§1983 CIVIL RIGHTS CASES AGAINST POLICE: PROSECUTION & DEFENSE AFTER FERGUSON

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THE NEXT STEP BEYOND FERGUSON: DEFENDING DEADLY FORCE ACTIONS UNDER §1983

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> *It is undisputed that [the suspect] continued toward [the officer] despite the officer's repeated orders to get on the ground …. Thus, a reasonable officer could believe that [the suspect's] failure to comply was a matter of choice rather than necessity*.

Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) (emphasis added).

> We are, of course, bound to analyze the qualified-immunity question "from the perspective `of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" …We must also "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

Fenwick v. Pudimott, (D.C. Cir. 2015) (Karen LeCraft Henderson,J., concurring), 2015 WL 590295, quoting *Plumhoff,* 134 S. Ct. at 2020 (quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989)).

INTRODUCTION: From *Garner* to *Graham*

Use of deadly force by a police officer is a seizure subject to the Fourth Amendment's reasonableness requirements. *Tennessee v. Garner*, 47 U.S. 1 (1985). If the police officer reasonably believes it is necessary to protect himself or another from death or great bodily harm, deadly force is justified. Id. The court's deadly force inquiry is necessarily fact-specific and focuses on whether the officer's decision to use deadly force was objectively reasonable, and whether the

police officer acted reasonably in using deadly force must be determined "in light of the facts and circumstances confronting [him] at the moment [he] acted." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Further, "the `reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, at 396.

All force, lethal as well as non-lethal, must be justified by the need for the specific level of force employed, and even where some force is justified, the amount of force actually used may be excessive. When an excessive force case involves the greatest possible amount of force, it requires the utmost justification, as the U.S. Supreme Court emphasized in *Tennessee v. Garner*, 471 U.S. at 9:

> The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.

But the real difficulty in not in reciting the black letter law on deadly force. The difficulty in all but the clearest of cases is in determining whether, under the facts of a particular case, the police officer's actions in using deadly force were objectively reasonable <u>in light of the facts and circumstances facing the officer at the moment he acted.</u>

THE FERGUSON CAULDRON

Add to the calculus a municipality in which minority citizens have long perceived they were marginalized from any meaningful participation in their own city government. Couple it with a pattern and practice that strongly indicates minority citizens have been subjected to police stops without reasonable suspicion, interference with their right to free expression, disproportionate and harmful police practices borne by minority citizens, and other practices attributable in part to intentional discrimination, racial bias and stereotyping of minority citizens by city police. These were the ingredients for a volatile, sustained, bitter and very public primal scream that came from the streets of the City of Ferguson, Missouri in August 2014.

Given the willingness of many federal district courts to grant summary judgment on qualified immunity in deadly force cases in the great majority of

cases, one may legitimately ask whether a victim of deadly force has a realistic chance of creating a triable, material issue of fact for resolution by a jury. As this analysis of the recent events in the City of Ferguson, Missouri and a Circuit-by-Circuit review of the most recent deadly force decisions will show, however, some courts decline to give deference to police officers' accounts surrounding the use of deadly force, and instead show a greater willingness to probe beneath the official accounts and to weigh the timing, credibility, plausibility, rationality and reasonableness of the officer's decision to use deadly force. Those courts, while admonished to determine the reasonableness of the police officer's use of deadly force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, have nonetheless begin taking the road less traveled and have denied summary judgment and declined to allow the qualified immunity defense, at least during the early stages of a 1983 lawsuit, opting instead for a more detailed factual predicate that can only be developed through intense discovery.

FACTS, PERCEPTION, PUBLIC OUTRAGE & MEDIA SPIN

The sustained public outrage over the shooting of Michael Brown by City of Ferguson, Missouri police officer Darren Wilson reverberated throughout every jurisdiction that has ever confronted the consequences of the use of deadly force and the policy considerations concerning its use. That outrage helped focus the nation's attention on the use of deadly force as well as the justification advanced by law enforcement agencies, police departments, sheriff's departments and public safety departments in cities, counties and other jurisdictions, regardless of size. With 24/7 news feeds from CNN and other major networks, the debate entered our living rooms and forced us to look hard at the authority of law enforcement officers to use deadly force. A firestorm of protests, rioting, and looting almost eclipsed the sincerely voiced claims of racial insensitivity. The uproar intensified when a grand jury refused to indict officer Wilson for what many in the minority community of Ferguson saw as murder.

Lost in the debate were the facts and fundamental, established principles governing the defense of qualified immunity and the justification for use of deadly force. To paraphrase the findings and recommendations that flowed from the U.S. Justice Department's exhaustive investigation, let us take a close look at the facts and what the DOJ concluded about those facts.

Lost in the debate were the facts and fundamental, established principles governing the defense of qualified immunity. According to the U.S. Justice

Department's exhaustive investigation, let us take a close look at the facts and what the DOJ concludes about those facts.

(1) It was not "unreasonable for Wilson to perceive Brown as a threat while Brown was punching and grabbing him in the SUV and attempting to take his gun."

(2) When Michael Brown started to flee, "Wilson was aware that Brown had attempted to take his gun and suspected that Brown might have been part of a theft a few minutes before. Under the law, it was not unreasonable for Wilson to perceive that Brown posed a threat of serious physical harm, either to him or to others."

(3) When Michael Brown turned around and moved toward officer Wilson, "the applicable law and evidence do not support finding that Wilson was unreasonable in his fear that Brown would once again attempt to harm him and gain control of his gun."

(4) "There are no credible witness accounts that state that Brown was clearly attempting to surrender when Wilson shot him," and the witnesses who said so "have given accounts that could not be relied upon in a prosecution because they are irreconcilable with the physical evidence, inconsistent with the credible accounts of other eyewitnesses, inconsistent with the witness's own prior statements, or in some instances, because the witnesses have acknowledged that their initial accounts were untrue."

Also lost in the extreme, sustained and deafening screams for justice was the black letter law that governs § 1983 claims of excessive force. As a threshold proposition, we can start with the principle recognized by the vast majority of the Courts of Appeals in evaluating the reasonableness of an officer's use of force: **it is to be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.**

Fourth Amendment Underpinnings of Deadly Force Analysis

Deadly force claims are governed by the Fourth Amendment prohibition against unreasonable seizures. Leading precedent includes *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), which held that the reasonableness of a particular use of force "turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation." It also includes

Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), wherein the Supreme Court held that the use of deadly force is reasonable "where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." And finally, the leading precedent includes the core holding of Graham and Tennessee v. Garner that courts often invoke when they declare they are "hesitant to second-guess the "split-second judgments" of officers working in "tense, uncertain, and rapidly evolving situation[s]." *Tennessee v. Garner*, supra, quoting *Graham*, 490 U.S. at 396-97.

But there is a harsh reality that many of the talking heads could not accept in August 2014. That reality was whether in this particular instance the use of force that resulted in the death of an unarmed black teenager could rationally be justified.

Of course, each case of deadly force must be determined on the basis of the specific facts and circumstances facing the police officer at the moment he used such force. The overarching question we must confront, in light of Ferguson, is whether this part of the criminal justice system is broken and needs to be fixed. If not, we still must ask whether there are in fact ascertainable standards across the many jurisdictions in this country that provide a core body of law that is relatively free of ambiguity, albeit quite difficult in application. Perhaps we can find consensus for the proposition that the use of deadly force should be reserved for those instances when it is necessary to protect human life or prevent serious physical injury. But that begs the question: Who makes that determination, if not the officer standing in harm's way as he or she faces a charging suspect?

The Transformative Events of August 2014

In remarks several months after the Michael Brown shooting incident, the 2015 President of the Missouri Bar had this to say about the transformative events of August 2014:

> Very smart, fair-minded people have taken positions on both sides of this issue. 24/7 news feeds contributed to the debate bogging down with accusations and innuendo, finger-pointing and distrust.. Out of this unfortunate event and the nationwide controversy it sparked was born a cross-sectional unity in which groups in the City of Ferguson that did not normally share the same space teamed up to resurrect neighborhoods and help residents bounce back, and dormant civic issues were put back on the table and are being addressed. …

> The goal is to make certain the rule of law is fair to all and followed. There has been much discussion about process and what should have happened. That discussion is important as people of great integrity hash out any tweaks in the system that may be necessary. But more importantly, there is a community that sits just north of Interstate 70 in St. Louis County that still needs help. Too often, the passion to help diminishes over time and people in need are soon forgotten. Let us continue to mobilize our forces and help our friends and neighbors in Ferguson unite behind this tragic event and come out much better on the other side."

Remarks of Reuben Shelton, 2015 President of the Missouri Bar, http://www.mobar.org/Media_Center/News_Blog/President_s_Page__Ferguson_United/#sthash.qH9w71BQ.dpuf [From the January-February 2015 Issue, Journal of The Missouri Bar]

DOJ Investigation and Report

Following a comprehensive pattern and practice investigation into the Ferguson Police Department, the U.S. Department of Justice on March 4, 2015, released its findings in a 100-page report, concluding that there was a pattern of civil rights violations by the City's police department in violation of the First, Fourth, and 14th Amendments of the U.S. Constitution. To the minority community, that was a little good news. The bad news was that the Justice Department also found, on the basis of the evidence examined in its federal investigation into the shooting death of Michael Brown, that federal civil rights charges would not be brought against officer Wilson. The report concluded in part:

> Sufficient credible evidence supports Wilson's claim that he reasonably perceived Brown to be posing a deadly threat. First, Wilson did not know that Brown was not armed at the time he shot him, and had reason to suspect that he might be when Brown reached into the waistband of his pants as he advanced toward Wilson. While Brown did not use a gun on Wilson at the SUV, his aggressive actions would have given Wilson reason to at least question whether he might be armed, as would his subsequent forward advance and reach toward his waistband. This is especially so in light of the rapidly-evolving nature of the incident. Wilson did not have time to determine whether Brown had a gun and was not required to risk being shot himself in order to make a more definitive assessment. Moreover, Wilson could present evidence that a jury likely would credit that he reasonably

> perceived a deadly threat from Brown even if Brown's hands were empty and he had never reached into his waistband because of Brown's actions in refusing to halt his forward movement toward Wilson.

This was not certainly an exoneration for the City of Ferguson, as seen in Attorney General Eric Holder's sobering remarks at the time the report was released,

> [T]his investigation found a community that was deeply polarized, and where deep distrust and hostility often characterized interactions between police and area residents. … Our investigation showed that Ferguson police officers routinely violate the Fourth Amendment in stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force against them. Now that our investigation has reached its conclusion, it is time for Ferguson's leaders to take immediate, wholesale and structural corrective action. The report we have issued and the steps we have taken are only the beginning of a necessarily resource-intensive and inclusive process to promote reconciliation, to reduce and eliminate bias, and to bridge gaps and build understanding.

The DOJ investigation entailed a review of over 35,000 pages of police records, interviews with city, police and court officials, hundreds of in-person and telephone interviews, meetings with community members and groups, and analysis of the City police department's data on stops, searches and arrests. It concluded that the police department had a pattern or practice of**:**

- Conducting stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment;
- Interfering with the right to free expression in violation of the First Amendment; and
- Using unreasonable force in violation of the Fourth Amendment.
- Harmful police practices are borne disproportionately by African Americans, an impact that was both disproportionate and avoidable.
- These and other practices were due, at least in part, to intentional discrimination, as demonstrated by direct evidence of racial bias and stereotyping about African Americans by certain Ferguson police and other officials.

DOJ Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, MO Police Officer Darren Wilson, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf

Use of Deadly Force after *Plumhoff v. Rickard*

The starting point for an analysis of the Circuits on use of deadly force is the U.S. Supreme Court's most recent pronouncement on the subject.

In *Plumhoff v. Rickard*, 134 S. Ct. 2012 (May 27, 2014), a police officer stopped Rickard's car because one of the headlights was out. 134 S. Ct. at 2017. Rickard appeared nervous and could not produce his driver's license on request so the officer asked him to step out of the car. *Id.* Instead of complying, Rickard accelerated the car and led police on a high-speed chase. *Id.* During his attempted escape, Rickard repeatedly caused "contact to occur" between his car and police cruisers. *Id.* (brackets omitted). Eventually, Rickard found his car penned in by police cruisers but he continued to "us[e] the accelerator" in an attempt to escape. *Id.* At that point—and even though Rickard's car "came temporarily to a near standstill," *id.* at 2021—an officer fired three shots into his car. *Id.* at 2017. Rickard "then reversed in a 180 degree arc and maneuvered onto another street, forcing [another officer] to step to his right to avoid the vehicle." *Id.* (internal quotation marks omitted). And then, *after* Rickard's car had passed the officer and Rickard "continued fleeing," officers "fired 12 shots toward Rickard's car, bringing the total number of shots fired during th[e] incident to 15." *Id.* at 2018 (internal quotation marks omitted). Rickard and his passenger were killed. *Id.*

The Supreme Court held that the officers were shielded by qualified immunity because the officers' use of deadly force "did not violate the Fourth Amendment." *Id.* at 2022. The Court reached this conclusion because "Rickard's outrageously reckless driving posed a grave public safety risk," *id.* at 2021, and when the officers opened fire, the only thing "a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." *Id.* at 2022. Moreover, the Supreme Court held that firing 15 shots—12 of which occurred after Rickard had maneuvered past officers and "continued fleeing," *id.* at 2018 (internal quotation marks omitted)—was reasonable because, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.* at 2022.

The Supreme Court held that firing 15 shots—12 of which occurred after Rickard had maneuvered past officers and "continued fleeing," *id.* at 2018 (internal quotation marks omitted)—was reasonable because, "*if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.*" *Id.* at 2022.

The bottom line is that after *Plumhoff*, the Court must determine the reasonableness of the use of **force** "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard,* ___ U.S. ___, 134 S. Ct. 2012, 2020 (2014) (citation and internal quotation marks omitted).

Before we turn to an analysis of deadly force precedent from each of the Circuits, we will assess the cost, benefits and impact of having police officers record their actions, movements and conduct during the course of citizen encounters, including the very few that turn into disasters.

The Civilizing Effect of Bodycams

The technology for bodycams, body worn video or head cams has developed significantly during the past several years and features devices about the size of a bluetooth earpierce, smaller, lighter and more effective than the dashboard-mounted audio and video recording systems that have been installed and used for decades on thousands of service vehicles. David A. Harris, *Picture This: Body Worn Video Devices ("Head Cams") As Tools for Ensuring Fourth Amendment Compliance by Police*, 43 Tex. Tech L. Rev. 357 (April 2010), Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=1596901.

Generally, the benefits and positive impacts of police use of cameras include enhanced officer safety, increased officer accountability, increased professionalism, enhanced performance in following agency protocols and reduced law enforcement-related liability. International Associations of Chiefs of Police, Impact of Video Enhancement on Modern Policing (2003), NCJ 208525, https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=208525.

The IACP Report from over a decade ago covered the results of two studies on the impact of in-car cameras, the first assessing the selection, acquisition, installation, and deployment of in-car camera technology among law enforcement agencies, and the second measuring the impact of in-car cameras on such variables as officer safety, officer performance and professionalism, agency liability and

internal control, training and education, community perception, agency policies and procedures, agency leadership, and the judicial process.

In 2003 the Office of Community Oriented Policing Services awarded 91 COPS Grants to 50 law enforcement agencies to acquire and install in-car cameras. There were very positive outcomes that included enhanced officer safety, improved agency accountability, and reduced agency liability . The IACP Report also highlighted the need for careful planning and development of clear policies for in-car camera use, and storage, filing, and retrieval of video evidence, as well as development of best practices for assessing the video evidence needs of law enforcement agencies and management of video evidence.

Following the Michael Brown shooting incident in Ferguson, the push intensified throughout the country to require police departments to require body cams.

Very shortly after the April 4, 2015 fatal shooting of Walter Scott, an unarmed black man, by a Michael Slager, a white North Charleston police officer, it was revealed that a bystander's cellphone video had captured the officer's shooting the black man in the back while the black man was running away (https://www.youtube.com/watch?v=Q6-jFQPu-yo, video provided by Post & Courier). A dashboard video camera had also captured what appeared to be a routine traffic stop over a broken tail light minutes before the shooting, but did not indicate what led Scott to flee from his vehicle and did not reveal the shooting itself. J. Collins and M. Biesecker, Associated Press, *Gap remains in video record of fatal SC police shooting* (April 11, 2015), http://news.yahoo.com/gap-remains-video-record-fatal-sc-police-shooting-094732182.html.
With the bystander's cellphone video and with the results of a SLED investigation into the shooting, the Mayor of North Charleston proactively announced that the police officer in question had been charged with murder, noting that the cellphone video was very demonstrative of exactly what had happened. Moreover, some state legislatures began pressing for legislation to require the use of body cams on officers. Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say* (New York Times, April 9, 2015) http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html ("Law professors, former prosecutors and police officers who watched the North Charleston video said it did not appear to them that the circumstances of the shooting met any of those legal parameters, and they said that based on what they saw in the video, the officer was not legally justified in opening fire."); see also M. Miller, L. Bever and S. Kaplan, *How a cellphone video led to murder charges against a cop in North Charleston, S.C.,* (Washington Post

April 8, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/ ("But the way police ultimately handled it, charging the officer with murder, gives hope to some. 'I am surprisingly and gratifyingly shocked because to the best of my memory, I cannot think of another occasion in which a law enforcement officer was actually prosecuted for something like this in South Carolina,' said the Rev. Joseph Darby, first vice president of Charleston's NAACP branch. 'My initial thought was, 'Here we go again. This will be another time where there will be a cursory investigation. It will be the word of law enforcement versus those who are colored as vile perpetrators. People will get very mad, but at the end of the day nothing will change.' This kind of changed the game,' Darby said of the video and Slager's arrest.").

Ironically, just three days before the North Charleston shooting incident, a report was published by the Reporters Committee for Freedom of the Press highlighting efforts by several state legislatures to shield bodycam recordings from public disclosure and access under state public records acts. A proposed North Dakota House Bill 1264 would exempt images taken with a bodycam "in a private place" from disclosure under state open records law, reflecting concerns that videos and images captured within residents' homes may implicate important privacy interests. A proposed Michigan bill would exempt recordings taken "in a private place" from disclosure, unless the individual requesting disclosure was the subject of the recording, and would effectively bar the press from requesting public records taken in a "private place." A proposed Florida Senate Bill 248 would exempt footage from disclosure if it is taken "within the interior of a private residence," at a health care, mental health, or social services facility, "at the scene of a medical emergency," or in a location where a person depicted in the footage has a "reasonable" expectation of privacy. A proposed measure in California Assembly Bill 1246 would eliminate almost all public access to footage and exempt all bodycam recordings from disclosure under the Public Records Act because "[t]he need to protect individual privacy from the public disclosure of images captured by a body worn camera outweighs the interest in the public disclosure of that information." Under the California Public Records Act, police departments would still be permitted to use their discretion to release footage, raising concerns that police agencies would release only footage that appears favorable to their position in a given controversy. Reporters Committee for Freedom of the Press, *State legislatures seek to exempt police body camera footage from open records laws,* http://www.rcfp.org/browse-media-law-resources/news/state-legislatures-seek-exempt-police-body-camera-footage-open-recor(April 1, 2015).

A 2014 report by the Police Executive Research Forum (PERF) and the Department of Justice's Community Oriented Policing Services (COPS) lists 33 specific recommendations (http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf), including the following:

1. Download, training, and storage policies;
2. different camera placements;
3. discouraging privately owned body-worn cameras;
4. recording protocols such as noting the existence of the recording in official incident report and articulating on camera or in writing the officer's reasoning if he or she fails to record an activity that is required by department policy;
5. clear definitions of what is included in "law enforcement-related encounters and activities that occur while the officer is on duty" when a bodycam should be used, such as traffic stops, arrests, searches, interrogations or interviews, and pursuits;
6. discretionary choice not to record informal, non-law enforcement-related interactions with members of the community, such as a person asking an officer for directions or officers having casual conversations with people they see on patrol, so as not to inhibit the informal relationships that are critical to community policing efforts;
7. discretionary choice to keep their cameras turned off during conversations with crime witnesses and members of the community who wish to report or discuss criminal activity in their neighborhood;
8. obtaining consent and informing subjects when they are being recorded unless impractical to do so;
9. prohibiting recording of conversations with confidential informants and undercover officers to protect confidentiality and officer safety; specifying places where a reasonable expectation of privacy exists (e.g., bathrooms or locker rooms), strip searches, and conversations with other agency personnel that involve case tactics or strategy;
10. specific measures to prevent data tampering, deleting, and copying, such as using data storage systems with built-in audit trails;
11. requiring the supervisor to physically take custody of the officer's body-worn camera at the scene of a shooting or at another serious

incident in which the officer was involved and to assume responsibility for downloading the data;

12. conducting forensic reviews of the camera equipment when questions arise if an officer claims that he or she failed to record an incident because the camera malfunctioned;
13. proper categorizing, classifying, reviewing, labelling and tagging of recorded data as evidentiary, non-evidentiary, or non-event;
14. retention policies for recorded data, taking into account departmental policies governing retention of other types of electronic records, openness of the state's public disclosure laws, the need to preserve footage to promote transparency and investigate citizen complaints, and capacity for data storage;
15. determining bodycam equipment storage location depending on security concerns, reliable methods for backing up data, chain-of-custody issues, and capacity for data storage,
16. And proactively releasing body-worn camera footage to share what the officer's video camera showed regarding controversial incidents, such as where the video may support a contention that an officer was in compliance with the law, or to show, taking into account whether the footage will be used in a criminal court case, and the potential effects that releasing the data might have on the case.

The PERF/COPS report also enumerates the benefits as well as concerns of of bodycams as an important tool in enhancing police accountability and transparency, and improving police-community relations. *Implementing a Body-worn Camera Program – Recommendations and Lessons Learned,* COPS/PERF http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf. Among the lessons learned about the financial costs of body-worn cameras, based on interviews with Police Executive Research Forum staff members, police executives and other experts, are the following:

• The financial and administrative costs associated with body-worn camera programs include costs of the equipment, storing and managing recorded data, and responding to public requests for disclosure.
• It is useful to compare the costs of the camera program with the financial benefits (e.g., fewer lawsuits and unwarranted complaints against officers, as well as more efficient evidence collection).
• Setting shorter retention times for non-evidentiary videos can help make the significant costs of data storage more manageable.

• Videos requiring long-term storage (e.g., those involving serious offenses) can be copied to a disc, attached to the case file, and deleted from the internal server or online cloud. This frees up expensive storage space for videos that are part of an ongoing investigation or that have shorter retention times.
• Linking recorded data to the agency's records management system or using electronic tablets, which officers can use in the field, can ease the administrative burden of tagging and categorizing videos."

Indeed, body cams are fast becoming a standard addition to equipment, supplementing the dashboard-type video camera that has become common with many police departments.
Body cams can be a significant factor in assuring that police officers comply with Fourth Amendment search and seizure rules and constitutional restraints on the use of deadly force. Increased use of body cams by police officers can give the public a level of assurance and accountability – assurance that the officer enforcing the law will also obey it, and accountability for police behavior during search and seizure activities.

The body cam recording can be downloaded to, stored and indexed in a central computer system, protected from tampering and providing a reliable chain of custody. According to ASU Criminology Professor Michael White, of the 18,000 police departments nationwide, an estimated 4000 to 6000 use body cameras, which officers turn on when they stop a driver or respond to an incident. Emerging problems over police department use of body cameras center on data management, storage and retention policies, and cost-benefit concerns.

With respect to cost, Lindsay Miller, senior research assistant at the Police Executive Research Forum, co-authored a DOJ report on the topic and has concluded that "The cameras themselves aren't overly expensive, but the years and years of data storage you're going to deal with—that can definitely be cost-prohibitive."

While inconsequential video may be kept for 30 to 60 days, video footage that is evidence in a criminal case has to be kept longer, and in some states, video in homicide cases must be kept indefinitely. According to Miller, there is an emerging consensus that the benefits outweigh the costs, and some preliminary studies indicate that body cams may be a significant factor in reducing both the use of force by police and the number of citizen complaints, saving money spent on investigating complaints and settling lawsuits.

Zusha Elinson and Dan Frosh, Police Cameras Bring Problems of Their Own http://www.wsj.com/articles/police-cameras-bring-problems-of-their-own-1428612804?tesla=y

The 560 body cameras deployed by the Oakland Police Department, one for just about every officer on duty, generate five to six terabytes of data each month, equal to 1,250 to 1,500 high-def movie downloads, necessitating either cloud-storage or a reduced retention period due to the sheer volume of the data. This cost is weighed against the benefit of providing the greater degree of accountability and transparency on the part of police officers, leading to what some see as a civilizing effect on officers and others who know they are being recorded.
Other costs to consider are the annual maintenance charges for data-storage plans and additional personnel to review the enormous amount of data being video recorded. For example, L.A. Mayor Eric Garcetti recently pledged to purchase 7000 body cams in addition to the 800 already purchased through private donors, and he is looking at a price tag for annual data storage and maintenance cost of about $7 million.

Public records requests for videos from body cameras are another concern, and the innovative Seattle police department responded by launching a YouTube channel showing heavily blurred-out video with no audio to protect the privacy of people and officers. As rhe Seattle Police Department's Chief Operating Officer, Mike Wagers, recently noted: "Where do people put videos if they capture police behaving inappropriately? They put it on YouTube, so we put our videos on YouTube. That was a middle ground." Police Cameras Bring Problems of Their Own, supra.

Just as videotape evidence can be an outcome determinative factor in an excessive force case, as in *Scott v. Harris*, 127 S. Ct. 1769 (2007), the absence of videotape evidence due to an officer's decision not to turn on his camera, can have a devastating effect on an analysis of liability based on excessive force, as in the Sixth Circuit's recent decision in *Goodwin v. City of Painesville*, *infra*. First, a quick reminder from *Scott v. Harris*:

In *Scott v. Harris*, the U.S. Supreme Court underscored the evidentiary value of police-car mounted video of a hot pursuit that resulted in a crash of the pursued vehicle and fatal injuries to the occupants, as the Court speaking through Justice Scalia observed:

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals. For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test.

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. Id. at 1776.

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

CIRCUIT ANALYSIS OF DEADLY FORCE

Governing precedent as recent as the *Plumhoff* decision provides guidance for determining when a law enforcement officer can properly make the split-second judgment under tense, uncertain and rapidly evolving circumstances, to use the force that he or she considers necessary in a particular situation. The teaching of *Plumhoff* is that a court must determine the reasonableness of a police officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012, 2020 (2014).

Guidance also is provided by an evolving body of case law on qualified immunity in §1983 actions arising from the use of deadly force, as we will see from a circuit by circuit analysis.

We begin with the Eighth Circuit, home of Ferguson, Missouri.

EIGHTH CIRCUIT:

Cases in the Eighth Circuit following *Loch*:

►*Bell v. Kansas City Police Department,* 635 F. 3d 346 (8th Cir. 2011)

[T]here is a genuine issue of fact on whether Bell was complying with the orders of Officers Dain Apple and Aaron Bryant just before he was tasered. Apple and Bryant attested that Bell was disobeying orders to show his hands or get out of the truck, whereas Bell maintained in his notarized opposition to summary judgment, that before he was tasered, he had complied with orders to place his truck in park, turn off the truck's engine, and place his hands in the air, and that the tasering continued even after he was handcuffed and subdued. The dispute was material, because it bears on whether the use of force was objectively reasonable under the circumstances. … Bell's overnight hospitalization for an irregular heartbeat and chest pain immediately following the tasering created a jury question on whether the tasering caused Bell injury that would suggest the force was unreasonable, *see Cook,* 582 F.3d at 850-51; and the right to be free from excessive force in the

context of an arrest was clearly established at the time of the incident, *see* Brown, 574 F.3d at 499-500. Accordingly, we find that Bell established a triable case of excessive force against Officer Apple, and against Officer Bryant for not intervening during the incident. *See* Krout v. Goemmer, 583 F.3d 557, 565 (8th Cir.2009) (duty to intervene).

►*Aipperspach v. McInerney*, 766 F. 3d 803 (8th Cir. 2014) http://scholar.google.com/scholar_case?case=12288148985651885840&hl=en&as_sdt=5,25&sciodt=6,25

The officers' use of deadly force was a seizure of Al-Hakim under the Fourth Amendment. Thus, Aipperspach's § 1983 claims of excessive force are governed by the Fourth Amendment prohibition against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation." Loch v. City of Litchfield, 689 F.3d 961, 965 (8th Cir.2012). "The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." *Id.,* citing Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). We are hesitant to second-guess the "split-second judgments" of officers working in "tense, uncertain, and rapidly evolving situation[s]." *Id.* at 967, quoting Graham, 490 U.S. at 396-97, 109 S.Ct. 1865. "It may appear, in the calm aftermath, that an officer could have taken a different course, but we do not hold the police to such a demanding standard." Estate of Morgan v. Cook, 686 F.3d 494, 497 (8th Cir.2012) (quotation omitted).

The district court concluded that the officers' use of deadly force was objectively reasonable and therefore Al-Hakim's Fourth Amendment rights were not violated. The court explained: "there is no genuine issue of material fact that Officer McLaughlan, Sergeant Ballard and Officer Westrich, in making a split-second judgment in a situation that was tense, uncertain, and rapidly evolving, had probable cause to believe that Al-Hakim posed a threat of serious harm to them and others." *Aipperspach v. McInerney,* 963 807*807 F.Supp.2d 901, 909 (W.D.Mo.2013). Reviewing this conclusion *de novo* and taking the material facts in the light most favorable to Aipperspach, we agree.

The responding officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed it once at Sergeant Jones, and then waved it in the direction of officers deployed along the

ridge line in an action they perceived as menacing. In these circumstances, objectively reasonable officers had probable cause to believe that Al-Hakim posed a threat of serious physical harm to the officers. We have held in prior cases that officers confronted with similar situations acted in an objectively reasonable manner when they employed deadly force. In *Loch,* the police officer reasonably believed the suspect had a gun, even though in fact the suspect had discarded his weapon before walking toward the officer. 689 F.3d at 966-67. …

On appeal, Aipperspach primarily argues that the district court erred in disregarding video footage taken from the news helicopter, which Aipperspach describes as "compelling evidence" that would permit a reasonable jury to find "that Mr. Al-Hakim's action of raising his hands above his head in response to the commands of the officers was an attempt to surrender." Aipperspach likens this video to the police cruiser video of a high-speed car chase in *Scott v. Harris,* an excessive force case in which the video "blatantly contradicted" the nonmoving party's version of the incident on which the Court of Appeals had relied in denying summary judgment. 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The Supreme Court reversed, concluding the video established that the officer was objectively reasonable in applying deadly force to end a high-speed chase that endangered public safety. *Id.* at 383-86, 127 S.Ct. 1769.

In this case, the district court did not ignore the news helicopter video. The court viewed the video and concluded that it "provides only the aerial perspective of the person who recorded it" and therefore could not answer the issue of objective reasonableness from the perspective of an officer on the ground. Therefore, the court concluded, the video "does nothing to controvert the testimony of numerous officers [who] believed that Al-Hakim pointed a real firearm at officers, endangering their lives." *Aipperspach,* 963 F.Supp.2d at 908-09.

This is not a case like *Scott,* where a video "blatantly contradicted" one party's version of the incident. *Compare Hayden v. Green,* 640 F.3d 150, 154 (6th Cir.2011) (affirming the grant of summary judgment where the police video "plainly contradicted" plaintiff's description of the incident). Here, the video confirmed the officers' description of the sequence of events. Aipperspach argues that summary judgment was improper because the video would permit a reasonable jury to infer that Al-Hakim 808*808 in raising his arm just before the officers fired was attempting to surrender, not "aiming" the gun at the officers. Therefore, her reply brief asserts, the video makes the record in this case comparable to that in *Nance v. Sammis,* where we reversed the grant of summary judgment in a deadly force case because eyewitness testimony and forensic evidence contradicted the

officers' claim that they had identified themselves as police officers, and the young victim had raised his hand with a toy gun that was tucked in his waistband before they used deadly force. 586 F.3d 604, 610-11 (8th Cir.2009).

We agree with the general proposition that a video of the incident can create a genuine issue of material fact that precludes the grant of summary judgment in an excessive force case, just as a video established undisputed facts warranting summary judgment in *Scott.* We nonetheless reject Aipperspach's contention because the video in this case does not cast doubt on the factual sequence of events; at most, it supports an inference that Al-Hakim may have intended to surrender, despite refusing repeated prior demands to drop the gun, or that he may have waved the gun above his head to regain his balance, rather than to threaten the police officers. Those possible inferences are not germane to the issue of Fourth Amendment objective reasonableness. As the district court recognized, "the inquiry here is not into [Mr. Al-Hakim's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [each defendant officer] reasonably feared for his life" or the lives of his fellow officers. *Wilson v. Meeks,* 52 F.3d 1547, 1553 (10th Cir.1995). The video taken from high above the scene shed no material light on that question.

Aipperspach presented no evidence contradicting the testimony that many officers at the scene of this "tense, uncertain, and rapidly evolving situation" perceived that Al-Hakim's actions posed an immediate threat of serious physical harm to the officers. On appeal, she contends that the district court ignored various fact disputes in making its ruling. We have closely examined the record and conclude that the fact issues she identifies were not material to the summary judgment analysis. Rather, our many cases declining to second-guess the "split-second judgments" of officers in similar circumstances warranted the district court's conclusion that there was no genuine issue of material fact precluding the grant of summary judgment. "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Our conclusion that the individual police officers did not violate Al-Hakim's Fourth Amendment rights in using deadly force resolves Aipperspach's appeal from the grant of summary judgment to the City of Riverside, Riverside Police Chief Gregory Mills, and the Kansas City Board of Police Commissioners. Absent a constitutional violation by the individual defendants, the municipal defendants

are not liable to the plaintiff. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Sinclair,* 268 F.3d at 596.

►*Coker v. Arkansas State Police*, (ED Ark. 2012)
http://scholar.google.com/scholar_case?case=12752543400842000857&hl=en&as_sdt=5,25&sciodt=6,25

Coker claims Trooper Cartwright used unjustified deadly force against him and argues that there are genuine issues of fact about whether Trooper Cartwright's use of force was objectively reasonable and whether Trooper Cartwright is entitled to qualified immunity.

The Court has carefully considered the matter and concludes on this record that Trooper Cartwright's use and amount of force against Coker was objectively reasonable. Coker was racing his untagged motorcycle on a highway at speeds exceeding 150 mph and Coker's actions in fleeing at such high speeds and his manner in crossing the opposite highway created a serious threat of immediate danger to those also traveling on the highway at that time. Trooper Cartwright had no idea of Coker's motive for fleeing or whether he was armed and dangerous, and Coker demonstrated from the outset an intent not to cooperate with Trooper Cartwright's traffic stop. When Trooper Cartwright's patrol car bumped Coker's motorcycle a second time, Coker fell of his motorcycle and immediately jumped up and began running in a clear attempt to flee. Coker was wearing bulky clothing and Trooper Cartwright, not knowing if Coker had a weapon on him, states he took Coker to the ground with a kick to the face after Coker assumed an aggressive fighting stance and that he struck him once more in the face while possibly holding his flashlight when Coker was struggling with him (as evidenced by the screaming and yelling heard on the video, including Trooper Cartwright yelling for Coker to put his hands behind his back). Coker disputes he assumed a fighting stance but he acknowledges he "threw [his] helmet off" and "kept turning a circle," movements that could reasonably be construed in the low light as hostile. Even if Trooper Cartwright was mistaken about Coker's intentions, "[a]n act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment." *Loch,* 689 F.3d at 966 (citation omitted).[7]

►*Ransom v. Grisafe*, (W.D. MO. 2014)
http://scholar.google.com/scholar_case?case=9188015340287739470&hl=en&as_sdt=5,25&sciodt=6,25

Defendants argue that plaintiff was not "seized" because he did not realize that he was being shot at, the shots did not strike him and his movement was not arrested. Defendants argue that for Fourth Amendment purposes, a seizure occurs only if the plaintiff is physically touched or when he submits to a show of authority. Plaintiff testified that he recalled "a bullet or glass" "grazed the side of my head." (Plaintiff's Depo. p. 45). Additionally, plaintiff states that his movement was restricted because the officers ordered him to get on the ground, show his hands, put his hands up, walk backward, get back on the ground and also because they handcuffed him and locked him in a patrol wagon. The Court finds that there is a question of fact as to whether plaintiff was "seized" by the bullets and the officer's actions.

Defendants also argue that even if plaintiff was seized, qualified immunity protects them due to their reasonable mistake of fact. Defendants argue that they were responding to a report of shots being fired, plaintiff appeared to disregard their commands to stay in the van, the officers could not see plaintiff's hands and they heard what they believed to be the sound of gunshots, leading to the conclusion that their actions in firing on plaintiff were reasonable. Plaintiff argues in opposition that the key question is whether the officer's actions were "objectively reasonable." In Loch v. City of Litchfield, 689 F.3d 961 (8th Cir.2012), the Court stated:

An official is entitled to qualified immunity unless (1) the evidence, viewed in the light most favorable to the plaintiff, establishes a violation of a constitutional or statutory right, and (2) the right was clearly established at the time of the violation. . . .[The plaintiff's] claim of excessive force is governed by the Fourth Amendment's prohibition against unreasonable seizures. . . .The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation. . . .We must consider the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively fleeing or resisting arrest. . . . The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others. . . . We judge the reasonableness of [the officer's] use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Id. at 965 (internal citations and quotations omitted).

Plaintiff argues that in this case, there are disputed issues of fact as well, especially since the officers did not have any reason to believe that a crime had been committed, they did not know for certain that shots had been fired or even where the "shot" came from, plaintiff had not been fleeing from the police or resisting arrest and the officers did not give any pre-shot warning or indeed any verbal warnings before firing their weapons. Conversely, defendants argue that they were responding to a call of "shots being fired" and it was reasonable to assume that the noise they heard after pulling behind the van was a gunshot and they believed they were being ambushed. Additionally, defendants argue that it initially appeared that plaintiff was not heeding their commands to stay in the van and that Officer Phillips thought he saw plaintiff reach back into the van, as if reaching for a weapon. The Court finds that there are disputed issues of fact which preclude the granting of qualified immunity in this case and therefore DENIES the Motion for Summary Judgment as to defendants Phillips and Conaway.

►*Freeman v. Chiprez*, (8th Cir. 2014)
http://scholar.google.com/scholar_case?case=15445053965260725734&hl=en&as_sdt=5,25&sciodt=6,25

Summary judgment was appropriate on Freeman's excessive-force claim against officer Chris Chiprez and deputy sheriff Kevin Glendening, based on qualified immunity. *See Loch v. City of Litchfield,* 689 F.3d 961, 965 (8th Cir. 2012) (official is entitled to qualified immunity, unless evidence viewed in light most favorable to plaintiff establishes violation of constitutional or statutory right, and right was clearly established at time of violation). Viewing the evidence in the light most favorable to Freeman, he did not create a genuine issue of material fact on this claim, because a reasonable officer at the scene could reasonably believe the officers were at serious risk of physical harm immediately before Chiprez and Glendening used force against Freeman. *See* Fed. R. Civ. P. 56(a); *Graham v. Connor,* 490 U.S. 386, 394-97 (1989) (excessive force is analyzed under Fourth Amendment objective reasonableness test, judged from perspective of reasonable officer on scene); *Loch,* 689 F.3d at 965-67 (affirming grant of summary judgment because, even if plaintiff's motives were innocent, reasonable officer on scene could have interpreted plaintiff's actions as resistance, and action taken based on mistaken perception or belief, if objectively reasonable, does not violate Fourth Amendment); *Nance v. Sammis,* 586 F.3d 604, 610 (8th Cir. 2009) (use of deadly

force is reasonable if officer has probable cause to believe suspect poses threat of serious physical harm to officer or others).

Chiprez was entitled to qualified immunity on Freeman's unreasonable-search claim, because the warrantless use of a global positioning system (GPS) device to track Freeman's movements in March 2010 did not violate clearly established law at the time. *See* United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010); *Davis v. Hall,* 375 F.3d 703, 711-12 (8th Cir. 2004) (summary judgment based on qualified immunity is appropriate if official's actions, even if unlawful, were objectively reasonable in light of clearly established law at time; officials are not liable for bad guesses in gray areas, they are liable for transgressing bright lines).

►*Partlow v. Stadler*, (8th Cir. 2014)
http://scholar.google.com/scholar_case?case=7143875273823852337&hl=en&as_sdt=5,25&sciodt=6,25

We analyze Partlow's excessive-force claim in the context of seizures under the Fourth Amendment, applying its reasonableness standard. …

The following facts are undisputed and set forth the information that a reasonable officer in the position that Stadler, Craig, and Mann were in would have known. The officers arrived on the scene in the dark of night, sometime after 2:00 a.m. They knew that Partlow had a shotgun and was suicidal. Mann heard Partlow threaten suicide and relayed to the other officers Partlow's comment to Lisa, "You don't want to see this." The officers first saw Partlow as he forcefully pushed open the door to the apartment building with a shotgun in his hand. Mere seconds passed from the time Partlow exited the building until the time the officers opened fire. During that time, the officers shouted, "Drop the gun," and they observed Partlow move the shotgun in such a way that the officers believed that Partlow was aiming the barrel of the shotgun at them.

Faced with these "tense, uncertain, and rapidly evolving" circumstances, the officers made a split-second decision to apply deadly force. Even if Partlow intended to do no harm to the officers as he moved the shotgun, the officers' use of force was objectively reasonable. They had no way of knowing what Partlow planned to do. In his brief, Partlow does not argue that in turning to set down the shotgun, his movement was so obviously an attempt to comply with the officers' commands to drop the shotgun that a reasonable officer would have known that opening fire would constitute excessive force. Instead, he cites only Lisa's testimony that after being told to drop his weapon, Partlow "was bent down and

then he kind of turned to me" and "he started going down like this while he was turning towards me."

The present case is thus distinguishable from Bell v. Kansas City Police Department, 635 F.3d 346, 347 (8th Cir. 2011) (per curiam). In Bell, the officers had testified that the plaintiff disobeyed orders to show his hands and exit his vehicle. According to the plaintiff, however, he had placed his vehicle in park, turned off the engine, and raised his hands in the air when the officers shocked him with a Taser. Under the plaintiff's version of the facts, a reasonable police officer on the scene would have known that the plaintiff had obviously complied with the officers' instructions, posed little to no threat to anyone's safety, and was not resisting arrest or attempting to flee. In those circumstances, a reasonable officer would have known that applying a Taser shock would constitute the use of excessive force. See id.

It is possible that the officers were mistaken in perceiving that Partlow was taking aim at them. Any such mistake, however, was objectively reasonable in light of the circumstances known to the officers. See Loch, 689 F.3d at 966 ("An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment."). In light of the undisputed facts, taken together with Partlow's version of the disputed facts, a reasonable officer would have had probable cause to believe that Partlow posed a threat of serious physical harm, and any mistake in believing that he posed such a threat was objectively reasonable. Accordingly, we conclude that Stadler, Craig, and Mann are entitled to qualified immunity.

CASES FROM OTHER CIRCUITS:

D.C. CIRCUIT:
Fenwick v. Pudimott, 2015 WL 590295 (D.C. Cir. 2015)
http://scholar.google.com/scholar_case?case=2878938118251889 52&hl=en&as_sdt=5,25&sciodt=6,25&as_ylo=2015

In this damages action against three deputy federal marshals, the plaintiff alleges that the officers violated the Fourth Amendment when they used deadly force against him. …

Our concurring colleague would have us decide this case at the first step and hold that, pursuant to *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014), the deputies' actions plainly complied with the Fourth Amendment. In our view, however, the

constitutional question is hardly clear, and *Plumhoff*—a case in which the fleeing suspect led police on a protracted high-speed chase, *id.* at 2017—has little to say about the quite different situation the deputies faced here. The officers in *Plumhoff* resorted to deadly force only after the suspect placed in peril the lives of dozens of innocent civilians during his 100 mile-per-hour flight and only after they sought to end the chase through non-lethal means. *Id.* In this case, by contrast, although the deputies opened fire after Fenwick clipped Officer Pudimott with the car's side-view mirror, Fenwick posed no immediate threat to either officers or bystanders at the time of the shooting. *See infra* at 8-9; *Garner,* 471 U.S. at 11. Given these significant differences between this case and *Plumhoff,* we think the constitutional question is "far from obvious," *Pearson,* 555 U.S. at 237, and that this case is therefore best resolved at the second step. We thus proceed directly to consider whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202. Because this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," *id.* at 201, it requires that we take a closer look at the facts. And since the district court decided this case on a motion for summary judgment, we must take the facts and draw reasonable inferences in the light most favorable to the party opposing summary judgment—here, in the light most favorable to Fenwick. *See Scott v. Harris,* 550 U.S. 376, 378 (2007).

This case features an "added wrinkle": a videotape capturing the incident in question. *Id.* In *Scott v. Harris,* the Supreme Court instructed that we must "view[] the facts in the light depicted by the videotape." *Id.* at 381. But in contrast to the videotape in *Scott,* which "quite clearly" portrayed the events at issue, *id.* at 378, the surveillance footage here does no such thing. True, it shows that a few pedestrians and vehicles were on the scene in the minutes before the officers opened fire, but it sheds almost no light on the shooting itself. As both the District Court and the D.C. Superior Court observed, the video is blurry and soundless, and the shooting occurs while Fenwick's vehicle and all of the officers are obscured by the dark shadow of an adjacent building. *Fenwick,* 926 F. Supp. 2d at 226-27 (noting Superior Court's description of the footage and outlining video evidence in detail). The videotape thus provides no "ready answers to the factual dispute" and does little to affect our analysis. *Id.* at 227.

But other important wrinkles—namely, the *Heck* bar and collateral estoppel—constrain how we view the facts. As the district court explained, the Superior Court Judge, in finding that Fenwick committed felony assault on Pudimott, "necessarily determined that [Fenwick] created `a grave risk of causing significant bodily injury' to Deputy Pudimott when, `without justifiable [and] excusable cause,' he drove the car forward in a manner that put the deputy in danger of being hit." *Id.* at 215 (quoting D.C. Code § 22-405(b) & (c)) (internal quotation marks added). Although Fenwick urges us to ignore these "bad facts," Appellee's Br. 50, we are bound by *Heck v. Humphrey* and the Supreme Court's admonishment that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81 (1984); *see also supra* at 4 (explaining requirements of collateral estoppel under D.C. law).

That said, several facts weigh in Fenwick's favor, including (1) the deputies' concession in this court that Pudimott and Fischer fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path, Appellants' Br. 7, 12, (2) the Superior Court's findings that Fenwick did nothing to endanger Mickle or Fischer during his flight, *see Fenwick,* 926 F. Supp. 2d at 215 (reproducing Superior Court findings), and (3) the surveillance footage showing no bystanders in the path of Fenwick's car.

Thus distilled the record reveals, on the one hand, that the deputies confronted a fleeing motorist who posed no immediate threat to either officers or bystanders when they opened fire, and on the other hand, that the deputies had observed pedestrians and vehicles close by in the minutes leading up to the shooting and, just moments before firing, had seen the fleeing suspect "create[] a grave risk of causing significant bodily injury to [an] officer." D.C. Code § 22-405(c). With "the specific context of th[is] case" now in mind, *Saucier,* 533 U.S. at 201, we turn to the officers' claim that their use of deadly force to apprehend Fenwick "to protect one or more of the deputies or members of the general public from harm," Appellants' Br. 22, violated no clearly established law.

To assess the officers' claim of qualified immunity, "we look to cases from the Supreme Court and this court" and, if neither provides an answer, "to cases from other courts exhibiting a consensus view." *Johnson v. D.C.,* 528 F.3d 969, 976 (D.C. Cir. 2008). We agree with the deputies that our inquiry begins and ends with Supreme Court precedent—in particular, *Brosseau v. Haugen,* 543 U.S. 194 (2004).

In *Brosseau,* three officers sought to catch a suspect wanted on drug charges. After pursuing him on foot for the better part of an hour, one of the officers chased the suspect back to his car, and, pounding on the driver's window with her handgun, ordered the suspect to stop. When the suspect ignored the order and began to accelerate forward, the officer fired through the rear driver-side window, striking the suspect in the back. The officer later testified that she shot the suspect out of fear for the safety of "other officers on foot" who, she believed, were close by, and for "occupied vehicles" in the suspect's path, and for anyone else who "might be in the area." *Id.* at 197. The suspect survived and later pleaded guilty to the felony of "eluding," thereby "admitt[ing] that he drove his [vehicle] in a manner indicating `a wanton or willful disregard for the lives ... of others.'" *Id.* (quoting Wash. Rev. Code § 46.61.024 (1994)).

Reviewing these facts and relevant precedent, the Supreme Court "express[ed] no view" on the Fourth Amendment question, but determined that the officer was entitled to qualified immunity as her actions "fell in the hazy border between excessive and acceptable force." *Id.* at 201 (citation omitted). For us to reach a different conclusion about qualified immunity in this case, Fenwick must show either that the deputies' conduct was "materially different from the conduct in *Brosseau*" or that between the incident in *Brosseau* and January 2007—when Fenwick was shot—there "emerged either controlling authority or a robust consensus of cases of persuasive authority that would alter our analysis." *Plumhoff,* 134 S. Ct. at 2023 (citations and internal quotation marks omitted).

Fenwick has done neither. He has made no attempt to distinguish *Brosseau,* and we doubt he could do so in a meaningful way. Although record evidence in both *Brosseau* and this case reveals a suspect attempting to flee who posed no immediate threat to any officer or bystander when the officers fired, *see supra* at 6-7; *Brosseau,* 543 U.S. at 204 (Stevens, J., dissenting) (describing record evidence in more detail than, but consistent with, majority opinion), trial courts in both cases had determined that the suspects were driving in a reckless and dangerous manner, *see* D.C. Code § 22-405 (c); Wash. Rev. Code § 46.61.024 (1994), and the officers in both cases justified their use of deadly force by claiming concern for the safety of other officers and bystanders. Nor has Fenwick shown that *Brosseau*'s analysis had become obsolete at the time the deputies shot him. In fact, he has failed to point to "any case—let alone a controlling case or a robust consensus of cases—decided between [the events in *Brosseau*] and 200[7] that could be said to have clearly established the unconstitutionality of using lethal force" in this situation. *Plumhoff,* 134. S. Ct. at 2024. For these reasons, unlike the district court, we see no genuine issue of material fact that precludes summary judgment for the deputies

based on qualified immunity. Whether the deputies shot Fenwick while Pudimott was still in danger from Fenwick's car, or whether they shot him in the seconds after that danger had passed, *Brosseau* makes clear that the deputies' use of deadly force violated no law that was clearly established at the time of the shooting.

In reaching this conclusion, we emphasize that nothing in this opinion should be read to suggest that qualified immunity will shield from liability every law enforcement officer in this circuit who fires on a fleeing motorist out of asserted concern for other officers and bystanders. Outside the context of a "dangerous high-speed car chase," *Scott,* 550 U.S. at 386, deadly force, as the Supreme Court made clear in *Garner,* 471 U.S. at 11, ordinarily may not be used to apprehend a fleeing suspect who poses no immediate threat to others—whether or not the suspect is behind the wheel. Here, however, the Superior Court determined that moments before the shooting, Fenwick's driving had posed a "grave risk of causing significant bodily injury" to an officer, D.C. Code § 22-405(c), and that conclusion binds us, *see supra* at 6. Because Fenwick operated his car in a way that endangered an officer, in an area recently traversed by pedestrians and other vehicles no less, it was not clearly established that the deputies violated the Fourth Amendment by using deadly force to prevent his flight. Accordingly, we cannot say that Pudimott and Fischer had "fair notice that [their] conduct was unlawful." *Brosseau,* 543 U.S. at 198. The deputies are therefore entitled to qualified immunity.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring in the judgment: I agree with my colleagues that the deputies are plainly entitled to qualified immunity. Maj. Op. 12. I further agree that our inquiry starts and ends with United States Supreme Court precedent. *See* Maj. Op. 9. But in my view, it is the Supreme Court's more recent opinion in *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014), that controls Fenwick's case. And, in contrast with *Brosseau v. Haugen,* 543 U.S. 194 (2004), which speaks only to the second qualified-immunity inquiry—"whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting," Maj. Op. 7—*Plumhoff* establishes that the deputies' actions were "objectively reasonable in light of the facts and circumstances confronting them." *Wardlaw v. Pickett,* 1 F.3d 1297, 1303 (D.C. Cir. 1993) (internal quotation marks omitted). Accordingly, their actions did not violate Fenwick's Fourth Amendment rights at all.

In *Plumhoff,* a police officer stopped Rickard's car because one of the headlights was out. 134 S. Ct. at 2017. Rickard appeared nervous and could not produce his driver's license on request so the officer asked him to step out of the car. *Id.* Instead

of complying, Rickard accelerated the car and led police on a high-speed chase. *Id.* During his attempted escape, Rickard repeatedly caused "contact to occur" between his car and police cruisers. *Id.* (brackets omitted). Eventually, Rickard found his car penned in by police cruisers but he continued to "us[e] the accelerator" in an attempt to escape. *Id.* At that point—and even though Rickard's car "came temporarily to a near standstill," *id.* at 2021—an officer fired three shots into his car. *Id.* at 2017. Rickard "then reversed in a 180 degree arc and maneuvered onto another street, forcing [another officer] to step to his right to avoid the vehicle." *Id.* (internal quotation marks omitted). And then, *after* Rickard's car had passed the officer and Rickard "continued fleeing," officers "fired 12 shots toward Rickard's car, bringing the total number of shots fired during th[e] incident to 15." *Id.* at 2018 (internal quotation marks omitted). Rickard and his passenger were killed. *Id.*

The Supreme Court held that the officers were shielded by qualified immunity because the officers' use of deadly force "did not violate the Fourth Amendment." *Id.* at 2022. The Court reached this conclusion because "Rickard's outrageously reckless driving posed a grave public safety risk," *id.* at 2021, and when the officers opened fire, the only thing "a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." *Id.* at 2022. Moreover, the Supreme Court held that firing 15 shots—12 of which occurred after Rickard had maneuvered past officers and "continued fleeing," *id.* at 2018 (internal quotation marks omitted)—was reasonable because, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.* at 2022.

Although Fenwick's case lacks the drama of the high-speed chase in *Plumhoff,* the factual differences between *Plumhoff* and Fenwick's case do not make the former inapposite. Rather, the principle animating *Plumhoff* is dispositive here. As the district court, in summarizing the relevant portion of the superior court's findings, put it, Fenwick "created a grave risk of causing significant bodily injury to Deputy Pudimott when, without justifiable or excusable cause, he drove the car forward in a manner that put the deputy in danger of being hit." *Fenwick v. United States,* 926 F. Supp. 2d 201, 215 (D.D.C. 2013). Based on the "grave public safety risk" that Fenwick created, *Plumhoff* establishes that the deputies "acted reasonably in using deadly force." 134 S. Ct. at 2022.

My colleagues consider "the constitutional question" in this case to be "close." Maj. Op. 6. But the "facts [that] weigh in Fenwick's favor" are largely immaterial.

Maj. Op. 8. My colleagues also find significant "the deputies' concession" that they "fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path." Maj. Op. 8 (emphasis in original). But under *Plumhoff,* once Fenwick threatened bodily injury to Pudimott, the deputies were not obligated to stop firing "until the threat ha[d] ended." 134 S. Ct. at 2022. And nothing in the record demonstrates that a reasonable officer would have concluded, in the few seconds that passed after Fenwick's car struck Pudimott, that Fenwick was no longer dangerous.[1]

Nor does it matter that "the surveillance footage show[ed] no bystanders in the path of Fenwick's car." Maj. Op. 8. The Supreme Court has made plain that law enforcement officers may use deadly force to stop a suspect who poses "an actual and imminent threat to the lives of any pedestrians who *might* [be] present, to other civilian motorists, and to the officers involved," *Scott v. Harris,* 550 U.S. 372, 384 (2007), and not only to protect civilians who, upon a *post hoc* review of security-camera footage, were in fact found to have been in the path of a fleeing suspect's car. Here, the deputies had every reason to believe that civilians "might" be in harm's way if the deputies did not neutralize the threat Fenwick's reckless behavior posed. *See id.* As my colleagues recognize, the deputies "observed pedestrians and vehicles close by in the minutes leading up to the shooting." Maj. Op. 9.

We are, of course, bound to analyze the qualified-immunity question "from the perspective `of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Plumhoff,* 134 S. Ct. at 2020 (quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989)). We must also "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* Although the videotape of the shooting "sheds almost no light on the shooting itself," Maj. Op. 7, it plainly shows that the deputies had precious few seconds to decide how best to neutralize the threat Fenwick presented when he ignored the deputies' commands and instead aimed his motor vehicle towards one of them. On these facts, the deputies' actions were "objectively reasonable in light of the facts and circumstances confronting them," *Wardlaw,* 1 F.3d at 1303 (internal quotation marks omitted), and I would hold that they are entitled to qualified immunity because they did not violate the Fourth Amendment.

My colleagues distinguish *Plumhoff,* in part, because the officers in that case resorted to deadly force only after they "sought to end the chase through non-lethal means." Maj. Op. 6. But the Supreme Court has long held—indeed, since *Tennessee v. Garner*—that "[w]here the officer has probable cause to believe that

the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. 1, 11 (1985). To the extent the majority opinion implies that law enforcement officers must first try non-lethal means to neutralize a deadly threat or risk violating the Fourth Amendment, it is irreconcilable with a decades-long line of U.S. Supreme Court precedent. *See Brosseau,* 543 U.S. at 197-98 (quoting *Garner,* 471 U.S. at 11).

[NOTE: As Circuit Judge Henderson made clear, we can obtain guidance from governing precedent as recent as the *Plumhoff* decision on when a law enforcement office can properly make the split-second judgment under tense, uncertain and rapidly evolving circumstances, to use the force that he or she considers necessary in a particular situation. Guidance also is provided by an evolving body of case law on qualified immunity in §1983 actions arising from the use of deadly force, as we will see from the following analysis of other circuits.]

SECOND CIRCUIT:

O'Brien v. Barrows, (2nd Cir. 2014)
http://scholar.google.com/scholar_case?case=13750113574335583156&q=deadly+force&hl=en&as_sdt=4,107,122&as_ylo=2014

The district court dismissed O'Brien's excessive **force** claim against Barrows after finding that Barrows was entitled to qualified immunity because it was objectively reasonable for Barrows to believe that his conduct did not violate any clearly established constitutional right. On appeal, O'Brien challenges this finding, arguing that, based on clearly established law, it was not objectively reasonable for Barrows to use **deadly force** in seeking to apprehend him.

"A police officer is entitled to qualified immunity if (1) his conduct does not violate a clearly established constitutional right, or (2) it was `objectively reasonable' for the officer to believe his conduct did not violate a clearly established constitutional right." *Hartline v. Gallo,* 546 F.3d 95, 102 (2d Cir. 2008). In the excessive **force** context, "[s]ummary judgment should not be granted on the basis of a qualified immunity defense premised on an assertion of objective reasonableness unless the defendant `show[s] that no reasonable jury, viewing the evidence in the light most favorable to the [p]laintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established

law.'" *O'Bert ex rel. Estate of O'Bert v. Vargo,* 331 F.3d 29, 37 (2d Cir. 2003) (first alteration in original) (quoting *Ford v. Moore,* 237 F.3d 156, 162 (2d Cir. 2001)).

The district court granted summary judgment in favor of Barrows on the second prong of the qualified immunity analysis, because, given the threat that O'Brien posed to Barrows and others, no clearly established law "ma[de] the unlawfulness of [Barrows'] conduct apparent." *O'Brien v. Barrows,* 1:10-cv-173-JGM, 2013 WL 486655, at *8 (D. Vt. Feb. 7, 2013). In so holding, the district court recognized that, under Supreme Court precedent, it is well established that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using **deadly force**." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). It also acknowledged that, under our precedent, "it `is not objectively reasonable for an officer to use **deadly force** to apprehend a [fleeing motorist] unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 764 (2d Cir. 2003) (quoting *O'Bert,* 331 F.3d at 36). However, the district court distinguished *Cowan* on the ground that *Cowan* holds only that "an officer should not shoot at a fleeing motorist who poses no apparent threat to the officer or others." *O'Brien,* 2013 WL 486655, at *8. The district court found that such an apparent threat existed in this case, and therefore, even taking the evidence in the light most favorable to O'Brien, it was not clear that Barrows "should have reasonably understood that his use of **deadly force** violated the Fourth Amendment." *Id.* at *7. For substantially the reasons stated by the district court, we agree.

O'Brien also challenges the district court's finding that, "viewing the summary judgment record in the light most favorable to him, [O'Brien] has not supported his failure-to-train claim with sufficient facts" to establish municipal liability. *Id.* at *10. He asserts that the Town was deliberately indifferent to his rights because it ignored a patently obvious risk that its deficient training would infringe his rights. This theory of liability is premised on the Supreme Court's refusal "to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Connick v. Thompson,* 131 S. Ct. 1350, 1361 (2011). Indeed, the Court has suggested that failing to provide an armed police officer with *any* training about the constitutional limitations on the use of **deadly force** could constitute deliberate indifference. *Id.* (describing the "single-incident liability" hypothesized in *City of Canton v. Harris,* 489 U.S. 378, 390 n.10 (1989) (internal quotation marks omitted)).

O'Brien's failure-to-train claim is premised on his contention that Shelburne Police Department ("SPD") officers merely read the Town's policy on the use of **deadly force** at in-service trainings, but do not receive classroom training or testing to ensure that the policy has been understood. That, in his view, is tantamount to a lack of training on the constitutional limits on the use of **deadly force**. But, as the district court noted, O'Brien's description does not fully account for the training that the SPD provides to its officers. Nor has O'Brien identified any authority for his argument that the SPD's method or quantity of training provided to its officers is insufficient— and we are aware of none. Moreover, there was no indication that the SPD's training was inadequate given its nearly unblemished record with respect to allegations of excessive **force**. In sum, we agree with the district court that O'Brien has not shown that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton,* 489 U.S. at 390.

THIRD CIRCUIT:

Williams v. City of Scranton, (3rd Cir. 2014)
http://scholar.google.com/scholar_case?case=5189490441092293289&q=deadly+force&hl=en&as_sdt=4,108,123&as_ylo=2014

This action arises from the fatal shooting of Brenda Williams by three police officers of the Scranton Police Department ("SPD"). Myron Williams, the administrator of Brenda Williams's estate, and Louise Williams, the guardian of Brenda Williams's minor daughter, sued the City of Scranton, the SPD,[2] and several SPD officers, alleging various state and federal law claims. The District Court granted summary judgment in the defendants' favor. For the reasons that follow, we affirm.

We first address Plaintiffs' excessive **force** claim. To prevail on an excessive **force** claim, a plaintiff must establish that a seizure occurred and that it was unreasonable. *Abraham v. Raso,* 183 F.3d 279, 288 (3d Cir. 1999). It is undisputed that Williams was seized when she was shot. Thus, the only question is whether this seizure was reasonable. An officer's use of **deadly force** is reasonable when "the officer has probable cause to believe that the suspect poses a significant threat

of death or serious physical injury to the officer or others." *Tennessee v. Garner,* 471 U.S. 1, 3 (1985).

We agree with the District Court that "no reasonable juror could find that the use of **deadly force** . . . violated Ms. Williams' Fourth Amendment rights." App. at 10. The undisputed facts reveal that Williams rapidly moved toward Smith with a large knife, ignored repeated warnings to stop and drop the knife, and was no more than five feet away from Smith at the time she was shot. Under these circumstances, the SPD officers had probable cause to believe that Williams posed a significant threat of serious bodily injury or death. Likewise, it was objectively reasonable for the officers to believe that using **deadly force** was necessary. Therefore, the officers' use of **deadly force** against Williams was reasonable as a matter of law. We affirm the District Court's grant of summary judgment to the SPD officers on Plaintiffs' excessive **force** claim.

Zion v. Nassan, (3rd Cir. 2014)
http://scholar.google.com/scholar_case?case=4586515366547140287&q=deadly+force&hl=en&as_sdt=4,108,123&as_ylo=2014

The amended complaint alleges that Haniotakis was driving a sport utility vehicle ("SUV") in the early morning hours of March 15, 2009. Two officers began following Haniotakis's car, claiming that it had a broken headlight. Police dispatch instructed the officers to stop following the car, but they refused. Haniotakis stopped his vehicle,[1] and the officers approached with their weapons drawn. Both shot their guns into Haniotakis's car, and one bullet went through his back, causing his death. Based on the incident, the plaintiffs seek relief through § 1983 against the officers who shot Haniotakis (Samuel Nassan and Terrance Donnelly) and their supervisors for violations of the Fourth Amendment. The plaintiffs also seek damages for assault and battery….

To determine if a shooting violated the Fourth Amendment's prohibition on unreasonable seizure, we inquire as to the reasonableness of the officer's belief concerning the level of **force** required. Curley v. Klem, 499 F.3d 199, 206 (3d Cir. 2007). We must look closely at the circumstances of each case, considering the severity of the crime, the potential threat to the safety of the officers and others, and whether the suspect is fleeing or evading arrest. Id. at 207

Nassan and Donnelly argue that even if their conduct violated the Fourth Amendment, they are protected by qualified immunity. Officials benefit from qualified immunity unless their conduct violates clearly established law. Ashcroft

v. al-Kidd, 131 S. Ct. 2074, 2080 (2011). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." Id. at 2083 (explaining that there must be enough clarity such that "every reasonable official would have understood that what he is doing violates that right") (quotation marks omitted). We must therefore determine whether it was clearly established that if the facts alleged by the plaintiffs are true, the officers' actions were unconstitutional.

The Supreme Court set forth general precepts concerning the use of **deadly force** against a suspect in Tennessee v. Garner, 471 U.S. 1 (1985). In that case, an unarmed fifteen year-old broke into a house and stole ten dollars and a purse. A police officer arrived on the scene when the suspect was climbing a six-foot fence in order to escape. When the suspect ignored commands to stop, the officer shot him in the back of the head (which killed him), apparently in accordance with Tennessee law. The Court explained that it is not always permissible to use **deadly force** to prevent the escape of felony suspects, and held that if there is no immediate threat to the officer or others, **deadly force** is unjustified. Id. at 11. Because the suspect was not a threat and the officer only shot him to prevent escape, the Court held that the use of **deadly force** was unconstitutional.

We applied Garner in Abraham v. Raso, 183 F.3d 279 (3d Cir. 1999). In that case, Abraham was seen stealing merchandise from a Macy's store at a mall, and Raso (an off-duty police officer working as a mall security guard) followed him out of the store into the parking lot. Abraham got in his car and backed out, hitting another car in the process. As Abraham began driving forward, Raso shot and killed him. The district court granted summary judgment in favor of Raso. We reversed, emphasizing that Garner "concluded that the government's interest in effective law enforcement was insufficient to justify killing fleeing felons who did not pose a significant threat of death or serious injury to anyone." Id. at 288.[3] Summary judgment was improper because it was unclear whether Raso was in front of (and thus endangered by) Abraham's car when he began driving away. Some evidence, such as the angle of the bullet wound, indicated that she had fired from beside the driver's window. And even if she had been in danger at some point, we held that a jury could have found that she only fired after she had moved out of the path of the car. Id. at 294.

Abraham requires us to conclude that the pleadings contain facts demonstrating a Fourth Amendment violation. The facts we must accept state that the officers followed Haniotakis's car for a short time and were directed by dispatch or a superior officer to discontinue the pursuit. After Haniotakis collided with a parked

car, he continued down the street "at or below the posted speed limits," which did not exceed twenty-five miles per hour.[4] Appendix ("App.") 495-97. The shots were fired when Haniotakis was moving his vehicle forward, and the angle of the shots indicates that Nassan was not directly behind Haniotakis's car when the shots were fired. App. 502-03. Continuing to drive at a relatively slow speed away from the police after a minor collision with a parked car does not create a level of danger to justify the use of **deadly force**. While the plaintiffs' allegations may not ultimately be proven, the facts as pled would clearly subject the officers to liability under Abraham because Haniotakis's behavior was no more dangerous than Abraham's and the level of **force** used was identical.…

In Scott v. Harris, 550 U.S. 372 (2007), a suspect led police on a car chase down a two-lane road at speeds of over eighty-five miles per hour. After ten miles and a previous collision, one officer hit his bumper against the rear of the suspect's car, causing the car to crash and severely injure the suspect. Id. at 375. The Court of Appeals for the Eleventh Circuit affirmed the district court's denial of the defendant's summary judgment motion. Id. at 376. The Supreme Court reversed, holding that the officer's actions did not violate the Fourth Amendment. In reaching its decision, the Court, after viewing a videotape of the events, focused on the danger created by the chase: the car was moving "shockingly fast," "in the dead of night," running red lights and frequently crossing the double-yellow line, forcing other cars to the shoulder. Id. at 379. The Court also explained that Garner had little application to Scott because of the "vastly different facts" — first, Garner involved shooting a suspect while Scott involved bumping a fleeing car, creating different levels of danger for the suspect. Id. at 383. Second, an unarmed suspect fleeing on foot was not "remotely comparable" to the danger created by a high-speed car chase. Id. The Court also found it appropriate to consider the relative culpability of actors when a police officer determines whether to use **force** — it is better to risk the life of a fleeing suspect than innocent bystanders. Id. at 384.

The defendants maintain that Brosseau and Scott contradict Abraham to such a degree that it is no longer good law, and that consequently there was no clearly-established rule to guide the officers here.[5] We disagree. First, we have continued to cite Abraham as good law. See Lamont v. New Jersey, 637 F.3d 177, 184 (3d Cir. 2011) (citing Abraham's statement that "[a] passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect"). Second, as noted by the District Court, the shooting in Brosseau occurred before Abraham was decided (and occurred within a different judicial circuit); since the Court in Brosseau did not opine on the constitutional question but relied only on qualified immunity, its conclusion that the law was unclear at that time is of little

consequence to our decision. Finally, unlike Abraham, neither Brosseau nor Scott contained facts comparable to those found in Zion's pleadings. Both Brosseau and Scott came to the Supreme Court after summary judgment motions, and the facts developed demonstrated a higher level of danger (to officers and the public) than the situation described in Zion's pleadings. And even with the higher level of danger in Scott, the Supreme Court specifically noted the fact that the officer's decision to bump the suspect's car was not as dangerous as deciding to shoot the suspect. 550 U.S. at 384.

In short, contrary to the defendants' arguments, Scott and Abraham are in fact in harmony: it may be reasonable for an officer to bump a car off the road to stop a reckless driver who is placing others in peril, while simultaneously unreasonable to shoot directly at a driver who is coming toward an officer when the officer has the opportunity to move out of the way.

While it is entirely possible that discovery will show that Haniotakis's actions put the officers or the public in significant danger, the facts contained in the pleadings do not demonstrate danger that would justify the use of **deadly force**. Thus, it would be premature to grant the defendants qualified immunity at this stage of the proceeding.

We will also affirm the District Court's judgment as to the supervisory defendants. The amended complaint includes numerous allegations of Nassan's violent propensities before and during his employment as a Pennsylvania state trooper. The amended complaint specifically alleges that the supervisory defendants were aware of a 2008 jury finding that Nassan was liable for the shooting death of a twelve-year-old boy. App. 189-91, 197. The supervisors allegedly did not order additional training for Nassan, and one of them allegedly ordered a subordinate to alter Nassan's employment records. App. 198. These allegations establish that the supervisory defendants were aware of a pattern of violent behavior by Nassan and did nothing to remedy the situation. At the time of the shooting, binding precedent held that a supervisor may be liable for his subordinate's constitutional violations if the supervisor "had knowledge of and acquiesced in" the violations. A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr., 372 F.3d 572, 586 (3d Cir. 2004). Because the legal norms allegedly violated by the supervisory defendants were clearly established at the time of the challenged actions, we will affirm the District Court's judgment as to the supervisory defendants as well.

Pagliaccetti v. Kerestes, (3rd Cir. 2014)
http://scholar.google.com/scholar_case?case=15241392699356986826&q=deadly+force&hl=en&as_sdt=4,108,123&as_ylo=2014

In the early morning hours of December 24, 2002, Jason McFarland, the victim, was at a tavern in South Philadelphia with his cousin, Michael Piazza, and his uncle, Michael McFarland. Pagliacetti, a lifelong friend of the victim who had grown up in the same neighborhood, and Pagliacetti's girlfriend were also at the bar. The parties were drinking heavily and talking. Jason McFarland's brother, Joseph McFarland, arrived, intending to drive Jason home. At some point, Pagliacetti asked Jason and Joseph McFarland if they knew anything about the recent robbery of Pagliacetti's sister's cell phone. Pagliacetti became angry when they denied knowing anything about it and a heated argument began.

Joseph McFarland attempted to break up the argument by getting the parties to leave the bar. Pagliacetti grabbed Jason McFarland's shoulder as the confrontation moved outdoors. Joseph McFarland tried to separate Pagliacetti and Jason McFarland by ushering Jason to his car. While Jason was near the car roughly twenty feet away from Pagliacetti, Pagliacetti pulled an unlicensed handgun from his waistband and shot twice, fatally striking Jason McFarland in the chest and the head. Pagliacetti then ran down the street, stashing his gun and sweatshirt in the wheel-well of a car as he ran. Piazza ran after him, ultimately catching him and leading him back to the scene. Pagliacetti's defense focused on a self-defense theory, with Pagliacetti arguing that Jason McFarland had punched him and that Pagliacetti had seen Jason reach for something, possibly a weapon, in his waistband when he was near the car. Pagliacetti did have an injury on or near his left eye, but other testimony indicated that this was from a punch from Piazza that occurred after the shooting, either during a scuffle when Piazza caught Pagliacetti or from when Pagliacetti had been brought back to the scene and denied shooting Jason.

The prosecutor presented sufficient evidence showing that Pagliacetti did not abide by the duty to retreat and did not hold a reasonable belief that he was in immediate danger of death or serious bodily harm.

There was considerable evidence that Pagliacetti could have retreated from the conflict at several points during the encounter. He could have reentered the bar at any point or retreated down the street, which he did after the shooting. Even crediting Pagliacetti's testimony that Jason McFarland punched him when they were standing near each other, Pagliacetti still could have retreated.

There is also little evidence that Pagliacetti reasonably believed that Jason McFarland was about to seriously injure him by reaching for something in his waistband. As the District Court noted, "it defies logic to argue that Jason would punch Petitioner, then run away from him, only to pull a gun on him from a distance of twenty feet." *Pagliacetti v. Kerestes,* 948 F. Supp. 2d 452, 460 (E.D. Pa. 2013).

Even if the jury had not received erroneous instructions, Pagliacetti's self-defense claim would still fail because there was substantial evidence showing that he violated his duty to retreat and did not have a reasonable belief that McFarland was going to seriously injure or kill him. Therefore, the error in the jury instruction was harmless and did not have a substantial influence on the verdict. *See Brecht,* 507 U.S. at 637. Because the error was harmless under *Brecht,* counsel's failure to object to the jury instruction was not prejudicial under *Strickland.*

Pagliacetti argues that the jury should have also been instructed on imperfect self-defense, that is, when there is an unreasonable, rather than a reasonable, belief that **deadly force** was necessary. This argument fails for the same reasons. First, there was still sufficient evidence that Pagliacetti did not adhere to his duty to retreat. Second, there was also sufficient evidence for the jury to find that Pagliacetti did not even unreasonably believe that **deadly force** was necessary.

FOURTH CIRCUIT:

Streater v. Wilson, (4th Cir. 2014)
http://scholar.google.com/scholar_case?case=11844576215210653407&q=deadly+force&hl=en&as_sdt=4,109,124&as_ylo=2014

It is undisputed here that Officer Wilson used a lethal weapon with intent to kill. The "intrusiveness of a seizure by means of **deadly force** is unmatched," and a police officer may only employ such **force** where he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Tennessee v. Garner, 471 U.S. 1, 9, 11 (1985). If an individual "poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of **deadly force** to do so." Id. at 11. And, while the qualified immunity doctrine accounts for mistakes police officers might make in the line of duty, "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Mazuz v. Maryland, 442 F.3d 217, 225 (4th Cir. 2006) (quoting Brinegar v. United States,

338 U.S. 160, 176 (1949)). We cannot agree with Officer Wilson that his decision to employ lethal **force** to seize J.G. was a reasonable mistake.

Taking the facts and reasonable inferences in the light most favorable to Streater, we conclude that no reasonable officer would have believed J.G. presented a threat of immediate, serious injury justifying the application of **deadly force**. Significantly, we may separately consider non-continuous uses of **force** during a single incident to determine if all were constitutionally reasonable. See Waterman v. Batton, 393 F.3d 471, 481 (4th Cir. 2005). Even if we were to conclude, therefore, that Officer Wilson could have reasonably perceived J.G. to be a threat prior to firing his first two shots, we cannot find that his third and fourth shots were justifiable as a matter of law.

Officer Wilson himself admits that he had time to pause after the first two shots for a brief period to reassess the situation and decide whether further **force** was necessary under the totality of the circumstances. Contrary to his contention on appeal, therefore, we are not confronted here with the "split-second judgments of a police officer to use **deadly force** in a context of rapidly evolving circumstances, when inaction could threaten the safety of the officers or others." Milstead v. Kibler, 243 F.3d 157, 165 (4th Cir. 2001). Nor do we risk judging an officer's conduct "with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)). At the point when Officer Wilson chose to fire a third and then a fourth shot, he knew or should have known that J.G. was over 30 feet away, standing still, unarmed, complying with his orders, and making no attempt to escape. His mistaken belief that J.G. posed an immediate threat of serious physical injury to himself or to Officer Helms and civilians, who were even further away, was objectively unreasonable. We hold therefore that Officer Wilson's resort to **deadly force** violated J.G.'s Fourth Amendment rights. We must now determine whether J.G.'s right to be free from excessive **force** under these facts was clearly established at the time of the shooting.

Whether a right was clearly established such that a reasonable officer would have known that his actions were unlawful must be analyzed "in light of the specific context of the case, not as a broad general proposition." Clem, 284 F.3d at 549 (internal quotations and citations omitted). When making this determination, we typically ask "whether a closely analogous situation ha[s] been litigated and decided before the events at issue, making the application of law to fact clear." Id. at 553. Further, in the rare case where the official's "conduct is so patently violative of the constitutional right that reasonable officials would know without guidance

from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." Id. at 553 (quoting Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994)). We have no troubling holding that both standards are met here.

In Garner, the Supreme Court held under analogous circumstances that it was clearly established that "[a] police officer may not seize an unarmed nondangerous suspect by shooting him dead." 471 U.S. at 11. Similarly, by the time Officer Wilson reassessed the objective facts on the evening of October 16, 2010, and decided to take what he called a "kill shot," J.G. had disarmed, was neither approaching nor threatening the officers or civilians, and based on the police broadcast and Streater's protests, was not a suspect in the domestic assault. Moreover, even accepting Officer Wilson's argument that these facts are not directly analogous to Garner, J.G.'s right to be free from the use of lethal **force** to effectuate a seizure under the totality of the circumstances was "manifestly included within more general applications of the core [Fourth Amendment] principle[s]." Pritchett v. Alford, 973 F.2d 307, 314 (4th Cir. 1992). We hold therefore that Officer Wilson violated J.G.'s clearly established Fourth Amendment rights.

Because we hold that Officer Wilson is not entitled to qualified immunity as a matter of law, the district court's denial of his renewed motion for judgment as a matter of law is AFFIRMED.

Krein v. Price, (4th Cir. 2014)
http://scholar.google.com/scholar_case?case=16933625341599179356&q=deadly+force&hl=en&as_sdt=4,109,124&as_ylo=2014

In this 42 U.S.C. § 1983 action, we consider whether a police officer who used **deadly force** is entitled to qualified immunity. In December 2008, two West Virginia State Police troopers, W.S. Snyder and appellant L.W. Price, blocked appellee Stephen Krein's vehicle at a gas station in Roane County, West Virginia. When Krein pulled forward in an attempt to evade the troopers, Price fired twice at Krein's vehicle, striking him in the head and leaving him permanently disabled.

In December 2010, Krein sued Price, Snyder, and the State Police in West Virginia state court, alleging, inter alia, violations of his civil rights under § 1983. After the defendants removed the case to federal court, the district court denied the defendants' motion for summary judgment, finding that several disputed issues of

material fact precluded judgment as a matter of law on their qualified immunity defense.

As explained below, we find that sufficient evidence exists for a factfinder to determine that Price's second shot was objectively unreasonable and thus constituted "excessive **force**" prohibited by the Fourth Amendment. We also conclude that the Fourth Amendment's prohibition on excessive **force** in this circumstance was a "clearly established" constitutional right, and that Price, as a West Virginia trooper, was charged with notice of this clearly established constitutional right. Accordingly, we affirm.

W.S. Snyder and appellant L.W. Price are troopers of the West Virginia State Police. On December 1, 2009, they set out to serve arrest warrants on appellee Stephen S. Krein. The warrants stemmed from an incident occurring a week earlier when two other officers attempted to arrest Krein for misdemeanor domestic violence. That time, Krein successfully fled and almost drove into one of the officers.

Price and Snyder located Krein's white Chevrolet truck at a gas station in Roane County, West Virginia. Although witnesses disagree about the relative positions of the vehicles and individuals during the confrontation, witness testimony supports the following: Krein's truck was backed into a parking space and faced the adjoining road. Facing the same direction, a maroon car was parked ten feet to the left of the truck. At least one set of fuel pumps was located ten feet to the right of the truck, and another set of pumps was located either next to Krein's truck or behind it.

When the officers arrived at the store, Krein was pulling forward in his truck. To prevent Krein from escaping, Price positioned his cruiser at an angle in front of Krein's truck, with the cruiser's passenger-side door facing the truck. Krein then backed up, hitting a fuel pump. Price and Snyder exited the cruiser. Price left the passenger-side door open. Krein pulled forward and bumped the passenger-side door of the cruiser with enough **force** to close it. Krein then "backed up and . . . cut[] his wheel to come out in between a small opening [between the cruiser and the maroon car]. He was trying to get out." J.A. 43. Both Price and Snyder drew their service weapons and repeatedly told Krein to stop and exit the vehicle. Snyder was standing near the truck's driver-side door and close to the maroon car. Price walked in front of the truck and stood between the truck and the cruiser.

When Krein drove forward toward Price, Price fired a shot that either hit the truck's grill or went under the truck. Krein then ducked inside the truck, turned the steering wheel, and accelerated toward Snyder. Snyder moved toward the maroon car to get out of Krein's way, and Price "stepped off to the side." J.A. 53. Both Price and Snyder stated that Price was trapped. See J.A. 45 ("I tried the best to get out of the way because I didn't have anywhere to go."); J.A. 52 ("[I]t was kind of like a triangle shape and . . . Trooper Price was wedged in the center of it, didn't have no way to escape."). A witness claims, however, that Price got out of harm's way when he stepped to the side. See J.A. 60 ("Mr. Krein would have hit the trooper with his truck if the trooper had not taken a quick step to his right[.]"). Price then fired a second shot, which went through the truck's passenger-side window and struck Krein in the head. The entire encounter lasted approximately one minute.

After Price shot Krein, the truck coasted through the gap between the maroon car and cruiser and stopped in the road. A witness called 911 and said, "Two state troopers, a truck tried to run over them there and they had to fire shots." J.A. 71. He also said that the troopers "fired shots when [Krein] was pulling around them." Id. Price and Snyder removed Krein from the truck and administered first aid until the paramedics arrived. Krein survived the gunshot wound to his head, but due to his injury, he cannot walk, speak properly, or care for himself.

As to the § 1983 claim, the district court denied summary judgment because a reasonable factfinder could conclude that Price did not act reasonably when he used **deadly force**. According to the district court, the evidence demonstrates that Price may have shot Krein simply to prevent Krein's escape rather than to save Price's or another's life. Thus, the district court found that Price was not entitled to qualified immunity. Price appeals that determination.

This Circuit has jurisdiction to review a district court's denial of qualified immunity at summary judgment if the court's decision turned on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Cooper v. Sheehan, 735 F.3d 153, 157 (4th Cir. 2013). Qualified immunity acts as "an immunity from suit rather than a defense to liability." Mitchell, 462 U.S. at 526. "As a result, pretrial orders denying qualified immunity generally fall within the collateral order doctrine." Plumhoff v. Rickard, 134 S. Ct. 2012, 2019 (2014) (citing Ashcroft v. Iqbal, 556 U.S. 662, 671-672 (2009)). Immunity—as a defense to prosecution in the first instance—is a separate issue from the merits and "could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." Id. (citations omitted).

We review a district court's denial of summary judgment on qualified-immunity grounds de novo. Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992). In doing so, we view the evidence in the light most favorable to the nonmoving party, and can grant summary judgment only if there is no genuine issue of material fact. Iko v. Shreve, 535 F.3d 225, 230, 235 (4th Cir. 2008). Similarly, in reviewing a district court's denial of qualified immunity, we generally accept the facts as the district court found them, Winfield v. Bass, 106 F.3d 525, 530 (4th Cir. 1997) (en banc), though we must also view them in the light most favorable to the nonmoving party. Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Price, as the public official asserting qualified immunity, bears the burden of proof. Meyers v. Balt. Cnty., 713 F.3d 723, 731 (4th Cir. 2013).

Having concluded that we have jurisdiction, we turn to Price's contention that qualified immunity shields him from Krein's § 1983 claim.

Qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009)….

An officer acts unreasonably if he or she "shoots a fleeing suspect without `probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" Henry, 652 F.3d at 531-32 (quoting Tennessee v. Garner, 471 U.S. 1, 3 (1985)). This assessment occurs at the moment that **force** is used. Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996).

Therefore, we must ask whether the facts—viewed in the light most favorable to Krein—demonstrate that Krein posed a serious threat to Price, Snyder, or the other individuals present at the scene when Price fired the second shot.

Based on our review of the record, a reasonable factfinder could conclude that Krein no longer posed a serious threat to the troopers at the time that Price fired his second shot. Admittedly, the record contains conflicting information regarding whether Price and Snyder were at risk of being struck when Price fired the second shot. Price and Snyder testified that Price was still in danger when he fired the second shot. Price explained that he "tried the best to get out of the way because

[he] didn't have anywhere to go" and that he "felt [his] life was threatened." J.A. 45, 47. He also explained that Krein "could possibly have cut a hard left but then Trooper Snyder's life would have been in danger." Id. at 47-48. Trooper Snyder said that Price "had no way to escape" and that "if [Krein] had come forward any more . . . Trooper Price would have been pinned between the vehicle and his truck." Id. at 52, 57. Jett and McKinney, the two bystanders, similarly believed that Price was in serious danger. Id. at 61 (Jett); Id. at 66 (McKinney).

But at the summary judgment stage, we must view the facts in the light most favorable to Krein. Waterman v. Batton, 393 F.3d 471, 473 (4th Cir. 2005). Taken in that light, the record contains numerous indications that Price and Snyder would have been able to escape Krein's truck without Price firing the second shot. Most importantly, Price's second shot entered through the passenger side window of Krein's truck, strongly suggesting that Price was not in front of the truck when he fired on Krein the second time. Multiple statements also indicate that Price and Snyder were not in danger when Price fired the second time. Price explained that he "got out of the way" when he fired the second shot. J.A. 45. Snyder said he "went down the side of the vehicle that was parked beside Mr. Krein to get away from him." Id. at 52. He also said that Price was "at like a 45 degree angle off" from Krein's truck when Price fired the second time. Id. at 55. Jett, one of the bystanders, said that "Mr. Krein would have hit the trooper with his truck if the trooper had not taken a quick step to the right." Id. at 60. When Jett called 911, he stated, "[t]wo state troopers, a truck tried to run over them there and they had to fire shots" but also stated that the troopers "fired shots when [Krein] was pulling around then." Id. at Ex. A. McKinney said that Price "jumped back out of the way." Id. at 66.

It is true that "[t]he calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of **force** that is necessary in a particular situation." Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001) (quoting Graham, 490 U.S. at 396-97). But even allowing Price some leeway to account for the tense, hurried nature of the incident cannot change the fact that the record contains numerous indications that a reasonable officer would have realized that **deadly force** was not necessary to protect himself or others when he was no longer in the direction of Krein's vehicle. Accordingly, viewing the facts in the light most reasonable to Krein, a reasonable fact-finder could conclude that Price acted unreasonably when he shot Krein.

Price also cannot satisfy the second prong of the qualified immunity test because the constitutional right that Price violated was "clearly established." …

Our decision in Waterman v. Batton demonstrates that the right Price allegedly violated is clearly established. 393 F.3d at 483; see also Estate of Rodgers ex rel. Rodgers v. Smith, 188 F. App'x 175, 183-184 (4th Cir. 2006) (determining that the law established in Waterman was clear). In that case, a police officer attempted to initiate a traffic stop of Waterman for speeding, but Waterman refused. 393 F.3d at 473. Officers then pursued Waterman. Id. One officer reported that Waterman tried to run him off the road. Id. at 474. When Waterman reached a toll plaza, five uniformed officers stood in front of his vehicle, "only a few feet to the passenger side of the vehicle's projected path." Id. at 474-75. Waterman coasted at about 11 miles per hour and then began "lurching or lunging forward" as he began to accelerate toward the toll plaza and the officers. Id. at 474 (internal quotation marks omitted). The officers shot at the vehicle, which avoided them by several feet as it passed. Id. at 475. The officers continued to fire on Waterman as he drove away. Id. Waterman sustained five gunshot wounds and died from his injuries. Id.

As we explained, "the reasonableness of an officer's actions is determined based on the information possessed by the officer at the moment that **force** is employed." Id. at 481 (emphasis added). Based on that principle, we concluded that "**force** justified at the beginning of an encounter is not justified even seconds later if the justification for the initial **force** has been eliminated." Id. We distinguished when Waterman's car was passing the officers—finding that they reasonably feared for their safety at that point—from when Waterman's car had passed them—finding that the danger had also passed. Id. at 482. The shots fired at Waterman after he had passed the officers in his car constituted excessive **force**. Id. At that point, the officers and bystanders were not endangered by Waterman's vehicle. Id.

A similar distinction between two sets of gunshots can be made here. Like the officers in Waterman, Price was in danger when he fired the first shot because he was directly in front of the vehicle. But just seconds later, he was on the passenger side of the vehicle and thus was no longer in danger of being hit. The other officer, Snyder, was similarly not threatened when Price fired the second time. As our decision in Waterman demonstrates, these types of fine distinctions must be made to give proper effect to the Fourth Amendment's prohibition on excessive **force**.

Indeed, the overall circumstances in this case were less dangerous than in Waterman. There, the officers fired at Waterman in the context of a high-speed chase. Here, however, Krein's vehicle was effectively trapped by the troopers'

vehicle and Krein was not driving at a high speed. Viewing the evidence in the light most favorable to Krein, Price and Snyder were not at serious risk of being struck by Krein's vehicle when Price fired the second shot. As such, Price's second shot violated the clearly established law this Circuit set out in Waterman.

FIFTH CIRCUIT:

Davis Ex Rel. JTT v. Romer (5th Cir. 2015)
Fort Worth Police Officer J. Romer ("Romer") was attempting to arrest Charal Thomas ("Thomas"), who was sitting in the driver's seat of his vehicle. Although there was a warrant for his arrest, Thomas refused to exit his vehicle and submit to a lawful arrest. Romer reached inside the driver's window, and Thomas suddenly began driving away. Romer then jumped on the vehicle's running board and ordered Thomas to stop the vehicle, but Thomas ignored the order and continued to drive toward the entrance to the freeway. After Thomas refused to stop the vehicle, Romer, who was still standing on the running board of the fleeing vehicle, fatally shot Thomas. Thomas's four children, three of whom were passengers in Thomas's vehicle, and an unrelated passenger brought this suit against Romer, alleging, among other things, excessive use of **force** in violation of the Fourth Amendment. The district court granted summary judgment after determining that Romer was entitled to qualified immunity. Because we conclude that there was no constitutional violation in Romer's use of **deadly force**, we affirm the district court's judgment.

On February 28, 2011, undercover officers observed Thomas leaving a house that was believed to be involved with drug trafficking. Those officers then observed Thomas committing traffic infractions while driving and called uniformed patrol officers to make a traffic stop. Thomas was driving his Ford Expedition in Fort Worth, Texas. His front seat passenger was Cordell Davis ("Davis"), and three of Thomas's minor children were seated in the second row. Officer Romer and Officer C.C. Drew ("Drew") stopped Thomas based on the alleged misdemeanor traffic violations. While Thomas waited in the vehicle, the officers ran his driver's license through the computer and discovered outstanding misdemeanor traffic warrants.

Standing by the driver's door, Drew informed Thomas that they were going to arrest him and asked him to exit his vehicle. Thomas refused, and Drew attempted to open the driver's side door. Romer reached inside the vehicle through the driver's side window in an attempt to unlock the door. With Romer's arm inside the

vehicle, Thomas starting driving to the left toward the exit of the parking lot and then onto the service road alongside the freeway. When the vehicle starting moving, Romer jumped on the running board. Although Romer and Davis were both shouting for Thomas to stop the vehicle, he continued driving. As the vehicle was traveling on the highway's service road, Romer, who was standing on the vehicle's running board, pulled his gun from the holster and fatally shot Thomas. Upon hearing the gunshots, Davis jumped out of the moving vehicle from the passenger side and was injured as he fell to the ground. The vehicle then came to a stop in the driveway of a residence along the service road.

In 2013, Davis and Thomas's four minor children (each acting through a next friend) brought suit against Romer, individually and in his official capacity as a police officer, and the City of Fort Worth. The plaintiffs alleged excessive use of **force** in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983 and various state law claims.

Qualified Immunity from Excessive Force Claim

Appellants contend that the district court erred in granting Romer summary judgment based on his defense of qualified immunity. "To determine whether a defendant is entitled to qualified immunity, this Court engages in a two-pronged analysis, inquiring (1) whether the plaintiff has alleged a violation of a constitutional right and, if so, (2) whether the defendant's behavior was objectively reasonable under clearly established law at the time the conduct occurred." *Hampton v. Oktibbeha Cnty. Sheriff Dep't,* 480 F.3d 358, 363 (5th Cir. 2007) (citing *Easter v. Powell,* 467 F.3d 459, 462 (5th Cir. 2006)). "If the plaintiff fails to state a constitutional claim or if the defendant's conduct was objectively reasonable under clearly established law, then the government official is entitled to qualified immunity." *Id.* (citing *Easter,* 467 F.3d at 462). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd,* ___ U.S. ___, 131 S. Ct. 2074, 2085 (2011) (internal quotation marks and citation omitted). "Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to show that the defense is not available." *Kovacic v. Villarreal,* 628 F.3d 209, 211 (5th Cir. 2010).

Appellants contend that Officer Romer violated the Fourth Amendment by using excessive **force**. The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. Here, it is undisputed that Romer's use of **deadly force** against Thomas constituted a seizure.

Accordingly, Appellants "need only show that the use of **deadly force** was excessive, and that the excessiveness of the **force** was unreasonable." *Thompson v. Mercer,* 762 F.3d 433, 437 (5th Cir. 2014) (citations and internal quotation marks omitted). However, an officer's use of **deadly force** is not unreasonable when the officer has reason to believe that the "suspect poses a threat of serious harm to the officer or others." *Id.* (citations and internal quotation marks omitted). We must determine the reasonableness of the use of **force** "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard,* ___ U.S. ___, 134 S. Ct. 2012, 2020 (2014) (citation and internal quotation marks omitted).

Appellants' principal argument is that Romer's conduct caused the dangerous encounter. Specifically, Appellants contend that "Romer's life was in danger because of his own intervening actions of attempting not once but twice, to grab a hold of a moving vehicle when Romer had a choice not to do so." Blue brief at 14. Appellants contend that the district court erred in interpreting this Court's precedent to limit its analysis to the circumstances existing at the moment Romer shot Thomas. Recently, this Court has rejected the same argument. In *Thompson v. Mercer,* an officer ended a two-hour high-speed chase by fatally shooting the suspect with an assault rifle. 762 F.3d at 436. The Thompsons argued that the officers created the danger in their attempts to intercept the fleeing vehicle driven by the suspect. *Id.* at 439. This Court held that such an argument was "wholly without merit," explaining that it had "consistently rejected similar reasoning." *Id.* at 439-40. This Court explained that the "question is not whether the **force** would have been avoided if law enforcement had followed some other police procedures." *Id.* at 440 (citations and internal quotation marks omitted). Instead, the Court explained that "regardless of what had transpired up until the shooting itself, the question is whether the officer [had] reason to believe, at that moment, that there was a threat of physical harm." *Id.* (citation and internal quotation marks omitted) (alteration in original). This Court concluded that it was the fleeing driver and not the officer "who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice that [the officer] had to make." *Id.* (citation and internal quotation marks omitted) (alteration added). Accordingly, this Court held that the officer's shooting of the suspect did not violate the Fourth Amendment. *Id.*

In *Rockwell v. Brown,* police officers were called because a mentally ill individual had threatened suicide and barricaded himself in his room. 664 F.3d 985, 989 (5th Cir. 2011). The individual refused to leave the room, and the officers decided that because he was a threat to himself and his family, they were going to arrest him.

Id. When the officers breached the bedroom door, the individual was wielding two eight-inch knives and rushed out of his room toward the officers. The officers fatally shot him. Relying on precedent from other circuits, the decedent's family asked this Court to consider the circumstances surrounding the breach of the bedroom door in determining the reasonableness of the officers' use of **deadly force**. *Id.* at 992. This Court found the argument unavailing, explaining that at the time the officers used **deadly force**, the decedent was armed, and the officers had a reasonable belief that he posed an imminent risk of serious harm. *Id.* at 993. Indeed, this Court stated that "[w]e need not look at any other moment in time." *Id.*; *see also* *Harris v. Serpas,* 745 F.3d 767, 772 (5th Cir. 2014) (explaining that "any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive **force** inquiry in this Circuit").

Additionally, in *Fraire v. City of Arlington,* a police officer fatally shot the driver of a truck that was headed toward the officer. 957 F.2d 1268 (5th Cir. 1992). The plaintiffs alleged that the officer may not have followed established police procedure in identifying himself while in plain clothes. *Id.* at 1275. The gist of their argument was that the officer's failure to follow procedure "manufactured the circumstances that gave rise to the fatal shooting." *Id.* This Court explained that "regardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm." *Id.* at 1276. Thus, the **force** was not excessive and the officer was entitled to qualified immunity.

Appellants recognize the above precedent and seek to distinguish it, stating that Davis and the minor children testified that Romer's arm was not trapped in the window as Romer claims. Brief at 13. Appellants asserted at oral argument that Romer should have made the "better decision . . . to let [Thomas] go." Appellants argue that Romer caused the danger by jumping on the running board of the vehicle. In other words, their argument is that instead of jumping on the vehicle Romer should have moved away from the fleeing vehicle. Appellants' argument that the "officer[] could have moved away from the car is, unfortunately, a suggestion more reflective of the `peace of a judge's chambers' than of a dangerous and threatening situation on the street." *Ramirez v. Knoulton,* 542 F.3d 124, 130 (5th Cir. 2008) (quoting *Elliott v. Leavitt,* 99 F.3d 640, 643 (4th Cir. 1996)). Viewing the evidence in the light most favorable to Appellants, there is testimony that Romer removed his arm from the window after Thomas began driving toward the service road. Nonetheless, this does not constitute a genuine issue of material fact because Appellants' brief concedes that Romer's arm was inside the vehicle at the time Thomas began driving away. Brief at 17. Moreover, the evidence,

including Davis's testimony, demonstrates that Thomas's driving away with Romer's arm inside the vehicle and Romer subsequently jumping on the vehicle's running board occurred very rapidly. Under such chaotic, dangerous circumstances, Appellants have not shown that Romer's conduct was objectively unreasonable. As previously discussed, **the definitive question is whether Romer had a reasonable belief that Thomas posed a risk of serious harm at the time Romer used deadly force. Appellants have conceded that Romer was on the running board of the fleeing vehicle when he fired the fatal shots. We therefore conclude that at the time of the shooting, Romer had reason to believe that there was a serious threat of physical harm to him.**

Nonetheless, Appellants argue that Romer did not kill Thomas in an act of self-preservation. Instead, Appellants claim Romer's "actions were motivated by a violent and sadistic rage to kill Charal Thomas when he left the scene of a traffic stop." *Id.* at 10. However, the "reasonableness inquiry is objective: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Rockwell,* 664 F.3d at 991 (citation and internal quotation marks omitted). Thus, Romer's subjective intent is irrelevant to the reasonableness determination.

Appellants further attempt to distinguish the above-discussed precedent, stating that unlike those cases, in the instant case, Thomas was unarmed. The Supreme Court has held that it is constitutionally unreasonable to use **deadly force** on an unarmed suspect by shooting him while he was fleeing on foot. *Tennessee v. Garner,* 471 U.S. 1 (1985). This is because the officer "could not reasonably have believed" that the suspect "posed any threat," and the officer "never attempted to justify his actions on any basis other than the need to prevent an escape," *Id.* at 21. That case is inapposite. Here, the testimony and the diagram of the scene demonstrate that Romer was standing by the driver's door when Thomas suddenly drove to the left with Romer's arm inside the vehicle. Moreover, it is undisputed that Romer was standing on the running board of the vehicle as it was being driven on the service road and headed toward the freeway. Clearly, Thomas's actions put the officer in harm's way, and there was a very real danger that Romer would sustain serious injury or death. Thus, unlike in *Garner,* Thomas's actions were posing a threat to Romer at the time of the shooting.

Additionally, Appellants contend that the **force** was unjustified because the warrants for Thomas's arrest were for outstanding misdemeanor traffic violations and not for the commission of any felony. Brief at 16. This Court has rejected just

such an argument, explaining that the important question is whether the suspect is "dangerous or benign" and "not whether the suspect is suspected of committing a felony or a misdemeanor." *Fraire,* 957 F.2d at 1276 n.29. Appellants also point to the fact that Romer fired 12 rounds as opposed to a single shot in self-defense. Blue brief at 13-14 (citing *Fraire,* 957 F.2d 1275). The Supreme Court has rejected the argument that an officer's firing of 15 rounds constituted excessive **force** because "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff,* 134 S. Ct. at 2022.

Accordingly**, because Romer's use of force was objectively reasonable, Appellants have not shown a Fourth Amendment violation. Thus, Appellants cannot show that Romer's use of deadly force was objectively unreasonable under clearly established law at the time the incident occurred**. *Cf. Brosseau v. Haugen,* 543 U.S. 194 (2004) (per curiam) (holding that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to others in the immediate area). The district court properly granted summary judgment as to the Fourth Amendment claim based on qualified immunity.

Manus v. Webster County et al, 2014 WL 1285946 (N.D. Miss. March 31, 2014) (Aycock, J.)
http://scholar.google.com/scholar_case?case=8687024841608008657&q=Manus+v.+Webster+County,+MS&hl=en&as_sdt=4,345

Excessive Force

Claims of excessive force used by law enforcement officials "in the course of making an arrest, investigatory stop, or other `seizure' of [a plaintiff's] person . . . are properly analyzed under the Fourth Amendment's `objective reasonableness' standard, rather than under a substantive due process standard." Graham v. Connor, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). When a plaintiff asserts claims for both unlawful arrest and excessive force, the Court must "analyze the excessive force claim without regard to whether the arrest itself was justified." Deville, 567 F.3d at 167 n.7 (quoting Freeman v. Gore, 483 F.3d 404, 417 (5th Cir. 2007)).

"[T]o state a violation of the Fourth Amendment prohibition on excessive force, the plaintiff must allege: (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need, and (3) the use of force that was

objectively unreasonable." Bush v. Strain, 513 F.3d 492, 500-01 (5th Cir. 2008) (citing Flores v. City of Palacios, 381 F.3d 391, 396 (5th Cir. 2004)). "The objective reasonableness of the force . . . depends on the facts and circumstances of the particular case, such that the need for force determines how much force is constitutionally permissible." Id. (citing Ikerd v. Blair, 101 F.3d 430, 434 (5th Cir. 1996)). "Specifically, the court should consider `the severity of the crime at issue, 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.'" Id. (quoting Graham, 490 U.S. at 396, 109 S. Ct. 1865). Importantly, an officer's subjective intent is irrelevant. Graham, 490 U.S. at 397, 109 S. Ct. 1865 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

Plaintiffs argue that Defendants used excessive force in arresting Manus. In his deposition, Manus testified that he had just taken a shower and was in his bedroom getting dressed when his mother knocked on the door and told him law enforcement was there and wanted to speak with him. Manus testified that he did not immediately exit the room because he was putting on his clothes but that he did voluntarily exit his bedroom after Deputy Kilgore threatened to break down the door. Manus further testified that he was willing to go with Deputy Kilgore until he spun him around and threw him up against a door facing. At that point, according to Manus, he "kind of got away from [Deputy Kilgore] a little bit," and then Deputy Kilgore tased him. Manus testified that he retreated into his bedroom and that Deputy Kilgore and Deputy May called for backup because they thought he had a knife.

According to Manus, Sheriff Smith arrived and broke down the door to Manus' bedroom, and then, when Manus stood up, Deputy Kilgore handcuffed Manus' hands behind his back. Manus testified that after he was handcuffed, Sheriff Smith hit him in the back of the neck with a bat and then again as he was falling to the ground.[9] Manus also claims that Mathiston Police Chief Roger Miller had arrived and sprayed him in the face with mace as he was falling, that Deputy May tased him on the knee with a hand taser while he was handcuffed, and that Sheriff Smith dropped down onto Manus' neck with his knee with a large amount of force

while Manus was lying handcuffed on the ground. Manus testified that he did not resist the officers.

With regard to Deputy Kilgore, Manus testified that he tased him before Manus was handcuffed and after he "got away" from Deputy Kilgore. Manus also testified that Deputy Kilgore thought he had a knife, though Manus claimed the object was actually a cellphone. Thus, according to Manus' own testimony, at the time Deputy Kilgore tased him, he was resisting arrest and Deputy Kilgore thought he posed a serious threat. Plaintiffs have not demonstrated a genuine issue of material fact as to whether Deputy Kilgore's use of his taser was "clearly excessive to the need." Ikerd, 101 F.3d at 433-34. Further, even if Deputy Kilgore's use of the taser did constitute excessive force, he is entitled to qualified immunity because his actions were not objectively unreasonable under clearly established law at the time of the incident. See Buchanan v. Gulfport Police Dep't, 2012 WL 1906523, at *9-10 (S.D. Miss. May 25, 2012) ("where the suspect is resisting arrest or disobeying the officers' orders, tasing may not be considered excessive force") (collecting cases), aff'd, 530 F. App'x 307 (5th Cir. 2013).

As to Deputy May, Manus testified that he was not resisting the officers and had his hands handcuffed behind his back when Deputy May deployed a hand taser on his knee. Five years before this incident, the Fifth Circuit held that a law enforcement officer was not entitled to qualified immunity where the officer tased someone who was not resisting arrest, was committing only a minor crime, and posed no threat to the officer or others. Autin v. City of Baytown, 174 F. App'x 183, 186 (5th Cir. 2005). The Fifth Circuit held that the three factors outlined in Graham were clearly established such that a reasonable officer would be charged with the knowledge that they "tend to indicate whether the use of force is appropriate." Id. Likewise, a reasonable officer in 2010 would have known that the Graham factors weighed against the use of a taser on a handcuffed suspect who posed little risk to officers or others and who was not resisting arrest. Accordingly, the Court finds that Plaintiffs have demonstrated a genuine issue of material fact with regard to whether Deputy May violated Manus' clearly established rights through the use of excessive force. Therefore, Deputy May is not entitled to qualified immunity, and summary judgment is not proper.

Similarly, genuine issues of material fact prevent the granting of summary judgment in favor of Sheriff Smith. Manus testified in his deposition that Sheriff Smith hit him in the back of the neck with a bat twice, that Sheriff Smith landed

with force on his neck with his knee, and that he was handcuffed and compliant at all times. Again, the Court finds that no reasonable officer could have believed that hitting an arrestee who is handcuffed and not resisting arrest with a bat or slamming a knee down onto that arrestee's neck constituted reasonable force in light of the Graham factors. Thus, Sheriff Smith is not entitled to qualified immunity from Plaintiffs' claims of excessive force, and summary judgment is not appropriate.[10]

Bystander Liability

It is undisputed that Webster County Jailer/Dispatcher Shay Holmes was not present at the scene when Manus was arrested, and Plaintiffs have not alleged that Holmes used or witnessed excessive force against Manus at any time. Therefore, she cannot be liable for Plaintiffs' claims of excessive force, and summary judgment as to those claims is appropriate with regard to Holmes. However, Plaintiffs contend Eupora Police Chief Gregg Hunter, Eupora Officer Keith Crenshaw, and Mathiston Officer Shane Box are liable for witnessing the use of excessive force by the other officers and failing to prevent or stop it, though they are not alleged to have used force against Manus themselves.

The Fifth Circuit has held that "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983." Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995) (citation omitted). Further, "[t]he fact that [officers] [a]re from different law enforcement agencies does not as a matter of law relieve [them] from liability for a failure to intervene." Id. "[L]iability under § 1983 can attach when the bystander officer `had a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it.'" Deshotels v. Marshall, 454 F. App'x 262, 268 (5th Cir. 2011) (citing Hale, 45 F.3d at 919).

Municipal Defendants concede a genuine issue of material fact exists as to whether Chief Miller witnessed Sheriff Smith hit Manus with a bat such that he might be liable as a bystander. However, it is undisputed that Officer Box never entered Manus' residence and did not witness the alleged use of excessive force by the other officers. Thus, he cannot be liable under a theory of bystander liability, and summary judgment as to Plaintiffs' excessive force claims against him is appropriate. See Whitley v. Hanna, 726 F.3d 631, 648 (5th Cir. 2013) (officers who were not in the presence of officer alleged to have used excessive force were "not bystanders for purposes of a bystander liability claim.").

With regard to Chief Hunter and Officer Crenshaw, Manus testified in his deposition that they were both in his bedroom but he only saw them as he was being escorted out and that he did not know if they were there the entire time or when they arrived. However, Lois Manus testified that Chief Hunter and Officer Crenshaw stood on either side of Manus' bedroom door during the alleged use of excessive force against Manus. She testified that when Chief Hunter and Officer Crenshaw arrived, Manus was on the floor with "Kilgore on top of him, May holding a taser to his knee, Roger Miller macing him, Phillip Smith standing over the top of him . . . ." She further testified that Manus was not resisting the officers while these events were taking place.

Whereas the Court has determined that a genuine issue of material fact exists as to whether Deputy May used excessive force against Manus and Municipal Defendants concede that a genuine issue of material fact exists with regard to Chief Miller's alleged use of excessive force, the Court finds that Plaintiffs have likewise raised a genuine issue of material fact as to whether Chief Hunter and Officer Crenshaw witnessed the use of excessive force against Manus and failed to take reasonable steps to protect him. Further, as it is undisputed that Sheriff Smith, Chief Miller, Deputy May, and Deputy Kilgore were in the bedroom at all times during the altercation, genuine issues of material fact also exist with regard to whether each of these officers likewise witnessed the use of excessive force by others and failed to protect Manus.

Hale was decided in 1995, fifteen years prior to the incident at issue. 45 F.3d 914. Therefore, the duty of an officer to take reasonable measures to protect a suspect from another officer's use of excessive force in his presence was clearly established at the time of the incident such that a failure to do so would have been objectively unreasonable. See id. at 919. Accordingly, Chief Hunter, Officer Crenshaw, Sheriff Smith, Deputy May, Chief Miller, and Deputy Kilgore are not entitled to qualified immunity, and summary judgment is improper as to Plaintiffs' claims against them for excessive force based upon a theory of bystander liability.

Further, in light of Manus' testimony that Webster County Dispatcher/Deputy Toby Britt and Deputy May were present when Officer Jackson allegedly used excessive force against him, these Defendants may be liable for failing to "take reasonable measures to protect" Manus. Id. Whereas the Court has determined that such a duty was clearly established at the time of the incident at issue, Britt and Deputy May are not entitled to qualified immunity, and summary judgment is improper as to

Plaintiffs' excessive force claims against them based upon a theory of bystander liability.

Manus v. Webster County et al (N.D. Miss. May 28, 2014) (Aycock, J.)
http://scholar.google.com/scholar_case?case=11839569514492218790&q=Manus+v.+Webster+County,+MS&hl=en&as_sdt=4,345

Bystander Liability — Excessive Force

The Court first addresses Defendants' argument that the Court erred by finding a genuine issue of material fact as to whether Hunter and Crenshaw witnessed the use of excessive force by other officers against Manus and failed to take reasonable steps to protect him.

As the Court has stated, the evidence presented in this case is highly contradictory. Each party describes the events of September 7, 2010 differently and many contradict not only other witnesses but also their own testimony and/or statements. Given the many conflicts within the summary judgment record, it is exceedingly important for the Court to be ever mindful of its duty at this stage of litigation to draw any inferences and resolve any disputes of material facts in favor of Plaintiffs. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Little, 37 F.3d at 1075. The Supreme Court very recently highlighted the importance of this principle in Tolan v. Cotton, 13-551, 2014 WL 1757856 (U.S. May 5, 2014). In that case, the Supreme Court articulated that, even in the context of qualified immunity, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." Tolan, 13-551, 2014 WL 1757856, at *4 (U.S. May 5, 2014).

Thus, viewing the evidence in the light most favorable to Plaintiffs, the Court finds no basis for reconsidering its denial of summary judgment and qualified immunity with regard to Plaintiffs' claim of bystander liability for excessive force against Hunter. Manus testified that "somebody" from Eupora was in the room at the time Webster County Sheriff Phillip Smith allegedly hit him with a bat. While this testimony would be insufficient on its own to overcome Hunter's assertion of qualified immunity, Manus also specifically testified that Hunter was in his bedroom.[4] Further, Webster County Deputy Kilgore testified in his deposition that Hunter arrived at the scene before the officers entered Manus' bedroom, and both he and Webster County Deputy May stated in writing shortly after the

incident that Hunter was present before the officers entered Manus' bedroom. Hunter also testified that he was in the room when Manus was handcuffed, and Manus testified that the bat attack occurred after he was handcuffed. Both Manus and Lois Manus testified that Hunter was still on the scene when the officers removed Manus from the residence.

Though disputed by other testimony, this evidence creates a genuine issue of material fact for trial as to whether Hunter witnessed the entire alleged incident at issue, including Smith hitting Manus with a bat and forcefully landing on his neck with his knee, as well as Mathiston Police Chief Roger Miller macing and Webster County Deputy Derek May tasing Manus, all while Manus was compliant and nonresistant. Whereas the Court has determined that such acts would have constituted excessive force and that it would have been objectively unreasonable in light of the clearly established law at the time to witness these acts but fail to intervene to protect Manus, the Court declines to reconsider its denial of qualified immunity and summary judgment in favor of Hunter on this claim. Further, as Hunter was the Chief of Police for the City of Eupora at the time of the incident, the Court likewise declines to reconsider its denial of summary judgment in favor of the City of Eupora.

However, upon reconsideration, the Court agrees that Plaintiffs failed to establish a genuine issue of material fact as to whether Crenshaw witnessed Smith hit Manus with a bat. Unlike Hunter, there is no evidence specifically placing Crenshaw at the scene before the officers entered Manus' room. Manus testified that Crenshaw was in his bedroom at some point but that he did not know when he arrived. However, Manus also testified that Crenshaw was not in the bedroom at the time Smith hit him with a bat. Crenshaw testified in his deposition that he arrived in his personal vehicle just after Hunter but that he never entered the residence because the other officers were already escorting Manus out of the residence. Lois Manus testified that Crenshaw and Hunter arrived at the same time but approximately ten to fifteen minutes after Smith hit Manus with the bat. As the Court has stated, Manus' testimony that "somebody" from Eupora was in his bedroom at the time Smith hit him with the bat, standing alone, is not enough to raise a genuine issue of material fact as to whether Crenshaw witnessed Smith hitting Manus with a bat. See Little, 37 F.3d at 1075 (In rebutting summary judgment motion, nonmovant's "burden is not satisfied with `some metaphysical doubt as to the material facts,' . . . or by only a `scintilla' of evidence.").

Still, the record evidence does place Crenshaw in the residence at some point before the conclusion of the incident at issue. Lois Manus testified that Crenshaw saw Miller spraying mace in Manus' face and May tasing Manus on the leg while Manus was lying on the ground, handcuffed and not resisting. Miller conceded that a genuine issue of material fact exists as to whether his conduct constituted excessive force and did not assert a defense of qualified immunity as to Plaintiffs' claim against him. Additionally, the Court determined that May was not entitled to qualified immunity at the summary judgment stage because a genuine issue of material fact existed as to whether May had committed the conduct alleged such that he violated Manus' clearly established constitutional right to be free from excessive force. Whereas the Court determined that the duty of an officer who is present at the scene to take reasonable measures to protect a suspect from another officer's use of excessive force was clearly established at the time of the incident at issue and Lois Manus testified that Crenshaw did not attempt to stop Miller or May, the Court found that Crenshaw was not entitled to qualified immunity as to Plaintiffs' claim against him based upon a theory of bystander liability.

Defendants now argue that the Court erred because Crenshaw did not have a reasonable opportunity to realize the excessive nature of the force being used against Manus or a realistic opportunity to intervene. While the Court is bound to view the evidence on summary judgment in the light most favorable to the nonmovant, it is the plaintiff's burden to rebut a defendant's assertion of qualified immunity. Michalik v. Hermann, 422 F.3d 252, 258 (5th Cir. 2005). "To prevail, a plaintiff must present evidence that, viewed in the light most favorable to him, presents a genuine issue of material fact that (1) the defendant's conduct amounts to a violation of the plaintiff's constitutional rights; and (2) the defendant's actions were `objectively unreasonable in light of clearly established law at the time of the conduct in question.'" Estate of Cheney ex rel. Cheney v. Collier, 13-60082, 2014 WL 1133564, at *1 (5th Cir. Mar. 24, 2014) (per curiam) (quoting Cantrell v. City of Murphy, 666 F.3d 911, 922 (5th Cir. 2012)).

Lois Manus testified that she followed Hunter and Crenshaw down the hall when they arrived at the residence and that she saw Manus lying on the floor face up with his hands behind his back with Miller macing and May tasing him. She further testified that Manus was not resistant or fighting and was completely quiet. She testified that when she saw this she yelled, "They are killing my son." According to Lois Manus, at that point, the officers in the room picked Manus up and escorted him out of the house. In isolation, this testimony would seem to show

only that Crenshaw came upon acts already in progress and that the officers engaging in those acts ceased their conduct almost immediately. However, Manus testified that, although he didn't know where Crenshaw was when he was on the ground, Crenshaw was in his bedroom, leaning against his dresser, when the officers picked him up from the floor following the alleged use of excessive force. Further, Lois Manus also testified in her deposition that Crenshaw and Hunter had "perched" on either side of the door and looked into the bedroom when she decided to follow them down the hall to see what was happening, and Manus testified that after May tased him and "before [they] got up out of the floor, Smith dropped down real hard on [his] neck." These statements contradict the conclusion that the officers ceased their use of excessive force immediately upon Crenshaw's arrival on the scene, before he could assess the situation and intervene.

Thus, the Court, drawing all inferences in favor of Plaintiffs, finds Plaintiffs' have submitted sufficient evidence to create genuine issues of material fact as to whether Crenshaw entered the room prior to the conclusion of the incident at issue, whether Crenshaw arrived on the scene in time to realize the excessive nature of the force allegedly being used against Manus, and whether Crenshaw failed to intervene to protect Manus, despite having the opportunity to do so. Accordingly, though the Court agrees upon reconsideration that Plaintiffs failed to establish a genuine issue of fact as to whether Crenshaw witnessed Smith hit Manus with a bat, the Court nevertheless declines to reconsider its denial of summary judgment and qualified immunity with regard to Crenshaw on the basis that other genuine issues of material fact exist which preclude a determination that Crenshaw's actions were objectively reasonable.

Estate of Manus v. City of Eupora et al. (N.D. Miss. March 31, 2015)(Aycock, C.J.)

Bystander Excessive Force

The Fifth Circuit has held that "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983." Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995) (citation omitted). Further, "[t]he fact that [officers] [a]re from different law enforcement agencies does not as a matter of law relieve [them] from liability for a failure to intervene." Id. "[L]iability under § 1983 can attach when the bystander officer `had a reasonable opportunity to realize the excessive nature

of the force and to intervene to stop it.'" Deshotels v. Marshall, 454 F. App'x 262, 268 (5th Cir. 2011) (citing Hale, 45 F.3d at 919).

In the case at bar, the Court has found that Miller and Hunter went to Manus' residence on the day in question in response to May's call for assistance claiming that Manus had a knife. When they arrived, Manus was in a bedroom refusing to comply with commands to come out into the hallway. The Court has additionally found that, once Kilgore kicked down the bedroom door, Manus resisted the officers and tried to keep them from handcuffing him. Miller and Hunter witnessed May tase Manus, Kilgore and Smith physically struggle and attempt to restrain Manus, and Hunter witnessed Miller mace Manus. Once the officers were able to place Manus in handcuffs, they picked him up and escorted him out of the residence.

Based on the Court's finding that Manus resisted the officers and failed to comply with their commands throughout this altercation, the Court cannot say that Hunter and Miller witnessed use of force against Manus that they had a reasonable opportunity to realize was excessive and that they failed to intervene despite having a reasonable opportunity to do so. Deshotels, 454 F. App'x at 268 (citation omitted). Therefore, the Court finds in favor of Defendants with regard to Plaintiffs' claims against Hunter and Miller, in their individual and official capacities, and the cities of Eupora and Mathiston based upon a theory of bystander liability.

SIXTH CIRCUIT:

Pollard v. City of Columbus, (6th Cir. 2015)

On July 7, 2009, a rape suspect led Columbus, Ohio police officers on a highway car chase before crossing the median, accelerating the wrong way, and ramming head on into a semitrailer. Officers surrounded the suspect's car and fatally shot the suspect after he reached down into the car, despite police commands to "show his hands," and then clasped his hands into a shooting posture, pointing them at the officers. The suspect's mother, Kathryn Pollard, brought a 42 U.S.C. § 1983 suit against the officers, alleging excessive force in violation of the Fourth Amendment. We reverse the district court's denial of qualified immunity because the suspect's conduct gave the officers probable cause to believe the suspect had a gun and thereby posed a threat of serious physical harm. …

Here, the totality of the circumstances clearly gave the officers probable cause to believe Bynum threatened their safety. The officers knew from police radio that Bynum was wanted on serious rape charges and was potentially armed, and they were told he had a concealed-carry permit. That Bynum was actually unarmed and did not have a permit is beside the point; what matters is the reasonableness of the officers' belief as they "did not and could not have known" otherwise. *See* Reese v. *Anderson,* 926 F.2d 494, 501 (5th Cir. 1991). Additionally, the officers knew Bynum was determined to avoid arrest, even at the expense of others' safety and his own life. In fact, Bynum was so determined to avoid arrest he chose to engage in a high-speed car chase and drive head-on into a semitrailer rather than surrender. Bynum "had proven he would do almost anything to avoid capture." *Smith v. Freland,* 954 F.2d 343, 347 (6th Cir. 1992). As such, the officers could reasonably "assume he would not stop at threatening others." *Id.*

Pollard suggests Bynum did not "pose any threat after his vehicle collided head on with [the] tanker trailer, as he sat (apparently unconscious) in his disabled vehicle, without a weapon." Appellee Br. at 41. But the officers did not shoot Bynum while he sat unconscious in the Cadillac. They shot *after* a dramatic change in circumstances — after Bynum regained consciousness and made gestures suggesting he had a weapon, gestures he continued to make even after officers told him to "Drop it" and "Don't do it." It is these facts immediately preceding the shooting which weigh most heavily in assessing the officers' split-second decision to shoot. *See Greenidge v. Ruffin,* 927 F.2d 289, 792 (4th Cir. 1991), *cited with approval in* Dickerson, 101 F.3d at 1162.

The "tense, uncertain and rapidly evolving" nature of the altercation with Bynum is apparent from the video. *See* *Graham,* 490 U.S. at 397. When the officers think Bynum is unconscious, they approach without hesitation, peering through the windows and attempting to open the car doors. Then suddenly, the officers all take a pronounced step back, startled by something inside the Cadillac. As the officers attest, what startled them was Bynum's sudden movement, forcing them to quickly assess the threat Bynum posed and to quickly conclude that Bynum posed a threat even in his injured, immobilized state. If Bynum had a gun, as the officers reasonably thought he did, they were at risk of serious injury or death and thus could reasonably consider Bynum a threat. *See* *Freland,* 954 F.2d at 347 ("[H]ad [the suspect] in fact retrieved a gun from his seat, he could have caused injury or death despite the presence of numerous police officers." (quoting *Reese,* 926 F.2d at 501). Because the undisputed record shows the officers had probable cause for believing that Bynum posed a threat of serious harm, the use of deadly force was

constitutionally permissible. Accordingly, we reverse the district court's denial of qualified immunity.

Goodwin v. City of Painesville, No. 14-3120 (6th Cir. Mar. 19, 2015), http://scholar.google.com/scholar_case?case=12859798216669745860&q=Goodwin+v.+City+of+Painesville,+No.+14-3120+(6th+Cir.+Mar.+19,+2015).&hl=en&as_sdt=3,25

In this excessive force/qualified immunity decision recently affirmed by the Sixth Circuit, the lower court had before it the testimony of the tasering officer who had failed to activate his recording device during a confrontation with an intoxicated apartment resident, an failure that violated the city police department policy of recording citizen encounters. Moreover, the tasering officer has previously been warned about his failure to use a recording device during another citizen encounter, indicating an apparent pattern of avoiding documentation of his actions, facts that undercut his credibility when the trial court engaged in a fact-intensive analysis of the Graham factors in determining whether the officer's actions were objectively reasonable.

The Sixth Circuit upheld the denial of qualified immunity to individual officers in a §1983 suit predicated on claims of excessive force in which the central issue was "whether an intoxicated misdemeanant, who had not been placed under arrest and who had neither fled nor resisted, had a right not to be tasered twice in his own home for a total of 26 seconds." Police responding to a noise complaint at an apartment complex tasered the host of a party in two segments totaling 26 seconds while they handcuffed him, after the host became agitated at the police presence and refused to leave his apartment as the officers had requested. Following the tasing, the host foamed at the mouth and began convulsing, was hospitalized for two weeks and ultimately suffered permanent brain damage due to oxygen deprivation and now requires 24-hour supervision. The Court refused to find the host was resisting arrest, and charges of disorderly conduct initially lodged by the police were dropped, and the Court refused to find the host was resisting arrest.

The Sixth Circuit affirmed the lower court's denial of a motion for summary judgment on the qualified immunity defense, noting that whether an officer's force was excessive requires the court to determine whether an officer's actions were "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. The three factors from Graham v. Connor, 490 U.S. 386, 397 (1989), frame the analysis: (1) "the severity

of the crime at issue, here a disturbance of the peace due to noise form a party; (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, for which sufficient conflicting evidence on credibility of testimony made this an issue for the jury, which the jury determined against the officer, and (3) whether he [wa]s actively resisting arrest or attempting to evade arrest by flight," the Court finding that the host/suspect's refusal to step outside after a single request to do so was only passive resistance and not sufficient to support the use of a Taser. Further, the Court found that the host's failure to immediately comply with any order during and immediately after the tasering was not resistance. The first tasering that took place when the host refused to produce his arms for handcuffing as requested lasted 21 seconds, which the city conceded was an atypically long period, and the tasering officer was trained on the Taser and knew or should have known that a typical tasering is five seconds, that a tasering of 15 seconds or longer is considered "prolonged," that tasering directly to the chest increases to the subject, and that involuntary muscle contraction is a result of tasering.

In denying qualified immunity to the officer who administered the tasing, the Sixth Circuit addressed the continued tasering of the host, first for 21 seconds based on a simple refusal to exit his own home and surrender the Fourth Amendment protections it provides, and again for five seconds under circumstances that the Court refused to characterize as resistance since the host after the initial tasering was "obviously convulsing and powerless to respond to the officers' commands."

Addressing the prolonged tasering incident, the Sixth Circuit observed:

Considering the facts of the incident taken in the light most favorable to the plaintiff, the constitutional question is whether as of June 26, 2010 it was a clearly established violation of a suspect's constitutional rights to subject him to a prolonged tasering after he had stopped resisting officers' efforts to arrest him. Caselaw reveals that such a right was clearly established.

The Officers contend that Officer Soto is entitled to qualified immunity not just on his initial decision to taser Mr. Nall, but for the duration of the first and second tasering on the basis that there is no clearly established law stating that a suspect has a right to be free of more than one Taser application when the suspect "objectively, reasonably appears to resist arrest." Officer Soto claims that he made a reasonable mistake of fact about how long his Taser would discharge when triggered and that Mr. Nall objectively appeared to resist arrest during the tasering. But as discussed in Section III.A.1, Officer Soto had been trained that

electricity would continue to flow past the five second mark, and Ms. Nall testified that Officer Soto stood over Mr. Nall and continued tasering him as he was obviously convulsing and powerless to respond to the officers' commands.

Though it is the Nalls' version of the facts that govern our inquiry here, even if a jury were to credit the Officers' account of events concerning Mr. Nall's alleged initial resistance in the doorway, it could still determine that the extended tasering of Mr. Nall was gratuitous because it extended far past the point that he had ceased resisting. In 2008, this court held that "the gratuitous or excessive use of a taser" violates a clearly established constitutional right.

…. We acknowledge that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. In some contexts this would counsel against holding an officer to a standard where it is necessary to evaluate changes in a suspect's behavior over a period of seconds, but with a Taser seconds count. Officer Soto had been trained about the potentially grave consequences of prolonged application, especially to the chest area. Furthermore, by Plaintiffs' account the change in Mr. Nall's physical state was drastic and immediately apparent to Officer Soto. On these facts, it is reasonable to hold the officer accountable for noting changes in Mr. Nall's physical state over the 26-second tasering period.

Because Mr. Nall had a clearly established constitutional right not to be tasered when he was at most offering passive resistance to an officer, and because he also had a clearly established constitutional right not to be gratuitously tasered after ceasing all resistance to the officers, we affirm the district court's denial of summary judgment with respect to Mr. Nall's excessive force claim against Officer Soto.

The lower court had noted during its summary judgment analysis of objective reasonableness of the tasering officer's conduct under Graham v. Connor that
1. the tasering officer had "failed to activate his recording device during the incident, in violation of the Painesville Police Department policy of recording citizen encounters" and that "[t]his was not the first time."
2. The officer "had already been warned about his failure to use a recording device during an earlier citizen encounter.
3. According to the lower court, the jury could weigh the tasering officer's "apparent pattern of avoiding documentation of his actions against his credibility."

The Sixth Circuit concluded that there was sufficient evidence under which the jury could reasonably find that the tasering officer violated the host's Fourth Amendment right to be free from excessive force, since the prolonged tasering of the host was severe, the officer's training indicated that it lasted well into the risky period and that the taser probes were in a position that could cause breathing problems during extended application. Applying the Graham factors to the facts taken in the light most favorable to the host and plaintiffs on motion for summary judgment, (1) the host's crime was not serious, (2) there was little basis to believe the host was a threat to the officers or others, (3) the host's initial resistance was at most a passive refusal to comply with a single request to leave his residence, and (4) it was objectively apparent that the host's failure to present his hands to be cuffed was due to Taser-induced involuntary convulsions.

SEVENTH CIRCUIT:

Helman v. Duhaime ,742 F. 3d 760 (7th Cir. 2014)

On April 9, 2009, members of the Indiana State Police arrived at Helman's residence to execute warrants for his arrest. They spoke with his brother Michael Helman, and explained that they were there to arrest Helman, who was in the home with his mother. The officers hoped to negotiate a peaceful surrender. Michael Helman then spoke with Helman in the home before departing the residence. Around noon, Helman exited the home and spoke with United States Marshal Brent Cooper and Sergeant Duhaime concerning lawsuits that Helman had filed in federal court. In response to the officers' questions as to whether he was armed, Helman pulled up his shirt to reveal that he was wearing a .45 caliber semi-automatic handgun. Helman then handed paperwork to the officers and returned to his residence. The officers informed the other members of the Indiana State Police that Helman was carrying a loaded firearm.

A stalemate ensued for approximately 6 hours, after which time Helman again exited the house to meet with law enforcement officers. This time, as Helman walked into his backyard carrying water and a coffee cup in his hands, the Indiana State Police Emergency Response Team (the ERT) moved in behind Helman to prevent him from retreating again into his home. The ERT then activated a flash bang device to distract Helman. At this point, the sequence of events becomes less clear. According to the district court opinion, Helman turned in response to the

commotion caused by the flash bang device, and upon seeing the ERT, attempted to draw his handgun. At that time, the officers fired shots at Helman, hitting him multiple times. Those facts, however, were identified by the district court as those supported by the defendants' evidence of record. But on a summary judgment motion by the defendants, we must take the facts and reasonable inferences in the light most 762*762 favorable to the plaintiff. Helman asserts that when the flash bang device detonated, he turned but he did not reach for his weapon until after that device went off and shots were fired at him.

Subsequently, Helman was charged in state court with Resisting Law Enforcement under Ind.Code § 35-44-3-3. Although resisting law enforcement is normally a Class A misdemeanor, Helman's use of a deadly weapon elevated it to a Class D felony. Helman pled guilty to that charge, acknowledging at the plea hearing that he "did knowingly or intentionally forcibly resist, obstruct or interfere with a law enforcement officer while the officer was lawfully engaged in the execution of the officer's duties and while committing said offense ... attempted to draw a deadly weapon."

Helman now argues that the defendant officers violated his rights under the Fourth and Fourteenth Amendments of the Constitution in using excessive force against him, and has sued under 42 U.S.C. § 1983 for redress. He asserts that as a result of their actions, he incurred medical and hospital expenses and suffered injuries that are permanently disabling.

The first issue that we must address is the defendants' argument that Helman is precluded from bringing this § 1983 action under Heck v. Humphrey, 512 U.S. 477, 486, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). In Heck, the Court held that a district court must dismiss a § 1983 action if a judgment in favor of the plaintiff in that § 1983 action would necessarily imply the invalidity of his criminal conviction or sentence. Id. at 487, 114 S.Ct. 2364; Skinner v. Switzer, ___ U.S. ___, 131 S.Ct. 1289, 1298, 179 L.Ed.2d 233 (2011). But if the claim, even if successful, will not demonstrate the invalidity of the conviction, then the § 1983 action should be allowed to proceed. Id.

In Evans v. Poskon, 603 F.3d 362 (7th Cir.2010), we addressed the ability of a plaintiff to proceed on a § 1983 excessive force claim where that plaintiff had been convicted of resisting arrest, and held that the plaintiff can only proceed to the extent that the facts underlying the excessive force claim are not inconsistent with the essential facts supporting the conviction. The police in that case burst into Evans' home because they believed he was attempting to strangle someone, and

arrested him after a struggle. He was convicted of attempted murder and resisting arrest. Id. at 363. Evans subsequently brought an action under § 1983 alleging that the officers violated the Fourth Amendment by using excessive force during and after the arrest. We held that Evans could not maintain a § 1983 action premised on the claim that he did not resist being taken into custody, but could proceed on claims that the police used excessive force in effecting custody or after doing so. Id. at 364; see also Burd v. Sessler, 702 F.3d 429, 433-35 (7th Cir.2012); Moore v. Mahone, 652 F.3d 722, 723 (7th Cir.2011). The latter claims were not inconsistent with his conviction for resisting arrest. Therefore, in considering whether Heck requires dismissal, we must consider the factual basis of the claim and determine whether it necessarily implies the invalidity of Helman's conviction. To the extent that factual allegations do not do so, Helman may proceed under § 1983.

In this case, the only viable theory of § 1983 liability is Helman's theory that he did not attempt to draw his weapon until after shots were fired at him. That theory is inconsistent with his conviction for Resisting Law Enforcement under Ind.Code § 35-44-3-3.

We begin by considering that criminal provision. The language of Ind.Code § 35-44-3-3 provides that "[a] person who knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer ... while the officer is lawfully engaged in the execution of [his] duties ... commits resisting law enforcement...." Cases interpreting that provision have held that the officer is not "lawfully engaged in the performance of his duties" if he is employing excessive force, and therefore a person who reasonably resists that force cannot be convicted under that provision. Shoultz v. State of Indiana, 735 N.E.2d 818, 823-25 (Ind.App. 2000). Accordingly, Helman would not be criminally liable under that statute if he attempted to draw his weapon in response to excessive force. It follows, then, that the criminal conviction under that statute necessarily entails a finding that at the time he drew his weapon, he did not face the use of excessive force by the officers.

Helman's § 1983 action, however, is premised upon the assertion that he drew his weapon only in response to the officers' use of excessive force. Specifically, he asserts that when the flash bang device detonated, he had a cup of coffee and a bottle of water in his hands. He maintains that he did not reach for his gun until after the officers began firing at him, and that they fired at him only because he possessed a weapon, not in response to any action by him in reaching for it. In fact, he argues to this court that the transcript of his guilty plea does not contain any admission that he reached for his gun prior to being shot.

The problem is that Helman's version of the facts would necessarily imply the invalidity of his state court conviction for resisting law enforcement. It would have been objectively unreasonable for officers to open fire on a person who was not reaching for a weapon or otherwise acting in a threatening manner, and therefore the officers would have been employing excessive force if they did so. Graham v. Connor, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (the Fourth Amendment reasonableness inquiry is an objective one, determined in light of the facts and circumstances confronting the officers, without regard to their underlying intent or motivation); Common v. City of Chicago, 661 F.3d 940, 943 (7th Cir.2011). If Helman attempted to access the gun only after the officers began firing at him, then Helman would have been attempting to draw a deadly weapon in response to excessive force. Accordingly, under Heck, Helman may not pursue a § 1983 claim premised upon that factual scenario.

Helman is left, then, with an argument under § 1983 that the officers violated his Fourth Amendment rights in shooting him when he was reaching for his firearm. That claim, however, cannot survive summary judgment because such a response is objectively reasonable. In fact, Helman does not even argue that he could pursue a § 1983 claim under such scenario. The district court properly held that Helman was precluded by his conviction from pursuing this § 1983 action. The decision of the district court is AFFIRMED.

McKnight v. City of Evansville (S.D. Indiana 2015)
http://scholar.google.com/scholar_case?case=16349523054835067137&q=deadly+force+&hl=en&as_sdt=4,112,127,268,269,270,271,272,314,315,331,332,333,334,335,377,378&as_ylo=2015

Read in the light most favorable to Plaintiff, the facts here do not conclusively establish that Officer Taylor shot McKnight in the objectively reasonable belief that doing so was necessary to protect himself from imminent danger of serious harm. Because Plaintiff offers no evidence contradicting it, we must accept as true Taylor's assertion that he subjectively believed McKnight was holding a gun as he stood on the porch.[8] Defs.' Br. ¶ 77; Pl.'s Ex. A (Taylor Dep.) at 34:13-21. An issue of fact exists, however, regarding whether it was reasonable for an officer in Taylor's circumstances to believe that McKnight was armed. When McKnight's body was recovered shortly after the shooting, he was found with a phone—whose silver and black colors matched those of the gun Taylor thought he saw—but no gun.[9] Defs.' Br. ¶ 106. It is clear that earlier in the standoff McKnight had possessed a gun, which he had used to fire several shots out the house's windows (one of which hit a police car), and to shoot himself in the foot. But the only gun

discovered in the house was found upstairs, and McKnight's body lay on the house's ground floor, id. at ¶¶ 102, 107; the most natural inference from these facts is that McKnight was holding a phone, not a gun, when he was standing on the porch. We conclude that this is sufficient to place the reasonableness of Taylor's evident belief in dispute, and at this stage we have insufficient evidence with which to resolve the question. The size and shape of the phone McKnight was holding, the lighting conditions, Taylor's exact distance from McKnight and the nature of his line of sight, and the manner in which McKnight was holding the phone are all unclear—and all will likely prove relevant in determining whether the belief that officers were in imminent danger of harm was justified by the circumstances. See Clash v. Beatty, 77 F.3d 1045, 1047 (7th Cir. 1996).

It is clear, however, that none of the circumstance of the standoff—other than McKnight's putative possession of a gun—would furnish grounds for a reasonable use of deadly force.[10] According to the undisputed facts, McKnight remained motionless while standing on the porch. Defs.' Br. ¶¶ 81, 87; Taylor Dep. at 34-35 ("[H]e is leaned over with this blank thousand yard stare on his face and he is just looking at us . . . . I said, `Drop the gun,' and as I finished my drop the gun, he had still not moved or even blinked it seemed like."). He did not threaten any of the police officers, nor did he make any physically threatening movements or advance towards them. Cf. DeLuna, 447 F.3d at 1011-1012 (granting summary judgment where suspect, who turned out to be unarmed, made an enigmatic threat and advanced towards the police officer, lunging forward as the police officer stumbled to the ground). We recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Abbott, 705 F.3d at 724 (quoting Graham, 490 U.S. at 397). But while the standoff with McKnight was undoubtedly tense and uncertain, the facts do not show that it was "rapidly evolving"; at the moment Taylor shot him, McKnight stood just as motionless as he had been in previous moments. Without discounting the "leeway" we are instructed to afford police officers' decision-making, see Baird v. Renbarger, 576 F.3d 340, 344 (7th Cir. 2009), we cannot help but consider that the (relatively) static nature of the standoff should enter into the multi-factor analysis of the reasonableness of Taylor's conduct.

The undisputed facts establish that Taylor's decision to shoot and kill McKnight was only within Fourth Amendment bounds if Taylor reasonably believed McKnight to have been armed—and thus an imminent threat to the responding officers. But McKnight was apparently unarmed, and we lack sufficient facts at this stage to determine whether Taylor's contrary belief was reasonable. The

existence of this crucial question of fact enables Plaintiff to withstand summary judgment on the question of whether McKnight suffered a violation of his Fourth Amendment rights.

Marshbanks v. City of Calumet City (N.D. Ill. 2015)
http://scholar.google.com/scholar_case?case=7511375088074153004&q=deadly+force+&hl=en&as_sdt=4,112,127,268,269,270,271,272,314,315,331,332,333,334,335,377,378&as_ylo=2015

On the evening of April 20, 2012, the Undisputed Car Club (the "Club") was hosting a party at the What's Up Bar and Grill on Torrence Avenue in Calumet City. (Id. ¶ 5.) The Club, of which Chambers was a member, is an organization of individuals who own and drive Chevy Impala or Pontiac Grand Prix automobiles. (Id. ¶¶ 6, 9.) At approximately 1:48 a.m. on April 21, 2012, the Calumet City Police Department's dispatch center received multiple 911 calls of shots being fired at the What's Up Bar and Grill. (Id. ¶ 24.) The Calumet City Police Department dispatcher announced to the police officers on duty that shots were fired and that a subject was down. (Id. ¶ 25.) The dispatchers also announced that they were hearing gunshots at the scene as they were putting the call out and Defendant Officers either heard shots from their vehicles or over the radio dispatch as they drove to the scene. (Id. ¶ 26.) The dispatcher did not give Defendant Officers a physical description of the shooter(s) during the dispatch call. (Id. ¶ 27; R. 158, Pl.'s Rule 56.1 Stmt. Add'l Facts ¶ 4.)

When it was announced that shots had been fired, Club members Geno Powers and Chambers were inside the What's Up Bar and Grill, and, upon hearing the news, Powers, Chambers, and several other individuals ran outside. (Defs.' Stmt. Facts ¶ 28.) Upon exiting the bar, Powers and Chambers went to the south side of the parking lot where they saw two Club members, Willie White and Michael Harris, both of whom were lying on the ground. (Id.)

The Calumet City Police Department is about four blocks from the What's Up Bar and Grill. (Id. ¶ 32.) Defendant Officers, who were all near the bar, took approximately one to two minutes to get to the scene after receiving the dispatcher's call. (Id.) Defendant Officers were in marked squad cars and were wearing full police uniforms. (Id. ¶ 33.) Also, Defendant Officers used their emergency lights and sirens while en-route to the bar. (Id.) When Defendant Officers arrived, there were at least 150 people in the parking lot. (Id. ¶ 39.) The people in the parking lot were screaming and the scene was chaotic. (Id.) When Defendant Officers reached the parking lot, they tried to control the crowd. (Pl.'s

Stmt. Facts ¶ 5.) At that time, people pointed to the two injured men on the ground, namely, Harris and White. (Defs.' Stmt. Facts ¶ 41.) Defendant Officer Gerstner then approached Harris and informed him that an ambulance was on the way. (Id. ¶ 42.) At that time, Harris did not tell Defendant Officers who had shot him. (Id.) Meanwhile, White was unconscious. (Id. ¶ 41.) In addition, there is evidence in the record that an individual at the scene of the shooting told Defendant Officer Lucius that the shooter(s) left the scene in a gray car traveling south on Torrence Avenue. (Pl.'s Stmt. Facts ¶ 7; R. 148-18, Lucius Dep., at 86-88, 91.)[1]

Thereafter, Chambers emerged from between two parked vehicles and fired two to three shots in the air in the presence of Defendant Officers. (Id. ¶ 12; Defs.' Stmt. Facts ¶ 43.) When Defendant Officer Fisher observed him, Chambers' arm was straight up in the air and when Defendant Officer Gerstner observed him, Chambers was about four to five car lengths away. (Id. ¶ 44.) Also, at that time, Defendant Officer Lucius saw a muzzle flash straight up in the air. (Pl.'s Stmt. Facts ¶ 11.) It is undisputed that Chambers did not discharge his weapon when it was level. (Id. ¶ 18.)

The parties dispute whether Defendant Officers gave Chambers any commands after Chambers fired the shots in the air, although several Defendant Officers and Powers testified that the officers told Chambers to drop his weapon. (Id. ¶¶ 14, 15; Defs.' Stmt. Facts ¶¶ 47, 48.) Also, the parties dispute whether Chambers dropped his gun at that time, although two Defendant Officers testified that Chambers drop his gun after certain Defendant Officers discharged their weapons at Chambers. (Pl.'s Stmt. Facts ¶¶ 16, 17, 18, 23, 26; Defs.' Stmt. Facts ¶¶ 50-52.) It is undisputed that the Defendant Officers who saw Chambers drop his gun did not tell any of the other officers or yell at the officers to stop shooting. (Pl.'s Stmt. Facts ¶ 21.)

Chambers then ran to a nearby fence on the south side of the parking lot that was approximately six feet tall, grabbed the top of the fence with both hands, and pulled himself over. (Pl.'s Stmt. Facts ¶¶ 20, 37; Defs.' Stmt. Facts ¶¶ 51, 56.) It is undisputed that Chambers did not have a gun in his hand when he climbed the fence, yet at least one Defendant Officer fired at Chambers when he was at the top of the fence. (Pl.'s Stmt. Facts ¶¶ 39, 40.) Chambers' body then dropped straight to the ground on the other side of the fence. (Id. ¶ 42.) Defendant Officers went to the other side of the fence, and, when they arrived they discovered that Chambers was dead. (Defs.' Stmt. Facts ¶¶ 57, 58.) No gun was found on Chambers' body. (Pl.'s Stmt. Facts ¶ 43.) Also, Defendant Officer Lucius testified that Chambers did not shoot at the police officers. (Id. ¶ 45.) In addition, it is undisputed that at no time

while Chambers was running toward the fence did he act as if he was going to fire at the police officers. (Id. ¶ 46.) Later, it was determined that Defendant Officers fired a total of 11-13 times at Chambers, including after he dropped his gun. (Id. ¶¶ 32, 34, 40, 50, 55; Defs.' Stmt. Facts ¶ 59.) Chambers' autopsy revealed that he suffered three gunshot wounds, including a wound to his chest, right hand, and left thigh. (Pl.'s Stmt. Facts ¶ 51.)

Plaintiff alleges a Fourth Amendment excessive force claim in Count I of the Second Amended Complaint.[2] "A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's `reasonableness' standard." Plumhoff v. Rickard, 134 S.Ct. 2012, 2020 (2014) (citing Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). In short, "[w]hen an officer stops or arrests an individual, some degree of physical force may be used, but the Fourth Amendment requires that the degree of force used be reasonable." Rabin v. Flynn, 725 F.3d 628, 636 (7th Cir. 2013). In Graham, the Supreme Court "held that determining the objective reasonableness of a particular seizure under the Fourth Amendment `requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" Plumhoff, 134 S.Ct. at 2023 (citation omitted). "In assessing whether an officer's use of force violates the Fourth Amendment, [courts] ask whether the officer's actions are objectively reasonable in light of the information known at the time of an arrest." Miller, 761 F.3d at 828-29. "This question turns on the `severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.'" Id. at 829 (quoting Graham, 490 U.S. at 396). Moreover, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 397.

Viewing the totality of the facts and circumstances Defendant Officers knew at the time of the shooting and construing the facts and all reasonable inferences in Plaintiff's favor, Plaintiff has set forth evidence creating a genuine factual dispute as to whether Defendant Officers used objectively reasonable force in their attempt to apprehend Chambers. See Anderson, 477 U.S. at 248 (genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). More specifically, Plaintiff has set forth evidence that once Defendant Officers arrived to the What's Up Bar and Grill's parking lot, they encountered a scene that was chaotic due to the earlier shooting of

two individuals. At that time, an individual told Defendant Officer Lucius that the shooters had driven away in a gray car traveling south on Torrence Avenue. Thereafter, Defendant Officers encountered Chambers, who had walked between cars in the parking lot and fired shots straight up in the air. Although the parties dispute whether Defendant Officers gave Chambers any commands after he fired the shots, there is evidence in the record that Chambers dropped his gun at that time or shortly thereafter. There is also evidence in the record that Defendant Officers fired at Chambers approximately 11-13 times, including after he dropped his gun and while he was running toward the fence. That Chambers dropped his gun is supported by the fact that it is undisputed that he did not have a gun while he was climbing the fence and no gun was found on Chambers' body after he jumped the fence. Moreover, there is evidence in the record that Chambers did not shoot at the police and it is undisputed that at no time while Chambers was running toward the fence did he act as if he was going to fire at the police officers. Indeed, he had already dropped his gun. Construing these facts and all reasonable inferences in Plaintiff's favor, Defendant Officers' use of deadly force after Chambers dropped his gun was not objectively reasonable—even though Chambers was fleeing the scene—because evidence suggests that Chambers did not pose an immediate threat to the police officers or the crowd at that time. See Graham, 490 U.S. at 396.

Citing Brosseau v. Haugen, 543 U.S. 194, 197-98, 125 S.Ct. 596, 160 L.E.2d. 583 (2004) (per curiam), Defendant Officers argue that because they had probable cause to believe that Chambers posed a threat of serious physical harm, it was not unreasonable to prevent his escape by using deadly force. See also Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985) (use of deadly force to prevent escape only justified if officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the police or others"). Because Brosseau's holding is the in context of the affirmative defense of qualified immunity, the Court turns to Defendant Officers' qualified immunity arguments.

"Even when a public official's actions have violated a plaintiff's constitutional rights, the official can escape liability if the right was not clearly established at the time of the violation." Findlay v. Lendermon, 722 F.3d 895, 899 (7th Cir. 2013). In other words, "[t]he doctrine of qualified immunity protects government officials from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Humphries v. Milwaukee Cnty., 702 F.3d 1003, 1006 (7th Cir. 2012) (quotation marks and citation omitted). To fulfill this standard, a plaintiff must show that the right is clearly established such that "the contours of the right

are sufficiently clear that a reasonable official would understand that what he is doing violates that right." Findlay, 722 F.3d at 899 (citation omitted). A plaintiff can demonstrate that a right is clearly established by identifying a "closely analogous case that the established right to be free from this type of force the police officers used on him" or by showing "that the force was so plainly excessive that, as an objective matter, the police officers would have been on notice that they were violating the Fourth Amendment." Id. (citation omitted). As the Seventh Circuit teaches, "[q]ualified immunity is supposed to protect officers in the close case, and it therefore must apply to the officer's snap judgment in a legally hazy area." White v. Stanley, 745 F.3d 237, 241 (7th Cir. 2014).

Keeping in mind that police officers often make quick decisions in tense situations, a police officer's use of deadly force to apprehend an unarmed individual is not a "legally hazy area." As the Supreme Court held in 1985, "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Garner, 471 U.S. at 11. Therefore, at the time Defendant Officers discharged their firearms at Chambers, it was clearly established that "[a]n officer's use of deadly force to apprehend a suspect is unreasonable, absent probable cause that the suspect is dangerous or has committed a violent crime." Jacobs v. City of Chicago, 215 F.3d 758, 774 (7th Cir. 2000) (citation omitted). Here, the factual disputes discussed above preclude a finding of qualified immunity at summary judgment. More specifically, viewing the facts and evidence in Plaintiff's favor, at least one Defendant Officer used deadly force after Chambers dropped his weapon and Chambers did not shoot at the police officers or the crowd creating a immediate threat of danger. Furthermore, a witness told one of the officers that the individuals who had committed the violent crime had departed from the scene. Defendant Officers' version of the facts, namely that Chambers' conduct was sufficiently threatening to warrant the use of deadly force, is a question for the jury to decide.

Accordingly, summary judgment is inappropriate under the circumstances because the parties tell different stories of what happened on April 21, 2012. Indeed, Defendant Officers' testimony is inconsistent, especially as to when Chambers dropped his gun and the circumstances leading up to Defendant Officers discharging their weapons. As the Seventh Circuit instructs, "since the Graham reasonableness inquiry `nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.'" Abdullahi v. City of Madison, 423 F.3d

763, 773 (7th Cir. 2005) (citation omitted). The Court therefore denies Defendants' summary judgment motion as Plaintiff's excessive force claim alleged in Count I.

Marshbanks v. City of Calumet City (N.D. Ill. 2015) (on motion to bifurcate Monell claim from other claims for discovery and trial purposes) http://scholar.google.com/scholar_case?case=5991745826913367153&q=deadly+force+&hl=en&as_sdt=4,112,127,268,269,270,271,272,314,315,331,332,333,334,335,377,378&as_ylo=2015

In Count II of the Second Amended Complaint, Plaintiff alleges that the Calumet City Police Department's policies and practices proximately caused Defendant Officers' unreasonable use of lethal force. (R. 77, Sec. Am. Compl. ¶ 51.) Plaintiff further alleges that "[t]hese widespread practices are allowed to flourish because the City directly encourages, and is thereby the moving force behind the very type of misconduct at issue by failing to adequately train, supervise, and control its officers, and by failing to adequately punish and discipline prior instances of similar misconduct, thus directly encouraging future abuses." (Id. ¶ 52.) In addition, Plaintiff asserts that these widespread practices constitute a policy where "misconduct is able to exist and thrive because final governmental policymakers with authority over the same exhibited deliberate indifference to the problem, thereby effectively ratifying it." (Id. ¶ 53.) Plaintiff contends that "Calumet City and its policy makers, including the Chief of Police, repeatedly disregard the explicit reporting requirements of the Use of Force General Order and it fails to convene a Use of Force Review Committee to review the reasonableness of an officer's use of lethal force." (Id. ¶ 54.)

From these allegations, Plaintiff is basing Calumet City's liability on the theory that the City failed to properly train, supervise, review, and discipline its police officers in the use of excessive and deadly force. See Connick v. Thompson, ___ U.S. ___, 131 S.Ct. 1350, 1359, 179 L.Ed.2d 417 (2011) ("In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983."); see also Canton v. Harris, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1029-30 (7th Cir. 2006)….

Turning to these factors, the nature of the constitutional violation at issue is a Fourth Amendment excessive force claim and Plaintiff alleges that Calumet City is liable due to its failure to properly train, supervise, review, and discipline its police officers in the use of excessive and deadly force. Under these circumstances,

Calumet City argues that "if Marshbanks fails to prove that Defendant Officers violated Chambers' constitutional rights, then she will not be able to prove that the City is liable for any alleged constitutional deprivation." (R. 174, Opening Mem., at 8.)

In response, Plaintiff states that she would "ordinarily" agree with this proposition, but explains:

[H]ere there were three officers who discharged their weapons. Plaintiff believes she will be able to present credible evidence that the fatal shot was fired by Officer Laster because he was the only officer using a .40 caliber gun and the projectile recovered from Decedent's body was from a .40 caliber firearm. However, it is entirely possible that Defendants may argue to a trier of fact that Plaintiff failed to prove by a preponderance of the evidence that a particular officer used excessive force.

For example, Officer Gerstner testified that he fired one shot at Decedent when he was a couple of feet from the fence and that Decedent's body did not react in a manner that would indicate Decedent was hit by the bullet. However, when asked to admit that the one shot fired by Officer Gerstner did not strike Decedent, Gerstner objected and asserted a lack of knowledge.

It is clear that Defendants want to have it both ways. They want to say that they do not know who shot Archie [Chambers] and that if the officers were not found liable that the City would not be liable. This is precisely the case where there are two gunshot wounds out of the three total that cannot be traced to an officer and Defendants may argue that the .40 caliber bullet did not come from Officer Laster. Under those circumstances, it is possible to have a scenario that was addressed in Thomas v. Cook County Sheriff's Department, 604 F.3d 293, 305 (7th Cir. 2009) (which held that a municipality may be held liable under Monell even when its officers are not, unless such a finding would create an inconsistent verdict). If Defendants are only going to argue that Officer Laster was justified in shooting Decedent off the fence when he was unarmed, then there is no issue, but if Defendants are going to argue that Plaintiff failed to identify the shooting officer, then the precedent in Thomas controls and Monell discovery should be allowed.

(R. 176, Resp. Brief, at 5-6.) (internal citations to the record omitted).

Calumet City does not meaningfully respond to Plaintiff's argument in its reply brief, but merely reiterates the arguments made in its opening memorandum. Calumet City, for example, does not deny that its theory of the case is that Plaintiff

cannot prove who shot Chambers, therefore, no one is liable for the deprivation of his Fourth Amendment rights. By not recognizing the nuance of Plaintiff's arguments, Calumet City has not sufficiently explained how the nature of the constitutional violation and the theory of municipal liability necessitate bifurcation under the circumstances.

Equally important, the individual Defendant Officers have asserted the affirmative defense of qualified immunity, which is significant to Court's analysis. As the Thomas decision explains-in the context of the facts in Heller-if the individual officer had asserted an affirmative defense, "the jury might have found that the plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable" because in "that case, one can still argue that the City's policies caused the harm, even if the officer was not individually culpable." Id. at 304. The Seventh Circuit clarified that "[w]ithout any affirmative defenses, a verdict in favor of the officer necessarily meant that the jury did not believe the officer violated the plaintiff's constitutional rights" and because "the City's liability was based on the officer's actions, it too was entitled to a verdict in its favor." Id. at 304-05. Here, because the individual Defendant Officers have asserted the affirmative defense of qualified immunity, Plaintiff has shown the possibility that holding Calumet City liable would not create an inconsistent verdict with a jury finding that Defendant Officers are not liable.[2]

Turning to the Rule 42(b) considerations, Calumet City argues that bifurcation will conserve judicial resources, including the need for extensive Monell discovery. As Plaintiff notes, however, the parties have conducted over twenty depositions in this matter, and, according to Plaintiff, some of deposition testimony reveals that certain Defendant Officers may not have adhered to the written general orders concerning the use of force and lethal force. Indeed, Calumet City admits in its opening brief that the parties have already completed extensive fact discovery in this matter. Furthermore, Plaintiff has indicated that Monell discovery could be conducted with the use of Rule 30(b)(6) witnesses and any witness who provides officer training. Therefore, Calumet City's argument that Monell discovery would require the parties to depose past and present Chiefs of Police, members of the Board of Police and Fire Commissioners, and possibly Calumet City's Mayor, is unavailing. Meanwhile, Plaintiff has propounded four interrogatories and numerous document requests related to Monell discovery. After reviewing this written discovery, the Court finds that it is not overly burdensome despite Calumet City's arguments to the contrary. Also, the parties are encouraged to work together during Monell discovery in the interests of curbing any burdensome tasks.

In addition, Calumet City's judicial economy argument is not persuasive because under the circumstances, bifurcation would result in two trials that would most likely involve many of the same witnesses and evidence. See 9A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2388 (3d Ed. 2008) ("The piecemeal trial of separate issues in a single lawsuit [] is not to be the usual course."). Finally, Calumet City's argument that the evidence against Calumet City will prejudice Defendant Officers is best cured by proper jury instructions and pre-trial evidentiary challenges. Accordingly, Calumet City has failed in its burden of demonstrating that the Rule 42(b) factors weigh in favor of bifurcation. See Real v. Bunn-O-Matic Corp., 195 F.R.D. 618, 620 (N.D. Ill. 2000).

For these reasons, the Court, in its discretion, denies Calumet City's motion to bifurcate Plaintiff's Monell claim from the other claims in this lawsuit for discovery and trial purposes.

NINTH CIRCUIT:

Contreras v. City of Los Angeles (9th Cir. 2015)
http://scholar.google.com/scholar_case?case=3284866358290337664&q=deadly+force&hl=en&as_sdt=3,25&as_ylo=2015

Plaintiff Robert Contreras sued Defendant LAPD Officers Julio Benavides and Mario Flores, under 42 U.S.C. § 1983, for using excessive **force** in violation of the Fourth Amendment. Defendants shot Plaintiff four times in the back, in the course of arresting him in connection with a drive-by shooting. A jury found in favor of Plaintiff and awarded him $5.725 million in damages. Defendants timely appeal from the district court's denial of their motions to dismiss and for judgment as a matter of law. Reviewing de novo, we affirm. …

Plaintiff introduced evidence that (1) he was shot in the back despite Defendants' claim that Plaintiff was facing them and threatening them with a gun and (2) no gun was recovered from the scene. Viewing the facts in the light most favorable to the verdict, sufficient evidence supports the jury's rejection of Defendants' theories of self-defense and defense of others. See A.D. v. Cal. Highway Patrol, 712 F.3d 446, 457 (9th Cir.) (holding that "the jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict"), cert. denied, 134 S. Ct. 531 (2013).

Defendants are not entitled to qualified immunity because the law was clearly established that shooting an unarmed, physically trapped suspect in the back four times is excessive **force**. Tennessee v. Garner, 471 U.S. 1, 11 (1985). Plaintiff's 20-

second flight from the police is not like the one-hour flight of the armed plaintiff in Forrett v. Richardson, 112 F.3d 416, 421 (9th Cir. 1997), superseded by rule on other grounds as stated in Chroma Lighting v. GTE Prods. Corp., 127 F.3d 1136 (9th Cir. 1997) (order). Moreover, Plaintiff introduced evidence that, although it was feasible to do so, Defendants did not warn Plaintiff before using **deadly force**, and the verdict demonstrates that the jury believed that evidence. See Garner, 471 U.S. at 11-12.

TENTH CIRCUIT:

Aldaba v. Pickens, (10th Cir. 2015)
http://scholar.google.com/scholar_case?case=3888994315248398202&q=deadly+force&hl=en&as_sdt=3,25&as_ylo=2015

Plaintiff Erma Aldaba brought this 42 U.S.C. § 1983 action on behalf of her deceased son, Johnny Manuel Leija, who died after an altercation with Appellants—Officer Brandon Pickens and Deputies James Atnip and Steve Beebe—in the Oklahoma hospital where he was being treated for pneumonia. Plaintiff brought several claims against various defendants, including Appellants. The district court granted summary judgment in favor of the defendants as to all claims except Plaintiff's claim of excessive **force** against Appellants. As for this claim, the district court denied Appellants' request for summary judgment on the grounds of qualified immunity, holding there were numerous fact issues regarding the reasonableness of the officers' conduct that prevented summary judgment. Appellants then filed this interlocutory appeal.

The district court held that Mr. Leija was lawfully seized, since probable cause existed for taking him into protective custody based on his mental incompetence and the threat he posed to his own health. The court accordingly granted summary judgment in favor of the law enforcement officers on Plaintiff's unlawful seizure claim. However, the court held that the officers were not entitled to qualified immunity on Plaintiff's excessive **force** claim. The court held that there were several material disputed facts relating to the objective reasonableness of the **force** the officers applied to seize Mr. Leija. "Primarily, the record is in dispute as to the *degree* of resistance exhibited by Leija after being confronted by the officers." (*Id.* at 442.) The court noted the hospital surveillance footage of the encounter between Mr. Leija and the officers showed Mr. Leija simply walking away from the officers. The officers contended Mr. Leija began acting more aggressively after he moved out of the frame of the surveillance video. However, "[t]he gap in the video recording results in a failure to have an objective viewing of what transpired after

the time Leija walked away from the officers and up until the point where the officers are seen apprehending Leija [after he had already been tased and grabbed by the officers]." (*Id.* at 443.) The court also held that "[t]he testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during this critical gap in the video." (*Id.*) The court thus held that there was a material dispute of fact as to the nature and degree of Mr. Leija's resistance to the officers' attempts to seize him. The district court further concluded that the record was in dispute as to the threat Mr. Leija allegedly posed to the officers or the public, since he was an unarmed hospital patient and, while there was an allegation that he was using his blood as a weapon, there was no evidence that any of his blood was spattered on any of the officers. Finally, the court concluded there was a material dispute as to "[t]he officers' knowledge of [Mr. Leija's serious medical] condition—and their efforts to ascertain information about Leija's condition before attempting to use any degree of **force** on him." (*Id.*) The district court concluded that all of these material disputed facts precluded the issuance of summary judgment in favor of Appellants on Plaintiff's excessive **force** claim. This interlocutory appeal followed.**….**

In determining whether an officer's use of **force** was excessive, many cases have focused solely on the three factors specifically described in *Graham. See, e.g., Casey v. City of Fed. Heights,* 509 F.3d 1278, 1281 (10th Cir. 2007). However, these three factors were not intended to be exclusive, and the circumstances of a particular case may require the consideration of additional factors. This is especially true where a Fourth Amendment excessive-**force** claim arises out of a protective custody seizure rather than a criminal arrest, since the *Graham* factors are tailored to the criminal context and are unlikely to cover all of the pertinent circumstances in a protective custody case.

For instance, while the three factors listed in *Graham* may be sufficient to evaluate the "governmental interests at stake" in a typical criminal arrest case, *see Graham,* 490 U.S. at 396, an additional governmental interest may be implicated in cases involving protective custody seizures—the governmental interest in preventing a mentally disturbed individual from harming himself. *See Pino v. Higgs,* 75 F.3d 1461, 1468 (10th Cir. 1996) ("The state has a legitimate interest . . . in protecting a mentally ill person from self-harm.). The need to protect such persons from themselves is thus an additional factor that may weigh into our evaluation of the reasonableness of a particular use of **force** in such cases. Just as the weight of the second *Graham* factor varies based on the threat the subject poses to police officers and others, the weight of this additional factor will vary based on the severity and immediacy of the threat the individual poses to himself. When an individual poses

a more severe and immediate threat to himself, a higher level of **force** may be reasonable in order to seize him for protective custody purposes.

Two more additional factors may also be pertinent in determining the reasonableness of the **force** used for a seizure, particularly in the protective custody context. First, as we have previously acknowledged, "a detainee's mental health must be taken into account when considering the officers' use of **force**[,] and it is therefore part of the factual circumstances the court considers under *Graham.*" *Giannetti v. City of Stillwater,* 216 F. App'x 756, 764 (10th Cir. 2007). The Ninth Circuit has explained why an individual's mental or emotional disturbance should be considered in determining the reasonableness of a particular use of **force**:

The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of **force** may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal **force** will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. Even when an emotionally disturbed individual is `acting out' and inviting officers to use **deadly force** to subdue him, the governmental interest in using such **force** is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. . . . [W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham,* the reasonableness of the **force** employed.

Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (citations and footnotes omitted). This factor will weigh against the use of **force** most strongly where the mentally disturbed individual has committed no crime and poses a threat only to himself, since a seizure by **force** may well undermine the sole governmental interest supporting the seizure in such a case—the interest in protecting the mentally disturbed individual from harming himself. As the Ninth Circuit has noted, when "a mentally disturbed individual not wanted for any crime . . . [i]s being taken into custody to prevent injury to himself[, d]irectly causing him grievous injury does not serve that objective in any respect." *Drummond ex rel. Drummond v. City of Anaheim,* 343 F.3d 1052, 1059 (9th Cir. 2003).

Second, the reasonableness of a particular use of **force** depends in part on whether the law enforcement officers knew or should have known that the individual had special characteristics making him more susceptible to harm from this particular use of **force**.

For instance, in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001), we found the use of hog-tie restraints to be unreasonable when officers know or should be on notice that the subject has diminished capacity and is accordingly more likely to experience positional asphyxia from the use of such restraints. We explained:

We do not reach the question whether all hog-tie restraints constitute a constitutional violation per se, but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.

Id. at 1188. This factor is particularly pertinent when the reason for seizing an individual is to ensure he receives the necessary medical treatments for his compromised physical condition. In such a case, law enforcement officers should be especially sensitive to the likelihood that a particular use of **force** may do more harm than good. We note in particular that the use of tasers and similar electronic control devices may be counterproductive, at best, to the goal of ensuring that a mentally and medically compromised individual is restored to health. *See Rosa v. Taser Int'l, Inc.,* 684 F.3d 941, 948 n.6 (9th Cir. 2012) (noting that a 2009 notice issued by Taser International warned law enforcement officers using electronic control devices "to pay special attention to `physiologically or metabolically compromised' suspects, including those with cardiac disease and the effects of drugs," since their bodies are at a greater risk of harm from such devices).

These three additional factors, as well as the three *Graham* factors, are all pertinent to our analysis of the law enforcement officers' seizure of Mr. Leija in this case. We consider all of these factors in order to "careful[ly] balanc[e] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake" as required by *Graham,* 490 U.S. at 396.

The first additional factor applicable to this case—the severity and immediacy of the threat Mr. Leija posed to himself—weighs in favor of the application of some **force**, if necessary, in order to protect Mr. Leija from the threat he posed to himself. According to the facts identified by the district court, Officer Pickens was informed that Mr. Leija could die if he left the hospital, and Mr. Leija was clearly delusional and mentally disturbed. Mr. Leija thus posed both an immediate and a severe threat to himself, and the government had an interest in seizing Mr. Leija in order to ensure he received the necessary medications he was refusing as a result of his disturbed mental state.

However, the other additional factors pertinent to this case weigh against the level of **force** employed here, and particularly against the officers' use of a taser. Mr. Leija was clearly delusional and mentally disturbed, which weighs against the reasonableness of the officers' decision to employ such a severe level of **force** against him. *See* *Cavanaugh v. Woods Cross City,* 625 F.3d 661, 664 (10th Cir. 2010) ("Although Tasers may not constitute **deadly force**, their use unquestionably `seizes' the victim in an abrupt and violent manner," making the nature and quality of the intrusion on the victim's Fourth Amendment interests "quite severe."). When faced with a mentally ill individual, a reasonable police officer should make a "greater effort to take control of the situation through less intrusive means." *Bryan v. MacPherson,* 630 F.3d 805, 829 (9th Cir. 2010).

A mentally ill individual is in need of a doctor, not a jail cell. . . . [T]he purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of **force** that may be justified by that interest necessarily differs in both degree and in kind from the use of **force** that would be justified against a person who has committed a crime or who poses a threat to the community.

Id. (internal quotation marks omitted). The situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and tasers.

Mr. Leija's compromised physical condition also weighs against the types of **force** employed in this case. A use of **force** that might be reasonable against an apparently healthy individual may be unreasonable when employed against an individual whose diminished capacity should be apparent to a reasonable police officer. *See* *Cruz,* 239 F.3d at 1188. Here, taking the facts in the light most favorable to Plaintiff, the officers were on notice that Mr. Leija was gravely ill and

thus was very likely to have diminished capacity. This factor thus weighs against the reasonableness of the officers' decision to tase and wrestle to the ground a hospital patient whose mental disturbance was the result of his serious and deteriorating medical condition.

Furthermore, the first two *Graham* factors weigh against the use of **force** in this case. Taking the facts in the light most favorable to Plaintiff, Mr. Leija did not commit any crime, much less a severe crime, and he posed no threat to the police officers or anyone else. Thus, the only governmental interest weighing in favor of the use of **force** in this case is the interest in protecting Mr. Leija from the threat he posed to himself, as discussed above.

Finally, the third *Graham* factor also weighs against the officers' actions in this case. Under this factor, a higher level of **force** may be employed when the subject is actively resisting or attempting to evade arrest by flight. In cases where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established. ...

Here, Deputies Atnip and Beebe claimed that Mr. Leija refused to comply with their orders to calm down and get on his knees, even after they warned him that he would be tased. Ms. Aldaba disputes that any such orders or warnings were rendered, but we must "take, as given, the facts that the district court assumed when it denied summary judgment," *Morris,* 672 F.3d at 1189 (internal quotation marks omitted). Moreover, based on all of the facts, we can at least infer that Mr. Leija knew the police were there to coax him back into his room for treatment and that he resisted in this regard. Indeed, the hospital surveillance video shows that just after he exited his room, Mr. Leija waved off Officer Pickens and slowly walked away, signaling that he understood the officers wanted him to return to his room. As the officers contend, these facts indicate some level of resistance. However, viewing the facts in Plaintiff's favor, nothing suggests Mr. Leija's resistance was anything more than passive. *See Bryan,* 630 F.3d at 830 ("Resistance . . . should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer." (internal quotation marks omitted)); *see also Mattos v. Agarano,* 661 F.3d 433, 450 (9th Cir. 2011) (en banc) ("[W]e draw a distinction between a failure to facilitate an arrest and active resistance to arrest."). The

analysis thus turns to whether the officers' use of **force** was commensurate with Mr. Leija's level of resistance.

In that regard, Deputy Beebe made the initial showing of **force** by tasing Mr. Leija. The surveillance video does not capture the first taser strike, but Deputy Atnip and Officer Pickens can be seen moments later grabbing Mr. Leija's arms and pushing him against a wall. Deputy Beebe then tases Mr. Leija a second time before the officers bring him to the floor and attempt to handcuff him. On appeal, the parties raise several arguments regarding the struggle that followed the initial taser strike. However, we need not address these arguments because we conclude that Plaintiff has sufficiently demonstrated an excessive **force** violation based on the officers' initial decision to tase Mr. Leija, which precludes summary judgment in favor of Appellants on Plaintiff's excessive **force** claim.[2]

Taking the facts in the light most favorable to Plaintiff, Deputy Beebe was not justified in tasing Mr. Leija as an initial use of **force** given the resistance he was exhibiting up to that point and the fact that the only governmental interest supporting the seizure was the interest in protecting Mr. Leija from the threat he posed to himself. *See Abbott v. Sangamon Cnty.,* 705 F.3d 706, 730 (7th Cir. 2013) (holding that passive non-compliance without active resistance does not justify substantial escalation of **force**); *cf. Hinton,* 997 F.2d at 781 (finding no violation where officers first grabbed non-compliant subject and then used stun-gun after the subject began actively and openly resisting officers' attempts to handcuff him). Moreover, while Officer Pickens and Deputy Atnip did not themselves tase Mr. Leija, it is clearly established in this circuit that "[a]n officer who fails to intervene to prevent a fellow officer's excessive use of **force** may be liable under § 1983." *Fogarty v. Gallegos,* 523 F.3d 1147, 1162 (10th Cir. 2008). Thus, Officer Pickens and Deputy Atnip may be found liable for their decision not to intervene after it became clear that Deputy Beebe intended to tase Mr. Leija.

Taking the facts in the light most favorable to Plaintiff, a jury could find that Appellants violated Mr. Leija's constitutional rights by employing such a severe level of **force** against him despite their knowledge of his mental instability, his serious medical condition, and the fact that he had committed no crime and posed a threat only to himself. We accordingly affirm the district court's conclusion that Appellants are not entitled to summary judgment on Plaintiff's excessive **force** claim.

Having held that the alleged facts regarding the initial taser strike would be sufficient to establish an excessive **force** claim, we must turn to the question of

whether the law was clearly established at the time of the alleged violation. *See Allstate Sweeping, LLC v. Black,* 706 F.3d 1261, 1267 (10th Cir. 2013). Under *Graham,* the analysis of an excessive-**force** claim is necessarily fact-specific, and thus prior cases do not need to involve all of the same factual circumstances or factors in order for an excessive **force** violation to be clearly established. *See Casey,* 509 F.3d at 1284. Rather, we use a sliding scale in which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Morris,* 672 F.3d at 1196 (internal quotation marks omitted).

In several previous cases, we have examined the reasonableness of taser use in general without discussing the specific ramifications of law enforcement's use of tasers against the mentally and physically ill. On one end of the spectrum, *Hinton* stands for the uncontroversial proposition that a misdemeanant who ignores an officer's orders to stop, shoves an officer, and then actively and openly resists arrest by, among other things, biting the officer, has no clearly established right not to be tased during the struggle. 997 F.2d at 781. At the other end of the spectrum, *Casey* clearly established that an officer could not tase a non-violent misdemeanant who appeared to pose no threat and who was given no warning or chance to comply with the officer's demands. 509 F.3d at 1281-82. … *Casey* establishes that only a lesser level of **force** may be employed against such an individual unless the individual begins actively resisting or fleeing, as the plaintiff did in *Hinton.* Under *Casey,* a warning is a necessary but not a sufficient part of the reasonableness analysis when a taser is used against a non-violent, non-threatening individual who has not committed a serious crime.

Consistent with our precedents, other courts that have examined the use of tasers against the mentally ill have found it clearly established that officers may not tase non-criminal, non-threatening subjects who primarily exhibit passive resistance. …

Here, we conclude that *Graham, Casey, Cruz,* and the other pertinent authorities sufficiently put Appellants on notice that it is not objectively reasonable to employ a taser as the initial use of **force** against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first. *Cf. Fogarty,* 523 F.3d at 1162 ("Considering that under [plaintiff's] version of events each of the *Graham* factors lines up in [her] favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions.").

We emphasize that significant factual issues remain which must be resolved at trial, including whether Mr. Leija was slinging blood at the officers, whether the officers knew about the extent of Mr. Leija's illness, and whether he exhibited something more than passive resistance in the moments before he was tased.[3] If those facts prove to be different than those we have considered on the summary judgment record, the excessive **force** analysis may yield a different result. However, based on the facts taken in the light most favorable to Plaintiff, we conclude that Plaintiff can show a violation of clearly established law sufficient to defeat Appellants' request for qualified immunity.

ELEVENTH:

Calderin v. Miami-Dade Police Dept., (11th Circuit 2015)
http://scholar.google.com/scholar_case?case=18303830557547326850&hl=en&as_sdt=5,25&sciodt=6,25&as_ylo=2015

Calderin argues that Officer Schottenheimer violated his right to be free from unreasonable seizures when Officer Schottenheimer shot him. *See* U.S. Const. amend. IV. Calderin maintains that all of the shots that hit him violated that right. Officer Schottenheimer counters that his discharging of his weapon was reasonable under the circumstances. ...

Preliminarily, we must address Officer Schottenheimer's assertions regarding his perception of the circumstances surrounding the shooting: (1) that he believed that Calderin was holding a gun and not a knife; (2) that he did not see Calderin drop the knife after the first shot; and (3) that he believed Hussein to have remained in the area after his arrival. Officer Schottenheimer's reasonable beliefs about the circumstances surrounding the shooting are relevant to the reasonableness of his actions. *See St. George v. Pinellas Cnty.,* 285 F.3d 1334, 1337 (11th Cir. 2002) ("We then ask not whether probable cause existed but whether the officer reasonably believed it existed, based upon the information he or she possessed at the time of the incident."). However, applying the summary judgment requirement that we view the facts in the light most favorable to the nonmoving party, and remaining mindful that a factfinder is entitled to disbelieve the defendant, *see Acoff v. Abston,* 762 F.2d 1543, 1548 (11th Cir. 1985), we must assume that Officer Schottenheimer knew the facts as Calderin sets them out. In other words, we assume that Officer Schottenheimer knew that Calderin was holding a knife, that Calderin dropped the knife after the first shot, and that Hussein was no longer in the vicinity.

Thus, the situation can be summarized as follows. Officer Schottenheimer arrived at the dealership, where he saw Calderin, whom he knew was suicidal. Calderin drew the knife, bringing it close to his own chest or neck area. Officer Lowry and Calderin both announced that Calderin had a knife, with Calderin making his announcement while he held the knife, and Officer Schottenheimer heard them. The only other individual in the vicinity was Officer Lowry, who was ten to twelve feet away. Officer Schottenheimer was thirty feet away. Calderin did not make any threatening movements. Officer Schottenheimer resorted to lethal force to disarm Calderin without giving Calderin any warning. Immediately after the first shot, Calderin dropped the knife, which Officer Schottenheimer saw. Calderin turned to escape the gunfire, and Officer Schottenheimer continued to shoot, even though he knew that Calderin had dropped the knife.

Under the *Mercado*/*Graham* balancing test, the nature and quality of the intrusion here is extremely severe. *See* Tennessee v. Garner, 471 U.S. 1, 9, 105 S. Ct. 1694, 1700 (1985) ("The intrusiveness of a seizure by means of deadly force is unmatched.").

Considering the governmental interest side of the balancing test, first, the crime at issue was not severe; MDPD eventually categorized it as a misdemeanor. *See* Galvez v. Bruce, 552 F.3d 1238, 1243 (11th Cir. 2008) ("[W]e note that the crimes with which Galvez was charged were not severe; petit theft and resisting arrest without violence are both misdemeanors . . . .").

Calderin also did not pose a threat to the safety of the officers or others. *Mercado* provides us with precedent with strikingly similar facts where we held that there was little to no safety issue and eventually ruled in the plaintiff's favor. There, the plaintiff threatened to attempt suicide by hanging after a fight with his wife. 407 F.3d at 1154. The wife called 911 and reported that her husband was suicidal. *Id.* When two police officers entered the home, the plaintiff was sitting on the floor, crying, and pointing the knife at his heart. *Id.* The officers ordered the plaintiff to drop the knife, but he refused. *Id.* The plaintiff never made threatening moves toward the officers. *Id.* The officers did not warn the plaintiff that they would use force if he did not drop the weapon. *Id.* Fifteen to thirty seconds later, one officer ordered the other to fire a non-lethal round at the plaintiff, which he did. *Id.* at 1154-55. The police department's policies allowed targeting of the head or neck with the non-lethal round only in situations where deadly force—i.e., force likely to cause death or serious bodily harm—would be justified. *Id.* at 1155.

"The defendants claim[ed] that the use of force [was] justified because suicidal subjects sometimes make erratic moves that can jeopardize the safety of the officers on the scene." *Id.* at 1157. We concluded that the plaintiff was not "posing an immediate threat to the officers at the time he was shot in the head" largely because there was "no indication that [the plaintiff] made any threatening moves toward the police." *Id.* at 1157-58. Likewise, speculation about erratic moves Calderin may have made or other weapons he may have had on his person are insufficient to justify the force applied here when Calderin was merely holding the knife. Moreover, we find it relevant to the inquiry of how a reasonable officer would react to the situation that Officer Lowry never felt the need to draw her firearm, even though she was closer to Calderin, and admonished Officer Schottenheimer for shooting Calderin.

Finally, whether Calderin was resisting or evading arrest also fits nicely into the analysis contained in *Mercado.* In *Mercado,* as is the case here, the plaintiff failed to comply with instructions from the officers. *Id.* at 1157. In some ways, failing to comply with officer instructions may be considered resisting arrest or at least akin to it. Nonetheless, we held that the plaintiff "was not actively resisting arrest" and noted the fact that he did not struggle with the officers. *Id.* Similarly, here, we cannot say that Calderin was resisting arrest, even though he was not complying with officer instructions.

With two of the governmental interest factors weighing heavily against Officer Schottenheimer and another barely, if at all, weighing in his favor, the balance between the intrusion and the governmental interest tips the scale against Officer Schottenheimer. His initial firing of his weapon was an unreasonable use of force under the circumstances. The same can be said of the subsequent shots fired during Calderin's flight because, taking the facts in the light most favorable to Calderin, Officer Schottenheimer knew that Calderin was unarmed after the first shot and did not pose a threat of immediate harm to others. *See* *Garner,* 471 U.S. at 3, 105 S. Ct. at 1697 (holding that the use of deadly force against a fleeing suspect is unreasonable unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others"). Therefore, Officer Schottenheimer violated Calderin's constitutional right to be free from unreasonable seizures.

We must now determine whether the right Officer Schottenheimer violated was clearly established. A right is clearly established where there exists "a materially similar case that has already decided that what the police officer was doing was unlawful." *Durruthy v. Pastor,* 351 F.3d 1080, 1092 (11th Cir. 2003) (internal

quotation marks omitted). We have already discussed *Mercado,* which we decided approximately six years before the shooting here. The facts of that case were sufficiently similar to put Officer Schottenheimer on notice that his conduct would violate Calderin's constitutional right. In fact, *Mercado* is nearly indistinguishable on the material facts. Calderin's right, then, was clearly established when Officer Schottenheimer violated it.

Willis v. Mock (11th Cir. 2015)
http://scholar.google.com/scholar_case?case=14225166258104087468&q=deadly+force&hl=en&as_sdt=3,25&as_ylo=2015

Willis asserts that a reasonable jury could reach such a conclusion. In his view, the jury could infer that the roadblock was set up to entice him to enter the space between the vehicles so that Captain James could tase him, thus throwing him off balance and causing him to crash in a way that was certain to result in death or serious injury. As support, he points to Deputy Cook's request that the officers construct the roadblock at the base of Gorrie Bridge "so he ain't got no way to go around." We are unpersuaded by this argument.…

Next, even if setting up the roadblock so that Willis had no way around or tasing him constituted the use of **deadly force**, this alone does not render the officers' conduct constitutionally unreasonable. This is because even the intentional use of **deadly force** does not necessarily violate the Fourth Amendment. *See* Scott, 550 U.S. at 383, 127 S. Ct. at 1778 ("Whether or not [the officer's] actions constituted application of `**deadly force**,' all that matters is whether [his] actions were reasonable."); *see also* Beshers v. Harrison, 495 F.3d 1260, 1268 (11th Cir. 2007) (holding that "if [the officer] intentionally used **deadly force** to seize [the plaintiff], the use of **force** was reasonable" under the circumstances).

The use of **deadly force** can be constitutionally reasonable where a driver "intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight" from law enforcement. *E.g.,* Scott, 550 U.S. at 384, 127 S. Ct. at 1778; Beshers, 495 F.3d at 1268. That is the case here. This is true whether or not Willis knew that he was being chased by multiple officers from multiple jurisdictions across multiple counties. The fact is Willis's riding put himself and the public at risk or loss of life or property. And because the Fourth Amendment's reasonableness inquiry is conducted from the officers' perspective, not Willis's, *see* Troupe, 419 F.3d at 1168, it is irrelevant whether he decided to barrel through the roadblock and continue his headlong flight because he reasonably believed that the officers were going to fire their weapons at him.

CONCLUSION

Ferguson and other high profile deadly force incidents and public demonstrations "have affected policing as a profession and how police relate to the communities they serve," and highlighted the need to "raise the bar" on both how law enforcement officers are trained in the use of force and in the content of such training. PERF, *Executive Session: Reengineering Police Use of Force*, at http://www.policeforum.org/index.php?option=com_mc&view=mc&mcid=72&eventId=474788&orgId=perf

Part of the Problem: Fragmented Training in Use of Force

Training in use of force, according to the Police Executive Research Forum, tends to be fragmented, with different aspects of firearms training, de-escalation skills and best practices for handling encounters with mentally ill individuals being addressed separately and at different times during recruit training and in-service training. Such fragmenting of training "makes it difficult for officers to comprehend how all these elements fit together." Id.

A Solution: Integration into a Comprehensive Training Format

The alternative approach advocated by PERF, described in its online announcement of the above conference scheduled for May 7, 2015, is integration of these use of force issues into "a comprehensive, scenario-based training format" that will provide meaningful guidance for police officers on these training issues as well as discussion of "policies, supervision, organizational culture, and the attitudes that officers bring to their work, with respect to de-escalating potentially dangerous situations." Id.

In furtherance of this integrated approach, the May 7 conference was designed to feature police executives, leaders in police training, academics, experts in use of force issues and federal officials to (1) explore how to change "organizational attitudes about use-of-force and de-escalation" and how to learn from "past incidents involving use of force that did not end well," and (2) develop "new systems and coordinated approaches to use-of-force training, policy, and supervision." Id.

While much more remains to be done, PERF's approach is a step in the right direction.