[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12857

D.C. Docket No. 1:17-cv-20323-CMA

EDELINE JULMISSE PROSPER,
as Personal Representative of the Estate
of Junior Prosper,

Plaintiff – Appellant,

versus

ANTHONY MARTIN,
Miami-Dade Police Officer, Badge 7819, individually,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(March 5, 2021)

Before WILLIAM PRYOR, Chief Judge, TJOFLAT, and HULL, Circuit Judges.

TJOFLAT, Circuit Judge:

This case arises from an encounter between a taxicab driver named Junior Prosper and a Miami-Dade police officer named Anthony Martin that resulted in Prosper's death. Prosper's widow Edeline sued Martin under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. The District Court found that Martin was entitled to qualified immunity and granted his motion for summary judgment.

Ordinarily, we would be required to decide a case of this posture on the plaintiff's version of the facts. In this case, however, Plaintiff's account is based on a blurry surveillance video that depicts little more than two persons engaged in a two-minute-long struggle in the dark beside a busy highway. We must therefore take the facts as told by the only living eyewitness of those critical two minutes—Defendant Martin. On those facts, we affirm the District Court's decision to grant summary judgment.

I.

A.

In the early morning hours of September 28, 2015, Prosper was driving his taxi on NW 119th Street in Miami when he apparently lost consciousness, allowing his taxi to slowly drift off the road and collide with a pole near the I-95 on-ramp. Minutes later, a bus driver named William Devy noticed Prosper's taxi and pulled over to assist. He approached the taxi on foot and peered through the window. Seeing Prosper

slumped over in the driver seat and breathing heavily, Devy tapped on the glass. Prosper did not respond, so Devy tapped louder. Prosper's arm jerked, and Devy retreated to call 911.

He told the dispatcher that a taxi had run into a pole and its driver looked like "he's passing out." After a few minutes, Prosper exited the taxi and, as Devy told the dispatcher, began "running" up the on-ramp toward I-95. A tow truck operator named Raul Sandoval pulled over to ask Devy what was happening. Still on the 911 call, Devy pointed to Prosper and told Sandoval he thought Prosper was drunk and had stolen the taxi.

Officer Martin then arrived on the scene in response to a dispatch call that a taxi had run into a pole. Devy and Sandoval pointed Prosper out to Martin, told him Prosper was running up I-95, that he was "on something" and "acting weird," and that the taxi was "probably stolen." Martin then approached Prosper in his police cruiser on the I-95 on-ramp, activated his emergency lights, and commanded Prosper through the cruiser speaker to "stop walking." Prosper did not obey Martin's commands, but continued walking up the ramp. Prosper's gait struck Martin as abnormal —in Martin's words, Prosper was "stumbling" and "looked like a zombie almost."[1] Observing that Prosper

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[1] Although not relevant to what a reasonable officer in Martin's position would have surmised about Prosper's behavior, *see infra* Part III.A, there is evidence in the record suggesting that Prosper was not, in fact, intoxicated on the night of his death.

was coming dangerously close to traffic, Martin exited his cruiser and approached Prosper on foot.

The parties disagree about what happened next, but three things are undisputed: (1) Martin tased Prosper, (2) Prosper bit down on Martin's left index finger, and (3) Martin shot Prosper three times in the chest. The parties dispute the manner and order in which these events unfolded. Plaintiff's version of events is based largely on a blurry surveillance video from a nearby business, Biscayne Air Conditioning, Inc. (the "Biscayne Air Video"). Martin's version is based on his own statement to police and his deposition testimony.[2] We will present Martin's version first, and then Plaintiff's.

According to Martin, Prosper punched him in the face after he tried to direct Prosper away from highway traffic. Martin struck back, took out his taser, and began commanding Prosper to "get down" and "get on the ground" so that he could make an arrest. Prosper started advancing toward Martin, and Martin discharged his taser, causing Prosper to fall down an embankment beside I-95.

Prosper crawled away from Martin through some bushes and Martin pursued. Prosper then emerged

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Evidence instead suggests that Prosper's behavior may have been caused by a brain infection.

[2] Devy left the scene to go to work shortly after Martin arrived, and although Sandoval was still present, he stated it was too dark for him to see most of the struggle. Thus, aside from the little that Sandoval observed, Martin is the only living eyewitness to the events.

from the brush and began running toward a nearby fence. While running, Prosper tripped and fell, allowing Martin to catch up to him. Martin ordered Prosper to "turn over" and "place his hands behind his back." When Prosper did not obey, Martin drive stunned him with his taser.[3] Prosper then lunged at Martin, bit down on Martin's left index finger, and dragged Martin down on top of him.

Martin dropped his taser and immediately began trying to pry Prosper's jaws open with his free hand while begging Prosper to release his finger. When that failed, he reached for his firearm and shot Prosper once in the chest. Prosper continued biting Martin's finger while "twisting and turning" his head from side to side. Martin shot Prosper a second time, and when Prosper still did not release his finger, he fired a third shot, killing Prosper.

Now Plaintiff's version. Plaintiff denies that Prosper ever struck Martin. According to Plaintiff, after Martin approached Prosper to direct him away from traffic, the two lost their balance and fell down the embankment. Martin promptly got to his feet, gained distance from Prosper, and tased him three times as he laid in the bushes. Prosper then crawled through the bushes in retreat, and Martin pursued. Martin caught up to Prosper and either drive stunned him or shot him

[3] A taser can be used in either prong mode or drive stun mode. A taser used in drive stun mode is less powerful and must be used at point blank range. Martin could not use his taser in prong mode because its cartridges had been depleted by the first tasing.

once with his firearm. As Prosper continued to flee, Martin tackled him to the ground and began beating him with his fists. His finger then became "lodged" in Martin's mouth,[4] and he shot Prosper two or three times in the chest without first pleading with Prosper to release his finger.[5]

B.

Edeline Prosper, acting as personal representative of the estate of Junior Prosper, sued Martin in his individual capacity in the United States District Court for the Southern District of Florida on January 25, 2017. The District Court stayed the case on March 10, 2017 pending the completion of state investigations into the incident. Once the investigations were completed, the case was re-opened, and Plaintiff filed her First Amended Complaint on September 28, 2017.

On April 17, 2018, the District Court dismissed Plaintiff's First Amended Complaint without prejudice on the ground that it was a shotgun pleading and failed to state a claim upon which relief could be granted. Plaintiff then filed her Second Amended Complaint, which the Court again dismissed on the ground

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[4] Plaintiff does not deny that Prosper bit Martin's finger, but insists that a reasonable jury could find that Prosper did not "bite down hard" until after Martin shot him.

[5] Plaintiff agrees that Martin only fired a total of three shots but is noncommittal on whether the first shot was fired before or after Prosper's finger became "lodged" in Martin's mouth.

that it failed to identify how Plaintiff had any basis of knowledge for the facts alleged.

On July 2, 2018, Plaintiff filed her Third Amended Complaint, the operative complaint in the case. The complaint contained a single count under 42 U.S.C. § 1983 alleging that Martin used excessive force by tasing and shooting Prosper in violation of the Fourth Amendment. Unlike her second complaint, Plaintiff's third complaint identified the Biscayne Air Video as the basis of her knowledge.

On July 23, 2018, Martin moved to dismiss Plaintiff's Third Amended Complaint on the grounds that it failed to state a claim and that Martin was entitled to qualified immunity. The Court denied Martin's motion and the parties proceeded to discovery.

On March 25, 2019, Martin moved to exclude two of Plaintiff's expert witnesses under *Daubert*.[6] Specifically, Martin challenged the opinions of Dr. Michael Knox (an expert in "crime scene reconstruction") and Dr. Bruce Kohrman (a neurologist). Knox offered nine opinions relating to the circumstances of the altercation between Martin and Prosper, the location of the Biscayne Air surveillance camera, and what the Biscayne Air Video shows. Kohrman offered a single opinion regarding the cause of Prosper's unusual behavior on the night of his death. In his opinion, Prosper had likely suffered a stroke, seizure, or brain infection.

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[6] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

The District Court granted Martin's *Daubert* motion in part. The Court agreed that Knox's opinions interpreting the Biscayne Air Video would not be helpful to a jury since Knox himself admitted that he does not "purport to have some expertise to see anything in the video that somebody else can't see." The Court also found that Knox's opinion that "Officer Martin could have fired a minimum of three rounds from his service weapon and a maximum of four rounds" was unhelpful because it was undisputed that Martin fired at least three shots, and whether he fired a fourth was a matter the jury could determine without Knox's help. Knox's remaining opinions—concerning measurements he had taken of the landscape where the altercation occurred and the position of the Biscayne Air surveillance camera—would be helpful to a jury. As for Kohrman's opinion regarding the cause of Prosper's behavior, the Court said it was both unreliable and unhelpful. It was unreliable because Korhman concluded merely that Prosper *may have* suffered from *one of three* separate neurologic events. It was unhelpful because the cause of Prosper's unusual behavior was irrelevant to whether Martin's use of force was objectively reasonable, since that cause was unknown to Martin at the time.

Martin moved for summary judgment on the same day he filed his *Daubert* motion. He argued he did not violate Prosper's Fourth Amendment rights because his use of force was objectively reasonable under the circumstances. In the alternative, Martin argued he was entitled to qualified immunity because, to the

extent he violated Prosper's constitutional rights, those rights were not "clearly established." The District Court agreed with Martin on both points and granted his motion for summary judgment on July 1, 2019.

On appeal, Plaintiff argues that the District Court abused its discretion in excluding the opinions of Knox and Kohrman and erred in entering summary judgment for Martin. We reject Plaintiff's arguments and affirm the District Court.

II.

We review a district court's exclusion of expert testimony for abuse of discretion. *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1305 (11th Cir. 2014) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141–43, 118 S. Ct. 512, 517 (1997)). Unless the district court's decision is "manifestly erroneous," we must defer to it. *Id.* (citation omitted).

We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and resolving reasonable inherences [sic] in her favor. *Al-Rayes v. Willingham*, 914 F.3d 1302, 1306 (11th Cir. 2019). Summary judgment is only proper if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

III.

We first address Plaintiff's argument regarding the District Court's decision to exclude her experts' opinions under *Daubert*. We then address her argument that the District Court erred in finding Martin entitled to qualified immunity.

A.

Expert testimony is admissible under Federal Rule of Evidence 702[7] if: "(1) the expert is qualified to testify regarding the subject of the testimony; (2) the expert's methodology is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the expert's testimony will assist the trier of fact in understanding the evidence or determining a fact at issue." *Chapman*, 766 F.3d at 1304 (quotation marks omitted). "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the

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[7] These three prongs are a judicial gloss on Rule 702, which says:

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

expert opinion." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, identified four non-exhaustive factors that will commonly bear on the second inquiry—i.e., the reliability inquiry:

> (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community.

United Fire & Cas. Co. v. Whirlpool Corp., 704 F.3d 1338, 1341 (11th Cir. 2013) (per curiam) (citing *Daubert*, 509 U.S. at 593–94, 113 S. Ct. at 2796–97). These factors are not "a definitive checklist or test," *Daubert*, 509 U.S. at 593, 113 S. Ct. at 2796, and "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1999). The ultimate objective of the inquiry is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* The judge "must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine

scientist." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316–17 (11th Cir. 1999) (quotation marks omitted). Importantly, the reliability inquiry is limited to "principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 594–95,113 S. Ct. at 2797.

The third inquiry—whether the expert's testimony will assist the trier of fact in understanding the evidence or determining a fact at issue—is commonly called the "helpfulness" inquiry. *See Frazier*, 387 F.3d at 1260. The touchstone of this inquiry is the concept of relevance. *See Daubert*, 509 U.S. at 591, 113 S. Ct. at 2795 (noting that the helpfulness inquiry "goes primarily to relevance"). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (quoting 3 Weinstein & Berger ¶ 702[02], p. 702–18). Even if the expert's testimony is relevant, it "generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262–63. Thus, to be helpful, the testimony must "concern[] matters that are beyond the understanding of the average lay person." *Id.* at 1262.

Plaintiff argues the District Court abused its discretion in excluding the expert opinions of Knox and Kohrman. To prevail, Plaintiff must convince us that the Court made a clear error of judgment when it determined that Knox's opinions were unhelpful and Kohrman's were both unhelpful and unreliable.[8] *See*

[8] That both experts are qualified is undisputed.

Frazier, 387 F.3d at 1259 ("[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard."). We are not convinced.

We agree with the District Court that Knox's interpretation of the Biscayne Air Video was not helpful because it did not offer anything the jury could not discern on its own. Knox asserted that the "physical and video evidence" did not indicate that Prosper (1) punched Martin during their initial encounter, (2) was standing when Martin first tased him, or that (3) he was biting Martin's finger at the time he was shot. The basic observation underlying these three opinions was that the video did not "really [show] much of anything." In Knox's words, "It's blobs, basically." "[A]nyone else watching the video," Knox admitted, "is going to see the same thing." As the District Court noted, the jury did not need Knox to tell them what they could plainly see for themselves.

Plaintiff argues that Knox would do more than "merely look at the video and tell the jury what he saw." His opinions, she says, are based on "decades of law enforcement experience in reviewing all the evidence, not just the video, conducting such advanced analyses as laser scanning, analyzing terrain and visual perspective, and creating computer models." Even so, the fact remains that Knox's experience and knowledge in this instance is simply not helpful. The jury can observe

that the video depicts little more than "gross movements" without Knox's aid.[9]

We also agree with the District Court that Kohrman's opinion regarding the cause of Prosper's erratic behavior on the night of his death would not be helpful to a jury. In Kohrman's opinion, Prosper's behavior was not due to drugs or alcohol, but rather "stroke, seizure, or [brain] infection" were the "most likely causes." Plaintiff argues that Kohrman's opinion would be helpful to (1) rebut Martin's contention that Prosper was drugged or intoxicated at the time of the incident and (2) show that Prosper "suffered some kind of neurological episode." We disagree.

The District Court correctly observed that "[t]he qualified immunity analysis . . . is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *White v. Pauly*, 580 U.S. —, —, 137 S. Ct. 548, 550 (2017) (per curiam) (quotation marks omitted)). Thus, whether Prosper was drugged, intoxicated, or had suffered a neurological episode was not relevant. What mattered was what Martin could have known on that night and

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[9] Although the District Court excluded a fourth opinion offered by Knox regarding the capacity of Martin's firearm, Plaintiff makes no mention of it in her brief and has therefore abandoned the point. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("A party fails to adequately brief a claim when he does not plainly and prominently raise it." (quotation marks omitted)).

whether he acted as an objectively reasonable officer under the circumstances.[10]

We conclude the District Court was within its discretion to exclude the opinions of both experts.

B.

Qualified immunity protects government officials from money damages unless a plaintiff shows (1) that the facts alleged, construed in the light most favorable to her, establish that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080 (2011); *Shaw v. City of Selma*, 884 F.3d 1093, 1099 (11th Cir. 2018).

The constitutional right at issue here comes from the Fourth Amendment's prohibition against unreasonable seizures of the person—specifically, the freedom from excessive uses of force. *Graham v. Connor*, 490 U.S. 386, 394–95, 109 S. Ct. 1865, 1870–71 (1989). As with Fourth Amendment claims generally, the touchstone of excessive force claims is "reasonableness." *See id.* at 395, 109 S. Ct. at 1871. Determining whether an officer's use of force is reasonable "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against

[10] Because we find that Kohrman's opinion was unhelpful, we need not decide whether the District Court abused its discretion in concluding that it was also unreliable.

the countervailing governmental interests at stake." *Id.* at 396, 109 S. Ct. at 1871 (quotation marks omitted). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97, 109 S. Ct. at 1872.

Importantly, we must judge the officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396, 109 S. Ct. at 1872. The question, ultimately, is whether the officer's actions were "objectively reasonable" in light of the facts and circumstances confronting him, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396–97, 109 S. Ct. at 1872. When the use of deadly force is at issue, we ask whether "the officer had probable cause to believe that the suspect posed a threat of 'serious physical harm' to the officer or others, and whether the officer had given the suspect a warning about the use of deadly force, if doing so was feasible." *Cantu v. City of Dothan, Ala.*, 974 F.3d 1217, 1229 (11th Cir. 2020).

In determining whether the constitutional right at issue was "clearly established" at the time the officer acted, we ask whether the contours of the right were sufficiently clear that every reasonable officer would have understood that what he was doing violates that

right. *al-Kidd*, 563 U.S. at 741, 131 S. Ct. at 2083. A plaintiff may show that a right was "clearly established" through: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016) (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009)). If a plaintiff relies on case law, the decisions must come from the United States Supreme Court, the Eleventh Circuit, or the highest court of the pertinent state. *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007). However it is shown, "clearly established law" must be "particularized" to the facts of the case, *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987), and must not be defined "at a high level of generality," *al-Kidd*, 563 U.S. at 742, 131 S. Ct. at 2084.

We agree with the District Court that Martin acted as an objectively reasonable officer both in tasing and in using deadly force on Prosper. But before we explain why, we must determine the contours of the particular right alleged to have been violated, taking the facts in the light most favorable to Plaintiff.

Plaintiff argues there are issues of fact regarding whether Prosper (1) punched Martin during their initial encounter, (2) was standing when Martin first tased him, and (3) was biting Martin's finger at the time he was shot. Martin's deposition testimony

answers all three questions in the affirmative, thus constructing a situation where Prosper committed a violent felony (battery of a law enforcement officer),[11] posed an "immediate threat" to Martin, and was resisting arrest. *See Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. The Biscayne Air Video—or more precisely, Plaintiff's interpretation of it—gives a different impression.[12]

Rather than showing punches thrown by Prosper, Plaintiff claims the Biscayne Air Video shows merely

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[11] In addition to battery of a law enforcement officer in violation of Florida Statutes § 784.07(2)(b), Martin alleges that Prosper violated: § 316.061(1) (leaving the scene of an accident); § 316.130(18) (walking on a limited access facility or a ramp connecting a limited access facility to any other street or highway); § 316.072(3) (failure to obey commands of police officials); § 843.02 (resisting an officer without violence to his person); § 843.01 (resisting an officer with violence to his person); and § 784.045(1)(a)(1) (aggravated battery).

[12] In addition to the video, Plaintiff relies on a few other materials in the record to create an issue of fact as to whether Prosper punched Martin. We assume for the sake of discussion that these materials are admissible, but we are unconvinced that they create a fact issue. According to Plaintiff, police reports of the incident show that "Martin did not immediately report any punches." On the contrary, the reports reflect that Prosper assaulted Martin not just by biting him but also by striking him with his "Hands/Arms." A report prepared by an officer arriving on the scene after Prosper was shot describes the altercation in vague terms—"they got into a struggle"—but such vagueness is perfectly consistent with Martin's testimony that Prosper struck him. Another officer who had arrived on the scene testified that Martin did not tell her that Prosper had punched him, but that she knew "they got into an altercation." This, too, is consistent with Martin's testimony and therefore fails to create an issue of fact.

that the two "los[t] their balance and f[e]ll together into some nearby bushes." It also shows, according to Plaintiff, that Martin proceeded to "tase[ ] [Prosper] as he lay on the ground in the bushes." Finally, Plaintiff argues it shows Martin chased Prosper down as he attempted to "crawl[ ] away from Martin through the bushes," stood over him "in a shooting position," and then either tased Prosper again or shot him with his firearm. If Plaintiff is correct about what the Biscayne Air Video shows, then the question before us is whether Martin violated Prosper's Fourth Amendment rights by tasing and shooting him without provocation while he slowly retreated, and all before he ever bit Martin's finger. We believe Plaintiff makes too much of the video.

Where there are "varying accounts of what happened" on summary judgment, we are required to adopt the account most favorable to the nonmoving party. *Smith v. LePage*, 834 F.3d 1285, 1296 (11th Cir. 2016) (quoting *Perez*, 809 F.3d at 1217). This principle, though, is subject to the caveat that the nonmoving party's version of events must be sufficiently supported by the record that a reasonable jury could find it to be true. *See* Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by *citing to particular parts of materials in the record* . . . ."); *Chapman*, 229 F.3d at 1023 ("A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor."). We will not treat as true a party's unfounded speculation

about what happened. *See Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985); *Smith*, 834 F.3d at 1296.

Plaintiff's interpretation of the Biscayne Air Video amounts to mere speculation, and the video therefore fails to create the issues of fact that Plaintiff says it does. Plaintiff herself described the video as "far from a model of clarity," and the expert witness she retained to interpret it said "[you] can barely make out their bodies. . . . You can't make out really much of anything other than some very gross movements." A blurry video that does not depict much of anything cannot give rise to issues of fact about what did or did not happen on a particular occasion. As the District Court noted, the video "does not *contradict* [Martin]'s statements; at best, it fails to *corroborate* them." Martin's version of events thus remains unrebutted and controls our analysis.

Accordingly, the question before us is whether Martin violated Prosper's Fourth Amendment rights by using deadly force after Prosper struck him in the face, resisted arrest through three taser discharges, and bit down on his finger while "twisting and turning" with unabating intensity. Since Plaintiff also challenges Martin's use of the taser as excessive, we must decide whether that violated Prosper's Fourth Amendment rights, as well. We are convinced the District Court committed no error in finding that Martin acted as an objectively reasonable officer in both respects.

The critical inquiry on the deadly force claim is whether an officer in Martin's position reasonably could have believed that Prosper posed a serious threat of physical harm at the time Prosper had Martin's finger in his mouth. *See Shaw*, 884 F.3d at 1099; *Cantu*, 974 F.3d at 1230. In making this assessment, we must consider the "totality of the circumstances," including the events leading up to the point at which deadly force was used and the impressions a reasonable officer would have gleaned from them. *See Shaw*, 884 F.3d at 1099.

From the moment he arrived on the scene, a reasonable officer would have observed—as Martin did—that Prosper was behaving irrationally and erratically. As Martin put it, Prosper was "stumbling . . . [like] something was wrong with him" and had an "out-of-it look on his face." He was also coming dangerously close to the expressway, where traffic was zooming by at 60 or 70 miles per hour.

Once Martin attempted to engage Prosper, it would have also become clear to a reasonable officer that Prosper was unresponsive and non-compliant. Martin approached Prosper in his cruiser and turned on his flashing lights "[t]o let him know that . . . I was the police, so . . . he would turn around." But Prosper did not turn around; he only continued stumbling toward traffic. Martin then shined his spotlight on Prosper and began commanding him over the cruiser speaker to "stop, stop walking." Prosper merely "turned around and looked," but kept walking.

It goes without saying that once Prosper struck Martin, a reasonable officer would know that he was dealing with a man who was not only irrational, erratic, and unresponsive, but also violent. After the two exchanged blows, Prosper continued to ignore Martin's repeated commands to "get down" and "get on the ground," which would have reinforced the impression in a reasonable officer's mind that his words were ineffectual on the suspect.[13] Prosper was either ignoring Martin's words or was incapable of comprehending them—the vacant look in his eyes, as if "he wasn't all there," and the fact that he had not uttered a single word throughout the encounter would have suggested the latter. After Martin's taser failed to subdue Prosper, a reasonable officer would also know that he was resilient—that a given degree of force would produce a lesser effect on him, perhaps, than it would on an average person.

The foregoing observations inform the way a reasonable officer would have assessed the danger posed to his person, as well as the defense necessary to mitigate that danger, in the critical moments before Martin fired the deadly shots into Prosper's chest. At that time, Martin's finger was locked between Prosper's jaws and quickly going numb, and a reasonable officer could well calculate that a plea or warning would be as ineffectual as his previous attempts at communication.

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[13] When Martin attempted to arrest Prosper after tasing him, Prosper continued to ignore Martin's commands to "turn over, turn over, lie on your back, turn over," and "place his hands behind his back."

Nonetheless, Martin pled with Prosper to "please stop" and attempted in vain to pry his finger free. Martin feared he might lose his finger, rendering him unable to defend himself against further, potentially deadly attacks from Prosper. In this "tense, uncertain, and rapidly evolving" situation, *Graham*, 490 U.S. at 396–97, 109 S. Ct. at 1872, it was reasonable for Martin to believe that Prosper posed an imminent threat of serious physical harm to his person and that deadly force, without any further warning, was necessary to prevent that harm. Therefore, the District Court properly concluded that Martin's use of deadly force did not violate Prosper's Fourth Amendment rights.

We also have no doubt that Martin's use of his taser on Prosper was reasonable under the circumstances. We have held that "the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force." *Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008) (citing *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004)); *see also Smith*, 834 F.3d at 1294 (determining the use of a taser was reasonable on suspect who was armed with a knife, repeatedly disobeyed commands to drop the knife, and moved toward officers with the knife); *Mobley v. Palm Beach Cnty. Sheriff Dep't*, 783 F.3d 1347, 1356 (11th Cir. 2015) (concluding the use of a taser was reasonable to effectuate arrest of suspect who was hostile, belligerent, and uncooperative); *cf. McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1245 (11th Cir. 2003) (holding that use of pepper spray

was reasonable when officer "had probable cause to believe that McCormick had committed a violent felony" and "could have reasonably determined that McCormick still posed a threat of further violence"). When an officer uses his taser "against a non-hostile and non-violent suspect who has not disobeyed instructions," however, he violates that suspect's rights under the Fourth Amendment. *Fils v. City of Aventura*, 647 F.3d 1272, 1289 (11th Cir. 2011); *see also Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (concluding officer used excessive force when he repeatedly tased suspect "into and beyond his complete physical capitulation").

According to Martin's unrebutted testimony, he first used his taser against Prosper after the two exchanged blows, and despite his commands to Prosper to "get on the ground," Prosper continued toward him. It was thus reasonable for Martin to believe that Prosper posed an immediate threat to his person and would not submit to arrest without a fight. Martin's use of his taser in this situation did not violate Prosper's Fourth Amendment rights.

For the foregoing reasons, the District Court committed no error in holding that Martin's use of force did not violate Prosper's Fourth Amendment rights. The Court's entry of summary judgment was proper.

IV.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20323-CIV-ALTONAGA/O'Sullivan

EDELINE JULMISSE PROSPER,

Plaintiff,

v.

ANTHONY MARTIN,

Defendant. /

ORDER

(Filed Jul. 1, 2019)

THIS CAUSE came before the Court on Defendant, Anthony Martin's Motion for Final Summary Judgment [ECF No. 102]. Plaintiff, Edeline Julmisse Prosper, filed a Response [ECF No. 117]; to which Defendant filed a Reply [ECF No. 141].[1] The Court has carefully considered the Third Amended Complaint [ECF No. 60] ("TAC"), the parties' submissions, the record, and applicable law.

[1] The parties' factual submissions include: Defendant's Statement of Undisputed Material Facts [ECF No. 103] ("Def.'s Facts"); Plaintiff's Response in Opposition to Defendant's Statement of Facts [ECF No. 132] 1–10 ("Pl.'s Reply Facts"); Plaintiff's Statement of Additional Material Facts [ECF No. 132] 10–18 ("Pl.'s Add'l Facts"); and Defendant's Response to Plaintiff's Statement of Additional Facts [ECF No. 141] 14–18 ("Def.'s Reply Facts").

I. BACKGROUND

This case arises out of a fatal encounter on September 28, 2015, between Junior Prosper ("Prosper") and Defendant, Miami-Dade police officer Anthony Martin. (*See* TAC ¶ 3). Plaintiff, Edeline Julmisse Prosper, was Prosper's wife and is the personal representative of his estate. (*See id.* ¶¶ 3–4).

The incident began when William Devy, a bus driver, witnessed a taxi cab colliding with a street sign near the on-ramp to I-95. (*See* Def.'s Facts ¶¶ 2–3).[2] Devy stopped to assist and approached the taxi, which was still running with its lights on. (*See id.* ¶ 4). Devy saw Prosper sitting in the driver's seat, slumped toward the passenger side of the car and breathing heavily. (*See id.* ¶ 5). Devy called 911 and informed the operator of the accident. (*See id.* ¶ 7). While Devy was speaking with the 911 operator, Prosper moved across the front seat of the car, exited through the passenger door, and began walking toward I-95. (*See id.* ¶ 10).

Raul Sandoval, a tow truck operator, passed Devy on the side of the road and pulled over to offer assistance. (*See id.* ¶ 18). Soon after, Defendant arrived on the scene, rolled down his window, and spoke with Devy and Sandoval. (*See id.* ¶¶ 27–28). Devy and Sandoval told Defendant they believed Prosper "was on something" and was "acting weird." (*Id.* ¶ 28; Martin Dep. [ECF No. 103-8] 46:11–18). They also informed Defendant that Prosper had jumped out of the

[2] All facts are considered undisputed unless otherwise indicated.

passenger side of the taxi and was running up the ramp toward I-95. (*Id.* ¶ 29; Martin Dep. 46:11–18). Defendant proceeded onto the ramp in pursuit of Prosper with his emergency lights flashing. (*See* Def.'s Facts ¶ 33).

As Defendant approached Prosper, Defendant issued several commands through his patrol car speaker, which Prosper ignored. (*See id.* ¶ 34; Martin Dep. 49:15–50:4).[3] Prosper appeared — at a minimum — to be disoriented and stumbling as he walked within a few feet of I-95. (*See* Pl.'s Add'l Facts ¶ 114; Def.'s Facts ¶ 35). Defendant, having been told by Devy and Sandoval they thought Prosper was "on something," and having observed Prosper's unusual gait, suspected Prosper was under the influence of drugs. (*See* Def.'s Facts ¶¶ 35–36). Because it appeared Prosper was about to walk into traffic, Defendant exited his patrol

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[3] Plaintiff denies Prosper ignored verbal commands. (*See* Pl.'s Reply Facts ¶ 34). Yet, Plaintiff fails to provide any evidence or citation to the record to controvert this fact. (*See id.*). As Plaintiff fails to provide any evidence to the contrary, the Court deems it admitted. *See* Local Rule 56.1(b) ("All material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement. . . ." (alteration added)); *see also Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293, 1305 (S.D. Fla. 2010), *aff'd*, 477 F. App'x 702 (11th Cir. 2012) ("[I]n accordance with Local Rule [56.1], where a party has failed to direct the Court to evidentiary support in the record for any proposed contravening material fact, the Court deems the corresponding proposed uncontroverted material fact admitted for purposes of the [motion] for [s]ummary [j]udgment, provided that the Court finds the statement of material fact at issue to be supported by the evidence." (alterations added; footnote call number omitted)).

car and tried to redirect Prosper away from the highway. (*See id.* ¶ 39). In recounting the events that took place after Defendant exited his vehicle, Plaintiff relies on a surveillance recording from a nearby building, provided by Biscayne Air Conditioning, Inc. [ECF No. 105] (the "Biscayne Air Video"). The Biscayne Air Video represents Plaintiff's primary source of evidence in this action.

The parties disagree on several points about the ensuing interaction between Defendant and Prosper. Defendant claims he tried to redirect Prosper, for his safety, away from the highway by placing his hand on Prosper's shoulder. (*See* Def.'s Facts ¶ 39).[4] Defendant states Prosper then struck him, and he struck Prosper back. (*See id.* ¶ 42, 46). Defendant states this physical struggle caused the parties to fall down an embankment on the side of the road. (*See id.* ¶ 47). According to Plaintiff, no punches were thrown and the parties simply "lost their balance and fell into the bushes along the embankment . . . ." (Pl.'s Reply Facts ¶¶ 42–47 (citing Biscayne Air Video)). Defendant states after this initial altercation occurred, Defendant intended to

[4] Plaintiff denies this fact, stating the Biscayne Air Video shows "it did not appear Prosper would walk onto [*sic*] highway or that Martin put his hand on Prosper's shoulder." (Pl.'s Reply Facts ¶ 39). But in her own facts, Plaintiff asserts Prosper was disoriented and stumbling along the highway (*see* Pl.'s Add'l Facts ¶ 114), and that Defendant "put his hands on Prosper's shoulder" (*id.* ¶ 124). Consequently, the Court accepts the fact as admitted.

arrest Prosper and take him into custody. (*See* Def.'s Facts ¶ 44).[5]

Once Defendant regained his footing, he took out his Taser, which had an attached light. (*See id.* ¶ 49). According to Defendant, Prosper appeared disoriented and aggressive, while refusing verbal commands. (*See id.* ¶¶ 48–50). Because Prosper was moving toward Defendant, Defendant discharged the Taser, and Prosper fell down the embankment. (*See id.* ¶¶ 51–52). Plaintiff denies this version of events. Relying solely on the Biscayne Air Video, Plaintiff states Defendant got up after losing his balance and discharged the Taser at Prosper, who remained lying on the ground. (*See* Pl.'s Add'l Facts ¶¶ 139–142).

After the initial Taser discharge, Defendant lost sight of Prosper, but could hear him trying to escape through the vegetation. (*See* Def.'s Facts ¶ 53).[6]

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[5] According to Defendant, Prosper had committed arrestable offenses by violating the following sections of the Florida Statutes: section 316.061(1), by leaving the scene of an accident (*see* Def.'s Facts ¶ 100); section 316.130(18), by walking on a limited access facility (*see id.* ¶ 101); section 316.072(3), by failing to obey commands from a police official (*see id.* ¶ 102); and sections 784.03(1)(a)(1) and 784.07(2)(b), by striking, making physical contact with, and/or pulling away from Defendant (*see id.* ¶ 104).

[6] It is unclear why Plaintiff denies this statement. (*See* Pl.'s Reply Facts ¶ 53). Plaintiff's citation to the Biscayne Air Video undisputedly shows Prosper moving through the vegetation and away from Defendant. (*See* Biscayne Air Video 4:14:30–4:14:42). Plaintiff states "Martin was using a flashlight, creating inference [sic] he could see Prosper." (Pl.'s Reply Facts ¶ 53 (alteration added)). Yet, in her statement of facts, Plaintiff asserts Defendant "could not see Prosper while he was in the brush after the first

Sandoval, who had followed the parties onto the ramp to provide assistance, heard Defendant telling Prosper to "[s]top," "[d]on't move," and "[c]ome back." (Sandoval Dep. 188:7–11 (alterations added); Def.'s Facts ¶¶ 77–78). At this point, Defendant deployed the Taser a second time to prevent Prosper from escaping. (*See* Pl.'s Add'l Facts ¶ 144). Defendant then moved along the embankment and called dispatch to report that Prosper was trying to escape. (*See* Def.'s Facts ¶¶ 54–55).[7]

Defendant saw Prosper moving away from him through the vegetation, and Defendant proceeded down the embankment after him. (*See id.* ¶ 56; *see* Resp. 3). Defendant caught up to Prosper, who had tripped over vegetation and was on the ground. (*See* Def.'s Facts ¶ 57; Pl.'s Add'l Facts ¶ 149). Defendant was standing on higher ground, slightly above Prosper, who was facing Defendant. (*See* Def.'s Facts ¶ 80). Prosper ignored Defendant's verbal orders to stop moving and to stay on the ground. (*See id.* ¶ 78; Sandoval Statement [ECF No. 103-6] 33:15–17).[8]

Taser strike and could only hear him moving." (Pl.'s Add'l Facts ¶ 145). As both parties independently agree to these facts, the Court accepts them as admitted.

[7] Plaintiff denies Defendant called dispatch to advise Prosper was attempting to escape (*see* Pl.'s Reply Facts ¶ 54) but admits Defendant "said something indecipherable over the dispatch frequency" (*id.* ¶ 55).

[8] Plaintiff denies this fact, stating the Biscayne Air Video shows Prosper did not try to get up off the ground. (*See* Pl.'s Reply Facts ¶ 78). Nevertheless, Plaintiff repeatedly references Prosper "rising" from the ground throughout her Response and

At this point in the altercation, Defendant had neither reached for nor taken out his firearm. (*See* Def.'s Facts ¶ 58).[9] Defendant attempted to arrest Prosper by using his Taser to dry stun him. (*See id.* ¶ 59).[10] According to both Defendant and Sandoval,

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statements of facts. (*See*, *e.g.*, Resp. 3 ("Prosper then rises briefly and is seen being tackled by Martin."); Pl.'s Reply Facts ¶¶ 61, 81 (same)). Again, this fact is not disputed by any record evidence, and Plaintiff admits its truth elsewhere. As such, the Court accepts it as admitted.

[9] Plaintiff denies this fact, relying on the Court's August 31, 2018 Order [ECF No. 74], denying Defendant's motion to dismiss the TAC. (*See* Pl.'s Reply Facts ¶ 58). Plaintiff's reliance on the August 31, 2018 Order is misplaced. The Order was based on an undeveloped record at the motion-to-dismiss stage. The Court, drawing all possible inferences in Plaintiff's favor, addressed whether the Biscayne Air Video *could* show Defendant shooting Prosper. (*See id.* 8).

The parties now provide narrative versions of the events, placing the shots fired after the moment in question. (*See* Resp. 3; Reply 6). In her own statement of facts, Plaintiff acknowledges the shooting does not take place as was considered plausible in the Court's Order. (*See* Pl.'s Add'l Facts ¶¶ 149–160). Further, Sandoval states no shots were fired until after he repositioned his tow truck and exited the vehicle. (*See* Sandoval Dep. 178:8–17). Indeed, the flashes of light seen in the Biscayne Air Video are seen several seconds prior to Sandoval's repositioning of the truck, and the record evidence thus confirms the parties' narratives. (*See* Biscayne Air Video 4:14:56–4:15:08). As the record shows this fact is undisputed, the Court accepts it as admitted.

[10] Plaintiff denies this fact, stating Defendant "may have shot Prosper prior to any bite." (Pl.'s Reply Facts ¶ 59). The bite Plaintiff references occurred during the ensuing physical engagement between Defendant and Prosper. Both parties submitted statements of fact placing the bite after Defendant's attempt to dry stun Prosper. (*See* Pl.'s Add'l Facts ¶¶ 153–163; Def's Facts ¶¶ 59–69). Plaintiff admits the bite in fact took place after the third and final use of the Taser. (*See* Resp. 15 ("[W]e know the

Prosper lunged at Defendant, pulling him down onto the ground. (*See id.* ¶ 61; Sandoval Statement 21:2–24). Plaintiff disputes this fact, arguing the Biscayne Air Video could be interpreted to show Defendant tackling Prosper. (*See* Pl.'s Reply Facts ¶ 61).

During this struggle on the ground, Defendant and Prosper moved down the embankment and out of Sandoval's sight. (*See* Def.'s Facts ¶ 83; Pl.'s Reply Facts ¶ 83). Sandoval then repositioned his truck to shine its headlights on the area where Defendant and Prosper were seen falling. (*See id.*). Sandoval exited his truck and walked toward the embankment. (*See id.*). Several seconds after exiting his vehicle, Sandoval heard gunshots but was unable to see who had fired the weapon. (*See* Def.'s Facts ¶ 84; Pl.'s Reply Facts ¶ 84).

According to Defendant, during the final altercation with Prosper, he was in excruciating pain as Prosper bit down on his finger while twisting his head left and right. (*See* Def.'s Facts ¶¶ 62–63). Defendant claims his finger began to go numb and he feared Prosper might sever his finger entirely. (*See id.* ¶¶ 65–66). Fearing for his life and suffering great bodily harm, Defendant unholstered his firearm and discharged it, shooting Prosper in an attempt to free his hand from Prosper's mouth. (*See id.* ¶ 67). Instead of releasing Defendant's finger, Prosper bit down harder. (*See id.*

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tasing took place *before* the minor finger bite." (alteration and emphasis added)). As Plaintiff's denial is not supported by the record evidence, this fact is admitted.

¶ 68). As Prosper continued to bite down on Defendant's finger, Defendant discharged his firearm a second time. (*See id.*). Prosper did not release Defendant's finger, and Defendant discharged his firearm a third time, at which point Prosper finally released Defendant's finger. (*See id.* ¶ 69).

Plaintiff denies these facts. (*See* Pl.'s Reply Facts ¶¶ 62–69). Plaintiff submits an alternate version of the incident, stating that after Defendant tackled Prosper, Defendant punched Prosper in the face multiple times, causing him to bleed from the mouth. (*See* Pl.'s Add'l Facts ¶ 156). Plaintiff does not seem to deny a bite occurred, but rather Plaintiff disputes how the bite occurred.[11] Plaintiff speculates as Defendant was above Prosper and in the process of punching him, Defendant's finger became lodged in Prosper's mouth. (*See id.* ¶¶ 157–158).[12] Defendant then unholstered his firearm and shot Prosper multiple times. (*See id.* ¶¶ 159–160).

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[11] (*See* Resp. 3 ("The Jury could find [Defendant's finger] lodged [in Prosper's mouth] while Martin was punching Prosper in the mouth. Martin then shoots Prosper the first time, causing him to bite down harder, or so the jury could find." (alterations added)); 15 ("[W]e know that the tasing took place before the minor finger bite"); 19 ("Here, a reasonable jury could find that the bite was defensive — not offensive — perhaps entirely involuntary.")).

[12] Plaintiff arrives at this characterization of the events from Defendant's statement, "when I was going down to make the contact, that's when Mr. Prosper hopped up and put my finger in his mouth." (Pl.'s Add'l Facts ¶ 158 (citing Martin Dep. 135:13–21)).

Prosper died as a result of the gunshot wounds. (*See id.* ¶ 161). Defendant proceeded up the embankment toward I-95 and immediately called dispatch, reported shots fired, and requested dispatch send fire rescue. (*See* Def.'s Facts ¶ 70). Defendant reported to dispatch Prosper had tried to bite his finger off. (*See id.* ¶ 71). Sandoval saw Defendant bleeding from his hand. (*See id.* ¶ 72; Sandoval Dep. 194:11–12).

Defendant was taken to Jackson Memorial Hospital for treatment. (*See* Def.'s Facts ¶ 89). Special Agent John A. Subic of the Florida Department of Law Enforcement photographed Defendant in the hospital and reported Defendant was seen with his uniform on, numerous sand spurs on his pants and shirt, a bandaged index finger, blood on his shirt and arm, and a swollen face. (*See id.* ¶ 90).[13] Defendant suffered three separate injury patterns on the top of his finger and one below the finger. (*See id.* ¶ 92). The Jackson Memorial Medical Record notes Defendant "was bit on his left index finger over the PIP joint today by another human . . . . The wounds appear to be superficial." (First Jackson Medical Record [ECF No. 131-3] 39).

The bite on Defendant's finger caused tissue displacement — consistent with head movement by the person biting. (*See* Def.'s Facts ¶¶ 94–95).[14] Although

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[13] Plaintiff disputes Defendant's face was swollen based on the photographs. (*See* Pl.'s Reply Facts ¶ 90).

[14] Plaintiff denies these facts. (*See* Pl.'s Reply Facts ¶¶ 94–95). Yet, each record Plaintiff cites fails to controvert Defendant's statements. (*See id.*; Pl.'s Add'l Facts ¶¶ 164–167). Plaintiff cites a First Jackson Medical Record 39 (noting Defendant was bit and

the bite on Defendant's finger was described as "superficial at skin level only" (Pl.'s Add'l Facts ¶ 165), the bite is consistent with causing pain (*see* Briggle Dep. 66:7–20) and could have caused temporary numbness (*see id.* 72:16–20). On October 22, 2015, Defendant was cleared to return to work full duty and no functional limitations were identified. (*See* Pl.'s Add'l Facts ¶ 170).

The TAC states one claim under 42 U.S.C. section 1983 for excessive force and deprivation of life. (*See generally* TAC). Plaintiff contends Defendant's uses of his Taser and firearm, respectively, were excessive.[15]

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the wound appears superficial); Second Jackson Medical Record [ECF No. 131-4] 38 (Defendant "sustained a human bite to the left index finger this morning. Patient is a police officer and was arresting someone when the person bit the officer's index finger causing dorsal and volar wounds over the PIP joint. At this time, the patient is reporting pain in the left index finger."); and a University of Miami Hospital Record [ECF No. 131-5] 9 (noting Defendant suffered a human bite and the wound was treated by fire rescue). As Plaintiff provides no evidence to controvert these facts, the Court accepts them as admitted.

[15] Defendant argues Plaintiff "has never alleged an excessive force [sic] premised exclusively on the use of the Taser." (Reply 13). The undersigned has previously noted the TAC's allegations are "threadbare." (August 31, 2018 Order 7). Nonetheless, the TAC does include allegations the "Taser effected [sic] and harmed [Prosper]" and "[Prosper] had not done or said anything that necessitated the use of [the Taser] against [him] . . . ." (TAC ¶¶ 22–23 (alterations added)). These allegations have been repeatedly raised throughout the course of this action. (*See*, *e.g.*, Response in Opposition to Motion to Dismiss [ECF No. 69] 2 ("[T]he video shows that Defendant Martin's deployment of a taser and firearm to seize Mr. Prosper lacked any rationale, legal or otherwise." (alteration added))).

(*See id.*). Regarding the instant Motion, Plaintiff insists her challenges to Defendant's credibility as well as ambiguities in the video evidence create triable questions of fact precluding summary judgment. (*See* Resp. 7–8).

Defendant argues Plaintiff "cannot simply manufacture a genuine dispute by seeking to establish an alternative version of events" based upon "unsupported allegations and her speculative interpretation of a grainy video." (Reply 2). Defendant further contends Plaintiff cannot overcome summary judgment on the basis of a credibility challenge without offering evidence to contradict the material facts. (*See id.* (citation omitted)). Defendant seeks entry of final summary judgment, arguing he is entitled to qualified immunity as to all allegations in the TAC. (*See generally* Mot.).

II. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; *see also Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

At summary judgment, the moving party has the burden of proving the absence of a genuine issue of material fact, and all factual inferences are drawn in favor of the non-moving party. *See Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). Courts must consider the entire record and not just the evidence singled out by the parties. *See Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987). The non-moving party's presentation of a "mere existence of a scintilla of evidence" in support of its position is insufficient to overcome summary judgment. *Anderson*, 477 U.S. at 252.

If there are any factual issues, summary judgment must be denied and the case proceeds to trial. *See Whelan v. Royal Caribbean Cruises Ltd.*, No. 1:12-CV-22481, 2013 WL 5583970, at *2 (S.D. Fla. Aug. 14, 2013) (citing *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981)). Even when the parties "agree on the basic facts, but disagree about the inferences that should be drawn from these facts[,]" summary judgment "may be inappropriate." *Id.* (alteration added; citation omitted). "If reasonable minds might differ on the inferences arising from undisputed facts, then . . . [c]ourt[s] should deny summary judgment." *Id.* (alterations added; citations omitted). Additionally, courts cannot weigh conflicting evidence. *See Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007) (quoting *Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986)).

B. Qualified Immunity

The defense of qualified immunity raised in response to the claim in Plaintiff's TAC alters the summary judgment analysis somewhat. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

To be entitled to the qualified immunity defense, a government official must demonstrate "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (internal quotation marks and citations omitted). When a defendant acts within the scope of his discretionary authority, the burden "shifts to the plaintiff to show that qualified immunity is not appropriate."[16] *Lee v. Ferraro*,

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[16] This two-step approach is enshrined in the Eleventh Circuit's *Zeigler/Rich* analysis, which provides:

> 1. The defendant public official must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."

284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted). The plaintiff can show qualified immunity is not appropriate by establishing (1) the defendant's conduct violated his or her constitutional rights; and (2) the constitutional violation was clearly established at the time. *See Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (internal quotation marks and citations omitted). These two requirements may be addressed in any order. *See id.* (citing *Pearson*, 555 U.S. at 236).

The plaintiff "bear[s] the burden of showing that the federal rights allegedly violated were clearly established." *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996) (alteration added; citations omitted). To satisfy the "clearly established" requirement, a law may not be "defined 'at a high level of generality,'" and the "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted). Although the Supreme Court "do[es] not require a case directly on point, . . . existing precedent must have placed the statutory or

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> 2. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law."

Courson, 939 F.2d at 1487 (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (per curiam)); *see also Rich v. Dollar*, 841 F.2d 1558, 1563–64 (11th Cir. 1988) (discussing two-part test).

constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2007) (citations omitted; alterations added).

There are three ways a plaintiff may show a right was clearly established: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016) (internal quotation marks and citation omitted). If case law is used, only decisions of the Supreme Court, Eleventh Circuit, and highest relevant state court can clearly establish the law for qualified immunity purposes. *See McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007) (citing *Marsh v. Butler Cty., Ala.*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001)).

In addressing the qualified immunity defense at summary judgment, "[a]ll issues of material fact are resolved in favor of the plaintiff, and then, under that version of the facts, the legal question of whether the defendant is entitled to qualified immunity is determined." *Sparks v. Ingle*, 724 F. App'x 692, 693 (11th Cir. 2018) (alteration added; citation omitted). Applying the plaintiff's "best case," "the court is able to move to the question of whether the defendant committed the constitutional violation alleged in the complaint without having to assess any facts in dispute." *Id.* (internal quotation marks and citation omitted).

III. ANALYSIS

The Court addresses Plaintiff's arguments regarding the Biscayne Air Video and Defendant's credibility, and then turns to the merits of qualified immunity as to both the use of non-lethal and lethal force.

A. Ambiguities in the Biscayne Air Video and Defendant's Credibility

Neither Plaintiff's attempt to bring to the forefront ambiguities in the Biscayne Air Video, nor her attempt to cast doubt on Defendant's credibility, preclude entry of summary judgment.

First, ambiguities in the Biscayne Air Video. Plaintiff argues her version of facts "may include one of two possible interpretations of a video taken of the incident in question." (Resp. 7). Plaintiff relies on *Keels v. Zambrana*, No. 15-CV-80546, 2018 U.S. Dist. LEXIS 119133 (S.D. Fla. July 16, 2018), to support her claim an ambiguous video precludes summary judgment. (*See* Resp. 7–8). Plaintiff's reliance on *Keels* is misplaced. In *Keels*, the plaintiff was the alleged victim of excessive force. *See Keels*, 2018 U.S. Dist. LEXIS 119133, at *13. The plaintiff provided an affidavit detailing his version of events based on his first-hand recollection of the experience. *See id.* The defendants provided a video of the incident, "[b]ut due to the video's poor image quality, lack of sound, unhelpful angle and distance, and unhelpful camera placement as a result of a horizontal structural pole obfuscating the

frame, it provide[d] little value on summary judgment." *Id.* (alterations added). Because the video did not conclusively refute Keels' affidavit, "[d]efendants failed at providing any objective record evidence" warranting summary judgment. *Id.* at *19 (alteration added).

Unlike in *Keels*, Plaintiff has no first-hand knowledge of the events that took place the night of the incident. (*See* Def.'s Facts ¶ 1). Many of Plaintiff's assertions and denials are thus based solely on her speculative interpretation of a video, providing "little value on summary judgment." *Keels*, 2018 U.S. Dist. LEXIS 119133, at *13. To the extent the video can be interpreted to support Plaintiff's allegations, the Court draws all reasonable inferences in her favor. *See Lee*, 284 F.3d at 1194 (citation omitted). Nevertheless, "an inference based on speculation and conjecture is not reasonable." *Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985) (citation omitted).

Although "[t]he line between circumstantial evidence sufficient to support a finding under a substantial evidence standard and evidence which merely permits conjecture or speculation is difficult to draw," it is the Court's responsibility to do so. *Id.* (alteration added). Given mere conjecture is insufficient to create a genuine issue of fact and noting the video on which Plaintiff relies is "far from a model of clarity" (Mot. 2 (quotation marks and citation omitted)), the undersigned finds ambiguities in the Biscayne Air Video do not preclude entry of summary judgment.

Next, Plaintiff questions Defendant's credibility because "a reasonable jury could find, when the evidence is viewed in the light most favorable to the Plaintiff" that some of Defendant's statements are false. (Resp. 4). Certainly, when evaluating whether a party is entitled to qualified immunity, the Court must take all the facts in the light most favorable to Plaintiff. *See Lee*, 284 F.3d at 1194 (citation omitted). But, "[t]hough factual inferences are made in the [Plaintiff's] favor, this rule applies only '*to the extent supportable by the record.*'" *Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010) (alteration added; citation omitted; emphasis in original). Thus, while Plaintiff may question Defendant's credibility, these assertions do not create a genuine dispute when Plaintiff "offer[s] no evidence to contradict the[] *material facts*." *Id.* (alterations and emphasis added; footnote call number omitted).

Plaintiff merely states there are several instances "in which we know or a jury can find that [Defendant] did not tell the truth." (Resp. 7). Plaintiff insists several statements have proven to be false, pointing to the Biscayne Air Video, the testimony of witness Raul Sandoval, the expert opinion of Michael Knox,[17] and

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[17] Dr. Michael Knox is the Chief Forensic Consultant at Knox & Associates, LLC. (*See* Forensic Analysis & Reconstruction Report [ECF No. 132-7] 1). Knox's relevant expertise is in Crime Scene Investigation, Analysis & Reconstruction; Firearms, Ballistics & Shooting Incidents; Gunshot Wound Dynamics; Gunshot Residue & Range of Fire Determination; and Bloodstain Pattern Analysis. (*See id.* 2). Plaintiff hired Knox to prepare a report based on Knox's analysis and reconstruction of the incident

the parties' medical records in support. (*See id.* 4). Plaintiff challenges the following statements: (1) Prosper punched Defendant prior to the Taser deployment; (2) Defendant deployed his Taser because Prosper was standing and appeared aggressive; (3) Prosper was attacking Martin from the ground during the third tasing; (4) Defendant pleaded with Prosper to release his finger from Prosper's mouth; and (5) Defendant shot Prosper because he had bitten hard on his finger, causing him to fear it might be severed. (*See id.* 3–4). Even though the challenged statements revolve primarily around non-material facts, the Court addresses each in turn.

Plaintiff relies on the Biscayne Air Video and Knox's opinion to dispute the first three statements — Prosper punched Defendant; Prosper was standing; and Prosper was attacking Martin from the ground. (*See* Pl.'s Reply Facts ¶¶ 42, 48, 59–61). This evidence fails to create any genuine dispute of material facts.

In Knox's own words, Knox is "certainly not suggesting that [the Biscayne Air Video] — that it contradicts [the punch] . . . ." (Knox Dep. [ECF No. 104-2] 74:22–23 (alterations added)).[18] Knox further admits it

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between Defendant and Prosper, and Knox's opinions as to the reconstructed physics of the interaction between Martin and Prosper are the subject of pending objections to an Order [ECF No. 147] granting in part Defendant's Motion to Exclude Dr. Knox's opinions. (*See* Plaintiff's Rule 72 Partial Objections . . . [ECF No. 148]).

[18] Although not cited in her Response, Plaintiff also disputes Defendant's statement regarding the punch with citations to the MDPD Initial Incident Report [ECF No. 132-4]; Barbara

is possible Prosper is standing after Defendant and Prosper initially fall down the embankment. (*See id.* 66:4–14). Indeed, Knox admits Prosper is not even visible in the Biscayne Air Video at this point. (*See id.*). Sandoval also states during the first application of the taser, "[w]hen I pulled up . . . I do believe that [Prosper] was standing." (Sandoval Dep. 119:25–120:1). The evidence fails to support Plaintiff's assertions, which remain entirely speculative.

Plaintiff then relies on the Biscayne Air Video to controvert Defendant's statement Prosper attacked him from the ground. (*See* Pl.'s Reply Facts ¶ 61). Again, the video simply does not show what transpired between Defendant and Prosper. (*See generally* Biscayne Air Video). Given the video's lack of clarity, the Court cannot make the inference Defendant's statement is not true. What's more, Sandoval's deposition corroborates Defendant's version of events. (*See*

Williams' Deposition [ECF No. 132-5]; and Kerry White's Deposition [ECF No. 132-6]. (*See* Pl.'s Reply Facts ¶ 42). Plaintiff's characterization of this evidence fails to persuade. The evidence cited does not specifically say the word "punch." And the evidence fails to contradict Defendant's statement in any material way. (*See* MDPD Report 4 ("As [Defendant] got closer to [Prosper] to take him into custody, they got into a struggle . . . ." (alterations added)); Williams Dep. 31:1–5 (stating she described the events as a "struggle" to avoid confusion); White Dep. 19:20–24 (stating he had little communication with Defendant at the scene because "any kind of shooting the first thing you are supposed to do is separate that officer, put him in the back seat, take his weapon and be quiet. Don't ask him no questions. That's it."). Reading the statements in their entirety, they fail to create any genuine dispute of material fact. In any event, the Court's analysis does not rely on Defendant's statement regarding the punch.

Sandoval Dep. 189:7–12). While Prosper was on the ground, Sandoval states he saw Prosper initiate "the 'lunge,' the 'attack,' the 'engagement,' whatever the term is for it . . . ." (*Id.* (alteration added)).

Plaintiff denies Defendant pleaded with Prosper to release his finger from Proper's mouth. (*See* Pl.'s Reply Facts ¶ 64). Although Plaintiff provides no evidence to contradict Defendant's statement, Plaintiff "submits it is a reasonable inference that if Defendant feared serious bodily harm that justified deadly force, he would not have taken a moment or had the time to beg Prosper to stop biting him." (*Id.*). This fails to create a genuine dispute as to Defendant's statement.

Finally, Plaintiff challenges Defendant's statement that he shot Prosper because Prosper had bitten down hard on his finger, causing him to fear it might be severed. (*See id.* ¶ 66). Plaintiff argues the medical records create "the reasonable inference Martin did not have the fear of bodily harm he alleges." (*Id.*). The bite and circumstances surrounding the bite are discussed in greater detail in Section C of this Order. To be clear, the medical records do not contradict Defendant's statement. The records show Defendant was bitten (*see* Jackson Medical Record 39), the bite would have been painful (*see* Briggle Dep. 66:7–20), and the bite could have caused temporary numbness (*see id.* 72:16–20).

The evidence — in the light most favorable to Plaintiff — does not *contradict* Defendant's statements; at best, it fails to *corroborate* them. Plaintiff's challenges

to Defendant's credibility are based on her own speculative interpretation of the evidence. "Consequently, the evidence to which [Plaintiff] cites does not create a fact issue . . . and, therefore does not preclude summary judgment." *Penley*, 605 F.3d at 853 n.4 (alterations added).

B. Use of Non-Lethal Force — the Taser

The parties' briefing regarding qualified immunity in the context of non-lethal force is cursory at best. Indeed, Plaintiff's entire argument on this issue is reduced to two lines, stating Defendant's use of the Taser is important here because the "sequence of events began with Officer Martin's unlawful tasing of Junior Prosper . . . [and] [t]he use of a Taser or stun gun in itself may be excessive force." (Resp. 14 (alterations added; footnote call number omitted)). According to Defendant, "Eleventh Circuit precedent has ratified the use of a Taser in situations far less egregious than this one, even when the subject did not present a threat of violence to the officers." (Reply 13 (citations omitted)).

As it is undisputed Defendant was acting within the scope of his discretionary authority (*see* Resp. 4–5), Plaintiff must show Defendant's use of the Taser "was unconstitutional, and that the state of the law at the time was clearly established so as to provide 'fair warning' to [Defendant] that such conduct was unconstitutional." *Wate v. Kubler*, 839 F.3d 1012, 1019 (11th Cir. 2016) (alteration added; citations omitted). Plaintiff fails to make either showing. (*See generally* Resp.).

"The standard for whether the use of force was excessive under the Fourth Amendment is one of 'objective reasonableness.'" *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007) (quoting *Graham v. Connor*, 490 U.S. 386, 388 (1989)). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citation omitted). A court looks to the "totality of circumstances" to determine whether the manner of arrest was reasonable. *Draper v. Reynolds*, 369 F.3d 1270, 1277 (11th Cir. 2004) (quotation marks and citation omitted). This analysis must "embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–397. "[T]he qualified immunity standard is broad enough to cover some mistaken judgment, and it shields from liability all but the plainly incompetent or those who knowingly violate the law." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009) (alteration added; quotation marks and citation omitted).

The relevant material facts, taken in the light most favorable to Plaintiff, show Defendant knew, or could reasonably believe, Prosper (1) had fled the scene of an accident (*see* Pl.'s Add'l Facts ¶ 110); (2) was intoxicated (*see* Def.'s Facts ¶ 28); (3) was stumbling along the side of a busy highway (*see* Pl.'s Add'l Facts ¶ 114); (4) appeared disoriented (*see id.*); and (5) did

not respond to verbal commands or verbally acknowledge Defendant (*see* Def.'s Facts ¶ 75). Additionally, Defendant engaged Prosper and the two lost their balance, tumbling down the embankment on the side of the road (*see* Pl.'s Reply Facts ¶ 47); and once Defendant regained his footing, Prosper still appeared disoriented and aggressive (*see* Pl.'s Add'l Facts ¶¶ 130–131).

Plaintiff disputes Defendant could reasonably believe Prosper was intoxicated or appeared aggressive. (*See* Pl.'s Reply Facts ¶¶ 21, 35; Pl.'s Add'l Facts ¶¶ 118–119, 130). Plaintiff relies on evidence adduced after the incident, asserting Prosper's toxicology report was negative and Prosper's behavior may have been caused by a stroke, seizure, or infection. (*See* Pl.'s Add'l Facts ¶¶ 115–118). This argument fails to persuade. Defendant's actions must be judged 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 (citation omitted). The qualified immunity analysis "is limited to 'the facts that were knowable to the defendant officer[]' at the time [he] engaged in the conduct in question." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (alterations added; citation omitted). "Facts an officer learns after the incident ends — whether those facts would support granting immunity or denying it — are not relevant." *Id.*

Plaintiff provides an alternative explanation for Prosper's erratic behavior but fails to explain how Defendant could have known the results of the toxicology report or the expert's diagnosis *at the time* the incident

was unfolding. An after-the-fact explanation is irrelevant to a qualified immunity analysis if the officer is incapable of reaching the conclusion at the time in question. Witnesses corroborate Prosper appeared intoxicated and aggressive. (*See* Sandoval Dep. 150:6–10). Certainly, Plaintiff does not dispute that Prosper was disoriented, stumbling, could not maintain his balance, and refused to verbally communicate with Defendant. Under these circumstances, "a reasonable officer on the scene" would believe Prosper was intoxicated. *Graham*, 490 U.S. at 396 (citation omitted).

Plaintiff also cites two cases, *Glasscox v. City of Argo*, 903 F.3d 1207, 1215 (11th Cir. 2018) and *Kubler*, 839 F.3d at 1012, to support her claim Martin's use of a Taser was excessive. Notably, even if these cases were factually similar to the events here — which they are not — both cases post-date Defendant's use of his Taser and could not be used to show Prosper's right was clearly established at the time of the incident. *See Perez*, 809 F.3d at 1221 (citation omitted).

In *Glasscox*, the court found a constitutional violation after the repeated use of a taser on a suspect who was not resisting arrest; verbally communicated the intent to comply with the officer's commands; and was, in fact, attempting to comply with the officer's commands during the third and fourth discharge of the taser, which "was wholly unnecessary, and grossly disproportionate to the circumstances." 903 F.3d at 1216 (citation omitted). In *Kubler*, the court found a constitutional violation after the repeated use of a taser on a suspect who was handcuffed, immobilized, and unable

to present a risk of flight or a threat of danger to the officers or the public. *See Kubler*, 839 F.3d at 1021. As Prosper continued to resist arrest, made no effort to comply with Defendant's requests, was not immobilized, presented a risk of flight, and was a threat to Defendant, these cases fail to present facts indistinguishable from those before the Court. *See Perez*, 809 F.3d at 1222.

Plaintiff provides no other support for her contention Defendant's use of the Taser violated Prosper's constitutional rights. (*See generally* Resp.). Defendant, for his part, provides multiple cases supporting his argument he did not violate Prosper's rights by discharging his Taser. (*See* Reply 13 (citing cases)). The Court must agree with Defendant.

The Eleventh Circuit has found an officer's initial use of a taser on a hand-cuffed, non-violent suspect did not violate the suspect's constitutional rights. *See Buckley v. Haddock*, 292 F. App'x 791, 799 (11th Cir. 2008). The Eleventh Circuit has also found an officer may use a taser on a non-compliant suspect without issuing a verbal arrest command. *See Draper*, 369 F.3d at 1278. Indeed, where a suspect appears aggressive and uncooperative, "use of a taser might be preferable to a 'physical struggle [causing] serious harm' to the suspect or the officer." *Fils v. City of Aventura*, 647 F.3d 1272, 1290 (11th Cir. 2011) (citation and quotation marks omitted; alteration in original). "[Eleventh Circuit] decisions demonstrate that the point at which a suspect is handcuffed and 'pose[s] no risk of danger to the officer' often is the pivotal point for excessive-force

claims." *Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347, 1356 (11th Cir. 2015) (first alteration added; citations omitted). The Eleventh Circuit "ha[s] held a number of times that severe force applied *after* the suspect is safely in custody is excessive." *Id.* (alteration added; citations omitted; emphasis in original).

The undisputed material facts show it was reasonable for Defendant to believe Prosper — who ignored repeated verbal commands, attempted to escape, and appeared visibly disoriented — was intoxicated and aggressive. (*See*, *e.g.*, Sandoval Dep. 154:12–16, 188:7–24; Pl.'s Add'l Facts ¶¶ 144–47; Resp. 3). At no point during the encounter was Prosper "safely in custody," *Mobley*, 783 F.3d at 1356, nor sufficiently restrained so as to pose no risk of danger to Defendant. Given the "'difficult, tense and uncertain situation[,]' the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force." *Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008) (alteration added; citation omitted). Accordingly, Defendant's use of non-lethal force did not violate Plaintiff's constitutional rights, and Defendant is entitled to qualified immunity for the use of the Taser.

C. Use of Deadly Force — the Firearm

1. Constitutional Violation

During an arrest, an officer is justified in the use of deadly force where he "has probable cause to believe that the suspect poses a threat of serious physical

harm, either to the officer or to others." *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). An officer will be entitled to qualified immunity in the absence of actual probable cause if he has arguable probable cause. *See Garczynski*, 573 F.3d at 1167 (citation omitted). "[B]ecause only arguable probable cause is required, the inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed." *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) (citations omitted). "Qualified immunity thereby protects officers who 'reasonably but mistakenly conclude that probable cause is present.'" *Garczynski*, 573 F.3d at 1167 (citation omitted).

Plaintiff argues "there is zero evidence that [Prosper] pose[d] any objective threat to Officer Martin, and certainly not a threat warranting the use of deadly force." (Resp. 3 (alteration added)). Not so. The undisputed facts show (1) Prosper was attempting to escape Defendant, who intended to arrest him (*see* Pl.'s Add'l Facts ¶¶ 144–147); (2) Prosper ignored repeated warnings to stop moving and stay on the ground (*see* Def.'s Facts ¶¶ 57, 78; Sandoval Dep. 188:7–24); and (3) Prosper bit Defendant during a physical altercation that resulted in Defendant discharging his firearm (*see* Def.'s Facts ¶¶ 61–69; Martin Dep. 138:13–21).

The facts critical to the Court's analysis relate to the bite and subsequent discharge of Defendant's firearm. Defendant's account of the incident is straightforward:

Prosper was biting his finger; Defendant could not get Prosper to release his finger; and because Defendant feared Prosper might sever his finger, Defendant discharged his firearm at Prosper. (*See* Def.'s Facts ¶¶ 61–69). Plaintiff relies primarily on the Biscayne Air Video to dispute these facts. (*See* Pl.'s Reply Facts ¶¶ 61–69).

First, Plaintiff states the Biscayne Air Video shows "Prosper does not lunge at Martin" (Pl.'s Reply Facts ¶ 61), and also "show[s] Prosper did not twist and turn while biting Martin's finger, much less before he was shot" (*id.* ¶ 63 (alteration added)). These statements are not in fact supported by the Biscayne Air Video or any other record evidence. Plaintiff's own expert found "[y]ou certainly can't make out details, like, whether or not somebody's got a finger in the mouth or anything like that. So, there would be *no way to use that video evidence to either determine that it supports or refutes what took place.* It just doesn't answer the question." (Knox Dep. 87:15–20 (alteration and emphasis added)). Plaintiff cannot rely on the Biscayne Air Video to controvert facts regarding the bite, given the video is "evidence which merely permits conjecture or speculation." *Blackston*, 764 F.2d at 1482. Plaintiff's insistence the Biscayne Air Video reveals alternative facts about the bite are grounded in pure speculation and are therefore "not reasonable." *Id.*

Next, Plaintiff cites a DNA Report stating there was an "absence of Martin's DNA in Prosper's mouth." (Pl.'s Reply Facts ¶ 63 (citing DNA Report [ECF No. 132-9])). Plaintiff mischaracterizes the results of the DNA analysis — the forensic report shows only the

blood around Prosper's mouth was Prosper's own blood. (*See generally* DNA Report). This is consistent with the other record evidence. (*See* Workers' Comp. Record [ECF No. 131-2] 68 (reporting Defendant was treated for exposure to blood or body fluid and Prosper was bleeding from the mouth when he bit Defendant's index finger and would not let go)).

The remaining evidence cited by Plaintiff — photos of Defendant's finger [ECF No. 103-11], Dr. Briggle's Deposition [ECF No. 103-12],[19] and paragraphs 164–171 of her facts — fail to controvert Defendant's testimony, and in fact support a finding that Prosper *did* bite Defendant. (*See* Pl.'s Reply Facts ¶ 63). Based on the lack of severity of the bite, Plaintiff seems to rely on this evidence to challenge the reasonableness of Defendant's application of deadly force. (*See* Pl.'s Add'l Facts ¶ 164–171). Yet, none of Plaintiff's evidence controverts Defendant's statement Prosper was biting his finger.

Based on the foregoing evidence, Plaintiff asks the Court to make the inference Defendant's finger became lodged in Prosper's mouth while Defendant was punching him. (*See id.* ¶¶ 157–158). To support this inference, Plaintiff references Defendant's Workers' Compensation Record and Deposition. (*See id.* ¶¶ 156, 158). Again, neither citation supports Plaintiff's

[19] "Q. And I think we mentioned earlier, clearly because there's tissue displacement and there was a bite mark there, there had to be a bite and simultaneous movement in order to create that level of damage, that level of displacement of the tissue? . . . THE WITNESS: Yes." (Briggle Dep. 68:23–69:4).

characterization of events. (*See* Workers' Comp. Record 68 (stating Prosper "was bleeding from mouth when [Prosper] bit[ ] his left index finger and wound [sic] not let go. [Defendant] had to struggle to get his finger free." (alterations added)); Martin Dep. 135:13–21 ("Like I said, it's — when I was going down to make the contact [with the Taser], that's when Mr. Prosper hopped up and put my finger in his mouth." (alteration added))).

Plaintiff asks the Court to make an inference that is wholly speculative and not supported by any record evidence.[20] This, the Court will not do. "As the Supreme

[20] Plaintiff does not point to, nor has the Court found, any record or account of the bite that contradicts Defendant's statement. Indeed, the evidence supports only one version of events — Defendant's. (*See*, *e.g.*, Williams Dep. 21:5–9 ("Q. You did hear [Defendant] saying, 'He's biting me'? A. Yes, 'My finger, he's biting me.' Q. And then after he said, 'He's biting me,' is that when he went silent? A. After shots were fired." (alteration added)); White Dep. 17:16–17 ("[Defendant] said something to the fact that he thought the guy bit his finger off."); First Jackson Medical Record 39 ("[Defendant] was bit on his left index finger over the PIP joint today by another human." (alteration added)); Second Jackson Medical Record 38 ("[Defendant] is a police officer and was arresting someone when the person bit the officer's index finger causing dorsal and volar wounds over the PIP joint. At his time, the patient is reporting pain in the left index finger." (alteration added)); University of Miami Medical Record ("[Defendant] presents to workers' compensation clinic for human bite he sustained on 9/28/15 during an altercation while working as a police officer." (alteration added)); Workers' Comp. Incident Report [ECF No. 131-6] ("[Defendant] WAS BITTEN BY A HUMAN ON THE LEFT HAND WHICH WAS BLEEDING . . . ." (alteration added)); OMCA Medical Record [ECF No. 131-7] 4 ("[Defendant] had left index finger laceration after human bite on 09/28/2015 . . . ." (alteration added)).

Court has instructed, '[w]hen 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.'" *Perez*, 809 F.3d at 1221 (citation omitted; alteration in original). There is no evidentiary support for Plaintiff's version of the events, nor is there any evidence to controvert Defendant's version.

Taken together, the undisputed facts show "a reasonable officer could — and likely would — have perceived [Prosper] as posing an imminent threat of serious physical harm." *Martinez v. City of Pembroke Pines*, 648 F. App'x 888, 893 (11th Cir. 2016) (alteration added) (finding use of deadly force reasonable where suspect ignored the officers' commands and, while still handcuffed, suddenly advanced to within a few feet of the defendant).

The clear and imminent threat posed by Prosper biting Defendant entitles Defendant to qualified immunity because "[i]t is reasonable, and therefore constitutionally permissible, for an officer to use deadly force against a person who poses an imminent threat of serious physical harm to the officer or others." *Id.* (citing *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005) (alteration added; other citation omitted)). Again, the undisputed facts[21] show (1) Prosper

[21] Plaintiff does not deny any of the specific facts on which the Court relies with citations to record evidence beyond the Biscayne Air Video. (*See generally* Pl.'s Reply Facts; Pl.'s Add'l Facts). Plaintiff's denials are thus insufficient. *See Garczynski*,

"continu[ed] to resist arrest" (Def.'s Facts ¶ 57); (2) the Taser "had no effect on Prosper" (*id.* ¶ 60);[22] (3) Prosper and Defendant were engaged in a physical confrontation on the ground prior to Defendant's use of deadly force (*see id.* ¶¶ 61–66; Pl.'s Add'l Facts ¶¶ 156–158); and (4) Prosper bit Defendant prior to the use of deadly force (*see* Def.'s Facts ¶¶ 61–67; *see also* Pl.'s Add'l Facts ¶¶ 157–159). These facts are indistinguishable from those in *Martinez*, where the arrestee was "unresponsive to all commands and gestures, impervious to the [T]aser, and otherwise unable to be restrained." *Martinez*, 648 F. App'x at 893 (alteration added). Accordingly, Defendant's "decision to use deadly force was reasonable under the circumstances, and thus in compliance with the Fourth Amendment." *Id.* at 894.

2. Clearly Established Law

Even assuming a constitutional violation, Defendant is entitled to qualified immunity unless Plaintiff can show Prosper's Fourth Amendment rights were clearly established at the time of the shooting. *See id.*

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573 F.3d at 1165 ("A genuine dispute requires more than some metaphysical doubt as to the material facts. . . . A mere scintilla of evidence is insufficient; the non-moving party must produce substantial evidence in order to defeat a motion for summary judgment." (internal quotation marks and citations omitted; alteration added)).

[22] Plaintiff fails to cite any evidence to controvert Defendant's statement. (*See* Pl.'s Reply Facts ¶ 60). The evidence shows Prosper continued to ignore verbal commands and attempt to escape after use of the Taser. (*See* Def.'s Facts ¶¶ 50, 52, 56; *see also* Resp. 3). This fact is therefore admitted.

This requires citation to decisions of the Supreme Court, Eleventh Circuit, or the highest relevant state court. *See McClish*, 483 F.3d at 1237. It is Plaintiff's burden to "demonstrate that, from the preexisting law, the deputy had 'fair and clear notice' that the deputy's conduct would break federal law." *Buckley*, 292 F. App'x at 797 (citations omitted).

Plaintiff relies primarily on the August 31, 2018 Order and the cases the Court cited there. (*See generally* Resp. 16–17). Plaintiff also includes citations to the following Eleventh Circuit case law: *Glasscox*, 903 F.3d 1207; *St. George v. Pinellas County*, 285 F.3d 1334 (11th Cir. 2002); and *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005).[23] Neither the Court's Order nor the cases cited address facts directly comparable to the undisputed facts in this case. Once again, only "indistinguishable facts" can clearly establish a constitutional violation. *Perez*, 809 F.3d at 1222 (citation omitted).

Plaintiff fails to discern the difference between the law applicable to a motion to dismiss and a motion for summary judgment. The August 31, 2018 Order made clear the "Court understands a wealth of evidence may exist to contradict Plaintiff's claim." (*Id.* 13). The undersigned then noted "[a]t this stage of proceedings, the Court must credit Plaintiff's allegations [in the

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[23] Plaintiff fails to complete her argument regarding *Mercado*. (*See* Resp. 18). Plaintiff's Response ends abruptly mid-explanation before moving on to a new argument. (*See id.* 18–19). Nevertheless, the Court considers *Mercado* in addition to Plaintiff's other arguments.

TAC] and draw all reasonable inferences in her favor." (*Id.* (alteration added)). By crediting the allegations in the TAC as true, the Court found "[u]nder Eleventh Circuit precedent, the use of deadly force against Prosper — who was unarmed, fleeing from Defendant, and allegedly did not pose a threat — violated Prosper's Fourth Amendment right to be free from excessive force." (*Id.* 12 (alteration added; citation omitted)). Based on those allegations made by Plaintiff, the Court found *Tolan v. Cotton*, 572 U.S. 650 (2014), and *Gaillard v. Commins*, 562 F. App'x 870 (11th Cir. 2014), were "clearly 'particularized to the facts of [this] case.'" (Order 13 (citation omitted; alteration in original)).

With discovery completed, the record does not support the referenced allegations of the TAC. Plaintiff "may not rest upon mere allegation or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256 (quotation marks and citation omitted). The facts show Prosper unquestionably posed a threat to Defendant. Prosper appeared hostile and aggressive (*see* Sandoval Dep. 150:6–10; Martin Dep. 74:16–20); ignored repeated verbal commands (*see* Def.'s Facts ¶ 78; Sandoval Statement 33:15–17); was non-compliant after the use of Defendant's Taser (*see* Def.'s Facts ¶ 60); and bit Defendant's finger during a physical altercation on the ground (*see* Def.'s Facts ¶ 61; Martin Dep. 135:13–21).

In *Tolan*, the unarmed suspect was shot, on his knees, from 15 to 20 feet away, *see* 572 U.S. at 653; and the fleeing suspect in *Gaillard* died from injuries

received when he was struck by a patrol car without posing any threat to a police officer or third party, *see* 562 F. App'x at 875. Considering the undisputed facts here, it no longer remains true that these cases provide "'fair and clear notice' that the [Defendant's] conduct would break federal law." *Buckley*, 292 F. App'x at 797 (alteration added; citations omitted).

As to the other cases Plaintiff cites: *Glasscox* considered the repeated use of a taser on a non-threatening suspect who was attempting to comply with the officer's commands, *see* 903 F.3d at 1216; *St. George* was decided at the motion-to-dismiss stage and assumed the suspect was neither threatening the officer nor in a position of flight by accepting as true the complaint's allegations, *see* 285 F.3d at 1338; and *Mercado* considered a suicidal subject who "was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot in the head," 407 F.3d at 1157–58. None of the cases Plaintiff provides have "indistinguishable facts clearly establishing [Plaintiff's] constitutional right." *Perez*, 809 F.3d at 1222 (alteration added; internal quotation marks and citation omitted).

As Plaintiff fails to cite any case with materially similar facts from the Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida which might have given Defendant fair warning his actions were unconstitutional, "[Plaintiff] can surmount the qualified immunity hurdle only if [Defendant's] conduct was 'so far beyond the hazy border between excessive and acceptable force that [Defendant] had to know he was

violating the Constitution even without case law on point.'" *Alday v. Groover*, 601 F. App'x 775, 778 (11th Cir. 2015) (alterations added; citation and quotation marks omitted). Plaintiff appears to suggest this hurdle has been met but provides no analysis in support. (*See* Resp. 19).

Tellingly, Plaintiff includes nothing except a conclusory quote and a citation to *Perez*, 809 F.3d at 1223.[24] (*See* Resp. 19). In addition to being decided after the fatal encounter between Defendant and Prosper took place, *Perez* deals with facts clearly distinguishable from those here. *See* 809 F.3d at 1219. In *Perez*, witnesses testified that at the time of the shooting, the suspect was subdued, compliant, and on the ground with his arms restrained, before being subjected to deadly force without warning. *Id.* Unlike the suspect in *Perez*, Prosper was not subdued, compliant, or restrained. (*See* Def.'s Facts ¶¶ 60–69). Given Prosper's erratic behavior, failure to comply with verbal commands, and physical assault on Defendant, Defendant's conduct was not "so far beyond the hazy border between excessive and acceptable force that [Defendant] had to know he was violating the Constitution even without caselaw on point." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (alteration added).

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[24] Plaintiff incorrectly cites the case as *Pearson v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016). (*See id.*).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment **[ECF No. 102]** is **GRANTED**. Final judgment will be entered by separate order. The Clerk is directed to mark this case **CLOSED**, and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 1st day of July, 2019.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20323-CIV-ALTONAGA/O'Sullivan

EDELINE JULMISSE PROSPER,

Plaintiff,

v.

ANTHONY MARTIN,

Defendant. /

ORDER

(Filed Aug. 31, 2018)

THIS CAUSE came before the Court on Defendant, Anthony Martin's Motion to Dismiss Third Amended Complaint [ECF No. 65], filed July 23, 2018. Plaintiff, Edeline Julmisse Prosper, filed a Response [ECF No. 69] on August 6, 2018, to which Defendant filed a Reply [ECF No. 73]. The Third Amended Complaint ("TAC") [ECF No. 60], filed on July 2, 2018, states a single claim of excessive force under 42 U.S.C. section 1983. (*See id.* ¶¶ 30–34). The Court has carefully reviewed the parties' submissions, the record, and applicable law.

I. BACKGROUND

This case arises out of the death of Junior Prosper, who died after he was shot by Defendant on September 28, 2015. (*See id.* ¶ 3). Plaintiff is the personal representative of the estate of Junior Prosper, who was her

husband and the father of her unborn child at the time of his death. (*See id.* ¶¶ 3–4).

Prosper, a resident of North Miami, was returning home from his shift as a taxi cab driver when he struck a traffic sign at low speed and came to a stop. (*See id. VI* ¶¶ 15–16). Witnesses alerted the Miami-Dade Police Department to the accident, and Defendant responded to the scene. (*See id.* ¶¶ 17–18). By the time Defendant arrived, Prosper had exited his vehicle and left the scene on foot. (*See id.* ¶ 19).

In recounting events that occurred after Defendant exited his vehicle, Plaintiff relies on a surveillance video recording she secured during the investigation of Prosper's death — specifically, a surveillance video provided by Biscayne Air Conditioning, Inc. (the "Biscayne Air Video" [ECF No. 66]). (*See* TAC ¶¶ 9–13). Plaintiff alleges Defendant approached Prosper, first in a marked police vehicle, and then on foot. (*See id.* ¶ 20). When Defendant encountered Prosper, he and Prosper lost their balance and fell into some bushes together. (*See id.* ¶ 21). Before this altercation, Prosper did not engage in any violent or threatening act. (*See id.*).

After falling into the bushes, Defendant immediately stood up and deployed his Taser on Prosper, who then crawled away through the bushes. (*See id.* ¶ 22). Defendant ran to reengage Prosper on the other side of the bushes. (*See id.* ¶ 25). Based on the Biscayne Air Video, Plaintiff alleges Prosper was either on his hands and knees or stomach when Defendant approached. (*See id.* ¶ 26). Defendant then shot Prosper multiple

times, killing him. (*See id.* ¶ 27). Defendant did not radio for backup until after he shot and killed Prosper. (*See id.* ¶29).

Plaintiff filed her original Complaint [ECF No. 1] on January 25, 2017. On March 10, 2017, the Court stayed the case pending investigation into the shooting by state authorities. (*See* Order Granting Motion to Stay [ECF No. 20]). Plaintiff filed her First Amended Complaint [ECF No. 30] on September 28, 2017; and following completion of the state investigation, the case was reopened on February 5, 2018 (*see* Order [ECF No. 35]). On April 17, 2018, the Court dismissed the First Amended Complaint for failure to comply with federal pleading standards (*See* Order Granting Motion to Dismiss [ECF No. 46]). Plaintiff filed a Second Amended Complaint ("SAC") [ECF No. 49] on April 30, 2018, which the Court dismissed on June 21, 2018. (*See* Order Granting Second Motion to Dismiss ("June 21 Order") [ECF No. 59]).

On July 2, 2018, Plaintiff filed the TAC, which is the operative pleading. (*See generally* TAC). Defendant now moves to dismiss the SAC for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and on the basis of qualified immunity. (*See generally* Mot.).

II. LEGAL STANDARDS

A. Rule 12(b)(6)

On a Rule 12(b)(6) motion to dismiss, a court does not reach the merits of the suit, only the sufficiency of the complaint. *See Levy v. City of Hollywood*, 90 F. Supp. 2d 1344, 1345 (S.D. Fla. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added) (quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted).

Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556). To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added) (citing *Twombly*, 550 U.S. at 556). When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue*

Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) (citation omitted).

B. Qualified Immunity

"A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim." *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (citing *Marsh v. Butler Cty.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc)). Once a qualified immunity defense has been asserted, unless Plaintiff's "allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery . . . . Absent such allegations, it is appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage." *Id.* (alterations, internal quotation marks, and citations omitted).

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Iqbal*, 556 U.S. at 672 (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

To be entitled to the qualified immunity defense, a government official must demonstrate "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (internal quotation marks and citations omitted). When a defendant is found to at within the scope of his discretionary authority, the burden "shifts to the plaintiff to show that qualified immunity is not appropriate."[1] *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted).

"To survive a motion to dismiss based upon qualified immunity, the plaintiff must have alleged sufficient facts to support a finding of a constitutional

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[1] This two-step approach is enshrined in the Eleventh Circuit's *Zeigler/Rich* analysis, which provides:

1. The defendant public official must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."
2. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law."

Courson, 939 F.2d at 1487 (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (per curiam)); *see also Rich v. Dollar*, 841 F.2d 1558, 1563–64 (11th Cir. 1988) (discussing two-part test)). The district court has the discretion to determine in what order to address each part of the qualified immunity two-part test. *See Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (citing *Pearson*, 555 U.S. at 236).

violation of a clearly established law." *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1198 (11th Cir. 2012) (citation omitted). The plaintiff "bear[s] the burden of showing that the federal rights allegedly violated were clearly established." *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996) (alteration added; citations omitted). To satisfy the "clearly established" requirement, a law may not be "defined 'at a high level of generality,'" and the "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted). Although the Supreme Court "do[es] not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2007) (citations omitted; alterations added).

A defendant is entitled to qualified immunity "unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice . . . what the defendant official was doing would be clearly unlawful given the circumstances." *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (alteration added; citation omitted). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing]' all but the plainly incompetent or those who knowingly violate the law.'" *Young v. Borders*, 850 F.3d 1274, 1282 (11th Cir. 2017) (alteration in original) (quoting *City & Cty. of S. F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015)).

There are three ways a plaintiff may show a right was clearly established: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016) (internal quotation marks and citation omitted). If case law is used, only decisions of the Supreme Court, Eleventh Circuit, and highest relevant state court can clearly establish the law for qualified immunity purposes. *See McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007) (citing *Marsh*, 268 F.3d at 1032 n.10).

III. ANALYSIS

Defendant seeks to dismiss the TAC because: (1) it fails to meet basic pleading standards under Rule 8 (*see* Mot. 5–12), and (2) Defendant is entitled to qualified immunity (*see id.* 12–14). The Court addresses each argument in turn.

A. Sufficiency of the Pleading

In the June 21 Order, the Court listed five essential facts alleged in the SAC: (1) Prosper exited his vehicle after the traffic accident and left on foot; (2) Defendant and Prosper lost their balance and fell into bushes; (3) Prosper did not engage in any threatening act; (4) Prosper crawled through the bushes after

Defendant deployed a Taser against him; and (5) Defendant shot Prosper several times in the stomach while Prosper was on his knees or stomach, killing him. (*See* June 21 Order 5 (citing SAC ¶¶ 12–20)). The Court then dismissed the SAC because it failed to "explain how [Plaintiff] knows these events occurred or on what basis she alleges these facts." (*Id.* (alteration added)).

In an attempt to rectify this deficiency, the TAC adds six paragraphs (*see* TAC ¶¶ 8–13) describing the surveillance video Plaintiff obtained while investigating her husband's death, and identifies the video as the basis for her allegation Prosper was "either on his knees or stomach when Defendant [] approached." *Id.* ¶ 26 (alteration added). Apart from the six paragraphs detailing the existence of the Biscayne Air Video, and the single paragraph alleging it shows Prosper was on his knees or stomach when Defendant approached, the TAC is substantively identical to the SAC. (*Compare* TAC ¶¶ 1–3; 5–7; 14–25; 27–34, *with* SAC ¶¶ 1–27).

Even with the seven additional paragraphs Plaintiff added, the allegations in the TAC are threadbare. They provide few facts; fail to cite to any specific time stamp in the video (which the TAC fails to attach); do not identify the precise time Prosper was shot; provide no timeline of events after the moment of the shooting; and fail to include evidence from the investigation Plaintiff claims she conducted (*see* TAC ¶ 8), including the autopsy reports, the medical examiner, the State Attorney file, witnesses, or other surveillance videos. (*See id.* ¶¶ 8–13, 26). Nevertheless, by basing her

allegations on the Biscayne Air Video, Plaintiff has incorporated the video into the TAC, allowing the Court to review it and infer facts from its contents.[2] *See Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) ("[A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment [] if the attached document is: (1) central to the plaintiff's claim; and (2) . . . the authenticity of the document is not challenged" (alterations added; citation omitted)).

Defendant contends the Biscayne Air Video "does not actually show what [Plaintiff] alleges it shows." (Mot. 6 (alteration added; emphasis omitted)). In response, Plaintiff admits the Biscayne Air Video "is far from a model of clarity" (Resp. 6), but argues the parties' disagreement about what it shows is "a dispute not properly resolved on a motion to dismiss" (*id.* 9). Upon review of the video, the Court agrees with Plaintiff that the surveillance footage is too ambiguous to determine the Complaint's allegations are utterly implausible.

The Biscayne Air Video's depiction of the confrontation between Defendant and Prosper begins at timestamp 4:13:31, when Defendant approaches Prosper and the two fall to the ground. (*See* Biscayne Air Video 4:13:31–38). One person then stands up and gestures at the ground for several seconds (*See id.*

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[2] Although Plaintiff failed to file the Biscayne Air Video, Defendant conventionally filed the video (*see* Biscayne Air Video), and does not dispute its authenticity (*see* Mot. 6 n.1).

4:13:39–4:14:30). The video then shows Prosper fleeing as Defendant pursues him. (*See id.* 4:14:35–40). Prosper falls to the ground as Defendant approaches. (*See id.* 4:14:41). While Prosper is on the ground, Defendant, standing over Prosper's prone body, raises his arms toward Prosper several times. (*See id.* 4:14:46). While Defendant's arms are raised and pointing toward Prosper, light flashes, either from a flashlight or perhaps from Defendant's gun. (*See id.* 4:14:47). Prosper then rises, staggers briefly – maybe wounded – and is tackled by Defendant. (*See id.* 4:14:57–4:15:01). Prosper does not appear on the video again, which ends with Defendant walking away unsteadily. (*See id.* 4:15:20–47).

The Biscayne Air Video clearly shows Prosper on the ground at least once, with Defendant approaching and then standing over him. (*See id.* 4:14:47). Given Defendant's posture and the flash of light, it may even show Defendant shooting Prosper while Prosper was on his knees or stomach, *as* the TAC suggests. (*See id.*; *see also* TAC ¶¶ 26–27). Drawing all inferences from the Biscayne Air Video and the TAC's allegations in Plaintiff's favor, the Court finds Plaintiff has stated a plausible Fourth Amendment violation. *See Mighty v. Miami-Dade Cty.*, 659 F. App'x 969, 972 (11th Cir. 2016) (affirming the denial of a motion to dismiss where, "[c]onstruing the amended complaint in Plaintiff's favor," Plaintiff alleged a plausible Fourth Amendment violation because he was "unarmed and standing in front of his parents' home when he was shot and killed" (alteration added)). Because the

video sufficiently establishes a basis for Plaintiff's claim of excessive force, the Court determines whether her claim is barred by the doctrine of qualified immunity.

B. Qualified Immunity

Taking the allegations in the TAC as true, Prosper was unarmed and had committed no crime when Defendant chose to pursue him. (*See* TAC ¶¶ 14, 16, 21). Drawing all reasonable inferences from the video in favor of Plaintiff, Prosper was fleeing from Defendant when he fell, and Defendant was standing upright when he shot Prosper, who was on the ground on his knees or stomach. (*See* Biscayne Air Video 4:14:41–47). From the TAC and video, the Court can also draw an inference that Prosper was not a threat to Defendant or to others because he was on his knees or stomach, and not resisting Defendant when shot. (*See* TAC ¶ 28; Biscayne Air Video 4:14:41–47).

To avoid dismissal on the ground of qualified immunity, Plaintiff bears the burden of showing Defendant's actions (1) violated a constitutional right; and (2) the constitutional right at issue was "clearly established" at the time of the violation. *See Pearson*, 555 U.S. at 232 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). This two-pronged inquiry "is an uncomfortable exercise where . . . the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." *Id.* at 239 (quotation marks and citations omitted; alterations in original).

Plaintiff provides the Court with no analysis of the two-pronged qualified immunity inquiry.[3] (*See generally id.*). Instead, in arguing Defendant is not protected by qualified immunity, Plaintiff cites two cases: *Felio v. Hyatt*, 639 F. App'x 604, 609 (11th Cir. 2016); and *Andrade v. Miami Dade County*, No. 09-23220-CIV, 2010 WL 4069128, at *1 (S.D. Fla. Sept. 30, 2010). (*See* Resp. 12–13). Plaintiff cites to *Felio* for the general proposition that "[t]he Supreme Court held long ago that deadly force is not justified when the suspect is unarmed and poses no immediate threat to law enforcement officers at the scene." (Resp. 13 (alteration added; internal quotation marks and citation omitted)). She cites to *Andrade* for the proposition "the use of deadly force against a mentally ill man engaged in a violent struggle with the police [is] not objectively unreasonable."[4] (*Id.* (alteration added; citation omitted)). Neither case addresses facts comparable to this case; as such, they are inapplicable to the Court's analysis of qualified immunity. *See Perez*, 809 F.3d at 1222 (noting only

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[3] Despite acknowledging the Court's "admonition that[ ] the briefing supplied thus far is inadequate" regarding qualified immunity (Resp. 12 (alteration added; citing June 21 Order 6)), Plaintiff fails to supplement the analysis of qualified immunity she first supplied and "basically reasserts the arguments previously made" (*id.*).

[4] Given the court in *Andrade* in fact *granted* a motion to dismiss based on qualified immunity, it is unclear why Plaintiff cited the case to support her argument. *See Andrade*, 2010 WL 4069128 at *16. In any event, because *Andrade* is not an opinion from the Supreme Court, Eleventh Circuit, or Florida Supreme Court, the Court does not consider it in the qualified immunity analysis. *See McClish*, 483 F.3d at 1237.

case law with "indistinguishable facts" can clearly establish a constitutional right).

In arguing Plaintiff's claim is barred by qualified immunity, Defendant points out "the Response fails to provide any case law clearly establishing that [Defendant's] use of force . . . was excessive or unjustified." (Reply 6 (alterations added; citation and footnote call number omitted)). Defendant contends Plaintiff's citation to *Felio v. Hyatt* does not meet her burden because her argument is "premised on an allegation — that Mr. Prosper was on his knees or stomach — which is *conclusively refuted by the video*." (*Id.* 7 (emphasis in original; internal quotation marks omitted)). As previously explained (*see supra* III.A), the Court cannot conclude the video provided by Defendant *conclusively* refutes Plaintiff's allegation Prosper was on his knees or stomach when shot. (*See* Biscayne Air Video 4:14:47). Plaintiff's allegation is plausible.

Defendant is correct that Plaintiff fails to cite any case law addressing similar facts to those alleged in the TAC. Yet, Plaintiff does make the legal argument "[i]t is clearly unconstitutional to shoot a man who, having been unlawfully Tasered, attempts to crawl away and is on his knees when shot." (Resp. 13 (alteration added)). Plaintiff also asserts "Defendant shot and killed Mr. Prosper[,] who was on his knees or stomach and not a threat to Defendant [ ], falling squarely within the framework of *Tennessee v. Garner* and that line of longstanding Supreme Court precedent." (*Id.* 13 (alterations added)). Defendant, for his part, does not provide the Court with case law holding that facts

similar to those Plaintiff alleges *do* merit dismissal under the doctrine of qualified immunity. (*See generally* Mot.; Reply).

Because neither party cites to binding authority from the Supreme Court, the Florida Supreme Court, or the Eleventh Circuit Court of Appeals addressing the fact pattern alleged in the TAC, the Court conducts independent research to determine whether Plaintiff's assertion Defendant's actions violated a clearly established constitutional right is, in fact, correct. *See Monster Energy Co. v. Consol. Distributors, Inc.*, No. 6:11-CV-329-ORL-22-DAB, 2013 WL 12156536, at *7 n.18 (M.D. Fla Jan. 3, 2013) ("At the outset, the Court is disappointed that the parties neglected to cite applicable and relevant Eleventh Circuit case law that is binding on this Court. Through the Court's own research, it found the applicable standards.").

The Supreme Court and the Eleventh Circuit have repeatedly held "the use of deadly force against a nonresisting suspect who pose[s] no danger violates a suspect's Fourth Amendment right to be free from excessive force." *Perez*, 809 F.3d at 1222 (alteration added; internal quotation marks and citations omitted); *see also Tennessee v. Garner*, 471 U.S. 1, 105 (1985). Accordingly, the Supreme Court has rejected attempts to extend the protection of qualified immunity to a police officer who shoots an unarmed suspect who is on his knees. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1867 (2014) (holding it was error to credit contradictory evidence of the party seeking summary judgment when the

plaintiff "testified . . . that he was on his knees when [Defendant] shot him" (alterations added)).

A person has "a right to be free from deadly force when he [is] not threatening [Defendant], [is] merely suspected of misdemeanor offenses, and [is] attempting to escape." *Smith v. LePage*, 834 F.3d 1285, 1297 (11th Cir. 2016) (alterations added; citations omitted). Taking the allegations of the TAC as true, Prosper was not threatening Defendant, was attempting to escape, and was not suspected of even misdemeanor offenses — Defendant was responding to a 911 call regarding a minor vehicle accident, not a crime. (*See* TAC ¶¶ 16–20). Under Eleventh Circuit precedent, the use of deadly force against Prosper — who was unarmed, fleeing from Defendant, and allegedly did not pose a threat — violated Prosper's Fourth Amendment right to be free from excessive force. *See Gaillard v. Commins*, 562 F. App'x 870, 877 (11th Cir. 2014) (affirming the denial of qualified immunity where officer applied deadly force against "an unarmed suspected felon fleeing on foot" (citation omitted)).

Like the suspect in *Tolan*, Prosper was unarmed and on his knees or stomach. *See* 134 S. Ct. at 1867. Like the suspect in *Smith*, Prosper was allegedly not threatening Defendant and had not committed a serious crime when he attempted to escape. *See* 834 F.3d at 1297. Like the suspect in *Gaillard*, Prosper was unarmed and fleeing on foot before he was shot. *See* 562 F. App'x at 877. These cases are clearly "particularized to the facts of [this] case." *Pauly*, 137 S. Ct. at 552 (alteration added; internal quotation marks and citation

omitted). Given two of these cases were decided before the confrontation between Prosper and Defendant in 2015, the Court finds Prosper's right to be free of deadly force was clearly established and Defendant is therefore not entitled to qualified immunity on a motion to dismiss. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004) (noting the right must be established "at the time of the alleged violation" (footnote call number and citation omitted)).

The Court understands a wealth of evidence may exist to contradict Plaintiff's claim. Defendant suggests as much in his Motion. (*See* Mot. 7). Yet on the record properly before the Court on a motion to dismiss — i.e., the four corners of the TAC and the video it incorporates — at the very least "[a] material factual dispute exists about whether [Prosper] posed a threat of serious harm to [Defendant] when the shooting occurred." *Cantrell v. White*, 669 F. App'x 984, 985 (11th Cir. 2016) (alterations added). At this stage of proceedings, the Court must credit Plaintiff's allegations and draw all reasonable inferences in her favor. In so doing, the undersigned cannot find Defendant is entitled to qualified immunity.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion to Dismiss Third Amended Complaint **[ECF No. 65]** is **DENIED**. The stay of discovery against Defendant (*see* [ECF No. 56]) is **LIFTED**.

DONE AND ORDERED in Miami, Florida, this 31st day of August, 2018.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12857-AA

EDELINE JULMISSE PROSPER,
as Personal Representative of the Estate of Junior Prosper,

Plaintiff - Appellant,

versus

ANTHONY MARTIN,
Miami-Dade Police Officer, Badge 7819, individually,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Apr. 29, 2021)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, TJOFLAT, and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)