APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 18-1430

Davdrin Goffin

Plaintiff - Appellant

v.

Robbie K. Ashcraft, Individually and Official capacity as Police Officer, Warren, AR; Randy Peek, Individually and Official capacity as Chief of Police, Warren, AR; Bryan Martin, Individually and Official capacity as Mayor, Warren, AR; John Doe, 1-10; Warren, Arkansas, City of

Defendants - Appellees

Appeal from United States District Court
for the Western District of Arkansas - El Dorado

Submitted: July 15, 2020
Filed: October 15, 2020

Before SMITH, Chief Judge, KELLY and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Officer Robbie Ashcraft tried to arrest Davdrin Goffin for burglary and stealing handguns, bullets, and prescription pain medication. Prior to the arrest, multiple

witnesses told her that Goffin was armed, possibly intoxicated, and dangerous. When Goffin broke free from arrest, fled toward a group of bystanders, and moved as though he was reaching into his waistband, she shot him once in the back.

This would be a relatively straightforward qualified immunity case if those were all the facts. An officer may constitutionally use deadly force when she reasonably believes a fleeing suspect poses a threat of serious harm to herself or others. But Goffin claims (and Officer Ashcraft disputes) that he was patted down by another officer just before he fled. The pat down removed nothing from Goffin and was later shown to have been unusually ineffective; the officer failed to discover that Goffin was carrying a loaded magazine and extra bullets.

We conclude that Officer Ashcraft is entitled to qualified immunity on these facts because it was not clearly established at the time of the shooting that a pat down that removes nothing from a suspect eliminates an officer's probable cause that the suspect poses a threat of serious physical harm.

I.

We construe the facts in Goffin's favor. In September 2012, Goffin's uncle, Tommy Reddick, reported to Officer Ashcraft and Officer Aaron Hines that his home had been burgled—and he suspected Goffin was responsible for stealing two handguns, a box of bullets, and a bottle of painkillers. Reddick told the officers that earlier that day Goffin came to his house and asked for a gun, explaining that he lost his own pistol fleeing from the police. Reddick refused and left the house. When he returned, he saw Goffin was still nearby, arguing with a man in a black pickup truck. Once inside his house, he discovered that someone had snuck in through a back window, broken down a bedroom door, and stolen guns, ammunition, and pills. Reddick warned Officer Ashcraft, "This dude is out of control!" and, "Y'all better be ready to fight when you find him."

When the officers started searching for Goffin, Officer Ashcraft stopped a black truck that looked like the one Reddick had described. The driver, Dewayne Moore, told her that earlier Goffin had asked him for a ride. Moore initially told Goffin no, but Goffin threatened him, saying "take me to the goddamn car wash" and then displayed two guns that matched the descriptions of Reddick's stolen pistols. Frightened, Moore gave Goffin a ride. He too warned Officer Ashcraft about Goffin, telling her that Goffin was drunk and that Moore was scared he would rob him. After the shooting, he recounted to police that Goffin looked like he "was going to do something stupid," like he didn't "give a damn . . . like, I'm going to take you out or whatever."

After Officer Ashcraft interviewed Moore, Officer Hines called her and told her that Goffin was at a nearby body shop. The officers arrived separately but then walked together toward a crowd of people in the parking lot. Officer Ashcraft asked where Goffin was and the owner of the body shop directed them toward the garage. In front of the garage, the officers found Goffin sitting in a car talking on a Bluetooth headset. Both officers approached the vehicle with guns drawn, but before they got there Officer Hines holstered his pistol and drew a taser.

The officers demanded that Goffin exit with his hands raised, which he did. They then escorted him to the back of the car and Officer Ashcraft claims she saw something "bumping in [Goffin's] right front pocket." Goffin denies anything was in that pocket. At the back of the vehicle, Goffin says that Officer Hines patted him down and "searched every part of [his] body," including feeling for items in his pockets and around his waist. Goffin admits Officer Hines "didn't go into [his] pockets" and did not remove anything from his body.

Officer Hines started to place Goffin in handcuffs, but before he could finish, Goffin pushed off the car and fled toward a group of seven or eight bystanders. With his back to the officers, he raised his right shoulder, which Officer Ashcraft

interpreted as a reach for something in his pocket or his waistband. She then shot him once in the back.

The shooting occurred in a "split second." Goffin says he took no more than two steps and Officer Ashcraft agrees he made it only "a very short distance" before she fired. After he was shot, officers discovered that the patdown had missed a loaded 9mm pistol magazine and several loose bullets. The stolen guns were discovered within reach of where Goffin had been sitting in the car, but Goffin did not have a weapon on him.

Goffin survived the gunshot wound and brought a 1983 action against Officer Ashcraft, the city, and several other municipal employees, claiming that Officer Ashcraft used excessive force against him and that the other defendants had failed to properly train and supervise her. The district court[1] granted summary judgment to the defendants, finding that Officer Ashcraft was entitled to qualified immunity because her actions were objectively reasonable as a matter of law. Because the underlying excessive force claim failed, so did Goffin's claims against the other defendants. After dismissing all federal claims, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. Goffin timely appealed and we have jurisdiction. 28 U.S.C. § 1291.

II.

We review the grant of summary judgment on the basis of qualified immunity *de novo*. *Michael v. Trevena*, 899 F.3d 528, 531 (8th Cir. 2018). "Summary judgment is appropriate if the evidence, viewed in the light most favorable to [Goffin] and giving him the benefit of all reasonable inferences, shows there is no genuine

[1]The Honorable Susan O. Hickey, Chief Judge, United States District Court for the Western District of Arkansas.

issue of material fact." *Morgan v. A.G. Edwards*, 486 F.3d 1034, 1039 (8th Cir. 2007). We avoid judging an officer's split-second decision (made with imperfect information) against one we would make with a complete record and the benefit of hindsight. *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014).

We analyze cases involving the use of deadly force against a fleeing suspect under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). An officer's actions are justified when they are "objectively reasonable in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Capps v. Olson*, 780 F.3d 879, 884 (8th Cir. 2015). An officer is justified in using lethal force when she "has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others." *Garner*, 471 U.S. at 11.

Officer Ashcraft is entitled to qualified immunity if her conduct did 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). We do "not define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

Goffin must identify "either 'controlling authority' or 'a robust consensus of cases of persuasive authority' that 'placed the statutory or constitutional question beyond debate' at the time of the alleged violation." *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (en banc) (quoting *Ashcroft*, 563 U.S. at 741–42). "A plaintiff's failure to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment is often fatal to a claim outside of obvious cases." *K. W. P. v. Kansas City Public Schools*, 931 F.3d 813, 828 (8th Cir. 2019) (cleaned up).

By the time that she confronted Goffin at the body shop, Officer Ashcraft objectively and reasonably believed that Goffin was dangerous.[2] *Capps*, 780 F.3d at 884–85. She knew that he had lost a gun while fleeing from the police and had strong evidence that he had recently stolen two more. Moore told her Goffin was drunk and that he had threatened him with the stolen guns. And to top it off, Goffin's uncle had warned her that Goffin was spoiling for a fight.

The case turns on whether the pat down changes our analysis.[3] Goffin argues that the pat down creates an issue of material fact because, if it occurred, then Officer Ashcraft must have *known* he was unarmed, or at least that there is an issue of material fact as to whether she knew he was unarmed. But whether probable cause exists is a *legal* question, not a factual one. *See United States v. Kelley*, 329 F.3d 624, 628 (8th Cir. 2003). He must therefore provide a case clearly establishing that a pat down that recovered nothing[4] eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous.

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[2]The dissent suggests this a question for the jury. But "whether [an] officer['s] actions were objectively reasonable in light of clearly established law" is a legal question for the courts. *Littrell v. Franklin*, 388 F.3d 578, 586 (8th Cir. 2004); *see Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) ("[T]he reasonableness of Scott's actions—or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,'—is a pure question of law.") (citation omitted).

[3]We refer to the search as a "pat down" because that is the language the parties use and it describes how Goffin alleges he was searched. But the search was not a limited *Terry*-style stop, as the dissent suggests. Rather, it appears to have been the first step in a full search incident to arrest.

[4]In addition to recovering nothing, the record demonstrates that this was an unusually ineffective pat down that missed items that should have been discovered. Because Goffin nevertheless insists that the pat down covered "every part of his body," and because determining the exact quality of the pat down is not necessary to our conclusion, we disregard this factual oddity and construe the pat down in the light most favorable to Goffin.

Goffin fails to point to such a case. He relies on *Tennessee v. Garner*, but that case stands for a general proposition and cannot clearly establish the rule in most cases. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). His reliance on *Wealot v. Brooks*, 865 F.3d 1119 (8th Cir. 2017), is similarly misplaced. In *Wealot*, the parties disputed whether an officer had seen the suspect throw down his gun and raise his hands in surrender. We reversed because the district court had improperly construed the record in favor of the officer moving for summary judgment. *Id.* at 1125–26. The district court did not make that mistake here and it is undisputed that Officer Ashcraft never saw any items removed from Goffin. And even if *Wealot* were factually analogous, it cannot have put Officer Ashcraft on notice that her conduct was illegal because it was decided four years after Goffin was shot. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (clearly established law must predate the alleged violation).

We therefore conclude that Officer Ashcraft is entitled to summary judgment because it is not clearly established that after observing a pat down that removes nothing from a suspect who an officer reasonably believed to be armed and dangerous, an officer cannot use lethal force against that suspect when he flees and moves as though he is reaching for a weapon. Nor do we think this is the "rare obvious case" in which "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation omitted).

The district court is affirmed.

SMITH, Chief Judge, concurring.

I concur in the court's determination that the unlawfulness of Officer Ashcraft's conduct was not *clearly established*. I write separately to express my view

that Officer Ashcraft did, however, violate Goffin's constitutional right to be free from excessive force.

According to Goffin, Officer Hines conducted a pat-down search for weapons. Goffin says Officer Hines checked around his waistband, felt his pockets, patted down his legs to his ankles, and "searched every part of [Goffin's] body." Statement of Facts in Supp. of Mot. for Summ. J., Ex. 13, at 18, *Goffin v. Peek*, No. 1:15-cv-01040 (W.D. Ark. Dec. 18, 2017), ECF No. 50-13. Officer Ashcraft testified to standing approximately four feet directly behind Goffin while he and Officer Hines stood at the rear of the vehicle. It is undisputed that Officer Hines did not remove anything from Goffin's person. Goffin alleges that after Officer Hines completed the search, he handcuffed Goffin's left hand and told Goffin to put his other hand behind his back. Instead of complying, Goffin pushed off of the car with his right hand and began to run toward the crowd in the parking lot.

As the court recognizes, "whether probable cause exists is a *legal* question, not a factual one." *See supra* Part II (citing *United States v. Kelly*, 329 F.3d 624, 628 (8th Cir. 2003)). Construing the facts in the light most favorable to Goffin, Officer Ashcraft witnessed Officer Hines conduct a full body pat-down search for weapons on Goffin that recovered nothing. "The purpose of [a pat-down] search is . . . to allow the officer to pursue his investigation without fear of violence" and "must be strictly limited to that which is necessary for the *discovery of weapons* which might be used to harm the officer or others nearby." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (emphasis added) (internal quotations omitted); *see also United States v. Gilliam*, 520 F.3d 844, 847–48 (8th Cir. 2008) ("Following a valid *Terry* stop, the officer may conduct a limited pat-down search of the individual's outer clothing for the purpose of uncovering concealed weapons if the officer has a reasonable, articulable suspicion that the person is armed and dangerous.").

In my view, probable cause to believe that Goffin was armed dissipated upon completion of this full body pat-down search that revealed no weapons. Some cases analyzing probable cause in the context of investigatory stops have so held. *See, e.g.*, *United States v. Butler*, 223 F.3d 368, 375 (6th Cir. 2000) (although the police had reasonable suspicion of narcotics trafficking "to justify the initial stop," "once Defendant identified herself, answered the officer's questions, and consented to the patdown which did not reveal anything suspicious, the officers were required under the Fourth Amendment to allow Defendant to go free"); *United States v. McDow*, 206 F. Supp. 3d 829, 856 (S.D.N.Y. 2016) ("Here—when the officers continued to detain McDow after their questioning and thorough search of his pockets yielded no evidence of the suspected crime—the *Terry* stop became unreasonably intrusive and ripened into a de facto arrest that must be based on probable cause." (cleaned up)); *United States v. Felix*, No. 08-CR-68A, 2009 WL 483178, at *2 (W.D.N.Y. Feb. 25, 2009) (although police officers had reasonable suspicion that the defendant "might be armed with a weapon that he was attempting to sell illegally," "[o]nce it was determined that the defendant did not have the weapon on his person, the basis for the Fourth Amendment seizure dissipated . . . and the defendant should have been released"). The dissipation of probable cause to believe Goffin possessed a firearm should have reduced the officers' reasonable concern that Goffin posed an imminent threat to them or to bystanders. Thus, construing the facts in the light most favorable to Goffin, Officer Ashcraft violated Goffin's constitutional right to be free from excessive force by shooting him after witnessing a full body pat-down search that revealed no weapons.

Nonetheless, I agree with the court's determination that Officer Ashcraft is entitled to qualified immunity because Goffin has not identified "a *case clearly establishing* that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous." *See supra* Part II (emphasis added); *see also City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (explaining that it is "particularly important in excessive force cases"

that "the clearly established right must be defined with specificity" and that "police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue" (internal quotation omitted)). The Supreme Court's and this court's precedent make the definition of the protected right crucial. That precedent binds this court. The more precise the definition, the more difficult the claim. Had there been no pat-down search, the threat posed by an arrestee known to have been armed prior to the encounter would strongly favor the grant of qualified immunity.

In this case, the officer who shot Goffin was not the officer who conducted the pat-down search. A pat down is not an invasive search and oversights can occur. The possibility of an oversight by the pat-down officer means an observing officer may still need to exercise independent judgment as to a potential threat. Here, circumstances abruptly changed and a compliant arrestee bolted from custody with unknown motives and capabilities. Pat-down searches are conducted precisely to diminish the officers' concern that an arrestee is armed, but those searches are not foolproof. The absence of authority clearly establishing that Officer Ashcraft's actions, on these facts, was constitutionally prohibited supports the district court's grant of qualified immunity under existing precedent.[5]

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[5]The evolved qualified immunity doctrine is experiencing increased legal and historical scrutiny. That scrutiny is warranted. A judicially created doctrine that bars constitutional claims against government officials otherwise enforceable through the right to a civil jury trial deserves close and continued examination."[C]ogent critiques of qualified immunity as incongruent with the principles of statutory interpretation" abound. *Diamond v. Pennsylvania State Educ. Ass'n*, No. 19-2812, 2020 WL 5084266, at *14 (3d Cir. Aug. 28, 2020) (Fisher, J., concurring in the judgment) (citing *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018)). Justice Thomas recently reasserted his "previously expressed . . . doubts about [the Supreme Court's] qualified immunity jurisprudence." *Baxter*, 140 S. Ct. at 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869–72 (2017) (Thomas, J., concurring in part and

KELLY, Circuit judge, dissenting.

Officer Ashcraft never saw Goffin with a weapon, and she watched a fellow officer conduct a pat down that revealed no weapons. Yet Ashcraft shot Goffin in the back, in "a split-second," after he took "no more than two steps." Because I believe that the relevant law is clearly established—a question for the court to decide—and that a reasonable jury could find that Ashcraft's use of deadly force was objectively unreasonable, I respectfully dissent.

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (cleaned up). Goffin argues Ashcraft violated his clearly established Fourth Amendment right to be free from excessive force. In assessing an excessive force claim, we ask whether the officer's actions were "'objectively reasonable' in light of the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989). Reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 396. "The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others."[6] Loch v.

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concurring in judgment)). As Justice Thomas points out, § 1983's text "makes no mention of defenses or immunities." *Id.* at 1862 (cleaned up). "Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Id.* at 1862–63.

[6]To the extent that a probable cause analysis is required here, we have not applied it under the clearly established prong and have only addressed it to determine whether an officer's actions were objectively reasonable. See Malone v. Hinman, 847 F.3d 949, 954 (8th Cir. 2017) (identifying the relevant question as "whether Officer Hinman's use of deadly force against Malone was objectively reasonable under the circumstances," and specifically whether the officer "had probable cause to believe" that Malone posed a threat of serious physical harm, but not explicitly finding that

City of Litchfield, 689 F.3d 961, 965 (8th Cir. 2012). "But where a person 'poses no immediate threat to the officer and no threat to others,' deadly force is not justified." Ellison v. Lesher, 796 F.3d 910, 916 (8th Cir. 2015) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)). "Before employing deadly force, an officer should give some warning when it is feasible to do so." Loch, 689 F.3d at 967 (cleaned up).

Viewing the facts in the light most favorable to Goffin and giving him the benefit of all reasonable inferences, a jury could find that a reasonable officer would not have believed Goffin posed a threat of serious physical harm to the officer or others. See Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1039 (8th Cir. 2007) (summary judgment standard). Ashcraft heard from two witnesses that Goffin had two guns and ammunition in his possession. But after she arrived at the auto body shop, she never saw a gun in Goffin's possession. He was not holding a gun when he was in the car, or when he exited the car. At the back of the car, Hines patted Goffin down and "searched every part of [his] body," including feeling for items in his pockets and around his waist.[7] Ashcraft saw the pat down revealed no

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probable cause existed); Partlow v. Stadler, 774 F.3d 497, 503 (8th Cir. 2014) (determining that a reasonable officer would have had probable cause when analyzing objective reasonableness); Aipperspach v. McInerney, 766 F.3d 803, 807 (8th Cir. 2014) (finding that "objectively reasonable officers had probable cause" to believe that suspect posed a threat of serious physical harm to the officers); Ribbey v. Cox, 222 F.3d 1040, 1043 (8th Cir. 2000) ("A shooting is objectively reasonable when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others."). Cf. Wallace v. City of Alexander, 843 F.3d 763,768–69 (8th Cir. 2016) (determining that the officer's actions were objectively unreasonable without addressing probable cause); Ellison v. Lesher, 796 F.3d 910, 916 (8th Cir. 2015) (mentioning probable cause when addressing objective reasonableness but not reaching the question of whether the officer had probable cause).

[7]The district court and the parties characterize this as a pat down, and the court here finds it "unusually ineffective." But the purpose of a pat down is "to determine whether the person is in fact carrying a weapon." Minnesota v. Dickerson, 508 U.S.

weapons of any kind. Then, in a "split second," she shot him in the back—without warning—after he took "no more than two steps." She thought Goffin might have been reaching for a weapon. "An act taken based on a mistaken perception or belief" that a suspect is armed does not necessarily violate the Fourth Amendment, but only "if objectively reasonable." Loch, 689 F.3d at 966. In my view, based on these facts, a jury could find that Officer Ashcraft's actions were not objectively reasonable.

In addition, the law is clearly established even if no prior case contained the exact factual circumstance here: a pat down before the suspect fled. The Supreme Court has long rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Officials can be on notice that their conduct violates established law "even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002). Although existing precedent must have placed the statutory or constitutional question beyond debate, "general statements of the law

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366, 373 (1993) (citing Terry v. Ohio, 392 U.S. 1, 24 (1968)). It is not to discover every item a person may be carrying. See id. ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."); United States v. Murphy, 261 F.3d 741, 743 (8th Cir. 2001) ("The justification for a pat-down search is to ensure the safety of a law enforcement officer."). The pat down "must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Dickerson, 508 U.S. at 373. The pat down here would only be unsuccessful if Goffin had a weapon that the pat down failed to reveal. Neither party argues, and the court does not contend, that the loose bullets and loaded magazine found in Goffin's pocket are considered weapons.

Even assuming the pat down was somehow ineffective, however, its ineffectiveness would have no bearing on the qualified immunity analysis. The relevant inquiry here is whether an officer reasonably conducted herself based on the facts she had at the time of the shooting. And at the time of the shooting, Ashcraft did not know that items would later be found in Goffin's pocket.

are not inherently incapable of giving fair and clear warning to officers." Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018). This is because, at its core, "clearly established" boils down to "whether the officer had fair notice that her conduct was unlawful." Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

Officer Ashcroft had "fair notice" that her conduct was unlawful. It is undisputed that "[s]ince 1985, it has been established by the Supreme Court that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted." Moore v. Indehar, 514 F.3d 756, 763 (8th Cir. 2008) (determining that a jury could find the officer's use of deadly force against an unarmed person fleeing the scene of a shooting objectively unreasonable). We have concluded that "an officer violate[s] *Garner* by using deadly force to seize an individual who did not possess a weapon and was attempting to flee the scene of a potentially violent crime." Wallace v. City of Alexander, 843 F.3d 763, 769 (8th Cir. 2016) (citing Moore, 514 F.3d at 763) (finding that a jury could determine the officer's use of deadly force on a fleeing, unarmed suspect objectively unreasonable, even though the officer had previously seen the suspect hold a gun); see also Ellison, 796 F.3d at 917 (acknowledging that "the precise scenario" of the case, shooting an armed person for standing in his apartment and refusing to lie down on the ground, does not appear in a reported decision but still finding that the officers were "on fair notice that the use of deadly force would not be reasonable").

The court relies on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law. But the pat down is a novel fact that does not render inapplicable the clearly established law that officers "may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others." Ellison, 976 F.3d at 917 (quotation omitted). And here, although the novel factual circumstance of a pat down may impact whether a reasonable jury finds Ashcraft's

actions objectively reasonable, it does not render inapplicable the clearly established law that she cannot use deadly force unless a suspect poses a significant threat of death or serious physical injury to her or others.

I would reverse the grant of qualified immunity.

United States Court of Appeals
For the Eighth Circuit

No. 18-1430

Davdrin Goffin

Plaintiff - Appellant

v.

Robbie K. Ashcraft, Individually and Official capacity as Police Officer, Warren, AR; Randy Peek, Individually and Official capacity as Chief of Police, Warren, AR; Bryan Martin, Individually and Official capacity as Mayor, Warren, AR; John Doe, 1-10; Warren, Arkansas, City of

Defendants - Appellees

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KOBES, Circuit Judge.

Officer Robbie Ashcraft tried to arrest Davdrin Goffin for burglary and stealing handguns, bullets, and prescription pain medication. Prior to the arrest, multiple witnesses told her that Goffin was armed, possibly intoxicated, and dangerous. When

Goffin broke free from arrest, fled toward a group of bystanders, and moved as though he was reaching into his waistband, she shot him once in the back.

This would be a relatively straightforward qualified immunity case if those were all the facts. An officer may constitutionally use deadly force when she reasonably believes a fleeing suspect poses a threat of serious harm to herself or others. But Goffin claims (and Officer Ashcraft disputes) that he was patted down by another officer just before he fled. The pat down removed nothing from Goffin and was later shown to have been unusually ineffective; the officer failed to discover that Goffin was carrying a loaded magazine and extra bullets.

We conclude that Officer Ashcraft is entitled to qualified immunity on these facts because it was not clearly established at the time of the shooting that a pat down that removes nothing from a suspect eliminates an officer's probable cause that the suspect poses a threat of serious physical harm.

I.

We construe the facts in Goffin's favor. In September 2012, Goffin's uncle, Tommy Reddick, reported to Officer Ashcraft and Officer Aaron Hines that his home had been burgled—and he suspected Goffin was responsible for stealing two handguns, a box of bullets, and a bottle of painkillers. Reddick told the officers that earlier that day Goffin came to his house and asked for a gun, explaining that he lost his own pistol fleeing from the police. Reddick refused and left the house. When he returned, he saw Goffin was still nearby, arguing with a man in a black pickup truck. Once inside his house, he discovered that someone had snuck in through a back window, broken down a bedroom door, and stolen guns, ammunition, and pills. Reddick warned Officer Ashcraft, "This dude is out of control!" and, "Y'all better be ready to fight when you find him."

When the officers started searching for Goffin, Officer Ashcraft stopped a black truck that looked like the one Reddick had described. The driver, Dewayne Moore, told her that earlier Goffin had asked him for a ride. Moore initially told Goffin no, but Goffin threatened him, saying "take me to the goddamn car wash" and then displayed two guns that matched the descriptions of Reddick's stolen pistols. Frightened, Moore gave Goffin a ride. He too warned Officer Ashcraft about Goffin, telling her that Goffin was drunk and that Moore was scared he would rob him. After the shooting, he recounted to police that Goffin looked like he "was going to do something stupid," like he didn't "give a damn . . . like, I'm going to take you out or whatever."

After Officer Ashcraft interviewed Moore, Officer Hines called her and told her that Goffin was at a nearby body shop. The officers arrived separately but then walked together toward a crowd of people in the parking lot. Officer Ashcraft asked where Goffin was and the owner of the body shop directed them toward the garage. In front of the garage, the officers found Goffin sitting in a car talking on a Bluetooth headset. Both officers approached the vehicle with guns drawn, but before they got there Officer Hines holstered his pistol and drew a taser.

The officers demanded that Goffin exit with his hands raised, which he did. They then escorted him to the back of the car and Officer Ashcraft claims she saw something "bumping in [Goffin's] right front pocket." Goffin denies anything was in that pocket. At the back of the vehicle, Goffin says that Officer Hines patted him down and "searched every part of [his] body," including feeling for items in his pockets and around his waist. Goffin admits Officer Hines "didn't go into [his] pockets" and did not remove anything from his body.

Officer Hines started to place Goffin in handcuffs, but before he could finish, Goffin pushed off the car and fled toward a group of seven or eight bystanders. With his back to the officers, he raised his right shoulder, which Officer Ashcraft interpreted as a reach for something in his pocket or his waistband. She then shot him once in the back.

The shooting occurred in a "split second." Goffin says he took no more than two steps and Officer Ashcraft agrees he made it only "a very short distance" before she fired. After he was shot, officers discovered that the patdown had missed a loaded 9mm pistol magazine and several loose bullets. The stolen guns were discovered within reach of where Goffin had been sitting in the car, but Goffin did not have a weapon on him.

Goffin survived the gunshot wound and brought a 1983 action against Officer Ashcraft, the city, and several other municipal employees, claiming that Officer Ashcraft used excessive force against him and that the other defendants had failed to properly train and supervise her. The district court[1] granted summary judgment to the defendants, finding that Officer Ashcraft was entitled to qualified immunity because her actions were objectively reasonable as a matter of law. Because the underlying excessive force claim failed, so did Goffin's claims against the other defendants. After dismissing all federal claims, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. Goffin timely appealed and we have jurisdiction. 28 U.S.C. § 1291.

II.

We review the grant of summary judgment on the basis of qualified immunity *de novo*. *Michael v. Trevena*, 899 F.3d 528, 531 (8th Cir. 2018). "Summary judgment is appropriate if the evidence, viewed in the light most favorable to [Goffin] and giving him the benefit of all reasonable inferences, shows there is no genuine issue of material fact." *Morgan v. A.G. Edwards*, 486 F.3d 1034, 1039 (8th Cir. 2007). We avoid judging an officer's split-second decision (made with imperfect information) against one we would make with a complete record and the benefit of hindsight. *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014).

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[1] The Honorable Susan O. Hickey, Chief Judge, United States District Court for the Western District of Arkansas.

We analyze cases involving the use of deadly force against a fleeing suspect under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). An officer's actions are justified when they are "objectively reasonable in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Capps v. Olson*, 780 F.3d 879, 884 (8th Cir. 2015). An officer is justified in using lethal force when she "has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others." *Garner*, 471 U.S. at 11.

Officer Ashcraft is entitled to qualified immunity if her conduct did 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). We do "not define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

Goffin must identify "either 'controlling authority' or 'a robust consensus of cases of persuasive authority' that 'placed the statutory or constitutional question beyond debate' at the time of the alleged violation." *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (en banc) (quoting *Ashcroft*, 563 U.S. at 741–42). "A plaintiff's failure to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment is often fatal to a claim outside of obvious cases." *K. W. P. v. Kansas City Public Schools*, 931 F.3d 813, 828 (8th Cir. 2019) (cleaned up).

By the time that she confronted Goffin at the body shop, Officer Ashcraft objectively and reasonably believed that Goffin was dangerous.[2] *Capps*, 780 F.3d at 884–85. She knew that he had lost a gun while fleeing from the police and had strong evidence that he had recently stolen two more. Moore told her Goffin was drunk and that he had threatened him with the stolen guns. And to top it off, Goffin's uncle had warned her that Goffin was spoiling for a fight.

The case turns on whether the pat down changes our analysis.[3] Goffin argues that the pat down creates an issue of material fact because, if it occurred, then Officer Ashcraft must have *known* he was unarmed, or at least that there is an issue of material fact as to whether she knew he was unarmed. But whether probable cause exists is a *legal* question, not a factual one. *See United States v. Kelley*, 329 F.3d 624, 628 (8th Cir. 2003). He must therefore provide a case clearly establishing that a pat down that recovered nothing[4] eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous.

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[2] The dissent suggests this a question for the jury. But "whether [an] officer['s] actions were objectively reasonable in light of clearly established law" is a legal question for the courts. *Littrell v. Franklin*, 388 F.3d 578, 586 (8th Cir. 2004); *see Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) ("[T]he reasonableness of Scott's actions—or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,'—is a pure question of law.") (citation omitted).

[3] We refer to the search as a "pat down" because that is the language the parties use and it describes how Goffin alleges he was searched. But the search was not a limited *Terry*-style stop, as the dissent suggests. Rather, it appears to have been the first step in a full search incident to arrest.

[4] In addition to recovering nothing, the record demonstrates that this was an unusually ineffective pat down that missed items that should have been discovered. Because Goffin nevertheless insists that the pat down covered "every part of his body," and because determining the exact quality of the pat down is not necessary to our conclusion, we disregard this factual oddity and construe the pat down in the light most favorable to Goffin.

Goffin fails to point to such a case. He relies on *Tennessee v. Garner*, but that case stands for a general proposition and cannot clearly establish the rule in most cases. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). His reliance on *Wealot v. Brooks*, 865 F.3d 1119 (8th Cir. 2017), is similarly misplaced. In *Wealot*, the parties disputed whether an officer had seen the suspect throw down his gun and raise his hands in surrender. We reversed because the district court had improperly construed the record in favor of the officer moving for summary judgment. *Id.* at 1125–26. The district court did not make that mistake here and it is undisputed that Officer Ashcraft never saw any items removed from Goffin. And even if *Wealot* were factually analogous, it cannot have put Officer Ashcraft on notice that her conduct was illegal because it was decided four years after Goffin was shot. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (clearly established law must predate the alleged violation).

We therefore conclude that Officer Ashcraft is entitled to summary judgment because it is not clearly established that after observing a pat down that removes nothing from a suspect who an officer reasonably believed to be armed and dangerous, an officer cannot use lethal force against that suspect when he flees and moves as though he is reaching for a weapon. Nor do we think this is the "rare obvious case" in which "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation omitted). The district court is affirmed.

KELLY, Circuit judge, dissenting.

Officer Ashcraft never saw Goffin with a weapon, and she watched a fellow officer conduct a pat down that revealed no weapons. Yet Ashcraft shot Goffin in the back, in "a split-second," after he took "no more than two steps." Because I believe that the relevant law is clearly established—a question for the court to decide—and that

a reasonable jury could find that Ashcraft's use of deadly force was objectively unreasonable, I respectfully dissent.

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (cleaned up). Goffin argues Ashcraft violated his clearly established Fourth Amendment right to be free from excessive force. In assessing an excessive force claim, we ask whether the officer's actions were "'objectively reasonable' in light of the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989). Reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 396. "The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others."[5] Loch v. City of

[5]To the extent that a probable cause analysis is required here, we have not applied it under the clearly established prong and have only addressed it to determine whether an officer's actions were objectively reasonable. See Malone v. Hinman, 847 F.3d 949, 954 (8th Cir. 2017) (identifying the relevant question as "whether Officer Hinman's use of deadly force against Malone was objectively reasonable under the circumstances," and specifically whether the officer "had probable cause to believe" that Malone posed a threat of serious physical harm, but not explicitly finding that probable cause existed); Partlow v. Stadler, 774 F.3d 497, 503 (8th Cir. 2014) (determining that a reasonable officer would have had probable cause when analyzing objective reasonableness); Aipperspach v. McInerney, 766 F.3d 803, 807 (8th Cir. 2014) (finding that "objectively reasonable officers had probable cause" to believe that suspect posed a threat of serious physical harm to the officers); Ribbey v. Cox, 222 F.3d 1040, 1043 (8th Cir. 2000) ("A shooting is objectively reasonable when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others."). Cf. Wallace v. City of Alexander, 843 F.3d 763,768–69 (8th Cir. 2016) (determining that the officer's actions were objectively unreasonable without addressing probable cause); Ellison v. Lesher, 796 F.3d 910, 916 (8th Cir. 2015) (mentioning probable cause when addressing objective

Litchfield, 689 F.3d 961, 965 (8th Cir. 2012). "But where a person 'poses no immediate threat to the officer and no threat to others,' deadly force is not justified." Ellison v. Lesher, 796 F.3d 910, 916 (8th Cir. 2015) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)). "Before employing deadly force, an officer should give some warning when it is feasible to do so." Loch, 689 F.3d at 967 (cleaned up).

Viewing the facts in the light most favorable to Goffin and giving him the benefit of all reasonable inferences, a jury could find that a reasonable officer would not have believed Goffin posed a threat of serious physical harm to the officer or others. See Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1039 (8th Cir. 2007) (summary judgment standard). Ashcraft heard from two witnesses that Goffin had two guns and ammunition in his possession. But after she arrived at the auto body shop, she never saw a gun in Goffin's possession. He was not holding a gun when he was in the car, or when he exited the car. At the back of the car, Hines patted Goffin down and "searched every part of [his] body," including feeling for items in his pockets and around his waist.[6] Ashcraft saw the pat down revealed no weapons of any kind. Then,

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reasonableness but not reaching the question of whether the officer had probable cause).

[6]The district court and the parties characterize this as a pat down, and the court here finds it "unusually ineffective." But the purpose of a pat down is "to determine whether the person is in fact carrying a weapon." Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (citing Terry v. Ohio, 392 U.S. 1, 24 (1968)). It is not to discover every item a person may be carrying. See id. ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."); United States v. Murphy, 261 F.3d 741, 743 (8th Cir. 2001) ("The justification for a pat-down search is to ensure the safety of a law enforcement officer."). The pat down "must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Dickerson, 508 U.S. at 373. The pat down here would only be unsuccessful if Goffin had a weapon that the pat down failed to reveal. Neither party argues, and the court does not contend, that the loose bullets and loaded magazine found in Goffin's pocket

in a "split second," she shot him in the back—without warning—after he took "no more than two steps." She thought Goffin might have been reaching for a weapon. "An act taken based on a mistaken perception or belief" that a suspect is armed does not necessarily violate the Fourth Amendment, but only "if objectively reasonable." Loch, 689 F.3d at 966. In my view, based on these facts, a jury could find that Officer Ashcraft's actions were not objectively reasonable.

In addition, the law is clearly established even if no prior case contained the exact factual circumstance here: a pat down before the suspect fled. The Supreme Court has long rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Officials can be on notice that their conduct violates established law "even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002). Although existing precedent must have placed the statutory or constitutional question beyond debate, "general statements of the law are not inherently incapable of giving fair and clear warning to officers." Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018). This is because, at its core, "clearly established" boils down to "whether the officer had fair notice that her conduct was unlawful." Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

Officer Ashcroft had "fair notice" that her conduct was unlawful. It is undisputed that "[s]ince 1985, it has been established by the Supreme Court that the use of deadly force against a fleeing suspect who does not pose a significant threat of

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are considered weapons.

Even assuming the pat down was somehow ineffective, however, its ineffectiveness would have no bearing on the qualified immunity analysis. The relevant inquiry here is whether an officer reasonably conducted herself based on the facts she had at the time of the shooting. And at the time of the shooting, Ashcraft did not know that items would later be found in Goffin's pocket.

death or serious physical injury to the officer or others is not permitted." Moore v. Indehar, 514 F.3d 756, 763 (8th Cir. 2008) (determining that a jury could find the officer's use of deadly force against an unarmed person fleeing the scene of a shooting objectively unreasonable). We have concluded that "an officer violate[s] *Garner* by using deadly force to seize an individual who did not possess a weapon and was attempting to flee the scene of a potentially violent crime." Wallace v. City of Alexander, 843 F.3d 763, 769 (8th Cir. 2016) (citing Moore, 514 F.3d at 763) (finding that a jury could determine the officer's use of deadly force on a fleeing, unarmed suspect objectively unreasonable, even though the officer had previously seen the suspect hold a gun); see also Ellison, 796 F.3d at 917 (acknowledging that "the precise scenario" of the case, shooting an armed person for standing in his apartment and refusing to lie down on the ground, does not appear in a reported decision but still finding that the officers were "on fair notice that the use of deadly force would not be reasonable").

The court relies on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law. But the pat down is a novel fact that does not render inapplicable the clearly established law that officers "may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others." Ellison, 976 F.3d at 917 (quotation omitted). And here, although the novel factual circumstance of a pat down may impact whether a reasonable jury finds Ashcraft's actions objectively reasonable, it does not render inapplicable the clearly established law that she cannot use deadly force unless a suspect poses a significant threat of death or serious physical injury to her or others.

I would reverse the grant of qualified immunity.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DAVDRIN GOFFIN PLAINTIFF

v. Case No. 1:15-cv-1040

RANDY PEEK, individually and in his official capacity as Police Chief for the city of Warren; CITY OF WARREN; ROBBIE K. ASHCRAFT, individually and in her official capacity as a law enforcement officer of the city of Warren; BRYAN MARTIN, individually and in his official capacity as mayor for the city of Warren; and JOHN DOES 1-10 DEFENDANTS

MEMORANDUM OPINION

Before the Court is a Motion for Summary Judgment filed by Defendants. ECF No. 48. Plaintiff has responded. ECF. No. 53. This matter is ripe for the Court's consideration.

BACKGROUND

Davdrin Goffin was shot by police officer Robbie Ashcraft. He brings this action for damages under 42 U.S.C. § 1983 against Ashcraft; Randy Peek, who is the police chief; Bryan Martin, who is the mayor of Warren, Arkansas; and the city of Warren. Goffin alleges an excessive use of force claim against Ashcraft. Plaintiff also brings claims for failure to train and failure to supervise, for violations of his Eighth and Fourteenth Amendment rights, as well as state law claims for outrage, battery, and negligence and for violations of the Arkansas Civil Rights Act. Defendants argue that they are entitled to summary judgment on all claims.

Officers Robbie Ashcraft and Aaron Hines responded to a residential burglary call at the home of Tommy Reddick, Goffin's uncle by marriage. Reddick reported to Ashcraft and Hines that Goffin had come to Reddick's house earlier in the day and told Reddick that he dropped his

gun while running from the police. Reddick stated that Goffin then demanded Reddick's gun but he did not comply with the demand. Reddick further reported that later that same day, while he was away from his home for thirty minutes, Goffin entered Reddick's home through the back window, kicked in his bedroom door, and took two guns (a 9mm pistol with clip and a .38 snub nose pistol), a box of bullets, and a bottle of hydrocodone.[1] Reddick told the officers that Goffin was "out of control."

Ashcraft knew of Goffin from previous dealings with him and knew that Goffin had an active arrest warrant for aggravated robbery at the time Reddick reported the burglary. Ashcraft told Reddick that "we've been looking for [Goffin]," and Reddick responded that they should be ready to fight when they find him.

After Ashcraft took Reddick's statement and as she was preparing to leave Reddick's house, she saw a black truck being driven by a black male drive by the residence. Ashcraft, who had parted ways with Hines, followed the truck to its destination and asked the driver, Dwayne Moore, if he had seen Goffin. Moore reported that Goffin, who smelled of alcohol, had flagged him down and jumped in Moore's truck. Moore told Ashcraft that Goffin asked Moore to take him to the car wash and that, when Moore hesitated, Goffin demanded a ride to the car wash and told Moore that he had two guns. Goffin reportedly pulled out either a 9mm or 40-caliber pistol and then pulled out either a .22 or .38 caliber pistol. Moore told Ashcraft he was afraid that Goffin was going to rob him and that Goffin looked as if he would "take [Moore] out," so he took Goffin to the car wash. Moore also told Ashcraft that Goffin had a gun in each pocket.[2]

[1] The Court notes that Goffin questions the truthfulness of Reddick's statements to Ashcraft and Hines; however, as discussed later in this Opinion, these statements are offered to show their effect on Ashcraft and not for their truthfulness.

[2] The Court notes that Goffin questions the truthfulness of Moore's statements to Ashcraft; however, as discussed later in this Opinion, these statements are offered to show their effect on Ashcraft and not for their truthfulness.

After Ashcraft finished taking Moore's statement, Hines called Ashcraft to tell her that Goffin had been seen at a specific body shop. Ashcraft and Hines met at the body shop and walked together toward Goffin's suspected location. They approached a crowd of people standing in and around the parking lot and asked where Goffin was. The body shop owner pointed to the garage door. As they approached the garage door, they heard a voice coming from a car parked by the garage door. Ashcraft saw Goffin sitting in the front passenger seat of the car. Both officers drew their guns and approached the vehicle. Ashcraft walked to the driver's side and Hines to the passenger side. As Hines made it to the front of the car, he holstered his weapon and grabbed his Taser gun. Both Ashcraft and Hines ordered Goffin to show his hands. Hines asked Goffin to keep his hands up and exit the car. Goffin stepped out of the vehicle with his hands slightly raised. Hines moved Goffin to the rear of the car while Ashcraft kept her weapon out. Ashcraft saw something "bumping in [Goffin's] right front pocket."

At the rear of the vehicle, Hines ordered Goffin to put his hands on the trunk of the car while Ashcraft continued to provide lethal cover for Hines. As Hines attempted to handcuff Goffin, he extended his left arm, and attempted to run. According to Goffin, he was patted down by Hines and then Goffin began to run. The fact that a pat down occurred is disputed by Hines and Ashcraft; however, the Court will view this fact in the light most favorable to Goffin and assume the pat down by Hines occurred. It is undisputed that Hines removed nothing from Goffin's pockets.

Goffin attempted to run toward the street near an area where several people were standing. As Goffin was attempting to run, Ashcraft saw his right shoulder raise and could not see Goffin's hands. Ashcraft fired one shot, hitting Goffin's lower back. Hines then handcuffed and searched Goffin, finding a loaded 9mm pistol magazine in Goffin's pocket and a box of bullets in another

pocket. The parties dispute in which pocket the loaded magazine was found. Hines states that he found the magazine in Goffin's right front pocket. However, the Court will view this fact in the light most favorable to Goffin, and assume the magazine was in Goffin's back pocket as he states in his deposition. Inside the car, officers found a 9mm pistol and .38 revolver within arms' reach of the seat where Goffin was sitting when he was discovered by Hines and Ashcraft. Goffin was transported to the hospital by ambulance, and he survived the gunshot wound.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provide that when a party moves for summary judgment:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a); *Krenik v. Cnty. of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995). The Supreme Court has issued the following guidelines for trial courts to determine whether this standard has been satisfied:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); *see also Agristor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987); *Niagara of Wis. Paper Corp. v. Paper Indus. Union-Mgmt. Pension Fund*, 800 F.2d 742, 746 (8th Cir. 1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id*. at 252.

The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enter. Bank v. Magna Bank*, 92

F.3d 743, 747 (8th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* The nonmoving party must then demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Krenik*, 47 F.3d at 957. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256.

DISCUSSION

The Court will first consider a threshold evidentiary issue before examining the substance of the summary judgment arguments Plaintiff's claims.

A. Evidentiary Issue

When supporting or disputing statements of material fact offered to support a motion for summary judgment, the opposing party may object that such a statement is not supported by admissible evidence. Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). Goffin argues that several of the facts offered to support Defendants' summary judgment motion are inadmissible hearsay. Specifically, Goffin's objections relate to statements made by witnesses, Reddick and Moore, to Ashcraft and Hines and an audio recording in real time of what Ashcraft heard Reddick say to Goffin on the phone and what he told Hines and Ashcraft about the events that occurred on the day Goffin was shot.[3]

The Court disagrees with Goffin for the following reasons. First, it does not appear that Defendants are offering these statements by witnesses or the audio recording for the truth of the

[3] The Court notes that Goffin has not filed a motion to strike the statements or audio recording, although he did object to the conventional filing of the audio recording (ECF No. 58) and stated objections to specific facts offered by Defendants (ECF No. 54).

facts stated but rather they are offering them to show their effect on Ashcraft. Thus, the statements and audio recording are not inadmissible hearsay. *See United States v. Wright*, 739 F.3d 1160, 1170 (8th Cir. 2014); *see also Bady v. Murphy-Kjos*, 628 F.3d 1000, 1002-03 (8th Cir. 2011) (holding that information provided to an officer about a suspect is not hearsay when only offered to show "what the officers knew, or thought they knew, at the time of the arrest.").

Second, even if the statements and audio recording were inadmissible hearsay, Defendants can present these items of evidence in an admissible form at trial. "The standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it *could* be presented at trial in an admissible form." *Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012) (emphasis in original). Goffin asserts that witness statements and the audio recording are inadmissible hearsay, but he has not shown, nor does he argue, that Defendants cannot present the evidence in a form that would be admissible at trial. Defendants assert that each fact they offer regarding the statements and audio recording could be admissible through witness testimony or introduction of the audio at trial. The Court agrees. Defendants do not rely on evidence that, on its face, presents evidentiary obstacles that would prove insurmountable at trial.

B. Excessive Force Claim against Ashcraft

Goffin alleges an excessive force claim against Ashcraft in her individual capacity, and she argues that she is entitled to qualified immunity. Qualified immunity "shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would know." *Ferguson v. Short*, 840 F.3d 508, 510 (8th Cir. 2016) (citing *Mallak v. City of Baxter*, 823 F.3d 441, 445 (8th Cir. 2016)). In resolving the issue of whether an officer is shielded by qualified immunity, the court must decide whether the facts shown by the plaintiff make out a violation of a constitutional right, and if so, whether that right

was clearly established at the time of the defendant's alleged misconduct. *Vester v. Hallock*, 864 F.3d 884, 886 (8th Cir. 2017).

In claims involving the use of excessive force, the first inquiry is whether the force amounts to a violation of the Fourth Amendment's prohibition against unreasonable seizures. *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012). In making that determination, courts must analyze the claim under the Fourth Amendment's "objective reasonableness" standard. *Malone v. Hinman*, 847 F.3d 949, 952 (8th Cir. 2017) (quoting *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005)). The standard is well settled in the Eighth Circuit:

> The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation. [*Graham v. Connor*, 490 U.S. 386, 397 (1989)]. [The Court] must consider the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively fleeing or resisting arrest. *Id.* at 396. The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). [The Court] judge[s] the reasonableness of [an officer's] use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

Loch, 689 F.3d at 965.

"Once the predicate facts are established, the reasonableness of [an officer's] conduct under the circumstances is a question of law." *Malone*, 847 F.3d at 953 (quoting *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001)).

To defeat the motion for summary judgment on this issue, Goffin needs to present enough evidence to permit a reasonable jury to conclude that Ashcraft's use of force was objectively unreasonable. *See Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001) (citing *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996)). First, Goffin questions the credibility of Ashcraft's statement that she shot Goffin because she feared for her life, and he contends that a question of

fact remains as to the "real reason why Ashcraft shot Mr. Goffin." ECF No. 56, p. 20. However, the reasonableness of use of force turns on whether Ashcraft's actions were objectively reasonable in light of the facts and circumstances confronting her, without regard to her subjective intent or motivation. *Loch*, 689 F.3d at 965 (citing *Graham*, 490 U.S. at 397). "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397. Thus, the "real reason why Ashcraft shot Mr. Goffin" is of no concern to the Court in its analysis of whether Ashcraft's use of force was objectively reasonable.

Next, Goffin argues that a fact question exists as to whether Ashcraft's use of force was objectively reasonable because Ashcraft knew Goffin was unarmed. Goffin attempts to discredit Ashcraft's statement that she believed Goffin was armed by pointing to the facts that Ashcraft never saw a weapon in Goffin's hand and knew that Hines had patted Goffin down for weapons just before she shot Goffin.

Whether Officer Hines performed a pat down search of Goffin prior to his attempting to run is a disputed fact, but the Court is required to view this fact in the light most favorable to Goffin and assume that the pat down occurred. Nothing was seized from Goffin's pockets as a result of the pat down, and Goffin had a loaded magazine and bullets in his pockets. The fact that Ashcraft knew that a pat down occurred when nothing had yet been seized from Goffin's pockets does not necessarily support a finding that Ashcraft knew Goffin was unarmed or that her conduct was objectively unreasonable.

The undisputed facts are that Ashcraft never saw a weapon in Goffin's hand, but she had been told that Goffin had recently stolen two guns, had two guns in his pockets, and had brandished those guns in demanding that Moore take him to the car wash. Further, it is undisputed that

Ashcraft noticed something "bumping" in Goffin's pocket and that Goffin, with his back toward Ashcraft, raised his shoulder as if to reach for a gun.

The fact that a pat down occurred prior to the shooting and the fact that Ashcraft never saw a weapon in Goffin's hands are insufficient to support an inference that Ashcraft is lying about her belief that Goffin had a weapon on him and that she actually knew he was unarmed. These facts are also insufficient to satisfy Goffin's burden of proving that Ashcraft's actions were objectively unreasonable. "An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." *Thompson*, 257 F.3d at 899.

Considering the totality of the circumstances and judging from the perspective of a reasonable officer on the scene, taking into account what Ashcraft believed at that time, the Court concludes that summary judgment is appropriate in this case. Ashcraft had been told that Goffin had stolen two guns and ammunition from Reddick's house. Ashcraft knew Goffin had an outstanding warrant for aggravated robbery and had been told that Goffin was running from the police. Moore told Ashcraft that Goffin had two guns in his pockets and had brandished the two guns as he demanded a ride to the car wash. Ashcraft had reason to believe that Goffin was armed and that a gun could be in his pocket. She could not see Goffin's hands as he attempted to flee and raised his right shoulder, and, thus, her belief that Goffin posed a threat to her safety was objectively reasonable. Further, a reasonable officer could believe that Goffin posed a threat to nearby bystanders as he began to run towards a group of seven or eight people. Goffin admitted that, if he would have continued running, he would have run right into the bystanders. Accordingly, the Court finds that Ashcraft had probable cause to believe that Goffin posed a threat

of serious physical harm to her and others, s*ee Loch*, 689 F.3d at 965, and concludes that Ashcraft's use of force was objectively reasonable.

Because the Court finds that Ashcraft did not infringe Goffin's Fourth Amendment right to be free from unreasonable seizures by using excessive force against him, it follows that Ashcraft is entitled to qualified immunity.

C. Claims against the City, Chief Peek, and Mayor Martin

Goffin generally alleges, pursuant to 42 U.S.C. § 1983, that the City of Warren, Arkansas, Chief Peek, and Mayor Martin failed to properly supervise or train Ashcraft. Goffin alleges this claim against Chief Peek and Mayor Martin in their individual and official capacities. Any claims against Chief Peek and Mayor Martin in their official capacities are essentially claims against the City of Warren. *See Brockington v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2010) ("A suit against a government actor in his official capacity is treated as a suit against the governmental entity itself"). Therefore, Goffin's official-capacity claims against Chief Peek and Mayor Martin are dismissed as redundant.

1. Chief Peek and Mayor Martin in their Individual Capacities

"[A] supervisor may be held individually liable under § 1983 if he directly participates in a constitutional violation or if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights." *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996). However, if a plaintiff has failed to establish that his constitutional rights were violated, he has no § 1983 claim against a defendant sued as a supervisor. *Moore v. City of Desloge, Mo.*, 647 F.3d 841, 849 (8th Cir. 2011); *Thompson*, 257 F.3d at 899 ("The § 1983 claims will not lie against either [the officer and his supervisor] individually or against the city unless plaintiffs can prove an underlying violation of [the suspect's] Fourth Amendment rights."). "A vital element of any

section 1983 claim is a showing that a right secured by the Constitution or a federal law was violated." *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993). In the present case, the Court has found that Ashcraft did not violate Goffin's constitutional rights. Therefore, the claims against her supervisors, Chief Peek and Mayor Martin, must fail.

2. City of Warren

The Eighth Circuit has consistently held that a municipality cannot be held liable on either an unconstitutional policy or custom theory or on a failure to train or supervise theory unless a defendant police officer is found liable on an underlying substantive claim. *McCoy v. City of Monticello*, 411 F.3d 920, 922-23 (8th Cir. 2005). In the present case, the Court has found that Ashcraft's use of force was objectively reasonable and that she did not violate Goffin's constitutional rights. Therefore, Goffin's claims against the City of Warren, Arkansas, must fail.

D. Eighth Amendment and Fourteenth Amendment

In addition to his Fourth Amendment claim, Goffin claims a violation of his Eighth Amendment and Fourteenth Amendment rights. The Fourth Amendment's prohibition against unreasonable seizures of the person applies to excessive-force claims that arise in the context of an arrest, *Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011), while the Eighth Amendment's ban on cruel and unusual punishment applies to excessive-force claims brought by convicted criminals serving their sentences. *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000) (citing *Whitley v. Albers*, 475 U.S. 312, 318-22 (1986)). Because Goffin's excessive-force claim arises in the context of his arrest, it is most properly characterized as a claim invoking the protections of the Fourth Amendment and not the Eighth Amendment. Thus, the Court finds that Goffin's Eighth Amendment claim should be dismissed.

Goffin alleges some Fourteenth Amendment Due Process claims relating to the alleged use of excessive force during his arrest. The Supreme Court has made explicit "that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. While the due process clause protects a pretrial detainee from the use of excessive force amounting to punishment, *Green v. Missouri*, 734 F. Supp. 2d 814, 840 (E.D. Mo. 2010) (citing *Graham*, 490 U.S. at 395), Goffin does not allege any excessive force outside of his arrest. Thus, Goffin's Fourteenth Amendment Due Process Clause claim fails as a matter of law.

E. State-Law Claims

In addition to his federal claims, Goffin alleges the following state-law claims: outrage, battery, negligence, and violations of the Arkansas Civil Rights Act. Having disposed of all of Goffin's federal claims, the Court declines to exercise supplemental jurisdiction over his state-law claims. *See* 28 U.S.C. § 1367(c)(3) (court may, *sua sponte*, decline to exercise supplemental jurisdiction over pendent state-law claims if it has dismissed all claims over which it had original jurisdiction); *Johnson v. City of Shorewood*, 360 F.3d 810, 819 (8th Cir. 2004) (when all federal claims are eliminated before trial, balance of factors to be considered in deciding whether to exercise supplemental jurisdiction over pendent state-law claims typically militates against exercising jurisdiction) (citing *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). Accordingly, the Court finds that Goffin's state-law claims should be dismissed without prejudice.

CONCLUSION

For the reasons stated above, the Court finds that Defendants' Motion for Summary Judgment (ECF No. 48) should be and hereby is **GRANTED**. The Court finds that Ashcraft is

entitled to qualified immunity regarding Goffin's Fourth Amendment claim and that all federal claims against all Defendants should be **DISMISSED WITH PREJUDICE**. The Court finds that all state-law claims against all Defendants should be **DISMISSED WITHOUT PREJUDICE**. The Court will issue a Judgment of even date consistent with this Memorandum Opinion.

IT IS SO ORDERED, this 23rd day of January, 2018.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge