nugent, Chief Johnny Ray Carpenter, and the City of Winnfield.

In a case as this one where multiple causes are present, the standard for causation against Officer Nugent, Chief Carpenter, and the City is the "substantial factor" test. Roberts v. Benoit, 605 So.2d 1032 (La. 1991). The relevant inquiry at the motion for summary judgment stage is whether there is a genuine dispute of material facts concerning whether Defendants' actions were "a substantial factor in bringing about" Mr. Pikes' death. Perkins v. Entergy Corp., 782 So.2d 606, 611 (La. 2001).

The claims against Chief Carpenter and the City are based on the actions of Officer Branch in allegedly failing to render appropriate medical care to Mr. Pikes. As detailed above, we find a genuine dispute of material fact concerning whether Officer Branch's negligence (failure to seek medical attention) was a substantial factor in causing Mr. Pikes' death.

Considering the facts in the light most favorable to Plaintiff, we also find a genuine dispute of material fact concerning whether Officer Nugent's use of force (multiple applications of his Taser X26) was a substantial factor in Mr. Pikes' death. We recognize that with our rulings pursuant to Federal Rule of Civil Procedure 701, Plaintiff's only evidence in this regard is Dr. Baden's process of elimination (differential diagnosis) for determining Mr. Pikes' cause of death. At this stage, it is appropriate for both parties to present and cross-examine experts and for the factfinder to determine whether Officer Nugent's use of his Taser X26 was a substantial factor in causing Mr. Pikes' death. As we will detail below, we note carefully it is only the *use of the Taser* X26 which could be attributed to causing Mr. Pikes' death and not the ECD itself based on the medical evidence submitted.

G. Louisiana Products Liability Act

The issue of medical causation is directly tied to Taser International's Motion for Summary Judgment based on the LPLA (Doc. 153). The LPLA establishes the exclusive theory of liability for manufacturers for damages caused by their products and is set forth in La. R.S. 9:2800.51.[13] The applicable standard under the LPLA is as follows:

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[13] In her Complaint, Plaintiff asserts a claim for negligence and a claim for strict liability against TI. Based on the exclusive nature of the LPLA, we address both claims under the Act.

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a *reasonably anticipated use* of the product by the claimant or another person or entity.

La. R.S. 9:2800.54 (italics added). There are four categories which render a product "unreasonably dangerous" under the LPLA: (1) construction or composition; (2) design; (3) inadequate warning; (4) failure to conform to express warranty. Id. The "unreasonably dangerous" characteristic must exist at the time the product left control of the manufacturer or result from a reasonably anticipated alteration or modification of the product. Id. Plaintiff has the burden of proving the required elements under the LPLA. Id.

Plaintiff must show a genuine dispute of material fact concerning whether Mr. Pikes' death was proximately caused by an unreasonably dangerous characteristic of Officer Nugent's *reasonably anticipated use* of his Taser X26. Based upon the evidence elicited in this case only, we find a trained police officer using his Taser X26 in drive stun mode nine times on a handcuffed individual is not a use "reasonably anticipated" by TI as the manufacturer.

In support, we reviewed studies, warnings, and guides produced in the record. To begin, it is undisputed Officer Nugent's Taser X26 was functioning properly. Officer Nugent completed the required training to carry an ECD as an officer with the Winnfield Police Department, and TI had no

indication Officer Nugent would use his ECD in a way that deviated from proper policy and procedures. Even studies relied on by Plaintiff support the conclusion that the Taser X26 in drive stun mode does not result in serious harm *when used reasonably*. The Winnfield Taser policy requires Tasers "to be used only as instructed in the training course and only in accordance with the Departmental Policy and State Law." (Doc. 201-6 at p. 2).

In its Product Warnings for Law Enforcement, TI specifically warns against "prolonged or continuous exposure(s) to the TASER" because "continuous application(s) of the TASER device may contribute to cumulative exhaustion, stress, and associated medical risk(s)." (Doc. 153-12 at p. 2). In conjunction with the warnings from TI, the Winnfield Taser Policy suggests a Taser should be used prior to and to effectuate handcuffing a subject, as opposed to continuously using the Taser after the individual has been restrained as was done in the situation with Mr. Pikes. (Doc. 201-6 at p. 3). In short, Officer Pikes' use of his Taser X26 and Officer Branch's failure to seek medical attention, once proved, would be superceding and intervening factors in causing Mr. Pikes' death.

Finally, it is important to note our decision as to TI is largely based on Plaintiff's inability to identify any affirmative medical evidence that the ECD, by virtue of its electrical effect on the human body, can or did cause Mr. Pikes' death. Because he lacks any knowledge in the area, Dr. Baden's testimony as to the effect of ECDs on the body has been excluded and

Plaintiff has supplied no individual who actually qualifies as an expert on the issue.

IV. Conclusion

This case revolves around the reasonableness of Officer Nugent's use of his Taser X26 and Officer Branch's bypassing the hospital after being advised of Mr. Pikes' purported need for medical attention. There also exist genuine disputes of material fact concerning supervisory liability for Chief Carpenter and the City of Winnfield for the manner Officers Nugent and Branch handled the incident.

For the reasons explained herein, the Motion to Exclude the Testimony of Dr. Michael Baden (Doc. 151) will be **GRANTED IN PART and DENIED IN PART.** The Motion to Exclude the Testimony of Dr. Anthony Storace (Doc. 154) will be **GRANTED IN PART and DENIED IN PART.** The Motion to Exclude the Testimony of Mr. Larry Alan Smith (Doc. 158) will be **GRANTED IN PART and DENIED IN PART.** The Motion for Summary Judgment by the City of Winnfield, Mayor Deano Thornton, and Chief of Police Johnny Ray Carpenter (Doc. 152) will be **GRANTED IN PART and DENIED IN PART.** The Motion for Summary Judgment by Taser International Based on the Louisiana Products Liability Act (Doc. 153) will be **GRANTED.** The Motion for Summary Judgment by Scott Nugent (Doc. 156) will be **GRANTED IN PART** and **DENIED IN PART.** The Motion for Summary Judgment by Raymond Carpenter and Alan Marsdin (Doc. 157) will be **GRANTED.** Defendants' Motion for Summary Judgment Based

on an Absence of Medical Causation (Doc. 167) will be **GRANTED IN PART and DENIED IN PART.**

Disposition will enter by a separate Judgment signed on this date.

SIGNED on this 13th day of April, 2012 at Alexandria, Louisiana.

DEE D. DRELL

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30527

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

Plaintiff–Appellee,

v.

SCOTT NUGENT, individually and in his official capacity as police officer for the City of Winnfield,

Defendant–Appellant.

Appeal from the United States District Court for the Western District of Louisiana, Alexandria

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October 18, 2013

ON PETITION FOR REHEARING

Before JOLLY, GARZA, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Priscilla R. Owen
United States Circuit Judge

Winnfield City Police Department Taser Policy and Procedures Chapter 29

Use of Taser

Purpose

This order sets forth the Winnfield City Police Department policy regarding the training, handling, deployment of, and reporting procedures for the Taser weapon system.

Specific objectives of this General Order are:

To inform and direct those officers who are authorized operators of the Taser, in a uniform and professional manner, the proper tactics, procedures, and documentation of deploying a Taser.

Information

The Taser is an additional police tool and is not intended to replace verbal problem solving skills, unarmed self defense techniques, or firearms. The Taser shall only be deployed in circumstances where it is deemed reasonably necessary to control a dangerous or violent subject. The Taser shall be deployed when deadly force does not appear to be justified and/or necessary, and attempts to subdue the subject by other conventional tactics have been, or will likely be, ineffective in the situation at hand; or there is reasonable expectation that it will be

unsafe for officers to approach within contact range of the subject.

Definitions

TASER - A Taser includes but is not limited to the M-26 Advanced Taser, the X- 26 Taser, and any Department authorized and issued non-lethal device which is designed to produce and emit an electrical charge. Personally owned Tasers are not authorized.

DEPLOYMENT - The activation of a Taser resulting in the arcing of the unit and either a contact maneuver (drive stun) on a subject or animal and/or the discharge of an air cartridge, whether or not the probes strike the intended target.

TASED - The accepted word indicating that the Taser was activated and utilized on either a person or animal.

TASER CONTROL MANAGER - A certified Taser instructor who has been appointed by the Chief of Police to manage the Departments Taser Program.

TASER INSTRUCTORS - All approved Taser instructors of the %infield Police Department.

DEPARTMENT - The City of Winnfield Police Department.

CONVENTIONAL TACTICS - Those tactics and other uses of force described in the Departments Use of Force Policy.

MEDICAL PERSONNEL - Includes but is not limited to Doctors, Physician's Assistants, Nurses.

SUPERVISOR - A Winnfield Police Department Law Enforcement Officer above the rank of Patrol Officer to include Corporals, Sergeants, Lieutenants, Assistant Chief, and the Chief of Police.

Procedure

1. Tasers shall be issued to and handled or deployed only by officers who have completed the Department's Taser Training Program, or a Taser Training Program from Taser International. The Taser shall be handled in the same manner and treated with the same degree of care and discretion.

2. Tasers shall only be used as instructed in the training course, and only in accordance with the Departmental Policy and State Law. The deployment of a Taser is considered a use of force **one level greater than Empty Hand Control** and on the same use of force scale as pepper spray (Oleoresin Capsicum).

3. Only proper functioning and charged Tasers shall be issued for field use. The battery charge shall be checked prior to removing the Taser from storage, the battery charge shall only be checked when there is no air cartridge loaded in the Taser. The Taser shall be pointed in a safe direction with no air cartridge loaded in the unit for the "test spark", performed when testing the Taser battery charge.

4. Any Taser or component thereof found to be defective or damaged shall be returned to the Taser Control Manager for repair or replacement, with a detailed explanation of the malfunction or cause of the damage.

5. All Taser and associated equipment shall be properly secured when not in use. When carried in the field, the Taser shall be carried in the Department approved holster. The holster shall be carried opposite of the Departmental issued sidearm.

6. Each deployment of a Taser shall be investigated and documented utilizing the Use of Force Report in the Departments Reporting System. Additionally, each deploying officer will complete a separate Taser Use Report. Copies of the incident report, Use of Force and Taser Use Report will be completed and forwarded to the appropriate supervisory staff and the Taser Control Manager. This includes a contact deployment (drive stun), as well as the discharge of an air cartridge resulting in the subject or animal receiving discharge of a Taser air cartridge shall be documented in a General Investigation Report.

Deployment

1. Whenever a Taser is to be deployed it is the responsibility of the deploying officer and the on scene supervisor to make certain officers on the scene understand that the Taser is being deployed and not lethal force. This should be done prior to the deployment of the Taser, if possible. This shall be accomplished thru the warning announcement "Taser! Taser!" This is to alert the other officers, as well as to provide the subject as additional opportunity to cease the conduct that has given rise to the deployment of the Taser.

2. When an officer approaches a subject with the intent to deploy the Taser, an additional officer should also approach whenever possible to provide immediate handcuffing of the subject while he or she is disabled due to the Taser affects. The additional officer can provide lethal cover should it become necessary for the protection of life.

3. When a subject has been Tased if at all possible the subject should be handcuffed while the Taser is activated and the subject is disabled.

4. Verbal commands shall be used constantly by the deploying officer before (when practical), during, and after the application of the Taser on a subject. This will warn the subject to cease his/her aggressive demeanor or actions and allow the subject to be placed into a position of advantage for the arresting officer (s).

5. After a subject has received one Taser application the deploying officer and/or on-scene supervisor shall evaluate the subject's condition and actions before administering a second application of the Taser (**when safe and practical to do so**).

6. Simultaneous Taser applications from multiple deploying officers shall be avoided unless under aggravated circumstances.

7. Subjects who have received an electrical charge from the Taser unit from a contact maneuver (drive stun) or the deployment of an air cartridge shall be treated as follows:

A. Once the subject is safely secured and in custody, the subject shall be transported to the appropriate medical facility either by

the arresting/transporting officer or ambulance, depending on the condition of the subject.

B. Upon arrival at the medical facility the officer shall notify the medical personnel that the subject has received an electrical charge from the Taser and the approximate time the action occurred. The officer shall also relate any pertinent information concerning the subject or his condition to the medical personnel.

C. Only medical personnel are authorized to remove or direct to be removed any Taser probes embedded in the skin of the subject.

D. Prior to the subject being transported to the jail the arresting/transporting officer will obtain a medical release from the medical personnel.

E. Officers must be aware of a subject's condition while the subject is in police custody and obtain/render appropriate medical aid as required. Officers need to recognize the subjects surrounding when deploying the Taser due the subjects sustaining possible injuries when falling from a standing position.

8. The spent cartridge and probes shall be collected and preserved as evidence. The wire connecting the air cartridge and probes shall be removed and discarded. Caution should be exercised in handling probes that have penetrated a subject's skin. Such probes shall be packaged and handled

with the same care as a hypodermic needle and shall be packaged in a suitable container to avoid accidental infection. The probes shall be labeled as a biohazard when submitted as evidence.

9. The Taser **will not** be deployed on children, elderly, or known pregnant females, unless under aggravated circumstances.

Documentation

1. The deploying officer is responsible for documenting the deployment of the Taser by completing the required reports, submitting a detailed account of the probable cause for deploying the Taser, the subject's actions prior to, during and after the deployment. If the deploying officer is not the arresting officer, the deploying officer shall complete a detailed supplemental report and the required Use of Force and Taser Use reports, detailing his/her role in the deployment of the Taser.

2. The officers deploying the Taser **will** ensure that photographs are taken of the subject receiving an electrical charge from the Taser (drive stun or probes). Special attention to any area injured and the location of the drive stun or where the probes impacted the subject. The probes shall be photographed prior to their removal by medical personnel if possible. The officer shall include in their reports details of how, if any, injuries occurred.

3. All relevant reports concerning a Taser deployment shall be forwarded to the Taser Control Manager for analysis.

Taser Control Manager Responsibilities

The Taser Control Manager shall:

A. Receive, inspect and ensure the maintenance and replacement of the Department's Taser devices and related equipment.

B. Establish and maintain systems to record issuance of equipment.

C. Return defective or damaged Tasers and air cartridges to the suppliers.

D. Obtain service and/or replacement for defective or damaged Tasers and respective equipment from suppliers.

E. Review reported uses of a Taser by Department personnel and establish a system for maintaining statistics on the performance of the Taser. A trained Taser instructor, so authorized by the Taser Control Manager, may also perform this function.

F. Ensure Basic certification and annual re-certification training on the Taser is provided as needed, as well as maintaining a record of that training.

G. Shall keep the Chief of Police or his designee and other command staff updated on the Taser program, training issues, equipment needs and usage of Taser by departmental personnel.

H. All other duties as may become necessary or designated by the Chief of Police for the

employment, maintenance, and enhancement of the Department Taser program.

Coroner's Office
Parish of Winn
State of Louisiana

Randolph Williams, M.D.
Coroner

DEATH INVESTIGATION
BARON DEAUNDRAE COLLINS, JR. (PIKES)
DOD: 01 - 17 - 2008, THURSDAY.
DOB: 01 - 12 - 1987
AGE - 21

06 - 01 - 2008.

* * *

Collins is then reported to have run behind Centennial Wireless, pursued by Officer A. Marsden, who had also responded and was behind Centennial Wireless. Collins then reportedly ran into a small wooded area behind Centennial Wireless. Meanwhile, Officer Branch had driven to Shopper's Village parking lot. Spotted Collins and after a brief chase - with weapon drawn - ordered Collins to get on the ground - face down, to which Collins complied, was warned of his rights, and was handcuffed double-lock behind his back by Officer S. Nugent per his report.

Thus Collins was in custody and police restraint at 1:32 p.m. (See Dispatcher's Log (#3)) Time elapsed - 1:29 p.m. - 1:32 p.m. three minutes. According to Officer S. Nugent's statement and

Officer Branch's, Officer Nugent commanded Mr. Collins to get up off the ground, and for reasons unknown, Collins did not immediately comply. After several commands Collins was told by Officer Nugent that if he did not get up immediately he would be "tased." Collins apparently did not immediately respond - reason - unknown. There were two officers present, and a third (Marsden) nearby. Collins did not by anyone's account, ever, exhibit any hostile or aggressive behavior, either verbal or physical. Rather, evidence suggests that he failed to comply "quickly" or "quickly enough" to Officer Nugent's commands to get up off the ground. There appears to be little time or effort expended on verbal communication or persuasion. The DPM - computer printout - as well as the WPD Dispatcher's Log (see exhibits #3 & #4) reveal that at 1:37 p.m., five minutes after being taken into custody and restrained (handcuffed) Mr. Collins was electroshocked with a CEW. See DPM (Exhibit #4) which records the time (adjusted to accurate local time) of each shot from the CEW, as well as the duration in seconds of each shot.

Electroshock #1 - 1:37:19 - 6 seconds with deployment of "fish hook" metal probes into Collin's back. 50,000 volts. 1 minute, 55 seconds later

#2 - 1:39:14, 50,000 volts - 5 seconds duration. 32 seconds later shot #3

#3 - 1:39:46, 50,000 volts - 5 seconds duration. 22 seconds later

#4 - 1:40:10, 50,000 volts - 5 seconds duration. 13 seconds later

#5 - 1:40:23, 50,000 volts - 5 seconds duration. 16 seconds later

#6 - 1:40:39, 50,000 volts - 5 seconds duration

Total - Six Electroshocks - 300,000 volts - "riding the lightning" as it is sometimes referred to, elapsed time 3 minutes, 10 seconds (190 seconds). The last 5 shocks were delivered in 85 seconds.

Apparent Reason. Failure to comply with verbal commands. Non-compliance.

Problem. Very serious problem. No time is allowed between shots for normal neuromuscular recovery time. The subject, Collins - could not reasonably be expected to walk, certainly not with any stability after 2 electroshocks - statements indicate that he indeed tried - but muscles are too weak, no stability. Walking requires good function of no less than 200 muscles. Six shots - 300,000 volts in 190 seconds, five in 85 seconds - should be more than incapacitating. The weapon is advertised to have the capacity to stop 94% of aggressive subjects in the first ½ second of a 5 second drive (see operator's manual). (Exhibit #12).

Collins was then dragged by Officers Nugent and Marsden to Officer Branch's patrol car, where Officer Scott Nugent states that he personally removed the metal probes from Collin's back and Collins was placed in the back seat.

He was transported to WPD station at 1:44 p.m. (See log sheet #3) - 7 minutes after he was first electroshocked at 1:37 p.m. Per Officer Branch's statement, Collins kept saying over and over, "I'm going to die." "I'm going to die." Officer Branch

reports that he reassured Collins by telling him that as soon as he got to the station, he would get him some medical attention. Per Daily Log Sheet Dispatcher's: 1:45 p.m. Officer Branch arrived at police station with B. Collins, Jr., 8 minutes after first electroshock. Once at the station Officer Nugent arrives and commands Collins to get out of the car, to which Collins replies he just wants to stay there and rest. Told to get out or be "tased" He did not move. 1:50:08 - 13 minutes after the first electroshock at 1:37 p.m., Collins is electroshocked - shot in the right anterior chest - Shot #7, 1:50:08, 50,000 volts - 3 second drive stun, while seated in back seat of car. Everything really starts to go downhill fast for Collins from this point on. Collins does not move, likely cannot. Officer Nugent states that he physically pulled Collins out of the car onto the pavement. He was lying on the concrete. Officer Nugent states that he refused to obey his orders to get off the ground. Officer Nugent waited 21 seconds before delivering electroshock #8 at 1:50:29 - a 2 second drive to the back. No neuromuscular pain compliance response is seen by Officers Nugent or Carpenter. This is an indication that something catastrophic has occurred, as this response is autonomic (involuntary), and the body simply cannot will itself not to respond. According to Officer Carpenter, Collins was lying on the concrete. There was no response to the electroshock after the shot to the right anterior chest. Officer Nugent states that he refused to comply with his commands to get up, and 54 seconds after shot #8, we get shot #9 at 1:51:23 p.m. Again, Collins is limp - there is no

response to a 5 second 50,000 volt drive stun to the back.

* * *

Reading, casually, might suggest that this entire incident took place over a lengthy period of time. In fact, the entire incident from start to finish lasted thirty minutes or less.

Summary Of Events

PD Log - Chase - 1:29 p.m.
In custody and police restraint, 1:32 p.m.
Time lapse - 3 minutes
CEW deployed -
Electroshock #1 at 1:37:19 p.m. 50,000 volts - 6 seconds
#2 at 1:39:14 p.m. 50,000 volts - 5 seconds
#3 at 1:39:46 p.m. 50,000 volts - 5 seconds
#4 at 1:40:10 p.m. 50,000 volts - 5 seconds
#5 at 1:40:23 p.m. 50,000 volts - 5 seconds
#6 at 1:40:39 p.m. 50,000 volts - 5 seconds
In custody and police restraint (handcuffed)
within 3 minutes, no aggression, hostility - either verbal or physical reported.
Six electroshocks of 50,000 volts each applied to Mr. Collins - total duration 31 seconds.
Six shots delivered in 3 minutes, 20 seconds, the last five being applied in 85 seconds
Total time for shots - 190 seconds - minus the 31 seconds that he was electroshocked
159 seconds, or 2 minutes, 39 seconds

Total time elapsed - 8 minutes 10 seconds total - in custody and application of six electroshocks

1:44 p.m. - Collins had been dragged to Branch's patrol car - Taser probes removed by Officer S. Nugent - Branch 10-8 en route to WPD station, in less than four minutes.

Total elapsed time - approximately twelve minutes.

1:45 p.m. - open sally port - Branch at station with Collins, within minutes Officer Nugent arrives and commands Collins to get out of the car - he does not comply - stating That he wants to stay there and rest. Again ordered to get out of the car. No response, or compliance from Collins.

Note: There is certainly reasonable doubt as to whether Mr. Collins was physically able to get out of the car, of his own volition at this time.

Nonetheless, at 1:50:08 p.m. Mr. Collins was electroshocked with a 3-second drive stun - to the right anterior chest while seated in the car.

CEW Electroshock #7 1:50:08 p.m. 50,000 volts - 3 seconds - to right anterior chest - nonresponsive - then pulled out of car. #8 1:50:29 p.m. 50,000 volts - 2 seconds. On Concrete - amp #9 1:51:23 p.m. 50,000 volts - 5 seconds.

Three shots - delivered in 75 seconds - No physiological or neuromuscular response to the last 2 shots.

Total electroshocks - nine - duration 41 seconds

Total voltage - 450,000 -

Time elapsed - 14 minutes total, first to last.

Taser - WPD Policy and Procedure. (See Exhibit #8). The policy seems reasonable and quite clear. Policies, in general are well-reasoned - and carefully crafted. With respect to the use of a weapon, the overriding principle is generally the health, welfare, and safety of the public, and secondarily, that of the officer as well. The policy for the deployment of this less lethal weapon was clearly ignored in its entirety, with one notable exception - Officer S. Nugent states that he did yell "Taser," "Taser," prior to each of the nine electroshocks applied to Collins.

Had the policy been followed at all - Collins could never have been electroshocked - as he was already in custody and police restraint and exhibited no hostile or aggressive behavior whatsoever. The reason for use of the CEW appears to be for non-compliance to verbal orders or commands. Use of the CEW in this manned is considered by all of the investigators as intemperate, excessive, injudicious, and inappropriate. According to Police Chief Carpenter, each officer certified in the use of a CEW, is required to sign a receipt for the policy and procedure for its deployment. I am informed that he has a signed receipt from Officer Nugent.

Subsequent to Collins death, my office sent via fax, all materials (offense reports - statements, DPM - printout, etc.), Advanced Ambulance Run Sheet, WPMC E.R. Records, 01-17-08, plus Collins old WPMC records to the Louisiana Forensic Center, L.L.C. - for their perusal. Old records revealed three visits to the WPMC E.R.

1) 1/7/97 - Sore throat - no know allergies - no asthma - or significant past history, age 10.

2) 10/22/99 - Age 12, diagnosis - sore throat - no asthma, or allergies or significant past 11x.
3) 11/11/99 - Referred to E.R. for Hemoglobin Electrophoresis - Result - Hemoglobin A S - Sickle Cell Trait. No treatment.

On each visit the name Joan Collins appears as next of kin. On 01-17-08 at WPMC - E.R., Records showed Dr. J. Iglesias as primary care physician. A request for records, sent to Dr. J. Iglesias - revealed no visits found at his office. (See Exhibit #10). The Louisiana Forensic Center and Dr. Joel Carney had this information in their possession prior to completing their report.

Meantime, my office downloaded 211 pages of articles on the history, principles, and usage of CEWs, as well as deaths related to CEW usage.

* * *

Having anticipated Dr. Baden's suggestion about the value of a review of Officer Nugent's history of Taser usage, I delivered a letter to Winnfield Chief of Police - Johnny Ray Carpenter. (See Exhibit # 16).

On 05-16-2008 at 1:00 p.m. I received the requested information from Chief Carpenter. Total number of times Taser deployed since issued (approximately 1 year) 15. Total number of officers certified to use Taser 13 no plus 1 who has left the Department, but used twice while there (Cook). (See Exhibit #17). Total - over year 14 officers certified - 8 did not use CEW at all. Three officers used Taser once - with only one application each time. One

officer used the Taser twice with on application each time (Cook), no longer with the department. Two officers account for 10 of the 15 deployments of the Taser against people, or two-thirds of the total use. Officers A. Cockerham (the Taser instructor) and Officer Scott Nugent. Each with five deployments. Noteworthy, two of 14 officers accounted for two-thirds (10 of 15) deployments of the Taser. Much more significant, is the fact that these two officers accounted for 29 of the 35 electroshocks - applied to all 15 people or 83% of the total number of shots fired or delivered - to persons for the entire year. The facts speak most eloquently for themselves. The pattern of use - clear.

The death certificate has been completed with the cause and manner of death being worded as suggested by Dr. Michael M. Baden and Dr. Frank Minyard, and concurred with by me. Cause of Death Cardiac Arrest following nine 50,000 volt applications from a conductive electrical weapon. Manner of Death Homicide. (See Exhibit #20)

The investigation of the death of Baron DeAundrae Collins, Jr. (Pikes) is now complete, and I am satisfied that the results reflect our best effort to arrive at a completely honest, professional, independent, and accurate cause and manner of death, with reasonable medical certainty.

Randolph L. Williams, M.D.
Coroner
Parish of Winn
State of Louisiana
06-01-2008