No. 24-4060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CORY DRISCOLL,

Plaintiff-Appellee,

v.

MONTGOMERY COUNTY, OHIO,
BOARD OF COMMISSIONERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court
Southern District of Ohio, Western Division at Dayton
Case No. 3:22-cv-287 (Rose, J.)

BRIEF FOR PLAINTIFF-APPELLEE CORY DRISCOLL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: No. 24-4060 Case Name: Driscoll v. Montgomery County et al.

Name of counsel: Becca Steinberg

Pursuant to 6th Cir. R. 26.1, Cory Driscoll
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Becca Steinberg

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Statement Regarding Oral Argument

Appellee Cory Driscoll urges the Court to decide this appeal without oral argument. In this interlocutory appeal of a decision denying qualified immunity, Appellant Jennifer Smiley is obligated to accept the facts viewed in the light most favorable to Driscoll. *See Heeter v. Bowers*, 99 F.4th 900, 908-09 (6th Cir. 2024). It is clear from the record that evidence supports Driscoll's position and the District Court's decision, and a straightforward application of clearly established Fourth Amendment principles requires affirmance. This case presents no novel issue or any factual dispute, and therefore this Court can expeditiously issue a decision without the need for oral argument.

Introduction

On May 10, 2020, Cory Driscoll went to the park to pray and reflect. His day at the park ended a few hours later when he was shot by Deputy Jennifer Smiley.

The only justification Smiley offers for using deadly force is that she believed Driscoll had doused himself in gasoline and might light himself on fire. Smiley's belief was not reasonable. Smiley saw Driscoll drink from a water jug repeatedly without any physical reaction. In addition, Smiley knew that Driscoll had gone to a nearby pond carrying the water jug and was returning from the pond when she confronted him. Nobody ever told Smiley that the jug contained gasoline, and Smiley never claimed to have smelled gasoline. There is no evidence from which an officer could have reasonably believed that he was drinking gasoline.

There was also no allegation or suspicion that Driscoll had committed any crime. Driscoll was in a public park, where he had every right to be. He is deeply religious, and his religious practice includes speaking in tongues. He has also been diagnosed with schizoaffective and bipolar disorders. Driscoll was in the midst of prayer and meditation when another visitor to the park perceived that he was in distress and called the county's non-emergency line to ask for help.

Help didn't arrive; Smiley did. Thankfully, a witness recorded what happened next.

Smiley didn't attempt to assist Driscoll or to deescalate the situation. Instead, as the District Court noted, she "appeared to be the aggressor." R. 38 (Order at 18) (Page ID #514). Smiley shouted and cursed at Driscoll, pointed her gun at him, and ordered him to lie on the ground without any explanation. Just a few minutes after Smiley arrived at the park, she shot Driscoll, even as he held his empty hands in the air showing her that he was unarmed.

Driscoll needed help. But Smiley shot him instead. Driscoll had no weapon and posed no threat. The District Court therefore correctly concluded that summary judgment was inappropriate because a jury could find that Smiley's use of deadly force was objectively unreasonable. The District Court also correctly decided that Driscoll's right not to be shot was clearly established. This Court should affirm.

Statement of Jurisdiction

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. A district court's denial of qualified immunity is appealable under the collateral order doctrine. *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024).

But this Court's appellate jurisdiction does not extend to "disputes about 'evidence sufficiency,'" that is, "which facts a party may, or may not, be able to prove at trial." *Heeter*, 99 F.4th at 909 (quoting *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). This Court "may only review the 'purely legal' issue of whether the facts," viewed most favorably to the plaintiff,

"support a claim of violation of clearly established law." *Id.* (quoting *Jones*, 515 U.S. at 313).

Statement of the Issues

I. Whether the District Court correctly determined that Smiley is not entitled to qualified immunity for shooting Driscoll, an unarmed person experiencing a mental health crisis.

II. Whether the District Court correctly determined that Smiley is not entitled to statutory immunity on Driscoll's state-law claims.

Statement of the Case

I. Factual background

This case arose after Deputy Jennifer Smiley shot Cory Driscoll, an unarmed African-American man, three-and-a-half minutes after she saw him for the first time. R. 38 (Order at 6) (Page ID #502); R. 23 (Video) (Page ID #251).

Driscoll, then twenty-nine years old, suffers from schizoaffective and bipolar disorders. R. 29-1 (Driscoll Aff. at 1) (Page ID #304). He sometimes experiences manic episodes, which are exacerbated by stressful situations. *Id.* at 1, 3 (Page ID #304, 306). During these episodes, it is difficult for him to control his movement, communication, and thinking. *Id.*

Driscoll's visit to the park. On the evening of May 10, 2020, Driscoll went to Possum Creek Park. R. 29-1 (Driscoll Aff. at 2) (Page ID #305).

Driscoll is a "deeply religious person" who sometimes "speak[s] in tongues" as part of his religious practice. *Id.* at 1 (Page ID #304). That day, he sat in his car in the parking lot and began to pray, speaking in tongues. *Id.* at 2 (Page ID #305).

Around 8 p.m., a group of five young people also visited the park. R. 29-6 (McNutt Interview at 0:13-0:32, 5:00-6:15) (Page ID #320). They saw Driscoll sitting in his car with the windows partially rolled down. *Id.* at 1:57-2:06. Driscoll was resting his head on the steering wheel and speaking in tongues, which sounded to the group like he was "rolling his R's." R. 22-8 (Dispatch Report at 4) (Page ID #245); R. 29-5A (Dispatch Call at 3:40-3:54) (Page ID #319). The group soon moved on to explore the park, but returned later and saw that Driscoll was still in his car speaking in tongues. R. 29-6 (McNutt Interview at 2:12-2:42) (Page ID #320). Two of the young women tried to check on him, but Driscoll did not respond or acknowledge them. R. 29-4 (Witness Statements at 1-2, 6-7) (Page ID #312-13, 317-18).

At this point, Marisah Roberts, a young woman in the group, called the Montgomery County Regional Dispatch Center's non-emergency line seeking help for Driscoll. R. 29-5A (Dispatch Call) (Page ID #319); R. 29-6 (McNutt Interview at 3:48-3:53) (Page ID #320). Not understanding that he was in the midst of prayer, she assumed that he was in distress. Roberts told Dispatch about Driscoll's behavior and advised that he didn't "seem okay at all," that he was potentially "on something," and that "he's

not okay; he needs help." R. 29-5A (Dispatch Call at 3:10-3:20) (Page ID #319); *see also* R. 22-8 (Dispatch Report at 4) (Page ID #245). Roberts did not express fear or alarm, nor did she claim that Driscoll had done anything criminal. *See* R. 29-5A (Dispatch Call) (Page ID #319). To the contrary, Roberts stated that she and her friends were worried about him and didn't want to leave until he got help. *Id.* at 1:18-1:22 (Page ID #319).

The dispatcher asked Roberts if Driscoll had any weapons, and Roberts reported that she hadn't seen any. R. 29-5A (Dispatch Call at 3:30-3:37) (Page ID #319). She said she was "pretty sure" they saw a lighter in Driscoll's car but emphasized that she could not say so definitively. *Id.* at 3:54-4:00, 4:24-4:36.

While Roberts was on the phone with Dispatch, Driscoll got out of his car and ran over to a nearby pond carrying what Roberts told Dispatch was a "big water jug." R. 29-5A (Dispatch Call at 2:30-2:37) (Page ID #319); R. 22-8 (Dispatch Report at 4) (Page ID #245). The jug was empty at the time. R. 29-6 (McNutt Interview at 4:10-4:20) (Page ID #320). Driscoll was thirsty and went to fill his jug with pond water. R. 29-1 (Driscoll Aff. at 2) (Page ID #305). The group followed at a distance, reporting to the dispatcher as they did, and eventually lost sight of Driscoll, but they could hear him continuing to speak in tongues. *See* R. 29-4 (Witness Statements at 3) (Page ID #314); R. 29-6 (McNutt Interview at 3:10-3:30) (Page ID #320); R. 29-5A (Dispatch Call at 2:39-4:12) (Page ID #319).

Driscoll soon returned to the parking lot with the jug now partially filled with a "dirty brown" liquid. R. 29-6 (McNutt Interview at 7:00-7:20) (Page ID #320). Although the group did not see Driscoll fill the jug, one of them said that pond water was the "only thing [he] could think" was in the jug. *Id.* at 7:15-7:17. Roberts told Dispatch that Driscoll was "by the pond" and that she thought he may "be filling his water jug up." R. 29-5A (Dispatch Call at 4:52-5:00) (Page ID #319).

Smiley arrives and sees Driscoll. Deputy Smiley was patrolling the area and responded to the call. R. 22-1 (Smiley Decl. at 2-3) (Page ID #104-05); R. 23 (Radio.wav at 1:05-1:10) (Page ID #251). On her way to the park, Smiley reviewed Dispatch's comments on the call, R. 22-1 (Smiley Decl. at 3) (Page ID #105), which included a note that Driscoll had been seen "running twds [towards] the pond with a big water jug in his hands" and was now returning to his car. R. 22-8 (Dispatch Report at 4) (Page ID #245). When Smiley arrived, Driscoll had not returned from the pond, so she proceeded to check the tags on his car. *See* R. 22-7 (Smiley Statement at 1) (Page ID #240).

As she did that, the group came walking up the path to the parking lot, and Driscoll approached behind them. R. 22-7 (Smiley Statement at 1) (Page ID #240). Driscoll was carrying a "milk jug" filled with what Smiley later described as a "yellowish/orange liquid" that "appeared to be gasoline." *Id.* She heard him "shouting in an unknown language/tongues." *Id.* She told the group to stand by their car. *Id.*

Smiley had been on the police force for nearly two decades. R. 22-1 (Smiley Decl. at 1) (Page ID #103). She has presented records showing attendance at many training sessions, R. 22-3 (Student Records) (Page ID #107-25), including at least four times in "handling persons with mental illnesses." R. 22-4 (Training Log at 20, 30, 34) (Page ID #145, 155, 159). Under the Department's policy, she was expected to be "capable of recognizing those symptoms that may indicate the presence of a mental illness." R. 22-6 (Policy 5.1.11 at 2) (Page ID #235). The policy listed several mental-illness symptoms: delusions; rapid and incoherent speech; disordered thinking and speech (including use of made-up words and sounds); one-sided conversations; and rhythmic gestures and movements such as pacing. *Id.* at 2-3 (Page ID #235-36). The policy also specifically warns officers that mental health symptoms may be easily confused with substance use or abuse. *Id.* at 3 (Page ID #236).

Once an officer "know[s] or suspect[s]" that a person is experiencing a mental illness, the policy outlines how the officer should respond. R. 22-6 (Policy 5.1.11 at 5) (Page ID #238). It directs officers to "[r]emain calm and avoid overreacting"; "[a]vert feelings of alarm or urgency"; "[t]ry not to move suddenly, give rapid orders or shout"; "[i]ndicate a willingness to understand and help"; "[t]reat the person with courtesy and respect"; and "[m]aintain a normal voice pitch." *Id.* The policy also instructs officers not to "verbally abuse or threaten the person"; "make a scene or aggravate the situation"; or engage in "actions or attitudes that may

provoke the person." *Id.* As can be seen in the video, Smiley's conduct did not conform to this policy. *See* R. 23 (Video at 0:16-3:37) (Page ID #251).

Smiley confronts Driscoll. As Driscoll returned from the pond carrying the water jug and speaking in tongues, Smiley crossed the parking lot to confront him. R. 23 (Video at 0:00-0:16) (Page ID #251). Smiley positioned herself between Driscoll and his car, such that he was unable to leave without walking toward her. *See id.* at 0:03-0:22; R. 29-1 (Driscoll Aff. at 2-3) (Page ID #305-06).

She immediately ordered him to drop his jug, which contained pond water. R. 23 (Video at 0:16-17) (Page ID #251); R. 29-1 (Driscoll Aff. at 2-3) (Page ID #305-06). Driscoll continued to walk forward, holding the jug loosely at his side, and then stopped, still holding the jug. *Id.* at 0:17-0:21. Smiley's hand quickly moved to her gun. *Id.* at 0:21. She repeated her order to put the jug down, her voice rising to a shout. *Id.* at 0:23-0:31. His voice rose in response. *Id.* at 0:31-0:35.

Driscoll poured some of the jug's contents on himself and on the ground in front of him and then tossed the jug away from him and Smiley, spilling much of its contents in the process. R. 23 (Video at 0:32-0:34) (Page ID #251). Although Dispatch had told her that Driscoll was carrying a water jug, and no one had mentioned gasoline, Smiley radioed Dispatch that Driscoll was "pouring gasoline." R. 23 (Radio.wav at 4:06-4:10) (Page ID #251); *see* R. 23 (Video at 0:33-0:35) (Page ID #251). Smiley never reported smelling gasoline, and when asked directly, she reported

that she couldn't say that she had. R. 29-11 (Police Report at 18) (Page ID #348); R. 29-14-3 (Smiley Interview Pt. 3 at 0:48-0:55) (Page ID #357). No witnesses reported smelling gasoline. *See* R. 29-4 (Witness Statements) (Page ID #312-18).

With his hands empty and stretched out to his sides, Driscoll moved toward Smiley and his car while loudly speaking in tongues. R. 23 (Video at 0:34-0:43) (Page ID #251). Smiley drew her gun and pointed it at Driscoll. *Id.* She ordered him to stop, and he complied. *Id.* at 0:39-0:45 His arms remained outstretched, parallel to the ground. *Id.* at 0:34-1:12.

Smiley next escalated her demands of Driscoll, shouting at him to get on the ground. R. 23 (Video at 0:47-55) (Page ID #251). Smiley continued to shout at him to get on the ground even as he remained stationary with his arms out and his hands empty. *Id.* at 0:55-1:11.

Driscoll was confused and panicked at this turn of events. R. 29-1 (Driscoll Aff. at 2) (Page ID #305). Moments earlier, he had been lawfully and peacefully praying at the park, and now he was staring down the barrel of a gun, with his path to his car blocked. *Id.* at 2-3 (Page ID #305-06). He attempted to walk to his car but could not. *Id.* at 3 (Page ID #306). According to Driscoll, Smiley's shouting triggered a manic episode, which made him unable to physically or mentally control himself and thus comply with her orders. *Id.*

Driscoll turned away from Smiley and walked back to the water jug. R. 23 (Video at 1:13-1:20) (Page ID #251). Smiley followed with her gun

still raised and pointed at his back. *Id.* Driscoll picked up the jug and drank from it. *Id.* at 1:22-1:41. Smiley radioed Dispatch again, this time requesting a medic because Driscoll was "drinking gasoline." *Id.* at 1:23-1:33; R. 23 (Radio.wav at 5:01-5:09) (Page ID #251). Driscoll continued to drink from the jug—with no outward physical reaction—and speak in tongues while Smiley continued to shout orders at him. R. 23 (Video at 1:22-1:43) (Page ID #251). He remained roughly in the same place, about eighteen feet from Smiley. *Id.*; R. 29-19 (Expert Report at 12) (Page ID #395).

The encounter escalates. Smiley commanded Driscoll to get on the ground as he shuffled toward her. R. 23 (Video at 1:33-1:35) (Page ID #251). She yelled that she would shoot him if he took another step. *Id.* at 1:37-1:39. He stopped and took another drink from the jug before resuming speaking in tongues. *Id.* at 1:39-1:43. He stood in place for about forty seconds, holding the jug at his side with his left hand and occasionally gesturing with his right hand as he spoke. *Id.* at 1:39-2:20. Smiley continued to order him to the ground. *Id.* She appeared to step towards him. *Id.* at 2:12-2:15.

In the face of Smiley's hostility, Driscoll said, "shoot me." R. 23 (Video at 2:20) (Page ID #251). He dropped the jug and took two steps toward Smiley with his hands again stretched out to his sides. *Id.* at 2:20-2:23. Smiley took one step back as Driscoll moved toward her. *Id.* at 2:22-2:23.

Driscoll then stepped back, and Smiley advanced toward Driscoll with her gun still trained on him. *Id.* at 2:23-2:25.

After Driscoll heard Smiley twice radio Dispatch and mention gasoline, Driscoll responded, "I'm drinking gasoline?" R. 23 (Video at 2:25-2:27) (Page ID #251); R. 29-1 (Driscoll Aff. at 3) (Page ID #306). The District Court noted that Driscoll's tone had an "arguably inquisitory inflection." R. 38 (Order at 5) (Page ID #501). He was trying to ask why she thought he was drinking gasoline. R. 29-1 (Driscoll Aff. at 3) (Page ID #306). But, in the midst of a manic episode, Driscoll was unable to communicate clearly to Smiley. *Id.* He picked up the jug and took another drink. R. 23 (Video at 2:28-2:35) (Page ID #251). He resumed speaking in tongues. *Id.*

Driscoll started saying "come on" as Smiley shouted at him to "get on the ground now." R. 23 (Video at 2:38-2:46) (Page ID #251). Smiley then yelled "I don't want to fucking shoot you," while Driscoll repeated "come on," his voice rising. *Id.* at 2:47-2:51. Driscoll swayed in place with his arms outstretched, the jug in his left hand. *Id.* He started speaking in tongues again. *Id.* at 2:50-2:55.

When Smiley briefly stopped ordering him to the ground, there was a moment of silence as Driscoll also grew quiet. R. 23 (Video at 2:55-2:56) (Page ID #251). Driscoll asked Smiley why he needed to get on the ground. *Id.* at 2:57-2:58. Instead of deescalating, *see* R. 22-6 (Policy 5.1.11 at 6) (Page ID #239), Smiley retorted that he had to get on the ground

because she was ordering him to. R. 23 (Video at 2:58-3:04) (Page ID #251). She continued to order him to get on the ground. *Id.* at 3:04-3:11. But Smiley still offered Driscoll no explanation as to why she was confronting him.

Smiley's "aggression made [Driscoll's] symptoms worse." R. 29-1 (Driscoll Aff. at 4) (Page ID #307). Gesturing with her gun, she commanded him to get on his knees with his palms on the sidewalk. R. 23 (Video at 3:09-3:11) (Page ID #251). Driscoll said "no" for the first time and then resumed speaking in tongues. *Id.* at 3:12-3:17.

Driscoll then pleaded with Smiley by invoking an article of his religious faith. *See* R. 29-1 (Driscoll Aff. at 4) (Page ID #307). He began to call out, "the blood of Jesus." *Id.*; R. 23 (Video at 3:22-3:34) (Page ID #251). At that point, as the District Court observed, Driscoll stood "stationary." R. 38 (Order at 6) (Page ID #499); *see* R. 23 (Video at 3:30-3:34) (Page ID #251). As Driscoll pleaded, Smiley offered a threat: "If you take one step toward me, I'm going to fucking shoot you." *Id.* at 3:26-3:34.

In response to Smiley's threat, Driscoll said "shoot me then." R. 23 (Video at 3:34) (Page ID #251). With his arms again outstretched and empty hands visible, he took two steps towards Smiley. *Id.* at 3:34-3:35. Smiley shot Driscoll in the abdomen, and he fell to the ground. *Id.* at 3:35-3:38. Smiley later claimed she thought that he might have had a lighter and could have ignited himself or her. R. 29-11 (Police Report at 18) (Page ID #348); R. 29-14-3 (Smiley Interview Pt. 3 at 1:40-2:15) (Page ID #357).

But at no point through the incident did Driscoll ever display a lighter in his hands. *See* R. 23 (Video) (Page ID #251).

Aftermath of the shooting. Driscoll was taken to the hospital and treated extensively for his gunshot wound and resulting injuries. R. 29-7 (Medical Records) (Page ID #321-24). The doctor who treated Driscoll specifically noted that he did not smell of gasoline. *Id.* at 1 (Page ID #321). Subsequent forensic testing of the water jug found no evidence of gasoline. R. 29-8 (Gisewite Supp. Report at 1) (Page ID #325); R. 22-9 (Forensic Report at 3) (Page ID #249).

Driscoll needed multiple surgeries and remained in the hospital for a month. R. 29-1 (Driscoll Aff. at 4) (Page ID #307). As a result of the gunshot, Driscoll lost a kidney and suffered other significant internal injuries. *Id.* His physical injuries rendered him permanently disabled and unable to work. *Id.* at 4-5 (Page ID #307-08). His mental health further deteriorated, and he suffers from Post Traumatic Stress Disorder. *Id.* He still lives with the physical scars and trauma of the shooting. *Id.*

The Department's investigation. Immediately after Smiley shot Driscoll, officers on the scene segregated the five civilian witnesses, recorded interviews, and took written statements. *See* R. 29-11 (Police Report at 8-9, 12-13) (Page ID # 338-39, 342-43).[1] Yet, the officers took no

[1] The Department failed to preserve at least three of the recordings of the witness statements. *See* R. 29-15 (Email Exchange at 2-3) (Page ID #359-60).

such measures to ensure that Smiley was segregated and promptly interviewed. *Id.* at 17-18 (Page ID #347-48).

Instead, Smiley was interviewed for the first time two days later. *See* R. 29-14-1-4 (Smiley Interview Pts. 1-4) (Page ID #444). In Smiley's interview, she revealed that she had been given access to the other witnesses' statements in advance of her interview. *See* R. 29-14-4 (Smiley Interview Pt. 4 at 1:30-1:40) (Page ID #444). The investigating officer then allowed her an additional two days in which to furnish a written report. *Id*. at 0:25-0:38. The Department's treatment of Smiley violated its own policy, which requires a deputy who fired their gun to submit a written report "before the end of [her] watch." R. 22-5 (Policy 1.1.3 at 10) (Page ID # 217).

The day after the shooting, the Department issued a public statement in which it publicized Smiley's claim that Driscoll had been drinking gasoline before she shot him. R. 29-9 (Press Release) (Page ID #326). Yet, at the time the press release was issued, the Department's lead investigator had reported that the water jug did not contain gasoline. *See* R. 29-8 (Gisewite Supp. Report) (Page ID #325). As a result of the Department's press release, local and national media articles reported erroneously that the shooting had involved a man who was drinking gasoline. R. 29-10 (Articles) (Page ID #327-30).

The Department concluded its investigation with a report finding that Smiley's conduct was justified. R. 29-16 (Investigation Report) (Page ID

#361-72). At no point in the Department's investigation of the shooting did any officer contact or seek information from Cory Driscoll.

II. Procedural background

Driscoll sued Smiley, Montgomery County Sheriff Rob Streck, and the Montgomery County Board of Commissioners in the Southern District of Ohio. R. 1 (Compl.) (Page ID #1-10). He alleged, as relevant here, that Smiley used excessive force against him in violation of the Fourth Amendment. *Id*. at 4-6 (Page ID #4-6). He also brought state-law claims for false arrest, battery, and intentional infliction of emotional distress. *Id.* at 8-10 (Page ID #8-10). Smiley moved for summary judgment, asserting both qualified immunity and state-law statutory immunity. R. 24 (Defs.' Mot. Summ. J. at 12-19) (Page ID #264-71). The District Court granted summary judgment in favor of the defendants on most of Driscoll's claims. R. 38 (Order at 26-27) (Page ID #522-23).

But on the excessive-force claim, the District Court held that a jury could find Smiley "acted unreasonably when she shot Driscoll" and thus violated his constitutional right. R. 38 (Order at 17, 19) (Page ID #513, 515). The Court noted, among other things, that Smiley was not responding to a criminal call but a "mere suspicious person report"; that Driscoll did not threaten Smiley; and that Smiley "appeared to be the aggressor" during the incident. *Id.* at 17-18 (Page ID #513-14). Furthermore, the Court said, a reasonable officer might have determined

that deadly force was not the appropriate response to Driscoll's "precarious mental state." *Id.* at 19 (Page ID #515).

Ultimately, the Court said, the question whether Smiley's use of deadly force was reasonable turned on whether she reasonably believed that Driscoll had gasoline. R. 38 (Order at 19) (Page ID #515). The Court acknowledged that it was reasonable for Smiley to believe that Driscoll had a lighter in his car. *Id*. It noted, however, that she should have been aware that Driscoll had taken a water jug down to the pond. *Id.* Therefore, the Court refused to accept Smiley's "subjective recitation of the circumstances" with respect to the presence of gasoline. *Id.*

The District Court then found that Driscoll's right to be free from deadly force was clearly established. *Id.* at 19-20 (Page ID #515-16). Relying on this Court's decision in *Palma v. Johns*, 27 F.4th 419 (6th Cir. 2022), the Court found that Driscoll, "an unarmed nondangerous suspect," had a clearly established right not to be shot, absent probable cause to believe that he posed a threat of serious physical harm. R. 38 (Order at 20) (Page ID #516) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

As to Driscoll's state-law claims, the Court held that Smiley was also not entitled to statutory immunity. R. 38 (Order at 25-26) (Page ID #521-22). There was no dispute that Smiley's state-law immunity would "stand[] or fall[]" with her federal qualified-immunity defense. *Id.* (quoting *Hopper v. Phil Plummer*, 887 F.3d 744, 760 (6th Cir. 2018)).

Smiley then filed this interlocutory appeal seeking to overturn the District Court's denial of qualified immunity. R. 39 (Notice of Appeal) (Page ID #524-25).

Summary of the Argument

I. A jury could find that Smiley violated Driscoll's Fourth Amendment right when she shot him. Smiley's use of deadly force was objectively unreasonable because Driscoll posed no threat to her or anyone else.

The only justification Smiley has given for her use of deadly force was her subjective fear that Driscoll was covered in gasoline and carrying a lighter. A jury could reject that fear as patently unreasonable. Dispatch told Smiley that Driscoll was carrying a big water jug to the pond. There was no smell of gasoline at the scene. She watched Driscoll repeatedly gulp the liquid with no physical reaction or change in his voice. All objective indicia pointed to the jug containing pond water, not gasoline. And even if Driscoll did have gasoline, a reasonable officer would have seen that he had no way to ignite it. His hands were empty and visible to Smiley throughout the encounter, and he made no furtive movements toward a potentially concealed lighter.

All the other circumstances known to Smiley made her subjective fear that Driscoll posed a threat even more unreasonable. Smiley responded to a noncriminal, nonemergency call requesting a wellness check. And Driscoll's behavior throughout the encounter suggests that he was experiencing a mental health crisis, not that he posed a threat. Instead

of helping him, Smiley drew her gun and pointed it at Driscoll a mere thirty-five seconds after first seeing him, and shot him three minutes later. Considering the totality of the circumstances, Smiley's use of deadly force was objectively unreasonable.

The District Court properly determined that Driscoll's rights were clearly established. Use of deadly force against an unarmed, nondangerous person such as Driscoll has been clearly established as unconstitutional since 1985. Smiley is therefore not entitled to qualified immunity.

II. Smiley's statutory-immunity defense stands or falls with her federal qualified-immunity defense. Because her qualified-immunity defense fails, Smiley is not entitled to statutory immunity from Driscoll's state-law claims of false arrest, battery, and intentional infliction of emotional distress.

Standard of Review

This Court reviews de novo a district court's denial of summary judgment on a qualified-immunity defense. *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024). "When considering a motion for summary judgment, 'the evidence is construed and all reasonable inferences are drawn in favor of the nonmoving party,'" here, Cory Driscoll. *Palma v. Johns*, 27 F.4th 419, 427 (6th Cir. 2022) (quoting *Wright v. City of Euclid*, 962 F.3d 852, 864 (6th Cir. 2020)). When a record contains video evidence,

this Court can "conduct [its] legal analysis based on the video and the undisputed facts." *Heeter*, 99 F.4th at 910.

Argument

I. Smiley is not entitled to qualified immunity.

Officers are entitled to qualified immunity at summary judgment only "when, viewing the facts in the light most favorable to the plaintiff, the challenged conduct did not violate 'clearly established … constitutional rights of which a reasonable person would have known.'" *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024) (quoting *Jackson v. City of Cleveland*, 64 F.4th 736, 745 (6th Cir. 2023)). That standard is not satisfied here. First, a jury could find that Smiley violated the Fourth Amendment when she shot Driscoll, an unarmed, nondangerous person experiencing a mental health crisis. Second, because it was clearly established at the time of the incident that Smiley's conduct was unconstitutional, she is not entitled to qualified immunity.

A. Smiley violated Driscoll's Fourth Amendment right to be free from excessive force.

The Fourth Amendment's prohibition against unreasonable seizures "protects citizens from excessive use of force by law enforcement officers." *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015). An officer's use of force is excessive if it is not "'objectively reasonable' in light of the facts and circumstances." *Graham v. Connor*, 490 U.S. 386, 397 (1989). That inquiry depends on the "totality of the circumstances." *Tennessee v.*

Garner, 471 U.S. 1, 9 (1985). This is an objective inquiry that applies without regard to the officer's "underlying intent or motivation." *Graham*, 490 U.S. at 397. Circumstances relevant to determining whether the force used was reasonable include (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

In the decades since *Garner* and *Graham*, this Court has provided more specific guidance relating to police use of force in situations where there is no ongoing crime and where the subject does not physically resist a lawful arrest. *See Palma v. Johns*, 27 F.4th 419, 429, 432 (6th Cir. 2022). In these situations, "certain factual considerations" are "particularly relevant" to determining whether the use of force is reasonable, including:

> "(1) why the officer was called to the scene";
>
> "(2) whether the officer knew or reasonably believed that the person was armed";
>
> "(3) whether the person verbally or physically threatened the officer or disobeyed the officer";
>
> "(4) how far the officer was from the person";
>
> "(5) the duration of the entire encounter";
>
> "(6) whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer"; and

> "(7) whether the officer could have diffused the situation with less forceful tactics."

Id. at 432. No one factor is dispositive, and the list of factors is non-exhaustive. *Id.*

An officer's burden is higher when she has used *deadly* force. Use of deadly force "is unreasonable unless 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Palma*, 27 F.4th at 432 (quoting *Garner*, 471 U.S. at 11). "In excessive force cases, the threat factor is 'a *minimum* requirement for the use of deadly force.'" *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019) (quoting *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2016)). As a result, this Court has "authorized the use of deadly force 'only in rare instances.'" *Id.* (quoting *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005)).

The only justification Smiley has ever given for her use of deadly force was her subjective fear that Driscoll was "covered in gasoline and carrying a lighter." Opening Br. 8; *see id.* at 17-19. As we show below, a jury could find that belief was unreasonable. Moreover, the other circumstances in the encounter—that Smiley was called to the park to conduct a wellness check; that Driscoll never verbally or physically threatened Smiley; and that Smiley should have recognized Driscoll was experiencing a mental health crisis—all make her claim that Driscoll posed a threat even more unreasonable. A jury could conclude from the

totality of the circumstances that Smiley's use of deadly force was unconstitutional.

1. Smiley lacked any reasonable belief that Driscoll possessed gasoline and a lighter—the only thing she claims made Driscoll a threat.

Smiley argues that she believed Driscoll was carrying a jug of gasoline and a lighter. *See* Opening Br. 8, 17-19. She has never claimed that he had any other weapon. *See* R. 38 (Order at 20) (Page ID #516).

But this Court need not "accept [Smiley's] subjective view" of the threat Driscoll supposedly posed. *Jacobs*, 915 F.3d at 1041. As discussed, whether an officer's use of force was reasonable is an objective inquiry. *Graham*, 490 U.S. at 397. So what matters is not whether Smiley formed an "honest but mistaken belief" that Driscoll possessed gasoline and a lighter, but whether a jury could find that her belief was unreasonable. *Floyd v. City of Detroit*, 518 F.3d 398, 408 (6th Cir. 2008). A jury could conclude that it was objectively unreasonable for Smiley to believe Driscoll possessed gasoline and a lighter and, therefore, posed an immediate threat to her safety.

Belief that Driscoll had gasoline. Smelling what Smiley smelled, knowing what she knew from the Dispatch call, and seeing what she saw throughout the incident, a reasonable officer would not have believed Driscoll was carrying a jug of gasoline.

No one present at the scene reported smelling gasoline, even though Driscoll poured out most of the jug's contents. Smiley couldn't say if she ever smelled gasoline. R. 29-11 (Police Report at 18) (Page ID #348). No member of the group who called for help reported smelling gasoline. R. 29-4 (Witness Statements) (Page ID #312-18). And the investigator who arrived on the scene shortly after the shooting noted that "[t]he jug and liquid did not smell like gasoline"; in fact, there was "no odor at all." R. 29-8 (Gisewite Supp. Report at 1) (Page ID #325).

And no one after the fact reported smelling gasoline either. The emergency room doctors who treated Driscoll after the shooting made a note that "[h]e does not smell of gasoline." R. 29-7 (Medical Records at 1) (Page ID #321). The forensic analyst found "no ignitable liquid" in the jug. R. 22-9 (Forensic Report at 3) (Page ID #249).

What Smiley knew before arriving made her belief that Driscoll was carrying gasoline even more unreasonable. From the start, Dispatch conveyed to Smiley that Driscoll had exited his car and run toward a pond with a "big water jug" in his hands. R. 22-8 (Dispatch Report at 4) (Page ID #245). Neither Dispatch nor the witnesses told Smiley they thought Driscoll was carrying gasoline. *See id.* at 4 (Page ID #245); R. 29-4 (Witness Statements) (Page ID #312-18); *see also* R. 38 (Order at 19) (Page ID #515) ("declin[ing] to accept" Smiley's claim that a witness told her there was gasoline because "this allegation is disputed by each independent witness account").

And Smiley's belief is all the more unreasonable because of what she observed throughout the incident. Smiley saw Driscoll walking away from what Dispatch had told her was a pond, carrying a gallon jug containing discolored liquid. R. 23 (Video at 0:16-0:22) (Page ID #251); R. 22-8 (Dispatch Report at 4) (Page ID #245). Compiling Dispatch's report with this information, a reasonable officer would conclude he had filled his "big water jug" with pond water. *See* R. 22-8 (Dispatch Report at 4) (Page ID #245).

As the encounter progressed, Smiley watched as Driscoll drank from the jug at least five times. R. 23 (Video at 1:20-1:23, 1:26-1:30, 1:40-1:42, 2:32-2:35, 3:26-3:28) (Page ID #251). He never coughed, gagged, or sputtered as he swallowed the liquid, even though he took generous gulps from the jug. Driscoll spoke loudly throughout the encounter, showing no effect of any solvent on his voice. Had the jug contained gasoline, a reasonable officer would expect Driscoll to have had at least some physical reaction to consuming the liquid, but he had none.

Smiley argues that her fear was reasonable because Driscoll said, "I'm drinking gasoline." Opening Br. 19. But a jury could find, based on Driscoll's inquisitory inflection, that he was questioning, not asserting that he was drinking gasoline. As noted above, Driscoll has presented evidence that he did not make a statement about drinking gasoline, but rather, he posed a question as to why Smiley had even mentioned gasoline. R. 29-1 (Driscoll Aff. at 3) (Page ID #306). By arguing that

Driscoll made a statement, Smiley inverts the summary-judgment standard by failing to interpret the video evidence in the light most favorable to Driscoll. *See Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017). Driscoll's question came only after he heard Smiley first reporting over the radio that he was "pouring gasoline," and then that he was "drinking gasoline." R. 23 (Radio.wav at 4:08-4:10, 5:05-5:10) (Page ID #251). Smiley herself acknowledges this chronology. Opening Br. 6-7. Faced with this dispute of fact that Smiley herself claims is material, the District Court correctly accepted the view most favorable to the nonmovant. *See Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015). The Court acknowledged that Driscoll said these words with an "arguably inquisitory inflection." R. 38 (Order at 5) (Page ID #501); *see* R. 23 (Video at 2:25-2:27) (Page ID #251).

Belief that Driscoll had a lighter. Even if Smiley reasonably believed that Driscoll had gasoline, that alone would not make him dangerous. Gasoline could cause danger to Smiley only if Driscoll had a way to ignite it. Without a lighter in his hands or within reach, no "reasonable officer [would] believe that [Driscoll] posed an immediate threat of serious harm." *Palma*, 27 F.4th at 434. Smiley's "subjective fear" that Driscoll threatened her safety because he had a lighter is owed no "credit" because no "objective indicia" supported that fear. *Shumate v. City of Adrian*, 44 F.4th 427, 444-45 (6th Cir. 2022).

The video evidence shows that Driscoll had no lighter in his hands at any point during the encounter. Driscoll's empty hands first became clearly visible thirty-three seconds into the video and remained visible throughout the rest of the encounter. R. 23 (Video at 0:33-3:35) (Page ID #251). His arms were either outstretched or dangling loosely at his sides, except for when he held the jug in his left hand. *Id.* And he never clenched his hands into fists. *Id.* At the moment Smiley used deadly force, Driscoll's hands were held wide, open and empty, and his palms were visible. *Id.* at 3:33-3:35. A reasonable officer would have had no objective evidence from which to believe that Driscoll had a lighter.

Nor would it be reasonable for Smiley to believe that Driscoll had a lighter anywhere else on his body. Dispatch conveyed to Smiley that the caller "believe[d]" that she saw a lighter in Driscoll's car, but that she was "not 100% sure." R. 22-8 (Dispatch Report at 4) (Page ID #245). The possibility of a lighter in the car does not mean that Driscoll had that lighter on his body.

Further, Driscoll's behaviors provided no reason for Smiley to believe that he had a lighter concealed on him. He never made furtive movements or reached for his pockets or waistband, R. 23 (Video at 0:33-3:35) (Page ID #251), and Smiley has never claimed that she saw any attempt to retrieve an object from his pockets. "A reasonable officer would not believe that [Driscoll] posed an immediate threat of harm when there was nothing—no evasive movements towards a waistband, no threats of

violence, no charging towards the officer—suggesting possession or intent to possess a weapon." *Shumate*, 44 F.4th at 444. Any "remote risk" that Driscoll "could have been armed" with a concealed lighter "does not establish that he posed a reasonable threat of danger." *Browning v. Edmonson County*, 18 F.4th 516, 528 (6th Cir. 2021).

Even if a reasonable officer could have believed that Driscoll had a lighter in his possession, it still would have been unreasonable for Smiley to shoot him. Deadly force is "*not* justified" where an individual "mere[ly] possess[es]" a weapon. *Bouggess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007). Deadly force is justified only when the individual "threat[ens] the lives of those around him" at the moment "he [is] fatally shot." *Smith v. Cupp*, 430 F.3d 766, 775 (6th Cir. 2005). When he was shot, Driscoll was moving toward Smiley with his arms outstretched, hands empty, and palms visible. R. 23 (Video at 3:33-3:35) (Page ID #251). He made no movement that could have been construed as an effort to ignite any gasoline he supposedly was carrying using any lighter he supposedly possessed.

2. The totality of the circumstances made Smiley's fear of Driscoll even more unreasonable.

No other circumstance present at the scene could have given Smiley a reasonable belief that Driscoll posed a "significant threat." *Garner*, 471 U.S. at 11. As explained (at 21-22), this Court considers a range of factors that are "particularly relevant" to determining whether the use of force

was objectively reasonable. *Palma,* 27 F.4th at 432. All of these factors show that Smiley's use of force was unreasonable and unconstitutional.

Lack of criminal activity. Smiley was called to the park not to respond to a crime, but to conduct a wellness check. Smiley responded to a non-emergency call seeking "help" for a person the caller was "worried" about because he was sitting in his car making odd noises. R. 29-5A (Dispatch Call at 1:18-1:23, 3:09-3:19) (Page ID #319). The caller was concerned that Driscoll "d[id]n't seem okay" and was potentially "on something." *Id.* at 3:09-3:19. Police responses to calls requesting a "wellness check" or reporting "other non-criminal" behavior do not justify the use of deadly force absent other factors. *Palma*, 27 F.4th at 432.

Smiley now suggests—for the first time—that the caller reported *criminal* activity. Opening Br. 15. But Smiley never specifies what crime Driscoll had engaged in. *See id*. She notes only a vague belief that Driscoll was an "intoxicated person." *Id.*

This argument strains both the facts and the law. To start, the caller's speculation that Driscoll was "not okay" and might be "on something," 29-5A (Dispatch Call at 1:18-1:23, 3:09-3:19) (Page ID #319), did not give Smiley probable cause to believe that Driscoll was engaged in criminal activity. In Ohio, public intoxication is not a crime unless a person also poses a risk of physical harm. *McCurdy v. Montgomery County*, 240 F.3d 512, 517 (6th Cir. 2001), *abrogated on other grounds by Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006); *see* Ohio Rev. Code Ann. § 2917.11(B)(2).

And, as we show (at 23-28, 30-32), Driscoll posed no threat and was exhibiting all the signs of a mental health crisis.

Even so, under Fourth Amendment jurisprudence, suspected public intoxication does not justify deadly force. "Conduct that is not a violent or serious crime does not permit an officer to use increased force absent other factors." *Vanderhoef v. Dixon*, 938 F.3d 271, 277 (6th Cir. 2019). Public intoxication is a misdemeanor charged under Ohio's disorderly conduct statute. Ohio Rev. Code Ann. § 2917.11(B), (E)(2). At most, Smiley was responding to a call regarding the misdemeanor of disorderly conduct, which "is not a violent or serious crime." *Thacker v. Lawrence County*, 182 F. App'x 464, 472 (6th Cir. 2006). So even if we credit Smiley's recent claim that she was responding to the crime of intoxication, this could not justify the use of force.

Furthermore, as Smiley herself has pointed out and will be further explored below, she was trained on Department policy instructing that symptoms of mental health disorders may easily be misidentified as substance use or abuse. R. 22-6 (Policy 5.1.11 at 3) (Page ID # 236). Thus, Smiley was trained to identify mental health incidents and to distinguish them from mere intoxication. *See id.*; R. 22-4 (Training Log at 20, 30, 34) (Page ID #145, 155, 159).

Mental health conditions. Officers are "required to take into account [a person's] diminished capacity," such as "suffering from some sort of mental illness," "before using force." *Roell v. Hamilton County*, 870

F.3d 471, 482 (6th Cir. 2017). Smiley did not act as a reasonable officer. As the District Court noted, a reasonable officer in Smiley's position could have "ascertained that Driscoll was in a precarious mental state which would not be best addressed with deadly force." R. 38 (Order at 19) (Page ID #515).

Prior to the encounter, Smiley had been trained at least four times on "handling persons with mental illnesses" in accordance with Department policy. R. 22-4 (Training Log at 20, 30, 34) (Page ID #145, 155, 159). That training informs whether the use of force was reasonable. *See Wright v. City of Euclid*, 962 F.3d 852, 868 (6th Cir. 2020) (considering officer training as part of reasonableness analysis); *see also King v. Taylor*, 944 F. Supp. 2d 548, 555 (E.D. Ky. 2013). Under this policy, Smiley "should" have been "capable of recognizing those symptoms that may indicate the presence of a mental illness." R. 22-6 (Policy 5.1.11 at 2) (Page ID #235). She learned symptoms include delusions, rapid and incoherent speech, the use of made-up words and sounds, one-sided conversations, and rhythmic gestures and movements such as pacing. *Id.* at 2-3 (Page ID #235-36).

Driscoll exhibited all of these symptoms during the encounter. He spoke in phrases and made repetitive noises that were unintelligible to Smiley and the other witnesses. R. 23 (Video at 0:00-2:55, 3:14-3:17) (Page ID #251). He paced back and forth with arms outstretched and often rocked from one foot to the other when stationary. *Id.* at 0:51-1:11,

1:23-1:36, 2:20-2:24, 2:43-2:55, 3:29-3:36. He was unable to engage in a coherent two-way conversation with Smiley. A reasonable officer would have recognized from this behavior that Driscoll was "suffering from some sort of mental illness," *Roell*, 870 F.3d at 482, even though she was never specifically informed of his mental health diagnoses, *see* R. 22-8 (Dispatch Report) (Page ID #242-46). "[M]ental illness" was therefore "a mitigating factor showing that [Driscoll] did not pose an immediate threat." *Palma*, 27 F.4th at 438.

True, Driscoll's behaviors were erratic. R. 38 (Order at 18-19) (Page ID #514-15). But Driscoll's conduct was not threatening. *See id.* This case is therefore distinct from cases in which a person was behaving "erratically" while wielding a weapon. *See Kisela v. Hughes*, 584 U.S. 100, 101, 104-06 (2018); *Baker v. City of Trenton*, 936 F.3d 523, 532, 535 (6th Cir. 2019). As the District Court properly recognized, Driscoll's erratic behaviors were evidence of a mental health crisis, not a threat. R. 38 (Order at 18-19) (Page ID #514-15).

Failure to deescalate. When faced with a person who "exhibited conspicuous signs that he was mentally unstable" and was also "unarmed," a reasonable officer in Smiley's position would have "de-escalate[d] the situation and adjust[ed] the application of force downward." *Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6th Cir. 2013). For example, "before engaging with a mentally ill man who

posed no immediate threat to anyone," a reasonable officer might have "waited for backup." *Palma*, 27 F.4th at 439.

Violation of local law-enforcement policy is not dispositive of a constitutional violation. But "all of the facts and circumstances confronting the officer … including standard police procedures" may be considered when determining whether an officer behaved reasonably. *King*, 944 F. Supp. 2d at 555; *see Wright*, 962 F.3d at 868. Here, Department policy advised officers on how to engage with a person they "know or suspect" to be "mentally ill." R. 22-6 (Policy 5.1.11 at 5) (Page ID #238).

Smiley did not follow this policy—she did the opposite. Throughout the encounter, she acted as "the aggressor." R. 38 (Order at 18) (Page ID #514). Despite her training to not "give rapid orders," R. 22-6 (Policy 5.1.11 at 5) (Page ID #238), she shouted rapid, repeated orders at Driscoll to drop his jug and get on the ground, R. 23 (Video at 0:39-2:00, 2:11-2:20, 2:38-2:45, 2:50, 2:58-3:12) (Page ID #251). Although she was trained not to "aggravate the situation" and to "[a]void direct, continuous eye contact," R. 22-6 (Policy 5.1.11 at 5) (Page ID #238), Smiley stared directly at Driscoll as she held him at gunpoint, R. 23 (Video at 0:35-3:35) (Page ID #251). She was taught to "not verbally abuse or threaten the person," R. 22-6 (Policy 5.1.11 at 5) (Page ID #238), but she repeatedly used profanity and threatened to shoot Driscoll if he didn't comply with her orders, R. 23 (Video at 1:37-1:39, 2:45-2:48, 3:32-3:33) (Page ID #251).

Because a reasonable officer would have recognized Driscoll's behaviors as mental illness, the Fourth Amendment requires the officer to take that into account. *See Roell*, 870 F.3d at 482. The fact that Smiley did not "diffuse[] the situation with less forceful tactics" makes her use of deadly force more unreasonable. *Palma*, 27 F.4th at 432.

Noncompliance with orders. The "mere failure to follow orders would not lead a reasonable officer to believe that [Driscoll] posed a danger" that justified the use of lethal force. *Palma*, 27 F.4th at 430. Driscoll did not attempt to flee. R. 23 (Video) (Page ID #251). He was not verbally hostile. *Id.* He did not physically threaten Smiley. *Id.* All he did was fail to comply with Smiley's orders to drop the jug, stop moving, and lie on the ground. R. 23 (Video at 0:17-3:12) (Page ID #251). Moreover, as shown (at 30-32), a reasonable officer would have recognized Driscoll's noncompliant behavior as evidence he was experiencing a mental health crisis, not as evidence he posed a threat.

Distance between officer and victim. A person who is more than "ten to fifteen feet away" from the officer and on whom the officer "never saw a weapon" does not pose an imminent threat of harm. *Palma*, 27 F.4th at 436. A jury could construe the evidence in Driscoll's favor and find that this was the situation Smiley confronted. Evidence indicates that about eighteen feet separated Driscoll and Smiley throughout the encounter, R. 29-19 (Expert Report at 12) (Page ID #395), and that Smiley never saw Driscoll with a weapon, *see supra* Part I.A.1. If an

unarmed person who is ten to fifteen feet away does not present a threat to the officer, *Palma*, 27 F.4th at 436, a jury could find that an unarmed person who is about eighteen feet away also does not pose a threat.

Duration of the encounter. Smiley never had to make a "split-second judgment[]" in response to Driscoll's actions. *Graham*, 490 U.S. at 397. The encounter "lasted only about three-and-a-half-minutes." R. 38 (Order at 6) (Page ID #502). But Driscoll posed "no *immediate* threat" to Smiley. *Palma*, 27 F.4th at 436. Although officers may sometimes use force when responding to a threatening situation that "unfolds quickly" due to the actions of the suspect, *Mitchell v. Schlabach*, 864 F.3d 416, 423 (6th Cir. 2017), that is not this case.

To the extent that the situation evolved rapidly, *see* Opening Br. 20, Smiley's own actions were the cause. As the District Court observed, Smiley acted as the "aggressor." R. 38 (Order at 18) (Page ID #514). She pulled her gun out and trained it on Driscoll thirty-five seconds into the encounter. R. 23 (Video at 0:35) (Page ID #251). She repeatedly yelled at Driscoll and ordered him to drop his jug and get on the ground. *Id.* at 0:17-2:00, 2:11-2:20, 2:38-2:45, 2:50, 2:58-3:12). She threatened to shoot him three times. *Id.* at 1:37-1:39, 2:45-2:48, 3:32-3:33. Then, without being faced with a split-second decision, Smiley cut the encounter short by shooting Driscoll. *Id.* at 3:34-3:36. That Smiley's own actions escalated the encounter does not turn Driscoll into an "*immediate* threat" to her safety. *Palma*, 27 F.4th at 436.

Lesser force alternatives. Smiley could have used "less forceful tactics." *Palma*, 27 F.4th at 423. To start, she could have followed Department policy and used nonviolent de-escalation techniques. *See* R. 22-6 (Policy 5.1.11 at 5-6) (Page ID #238-39).

Driscoll provided expert testimony that Smiley was also armed with a retractable baton. *See* R. 29-19 (Expert Report at 11) (Page ID #394). As stated by Driscoll's expert, officers are trained in the standard continuum for the escalation of force, which counseled in this case for, at most, a baton strike against Driscoll. *See id.*

Furthermore, Smiley knew that other officers were on their way to assist. *See* R. 23 (Radio.wav at 0:49-0:54, 6:59-7:13) (Page ID #251). By simply slowing things down, she could have avoided any need to use force. Even if some degree of force may have been permissible (which Driscoll does not concede), under no circumstances was the use of lethal force justified.

Totality of the circumstances. Looking at the whole picture, a jury could find that Smiley's use of deadly force against an unarmed, nondangerous individual who was experiencing a mental health crisis was objectively unreasonable. No reasonable officer in her position would have believed Driscoll posed a "significant threat of death or serious physical injury" to justify shooting him. *Garner*, 471 U.S. at 3.

Callers reported that a man in the park was "not okay" and might have been "on something." R. 29-5A (Dispatch Call at 3:10-3:20) (Page ID

#319). Smiley watched as Driscoll walked back from the pond carrying a jug of discolored liquid that did not smell like gasoline, which he gulped from repeatedly with no physical reaction. He allegedly had a lighter in his car but stood with his arms outstretched and palms open for most of the encounter. He never made furtive movements toward anywhere a lighter may have been concealed. He made repetitive sounds that might have been unsettling but were not threatening. He moved back and forth toward the officer but remained about eighteen feet away. He was, at times, nonresponsive to orders to drop the jug and get on the ground but never made any threats or demonstrated any aggression.

Based on these facts, a jury could conclude that a reasonable officer would not have found Driscoll to be a threat. Therefore, Smiley's use of deadly force violated Driscoll's Fourth Amendment right.

Smiley's reliance on *Mitchell v. Schlabach*, 864 F.3d 416 (6th Cir. 2017), misses the mark. *See* Opening Br. 16, 20. In that case, an officer responded to a drunk-driver call, and Mitchell initiated a ten-minute, high-speed car chase before crashing his car, disobeying all officer orders, and charging toward the officer with clenched fists. *Id.* at 419-20, 423. Only then did the officer use deadly force. *Id.* at 420.

Mitchell and this case are miles apart. Mitchell, a suspected drunk driver, initiated a dangerous high-speed chase; Driscoll was suspected of no crime. Mitchell never once complied with officer orders; Driscoll at times complied with orders, but more often demonstrated an inability to

comply because of a mental health crisis. Mitchell charged toward the officer; Driscoll wavered toward and away from Smiley. Mitchell approached aggressively with clenched fists; Driscoll's arms were outstretched and his hands open. All told, the circumstances that justified the use of force against Mitchell are the opposite of the circumstances here, so *Mitchell* proves Driscoll's point: Smiley's use of force was unreasonable in violation of the Fourth Amendment.

B. The right of an unarmed, nondangerous person not to be shot by the police was clearly established at the time of the incident.

The District Court correctly held that Driscoll's right as an "unarmed nondangerous suspect" not to be shot by the police was clearly established at the time of the incident. R. 38 (Order at 20) (Page ID #516) (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)).

Smiley suggests this law clearly establishing Driscoll's right not to be shot by police doesn't apply because Driscoll's behavior was "erratic and ultimately threatening." Opening Br. 21. That reasoning assumes an upside-down summary-judgment standard, with inferences drawn in favor of the moving party, Smiley. And, as just shown, a jury could find that Driscoll was not any of these things: He was not armed with gasoline or a lighter; any erratic behavior was consistent with a mental health crisis; and he never verbally or physically threatened Smiley. Disputes of

material facts exist over whether Driscoll was dangerous, so it is inappropriate on summary judgment to assume he was.

Driscoll has met his burden of proving he had a clearly established right not to be shot on May 10, 2020. A right is clearly established if a reasonable officer would have "objectively and 'clearly understood that [she] was under an affirmative duty to have refrained from' using deadly force" when faced with the circumstances she encountered. *Heeter v. Bowers*, 99 F.4th 900, 915 (6th Cir. 2024) (quoting *Campbell v. Cheatham Cnty. Sheriff's Dep't*, 47 F.4th 468, 480-81 (6th Cir. 2022)).

The Supreme Court put Smiley on notice in 1985 that shooting an "unarmed, nondangerous suspect" would violate his constitutional rights. *Garner*, 471 U.S. at 7. Driscoll was unarmed—no reasonable officer would believe he was carrying gasoline or a lighter. *Supra* Part I.A.1. Driscoll was nondangerous—no reasonable officer would believe Driscoll's behavior posed a significant threat. *Supra* Part I.A.

Moreover, this Court clarified in 2005 that even suspects who are armed have a right not to be shot absent a "reasonabl[y] … perceived threat of serious physical harm to the officer or others." *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005). This rule applies "regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane." *Id.* The "factual distinctions … do not alter the certainty about the law itself." *Id.*

Applying these principles, this Court has recognized the violation of clearly established rights in circumstances where the plaintiff posed an equal or greater risk than existed here. It was "clearly established in November 2018" that it violated the Constitution to shoot "a suicidal individual that had moved slightly," "even if [he] was armed and had disobeyed the officers' commands." *Heeter*, 99 F.4th at 915. The officers knew prior to arriving that Heeter was experiencing a mental health crisis and needed help. *Id.* at 904-05. During the two-minute encounter, Heeter was noncompliant with orders to put his weapon down and remove his hand from his pocket. *Id.* at 905-06. As Heeter eventually pulled his hand out of his pocket, an officer shot and killed him. *Id.* at 906. At the time of the incident in 2018, "any officer would have known" that "these facts do not alone amount to a threat of serious or deadly harm," "even if the person held a gun in their pocket or could grab a gun within reach." *Id.* at 915. The use of force was unconstitutional, and the officer was not entitled to qualified immunity. *Id.*

Palma v. Johns likewise held that shooting a person who "did not pose a threat of serious physical harm" "violated clearly established constitutional law." 27 F.4th 419, 443-44 (6th Cir. 2022). An officer tased and shot Palma, a mentally ill individual who had not been accused of a crime. *Id.* at 424-25. During the eight-to-ten-minute encounter, Palma never made threatening gestures toward the officer or verbally threatened him, but he was noncompliant with officer commands to take

his hands out of his pockets and stop walking. *Id.* at 424-25, 436. However, these facts did not amount to "probable cause to believe that Palma posed an imminent threat of serious bodily harm." *Id.* at 440. A jury could have found the officer unconstitutionally used excessive force, so the officer was not entitled to qualified immunity. *Id.* at 440, 443-44.

Heeter and *Palma* confirm Driscoll's right as an unarmed, nondangerous person not to be shot was clearly established at the time of this incident. Like the officers in *Heeter* and *Palma*, Smiley responded to a call regarding non-criminal behavior. None of the plaintiffs physically or verbally threatened the officers. Just like Heeter and Palma, Driscoll was experiencing a mental health crisis that the officers were either informed about or should have recognized. At times, Heeter, Palma, and Driscoll were all noncompliant with officer commands. In both *Heeter* and *Palma*, this Court concluded that it had clearly established before 2018 that it was unconstitutional to shoot suspects who were either visibly or potentially armed but otherwise posed no threat. It was, then, clearly established by 2020 that it was unconstitutional to shoot a person who no reasonable officer would believe was armed and dangerous.

Smiley attempts to sidestep this conclusion in two ways. First, she suggests Driscoll cannot rely on cases published after May 2020 to demonstrate his right was clearly established. Opening Br. 22. But those cases held that the plaintiffs' rights had been clearly established at the

time of the constitutional violations in 2017 and 2018. *See Palma*, 27 F.4th at 442-44; *Heeter*, 99 F.4th at 915. So, by 2020, when the violation occurred here, Smiley was on notice that shooting Driscoll was unlawful.

Second, Smiley claims that Driscoll failed to present "clearly established law that [her] *specific* conduct was unlawful." Opening Br. 21-22. It is unclear what level of specificity Smiley is demanding. Driscoll need identify only "controlling precedent where the factual circumstances are specific enough to 'give fair and clear warning to officers' that a particular conduct violates the law." *Heeter*, 99 F.4th at 915 (quoting *Kisela v. Hughes*, 584 U.S. 100, 105 (2018)). As just shown, Driscoll has done exactly that: The factual similarities between *Heeter*, *Palma*, and this case confirm that Smiley was on notice that it was unconstitutional to shoot Driscoll.

This Court routinely defines the right in question just as Driscoll does—the right of an unarmed, nondangerous person not to be subject to deadly force. *See*, *e.g.*, *Palma*, 27 F.4th at 432, 442-43; *Mitchell v. Schlabach*, 864 F.3d 416, 424-25 (6th Cir. 2017); *Pleasant v. Zamieski*, 895 F.2d 272, 275 (6th Cir. 1990); *Green v. Taylor*, 239 F. App'x 952, 960 (6th Cir. 2007); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 346-47 (6th Cir. 2007).

Smiley would have this Court raise the bar by imposing a more demanding standard for specificity of a clearly established right. This argument has already been rejected. A plaintiff does not need to cite a

"fundamentally similar" case in order to put them on notice. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Bedrock constitutional standards are well known "at a high level of generality." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). Such "standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.*

The Constitution does not permit officers to use deadly force on unarmed persons lawfully present in a public park who are accused of no crime where the force is based solely on an officer's unsupported belief that the person may pose a threat, when the officer has lesser force options available. This right is clearly established.

II. Smiley is not entitled to statutory immunity from Driscoll's state-law claims.

Smiley is not immune under Ohio law from liability for Driscoll's claims of false arrest, battery, and intentional infliction of emotional distress. Ohio law immunizes state employees from liability except when the employee's "acts or omissions" were done with "malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code Ann. § 2744.03(A)(6). "When federal qualified immunity and Ohio state-law immunity under § 2744.03(A)(6) rest on the same questions of material fact," as they do here, "[d]efendant['s] statutory immunity defense stands or falls with [her] federal qualified immunity defense." *Hopper v. Phil Plummer*, 887 F.3d 744, 759-60 (6th Cir. 2018). Because Smiley is not

entitled to qualified immunity, *see supra* Part I, she is not eligible for statutory immunity on Driscoll's state-law claims.

In addition, Driscoll's Count VI sounds in false arrest, which is distinct from the federal § 1983 claims because this claim stems from Smiley's detention of Driscoll prior to the shooting. Smiley offered no separate argument to the District Court that would support statutory immunity on this claim. Accordingly, even if qualified immunity applied here as to excessive force, there would still be no grounds for imposition of summary judgment on Count VI for false arrest.

Conclusion

This Court should affirm the District Court's denial of Defendant's motion for summary judgment.

Respectfully submitted,

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Certificate of Compliance

This document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i)'s type-volume limitation because it contains 10,748 words excluding parts of the brief exempted by Rule 32(f).

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May 2, 2025

/s/ Becca Steinberg

Becca Steinberg

Designation of Relevant Documents

Under Sixth Circuit Rules 28(b) and 30(g), Appellee designates the following filings in the district-court record as entries relevant to this appeal:

Description of Entry	**Docket No.**	**Page ID**
Complaint	RE # 1	1-10
Smiley Declaration	RE # 22-1	103-05
Student Records	RE # 22-3	107-25
Training Log	RE # 22-4	126-207
Policy 1.1.3	RE # 22-5	208-33
Policy 5.1.11	RE # 22-6	234-39
Smiley Statement	RE # 22-7	240-41
Dispatch Report	RE # 22-8	242-46
Forensic Report	RE # 22-9	247-50
Video	RE # 23	251-52
Radio.wav	RE # 23	251-52
Driscoll Affidavit	RE # 29-1	304-09
Photo	RE # 29-3	311

Description of Entry	Docket No.	Page ID
Witness Statements	RE # 29-4	312-18
Dispatch Call	RE # 29-5*	319
McNutt Interview	RE # 29-6*	320
Medical Records	RE # 29-7	321-24
Gisewite Supp. Report	RE # 29-8	325
Press Release	RE # 29-9	326
Articles	RE # 29-10	327-30
Police Report	RE # 29-11	331-52
Campbell Report	RE # 29-12	353-55
Smiley Medical Records	RE # 29-13	356
Smiley Interview	RE # 29-14	357
Email Exchange	RE # 29-15	358-60
Investigation Report	RE # 29-16	361-72
Expert Report	RE # 29-19	382-443
Order	RE # 38	497-523
Notice of Appeal	RE # 39	524-25

*Record items 29-5 (A and B), 29-6, and 29-14 (1-4) are audio or video files that were manually submitted, as memorialized in R. 30 (Plaintiff's Notice of Manual Filing) (Page ID #444-45).

Certificate of Service

I certify that on May 2, 2025, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

/s/ Becca Steinberg

Becca Steinberg