No.

IN THE

Supreme Court of the United States

CASEY BENTON,

Petitioner,

v.

MARY JO BRADLEY, AS ADMINISTRATOR OF THE ESTATE OF TROY ROBINSON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issue in this case is whether a police officer who deployed a taser to stop a fleeing person on top of an eight-foot wall is entitled to qualified immunity. The fleeing person, who the officer had reason to believe might have a weapon and who was about to escape into a residential community, died when he fell off the wall. Relying on *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that a police officer violated the Fourth Amendment when he shot in the head a person he was "reasonably sure" was not armed, the Eleventh Circuit held that the officer was not entitled to qualified immunity because, under clearly established law, the officer unlawfully used deadly force by deploying the taser. In the alternative, the Eleventh Circuit held that, even disregarding *Garner*, qualified immunity was unavailable because the use of the taser was obviously unlawful. The questions presented are:

1. Did the Eleventh Circuit define clearly established law at too high a level of generality in assessing whether any reasonable officer would have known that deploying the taser constituted use of excessive force?

2. Did the Eleventh Circuit err in holding that under clearly established law any reasonable officer would have known that deploying the taser constituted use of excessive force?

3. Did the Eleventh Circuit err in its alternative holding that the officer was not entitled to qualified immunity because his use of force was so obviously unconstitutional that any reasonable officer would have known it was unlawful?

RULE 14(B) STATEMENT

The parties in the Eleventh Circuit Court of Appeals were appellant Officer Casey Benton, who is a police officer with the DeKalb County Police Department, appellee Mary Jo Bradley, in her capacity as administrator of Troy Robinson's estate, and R.B., T.B., J.B. and G.B., Robinson's minor children. The following is a list of all directly related proceedings:

- *Bradley v. Benton*, No. 20-11509 (11th Cir.) (opinion issued and judgment entered August 26, 2021).
- *Bradley v. Benton*, No. 1:18-CV-1518-CAP (N.D. Ga.) (opinion issued and judgment entered April 13, 2020).
- *Bradley v. Benton*, No. 1:18-CV-01518-CAP (N.D. Ga.) (opinion issued and judgment entered October 20, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Officer Casey Benton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Police officers often must make split-second decisions regarding what level of force to use in a wide variety of circumstances, including when pursuing fleeing persons. This Court has recognized that tasers provide police officers with a valuable less lethal alternative to guns. Here, Officer Benton deployed his taser to stop a fleeing person, who he had reason to believe might have a weapon, from escaping over an eight-foot wall into a residential area. The Eleventh Circuit held that Officer Benton violated clearly established law by deploying his taser in these circumstances. In reaching that conclusion, the Eleventh Circuit did not cite any case with remotely comparable facts to demonstrate that the law was so well established that no reasonable officer could think it was lawful to deploy the taser. Instead, it relied on the broad general principle that deadly force may not be used to stop a fleeing person who did not commit a violent crime.

The manner in which the Eleventh Circuit decided the qualified immunity issue directly violates this Court's repeated instructions that whether the law is well established must be decided "not as a broad general proposition, but in a particularized sense." *Reichle v. Howards*, 566 U.S. 658, 666 (2012) (citation

and internal quotation marks omitted). Moreover, on the merits, the Eleventh Circuit's decision is wrong. Especially considering the widespread use of tasers as an alternative to guns and other more lethal forms of force, the issue presented is an important and recurring one.

Accordingly, Officer Benton asks that this Court summarily reverse the Eleventh Circuit's judgment denying qualified immunity or, alternatively, grant the petition to review that judgment.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, reported at 10 F.4th 1232, is reprinted in the Appendix (Pet. App.) at 1a–21a. There have been two opinions of the Northern District of Georgia. The first was not reported in the Federal Supplement but is available at 2018 WL 8949775. Pet. App. at 78a–96a. The second has not been published in the Federal Supplement but is available at 2020 WL 10867981. Pet. App. at 22a–77a.

JURISDICTION

Officer Benton invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for writ of certiorari within ninety days of the

Eleventh Circuit's judgment, which was entered on August 26, 2021.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought a civil action for damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's Fourth Amendment rights.

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

Section 1983 provides, in relevant part: "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

STATEMENT OF THE CASE

On August 6, 2015, Troy Robinson fled on foot from a police traffic stop. Officer Benton, one of the officers at the scene, pursued Robinson as he headed toward an apartment complex. Officer Benton had reason to believe that Robinson might be armed. After

Robinson climbed onto an eight-foot wall to avoid apprehension by attempting to escape into the apartment complex on the other side, Officer Benton deployed his taser on Robinson, who fell from the wall and died.

Robinson's estate brought a § 1983 claim against Officer Benton, alleging use of excessive force in violation of the Fourth Amendment. Despite acknowledging that Officer Benton had a reasonable basis to pursue and apprehend Robinson, and despite Officer Benton's effort to use nonlethal force by deploying a taser rather using a gun, the Eleventh Circuit held that Officer Benton was not entitled to qualified immunity. It reasoned that, under clearly established law, Officer Benton improperly used deadly force by deploying a taser to prevent Robinson from escaping over an eight-foot wall.

A. Factual Background

Because this case is on review from summary judgment, the facts are stated in the light most favorable to the Respondent.[1]

On August 6, 2015, police officer Casey Benton was patrolling near the Highlands of East Atlanta Apartments. Doc. 50, pp. 5–6; Doc. 51, pp. 6–7. The DeKalb County Police Department wanted to increase

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[1] Officer Benton's account differs in some respects from this version of the facts stated in the light most favorable to Respondent.

police visibility in that area due to a high volume of gang-related and violent crime, including several shootings at both the Highlands and a neighboring apartment complex. Doc. 50, pp. 5–6; Doc. 51, pp. 4–5; Doc. 52, pp. 6–7.

Around 7:00 p.m., Officer Benton observed a white SUV enter the apartment complex and then leave shortly thereafter. Doc. 50, p. 6. When the SUV passed Officer Benton at the exit gate, he saw that the car had a temporary tag but did not see the required expiration date on the tag. Officer Benton accordingly initiated a traffic stop. Doc. 50, pp. 6, 15.

The driver of the SUV was Wilford Sims, who provided his license upon request; Robinson was the sole passenger. Doc. 57, pp. 6–7; Doc. 50, pp. 7–8. In response to Officer Benton's question if there were any weapons in the car, Sims disclosed that he had a handgun. Doc. 57, p. 7; Doc. 50, pp. 7–8. Officer Benton asked Sims to step out of the car. Doc. 50, p. 7; Doc. 57, p. 7. After Sims did so, Officer Benton retrieved the loaded handgun. Doc. 50, p. 7; Doc. 57, p. 7. He then asked Sims to get back in the car. Doc. 57, pp. 14–15; Doc. 50, pp. 7–9.

Next, Officer Benton asked Robinson if he had any identification. Doc. 50, p. 8. Robinson responded that he did not, prompting Officer Benton to ask one of the other officers at the scene to run Robinson's name. Doc. 57, p. 7. At that point, Robinson abruptly exited the vehicle and fled the scene on foot, across a road

and toward a Family Dollar Store. Doc. 50, p. 9; Doc. 57, p. 7; Doc. 51, p. 11. Officer Benton pursued Robinson on foot. Doc. 50, p. 9.

During the chase, one of the other officers noticed that Robinson was running with one arm swinging free and one hand on the waistband of his pants, from which he inferred Robinson might be holding something there. Doc. 50, p. 9; Doc. 51, pp. 11–12. The officer radioed Officer Benton, telling him to use caution just in case Robinson had something in his waistband. Doc. 51, p. 12. Officer Benton also observed that Robinson was holding his waistband with his left hand.[2] Doc. 50, p. 9. Based on how Robinson was running combined with the fact that a gun had been found in the car, Officer Benton thought "there was a pretty good chance [Robinson] may also be armed." Doc. 50, p. 10. Officer Benton believed that Robinson could be a threat to others because he

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[2] The deposition testimony of Officer Benton and the other officer on this point was uncontradicted. Under Federal Rule of Civil Procedure 56, the obligation to view the facts in the nonmoving party's favor extends only to disputed facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A genuine dispute as to a material fact cannot be created by relying on the hope that the jury will not trust the credibility of the witness." *McGrath v. Tavares*, 757 F.3d 20, 28 n.13 (1st Cir. 2014) (internal quotation marks omitted). The officers' testimony on this point therefore may be considered as true for the purposes of the summary judgment motion on review.

was "running back into a residential area, possibly with a weapon . . . ." Doc. 50, p. 10.

Officer Benton continued to pursue Robinson behind the Family Dollar Store and through a wooded area that abuts the Highlands of East Atlanta apartment complex. Doc. 50, pp. 9–10. Robinson then reached a chain link fence, behind which was a concrete wall that Officer Benton estimated to be "maybe six feet or so . . . something like that." Doc. 50, pp. 9–10, 12–13. It is undisputed that the wall is eight feet high. Officer Benton recognized that Robinson was going to continue towards the apartment complex by climbing the fence and then over the wall. Doc. 50, p. 9.

To prevent Robinson from escaping, Officer Benton fired his taser at Robinson. Doc. 50, pp. 9, 12; Doc. 55, p. 18. Robinson was found unconscious on the other side of the wall and subsequently died from head trauma. Doc. 50, p. 14; Doc. 48-13, p. 25.

B. Procedural Background

Robinson's family filed suit against Officer Benton in federal district court. Pet. App. at 22a. The complaint asserted state law claims and a claim under 42 U.S.C. § 1983, alleging that Officer Benton violated the Fourth Amendment by using excessive force.[3] Pet.

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[3] Only Robinson's mother, in her capacity as administrator of Robinson's estate, alleged the § 1983 claim.

App. at 6a, 23a. Officer Benton moved for summary judgment, arguing that the federal law claims were barred by qualified immunity and the state law claims were barred by official immunity. Pet. App. at 6a, 23a. The district court granted the motion with respect to the state law claims but denied it with respect to the § 1983 claim, concluding that Officer Benton was not entitled to qualified immunity because, under clearly established law, the initial stop, the pursuit of Robinson, and Officer Benton's use of the taser were all unconstitutional. Pet. App. at 7a, 77a.

The Eleventh Circuit affirmed the denial of Officer Benton's motion for summary judgment as to qualified immunity. Pet. App. at 21a. Unlike the district court, the Eleventh Circuit held that both the initial stop and Officer Benton's subsequent pursuit of Robinson were lawful. Pet. App. at 21a. Nonetheless, it held that Officer Benton was not entitled to qualified immunity because he had violated a clearly established right by using deadly force when he deployed his taser to restrain Robinson.

In reaching that conclusion, the court of appeals stated that this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), "clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. The court of appeals stated that it was not simply applying "*Garner*'s high-level holding," but instead was "concerned with *Garner*'s analogous facts,"

asserting that those facts clearly established the unlawfulness of Officer Benton's actions. Pet. App. at 19a. It characterized the fact that Officer Benton used a taser, instead of a gun as in *Garner*, "a distinction without a difference" because Officer Benton "knew" that tasing Robinson while he was on an eight-foot wall would "create a substantial risk of causing death or serious bodily harm." Pet. App. at 19a (quoting *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)).

The court of appeals held in the alternative that Officer Benton was not entitled to qualified immunity because his conduct was obviously unconstitutional, even absent a prior case with similar facts. Pet. App. at 20a.

REASONS FOR GRANTING THE WRIT

Under the doctrine of qualified immunity, an officer who violates a citizen's constitutional rights is entitled to immunity from liability unless precedent has clearly established a rule "so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). This Court has repeatedly instructed courts to assess whether a right is clearly established "not as a broad general proposition, but in a particularized sense." *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (citation and internal quotation marks omitted).

The Court reiterated that admonition just last month in *City of Tahlequah v. Bond*, No. 20-1668, 2021 WL 4822664, (U.S. Oct. 18, 2021) (*per curiam*), reminding courts that they should not "define clearly established law at too high a level of generality." *Id.* at *2 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) A "high degree of specificity" is particularly important in Fourth Amendment excessive-force cases because they are necessarily fact-dependent, making it "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (*per curiam*).

The Eleventh Circuit's decision denying qualified immunity in this case directly violates those fundamental principles. Officer Benton made a split-second decision to deploy his taser to stop a fleeing person he had reason to believe might be armed and who was climbing over an eight-foot wall to escape into a residential community. In holding that Officer Benton was not entitled to qualified immunity, the Eleventh Circuit did not point to any case with remotely similar facts. Instead, it relied on this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), which it held "clearly established that an officer cannot use deadly force to stop an unarmed

man who is not suspected of committing a violent crime from fleeing on foot."[4] Pet. App. at 19a.

The Eleventh Circuit's reasoning in this case could be the paradigm for how this Court has instructed lower courts *not* to evaluate whether an officer is entitled to qualified immunity. *Garner* may create a general rule against using deadly force to stop an unarmed person who is not suspected of committing a violent crime (and who is not an immediate threat to the officer or a threat to others) from fleeing on foot. It does not, however, provide an appropriate framework for assessing whether it is clearly established that using a taser in a particular circumstance constitutes deadly force.

Likewise, even assuming that deploying the taser could be said to cross what this Court has recognized is often a fuzzy line between less lethal force and deadly force, *Garner* does not speak to whether any reasonable officer would know that deploying a taser as Officer Benton did here would constitute excessive use of force where the officer has reason to believe the

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[4] The Eleventh Circuit's characterization of *Garner*—that it prohibits the use of deadly force against an unarmed person who has not committed a violent crime—is incomplete. *Garner* holds that deadly force cannot be used against an unarmed person who "poses no immediate threat to the officer and no threat to others." 471 U.S. at 11. Needless to say, a person who has not committed a violent felony may still pose a threat to the officer or others.

fleeing person may have a weapon and is heading into a residential community.

The proper threshold inquiry is the particularized question whether existing precedent would have put all reasonable officers on notice that deploying a taser to stop a person on top of an eight-foot wall constitutes deadly force. Beyond that, the label put on the level of force used should not be controlling where, as here, the line between deadly force and less lethal force is fuzzy. Rather, the proper analysis requires consideration of the more particularized question whether all reasonable officers would have known that it would be unlawful to deploy a taser to stop a fleeing suspect who was on an eight-foot wall and who the officer had reason to believe was carrying a weapon and about to enter a residential community. In relying on *Garner*, a case in which the officer shot in the head a fleeing suspect the officer was reasonably sure was unarmed, the Eleventh Circuit directly violated this Court's repeated holdings that courts must determine what constitutes clearly established law with a high degree of specificity.

In addition to departing from this Court's instructions as to how to determine whether the law is clearly established for purposes of a qualified immunity analysis, the Eleventh Circuit erred in concluding that Officer Benton violated clearly established law. First, it was not clearly established that deploying a taser—typically a nonlethal device—on a fleeing person eight feet off the ground

constitutes use of deadly force. Although tasers can be deadly in some circumstances, the line between when the use of a taser is deadly or non-deadly force at a height like eight feet is a fuzzy one, and there was no established law putting every reasonable officer on notice that Officer Benton's use of the taser falls on the deadly force side of that line. Second, the Eleventh Circuit erred in focusing on the label put on the force used instead of considering whether it was clearly established that Officer Benton used excessive force on the specific facts of this case: deploying a taser to stop a fleeing person on an eight-foot wall who the officer had reason to believe might be armed and who was headed into a residential complex. In short, there was no clearly established law that would lead every reasonable officer to know that the Fourth Amendment prohibited use of a taser on the specific facts of this case.

The court of appeals also disregarded this Court's precedents by concluding, in the alternative, that Officer Benton is not entitled to qualified immunity because his conduct so obviously violated the Fourth Amendment that no prior decision with closely comparable facts is necessary. This Court has limited the obvious clarity doctrine to truly exceptional circumstances where an official's conduct is so egregious that it obviously and unquestionably violates the Constitution. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*); *see Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377–78 (2009).

The facts of this case do not come close to meeting that standard.

The questions presented by this petition are important and recurring. Lower courts continue to misapply this Court's precedents by determining qualified immunity based on broad general propositions of law in the absence of a prior case with similar specific facts. The factual context here is particularly important because police officers often use tasers and other typically nonlethal means to restrain or apprehend suspects precisely to avoid using excessive force. Under the rationale of the Eleventh Circuit's decision, officers attempting to use what a reasonable officer could consider to be nonlethal force would be denied qualified immunity when that force results in unintended death or serious injury. The Eleventh Circuit's decision would expose police officers to personal liability for split-second decisions made in unique factual contexts and could deter police officers from using force even where doing so was justified. This Court accordingly should grant review and reverse the Eleventh Circuit's decision.

A. The Eleventh Circuit's decision conflicts with this Court's holdings regarding how to determine what constitutes clearly established law.

Qualified immunity shields public officials from suit unless their actions violate "clearly established statutory or constitutional rights of which a

reasonable person would have known." *Hope v. Pelzer,* 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Put differently, an official's actions violate clearly established law only if "every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Although precedent with *identical* facts is not necessary to clearly establish the law, existing precedent must place the question "beyond debate" to satisfy the standard. *Id.* Thus, qualified immunity is a broad principle that "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This Court has repeatedly held that clearly established law should not be defined "at too high a level of generality." *City of Tahlequah*, No. 20-1668, 2021 WL 4822664, at *2 (quoting *Ashcroft*, 563 U.S. at 742). Reference must be made to the particular circumstances of the case, not just general propositions abstracted from precedent. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*). The determination that law is clearly established necessarily requires a "high degree of specificity," *Wesby*, 138 S. Ct. at 590, particularly in the Fourth Amendment context, where it can be "difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *City of Tahlequah*, No. 20-1668,

2021 WL 4822664, at *3 (quoting *Mullenix*, 577 U.S. at 12).

Brosseau illustrates the rule against framing clearly established law "at too high a level of generality." There, the Ninth Circuit denied qualified immunity to an officer who shot a suspect in the back as he was fleeing in a vehicle. *Brosseau*, 543 U.S. at 196–97. In doing so, the Ninth Circuit relied on *Garner* in exactly the same way that the Eleventh Circuit did in this case. Specifically, the Ninth Circuit held that the officer was not entitled to immunity for the shooting because *Garner* clearly established the rule that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003).

This Court reversed, holding that the "general test[]" set out by *Garner* is cast at too high a level of generality to clearly establish that the officer's actions were unconstitutional. *Brosseau*, 543 U.S. at 199. Instead, for qualified immunity to be denied, there must be a prior decision with similar facts establishing the law in a more "'particularized' sense." *Brosseau*, 543 U.S. at 199–200. Because the court of appeals was unable to point to any such similar prior decision, *id.* at 201, it erred in holding that the officer was not entitled to qualified immunity.

Similarly, in *Mullenix v. Luna*, 577 U.S. 7 (2015) (*per curiam*), another case involving alleged excessive force, this Court once again cautioned against defining clearly established law at too high a level of generality. There, a police officer attempted to disable a suspect's car during a high-speed chase by shooting at it, but instead struck and killed the suspect. *Id.* at 9–10. The Fifth Circuit held that officer had violated the clearly established rule that "a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others." *Id.* at 12. This Court reversed, explaining that the Fifth Circuit had "define[d] the qualified immunity inquiry at a high level of generality" and "fail[ed] to consider th[e] question in the specific context of the case." *Id.* at 16.

Like the lower courts in *Brosseau* and *Mullenix*, the Eleventh Circuit in this case defined the inquiry "at too high a level of generality." In determining whether Officer Benton is entitled to qualified immunity, the court of appeals stated that "*Garner* clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. That approach is directly contrary to this Court's holdings in *Brosseau* and *Mullenix* because it lacks the "high degree of specificity" necessary for the law to be established in a "particularized" sense.

It may be true that *Garner* clearly establishes the general proposition that "an officer cannot use deadly

force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. But that general rule does not speak at all to what constitutes the use of deadly force, a question as to which this Court has expressly recognized there is no bright-line, general rule. *Scott v. Harris*, 550 U.S. 372, 384 (2007). All force has some probability of resulting in death. Whether force constitutes deadly force necessarily depends on the specific circumstances of the case, including the magnitude of the risk of death. *Garner* provides no guidance on that point outside its specific context of an officer shooting to kill the fleeing person.

For these reasons, the Eleventh Circuit departed from this Court's instructions by determining clearly established law at too high a level of generality. The proper initial inquiry here is whether, under clearly established law, the particular force used by Officer Benton crossed what *Scott* teaches can be the fuzzy line between deadly and non-deadly force. *See Brosseau*, 543 U.S. at 198–99 ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))). More specifically, the court of appeals should have asked whether all reasonable officers would have known that deploying a taser on a person on an eight-foot wall constitutes use of deadly force.

Because *Garner* involved an officer shooting a suspect in the head, it says nothing about whether deploying a taser under different circumstances constitutes deadly force. To be sure, there may be circumstances in which use of a taser or other force is so obviously deadly that a prior case with similar facts is not necessary for the law to be clearly established that such force cannot be used where use of deadly force is unlawful. But deploying a taser on a person on an eight-foot wall is not close to being in that category. Yet, without citing a single case in which deploying a taser under similar circumstances has been held to be use of deadly force, the Eleventh Circuit treated the difference between Officer Benton's use of a taser and the officer in *Garner* shooting the suspect in the head as a "distinction without a difference." Pet. App. at 19a.

Moreover, the Eleventh Circuit did not consider the other significant factual distinctions between *Garner* and this case. Notably, unlike the officer in *Garner* who was "reasonably sure" the suspect was not armed, uncontradicted summary judgment evidence showed that Officer Benton had reason to believe Robinson might have a weapon and was headed into a residential community.

In short, the facts of *Garner* are far too different to constitute clearly established law putting every reasonable officer on notice that deploying a taser, as Officer Benton did here, would be unlawful. Because the approach taken in the court of appeals' decision

conflicts with this Court's precedent, this Court should grant review.

B. The Eleventh Circuit erred in concluding that Officer Benton violated clearly established law.

Review is also warranted because the court of appeals erroneously concluded on the merits that Officer Benton is not entitled to qualified immunity. An official sued under § 1983 is entitled to qualified immunity unless the plaintiff shows that it was clearly established that the official's particular conduct violated a constitutional right. *al-Kidd*, 563 U.S. 731 at 735. Here, Officer Benton is entitled to qualified immunity because it was not clearly established that his deployment of the taser in the specific circumstance he confronted constituted excessive force in violation of the Fourth Amendment.

1. It was not clearly established that deploying a taser on a fleeing person eight feet off the ground constitutes deadly force.

No decision of this Court would have alerted Officer Benton that tasing a person on an eight-foot wall constitutes deadly force. This Court has never held that using a taser under any particular circumstances constitutes deadly force. To the contrary, this Court has recognized that a taser is a

nonlethal alternative to a gun. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1157 (2018) (pointing to expert testimony that tasing presented less of a risk than shooting a gun); *see also Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring in the judgment) (noting that tasers are useful "for such purposes as nonlethal crowd control").

Likewise, the lower court did not point to any Eleventh Circuit or Georgia Supreme Court decision holding that using a taser in any particular circumstance constitutes deadly force, let alone a case with facts similar to those here. To the contrary, the one Eleventh Circuit case that the lower court cited involving a suspect who was tased eight feet off the ground, just as Robinson was here, acknowledged doubts about whether tasing in those circumstances constitutes deadly force, characterizing using a taser in that circumstance as "bordering on deadly force." *Harper v. Davis*, 571 F. App'x 906, 912 (11th Cir. 2014).

In *Harper,* officers responded to a domestic violence call. *Id.* at 908. When they arrived on the scene, they learned that the suspect had fired a rifle and threatened suicide before running into the nearby forest. *Id.* at 909. Tracking the suspect into the forest, the officers eventually found him hiding in a tree. *Id.* In a confusing sequence of events regarding whether the suspect had a gun, two officers deployed their tasers. *Id.* at 909–10. The second taser caused the suspect to fall from an eight-foot branch, resulting in

him being paralyzed. *Id.* at 910. The Eleventh Circuit held that the officers were entitled to qualified immunity on the ground that the circumstances warranted incapacitating the suspect. *Id.* at 912.

The Eleventh Circuit distinguished *Harper* on the ground that the suspect there had committed a serious offense and posed a threat to the officers and others, whereas "Robinson was neither armed nor suspected of committing a violent crime." Pet. App. at 20a. This attempted distinction misses the key relevance of *Harper*, which is not the officers' justification for using force but rather the Eleventh Circuit's own characterization of using a taser on a person eight feet in the air as "bordering on deadly force." *Harper*, 571 F. App'x at 912.

The Eleventh Circuit did not provide any meaningful explanation for why Officer Benton's use of a taser on a fleeing person on an eight-foot wall is so different from the use of a taser on a suspect eight feet up in a tree as in *Harper* that the former is "deadly force" as a matter of established law whereas the latter merely "borders on deadly force." And, although the Eleventh Circuit correctly observes that *Harper* is an "unpublished, nonprecedential opinion," Pet. App. at 19a, the court of appeals provides no reason why any reasonable officer would have known that what the Eleventh Circuit had declined to call deadly force was in fact deadly force under clearly established law. The Eleventh Circuit's own acknowledgement that the tasing in *Harper* fell short

of deadly force undermines any claim that *Harper* provided clear notice to Officer Benton that tasing a person on an eight-foot wall constitutes deadly force.

Moreover, of course, an officer in hot pursuit of a fleeing person cannot know with precision anything like the height of a wall. Considering that the Eleventh Circuit cited no prior case establishing that tasing a person eight feet off the ground constitutes deadly force, and *Harper*'s characterization of such force as something short of deadly force, reasonable officers in Officer Benton's shoes would not have had clear notice that deploying the taser on Robinson constituted deadly force.

To support its decision that Officer Benton's conduct violated clearly established law, the court of appeals pointed to *Garner*, as well as evidence that Officer Benton "knew" that deploying a taser "would create a substantial risk of causing death or serious bodily harm." Pet. App. at 19a (quoting *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)). But neither provides a basis for holding that Officer Benton violated clearly established law when he deployed the taser.

In *Garner*, an officer responding to a possible burglary saw a suspect run across the backyard of a house. 471 U.S. at 3. Shining a flashlight on the suspect, the officer was able to see the suspect's face and hands, making the officer "reasonably sure" that the suspect was unarmed. *Id.* Nonetheless, when the

suspect began to climb over a fence, the officer opened fire with his gun. *Id.* at 4. The bullet struck the suspect in the back of the head, killing him. *Id.* This Court held that the officer violated the Fourth Amendment by using deadly force on an apparently unarmed, non-dangerous fleeing suspect. *Id.* at 1. As this Court later observed, that shooting created a "near *certainty* of death," *Scott*, 550 U.S. at 384.

The facts of this case are not remotely comparable. Officer Benton did not shoot Robinson with a gun. He deployed a taser against a fleeing person who had climbed an eight-foot wall. Tasers are by their very nature intended to provide a nonlethal means for subduing suspects. *See, e.g.*, *Abbott v. Sangamon Cnty.*, 705 F.3d 706, 726 (7th Cir. 2013) (noting that a taser "is generally nonlethal"); Douglas B. Mckechnie, *Don't Daze, Phase, or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. Kan. L. Rev. 139, 188 (2011) ("[I]f future nonlethal weapons are as enthusiastically adopted as the Taser . . . .").

To be sure, use of a taser may sometimes result in serious injury or death. But *Garner* provides no insight as to when the use of a taser crosses the hazy border from nonlethal to deadly force. It accordingly does not clearly establish that Officer Benton's use of the taser was unlawful.

Nor does it suffice that Officer Benton may have thought that deploying a taser on a person who "is at an elevated height" could pose a risk of serious injury. Pet. App. at 5a. This Court has made clear that the subjective views of the officer are not relevant to the analysis under either the Fourth Amendment or qualified immunity. Both turn on the "objective reasonableness" of the officer's conduct. *See Torres v. Madrid*, 141 S. Ct. 989, 998 (2021) ("Only an objective test allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." (citation and internal quotation marks omitted)); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (holding that qualified immunity depends on "the objective reasonableness of an official's conduct" instead of "subjective" views of the officer).

2. It was not clearly established that Officer Benton used excessive force under the circumstances.

The Eleventh Circuit treated the label "deadly force" as though it were a bright line determinative of Officer Benton's entitlement to qualified immunity. But as explained above, this Court has recognized that there is no such bright line in many circumstances. *Scott*, 550 U.S. at 384. And the Eleventh Circuit itself recognized in *Harper* that "there is no clear signpost demarcating 'the hazy border between excessive and acceptable force.'" *Harper*, 571 F. App'x at 910 (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th

Cir. 1997)). Instead of focusing on the label put on the force Officer Benton used, the court of appeals should have evaluated whether under established law any reasonable officer would know that deploying a taser as Officer Benton did here would constitute excessive force. As to that question, all of the circumstances Officer Benton faced are relevant. Those circumstances notably include that Officer Benton had reason to believe there was a good chance Robinson was armed and headed into a residential community.

As this Court explained, the question whether a law enforcement officer has used excessive force—whether deadly or not—depends on the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The "reasonableness" must be judged from the perspective of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight," *id.* at 396, and it must take account of "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. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally

unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

Applying these principles reveals that no clearly established law put all reasonable officers on notice that deploying a taser as Officer Benton did here would constitute excessive force. While chasing Robinson, Officer Benton was facing "tense, uncertain, and rapidly evolving" circumstances. He was pursuing an individual who was fleeing from the police after he heard that his name would be run in the police system. Officer Benton knew that there was at least one gun in the car, had heard another officer on the radio tell him to use caution because Robinson may have been holding something in his waistband, and himself thought Robinson might be armed. He also knew that Robinson was running toward an apartment complex. Given these facts, a reasonable officer could conclude that Robinson was potentially armed and heading toward a residential area.

Yet, the Eleventh Circuit glossed over the fact that Officer Benton had reason to believe Robinson might have a weapon, noting that as it turned out Robinson was not armed. Pet. App. at 15a. It did not cite any case finding the use of comparable force in the context Officer Benton faced to be unlawful. *Garner*, the case on which the court relied, is not a proper comparison for two independently sufficient reasons: the officer in *Garner* used a gun to shoot the suspect in the head and was reasonably certain that the suspect was unarmed.

It therefore was not clearly established that the Fourth Amendment forbid Officer Benton from using the level of force he did under the circumstances, regardless of on which side of the fuzzy line between deadly force and less lethal force one places using a taser in these circumstances. *See Kisela*, 138 S. Ct. at 1152.

C. The Eleventh Circuit's decision conflicts with this Court's decisions regarding when a constitutional violation is obvious.

The Eleventh Circuit also departed from this Court's precedents in holding that, even absent a prior case with similar facts, Officer Benton was not entitled to qualified immunity because his use of force was so obviously unconstitutional that any reasonable officer would recognize it was unlawful. Pet. App. at 20a. Under this Court's precedents, the facts of this case do not come close to meriting application of the narrow and rare "obvious clarity" exception to the general rule that an officer is entitled to qualified immunity absent a prior case with substantially similar facts clearly establishing that the officer's conduct was unconstitutional.

To be sure, "general constitutional rule[s] already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741. Put differently, "there can be the rare 'obvious case,' where the unlawfulness of the

officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590 (2018); *see Redding*, 557 U.S. at 377–78.

In *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*), for example, this Court held that officers committed an obvious constitutional violation by confining an inmate for six days in two "shockingly unsanitary" cells. *Taylor*, 141 U.S. at 53. The first cell was covered in feces and so unsanitary that the inmate did not eat or drink for the four days he was held there. *Id.* The second cell was frigidly cold and had no disposal system for bodily waste, forcing the inmate to sleep naked in sewage. *Id.* Based on these "particularly egregious facts," this Court held that "any reasonable officer should have realized that [the inmate's] conditions of confinement offended the Constitution." *Id.* at 54.

Similarly, in *Hope*, this Court held that an obvious constitutional violation occurred when officers punished an inmate for minor disruptive conduct by putting him in leg irons, handcuffing him to a hitching post, and leaving him for seven hours in the blazing sun, during which time he was given no bathroom breaks, was given water only once or twice and was taunted about his thirst. *Hope*, 536 U.S. at 734–35. Notwithstanding the absence of a prior decision with substantially similar facts, this Court held that the "gratuitous infliction" of pain on the inmate constituted such an obvious violation "that our own

Eighth Amendment cases gave [the officers] fair warning that their conduct violated the Constitution." *Id.* at 741.

The extreme and shocking facts of these cases in which the Court held the "obvious clarity" exception applies reflect that the "obvious case" is in fact the rare exception and not the rule. *See Wesby*, 138 S. Ct. at 589–90 (noting that "a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause" (internal quotation marks omitted)).

In *Brosseau*, for example, this Court held that it was "far from . . . obvious" that a constitutional violation occurred when an officer shot a suspect in the back as he was fleeing in a vehicle. *Brosseau*, 543 U.S. at 199. The officer ordered the suspect out of the vehicle several times before shattering the driver's window with her gun, attempting to grab the suspect's key, hitting the suspect's head with the butt of the gun, and ultimately shooting the suspect while he attempted to drive away. *Id.* at 196–97. Noting that the officer's conduct fell within the "hazy border between excessive and acceptable force," this Court held the obvious clarity exception was inapplicable to clearly establish the officer's conduct violated the Fourth Amendment. *Id.* at 199–201 (citation and internal quotation marks omitted).

Officer Benton's conduct in deploying a taser on Robinson while he was on the eight-foot wall does not

rise to the level of shocking and egregious conduct that this Court has found to be sufficient to invoke the "obvious case" exception. *Riojas* and *Pelzer* involved calculated, sustained, intentional misconduct, akin to torture, that utterly shocks the conscience. Here, in contrast, Officer Benton made a split-second decision to use what is typically nonlethal force. Beyond that, Officer Benton had reason to believe the fleeing suspect might be armed and was headed into a residential community.

To be sure, at some height, tasing a person poses such a risk of death that it obviously constitutes deadly force. But an eight-foot wall is not so high that tasing a person on it obviously constitutes deadly force. Likewise, particularly under the circumstances here in which Officer Benton had reason to believe Robinson might be armed, use of the label "deadly force" does not make it obvious that the force used was excessive in the absence of a case with similar facts.

CONCLUSION

Officer Benton respectfully requests that this Court summarily reverse the Eleventh Circuit's judgment denying qualified immunity or, alternatively, grant the petition to review that judgment.

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November 23, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 26, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11509

D.C. Docket No. 1:18-cv-01518-CAP

MARY JO BRADLEY, R.B., *et al.*,

Plaintiffs-Appellees,

versus

CASEY BENTON,

Defendant-Appellant.

August 26, 2021, Decided;
August 26, 2021, Filed

Before JORDAN, BRASHER, and ANDERSON, Circuit Judges.

BRASHER, Circuit Judge:

This appeal is about a traffic stop for an unusual temporary tag that ended in a fatality. Troy Robinson, a passenger in the stopped vehicle, inexplicably fled the scene on foot. He ran across a busy road and through

a dollar-store parking lot before attempting to scale an eight-foot wall and escape into a nearby apartment complex. What happened next is hotly disputed. But a reasonable jury could find that the pursuing officer, Casey Benton, fired his taser at Robinson while he was on top of the wall and that the shock from the taser incapacitated Robinson, causing him to fall, break his neck, and die. Robinson's family sued, Officer Benton asserted the defense of qualified immunity, the district court rejected that defense, and Officer Benton appealed. After a thorough review and with the benefit of oral argument, we affirm in part and reverse in part. We conclude that Officer Benton cannot be held liable for conducting the traffic stop or pursuing Robinson when he fled. On these two issues, we reverse the district court. But we hold that Officer Benton's decision to tase Robinson at an elevated height violated Robinson's clearly established right to be free from excessive force. On that issue, we affirm.

I. BACKGROUND

On the day of Robinson's death, Officer Casey Benton of the DeKalb County Police Department was patrolling near The Highlands of East Atlanta apartment complex in Atlanta, Georgia. That area had recently experienced a rise in gang-related and violent crime.

Around 7:00 p.m., Officer Benton observed a white SUV with a temporary license plate leaving the apartment complex shortly after it had entered. He decided to follow. The SUV was driven by Wilford Sims and its lone passenger was Troy Robinson. Sims had bought it a few

days earlier. Officer Benton later testified that he decided to follow the car because he could not see an expiration date on the temporary tag. While Officer Benton was following Sims's car, he looked at the temporary tag and ran the tag number in the police department's computer system. He does not recall the information that was returned by the computer system about the tag, nor did he check the system to see whether the tag was expired. Sims was not suspected of committing any other traffic violations. After about two minutes, Officer Benton stopped the SUV.

Officer Benton asked for Sims's driver's license, and Sims provided it. Officer Benton then asked whether there were any weapons in the car. Sims advised Officer Benton that he was carrying a handgun. Officer Benton asked Sims to step out of the vehicle, and Sims complied. Officer Benton then retrieved a loaded handgun from the center console. Officer Benton told Sims that he could reenter the car, which he did. Officer Benton then asked Robinson if he had any identification. Robinson replied that he did not.

There were two other officers on the scene: Officer C.M. Franklin and Officer L.O. Niemann. When Officer Benton asked one of them to run Robinson's name in the police department's system, Robinson abruptly exited the vehicle and fled on foot. Robinson ran across a road and through the parking lot of a Family Dollar store that abutted the apartment complex. Officer Benton pursued him on foot while Officer Niemann attempted to follow in his patrol car. Officer Franklin remained with Sims.

At some point after Robinson reached the area behind the Family Dollar, Officer Benton fired a single shot from his taser without warning, striking Robinson. The ground behind the store slopes down toward a chain-link fence that, on the day of the chase, was surrounded by thick undergrowth. The fence stands several feet from an eight-foot-high concrete wall that lines the back of the Highlands apartment complex. By the time Robinson reached the chain-link fence, Officer Benton was still ten to fifteen feet behind him. Robinson went over the fence and tried to climb the concrete wall, fell off the wall, and suffered blunt force trauma to his head and neck that caused his death.

Officer Benton testified that he fired his taser without warning while Robinson was still on the ground. As Officer Benton tells it, the taser did not affect Robinson because only one of the two taser probes pierced Robinson's skin, with the other getting stuck in Robinson's clothing. Consequently, Officer Benton stopped his taser short of a full five-second cycle. Robinson proceeded to climb up the fence, then onto the wall, where he lost his balance, fell, and died.

Robinson's family tells a different story. In their version of events, Officer Benton fired his taser upward at Robinson while he was on top of the wall. The taser probes contacted Robinson with full effect, causing him to become temporarily incapacitated, fall, break his neck, and die. The plaintiffs point to substantial evidence that contradicts Officer Benton's account. First, several days after the incident, another officer investigating the

shooting found a green blast door from a taser cartridge inside the complex, on the opposite side of the wall from where Officer Benton was standing when he fired his taser, suggesting that the taser had been fired upwards and over the wall. Second, several eyewitnesses from the nearby apartment complex testified that they saw Robinson fall. One witness testified that she heard a "pop" while Robinson was still visible on top of the wall. Another witness testified that he heard Robinson "yell 'help' three or four times" while on top of the wall. That witness testified that she saw Robinson sitting on the wall until "something occurred" and "[h]is right arm went in the air" before he fell. A third witness said that he also heard Robinson call for help while sitting on the wall. He then saw Robinson "stiffen up" like "he went into shock" before falling over the wall into the apartment complex.

Officer Benton testified that he was aware of and understood police department policy that a taser "will cause most everyone to fall and therefore should not be used when the risk of falling would likely result in death[.]" He also agreed that under that policy it was "not appropriate" to use a taser "if someone is at an elevated height[.]" Tracy Rucker, the master instructor on taser use for DeKalb County, testified that a person who is tased will experience "neuromuscular incapacitation" and will be paralyzed from pain for around five seconds. He also testified that he instructed DeKalb County officers that tasers could be deadly when the target is in a dangerous position such as an elevated height. And he affirmed that even a fall "from a level that's not that high" can cause serious injury when the victim has been incapacitated by a taser.

Officer Benton never issued a ticket to Sims for a traffic violation. The temporary tag on Sims's vehicle did have an expiration date and was valid. Officer Benton later testified that he never felt like Robinson posed an immediate threat to him or any of the other officers. The officers found no weapons on Robinson's body, and there is no other evidence he had a weapon. A posthumous toxicology report revealed traces of marijuana in Robinson's system. The record does not explain why Robinson ran away from the traffic stop.

Robinson's mother and his nine surviving children sued under federal and state law. Their complaint included the following claims: (1) a 42 U.S.C. § 1983 claim against Officers Benton, Franklin, and Niemann for seizing Robinson; (2) a Section 1983 claim against Officer Benton for pursuing and tasing Robinson; (3) a Section 1983 municipal liability claim against DeKalb County; and (4) state law claims against Officer Benton for pain and suffering and wrongful death.

Officer Benton moved for summary judgment. He argued that the plaintiffs' federal and state law claims against him were barred by qualified immunity and official immunity, respectively. Regarding the Section 1983 claims, he argued that he was entitled to qualified immunity for the traffic stop, the pursuit of Robinson, and the tasing of Robinson. Specifically, he argued that (1) he had reasonable suspicion to conduct the initial stop; (2) he had reasonable suspicion to pursue and seize Robinson after he fled; (3) his use of force against Robinson was not excessive; and (4) even if his conduct was arguably illegal, he did not violate law that was clearly established.

The district court granted the motion in part and denied it in part. The district court concluded that official immunity shielded Officer Benton from the plaintiffs' state law claims against him. But it also concluded that he was not entitled to qualified immunity from the Section 1983 claim. Officer Benton appealed. Because the district court's denial of qualified immunity is an immediately appealable collateral order, we have appellate jurisdiction. *See Hall v. Flournoy*, 975 F.3d 1269, 1276 (11th Cir. 2020) ("[W]hen legal questions of qualified immunity are raised . . . interlocutory appellate jurisdiction exists.").

II. STANDARD OF REVIEW

We review an order denying summary judgment based on qualified immunity *de novo*. *See Helm v. Rainbow City, Ala.*, 989 F.3d 1265, 1271 (11th Cir. 2021). On a motion for summary judgment based on qualified immunity, courts "must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, [they must] credit the nonmoving party's version." *Id.* (quoting *Feliciano v. City of Miami Beach, Fla.*, 707 F.3d 1244, 1252 (11th Cir. 2013)). "Summary judgment is appropriate if 'the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *McCullough v. Antolini*, 559 F.3d 1201, 1204-05 (11th Cir. 2009) (quoting *Haves v. City of Miami, Fla.*, 52 F.3d 918, 921 (11th Cir. 1995)).

"Qualified immunity shields public officials from liability for civil damages when their conduct does not violate a constitutional right that was clearly established at the time of the challenged action." *Bailey v. Wheeler*, 843 F.3d 473, 480 (11th Cir. 2016)). In other words, an officer is entitled to qualified immunity unless he (1) violated a constitutional right, and (2) that constitutional right was clearly established at the time. *See Helm*, 989 F.3d at 1272. These two elements may be analyzed in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). If the evidence at the summary judgment stage, construed in the light most favorable to the non-movant, contains "facts inconsistent with granting qualified immunity, then the case and the qualified immunity defense proceed to trial." *Stryker v. City of Homewood*, 978 F.3d 769, 773 (11th Cir. 2020).

III. DISCUSSION

This appeal is about Officer Benton's qualified immunity defense as to three separate actions: the initial traffic stop, the pursuit of Robinson, and the tasing. We address each in turn.

A. The Initial Traffic Stop

The district court denied Officer Benton's motion for summary judgment as it pertained to the initial traffic stop, concluding that a jury could find that Benton lacked reasonable suspicion. On appeal, Officer Benton argues that the district court erred because he had a particularized and objective basis for conducting the stop. We agree.

Appendix A

Under the Fourth Amendment an officer may "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" *Id.* at 123-24 (citing *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)). Still, it requires "a minimal level of objective justification for making the stop." *Id.* We consider whether a "particularized and objective basis" for the stop existed in light of the totality of the circumstances. *Brent v. Ashley*, 247 F.3d 1294, 1300 (11th Cir. 2001).

Here, Officer Benton had a particularized and objective basis for the stop. He testified that when he first observed Sims's vehicle, he could not see the expiration date on the tag. And he testified that he stopped Sims because the temporary tag on Sims's vehicle appeared to be in violation of state law requiring an expiration date to be displayed. O.C.G.A. § 40-2-8(b)(2). Driving with an improper tag is a misdemeanor. *Id.* Further, the other police officers who were questioned about the temporary tag on Sims's vehicle all believed that it looked unusual enough to warrant suspicion. These officers specifically pointed to the placement of the expiration date as justification for their belief. Officers Franklin and Niemann said that the look of the tag would have caused them to stop the car. We have examined photographs of the tag in the record and concur that the date's location on

the tag could lead a reasonable officer to believe that the tag was improper. Accordingly, we have little difficulty in concluding that Officer Benton had reasonable suspicion to make the stop.

The plaintiffs contend that the record contains evidence that could lead a jury to conclude that Officer Benton merely used the tag violation as a pretext for an otherwise unlawful stop. But Officer Benton's subjective purpose for conducting the traffic stop is immaterial. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *see also United States v. Holloman*, 113 F.3d 192, 195-96 (11th Cir. 1997) (traffic stop of a vehicle whose tag light was out did not violate the Fourth Amendment, even though the search was conducted as part of a wider anti-narcotic operation). Under the reasonable suspicion standard, we need not guess at Officer Benton's motivation for initiating the stop. We need only consider whether, given the totality of the circumstances, an objective and particularized basis for the stop existed. *Brent*, 247 F.3d at 1300. Here, one did.

B. Officer Benton's Pursuit of Robinson

The district court also held that because Officer Benton failed to establish that the initial stop was lawful, he necessarily failed to establish that his pursuit of Robinson was lawful. On appeal, Officer Benton argues that Robinson's headlong flight from the traffic stop justified pursuing him. Again, we agree with Officer Benton.

Whether Officer Benton had reasonable suspicion to pursue Robinson turns on the totality of the circumstances. *See United States v. Gordon*, 231 F.3d 750, 757 (11th Cir. 2000) ("[W]hether reasonable suspicion exists must be determined on a case-by-case basis in view of the totality of the circumstances."). Even though Robinson was merely a passenger in a vehicle that Officer Benton stopped on suspicion of driving with an invalid tag, his behavior was suspicious enough to warrant pursuit. When Officer Benton asked another officer to run Robinson's name through the computer system, Robinson fled the traffic stop by sprinting across a busy road toward the apartment complex. The Supreme Court has held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion," and though "[i]t is not necessarily indicative of wrongdoing, . . . it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124. *See also United States v. Franklin*, 323 F.3d 1298, 1301 (11th Cir. 2003) (reasonable for officers to pursue someone who ran away); *Gordon*, 231 F.3d at 755 (same). Under these circumstances, Officer Benton did not violate the Constitution by pursuing Robinson on foot.

C. Officer Benton's Tasing of Robinson

The district court denied Officer Benton qualified immunity for killing Robinson, concluding that a jury could find Benton's use of force was excessive. On appeal, Officer Benton argues that his use of force against Robinson was objectively reasonable and not excessive. Alternatively, he argues that the unlawfulness of his use of force was not clearly established at the time of the incident. We disagree.

Appendix A

1. Officer Benton Violated Robinson's Constitutional Right to be Free from Deadly Force

Officer Benton maintains that he fired his taser while Robinson was still on the ground. But the plaintiffs point to evidence in the record—eyewitness testimony contradicting Officer Benton and a taser cartridge's blast door on the far-side of the wall from where Officer Benton was standing—suggesting that Officer Benton fired his taser while Robinson was in a precarious position atop the eight-foot wall. On a motion for summary judgment, we resolve doubts about the record in favor of the non-moving party. *See Stryker*, 978 F.3d at 773. So, for the purposes of our analysis, we assume that Officer Benton fired his taser while Robinson was atop the wall, temporarily paralyzing him and causing him to fall, break his neck, and die. We are tasked with deciding whether Officer Benton's use of force in this context—shooting a taser aimed at a person on top of an eight-foot wall who was unarmed and not suspected of committing any particular crime—was excessive.

We have little trouble in concluding that this use of force was excessive. The amount of force used by an officer "must be reasonably proportionate to the need for that force." *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002). "'The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene,' and the inquiry 'is an objective one.'" *Smith v. LePage*, 834 F.3d 1285, 1294 (11th Cir. 2016) (quoting *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). A court cannot apply this standard mechanically. *Kingsley v. Hendrickson*, 576

U.S. 389, 397, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015). Instead, the inquiry "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396.

We therefore consider "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley*, 576 U.S. at 397. When an officer uses deadly force, we must also consider whether the officer (1) "'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm'"; (2) "reasonably believes that the use of deadly force was necessary to prevent escape"; and (3) "has given some warning about the possible use of deadly force, if feasible." *McCullough*, 559 F.3d at 1206 (quoting *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (2003)); *see also Cantu v. City of Dothan, Alabama*, 974 F.3d 1217, 1229 (11th Cir. 2020).

Here, a reasonable jury could find that that Officer Benton applied deadly force, that is, force that an officer "knows to create a substantial risk of causing death or serious bodily harm." *Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985). We have recognized that a taser is generally not a deadly weapon. *Fils v. City of Aventura*, 647 F.3d 1272, 1276 n.2 (11th Cir.

2011). But like many other weapons, a foot, or a fist, a taser may be used to apply deadly force. *See United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) ("[W]hether an object constitutes a 'dangerous weapon' turns not on the object's latent capability alone, but also on the manner in which the object was used," especially "when used in a manner likely to endanger life or inflict great bodily harm."). As relevant here, we join many other courts that have recognized that tasing a person who is at an elevated height may come with a substantial risk of serious bodily harm or death. *See Peroza-Benitez v. Smith*, 994 F.3d 157, 168 (3d Cir. 2021) (collecting cases); *Baker v. Union Twp.*, 587 F. App'x 229, 234 (6th Cir. 2014) ("It is widely known among law enforcement . . . that tasers should not be employed against suspects on elevated surfaces because of the risk of serious injury from a resulting fall.").

Moreover, again taking the facts in the light most favorable to the plaintiffs, Officer Benton knew that he was using deadly force when he tased Robinson on top of the wall. He had been trained that a person who is tased will experience "neuromuscular incapacitation" and will be paralyzed from pain for around five seconds; more than enough time for Robinson to lose his balance and fall from atop the wall. In his deposition, Officer Benton was asked if he understood department policy that a taser "should not be used when the risk of falling would likely result in death, for example, on a roof or next to a swimming pool." He replied that he did. He was then asked if he agreed that it was "not appropriate" to use a taser "if someone is at an elevated height[.]" He replied, "I agree." *Cf. Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2241, 210

L. Ed. 2d 609 (2021) (when deciding whether to grant summary judgment on an excessive force claim, relevant facts include departmental instructions and other well-known police guidance). Accordingly, considering the facts in the light most favorable to the plaintiffs, Officer Benton applied force that he knew created a substantial risk of serious bodily harm or death.

We also conclude that Officer Benton's decision to use this level of force was not reasonable under these circumstances. This is so for three reasons.

First, Officer Benton lacked "probable cause to believe that [Robinson] posed a threat of 'serious physical harm'" to anyone. *Cantu*, 974 F.3d at 1229 (quoting *McCullough*, 559 F.3d at 1206). Robinson was unarmed and never made any move indicating that he was about to draw a weapon. The gun in the center console of the car belonged to Sims and had already been retrieved by Officer Benton, eliminating the possibility that Robinson had taken the gun. Robinson made no threatening gestures of any kind. There is no evidence that he posed a threat to anyone in the apartment complex, which he had just left. There is no objective evidence in the record suggesting that Robinson was dangerous at all. This lack of evidence accords with Officer Benton's subjective impression of the situation; he testified that he never felt like Robinson posed an immediate threat to him or any of the other officers.

Second, Officer Benton did not have probable cause to believe Robinson had committed a crime "involving the infliction or threatened infliction of serious physical

harm." *McCullough*, 559 F.3d at 1206. In fact, Officer Benton lacked probable cause to believe that Robinson had committed any crime. *See Cantu*, 974 F.3d at 1229; *Graham*, 490 U.S. at 396. Robinson was not the driver of the vehicle that Officer Benton stopped for a suspected tag violation. The vehicle was driven by and belonged to Sims; Robinson was merely a passenger. And although Robinson's flight from the traffic stop was suspicious, that act alone would not give a reasonable officer probable cause to believe that Robinson had committed crimes involving the infliction of serious physical harm.

Third, Officer Benton fired his taser at Robinson without warning. "When considering whether it was feasible for a police officer to warn a suspect that []he plans to use deadly force, we consider both time and opportunity." *Cantu*, 974 F.3d at 1231. Officer Benton had both. He was never more than a few seconds behind Robinson and had eyes on him throughout the entire chase. He could have ordered Robinson to stop or warned him that he intended to fire his taser if Robinson failed to comply. Instead, he waited until Robinson was on top of the wall before firing his taser at him without warning, causing him to fall to his death.

Accepting the plaintiffs' version of the facts as true, Robinson posed no threat of serious physical harm to anyone. Nor was he suspected of committing a crime involving the infliction or threatened infliction of serious physical harm. He was not even the suspect of the traffic stop; the vehicle was owned and driven by Sims. Nevertheless, Officer Benton applied deadly force without

warning to prevent Robinson's escape on foot. Under these circumstances, Officer Benton's use of deadly force was objectively unreasonable.

2. The Tasing Violated Clearly Established Law

To prevail, it is not enough for the plaintiffs to show that Officer Benton violated Robinson's Fourth Amendment right to be free from deadly force. They must also show that the right in question was clearly established at the time of the incident. The ordinary way of showing that a right is clearly established is by showing that "a materially similar case has already been decided." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). A plaintiff may also show that a "broader, clearly established principle should control the novel facts [of the] situation." *Mercado*, 407 F.3d at 1159 (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). To control a novel factual situation, a broad principle "must be established with obvious clarity by the case law so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *Waldron v. Spicher*, 954 F.3d 1297, 1305 (11th Cir. 2020) (quoting *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012)). In either case, only prior decisions from the United States Supreme Court,

this Court, or the relevant state supreme court can put officers on notice regarding the constitutionality of their actions. *See Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021).

The Supreme Court has held that the existence of materially similar caselaw is "especially important in the Fourth Amendment context." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (quotation marks omitted). To defeat a qualified immunity defense without a materially similar precedent on point, a Fourth Amendment plaintiff must show that an officer's "conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official." *Cantu*, 974 F.3d at 1232 (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). She "must show that the official's conduct 'was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.'" *Id.* at 1232-33 (quoting *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926 (11th Cir. 2000)).

This case passes both tests: the right in question was clearly established by a materially similar precedent and was obviously clear in any event.

First, there is a materially similar precedent: *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). There, the Supreme Court held that a police officer used excessive force when he shot an unarmed burglary suspect to stop him from fleeing on foot. *See*

Garner, 471 U.S. at 21. The Supreme Court has cautioned us against relying on the holding of *Garner* to the extent that holding is "cast at a high level of generality." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). But we are concerned with *Garner*'s analogous facts, not *Garner*'s high-level holding. *Garner* clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot. That is precisely what happened in *Garner* and that is precisely what happened in this case. Accordingly, *Garner* put Officer Benton on notice that he could not use deadly force to stop Robinson from running away on foot.

To be sure, there is one factual distinction between this case and *Garner*. In *Garner*, the officer shot the suspect with a gun. Here, Officer Benton shot Robinson with a taser. But that is a distinction without a difference. As explained above, taking the facts in the light most favorable to Robinson, Benton used deadly force when he shot Robinson off the eight-foot wall with a taser. That is, he used force that he knew would "create a substantial risk of causing death or serious bodily harm." *Pruitt*, 771 F.2d at 1479 n.10. He used this level of force to stop an unarmed man who was not suspected of committing a violent crime from fleeing on foot. *Garner* establishes that this level of force is excessive in that circumstance.

Officer Benton argues that the law was not clearly established on this point because of our unpublished, nonprecedential opinion in *Harper v. Davis*, 571 Fed. Appx. 906 (11th Cir. 2014). We disagree. In *Harper*, police

officers responded to an emergency call about an armed man who "had been drinking all day and taken methadone" and who was "pointin' guns at everybody" and "beatin' on his wife." *Id.* at 908-909. Around 10:30 p.m., the officers donned bullet proof vests and tracked the suspect into the woods. When they found the suspect hiding in a tree with a gun, they shot him with a taser, causing him to fall and suffer serious injuries. *Id.* at 910. We recognized that the officers had used "significant force" that "border[ed] on deadly force" when they shot the suspect with a taser while he was in the tree. *Id.* at 912. But we reasoned that the officers had qualified immunity because of the seriousness of the suspect's crimes and the threat that the armed and violent suspect posed to the safety of the officers and to others. *Id.* at 913-14. Unlike the suspect in *Harper*, Robinson was neither armed nor suspected of committing a violent crime. But, despite lacking these justifications, Officer Benton used the same significant degree of force against Robinson that the officers used in *Harper*. Accordingly, our nonbinding opinion in *Harper* does not support Officer Benton's position.

Second, we would conclude that the use of force here was obviously unconstitutional even absent a case directly on point. Robinson posed no immediate threat to Officer Benton. He never tried to harm any of the officers, nor did he make any threatening movements or gestures. The officers also had no reason to think he posed a threat to anyone in the apartment complex, which he had just left. He was not suspected of committing a crime involving the infliction of serious physical harm. He was not even the suspect of the traffic stop, which was conducted on

the suspicion that Sims was driving with an illegal tag. Yet, without any warning, Officer Benton applied deadly force to prevent Robinson's escape from the traffic stop on foot. We conclude that no reasonable officer could have believed that the application of deadly force was warranted under these circumstances. *See Cantu*, 974 F.3d at 1235 (an officer violated the Fourth Amendment with obvious clarity by, without warning, shooting a non-violent suspect who had tried but failed to grab the officer's taser); *Mercado*, 407 F.3d at 1159 (an officer violated the Fourth Amendment with obvious clarity by, without warning, firing a high velocity projectile at a suspect who, though he had a knife and was threatening suicide, was non-threatening toward the officers).

IV. CONCLUSION

We see no constitutional infirmity in either Officer Benton's decision to conduct the initial traffic stop or to pursue Robinson on foot, and we reverse the district court's ruling as to those two issues. Regarding the main issue in this case—Officer Benton allegedly tasing Robinson on top of the wall, causing him to fall, break his neck, and die—we affirm the district court's denial of Officer Benton's motion for summary judgment on qualified immunity grounds, and remand so that the plaintiffs' claims against Officer Benton relating to the tasing may proceed to trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED APRIL 13, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

April 13, 2020, Decided

CIVIL ACTION NO. 1:18-CV-1518-CAP

MARY JO BRADLEY, *et al.*,

Plaintiffs,

v.

OFFICER CASEY BENTON, *et al.*,

Defendants.

ORDER

This is a civil rights action brought by the plaintiffs based on the death of Troy Robinson. The plaintiffs are Robinson's mother and his nine surviving children.[1] Robinson died after fleeing a traffic stop conducted by one of the defendants, DeKalb County, Georgia police officer Casey Benton. Officer Benton stopped a vehicle driven by Wilford Sims; Robinson was a passenger in that vehicle.

1. The minor children are represented by their respective mothers.

After Officer Benton stopped the vehicle, Robinson fled the scene, and Benton pursued. During the pursuit, Officer Benton tased Robinson. At some point after being tased, Robinson fell from the top of an eight-foot wall that he had climbed. Upon hitting the ground, his neck was broken, and he died before arriving at the hospital. The plaintiffs bring claims for civil rights violations under 42 U.S.C. § 1983 as well as state law claims for wrongful death and pain and suffering. They also seek attorneys' fees and their litigation expenses. This matter is currently before the court on the defendants' motion for summary judgment [Doc. No. 48].

I. Background

On August 6, 2015, Officers Benton and Franklin were on patrol in the area around The Highlands of East Atlanta apartment complex[2] in Atlanta, Ga. [DSMF ¶ 6].[3]

2. This complex is also known as the East Hampton Apartments. [DSMF ¶ 6].

3. Citations that reference only paragraph numbers preceded by "DSMF" refer to the defendants' statements of material facts, [Doc. No. 48-2], or portions thereof, that are not disputed. Citations that reference only paragraph numbers preceded by "PSMF" refer to the plaintiffs' statement of material facts, [Doc. No. 69], or portions thereof, that are not disputed. Pursuant to the Local Rules of this court, each of the proponents' facts will be deemed admitted unless the other side "(i) directly refutes the [proponents'] fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the [proponents'] fact; or (iii) points out that the [proponents'] citation does not support the [proponents'] fact or that the [proponents'] fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B(1)." LR 56.1B(2), NDGa.

Around 7:00 PM that evening, Officer Benton observed a vehicle with a temporary license plate exit the apartment complex, and he decided to conduct a traffic stop of the vehicle. [*Id.* ¶¶ 9, 16]. He announced his intention to do so over the radio, and Officer Franklin, who was already in the immediate vicinity patrolling inside the apartment complex, decided to provide backup. [*Id.* ¶ 20]. The vehicle contained two individuals, the driver Wilford Sims and a passenger, Troy Robinson. [*Id.* ¶ 17]. Sims had purchased the vehicle a few days previously. [*Id.* ¶ 18]. After stopping the vehicle, Officer Benton requested that Sims provide his driver's license. [*Id.* ¶ 23]. Sims did so, then advised Officer Benton that he had a handgun in the car. [*Id.* ¶ 24]. Officer Benton asked Sims to step out of the vehicle. [*Id.* ¶ 25]. After Sims exited the vehicle, Officer Benton retrieved the handgun and gave it to Officer Franklin. [*Id.* ¶ 25]. Officer Benton told Sims that he could sit in the car, and Sims complied. [*Id.* ¶ 26]. Officer Benton proceeded to ask Robinson if he had any identification; Robinson replied that he did not. [*Id.* ¶ 27].

Officer L.O. Niemann then arrived on the scene.[4] [*Id.* ¶ 28]. Officer Benton asked either Officer Franklin

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Where a factual assertion or portion thereof is properly disputed, the court will cite to the paragraph appearing in the proponents' statement of material fact; will view the material evidence and factual inferences in the light most favorable to the plaintiffs; and will, where appropriate, also cite directly to the evidence supporting the court's resulting factual recitation.

4. Niemann was dismissed as a defendant in this action pursuant to the court's order of October 30, 2018. [Doc. No. 16]. The court found that he was entitled to qualified immunity and therefore granted the motion to dismiss the constitutional claim against him.

or Officer Niemann to run Robinson's name in the police department's system. [*Id.* ¶ 29]. At this time, Robinson fled from the vehicle. [*Id.* ¶ 30]. The vehicle was stopped in the parking lot of the Chevron gas station located at the corner of Flat Shoals Road and Fayetteville Road. [*Id.* ¶ 16]. Upon fleeing from the vehicle, Robinson crossed Fayetteville Road and ran through the parking lot of a Family Dollar store that is located adjacent to the back of The Highlands apartment complex. [*Id.* ¶ 30]. After Robinson fled, Officer Benton proceeded to chase him on foot while Officer Niemann attempted to follow the chase in his patrol car. [*Id.* ¶ 31]. Officer Franklin remained with Sims at the vehicle. [*Id.* ¶ 31]. As Officer Benton was engaged in the foot pursuit, Officer Franklin advised him via radio to exercise caution because Robinson was holding something near his waistband, possibly a weapon. [*Id.* ¶ 32].

The area behind the Family Dollar is wooded and the ground slopes downward to a chain link fence that is separated by several feet from a concrete wall that lines the back of The Highlands apartment complex. [*Id.* ¶ 33]. By the time Robinson reached the chain link fence, Officer Benton was still several feet behind him. [*Id.* ¶ 35]. Robinson climbed the chain link fence and proceeded to the top of the concrete wall. [*Id.* ¶ 38]. At some point during the chase, Officer Benton fired his taser, striking Robinson. [*Id.* ¶ 36]. He stopped firing the taser before it completed the full five-second cycle. [*Id.* ¶ 38].

Witnesses at The Highlands apartment complex testified that Robinson called for help as he was on top of

the concrete wall. [*Id.* ¶ 39]. One witness testified that he saw the wires from the taser on Robinson while he was on top of the wall. [*Id.* ¶ 39]. Two witnesses testified that Robinson appeared to lose his balance while on top of the wall, and one of these witnesses stated that Robinson seemed to be trying to hold onto the wall to prevent falling. [*Id.* ¶¶ 41, 42]. A third witness testified that Robinson appeared to go into shock and stiffened up while atop the wall. [*Id.* ¶ 43]. Robinson fell from the wall, and the resulting trauma caused his death. [*Id.* ¶ 44].

The Georgia Bureau of Investigations ("GBI") arrived at the scene to investigate. [*Id.* ¶ 48]. The GBI sent its findings to the DeKalb County Police Department, and the Police Department concluded that no violations of department policies had occurred. [*Id.* ¶ 49, 51]. These policies include ones for traffic enforcement, conducting vehicle stops, foot pursuits, and using force, including tasers. [*Id.* ¶ 52]. As of August 6, 2015, Officer Benton was properly certified under the appropriate policy to use his taser. [*Id.* ¶¶ 59-61]. DeKalb County policy states that an officer's decision to use his taser must involve either an arrest or custodial situation in which the subject is actively physically resisting. [*Id.* ¶ 62]. The policy also states that the sole justification for using a taser cannot be that the subject has engaged in flight. [*Id.* ¶ 63].

II. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure authorizes summary judgment "if the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970); *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Johnson*, 74 F.3d at 1090. Once the moving party has adequately supported its motion, the nonmovant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In deciding a motion for summary judgment, it is not the court's function to decide issues of material fact but to decide only whether there is such an issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The applicable substantive law will identify those facts that are material. *Id.* at 247. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *Id.* Genuine disputes are those by which the evidence is such that a reasonable jury

could return a verdict for the nonmovant. *Id.* "Genuine" factual issues must have a real basis in the record. *See Matsushita*, 475 U.S. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (citations omitted).

III. Analysis

A. The federal claim against Officer Benton

In Count III of the amended complaint, the plaintiffs allege that Officer Benton seized Robinson without probable cause or any other legal justification, and ultimately deprived him of his life and liberty without providing him due process under the law. [Doc. No. 2 at 10-11, Amend. Compl. ¶¶ 46, 48]. Any "person" who, under color of law, causes a United States citizen to be deprived of a constitutional right may be liable at law or in equity. 42 U.S.C. § 1983. There are two basic elements to a § 1983 claim. A plaintiff must show (1) that he has been deprived of a right secured by an appropriate federal law and (2) that the defendant was acting under color of state law in depriving him of this right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). There is no dispute that the defendants were acting under color of state law, so the court's analysis will focus solely on whether Officer Benton violated Robinson's constitutional rights.

The defendants argue that Officer Benton is entitled to qualified immunity on this claim. Their argument is divided into four sections: (1) that Officer Benton had

arguable reasonable suspicion to conduct the traffic stop, (2) that he had arguable reasonable suspicion to seize Robinson after he fled from the vehicle, (3) that the force he used against Robinson was objectively reasonable and not excessive, and (4) that his actions on August 6, 2015, did not violate clearly established law. The plaintiffs respond that there are issues of material facts concerning the traffic stop, such that a jury could find the stop itself to be invalid; that Robinson committed no crime so the fact that he fled from the vehicle cannot support his seizure by Officer Benton; and that there are issues of material fact concerning where Robinson was located at the time that he was tased, such that a jury could find that Officer Benton's use of the taser qualifies as excessive force. In his reply brief, Officer Benton contends that the facts the plaintiffs point to concerning the traffic stop are not material; that the plaintiffs erroneously rely on the exclusionary rule in this civil action under 42 U.S.C. § 1983; that the taser is a non-deadly weapon and Officer Benton deployed it before Robinson started climbing rather than after he had reached the top of the concrete wall; and that the plaintiffs have not cited binding authority from the United States Supreme Court, the Eleventh Circuit, or the Georgia Supreme Court to support their contention that Officer Benton violated clearly established law. The court will address each of the defendants' four arguments in turn.

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson*,

667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The standard for qualified immunity is objective, "and an officer's subjective intent or beliefs are irrelevant to the inquiry." *Moreno v. Turner*, 572 F. App'x. 852, 855 (11th Cir. 2014).

To claim qualified immunity, a defendant must first show he was performing a discretionary function. *Id.* at 855. The term "discretionary authority" includes "all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." *Id.* (internal quotations omitted). The court "must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." *Maughon v. City of Covington*, 505 F. App'x 818, 822 (11th Cir. 2013) (quotations omitted). There is no dispute amongst the parties that Officer Benton was acting within his discretionary authority "at all relevant times" because he was performing law enforcement related functions as a DeKalb County officer. [Doc. No. 48-1 at 17, Doc. No. 2 at 3, Amend. Compl. ¶ 7]. "Enforcing traffic laws and conducting traffic stops are squarely within the realm of an on-duty police officer's legitimate job-related functions." *Merritt v. Gay*, No. CV 514-083, 2016 WL 4223687, at *6 (S.D. Ga. Aug. 9, 2016).

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified

immunity should not apply." *Edwards v. Shanley*, 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009)). A plaintiff demonstrates that qualified immunity does not apply by showing that "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Moreno*, 572 F. App'x at 855. The court must look at the specific facts of the case in determining whether a constitutional right was clearly established. *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204 (11th Cir. 2012). A plaintiff "can demonstrate that the contours of the right were clearly established in one of three different ways." *Terrell v. Smith*, 668 F.3d 1244, 1255 (11th Cir. 2012). A plaintiff may (1) show that a case with materially similar facts has already been decided, (2) demonstrate that there is a clearly established legal principle that applies to the facts of his case, or (3) point out that the conduct of the defendants in his case so clearly violates the constitution that it is unnecessary to cite prior case law. *Id.* at 1255, 1256.

1. Did Officer Benton have arguable reasonable suspicion to stop Sims' vehicle?

It is undisputed that on August 6, 2015, Officer Benton stopped a vehicle driven by Wilford Sims and containing one passenger, Troy Robinson. The argument at issue concerns whether Office Benton had legal justification to conduct the stop. "[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528

U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Id.* at 675-76 (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). "When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion to support an investigatory stop." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). The officer's determination of reasonable suspicion requires "more than an inchoate and unparticularized suspicion or hunch." *United States v. Nunez*, 455 F.3d 1223, 1226 (11th Cir. 2006) (quoting *United States v. Powell*, 222 F.3d 913, 917 (11th Cir. 2000)). Instead, it must be based upon the objective facts before the officer at the time. *Nunez* at 1226. An officer may be entitled to qualified immunity even if he mistakenly concludes there is reasonable suspicion for the investigatory stop, as long as his conclusion is reasonable. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The crux of Officer Benton's argument is that he had arguable reasonable suspicion to conduct the traffic stop because "the temporary tag on the vehicle in which Robinson was a passenger appeared to be improper and thus possibly in violation of O.C.G.A. § 40-2-8(b)(2), which requires an expiration date to be displayed and provides that driving with an improper tag is a misdemeanor." [Doc. No. 48-1 at 19]. The plaintiffs contend that this argument contradicts Officer Benton's testimony, because

"[h]e testified that he did not see any expiration date; not that he saw an improperly placed expiration date." [Doc. No. 70 at 21]. They also argue there is an issue of material fact as to whether Officer Benton actually saw an expiration date on the license plate, and that he had decided to stop the vehicle simply because he had seen it driving around The Highlands apartment complex. [*Id.* at 22]. The defendants respond that it is immaterial that (1) Officer Benton decided to follow the vehicle before he even viewed the license tag and (2) he testified in his deposition that he did not see an expiration date on the license tag, as opposed to testifying that he saw the expiration date in an improper place. [Doc. No. 71 at 2].

"In a traffic-stop setting . . . a lawful investigatory stop . . . is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). The defendants are correct that police officers may follow a vehicle to see if either probable cause or reasonable suspicion develops that could justify a traffic stop. *See United States v. Benitez*, 541 F. App'x 961, 963 (11th Cir. 2013). In *Whren v. United States*, the Supreme Court ruled that the subjective intentions or motivations of an officer conducting a traffic stop are not relevant to the analysis of reasonableness. 517 U.S. 806, 813 (1996); *accord. Benitez* at 963 (finding that an officer's subjective motives in following a car before observing the traffic violation that predicated the stop were not relevant). Accordingly, it is immaterial whether Officer Benton decided to follow Sims' vehicle before or after he initially viewed the license tag.

However, the officer must have an objectively reasonable basis to actually conduct the traffic stop. *Benitez* at 963. This is because a traffic stop constitutes a seizure under the Fourth Amendment, *Whren* at 809-10, *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), and this is true for the vehicle's passengers as well as its driver, *Brendlin v. California*, 551 U.S. 249, 257-58 (2007). Though temporary, the seizure lasts for the duration of the traffic stop—from the moment the vehicle is pulled over until the officers "inform the driver and passengers they are free to leave." *Arizona* at 333.

Such an investigatory stop is often termed a *Terry* stop, after the Supreme Court ruled in *Terry v. Ohio*, 392 U.S. 1 (1968), that a police officer can stop and frisk an individual without probable cause, as long as the officer has reasonable suspicion to believe that the individual has either committed a crime, is currently in the process of committing a crime, or is about to commit a crime. Specifically, "the officer must have 'a particularized and objective basis for suspecting the person stopped of criminal activity.'" *United States v. Campbell*, 912 F.3d 1340, 1349 (11th Cir. 2019) (quoting *Navarette v. California*, 572 U.S. 393, 396 (2014)).[5] The court's decision as to whether the officer in the case before it had reasonable suspicion to believe that criminal activity was afoot must be "determined from the totality of the circumstances . . . and from the collective knowledge of the officers involved in the stop." *United States v. Pruitt*, 174 F.3d 1215, 1219 (11th Cir. 1999) (citations omitted).

5. Even minor traffic violations fall under the realm of criminal activity. *See United States v. Chanthasouxat*, 342 F.3d 1271, 1277 (11th Cir. 2003).

It is unlawful to stop a vehicle merely because it has a temporary license tag. *Berry v. State*, 547 S.E.2d 664, 668 (Ga. Ct. App. 2001). "[S]topping a car with a drive-out tag solely to ascertain whether the driver was complying with our vehicle registration laws is also not authorized." *Bius v. State*, 563 S.E.2d 527, 530 (Ga. Ct. App. 2002). The defendants argue that "the temporary tag on the vehicle in which Robinson was a passenger appeared to be improper and possibly in violation of O.C.G.A. § 40-2-8(b)(2), which requires an expiration date to be displayed and provides that driving with an improper tag is a misdemeanor." [Doc. No. 48-1 at 19]. They then cite the following cases to support the proposition that this constituted arguable reasonable suspicion necessary to conduct the traffic stop. In *Green v. State*, the Georgia Court of Appeals ruled that the officer had reasonable suspicion to stop Green's vehicle because the temporary license tag on Green's vehicle did not have a metallic seal or strip on the bottom to prevent tampering with the expiration date as was required by law at that time. 637 S.E.2d 498, 499-500 (Ga. Ct. App. 2006). Green challenged the stop on the basis that it was pretextual. There is no indication in the court's decision that Green's license tag did actually have the seal or metallic strip. In *United States v. DeJesus*, an Alabama state trooper stopped the vehicle DeJesus was in "[b]ecause the minivan had a temporary paper license plate that was just a piece of paper that you could print out . . . with your personal computer and because he could not identify its state of origin." 435 F. App'x 895, 896 (11th Cir. 2011) (internal quotation omitted). In *United States v. Hires*, a St. Petersburg, Florida police officer stopped Hires' vehicle at 3:00 AM because the license tag was unreadable or had possibly expired. 282 F. App'x 771, 773

(11th Cir. 2008). In *United States v. Jennings*, a Florida officer testified that he believed the out-of-state temporary tag had expired and had possibly been altered. 280 F. App'x 836, 840 (11th Cir. 2008).

As the plaintiffs in the instant case point out, all of these rulings concerned motions to suppress. [Doc. No. 70 at 22]. In *Green*, the appeals court relied on evidence produced during both the trial in the case and a hearing on the motion to suppress. 637 S.E.2d at 499. In *DeJesus*, the court relied on the officer's testimony at the suppression hearing. 435 F. App'x at 899. The same is true in *Hires*, 282 F. App'x at 773, and *Jennings*, 280 F. App'x at 838.[6] In those cases, the trial court could weigh the evidence and evaluate the credibility of live witnesses, and at least in *Hires*, credibility was a swaying factor. At the summary judgment stage in a civil action, however, "[t]he court must avoid weighing conflicting evidence or making credibility determinations." *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)). Here, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* at 255.

In determining whether Officer Benton had reasonable suspicion, the court must "look at the 'totality of the

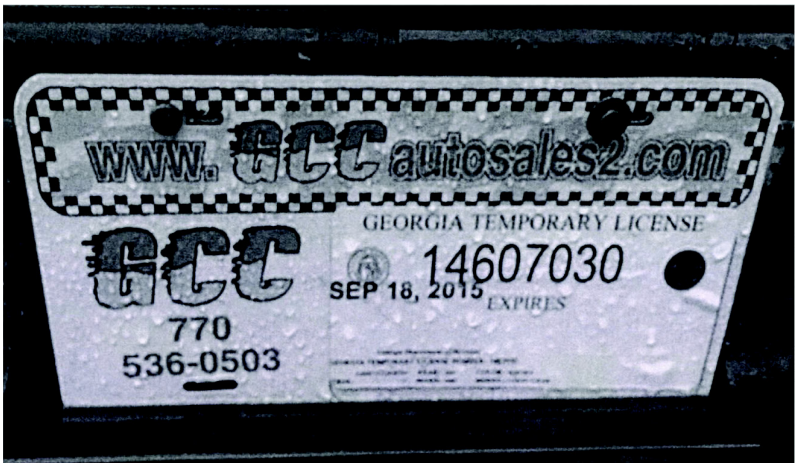
6. The court also notes that *DeJesus, Hires*, and *Jennings* concerned violations of Alabama and Florida law respectively, whereas the instant case concerns Georgia law. Further, *DeJesus, Hires*, and *Jennings* are unpublished opinions from the Eleventh Circuit. "Unpublished decisions of this court are not binding precedent." *Moore v. Barnhart*, 405 F.3d 1208, 1211 n.3 (11th Cir. 2005).

circumstances' in each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). This suspicion must be grounded in "specific articulable facts, together with rational inferences from those facts." *United States v. Bautista-Silva*, 567 F.3d 1266, 1272 (11th Cir. 2009) (citation and internal quotation omitted). In his motion for summary judgment, Officer Benton does not specifically point the court to the facts that generated his suspicion that a crime was being committed, other than providing a photograph of the license plate and stating that he was on patrol in a high-crime area.

Reviewing the record, the court has determined that the facts confronting Officer Benton on August 6, 2015, prior to the stop of the vehicle are as follows. He was assigned to the area in and around The Highlands apartment complex. There had been an increase in gang-related and violent crime in that area. At approximately 7:00 PM, Officer Benton observed a white Yukon leaving the apartment complex shortly after it had entered it. The vehicle had a temporary license tag. Officer Benton followed the vehicle out of the apartment complex. He proceeded to follow the vehicle for approximately one-quarter of a mile, or two minutes, during which time he looked at the license tag and ran the tag number in the police department's system. He does not recall the information that was returned by the computer system about the tag, and he did not check the system to see whether the tag was expired. At the time of these events, there was sufficient daylight for him to adequately view the tag. The driver of the vehicle did not commit any

traffic violations during the time that Officer Benton was following him. The driver also proceeded to stop the vehicle in an orderly fashion after Officer Benton signaled him to stop. While approaching the stopped vehicle from the rear, Officer Benton did not look at the license tag to see if it had an expiration date on it. The license tag did have an expiration date. There is no indication in the record that the vehicle or its occupants acted suspiciously while in the apartment complex or during the period that Officer Benton followed their vehicle. Officer Benton did not issue a ticket to the driver of the vehicle.

Analyzing the record and the briefing in this case, the court finds that there is an issue of material fact concerning the traffic stop. The plaintiffs dispute Officer Benson's testimony that he did not see an expiration date on the license tag. [Doc. No. 68 at 2, PSMF ¶ 9]. The license tag that was on Sims' vehicle appears as follows:



[Doc. No. 55 at 79].[7] Officer Benton testified in his deposition that he ran the number on the tag:

Q Did you see a license number on the tag?

A Yes, I believe I remember seeing a license number on the SUV. You talking about —

Q Did you —

A -- the number on the tag itself?

Q Right.

A Yes.

---

7. The photograph of the license plate provided by defendants contains red squares on the image that have been added by defense counsel. [Doc. 48-2 at 4, DSMF ¶ 11]. The plaintiffs do not dispute that the image is a picture of the actual license tag from Sims' vehicle, however, they argue "that the image appears to contain alterations and appears to be obscured by water, which was not the condition of Mr. Sims's tag on the date of the incident." [Doc. No. 68 at 6, PSMF ¶ 11]. The plaintiffs point the court to two additional pictures of the license tag in the record, Exhibits 3 and 5 to Sims' deposition [Doc. No. 57 at 25, 27], however, those pictures also show water on the tag and include full frames that show the back of the entire vehicle is wet. There is another picture of the tag in the record as Exhibit 6 to Officer Benton's 2019 deposition [Doc. No. 72-6 at 1], however it is poorer quality reproduction in black and white. Another image, attached as Exhibit 6 to Officer Niemann's June 14, 2017, deposition, also shows water droplets on the tag, but appears to be the clearest image of the tag in the record. [Doc. No. 55 at 79]. The court accordingly uses that image above.

Q Did you run that number?

A I believe I did, yes.

Q What information did you get?

A I don't recall exactly. The stuff we usually get back is registration or registered owner's information, registration information. That kind of thing. But, I don't recall exactly on that tag.

Q Do you usually get the date it was issued?

A It's -- it is on the information, but it's kind of buried in the information. You kind of have to hunt for it.

Q But that was what you were concerned about, right, is that you didn't see an expiration date?

A Yes, I didn't see an expiration date.

Q But you knew that this was a tag that had been issued by a dealer?

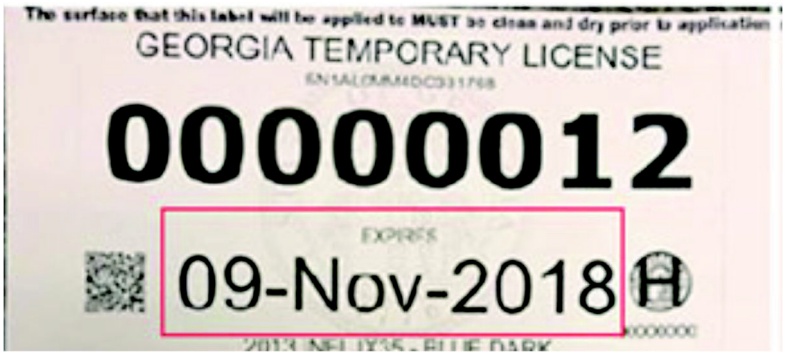
A I knew it was a temporary drive-out tag, yes.

Q But you had run that number and you knew that was a number that had been issued by a dealer?

A I remember the tag came back. I don't remember all the information that came back.

[Doc. No. 50 at 7, Benton Dep. 6/22/2017 at 25:17 - 26:22]. The expiration date of the license tag is located immediately below the tag number that was run by Officer Benton. Other than the license tag number and the telephone number for the dealership that sold the vehicle, the date includes the only other large-font numerals on the tag. The year, 2015, even overlaps partially with the tag number that Officer Benton had to read in order to input it into the police department's system.

The defendants provided a sample temporary tag issued by the Georgia Department of Revenue:



[Doc. No. 48-2 at 4, DSMF ¶ 13].[8] Presumably, the purpose of this example is to show a juxtaposition between Sims' tag and the type of temporary tag that Officer Benton

8. This is not a complete license plate, but rather the sticker insert designed by the Department of Revenue that is then affixed to a temporary license plate designed by a dealership. Ga. Comp. R. & Regs. 560-10-32-.05. The defendants are comparing this sticker to the correlating sticker portion of Sims' license plate. The red square on this sample has been added by defense counsel.

might expect to see on a vehicle.[9] The court finds this presentation to be a bit disingenuous, however. As the plaintiffs note, "Defendants do not present undisputed facts to show that Officer Benton had ever seen this alleged 'sample tag' prior to making the stop of Mr. Sims' vehicle." [Doc. No. 68 at 6, PSMF ¶ 13]. Further, the sample tag is from 2018 and the tag on Sims' car is from 2015. It is not reasonable to infer that the state did not change the design of its temporary license plates over the course of this three-year period. Especially considering that the state retains the right to change the design at will and with no prior notice. Ga. Comp. R. & Regs. 560-10-32-.07(1).

The court disagrees with the defendants that Officer Benton's testimony concerning his reason for conducting the stop is immaterial [Doc No. 71 at 2]. In their statement of material facts, they specifically point the court to his testimony that he did not see an expiration date on the license plate [Doc. No. 48-1 at 3, 5, DSMF ¶¶ 9, 16]. They also argue that he had arguable reasonable suspicion for the traffic stop because the tag "appeared to be improper and thus possibly in violation of O.C.G.A. § 40-2-8(b)(2)." [Doc. No. 48-1 at 19]. In the reply brief, they state that "the expiration date on the vehicle's temporary tag was not in the proper or usual place, such that the tag appeared to be potentially in violation of Georgia law." [Doc. No. 71 at 2]. The plaintiffs contend that the defendants are trying to "manufacture an issue of undisputed fact by changing

9. The location of the expiration date on this sample tag is similar to the location on Sims' tag, in that both are located under the tag number.

their witness's testimony." [Doc. No. 70 at 21]. At one point, Officer Benton testified that the only reason he stopped Sims' vehicle is because he did not see an expiration date on the license plate. [Doc. No. 50 at 16, Benton Dep. 6/22/17 at 61:23 - 62:18]. However, in that same deposition he later testified as follows:

> **Q If you had seen the tag having a valid expiration date as you approached it from the rear, would you have had arguable probable cause to conduct any further investigation related to the occupants of the white SUV?**

MR. ROSS: Objection. Calls for a legal conclusion.

BY MR. MOORE:

> **Q Your understanding —**
>
> A I want to clarify something, if I could. So the expiration date is required to be written at a certain size and a certain location on the tag. So the fact that it wasn't written at a certain size clearly legible is still a violation even if it is written on the tag. So, let me go back to that previous question. I believe I still would have had cause to issue a citation because it's required to be written legibly at a certain -- and the letters to be a certain size, I believe.
>
> **Q Have you examined the tag?**

A I have seen pictures of it.

Q When did you see pictures of it?

A Mr. Ross showed me a picture of it and I believe internal affairs showed me a picture of it.

Q Did you tell internal affairs that you thought the tag violated Georgia law?

A I believe in my written statement, I put in there that the tag is required to have letters written at a certain height -- in my written statement to internal affairs.

[*Id.* at 26, Benton Dep. 6/22/2017 at 102:10 - 103:14].

Fred Renaud is a detective in the Internal Affairs section of the DeKalb County police department. He was the investigator who was notified about the events in question when they occurred.[10] At his deposition, Renaud testified as follows:

A And then -- he then conducted the stop on the vehicle some distance from where he actually saw it. During that time frame, I questioned Officer Benton extensively as to whether he saw the -- the date on the tag again, whether he could -- at any time, if he could clearly see the date, and he said no. He -- he was very clear on that, that he did

10. Renaud is also the county's Rule 30(b)(6) witness.

> not recall ever seeing any date or any writing in the location that was designated for the date on the drive-out tag.

[Doc. No. 54 at 14, Renaud Dep. 52:22 - 53:4]. This testimony, and the defendants' arguments, suggest two different possible reasons that Officer Benton may have had for stopping Sims' vehicle: (1) he did not see an expiration date on the license tag and thus deemed the tag to be improper, or (2) he considered the tag to be improper because the expiration date was in a different font and location than what he, in his experience, expected to see on a temporary license tag. The second reason leads to the inference that he did see the expiration date, which conflicts with his express testimony that he did not see an expiration date.

The plaintiffs also dispute the defendants' statement that the "Georgia Department of Revenue regulates the appearance of Georgia temporary license plates." [Doc. No. 48-2 at 4, DSMF ¶ 12, Doc. No. 68 at 6, PSMF ¶ 12]. The two code sections cited by the defendants, O.C.G.A. §§ 40-2-1(3) and 40-2-8 do not mandate that the expiration date on a temporary license tag has to look a certain way. The first code section, 40-2-1(3), is merely the definition of the word "Department," stating that this stands throughout the code section for "Department of Revenue." The second code section, 40-2-8, states that 'a temporary plate as provided for by department rules or regulations which may bear the dealer's name and location and shall bear an expiration date 45 days from the date of purchase . . . Such temporary plate shall not

resemble a license plate issued by this state." O.C.G.A. § 40-2-8(b)(2)(B)(i). The statute goes on to state that "All temporary plates issued by dealers to purchasers of vehicles shall be of a standard design prescribed by regulation promulgated by the department." O.C.G.A. § 40-2- 8(b)(2)(B)(ii). A tag violation is a misdemeanor offense attributable to the driver or owner of the vehicle. O.C.G.A. § 40-2-8(b)(2)(A).

The code that regulates the appearance of temporary license tags provides:

> (1) Temporary Plates shall consist of two parts:
>
> > (a) A non-permanent license plate that is the same size as a State of Georgia general issue license plate and is displayed no longer than the time period specified in Code Sections 40-2-8(b) and 40-2-20; and
> >
> > (b) An Insert, which is:
> >
> > > (i) A sticker designed by the Department and provided by a Registered Temporary Plate Distributor, with security features;
> > >
> > > (ii) Machine printed with an expiration date fixed by the Department and affixed to the

> Temporary Plate at the time of purchase;
>
> (iii) Obtained from the Department or one of the Department's Registered Temporary Plate Distributors; and
>
> (iv) Issued by the New Vehicle Dealer or Used Vehicle Dealer at the time of purchase.

Ga. Comp. R. & Regs. 560-10-32-.05.[11] Under this regulation, the dealer who sells the vehicle affixes the expiration date to the license tag. There is no requirement in this regulation that the expiration date be in an exact font or font size, nor is there a requirement concerning the exact placement of the expiration date on the tag.

If a reasonable juror can "draw more than one inference from the facts, and that inference creates a general issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). Viewing the facts and inferences in the light most favorable to the plaintiffs, the court determines that a reasonable jury could find that Officer Benton did see an expiration date

11. This regulation is referenced in Exhibit 1 to the Declaration of Aaron Ross. [Doc. No. 48-11 at 5]. This is the regulation that was in effect at the time of the events in this case; there has been no change to the present day.

on the license tag and that the placement and appearance of the expiration date on the tag did not violate state law. "[T]he mere presence of [a person] in a 'high-crime area' is insufficient, by itself, to warrant a *Terry* stop and seizure." *United States v. Parker*, 214 F.Supp.2d 770, 779 (E.D. Mich. 2002). Further, it is the jury's role as fact finders to weigh the credibility of the witnesses. Consequently, a reasonable jury could find that Officer Benton lacked arguable reasonable suspicion to conduct the traffic stop. This precludes the court from granting Officer Benton summary judgment on the traffic stop based on qualified immunity.

2. Did Officer Benton have arguable reasonable suspicion to seize Robinson after he fled from the vehicle?

The plaintiffs maintain that "[i]f the jury were to find that Benton's stop of Sims was pretextual and not supported even by arguable reasonable suspicion, the necessary consequence of that finding would be that the encounter never rose above a first-tier encounter for Robinson . . . [a]s such, he was within his rights to depart, or even run away." [Doc. No. 70 at 23]. The defendants counter that "Plaintiffs still must show that, independent of the stop, Benton lacked arguable reasonable suspicion to pursue and seize Robinson after he ran." [Doc. No. 71 at 6].

The defendants' argument is that Robinson's flight in a high crime area provided arguable reasonable suspicion "to pursue and stop Robinson after he fled from Sims' vehicle." [Doc. No. 48-1 at 20]. The defendants rely on

Illinois v. Wardlow, 528 U.S. 119 (2000). In that case, the officers saw Wardlow standing next to a building holding a bag. Wardlow looked in the direction of the police car as it travelled down the street, then fled. The officers found him, conducted a protective pat down for weapons, and discovered that there was a gun in the bag. The Supreme Court found that Wardlow's flight, when coupled with his presence in a high-crime area, provided the officers with the requisite reasonable suspicion to conduct a *Terry* stop. *Id.* at 124. The defendants contend that the situation in *Wardlow* is analogous to the situation in this case,[12] but that there was even further cause for Officer Benton to conduct a second *Terry* stop of Robinson because "one handgun already had been located in the vehicle; and during the flight, Robinson appeared to be possibly concealing a separate weapon." [Doc. No. 48-1 at 22]. In their arguments on this issue, the defendants do not reference Officer Benton's testimony that he smelled marijuana as he approached the car as providing him with arguable reasonable suspicion to seize Robinson after he fled the vehicle. They claim that this is immaterial. [Doc. No. 48-1 at 6, n.7]. The plaintiffs, however, argue that this is a material fact. They contend that Officer Benton lied about smelling marijuana, and they point to his

12. The defendants maintain that the area around The Highlands apartment complex is a "high crime area" [Doc. No. 48-1 at 21], because "there had been a rise in gang-related and violent crime" in and around the apartment complex [Doc. No. 48-2 at 2-3, DSMF ¶¶ 6, 7]. The plaintiffs do not dispute this characterization of the neighborhood but assert that it is immaterial "because there is no evidence that anyone involved with this case was a member of a gang." [Doc. No. 68 at 2].

testimony at his deposition "that, absent the alleged smell of marijuana, he would have had no reason to apprehend Mr. Robinson for fleeing the scene, because Mr. Robinson would not have been subject to a custodial stop." [Doc. No. 69 at 4 PSMF ¶¶ 2, 3]. No marijuana was found in Sims' car. [Doc. No. 57 at 9, Sims Dep. at 33:7 - 34:4]. Robinson's toxicology report did include traces of marijuana [Doc. No. 48-13 at 33-35]. While there is conflict in the record as to whether Sims forthrightly advised Officer Benton there was a handgun in the car,[13] it is nonetheless undisputed that the handgun legally belonged to Sims. Officer Franklin, who remained at the vehicle with Sims, radioed Officer Benton to be careful as he thought Robinson might have a weapon because he kept holding his waistband. However, this opinion was relayed to Officer Benton after he had already begun his foot pursuit.

Viewing the facts and inferences in the light most favorable to the plaintiffs, the court concludes that the facts before Officer Benton at the time of Robinson's flight were as follows. Robinson was a passenger in a vehicle that Benton had stopped at 7:00 PM in the evening after leaving a residential apartment complex located in

13. Sims testified that when Officer Benton asked him if there was a gun in the car, he immediately replied "yes" and advised Officer Benton of its location. [Doc. No. 57 at 15, Sims Dep. 57:5 - 57:18]. He further testified that he even removed the handgun from the center console and placed it in the cupholder after he stopped the vehicle so that it would be in plain view for Officer Benton after he approached the car. [*Id.* at 14, Sims Dep. at 54:7 - 56:17]. Officer Benton testified that Sims initially lied to him about there being a gun in the vehicle, and that the handgun was not in plain view. [Doc. No. 50 at 7, Benton Dep. 6/22/2017 at 28:1 - 28:22].

a high crime area. Officer Benton's professed reason for stopping the vehicle was that he did not view an expiration date on the temporary license tag. Having an improper license tag is a misdemeanor offense attributable to the driver of the vehicle. Robinson told Benton that he did not have any identification on him. There was a gun in the vehicle that was not hidden from Officer Benton and was produced to Officer Benton without resistance. Officer Benton did not fear for his safety. He also had not directed Robinson to remain in the car and had not engaged with Robinson other than asking for identification. These facts alone are not sufficient to support the proposition that Officer Benton had arguable reasonable suspicion to seize Robinson a second time. "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124 (*citing Brown v. Texas*, 443 U.S. 47, 52 (1979)). *See also United States v. Brown*, 731 F.2d 1491, 1493 (11th Cir. 1984) (finding that the police's determination that the defendants came from a "source city" for distribution of narcotics was insufficient to provide the reasonable suspicion necessary to conduct a *Terry* stop).

The court now turns to the issue of Robinson's flight—relied upon by the defendants as the source of Officer Benton's arguable reasonable suspicion necessary to seize Robinson a second time. They again cite to *Wardlow*, which states that "[h]eadlong flight — wherever it occurs — is the consummate act of evasion." 528 U.S. at 124. The defendants' argument is predicated on attenuation of the connection between the two *Terry* stops that Officer

Benton conducted. They do not argue that Officer Benton had a right to control Robinson as the passenger of a car. At the end of a string cite, they include O.C.G.A.§ 16-10-24(a), which provides that "a person who knowingly and willfully obstructs or hinders any law enforcement officer . . . in the lawful discharge of his or her duties shall be guilty of a misdemeanor." [Doc. No. 48-1 at 22]. They, however, never make an actual argument that Robinson obstructed Officer Benton in the performance of his duties. Indeed, "Georgia law does not authorize law enforcement officers to request identification from citizens for no reason and charge them with obstruction if they fail to comply." *Brown v. GeorgiaCarry.org, Inc.*, 770 S.E.2d 56, 62 (Ga. Ct. App. 2015). The defendants' argument thus assumes that the causal chain between the seizure of Robinson during the traffic stop[14] and the second seizure after his flight was attenuated.

"Supreme Court holdings sculpt out, at least theoretically, three tiers of police-citizen encounters: communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause." *United States v. Berry*, 670 F.2d 583, 591 (5th Cir. 1982). *Terry* stops, such as the stop of Sims' vehicle, fall into the second tier. *United States v. Hastamorir*, 881 F.2d 1551, 1556 (11th Cir. 1989).

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14. The defendants continue to maintain that Robinson was not seized during the traffic stop [Doc. No. 48-1 at 18, n. 19], even though this court has ruled otherwise [Doc. No. 16 at 5-8].

The plaintiffs argue that if a jury found there was not arguable reasonable suspicion for the traffic stop, then that would mean that the encounter from Robinson's perspective belonged to the first tier. [Doc. No. 70 at 23]. "[I]t is well settled that 'a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter.' Indeed, '[e]ven running from police during a first-tier encounter is wholly permissible.'" *Ewumi v. State*, 727 S.E.2d 257, 261 (Ga. Ct. App. 2012) (quoting *Black v. State*, 635 S.E.2d 568, 572 (Ga. Ct. App. 2006)). The defendants respond that the plaintiffs' argument relies on an inappropriate application of the exclusionary rule. [Doc. No. 71 at 5]. The court does not agree with this characterization of the plaintiffs' argument, although it can understand why the defendants might view it this way. The defendants are correct that the exclusionary rule does not apply in civil lawsuits brought against police officers. *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016). However, the exclusionary rule concerns the suppression of evidence that was unlawfully seized. In this case, the plaintiffs' argument could be characterized as the opposite. Instead of arguing that actions (such as the seizure of evidence) following an illegal detention must also be illegal, they are arguing that actions (such as Robinson's flight) following an illegal detention must be legal. In other words, the plaintiffs' argument here is that if the traffic stop conducted by Officer Benton was illegal, Robinson was then within his legal rights to flee the scene, as he was not a criminal suspect.

Courts have found that a driver's flight from a lawful traffic stop can justify a second investigatory stop of the

fleeing individual. *See, e.g., United States v. Edmonds*, No. 12-70, 2013 WL 6002234, at *9 (W.D. Penn. Nov. 12, 2013); *United States v. Espinoza*, No. SA-05-CR-646-OG, 2007 WL 9717692, at *2 (W.D. Texas, Oct. 12, 2007). This is the case even when the passenger of the vehicle flees. *See e.g., United States v. Bonner*, 363 F.3d 213, 218 (3rd Cir. 2004) (holding that a passenger's "flight from a non-consensual, legitimate traffic stop (in which the officers are authorized to exert superintendence and control over the occupants of the car) gives rise to reasonable suspicion"); *United States v. Costner*, 646 F.2d 234, 236 (5th Cir. 1981) (finding that passenger's flight following a legal traffic stop "was a sufficient additional factor to increase their reasonable suspicion to probable cause").

In *Reynolds v. State*, Reynolds' vehicle was illegally stopped by the police who then ordered him to get out of the vehicle so that they could question him. The court deemed this to be a second-tier encounter. At the time of this encounter, Reynolds was not suspected of any criminal activity. His vehicle was stopped by officers as it drove by the perimeter they had created around a house where they were executing a valid search warrant. After the officers ordered him to exit his vehicle, one of them noticed a rifle on the floor of his truck and yelled "gun." At that point, Reynolds fled the scene, was apprehended after a brief chase, and was subsequently charged with obstruction of justice. The court ruled that:

> [r]egardless of the propriety of an officer's basis for the execution of a *Terry* traffic investigative stop, attempting to flee from such

> stop is a separate crime altogether, i.e., fleeing or attempting to elude a police officer. Such offense does not require that the investigative stop be proper. The determination of whether there is a legal basis for a *Terry* stop does not belong to the detainee, thereby giving him the right to flee if he determines he is being stopped illegally.

634 S.E.2d 842, 845 (Ga. Ct. App. 2006).

There is an important distinction, however, between *Reynolds* and the instant action. Georgia has a specific law that makes it "unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer." O.C.G.A. 40-6-395(a).[15] Thus, the flight of the defendant in *Reynolds* constituted a separate crime and did provide an independent basis for his subsequent arrest. *See People v. Shipp*, 34 N.E.3d 204, 217 (Ill. App. 2d. 2015) (discussing *Reynolds*). "Where Courts have found attenuation in a defendant's flight, it has been premised on a determination that the flight was a truly independent and voluntary act by the defendant; constituted a new, distinct crime; or posed a serious risk to public safety." *United States v. Gallinger*, 227 F. Supp. 3d 1163, 1172-73 (D. Idaho 2017) (citing *United States v. Allen*, 619 F.3d 518, 526 (6th Cir. 2010), *United States v. Boone*, 62 F.3d 323, 324 (10th Cir. 1995), and *United States v. Bailey*, 691 F.2d 1009, 1016-18 (11th Cir. 1982)).

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15. This language in the code section has not changed since *Reynolds* was decided in 2006.

Here, there may not be an independent basis for a second seizure based on Robinson's flight. "Georgia law clearly provides that citizens have no freestanding obligation to comply with a police officer's requests when the officer is not discharging a lawful duty. For example, when an officer detains an individual without reasonable suspicion, the citizen is free to ignore requests and/or to walk away, and . . . no charge of obstruction [will] lie." *WBY, Inc. v. DeKalb Cty., Ga.*, 695 F. App'x 486, 493 (11th Cir. 2017). (internal quotation marks and citation omitted) (alteration in original). *See also United States v. Marcelino*, 736 F. Supp. 2d 1343, 1351 (N.D. Ga. 2010) ("Where an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." (citing *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion)). Further, under Georgia law, a person has the right to resist an illegal arrest, and flight to avoid an illegal arrest will not be viewed as a crime. *See Thomas v. State*, 18 S.E. 305, 305 (Ga. 1892) ("Every man, however guilty, has a right to shun an illegal arrest by flight. The exercise of this right should not, and would not, subject him to be arrested as a fugitive."). *See also Scott v. State*, 182 S.E.2d 183, 184 (Ga. Ct. App. 1971) ("flight to prevent an illegal arrest is permissible").

The court has found several cases that analyze situations of flight from unlawful *Terry* stops. In *People v. Moore*, 676 N.E.2d 700 (Ill. App. 3d. 1997), the Illinois appeals court determined that fleeing an illegal *Terry* stop did not constitute a new crime of resistance or obstructing an authorized act of a police officer. "When a

police officer approaches a person to make a *Terry* stop without sufficient articulable facts to warrant the stop, the officer's actions are not 'justified at the inception' . . . In this circumstance, a person who runs away is not resisting or obstructing an authorized act of the police officer." *Id.* at 704. *Accord. People v. Shipp*, 34 N.E.3d 204 (Ill. App. 2d. 2015). The Supreme Court of Tennessee ruled that the seizure of an individual was unreasonable when he was seized based on the facts that he was in an area being investigated for gang activity, and he engaged in rapid flight after the officer told him to "hold up." *State v. Nicholson*, 188 S.W.3d. 649, 660-61 (Tenn. 2006). In *Com. v. Warren*, 58 N.E. 3d 333, 341-42 (Mass. 2016), the Supreme Judicial District of Massachusetts found that "[w]here a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined." The court went on to posit that "the finding that black males in Boston are disproportionately and repeatedly targeted for [stops] suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[16] That echoes the words of Justice Stevens in *Wardlow*:

16. The court notes that Robinson was African-American.

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient. In any event, just as we do not require "scientific certainty" for our commonsense conclusion that unprovoked flight can sometimes indicate suspicious motives . . . neither do we require scientific certainty to conclude that unprovoked flight can occur for other, innocent reasons.

528 U.S. 119, 132-35 (2000) (concurring in part and dissenting in part) (footnotes omitted). The Supreme Court held in *Wong Sun v. United States*, 371 U.S. 471, 483-84 (1963), that a defendant's flight from a federal agent's unlawful entry into his home could not give rise to probable cause, noting that "[a] contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous

conduct which the arresting officers themselves have provoked."

Based on this review, the court cannot find it appropriate to grant Officer Benton summary judgment on the second seizure of Robinson. The connection between the seizure that occurred after Robinson's flight and his initial seizure during the traffic stop is not attenuated. The determination of whether the traffic stop was unlawful having been left to a reasonable jury, the court cannot decide this issue at the summary judgment stage.

3. Did Officer Benton use excessive force when he tased Robinson?

The defendants argue that the force exerted when Officer Benton tased Robinson was both objectively reasonable and not excessive. [Doc. No. 48-1 at 23-24]. They maintain that "a taser is a 'non-deadly' weapon" and that the decision to employ a taser was reasonable from Officer Benton's perspective because "Robinson (a) fled from a traffic stop, (b) in a high crime area, (c) from a vehicle in which a loaded handgun had been located in the center console, and (d) continued to flee despite multiple officers in pursuit, while appearing to be possibly holding a weapon, and (f) towards a residential community." [*Id.* at 23, 24]. The plaintiffs respond that the force used was deadly because they argue the facts show that Robinson was already on top of the eight-foot concrete wall when Office Benton deployed his taser. [Doc. No. 70 at 24-26]. The defendants reply that "the evidence is undisputed that Benton deployed his taser at Robinson when Robinson was

on the ground rather than when Robinson was on top of the wall." [Doc. No. 71 at 6].

Under the Fourth Amendment, a seizure occurs "when the officer, by means of physical force or show of authority, terminates or restrains [a person's] freedom of movement, through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal quotations and citations omitted). "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The "proper application requires careful attention to the facts and circumstances of each particular case, 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. The inquiry into whether the force an officer utilizes is excessive is purely objective: "the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation." *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (quotations omitted). This means that the actions must be viewed through the lens of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight." *Id.*

This circuit historically correlates the level of the force involved to the severity of the injury suffered.

Consequently, excessive force results in significant injuries, or in the very least, injuries requiring more than minor medical treatment. "[T]his Circuit has established the principle that the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000). For example, this circuit has held that tightening handcuffs to the point of causing skin abrasions does not rise above de minimis force when the plaintiff did not require medical treatment. *Gold v. City of Miami*, 121 F.3d 1442, 1446-47 (11th Cir. 1997). Likewise, the court in *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997), found that the force involved in slamming a person against a wall, kicking his legs apart, and making him raise his hands above his heads was de minimis even though the person received minor medical treatment for pain in his arthritic knee. Even pushing a plaintiff against a wall after applying a choke hold and handcuffing him, although he was not resisting arrest for a building code violation, has been considered a de minimis level of force. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559-60 (11th Cir. 1993).

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," *Graham*, 490 U.S. at 396. However, "even de minimis force will violate the Fourth Amendment if the officer is not entitled to arrest or detain the suspect." *Reese v. Herbert*, 527 F.3d 1253, 1272 (11th Cir. 2008) (quoting *Zivojinovich v. Barner*, 525 F.3d 1059, 1071 (11th Cir. 2008) (per curiam)). "[I]f a stop or arrest is illegal, then there is no basis for

any threat or any use of force, and an excessive force claim would always arise but only collaterally from the illegal stop or arrest claim." *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000). Thus, if a reasonable jury found that the traffic stop was unlawful and that Officer Benton did not have arguable reasonable suspicion to seize Robinson a second time, then it could find that Officer Benton employed excessive force when he tased Robinson.

The court also finds that there is an issue of material fact concerning where Robinson was located when Officer Benton tased him. Officer Benton testified in his deposition that Robinson was on the ground near the chain-link fence at the time that he was tased. His testimony is that after being tased, Robinson climbed the chain-link fence and then proceeded to go over the concrete wall. [Doc. No. 50 at 9, Benton Dep. 6/22/17 at 35:10 - 36:10]. Officer Neimann testified that he saw Officer Benton tase Robinson while Robinson was still on the ground [Doc. No. 55 at 17-18, Niemann Dep. at 67:9 - 69:25], however, this testimony conflicts with that of Officer Benton, who testified that Officer Niemann was not present when he tased Robinson [Doc. No. 50 at , Benton Dep. 6/22/2017 at 42:10 - 42:24]. Witnesses from the apartment complex testified that Robinson called out for help while he was on top of the wall. [Doc. No. 48-2 at 9-10, DSMF ¶ 39]. One witness even testified that she saw Robinson stiffen up when he was on top of the wall, then call out for help prior to falling. [*Id.* at 10, DSMF ¶ 43]. Other witness testimony indicates that after getting on top of the wall, Robinson appeared to be holding onto it with his arms to try to prevent falling. [*Id.* at 10, DSMF ¶ 42]. Officer Rucker, the master instructor

on taser use for DeKalb County, testified a person who is tased will experience "neuromuscular incapacitation" and will be paralyzed, experiencing pain "like someone has a jackhammer from the inside of your body for five seconds." He rated the level of pain as a ten on scale of one to ten. [Doc. No. 53 at 11, Rucker Dep. at 39:12 - 40:8]. The court finds it unreasonable to infer that Robinson climbed a chain-link fence, navigated another several feet of sloping terrain, and then proceeded to climb atop a concrete wall, all after he had been tased.

The Eleventh Circuit has held that the use of a taser does not constitute deadly force. *See Lewis v. City of Union City, Ga.*, 934 F.3d 1169, 1173, n.3 (11th Cir. 2019). Further, the use of a taser during a *Terry* stop does not automatically constitute excessive force. *See, e.g., Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004). This circuit has also 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*, 525 F.3d at 1073. This is because, "where a suspect appears hostile, belligerent, 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) (quotations omitted) (alteration adopted). However, unprovoked taser use "against a non-hostile and non-violent suspect who has not disobeyed instructions violates that suspect's rights under the Fourth Amendment." *Id.* at 1289.

The use of a taser can constitute excessive force based on the environment in which it is deployed. Especially in

light of the facts confronting the officer at the time he decides to fire the taser. This is apparent in the Eleventh Circuit's rulings in *Harper v. Perkins*. The defendants cite to the circuit's ruling in the case at the summary judgment stage, and the plaintiffs cite to the circuit's ruling at the motion to dismiss stage. At the motion to dismiss stage, the Eleventh Circuit "found—based on scarce evidence in the complaint—that Harper (1) was at least four feet up in a tree with his hands raised, (2) posed no threat to [the officers'] safety or the safety of others, (3) had no chance, and did not attempt, to flee, and (4) merely put his hands in the air in compliance with the instructions of at least one officer." 571 F. App'x 906, 913 (11th Cir. 2014) (internal quotation omitted). At that stage of the proceedings, based on the facts before it, the court found that using a taser on someone four-feet high in a tree did qualify as excessive force. "After discovery we know, however, that defendants were told Harper overdrank, beat his wife, fired a rifle in his home, threatened suicide, then fled with his weapon into the woods. Harper's crimes were indeed so worrisome that Gourley, Davis, and the other officers donned bulletproof vests before tracking. We doubt a reasonable officer would find it 'readily apparent' that defendants' force was excessive under the circumstances." *Id.*

In the instant action, Officer Benton did not feel that Robinson posed an immediate threat to him. [Doc. No. 50 at 12, Benton Dep. 6/22/2017 at 46:12 - 47:9]. Robinson was fleeing from what was at most a misdemeanor charge. No weapon was found on Robinson's body and there is no testimony in the record that he pulled a weapon. If Officer Benton fired his taser when Robinson was on top of the wall, that would constitute deadly force. Other

courts have found similarly. *See Peabody v. Perry Twp.*, No. 2:10-cv-1078, 2013 U.S. Dist. LEXIS 46344 (S.D. Ohio Mar. 29, 2013) (denying qualified immunity to an officer that tased a fleeing suspect as he was on top of an eight-foot fence because "a reasonable jury could find that the force used by [the officer] was excessive in that it created a substantial risk of causing death or serious bodily harm"); *Snauer v. City of Springfield*, No. 09-CV-6277-TC, 2010 WL 4875784 (D. Or. Oct. 1, 2010), adopted by 2010 WL 4861135 (D. Or. Nov. 23, 2010) (denying qualified immunity to an officer that used a taser on a suspect who was at the top of a six to seven-foot high wooden fence because "[i]t does not take a panel of judges to alert a reasonable police officer that causing a paralyzed man to tumble head first onto the ground from a platform six to seven feet above the ground creates a substantial risk of causing death or serious bodily injury.") (internal quotation omitted).

A reasonable jury could find that Robinson was on top of the wall at the time he was tased. Such a finding would have distinct bearing on the determination of whether Officer Benton employed excessive force during the second seizure of Robinson. For the reasons stated above, the court finds that Officer Benton is not entitled to qualified immunity on the claim that he used excessive force against Robinson.

4. Did Officer Benton's actions violate clearly established law?

The defendants argue that "the unlawfulness of Benton's conduct was not clearly established as of August

6, 2015." [Doc. No. 48-1 at 26]. In order to be considered clearly established, the legal principle at issue must have a clear foundation in precedent at the time the events occurred. *District of Columbia v. Wesby*, 583 U.S. --, 138 S. Ct. 577, 589 (2018). A right is considered to be clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Evans v. Stephens*, 407 F.3d 1272, 1282 (11th Cir. 2005).

"It has been clearly established since the Supreme Court decided *Terry* that an investigative stop—a seizure for Fourth Amendment purposes—performed without reasonable suspicion violates the Fourth Amendment." *Childs v. DeKalb County, Ga.*, 286 F. App'x 687, 695 (11th Cir. 2008). *Terry* was decided in 1968. As far back as 1980, the Supreme Court in *United States v. Mendenhall* determined that the arbitrary seizure of an individual by law enforcement implicates the Fourth Amendment. 446 U.S. 544, 553-54 (1980).

Further, the conduct may be "so bad that case law is not needed to establish that the conduct cannot be lawful." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002). In such an instance, the officer's conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the official], notwithstanding the lack of fact-specific case law" on point. *Id.* at 1355 (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1199 (2002)). Under this test, "the law is clearly established, and qualified immunity can be overcome, only if the standards set forth in *Graham* and our own case law 'inevitably lead every reasonable

officer in [the defendant's] position to conclude the force was unlawful.'" *Lee*, 284 F.3d at 1199 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993)).

The plaintiffs cite to *Tennessee v. Garner*, 471 U.S. 1 (1985) for the proposition that "[i]t is clearly established, and has been for decades, that an officer cannot use deadly force to apprehend a suspect who does not pose a threat to the officer or others." [Doc. No. 70 at 24]. In that case, the Supreme Court held that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). The Eleventh Circuit has found that "[n]o particularized, preexisting case law was needed to inform [the defendant] that an officer is not entitled to qualified immunity where his conduct goes 'so far beyond the hazy border between excessive and acceptable force that [he knows that he is] violating the Constitution.'" *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008) (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926-27 (11th Cir. 2000)).

In *Oliver v. Fiorino*, the Eleventh Circuit found that an officer's repeated use of a taser on an individual who was not suspected of a crime and who struggled and pulled away from an officer as he attempted to leave was a constitutional violation because "the force employed was so utterly disproportionate to the level of force reasonably necessary that any reasonable officer would

have recognized that his actions were unlawful." 586 F.3d 898, 908 (11th Cir. 2009). Here, Robinson was not suspected of any crime, and any charge that could have been levelled against him would have been no greater than a misdemeanor. Therefore, a jury could find that the use of force employed by Officer Benton violated clearly established law.

B. The state law claims against Officer Benton

Officer Benton asserts that official immunity bars the plaintiffs' state law claims. [Doc. No. 48-1 at 26-27]. The plaintiffs did not respond to this argument. The defendants contend that this failure to respond constitutes abandonment of these claims. [Doc. No. 71 at 11]. However, "[t]he non-movant's failure to respond to a defendant's motion for summary judgment is not fatal; rather, the court must determine if the facts in the record illustrate that the movant is entitled to summary judgment." *Ogwo v. Miami Dade Cty. Sch. Bd.*, 702 F. App'x 809, 810 (11th Cir. 2017). *See also Dixie Stevedores, Inc. v. Marinic Maritime, Ltd.*, 778 F.2d 670, 673 (11th Cir. 1985) ("hold[ing] that mere failure of the non-moving party to create a factual dispute does not automatically authorize the entry of summary judgment for the moving party").

Georgia's official immunity doctrine "offers public officers and employees limited protection from suit in their personal capacity." *Cameron v. Lang*, 549 S.E.2d 341, 344 (Ga. 2001). The doctrine applies differently depending on whether the officer was engaged in a ministerial or discretionary act. *Tisdale v. Gravitt*, 51 F. Supp. 3d 1378,

1398-99 (N.D. Ga. 2014) (noting differing standards of liability between an official's ministerial and discretionary acts). Because there is no dispute that Officer Benton's acts were discretionary, the court need address official immunity only as it applies to discretionary acts.

Georgia's constitution provides officers with official immunity for discretionary acts unless "they act with actual malice or with actual intent to cause injury in the performance of their official functions." GA. CONST. art. I, § 2, ¶ IX(d); *see also* O.C.G.A. § 36-33-4 ("Members of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law."). "Actual malice is a demanding standard: it requires an officer to act with a deliberate intention to do a wrongful act." *Black v. Wigington*, 811 F.3d 1259, 1266 (11th Cir. 2016) (internal citations and quotations omitted). Intent to injure is a similarly demanding standard: it requires an officer to act with "intent to cause the harm suffered by the plaintiff." *Tisdale*, 51 F. Supp. 3d at 1399.

"Actual malice does not include implied malice, or the reckless disregard for the rights and safety of others." *Selvy v. Morrison*, 665 S.E.2d 401, 405 (Ga. 2008) (holding also that poor judgment and rude behavior does not constitute actual malice). *See also Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1333 (11th Cir. 2006) (holding that although sheriff's deputies acted unreasonably and violated plaintiff's Fourth Amendment rights in arresting plaintiff after their warrantless entry into his home, deputies

were entitled to official immunity under Georgia law on state law claims because plaintiff failed to demonstrate that the deputies possessed a deliberate intention to do wrong sufficient to satisfy the actual malice standard). Evidence of excessive force is usually insufficient for a finding of actual malice. *See, e.g., Dukes v. Deaton*, 852 F.3d 1035, 1045 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 72 (2017) (holding that the officer's use of a flash bang grenade before entering a room, although the occupants were asleep at the time, at most establishes recklessness, not malice, so officer was entitled to official immunity); *Phillips v. Hanse*, 637 S.E.2d 11, 14 (Ga. 2006) (granting official immunity to officer who allegedly rammed a fleeing vehicle during a high-speed chase on the interstate in a major city, causing a crash which resulted in the death of another driver and significant injuries to three minor passengers, because although the officer's conduct was reckless, there was no evidence this was done to physically harm the suspect or any other individual); *Tittle v. Corso*, 569 S.E.2d 873, 877 (Ga. Ct. App. 2002) (threatening and slamming compliant subject onto the hood of patrol car—without more—does not establish actual malice). Unreasonable conduct also does not support an inference of actual malice. *See Bashir*, 445 F.3d at 1333. Even reckless disregard for the safety or rights of others does not support an inference of actual malice. *See Daley v. Clark*, 638 S.E.2d 376, 386 (Ga. Ct. App. 2006) (holding that conduct displaying a reckless disregard for human life, such as actively hindering efforts to assist a high school student who suffered cardiac arrest during a fight, does not support a finding of actual malice). Viewing the facts in the light most favorable to the plaintiffs, the court

cannot find anything that suggests Officer Benton acted with actual malice. The court cannot speculate about Officer Benton's motives or "make assumptions that simply are not justified by the record." *Conley v. Dawson*, 572 S.E.2d 34, 37 (Ga. Ct. App. 2002). The court therefore finds that Officer Benton is entitled to official immunity on the plaintiffs' state law claims.

C. The federal claim against Officer Franklin

The plaintiffs have also asserted a federal claim against Officer Franklin under 42 U.S.C. § 1983. The defendants contend that Officer Franklin is entitled to qualified immunity on this claim because he merely served as backup on the traffic stop and he never engaged with Robinson. [Doc. No. 48-1 at 27-28]. The plaintiffs have not responded to this argument.

Under the doctrine of qualified immunity an officer is immune from suit when he makes a reasonable mistake of fact or law. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Cases in this district and circuit have found that backup, or assisting, officers are generally entitled to qualified immunity because their knowledge at the time the events unfolded would not have "alerted a reasonable officer in his shoes that his conduct might result in the violation of [the plaintiff's] Fourth Amendment rights." *Shepard v. Hallandale Beach Police Dept.*, 398 F. App'x 480, 484 (11th Cir. 2010) (holding that a backup officer was entitled to qualified immunity on the plaintiff's Fourth Amendment claims concerning a warrantless arrest). *See also Smith v. LePage*, No. 1:12-cv-0740-AT, 2015 WL 13260394, at

*10 (N.D. Ga. Mar. 31, 2015) (granting qualified immunity to backup officers for warrantless entry into plaintiff's house); *Smith v. Confreda*, No. 6:14-cv-1704-Orl-37TBS, 2016 WL 3344481 at *8 (M.D. Fla. June 15, 2016) (finding that officer was entitled to qualified immunity when following the direction of his supervising agent).

Assisting officers are "entitled to qualified immunity when there is no indication that they acted unreasonably in following the lead of a primary officer or that they knew or should have known that their conduct might result in a [constitutional] violation, even when the primary officer is not entitled to qualified immunity." *Shepard at 483* (citing *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001)). The facts before the court in this case demonstrate that Officer Franklin's actions were objectively reasonable. He arrived on the scene after Officer Benton had already stopped Sims' vehicle. While Officer Benton chased Robinson, Officer Franklin remained at the vehicle with Sims. He did not in any way interact with Robinson. Accordingly, the court finds that Officer Franklin is entitled to summary judgment on the plaintiffs' federal claim.

D. The federal claim against DeKalb County

The defendants argue that DeKalb County is also entitled to summary judgment because "there is no evidence whatsoever of any official or unofficial policy or practice of DeKalb County that reasonably could be said to have been the moving force behind Robinson's alleged constitutional injury." [Doc. No. 48-1 at 30]. In response, the plaintiffs point to the testimony of DeKalb County's

Rule 30(b)(6) witness, who they say "testified that DeKalb does not train its officers with any specificity whatsoever as to what types of offense are serious enough to justify that level of force." [Doc. No. 70 at 27].

Municipalities are "persons" subject to liability under § 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). While the Supreme Court has stated that municipalities do not receive qualified immunity from suit, *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993), municipal liability under Section 1983 is strictly limited. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003). In *Monell*, the Supreme Court held that municipalities are not subject to § 1983 liability on the theory of respondeat superior. 436 U.S. at 690. That is, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Thus, to impose § 1983 liability on a municipality, a plaintiff must show that a municipal employee or agent committed a constitutional violation and did so based on a municipal policy or custom. "Random acts or isolated incidents" are usually insufficient to demonstrate a policy or custom; the plaintiff must instead show a "persistent and wide-spread practice." *Depew v. City of St. Mary's, Ga.*, 787 F.2d 1496, 1499 (11th Cir. 1986). In addition, the

plaintiff must show that the "policy or custom of the city 'subjected' him, or 'caused him to be subjected' to the deprivation of constitutional rights." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 828 (1985). A "single incident of a constitutional violation is insufficient to prove a policy or custom even when the incident involves several employees of the municipality." *Craig v. Floyd Cty., Ga.*, 643 F.3d 1306, 1311 (11th Cir. 2011).

The plaintiffs contend that DeKalb County failed to adequately train its officers "as to the seriousness of an offense that could justify the use of a TASER [sic] to apprehend a suspect." [Doc. No. 70 at 27]. They reference another lawsuit in this court against Officer Benton for the use of excessive force in an incident involving a taser, *Kinlocke v. Benton, et al.*, Civil Action No. 1:16-cv-4165-MLB (N.D. Ga. Dec. 6, 2019). The defendants have sought leave to file a notice of supplemental authority in support of their motion for summary judgment containing the court's decision in that case. [Doc. No. 74].[17] The plaintiffs have filed no response in opposition. Further, as the plaintiffs have referenced this case in their arguments, the court finds the notice of supplemental authority to be appropriate. Accordingly, the defendant's motion for leave to file is GRANTED. [Doc. No. 74].

The court in *Kinlocke* granted summary judgment in favor of Officer Benton, on the grounds of qualified immunity. The events in *Kinlocke* occurred in November

17. The *Kinlocke* case was decided after briefing in this instant action was completed.

2014, approximately nine months before the events in the instant action. In *Kinlocke*, Officer Benton tased an individual who repeatedly resisted his commands during a *Terry* stop. Relying extensively on the footage from Officer Benton's body cam,[18] the court ruled that the force applied was not excessive. This case does not bolster the plaintiffs' argument. The presiding court found that the force employed was not excessive. There was no claim in *Kinlocke* for municipal liability and the other defendant was sued for medical indifference, not excessive force. Also, the fact that Officer Benton is a defendant in both *Kinlocke* and the instant action does not support a theory of widespread policy or deficient training to multiple employees.

The failure of a municipality to train its police officers may be properly thought of as a city 'policy or custom' that is actionable under § 1983 only when the failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Accordingly, a claim for failure to train is predicated on the deficiency of the training program and its application "over time to multiple employees." *Bd. of the Cty. Commis of Bryan, Cty. v. Brown*, 520 U.S. 397, 407 (1997). "Mere allegations that

18. The court notes that there is no body cam or dash cam footage in the instant action. In fact, Officer Franklin testified at his deposition that the officers had not yet been issued body cams. [Doc. No. 51 at 8, Franklin Dep. at 31:3 - 31:11]. The court finds this testimony somewhat perplexing since Officer Benton was wearing a body cam approximately nine months before the events in the instant action occurred.

an officer was improperly trained or that an injury could have been avoided with better training are insufficient to prove liability." *Miller v. Calhoun Cty.*, 408 F.3d 803, 816 (6th Cir. 2005)

To show deliberate indifference in the application of a facially valid municipal policy, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold v. Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). Deliberate indifference can also be shown by the municipality's "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees." *Brown*, 520 U.S. at 407. Either way, "[t]his high standard of proof is intentionally onerous for plaintiffs; imposing liability on a municipality without proof that a specific policy caused a particular violation would equate to subjecting the municipality to respondeat superior liability—a result never intended by section 1983." *Gold*, 151 F.3d at 1351 n. 10. "To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *City of Canton*, 489 U.S. at 391-92 (1989).

The Eleventh Circuit "repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter

of law for any failure to train or supervise." *Gold* at 1351. Although there is clearly a need to train officers with respect to the constitutional limitations regarding the use of deadly force, *City of Canton*, 489 U.S. at 390 n.10, the record supports a finding that DeKalb County does provide training with respect to the use of tasers and the situations in which the use of a taser could constitute deadly force. Accordingly, DeKalb County is entitled to summary judgment on the plaintiffs' § 1983 claim.

IV. Conclusion

The defendants' motion for leave to file a notice of supplemental authority is GRANTED. [Doc. No. 74]. The defendants' motion for summary judgment is GRANTED IN PART AND DENIED IN PART. [Doc. No. 48]. Summary judgment is granted as to the federal claims against Officer Franklin and DeKalb County, Georgia. The clerk is DIRECTED to terminate these parties as defendants in this action. Summary judgment is granted as to the state law claims against Officer Benton. Summary judgment is denied as to the federal claim against Officer Benton. The plaintiffs and Officer Benton are DIRECTED to file their proposed consolidated pretrial order within thirty days of the entry date of this order.

SO ORDERED this 13th day of April, 2020.

/s/ CHARLES A. PANNELL, JR.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED OCTOBER 30, 2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

October 30, 2018, Decided; October 30, 2018, Filed

CIVIL ACTION NO. 1:18-CV-01518-CAP

MARY JO BRADLEY, *et al.*,

Plaintiffs,

v.

OFFICER CASEY BENTON, *et al.*,

Defendants.

ORDER

This is a civil rights action brought by the plaintiffs based on the death of Troy Robinson. Robinson was killed while fleeing a traffic stop when the pursuing officer tased him, causing him to fall from an eight-foot fence and break his neck. The plaintiffs bring tort claims for wrongful death and for pain and suffering, as well as claims for civil rights violations under 42 U.S.C. § 1983. Before the court

is the defendants' motion to dismiss [Doc. No. 8].[1] Having reviewed the record, the court enters the following order.

I. Factual Allegations[2]

On August 6, 2015, Robinson was riding in a vehicle driven by Wilfred Sims. They were pulled over by Benton and Franklin (officers of the Dekalb County Police Department) for having an expired drive-out tag from the car's dealership. However, the tag was not expired. And while Benton also stated that he thought he could smell a faint odor of marijuana, none was found. The plaintiffs allege that the real reason for the traffic stop was due to an illegal policy by Dekalb County. Specifically, they allege that the officers were part of a task force created to crack down on gang activity in the area, and that the task force would conduct pretextual traffic stops of cars driven by young African-American men regardless of probable cause.

In any event, Sims complied with the officers and pulled the car over. He told the officers that he had a firearm, which they secured and placed in the patrol car of Niemann, a fellow officer who had arrived separately at

1. The four defendants in this case are Officer Casey Benton, Officer C.M. Franklin, Officer L.O. Niemann, and Dekalb County. The motion to dismiss is brought by only the latter three defendants. Benton did not join in the instant motion to dismiss, and has instead filed his own answer to the plaintiff's complaint.

2. On a motion to dismiss, the court must take the facts alleged in the amended complaint as true. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012).

the scene. The officers then asked for identification from both Sims and Robinson. When Franklin approached the passenger side window, Robinson got out of the car and began fleeing the scene. Benton and Niemann pursued—Benton on foot and Niemann in his patrol car—while Franklin remained with Sims.

Robinson scaled a fence during the pursuit, putting him on an eight-foot wall. While in this elevated position, he was hit in the back with a taser gun discharged by Benton. The shock caused Robinson to fall and break his neck, killing him. Niemann then arrived in his patrol car. He handcuffed and searched Robinson, and then called Emergency Medical Services ("EMS"). EMS arrived and took Robinson to the hospital, where he was pronounced dead.

Before these events took place, at least two other instances involving taser guns occurred in Dekalb County. In May 2010, Dekalb County police officers caused the death of Audrecas Davis by using a taser on him, although Davis had was not under arrest for a crime. And on November 8, 2014, Benton tased Kent-Stephen Kinlocke while arresting him for jaywalking. The latter incident has resulted in a lawsuit against Benton, Dekalb County, and others that is ongoing. In addition, Dekalb County policies and national standards require officers to be recertified in taser gun training every twelve months to carry a taser. When the events of this action took place, Benton had not received recertification training for sixteen months.

Based on these facts, the plaintiffs assert claims for (1) pain and suffering against Benton; (2) wrongful death against Benton; (3) violation of the Fourth and Fifteenth Amendments to the United States Constitution against all the defendants under 42 U.S.C. § 1983; and (4) attorney's fees and expenses.[3] Franklin, Niemann, and Dekalb County now move to dismiss the claims against them for failure to state a claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6).

II. Standard

Rule 12(b)(6) allows for dismissal of a case when the complaint "fail[s] to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). When evaluating a Rule 12(b)(6) motion, the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick*, 693 F.3d at 1321-22. To survive a Rule 12(b)(6) 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp.*

3. In stating their civil rights claim, the plaintiffs also allege that Robinson's state constitutional rights were violated. The defendants have moved to dismiss any such state law claims against Franklin, Niemann, and Dekalb County. In response, the plaintiffs do not address any state law related claims as to Franklin, and have clarified that they do not assert state law claims against Niemann and Dekalb County. Accordingly, the court finds that any state law civil rights violations asserted against Franklin, Niemann, and Dekalb County are due to be DISMISSED.

v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This requires more than mere "labels and conclusions, and a formulaic recitation of a cause of action's elements." *Twombly*, 550 U.S. at 555. The plaintiff must allege facts that "raise the right to relief above the speculative level." *Id.*

III. Discussion

A. Officer Franklin

The plaintiffs claim that Franklin violated Robinson's "constitutional rights by seizing [him] without probable cause or any lawful justification." Compl. at ¶46 [Doc. No. 2]. They allege that the traffic stop was an unlawful seizure of Robinson as a passenger in the vehicle, in violation of the Fourth Amendment to the United States Constitution. The defendants' sole argument for dismissing the claim against Franklin is that he never actually "seized" Robinson.

The Fourth Amendment provides the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. A person is seized by a police officer when, "by means of physical force or show of authority," the officer "terminates or restrains his freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Generally, a traffic stop is a seizure under the Fourth Amendment, *Delaware v.*

Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), and this is true for the vehicle's driver and its passengers. *Arizona v. Johnson*, 555 U.S. 323, 327, 332, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009). Though temporary, the seizure lasts for the duration of the traffic stop—from the moment the vehicle is pulled over until the officers "inform the drive and passengers [that] they are free to leave." *Id.* at 333.

But "there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin*, 551 U.S. at 254. A person is not seized during a traffic stop when he immediately flees after stopping the vehicle, or momentarily complies as "a ruse to aid his evasion of the stop." *Jenkins v. State*, 345 Ga. App. 684, 813 S.E.2d 438, 440 (Ga. Ct. App. 2018); *United States v. Dolomon*, 569 F. App'x 889, 892 (11th Cir. 2014) (finding merely an attempted seizure of driver who stopped his vehicle when cornered by police cars but immediately maneuvered the car in an evasive manner). These are examples of mere attempted seizures that do not implicate the Fourth Amendment. Accordingly, the defendants argue that Franklin did not seize Robinson because he did not submit to the officers and instead fled during their investigation. The question for the court is whether Robinson's flight turned the traffic stop into an attempted seizure.

The Supreme Court created a test for distinguishing between an actual and an attempted seizure in *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). "[T]he appropriate inquiry is whether a

reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* It later applied this standard to find that a passenger in a private vehicle was seized during a traffic stop in *Brendlin*, 551 U.S. at 254. The Court explained that "even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id.* at 257. That said, the standard in *Bostick* "necessitates a consideration of 'all the circumstances surrounding the encounter.'" *United States v. Drayton*, 536 U.S. 194, 201, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (citations omitted).

In this case, the driver complied with the officers by pulling the car over. He then alerted the officers that he had a firearm after they approached and provided it to them. The officers secured the firearm and asked to see identification. It was only then, when Franklin approached the passenger window, that Robinson fled. Based on these allegations, the court finds that "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." *Brendlin*, 551 U.S. at 257. Robinson was therefore seized under the Fourth Amendment. *Johnson*, 555 U.S. at 333 ("[Passenger] was seized from the moment [the driver's] car came to a halt on the side of the road.").

Obviously, this does not mean that a traffic stop itself violates the Fourth Amendment. A seizure must

be unreasonable to be a violation. Thus, a traffic stop is a constitutional seizure if "based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." *United States v. Spoerke*, 568 F.3d 1236, 1248 (11th Cir. 2009). The plaintiffs have alleged that the officers made the stop without probable cause and for pretextual purposes, and the defendants do not argue that the the claim against Franklin is deficient in that respect. Accordingly, when construing the allegations in the plaintiffs' favor, the court finds that the plaintiffs have sufficiently stated a claim against Franklin under § 1983. The defendants' motion to dismiss the claim against Franklin is therefore due to be DENIED.

B. Officer Niemann

The plaintiffs also claim that Niemann violated Robinson's "constitutional rights by seizing [him] without probable cause or any lawful justification." Compl. at ¶46 [Doc. No. 2]. The defendants argue that, even if the traffic stop was a seizure, Niemann did not violate Robinson's rights because he did not initiate the traffic stop. They also argue that the claim against Niemann is barred by qualified immunity.

The plaintiffs allege that Niemann arrived at the traffic stop while it was ongoing, and he then took part in it by taking custody of Sims' firearm, chasing Robinson when he fled, and ultimately handcuffing and searching Robinson after he fell. The court finds these allegations

sufficient to show that Niemann participated in the traffic stop—which the court has found was a seizure. *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1013 (7th Cir. 2000) (finding it "straightforward" that plaintiff stated a Fourth Amendment claim against officer who joined in an ongoing seizure "[b]ecause he also participated in the seizure"); *cf. Whitcomb v. City of Panama City*, No. 5:13-CV-30-RS-EMT, 2013 U.S. Dist. LEXIS 181224, 2013 WL 6859095, at *5 (N.D. Fla. Dec. 30, 2013) (finding officer not subject to Fourth Amendment seizure claim because he "did not cause, nor participate, in Plaintiff's seizure").

However, the plaintiffs do not allege that Niemann was privy to the unlawful nature of the stop. It would be enough for the plaintiffs to allege that Niemann was relying on information communicated to him from the other officers for probable cause. *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971) ("[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."); *United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (finding that conducting a *Terry* stop "in the objective reliance upon" information from others that ultimately does not support the stop "violates the Fourth Amendment"). But they do not make that allegation. Rather, after noting that Nieman arrived and received Sims' firearm, the plaintiffs specifically mention only Franklin and Benton as acting in "the absence of any probable cause or even reasonable suspicion of any offense." Compl. at ¶22 [Doc. No. 2]. The plaintiffs also allege—specifying only those two officers—

that they made the traffic stop based on the race of the occupants rather than for a lawful reason, and that this was part of their participation in a task force assigned by the county. *Id.* at ¶¶18-19. Without any such factual allegations as to Niemann, the court is left to infer that he based his actions on what he observed.

As noted above, a traffic stop is constitutional if "based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." *Spoerke*, 568 F.3d at 1248. Thus, if probable cause or reasonable suspicion exist, an officer conducting the traffic stop will be immune from suit. "In examining the existence of probable cause and reasonable suspicion, the [c]ourt looks at the totality of the circumstances confronting the officer." *United States v. Rodriguez-Alejandro*, 664 F. Supp. 2d 1320, 1334 (N.D. Ga. 2009). This is an objective inquiry that asks whether reasonable officers in the same circumstances and possessing the same knowledge could have believed that probable cause or reasonable suspicion existed. *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 734 (11th Cir. 2010). Officers who "reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991).

Here, the plaintiffs allege that Niemann arrived at the scene of the traffic stop initiated by other officers and saw them retrieve a firearm from the driver. They then gave him the firearm and returned to the vehicle

for further investigation. On these facts, the court finds it reasonable—even if mistaken—for Niemann to conclude that there was either probable cause or reasonable suspicion for the traffic stop. Robinson's flight after being asked for identification further supports this. To the extent the plaintiffs argue that handcuffing and searching Robinson is a separate seizure, the court finds that claim unactionable. An officer has probable cause to arrest a person fleeing the scene of an investigation. *McCall v. Cavender*, No. 3:13-CV-79-TCB, 2014 U.S. Dist. LEXIS 189278, 2014 WL 12498233, at *4 (N.D. Ga. Mar. 20, 2014) (finding that when an officer saw a person "attempting to flee the scene, at the very least there was probable cause to arrest him for obstruction of an officer." (quoting *Johnson v. State*, 302 Ga. App. 318, 690 S.E.2d 683, 689 (Ga. Ct. App. 2010))). That is exactly what Niemann witnessed. Handcuffing and searching Robinson was also lawful conduct incident to that arrest. *Holmes v. Kucynda*, 321 F.3d 1069, 1082 (11th Cir. 2003) (noting that a "search incident to arrest" is generally constitutional conduct).

Therefore, based on the allegations of the complaint, Niemann is entitled to qualified immunity. The defendants' motion to dismiss the constitutional claim against Niemann is due to be GRANTED.[4]

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4. In arguing against the defendants' motion to dismiss, the plaintiffs alternatively request that the court grant them leave to amend the complaint for any deficiencies. But in doing so, they provide only a boilerplate request for leave to amend. They do not provide any justification for such relief or otherwise indicate what additional allegations or improvements could be made by filing a new complaint. Thus, the plaintiffs' request for leave to amend the complaint is DENIED.

C. Dekalb County

The plaintiffs also assert a civil rights claim under 42 U.S.C. § 1983 against Dekalb County. They allege that the county violated Robinson's rights in two ways. First, "by maintaining a pattern, practice, and *de facto* policy of unlawfully and pretextually detaining black men in South DeKalb County without probable cause." Compl. at ¶50 [Doc. No. 2]. And second, by failing "to maintain current and adequate training and certification of its police officers" for the use of tasers. *Id.* at ¶52. The defendants argue that Dekalb County is entitled to dismissal of both alleged civil rights violations for failure to adequately plead municipal liability.

1. Discriminatory Traffic Stops

Under § 1983, any "person" who, under color of law, causes a United States citizen to be deprived of a constitutional right may be liable at law or in equity. 42 U.S.C. § 1983. Municipalities are "persons" subject to liability under § 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, municipal liability under Section 1983 is strictly limited. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003). "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom,[5] whether made by its

5. Case law has defined these terms in the context of § 1983 actions. A "policy" is a "decision that is officially adopted by the municipality, or created by an official of such rank that he or she

lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

Thus, "to impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) (citation omitted). "Random acts or isolated incidents" are usually insufficient to demonstrate a policy or custom; the plaintiff must instead show a "persistent and wide-spread practice." *Depew v. City of St. Mary's, Ga.*, 787 F.2d 1496, 1499 (11th Cir. 1986). In addition, the plaintiff must show that the "policy or custom of the city 'subjected' him, or 'caused him to be subjected' to the deprivation of constitutional rights." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 828, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). With this backdrop, the court will address whether the plaintiffs have adequately pled municipal liability for the allegedly unlawful and discriminatory traffic stop.

First, the plaintiffs have sufficiently alleged a constitutional violation. The court has found that the traffic stop was a seizure under the Fourth Amendment.

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could be said to be acting on behalf of the municipality." *Goebert v. Lee Cty.*, 510 F.3d 1312, 1332 (11th Cir. 2007). A "custom" is an "unwritten practice that is applied consistently enough to have the same effect as a policy with the force of law." *Id.*

According to the complaint, the officers conducted the traffic stop without probable cause or reasonable suspicion of any offense. Thus, the plaintiffs have alleged an unlawful seizure in violation of Robinson's constitutional rights.

Second, the plaintiffs claim that the officers' unconstitutional actions resulted from "a pattern, practice, and *de facto* policy of making unlawful, pretextual stops of cars occupied by groups of young African-American men, despite the absence of probable cause to support the stops." Compl. at ¶19 [Doc. No. 2]. The plaintiffs have alleged enough to continue their claim against Dekalb County under municipal liability. In most instances, a plaintiff must prove that a violation occurred more than once. *City of Oklahoma City*, 471 at 823-24 ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). However, "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). The plaintiffs have alleged that the officers "were part of a task force assigned by Dekalb County" that would make similar unlawful traffic stops as part of the task force's strategy. Compl. at ¶19 [Doc. No. 2]. The allegations support the "reasonable inference" that the unlawful stops were a routine practice for the task force. *Iqbal*, 556 U.S.

at 678. Therefore, construing the allegations in the light most favorable to the plaintiffs, the court finds that they have plausibly alleged that Dekalb County had a custom or policy that constituted a deliberate indifference to Robinson's Fourth Amendment rights.

Finally, the plaintiffs must show that the custom or policy caused the constitutional violation. They alleged that the defendant officers unlawfully seized Robinson pursuant to the county's custom or policy of conducting unlawful traffic stops. The plaintiffs assert that the officers did so to carry out the strategy of the task force to which they were assigned. Therefore, the plaintiffs have alleged that the custom or policy caused the constitutional violation.

Taking the facts alleged in the complaint as true and construing them in the light most favorable to the non-movants, that plaintiffs have sufficiently alleged that Robinson's constitutional rights were violated by the traffic stop, that Dekalb County had a policy or custom that constituted a deliberate indifference to his constitutional rights, and that this policy or custom caused that violation. Based on these allegations, the plaintiffs have properly stated a claim against Dekalb County based on the traffic stop, and the motion to dismiss this claim for failure to allege municipal liability is due to be DENIED.

2. Failure to Train

The plaintiffs also allege that Dekalb County maintained an inadequate taser training program. The plaintiffs appear to allege that Benton violated Robinson's Fourth Amendment rights by use of excessive force, *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (U.S. 1989) (recognizing that use of excessive force violates the Fourth Amendment), and that Dekalb County's failure to adequately train on the use of tasers constitutes deliberate indifference and caused the civil rights violation.

Municipal liability based on a failure to train is particularly difficult to establish. *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) ("A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train."). "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [untrained officers] come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Deliberate indifference is a stringent standard that requires "proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (quoting *Bryan Cty.*, 520 U.S., at 410). A pattern of similar "tortious conduct by inadequately trained employees may tend to show that the lack of proper training" caused a plaintiff's injury. *Bryan Cty.*,

520 U.S., at 408; *Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."). When a municipality's policymakers are on actual or constructive notice that an omission in their training program causes employees to violate constitutional rights, the municipality "may be deemed deliberately indifferent if the policymakers choose to retain that program." *Connick*, 563 U.S. at 61. A "policy of inaction" in light of such notice "is the functional equivalent of a decision by the [municipality] itself to violate the Constitution." *Id.* at 61-62.

The plaintiffs have alleged two similar previous instances involving tasers in Dekalb County. First, in May 2010, Dekalb County police officers caused the death of Audrecas Davis by using a taser on him, although Davis was not under arrest for a crime. And second, on November 8, 2014, Benton—the same officer who tased Robinson—tased Kent-Stephen Kinlocke while arresting him for jaywalking. The latter incident has resulted in a lawsuit against Benton, Dekalb County, and others. In addition, the plaintiffs allege that "DeKalb County's own policies and applicable national standards provide that an officer must be recertified for TASER use every twelve months in order to carry and use a TASER." Compl. at ¶53 [Doc. No. 2]. They allege that Dekalb County knew that Benton had not received recertification training for sixteen months when he used the taser on Robinson. The plaintiffs also allege that Dekalb County knew Benton had not updated his taser training since the November

2014 incident—which was about nine months before the events here.

Construing these allegations in the plaintiffs' favor, the court finds that they may proceed with their failure to train claim. The plaintiffs allege that Dekalb County knew of the need to train its officers on the use of tasers, that it knew of prior instances that indicated that training may need to be improved (including one that involved Benton), and that it knew that Benton was not properly recertified to use a taser for several months before the events of this action. This is enough to plausibly show that the Dekalb County was deliberately indifferent to the constitutional rights of its citizens and to subject it to municipal liability for failure to train. *Wilson ex rel. Estate of Wilson v. Miami-Dade Cty.*, No. 04-23250-CIV-MOORE, 2005 U.S. Dist. LEXIS 38875, 2005 WL 3597737, at *4 (S.D. Fla. Sept. 19, 2005) (denying motion to dismiss where the plaintiff alleged that the county was aware of other incidents of similar conduct by an individual employee that supported an inadequate training claim (citing *Leatherman v. Tarrant County et al.*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)); *Hooks v. Rich*, No. CV 605-065, 2006 U.S. Dist. LEXIS 12955, 2006 WL 565909, at *4 (S.D. Ga. Mar. 7, 2006) ("Repeated abuse by a single officer may be sufficient to constitute a pattern of abuse for which a supervisory official may be held liable under § 1983." (citing *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996)).

Thus, based on the allegations of the complaint, the plaintiffs have properly stated a claim for relief under

§ 1983 for failure to train, and the motion to dismiss this claim against Dekalb County for failure to allege municipal liability is due to be DENIED.

IV. Conclusion

Accordingly, the defendants' motion to dismiss [Doc. No. 8] is **GRANTED IN PART** and **DENIED IN PART**. It is **GRANTED** as to any state law civil rights claims asserted against Franklin, Nieman, and Dekalb County. It is also **GRANTED** as to the plaintiffs' § 1983 claim against Niemann. It is **DENIED** as to the § 1983 claims against Franklin and Dekalb County. The plaintiffs' request for leave to amend is **DENIED**.

In addition, per Local Rule 16.2, the parties must submit a joint preliminary report and discovery plan within thirty (30) days after the first appearance of the defendants is made. The court also notes that discovery in this action is currently set to close on November 29, 2018. Accordingly, the parties are **DIRECTED** to file their joint preliminary report and discovery plan per Local Rule 16.2 within twenty-one (21) days of the date of this order.

SO ORDERED this 30th day of October, 2018.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge