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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20544

JEAN HENDERSON; CHRISTOPHER DEVONTE HENDERSON,

Plaintiffs-Appellants,

v.

HARRIS COUNTY, TEXAS; ARTHUR SIMON GARDUNO,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2052

Filed: October 12, 2022

Before SMITH, DUNCAN, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Christopher Henderson fled from three officers investigating drug activity. An officer chased Henderson and commanded him to stop. Eventually, Henderson stopped and turned suddenly toward the officer. The officer feared Henderson was reaching for a weapon, so he tased him. Henderson sued Harris County and the officer. The district court dismissed the *Monell* claim against Harris County for failure to state a claim and granted summary judgment to the officer based on qualified immunity. We affirm.

I.

A.

On April 26, 2018, three police officers went to Houston's Ingrando Park to investigate drug activity. One of the officers was Arthur Garduno, a deputy constable for Harris County Constable Precinct 6. The officers approached the park separately in marked patrol cars and saw three men at a picnic table. Garduno claims he smelled marijuana and saw one of the men "breaking up marijuana" into a shoebox. Another one of the men was Christopher Henderson. Garduno claims Henderson had a blunt tucked behind his ear and that Henderson threw a plastic bag containing a leafy green substance onto the ground.

When Henderson saw the officers, he ran. Garduno radioed about a person evading arrest, activated his siren, and followed. As Henderson entered an apartment complex, Garduno jumped out of the car and continued the chase on foot. Eventually, Garduno caught up to Henderson in the complex parking lot and ordered Henderson to stop running.[1] Garduno warned, "I'm going to tase you." What happened next is disputed. Garduno says Henderson stopped, turned to face him, and reached toward his waistband with both hands. Henderson claims he stopped running, "turned his head slightly toward the deputy, and raised his hands in the air as if to surrender."

Garduno feared Henderson was reaching for a weapon, so Garduno deployed his taser. But because only one of the taser's prongs reached Henderson—one lodged

[1] The parties dispute how many times Garduno told Henderson to stop. Henderson says he heard Garduno yell "stop" only once. Garduno and several witnesses recall multiple commands.

in his face, and the other went over his head—the circuit didn't complete, and the taser didn't shock Henderson. So one second later, Garduno deployed his taser a second time. This time both prongs lodged in Henderson's back. He fell backward and hit his head.

The other officers arrived at the scene. Garduno claims Henderson continued to struggle while on the ground and resisted being placed in handcuffs. So Garduno "dry" tased him a final time.

The officers searched Henderson and found marijuana in his pocket but no weapon. Henderson was charged with possession of marijuana of less than 2 oz. in a drug-free zone, but that charge was later dismissed on the prosecution's motion.

B.

Christopher Henderson and his grandmother Jean Henderson sued Deputy Garduno and Harris County under 42 U.S.C. § 1983 for violations of Henderson's Fourth Amendment rights, as incorporated. *See Mapp v. Ohio,* 367 U.S. 643, 655 (1961).[2] The district court dismissed the claim against the County and granted summary judgment to Garduno. Henderson timely appealed.

As to the *Monnell* claim, Henderson alleged the County failed "to adopt any policies whatsoever to govern Deputy Garduno's use of force," "failed to train Deputy Garduno in the proper use of a [t]aser," and "failed to supervise Deputy Garduno." Henderson further alleged the "chief policymaker was the Constable of Precinct 6,

[2] Jean Henderson is plaintiff-appellant here. Chris and Jean were both named plaintiffs when the suit was filed. But earlier in the litigation, Chris became unable to act for himself, so Jean obtained a guardianship over Chris's person and estate. Jean is now the sole plaintiff on behalf of Chris both as next friend and as the guardian of his person and estate.

Silvia R. Trevino," or "in the alternative, the chief policymaker was another person with managerial authority."

The County moved to dismiss under Rule 12(b)(6). The district court granted the motion. It held Henderson (1) failed to allege an "official policy" to state a plausible § 1983 claim against Harris County and (2) failed to allege a pattern of constitutional violations sufficient to show deliberate indifference or establish deliberate indifference through the single-incident exception to failure-to-train liability.

Afterward, Henderson moved to alter or amend the judgment under Rule 59(e), asking the court to either allow her to amend her complaint based on additional evidence contained in her summary-judgment filings, or reconsider its dismissal order based on the court's alleged mischaracterization of the facts and Henderson's ability to plead a *Monell* cause of action. The district court declined, holding: (1) Henderson was not entitled to leave to amend because she did not seek such leave during the fourteen months Harris County's motion to dismiss was pending, nor did she allege any facts unavailable to her during those fourteen months; (2) Henderson was not entitled to reconsideration based on the court's allegedly "misleading" summary of the facts because "[e]ven assuming that the [c]ourt's brief recitation of the facts was inaccurate, which the [c]ourt disputes, such characterization would not alter the outcome of the [m]otion to [d]ismiss."

As to the claim against Officer Garduno, Henderson alleged Garduno's conduct violated the Fourth Amendment and was objectively unreasonable under clearly

established law. Garduno moved for summary judgment, asserting qualified immunity. The district court held that Henderson alleged facts sufficient to establish a Fourth Amendment violation but failed at the second step of the qualified-immunity analysis because Garduno's "conduct was not objectively unreasonable in light of clearly established law at the time the violation occurred." Accordingly, the district court granted summary judgment for Garduno, finding he was entitled to qualified immunity.

We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* both the district court's grant of Garduno's summary judgment motion based on qualified immunity, *Griggs v. Brewer,* 841 F.3d 308, 311 (5th Cir. 2016), and its grant of the County's motion to dismiss for failure to state a *Monell* claim, *Groden v. City of Dallas,* 826 F.3d 280, 283 (5th Cir. 2016). We review the district court's denial of Henderson's Rule 59(e) motion to alter or amend the judgment for abuse of discretion. *Trevino v. City of Fort Worth,* 944 F.3d 567, 570 (5th Cir. 2019).

II.

First, the *Monell* claim. Henderson argues the district court erred because (A) Harris County failed to provide *any* use-of-force policies or train its officers on taser use,[3] and (B) the district court employed an unfair procedure by dismissing her claims *sua sponte.* Both arguments fail.

[3] Henderson also asserted that Harris County "failed to supervise Deputy Garduno." But as Henderson conceded—and as the district court correctly noted—this claim relies entirely "on Harris County's [alleged] failure to formulate an adequate policy concerning [t]aser usage." Thus, we follow the district court's lead in treating Henderson's supervisory liability claim as encompassed in her other claims.

A.

To establish *Monell* liability, a plaintiff must show that an official policy promulgated by a municipal policymaker was the moving force behind the violation of a constitutional right. *Peterson v. City of Fort Worth,* 588 F.3d 838, 847 (5th Cir. 2009). And to get past the pleading stage, a complaint's "description of a policy or custom and its relationship to the underlying constitutional violation cannot be conclusory; it must contain specific facts." *Peña v. City of Rio Grande City,* 879 F.3d 613, 622 (5th Cir. 2018) (quotation omitted). A "failure-to-train action is a type of *Monell* claim." *Hutcheson v. Dallas Cnty.,* 994 F.3d 477, 482 (5th Cir. 2021). To establish *Monell* liability on a failure-to-train theory, a plaintiff must prove that: "(1) the city failed to train or supervise the officers involved; (2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and (3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights." *Ibid.* Henderson must plausibly allege each element, but she flunks all three.

First, Henderson has not plausibly alleged that the County failed to train the officers involved on the constitutional use of tasers. Henderson contends Harris County was placing officers on the street *without any training* as to when they may constitutionally use a taser. Her only support for that contention: The County—in response to public information requests by Henderson's attorney—"failed to produce any written policies or procedures governing the conduct of deputy constables in performing law enforcement." The district court rightly rejected these allegations as

"conclusory," holding that the complaint contained "no 'specific facts' as to whether Trevino or Harris County had a 'custom or practice' of not creating or implementing policies governing Precinct 6 deputies." This alone is enough to dispose of Henderson's failure-to-train claim. And Henderson's broader claim that the County failed to implement any use-of-force policies is deficient for the same reason.

Second, Henderson has not plausibly alleged a causal connection between any failure to train officers and the alleged violation here. That is because it was Deputy Garduno who allegedly violated the Constitution by deploying his taser. Indeed, Henderson herself "conceded that Garduno received [t]aser training from TCOLE," the Texas Commission on Law Enforcement. She attempts to get around that concession by arguing there is a difference between training officers in "the mechanics of using a taser weapon" and in "the constitutional limitations of the use of force with a taser weapon." But she supplies no reason to think the TCOLE program trained officers in the former and not the latter.

Third, Henderson has not plausibly alleged that any failure to train constituted deliberate indifference. "To show deliberate indifference, a plaintiff normally must allege 'a pattern of similar constitutional violations by untrained employees.'" *Hutcheson,* 994 F.3d at 482 (quoting *Connick v. Thompson,* 563 U.S. 51, 62 (2011)). If a plaintiff cannot allege a pattern, "it is still possible to establish deliberate indifference through the single-incident exception." *Id.* But that exception is "extremely narrow." *Id.* (citation omitted). Indeed, "[t]he single-incident exception 'is generally reserved for those cases in which the government actor was provided *no*

training whatsoever.'" *Id.* at 483 (emphasis added) (quoting *Peña,* 879 F.3d at 624). And it requires proving "that the highly predictable consequence of a failure to train would result in the specific injury suffered." *Id.* at 482 (quoting *Valle v. City of Houston,* 613 F.3d 536, 541 (5th Cir. 2010)). "For a violation to be 'highly predictable,' the municipality 'must have failed to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.'" *Id.* at 483 (quoting *Littell v. Houston Indep. Sch. Dist.,* 894 F.3d 616, 624–25 (5th Cir. 2018)).

Here, Henderson concedes that she does "not allege a pattern of similar constitutional violations" and instead "contend[s] that [her] claim falls within the single-incident exception." *Id.* There are at least two problems with that. First, as already noted, this is not a case where "the government actor was provided no training whatsoever," *id.* (quotation omitted), because everyone agrees Garduno was trained in proper taser use. Second, Henderson again relies *only* on the County's "failure to produce certain policies and procedures" in response to public information requests. She suggests the only possible conclusion to be drawn from the County's failure to respond to those requests is that the County had *no* policies and offered its officers *no* training on proper taser use. As the district court rightly concluded, these "vague allegations are insufficient to establish 'deliberate indifference' through the single-incident exception."

B.

Henderson also contends the district court erred by dismissing the *Monell* claim against Harris County *sua sponte.* But the district court did not dismiss *sua sponte;* it acted on the County's motion to dismiss. Henderson claims she "was truly blindsided by the [d]istrict [c]ourt's decision to dismiss Harris County." But she concedes in the very same sentence that Harris County's motion to dismiss was pending for fourteen months. She even responded to that motion, making the same arguments she now advances on appeal. The district court's order granting dismissal closely tracked the arguments in the County's motion and rejected the arguments in Henderson's response. Thus, Henderson could not have been blindsided by anything in the district court's order, and the district court was well within its discretion to deny Henderson's Rule 59(e) motion.

III.

Next, Henderson's claims against Officer Garduno. To prevail, Henderson must overcome Garduno's qualified immunity defense, which "includes two inquiries. The first question is whether the officer violated a constitutional right. The second question is whether the right at issue was clearly established at the time of the alleged misconduct." *Morrow v. Meachum,* 917 F.3d 870, 874 (5th Cir. 2019) (quotation omitted). "We can decide one question or both." *Ibid.* Here, we only answer the second.

To show clearly established law, Henderson has two paths: (A) she can identify an on-point case, or (B) she can satisfy the obvious-case exception. *See Salazar v. Molina,* 37 F.4th 278, 285–86 (5th Cir. 2022). Henderson does neither.

A.

Start with on-point cases. Qualified immunity generally relieves law enforcement officers of the burden of defending personal-capacity suits. The immunity, however, does not protect officers who violate clearly established constitutional rights. Rights are "clearly established" when "existing precedent 'squarely governs' the specific facts at issue," *Kisela v. Hughes,* 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix v. Luna,* 577 U.S. 7, 15 (2015) (per curiam)), *not* when a rule is merely "suggested by then-existing precedent," *City of Tahlequah v. Bond,* 142 S. Ct. 9, 11 (2021) (per curiam). The Supreme Court recently underscored the importance of specificity in the clearly-established-law inquiry when it reminded lower courts "not to define clearly established law at too high a level of generality." *Id.* Rather, courts must determine that existing precedent has rendered the right "beyond debate." *Rivas-Villegas v. Cortesluna,* 142 S. Ct. 4, 8 (2021) (per curiam) (quoting *White v. Pauly,* 137 S. Ct. 548, 551 (2017) (per curiam)).

The hurdle is even higher when the plaintiff alleges a Fourth Amendment violation. As we have said elsewhere, in excessive-force cases requiring split-second judgments, it is "especially difficult" to overcome qualified immunity. *Morrow,* 917 F.3d at 875. That is because in the Fourth Amendment excessive-force context, "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will

apply to the factual situation the officer confronts." *Mullenix,* 577 U.S. at 12 (quotation omitted); *see Graham v. Connor,* 490 U.S. 386, 396–97 (1989) (laying out the excessive-force inquiry, which "requires careful attention to the facts and circumstances of each particular case"). Thus, Henderson must demonstrate that the law is "*so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow,* 917 F.3d at 875.

Henderson points to a slew of cases. But many of the cases she relies on are irrelevant to the clearly-established-law inquiry—either because they issued too late or because they do not bind us (and hence do not give officers in our circuit fair notice of the law). And the cases she cites that *could* clearly establish law do not do so with the requisite specificity.

First, several of Henderson's cases came too late to supply clearly established law. Garduno tased Henderson on April 26, 2018. Any cases after that date "cannot show clearly established law at the time of the violation." *Salazar,* 37 F.4th at 286 (quotation omitted); *see also Kisela,* 138 S. Ct. at 1154 ("[A] reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious."). That rule dispatches the bulk of Henderson's cases.[4] *See Joseph ex rel. Est. of Joseph v. Bartlett,* 981 F.3d

[4] To this, Henderson argues that "[p]ost-incident cases which merely apply clearly established law from pre-incident authority are instructive and provide valuable guidance in determining whether the law was clearly established with sufficient clarity at the time of the incident." Specifically, Henderson says that she never contends any of the post-incident cases she cites *established* new law; rather, these cases are meant to demonstrate "how the legal principles clearly established in [cases like] *Newman, Trammel, Stain, Hanks, Cooper,* and *Goodson* . . . have been applied." We reject Henderson's attempt

319, 335 (5th Cir. 2020); *Amador v. Vasquez,* 961 F.3d 721, 730 (5th Cir. 2020); *Timpa v. Dillard,* 20 F.4th 1020, 1035 (5th Cir. 2021); *Cole v. Carson,* 935 F.3d 444, 449, 456–57 (5th Cir. 2019) (en banc); *Scott v. White*, 810 F. App'x 297, 301–02 (5th Cir. 2020); *Fairchild v. Coryell Cty.*, 40 F.4th 359, 362–67 (5th Cir. 2022).

Second, various other cases Henderson cites are unpublished. But unpublished opinions "do not establish any binding law for the circuit," so "they cannot be the source of clearly established law for the qualified immunity analysis." *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019) (quotation omitted); *see also Salazar*, 37 F.4th at 286 (same); *Bell v. City of Southfield*, 37 F.4th 362, 367–68 (Thapar, J.) ("[A] plaintiff cannot point to unpublished decisions to . . . [demonstrate] a right has been clearly established."). This rule eliminates several more of Henderson's authorities. *See Peña v. City of Rio Grande*, 816 F. App'x 966, 974–77 (5th Cir. 2020) (per curiam); *Autin v. City of Bayton*, 174 F. App'x 183, 186 (5th Cir. 2005) (per curiam); *Massey v. Wharton*, 477 F. App'x 256 (5th Cir. 2012) (per curiam).

Finally, Henderson also invokes a handful of published Fifth Circuit opinions.[5] Most of Henderson's remaining cases "do not involve tasing or fleeing," *Salazar*, F.4th at 286, so she relies on them for general statements of law. *See Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (denying QI to officer who "forcefully slam[med

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to bootstrap after-the-fact precedent. The law must be "'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan,* 555 U.S. 223, 232 (2009). If Henderson must rely on post-incident cases to prove clearly established law, then the law was not clearly established at the time of the incident. A pig with lipstick is still a pig.

[5] "Even on the assumption that Fifth Circuit precedent can create clearly established law . . . none of [Henderson]'s cases is a close enough fit." *Salazar,* 37 F.4th at 286 (citing *Rivas-Villegas,* 142 S. Ct. at 7 (assuming without deciding that "controlling Circuit precedent clearly establishes law for purposes of § 1983")).

arrestee's] face into a vehicle while she was restrained and subdued"); *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016) (denying QI to officer who subjected arrestee "to a lengthy dog attack" even though he "was not actively resisting arrest or attempting to flee"); *Lytle v. Bexar Cnty.*, 560 F.3d 404, 412–13 (5th Cir. 2009) (denying QI to officer who "fir[ed] at the back of a fleeing vehicle some distance away"); *Trammell v. Fruge*, 868 F.3d 332, 343 (5th Cir. 2017) (denying QI where several officers tackled an individual who was not fleeing and who did not pose danger to himself or others); *Hanks v. Rogers,* 853 F.3d 738, 745–46 (5th Cir. 2017) (denying QI to officer who employed a "half spear takedown" on suspect who was not actively resisting and "made no attempt to flee"); *Goodson v. City of Corpus Christi,* 202 F.3d 730 (5th Cir. 2000) (denying QI to officers who, without reasonable suspicion, tackled an individual who was not fleeing, not violent, and who resisted only by pulling his arm away from the officer). But such general statements are insufficient to produce "clearly established" law. *See Kisela,* 138 S. Ct. at 1153 ("[P]olice officers are entitled to qualified immunity unless existing precedent *squarely governs* the *specific facts* at issue." (emphasis added) (quotation omitted)).

That leaves only two published Fifth Circuit cases involving tasings: *Newman v. Guedry,* 703 F.3d 757 (5th Cir. 2012), and *Darden v. City of Fort Worth,* 880 F.3d 722 (5th Cir. 2018). These cases are cited by every tasing plaintiff who sues under § 1983 in our circuit. But these cases are extreme examples that do nothing to clearly establish the law for less-extreme tasings like Henderson's.

Start with *Newman.* In that case, Derrick Newman was a passenger in a vehicle that was pulled over for failing to yield. An officer discovered an outstanding warrant for a different passenger and began to arrest him. Newman got out of the car and consented to a protective pat-down search. In his telling, Newman complied with all commands, but after he made an off-color joke, the officers beat him with a baton and tased him three times. This court denied the officer qualified immunity. *See Newman,* 703 F.3d at 759 (concluding none of the *Graham* factors justified the tasing because "on Newman's account, he committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command"). "Because *Newman* involved a plaintiff who committed no crime and obeyed all commands, that case cannot clearly establish that using a taser was unlawful in the circumstances [Garduno] confronted here." *Salazar,* 37 F.4th at 288.

Henderson's reliance on *Darden* fares no better. While executing a no-knock warrant at a private residence, officers "allegedly threw [Darden] to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him," ultimately causing him to suffer a heart attack and die during the arrest. *Darden,* 880 F.3d at 725. "The force used in *Darden*—causing the death of the arrestee—is obviously much more extreme than the . . . tasing at issue here." *Salazar,* 37 F.4th at 288.

In short, *Newman* and *Darden* are nothing like this case. Both involved "far more force than was deployed here." *Id.* at 287. And neither involved a suspect fleeing

from police. Even on Henderson's own version of the facts, this case is radically different: Henderson concededly ran from police, then stopped suddenly and turned toward the pursuing officer. Thus, neither *Newman* nor *Darden* involves materially similar facts and hence cannot clearly establish the law.

B.

Finally, the obvious-case exception. Henderson cites *Hope v. Pelzer* and *Taylor v. Riojas* for the proposition that there can be "notable factual distinctions between the precedents relied on . . . so long as the prior decision gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002) (quotation omitted); *see Taylor v. Riojas,* 141 S. Ct. 52, 53–54 (2020) (per curiam) (similar). *Hope* and *Taylor* are Eighth Amendment cases that predated *City of Tahlequah.* So it is unclear how much if any weight we should place on obvious *Eighth* Amendment cases in the face of Supreme Court direction in *Fourth* Amendment cases "not to define clearly established law at too high a level of generality." *City of Tahlequah,* 142 S. Ct. at 11. And even if *Hope* and *Taylor* could apply here, "obvious" cases are exceedingly "rare." *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018); *see Bartlett,* 981 F.3d at 337 ("The standard for obviousness is sky high.").

Even accepting Henderson's versions of the facts, this case is not obvious. Garduno made the split-second decision to deploy his taser after Henderson had led him on a long chase by car and by foot and was still unrestrained. Henderson admits he suddenly stopped running, turned toward Garduno, and moved his arms in a

manner that suggested to Garduno that Henderson was reaching for a weapon. This is a far cry from the handful of instances where we have recognized an "obvious case." If anything, the obviousness of this case points in the other direction: As illustrated in *Escobar v. Montee,* 895 F.3d 387 (5th Cir. 2018), and as we explained in *Salazar,* "a suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place." *Salazar,* 37 F.4th at 282–83.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

Civil Action No. 4:18-CV-02052

JEAN HENDERSON, et al.,

Plaintiffs,

v.

HARRIS COUNTY, TEXAS, et al.,

Defendants.

Signed: 09/10/2021

AMENDED ORDER

Alfred H. Bennett, United States District Judge

Before the Court are Defendant's Motion for Summary Judgment (Doc. #70); Plaintiff's Response (Doc. #81), and Defendant's Reply (Doc. #91). Having considered the parties' arguments and applicable law, the Court grants the Motion for Summary Judgment.

I. Background

Jean Henderson ("Plaintiff"), as next friend of and guardian for Christopher Henderson, brings this case against Arthur Simon Garduno ("Defendant") pursuant to 42 U.S.C. § 1983 for excessive use of force in violation of the Fourth Amendment.

Defendant is a deputy constable for Harris County Constable Precinct 6.[1] Doc. #81, Ex. A at 25:2–20. On April 26, 2018, Defendant and two other deputy constables visited Ingrando Park in Houston, Texas, to check for drug activity. *Id.* at 59:11–63:10. As the officers approached the park in separate marked patrol vehicles, Defendant saw three men stand up to leave a picnic table. *Id.* at 64:18–65:14, 69:9–10. Defendant claims he also saw one of the men "breaking up marijuana" and could smell its odor. *Id.* at 64:18–65:14, 69:2–20. Defendant alleges that another man, Henderson, appeared to have a "marijuana cigar" behind his ear and threw a clear, plastic bag containing a leafy green substance toward the ground. *Id.* at 74:4–13. Henderson then took off running. *Id.* at 69:21–70:3.

Defendant sent out a call on the Precinct 6 radio about a person evading arrest, activated his siren, and pursued Henderson in his vehicle. *Id.* at 70:6–17. As Henderson entered an apartment complex, Defendant exited his vehicle and chased Henderson on foot. *Id.* at 70:13–71:4, 83:14–20. The two ended up in an asphalt parking lot about 1,400 feet away from where the pursuit initially began. *Id.* at 82:16–83:13, 84:2–3, 94:22–24.

According to Defendant and two other witnesses, he gave Henderson multiple commands to stop, but Henderson did not stop right away. *Id.* at 71:3–10, 91:11–16; *id.,* Ex. D at 36:19–22; *id.,* Ex. E at 42:15–25. Henderson has stated that he heard Defendant yell "stop" only one time. *Id.,* Ex. C at 11:11–17. Both Defendant and

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[1] Plaintiff has also sued Harris County, Texas, in connection with Defendant's use of force. Those claims have since been dismissed and are currently the subject of a Motion to Alter or Amend Judgment filed by Plaintiff. *See* Doc. #104.

Henderson agree that Defendant said, "I'm going to tase you." *Id.* at 12:22–23; *id.,* Ex. A at 91:11–19. But the parties dispute what happened next. Defendant claims that Henderson stopped, turned around to face him, and reached toward his waistband with both hands. Doc. #70, Ex. 1 at 98:23–100:22. Defendant apparently perceived this "about-face" as Henderson reaching for a weapon "to scare [him] into retreating or stop pursuing him." *Id.* at 99:4–14. But in Henderson's telling, he stopped running and had raised his hands to surrender, his back facing Defendant. *See* Doc. #81, Ex. C. Two witnesses have stated that they saw Henderson stop and raise his hands as well. *See id.,* Ex. D, Ex. F.

At that point, Defendant deployed his taser "out of fear that [Henderson] was going to pull that gun out or what I perceived to be a weapon in his waistband." *Id.,* Ex. A at 101:23–24. One prong lodged next to Henderson's nostril, and the other landed on the bed of a nearby truck, so the taser did not shock Henderson. *Id.* at 102:1–18, 264:22–25, 265:1–11. One second after the first discharge, Defendant deployed his taser a second time. *See* Doc. #70, Ex. 8 at 3. Both prongs lodged in Henderson's back, causing him to fall backward onto the ground. Doc. #81, Ex. A at 106:16–107:11, 107:17–108:5. Plaintiff alleges that Henderson's head hit the ground, causing him to suffer a traumatic brain injury. *Id.* at 8 (citing *id.,* Ex. K at 68:8–20). Defendant deployed his taser for a third time about one minute later because, according to him and another officer, Henderson was resisting being placed in handcuffs. Doc. #70, Ex. 1 at 122:17–123:18; *id.,* Ex. 2 at 70:4–71:8; *see id.,* Ex. 8 at 3. Body cam footage recovered from another officer at the scene begins after the third

tasing as officers are handcuffing Henderson. *See* Doc. #81, Ex. J. Officers never discovered a weapon belonging to Henderson nor recover the marijuana cigar or plastic bag that Defendant attributed to him. *Id.* at 76:22–77:11, 98:19–22.

On June 20, 2018, Plaintiff initiated this case. Doc. #1. Plaintiff alleges that Defendant "exercised constitutionally impermissible excessive force and seizure" and violated Henderson's "clearly established constitutional rights." Doc. #41 ¶ 41. Defendant now moves for summary judgment on qualified immunity grounds, arguing that his actions were not clearly excessive or objectively unreasonable and that he did not violate any clearly established law. Doc. #70. In the Response, Plaintiff provided deposition testimony from Henderson and two witnesses, Henry Garcia and Troy Carlton. Doc. #81, Ex. A, Ex. C, Ex. D, Ex. E. Plaintiff also submitted an affidavit from a third witness, Daniel Pinon, Jr., along with an expert report from Scott A. DeFoe. *Id.,* Ex. F, Ex. H.

II. Legal Standards

a. Federal Rule of Civil Procedure 56

Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. When a public official raises a qualified immunity defense, the plaintiff has the burden of showing that the defense is not available. *Joseph on behalf of Est. of Joseph v. Bartlett,* 981 F.3d 319, 329–30 (5th Cir. 2020) (citing *Orr v. Copeland,* 844 F.3d 484, 490 (5th Cir. 2016)). To meet this burden, the plaintiff must demonstrate "that there is a genuine dispute of material fact and that a jury could return a verdict

entitling the plaintiff to relief for a constitutional injury." *Id.* at 330. Once qualified immunity is involved, "the plaintiff's version of those disputed facts must also constitute a violation of clearly established law." *Id.* As with any motion for summary judgment, the court "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Newman v. Guedry,* 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Deville v. Marcantel,* 567 F.3d 156, 164 (5th Cir. 2009)).

b. Qualified Immunity Defense

"In determining qualified immunity, courts engage in a two-step analysis. First, they assess whether a statutory or constitutional right would have been violated on the facts alleged. Second, they determine whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Hanks v. Rogers,* 853 F.3d 738, 744 (5th Cir. 2017) (quoting *Griggs v. Brewer,* 841 F.3d 308, 312–13 (5th Cir. 2016)). The court has discretion to decide which step to address first. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009). When analyzing an excessive force claim, the court treats the second prong of the analysis as two separate inquiries: "whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." *Hanks,* 853 F.3d at 744 (quoting *Griggs,* 841 F.3d at 313). "If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." *Id.*

III. Analysis

a. Constitutional violation

"To prevail on an excessive-force claim, a plaintiff must show '(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.' " *Hanks,* 853 F.3d at 744 (quoting *Cooper v. Brown,* 844 F.3d 517, 522 (5th Cir. 2016)). "Excessive force claims are necessarily fact-intensive; whether the force used is excessive or unreasonable depends on the facts and circumstances of each particular case." *Id.* (quoting *Deville,* 567 F.3d at 167). "Factors to consider include 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.* Plaintiff argues that all three factors weigh in Henderson's favor because he (1) was suspected only of possession of a small quantity of marijuana, a minor offense; (2) posed no objective threat to Defendant or anyone else; and (3) was not actively or passively resisting when he was tased. Doc. #81 at 21.

As to the first factor, it is undisputed that the severity of the crime weighs in favor of Henderson. As to the second factor, Plaintiff asserts that Henderson posed no objective threat to Defendant because his hands were raised and visible, and he had "made no advances" or any other threatening gestures before Defendant tased him. Doc. #81 at 21. Here, Defendant testified that he used his taser because, when Henderson did an "about-face," "he was pulling backward instantaneously," and Defendant "took it as though [Henderson] was reaching for a weapon." *Id.* at 99:4–8.

Defendant stated that he could not understand why anybody would evade a patrol vehicle or police officers "and why [Henderson] would do an about-face on [him]." *Id.* at 99:7–12. Defendant also stated that in his experience, this movement was "consistent" with someone "who would carry a weapon or a gun in his waistband." *Id.* at 101:20–24, 114:15–22. But Defendant conceded that he never saw Henderson actually reach into his waistband or take any other threatening or "aggressive" movements. *Id.* at 99:15–21, 98:11–18.

As to the third factor, Plaintiff alleges that, even if Henderson had been previously evading arrest, he had abandoned the effort and "signaled that he was giving himself up as the deputy had instructed." *Id.* Here, Henderson, Garcia, and Pinon testified that Henderson had already stopped running and raised his hands in the air when Defendant first discharged his taser.[2] *Id.,* Ex. C at 9:18–2, 11:2–24, 19:10–21:24; *id.,* Ex. D at 35:12–36:25, 38:15–39:5, 124:12–126:123; *id.,* Ex. F at 2–3. Defendant denies that Henderson ever raised his hands to surrender before he deployed his taser. Doc. #70 at 110:4–21.

Taking Plaintiff's version of the facts as true, the Court finds that Plaintiff has presented sufficient evidence to create a genuine dispute of material fact as to whether Defendant's use of force was "clearly excessive" and "clearly unreasonable."

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[2] The Court notes that witness accounts vary about how many times Defendant told Henderson to stop and when Henderson finally stopped. Garcia and Carlton have testified that Defendant yelled "stop" about three times before Henderson stopped. Doc. #81, Ex. D at 36:19–22; *id.,* Ex. E at 42:15–25. Carlton also testified that he did not recall whether Henderson was still moving when Defendant first discharged his taser but was certain Henderson had stopped after the first taser. *Id.,* Ex. E at 45:17–46:13. Additionally, Pinon stated that Defendant yelled, "I'm going to shoot. I'm going to shoot. Freeze. Stop." and then, "Here it comes, motherfucker." *Id.,* Ex. F at 2.

See Hanks, 853 F.3d at 744. Specifically, a reasonable jury could conclude that Henderson posed no serious, immediate threat to Defendant or anyone else based on Defendant's testimony that Henderson made no threatening or aggressive gestures other than doing an "about-face" toward him and "falling backwards," which Defendant understood to be Henderson reaching for a weapon. Additionally, whether Henderson was resisting arrest when Defendant tased him depends on the factual question of whether Henderson did, in fact, raise his hands in surrender beforehand. Accordingly, Plaintiff has alleged sufficient facts that, when viewed in the light most favorable to Plaintiff, would establish a violation of Henderson's Fourth Amendment right to be free from excessive force. *See Joseph,* 981 F.3d at 330.

b. Clearly Established Law

Although Plaintiff has submitted sufficient evidence to demonstrate that a reasonable jury could return a verdict in Henderson's favor for the constitutional injury alleged, if Defendant's conduct did not violate clearly established law of which a reasonable person would have known, then qualified immunity attaches. *See Hanks,* 853 F.3d at 744; *see also Bush v. Strain,* 513 F.3d 492, 501 (5th Cir. 2008) (citation omitted) ("Even though an officer's use of force must be objectively unreasonable to violate constitutional rights, a defendant's violation of constitutional rights can still be objectively reasonable if the contours of the constitutional right at issue are sufficiently unclear."). "A right may be clearly established without 'a case directly on point,' but 'existing precedent must have placed the statutory or constitutional question beyond debate.' " *Hanks,* 853 F.3d at 746–47 (quoting *White,*

137 S. Ct. at 552). "Clearly established law must be particularized to the facts of the case," and "should not be defined 'at a high level of generality." *Id.* (internal citations omitted). *Id.* In short, "outside of 'an obvious case,' the law is only 'clearly established' if a prior case exists 'where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.' " *Id.*

In this case, Plaintiff describes the clearly established law at a level of generality admonished by our precedent. First, Plaintiff alleges that, when this incident occurred in 2018, "it was beyond debate that Garduno's use of a Taser in the manner described by witnesses violated Chris Henderson's Fourth Amendment and Due Process rights." Doc. #81 at 17. In support, Plaintiff points to case in which the court denied qualified immunity because the officer's use of a taser constituted an excessive use of force. But those cases are markedly distinguishable. In *Pena,* the court held that taking the plaintiff's version of events as true, "no reasonable officer under the circumstances [the defendants] confronted would have believed it was reasonable to tase [plaintiff]—a juvenile girl who was not suspected of a crime, posed no objective threat to the safety of the officers' or others, and was not actively resisting arrest—without warning and without attempting to use any intermediate measures of force." *Pena v. City of Rio Grande City, Texas,* 816 F. App'x 966, 976 (5th Cir. 2020). Importantly, the plaintiff's "only physical resistance prior to being tased was her refusal to give [an officer] her hands and get out of the car" when he ordered her to, and the plaintiff disputed that "the officers were lawfully attempting to arrest or detain her in the first place. *Id.* at 973. And in *Newman,* which involved the use of a

taser during a traffic stop, no one claimed that the plaintiff had ever attempted to flee, and the plaintiff alleged that in in respond to his off-color joke, "the officers immediately resorted to taser and nightstick without attempting to use physical skill, negotiation, or even commands." *Newman v. Guedry,* 703 F.3d 757, 762 (5th Cir. 2012).

Here, Henderson was suspected of a crime, albeit a minor one, and concedes that he had bought or was attempting to buy marijuana at the park and "got scared" when he saw the police. Doc. #81 at 8:18–9:16. Plaintiff does not dispute that Defendant pursued Henderson—first in his vehicle, then on foot—for about 1,400 feet before tasing him. *See* Doc. #81 at 6. And though it is disputed whether Henderson raised his hands in surrender after Defendant ordered him to stop, no one disputes that Defendant warned him by saying, "I'm going to tase you." *See e.g.,* Doc. #81, Ex. at 11:2–24; *id.,* Ex. D 35:12 – 36:25; *id.,* Ex. E at 46:17–22. Thus, neither *Newman* nor *Pena* would have given Defendant "fair notice" that discharging his Taser would be unlawful under the circumstances because, unlike in those cases, a lengthy pursuit preceded the use of force, the person injured was suspected of a crime, and the officer issued a warning. *See Morrow v. Meachum,* 917 F.3d 870, 875 (5th Cir. 2019) (quoting *Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)) ("[Q]qualified immunity is inappropriate only where the officer had 'fair notice'—'in light of the specific context of the case, not as a broad general proposition'—that his *particular* conduct was unlawful.").

Plaintiff also relies on one precedential and two unpublished cases from the Fifth Circuit to support the general proposition that "even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify the use." Those too are inapposite because those cases involved the use of deadly force without warning. *See Cole v. Carson,* 935 F.3d 444, 453 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole,* 141 S. Ct. 111, 207 L.Ed. 2d 1051 (2020) (determining that officers' conduct violated clearly established law where there was a genuine factual dispute as to whether the officers had "opened fire" and shot the plaintiff, a suicidal teenager, "without warning, even though it was feasible" to have given him one); *Reyes v. Bridgwater,* 362 F. App'x 403, 409 (5th Cir. 2010) (concluding that, because law was clearly established that "an officer cannot use deadly force without an immediate serious threat to himself or others," summary judgment was improper because the officer and witnesses disputed whether such threat existed); *Bacque v. Leger,* 207 F. App'x 374, 376 (5th Cir. 2006) (finding that court lacked jurisdiction to review denial of qualified immunity because evidence suggested that officer shot suspect "while he stood motionless with his knife at his side and had ceased to menace anyone" and that that no officer had warned [the suspect] to drop his knife. To be sure, the Fifth Circuit has made clear that "a taser is a force that, deployed when not warranted, can result in a constitutional deprivation." *Samples v. Vadzemnieks,* 900 F.3d 655, 661 (5th Cir. 2018). But the cases relied upon by Plaintiff do not define the contours of the right alleged in this case with sufficient particularity to make it clearly established that the use of taser

was not warranted. *See Clarkston v. White,* 943 F.3d 988, 993 (5th Cir. 2019), *cert. denied,* 140 S. Ct. 2763, 206 L.Ed. 2d 937 (2020) (quoting *Delaughter v. Woodall,* 909 F.3d 130, 139 (5th Cir. 2018)) ("Clearly established law is determined by controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.").

Lastly, Plaintiff cites another unpublished case to contend that "[c]learly established law provides that officers may not use force against a suspect who has given himself up and is not resisting." Doc. #81 at 20. In *Scott v. White,* the Fifth Circuit affirmed the district court's conclusion that, viewing the evidence in the light most favorable to the plaintiff, "clearly established law at the time of [the officer's] violation prohibited his use of force given the circumstances." 810 F. App'x 297, 301 (5th Cir. 2020). Although the court listed cases establishing that an officer's use of force against a suspect not actively resisting arrest was clearly established, it did not indicate which facts it relied upon in denying qualified immunity, such that the Court could consider them here. *See id.* at 301–02. Plaintiff also cites the precedential opinion in *Hanks* where the court concluded that "clearly established law demonstrated that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation." 853 F.3d at 747. Here, Plaintiff was an obvious flight risk, and there is no indication that Defendant should have initiated verbal negotiations rather than resort to physical

force at moment he deployed his taser.[3] Similarly, in the other precedential case relied upon by Plaintiff, the suspect was tackled by officers after very minimal resistance. *See Trammell v. Fruge,* 868 F.3d 332, 343 (5th Cir. 2017). Here, Defendant tased Henderson after pursuing him for about one-quarter of a mile.

Therefore, in the absence of existing precedent that places the constitutional question beyond debate, the Court finds that Plaintiff's excessive force claim against Defendant fails at the second step of the qualified immunity analysis. Simply put, Plaintiff has failed to meet her burden of showing that a prior case exists in which the court held that an officer acting under similar circumstances as Defendant had violated the Fourth Amendment. *See Hanks,* 853 F.3d at 757. Accordingly, the Court concludes that Defendant's conduct was not objectively unreasonable in light of clearly established law at the time the violation occurred.

IV. Conclusion

For the foregoing reasons, the Court finds that Defendant is entitled to qualified immunity because officers of reasonable competence could disagree as to whether Henderson's rights were violated when Defendant deployed his taser against him. Accordingly, the Motion is hereby GRANTED, and this case is DISMISSED.

It is so ORDERED.

[3] According to Plaintiff's expert witness, Defendant should have formulated a tactical plan with the other officers who were present at the scene before initiating a foot pursuit of Henderson and, if the tactical plan failed, requested an air support unit. *Id.,* Ex. H at 7.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20544

JEAN HENDERSON; CHRISTOPHER DEVONTE HENDERSON,

Plaintiffs-Appellants,

v.

HARRIS COUNTY, TEXAS; ARTHUR SIMON GARDUNO,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2052

Filed: December 2, 2022

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before SMITH, DUNCAN, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.