IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 19-20429

JW; LORI WASHINGTON, a/n/f J.W.,
Plaintiffs-Appellees,

v.

ELVIN PALEY,
Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRIEF OF APPELLANT ELVIN PALEY

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. JW; Lori Washington, a/n/f J.W.,– **Plaintiffs/Appellees**
2. Nicholas Riley – **Appellate Counsel for Plaintiffs/Appellees**
3. Martin J. Cirkiel – **Trial Counsel for Plaintiffs/Appellees**
4. Holly Terrell - **Trial Counsel for Plaintiffs/Appellees**
5. Drew Wiley – **Trial Counsel for Plaintiffs/Appellees**
6. Elvin Paley – **Defendant/Appellant**
7. Katy Independent School District – **Defendant**
8. Christopher B. Gilbert and Hailey R. Janecka of the law firm of Thompson & Horton LLP - **Counsel for the Defendants/Appellant Elvin Paley**

/s/ Christopher B. Gilbert
Christopher B. Gilbert

STATEMENT REGARDING ORAL ARGUMENT

Appellant Elvin Paley requests oral argument in this matter, due to the important and novel questions of law raised by the lower court's opinion. Paley, a school district police officer, was denied qualified immunity below on an excessive force claim, and the lower court's decision evidences many of the deficiencies in analysis recently discussed by several of the judges of this Court in the *en banc* decision in *Cole v. Hunter*, ___ F.3d ___, 2019 WL 3938014 (5th Cir. Aug. 20, 2019) (*en banc*). Specifically, the lower court narrowly focused on the substantive question of whether Paley used excessive force in trying to subdue J.W., an out-of-control student, and not on the proper immunity question of whether *every* reasonable officer in this factual context would have known he could not use the force employed by Paley. The lower court also engaged in the sort of hindsight review of exactly when Paley should have taken his finger off the taser trigger that the Supreme Court in *Graham v. Connor,* 490 U.S. 386, 397, 394 (1989) said was improper. Lastly, this case raises the question of whether this Court's doctrine in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990) applies to school district employees who just happen to also be police officers – an issue the lower court seemed to feel was novel, but which was actually answered by this Court in *Campbell v. McAllister,* 162 F.3d 94 (5th Cir. 1998). Because the decisional process would be significantly aided by oral argument, Appellant Paley respectfully requests said argument.

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I.
JURISDICTIONAL STATEMENT

This case is an appeal from the denial of qualified immunity to Appellant Elvin Paley, a Defendant in the matter below. Officer Paley's Motion for Summary Judgment on the basis of qualified immunity was denied by order of United States Chief District Judge Lee Rosenthal, United States District Court for the Southern District of Texas, Houston Division, entered on June 5, 2019. (ROA.2113.) Appellate jurisdiction in the Court of Appeals is proper under 28 U.S.C. § 1291 and *Mitchell v*. *Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985), which states that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." Appellant Paley's Notice of Appeal was filed on June 20, 2019. (ROA.2151.)

II.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Officer Paley was entitled to qualified immunity below, because the lower court incorrectly found that *Fee v*. *Herndon* did not apply to excessive-force claims against school district police officers for injuring students on school grounds.
2. Whether Officer Paley was entitled to qualified immunity below, because the lower court failed to properly analyze whether every reasonable officer in this

factual context would have known that he or she could not use the taser in the same manner as Paley did.

III.
STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court

Plaintiff Lori Washington, on behalf of her son J.W., brought suit against Defendants Katy Independent School District and Officer Elvin Paley, over an incident that occurred at Mayde Creek High School on or about November 30, 2016. (ROA.8.) Plaintiff J.W., a then 17-year old special education student, was physically restrained and tased by KISD Officer Elvin Paley, after J.W. physically pushed his way past another employee who was trying to stop J.W. from leaving the school building. As a result of that incident, Plaintiffs filed suit against the District and Officer Paley on June 5, 2018, asserting numerous claims against the District and Officer Paley, including the claim against Paley for excessive force that is at issue here. On April 11, 2019, Katy ISD and Paley moved for summary judgment on all claims, including Paley's qualified immunity defense. (ROA.598.)

On June 5, 2019, the district court granted the motion as to all claims "except the § 1983 claim against Officer Paley." (ROA.2113.) Although the decision initially appears to be denying summary judgment as to any "§ 1983 claim" against Officer Paley, the decision actually granted summary judgment to Officer Paley on

the illegal restraint claim involving handcuffs (ROA.2144); the substantive and procedural due process claims, including the liberty interest claim in bodily integrity (ROA.2146); the Equal Protection claim (ROA.2147); and the Fourteenth Amendment "Constitutional Right to an Education" claim. (ROA.2149.) Summary judgment was only denied as to the excessive force claim against Officer Paley. (ROA.2143.)

On June 20, 2019, Paley filed his notice of appeal. (ROA.2151.)

B. Statement of Facts

In November 2016, Plaintiff J.W. was a 17-year old special education student at Mayde Creek High School, who classified for special ed as emotionally disturbed and as intellectually disabled. (ROA.155, ¶¶ 31-32.) J.W. is very large (the police report lists him as 6'2" and 250 pounds). (ROA.812.)

On November 30, 2016, J.W. and another student had finished their assignment and were playing a card game. (ROA.1465.) The students were bickering with each other, and the classroom aide told the students that if they weren't going to play nice, she was going to take up their cards. (*Id.*) The other student told J.W., "yeah, quit being stupid," and that triggered J.W., who became very angry, got up, and began yelling and cursing. (*Id.*) J.W. then approached the other student, punched him in the chest and knocked him out of his chair. (*Id.*) The aide ran out into the hallway to get the math teacher, but when she turned J.W. had

followed her to the door, "cursing and yelling at everyone." (*Id.*) The teachers tried to stop J.W., but he stormed out of the classroom and down the hall. (*Id.*) The math teacher alerted Denise Majewski (Student Support Principal) by email that J.W. had gotten mad at another student, hit him in the chest, and was on the loose in the school. (ROA.1469, ¶ 2; ROA.1473.)

J.W. went to the PASS classroom, one of his approved areas to go when he needs to cool down, but when he got there another student was already in the room, which made him even more upset. (ROA.1467.) J.W. immediately grabbed a student desk and threw it across the room, and then began to shout, "I hate this school." (*Id.*) Larry Hamilton, the PASS teacher, tried unsuccessfully to calm J.W. down. (*Id.*) J.W. then kicked the door and walked down the hallway with Hamilton following, and finally stopped in the doorway leading to the outside/tennis court area. (*Id.*) Jill Voss, a health teacher, witnessed J.W. going down the hallway screaming curse words. She said, "Excuse me, watch your mouth," and J.W. replied "Fuck you bitch" and continued down the hallway. (ROA.1470, ¶ 10; ROA.1477.)

As they were walking towards the exit to the gym, Katy ISD Security Officer Johnny Oglesby got in front of J.W. and physically blocked the door leading outside. (ROA.633, ¶ 3; 1469, ¶ 3; 1481.) J.W. kept saying that he just wanted to leave the school and walk home, but the Katy ISD officials involved felt that it was very important to keep J.W. inside the school building, due to his limited cognitive

abilities and the fact that he might get hit by a car if he left the building. (ROA.633, ¶ 4; 1469, ¶ 4.) Oglesby kept telling him that he couldn't leave the school, and that they needed to contact his mother. (*Id*.) Officer Elvin Paley, who had heard the call for security assistance over the radio, arrived shortly thereafter. (ROA.633, ¶ 3.)

J.W. continued to get more agitated and aggressive, and was being more forceful about trying to get through the door. (ROA.634, ¶ 5; 1469, ¶ 4.) All of a sudden J.W. started trying to push his way past Oglesby and out the door. (ROA.634, ¶ 6; 1469, ¶ 4.) Paley and Officer Angelina Molina moved in and attempted to hold J.W. in the doorway, to keep him from leaving the building. (*Id*.) As a result of J.W.'s large stature compared to the officers (Paley is only 5'6"), they quickly realized it was going to be difficult to gain control of him. (ROA.634. ¶ 7.) Paley instructed J.W. to calm down several times. (*Id*.) Officer Paley then told J.W. that he did not want to have to tase him and that he needed to calm down. (ROA.634, ¶¶ 6-7; 1469, ¶ 4.) J.W. was very angry, and pushed with extreme force through the doorway. (*Id*.) The situation had escalated to the point where the officers could not hold J.W. back any longer. (*Id*.) At that time, Officer Paley advised Oglesby and Molina to release J.W., and he then deployed his taser on the right side of J.W.'s chest. (*Id*.) The taser did not have any effect on J.W., and he continued to walk away. (ROA.634, ¶ 7.) Officer Paley then "dry stunned" (or "drive stunned") J.W., and he went down on both knees and lay down on the ground in a prone position.

(*Id*.) Officer Paley commanded J.W. to put his hands behind his back. (*Id*.) J.W. complied, and Molina tried to handcuff J.W. with one set of handcuffs, but because of J.W.'s size, Molina had to link two handcuffs together in order to get him fully handcuffed. (*Id*.) Molina and Paley then positioned J.W. on his side, so he could maintain a clear airway, and Paley told Oglesby to contact the nurse. (ROA.634, ¶ 8; 1470, ¶ 5.)

School Nurse Shirley Willett was contacted immediately and treated J.W. (ROA.634, ¶ 9; 1470, ¶ 5.) EMS arrived at approximately 1:00 p.m. (ROA.634, ¶ 10; 1470, ¶ 5.) Majewski attempted to contact J.W.'s parent (Lori Washington), but was unable to contact her because her phone was unable to accept new messages. (ROA.1470, ¶ 6.) Majewski tried another emergency number to no avail. (*Id*.) Majewski then sent Washington emails, but received no response from Washington. (*Id*.; *see also* ROA.1475.) J.W. was stabilized at approximately 1:30 p.m. and brought back into the security office. (ROA.634, ¶ 10; 1470, ¶ 7.)

Majewski continued to try to contact Washington. (ROA.1470, ¶ 7.) Finally, at approximately 2:00 p.m., Washington called back. (*Id*.) Majewski explained the incident, and Washington said she was on her way. (*Id*.) At approximately 2:45 p.m. Majewski received a call from the Westlake EMS because an ambulance had been dispatched to the school again. (ROA.1470, ¶ 8.) Majewski explained that EMS had arrived and left approximately two hours earlier. (*Id*.) The caller told Majewski that

Washington made a 911 call a little earlier, and was adamant that J.W. be taken to the hospital. (*Id*.) EMS returned to the school and assessed the student as requested by the parent, and they left campus at approximately 3:05 p.m. (ROA.1470, ¶ 9.)

IV.
SUMMARY OF THE ARGUMENT

The lower court's conclusion that *Fee v*. *Herndon*, 900 F.2d 804 (5th Cir. 1990) would not apply to excessive force claims against school district police officers was not only internally inconsistent with its conclusion that *Fee* would apply to bodily integrity claims against school district police officers, it contradicts this Court's decision in *Campbell v*. *McAllister,* 162 F.3d 94 (5th Cir. 1998).

The lower court also erred as a matter of law in denying Officer Paley qualified immunity on the excessive force claim, because the lower court improperly focused on the substantive question of whether Paley used excessive force in trying to subdue J.W., and not on the proper immunity question of whether *every* reasonable officer in this factual context would have known he could not use the force employed by Paley. In concluding that Paley should have taken his finger off the taser trigger seconds earlier than he did, the lower court also engaged in the sort of 20/20 hindsight review disallowed by the Supreme Court in *Graham v*. *Connor,* 490 U.S. 386, 397 (1989).

V.
STANDARD OF REVIEW

The Fifth Circuit Court of Appeals conducts a *de novo* review of a district court's grant of a motion for summary judgment. *Ballard v. Burton*, 444 F.3d 391, 396 (5th Cir. 2006). Summary judgment is appropriate where the moving party establishes "there is no genuine issue of material fact and that [it] is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see Cronn v. Buffington,* 150 F.3d 538, 541 (5th Cir. 1998). "An issue is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001). A material fact issue is one that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 249 (1986).

In a qualified immunity case, the burden of proof – including for summary judgment purposes – shifts:

> The defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority. Once the defendant has done so, the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.

Bazan, 246 F.3d at 489 (quoting *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992)). As this Court has previously noted, "We do *not* require that an official demonstrate that he did *not* violate clearly established federal rights; our precedent places that burden upon plaintiffs." *Pierce v. Smith,* 117 F.3d 866, 872 (5th Cir.

1997) (emphasis added; internal quotation marks omitted); *see also Club Retro, L.L.C. v. Hilton,* 568 F.3d 181, 194 (5th Cir. 2009); *Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir. 2008).

"A denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine, *when based on an issue of law*." *Bazan*, 246 F.3d at 489 (quoting *Rodriguez v. Neeley*, 169 F.3d 220, 222 (5th Cir. 1999)). As the *Bazan* Court noted, "we have jurisdiction for this interlocutory appeal *if* it challenges the *materiality* of factual issues, but lack jurisdiction *if* it challenges the district court's *genuineness* ruling—that *genuine issues* exist concerning *material facts*." *Id*. (emphasis in original). This Court stated in *Colston v. Barnhart*:

> *Johnson* [*v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995),] makes clear that *an appellate court may not review a district court's determination that the issues of fact in question are genuine*.... *Behrens,* on the other hand, makes clear that an appellate court is free to review a district court's determination that the issues of fact in question are *material*.

Colston v. Barnhart, 146 F.3d 282, 284 (5th Cir. 1998) (emphasis in original). As this Court recently reaffirmed in *Cole*, "we lack jurisdiction to resolve the genuineness of any factual disputes" and "consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Cole v. Hunter*, ___

F.3d ___, 2019 WL 3938014 (5th Cir. Aug. 20, 2019) (*en banc*) (citing *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015)). Within that limited scope of inquiry, review is *de novo*. *Id*.

VI.
ARGUMENT AND AUTHORITIES

> "My colleagues' differing opinions on whether the force applied in this tragic case was excessive demonstrate that the constitutional question is a close call even for a judge who can spend days parsing the fine points of case law, let alone for an officer making split second decisions in the field. It is precisely for such situations – when the existence of a constitutional violation is not 'beyond debate' – that qualified immunity provides a defense." *Pratt v. Harris County*, 822 F.3d 174, 185 (5th Cir. 2016) (Costa, J., concurring).

While what happened to J.W. at Mayde Creek High School on November 30, 2016 was certainly regrettable, the district court below erred as a matter of law in denying qualified immunity to Officer Paley on the excessive force claim. The Supreme Court has long held that public servants are immune from suit unless their conduct violated "clearly established" federal law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The availability of immunity is a question of law. *Siegert v. Gilley*, 500 U.S. 226, 231-232 (1991). Courts must determine (i) whether the plaintiff has described a violation of a constitutional right; and (ii) whether the right was "clearly established" at the time of the official's conduct. *Pearson v. Callahan*, 555 U.S. 223, 223-24 (2009). Courts may decide which of the two prongs should be decided first in light of the circumstances of the case. *Id*. at 225.

To defeat qualified immunity, the plaintiff must show that the official's conduct was objectively unreasonable in light of a clearly established rule of law. *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). Because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986), the courts do not deny its protection unless existing precedent places the constitutional question "beyond debate." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (*en banc*) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083 (2011)). The court must "ask whether the law so clearly and unambiguously prohibited [the official's] conduct that *every* reasonable official would understand that what he is doing violates [the law]." *Id*. (citing *al–Kidd*, 131 S.Ct. at 2083) (emphasis in original).

The plaintiff must identify the violation of a "particularized" right. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A plaintiff may not defeat immunity by describing a "general proposition" of constitutional law, such as a right to due process. *al-Kidd*, 563 U.S. at 742. Although a case directly on point is not necessary, there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful. *Morgan*, 659 F.3d at 372. Abstract or general statements of legal principle untethered to analogous or near-analogous facts are not sufficient to establish a right "clearly" in a given context; rather, the inquiry must focus on

whether a right is clearly established as to the specific facts of the case. *Vincent*, 805 F.3d at 547; *see also Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596 (2004).

As will be discussed in greater detail below, several of the lower court's rulings in this case suffer from a common problem in qualified immunity cases that was discussed by Judge Jones in her dissenting opinion in this Court's recent *en banc* decision in *Cole v. Hunter*, ___ F.3d ___, 2019 WL 3938014 (5th Cir. Aug. 20, 2019) (*en banc*). One of the main issues in *Cole*, another police excessive force case, was whether Cole posed a threat to the two officers at the time that he was shot multiple times. Judge Jones argued that the majority opinion focused too much on whether the officers actually used excessive force (the substantive issue on the merits), and not on whether it was "clearly established" that what the officers did would have constituted excessive force (the qualified immunity analysis). As Judge Jones noted:

> Characterizing this case as a "no threat" or "obvious" Fourth Amendment violation is wrong for additional reasons. Whether, under the material undisputed facts, Cole presented "no threat" to a reasonable police officer is the relevant issue to assess a Fourth Amendment violation. But the immunity question, which the majority elides, is whether *every* reasonable officer in this factual context would have known he could not use deadly force. The majority's analysis conflates these inquiries.

Id. at *15 (Jones, J., dissenting). As will be shown below, the trial court here also focused too narrowly on whether *Fee v. Herndon* actually applied to police officers -- despite the fact there was no caselaw saying that it did not -- and whether Officer

Paley's use of the taser actually constituted excessive force -- despite the fact there are no Fifth Circuit cases "at a sufficiently high level of specificity", *Morgan*, 659 F.3d at 372, to have alerted Paley that his conduct was "definitively unlawful." *Id*.

A. Officer Paley was entitled to qualified immunity below, because the lower court incorrectly found that *Fee v. Herndon* did not apply to excessive-force claims against school district police officers for injuring students on school grounds.

Officer Paley asserted his qualified immunity defense against both the excessive force claim and the bodily integrity claim, on the grounds that J.W.'s claims were barred by the Fifth Circuit's decision in *Fee v*. *Herndon*, 900 F.2d 804 (5th Cir. 1990) and its progeny. In *Fee*, a case originating out of Texas, the plaintiff was a sixth-grade special-education student whose parents claim that the principal beat their child so excessively the student was forced to remain in psychiatric rehabilitation for a total of six months. The plaintiffs asserted claims against the school district and the principal for excessive force under the Fourth or Fourteenth Amendment. Recognizing that the Supreme Court in *Ingraham v*. *Wright*, 430 U.S. 651, 97 S.Ct. 1401 (1977) held that reasonable corporal punishment was constitutionally permissible, but excessive corporal punishment was not, this Court held that "[t]his dispute presents the question of whether the federal Constitution independently shields public school students from excessive discipline, irrespective of state-law safeguards." *Fee*, 900 F.2d at 808. The Court held:

> Our precedents dictate the injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions. The rationale for this rule, quite simply, is that such states have provided all the process constitutionally due.

Id. at 808. The Court noted that the Constitution is not intended to be a source of federal criminal or tort law. After examining Texas law, this Court determined that injuries to students during discipline do not violate the Fourth or Fourteenth Amendment:

> Although the injuries are alleged to have been severe, the student's substantive due process guarantees have not been violated under the rationale of *Cunningham*, as Texas does not allow teachers to abuse students with impunity and provide civil and criminal relief against educators who breached statutory and common law standards of conduct.

Id. at 809. This Court therefore upheld the dismissal of the Fourth and Fourteenth Amendment claims against all defendants arising out of the beating of the student. The *Fee* doctrine has been applied by this Court in numerous subsequent cases, including *Campbell v*. *McAllister*, 162 F.3d 94 (5th Cir. 1998), *Moore v*. *Willis Indep*. *Sch*. *Dist*., 233 F.3d 871 (5th Cir. 2000), and *Serafin v*. *School of Excellence*, 252 Fed.Appx. 684 (5th Cir. 2007).

The court below did not disagree with the *Fee* doctrine in general, nor that it would have applied to J.W.'s situation.[1] Instead, the court noted that "[l]ess clear is *Fee*'s application to excessive-force claims against police officers for injuring students on school grounds," and ultimately concluded that *Fee* would not apply to foreclose Ms. Washington's § 1983 excessive-force claim against Officer Paley because he was a police officer. (ROA.2132-33.)

The lower court's conclusion that the *Fee* doctrine would not apply to bar the excessive force claim against Paley simply because he is a police officer was internally inconsistent and made little sense, because eleven pages later in the same opinion the court ruled that *Fee* did serve to bar the liberty interest in bodily integrity claim against Paley:

> Under *Fee*, Ms. Washington cannot maintain her due-process claims based on Officer Paley's use of force. The defendants are entitled to summary judgment as a matter of law on these claims.

[1] Plaintiffs argued below that "J.W.'s injuries were not pursuant to corporal punishment and as such the cases cited by SRO in regard to 14th Amendment due process claims, do not help him in regard to 4th Amendment claims" (ROA.1544, ¶ 48) – which was presumably their entire response to the *Fee v*. *Herndon* argument from pages 15-17 of the Motion for Summary Judgment. (*See* ROA.619-21.) The Defendants pointed out, however, that Plaintiffs themselves admitted that "One way to discipline is by using restraints" in their First Amended Complaint. (*See* ROA.154, ¶ 23.). The lower court did not address this issue either way with regard to the excessive force claim, but rejected the same argument with regard to the bodily integrity claim, holding that "[t]he force used against J.W. can be characterized as discipline because the summary judgment evidence supports that it was rationally related to the school's legitimate interest in maintaining order and keeping J.W. safe." (ROA.2146.)

(ROA.2146.) The court expressed no concern in its bodily integrity analysis that Paley was a police officer. (ROA.2144-46.) The excessive force claim based on Paley's use of force against J.W. and the due process bodily integrity claim "based on Officer Paley's use of force" (ROA.2146) are clearly mirror claims, so why would *Fee* apply to bar one claim against Paley, but not the other?

The lower court also offered no principled reason why a school district police officer would be subjected to different rules than other school employees involved in the same situation. One could understand that if a city police officer or a county sheriff came onto school property to investigate a crime committed by someone who happened to be a student, and used excessive force in arresting that student, they would not be entitled to the protection of the *Fee* doctrine, since *Fee* applies to "injuries sustained incidentally to corporal punishment," *Fee*, 900 F.2d at 808, and outside police officers would not be engaging in "corporal punishment." But the lower court conceded that Paley was an employee of the school district (ROA.2132, n.2), and that he and the other KISD staff members were engaging in discipline by trying to restrain J.W. (ROA.2146.) Presumably the lower court would have applied *Fee* to bar an excessive force claim against any of the non-police officer school employees who were also involved in the physical altercation with J.W.. Paley himself testified that although he was there as a last resort, he was trained to work with the school staff as part of the team:

> Our training also stresses that in school situations we are often there to assist the school staff as a last resort, which is different from normal police situations (where we are taught to take charge of the scene), and so we try to incorporate the school staff into any response we may make. Our training also encourages us to defer to the special education staff, since they have greater knowledge of a student's specific situation and condition.

(ROA.634, ¶ 5; ROA.635-36, ¶ 16.) While a line must obviously be drawn as to how far *Fee* extends, the more principled line is between school district employees and non-school district employees, since *Fee* is based on disciplining students, and not between school employees who happen to have the title "police officer" and those who do not, but who are all doing the same thing to try to help restrain the student.

The more fundamental problem with the Court's *Fee* analysis is that it focuses too much on whether *Fee* actually applied to Paley, and not on whether it was clearly established that *Fee* applied to Paley's actions for purposes of qualified immunity. As Judge Jones noted in *Cole*:

> Characterizing this case as a "no threat" or "obvious" Fourth Amendment violation is wrong for additional reasons. Whether, under the material undisputed facts, Cole presented "no threat" to a reasonable police officer is the relevant issue to assess a Fourth Amendment violation. But the immunity question, which the majority elides, is whether *every* reasonable officer in this factual context would have known he could not use deadly force. The majority's analysis conflates these inquiries.

Cole, ___ F.3d ___, 2019 WL 3938014 at *15 (5th Cir. 2019) (Jones, J., dissenting). While the lower court suggests (incorrectly, as discussed below) that there are no cases where this Court has applied *Fee* to a school district police officer, it is more relevant to note, for purposes of the "clearly established" analysis, that there are also no cases where the Fifth Circuit has held that *Fee* does **not** apply to a school district police officer.

Of particular note in this reversed context is *Campbell v. McAllister,* 162 F.3d 94 (5th Cir. 1998), in which this Court actually did apply *Fee* to dismiss an excessive force claim against a school police officer. In *Campbell*, a student plaintiff alleged that McAllister, a police officer assigned to the high school, removed him from his classroom by "slam[ming] [Dennis] to the floor" and "dragg[ing] [him] along the ground to the principal's office." *Id*. at *1. After first noting that "we have consistently applied a substantive due process analysis to claims of excessive force in the context of corporal punishment at public schools," *id*. at *2, this Court does appear to first analyze the excessive force claim on the merits. *See id*. at *3-5. However, the Court then clearly turns to a *Fee* analysis:

> We turn next to the Campbells's claim that McAlister used excessive force in violation of Dennis's substantive due process rights. Corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard,* 732 F.2d at 1246). "[I]njuries sustained incidentally to corporal punishment, irrespective of the severity of these

> injuries or the sensitivity of the student, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions." *Fee,* 900 F.2d at 808; *see also Cunningham,* 858 F.2d at 272. If, however, an excessive or abusive use of force is wholly unrelated to legitimate school interests, it is quite likely that no post-deprivation remedy would meet the requirements of due process. *See Doe,* 15 F.3d at 451-52: *id*. at 461 (Higginbotham, J., concurring).
>
> In this case, there is no question that McAlister's use of force to remove Dennis from his classroom were rationally related to legitimate school interests in maintaining order. As the district court noted, and the Campbells apparently concede, Texas provides civil and criminal post-deprivation remedies for the excessive use of force by school officials. Thus, the district court correctly concluded that the Campbells's substantive due process claim fails as a matter of law.

Id. at *5. It is impossible to see how the lower court here could have concluded that *Fee* did not apply to Paley because he was a police office – or, more appropriately, that it was clearly established that *Fee* did not apply to Paley because he was a police office – in light of this passage from the *Campbell* decision.

In concluding that "[w]hen faced with similar Fourth and Fourteenth Amendment claims against a police officer who used force that injured a student on school grounds, the Fifth Circuit has not applied *Fee* to foreclose § 1983 excessive-force claims under the Fourth Amendment," (ROA.2133), the lower court cited to two cases: *Curran v*. *Aleshire*, 800 F.3d 656 (5th Cir. 2005) and *Foster v*. *McLeod Indep*. *Sch*. *Dist*., 2009 WL 175154 (E.D. Tex. Jan. 23, 2009). While it is true that *Curran* involved a claim of excessive force by a student against a police officer, the

Fee doctrine is not discussed in the opinion at all; we don't know why the Court did not discuss the issue, but it appears from the district court opinion that the officer did not raise the *Fee* doctrine. *See Curran v. Aleshire*, 67 F. Supp. 3d 741, 748 (E.D. La. 2014) (listing the three arguments raised by the officer in his motion for summary judgment as to the excessive force claim). *Foster* is not an excessive force case at all; it involved a claim by a student that she had been raped by her agriculture teacher, and it is not clear why anyone in *Foster* would have raised the *Fee* doctrine. *See Foster*, 2009 WL 175154 at *1. Regardless, neither *Curran* nor *Foster* clearly establish that school district police officers are not entitled to the protection of *Fee*, especially in light of the *Campbell* decision.

No caselaw exists that clearly established – in November 2016 or now – that *Fee* did not apply to a school district employee like Paley, simply because he happened to be a police officer. Like in *Fee* and *Campbell*, J.W. asserted a claim for excessive force based on Officer Paley's use of force that the lower court ruled "can be characterized as discipline because the summary judgment evidence supports that it was rationally related to the school's legitimate interest in maintaining order and keeping J.W. safe." (ROA.2146.) Like in *Fee* and *Campbell*, those claims were required to be dismissed as a matter of law, and Officer Paley should have been entitled to qualified immunity.

B. Officer Paley was entitled to qualified immunity below, because the lower court failed to properly analyze whether every reasonable officer in this factual context would have known that he or she could not use the taser in the same manner as Paley.

As Judge Jones noted in *Cole*, "[n]early as venerable as the general defense of qualified immunity are the decisions applying it to Fourth Amendment claims against law enforcement officers." *Cole*, 2019 WL 3938014 at *12. The Supreme Court recently confirmed that "[t]he '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." *Kisela v*. *Hughes*, 138 S.Ct. 1148, 1152 (2018) (quoting *Graham v*. *Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989)). The Court went on to note that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. (quoting *Graham*, 490 U.S. at 396–397.) The Court cautioned that "specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id*. (quoting *Mullenix v*. *Luna,* 136 S.Ct. 305, 308 (2015)). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are

entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id*. (quoting *Mullenix,* 136 S.Ct. at 309).

As this Court has noted, a plaintiff has a high burden in order to state a claim for excessive force in violation of the Constitution. A plaintiff must allege:

(1) an injury, which
(2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
(3) objectively unreasonable.

Freeman v. *Gore*, 483 F.3d 404, 416 (5th Cir. 2007). To gauge the objective reasonableness of the force used by a law enforcement officer, the Court must balance the amount of force used against the need for that force. *Id*. When questions arise, "qualified immunity operates ... to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v*. *Katz*, 533 U.S. 194, 206 (2001) (internal citation omitted).

In this case, when Officer Paley approached J.W., J.W. admits that he "was in the midst of an emotional breakdown and anxiety attack." (ROA.150, ¶ 3.) Many of the arguments made by the plaintiffs below regarding excessive force against Paley ignored the fact that multiple adults had been trying to calm J.W. down using less intrusive methods; that they unfortunately did not work; and that Paley had to step in as a "last resort." Officer Paley stood back and watched J.W. as Ogelsby tried

to de-escalate the situation and talk him down, but Paley could tell that the longer school officials talked to J.W., the more irritated he became, finally reaching the point where he was not responding well to normal conversation. (ROA.634, ¶ 5.) As Paley explained his actions:

> There were 2 doors exiting the building where we were all standing. Guard Oglesby was standing in front of the left exit door, when [J.W.] attempted to exit the right door. In doing so, Guard Oglesby tried to hold on the right door with his left hand, but [J.W.] was too strong to be maintained by one arm. I saw Guard Oglesby struggling with [J.W.], so I grabbed [J.W.] and told him 4 times to calm down, before I tased him. [J.W.] replied "Do it, fucking it!" Officer Molina also grabbed [J.W.] from behind. Then [J.W.] tried to push through the door with all of his might and I realize that he was too big and too strong for us to handle. I told [J.W.] "I don't want to hurt you" and several times again to calm down, but he refused. Guard Oglesby, Officer Molina, and I physically struggled with [J.W.] for approximately 1 to 2 minutes. I felt that the situation reached a point where my verbal commands, soft and hard hand techniques were not effective, and that I would have to result to my next level of use of force (Taser) to restore order. So, I advised Guard Oglesby and Officer Molina to release [J.W.], deployed my department issued Taser, and administered 1 Taser cycle on [J.W.].

(ROA.813.) J.W.'s arguments below that Paley did not "attempt[] to provide any reasonable accommodations to J.W. before restraining and tasing him," and even more bizarrely that "SRO Paley (or anyone else for that matter) made absolutely no attempt to provide less restrictive and less intrusive methods as noted above in detail, or any potential accommodations, before restraining and tasing J.W." (ROA.1543, ¶ 46) completely ignored the undisputed facts that J.W. was allowed to go to the PASS room, but it was unfortunately already occupied; that J.W. was allowed to

walk the interior halls to cool down; and that the adults did try to verbally talk him down when he reached the outer doors and tried to leave the building. It simply was unsuccessful.

The undisputed evidence below also showed that Paley did not initially intend to tase J.W., but only to physically restrain him (the next step on the force continuum after verbal de-escalation fails to work). (ROA.634, ¶ 6.) Because J.W. was completely out of control and much larger than both Paley and Molina, they quickly realized that they were not going to be able to physically restrain J.W., and only then did Paley make the decision to use the non-lethal taser. (*Id*.) J.W.'s suggestion below that Paley should have engaged in "measured and ascending actions" – citing to cases like *Poole v. City of Shreveport*, 691 F.3d 624 (5th Cir. 2012) for the proposition that Paley should have used "verbal warnings, hand and arm manipulation techniques, pepper spray and then use a taser" (ROA.1543, ¶ 46) – completely ignores the fact that that was what happened! Multiple adults, including Paley, tried to talk J.W. down, and then used verbal warnings (Paley testified, and can repeatedly be heard on the video, telling J.W. to calm down and warning him that he didn't want to use a taser on him). Paley then testified that when he saw J.W. move to the door and make physical contact with Ogelsby, he felt he had to move in, but "I did not intend to use my taser on J.W., but to try to use soft or hard hand techniques and physically restrain him, which are the next steps on our use of force

continuum, since verbal commands had not worked." (ROA.634, ¶ 6,) It was only after it became clear that three grown adults could not restrain J.W. that Paley felt he had to resort to the next step on the use of force continuum, which was the taser.[2] Paley (and team) did exactly what J.W. argued he should have done under *Poole*. Stopping a student – especially one who has limited intellectual capacities, such as J.W. – from leaving a school is imminently reasonable.

1. The court below defined the "clearly established law" regarding the use of tasers at too high a level of generality.

The lower court began framing the qualified immunity analysis by noting, "Students have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures while on school premises." (ROA.2136 (citing *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621–22 (5th Cir. 2004) and *T.L.O. v. New Jersey*, 469 U.S. 325, 334–37 (1985)). This was far too generalized a statement of law, however, for a proper qualified immunity analysis. By analogy, the courts have repeatedly noted that just because *Tennessee v. Garner*, 471 U.S. 1 (1985) establishes the general rule that a police officer can only use deadly force where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, that general proposition does not make it clearly established that a police officer cannot use

[2] Paley testified that pepper spray would have been before the taser on the use of force continuum, but that he doesn't carry pepper spray. (ROA.2098-99.)

deadly force under the specific circumstances facing the officer. *See*, *e.g.*, *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015) (discussing the problems in relying too generally on *Garner*); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) ("But the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case.") (internal citations omitted). As the *Mullenix* Court explained, "[t]he correct inquiry…was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [she] confronted…." *Mullenix*, 136 S.Ct. at 309. Likewise, the fact that students may possess a general right to be free from unreasonable searches and seizures while on school premises "hardly settles this matter." *See Cole*, 2019 WL 3938014 at *14 ("in *Mullenix*, the Supreme Court reversed this court because 'the general principle that deadly force requires a sufficient threat hardly settles the matter.'") (Jones, J., dissenting).

2. The Fifth Circuit has rarely ruled that the use of tasers by police officers constituted excessive force.

What is generally absent from the lower court opinion is a discussion of the Fifth Circuit cases involving the use of tasers in general, which show that it is hardly "clearly established" when the use of tasers – if ever – is "so clearly and unambiguously prohibited … conduct that *every* reasonable official would understand that what he is doing violates [the law]." *Morgan*, 659 F.3d at 371

(citing *al–Kidd*, 131 S.Ct. at 2083). In 2015, this Court decided *Carroll v. Ellington*, 800 F.3d 154 (5th Cir. 2015). The facts of *Carroll* are complicated, arising out of a confrontation between a police officer and a man suffering from paranoid schizophrenia (Barnes), who the officer found wandering around a neighborhood and believed may have been engaging in vandalism of mailboxes. Barnes was tased five times by one officer, three of which were drive stuns. *Id*. at 163-64. He was then struck at least ten times with a baton, kicked, punched in the brachial nerve five to eight times. He was then tased again, multiple times. Barnes eventually suffered a cardiac arrest and died. The taser logs of four officers showed that the tasers had been cycled thirty-five times, delivering bursts of electricity of between three and eleven seconds each. *Id*. at 166.

After reviewing caselaw on the use of tasers, this Court concluded that "as of October 2006, the law was not clearly established that using a Taser to gain compliance of an unarmed, seated suspect for resisting arrest and failing to follow verbal commands was clearly excessive and objectively unreasonable." *Id*. at 175. The Court granted qualified immunity to multiple officers for their use of non-lethal force, including the tasers, up until the point where Barnes was subdued and handcuffed. *See id*. at 175-76. Numerous cases from this Court from that same time period have granted qualified immunity to officers who have used their tasers to subdue suspects. *See*, *e.g.*, *Poole v. City of Shreveport*, 691 F.3d 624 (5th Cir. 2012)

(upheld qualified immunity for police officers who repeatedly tased the plaintiff following a traffic stop); *Batiste v*. *Theriot*, 458 Fed.Appx. 451 (5th Cir. 2012) (reversed and granted qualified immunity to officers who tased a suspect who had fled the police); *Pratt v*. *Harris County, Tex*., 822 F.3d 174 (5th Cir. 2016) (discussed at length below); *Buchanan v*. *Gulfport Police Dept*., 530 Fed.Appx. 307, 314 (5th Cir. 2013) ("Several other circuits have determined similarly that, where a suspect resists arrest and or fails to follow police orders, officers do not violate his right against excessive force by deploying their tasers to subdue him."); *Williams v*. *City of Cleveland, Miss*., 736 F.3d 684 (5th Cir. 2013); *Zimmerman v*. *Cutler*, 657 Fed.Appx. 340 (5th Cir. 2016); *Galvan v*. *City of San Antonio*, 435 Fed.Appx. 309 (5th Cir. 2010). The facts of many of these cases are obviously different from those here, but they make the point that a police officer like Paley, looking for general guidance on the use of tasers, would see that the courts have routinely ruled that the use of tasers did not constitute clearly excessive force. The very few cases in which this Court has either found that the use of tasers constituted excessive force or denied qualified immunity on that issue – including *Darden v*. *City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018); *Ramirez v*. *Martinez*, 716 F.3d 369 (5th Cir. 2013); and *Newman v*. *Guedry*, 703 F.3d 757 (5th Cir. 2012) – all involved the issue of whether the tasers were used well after the suspect had stopped resisting, and will be discussed below.

3. The few cases that have addressed the use of tasers by school police officers fail to clearly and unambiguously prohibit conduct such that *every* reasonable police officer in Officer Paley's position would have understood that what he did would have violated the law.

Although the lower court does note that "[w]hether Officer Paley's force was objectively reasonable requires looking at similar cases involving excessive force in the school context," (ROA.2137), it really doesn't find many -- at least from this Court. While the Court cites *Campbell v. McAllister*, 162 F.3d 94 (5th Cir. 1998) for the propositions that "[t]he Fourth Amendment's reasonableness standard must afford school officials with a relatively wide range of acceptable action in dealing with disruptive students" and "[t]he fact that less force could have been used, or that a more appropriate punishment may have been available, is not enough to establish that the punishment administered was unconstitutional" (ROA.2138), it does not immediately analyze that case any further…which is interesting, because the court later admits that in *Campbell*, this Court found that a school police officer who removed a five year-old kindergarten student, who was "disruptive" but not apparently a danger to anyone, from his classroom by "slam[ming] [Dennis] to the floor" and "dragg[ing] [him] along the ground to the principal's office" did not use excessive force at all. *Id*. at *4.

The lower court here did admit that "[c]ourts in the Fifth Circuit have not squarely addressed what constitutes an objectively unreasonable use of a taser

against a student" (ROA.2139) – which is usually a sign that there are no clearly established standards. The court then notes that "several cases" outside the Fifth Circuit "offer guidance," and cites to three district court cases: *Johnson v. City of Lincoln Park*, 434 F. Supp. 2d 467 (E.D. Mich. 2006), *Geist v. Ammary*, 40 F. Supp. 3d 467 (E.D. Pa. 2014), and *R.T. v. Cincinnati Pub. Schs.*, 2006 WL 3833519 (S.D. Ohio 2006). (ROA.2139-40.) If these were the only three cases that would have "offered guidance" to Officer Paley, then there is no way that he (or any other reasonable police officer) would have realized that his actions were "clearly established" as unconstitutional, because in two of these cases the courts did not even reach the issue of qualified immunity, but instead ruled that the force used by the officers was constitutionally reasonable (under similar factual circumstances to those facing Officer Paley), and in the third the court essentially reserved the issue of qualified immunity due to rather extensive disputed fact issues.

In *Johnson v. City of Lincoln Park*, 434 F. Supp. 2d 467 (E.D. Mich. 2006), a police officer was summoned to the office after a student had refused to turn over a Nintendo Gameboy, which was prohibited by school rules, to the assistant principal. The student was a ninth grader, and like J.W. here, he was classified as a special needs (emotional impaired) student. After the student refused to give the Gameboy to the officer, the officer tried to search his pockets, and the student "took a swing" at the officer. The officer took the student to the ground (during which time the

student bit the officer), and after additional officers arrived, they were able to handcuff the student. However, the student became violent and started struggling again, so after threatening to tase the student, the officer dry stunned the student in the back. Like here, the initial tasing did not appear to be effective – the officer speculated it was because the student was wearing multiple layers of clothing – so after taking the student to the ground again, the officer tased him a second time, this time on his bare skin. That ended the struggle. The court had little trouble finding that the amount of force used was constitutionally reasonable:

> Under these circumstances, it is simply impossible to say that the amount of force employed by Officers Cochran and McFarland was unreasonable. To the contrary, the Court concludes that the amount of force was reasonable under the Fourth Amendment.

Id. at 480.

In *R.T. v. Cincinnati Pub. Schs*., 2006 WL 3833519 (S.D. Ohio Dec. 29, 2006), a student became non-compliant in a school hallway and refused to accompany the officer to in-school suspension. After warning her that he would tase her, the officer did so, which allowed him to handcuff her. The court noted that "Officer Rhone decided to use the taser because he thought it was the most effective way to end RT's resistance without causing her physical injury", and that "Officer Rhone's use of force was reasonable under the circumstances and that he complied

with CPD Policy concerning use of force when he used the taser to obtain RT's compliance." *Id*. at *2.

Only in *Geist v*. *Ammary*, 40 F. Supp. 3d 467 (E.D. Pa. 2014) did the court refuse to grant qualified immunity to a police officer who used a taser on a student. The facts in *Geist* were highly disputed.[3] The student (Wilson) claimed that she and two friends were walking home in the street after school was dismissed, when Officer Ammary approached them from behind and grabbed Wilson (but not her friends) without identifying himself. Wilson pulled away, so Officer Ammary grabbed her again, twisted her around and pushed her against a parked car. A struggled ensued, whereupon Officer Ammary stepped away and tased Wilson *in the groin*. Wilson also claimed that Officer Ammary then deliberately rolled her over onto her stomach to handcuff her, pushing the taser spikes further into her stomach and groin. *Id*. at 470-71, 478-79.

The court concluded that there were simply too many stark factual disputes in the case to resolve qualified immunity at that stage of the case, noting five in particular:

[3] The precedential value of this case to school district police officers is also somewhat questionable, given that Officer Ammary was not a school district employee (he was a city police officer assigned to assist at the high school), and the incident took place after school on a street near the school. *Id*. at 470-71.

- Officer Ammary claimed that two hundred students were gathering near where he confronted Wilson, and he thought there was going to be a gang fight; Wilson claimed that she and her friends were just walking home, and she saw no large groups of students and knew nothing about any planned fights, *id*. at 478-79 & n.35 & n.36;
- Ammary claimed that during the struggle, Wilson hit him several times in the face; Wilson denied doing so, and said at most she tried to push him off her because she was unable to breathe, *id*. at 480;
- The parties disputed whether any warnings were given, *id*.;
- The parties disputed whether Ammary deliberately rolled Wilson onto her stomach to drive the barbs into her stomach (Ammary claimed she remained on her side), *id*. at 482;
- Ammary claimed that he aimed his taser low on Wilson because she had a messenger bag on the front of her body and he was aiming under it; Wilson claimed the bag was on her back, and he deliberately and unnecessary aimed for her groin. *Id*.

The court concluded that in light of these extensive factual disputes, "a decision of whether Officer Ammary is entitled to qualified immunity would not be appropriate at this time," but noted that he was free to raise the defense again once the identified fact issues were resolved. *Id*. at 485-86.

The three cases cited by the lower court here involving the use of tasers by school police officers fail to "place[] the statutory or constitutional question beyond debate," *Mullenix*, 136 S.Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 741), because "[n]one of [the cases] *squarely governs* the case here." *Id*. (alterations and emphasis in original). *Geist* is the only case to have ruled negatively on the excessive-force-by-taser claim, and in addition to the extensive and material fact disputes that are not present in this case, the court simply used the wrong standard: the court held that "[t]he facts presented in the record thus far also do not clearly establish that every reasonable officer would have used the level of force employed by Officer Ammary in making the arrest of Ms. Wilson, a minor." *Geist*, 40 F.Supp.3d at 484. This is backwards: the standard is whether the law "clearly and unambiguously prohibited [the official's] conduct [such] that *every* reasonable official would understand that what he is doing violates [the law]." *Morgan*, 659 F.3d at 371 (citing *al–Kidd*, 131 S.Ct. at 2083) (emphasis in original). The court's discussion of the objective reasonableness standard also appears overly general, and probably would not survive review after the Supreme Court's later decisions in *Mullenix* and *Kisela*. *See Geist,* 40 F.Supp.3d at 484-85. Turning to the other two cases, in *RT*, for example, the court found the force to be reasonable even though there was no indication that the student tried to assault or otherwise posed a threat to school officials (the one area here where the lower court found a possible fact dispute); the officer used the taser

solely "to obtain RT's compliance." *R.T.*, 2006 WL 3833519 at *2. And *Johnson*, which is by far the most closely-analogous of the three cases to the facts facing Officer Paley, had little trouble concluding that the officers there did not use excessive force. *Johnson*, 434 F. Supp. 2d at 480.

4. There were no *material* disputed fact issues below that should have prevented the court from resolving the "clearly established" prong of qualified immunity.

Although *Geist* ultimately did not reach the issue of qualified immunity because of disputed fact issues, there were no disputed fact issues below that were *material* and that would have prevented the court from resolving the "clearly established" prong of qualified immunity. On pages 29 to 31 of the lower court's opinion, the court compared and contrasted the declarations of the Katy ISD officers and employees with J.W.'s declaration, and reached the conclusion that there were disputed facts that precluded summary judgment. (ROA.2141-43.) None of the identified "disputed facts" were material, however, to whether Paley was entitled to qualified immunity from the excessive force claim. The lower court admitted that "the record shows that J.W. refused to follow school staff members' and officers' instructions, was agitated and insistent on leaving, and that Officer Paley gave warnings before using the taser, but it is disputed that he pushed a staff member, so as to justify the taser use." (ROA.2141.) Paley testified that he moved in when Oglesby was pushed, and while there may be some dispute as to whether J.W. pushed

a staff member on his way out the door, the critical issue was that he was on his way out the door, and the school officials had been trying to keep him in the building:

> J.W. kept saying that he wanted to leave campus and walk home, but Guard Oglesby, Coach Hamilton, and AP Majewski were trying to convince him to stay on the campus. I felt it was very important to keep him in the building and on campus, because with his special needs, I believed that he would be a danger to himself if he was allowed to just leave the building and walk home. I was particularly worried that he might get hit by car … As the police officer, I was there as a last resort, so I stood off to the side to let the school staff try to de-escalate the situation.

(ROA.633, ¶ 4.) This is consistent with how Assistant Principal Denise Majewski testified:

> J.W. was highly agitated and wanted to leave the campus through the glass doors … As a special needs student, I felt that it was important that we not allow J.W. to leave the building, because we would lose all control over him, and he might get injured.

(ROA.1469, ¶ 4.) Paley did not move in because J.W. was "assaulting" Oglesby, but because he was trying to leave the building, and outside they would lose all control over him. Whether J.W. actually pushed Oglesby was not ultimately *material* to why Paley used force (*i.e*. to stop J.W. from leaving the school and keep him safe).

It should also be noted that the undisputed evidence showed that Paley did not initially intend to tase J.W., but only to physically restrain him (the next step on the force continuum after verbal de-escalation failed to work). (ROA.634, ¶ 6.) Paley

and Molina quickly realized that they were not going to be able to physically restrain the much larger J.W., and only then did Paley make the decision to use the non-lethal taser. (*Id*.) As noted above, these are precisely the type of "measured and ascending actions" in which cases like *Poole v*. *City of Shreveport* held Paley should have engaged.

5. Cases that have found excessive force because the suspect had stopped resisting when the force was used are not instructive here, because this case lacked the "temporal gap" of those cases, and the court below should not have second-guessed the exact second when Paley should have taken his finger off the taser trigger.

Ultimately, the lower court's biggest problem with Officer Paley's actions was that "Officer Paley did not stop using the taser when J.W. stopped resisting." (ROA.2141.) The court proffers the general rule that police officers may "use reasonable force to subdue and handcuff suspects who strike them or are otherwise resisting," but "the force calculus changes substantially once that resistance ends," and cites to *Curran v*. *Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015) as authority. (ROA.2138.) As above, the fact that cases like *Curran* establish that a police officer cannot continue to use excessive force generally once a subject has been subdued, does not clearly establish that a police officer cannot continue to use force under the specific circumstances facing the officer. *Mullenix*, 136 S.Ct. at 309. This is particularly true here, where most of the "stopped resisting" cases have a distinct

temporal gap between when the suspect stopped (or allegedly stopped) resisting, and when force was again applied to the suspect, that was absent in this case.

In *Curran*, which involved two separate instances of force, a teacher called a police officer (Aleshire) for assistance because student Curran was using a cell phone on school property, against school rules. When Aleshire confronted Curran, he reached for her ID on a lanyard around her neck. Curran claimed "that he yanked her head and neck when he pulled at her ID, causing her to reflexively "jerk[ ] back. Aleshire then "threw" her against a wall—allegedly headfirst. *Id*. at 658. After the student had been handcuffed and while they were walking to the office, "Aleshire 'slammed' Curran into a wall, hard enough to dislodge the cell phone which she had hidden in her shirt." *Id*. Curran claimed that she had been cooperating and had done nothing to provoke being pushed into a wall. The Court noted:

> Aleshire contends that qualified immunity shields him from liability for his first use of force because he could have reasonably believed it necessary to push Curran against the wall in order to bring her under control after she struck him. That may be true under the deferential qualified immunity standard if his pushing her head into the wall was a split-second response to Curran's battery or continued resistance. While the district court accepted that Curran battered Aleshire, it then found a factual dispute as to timing which, viewed in Curran's favor, takes Aleshire's first use of force outside the context of an immediate and inseparable response to the battery.

Id. at 660. When the officer argued that there was not a specific case on point, the Court noted:

> But if enough time elapsed between the battery and the use of force that a reasonable officer would have realized Curran was no longer resisting, then this may qualify as an "obvious" case in which the *Graham* factors alone can provide fair warning.

The Court had even less trouble finding that the second incident of force had too large a temporal gap between the end of the resistance and the use of force. *See id*. at 664 ("And under Curran's version of events, she was handcuffed and subdued when Aleshire pushed her into the wall outside the disciplinarian's office—making this an obvious case of excessive force sufficient to defeat Aleshire's claim of qualified immunity. *See Bush,* 513 F.3d at 501–02 (holding that officer had fair warning "he could not forcefully slam [an arrestee's] face into a vehicle while she was restrained and subdued")))."

The *Curran* analysis is almost identical to that of *Darden v*. *City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018), one of the only Fifth Circuit cases to have ever denied qualified immunity on an excessive-force-by-taser claim.[4] *Darden* involved a drug bust at a private home by a large team of heavily armed police officers

[4] For the record, the *Darden* opinion itself could not have put Officer Paley on notice that using a taser might constitute excessive force, since the opinion was issued in January 2018, over a year after the incident occurred in this case in November 2016. *See Kisela*, 138 S.Ct. at 1154 ("*Glenn* could not have given fair notice to [Kisela] because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Glenn* was therefore of no use in the clearly established inquiry.") (internal citations omitted). *Morris v*. *LeBlanc*, 674 Fed.Appx. 374 (5th Cir. 2016), another case in which this Court held that a fact issue precluded a determination of whether the suspect had been subdued at the time he was tased, was decided on December 30, 2016, and therefore could also not have provided notice to Paley in November 2016.

executing a no-knock warrant. According to the facts on summary judgment, Darden was kneeling on a couch when the police entered and immediately raised his hands, but "the officers allegedly threw him to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him." *Id*. at 725. Darden suffered a heart attack and died during the arrest. Although the officers claimed that Darden had been resisting arrest, there were gaps in time when Darden did not appear to be doing anything, and the Court noted that "[w]e have previously suggested that a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest." *Id*. at 731. The Court cited three cases for the proposition that tasing might constitute excessive force: *Ramirez v*. *Martinez*, 716 F.3d 369 (5th Cir. 2013), *Newman v*. *Guedry*, 703 F.3d 757 (5th Cir. 2012), and *Bush v*. *Strain*, 513 F.3d 492 (5th Cir. 2008).

The *Bush* case, which involved a suspect whose face was slammed into a vehicle after she had already been handcuffed did not involve the use of tasers. *Bush*, 513 F.3d at 502.[5] *Ramirez* involved a suspect who was tased after he was handcuffed

[5] *Bush* is also a really strange qualified immunity case, in that the defendant officers apparently argued to the Court that the issue of qualified immunity was not properly before the Court, but the Court went ahead and considered it anyway, even though the officers did not brief the issue or respond to any of the plaintiff's arguments. *See id*. at 500.

and lying face-down on the ground; the Court held that "we have held the use of certain force after an arrestee has been restrained and handcuffed is excessive and unreasonable." *Ramirez*, 716 F.3d at 378. *Ramirez* claimed that the question of whether the law on the use of tasers had been clearly established had been resolved by the following passage in the *Newman* decision:

> Guedry contends that he had no reasonable warning that tasing Newman multiple times violated Newman's constitutional rights, because there was then no binding caselaw on the appropriate use of tasers. Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.

Newman, 703 F.3d at 763-64. The validity of this passage, however, is highly doubtful after the Supreme Court's decisions in *Mullenix* and *Kisela*, which cautioned courts against trying to define applicable rules with too much generality. *See Cole*, 2019 WL 3938014 at *6.[6] Regardless, *Newman* is another case where the suspect was alleged to have been hit with a police baton ten (10) times and was just standing there in pain when the officer pulled his taser and used it. *Newman*, 703 F.3d at 763.

[6] In fact, in his dissenting opinion in *Cole* calling for a reconsideration of the entire doctrine of qualified immunity, Judge Willett argues that this is precisely the problem with how the Supreme Court views qualified immunity: "the 'clearly established law' prong, which is outcome determinative in most cases, makes qualified immunity sometimes seem like unqualified impunity: 'letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." *Cole*, 2019 WL 3938014 at *19 (Willett, J. dissenting).

The point is that in all of these cases, from the non-taser cases like *Curran* and *Bush*, to the taser cases like *Darden*, *Newman* and *Ramirez*, the courts found at least a fact question as to whether the officers had used excessive force, because the suspects had stopped resisting and there was a significant temporal gap before the use of the force at issue. Most of the cases involved suspects who had been tased after they were "restrained and handcuffed," and the *Ramirez* court contrasted the situation before it with the situation at issue in *Poole*, where "we recently held the use of a taser was not excessive where the arrestee was resisting arrest and the officers ceased use of the taser once the arrestee was handcuffed and subdued." *Ramirez*, 716 F.3d at 378 (citing *Poole*, 691 F.3d at 626).

The difference between all of the cases discussed above and the lower court's finding that Officer Paley did not stop using the taser when J.W. stopped resisting is that here, there was no temporal gap: the use of the taser was one nineteen-second application, and the court is literally second-guessing whether Paley should have taken his finger off the trigger at ten seconds, or maybe fifteen seconds, instead of going the full nineteen seconds. This is the exact sort of "20/20 vision of hindsight" decision that the Supreme Court cautioned against making "in the peace of a judge's chambers," *Graham,* 490 U.S. at 396, 109 S. Ct. 1865. While nineteen seconds certainly sounds like a long time, J.W. – who bore the burden below to establish that Paley's allegedly wrongful conduct violated clearly established law, see *Bazan*, 246

F.3d at 489[7] – offered no evidence as to what nineteen seconds might mean, *i.e*. whether it was an excessive amount of time, either generally or under the circumstances of this case.

Paley testified without contradiction that his taser did not immediately stop J.W., and that "[o]nly one of my Taser prongs had connected to J.W. – the other prong had gotten lodged in his backpack's strap, which is why the taser had not initially been 100% effective." (ROA.634, ¶ 10.) This Court has previously noted that both prongs of the taser must strike the suspect for the taster to be effective:

> The HCSD's tasers typically discharge two probes. If both probes attach to an arrestee's skin, then the arrestee's body completes the path between the two probes. A predetermined voltage is then applied by the taser and an electrical current flows through the arrestee's body. Feeling the effects of the electrical current flowing through his body, the arrestee is typically incapacitated. If, however, only one probe connects to the arrestee upon deployment, and the other probe, for instance, falls to the ground, then the circuit is not complete, and almost no current flows through the arrestee's body.

Pratt v. Harris County, Tex., 822 F.3d 174, 178 (5th Cir. 2016). The *Pratt* court granted qualified immunity to officers who administered three full cycles of a taser over a forty second period, plus four more tasings (including at least one in "drive stun" mode), which led to the death of the suspect (who was drunk and probably belligerent, but not terribly dangerous), in part because the taser was not effective in

[7] *See also Poole*, 691 F.3d at 630 ("It bears repeating that while we view all facts in a light most favorable to Poole, the burden remains on Poole to negate the qualified immunity defense once properly raised.") (internal citations omitted).

stopping the suspect. The Court also noted that "[i]t is also important that neither officer used their taser as the *first method* to gain Pratt's compliance. The record shows that both officers responded "with 'measured and ascending' actions that corresponded to [Pratt's] escalating verbal and physical resistance." *Id*. at 182. So did Officer Paley.

Given the continuing nature of the force used in this case, Paley's situation is more similar to this Court's recent decision in *Escobar v*. *Montee*, 895 F.3d 387 (5th Cir. 2018), in which the plaintiff argued that the officer had used excessive force both by allowing his police dog to bite him in the first place, and then allowing the dog "to continue biting Escobar until Escobar was fully subdued and in handcuffs," *id*. at 391, which lasted a full minute. The court deferred to the officer's testimony that he felt he needed to allow the dog to continue biting Escobar until he had Escobar fully under control, and distinguished *Darden*, *Newman* and *Bush* because based on the temporal gaps in those cases, "in none of them would an officer have reason to doubt the suspect's compliance and still perceive a threat." *Id*. at 395. Like in *Escobar* and *Poole*, Paley used force to bring J.W. under control so that he could handcuff him; he did not use his taser (or any other force) after J.W. had been handcuffed. (ROA.634, ¶¶ 5-8.) Second guessing whether Paley could have decided that J.W. was no longer struggling at ten or fifteen seconds ignores the Supreme Court's admonition that "[t]he 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." *Kisela*, 138 S.Ct. at 1152 (quoting *Graham*, 490 U.S. at 396–397.)

VII.
CONCLUSION AND PRAYER

For the reasons stated above, Appellant Elvin Paley was entitled to qualified immunity below as a matter of law on Plaintiff's excessive force claim. Officer Paley respectfully requests that this Court grant his appeal; reverse the relevant rulings of the court below and render him qualified immunity; grant Officer Paley his costs of appeal; and grant Officer Paley such relief, both at law and in equity, to which he has shown himself justly entitled.

Respectfully submitted,

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