No. _____

In the Supreme Court of the United States

ZACHERY PITTMAN,
Fayetteville Police Department,

Petitioner,

v.

HERMAN HARRIS,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX
TABLE OF CONENTS

[ENTERED JUNE 18, 2018]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7308

HERMAN HARRIS,

Plaintiff - Appellant,

v.

ZACHARY PITTMAN,
Fayetteville Police Department,

Defendant - Appellee,

and

MOOSE BUTLER,

Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:13-ct-03087-BO)

Argued: January 30, 2019 Decided: June 18, 2019

Before WILKINSON, WYNN, and HARRIS, Circuit Judges.

Reversed and remanded by published opinion. Judge Harris wrote the opinion, in which Judge Wynn joined. Judge Wilkinson wrote a dissenting opinion.

ARGUED: Rafael Reyneri, COVINGTON & BURLING LLP, Washington, D.C., for Appellant. Donald Brandon Christian, CITY OF FAYETTEVILLE, Fayetteville, North Carolina, for Appellee. **ON BRIEF:** Richard Rainey, COVINGTON & BURLING LLP, Washington, D.C., for Appellant. James C. Thornton, CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina, for Appellee.

PAMELA HARRIS, Circuit Judge:

This is the second time we have addressed this § 1983 action, in which plaintiff Herman Harris alleges that police officer Zachary Pittman used excessive force in arresting him after an intense hand-to-hand struggle between the men. Previously, we reversed the district court's grant of summary judgment to Officer Pittman on qualified immunity grounds, finding that the district court erred when it failed to construe the evidence in the light most favorable to Harris. On remand, the district court again held that Pittman is entitled to qualified immunity as a matter of law.

We must reverse for a second time. The district court again based its qualified immunity holding on inferences drawn in favor of Officer Pittman. But as we held in our prior decision, the court was obligated to construe the salient facts in the light most favorable to Harris, as the party opposing summary judgment. And on Harris's version of the disputed

facts, construed in the light most favorable to him, a reasonable jury could find a violation of Harris's clearly established Fourth Amendment rights. Because there remain genuine factual disputes bearing on Pittman's entitlement to qualified immunity, the district court erred in awarding summary judgment to Pittman.

I.

A.

This case centers around Officer Pittman's use of deadly force at the conclusion of a violent, hand-to-hand struggle between Pittman and Harris. The parties agree that Pittman shot Harris several times at point-blank range. And Harris does not dispute that Pittman's first shot, into his chest, was justified by the intensity of the struggle and the threat he posed to Pittman's safety. As we have held, however, even where an initial use of deadly force is reasonable, the repeated use of force may be constitutionally excessive if circumstances change in a material way. *See Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005). And so the critical disagreement here is over the precise circumstances under which Pittman fired his final shots at Harris: whether, as Pittman says, a deadly struggle was ongoing, with Harris standing over Pittman, as Pittman fired; or whether, as Harris has it, the struggle was over, with Harris lying on the ground, wounded and unarmed, when Pittman stood above him and fired two more shots into his chest and leg.

The events leading up to this confrontation began when a Fayetteville, North Carolina police officer noticed a vehicle that had been reported stolen the previous night. The officer alerted other officers in the

area to be on the lookout for the suspects involved, described as "early- to mid-teenage black males." J.A. 237–38. One nearby officer spotted Harris, a then-38-year-old black male whom the parties now agree had no role in the reported vehicle theft. Nonetheless, the officer "noticed that [Harris] was on his cell phone, walking at a fast pace, sweating excessively and appeared to be nervous." J.A. 245. Further, according to the officer, Harris "avoided eye contact and had rapid head and hand movement." *Id.* Based on this information, the officer determined that Harris was behaving suspiciously and turned his vehicle to pursue Harris.

Harris began to run, and as he fled, he came into Officer Pittman's line of sight. Pittman got out of his squad car and gave chase. According to Pittman, as he gained on Harris, he threatened to use his taser on Harris in an attempt to stop his flight. Harris continued running, and Pittman eventually caught him at the edge of a wooded bramble and tackled him down a steep incline into some shrubs.

When the men came to a stop, a hand-to-hand struggle ensued. Pittman attempted to use his taser against Harris, and alleges that Harris tried to use the taser against him as well. Both times, however, the men were able to deflect the taser's aim, and though each felt the partial effects of the discharges, Pittman "could not use the [t]aser to [his] advantage" to effectuate Harris's arrest and secure his own safety. J.A. 241. The struggle continued to escalate, and though the parties dispute who first reached for Pittman's firearm, the two men fought for control of the gun. The gun fired while in Pittman's holster, and the bullet struck Harris's right ring finger, severing part of it.

According to Pittman, Harris then wrestled the gun away from Pittman, pointed it at Pittman's face, and pulled the trigger. But for a firearm malfunction, Pittman says, Harris would have killed him. The gun did not go off, however, and Pittman regained control of the weapon. Pittman then fired the first of his intentional shots at Harris, striking him in the chest. As noted above, Harris does not argue that Pittman lacked justification for this initial use of deadly force.

Thus, while Harris disputes some of the preceding details, it is at this point that the parties' narratives diverge in ways most significant to this appeal. There remains some overlap in their accounts: The parties agree that Pittman now had full control over his weapon, leaving Harris unarmed; Pittman does not contend either that Harris was armed or that he mistakenly believed him to be armed. And they agree that Pittman continued to fire his gun at Harris. But the parties vigorously dispute the factual circumstances directly attendant to those final shots, which form the basis for Harris's excessive force claim.

On Pittman's account, there was no material change in circumstances as he fired at Harris. According to Pittman, once he regained control of his firearm, he was lying on the ground and saw Harris standing a few feet away. Fearing another attack, Pittman "fired [his] weapon until [] Harris fell," consistent with training that had taught him to fire until a perceived threat is eliminated. J.A. 242. Although Pittman does not specify how many shots he fired, he is adamant that he fired each at roughly the same time and under the same circumstances: Pittman was on the ground, and Harris was on his

feet, presenting an imminent threat to Pittman's life and safety.

On Harris's account, by contrast, Pittman fired three shots, and the circumstances changed significantly between the first shot and the second two. According to Harris, Pittman's initial shot, which "hit[] him in his right chest area," had "lift[ed] him off his feet," J.A. 379, so that he was lying on the ground badly wounded. Pittman then got to his feet and stood over Harris, who "was not trying to escape, nor . . . showing any further resistance." J.A. 329. And then, Harris says, while he was lying bleeding and subdued on the ground, Pittman shot him twice more, once in the chest and then in the back of his left leg. The final shot struck Harris in the left buttock, broke his femur on the way through his body, and exited his body near his groin, suggesting that Harris rolled onto his stomach before Pittman fired for the last time.

B.

Harris initiated this § 1983 action against Pittman, proceeding pro se – that is, without the assistance of counsel – and alleging that Pittman used excessive force against him in violation of his Fourth Amendment rights. Pittman moved for summary judgment, asserting qualified immunity as a defense.

The district court granted Pittman's motion for summary judgment. As the district court explained, a defendant like Pittman is entitled to qualified immunity at the summary judgment stage if (1) the facts, viewed in the light most favorable to the plaintiff – here, Harris – do not demonstrate a violation of the plaintiff's constitutional rights; or (2) they do, but the relevant constitutional right was not clearly established at the time of the alleged violation.

J.A. 206–07; *see also Waterman*, 393 F.3d at 476. Focusing on the first prong, the district court held that Pittman had not violated Harris's Fourth Amendment rights because Pittman's use of force was objectively reasonable as a matter of law.

In making that determination, the district court appeared to credit Pittman's account of the immediate circumstances under which he fired at Harris. As the district court described the relevant facts, Pittman regained control of his gun while he was lying on the ground, and then, having turned on his gun light, saw "Harris *standing* a few feet from him." J.A. 208 (emphasis added). Able to see only a "partial silhouette" of Harris, the district court went on, "Pittman believed that Harris was still a threat and his life was in danger." *Id.* Still on the ground, Pittman fired at the upright Harris and then, when Harris did not fall, continued to fire. Under those circumstances, the district court concluded, no genuine dispute of material fact remained as to whether Pittman's use of force had been objectively reasonable under the Fourth Amendment.

Harris appealed, and we reversed. *See Harris v. Pittman*, 668 F. App'x 486 (4th Cir. 2016) (per curiam). The parties' "different versions of the salient facts," we held, gave rise to a material dispute over "what occurred when Pittman fired the final shots at Harris," including "whether Harris was standing or lying down." *Id.* at 487. Instead of resolving that dispute in Pittman's favor at the summary judgment stage, the district court was required to view the facts "in the light most favorable" to Harris. *Id.* Its failure to do so meant that the district court had not answered the critical question in the case: "whether, construing the facts in the light most favorable to

Harris (i.e., Harris was lying on the ground when Pittman, still on top of him, fired the final shots), a reasonable officer would have probable cause to believe that Harris posed a significant threat of death or serious physical injury to the officer or others." *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 3, 11–12 (1985) (describing Fourth Amendment standard for use of deadly force)). Accordingly, we vacated the grant of summary judgment and remanded with instructions "to determine, in the first instance, if construing the salient facts in the light most favorable to Harris, Pittman is entitled to qualified immunity." *Id.*

On remand, the district court again granted summary judgment to Pittman. This time, the court assumed that Pittman was standing over Harris when he fired the final shots. But even under those circumstances, the court held, his use of force was objectively reasonable as a matter of law. That the final shots were (by assumption) fired while Pittman was standing over Harris, the court reasoned, did not render them unreasonable, given record evidence "that the shots were fired in rapid succession" and the preceding "relentless" attacks on Pittman by Harris, "even after [Harris was] struck by a taser." J.A. 393. And "[n]otably," the court concluded, "from the location of [Harris's] wounds, it appears that Pittman intended his shots only to disable [Harris]." *Id.*

Because Harris's own assertions did not establish a constitutional violation, the court held, Pittman was entitled to summary judgment under the first prong of the qualified immunity analysis. And in any event, the court continued, Pittman would be entitled to summary judgment under the second prong, because even if Harris could establish a violation of his Fourth

Amendment right to be free of excessive force, that right was not clearly established with the requisite specificity at the time of the incident.

Harris timely noticed this appeal and again submitted uncounseled and informal briefing. We appointed counsel for Harris, who filed a brief on his behalf, and heard argument in the case.

II.

On appeal, Harris argues that the district court erred by failing to follow this court's mandate and construe the evidence in the light most favorable to him on summary judgment. According to Harris, when viewed under the proper standard – construed in the light most favorable to him, with all reasonable inferences drawn in his favor – the record evidence would allow a reasonable jury to find that Pittman violated his clearly established constitutional rights. We agree.

Our holding is a narrow one. How an ultimate fact-finder might weigh and evaluate the parties' accounts and the other evidence in this case is not the question before us. The only issue on appeal is whether, at this early stage of the litigation and before a jury has had a chance to assess witness credibility and other evidentiary issues, it can be said that Pittman is entitled to qualified immunity as a matter of law. We conclude that genuine factual disputes bearing directly on Pittman's qualified immunity defense preclude the award of summary judgment, and therefore reverse the judgment of the district court.

A.

Harris alleges a violation of his rights under the Fourth Amendment, which "guarantees citizens the

right 'to be secure in their persons . . . against unreasonable . . . seizures.'" *Graham v. Connor*, 490 U.S. 386, 394 (1989) (quoting U.S. Const. amend. IV). The Fourth Amendment's bar on unreasonable seizures prohibits the use of excessive force by a police officer in effectuating an arrest. *Clem v. Corbeau*, 284 F.3d 543, 549–50 (4th Cir. 2002).

To determine whether an officer's use of force is excessive, we apply a "standard of objective reasonableness." *Id.* at 550. In this case, the parties agree that Pittman used deadly force against Harris when he fired repeatedly at Harris at point-blank range. Because the "intrusiveness of a seizure by means of deadly force is unmatched," a police officer may use deadly force only if the officer has "probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others." *Waterman*, 393 F.3d at 477 (quoting *Garner*, 471 U.S. at 9, 11).

Harris does not dispute that this standard was satisfied when Pittman fired his first intentional shot at him, during an intense hand-to-hand struggle. Instead, Harris focuses on Pittman's final two shots, invoking case law establishing that even when an initial use of force is objectively reasonable, subsequent applications of force – even moments later – may not be. Because the inquiry into excessiveness turns on "the information possessed by the officer at the moment that force is employed," "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.* at 481 (citing *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996)). It follows, we held in *Brockington v. Boykins*, 637 F.3d 503, 507–08 (4th Cir. 2011), that even where an officer

originally was justified in shooting at a suspect, the use of deadly force became objectively unreasonable once the suspect, disabled by the officer's initial shots, fell to the ground.

B.

With that legal standard in mind, we turn to the district court's treatment of the record in evaluating Pittman's motion for summary judgment. It is axiomatic that in deciding a motion for summary judgment, a district court is required to view the evidence in the light most favorable to the nonmovant – here, Harris – and to draw all reasonable inferences in his favor. *See Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015). Importantly, that obligation does not give way to a court's doubts about the credibility of a nonmoving party's account. A district court may not "weigh the evidence or make credibility determinations," *id.* at 569, and is not in a position "to disregard stories that seem hard to believe," *Gray v. Spillman*, 925 F.3d 90, 95 (4th Cir. 1991). Instead, the district court was required to construe the record evidence favorably to Harris, even if it did not believe that Harris ultimately would prevail at trial. *See Jacobs*, 780 F.3d at 568 (district court may not grant summary judgment "merely because the court believes that the movant will prevail if the action is tried on the merits" (internal quotation marks omitted)).

We review de novo the district court's grant of summary judgment. *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017). And here, we analyze the district court's decision not only against the record, but also for conformity to the mandate we issued in our earlier ruling in this case. *See Doe v.*

Chao, 511 F.3d 461, 464–65 (4th Cir. 2007). In that earlier ruling, we identified a genuine and material dispute of fact as to "what occurred when Pittman fired the final shots at Harris," particularly "whether Harris was standing or lying down." *Harris*, 668 F. App'x at 487. It followed, we held, that the district court was obliged to accept Harris's version of events – "i.e., Harris was lying on the ground when Pittman, still on top of him, fired the final shots" – and consider whether, on those facts, a "reasonable officer would have probable cause to believe that Harris posed a significant threat of death or serious physical injury to the officer or others." *Id.* (citing *Garner*, 471 U.S. at 3, 11–12).

1.

Consistent with our instruction, the district court on remand specifically addressed Harris's allegation that at the time of the final two shots, Pittman was standing above Harris, who was lying wounded on the ground.[1] Even under those circumstances, the district court concluded, there could be no Fourth Amendment violation: As a matter of law, Pittman reasonably believed that Harris remained a threat to his safety, satisfying the *Garner* standard. In reaching that determination, however, the district court improperly drew inferences in favor of Pittman, rather than Harris, and appears to have

[1] The district court referred to the final "shot," singular, J.A. 393, while Harris's account alleges that, of the three shots Pittman intentionally fired at Harris, both the second and third were fired at him after he had fallen to the ground. *See Harris*, 668 F. App'x at 487 (referring to final "shots," plural). Nothing in the district court's analysis, however, appears to turn on this distinction.

misapprehended both our mandate and our circuit's governing law.

We may dispense quickly with one of the three rationales offered by the district court for its conclusion: that "from the location of plaintiff's wounds, it appears that Pittman intended his shots only to disable plaintiff," J.A. 393. Harris suffered four gunshot wounds, three of which were inflicted intentionally: two wounds to Harris's chest, and a third to the back of his leg that broke his femur and narrowly missed his femoral artery. To conclude that this pattern of wounds reflects an intent "only to disable" is to draw an inference – and a heroic one – in favor of Pittman, not Harris, in violation of basic summary judgment principles. And it has nothing to do with the legal question of whether Pittman's final two shots were justified. Whatever his motives, Pittman used deadly force when he fired his gun at Harris; what matters is whether he had objectively reasonable grounds for doing so under *Garner*, not whether he expected or hoped that Harris could survive the shooting. *See Elliott*, 99 F.3d at 642 ("intent or motivation of the officer is irrelevant" in evaluating use of deadly force).

In holding that Pittman's final shots were justified even if Harris by then was lying on the ground wounded, the district court also relied on a finding that "the record reflects that the shots were fired in rapid succession." J.A. 393. In support, the court cited the affidavits of two Fayetteville police officers, recounting what they were told by two auditory witnesses – witnesses who did not see the events in question but heard the gunshots. Both witnesses, according to the officers, heard substantially the same thing: a gunshot (presumably the accidental

discharge during the struggle for Pittman's holstered gun), followed "[a]fter about a 30-second pause" by "three more gun shots and someone yelling," J.A. 252 – or, for the other witness, followed "[a] few seconds later" by additional shots, J.A. 259–60.

The district court did not explain what significance it was attaching to its determination that Pittman fired his shots at Harris in "rapid succession." One possibility is that the court perceived an inconsistency between three shots fired in "rapid succession" and Harris's version of events, in which there was time between the first and second of these shots for Harris to fall to the ground and Pittman to get to his feet. But that, too, would require drawing inferences in Pittman's favor and against Harris. The witness statements focus on the temporal gap between the first (accidental) discharge and the subsequent (intentional) firings; they do not specify the time elapsed between each of the final three shots. And while the statements do suggest that those shots were clustered together in relation to the previous discharge, that does not foreclose the possibility that there still was time enough between the first two intentional shots for Harris to fall and Pittman to regain his footing. Only by drawing inferences against Harris rather than in his favor could the court have found a conflict between the witness statements and Harris's account.[2]

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[2] All of this assumes, of course, the admissibility and credibility of the affidavits and the second-hand accounts they contain. An affidavit used to support or oppose a motion for summary judgment generally "must be made on personal knowledge," Fed. R. Civ. P. 56(c)(4), which these affidavits – consisting of police officers' summaries of witness statements – are not. And even if there were an actual conflict between admissible affidavits and

Moreover, the question before the district court, as laid out expressly in our mandate, was whether, assuming Harris's version of events – specifically, that "Harris was lying on the ground when Pittman, still on top of him, fired the final shots" – those final shots were justified under the Fourth Amendment. *Harris*, 668 F. App'x at 487. Pointing to record evidence that might, construed in Pittman's favor, suggest that Pittman and not Harris was lying on the ground cannot answer that question, and it is not responsive to the mandate from our prior decision. *See Doe*, 511 F.3d at 465 (district court may not reconsider questions resolved by an appellate court's mandate).

The other possibility is that the district court reasoned that because the shots were fired in "rapid succession," they should be analyzed collectively and as one sequence, so that the conceded justification for the first shot would extend to the final two as well. But any such rationale would be inconsistent with our case law, which rejects precisely this approach and instead insists that "the reasonableness of force employed can turn on a change of circumstances during an encounter lasting only a few seconds," *Waterman*, 393 F.3d at 481 (rejecting argument that reviewing subsequent shots separately from initial shot draws "artificial divisions in the sequence of events" (internal quotation marks omitted)). That shots are fired in "rapid succession," in other words, is not enough to establish, as a matter of law, that the risk of physical harm to Pittman that supported the first shot still existed at the time of the second and third – when, by hypothesis, Harris, having been

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Harris's account, it would be up to a fact-finder to assess credibility and weigh the evidence.

struck in the chest by the first shot, was lying on the ground wounded and unarmed. *See Brockington*, 637 F.3d at 507 ("pars[ing]" sequence of shots and finding that safety risk that justified initial shots did not justify subsequent shots once suspect, wounded, had fallen to ground).

That leaves the district court's third and last rationale: that Pittman's final shots were reasonable as a matter of law even if he was standing over a prone Harris because Harris's attack on Pittman had been "relentless," continuing "after [Harris] was struck by a taser on two occasions." J.A. 393. Here, the district court appears to be reasoning that Harris demonstrated unusual persistence and endurance in his struggle with Pittman, making it reasonable for Pittman to believe that Harris remained a threat while lying on the ground wounded and unarmed, with Pittman above him holding a gun. *See* J.A. 393–94 ("[T]he record reflects that Pittman reasonably believed that plaintiff would continue to attack Pittman at all costs."). But even if a jury could draw this inference in Pittman's favor, the district court on summary judgment could not. *See Jacobs*, 780 F.3d at 568 (district court must draw all reasonable inferences in favor of nonmovant at summary judgment stage).

On Harris's account, which has him "lift[ed] . . . off his feet" and thrown to the ground by Pittman's first shot to his chest, J.A. 379, a reasonable jury could find that it would have been evident to Pittman, at least once he regained his footing and stood over Harris with his gun, that Harris was badly wounded and subdued. Pittman acknowledges turning on his gun light before opening fire, suggesting he had the opportunity to observe Harris's condition as he fired

the final shots. Nor, again, does Pittman allege that he believed Harris to be armed at that point. And viewed most favorably to Harris, the evidence suggests that by the time of the final shot – which, he says, struck him in the left buttock and exited his body near his groin – Harris had rolled over and was lying with his face in the ground. Against all of this, the district court seems to have concluded that Harris showed himself to be uniquely threatening when he proved impervious to two prior taser strikes – but that is yet another inference improperly drawn in Pittman's favor, given Pittman's own account of finding himself unable to deploy his taser effectively against Harris. On this point, in other words, the district court again erred by drawing inferences in favor of Pittman, when the opposite is required on summary judgment.

2.

On appeal, Pittman does not defend the district court's answer to the question we posed in our mandate: "whether, construing the facts in the light most favorable to Harris (i.e., Harris was lying on the ground when Pittman, still on top of him, fired the final shots), a reasonable officer would have probable cause to believe that Harris posed a significant threat of death or serious physical injury," *Harris*, 668 F. App'x at 487. Instead, he rejects the premise – and with it, our mandate – arguing for the first time that Harris's account should *not* be credited on summary judgment, primarily because it is "blatantly contradicted by the record" and thus fails to create a genuine dispute of fact under *Scott v. Harris*, 550 U.S. 372, 380 (2007). Even if this argument were not foreclosed by the mandate rule that precluded

Pittman from raising it before the district court, *see Doe*, 511 F.3d at 465, we would find it unpersuasive.

In *Scott v. Harris*, which also involved a Fourth Amendment excessive force claim, the Supreme Court was faced with a videotape of the incident in question that "utterly discredited" the plaintiff's account, rendering it a "visible fiction." 550 U.S. at 380–81. As between a videotape of undisputed authenticity, *id.* at 378, and the plaintiff's story, the Court held, the videotape should prevail. Where the nonmoving plaintiff's account is "blatantly contradicted by the record" so that "no reasonable jury could believe it," it should not be adopted by a court ruling on a motion for summary judgment. *Id.* at 380.

As we have clarified, *Scott* is the exception, not the rule. It does not "abrogate the proper summary judgment analysis, which in qualified immunity cases 'usually means adopting . . . the plaintiff's version of the facts.'" *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 276 (4th Cir. 2011) (quoting *Scott*, 550 U.S. at 378). That standard continues to apply in the face of "documentary evidence" that lends support to a government official's account of events, *id.*, or even makes it "unlikely" that the plaintiff's account is true, *United States v. Hughes*, 606 F.3d 311, 319–20 (6th Cir. 2010) (holding that *Scott* does not apply to photographs rendering plaintiff's account "unlikely"). Summary judgment is proper under *Scott* only when there is evidence – like the videotape in *Scott* itself – of undisputed authenticity that shows some material element of the plaintiff's account to be "blatantly and demonstrably false." *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3d Cir. 2007) (refusing to extend *Scott* to evidence in form of police photographs that fail to depict "all of the defendant's conduct and all of the

necessary context"); *see also Witt*, 633 F.3d at 277 (holding *Scott* inapplicable to soundless video that does not capture key disputed facts).

The *Scott* principle has no application here. That is perhaps clearest with respect to Pittman's reliance on police officer affidavits recounting the statements of auditory witnesses to the shootings. According to Pittman, those statements, because they fail to describe a "meaningful pause" between shots, "blatantly contradict" Harris's account, just as the video in *Scott v. Harris* "blatantly contradicted" the plaintiff's account in that case. We have discussed already the absence of any necessary conflict between the witness statements and Harris's version of events. More important here, second-hand descriptions by police officers of the impressions of witnesses who heard but did not see the crucial events are a far cry from an authentic videotape that "depict[s] all of the defendant's conduct and all of the necessary context that would allow the [c]ourt to assess the reasonableness of that conduct," *Blaylock*, 504 F.3d at 414 (describing *Scott* video and distinguishing two police photographs). Affidavits that "offer[] some support for a governmental officer's version of events" are a routine feature of excessive force cases, and they do not justify a departure from the normal summary judgment standard. *Witt*, 633 F.3d at 276.

Pittman points to two other forms of evidence that he contends "blatantly contradict" Harris's account: DNA evidence indicating the presence of Harris's DNA on Pittman's gun; and post-altercation photographs showing bruises and scratches on Pittman's face, hands, and legs. But none of that evidence actually contradicts, blatantly or otherwise, Harris's crucial contention on summary judgment: that

after a hand-to-hand struggle over Pittman's gun – which would account for Pittman's injuries, and during which Harris admits he reached for Pittman's gun, though he claims to have done so defensively – Pittman gained control over the weapon, used it to shoot Harris once in the chest, and *then*, after Harris fell to the ground badly wounded, stood over Harris and shot him twice more. Pittman's evidence, in other words, runs out at precisely the moment the parties' accounts critically diverge, and thus cannot establish that Pittman is entitled to summary judgment under *Scott v. Harris*. *See Witt*, 633 F.3d at 277 (declining to apply *Scott* to soundless video that "fails to capture seven important seconds of the incident, about which the parties' accounts decidedly differ").[3]

Finally, there is the last piece of evidence on which Pittman relies to show that the record "blatantly contradicts" Harris's version of events: the summary of facts accompanying Harris's state court *Alford* plea. After the events at issue here, Harris faced multiple charges in North Carolina, including one for assaulting a law enforcement officer (Pittman) with a firearm, and one for possession of a firearm (Pittman's gun) by a felon. Harris responded by entering an *Alford* plea, which allows a defendant to "proclaim[] he is innocent" but "intelligently conclude[] that his interests require entry of a guilty plea," where the "record before the judge contains strong evidence of

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[3] Pittman also suggests that this DNA and photographic evidence contradicts some of Harris's earlier statements about the encounter, in which he denied touching Pittman's gun or engaging in an intense struggle with Pittman. Whether there are meaningful discrepancies between Harris's various accounts of events and, if so, what bearing they have on Harris's ultimate credibility, are questions to be assessed by a finder of fact.

actual guilt," *United States v. Davis*, 679 F.3d 177, 186 (4th Cir. 2012) (internal quotation marks omitted). The "distinguishing feature" of an *Alford* plea is that "the defendant does *not* confirm the factual basis" for his plea; the statement of facts accompanying an *Alford* plea is not intended to establish guilt but to "ensure merely that the plea is being intelligently entered." *United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (internal quotation marks and alteration omitted).

According to Pittman, the state prosecutor's summary of facts, to which Harris consented, "blatantly contradicts" Harris's critical assertion that he was lying on the ground when Pittman fired his final shots. It follows, Pittman concludes, that *Scott v. Harris* precludes a court from crediting Harris's account on summary judgment. Pittman cites no cases applying *Scott v. Harris* in this context, and we have found none. In any event, we cannot agree that the summary of facts that accompanied Harris's *Alford* plea "blatantly contradicts" Harris's account.

Not surprisingly, the prosecutor's summary focused on the facts underlying the actual charges against Harris, describing in detail the struggle for control of Pittman's weapon, Harris's temporary possession of the gun, and Harris's attempt to fire the gun point-blank at Pittman. The precise circumstances under which Pittman fired at Harris are the subject of less attention. According to the prosecutor, once Pittman took control of his weapon, he was able to "discharge[] his firearm" at a then-standing Harris, after warning Harris to "get down." J.A. 168. The rest is a brief and undifferentiated account of Pittman's intentional shots: "The [o]fficer discharged his weapon striking the defendant

multiple times" in the torso area and leg. J.A. 168–69. As the prosecutor explained, although there was "lots more evidence," his summary was intended to establish only what was material to the charges against Harris: that Harris "possessed [Pittman's firearm] for long enough to pull that weapon, pull that trigger." J.A. 169.

We discern no "blatant contradiction" between the prosecutor's summary of facts and the account Harris advances on summary judgment. Because they were not material to the charges against Harris, the state prosecutor did not dwell on the precise circumstances surrounding Pittman's final shots at Harris, the crux of Harris's § 1983 action. Most important, the prosecutor did not specify whether all of Pittman's shots were fired while Harris was standing, or only the first intentional shot – meaning that his account can be reconciled with Harris's, which also has Harris standing when the shooting begins. *See Witt*, 633 F.3d at 277 (declining to apply *Scott* to "ambiguous" evidence). Moreover, at the plea hearing, Harris's counsel noted for the record that Harris was disputing some of the details in the prosecutor's account. J.A. 171 (noting that Harris disputed "his actual possession or control over the firearm and some of the other instances relating to the struggle that did ensue"). Harris's plea colloquy thus does not foreclose his account of the critical events. And because there is no record evidence that "blatantly contradicts" Harris's account under *Scott*, we apply our normal summary judgment standard for qualified immunity

cases, "adopting . . . the plaintiff's version of the facts," *Witt*, 633 F.3d at 276 (quoting *Scott*, 550 U.S. at 378).[4]

In addition to his argument under *Scott*, Pittman offers an alternative justification for going beyond our mandate and refusing to adopt Harris's account in evaluating the reasonableness of Pittman's use of force: According to Pittman, doing so would require invalidating Harris's state court conviction, something a federal court may not do under *Heck v. Humphrey*, 512 U.S. 477 (1994). This argument – also raised for the first time on appeal – is without merit. Nothing about Harris's § 1983 suit calls into question his North Carolina judgment of conviction on charges of assaulting Officer Pittman while in possession of Pittman's gun. Harris would remain guilty on those charges even if Pittman were found to have used excessive force when he arrested Harris following Harris's commission of his crimes.

In sum, there is no ground in this case for departing from the standards that generally govern a motion for summary judgment based on a qualified immunity defense. As we explained in our prior ruling, those standards require a district court to view the facts in the light most favorable to the plaintiff and to draw all reasonable inferences in the plaintiff's favor. *Harris*, 668 F. App'x at 487. And although the district court assumed that the final shots were fired while Pittman was standing over Harris, in holding that Pittman's use of deadly force nevertheless was

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[4] The parties also dispute whether Harris's *Alford* plea has preclusive effect in this § 1983 action, independent of Pittman's argument under *Scott v. Harris*. Because we find no conflict between the summary of facts accompanying Harris's *Alford* plea and Harris's account in this action, we need not resolve that question.

reasonable as a matter of law it drew a series of inferences in favor of Pittman, not Harris, and overlooked record evidence that could support Harris's claim.[5] Accordingly, we find that the district court erred in granting summary judgment by failing to construe the evidence in the light most favorable to Harris.

C.

Having determined that the district court erred in its analysis, we must now consider whether, construing the salient facts in the light most favorable to Harris, Pittman is entitled to qualified immunity as a matter of law. Harris argues that when the record is viewed in the light most favorable to him, he can show that Pittman's final two shots, fired while Harris was lying on the ground wounded and unarmed, violated his Fourth Amendment rights, and that those rights were clearly established at the time of the incident. We agree, and reverse the district court's contrary finding.

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[5] The district court also suggested that Harris had not produced competent evidence to support this part of his account because he relied on "unverified documents." J.A. 392. In fact, Harris's opposition to Pittman's summary judgment motion was verified, and a party opposing summary judgment may rely on verified filings. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (explaining that courts treat verified pleadings as "the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge"). And our prior ruling, of course, was premised on the conclusion that Harris indeed had established a genuine dispute of fact as to "whether Harris was standing or lying down," requiring the district court to assume on remand "Harris was lying on the ground when Pittman, still on top of him, fired the final shots." *Harris*, 668 F. App'x at 487.

In assessing Pittman's qualified immunity defense, this court applies a familiar two-step inquiry. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (granting courts the discretion as to order in which two steps are addressed). At step one, we ask "whether the facts alleged or shown, taken in the light most favorable to the plaintiff, establish that the police officer's actions violated a constitutional right." *Meyers v. Balt. Cty.*, 713 F.3d 723, 731 (4th Cir. 2013). At step two, the question is whether the right at issue was "clearly established" at the time of the officer's conduct. *Id.* (quoting *Saucier*, 533 U.S. at 201).

We begin with the first prong, on which the district court primarily relied: whether Pittman's alleged conduct violated Harris's Fourth Amendment right to be free of excessive force in the making of an arrest. Harris claims that once he had been knocked to the ground with a gunshot wound to his chest, the justification for Pittman's initial shot – the threat posed to Pittman by Harris as they struggled for control of his weapon – was neutralized. At that point, he argues, a "reasonable officer" no longer "would have probable cause to believe that Harris posed a significant threat of death or serious physical injury," *Harris*, 668 F. App'x at 487 (citing *Garner*, 471 U.S. at 3, 11–12), rendering Pittman's final two shots objectively unreasonable and thus constitutionally excessive.

Viewing the record in the light most favorable to Harris, we think a reasonable jury could reach just that conclusion. We took the same view in *Waterman*, in which an extended highway chase ended with police officers firing a series of shots at the plaintiff's vehicle as it accelerated toward them and then passed them, killing the plaintiff. 393 F.3d at 473–75. The

officers' initial shots, we held, were constitutionally justified, and no reasonable jury could find to the contrary: As the vehicle approached, the officers had an objectively reasonable belief that it "posed an immediate threat of serious physical harm" to them. *Id.* at 477–79. But the situation changed, we reasoned, "mere seconds" later, once the vehicle passed the officers and the officers continued to fire after it. *Id.* at 480–82. At that point, the record evidence, viewed in the light most favorable to the plaintiff, would allow a reasonable jury to find that the officers "knew or should have known" that the plaintiff had passed them without veering in their direction, and that "any belief that the officers continued at that point to face an imminent threat of serious physical harm would be unreasonable." *Id.* at 482.

So too here. Harris does not dispute that Pittman's first intentional shot, fired when Pittman regained control of his weapon during a hand-to-hand struggle with Harris, was justified by an objectively reasonable belief that Harris posed a very serious threat to Pittman's safety. But on Harris's account, which we credit at this stage of the litigation, circumstances changed after that first shot, which struck Harris in the chest, "lift[ed] him off his feet," and threw him to the ground. J.A. 379. At that point, according to Harris, Pittman got to his feet and took aim at Harris, now lying on the ground wounded, unarmed, and "not trying to escape . . . [or] showing any further resistance," J.A. 329, before firing two more shots into his chest and the back of his leg. Viewing the evidence in the light most favorable to Harris – including Pittman's own statement that he had turned on his gun light, and evidence suggesting

that Harris rolled onto his stomach before Pittman fired for the final time – a reasonable jury could find that Pittman "knew or should have known" that Harris no longer posed an imminent threat to his safety that justified the further use of deadly force. *Cf. Waterman*, 393 F.3d at 482.

And *Waterman* is not our last word on this subject. In *Brockington v. Boykins*, we applied *Waterman*'s logic to a situation closely resembling the one at issue here. That excessive force case, like this one, began with a confrontation between the plaintiff and a police officer, sufficiently serious that the plaintiff ultimately was convicted on criminal charges in state court – there, for kidnapping the officer. 637 F.3d at 504–05. And as in this case, the plaintiff did not dispute that when the officer fired on him initially, hitting him in his hand and his abdomen, that use of deadly force was justified. *Id.* at 507. The issue – just as here – was that the officer allegedly continued to shoot down at the plaintiff, even *after* the plaintiff, wounded by the initial shots, had fallen to the ground, unarmed. We affirmed the denial of the officer's motion to dismiss on qualified immunity grounds. That the officer's shots were all part of a single series, with the initial shots concededly justified, did not establish that the final shots were justified as well; instead, we found, "it is possible to parse the sequence of events as they occur." *Id.* Drawing all inferences in favor of the plaintiff, we reasoned, his account, if credited, would substantiate a Fourth Amendment violation: "There is no indication that deadly force was necessary or reasonable once [the plaintiff] was initially shot, thrown to the ground by the force of the bullets, and wounded." *Id.* (citing *Garner*, 471 U.S. at 9–11).

That analysis governs here. Accepting Harris's account and drawing all inferences in his favor, as we must, Pittman – just like the officer in *Brockington* – would have known that Harris was lying on the ground wounded and unarmed at the time of the final two shots. *See id.* ("drawing all inferences in favor of [the plaintiff]," it would have been apparent to the officer that the plaintiff was wounded and unarmed). And at that point, "[r]ather than shoot [Harris] as he lay helpless on the ground, a reasonable police officer would have asked him to surrender, called for backup or an ambulance, or retreated," *id.* In sum, under *Brockington*, as well as *Waterman*, the facts alleged by Harris, taken in the light most favorable to him, would allow a reasonable jury to find a violation of his constitutional rights, satisfying the first prong of the qualified immunity analysis. *See Meyers*, 713 F.3d at 731.

That leaves us with the district court's alternative holding, under the second prong of the analysis: that even if Pittman could be found to have violated Harris's right to be free of excessive force, Pittman is entitled to qualified immunity because that right was not "clearly established" with sufficient specificity at the time of the incident. *See id.* We disagree.

The cases on which we rely above, laying out the rule that governs here, were decided in 2005 (*Waterman*) and 2011 (*Brockington*), before the 2012 events of this case. Since 2005, it has been established that "an imminent threat of serious physical harm to an officer is not sufficient to justify the employment of deadly force *seconds after the threat is eliminated* if a reasonable officer would have recognized when the force was employed that the threat no longer existed." *Waterman*, 393 F.3d at 482 (emphasis added). Six

years later, in *Brockington*, we held that the *Waterman* rule was sufficiently specific to "clearly establish[]" the right of a suspect, once shot by an officer and lying wounded on the ground, not to be shot again. *Brockington*, 637 F.3d at 508. And although an exact factual match is not required to overcome a qualified immunity defense, *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002), *Brockington* certainly comes close: Under *Brockington*, it is clear that even a police officer who has just survived a harrowing encounter that necessitated the use of deadly force to extricate himself may not continue to use deadly force once he has reason to know that his would-be assailant is lying on the ground wounded and unarmed, 637 F.3d at 507–08. This is not a case, in other words, in which an officer would be required to reason backward from case law "at a high level of generality" to determine whether his conduct violated a constitutional right. *Cf. Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Here, "pre-existing law makes the unlawfulness" of the conduct in question – as alleged by Harris, and drawing all reasonable inferences in Harris's favor – "'apparent.'" *Clem*, 284 F.3d at 553 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).[6]

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[6] In reaching the opposite result, the district court discussed neither *Waterman* nor *Brockington*. Instead, it relied on a series of cases involving suspects who were wounded or fallen but also armed or thought to be armed when the police continued shooting. *See* J.A. 395 (citing *Elliott*, 99 F.3d at 641, 644; *Maradiaga v. Wilson*, 518 F. Supp. 2d 760, 775 (D.S.C. 2007); and *Estate of Rodgers ex rel. Rodgers v. Smith*, 188 F. App'x 175, 183 (4th Cir. 2006)). But as we explained in *Brockington* itself, such cases – and we mentioned *Estate of Rodgers* specifically – do not govern where, as here, "[i]n drawing all inferences in favor of [the plaintiff], he was unarmed and this fact was apparent,"

In so holding, we are cognizant of the reality that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 397. This is a case in point; even on Harris's account, and certainly on Pittman's, Officer Pittman was faced with a genuine and no doubt terrifying threat to his safety during his struggle with Harris. We do no more today than reiterate what this court repeatedly has held: that even where deadly force initially is justified by a significant threat of death or serious physical injury, a police officer may not continue to employ deadly force when the circumstances change so as to eliminate the threat. Applying that principle to this case, we conclude that Pittman is not entitled to qualified immunity on summary judgment.

This conclusion, of course, does not mean that Harris "will prevail if the action is tried on the merits," *Jacobs*, 780 F.3d at 568 (internal quotation marks omitted). That decision is not ours – or the district court's – to make at this juncture. Instead, we hold only that there remain genuine disputes of material fact bearing on Pittman's qualified immunity defense, and that summary judgment therefore is not appropriate on this record.[7]

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so that the justification for the initial use of force had been eliminated. 637 F.3d at 507. Nothing about those cases, in other words, conflicts with *Waterman* or *Brockington*, or undermines the clarity of the rule those precedents establish.

[7] We note that Harris on several occasions moved in the district court for the appointment of counsel. In his informal brief before this court, Harris appealed the district court's denial of his most recent motion. Although Harris's counseled brief did not re-raise this issue, we encourage the district court on remand to consider appointing counsel for Harris to assist in the litigation of the

III.

For the foregoing reasons, we reverse the judgment of the district court granting summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

WILKINSON, Circuit Judge, dissenting:

This dispute began when Herman Harris fled from Officer Zachary Pittman, after repeatedly being told to stop. Pittman caught up to Harris at the edge of a tree line and both men fell many feet down into the woods. In the ensuing struggle, the suspect fought off a taser and repeatedly struck Pittman. As Harris later admitted in a guilty plea for this assault, he tried to shoot Pittman in the head with Pittman's gun. Both men sustained serious injuries. When the altercation ended, Officer Pittman's face was lacerated, his hands were bleeding, taser wire covered the forest floor, and parts of Pittman's uniform and gun holster were destroyed. Harris was shot multiple times. Only a few minutes passed between the time that Officer Pittman first announced his presence and the time he emerged injured from the woods.

The majority shaves this incident oh so fine, parsing and segmenting the encounter almost second by second, ultimately finding that Pittman's efforts to save his life in the final moments of the altercation were excessive. Sadly for the majority, the action here spun by; the struggle allowed the combatants no time for a coffee break. In the majority's view, if a suspect

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case. *See Brooks v. Johnson*, ___ F.3d ___, 2019 WL 2063365, at *13 n.9 (4th Cir. May 10, 2019).

lands a punch in one moment, drags you to the ground the next, and goes for your gun a second later, a reasonable officer must shed any attempt to preserve his own life if, in the course of the ongoing fight, the officer gains so much as a fleeting advantage.

It was much to be hoped that the majority would understand the difference between a struggle in which life and death hinged on an instant and the leisured contemplation brought to events years later. To the best of my knowledge, the majority was not present at the scene. The majority was not tumbling down a wooded ravine in the dark of night. The majority was not alone, fighting a person who had disregarded clear warnings, fled arrest, fought through a taser, and tried to grab its gun. The majority did not struggle to regain its weapon while lying beaten and bloodied on the ground. And the majority did not fear for its life when that weapon was ultimately used to stop the assault. The law of qualified immunity does not allow us to ignore the serious and ongoing threat faced by Officer Pittman. Although I may never understand the risks that officers face in the service of public safety, settled law requires that I try. Because I cannot see how Pittman's actions were in any way unreasonable, I respectfully dissent.

I.

My esteemed colleagues in the majority are surely right in one respect. Police officers do overreach. And when they do, the law must hold them to account. This court's decision in *United States v. Slager*, decided only a few months ago, makes it clear beyond question that police officers cannot apply force, and certainly not unreasonable force, in response to every

provocation. 912 F.3d 224, 237 (4th Cir. 2019). Officer Slager badly abused his authority by firing on a fleeing suspect and then lying about it afterwards. The law imposed its consequences. Qualified immunity, however, provides officers the "breathing room to make reasonable but mistaken judgments." *Stanton v. Sims*, 571 U.S. 3, 5 (2013) (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011)). In other words, an officer may employ force in a fraught situation to forestall a deadly threat. That is all Officer Pittman did.

Four years ago, the Supreme Court noted how often it is called upon to reverse federal courts that deny qualified immunity in excessive force cases: "Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

The Court's view on the importance of qualified immunity has not wavered. Each year, it has continued to issue opinions, often per curiam, reversing a denial of qualified immunity in an excessive force suit. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam). In some cases, lower courts erred by defining the constitutional right at such a high level of abstraction that no conduct whatsoever was protected by the immunity. *See, e.g., Mullenix*, 136 S. Ct. at 308. At other times, courts have erred in applying the

immunity standard, either by assessing the officer's conduct without regard to the facts on the ground, *see, e.g.*, *Kisela*, 138 S. Ct. at 1153, or wrongfully finding a "genuine" dispute of fact, *see, e.g., Scott v. Harris*, 550 U.S. 372 (2007). The Supreme Court has been forced into the fray to prevent the total erosion of qualified immunity.

At some point a pattern of Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the Court's message to break through. Perhaps the Court's patience on this point is endless, because, golly, it has been so sorely tried. The failings that have been so routinely documented by the Supreme Court rear their head once again. The majority has used the summary judgment standard once more to eviscerate qualified immunity protections. In the majority's hands, every dispute becomes genuine and every fact becomes material. Qualified immunity fades to the end of every discussion, its values reserved for lip service until little enough is left. The result? The majority has ignored Supreme Court precedent, somehow finding Pittman's actions to save his own life something our Constitution cannot condone.

II.

This case comes to us at the summary judgment stage and a suit can only proceed if some material fact is "genuinely" disputed. Although it may not be clear from reading the majority opinion, awards of pre-trial dismissals are crucial to the utility of any immunity. The Supreme Court has repeatedly emphasized that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously

permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). If a case goes to trial when a valid basis for summary judgment exists, the entire purpose of the immunity is thwarted. The majority belies all of this teaching in repeatedly referring to this case as at an "early stage of the litigation," Maj. Op. at 10, thereby betraying its view that these sorts of cases should be resolved at a later, rather than earlier, point in time. But the more litigation the merrier is not at all what qualified immunity is about.

The majority portrays this case as a one-on-one swearing contest between Harris and Pittman, but it is hardly that. My colleagues here are willing to rest their decision on a conclusory version of the facts offered by Harris, which is not only unsupported by the whole record, but flatly contradicted by it. Controlling precedent, however, simply does not allow the majority to turn a blind eye to the stark weaknesses in the plaintiff's claim. The requirement that there be a "genuine" dispute to get to trial should not be too high a barrier for plaintiffs, but it should not be an open door either. Harris has not done nearly enough to show a "genuine" dispute in this case, and his version of events should be rejected.

Many of the facts offered by Officer Pittman are not disputed. Given that Harris offered very few facts of his own and previously pled guilty in state court to assaulting Officer Pittman, this is unsurprising. The parties agree that Harris fled after Pittman told him to stop, jumping a fence and ignoring multiple warnings. They also agree that the parties were engaged in a violent ground altercation, that there was a struggle for Pittman's gun, and that the first gunshot that struck Harris in the torso was fired in the course of the fight. Opening Br. at 3-4; Resp. Br.

at 4-8. The majority acknowledges this broad agreement between the parties, which demonstrates beyond any doubt that Officer Pittman was involved in an incident that might well have taken his life. Maj. Op. at 3-4.

The parties' accounts diverge on what happened in the final seconds of the fight, when the last shots were fired. Pittman alleges that he fired all of the shots in quick succession while Harris was standing over him, after telling him to get down. On his view, he was lying on the ground, physically exhausted and wounded, facing a suspect who was much larger than himself and who had just attempted to shoot him in the head with his own gun. We do not, of course, simply take Pittman's word for it. But Pittman's account of events not only comes from his own statement, but also has ample support in the record, including forensic evidence, witness statements, and photos taken at the crime scene. It is also consistent with the facts that Harris already accepted in his earlier state court plea. For his part, Harris alleges that Pittman fired on him once he fell to the ground, after he was already incapacitated by the earlier shot. Harris offers only his own affidavit to support his version of the facts.

The Supreme Court's decision in *Scott v. Harris* tees up this case perfectly. 550 U.S. 372 (2007). In *Scott*, the Court was also confronted by two wildly divergent accounts of the facts, one of which was provided by a plaintiff who offered no more than his own affidavit to support his claim. Even though the facts of the case were disputed at the summary judgment stage, the Court noted that what mattered was whether the dispute was "genuine," not merely contested. "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." *Id.* at 380.

The majority abruptly dismisses *Scott*, terming it an "exception, not the rule." Maj. Op. at 18. But the Court in *Scott* had in mind an affidavit just like the one submitted by Harris, which offers little more than conclusory assertions and wild accusations. Harris at various times accuses the police (without support) of falsifying DNA evidence and lying about which officers were at the scene. J.A. 51, 57. He then asserts that he never grabbed Officer Pittman's gun and never initiated contact with him. *Id.* at 43. And most critically, he alleges that the final shots were fired long after he fell to the ground. *Id.* at 41-43.

Harris's view may fit well with the prevailing social discourse, but it does not fit at all with the evidence. Unfortunately for my majority colleagues, who casually accept Harris's affidavit full stop, the record in this case undermines his story at nearly every turn. Harris's DNA was found on Pittman's weapon, belying any claim that he never grabbed the gun. J.A. 303-304. Forensic evidence demonstrates that the gunshot that injured Harris' hand was fired while the gun was holstered, further showing that he was grabbing for the weapon during the fight. *Id.* at 62, 252. Witnesses who heard the encounter recalled hearing a single shot, followed later by a series of shots fired in rapid succession. *Id.* at 59. This stands in stark contrast with Harris' contention that the second shot was followed by a long pause, such that Pittman would know for sure that Harris no longer posed a threat.

As if this evidence from the scene were not enough, Harris, in the course of pleading guilty to assaulting Pittman, admitted in state court that he fought over the gun. In fact, he admitted trying to shoot Pittman in the head, and only failing because the gun misfired in the holster. J.A. 169. He also admitted in his plea proceedings to hearing "get down, get down" in the moments before the final shots, demonstrating that he was still standing at the time. *Id.* at 168. There is simply no way that a reasonable juror could look at an account so devoid of independent factual development, so full of unsupported accusations, and so weakened by blatant contradiction in the record and walk away with the sense that Harris's version of events is accurate, or in any way compelling. *Scott* recognizes that while the non-moving party's burden of showing a "genuine" dispute is not an onerous one, it cannot rest solely on such a flimsy foundation. Without additional support in the record, the decision in *Scott* requires that we adopt the version of events that is supported by objective record evidence.

By this objective standard, taken not just from Pittman's account but from the record in its entirety, Pittman's actions were altogether reasonable. He fired on Harris while Harris was standing over him during an ongoing violent altercation. Moments earlier, his life was only spared by a misfiring gun. This court has never suggested that an officer is forbidden from taking action, including lethal action, to save his own life in such a situation. To the contrary, it is clearly established that he may do exactly that. *See White*, 137 S. Ct. at 550; *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996).

The majority finds otherwise only by looking to cases far afield from the facts actually faced by Officer

Pittman. To be sure, there are prior cases in this circuit in which a use of force was reasonable one moment but was unreasonable in the next. *See Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011); *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005). From these cases it is evident that, as a general matter, an officer's use of force must be examined at the moment it takes place. The district court did not disagree with that proposition, nor do I. What mattered in our prior cases, however, and what ought to matter here, is whether the risk facing the officer was still present when force was used. In *Waterman*, officers continued to fire on a car after the "vehicle passed the officers," 393 F.3d at 480, while the officer in *Brockington* fired additional gunshots after the plaintiff "fell off the porch onto the concrete backyard below," 637 F.3d at 507. Neither case bears any resemblance to the one here. In this case, Pittman was in an isolated patch on a dark night. He was indisputably facing a man who had struggled to grab his weapon, sought by his own admission to shoot him in the head, fought through taser wire, ignored an order to "get down, get down," and had earlier disregarded clear warnings to stop. There was no break in the action. Pittman could well and reasonably believe that he was faced with a mortal threat and he was permitted to respond accordingly.

It may be that one day this court will openly announce what is implicit here: a rule of constitutional law that subjects a police officer to liability for trying to save his life. I rather doubt, however, that our founding document forces officers to play roulette with their own existence. All we have ever needed to resolve this case is the recognition that no such unfeeling rule currently exists. Qualified

immunity shields all but those are "plainly incompetent or . . . knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and Officer Pittman is clearly not deserving of either label. He has violated no clearly established right, or any other right for that matter, and he is entitled to immunity.

III.

Interactions between citizens and police continue on edge, and minority communities and neighborhoods have justly felt that race brings with it an unwarranted presumption of wrongdoing. The Fourth Amendment, invaluable as it is, is but an imperfect check on the invisible hand of discriminatory enforcement. These grievances are now rightly garnering increased attention, but attention to one side of a fraught equation raises the risk that the other side will be neglected.

And there is another side. "Nationwide, interest in becoming a police officer is down significantly." *See* Tom Jackman, Who Wants to be a Police Officer? Job Applications Plummet at Most U.S. Departments: Perceptions of Policing, Healthy Economy Contribute to Decreased Applications at 66 Percent of Departments, Wash. Post (Dec. 4, 2018) ("Recently, [Chuck Wexler, head of the Police Executive Research Forum,] asked a roomful of chiefs to raise their hands if they wanted their children to follow them into a law enforcement career. Not one hand went up."). While this drop has many causes, unwarranted disrespect for the police profession is surely one.

Police work, like the calling of many a skilled tradesman, has often been handed down through the generations in America, but self respect depends in part upon societal respect, and that for officers is

sadly ebbing. Court decisions that devalue not only police work but the very safety of officers themselves risk severing those bonds of generational transmission that have so sustained the working classes of our country. It is a shame, because professional police work helps to bridge the gulf between the haves and have nots in a community and protects our most vulnerable and dispossessed populations. Law must sanction officers who would abuse their power or disregard controlling law; it should not scare off those who worry that no matter what they do or whom they protect, they cannot avoid suits for money damages.

When Officer Pittman emerged from that tree line, "gasping for air and . . . in physical pain," J.A. 250, he ought to have been greeted with respect. Instead he has been pulled from one fight and thrust into another, this time in a courtroom. The district court in this case applied our precedent faithfully and the officer here showed conspicuous courage. I cannot join a decision that engineers such a perverse punishment for his actions and tells future officers that they cannot preserve their very lives without having their conduct assessed through the uncomprehending lens of hindsight.

The second-guessing will have no end. If not now, never.

[ENTERED SEPTEMBER 25, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION

NO. 5:13-CT-3087-BO

HERMAN HARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
ZACHERY PITTMAN,	)	
	)	
Defendant.	)	

The matter comes before the court on defendant's third motion for summary judgment (DE 97) pursuant to Federal Rule of Civil Procedure 56 and motion to strike (DE 117). Also before the court are plaintiff s motions to appoint counsel (DE 84, 90, 112). For the following reasons, the court grants defendant's motion for summary judgment, denies defendant's motion to strike, and denies plaintiff s motions to appoint counsel.

STATEMENT OF THE CASE

On April 18, 2013, plaintiff Herman Harris ("plaintiff ') filed this civil rights action *pro se,* on an unverified complaint, pursuant to 42 U.S.C. § 1983. Plaintiff alleged that defendant Zachery Pittman

("Pittman" or "defendant"), a police officer in the Fayetteville Police Department, violated his constitutional rights pursuant to the Fourth Amendment to the United States Constitution by using excessive force against him. As relief, plaintiff seeks compensatory and punitive damages as well as a declaratory judgment. Defendant subsequently filed his first motion for summary judgment, which was denied without prejudice on August 28, 2014, because plaintiff was permitted to amend his complaint and did submit a verified amended complaint. Defendant then filed his second motion for summary judgment and asserted the affirmative defense of qualified immunity. On February 22, 2016, the court granted defendant's second motion for summaryjudgment. Plaintiff appealed.

On September 1, 2016, the United States Court of Appeals for the Fourth Circuit issued an order providing the following:

> The parties offered different versions of the salient facts surrounding Pittman's arrest. In particular, Harris' and Pittman's versions of events critically differ over what occurred when Pittman fired the final shots at Harris (e.g., whether Harris was standing or lying down). Thus, the question for the district court was whether, construing the facts in the light most favorable to Harris (i.e., Harris was lying on the ground when Pittman, still on top of him, fired the final shots), a reasonable officer would have probable cause to believe that Harris posed a significant threat of death or serious physical injury to the officer or others.

Harris v. Pittman, 668 F. App'x 486, 487 (4th Cir. 2016) (citing Tennessee v. Garner, 471 U.S. 1, 3 91985). Based upon the foregoing, the Fourth Circuit vacated the court's February 22, 2016, judgment and remanded the action "to determine, in the first instance, if construing the salient facts in the light most favorable to Harris, Pittman is entitled to qualified immunity." Id. Plaintiff subsequently filed two motions to appoint counsel.

On January 6, 2017, defendant filed his third motion for summary judgment arguing that plaintiff is unable to establish a constitutional violation or, alternatively, that defendant is entitled to the affirmative defense of qualified immunity. As part of hisinotion, defendant filed an appendix which included affidavits from defendant as well as Fayetteville Police Officers Jeremy Glass ("Glass"), Ronnie Rivera ("Rivera") (now aNew York City police officer),Alan Comer ("Comer"), and Pedro Orellano ("Orellano"). Orellano attached various exhibits to his affidavit. Plaintiff subsequently filed another motion to appoint counsel, as well as two responses to defendant'smotion for summary judgment. Defendant replied and filed a motion to strike plaintiff s second response to defendant's motion for summary judgment. On September 20, 2017, the court conducted an evidentiary hearing, and heard oral argument on defendant's motion for summaryjudgment.

STATEMENT OF FACTS

Except as where otherwise noted below, the undisputed facts are as follows. Plaintiff's action arises out of a struggle that ensued while Pittman, a

Fayetteville Police Department officer, attempted to apprehend plaintiff on August 26, 2012. On such date, Glass, another Fayetteville Police Department officer, located a vehicle which he suspected was the same vehicle which had been reported stolen the previous evening. (Glass Aff. ¶ 4, 5). Glass observed that the lights on the inside of the car were still bright and detected a gas/exhaust odor, which lead him to believe that the vehicle had been recently abandoned (Id. ¶ 5). Glass then advised officers in the area, at approximately 9:00 p.m., to be on the lookout for the suspects described as early to mid-teenage black males. (Id. ¶ 6; Pittman Aff. ¶ 3). Another officer, Rivera, saw plaintiff and identified him as a potential suspect and advised his fellow officers that he would pursue plaintiff. (Rivera Aff. ¶ 6).

Pittman, also in the area during this time, observed plaintiff climb a fence into the Kings Cross (Ivanhoe Court) Apartments, which were located across from the Westlake Apartments. (Pittman Aff. ¶ 7). Pittman then radioed that plaintiff was going toward Ivanhoe Court. (Id.) Pittman exited his vehicle and called out "Stop, police!" (Id.) After exiting his vehicle, Pittman chased plaintiff through a breezeway in between buildings in the apartment complex. (Id.) While in the breezeway, plaintiff slowed down as if he was looking for an avenue to escape. (Id.) Pittman, who was gaining on plaintiff, yelled to plaintiff that he would tase plaintiff in order to prevent him from fleeing. (Id.) Plaintiff continued to flee. (Id.)

Pittman subsequently reached plaintiff as plaintiff was attempting to escape into the woods surrounding the apartment complex. (Id. ¶ 8; (DE 102), Attach. pp. 27-28). Pittman caught hold of

plaintiff and both men fell approximately five feet downhill into a wooded area. (Id. ¶¶ 8-9). As the men were falling, plaintiff punched Pittman in the face twice. (Id. ¶ 9). When the men stopped falling, plaintiff was on his back, face to face with Pittman. (Id.) At that point, Pittman warned plaintiff that he was going to tase him and attempted to do so, but was unable to incapacitate plaintiff. (Id.) When Pittman activated the taser, both he and plaintiff were affected by the discharge. (Id.) As aresult, Pittman could not use his taser to his advantage. (Id.) After the original five second taser discharge ended, plaintiff took the taser out of Pittman's hands and held it out of Pittman's reach. (Id. ¶ 11). Plaintiff again pulled the taser trigger and another five-second electric current was delivered to both plaintiff and Pittman. (Id.) Plaintiff disputes that he ever attempted to gain control of the taser or that he ever operated the taser. ((DE 38-1), p. 18). Plaintiff's DNA was not found on Pittman's taser or the taser's holster. (Orellano Aff. Ex. D).

As Pittman struggled to retrieve his taser from plaintiff, Pittman noticed that plaintiff's hands were on Pittman's gun, and that plaintiff was pulling for the gun in an attempt to get it out of Pittman's holster. (Pittman Aff. ¶ 12). Pittman thought to himself: "This guy's trying to kill me. He's not trying to get away; he's trying to kill me." (Id.) In an attempt to retrieve his firearm, Pittman began choking plaintiff. (Id. ¶ 13). Inresponse, plaintiff took one of his hands off of the firearm and attempted to choke Pittman. (Id.) Pittman then released plaintiff s throat and again began using both of his hands to secure full control of the firearm.

(Id.) As the men were fighting for the gun, the gun discharged while in Pittman's holster. (Id. ¶ 15).

After the gun discharged, the men continued to fight over the weapon, which then came out of Pittman's holster. (Id. ¶ 16). Both plaintiff and Pittman's hands were on the gun, and plaintiff bit Pittman twice in an attempt to get Pittman to release the gun. (Id.) Pittman states that, at that point, he had his hands on the weapon, and determined that the muzzle was pointed in the direction of his head. (Id. ¶ 17). As Pittman attempted to push the muzzle of the gun away from his head, he heard the gun click. (Id.) The gun had malfunctioned or misfired when plaintiff pulled the trigger because there was still an un-ejected shell casing in the weapon from when it had discharged in Pittman's holster. (Id.) The men continued to struggle over the weapon. (Id.)

Ultimately, Pittman was able to gain control of his gun, and then immediately performed a malfunction drill to reactivate the weapon. (Pittman Aff. ¶ 18). When Pittman activated his gun's light, he states that plaintiff was standing a few feet away. (Id.) Pittman attests that, due to the darkness, he could only see plaintiff s silhouette from the belly button down and could not see plaintiff's hands or face. (Id.) Pittman further attests that he was not certain whether plaintiff was going to attack him again, and feared a further attempt on his life by plaintiff. (Id.) Pittman states that he was completely exhausted and unable to stand because he had become more and more ensnared in the vegetation as the struggle went on. (Id. ¶ 19). According to Pittman, he knew that he could not overcome other attack by plaintiff, and, fearing for

his life, fired his weapon at plaintiff. (Id. ¶¶ 20, 21). Pittman states that, pursuant to his law enforcement training, he fired until he observed plaintiff fall to the ground. (Id. ¶ 21).

According to plaintiff's version of events, Pittman stated "Mother [] I ought to kill you," as he fired his weapon at plaintiff. ((DE 38-1), p. 10). Plaintiff states that the "first shot severed [his] right hand ring finger . . . "as he held it up in a defensive position." (Compl. Attach. ¶ 10). The second shot entered plaintiff's abdomen, and the third shot entered plaintiff's upper right torso. (Id.) According to plaintiff, plaintiff was lying on the ground before the final shot was fired. ((DE 38-1), pp. 13-14; ((DE 111), Mem. in Supp. p. 8). Plaintiff denies that he attempted to gain control over Pittman's weapon or that he ever fired the weapon. ((DE 38-1, p. 18). However, plaintiff's DNA was found on the trigger and grip of Pittman's weapon. (Orellano Aff. Ex. D).

Officer Comer responded to the Kings Cross apartments after he heard Rivera call for assistance over the radio ten times, with no response. (Comer Aff. ¶ 9). Upon arrival, Comer observed Pittman come out of the wood line and fall to the ground. (Id. ¶¶ 16-17). Comer approached Pittman and saw that he was physically exhausted, and it appeared to Comer that Pittman had been in a tough fight. (Id. ¶ 17). Comer observed that Pittman's taser cartridge was separated from his x-26 taser which was lying on the ground. (Id. ¶ 18). The taser wire was wrapped around Pittman. (Id.) As a result of the incident, Pittman suffered facial injuries, a swollen right eye, and scratches to his face. (Id. ¶¶ 31-32; Orellano Aff. Ex. C).

At some point, Forensic Technician Mary Earnhardt ("Earnhardt") arrived and began to process the scene. (Comer Aff. ¶ 33). Comer walked Earnhardt to the wood line and showed her the location of the incident. (Id.) Approximately three to five feet down the hill, Comer and Earnhardt located four silver casings, Pittman's name tag, as well as clothing which possibly belonged to plaintiff. (Id.) Near the spent shell casings, Comer saw a small piece of black plastic which appeared to be a part of Pittman's handgun holster. (Id.) When Pittman examined his firearm holster after the incident, a piece of black plastic was missing, and a screw was hanging loose. (Pittman Aff. ¶ 23).

At some point, Comer spoke with Ms. Rachel Locey, a resident in the nearby apartment complex. (Comer Aff. ¶ 34). Ms. Locey told Comer that she called the police because she heard four shots behind her apartment building. (Id.) Specifically, she stated that she heard a gunshot when she was about to go to bed, and after an approximately 30 second pause, heard three more gun shots and someone yelling. (Id.) Ms.Locey informed the officer that she could not understand what was said and did not witness the incident. (Id.) Orellano, a detective, then arrived at the scene and spoke with additional residents of the apartment complex. (Orellano Aff. ¶ 5, 6, 9). Orellano spoke with David Rogler who stated that he heard a shot and then, a few seconds later, heard additional shots. (Id. ¶ 5). Those residents also indicated that they heard the gunshots and the deployment of a taser. (Id.)

On August 28, 2012, Orellano and Detective James Walker interviewed plaintiff at the Cape Fear Valley Hospital. (Orellano Aff. (DE 56) ¶ 10).

Orellano explained to plaintiff that he was not under arrest, and that they were there to get the facts about the shooting incident. (Id.) Plaintiff agreed to talk to the detectives, but states that the detectives did not tell him that he did not have to speak to them. (Id.; (DE 38-1, p. 5)). Inthe course of the interview, plaintiff admitted to hearing Pittman telling him to "freeze" while he wasjumping the fence, but did not stop because he thought he could outrun Pittman. (Orellano Aff. (DE 56) ¶ 13). Plaintiff also admitted to struggling with Pittman, taking the taser leads from his body, and resisting arrest. (Id. ¶ 14). At the conclusion of his investigation, Orellano obtained warrants against plaintiff for attempted first-degree murder and assault of a law enforcement officer with a firearm. (Id. ¶ 40). On January 16, 2015, plaintiff pleaded guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to assault of a law enforcement officer with a firearm, possession of a firearm by a felon, and attaining the status of a habitual felon in the Cumberland County Superior Court. (Plea Hr'g Tr. (DE 56) pp. 3-7, 28-29).

DISCUSSION

A. Motion to Strike

Defendant moves to strike plaintiff's second response to defendant's motion for summary judgment. The court has reviewed the motion under the governing standard and declines to strike the filing. Fed. R. Civ. P. 12(f); see, e.g., Waste Mgmt. Holdings. Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001); Hill v. Robeson Cty., 733 F. Supp. 2d 676, 690 (E.D.N.C. 2010). Thus, the court denies the motion.

B. Motions to Appoint Counsel

Plaintiff seeks the appointment of counsel stating that his incarcerated status and lack of access to a law library impede his ability to litigate this action. Generally, there is no constitutional right to counsel in civil cases, and courts should exercise their discretion to appoint counsel for *pro se* civil litigants "only in exceptional cases." Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). The existence of exceptional circumstances justifying appointment of counsel depends upon "the type and complexity of the case, and the abilities of the individuals bringing it." Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated on other grounds by Mallard v. U.S. Dist. Court for the S. Dist. Of lowa, 490 U.S. 296 (1989) (quoting Branch v. Cole, 686 F.2d 264 (5th Cir. 1982)); see also Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978) ("Ifit is apparent . . . that a pro se litigant has a colorable claim but lacks capacity to present it, the district court should appoint counsel to assist him.").

Plaintiff has demonstrated through the detail of his filings he is capable of proceeding *pro se*. Additionally, plaintiff s claim is not complex and is not one in which exceptional circumstances merit appointment of counsel. See Pickens v. Lewis, No. 1:15-cv-275-FDW, 2017 WL 2198342, at *1 (W.D.N.C. May 18,2017) (finding no exceptional circumstances warranting appoint of counsel where plaintiff alleged limitations due to incarcerated status and lack of access to a law library). Therefore, plaintiff s motions to appoint counsel are DENIED.

C. Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for ajury to return a verdict for that party. Anderson, 477 U.S. at 250.

2. Analysis

Defendant raises the affirmative defense of qualified immunity in this § 1983 action. Government officials are entitled to qualified immunity from civil damages so long 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). In other words, a government official is entitled to qualified immunity when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 236 (2009). The court first

determines whether defendant violated plaintiff s constitutional rights.

Claims that law enforcement officers used excessive force when making an arrest are governed by the Fourth Amendment to the United States Constitution and are analyzed under an "objective reasonableness" standard. Graham v. Connor, 490 U.S. 386, 388 (1989); Anderson v. Russell, 247 F.3d 125, 129 (4th Cir. 2001). The relevant question is "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." Elliott v. Leavitt, 99 F.3d 640, 642 (4th Cir. 1996). This standard mandates "a careful balancing" of Fourth Amendment rights "against the countervailing governmental interests at stake." Graham, 490 U.S. at 396. Application of the standard is highly fact dependent; factors to consider include "the severity of the crime at issue, whether the suspect poses an iediate threat to the safety of officers or others, and whether he is actively resisting arrest." Id. The reasonableness of the force used "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. Thus, to establish a violation of a constitutionally protected right, plaintiff must allege facts demonstrating that defendant, used force in an objectively unreasonable manner under the circumstances. See id. In making its determination with respect to whether Pittman used excessive force, the court must "view the reasonableness of the force in full context, with an eye toward the proportionality of the force in light of the totality of the

circumstances." Yates v. Terry, 817 F.3d 877, 883 (4th Cir. 2016).

As an initial matter, plaintiff relies largely on unverified documents to support his allegations. Plaintiff has the burden to produce some evidence which would create a genuine issue of material fact in order to survive summary judgment. See Celotex, 477 U.S. at 324 ("Rule 56(e) []requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial.") (internal quotations omitted). Generally, unverified pleadings are not sufficient to withstand an otherwise properly supported summary judgment motion. See Williams v. Griffin, 952 F.2d 820 823 (4th Cir.1991); see also, Fed. R. Civ. P. 56(e); see. e.g., Askins v. Belissary. No. 4:12-CV-1856-RBH, 2014 WL 507279, at *7 (D.S.C. Feb. 6i 2014) aff'd, 564 F. App'x 46 (4th Cir. 2014) (emphasis in original) (referencing Fed. R. Civ. P. 56(c), (e)). Based upon the foregoing, plaintiff has not met his burden of producing some evidence to demonstrate a genuine issue of material fact.

Even considering plaintiff s unverified statements, he still fails to establish a constitutional violation-that Pittman used excessive force. In evaluating the Graham factors, the court first considers the severity of the crime at issue. The incident began when Pittman pursued plaintiff as a suspect in connection with a stolen vehicle. While there is no evidence that plaintiff had any involvement with the alleged stolen vehicle, plaintiff fled from Pittman when Pittman approached to investigate. From that point

forward, the severity of the crime began to escalate when plaintiff punched Pittman twice, fought with Pittman over the taser, and engaged in conduct which lead Pittman to believe that plaintiff was attempting to murder Pittman. Given the severity ofthe offenses committed by plaintiff against Pittman before Pittman fired the shots, the first Graham factor weighs in plaintiff s favor.

The court next considers the second and third Graham factors together-whether the suspect posed an immediate threat to the safety of officers or others, and whether he was actively resisting arrest. There is no question that plaintiff was actively resisting Pittman and posed a significant and serious threat to both Pittman and the community at large. For instance, the evidence in the record shows that plaintiff refused direct orders from Pittman to stop fleeing and engaged in a struggle with Pittman which caused both men to fall into a dark wooded area. Plaintiff punched Pittman in the face twice as the men fell over the hill, and continued to struggle with Pittman after the fall. (See (DE 102), Attach. pp. 27-28, 30-34). In the course of the struggle, plaintiff attempted to gain control over both Pittman's taser and gun. At that point, Pittman believed that plaintiff was attempting to discharge the weapon into Pittman's head in an attempt to murder Pittman. Pittman's belief is corroborated by the fact that plaintiff s DNA was on Pittman's weapon and that Pittman's weapon was fired into Pittman's holster. Based upon the foregoing, and in light of plaintiff s relentless attacks on Pittman, Pittman was reasonable in his belief that plaintiff was actively resisting arrest and posed a serious threat to

Pittman and the community at large at the time Pittman fired each of the shots at plaintiff.

To the extent plaintiff states that the final shot was discharged while Pittman was standing over plaintiff, the record reflects that the shots were fired in rapid succession. (Comer Aff. ¶ 34 and Orellano Aff. ¶ 5). The record further reflects that plaintiff was relentless because he continued to attack Pittman even after being struck by a taser on two occasions. At the point Pittman fired the shots, he was exhausted and did not believe that he could fend off another attack. Notably, from the location of plaintiff s wounds, it appears that Pittman intended his shots only to disable plaintiff. Even when viewing the facts in the light most favorable to plaintiff, the record reflects that Pittman reasonably believed that plaintiff would continue to attack Pittman at all costs until Pitman was eliminated as a threat and that plaintiff had been trying to kill Pittman. See Elliott, 99 F.3d at 642 ("A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others.") (citing Garner, 471 U.S. 1); Clem v. Corbeau, 284 F.3d 543, 550 (4th ,Cir. 2002). As a result, the second and third Graham factors weigh in favor of plaintiff. Thus, plaintiff fails to establish a constitutional violation, and Pittman is entitled to qualified immunity.

In an abundance of caution, the court proceeds to the next step in the qualified immunity analysis-determining whether Pittman's conduct violated a clearly established statutory or constitutional right of which a reasonable officer would have known. See White v. Pauly, 137 S. Ct. 548, 551 (2017) (citing Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)). In

making such determination, the United States Court of Appeals for the Fourth Circuit has provided as follows:

> A right is sufficiently clearly established to expose an official to liability if "every reasonable official would have understood that what he is doing violates that right." [Mullenix, 136 S. Ct. at 308] (quoting Reichle v. Hoards, — U.S. —, 132 S. Ct. 2088, 2093, 182 L. Ed.2d. 985 (2012)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987) (citation omitted). We evaluate whether the unlawfulness of a particular violation was apparent "in light of the specific context of the case, not as a broad general proposition." Mullenix, 136 S. Ct. at 308 (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed.2d 583 (2004) (per curiam)).

Connor v. Thompson, 647 F. App'x 231, 238 (4th Cir. 2016). The United States Supreme Court in White further clarified that clearly established law cannot "be defined at a high level of generality" but "must be particularized to the facts of the case." White, 137 S. Ct. at 552. The Court further rejected the use of the decisions in Garner and Graham as general precedents for clearly established law, stating "we have held that Gamer and Graham do not by themselves create clearly established law outside an obvious case." Id. (internal quotation marks and

citation omitted)); see also Garner, 471 U.S. 1 (1985); Graham, 490 U._S. at 386.

Here, although Pittman recovered his firearm from plaintiff, the other attendant facts and circumstances-Pittman's physical exhaustion, the fact that Pittman believed plaintiff was attempting to murder him, plaintiff's continued attacks on Pittman, and the dark wooded surroundings-support Pittman's reasonable belief that plaintiff continued to present a threat to Pittman when Pittman fired each of the shots at plaintiff in rapid succession. See Elliott, 99 F.3d at 641, 644 (stating that courts cannot expect a police officer to remain passive in the face of an active threat and that "[t]he Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm."); ((DE 102), Attach. pp. 16-17); Maradiaga v. Wilson, 518 F. Supp. 2d 760, 775 (D.S.C. 2007) ("[Officer] asserts that he shot plaintiff until he feel to the ground. Even assuming Plaintiff's claim to be true, [officer's] justification for using deadly force against Plaintiff did not end when Plaintiff fell to the ground."), aff'd, 272 F. App'x 263 (4th Cir. 2008); Estate of Rodgers ex rel. Rodgers v. Smith, 188F. App'x 175, 183 (4th Cir. 2006) ("The [Plaintiff] further contends, however, that even if the use of deadly force was justified when [the o]fficer . . . fired the initial shots, that justification ended when [plaintiff] fell to the ground. We disagree. The reasonableness of an officer's actions rests on the information possessed by the officer at the moment force is employed."). Further, there is no pre-existing case law particularized to the facts of this case which provides that Pittman's conduct violated clearly established law. See White, 137

S. Ct. at 552 (stating that plaintiff must "identify a case where an officer acting under similar circumstances as [the officer at issue] was held to have violated the Fourth Amendment."); Reichle, 132 S. Ct. at 2093 (stating that for a right to be clearly established, it "mut be sufficiently clear that every reasonable officer would [have understood] that what he is doing violates that right.") (internal quotations omitted). Rather, an officer, such as Pittman, who shoots a suspect who has attacked him repeatedly, failed to obey the officer's commands, engages in conduct which leads the officer to believe that he may be murdered, and continues to behave in a way that causes the officer to believe that a continued attack is imminent is protected by qualified immunity. Thus, Pittman is entitled to qualified immunity and his motion for summary judgment is GRANTED.

CONCLUSION

Based upon the foregoing, the court ORDERS as follows:

(1) Defendant's motion to strike (DE 117) is DENIED;

(2) Plaintiff s motions to appoint counsel (DE 84, 90, 112) are DENIED;

(3) Defendant's third motion for summary judgment (DE 97) is GRANTED;

(4) The clerk of court is DIRECTED to close this case.

SO ORDERED, this the 22 day of September, 2017.

/s/ Terrence W. Boyle
United States District Judge

[ENTERED JULY 10, 2019]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7308

(5:13-ct-03087-BO)

HERMAN HARRIS

Plaintiff - Appellant

v.

ZACHARY PITTMAN,
Fayetteville Police Department

Defendant - Appellee

and

MOOSE BUTLER

Defendant

O R D E R

Upon consideration of the petition for rehearing en banc, the court denies the petition. No judge requested a poll under Fed. R. App. P. 35.

Entered at the direction of the panel. Judge Wilkinson voted to grant panel rehearing.

For the Court

/s/ Patricia S. Connor, Clerk