No. 23-____

IN THE

Supreme Court of the United States

JOSH PATRICK,

Petitioner,

v.

LARHONDA DUNLAP PEREZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS OF LAW PRESENTED

1. Is there variance among federal judicial circuits regarding how they apply Fourth Amendment law in excessive force cases involving taser use?

2. Should the Sixth Circuit's collapsed *Graham* test be adopted for implementation nationwide in all federal judicial circuits to harmonize these inconsistent circuit opinions and to create greater uniformity and consistency in Fourth Amendment use of force taser cases?

3. What effect are a subject's deliberate, clear, and unequivocal sworn admissions to be given in assessing whether a subject was engaged in active resistance?

4. Is a police officer entitled to qualified immunity if he/she tases a subject that is actively resisting or attempting to evade by flight?

5. Did this Sixth Circuit panel wrongly deny Patrick qualified immunity under the clearly established law and given that there is no clear evidence of a constitutional violation?

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INTRODUCTION

Certiorari should be granted to harmonize a split among the federal judicial circuits in how they apply Fourth Amendment law in taser cases. That split has led to inconsistencies, a lack of uniformity, and wide variance in the law.

Certiorari should also be granted to set a key precedent by adopting the Sixth Circuit's collapsed *Graham* test for the analysis of Fourth Amendment use of force taser cases. Under this novel and appropriate test, a simple dichotomy exists - if a subject is actively resisting, taser use is authorized; if there is mere passive resistance, then taser use is improper. This case presents an ideal vehicle for this Court to adopt and implement this standard for issues of great national significance - use of force under the Fourth Amendment and qualified immunity.

Certiorari should also be granted to rectify the Sixth Circuit's erroneous denial of qualified immunity in this case. The Sixth Circuit's opinion, if it left to stand, muddies the waters and will create confusion as police officers will have no idea when they can use a taser and when they cannot. Police work has become guesswork. This panel disregarded the clearly established law that had been authoritative for decades.

This qualified immunity appeal raises a simple question of law - was Respondent LaRhonda Perez ["Perez"] actively resisting or attempting to evade by flight at the time she was tased by Petitioner City of Campbellsville police officer Josh Patrick? ["Patrick"] Perez testified (1) that her intent was not to surrender and (2) that her intent was to flee across Meader Street away from the officers. Her active resistance and intent to continue her flight are undisputed.

Yet inexplicably, the Sixth Circuit ignored these twin admissions and denied qualified immunity to Patrick. Instead of relying upon sworn testimony, the Sixth Circuit improperly relied upon an inference that the district court had drawn from an unsworn, pro se pleading.

The Sixth Circuit panel stated, "But in fast-paced, high-intensity situations like this one, the 'was she still resisting?' question is not the whole ballgame." [App. A, p. 3.] Respectfully, the Sixth Circuit is incorrect - in a Fourth Amendment use of force taser case, the active resistance question is indeed the whole ballgame.

OPINIONS BELOW

On March 1, 2023, the Western District of Kentucky entered a Memorandum Opinion and Order denying summary judgment to Patrick on the basis of qualified immunity. [App. B]

On October 11, 2023, the United States Court of Appeals for the Sixth Circuit entered an Opinion and Judgment dismissing Patrick's interlocutory appeal for lack of jurisdiction as they perceived a material dispute of fact. [App. A].

On November 15, 2023, the Sixth Circuit denied Petitioner's petition for rehearing *en banc* [App. C].

JURISDICTION

The Order denying Petitioner's petition for rehearing *en banc* was entered by the Sixth Circuit on November 15, 2023. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of that order. This court has jurisdiction to review the orders of the United

States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved in this case is the Fourth Amendment to the United States Constitution. The relevant statutory provisions involved are 42 U.S.C. § 1983 and 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Probable Cause For This Arrest Is Undisputed.

On April 30, 2018, a relative of Perez contacted the Campbellsville Police Department ["CPD"] and reported that Perez had stolen checks, requested that she be arrested, and gave her address to CPD sergeant Bryon Simpson. ["Simpson"] Simpson verified that Perez's felony warrants were outstanding.

Perez admits that there were seven felony charges pending against her at the time of this incident and does not dispute that these officers had probable cause to arrest her.

B. Perez's Active Resistance And Flight.

On the evening of May 1, 2018, Simpson and Patrick went to the home that Perez rented located at 514 Coakley Street in downtown Campbellsville. The officers did not use their blue lights or siren and both were in uniform.

Upon exiting their vehicles, Patrick went to the left front corner of the house, and Simpson went to the back of the residence where he saw Perez outside and told her, "LaRhonda, I need to talk to you." Simpson told her that she had warrants and that she was under

arrest. Perez testifies "I already knew they had the warrants," and that she told Simpson, "I already know why you're here."

Perez then abruptly fled as Simpson states, "[S]he kicked off the flip-flops and took off." As the Sixth Circuit rightly describes, "Perez bolted." [App. A, p. 2] As she started to run, Simpson warned her, "Don't you do it," which Perez understood was an officer command for her not to run.

Patrick saw her flee and states, "I made the decision to follow her," which he calls a "split-second decision to pursue to effect arrest." Perez is a fast runner and Patrick began "falling back behind her." Perez's flight route can be broken down into the following five areas: neighboring yards, Coakley Street, a grassy area, a church parking lot, and finally Meader Street. Perez chose an erratic and unpredictable route.

Perez had marijuana and cocaine in her system. Patrick suspected she had been using drugs because of her agitation and irrational actions. Perez's expert, Billy Fryer, thinks her drug use is likely the reason she fled from the police.

While chasing her, both officers were repeatedly shouting commands to Perez to stop. Patrick told her to stop "several times" and advised her that she was under arrest. Patrick warned Perez two or three times, around the time she crossed Coakley Street and entered the grassy area, that if she did not stop she would be tased. Patrick's experience has been that when he issues a taser warning, people will stop "nine times out of ten," unless they are under the influence of something.

Perez admits that she heard the officers say "stop running" and that she refused to obey their commands.

As the Sixth Circuit succinctly stated, "Perez didn't listen." [App. A, p. 3.]

C. Patrick's First Taser Shot.

Patrick is an experienced, taser-certified officer. He had to make quick decisions about whether to use force, and if so, what type and when to use it. He has been taught and trained to use a taser for persons who are actively resisting and/or evading arrest by flight. Patrick had other force options at his disposal, such as a handgun, OC/pepper spray, and a baton. He chose a taser, which is "very low" on the continuum of force.

In the grassy area near St. Mark's church, Patrick closed the distance to within 15-20 feet and fired cartridge #1 from his taser but the probes missed. After this initial taser shot missed, Patrick continued in pursuit.

Patrick still perceived a danger to Perez, to the officers, and to the public. Perez was running toward Broadway, the busiest street in downtown Campbellsville. Patrick describes his motive and decision-making process at the time as follows:

> I was trying to end the pursuit quickly and stop her from crossing the road. It seemed very dangerous, also to the public and to myself, in crossing that road [Meader Street].

Patrick was trying to end this pursuit as quickly as possible to eliminate the threat to the lives of Perez, both officers, and members of the public on the roadways.

D. Perez's Continued Flight To Meader Street.

As Perez approached Meader Street, she saw "at least five or six cars" in one direction "lined all the way around the curve," and the other direction she saw

"around two or three cars." The cars stopped when the drivers saw her approaching the roadway.

Patrick saw these same vehicles braking and stopping to avoid hitting Perez and him. Perez testifies, "I wasn't thinking at the time," and she admits this situation was dangerous to the public and vehicles.

Detective Nelson Bishop, who later performed an internal affairs investigation for the CPD, says that Perez's flight created a danger to herself, the officers, and the public. If Perez had not been tased, she or the officers could have been struck by a vehicle or she may have caused a wreck. Bishop believes that Patrick may have saved Perez's life by tasing her because it prevented her from running into oncoming traffic. Fryer admits that during this tense and rapidly-evolving situation, Perez's flight created a danger both to herself and the public.

E. Perez's Twin Admissions.

In her deposition, Perez makes two (2) admissions that are highly relevant to this appeal. First, Perez stipulates that she had no intent to surrender to the police, as she testified as follows:

> **Q Okay. And then you were going to surrender to the officers there? [Meader Street]**
>
> **A I wasn't going to surrender.**

Perez admits, under oath, that her subjective intent was not to voluntarily surrender.

Secondly, Perez testifies that her plan was to continue her flight across Meader Street in the opposite direction of the approaching officers, as follows:

Q What was your intent? Were you going to cross Meader Street?

A Yes, sir.

[emphasis added] We do not have to infer Perez's intent - she tells us. These questions in her deposition were clear, she understood them, and Perez twice verbalized that she was not giving up peacefully.

What Perez does not say is also important. She never testified, under oath, that she raised her hands to surrender, that she verbalized an intent to surrender, or that she fell to her knees or the ground in an effort to demonstrate surrender. Also, Patrick never saw Perez raise her hands prior to being tased.[1]

F. Patrick's Second Successful Taser Shot.

At Meader Street, Perez paused "for a brief second." Simpson describes that Perez "was getting ready to take off again" and had already taken a step to run. Patrick testifies that she "seemed to still have a lot more go in her."

Patrick saw Perez take two steps and start to run into traffic. When she did so, he deployed cartridge #2 from his taser at 7:08:22 p.m., when he was 12-15 feet from Perez. The taser probes struck Perez in the back of her right shoulder and the back of her right hip.

Patrick pulled the trigger one time, and his single taser shot lasted five seconds. When she was tased, Perez fell on the edge of Meader Street, and the officers

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[1] Of note, this is not one of the "past-flight-forfeits-surrender" cases. Patrick is not alleging that Perez's flight forfeited her right to surrender. Rather, he never thought for a moment that she was surrendering.

handcuffed her without further incident. In total, Perez fled 660 feet during this pursuit.

G. Perez's Subsequent Guilty Pleas.

As a result of this incident, Perez was charged with the crimes of Resisting Arrest and Fleeing or Evading Police - Second Degree. Perez, represented by counsel, pled guilty to both crimes. She is currently serving a jail sentence of thirteen (13) years for the felony warrants served on her during this incident.

H. Procedural History Of This Case.

On January 4, 2021, Perez, pro se, filed this action, asserting claims against Patrick and Simpson for excessive force in violation of the Fourth Amendment and failure to provide medical care in violation of the Fourteenth Amendment.

On March 1, 2023, the Western District of Kentucky, Judge Gregory Stivers, entered a Memorandum Opinion and Order dismissing the Fourteenth Amendment failure to provide medical care claims against both Patrick and Simpson, but denying Patrick qualified immunity for Perez's Fourth Amendment excessive force claim. [App. B] Patrick filed an interlocutory appeal of the denial of qualified immunity to the Sixth Circuit.

On October 11, 2023, the Sixth Circuit, Judge Amul Thapar, entered an Opinion and Judgment dismissing the interlocutory appeal for lack of jurisdiction.

On November 15, 2023, the Sixth Circuit denied Petitioner's petition for rehearing *en banc*. This Petition follows.

REASONS FOR GRANTING THIS PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING OPINIONS IN VARIOUS FEDERAL JUDICIAL CIRCUITS.

First Circuit - This circuit appears to apply the traditional three *Graham* factors to taser cases. *Taylor v. Moore*, 383 F.Supp.2d 91, 98 (D. Mass. 2019), citing *Jennings v. Jones*, 499 F.3d 2, 11 (1st Cir. 2007).

Second Circuit - This circuit appears to apply the traditional three *Graham* factors to taser cases. *Garcia v. Duchess County*, 43 F.Supp.3d 281, 290 (S.D.N.Y. 2014), citing *Tracy v. Freshwater,* 623 F.3d 90, 96 (2d Cir. 2010).

Third Circuit - This circuit appears to apply the traditional three *Graham* factors to taser cases. *Wargo v. Municipality of Monroeville, Pa*., 646 F.Supp.2d 777, 783-4 (W. D. Pa. 2009), citing *Kopec v. Tate,* 361 F.3d 772, 776–77 (3d Cir. 2004).

Fourth Circuit - In *Estate of Armstrong v. Village of Pinehurst et al*., 810 F.3d 892 (4th Cir. 2016), the Fourth Circuit fashioned a new and different "immediate danger" test, holding that "[T]aser use is unreasonable force in response to resistance that does not raise a risk of immediate danger. *Id*. at 905. The *Armstrong* Court vaguely referenced the three traditional *Graham* factors, and then placed strict limitations on taser use. *Id*. at 899. They thought that "deploying a taser is a serious use of force," and that this weapon is "designed to cause excruciating pain." *Id*. at 902. The rule from *Armstrong* is that an officer is only allowed to deploy a taser in situations where there is risk of "immediate danger." *Id*. at 903. "Physical resistance" is not necessarily enough to justify taser use, and it is

not the same thing as "immediate danger" according to the Fourth Circuit. *Id*. at 904.

Obviously, the Fourth Circuit uses their own highly restrictive analysis to decide Fourth Amendment taser cases. They heap onerous restrictions on an officer's ability to use a taser. Police officers working in the Fourth Circuit have vastly different rules than those working in the Sixth Circuit.

Fifth Circuit - In a Fourth Amendment excessive force claim involving a taser, this circuit describes the factors to be considered as (1) an 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. *Hale v. City of Biloxi, Mississippi*, No. 1:16-cv-113 WL 3087279 at 2 (S.D. Miss. 2017), citing *Brown v. Lynch*, 524 Fed. Appx. 69, 79 (5th Cir. 2013). These are not the *Graham* factors, and this appears to be a different test altogether.

Sixth Circuit - This circuit uses the "collapsed *Graham*" test that is fully described herein. Objective reasonableness is still the goal, and active resistance is the central, dispositive issue.

Seventh Circuit - This circuit apparently uses a four factor analysis. They start with the three traditional *Graham* factors. *Abbott v. Sangamon Cnty.,* 705 F.3d 706, 724 (7th Cir. 2013); *Cyrus v. Town of Mukwonago,* 624 F.3d 856, 861-2 (7th Cir. 2010). However, they add to those factors in certain circumstances, if needed, stating for example that, "If the suspect is mentally ill, the officer's awareness of his mental illness is also a factor in the analysis." *Abdullahi v. City of Madison,* 423 F.3d 763, 772 (7th Cir. 2005). This circuit seems to read in a subjective

awareness component into the analysis in some, but not all cases. Again, this is a far different legal analysis.

Eighth Circuit - This circuit has crafted a four-factor test that is different from the Seventh Circuit's four-factor test. In addition to the three *Graham* factors, the Eighth Circuit considers the "result of the force," a factor apparently relating to injuries. They state as follows: [we] "give '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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight.' **We may also consider the result of the force**." [emphasis added] *McKenney v. Harrison,* 635 F.3d 354, 359 (8th Cir. 2011); See also *Littrell v. Franklin,* 388 F.3d 578, 583 (8th Cir. 2004)(stating that Eighth Circuit courts may also consider the result of the force). This "result of the force" factor appears to be unique to the Eighth Circuit.

Ninth Circuit - This circuit has adopted what can only be described as the "*Graham* plus whatever" test. In taser cases, the Ninth Circuit starts with the three traditional *Graham* factors, but then adds whatever they want, as they "consider whatever specific factors may be appropriate in a particular case, **whether or not listed in *Graham***." *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2005). [emphasis added] The Ninth Circuit thinks the most important *Graham* factor is the immediate threat factor, not the active resistance factor. *Id*. Certainly, this is a far cry from the Sixth Circuit's collapsed *Graham* test that considers active resistance to be the sole and dispositive factor - "the whole ballgame."

Tenth Circuit - This circuit uses a traditional *Graham* analysis for taser cases and emphasizes that the active resistance factor weighs heavily in their decision. *Hinton v. City of Elwood,* 997 F.2d 774, 781 (10th Cir. 1993)(tasing suspect three times who actively resisted officers' attempts to handcuff him was not excessive force). This circuit appears to employ reasoning highly similar to the Sixth Circuit's collapsed *Graham* test.

Eleventh Circuit - In taser cases, the Eleventh Circuit analyzes three factors, (1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted. *Draper v. Reynolds,* 369 F.3d 1270, 1278-79 (11th Cir. 2004). This is yet another different test and another different analysis.

D.C. Circuit - This circuit appears to apply the traditional three *Graham* factors to taser cases and appears to emphasize the active resistance factor, stating "[t]here is no clearly established right for a suspect who actively resists and refuses to be handcuffed to be free from a Taser application." *Lash v. Lemke*, 786 F.3d 1, 7 (D.C. Cir. 2015).

In summary, obviously there is no uniformity among the federal judicial circuits. Some circuits use the three traditional *Graham* factors only, some have added other factors to them, others have formed their own tests, and the Ninth Circuit considers *Graham* plus whatever. The "collapsed Graham" test appears to be unique to the Sixth Circuit. It also appears to be the most accurate, logical, and simple method to analyze Fourth Amendment taser claims.

The lack of uniformity or consistency nationwide causes problems for police officers, those who train them, judges, law professors, and anyone else who

needs to know what police conduct is permissible and what is prohibited. This confusing split in authority among federal judicial circuits in the area of Fourth Amendment use of force taser law must be reconciled and harmonized.

II. THIS PETITION SHOULD BE GRANTED TO ADOPT THE COLLAPSED *GRAHAM* TEST NATIONWIDE.

A. The Nature Of This Test.

The Sixth Circuit's collapsed *Graham* test is a simplified analysis derived from the watershed use of force case, *Graham v. Connor*, 490 U. S. 386 (1989). Typically under *Graham*, a court considers three factors to determine the objective reasonableness of use of force: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and, (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396.

However, in a taser case, the first two factors - the severity of the crime and the immediate threat - are less relevant than they would be in, for example, a deadly force case. Indeed, the Sixth Circuit has referred to *Graham*'s three prongs as merely "[r]elevant considerations." *Bennett v. Young,* No. 3:16-cv-169-DJH-DW WL 1575828 (W.D. Ky. 2018), footnote 2, citing, *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir. 2007).

The collapsed *Graham* test involves applying only the third factor of the three traditional *Graham* factors - whether a subject was actively resisting or evading by flight. That factor is all that is necessary or relevant in a taser case. Consideration of the other two factors could complicate the analysis, skew the decision, or lead to improper results.

Recognizing the flaws inherent in a typical *Graham* analysis when applied to taser cases, the Sixth Circuit simplified the test into a "collapsed *Graham*" analysis as follows:

> When addressing claims of excessive force arising out of an officer's use of a taser, however, the Sixth Circuit Court of Appeals has occasionally collapsed the *Graham* test into a more straightforward inquiry. "Cases from [the Sixth Circuit] ... adhere to this line: If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him.

Bennett v. Young, WL 1575828 at 3 (W. D. Ky. 2018). Under this test, the legal analysis is logical and straightforward - if there is active resistance, then taser use is justified; if there is mere passive resistance, then taser use is improper.

B. Adopting This Test Would Create Uniformity And Consistency.

If the Sixth Circuit's "collapsed *Graham*" test were adopted nationwide, it would create an important precedent that would create uniformity and consistency in this vitally important area of law.

A national precedent would provide clarity for police officers, those training them, law school professors, and for judges across the country. Everyone would gain from knowing when it is permissible for police officers to use a taser.

The collapsed *Graham* test is simple, easily understandable, and time-tested as it has worked effectively in the Sixth Circuit for years. Accordingly, certiorari

should be granted to adopt and implement it nationwide and to thereby create consistency among the circuits. This particular discrete aspect of Fourth Amendment law needs to be clarified so that police officers will know which actions are entitled to qualified immunity and which ones are not.

C. Adopting This Test Would Reduce Appeals And Further Judicial Economy.

If certiorari is granted and the collapsed *Graham* test adopted nationwide, then lower courts will have clear guidance and will know when, and when not, to grant qualified immunity in Fourth Amendment taser cases. This will result in fewer interlocutory appeals of qualified immunity cases.

Unfortunately, the contrary is also true - uncertainty produces appeals. If certiorari is not granted, then this Sixth Circuit's panel's opinion will become law and will create greater uncertainty. Parties will be forced to appeal cases in which there was active resistance, and yet immunity was denied.

III. CERTIORARI SHOULD BE GRANTED TO CORRECT ERRORS IN THE SIXTH CIRCUIT'S OPINION.

A. The Sixth Circuit Ignored Deliberate, Clear, And Unequivocal Admissions.

The Sixth Circuit dismissed this appeal on the grounds that there is an alleged factual dispute, and hence, they lack jurisdiction to decide this qualified immunity appeal. [App. A, p. 3.] However, this is simply incorrect.

The Petitioner is not arguing facts; rather, he merely asks the Court to credit Perez' own testimony. Petitioner relies only upon undisputed facts for this appeal.

The Sixth Circuit failed to rely upon Perez's testimonial admissions about refusing to surrender and continuing to actively resist, but instead only footnoted them.[2] [App. A, p. 3.]. Their refusal to do so is puzzling and incomprehensible. Perez's admissions take the active resistance and/or evading by flight issues of the realm of disputed fact.

It bears repeating that has Perez admitted, under oath, that "I wasn't going to surrender." Later in her deposition, she confirmed that her intent was to proceed across Meader Street - which was in a northerly direction, further toward downtown, and in the opposite direction from the officers who were approaching her on foot from the south.

Perez's twin admissions are deliberate, clear, and unequivocal statements of fact. She was asked simple questions that she understood. Her responses are unambiguous. Perez stands by these statements, and has never recanted or retracted them. Her answers were made during a judicial proceeding - a discovery deposition. These are concrete facts that were squarely within her personal knowledge. She knew her intentions and has clearly expressed them.

Admissions made during a deposition, absent exceptional circumstances, have been held to be binding on the parties. *Cadle Co. II, Inc. v. Gasbusters Production I Ltd. Partnership,* 441 Fed. Appx. 310, 313 (6th Cir. 2011); *Maynard v. Brewer,* No. 7:81-cv-82 WL 16743 at 1 (6th Cir. 1986)(a blatant judicial admission by a Kentucky plaintiff in his deposition that a jailer did

[2] The panel fails to cite *Bennett, Thomas, Hagans,* or *Cockrell,* which represent the clearly established law.

not assault him, absent exceptional circumstances was binding on the parties).

Perez's admissions establish facts - she was actively resisting and still fleeing. Once those facts are established, then the Sixth Circuit should have found that Patrick's use of a taser was objectively reasonable and that he was entitled to qualified immunity.

The Sixth Circuit incorrectly stated, "And in this appeal, the facts are everything. So we lack jurisdiction." [App. A, p. 2] However, there is no factual dispute. This panel improperly ignored the uncontroverted testimonial evidence of non-surrender. Since they were only presented with a question of law, they indeed had proper jurisdiction. *Mitchell v. Forsyth*, 472 U. S. 511, 530 (1985).

B. The Sixth Circuit Relied Upon An Unreasonable Inference About Perez Allegedly Raising Her Hands An Instant Before Being Tased.

In her Fourth Amended Complaint, pro se, which Perez handwrote on June 10, 2020,[3] she says that she "[Q]uit running and raised my hands." [App. B, p. 14] The district court drew an inference from this unsworn statement that it could possibly be interpreted as an act of surrender. [App. B, p. 14]

The Sixth Circuit deferred to this inference drawn by the district court, and stated that they were "bound by that conclusion." [App. A, p. 3, footnote 1] The Sixth

[3] Perez subsequently testified in her discovery deposition on February 20, 2021, roughly eight (8) months later, never mentioning raising her hands despite being asked numerous questions about all aspects of this incident.

Circuit is not so bound, and their reliance upon this inference is both unreasonable and improper.

A court's inference taken from the evidence must be reasonable. To have evidentiary value, the inference must be considered "reasonable," meaning it must be more than surmise or conjecture, and must be based on probabilities, not mere possibilities. *Aguimatang v. California State* Lottery, 234 Cal.App.3d 769 (Cal. App. 1991). This inference is indeed only surmise and conjecture and it is based solely on mere possibility.

(1) This Inference Is Unreasonable And Contradictory.

This inference directly contradicts Perez's sworn testimony. Perez never said under oath that she raised her hands, despite having the opportunity to do so during her discovery deposition wherein she was asked repeatedly to describe what occurred during this incident with the police. Instead, she clearly and unequivocally denied that she was surrendering and advised that her intent was to continue her flight.

(2) This Inference Is Unnecessary.

The district court improperly created an inference, and hence a factual dispute, where there was none. Perez provided first person testimonial evidence about her intent. We do not have to infer her intent - she tells us that she was not giving up.

This judicial creation of an inference, in hindsight, is exactly the kind of "Monday-morning quarterbacking" that the law prohibits in a qualified immunity analysis. In *Graham*, the Supreme Court denounced such hindsight analysis by courts as follows:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's

> chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

Id. at 396-397. The Sixth Circuit has since re-iterated this hindsight principle, stating as follows:

> A court should avoid substituting personal notions of proper police procedures for **the instantaneous decisions of officers at the scene,** and should never allow the theoretical, sanitized world of our imaginations to replace the dangerous and complex world policemen face every day, as what constitutes 'reasonable' action may seem quite different to someone facing a possible assailant that to someone analyzing the question at leisure.

Smith v. Frelund, 954 F.2d 343, 347 (6th Cir. 1992). [emphasis added] The Seventh Circuit adds that the Court's focus should be officer-centric - "to see what they saw and hear what they heard." *Abbott v. Sangamon County, Ill.*, 705 F.3d 706, 714 (7th Cir. 2013). A police officer's split-second decisions in the heat of the moment are not to be judged in hindsight.

However, that is precisely what the Sixth Circuit does. This panel's opinion states, "But Perez claims she stopped, raised her hands, and surrendered **the instant** before Officer Patrick tased her. [App. A, p. 3] [emphasis added] Even if this was true, police officers cannot be expected to refrain if a subject only decides to stop "an instant" before being tased. This was a tense, dangerous, rapidly-evolving situation. As the

Sixth Circuit noted, Perez "twisted and wove her way" on a path the length of two football fields through the middle of downtown Campbellsville. [App. A, p. 2]

Patrick cannot be held to a standard where he is required to read a subject's mind "the instant" before using force. Yet, that is the standard imposed by the Sixth Circuit here.

In another puzzling statement, the Sixth Circuit states, "Another dispositive question is whether, at the time Officer Patrick fired his taser, every reasonable officer would have *perceived* Perez as no longer actively resisting arrest. Then - and only the - should qualified immunity be denied." [App. A, p. 3] There is no other dispositive question.

Also, both Simpson and Patrick subjectively perceived the same thing. Their perceptions were in accordance with Perez's testimony. They both perceived that Perez was still evading and was continuing her flight. Perez's testimony ratifies the officers' perceptions. As a matter of law, there is no factual dispute about what the Sixth Circuit said was a dispositive question.

(3) There Is No Other Proof Supporting This Inference.

Perez's pro se statement in her Fourth Amended Complaint is an isolated statement. She never mentions raising her hands during her discovery deposition. Patrick never mentions seeing her raising her hands. No other witness says they saw her raise her hands.

This inference is further unsupported by any physical evidence. Perez was shot in the back of her right shoulder and the back of her right hip. This physical evidence is compelling proof that she had not turned around to surrender. If Perez had thrown her hands

up to surrender, she likely would have also turned around to face the officers. The fact that she was tased in the back is probative that she was still on the run.

C. The Sixth Circuit Relied Upon A Contradictory, Unsworn, Handwritten, and Pro Se Statement Over Sworn Testimony.

The Sixth Circuit's opinion is improper because it hinges on an unsworn, handwritten statement in Perez's pro se Fourth Amended Complaint, rather than her deposition testimony, taken under oath and while she was represented by counsel. In doing so, this panel ignores the best evidence and erodes *Graham*.

If a plaintiff testifies, under oath, that she was not surrendering, was actively resisting, and was continuing to evade by flight, then under the collapsed *Graham* test, that sworn testimony should control the issue. Perez's unsworn, handwritten statement in her Fourth Amended Complaint, pro se, cannot be given more weight than her sworn deposition testimony. Otherwise, parties and their counsel could simply plead their way around summary judgment and avoid damaging deposition admissions.

In *Bard v. Brown County, Ohio*, No. 1:15-cv-00643 WL 11357533 (S.D. Ohio 2018), the testimony of Brown County jail officers were unsworn statements deemed akin to attorney argument or to expert witness opinion testimony, and thus they were not evidence that could be used to defeat a properly supported summary judgment motion. *Id*. at 4.

D. The Sixth Circuit Oddly Found That Patrick Could Assert Immunity Later.

In denying qualified immunity to Patrick, Judge Thapar makes the following unusual statement:

> But this isn't the last chance for Officer Patrick to assert qualified immunity. If, after Perez presents her evidence at trial, it's clear that either (a) Perez was actively resisting arrest or (b) a reasonable officer wouldn't have recognized that Perez had stopped actively resisting arrest, the district court must grant qualified immunity. And, of course, the jury may as well.

[App. A, p. 3, footnote 1] This quote seems to mis-state the law regarding qualified immunity. First, it is undisputed now that Perez was actively resisting. Secondly, it is also clear now that no reasonable officer would not have recognized that Perez was still actively resisting. Thirdly, Patrick does not have to wait until the directed verdict stage at trial to assert his immunity defense. By its very nature, qualified immunity involves the right not to have to undergo trial.

In *White v. Pauly*, 137 S. Ct. 548 (2017), the Supreme Court noted their recent trend to expand the application of qualified immunity to allow officers to not have to endure trial, stating, in a per curiam opinion, that qualified immunity is important to society as a whole and because it is an immunity from suit, its protections are effectively lost if a case is erroneously permitted to go to trial. *Id*. at 551-552; citing *Pearson v. Callahan,* 555 U.S. 223, 231 (2009).

Judge Thapar's statement about Patrick asserting immunity defenses in the future at trial misses the

very purpose of immunity - to not have to undergo the time, expense, and stress of trial in the first place.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH THE CLEARLY ESTABLISHED LAW.

Unfortunately, this particular panel mis-applied the collapsed *Graham* test and ignored years of clearly established case law regarding qualified immunity. Their opinion is an outlier that if left to stand, would create confusion and uncertainty for law enforcement personnel regarding the proper parameters of taser use. Police work has now become uncertain.

The Sixth Circuit failed to cite any case stating that tasing an actively resistant subject is unconstitutional. In fact, there is no such Sixth Circuit case. Accordingly, there was no law that put Patrick on notice that his conduct was unconstitutional.

Qualified immunity shields government officials from personal liability for civil damages insofar as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982); *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009). The essence of this requirement is notice.

Justice Scalia wrote that the law must be "sufficiently clear such that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

A. *Bennett v. Young*, WL 1575828 (W. D. Ky. 2018).

This case was decided on March 30, 2018, thirty-one days before Patrick tased Perez on May 1, 2018. As such, *Bennett* reflects the clearly established Sixth Circuit law at the time of this incident.

In *Bennett*, the plaintiff Eugene Bennett began "barraging the officers with profanity, actively pacing around the vehicles, and refusing [officer] Young's repeated commands to leave." *Id*. at 1. He told them "it would take more than you three sons-of-bitches to take me to jail." *Id*. Despite the officers' attempts to de-escalate the situation, Bennett's behavior took on a physical tone as he clenched his fists, swayed his shoulders, wrung his hands, swung and twisted his arms, was "huffing and puffing," and approached Young as if eager to fight. *Id*.

Young gave Bennett a specific warning that he was going to be tased if he did not cease his aggression. *Id*. After issuing this final warning, Young deployed his taser in probe mode from six feet away and the probes struck Bennett in the front of his torso and left arm. *Id*. at 2.

Bennett later filed a civil suit against officer Young alleging excessive force. *Id*. Young and the city moved for summary judgment. *Id*. Judge Hale granted qualified immunity to the officers, cited *Thomas v. City of Eastpointe,* and found that Bennett's profanity and insinuation of a struggle constituted active resistance which justified taser use. *Id*. at 4. The Court added that "active resistance exists where an individual refuses to comply with an officer's orders and that refusal is coupled with 'some outward manifestation' that suggests conscious defiance." *Id*. at 4.

B. *Thomas v. City of Eastpointe,* 715 Fed. Appx. 458 (6th Cir. 2017), *unpublished.*

In *Thomas*, police officers arrived and repeatedly told Thomas and Clements to get on the ground, and both men ignored the officers' commands. *Id*. at 459. Officer Barr thought Thomas might be armed and tased him without giving a prior warning. *Id*. Thomas filed a civil suit against Barr and others claiming excessive force. *Id*. The district court denied the defendants were entitled to qualified immunity, and Barr appealed. *Id*.

On appeal, the Sixth Circuit, Judge Thapar, cited *Cockrell* and reversed, finding that even if the suspect was not verbally or physically aggressive, when he ignored police commands and walked away that alone justified taser use and entitled the officers to qualified immunity. *Id*. at 460-462.

Judge Thapar's opinion in *Thomas* is inconsistent with his opinion in this case. Perez's actions were more egregious than those exhibited by Thomas. Thomas did not hear the officers and did not endanger the officers, whereas Perez heard the officers telling her to stop, deliberately disobeyed them, and then led them on a wild goose chase for 660 feet through the streets of downtown Campbellsville, endangering herself, the officers, and the public.

C. *Rudlaff v. Gillispie*, 791 F.3d 638 (6th Cir. 2015).

In *Rudlaff*, Lawrence Carpenter resisted arrest and refused to obey officer commands so an officer deployed his taser which incapacitated Carpenter so he could be handcuffed. *Id*. Carpenter sued the officers alleging excessive force. *Id*. at 640-641. The Sixth Circuit found that it is not excessive for the police to tase

someone, even multiple times, when the suspect is actively resisting arrest. *Id*. at 639; 641. They employed the collapsed *Graham* test, stating "a simple dichotomy thus emerges in taser cases: When a suspect actively resists arrest, the police can use a taser to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot." *Id*. at 642.

The *Rudlaff* opinion emphasized that "Carpenter conceded that he resisted arrest," and when someone resists arrest, the police may constitutionally use force to ensure compliance, so a jury had nothing left to decide. *Id*. at 644. Likewise, Perez concedes that she resisted arrest, and in fact, she pled guilty to that charge. This panel's opinion cannot be reconciled with *Rudlaff*.

D. *Hagans v. Franklin Co. Sheriff's Office*, 695 F.3d 505 (6th Cir. 2012).

In *Hagans*, Patrick Hagans fled from officers and when they caught him, there was a scuffle before Hagans laid down on the pavement and locked his arms under his body refusing to be handcuffed. *Id*. at 509. An officer tased Hagans 4-6 times while on the ground so they could handcuff him. *Id*. Hagans later died, and his estate sued the officers alleging excessive force. *Id*. at 508.

The Sixth Circuit held that tasing an actively resistant suspect 4-6 times was not excessive and that "no case in any circuit held that officers used excessive force by tasing suspects who were actively resisting arrest, even though many of them, like Hagans, were suspected of innocuous crimes, posed little risk of escape, and had not yet physically harmed anybody." *Id*. at 509-11. The Court discussed that "[T]asers carry 'a significantly lower risk of injury than physical force' and that the vast majority of individuals subjected to

a taser - 99.7% - suffer no injury or only mild injury." *Id*. at 510.

E. *Cockrell v. City of Cincinnati,* 488 Fed. Appx. 491 (6th Cir. 2012).

In *Cockrell*, Keith Cockrell fled from police. *Id*. at 492. After a foot chase, officer Hall deployed his taser and the darts, "temporarily paralyzed Cockrell, causing him to crash headlong into the pavement and to sustain lacerations and abrasions to his face, chest, and arms." *Id*. at 492. Cockrell filed suit alleging that Hall used excessive force. *Id*.

The district court denied Hall was entitled to immunity, but the Sixth Circuit reversed, and framed the issue as "whether a misdemeanant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right not to be tased." *Id*. at 495.

The Sixth Circuit found flight alone justified taser use, stating, "At no point did Cockrell use violence, make threats, or even disobey a command to stop. He simply fled. Yet flight, non-violent though it may be, was held to still be a form of resistance." *Id*. at 496. The use of a taser against a non-violent, fleeing misdemeanant did not violate clearly established Fourth Amendment law and immunity applied. *Id*. at 498. Again this Sixth Circuit panel's opinion cannot be reconciled with *Cockrell*.

In summary, a line of cases spanning from 2012-2018 represent clearly established Sixth Circuit law. Under the collapsed *Graham* test, using a taser on an actively resistant subject is constitutional, objectively reasonable, and entitles the officer to qualified immunity. As of May 1, 2018, there was no law putting Patrick on notice that he could not use a taser on Perez, a non-

compliant arrestee who was actively resisting. Patrick's use of a taser was constitutional under clearly established Sixth Circuit law at the time of this incident.

V. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS NO CONSTUTIONAL VIOLATION PRESENT HERE.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." *U.S. Const. amend. IV*. Patrick is further entitled to qualified immunity because he did not violate the Fourth Amendment.

The Sixth Circuit takes a "segmented approach" to excessive force cases under the Fourth Amendment, focusing on the moments immediately preceding the use of force, rather than the adequacy of planning or time spent thinking through the problem. *Rucinski v. County of Oakland*, 655 Fed. Appx. 338, 342-343 (6th Cir. 2017). Thus, the key moment is the time when force was applied. In this case, that was as Perez was preparing to dart into Meader Street.

Timing and context are important. Any alleged raising of her hands by Perez admittedly happened within an instant of Patrick's pulling the trigger of his taser. As he was running and chasing her, Patrick was forced to make quick decisions in a tense, dangerous, rapidly-evolving situation. There is no proof that he had any significant time to deliberate.

A police officer's split-second decisions in the heat of the moment are not to be judged in hindsight. Patrick could not read Perez's mind, and she verbalized nothing indicating an intent to surrender. For the sake of argument, even if Perez had raised her hands in

surrender an instant before being tased, Patrick's use of force was nevertheless objectively reasonable.

Constitutionally, the issue is not whether or not Perez ever actually raised her hands or not; rather, the issue is whether she ceased actively resisting. Perez's sworn testimony is that she was still actively resistant.

Active resistance is further undisputed because Perez's police practices expert witness says that she engaged in active resistance. Both Perez, and her liability expert, stipulate to active resistance.

Perez actively resisted arrest by fleeing, by disobeying multiple officer commands, and by putting herself, the officers, and members of the public in danger. Patrick shot her one time with a taser for five seconds. Patrick's use of force prevented Perez from running into traffic and allowed him to arrest and handcuff her. He applied no gratuitous force. His use of minimal, non-deadly force to apprehend an actively resistant felon was objectively reasonable. Patrick ended this incident before she dangerously and foolishly ran into oncoming traffic, risking injury to herself, the officers, and nearby motorists.

In fact, the Sixth Circuit has found "active resistance" for far more benign conduct, such as where a perpetrator merely threatens officers, merely disobeys officers, or simply refuses to be handcuffed. *Thomas,* 715 Fed. App'x 458 at 2. In fact, verbal hostility alone may constitute active resistance where it is "the final straw in a series of consciously-resistive acts." *Eldride v. City of Warren*, 533 Fed. App'x 529, 534 (6th Cir. 2013).

Lastly, for the sake of argument, even if Perez had raised her hands in surrender, there is no proof Patrick saw or knew that. Even if he failed to see it, good faith

mistakes of officers are still protected by the doctrine of qualified immunity.

CONCLUSION

Over the past few years, the use of tasers have become more common for police officers and jail personnel. Tasers are being used by thousands of law enforcement personnel nationwide. As the use of tasers becomes more prevalent, it is high time that this Court accept a taser case to clarify Fourth Amendment law and to resolve the conflicting opinions from various federal judicial circuits. Fourth Amendment taser cases from various federal judicial circuits are largely analyzed inconsistently, and these various and scattered opinions need to be harmonized.

This case presents the perfect vehicle to establish a key precedent. This case could define the parameters of Fourth Amendment use of force law in taser cases. One way to do that would be to adopt the Sixth Circuit's collapsed *Graham* test. As its name suggests, this test is consistent with *Graham* and has proven to be effective for many years. It is also logical, simple, and easy for officers to understand. It reduces ambiguity and creates certainty.

Under this test, if there is active resistance, taser use is proper; if there is passive resistance, than no taser should be used. The issue of active resistance is indeed "the whole ballgame."

Implementation of this test is an issue of national importance. It would simplify the legal analysis for lower court judges, attorneys, members of law enforcement, police trainers, educators, and for members of the general public. Having a unform test would enhance the effectiveness of law enforcement and would help to reduce appeals.

Turning to this particular case, this Sixth Circuit panel's opinion is an outlier. It ignores years of clearly established law such as *Bennett, Thomas, Rudlaff, Hagans,* and *Cockrell*, which hold that a police officer can tase an actively resistant or evading subject without violating the Fourth Amendment. If left to stand, this panel's opinion would create confusion, uncertainty, and would call into question the viability of the Sixth Circuit's collapsed *Graham* test that has been effective for over a decade.

The panel's opinion merely footnoted Perez's admissions of her intent not to surrender. These deliberate, clear, and unequivocal admissions, about her intent at the critical moment preceding the use of force, makes the issue of active resistance/evading by flight academic. The brilliant words of Winston Churchill in 1940 apply here, as follows:

> The British Empire and the French Republic, linked together in their cause and in their need, will defend to the death their native soil, aiding each other like good comrades to the utmost of their strength. Even though large tracts of Europe and many old and famous States have fallen or may fall into the grip of the Gestapo and all the odious apparatus of Nazi rule, we shall not flag or fail. We shall go on to the end, we shall fight in France, we shall fight on the seas and oceans, we shall fight with growing confidence and growing strength in the air, we shall defend our Island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the

> fields and in the streets, we shall fight in the hills; we shall never surrender...[4]

Like Churchill during World War II, Perez was not going to surrender. There is no dispute of fact regarding this issue, and hence, the Sixth Circuit had jurisdiction to decide this interlocutory appeal.

Finally, it goes without saying that police use of force issues and the doctrine of qualified immunity are hot-button issues in our current culture. Thus, as a matter of public policy, it is imperative that the contours of this area of Fourth Amendment law be crystal clear. Police officers need to know what they can, and cannot do without violating the Constitution. That includes the specific use of force issue here - whether an officer is immune when he/she tases an actively resistant or evading subject.

Respectfully, certiorari should therefore be granted by this Court (1) to harmonize a circuit conflict in Fourth Amendment taser cases, (2) to establish a key precedent by adopting the collapsed *Graham* test nationwide to analyze Fourth Amendment taser cases, (3) to clarify and achieve uniformity and consistency in this nationally-important area of constitutional law, and (4) to correct and reverse this Sixth Circuit panel's erroneous opinion that denies qualified immunity to Patrick who merely tased and actively resistant subject as he had been taught and trained to do.

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[4] Winston Churchill, excerpt from "We Shall Fight On The Beaches," House of Commons Speech, June 4, 1940.

Respectfully submitted,

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February 12, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5193

LARHONDA DUNLAP PEREZ,

Plaintiff-Appellee,

v.

BRYAN SIMPSON, Officer,

Defendant,

JOSH PATRICK, Officer,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Kentucky at Bowling Green.
No. 1:18-cv-00064—Gregory N. Stivers, District Judge.

Decided and Filed: October 11, 2023

Before: KETHLEDGE, THAPAR, and MATHIS,
Circuit Judges.

COUNSEL

ON BRIEF: Jason Bell, BELL, HESS & VAN ZANT, PLC, Elizabethtown, Kentucky, for Appellant. Aaron Bentley, Louisville, Kentucky, for Appellee.

OPINION

THAPAR, Circuit Judge. When Officer Josh Patrick tried to arrest LaRhonda Perez, she ran. After a chase, Perez suddenly stopped at a street, and Officer Patrick tased her. Perez sued, alleging Officer Patrick used excessive force. The district court denied him qualified immunity. Because Officer Patrick's appeal rests on a factual dispute, we dismiss for lack of jurisdiction.

I.

Officers Bryan Simpson and Josh Patrick drove to LaRhonda Perez's house to execute seven felony arrest warrants. Officer Simpson approached Perez behind the house. After a brief exchange, Perez bolted.

Officer Patrick and Perez agree on most of what happened next. Perez twisted and wove her way through the neighborhood—including across a two-way street—in a chase the length of two football fields. While running, Officer Patrick ordered her to stop. Perez didn't listen. So Officer Patrick fired his taser. He missed, and Perez kept fleeing. She headed toward another two-lane street, intending to cross. But a row of moving cars stood in her way, so she stopped.

Here's where the accounts diverge. Perez alleges she raised her hands and stood still, expecting to be handcuffed. Officer Patrick claims she didn't raise her hands and instead took off running. Both agree, however, that at that moment, Officer Patrick made the split-second decision to fire his taser again. This time, it connected. Perez fell forward and hit her chin on the ground, fracturing her jaw. She later pled guilty to evading police and resisting arrest.

Perez filed suit under 42 U.S.C. § 1983, alleging Officer Patrick used excessive force when he fired his

taser. The district court denied Officer Patrick's request for summary judgment on qualified immunity grounds. This appeal follows.

II.

We start and end with our jurisdiction. Typically, we lack jurisdiction to review a denial of summary judgment. *See* 28 U.S.C. § 1291. We may, however, review a denial of qualified immunity, but only if it "turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). And in this appeal, the facts are everything. So we lack jurisdiction.

We briefly explain why. When analyzing excessive force, our circuit often sorts taser cases based on "[a] simple dichotomy"—was the suspect actively resisting or not? *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015). Fleeing from officers is active resistance. *See VanPelt v. City of Detroit*, 70 F.4th 338, 340 (6th Cir. 2023). And tasing an actively resisting suspect is not excessive force. *Rudlaff*, 791 F.3d at 642.

It's undisputed that, seconds before Officer Patrick fired his taser, Perez was actively resisting. But Perez claims she stopped, raised her hands, and surrendered the instant before Officer Patrick tased her.[1] Officer

[1] In her deposition, Perez says she didn't intend to surrender. R. 89-1, Pg. ID 548 ("I wasn't going to surrender."). But under circuit precedent, we must accept both the facts as the plaintiff alleges and the inferences drawn by the district court. *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). *But see Romo v. Largen*, 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring). Because the district court inferred that Perez surrendered, we are bound by that conclusion. But this isn't the last chance for Officer Patrick to assert qualified immunity. If, after Perez presents her evidence at trial, it's clear that either (a) Perez was actively resisting arrest or (b) a reasonable officer wouldn't have recognized that Perez had stopped actively resisting arrest, the

Patrick disagrees. The district court denied qualified immunity based on this factual dispute. And the parties' briefing on appeal rehashes these same facts.

But in fast-paced, high-intensity situations like this one, the "was she still resisting?" question is not the whole ballgame. Our Fourth Amendment inquiry focuses on what was "knowable" to a reasonable officer. *White v. Pauly*, 580 U.S. 73, 77 (2017). Another dispositive question is whether, at the time Officer Patrick fired his taser, every reasonable officer would have *perceived* Perez as no longer actively resisting arrest. Then—and only then—should qualified immunity be denied.

But answering that question requires resolving factual disputes. And because we can't resolve those disputes on appeal, we dismiss this appeal for lack of jurisdiction and remand.

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district court must grant qualified immunity. And, of course, the jury may as well.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5193

LARHONDA DUNLAP PEREZ,

Plaintiff-Appellee,

v.

BRYAN SIMPSON, Officer,

Defendant,

JOSH PATRICK, Officer,

Defendant-Appellant.

Before: KETHLEDGE, THAPAR, and MATHIS,
Circuit Judges.

On Appeal from the United States District Court for the Western District of Kentucky at Bowling Green

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JUDGMENT

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the case is DISMISSED for lack of jurisdiction and REMANDED to the district court for resolution of the factual disputes in this case.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

Civil Action No. 1:18-CV-00064-GNS-HBB

LaRHONDA DUNLAP PEREZ

Plaintiff

v.

OFFICER BRYAN SIMPSON; and
OFFICER JOSH PATRICK

Defendants

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motions for Additional Pages (DN 87), Summary Judgment (DN 91), and to Exclude Plaintiff's Expert (DN 92), and Plaintiff's Motion to Exclude an Opinion by Defendants' Expert (DN 88). The motions are ripe for adjudication.

I. SUMMARY OF THE FACTS

In May 2018, Defendants Bryan Simpson[1] ("Simpson") and Josh Patrick ("Patrick"), both police officers employed by the Campbellsville Police Department, approached Plaintiff LaRhonda Dunlap Perez ("Perez")

[1] The Fourth Amended Complaint asserts claims against "Bryan Simpson," while the Answer identifies him as "Bryon Simpson." (4th Am. Compl. 2, DN 27; Defs.' Answer 1, DN 36). For clarity, the Court will use "Bryan" to align with the pleadings.

at her home regarding several outstanding felony arrest warrants. (4th Am. Compl. 4). Perez fled, with Simpson and Patrick in pursuit. (4th Am. Compl. 4). After a brief flight, Perez allegedly stopped and raised her hands in surrender. (4th Am. Compl. 4). Nevertheless, Patrick deployed his taser, which struck Perez in the back. (4th Am. Compl. 4). The resulting electrical shock caused Perez to hit her head on asphalt, which rendered her unconscious and knocked out several teeth.[2] (4th Am. Compl. 4-5).

Perez initiated this action pursuant to 42 U.S.C. § 1983 asserting claims against Simpson and Patrick for excessive force and failing to provide medical care, in violation of the Fourth and Fourteenth Amendments, respectively. (Compl., DN 1; 4th Am. Compl.). Perez now abandons all claims except for the Fourth Amendment excessive force claim against Patrick for use of the taser.[3] (Pl.'s Resp. Defs.' Mot. Summ. J. 25 n.214, DN 99).

II. JURISDICTION

The Court exercises federal question jurisdiction over the action. *See* 28 U.S.C. § 1331.

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[2] Patrick previously deployed his taser, but missed, while pursuing Perez. (Patrick Dep. 57:5-24, Dec. 9, 2021, DN 89-3).

[3] After a plaintiff abandons a claim, courts routinely to grant summary judgment as a matter of course. *See Alexander v. Carter*, 733 F. App'x 256, 261 (6th Cir. 2018); *Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013). As such, the motion for summary judgment is granted on both claims under the Fourteenth Amendment and on the Fourth Amendment claim against Simpson.

III. DISCUSSION

A. Motions Regarding Expert Witnesses

Perez and Patrick filed motions to exclude opinions by expert witnesses. (Pl.'s Mot. Exclude, DN 88; Defs.' Mot. Exclude, DN 92). Perez moves to exclude one of several opinions by Patrick's expert, Greg Meyer ("Meyer"); Patrick seeks the wholesale exclusion of Perez's expert, William Dee Fryer ("Fryer"). (Pl.'s Mot. Exclude 2-3; Defs.' Mot. Exclude 6-8). Patrick insists that Meyer's contested opinion rebuts opinions offered by Fryer, so both motions are ultimately predicated on the admissibility of Fryer's opinions. (Defs.' Resp. Pl.'s Mot. Exclude 1-2, DN 94).

Fed. R. Evid. 702 governs expert witness testimony, with an expert's opinion being admissible if: (1) the expert is qualified by knowledge, skill, experience, training, or education; (2) the testimony is relevant, so it assists the jury in understanding the evidence or determining a fact in issue; and (3) the testimony is reliable. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (quoting Fed. R. Evid. 702). The testimony must also be "relevant to the task at hand." *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997) (internal quotation marks omitted) (citation omitted). Thus, courts act as gatekeepers to ensure conformity with these requirements. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).[4]

The proffering party bears the burden of establishing the admissibility of expert testimony, and "[a]ny

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[4] The gatekeeping obligations in *Daubert* only applied to "scientific knowledge," but they were later extended to include "testimony based on 'technical' and 'other specialized' knowledge." *Daubert*, 509 U.S. at 592; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 152 (1999) (citing Fed. R. Evid. 702).

doubts . . . should be resolved in favor of admissibility." *Commins v. Genie Indus., Inc.*, No. 3:16-CV-00608-GNS-RSE, 2020 U.S. Dist. LEXIS 43123, at *8 (W.D. Ky. Mar. 12, 2020) (alteration in original) (quoting *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001); *In re E.I. Du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 337 F. Supp. 3d 728, 739 (S.D. Ohio 2015)). The "rejection of expert testimony is the exception, rather than the rule," as these gatekeeping obligations should not "replace the traditional adversary system . . . [or] the jury within the system." *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 530 (quoting Fed. R. Evid. 702 advisory committee's notes to the 2000 amendments); *Rogers v. Detroit Edison Co.*, 328 F. Supp. 2d 687, 691 (E.D. Mich. 2004) (citing *Daubert*, 509 U.S. at 596). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted).

Perez timely disclosed Fryer as an expert witness and proffered his report. (Pl.'s Expert Disclosure 1, DN 78; Pl.'s Expert Disclosure Ex. 1, DN 78-1 [hereinafter Fryer Report]). Fryer details decades of police experience, including serving as a police officer; an instructor with, and as deputy director of, the Kentucky Police Corps; and an instructor with the Kentucky Department of Criminal Justice Training. (Fryer Report 1). Fryer indicated he was certified in thirteen areas, including use of force, and previously testified as an expert regarding use of force. (Fryer Report 1).

Patrick contends Fryer is unqualified to be an expert as he has not served as a police officer since 1998, has never been trained or certified with tasers, nor has he published articles about their use. (Defs.' Mot. Exclude

7). Patrick alleges Fryer's knowledge and experience is outdated and overbroad, thereby lacking the required specialized knowledge about tasers and their proper use. (Defs.' Mot. Exclude 6 (citing *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004); *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994))). Patrick's interpretation of *Champion* and *Berry* ultimately requires an expert to be specialized in the exact weapon used.

In *Berry*, the Sixth Circuit determined an expert witness was unqualified to testify concerning the city's policy on use of force, as his expertise in "police policies and practices" was too broad to qualify as specialized knowledge. *Champion*, 380 F.3d at 907-08 (citing *Berry*, 25 F.3d at 1348-54). Moreover, the witness had no credentials demonstrating expertise or training in police activities. *Id.* at 908. In *Champion*, however, the Sixth Circuit found the field of criminology to be sufficient for an expert to testify about excessive force, especially when his credentials were "more extensive and substantial." *Id.* at 908-09. Neither case supports Patrick's suggested standard.

Additionally, this Court has declined to exclude Fryer as an expert, albeit on a different but related subject, and reiterated:

> The law does not require that an admissible expert have every conceivable qualification, only that his background provides a proper foundation for testimony which will 'assist the trier of fact in understanding and disposing of issues relevant to the case.' . . . The law does not require [an expert to] be the most qualified expert conceivable . . . ."

Browning v. Edmonson Cnty., No. 1:18-CV-00057-GNS-HBB, 2020 U.S. Dist. LEXIS 145787, at *49 (W.D.

Ky. Aug. 13, 2020) (alteration in original) (quoting *Faughn v. Upright, Inc.*, No. 5:03-CV-000237-TBR, 2007 U.S. Dist. LEXIS 19341, at *4, *10 (W.D. Ky. Mar. 15, 2007)), *aff'd in part and rev'd in part on other grounds*, 18 F.4th 516 (6th Cir. 2021); *see also Lee v. Metro. Gov't of Nashville & Davidson Cnty.*, 596 F. Supp. 2d 1101, 1122 (M.D. Tenn. 2009) (noting that despite the expert's limited taser experience, "based on his experience, he is capable of understanding how a taser basically works and whether a certain type of application would be unreasonable."); *accord Morrison v. Stephenson*, No. 2:06-cv-283, 2008 U.S. Dist. LEXIS 12308, at *16 (S.D. Ohio Feb. 5, 2008) ("The fact [an expert] has not used or been trained in the use of a TASER is not dispositive of his knowledge regarding use of force."). "Whether [an expert's] expertise is dated or . . . too limited go[es] to the weight of his testimony, not its admissibility." *Lee*, 596 F. Supp. 2d at 1122.

Patrick also maintains Fryer does not utilize reliable principles and methods but offers only personal opinions. (Defs.' Mot. Exclude 8). As noted, the proposed testimony must be "relevant to the task at hand." *Smelser*, 105 F.3d at 303 (internal quotation marks omitted) (citation omitted). "[T]he court is to examine 'not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.'" *Id.* (quoting *Berry*, 25 F.3d at 1351). "[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation," which is "premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592 (citations omitted). Still, "a witness is not an expert simply because he claims to be." *Rose v. Truck Ctrs., Inc.*, 388 F. App'x 528, 533 (6th Cir. 2010) (citation omitted).

Fryer testified that he reviewed the police department's policies and procedures and general orders, specifically those discussing foot pursuits and resistance responses, which are drafted to align with relevant caselaw. (Fryer Dep. 33:23-35:2, Feb. 8, 2022, DN 89-5). Moreover, Fryer reviewed the taser training materials. (Fryer Report 6). Fryer's report details considerations made during a pursuit to determine whether and when certain weapons or techniques should be used, such as whether the suspect's identity is known, the nature of the alleged crimes, the risk of harm to the suspect, the level of threat to the officers and community, and whether capture could be safely effected later. (Fryer Report 4); *cf. Graham v. Connor*, 490 U.S. 386, 396 (1989) (explaining that reasonableness "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." (citation omitted)). Considering the overlap between *Graham* and Fryer's report, his testimony is sufficiently reliable. Though Fryer's opinion embraces the issue of reasonableness, it could be helpful to the jury. *See Berry*, 25 F.3d at 1353 ("Although an expert's opinion may 'embrace[] an ultimate issue to be decided by the trier of fact[,]' the issue embraced must be a factual one." (alterations in original) (internal citation omitted)). Therefore, Patrick's motion to exclude is denied.

Relatedly, Perez moves to exclude an opinion from Meyer's report that tasers are "a generally effective, generally safer alternative to other types of force." (Pl.'s Mot. Exclude 2-3 (quoting Defs.' Expert Disclosure Ex. 1, at 11, DN 84-1 [hereinafter Meyer Report])). Perez contends that efficacy and safety are not relevant, only

whether Patrick's use of the taser was reasonable under the circumstances. (Pl.'s Mot. Exclude 2). Patrick maintains that Meyer's opinion responds to criticism by Fryer about tasers. (Defs.' Resp. Pl.'s Mot. Exclude 2).

Fryer testified that a taser is classified as an "intermediate weapon" on the "continuum of force", but that a taser is "one of the most harsh of the intermediate weapons" and "very volatile." (Fryer Dep. 35:6-36:3, 38:9-15). He reiterated that it is necessary for officers to consider the environmental conditions and type of surface when evaluating whether to deploy a taser. (Fryer Dep. 16:2-11). Fryer characterized Perez's post-taser fall as one where she "became a lawn dart," as she fell "face first into the street with no ability to break her fall . . . ." (Fryer Dep. 23:22-24). Fryer opined that the officers should have apprehended Perez by continuing the pursuit until she was caught and then subdue her through "Empty Hand Control techniques," but "[t]here was no indication . . . that this option was ever considered." (Fryer Report 4). Instead, Fryer stated that Patrick should have known his taser would result in serious injury, especially with Perez being in a roadway. (Fryer Report 5). Ultimately, Fryer disagreed that tasers reduced the risk of injury to officers and suspects. (Fryer Dep. 79:7-12).

Meyer's opinion contradicts Fryer's opinions and cites academic studies to bolster his opinion about a taser's safety and efficacy. (Meyer Report 11-13). When evaluating the degree of use of force, the reasonableness of an officer's actions also considers "whether the officer could have diffused the situation with less forceful tactics." *Palma v. Johns*, 27 F.4th 419, 432 (6th Cir. 2022) (citation omitted) (discussing the reasonableness for using deadly force). As discussed above, an officer may consider the risk of injury to the suspect

when weighing the best course of action to terminate a pursuit, and the efficacy of a taser in subduing a suspect with minimized injuries may impact that deliberation. (*See* Fryer Report 4). Such considerations are discussed in both experts' opinions and would assist the fact finder in deciding the merits of claims asserted by Perez. *See* Fed. R. Evid. 702. As such, Perez's motion to exclude is denied.

B. Defendants' Motion for Summary Judgment[5]

Patrick maintains that he is entitled to summary judgment by virtue of qualified immunity.[6] (Defs.' Mem. Supp. Mot. Summ. J. 18-29). Perez insists qualified immunity is inapplicable, as Patrick violated her clearly established rights and because qualified immunity did not exist at common law when 42 U.S.C. § 1983 was enacted. (Pl.'s Resp. Defs.' Mot. Summ. J. 13-24).

Summary judgment is proper "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

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[5] Patrick requests leave for additional pages in filing his summary judgment motion, which is uncontested. (Defs.' Mot. Leave, DN 87 (citing LR 7.1(d)). Perez has not contested the motion. Therefore, it is granted.

[6] Patrick also argues Perez's claim is barred by KRS 503.090, which details when the use of force is justified under Kentucky law. (Defs.' Mem. Supp. Mot. Summ. J. 30-31, DN 91-1). This statute is inapplicable, as Perez only asserts federal constitutional claims. (*See* 4th Am. Compl.); *cf. Browning*, 18 F.4th at 530-31 (considering KRS 503.090 when reviewing the denial of qualified immunity for a state law claim of battery). Moreover, this Court's jurisdiction is predicated on federal question, not diversity. *See* 28 U.S.C. §§ 1331, 1332; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). Thus, Patrick is awarded no relief.

law." Fed. R. Civ. P. 56(a). The moving party bears the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must present specific facts indicating a genuine issue of a disputed material fact essential to the case which must be presented to "a jury or judge to resolve the parties' differing versions of the truth at trial[;]" the evidence, however, is "not required to be resolved conclusively in favor of the party asserting its existence . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

This analysis is modified, however, when qualified immunity is involved. "[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see Graham*, 490 U.S. at 394 (concluding that excessive force claims are "most properly characterized as [] invoking the protections of the Fourth Amendment . . . ."); *Browning*, 18 F.4th at 524 ("To prevail on the excessive-force claim, [a plaintiff] must show that [the officer]'s use of the taser amounted to a violation of [her] clearly established constitutional rights." (citation omitted)). "Once invoked, the plaintiff must show that the defendant is *not* entitled to qualified immunity . . . [and] that those facts and inferences would allow a reasonable juror to conclude that the defendant violated a clearly established constitutional right." *Puskas v. Del. Cnty.*, 56 F.4th 1088, 1093 (6th Cir. 2023) (quoting *Williams v. Maurer*, 9 F.4th 416, 430-31 (6th Cir. 2021)). "Thus, a defendant is entitled to qualified immunity on summary

judgment unless the facts, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Id.* (citation omitted).

"The difficult part . . . is identifying the level of generality at which the constitutional right must be clearly established." *Cockrell v. City of Cincinnati*, 468 F. App'x 491, 497 (6th Cir. 2012) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)). Courts should "not [] define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). *Cockrell* lends guidance, as it asked "whether a misdemeanant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right not to be tased . . . ." *Cockrell*, 468 F. App'x at 495. Perez, however, knew the officers were attempting to serve were there about warrants and heard them yell at her to stop running. (Perez Dep. 32:12-34:25,52:14-54:1, 75:1-5, Aug. 12, 2021, DN 89-1). As such, the question is whether a felony suspect in flight from officers attempting to effect an arrest warrant and who disobeyed an official order, but subsequently stopped fleeing and surrendered,[7] had a clearly established right not to be tased.

"[A] plaintiff need not always put forth 'a case directly on point' to show that his claimed rights were indeed clearly established at the time of the conduct."

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[7] As discussed below, Perez alleges she stopped running and surrendered before Patrick deployed his taser, while Patrick contends that Perez had restarted her flight before deploying his taser. (4th Am. Compl. 4; Patrick Dep. 70:13-72:5). At this stage, the facts must be viewed in the light most favorable to Perez. *Puskas*, 56 F.4th at 1092.

Shumate v. City of Adrian, 44 F.4th 427, 449 (6th Cir. 2022) (quoting *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curium)). Rather, Perez must show "it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted" and "in light of pre-existing law, the unlawfulness [of the official action] must be apparent." *Id.* at 449-50 (alteration in original) (internal quotation marks omitted) (quoting *Palma*, 27 F.4th at 442; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). As the events in this case occurred on May 1, 2018, the right must be clearly established before then.

The Sixth Circuit has held it to be clearly established that "an officer cannot use injurious physical force to subdue a suspect that is not actively resisting arrest." *Meadows v. City of Walker*, 46 F.4th 416, 423 (6th Cir. 2022) (citation omitted); *cf. Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2015) ("Our cases firmly establish that it is *not* excessive force for the police to tase someone (even multiple times) when the person is actively resisting arrest." (citing *Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509 (6th Cir. 2012))). Moreover, "[c]ertainly by 2018 . . . it was clearly established in this circuit that an individual has a constitutional right not to be tased when he or she is not actively resisting." *Browning*, 18 F.4th at 525; *see id.* (collecting cases); *Brown v. Chapman*, 814 F.3d 447, 461-62 (6th Cir. 2016) ("[A]s of December 31, 2010, it was clearly established that tasering a non-threatening suspect who was not actively resisting arrest constituted excessive force."); *Shumate*, 44 F.4th at 450 (holding that the right to be free from physical force when one is not actively resisting the police was clearly established by 2019); *Gambrel v. Knox Cnty.*, 25 F.4th 391, 403 (6th Cir. 2022) ("[O]ur precedent had 'clearly establish[ed] the right of people who pose no

safety risk to the police to be free from gratuitous violence during arrest.'" (second alteration in original) (quoting *Shreve v. Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681, 688 (6th Cir. 2006))). This applies when "suspects were compliant or had stopped resisting." *Hagans*, 695 F.3d at 509-10; *see Rudlaff*, 791 F.3d at 642. Thus, Perez's right was clearly established by May 2018.

As for the constitutional violation prong, an officer's use of force is excessive, thereby violating the Fourth Amendment, if it is objectively unreasonable. *Jarvela v. Washtenaw Cnty.*, 40 F.4th 761, 764 (6th Cir. 2022) (quoting *Hicks v. Scott*, 958 F.3d 421, 435 (6th Cir. 2020)). This is "judged from the perspective of a reasonable officer on the scene," untainted by hindsight. *Graham*, 490 U.S. at 396. Courts consider the amount of force used and the factors detailed in *Graham*—(1) the severity of the crime at issue, (2) whether the suspect posed an immediate safety threat to the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight—when evaluating reasonableness.[8] *Id.*; *Jarvela*, 40 F.4th at 764 (quoting *Hicks*, 958 F.3d at 435). "Importantly, the inquiry is not whether *any* force was justified, but 'whether the [officer] "could reasonably use the *degree* of force"' that was employed." *LaPlante*, 30 F.4th at 579 (alteration in original) (quoting *Roell v. Hamilton Cnty.*, 870 F.3d 471, 483 (6th Cir. 2017)).

The Sixth Circuit has indicated that "there is not 'obvious cruelty inherent' in the use of tasers," but they do "involve a significant degree of force." *Cockrell*, 468

[8] This list is not exhaustive, however, as reasonableness is assessed by the totality of the circumstances. *LaPlante v. City of Battle Creek*, 30 F.4th 572, 579 (6th Cir. 2022) (quoting *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 404 (6th Cir. 2007)).

F. App'x at 497-98 (citation omitted). The use of a taser alone, however, does not presuppose that Patrick's actions were objectively unreasonable, as the Sixth Circuit has previously concluded that their use is not excessive force. *See, e.g.*, *id.* at 495 (collecting cases); *Rudlaff*, 791 F.3d at 642-43 (collecting cases); *Williams v. Sandel*, 433 F. App'x 353, 362-63 (6th Cir. 2011) (concluding that using tasers thirty-seven times, plus batons and pepper spray, was not objectively unreasonable given that the suspect was still not subdued). Patrick deployed his taser one time with the electrical charge to Perez lasting for five seconds. (4th Am. Compl. 4; Defs.' Mot. Summ. J. Ex. 7, at 4, DN 91-8 (response to resistance form completed by Patrick); Defs.' Mot. Summ. J. Ex 9, DN 91-10 (taser event log)). Thereafter, Patrick was able to secure Perez in handcuffs. (Perez Dep. 55:13-56:11). This single burst favors reasonableness, as it does not show gratuitous overuse of the taser. Adding to the calculus is whether Patrick announced his intention to use his taser, which he maintains that he did, while Perez alleges that she did not hear anything to that effect. (Patrick Dep. 64:10-17; Perez Dep. 52:14-54:1); *see Baker v. Union Twp.*, 587 F. App'x 229, 236 (6th Cir. 2014) ("The tasing of a suspect without warning is, at the very least, an additional factor useful in determining whether an officer violated a suspect's Fourth Amendment right to be free of excessive force." (citation omitted)).

As for the severity of her crimes, Perez's arrest warrants were for six felony charges of criminal possession of a forged instrument in the second degree. (Perez Dep. 66:8-67:5; *see* Perez Dep. Ex. 4 (served warrant)). These charges are serious but are not "severe" under this factor, as they lack violent or aggressive conduct. KRS 516.060; *see Eldridge v. City of Warren*, 533 F. App'x 529, 532-33 (6th Cir. 2013)

(citation omitted) (noting that an allegation of driving under the influence "is undoubtedly serious" but concluding that it was not "categorically 'severe'" or severe based upon the facts to permit the use of a taser on a driver); *Grawey v. Drury*, 567 F.3d 302, 311 (6th Cir. 2009) (observing that disturbing the peace is a "relatively minor" offense and, given the circumstances, did not merit the use of pepper spray).

Relatedly, it is unclear whether Perez posed an immediate threat to the safety of the officers or others, given the lack of violent or aggressive offense-related conduct and that Perez only fled from the scene. Neither party has alleged, nor has any evidence demonstrated, that Perez attacked (or attempted to attack) Patrick or Simpson or that Perez was armed during this encounter. Perez voiced her anger and displeasure to the officers about Patrick's use of the taser and her injuries, but this did not occur until after Patrick deployed the taser, handcuffed Perez, and escorted her to a police cruiser. (Perez Dep. 57:22-58:11; *see* Defs.' Mot. Summ. J. Ex. 5, DN 91-6 (Facebook Live video)). As such, her statements do not constitute an immediate safety threat to justify the use of the taser. Perez conceded that it was possible for her flight to be a danger to motorists but did not believe it placed her, Patrick, or Simpson in danger. (Perez Dep. 75:6-76:1). While fleeing, Perez ran across one street and stopped before the second, as the first street did not have any cars on the road while the second had oncoming cars. (Perez Dep. 43:22-44:18, 47:5-18, 50:4-51:14). Thus, it is unclear whether Perez presented a danger to motorists. (*See* Patrick Dep. 64:23-66:18 (discussing how Patrick viewed the flight as a danger to Perez, Patrick, Simpson, and motorists)).

Finally, the Sixth Circuit has pronounced it is "firmly establish[ed] that it is *not* excessive force for the police to tase someone (even multiple times) when the person is actively resisting arrest." *Rudlaff*, 791 F.3d at 641 (citing *Hagans*, 695 F.3d at 509). Thus, a "simple dichotomy [] emerges: When a suspect actively resists arrest, the police can use a taser . . . to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot." *Id.* at 642. Active resistance requires "some outward manifestation—either verbal or physical—on the part of the suspect [to] suggest[] volitional and conscious defiance." *Shumate*, 44 F.4th at 446 (quoting *Eldridge*, 533 F. App'x at 533-34); *cf. LaPlante*, 30 F.4th at 580 ("But the fact that a suspect does not immediately surrender does not inherently mean that he is resisting." (citations omitted)). "[F]light, non-violent though it may be, is still a form of resistance." *Cockrell*, 468 F. App'x at 496.

Neither party disputes that Perez fled, as Perez was charged with and pled guilty to fleeing or evading police and resisting arrest. (Perez Dep. 14:9-23). Perez alleges, however, that she stopped running and raised her arms in surrender before Patrick deployed his taser. (4th Am. Compl. 4). She testified that she intended to cross the street and "wasn't going to surrender" but stopped because of the cars, "knew [she] couldn't go any further," and "just figured [she] would be handcuffed and taken to jail." (Perez Dep. 47:22-48:5, 50:3-51:14, 55:5-10). Conversely, Patrick testified that Perez stopped before the road but began running again before he tased her. (Patrick Dep. 70:13-72:5).

At the summary judgment stage, facts must be viewed in the light most favorable to Perez. *See Puskas*, 56 F.4th at 1092. If Perez had surrendered, then she would have been no longer actively resisting,

so Patrick's use of the taser could have violated a clearly established right given that a reasonable officer "would have understood that what he [was] doing violates" the right of a non-resisting suspect to be free from being tased. *Rivas-Villegas*, 142 S. Ct. at 7 (internal quotation marks omitted) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curium)); *Browning*, 18 F.4th at 525. Alternatively, if Perez was still fleeing then she was actively resisting and Patrick's use of the taser could be deemed reasonable. *See Rudlaff*, 791 F.3d at 641. Therefore, a reasonable jury may conclude that Perez ceased any resistance by stopping and raising her arms in surrender. *See Green v. Throckmorton*, 681 F.3d 853, 864 (6th Cir. 2012) ("[W]here the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability." (quoting *McKenna v. Edgell*, 617 F.3d 432, 437 (6th Cir. 2010))); *accord Champion*, 380 F.3d at 900 (quoting *Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000)). As such, Patrick's motion for summary judgment is denied.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED as follows:

1. Defendants' Motion for Leave for Additional Pages (DN 87) is GRANTED.
2. Plaintiff's Motion to Exclude Opinions by Greg Meyer (DN 88) is DENIED.
3. Defendants' Motion to Exclude William Dee Fryer (DN 92) is DENIED.
4. Defendants' Motion for Summary Judgment (DN 91) is GRANTED IN PART and

DENIED IN PART. Plaintiff's claims against Defendant Bryan Simpson are DISMISSED WITH PREJUDICE. Plaintiff's claim against Defendant Josh Patrick for failure to provide medical care in violation of the Fourteenth Amendment is DISMISSED WITH PREJUDICE. Plaintiff's claim against Defendant Josh Patrick for excessive force in violation of the Fourth Amendment shall continue.

/s/ Greg N. Stivers
Greg N. Stivers, Chief Judge
United States District Court
March 1, 2023

cc: counsel of record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Nov. 15, 2023]

No. 23-5193

LARHONDA DUNLAP PEREZ,

Plaintiff-Appellee,

v.

BRYAN SIMPSON, OFFICER,

Defendant,

JOSH PATRICK, OFFICER,

Defendant-Appellant.

ORDER

BEFORE: KETHLEDGE, THAPAR, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk