No. _____

In The
Supreme Court of the United States

BRANDON PICKENS, JAMES ATNIP,
and STEVE BEEBE,

Petitioners,

vs.

ERMA ALDABA, personal representative and next
of kin of JOHNNY MANUEL LEIJA, deceased,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the District Court erred in denying qualified immunity to the Petitioners, law enforcement officers who in an attempt to detain an agitated and aggressive person who needed to be detained, resorted to use of a Taser device (after failed verbal warning and attempts to calm the person) in order to avoid or minimize a hands-on-encounter that was very likely to be dangerous to the individual and the officers' safety and well-being.

2) Whether it is a constitutional violation for a law enforcement officer who must detain an agitated and aggressive person to resort to use of a Taser device (after failed verbal warning and attempts to calm the person) in order to avoid or minimize a hands-on-encounter that is very likely to be dangerous to the officer's safety and well-being.

3) Whether the existing law would make it clear to a reasonable law enforcement officer that it violated the law to use a Taser to avoid or minimize the hands-on-encounter with the aggressive person, when that person: i) is clenching and shaking his fists at the officer; ii) has caused hospital staff to be too scared to try to detain him; iii) claims that he is "God" and "Superman," that the doctors are trying to kill him, and that "only water is pure enough to save him"; and iv) is bleeding from his arms where he removed his own IV tubing which would expose the officers to risk of facial contact with the blood during a hands-on-altercation.

PARTIES TO THE PROCEEDING

Erma Aldaba, personal representative and next of kin to Johnny Manuel Leija, Deceased, was the Plaintiff and Appellee below. Brandon Pickens, James Atnip, and Steve Beebe (altogether "Petitioners") were the Defendants at the District Court level and Appellants at the 10th Circuit level. The Board of County Commissioners of Marshall County and the City of Madill were Defendants at the District Court level, but did not appeal the District Court's ruling granting them summary judgment. The Board of County Commissioners of Marshall County and the City of Madill are not joining this Petition, but are aware that the Petitioners are bringing the Petition because the Board of County Commissioners of Marshall County and the City of Madill are represented by the same counsel that are bringing this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Brandon Pickens, James Atnip, and Steve Beebe respectfully petition for a writ of certiorari to review the judgment of the 10th Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Decision of the Court of Appeals, reported at 777 F.3d 1148 (10th Cir. 2015), is reprinted in the Appendix (App.) at 1-49. The District Court's opinion, which was unpublished, is reprinted at App. 50-67.

JURISDICTION

The Court of Appeals entered its judgment on February 4, 2015, and denied a petition for rehearing en banc on March 20, 2015. (App. 68-69). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The holding below threatens law enforcement and public well-being everywhere. Qualified immunity protects law enforcement officers from civil claims for use of force unless such actions are a

violation of clearly established law. Here there simply was no such clearly established law that would make it clear to a reasonable official in the Petitioners' position that their actions were unlawful. To the contrary, the Petitioners' use of force was reasonable and necessary to detain a man who had to be detained.

This case arises out of a tragic incident that occurred at the Integris Marshall Memorial Hospital in Madill, Oklahoma on March 24, 2011. This case involved a difficult and tense emergency situation in which there were no good options apparent to the law enforcement officers trying to help. Three ordinary officers responded to a hospital's call to law enforcement to detain a delusional and aggressive patient of unsound mind. The patient was yelling in the hallway, visibly agitated, claiming that he was "God" and "Superman," and claiming that the hospital staff was trying to kill him. The staff at the hospital was too afraid to attempt to detain the patient because of his behavior, and was also simply physically unable to restrain him without assistance. The law enforcement officers did not create this problem, but it was now up to them to detain this agitated patient per the hospital staff's request. The patient was bleeding from his arms, where he had pulled out his IV tubing. The law enforcement officers' verbal efforts to persuade the patient to comply with orders to return to his room failed. Then, the patient faced the officers, clenching and shaking his fists. A warning that a Taser would be used was given, but it failed to have any effect. An officer then used his Taser device, deploying two prongs toward the patient, but only one struck the

patient and appeared to have no effect. The officers therefore attempted to detain the patient by grabbing his arms, placing themselves at risk of injury and the risk of facial contact with the patient's blood. An officer then used a Taser again, but it did not stop the patient from struggling and resisting. Even when the officers managed to bring him to the floor, the patient continued resisting, and one officer started to lose his grip on the patient's arm. Once brought to the floor, however, the staff from the hospital administered a shot of anti-anxiety medication, which the hospital was too scared and physically unable to give without help from the law enforcement officers. Suddenly, and tragically, the patient stopped struggling and unexpectedly lost consciousness and passed away.

Based on this incident, Plaintiff asserted causes of action against Brandon Pickens, James Atnip, Steve Beebe, the Board of County Commissioners of Marshall County ("Board"), and the City of Madill under 42 U.S.C. § 1983 for illegal seizure and excessive force, and against the Board and the City of Madill under state tort law for negligence.

Atnip, Beebe, and Pickens filed separate Motions for Summary Judgment, arguing, in part, that they were entitled to qualified immunity on Plaintiff's illegal seizure and excessive force claims because Plaintiff had failed to show any violation of Leija's clearly established constitutional rights by Atnip, Beebe, or Pickens. Atnip, Beebe, and Pickens further argued that they were entitled to qualified immunity because it would not be clear to a reasonable officer in their position that they were violating Leija's

clearly established constitutional rights. In its order on summary judgment, the District Court set out findings as to the undisputed facts in this case. Based on that opinion, the following are the material undisputed facts of this record:

> 1) On the morning of March 24, 2011, Mr. Leija voluntarily presented himself to Integris Marshall Memorial Hospital in Madill, Oklahoma, where he was evaluated and diagnosed with severe pneumonia in both lungs and dehydration. (App. 52).
>
> 2) By that evening, Leija became delusional and aggressive, disconnected his oxygen, refused to take his medication, removed his IV tubing, and claimed that hospital personnel were telling him lies and secrets, and were trying to poison him. (App. 52-53).
>
> 3) Leija told a hospital nurse "I am Superman. I am God. You are telling me lies and trying to kill me." (App. 53).
>
> 4) The treating physician and the medical personnel were concerned that Leija was harming himself by removing his oxygen and IV and refusing his medication, and concluded that they needed to resort to calling law enforcement to restrain Leija so that he could be given his medication. (App. 53-54).
>
> 5) When Pickens, Atnip, and Beebe arrived on the scene, Leija was standing in the hallway, visibly agitated and upset, and yelling and screaming that people were trying to poison and kill him. (App. 55).

6) Despite Pickens' attempts to talk Leija into returning to his room and letting the hospital staff help and treat him, Leija refused and said that the hospital staff were trying to kill him, and continued down the hallway toward the lobby area. (App. 55).

7) "Leija continued with his aggressive behavior by pulling the remaining IV from his arms causing blood to come out. After speaking with Pickens, Leija faced the officers and clenched and shook his fists." (App. 55).

8) Leija then removed the gauze and tape from his arms, raised his arms, and stated that this was his blood. (App. 55-56).

9) "Atnip and Beebe contend that they gave Leija several commands to step back, calm down, and get on his knees. They warned Leija that if he did not comply they would use a Taser on him. After Leija did not comply with their demands, Beebe fired the Taser at Leija with one prong hitting him in the upper torso. The Taser did not appear to affect Leija." (App. 56).

10) At that point, Defendants attempted to seize Leija with physical force as follows:

> "At this point, Atnip attempted to restrain Leija by grabbing his right arm around the wrist and elbow area. Pickens grabbed Leija's left arm. Atnip and Pickens attempted to do an armbar takedown of Leija. Leija continued to struggle with the officers and they were unable to

> move his arms behind his back, but they were able to turn him against the lobby wall face first. Beebe then administered a 'dry' sting on Leija's back shoulder area in order to relax him so they could move his arms back. The 'dry' sting had no effect. Atnip pushed his leg into the bend of Leija's right leg and the officers were able to turn Leija around and he was pushed to the floor. Atnip and Pickens held Leija's arms while Beebe attempted to handcuff him. Beebe was able to place a handcuff on Leija's right wrist and Pickens pulled on Leija's left arm as Leija was resisting Pickens' grip. While this struggle was going on, [Nurse] Turvey appeared and injected Leija with the shot of Haldol and Ativan. Leija then went limp, made a grunting noise, and vomited a clear liquid. The officers moved away from Leija and medical personnel immediately began CPR in an effort to revive Leija. The attempts to revive Leija were unsuccessful and those efforts were stopped at 7:29 p.m."

(App. 56).

The District Court held that, in light of the undisputed facts, Defendants could properly seize Plaintiff. (App. 59-62). The District Court granted summary judgment in favor of all the Defendants on all claims, except for the § 1983 claims for alleged excessive force against Defendants Pickens, Beebe, and Atnip. (App. 67). The District Court found that

fact issues existed as to whether Defendants used excessive force in violation of the Fourth Amendment. The District Court implicitly denied Defendants' respective arguments for qualified immunity. Defendants had argued that even if a constitutional violation could be found, the law was not "clearly established" that the Defendants' respective conduct constituted a violation. However, the District Court did not specifically address the issue of whether the law was clearly established that Defendants' conduct was a constitutional violation. Defendants appealed from the District Court's implicit decision to deny qualified immunity.

Upon appeal, the 10th Circuit panel inexplicably found that Mr. Leija posed no threat to the officers, and that Mr. Leija was exhibiting only "passive" resistance in the period prior to the original Taser strike. (App. 15-20). Judge Phillips' blistering dissent points out his disagreement with the majority's characterizations, finding that the undisputed facts simply cannot be considered "passive resistance," and that the Majority completely ignored the danger to the officers from Mr. Leija's "steady stream of blood" as well as ignoring the possibility that a successful tasering could have actually saved all four men from a dangerous physical tussle, and the imminent danger of Mr. Leija leaving the hospital to his possible death. (App. 29-34). After pointing out the fact that Mr. Leija was delusional and paranoid, frightening the hospital workers, and pulling his IV's out of his arms, Judge Phillips also noted that Mr. Leija

continued to act in a bizarre, aggressive manner even after the arrival of the law enforcement officers. "He tore the IV needle from his arm, causing more bleeding, and he then faced the officers and clenched and shook his fists. After this, Mr. Leija removed the gauze and tape from his arms, causing yet more bleeding, and raised his arms, proclaiming that this was his blood." (App. 29-34).

Pickens, Atnip, and Beebe moved for rehearing en banc; it was denied on March 20, 2015.

REASONS FOR GRANTING THE PETITION

Petitioners now respectfully petition for a writ of certiorari because the 10th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Moreover, the 10th Circuit Court of Appeals has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

A. The Qualified Immunity Overarching Standard

The issue here is whether the law enforcement officers' use of force violated the constitution, and then whether a reasonable officer in the circumstances could conclude that the officers' decision and conduct was proper in light of clearly established case law. If

the answer to either question is "no," then qualified immunity provides immunity to the officers from a § 1983 excessive force suit. Law enforcement officers who are sued in their individual capacities in an action under 42 U.S.C. § 1983 "are entitled to qualified immunity unless it is demonstrated that their conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known." *Murrell v. Sch. Dist. No. 1, Denver, CO.,* 186 F.3d 1238, 1251 (10th Cir. 1999) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011).

Qualified immunity is an entitlement not to stand trial or face the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). It is an immunity from suit rather than a mere defense to liability. *Id*. Qualified immunity gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 532 (1991). Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Pearson*

v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009).

B. The Law Must Be Clearly Established Such that a Reasonable Officer Under the Circumstances Would Know the Conduct is a Violation of the Constitution

In *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), this Court explained that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." (Internal citations omitted). A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (internal citations omitted). "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014).

"This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to

advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001) (receded from on other grounds by *Pearson, supra*). "In cases alleging unreasonable searches or seizures, we have instructed that courts should define the clearly established right at issue on the basis of the specific context of the case." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014) (internal quotations omitted).

When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865, 188 L. Ed. 2d 895 (2014). "The inquiry into whether this right was violated requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (internal quotations omitted). While the general concept of the "reasonableness standard" is certainly clearly established, that does not mean that the qualified immunity defense can be defeated on every excessive force claim. "In other words, the fact that it is clear that any unreasonable use of force is unconstitutional does not mean that it is always clear *which* uses of force are unreasonable." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (citing *Saucier, supra,* 533 U.S. at 201-02).

Rather, for purposes of qualified immunity, the salient question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (internal quotations omitted); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014) (internal citations omitted) ("In addition, we have repeatedly told courts . . . not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.").

This Court has recently held that even a Circuit Court's own precedent, let alone precedent from other Circuits, may be insufficient to show that a right was "clearly established" unless it puts the officers on notice of a constitutional violation. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). The 10th Circuit has established a rule that in order for the law to have

been clearly established in the 10th Circuit, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Klein v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011). The 10th Circuit has further held that because the existence of excessive force is a fact-specific inquiry, however, there will almost never be a previously published opinion involving exactly the same circumstances, so the 10th Circuit has adopted a sliding scale to determine whether the law is clearly established. *Morris v. Noe,* 672 F.3d 1185, 1196-1197 (10th Cir. 2012). The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).

In the instant case, the conduct of Petitioners was far from being clearly egregious. The decision of what to do was clearly difficult, unusual, tense, and without any clear good options. This is beyond legitimate dispute. Moreover, the undisputed facts set out by the District Court in this case establish that, in direct contrast to the facts in *Morris* and other egregious cases, Leija *was* acting in an aggressive fashion and posed a threat to the officers and even the medical staff in the hospital who were afraid of him.

Thus, Petitioners submit to the Court that, if the conduct at issue here can be a violation at all, there must be clear authority rendering it beyond doubt in

a reasonable officer's mind. There is no such clear authority, however. In fact, reversal is necessary here because the case law indicates that the conduct was reasonable, or that a reasonable officer could at least conclude it was proper under the unusual circumstances Petitioners faced. As Judge Phillips pointed out in his dissent, neither of these prongs of qualified immunity was met in the instant case. (App. 42, 49).

C. The State of the Law

Here, the 10th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Moreover, the 10th Circuit court of Appeals has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

As stated above, the basic proposition of reasonableness was outlined in the *Graham* case, where this Court stated as follows:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra,* 392 U.S., at 20-22, 88 S.Ct., at 1879-1881. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick,* 481 F.2d, at 1033,

> 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.

Graham v. Connor, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

This Court has not weighed in on the reasonableness of the use of a Taser in circumstances remotely resembling the instant case. However, both 10th Circuit precedent and the weight of authority from other jurisdictions shows that in fact officers may use a Taser against a threatening or aggressive person who must be detained, as long as warning is given.

For example, in *Hinton v. City of Elwood*, the 10th Circuit held that it was not excessive for officers to use an "electrical stun gun" on a man after grabbing him and wrestling him to the ground when the man was actively resisting and the officers warned him that he would be arrested for disorderly conduct "if he engaged in one more outburst." 997 F.2d 774, 776-77, 781 (10th Cir. 1993). The Court ruled this way even though the man was only stopped for the misdemeanor of disturbing the peace, and he was not an immediate threat to the police or public. *Id*. at 781. Similarly, in *Draper v. Reynolds,* 369 F.3d 1270 (11th Cir. 2004), the Eleventh Circuit held it reasonable to fire a Taser at a truck driver who refused to

provide his insurance information or a bill of lading and was yelling loudly at a police officer who pulled him over. In that case, the officer had not advised the truck driver that he was under arrest. *Id.* at 1276-77. However, the court found an electric shock from the Taser "reasonably proportionate" to the situation because the truck driver was belligerent and hostile, and because he had refused five commands to retrieve his documents from the cab of his truck. *Id.* at 1278.

In *Nichols v. Davison*, the Western District of Oklahoma found that the use of a Taser did not constitute excessive force when an individual continued to resist law enforcement officials. 2005 WL 1950361 at *3 (W.D. Okla., July 26, 2005) (unpublished opinion). In *Sanders v. City of Fresno*, the Eastern District of California found that "officers may utilize a Taser, even multiple times, when they are physically struggling or wrestling with a suspect in order to gain control of the suspect." 551 F. Supp. 2d 1149, 1173 (E.D. Cal. 2008). The Court further stated that since three officers were unable to control the individual, where the first Taser application was wholly ineffective, a second Taser shot was reasonable and did not violate Plaintiff's constitutional rights. *Id.* The similarities to the case at bar are inescapably striking, which additionally demonstrates why Petitioners were entitled to qualified immunity as a matter of law.

Despite this case law, the 10th Circuit's majority opinion determined that the "pertinent authorities

sufficiently put the officers on notice that it was not objectively reasonable to employ a Taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first." (App. 24). The panel apparently based this decision on *Graham*, *supra*, *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007), as well as rulings from the 11th Circuit, and District Court rulings from Colorado and Alabama.

Petitioners contend, however, that the 10th Circuit erred in making this determination. Judge Phillips' dissent clearly sets out the issues with the majority's analysis of "clearly established" law. As Judge Phillips correctly notes, *Casey* involved a situation where an individual posed no threat, was not warned, and was then tackled and Tasered twice for no apparent reason, whereas here Mr. Leija was warned, and there was a pressing need to subdue Mr. Leija to get him his needed medical treatment. (App. 44-47). In *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) too, the circumstances were extremely different than the present case, as they did not involve the use of a Taser, but rather the use of a technique called hog-tying of a combative individual. *Id.* As Judge Phillips correctly pointed out, this Court there *granted* the Defendants qualified immunity, as this Court could not say that a rule prohibiting

such a restraint in this situation was clearly established at the time of the incident. (App. 45-46).

Moreover, the cases from other Circuits and District Courts discussed by the 10th Circuit as additional support for the denial of qualified immunity not only involved situations of far more egregious and shocking uses of force, but, importantly, they involved detainees who were clearly not aggressive and not posing a threat, and who were not provided warning. The cases even specifically state these important facts in their analysis. In fact, these cases would support the proposition that one may be able to use a Taser on a person who is acting in an aggressive fashion and posing a threat. *See Oliver v. Florin*, 586 F.3d 898, 901-02, 906-07 (11th Cir. 2009) (finding clearly established violation only where detainee was not aggressive or threatening and was tasered 8 to 12 times for five seconds each, while lying immobilized on hot pavement, without warning); *Borton v. City of Dotham*, 734 F. Supp. 2d 1237, 1242-44, 1249-50 (M.D. Ala. 2010) (finding clearly established violation only where detainee posed no threat due to being strapped to a gurney yet was tasered three times, including once on her face, without warning for being too loud, as she screamed "I give up"); *Asten v. City of Boulder*, 652 F. Supp. 2d 1188, 1194 (D. Colo. 2009) (after a mentally ill woman denied police entry into her home, an officer cut the screen on her door and used it to fire his Taser into her stomach, never warning her or telling her of their intent to take her into custody).

As Judge Phillips correctly pointed out in his dissent, "I disagree that any of the majority's cases would put on notice that their actions amount to excessive force. The majority fails to acknowledge the urgency of Mr. Leija's medical condition and the danger he posed to the officers and others. The majority's broad rule against the use of Tasers compels officers desiring not to be sued to resort first to physical force in restraining individuals needing to be restrained for their own protection." (App. 49).

Thus, the case law was not clear in the 10th Circuit that the conduct at issue here was a violation of law, assuming there is a constitutional violation. As the dissenting Judge Phillips explained, the most on point case law actually indicates that the conduct at issue here *was* constitutional. Certainly, existing precedent did not place the statutory or constitutional question beyond debate; nor did existing law make the unlawfulness of Petitioners' actions in using a Taser apparent. The 10th Circuit's claim that "the pertinent authorities sufficiently put the officers on notice that it was not objectively reasonable to employ a Taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first" is not only based on incorrect characterizations of the circumstances surrounding the encounter, but also demonstrably misstates these "pertinent authorities." There are no pertinent authorities that would make clear to a reasonable official in the Petitioners'

position that their conduct violated the constitution under the highly unusual circumstances in this case. Moreover, Petitioners would additionally note that there are no pertinent authorities that would make clear to a reasonable official in the Petitioners' position that their conduct after the first Taser strike in attempting to physically subdue Plaintiff so that he could be given the medical attention he needed, violated the Constitution.

D. Certiorari Should be Granted

For all of these reasons, it is apparent that the 10th Circuit has far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Moreover, the 10th Circuit Court of Appeals has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

The District Court specifically found the undisputed fact that Leija was acting in an aggressive fashion. No cases have been cited in this proceeding, nor were any cases found by Petitioners, clearly establishing that an officer, after giving a verbal warning, cannot use a Taser where the person-to-be-seized is acting aggressively and posing a threat to officers *and* himself. The 10th Circuit did not just engage in fact finding of its own in this matter. It changed the undisputed facts found by the District Court. It assumed that Mr. Leija was not a threat to anyone but himself and was not actively resisting,

but such claims blatantly contradict the record and even the findings of the District Court. Moreover, as even the majority opinion noted, the cases cited by the majority which allegedly made it "clearly established" that such conduct was unconstitutional "do not exactly mirror the factual circumstances of our case." (App. 24). As Judge Phillips has articulated, the majority's claim is a dramatic understatement, as the cases cited by the 10th Circuit actually in no way make the unlawfulness of the Petitioners' actions apparent. There is no U.S. Supreme Court case, 10th Circuit case, or weight of authority which would establish that the officers here are not entitled to qualified immunity. There simply is no existing precedent which would have placed the statutory or constitutional question beyond debate.

Neither the Plaintiff, the District Court, nor the 10th Circuit's majority set out how it was clearly established such that a reasonable officer in these officers' position would know that it was a violation of law to use a Taser after warning Mr. Leija under the evolving, highly unusual circumstances that these officers faced, or even set out how such conduct is a constitutional violation in the first place. The 10th Circuit's reliance on cases that would clearly NOT put the Petitioners on notice that their actions were unconstitutional is a far departure from the accepted and usual course of judicial proceedings. The 10th Circuit essentially took cases of extremely egregious behavior where non-aggressive individuals were Tasered without warning, and somehow jumped to

the conclusion that this would put a reasonable officer on notice that it was clearly established that one cannot use a Taser on an aggressive individual, even with warning. Such a quantum leap in logic is neither accepted nor usual in the course of judicial proceedings.

The 10th Circuit's ruling also clearly conflicts with several relevant decisions of this Court. The 10th Circuit's ruling conflicted with *Anderson v. Creighton,* 483 U.S. 635, 639 (1987), *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011), *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014), *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014), and *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015), as it completely ignored this court's admonition that existing precedent must have placed the statutory or constitutional question beyond debate. Despite the fact that existing precedent actually made it clear that the Petitioners' actions in using a Taser on an aggressive individual after a warning is perfectly constitutionally valid, the 10th Circuit nevertheless inexplicably ruled that the existing precedent said the opposite. While Petitioners maintain that the existing precedent actually clearly established the constitutional validity of their actions, at the very least it would *not* be clear to a reasonable official that such conduct was constitutionally *invalid.*

Moreover, Petitioners would also note that denying qualified immunity here will create exceptionally important and problematic precedent. The effect will be that even with several warnings, an officer desiring not to be sued must not use a Taser, but rather must either not detain a person needing to be detained in order to save his/her life, or alternatively, engage directly in a hands-on-altercation with a bleeding, uncooperative, delusional suspect. This is so even when there is no question that the person is acting in an aggressive fashion and posing a threat such that it is very likely the hands-on-altercation will be dangerous. Moreover, Plaintiff undisputedly had to be detained in order to receive the medical attention that he needed. The District Court already ruled that such a detention was constitutional. Nevertheless, the 10th Circuit's ruling leaves as its legacy an admonition that the use of a Taser was per se unreasonable, without acknowledging that use of the Taser did not work to detain Mr. Leija in any event, and that its failure left no alternative other than physical struggle with an aggressive person who needed to be detained. Under the 10th Circuit's analysis, the aggressiveness and threat objectively demonstrated by the person, even combined with the lack of good alternative options, would simply not be enough for the officer to have qualified immunity in concluding that he needs to use a Taser.

Petitioners respectfully submit that this would shred the qualified immunity defense to pieces. Numerous detainees, who needed to be detained and

showed aggressiveness, would be able to defeat the qualified immunity defense by admitting they were aggressive but arguing that a fact issue exists as to the extent or degree of their aggressiveness and the threat they posed, even when they have no evidence that they were not aggressive or threatening toward the officers (in this case, no such evidence has ever been offered by Plaintiff). They may liken their own permutations of aggressive conduct to raised and shaken fists, yelling, and bleeding IV ports, all present in this case and accurately described as "aggressive" by the District Court. This would, in essence, put officers in an unfair and far too difficult position each time they face a suspect showing significant signs of aggressiveness and posing a threat. Regardless of the aggressive actions of the individuals, regardless of how much of a threat the individual appears to be to the officers, and even regardless of the likelihood that a hands-on confrontation would harm both the officers and the individual, the 10th Circuit's opinion would leave the officers subject to suit for any use whatsoever of a Taser device, even after warnings. Petitioners believe that holding officers to such a standard is not right and is not in the best interests of our society. For all of the above reasons, Petitioners respectfully request that the Court grant certiorari in the instant case.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ERMA ALDABA, as personal representative and next of kin to Johnny Manuel Leija, deceased, Plaintiff-Appellee, v. BRANDON PICKENS; JAMES ATNIP; STEVE BEEBE, Defendants-Appellants, and THE BOARD OF MARSHALL COUNTY COMMISSIONERS; THE CITY OF MADILL, Defendants.	Nos. 13-7034 & 13-7035

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (D.C. No. 6:12-CV-0085-FHS)

(Filed Feb. 4, 2015)

Philip W. Anderson of Collins, Zorn & Wagner, P.C., Oklahoma City, Oklahoma, and Eric D. Janzen of Steidley & Neal, P.L.L.C., Tulsa, Oklahoma, for Defendants-Appellants.

Jeremy Beaver of Gotcher & Beaver Law Firm, McAlester, Oklahoma, for Plaintiff-Appellee.

Before **BRISCOE**, Chief Judge, **McKAY** and **PHILLIPS**, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff Erma Aldaba brought this 42 U.S.C. § 1983 action on behalf of her deceased son, Johnny Manuel Leija, who died after an altercation with Appellants – Officer Brandon Pickens and Deputies James Atnip and Steve Beebe – in the Oklahoma hospital where he was being treated for pneumonia. Plaintiff brought several claims against various defendants, including Appellants. The district court granted summary judgment in favor of the defendants as to all claims except Plaintiff's claim of excessive force against Appellants. As for this claim, the district court denied Appellants' request for summary judgment on the grounds of qualified immunity, holding there were numerous fact issues regarding the reasonableness of the officers' conduct that prevented

summary judgment. Appellants then filed this interlocutory appeal.

I.

When reviewing an interlocutory appeal from the denial of qualified immunity, "we 'take, as given, the facts that the district court assumed when it denied summary judgment.'" *Morris v. Noe,* 672 F.3d 1185, 1189 (10th Cir. 2012) (quoting *Johnson v. Jones,* 515 U.S. 304, 319 (1995)). We accordingly rely on the district court's description of the facts, taken in the light most favorable to Plaintiff, and do not reevaluate the district court's conclusion that the summary judgment record is sufficient to prove these facts. *Id.*

On March 24, 2011, Mr. Leija went to the hospital and was diagnosed with dehydration and severe pneumonia in both lungs. His pneumonia was causing hypoxia – low oxygen levels – which can affect an individual's mental state. When Mr. Leija was admitted to the hospital at 11:00 a.m., he was pleasant, cooperative, and responsive. He was placed on oxygen and given breathing treatments and intravenous antibiotics, and his oxygen saturation level improved. By 6:00 p.m., however, Mr. Leija's behavior had changed. He complained of extreme thirst, and a female nurse found that he had disconnected his oxygen and cut his intravenous tube. The nurse also saw that Mr. Leija was bleeding from his arms and that there was blood on the floor and the toilet. Although the nurse reconnected Mr. Leija's oxygen and IV, he seemed

confused and anxious, repeatedly asking for his girlfriend. The nurse reported this to the doctor who had seen Mr. Leija earlier in the day. The doctor prescribed Xanax to control Mr. Leija's anxiety, but when the nurse attempted to give Mr. Leija the medication, he refused to take it and accused the nurse of telling him lies and secrets. Mr. Leija became increasingly uncooperative and aggressive, shouting that the staff was trying to poison him.

The female nurse contacted the doctor again for assistance, and the doctor sent a male nurse to Mr. Leija's room. The male nurse discovered Mr. Leija had again removed his oxygen and IV and was now yelling, "I am Superman. I am God. You are telling me lies and trying to kill me." (Appellant's App. at 80.) The male nurse tried to persuade Mr. Leija to calm down and get back in his bed, but Mr. Leija refused. Mr. Leija's doctor was contacted, and he directed the nurse to give Mr. Leija an injection of Haldol and Ativan in order to calm him down. However, Mr. Leija refused this medication as well, insisting that only water was pure enough to help him. The male nurse did not believe he and the doctor could restrain Mr. Leija in order to administer the injection. Accordingly, with the doctor's approval, the nurse called law enforcement at 6:36 p.m. "for assistance with a disturbed patient." (*Id.* at 106.) Officer Pickens received the call for assistance while he was eating dinner with Deputies Atnip and Beebe, and the other two officers agreed to go to the hospital with him.

Meanwhile, the doctor arrived at Mr. Leija's room to assist the nurses. He heard Mr. Leija state that the medical staff was trying to poison him, that he was God and Superman, and that only water was pure enough for him. The doctor became increasingly concerned for Mr. Leija's health given the behavioral and personality changes in Mr. Leija from earlier in the day when he was admitted.

Mr. Leija subsequently exited his room in his hospital gown and began walking down the hall. The three police officers arrived at the scene at about this time and observed Mr. Leija standing in the hall, visibly agitated and upset. Medical personnel informed Officer Pickens that Mr. Leija was ill and could die if he left the hospital. Officer Pickens attempted to persuade Mr. Leija to return to his room, but Mr. Leija refused, insisting that the staff was trying to kill him. Officer Pickens assured him that no one was trying to kill him, but Mr. Leija continued down the hallway toward the lobby area. At some point, Mr. Leija stopped, pulled out the IV ports on his arms, and said, "This is my blood," as he clenched and shook his fists. (*Id.* at 290.)

Deputies Atnip and Beebe testified (and the district court apparently assumed) that they repeatedly ordered Mr. Leija to calm down and get down on his knees, but Mr. Leija did not comply, even after they warned him several times they would use a taser. When Mr. Leija failed to comply with their commands, Deputy Beebe fired his taser at Mr. Leija, striking him in the upper torso with one of the two

probes. The taser appeared ineffectual, however, and a struggle ensued. Deputy Atnip grabbed Mr. Leija's right forearm while Officer Pickens took his left arm. The officers thrust Mr. Leija face-first against a wall, at which point Deputy Beebe tased him again on the back of the shoulder with a "dry" sting, which causes direct contact with the electrical probes without launching the penetrating barbs. This second taser shot appeared ineffectual as well, but Deputy Atnip pushed his leg into the back of Mr. Leija's knee, causing it to buckle. As the four men fell to the floor, Mr. Leija continued to resist, falling face-down while Deputy Atnip and Officer Pickens struggled with his arms. Deputy Beebe managed to place a handcuff on Mr. Leija's right arm as Officer Pickens kept hold of his left, allowing the male nurse to administer the injection of Haldol and Ativan. At this point, however, Mr. Leija went limp, made a grunting sound, and vomited clear fluid. The officers moved away from Mr. Leija, and medical personnel immediately began CPR. The efforts to revive Mr. Leija failed, however, and he was pronounced dead at 7:29 p.m.

The medical examiner determined Mr. Leija's cause of death to be respiratory insufficiency secondary to pneumonia, with the manner of death being natural. The medical examiner testified the taser shots "certainly could" have increased Mr. Leija's need for oxygen (*id.* at 332), and he further testified the exertion caused by Mr. Leija's physical struggle with the officers "exacerbated his underlying pneumonia" (*id.* at 333). Mr. Leija's treating physician also

testified that placing a man in the prone position with his hands cuffed behind his back could compromise his body's ability to inhale and get oxygen.

The district court held that Mr. Leija was lawfully seized, since probable cause existed for taking him into protective custody based on his mental incompetence and the threat he posed to his own health. The court accordingly granted summary judgment in favor of the law enforcement officers on Plaintiff's unlawful seizure claim. However, the court held that the officers were not entitled to qualified immunity on Plaintiff's excessive force claim. The court held that there were several material disputed facts relating to the objective reasonableness of the force the officers applied to seize Mr. Leija. "Primarily, the record is in dispute as to the *degree* of resistance exhibited by Leija after being confronted by the officers." (*Id.* at 442.) The court noted the hospital surveillance footage of the encounter between Mr. Leija and the officers showed Mr. Leija simply walking away from the officers. The officers contended Mr. Leija began acting more aggressively after he moved out of the frame of the surveillance video. However, "[t]he gap in the video recording results in a failure to have an objective viewing of what transpired after the time Leija walked away from the officers and up until the point where the officers are seen apprehending Leija [after he had already been tased and grabbed by the officers]." (*Id.* at 443.) The court also held that "[t]he testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during this

critical gap in the video." (*Id.*) The court thus held that there was a material dispute of fact as to the nature and degree of Mr. Leija's resistance to the officers' attempts to seize him. The district court further concluded that the record was in dispute as to the threat Mr. Leija allegedly posed to the officers or the public, since he was an unarmed hospital patient and, while there was an allegation that he was using his blood as a weapon, there was no evidence that any of his blood was spattered on any of the officers. Finally, the court concluded there was a material dispute as to "[t]he officers' knowledge of [Mr. Leija's serious medical] condition – and their efforts to ascertain information about Leija's condition before attempting to use any degree of force on him." (*Id.*) The district court concluded that all of these material disputed facts precluded the issuance of summary judgment in favor of Appellants on Plaintiff's excessive force claim. This interlocutory appeal followed.

II.

We review the district court's denial of summary judgment on qualified immunity grounds de novo, with our review limited to purely legal issues. *Morris,* 672 F.3d at 1189. Based on the facts identified by the district court, we thus consider de novo the purely legal questions of "whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation" and "whether that law was clearly established at the time of the alleged

violation." *Allstate Sweeping, LLC v. Black,* 706 F.3d 1261, 1267 (10th Cir. 2013).[1]

A. Constitutional Violation

In *Graham v. Connor,* 490 U.S. 386, 395 (1989), the Supreme Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed

[1] The dissent concludes that this court may conduct its own factual review of the record in order to identify additional facts that the district court would be likely to find for summary judgment purposes However, appellate review of the evidence in the record should be the exception, not the rule, in qualified immunity cases. *See Johnson,* 515 U.S. at 319. We may need to conduct an evidence-based review of the record when the district court opinion on appeal is so cursory that we cannot determine what facts the court relied on in denying summary judgment. *See Behrens v. Pelletier,* 516 U.S. 299, 312-13 (1996) (concluding that the appellate court would need to conduct a factual review of the record where the district court simply stated that it was denying summary judgment "on the ground that 'material issues of fact remain' " (brackets omitted)). In the case before us, however, the district court's ruling was fully explained. We accordingly will not embark on our own fact-finding expedition into the evidence, particularly not in a manner that would call the district court's own factual determinations into question and resolve factual disputes in favor of the officers, rather than Plaintiff. Following our established practice, we take as given the district court's statement of the facts and its conclusion that the facts are in dispute on several material questions, including the threat Mr. Leija allegedly posed to others in the hospital and the degree and type of resistance he demonstrated in the moments preceding his tasing by the officers.

under the Fourth Amendment and its 'reasonableness' standard." The Court then held that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks omitted). This balancing test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

In determining whether an officer's use of force was excessive, many cases have focused solely on the three factors specifically described in *Graham*. *See, e.g., Casey v. City of Fed. Heights,* 509 F.3d 1278, 1281 (10th Cir. 2007). However, these three factors were not intended to be exclusive, and the circumstances of a particular case may require the consideration of

additional factors. This is especially true where a Fourth Amendment excessive-force claim arises out of a protective custody seizure rather than a criminal arrest, since the *Graham* factors are tailored to the criminal context and are unlikely to cover all of the pertinent circumstances in a protective custody case.

For instance, while the three factors listed in *Graham* may be sufficient to evaluate the "governmental interests at stake" in a typical criminal arrest case, *see Graham,* 490 U.S. at 396, an additional governmental interest may be implicated in cases involving protective custody seizures – the governmental interest in preventing a mentally disturbed individual from harming himself. *See Pino v. Higgs,* 75 F.3d 1461, 1468 (10th Cir. 1996) ("The state has a legitimate interest . . . in protecting a mentally ill person from self-harm."). The need to protect such persons from themselves is thus an additional factor that may weigh into our evaluation of the reasonableness of a particular use of force in such cases. Just as the weight of the second *Graham* factor varies based on the threat the subject poses to police officers and others, the weight of this additional factor will vary based on the severity and immediacy of the threat the individual poses to himself. When an individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes.

Two more additional factors may also be pertinent in determining the reasonableness of the force used for a seizure, particularly in the protective

custody context. First, as we have previously acknowledged, "a detainee's mental health must be taken into account when considering the officers' use of force[,] and it is therefore part of the factual circumstances the court considers under *Graham*." *Giannetti v. City of Stillwater,* 216 F. App'x 756, 764 (10th Cir. 2007). The Ninth Circuit has explained why an individual's mental or emotional disturbance should be considered in determining the reasonableness of a particular use of force:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person

> who has committed a serious crime against others, but with a mentally ill individual. . . . [W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham,* the reasonableness of the force employed.

Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (citations and footnotes omitted). This factor will weigh against the use of force most strongly where the mentally disturbed individual has committed no crime and poses a threat only to himself, since a seizure by force may well undermine the sole governmental interest supporting the seizure in such a case – the interest in protecting the mentally disturbed individual from harming himself. As the Ninth Circuit has noted, when "a mentally disturbed individual not wanted for any crime . . . [i]s being taken into custody to prevent injury to himself[, d]irectly causing him grievous injury does not serve that objective in any respect." *Drummond ex rel. Drummond v. City of Anaheim,* 343 F.3d 1052, 1059 (9th Cir. 2003).

Second, the reasonableness of a particular use of force depends in part on whether the law enforcement officers knew or should have known that the individual had special characteristics making him more susceptible to harm from this particular use of force. For instance, in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001), we found the use of hog-tie restraints to be unreasonable when officers know or

should be on notice that the subject has diminished capacity and is accordingly more likely to experience positional asphyxia from the use of such restraints. We explained:

> We do not reach the question whether all hog-tie restraints constitute a constitutional violation per se, but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.

Id. at 1188. This factor is particularly pertinent when the reason for seizing an individual is to ensure he receives the necessary medical treatments for his compromised physical condition. In such a case, law enforcement officers should be especially sensitive to the likelihood that a particular use of force may do more harm than good. We note in particular that the use of tasers and similar electronic control devices may be counterproductive, at best, to the goal of ensuring that a mentally and medically compromised individual is restored to health. *See Rosa v. Taser Int'l, Inc.,* 684 F.3d 941, 948 n.6 (9th Cir. 2012) (noting that a 2009 notice issued by Taser International

warned law enforcement officers using electronic control devices "to pay special attention to 'physiologically or metabolically compromised' suspects, including those with cardiac disease and the effects of drugs," since their bodies are at a greater risk of harm from such devices).

These three additional factors, as well as the three *Graham* factors, are all pertinent to our analysis of the law enforcement officers' seizure of Mr. Leija in this case. We consider all of these factors in order to "careful[ly] balanc[e] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake" as required by *Graham,* 490 U.S. at 396.

The first additional factor applicable to this case – the severity and immediacy of the threat Mr. Leija posed to himself – weighs in favor of the application of some force, if necessary, in order to protect Mr. Leija from the threat he posed to himself. According to the facts identified by the district court, Officer Pickens was informed that Mr. Leija could die if he left the hospital, and Mr. Leija was clearly delusional and mentally disturbed. Mr. Leija thus posed both an immediate and a severe threat to himself, and the government had an interest in seizing Mr. Leija in order to ensure he received the necessary medications he was refusing as a result of his disturbed mental state.

However, the other additional factors pertinent to this case weigh against the level of force employed here, and particularly against the officers' use of a taser. Mr. Leija was clearly delusional and mentally disturbed, which weighs against the reasonableness of the officers' decision to employ such a severe level of force against him. *See Cavanaugh v. Woods Cross City,* 625 F.3d 661, 664 (10th Cir. 2010) ("Although Tasers may not constitute deadly force, their use unquestionably 'seizes' the victim in an abrupt and violent manner," making the nature and quality of the intrusion on the victim's Fourth Amendment interests "quite severe."). When faced with a mentally ill individual, a reasonable police officer should make a "greater effort to take control of the situation through less intrusive means." *Bryan v. MacPherson,* 630 F.3d 805, 829 (9th Cir. 2010).

> A mentally ill individual is in need of a doctor, not a jail cell. . . . [T]he purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs in both degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Id. (internal quotation marks omitted). The situation the police officers faced in this case called for conflict

resolution and de-escalation, not confrontation and tasers.

Mr. Leija's compromised physical condition also weighs against the types of force employed in this case. A use of force that might be reasonable against an apparently healthy individual may be unreasonable when employed against an individual whose diminished capacity should be apparent to a reasonable police officer. *See Cruz,* 239 F.3d at 1188. Here, taking the facts in the light most favorable to Plaintiff, the officers were on notice that Mr. Leija was gravely ill and thus was very likely to have diminished capacity. This factor thus weighs against the reasonableness of the officers' decision to tase and wrestle to the ground a hospital patient whose mental disturbance was the result of his serious and deteriorating medical condition.

Furthermore, the first two *Graham* factors weigh against the use of force in this case. Taking the facts in the light most favorable to Plaintiff, Mr. Leija did not commit any crime, much less a severe crime, and he posed no threat to the police officers or anyone else. Thus, the only governmental interest weighing in favor of the use of force in this case is the interest in protecting Mr. Leija from the threat he posed to himself, as discussed above.

Finally, the third *Graham* factor also weighs against the officers' actions in this case. Under this factor, a higher level of force may be employed when the subject is actively resisting or attempting to

evade arrest by flight. In cases where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established. *See, e.g., Hinton v. City of Elwood,* 997 F.2d 774, 781 (10th Cir. 1993) (finding no violation where subject refused to talk to police after they asked him to stop, shoved an officer, and was tased during the ensuing struggle); *see also Cockrell v. City of Cincinnati,* 468 F. App'x 491, 495 (6th Cir. 2012) (collecting cases). Conversely, when officers tased a subject who was detained or not exhibiting active resistance, courts have typically allowed an excessive force claim to proceed. *See, e.g., Roosevelt-Hennix v. Prickett,* 717 F.3d 751, 759-60 (10th Cir. 2013) (affirming denial of qualified immunity where detained subject alleged she was tased after telling officers that she was physically incapable of complying with their command to place her feet outside police cruiser and officers made no attempt to help her); *see also Cockrell,* 468 F. App'x at 496 (collecting cases).

Here, Deputies Atnip and Beebe claimed that Mr. Leija refused to comply with their orders to calm down and get on his knees, even after they warned him that he would be tased. Ms. Aldaba disputes that any such orders or warnings were rendered, but we must "take, as given, the facts that the district court assumed when it denied summary judgment," *Morris,* 672 F.3d at 1189 (internal quotation marks omitted).

Moreover, based on all of the facts, we can at least infer that Mr. Leija knew the police were there to coax him back into his room for treatment and that he resisted in this regard. Indeed, the hospital surveillance video shows that just after he exited his room, Mr. Leija waved off Officer Pickens and slowly walked away, signaling that he understood the officers wanted him to return to his room. As the officers contend, these facts indicate some level of resistance. However, viewing the facts in Plaintiff's favor, nothing suggests Mr. Leija's resistance was anything more than passive. *See Bryan,* 630 F.3d at 830 ("Resistance . . . should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer." (internal quotation marks omitted)); *see also Mattos v. Agarano,* 661 F.3d 433, 450 (9th Cir. 2011) (en banc) ("[W]e draw a distinction between a failure to facilitate an arrest and active resistance to arrest."). The analysis thus turns to whether the officers' use of force was commensurate with Mr. Leija's level of resistance.

In that regard, Deputy Beebe made the initial showing of force by tasing Mr. Leija. The surveillance video does not capture the first taser strike, but Deputy Atnip and Officer Pickens can be seen moments later grabbing Mr. Leija's arms and pushing him against a wall. Deputy Beebe then tases Mr. Leija a second time before the officers bring him to

the floor and attempt to handcuff him. On appeal, the parties raise several arguments regarding the struggle that followed the initial taser strike. However, we need not address these arguments because we conclude that Plaintiff has sufficiently demonstrated an excessive force violation based on the officers' initial decision to tase Mr. Leija, which precludes summary judgment in favor of Appellants on Plaintiff's excessive force claim.[2]

Taking the facts in the light most favorable to Plaintiff, Deputy Beebe was not justified in tasing Mr. Leija as an initial use of force given the resistance he was exhibiting up to that point and the fact that the only governmental interest supporting the seizure was the interest in protecting Mr. Leija from the threat he posed to himself. *See Abbott v. Sangamon Cnty.,* 705 F.3d 706, 730 (7th Cir. 2013) (holding that passive non-compliance without active resistance does not justify substantial escalation

[2] The reasonableness of the initial taser strike is pertinent to the reasonableness of the officers' subsequent actions, since the "totality of the circumstances" analysis includes consideration of "whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Medina v. Cram,* 252 F.3d 1124, 1132 (10th Cir. 2001) (internal quotation marks and brackets omitted). Because we affirm the district court's denial of summary judgment based on the initial taser strike, we need not resolve the question of whether the officers' subsequent actions would likewise constitute excessive force. The jury can appropriately resolve this and other remaining factual disputes regarding Plaintiff's excessive force claim on remand.

of force); *cf. Hinton,* 997 F.2d at 781 (finding no violation where officers first grabbed non-compliant subject and then used stun-gun after the subject began actively and openly resisting officers' attempts to handcuff him). Moreover, while Officer Pickens and Deputy Atnip did not themselves tase Mr. Leija, it is clearly established in this circuit that "[a]n officer who fails to intervene to prevent a fellow officer's excessive use of force may be liable under § 1983." *Fogarty v. Gallegos,* 523 F.3d 1147, 1162 (10th Cir. 2008). Thus, Officer Pickens and Deputy Atnip may be found liable for their decision not to intervene after it became clear that Deputy Beebe intended to tase Mr. Leija.

Taking the facts in the light most favorable to Plaintiff, a jury could find that Appellants violated Mr. Leija's constitutional rights by employing such a severe level of force against him despite their knowledge of his mental instability, his serious medical condition, and the fact that he had committed no crime and posed a threat only to himself. We accordingly affirm the district court's conclusion that Appellants are not entitled to summary judgment on Plaintiff's excessive force claim.

B. Clearly Established Law

Having held that the alleged facts regarding the initial taser strike would be sufficient to establish an excessive force claim, we must turn to the question of whether the law was clearly established at the time

of the alleged violation. *See Allstate Sweeping, LLC v. Black,* 706 F.3d 1261, 1267 (10th Cir. 2013). Under *Graham,* the analysis of an excessive-force claim is necessarily fact-specific, and thus prior cases do not need to involve all of the same factual circumstances or factors in order for an excessive force violation to be clearly established. *See Casey,* 509 F.3d at 1284. Rather, we use a sliding scale in which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Morris,* 672 F.3d at 1196 (internal quotation marks omitted).

In several previous cases, we have examined the reasonableness of taser use in general without discussing the specific ramifications of law enforcement's use of tasers against the mentally and physically ill. On one end of the spectrum, *Hinton* stands for the uncontroversial proposition that a misdemeanant who ignores an officer's orders to stop, shoves an officer, and then actively and openly resists arrest by, among other things, biting the officer, has no clearly established right not to be tased during the struggle. 997 F.2d at 781. At the other end of the spectrum, *Casey* clearly established that an officer could not tase a non-violent misdemeanant who appeared to pose no threat and who was given no warning or chance to comply with the officer's demands. 509 F.3d at 1281-82. Appellants argue that *Casey* is distinguishable because the officer in that case used a taser without a warning, while here Mr. Leija was warned he would

be tased if he did not comply with the officers' demands. However, our decision in *Casey* was based on the conclusion that "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force – or a verbal command – could not exact compliance." *Id.* at 1286. Thus, *Casey* does not stand for the proposition that it is reasonable for an officer to simply give a warning and then use a taser as the initial use of force against a non-violent, non-threatening misdemeanant. Rather, *Casey* establishes that only a lesser level of force may be employed against such an individual unless the individual begins actively resisting or fleeing, as the plaintiff did in *Hinton*. Under *Casey,* a warning is a necessary but not a sufficient part of the reasonableness analysis when a taser is used against a non-violent, non-threatening individual who has not committed a serious crime.

Consistent with our precedents, other courts that have examined the use of tasers against the mentally ill have found it clearly established that officers may not tase non-criminal, non-threatening subjects who primarily exhibit passive resistance. For example, in *Oliver v. Fiorino,* 586 F.3d 898, 901, 906-07 (11th Cir. 2009), the court found that as of 2004, a mentally unstable subject who flagged down an officer to falsely report a shooting had a clearly established right not to be tased where he was suspected of no crime, was largely compliant, and posed no immediate threat of danger to officers beyond one moment of struggle. Likewise in *Asten v. City of Boulder,* 652 F. Supp. 2d

1188, 1203 (D. Colo. 2009), the court concluded that a mentally unstable woman had a clearly established right not to be tased in her own home without warning where she was suspected of no crime, posed no threat to officers or others, only resisted by refusing to allow the officers to enter her home. Finally, in *Borton v. City of Dothan,* 734 F. Supp. 2d 1237, 1249-50 (M.D. Ala. 2010), the court held that officers called to a hospital to assist with a "disturbed patient" who was loud, boisterous, and screaming could not tase the patient without warning while she was restrained to a gurney because she had committed no crime, was no longer a danger or threat, and was outnumbered.

These cases do not exactly mirror the factual circumstances of our case, but "the qualified immunity analysis involves more than 'a scavenger hunt for prior cases with precisely the same facts.'" *Cavanaugh,* 625 F.3d at 666 (quoting *Casey,* 509 F.3d at 1284). Instead, the "more relevant inquiry" for qualified immunity purposes is "whether the law put officials on fair notice that the described conduct was unconstitutional." *Casey,* 509 F.3d at 1284. Here, we conclude that *Graham, Casey, Cruz*, and the other pertinent authorities sufficiently put Appellants on notice that it is not objectively reasonable to employ a taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first. *Cf. Fogarty,* 523 F.3d at 1162 ("Considering that under [plaintiff's] version of events each of the *Graham*

factors lines up in [her] favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions.").

We emphasize that significant factual issues remain which must be resolved at trial, including whether Mr. Leija was slinging blood at the officers, whether the officers knew about the extent of Mr. Leija's illness, and whether he exhibited something more than passive resistance in the moments before he was tased.[3] If those facts prove to be different than those we have considered on the summary judgment record, the excessive force analysis may yield

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[3] These disputes regarding the reasonableness of the initial taser strike will also be relevant to the analysis of whether the officers' subsequent actions were reasonable. In this analysis, further factual disputes abound as to the severity of force employed by the officers and the degree of resistance displayed by Mr. Leija following the initial taser strike.

We note that a plaintiff may only recover on an excessive force claim if she shows "(1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury caused by the unreasonable seizure that is not de minimis, be it physical or emotional." *Cortez v. McCauley,* 478 F.3d 1108, 1129 n.25 (10th Cir. 2007). Depending on which, if any, of the officers' actions are found to constitute excessive force, the jury may need to resolve factual disputes regarding the cause of Mr. Leija's death and whether he sustained "some actual injury caused by the unreasonable seizure." For instance, at that stage of the inquiry, the jury may need to resolve the factual dispute regarding whether the initial Taser strike actually caused an electrical shock or other injury to Mr. Leija.

a different result. However, based on the facts taken in the light most favorable to Plaintiff, we conclude that Plaintiff can show a violation of clearly established law sufficient to defeat Appellants' request for qualified immunity.

III.

We accordingly **AFFIRM** the district court's denial of qualified immunity.

PHILLIPS, Circuit Judge, dissenting:

I would conclude that the three officers did not act with excessive force under the Fourth Amendment. Accordingly, I would also conclude that they violated no clearly established law. I believe they are entitled to summary judgment on their qualified immunity defense.

This case presents a highly unusual encounter between a hospital patient not in his right mind and three law enforcement officers responding to a distress call from his medical providers, who sought help restraining him so they could treat his deteriorating, life-threatening medical condition. Despite the tragic death of Mr. Leija, I believe the officers acted reasonably in confronting a difficult emergency situation.

1. Qualified Immunity: General Policies

"The doctrine of qualified 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)). It "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 231. The doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs,* 475 U.S. 335, 343, 341 (1986)). This "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Davis v. Scherer,* 468 U.S. 183, 196 (1984)). Qualified immunity is available "to ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties.'" *Camreta v. Greene,* 131 S. Ct. 2020, 2030 (2011) (quoting *Anderson v. Creighton,* 483 U.S. 635, 638 (1987)).

The Supreme Court has repeatedly stressed the importance of early review of qualified immunity defenses. "*Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid

the burdens of 'such *pretrial* matters as discovery . . . , as '[i]nquiries of this kind can be particularly disruptive of effective government.'" *Behrens v. Pelletier,* 516 U.S. 299, 307 (1996) (emphasis in original) (citation omitted). "The privilege is 'an *immunity from suit* rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier v. Katz,* 533 U.S. 194, 200-01 (2001) (emphasis in original).

2. Qualified Immunity: The Fourth Amendment

"Fourth Amendment reasonableness 'is predominantly an objective inquiry.'" *Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2080 (2011) (quoting *City of Indianapolis v. Edmond,* 531 U.S. 32, 47 (2000)). We inquire whether "the circumstances, viewed objectively, justify [the challenged] action." *Id.* (quoting *Scott v. United States,* 436 U.S. 128, 138 (1978)). If the action was justified objectively, it is reasonable whatever the officer's subjective intent. *Id.* (quoting *Whren v. United States,* 517 U.S. 806, 814 (1996)). Qualified immunity shields officers from suits for damages if "a reasonable officer could have believed [the challenged conduct] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter,* 502 U.S. at 227 (quoting *Anderson,* 483 U.S. at 641). A court "should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact." *Id.* at 228.

3. Qualified Immunity: Summary Judgment

"Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Morris v. Noe,* 672 F.3d 1185, 1191 (10th Cir. 2012) (citation omitted). In determining what material facts are genuinely in dispute, the district court construes the evidence in the light most favorable to the nonmovant. *Weigel*, 544 F.3d at 1151.

4. The Material Facts Actually Found by the District Court

The first step in determining the constitutionality of the actions of the three law enforcement officers is to determine the material facts. *Scott v. Harris,* 550 U.S. 372, 378 (2007). After the district court does so, resolving genuine issues of material fact in favor of the nonmovant, the district court then measures those material facts against the substantive claim to see whether they could sustain a jury verdict on the claim. *See id.* at 380. On appeal, we review de novo the district court's legal determination. *Cortez,* 478 F.3d at 1115 (reviewing de novo the district court's denial of qualified immunity).

After reviewing the district court's findings, I disagree with the majority's characterizations that "[Mr. Leija] posed no threat to the police officers or anyone else"; that the "officers tased a subject who was not detained or not exhibiting active resistance"; that, while the district court's facts "indicate some level of resistance" "nothing suggests Mr. Leija's resistance was anything more than passive"; and that during this episode Mr. Leija can be fairly characterized as "a non-violent, non-threatening misdemeanant." Maj. Op. at 14, 15, 16, 19.

Contrary to the majority's characterizations, the facts show that during this episode Mr. Leija (because of his medical condition) was out of control. *See* Maj. Op. at 3-5. As I discuss below, the evidence shows that Mr. Leija was anything but passive, non-violent, and non-threatening. In fact, the doctor and male nurse called law enforcement for help in restraining Mr. Leija after concluding that they could not do it themselves. Appellant's App. vol. II at 434. During this time, Mr. Leija yelled and screamed delusional claims and accusations demonstrating that he was not in his right mind (claiming that he was God and Superman and that the hospital's staff was trying to poison him). *Id.* at 434-35. He had frightened the nurse and doctor with his aggressive behavior, causing the doctor to retreat from Mr. Leija's room after Mr. Leija acted aggressively and began stepping toward him. *Id.* Even early on, before tearing the IV needle from his arm in the hallway, Mr. Leija was

bleeding sufficiently to leave blood on the floor, wall, and toilet. *Id.* at 433-34.

Nor did Mr. Leija's behavior become passive after the officers arrived. When the officers first encountered Mr. Leija, he was still yelling about being God and Superman and claiming that the hospital staff was trying to poison him. *Id.* at 435. In its opinion, the majority does not consider the effect this had on the welfare of other patients in the hospital or consider the possibility that someone in Mr. Leija's disturbed state might pose a threat to them. Mr. Leija was visibly agitated and upset. *Id.* Upon Officer Pickens's arriving, the doctor told him that Mr. Leija may die if he left the hospital. *Id.* Seeing that Mr. Leija was trying to leave the hospital, Officer Pickens got in front of him and tried to calm him. *Id.* Ultimately this failed, and Mr. Leija continued down the hallway toward the lobby. *Id.* After Officer Pickens again stopped him and continued trying to calm him, Mr. Leija continued with his aggressive behavior. *Id.* He tore the IV needle from his arm, causing more bleeding, and he then *faced the officers* and clenched and shook his fists. *Id.* After this, Mr. Leija removed the gauze and tape from his arms, causing yet more bleeding, and raised his arms, proclaiming that this was his blood. *Id.*

The district court also found that Deputies Atnip and Beebe then commanded Mr. Leija several times to step back, to calm down, and to get on his knees. Maj. Op. at 4-5; Appellant's App. vol. II at 435. They

warned him that otherwise they would taser him.[1] *Id.* at 435-36. When Mr. Leija did not comply, Deputy Beebe fired the taser.[2] *Id.* at 436. One of the two prongs hit Mr. Leija in the upper body but had no effect (presumably, because the second prong did not strike him). *Id.* Almost immediately, Deputy Atnip then grabbed Mr. Leija's left arm, and Officer Pickens grabbed his right arm. *Id.* Despite turning him to the wall, they still could not get his arms behind his back. Deputy Beebe then tried to "dry" stun Mr. Leija to relax his muscles and help Officer Pickens and Deputy Atnip get his arms behind his body. *Id.* This too had no effect. *Id.* Ultimately, after a struggle, one officer managed to buckle Mr. Leija's knee and all four men went to the floor. *Id.* During this episode, medical personnel were observing and standing by. *Id.* After the officers had Mr. Leija somewhat in control, the male nurse – with syringe in hand – asked them to hold Mr. Leija still so he could inject the medicine. *Id.* Almost immediately after the injection, Mr. Leija vomited and went limp. The officers stepped away, and medical staff tried to revive him. *Id.* That effort failed, and tragically Mr. Leija died. *Id.*

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[1] Although the device used was a "Stinger," not a "taser," the two devices are similar and because the witnesses use the verb "taser," I do the same for ease of understanding.

[2] An officer can use a taser in one of two ways. First, the officer can use the taser for a "drive-stun," where the officer presses the taser against a person's body. Second, the officer can fire metal darts – prongs – into the body. *McKenney v. Harrison,* 635 F.3d 354, 364 (8th Cir. 2011) (Murphy, J., concurring).

Even based on those limited fact findings – all taken in the Estate's favor as the party opposing summary judgment – I would conclude that the three officers did not use excessive force. To say that Mr. Leija was passive in this encounter is more than the facts can bear. In measuring the reasonableness of the three officers' conduct, the majority ignores the pressing need to restrain Mr. Leija to treat him. The doctor and male nurse obviously wanted to restrain him to the bed to administer medicine and get his oxygen level to a safe level. In addition, the majority ignores the danger to the officers from Mr. Leija's steady stream of blood. Whether he was flinging it at them or not (and I will assume he did not since the district court specifically addressed that issue and did not find that Mr. Leija did fling his blood), the officers feared with good reason a wrestling match in which Mr. Leija's blood might injure them. As events proved, and as the doctor and male nurse had correctly surmised, Mr. Leija presented a physical challenge, even against superior numbers. The majority fails to consider that a successful tasering could have saved all four men from a dangerous physical tussle and could have led to Mr. Leija getting the medical care he so desperately needed.

In short, I believe the officers acted reasonably for their own safety and Mr. Leija's. They did not simply arrive and taser him without warning or provocation. They tried for several minutes to reason with him and calm him – even as Mr. Leija slowly made his way to the lobby and a possible death if he got

outside the hospital. They tasered him when he refused their commands after all else had failed. Their other two alternatives – first using physical force against him or letting him walk out the door – were hardly attractive ones. Indeed, had they opted for either of those two choices and Mr. Leija still died, it is not hard to imagine the officers being sued for *not* using the taser.

I think the reasonableness of their actions is shown by a simple question: What else should the officers have done? At oral argument, the Estate's counsel suggested that one officer could have met with the doctor to learn more about Mr. Leija's condition while the others followed him down the hallway (and presumably out of the hospital and down the street). That itself is unreasonable. The majority criticizes the officers' actions because "[t]he situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and tasers." Maj. Op. at 14. Yet the majority offers nothing concrete for achieving that laudatory goal as the clock ticked on Mr. Leija's life-threatening medical condition. And lost in the majority's criticism is any acknowledgement that the officers *did* try to resolve and de-escalate the conflict.

Does the majority really contend that the three officers – facing this emergency situation in real time – acted incompetently or knowingly violated the law? *See Medina,* 252 F.3d at 1128. Does it contend that the officers should not be credited with a "mistaken judgment" if they really used excessive force? We

must remember that "[b]ecause '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,' . . . the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier,* 533 U.S. at 205 (quoting *Graham v. Connor,* 490 U.S. 386, 397 (1989)). The Supreme Court has "cautioned us against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Id.* (quoting *Graham,* 490 U.S. at 393, 396).

5. The Material Facts That The District Court Likely Would Find

I agree with the majority that we do not have authority to review the record to challenge or reweigh the fact findings that the district court actually made for summary judgment. *See Johnson v. Jones,* 515 U.S. 304, 313 (1995) (reviewing denial of summary judgment based on qualified immunity, and concluding that a party cannot appeal any part of district court's order based on "evidence sufficiency" – that is, "facts a party may, or may not, be able to prove at trial"). Thus, I accept that the district court's material fact determinations (for summary judgment purposes) bind us at this stage. Accordingly, as I noted above, I give the Estate full credit on all those facts that the district court found.

But here, the district court failed to find or identify all the facts material to excessive force. It declared that "[t]he present case presents many material disputed facts as to the objective reasonableness of the force by Atnip, Beebe, and Pickens." Appellant's App. vol. II at 442. Clarifying this, the district court said that "[p]rimarily, the record is in dispute as to the degree of resistance exhibited by Leija after being confronted by the officers." *Id.* Along this same line, the district court found that "[t]he testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during [a] critical gap in the video."[3] *Id.* at 443. Additionally, the district court said that "the record is in dispute as to the degree of threat Leija posed to the officers or the public." *Id.* Here, it noted that no blood had splattered the officers, despite the officers saying that Leija had used his blood as a weapon. *Id.* Finally, the district court found genuine issues of material fact about "[t]he officers' knowledge of [Leija's medical] condition – and their efforts to ascertain information about Leija's condition before attempting to use any degree of force on him. . . ."[4]. *Id.*

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[3] The word "gap" might suggest that the video was edited in some fashion to remove the images leading up to and including the tasering. In fact, the video is intact, but the camera looked down one hallway and not around a corner where that activity occurred.

[4] In view of these general pronouncements that genuine issues of material fact remain on these areas critical to qualified immunity, I must disagree with the majority that "the district

(Continued on following page)

When a district court simply announces that there are "genuine issues of material fact" remaining, but does not identify and resolve them for summary judgment, we must delve into the record to find what material facts the district court likely would have found. *See Behrens,* 516 U.S. at 312-13. This makes sense because otherwise, defendants would have no way to inform the appeals court of the facts supposedly amounting to a violation of clearly established law. *See id.* at 312-13 (tasking the court of appeals with reviewing the record to determine what facts the district court likely assumed when the district court "did not identify the particular charged conduct that it deemed adequately supported" denial of summary judgment, but instead justified denial on the ground that "[m]aterial issues of fact remain"); *Johnson,* 515 U.S. at 319 (recognizing that when district courts fail to state the facts they relied upon to deny summary judgment, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed"); *see also Leatherwood v. Welker,* 757 F.3d

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court's ruling was fully explained." Maj. Op. at 8 n.1. In my view, it is insufficient for the district court to set forth facts on summary judgment that themselves do not defeat qualified immunity, but then to avoid any review by generally stating afterward that genuine issues of material fact remain on those same matters. Under that standard, the strong policies set forth by the Supreme Court favoring early disposition of qualified immunity defenses lose all force. *Hunter v. Bryant,* 502 U.S. at 227.

1115, 1117, 1119 (10th Cir. 2014) (reviewing district court's denial of summary judgment for qualified immunity on grounds that "questions of material fact remain regarding the existence of reasonable suspicion [for the search]," and saying that "[w]hen the district court does not set forth with specificity the facts it relied on, we may look to the record to determine which facts the court likely assumed").

Here, the district court merely (and without explanation) found that genuine issues of material fact existed about Leija's degree of resistance. On that same subject, it concluded that the officers' testimony was "inconsistent" but never described in what way. Because of the importance of this latter conclusion, this is a good place to start our not-so-cumbersome review of the slim record for facts the district court would likely find in denying summary judgment.

Deputy Atnip testified that, before Deputy Beebe tasered Mr. Leija, Mr. Leija was shaking his clenched fists and asking Officer Pickens if he wanted to fight. Appellant's App. vol. I at 131-33; vol. II at 395. Deputy Atnip testified that Mr. Leija had his fists up with blood dripping from his hands. *Id.* vol. II at 397. He testified that Mr. Leija got close to Officer Pickens with blood dripping and that he (Deputy Atnip) then commanded Mr. Leija to get to his knees. *Id.* vol. II at 381. Deputy Atnip repeated the commands several times before Deputy Beebe fired the taser. *Id.* Deputy Atnip said that Mr. Leija never stopped being aggressive. *Id.* at 383.

Deputy Beebe also testified that Mr. Leija, with fists raised, asked Officer Pickens if he wanted to fight. *Id.* vol. I at 158. Soon after that, Mr. Leija ripped the IV port from his arm, causing blood to drip, and then raised his fists toward Officer Pickens. *Id.* As Officer Pickens backed up, he and Deputy Atnip then began commanding Mr. Leija to quit swinging his arms and to get on his knees. *Id.* at 159. Deputy Beebe further testified that Mr. Leija continued toward them, and that Deputy Beebe took about three steps back before firing the taser. *Id.* Deputy Beebe retreated because he did not want Mr. Leija's blood on him. *Id.* at 252. He believed that Mr. Leija was using his blood as a weapon. *Id.*

Officer Pickens testified about his efforts to talk to Mr. Leija. In addition to Mr. Leija's statements about the hospital staff trying to kill and poison him, Mr. Leija said he wanted his wife and wanted to leave the hospital. *Id.* at 242. Officer Pickens testified that, upon stopping Mr. Leija a second time in the hallway, Mr. Leija grew even angrier, that he pulled the gauze and needles from his arm, and that he began bleeding everywhere. Appellant's App. vol. II at 285, 288, 290. He testified that he stepped away because he was worried Mr. Leija's blood might get on him and injure him ("I didn't know what he had, if it was something I could get, so I stepped away from him."). *Id.* at 290. He described Mr. Leija's raising his arms over his head, both arms losing a fairly steady stream of blood. *Id.* at 290. He recollected Mr. Leija then saying that this was his blood, which he took to mean that

Mr. Leija was going to use his blood as a weapon. *Id.* at 290-91. In addition, in an interrogatory answer, Officer Pickens stated that during this time, Mr. Leija had pounded his clenched fists on his thighs and sprayed blood. *Id.* at 430.

Although the district court did not explain why, it stated that the officers' testimony was inconsistent about the degree of Mr. Lejia's resistance. Officer Pickens certainly never testified that Mr. Leija had *not* challenged him to a fight. Nothing in the record shows anyone asking Officer Pickens about that. In the middle of his testimony about Mr. Leija's bloody arm raising, the Estate's counsel asked, "And you haven't left out anything, as far as any statements that he made or that you made to him? You've told me everything that happened up until the time that he raised his hands above his head and said, this is my blood?" *Id.* at 290-91. Officer Pickens responded, "As far as I know, yes." *Id.* at 291. I would not reward this indirect "tell me everything" question by foreclosing Officer Pickens from asserting that Mr. Lejia asked him if he wanted to fight. The way to foreclose it is to ask about it directly.

Based on this record I have some difficulty concluding that the district court could likely find that Mr. Leija did not challenge Officer Pickens to fight. The two deputies were emphatic about it. The Estate apparently did not think it wise to ask Officer Pickens about it directly. We have no deposition testimony in the record from any of the other witnesses in the hallway saying that the deputies are wrong.

Yet based on the district court's finding of "inconsistent testimony," I assume this is what it meant and accordingly think it would likely find for summary judgment purposes that Mr. Leija did not challenge Officer Pickens to fight.

But based on the undisputed record, I also think that the district court would likely find that Mr. Leija made threatening gestures that would cause the officers to fear for their safety. In addition, I think the district court would likely find that the officers had legitimate health concerns about exposing themselves to Mr. Leija's free-flowing blood. In measuring the degree of risk posed, the district court would likely credit the doctor's testimony about a trail of blood down the hallway. Appellant's App. vol. I at 229.

I believe that the district court would also likely find that the medical staff wanted the officers to subdue Mr. Leija so that they could treat his serious, deteriorating medical condition. The doctor stated that he considered physical force to ensure that Mr. Leija got the needed treatment, and that someone had gone to get soft restraints to immobilize him for medical care once he was subdued. *Id.* at 226. The male nurse testified that he had told the doctor that the two of them could not handle Mr. Leija. *Id.* at 103. After observing Mr. Leija, the male nurse believed that more than two people were needed to approach Mr. Leija. *Id.* He felt he needed law enforcement for patient safety. *Id.* at 104.

Finally, I believe that the district court would likely find that the officers ordered Mr. Leija to stop and get on his knees, but that he would not comply. In addition to the officers' testimony, the doctor testified that he heard an officer loudly tell Mr. Leija to get to his knees, but that Mr. Leija continued down the hallway toward the officers without breaking stride. *Id.* at 229. The male nurse testified that he heard the officers tell Mr. Leija more than once to get on his knees, but that Mr. Leija did not comply. *Id.* at 108.

While I do not believe these additional findings are necessary to make the officers' response to the emergency situation reasonable, I believe that they make it all the more reasonable. They further support my view that the officers did not use excessive force in violation of the Fourth Amendment.

6. Clearly Established Law

Even if the officers acted with excessive force under the Fourth Amendment, I still believe they would be entitled to summary judgment. They would be entitled to this "unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct." *Plumhoff v. Rickard,* 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft,* 131 S. Ct. at 2080). "And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the

defendant's shoes would have understood he was violating it." *Id.* at 2023 (quoting *Ashcroft,* at 2083-84). "In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" *Id.* (citation omitted). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Morris,* 672 F.3d at 1196. But because cases almost never have exactly the same circumstances, we require less that way as the conduct becomes more obviously egregious. *Id.*

In its sole reference to the second prong of qualified immunity – clearly established law – the district court simply noted that "[t]he reasonableness standard is clearly established for the purposes of a section 1983 action . . . and it requires courts to balance several factors including the severity of the crime, the degree of the threat the subject poses to the safety of the officer and the public, and the subject's cooperation or resistance." Appellant's App. vol. II at 442 (citation omitted). Yet the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality . . . since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff,* 134 S. Ct. at 2023 (quotation marks and citation omitted). "The general proposition, for example, that an unreasonable search or

seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft,* 131 S. Ct. at 2084.

At oral argument, counsel for the Estate commendably began his argument by acknowledging that he had no cases with similar facts. The majority faces this same problem. Even so, it still apparently concludes that clearly established law advised the officers "beyond debate" that their actions amounted to excessive force. To get there, the majority relies on our "sliding scale" analysis, in which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Morris,* 672 F.3d at 1189 (quoting *Johnson,* 515 U.S. at 319). In this regard, it notes that "the qualified immunity analysis involves more than a 'scavenger hunt for prior cases with precisely the same facts.'" Maj. Op. at 20; *Cavanaugh v. Woods Cross City,* 625 F.3d 661, 666 (10th Cir. 2010) (quoting *Casey v. City of Fed. Heights,* 509 F.3d 1278, 1284 (10th Cir. 2007)).

As its strongest case from our circuit supporting its notion that the three officers here violated clearly established law, the majority relies upon *Casey v. City of Federal Heights,* 509 F.3d 1278 (10th Cir. 2007). In that case, we reversed the grant of summary judgment based on qualified immunity. *Id.* at 1287. The facts of the case are shocking. Casey challenged a traffic ticket and lost. *Id.* at 1279. After ruling, the

judge handed him the case file and told him to take it to the cashier's window to pay the fine. *Id.* His eight-year-old daughter visited the restroom while Casey went to the parking lot to get money to pay the fine. *Id.* A court clerk told him not to take the file outside the building, but Casey responded that he would be right back after getting his money. *Id.* As he returned with the court file and money to pay his fine, Officer Sweet intercepted him and ordered him back to his truck. *Id.* at 1280. Casey replied that he needed to return the file and get his daughter. *Id.*

When Casey moved around him to take the file to the cashier, the officer grabbed Casey's arm and put it in a painful arm-lock. *Id.* As Casey tried to continue to the courthouse, the officer jumped on his back. Office Lor then arrived and almost immediately tasered Casey. *Id.* With more officers now there, the officers took Casey to the ground and repeatedly banged his face into the concrete. *Id.* While Casey was on the ground, Officer Losli tasered him again with a "dry" stun. *Id.* Officer Lor tried to tase Casey a third time before being told to put her taser away after she hit another officer instead. *Id.*

As a second case, the majority relies on *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001). In this case, police responded to a call that a man was running around naked. *Id.* at 1185. Upon seeing him and his lively behavior (jumping up and down on an exterior landing of an apartment building, yelling, and kicking his legs up and down), police called for an ambulance. *Id.* After trying to calm him and coax him

down, the officers finally succeeded and Cruz came down to the ground but tried to walk past them. *Id.* The officers wrestled him to the ground and handcuffed him face down. *Id.* To stop his kicking, the officers wrapped a nylon restraint around his ankles. *Id.* The record had some evidence that the officers had "hog-tied" him, that is, tied his ankles within a foot of his wrists. *Id.* Before the ambulance arrived, Cruz's face blanched, leading the officers to remove the restraint. *Id.* The emergency crew unsuccessfully tried CPR, but Cruz died. *Id.* His autopsy revealed a large amount of cocaine in his system. *Id.*

On appeal, we noted that our circuit had not yet ruled on the validity of hog-tie restraints. *Id.* at 1188. We held that officers "may not apply this technique when an individual's diminished capacity is apparent." *Id.* Although recognizing cases from other jurisdictions, we could not say that "a rule prohibiting such a restraint in this situation was 'clearly established' at the time of this unfortunate incident." *Id.* at 1189. I simply observe that the cases on hog-ties were more plentiful and on point than the majority's cases offered in support of its decision in this case.

Reviewing the three factors set forth in *Graham,* 490 U.S. at 396, we found it debatable whether Casey's conduct even amounted to a crime. *Casey,* 509 F.3d at 1281. We found that Officer Sweet had no reason to believe that Casey posed a threat to anyone's safety. *Id.* at 1282. And finally, we concluded that when Officer Sweet used physical force on Casey, Casey was "neither 'actively resisting arrest' nor

'attempting to evade arrest by flight.'" *Id.* (quoting *Graham,* 490 U.S. at 396). Although we located no case in which a citizen was peacefully trying to return to a courthouse and then "tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation," we denied Officer Sweet qualified immunity. *Id.* at 1285. We also denied it to Officer Lor after noting that we knew of no circuit court that had "upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey." *Id.* at 1286.

I disagree that the three officers in the present case could read *Casey* and know that it clearly established they could not taser Mr. Leija in the circumstances of this case. I fail to understand how the majority likens the peaceful Mr. Casey to the combative Mr. Leija. Nor do I understand how the two cases compare when Mr. Leija was warned about the taser if he did not comply with the officers' directions, while Mr. Casey was tackled and tasered twice for no apparent reason, except perhaps for overzealous officers who lacked any sense or judgment. In relying upon *Casey,* the majority continues to ignore the pressing need for the officers to do what the medical staff wanted and needed – control of Mr. Leija so he could be treated rather than allowed to drift outside untreated, where the doctor said he would probably die. In short, I think, if anything, *Casey* helps the officers here because they had a need to use the taser and warned Mr. Leija before using it.

In addition, the majority relies on a string of cases from outside our circuit involving "the use of tasers against the mentally ill [that] have found it clearly established that officers may not tase non-criminal, non-threatening subjects who primarily exhibit passive resistance." Maj. Op. at 20. Again, describing Mr. Leija in those terms disregards the facts. On inspection, none of these cases resemble Mr. Leija's case and provide no basis for a conclusion that the three officers here should have known that their actions violated clearly established law. None of the cited cases involves the same medical emergency here or a corresponding need for force to subdue a combative person endangering his own life because his medical condition had deprived him of his ability to continue to undergo necessary treatment. As such, the cases offer no help.

The majority understates it when it says that "[t]hese cases do not exactly mirror the factual circumstances of our case." Maj. Op. at 21. *See Oliver v. Fiorino,* 586 F.3d 898, 901-02 (11th Cir. 2009) (affirming denial of summary judgment for qualified immunity in case where man appearing mentally unstable but not accused or suspected of a crime was tasered 8 to 12 times for five seconds each while he was lying on hot pavement immobilized and clenched up, allegedly resulting in his death); *Borton v. City of Dothan,* 734 F. Supp. 2d 1237, 1242-44 (M.D. Ala. 2010) (denying summary judgment on qualified immunity grounds for a mentally ill woman who while strapped to a gurney but struggling and screaming

was tasered three times, first on her right leg, then on her left leg as she screamed, "I give up," and finally on her face, knocking her unconscious); *Asten v. City of Boulder,* 652 F. Supp. 2d 1188, 1194 (D. Colo. 2009) (after a mentally ill woman denied police entry into her home, an officer cut the screen on her door and used it to fire his taser into her stomach, never warning her or telling her of their intent to take her into custody).

I disagree that any of the majority's cases would put the three officers on notice that their actions would amount to excessive force. The majority fails to acknowledge the urgency of Mr. Lieja's medical condition and the danger he posed to the officers and others. The majority's broad rule against the use of tasers compels officers desiring not to be sued to resort first to physical force in restraining individuals needing to be restrained for their own protection. In my mind, it disregards the risks to law enforcement from violent physical encounters and will "unduly inhibit [officers] in the discharge of their duties." *Camreta,* 131 S. Ct. at 2030.

For these reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

ERMA ALDABA, Personal Representative and Next of Kin to JOHNNY MANUEL LEIJA, Deceased, Plaintiff,	)	
v.	)	No. CIV-12-85-FHS
THE BOARD OF MARSHALL COUNTY COMMISSIONERS; JAMES ATNIP; STEVE BEEBE; THE CITY OF MADILL; and BRANDON PICKENS, Defendants.	)	

OPINION AND ORDER

This is an action brought by Plainitff Erma Aldaba, as the personal representative and next of kin to Johnny Manuel Leija ("Leija"), the decedent, pursuant to 42 U.S.C. § 1983 for claimed violations to Leija's constitutional rights in connection with an altercation involving the individual defendants and Leija on March 24, 2011, while Leija was an admitted patient at Integris Marshall Memorial Hospital ("Integris") in Madill, Oklahoma. Plaintiff alleges that Defendants James Atnip ("Atnip") and Steve Beebe ("Beebe"), Marshall County deputy sheriffs, and Brandon Pickens ("Pickens"), a City of Madill police officer, violated Leija's constitutional rights by

(1) executing a warrantless and unreasonable seizure of Leija, and (2) using excessive force in connection with their seizure of Leija. Plaintiff also asserts pendent state law tort claims against Defendants, the Board of Marshall County Commissioners ("Marshall County"), and the City of Madill ("the City") for the alleged negligent acts of their respective law enforcement officials, Atnip, Beebe, and Pickens.[1] Before the Court for its consideration are the following motions: (1) Marshall County's Motion For Summary Judgment (Dkt. No. 49), (2) Atnip's and Beebe's Motion For Summary Judgment (Dkt. No. 51), and (3) the City's and Brandon Pickens' Motion For Summary Judgment (Dkt. No. 53). Having reviewed the parties' respective submissions in connection with these motions, the Court finds summary judgment is appropriate as to Plaintiff's section 1983 claims for unlawful seizure and the pendent state tort claims, but that questions of fact preclude the issuance of summary judgment in favor of Atnip, Beebe, and Pickens on Plaintiff's section claims for excessive force.

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[1] Additional claims and defendants were included in Plaintiff's Complaint. On December 21, 2012, the parties filed a Stipulation of Dismissal With Prejudice (Dkt. No. 56) eliminating several of those claims and parties. By virtue of this Stipulation, Plaintiff dismissed all constitutional claims pursuant to 42 U.S.C. § 1983 against the City, Marshall County, James Fullingim, and Robert Wilder. As the Stipulation recognizes, the claims remaining are the section 1983 claims against Atnip, Beebe, and Pickens for unlawful seizure and excessive force, and the pendent tort claims against the City and Marshall County.

Background

The events that transpired on March 24, 2011, are, in large part, undisputed.[2] On the morning of March 24, 2011, Leija voluntarily presented himself to the Integris emergency room accompanied by his girlfriend, Olivia Arellano ("Arellano"). Leija was evaluated and it was determined that he was suffering from hypoxia (low oxygen level) and he was diagnosed with severe pneumonia in both lungs and dehydration. As a result, Leija was admitted to Integris for further evaluation and treatment. Upon admission at 11:00 a.m., Leija was cooperative, responsive, and in full agreement with the decision to admit him into the hospital for treatment. Leija was given breathing treatments, put on oxygen through his nostrils, and given intravenous antibiotic treatment. As a result of the breathing treatments and being put on oxygen Leija's oxygen saturation level increased form 77% to 88%. When an individual's oxygen saturation level is low enough, one's mental status can be affected. By lunchtime on March 24, 2011, Leija was still receptive to the treatment being provided to him by the medical staff at Integris and was polite and cooperative in his interaction with the staff. Around 5:35 p.m., Leija's mood and demeanor

[2] Plaintiff has admitted most of the facts set forth by the defendants in their motions. The Court's recitation of facts is framed by these admissions, the undisputed facts established by the record, and the Court's viewing of the hospital video recording submitted by the parties.

began to change when Leija complained of extreme thirst. Around 6:00 p.m., Nurse Melissa Farmer ("Farmer") observed that Leija had disconnected his oxygen and severed his IV tubing. Farmer also noticed that Leija was bleeding from his arms and that there was blood on the floor and the toilet. Farmer reconnected Leija's oxygen and IV tubing and Leija's oxygen saturation level increased from 84% to 92%. During this process, Leija appeared confused and he asked for his girlfriend, Arellano, several times. Leija became very anxious, but refused to take any medication to ease his anxiety. Farmer contacted Dr. John Conley ("Conley") about Leija's condition and Dr. Conley ordered that Leija be administered 1 mg of Xanax. At 6:20 p.m., Farmer attempted to give Leija the Xanax tablet but he refused the tablet, took out his oxygen, and yelled at Farmer that he didn't need the medicine and that she was just telling him lies and more secrets. Leija continued to be uncooperative and his aggressiveness increased. Leija continued yelling and told the nursing staff not to approach him. He claimed the staff was trying to poison him.

Farmer contacted Dr. Conley again for assistance and Nurse Matt Turvey ("Turvey") was sent to Leija's room. Turvey attempted to calm Leija, but Leija began yelling "I am Superman. I am God. You are telling me lies and trying to kill me." Turvey observed that Leija had once again removed his IV tubing and that there was blood on the bathroom wall, toilet, and floors. Turvey and Dr. Conley were concerned that the low oxygen level was causing diminished capacity in

Leija. Dr. Conley believed Leija was harming himself by removing his oxygen and IV and refusing the medication. Dr. Conley directed Turvey to administer an injection of Haldol and Ativan in order to calm Leija so that he could be put back on oxygen and have his IV hooked up again. Leija would not allow Turvey to administer the medication and Turvey did not believe that he and Dr. Conley could restrain Leija in order to administer the injection. With Dr. Conley's approval, Turvey called law enforcement for assistance with a disturbed patient at 6:36 p.m. Atnip and Beebe were eating dinner with Pickens when Pickens received the call to assist the hospital with a combative person. Pickens informed Atnip and Beebe of the call and they agreed to assist Pickens.[3]

At 6:40 p.m., Dr. Conley arrived at Leija's room to assist Turvey and he observed Leija state that the medical staff was trying to poison him, that he was God and Superman, and that only water was pure enough for him. Dr. Conley observed blood on the ground and on the toilet and that Leija's underwear was pulled down. Dr. Conley became increasingly concerned for Leija's health given the behavioral and personality changes in Leija from earlier in the day when he was admitted. Dr. Conley observed Leija's

[3] Some confusion exists in the record as to who received the call for assistance. Atnip and Beebe state Pickens received the call while Turvey states he notified the Marshall County Sheriff's Office for assistance with a disturbed patient. In any event, they were all notified and responded to the call.

aggressive behavior and left Leija's room when Leija started to step towards him. It was Dr. Conley's opinion that he and Turvey could not secure Leija to his bed to treat and evaluate him without the assistance of law enforcement officials.

Leija exited his room in his hospital gown and began walking down the hall. At this point, Atnip, Beebe, and Pickens arrived at the scene and observed Leija standing in the hall, yelling and screaming that people were trying to poison and kill him. Leija was visibly agitated and upset. Pickens was informed by medical personnel that Leija was ill and that he could die if he left the hospital. Pickens attempted to persuade Leija to return to his room, but Leija refused and said the hospital staff was trying to kill him. Pickens informed Leija that no one was trying to kill him and that he needed to let the hospital staff help him. Leija continued down the hallway toward the lobby area.[4] Leija continued with his aggressive behavior by pulling the remaining IV from his arms causing blood to come out. After speaking with Pickens, Leija faced the officers and clenched and shook his fists. Leija caused more bleeding when he removed the gauze and tape from his arms, and he

[4] The video recording shows Leija continuing down the hall, but he remains out of view of the camera until he is seen being subdued by all three officers. Thus, the video fails to capture that portion of the altercation where the defendants contend Leija became increasingly agitated, aggressive, and confrontational.

raised his arms and stated that this was his blood. Atnip and Beebe contend they gave Leija several commands to step back, calm down, and get on his knees. They warned Leija that if he did not comply they would use a Taser on him. After Leija did not comply with their commands, Beebe fired the Taser at Leija with one prong hitting him in the upper torso. The Taser did not appear to affect Leija. At this point, Atnip attempted to restrain Leija by grabbing his right arm around the wrist and elbow area. Pickens grabbed Leija's left arm. Atnip and Pickens attempted to do an armbar takedown of Leija. Leija continued to struggle with the officers and they were unable to move his arms behind his back, but they were able to turn him against the lobby wall face first. Beebe then administered a "dry" sting on Leija's back shoulder area in order to relax him so they could move his arms back. The "dry" sting had no effect. Atnip pushed his leg into the bend of Leija's right leg and the officers were able to turn Leija around and he was pushed to the floor. Atnip and Pickens held Leija's arms while Beebe attempted to handcuff him. Beebe was able to place a handcuff on Leija's right wrist and Pickens pulled on Leija's left arm as Leija was resisting Pickens' grip. While this struggle was going on, Turvey appeared and injected Leija with the shot of Haldol and Ativan. Leija then went limp, made a grunting noise, and vomited a clear liquid. The officers moved away from Leija and medical personnel immediately began CPR in an effort to revive Leija. The attempts to revive Leija were unsuccessful and those efforts were stopped at 7:29 p.m. The medical

examiner determined Leija's cause of death as respiratory insufficiency secondary to pneumonia. He further determined that the manner of death was natural.

Summary Judgment Standards

The standards relevant to the disposition of a case on summary judgment are well established. Having moved for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure, defendants' initial burden is to show the absence of evidence to support Plaintiff's claims. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Defendants must identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which establish the absence of any genuine issue of material fact. *Universal Money Centers v. AT&T*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S.Ct. 655 (1994) (quoting Fed. R. Civ. P. 56(c)). defendants' need not negate Plaintiff's claims or disprove her evidence, but rather, their burden is to show that there is no evidence in the record to support her claims. *Celotex*, 477 U.S. at 325. Plaintiff, as the nonmoving party, must go beyond the pleadings and "must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [she] carries the burden of proof." *Applied Genetics v. First Affiliated Securities*, 912 F.2d 1238, 1241 (10th Cir. 1990).

Summary judgment is not appropriate if there exists a genuine material factual issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986). "A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Thomas v. IBM*, 48 F.3d 478, 486 (10th Cir. 1995) (quoting *Anderson*, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the Plaintiff. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

As part of the summary judgment motion, the individual defendants claim an entitlement to qualified immunity. The affirmative defense of qualified immunity is available to all government officials. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This immunity is an immunity from suit and not merely a defense to liability. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 644-45 (10th Cir. 1988) and *England v. Hendricks*, 880 F.2d 281 (10th Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990). The test the court must apply is an objective one which inquires into the objective reasonableness of the official's actions. *Harlow*, 457 U.S. at 816. Government officials performing discretionary functions will not

be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997) (quoting *Harlow*).

In assessing a request for summary judgment on qualified immunity grounds, the Court must determine whether the facts, taken in the light most favorable to the Plaintiff, establish a violation of a federal statutory or constitutional right by the particular defendant under consideration. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). Additionally, the Court must make the determination as to whether the federal statutory or constitutional right at issue was "clearly established" at the time the particular defendant allegedly committed the violation. *Id.* at 201. While the Supreme Court in *Saucier* required that the determination of a violation of a federal right be the threshold inquiry, with the issue of whether the right was clearly established being the second part of the two-step analysis, the Supreme Court later held "that the *Saucier* protocol should not be regarded as mandatory in all cases, [however] we continue to recognize that it is often beneficial." *Pearson*, 555 U.S. at 236.

Illegal Seizure

Plaintiff contends Leija was subjected to an unlawful seizure by Atnip, Beebe, and Pickens. The

Court disagrees and finds Plaintiff has failed to satisfy her burden of establishing a constitutional violation for an illegal seizure claim. The Fourth Amendment right to be free from an unreasonable seizure applies "when officers use physical force to subdue a person or when the individual submits to the officers' assertion of authority." *Pino v. Higgs*, 75 F.3d 1461, 1467 (10th Cir. 1996). This Fourth Amendment right "is not limited to criminal cases, but applies whenever the government takes a person into custody against [his] will." *Id.* Not every seizure of an individual by law enforcement officials, however, is a violation of the Fourth Amendment. The seizure must be unreasonable to violate the Fourth Amendment. *Id.*

In the context of a seizure or detention of an individual for mental evaluation or medical care, it is appropriate for law enforcement officials to seize such individual if the officials "have probable cause to believe that the person presents a danger to himself or others." *Meyer v. Board of County Com'rs of Harper County, Okla.*, 482 F.3d 1232, 1237 (10th Cir. 2007); *see Pino*, 75 F.3d at 1468 ("The state has a legitimate interest in protecting the community from the mentally ill and in protecting a mentally ill person from self-harm."). Oklahoma law mirrors this "probable cause" standard. Under Oklahoma law "[a]ny person who appears to be or states that such person is mentally ill, alcohol-dependent, or drug-dependent to a degree that immediate emergency action is necessary may be taken into protective custody and

detained. . . .” Okla.Stat.tit. 43A, § 5-207(A). Furthermore, with respect to the actions of law enforcement officials, Oklahoma law provides “[a]ny peace officer who reasonably believes that a person is a person requiring treatment as defined in Section 1-103 of this title shall take the person into protective custody.” Okla. Stat.tit. 43A, § 5-207(B). Under Okla. Stat.tit. 43A, § 1-103(3), “‘Mental illness’ means a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.”

Based on the undisputed facts in the record, the Court concludes the seizure of Leija did not violate the Fourth Amendment as Atnip, Beebe, and Pickens acted reasonably under the circumstances given that probable cause existed for taking Leija into protective custody. Leija was demonstrating aggressive behavior, mental instability, and irrational thinking. He had removed his oxygen and IV tubes against the directives of the medical staff and he was making statements which were delusional and irrational. The medical staff believed he was harming himself and was placing his health at great risk by his behavior. Believing that Leija was experiencing a substantial mental disorder which was affecting his ability to make sound judgments, the medical staff sought the assistance of law enforcement officials to take Leija into protective custody so that the medical staff could properly evaluate and treat Leija. The officers were

informed that assistance was needed with a disturbed patient. Upon their arrival at the hospital, the officers were confronted with an agitated and combative individual who was yelling and screaming that people were trying to poison and kill him. At least one of the officers was informed by the medical staff that Leija could die if he was allowed to leave the hospital. In the officers' presence, Leija pulled a remaining IV tube from his arm and began to bleed. He also removed the gauze and tape from his arms causing more bleeding. Given these undisputed facts, it was clearly reasonable for the officers to act in the manner they did in attempting to seize Leija for his own protection. The officers were confronted with an emergency situation involving a person exhibiting signs of a mental illness which impaired his ability to recognize his need for medical treatment. Clearly, probable cause existed for the officers to attempt to take Leija into protective custody for evaluation purposes as he was posing a threat to his own medical health.[5] The Court therefore concludes that Atnip, Beebe, and Pickens did not violate Leija's Fourth Amendment rights when they seized him for protective custody purposes.[6]

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[5] This objective probable cause determination is not affected by the stated justification of Atnip for the seizure, i.e., that Leija was assaulting Pickens by slinging blood.

[6] The Court recognizes Plaintiff's argument concerning the right of an individual to refuse medical treatment. *See, Cruzan v. Director, Missouri Dept't of Health*, 497 U.S. 261 (1990); *see Granato v. City and County of Denver*, 2011 WL 820730 *7

(Continued on following page)

Excessive Force

Plaintiff claims the officers subjected Leija to excessive force in violation of the Fourth Amendment when they seized him at the hospital. The court's initial focus is on whether Plaintiff has alleged sufficient facts to establish a constitutional violation. A claim of excessive force is governed by the "reasonableness standard" of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). In *Graham*, the Supreme Court set forth the test for determining whether a police officer's use of force was constitutionally excessive in terms of "whether the officer's actions [were] objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (quotations omitted). Thus, the relevant question with respect to Defendants is whether the force they applied to seize Leija was "objectively reasonable in light of the facts and circumstances confronting [them]." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (internal quotation marks and citations omitted). This reasonableness standard is clearly established for purposes of a section 1983 action, *Wilson v.*

("Although couched in somewhat tentative and speculative terms, *Cruzan* nevertheless appears to recognize a constitutional right of a competent person to refuse undesired medical treatment."). The present case, however, does not involve a competent individual's refusal of medical treatment. The undisputed facts establish that the officers were dealing with an individual suffering from a mental impairment who was unable to make an informed decision about his medical care.

Meeks, 52 F.3d 1547, 1552 (10th Cir. 1995), *abrogated on other grounds by, Saucier v. Katz*, 533 U.S. 194 (2001), and it requires courts to balance several factors including the severity of the crime, the degree of threat the subject poses to the safety of the officer and the public, and the subject's cooperation or resistance. *Graham*, 490 U.S. at 396-97; *Olsen*, 312 F.3d at 1314; *Latta v. Keryte*, 118 F.3d 693, 701 (10th Cir. 1997).

Summary judgment on an excessive force claim under section 1983 may not be granted where "*any* genuine issue of material fact remains – regardless of whether the potential grant would arise from qualified immunity or from a showing that the officer merely had not committed a constitutional violation." *Olsen*, 312 F.3d at 1314 (emphasis in original) (citing *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997). The present case presents many material disputed facts as to the objective reasonableness of the force by Atnip, Beebe, and Pickens. Primarily, the record is in dispute as to the *degree* of resistance exhibited by Leija after being confronted by the officers. The video shows Leija merely walking away from the officers. The gap in the video recording results in a failure to have an objective viewing of what transpired after the time Leija walked away from the officers and up until the point where the officers are seen apprehending Leija. The testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during this critical gap in the video. Additionally, the record is in dispute as to the degree of threat Leija

posed to the officers or the public. Leija was a hospital patient. He was not armed in any fashion. While it is alleged that he was using his blood as a weapon, there is no evidence that any blood was spattered on any of the officers. Finally, an evaluation of the reasonableness of the officers' actions must be made in the context of Leija's medical condition. The record reflects that Leija was suffering from a significant medical condition which severely comprised his health. The officers' knowledge of this condition – and their efforts to ascertain information about Leija's condition before attempting to use any degree of force on him – are issues of material fact which remain in dispute. Consequently, the Court finds that material disputed facts remain which preclude the issuance of summary judgment in favor of Atnip, Beebe, and Pickens on Plaintiff's excessive force claim.

Pendent State Tort Claims

Plaintiff asserts pendent state tort claims for negligence against Marshall County and the City. Invoking the "protective function" immunity provision of the Oklahoma Governmental Tort Claims Act ("OGTCA"), Okla.Stat.tit. 51, § 155(6), Marshall County and the City contend they are entitled to summary judgment on Plaintiff's tort claims as their respective officers were providing law enforcement protection in connection with their encounter with Leija. The Court agrees. Section 155(6) of the OGTCA provides the state or a political subdivision immunity for "the method of providing police, law enforcement

or fire protection." In *Schmidt v. Grady County*, 943 P.2d 595 (Okla. 1997), the Oklahoma Supreme Court addressed a situation where a plaintiff was injured after a Grady County deputy sheriff had taken the plaintiff "into custody to protect her from harming herself or others and from being harmed by others." *Id.* at 596. The plaintiff in *Schmidt* was injured when she either jumped or fell out of the deputy sheriff's patrol vehicle after being placed in the front seat without any type of restraint. The Oklahoma Supreme Court applied the immunity provision of section 156(6) of the OGTCA and concluded, "[w]e hold subsection 156(6) provides immunity for a political subdivision for liability for personal injuries resulting from the acts of its employees acting within the scope of their employment in taking into protective custody and transporting a person to the county jail." *Id.* at 598. Similarly, the Court finds Marshall County and the City are entitled to this "protective function" immunity as the Court has previously determined in the context of Plaintiff's illegal seizure claim that Atnip, Beebe, and Pickens were justified in attempting to take Leija into protective custody for the purposes of further medical evaluation and treatment. Summary judgment is therefore appropriate on Plaintiff's pendent state tort claims against Marshall County and the City.

Conclusion

Based on the foregoing reasons, the Court finds that summary judgment is appropriate as to Plaintiff's section 1983 claims for illegal seizure and her pendent state tort claims for negligence. Summary judgment is not appropriate on Plaintiff's section 1983 claims for excessive force. Consequently, the Court makes the following orders:

1. Marshall County's Motion For Summary Judgment (Dkt. No. 49) is granted as to Plaintiff's pendent state tort claim and Marshall County is dismissed from this suit;

2. Atnip's and Beebe's Motion For Summary Judgment (Dkt. No. 51) is granted as to Plaintiff's section 1983 illegal seizure claim and denied as to Plaintiff's section 1983 excessive force claim; and

3. The City's and Brandon Pickens' Motion For Summary Judgment (Dkt. No. 53) is granted as to Plaintiff's pendent state tort claim against the City, granted as Plaintiff's section 1983 illegal seizure claim, and denied as to Plaintiff's section 1983 excessive force claim.

It is so ordered this 5th day of April, 2013.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge
Eastern District of Oklahoma

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERMA ALDABA, as personal representative and next of kin to Johnny Manuel Leija, deceased, Plaintiff-Appellee, v. BRANDON PICKENS, et al., Defendants-Appellants, and THE BOARD OF MARSHALL COUNTY COMMISSIONERS, et al., Defendants.	Nos. 13-7034 & 13-7035

ORDER

(Filed Mar. 20, 2015)

Before **BRISCOE**, Chief Judge, **McKAY** and **PHILLIPS**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk