No. 08-996

In The

Supreme Court of the United States

JESSE DANIEL BUCKLEY,

Petitioner,

v.

JONATHAN RACKARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a deputy sheriff violates the Fourth Amendment when he deploys a Taser three times in "drive-stun" mode to accomplish a lawful arrest on an actively but not violently resisting person after repeated warnings the Taser would be used if compliance with lawful orders did not occur, where the officer is alone, at night, immediately adjacent to a dark highway.

2. Whether it was clearly established, so as to defeat the individual qualified immunity from suit enjoyed by a deputy sheriff, that a lone deputy who uses a Taser in drive-stun mode three times to accomplish a lawful arrest on an actively but not violently resisting person after repeated warnings immediately adjacent to a dark highway is violative of the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Jesse Daniel Buckley, Plaintiff-Appellee below.

Respondent is Jonathan Rackard, Deputy Sheriff of Washington County, Florida, in his individual capacity, Defendant-Appellant below.

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The opinion of the United States Court of Appeals for the Eleventh Circuit that is the subject of this petition can be found in the Petition for a Writ of Certiorari at page 1a of the Appendix.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Rackard opposes issuance of the writ of certiorari as sought by Petitioner Buckley.

PERCEIVED MISSTATEMENTS IN THE STATEMENT OF THE CASE

As required by Rule 15.2 of the Supreme Court Rules, Respondent Rackard is required to address perceived misstatements of fact or law in the petition that bear on what issues would properly be before the court if certiorari were granted. There are several significant examples of such misstatements which either are misstatements of fact or law, or which have no record support for the assertions made.

The incident in which Jonathan Rackard, a Deputy Sheriff in rural Washington County, Florida, felt the need to deploy a department issued Taser in drive-stun mode was fairly and completely recorded on videotape. As a result, the need for pre-trial discovery was substantially moderated. Not a single

deposition was taken. As a result, the record evidence consisted of the videotape itself, Deputy Rackard's affidavit in support of his Motion for Summary Final Judgment, certified copies of state court documents reflecting Buckley's no contest plea to having resisted Deputy Rackard's lawful arrest, Buckley's "declaration" in opposition to summary judgment, the Taser Use Report, several photos of Buckley's back, the Washington County Sheriff's Office Taser Policy, a complaint by a "Mrs. Buckley", an Internal Affairs Report, and the report of Plaintiff's "expert" Ronald Lynch.

From this sparse and spartan record the Petitioner's brief includes rhetorical flourishes and hyperbolic embellishments asserted without record support. Buckley's petition opens with the assertion that the Eleventh Circuit's opinion authorizes Taser deployment on citizens, like Buckley, who will suffer "excruciating pain and severe burns through repeated . . . Taser discharges of 50,000 volts of electricity." In fact, there is no evidence *in the record* of how the Taser works, how much electricity is conducted or whether the electrical measurements that explain its operation are volts, watts, amperes, or ohms. Buckley's petition morphed his original reporting at the district court level of the pain he experienced from being merely "intense at the time" to now "excruciating."

As evidence of record in opposition to summary judgment, Buckley's "Declaration" made only passing

reference to any burns indicating only that he developed "Keloid growths at some of the Taser burn points on my body." In contrast, the petition now blithely describes those as "severe burns" without any medical record support whatever as to whether the burns were in any way "severe."

The videographic recording of the entire incident effectively refutes the suggestion in the petition that Petitioner frustrated Deputy Rackard's effort at effectuating a lawful arrest either because he was "physically unable to do so because of his emotional condition or because his hands were cuffed behind his back." A careful review of that videotape makes indisputably clear that Buckley was far from a non-resistor or a mere passive resistor. Contrary to the bold suggestion that Buckley "fell" to the ground, one cannot help but note that Buckley made it well out of the roadway before falling. Buckley's recitation of the case in support of the petition notably fails to mention that Deputy Rackard attempted three times to help Buckley to his feet because to do so would acknowledge that the suggestion that Buckley was unable to get up and not attempting to defeat or delay a lawful arrest is fatuous on its face.

The last of the substantial and gratuitous misstatements of the facts for which there is no record support is the glib assessment that Deputy Rackard's only purpose in tasing Mr. Buckley "was to inflict pain." In stark contrast is the actual evidence of record in which Rackard explained his actions and the reasons for them.

> *"6) Once I was able to transport Mr. Buckley to my patrol car, there was no further Taser application to his person or otherwise. I never punched, kicked, struck, pepper-sprayed or used any other devices to apply any other force to Mr. Buckley.*
>
> *7) I used only such force as I thought was needed to arrest Mr. Buckley after he refused to sign a traffic citation. I tried to persuade Mr. Buckley to sign his traffic citation and tried to persuade him to simply come with me to my patrol car.*
>
> *8) I was concerned that Mr. Buckley might cause me harm either by intent or by accident if I remained at that dark roadside attempting to move him myself."*

Petitioner's description of the Eleventh Circuit's opinion as being "fractured" is indeed a strained description. In fact, Judge Edmondson and Judge Dubina each substantially agreed not only on the decision but on its rationale. Judge Edmondson's opinion focused broadly on the overall reasonableness of Rackard's actions in attempting to complete the arrest of the Plaintiff who was not "fully secured until after the second officer arrived." Judge Edmondson concluded that the three Taser deployments of Rackard were not excessive in a constitutional sense, and therefore were obviously not contrary to clearly established law. Thus, Judge Edmonson opined that Rackard's actions were both constitutional and, at a minimum, entitled to qualified immunity from suit.

Judge Dubina's reasoning, though not a perfect acetate overlay of Judge Edmondson's, had many points of alignment. Judge Dubina agreed that the first two Taser deployments simply did not violate the Constitution at all and that the third was not an affront to clearly established law. Thus two of the panel members agree that two of the Taser deployments were simply lawful. Those same panel members agree that none of the three Taser applications was contrary to clearly established law. Both rehearing and rehearing *en banc* were denied on November 8, 2008 after no Judge in regular active service requested that the court be polled. It is then the opinion of a single District Court Judge, sitting by designation, that concludes Deputy Rackard's actions were violative of the Constitution.

Finally, Respondent respectfully suggests that Petitioner's assertions that "Petitioner never once resisted" and that "neither Petitioner nor Respondent was in actual danger from potential traffic" (Petition for Certiorari at pp. 4-5) are fundamentally wrong and clearly observable as such on the videotape. The Petitioner equates *active* resistance and *violent* resistance. By inference then, only violent resistance with the purpose of causing pain or injury to the officer is "active." Petitioner can envision then only two types of resistance as though they are governed by a legal binary on-off light switch. Instead, more accurately, resistance to lawful authority is better understood as on a continuum or rheostat. Of course there is the "passive resistance" of the sit-down striker

who refuses to move using civil disobedience as an adjunct to political speech on the one hand and armed resistance with a firearm on the other. However, in between and the existence of which is not acknowledged by the Petitioner, is active, though non-violent, physical resistance. Buckley's actions transparently are continuously active in nature though they primarily involve the gravitational laws of physics. Defeating that required a law enforcement officer to subject himself to the perils of vehicular traffic next to a darkened roadside. Though Respondent concedes there is no evidence to support an argument that the purpose of the active resistance is physical injury to Deputy Rackard, that unintended result could be a very real outcome. When a deputy repeatedly attempts to lift a person to accomplish a lawful arrest, and the arrestee moves so as to make it impossible to lift him, the arrestee moves to a middle ground on the continuum that is less than active violent resistance but is more than merely "passive." It is within that gray middle ground fact-bound morass, that one must determine what is reasonable, and whether it has been clearly established as such.

REASONS FOR DENYING THE PETITION

Petitioner encourages the court to issue the writ because the Eleventh Circuit's opinion below is inconsistent with *Graham v. Connor*, 490 U.S. 386 (1989) and *Hope v. Pelzer*, 536 U.S. 730 (2002), because the case presents recurring questions of ever increasing

importance, and because this case presents an ideal vehicle for review because of the "undisputable record." Respondent argues that none of those assertions is true or valid.

I. Conflict with Other Decisions

The first thing that should be kept in mind is that the narrowest grounds on which the Circuit court majority agreed is that the actions of Deputy Rackard in deploying his Taser three times in drive-stun mode were not contrary to clearly established law. In order for Rackard individually to enjoy qualified immunity from suit, so long as he does not use force which is objectively unreasonable, no constitutional tort arises.

The decision of the Eleventh Circuit below is not in conflict with either *Graham v. Connor*, 490 U.S. 386 (1989) or *Hope v. Pelzer*, 536 U.S. 730 (2002). *Graham* teaches that in deciding whether a given application of force is lawful, consideration must be given to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or officers, and whether there is active resistance or attempt at flight. *Hope* explains that although it is not always necessary for pre-existing case law to be "materially similar" or "fundamentally similar" to provide the "fair warning" required by *Hope*, for qualified immunity to be denied, the alleged wrongful conduct must lie so obviously at the core of

the right violated, that the unlawfulness of the conduct is readily apparent.

It is apparent that what the Eleventh Circuit's panel did was the analytical process required for resolution of qualified immunity questions at the time. It employed the "rigid order of battle" required by *Saucier v. Katz*, 533 U.S. 194 (2001), and *Brosseau v. Hagan*, 543 U.S. 194, 201-202 (2004). They determined first whether the Constitution had been violated and then moved on to whether on a given set of facts, the right and its factual parameters was clearly established. This process was required until *Pearson v. Callahan*, 129 S.Ct. 808 (2009) was decided earlier this year. Respondent suggests that there is no conflict with the decisions of this court. Petitioner attempts to manufacture conflict not by the content of the Eleventh Circuit's opinion but by what that opinion purportedly "resurrected" *sub-silentio* – that is what the opinion *did not* say was in conflict with the law as established by this court.

The circuit court worked its way through the "fact bound morass" of what is reasonable, balancing the nature and quality of the governmental intrusion against the importance of the governmental interests involved. *Scott v. Harris*, 550 U.S. 372 (2007). It properly considered the physical hazards and dangers, that Buckley's type of resistance prevented Rackard from "truly controlling" Buckley, Rackard's failed but repeated efforts at persuasion prior to Taser deployment, Rackard's repeated pre-deployment warnings, and Rackard's efforts to assist Buckley to his

feet at least three times prior to de-ployment. This the court concluded, after careful application of facts, was not unreasonable at least two of three times, and not contrary to clearly established law as to the third. The Eleventh Circuit did exactly as guided by this Court.

Petitioner further argues that the writ should issue because the Buckley decision below has "created a conflict among the circuits where none previously existed." (Petition for Certiorari at p. 12). Petitioner cites to five different circuit court opinions in support of that assertion. In fact, each of the decisions referenced is readily distinguishable and none is logically in conflict with the decision *sub judice*. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002) involved the deployment of pepper spray on persons participating in a "peaceful protest." It is not clear from the opinion that the officer's uses of force were intended to accomplish an arrest. Instead the pepper spray was utilized to disperse people who had utilized devices known as "black bears" to connect themselves to each other thereby effectively incapacitating themselves. The pepper spray was being used as a matter of policy and a tactical response on a number of occasions to discourage the protesters continued use of this tactic. This fact pattern does not then involve use of moderate non-lethal force in effectuation of lawful arrests on persons who had the ability to effectively resist.

Petitioner points to the Ninth Circuit once again in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th

Cir. 2000). However, the narrow holding in that pepper spray case is that it was error to take from a jury by case dispositive motion the question over whether it was constitutionally excessive force to refuse for twenty to thirty minutes to rinse out the eyes of a person pepper sprayed. After the arrest of this Petitioner, it is undisputed that Deputy Rackard inflicted no additional pain or injury and did not act so as to exacerbate Mr. Buckley's discomfort. The *LaLonde* court merely decided factual disputes remained for jury consideration.

Petitioner argues that inter-circuit conflict arises between the Eleventh Circuit's decision below and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007). In fact, *Casey* is readily distinguishable and can be easily harmonized. In *Casey*, a Fourth Amendment violation occurred because Taser deployment occurred "immediately and without warning." *Casey*, at 1285. The Court even commented that it did not rule out the possibility that there might be circumstances in which the use of a Taser against a non-violent offender might be appropriate, particularly when officers were confronted with "active" (as distinguished from "violent") resistance. When the Tenth Circuit confronted a fact pattern remarkably similar to that presented in this case involving the use of pepper spray on a female after numerous warnings during a traffic stop who offered passive resistance and repeatedly refused lawful commands, the court found no constitutional violations emphasizing safety concerns for the officer who worked at a

"narrow shoulder of a busy highway over fifty minutes." It should be mentioned that this decision arose from an incident which occurred in broad daylight. *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007).

Petitioner's citations to *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004) and *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) for the proposition that each demonstrates inter-circuit conflict is unsupportable. Each of those cases did little more than decide either that disputed issues of fact precluded resolution as a matter of law or that the allegations in a complaint were sufficient to survive a motion to dismiss. *Amnesty America* was an official capacity case and did not invoke the qualified immunity question. *Buck* is not factually the equivalent of this case in that it involved the deployment of tear gas and pepper balls on political demonstrators at the University of New Mexico. The force was deployed on numerous people, many of whom were simply exercising their First Amendment Rights and who were not resisting any effort at lawful arrest.

Finally, Petitioner's reference to *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993) to support an argument for inter-circuit conflict seems the greatest stretch. That case, raising Eighth Amendment issues, brought into question the deployment of a stun gun not to aide in accomplishing a lawful arrest, but to simply coerce a prisoner into sweeping his cell floor. There is a wide conceptual chasm between whether it is reasonable for a lone officer on a darkened roadside to deploy a

Taser to accomplish the lawful arrest of an actively, albeit non-violently, resisting person and the deployment of a Taser on a person to enforce jail cell cleanliness standards in a secure setting with six or seven fellow correctional officers present.

The Petitioner concludes his survey of other circuits' contrary decisions by commenting:

> "*All four circuits understood what the Eleventh Circuit failed to grasp – the Fourth Amendment does not permit the deliberate infliction of pain on submissive non-violent arrestees.*" (Petition for Certiorari at p. 14)

This much we all grasp. It is a truism. What the Petitioner does not grasp is what the Eleventh Circuit understood. Mr. Buckley was not clearly identifiable as a "submissive non-violent arrestee" who posed no threat of injury or harm to Deputy Rackard or himself and, once he was "controlled", no additional deployments of Tasers or other applications of force occurred.

II. The Question Presented Does Not Need Supreme Court Resolution

The paths of Mr. Jesse Buckley and Deputy Jonathan Rackard intersected on March 17, 2004. At that time Tasers were a much less familiar device issued to law enforcement officers as a less-than-lethal force option. Florida's experiences with them in the last few years has led the Florida Legislature, as a matter of state-wide policy, to establish guidelines

for their use which are almost certainly more restrictive than that imposed by the Fourth Amendment to the United States Constitution. Effective June 26, 2006, Florida enacted Florida Statute §943.1717(1). It provides:

> *"A decision by a law enforcement officer, correctional officer, or correctional probation officer to use a dart firing stun gun must involve an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person:*
>
> *(a) Has the apparent ability to physically threaten the officer or others; or*
>
> *(b) Is preparing or attempting to flee or escape."*

Respondent acknowledges that he would argue that his actions toward Mr. Buckley would remain proper even under Florida's new stricter statute. However, the average non-violent political protester at a sit-in, in Florida, has not faced the threat of lawful Taser deployment for almost three years.

Furthermore, the Eleventh Circuit has not countenanced the arbitrary and gratuitous use of Tasers that the Petitioner fears, should the Petition be denied. Without any factually similar case, the Eleventh Circuit has denied qualified immunity to police officers who tased a "motionless and frightened" 53 pound 6 year old who after disrupting her elementary

school class, apparently held officers at bay with a one-half inch piece of glass. *Moretta v. Abbott*, 280 Fed. Appx. 823 (11th Cir. 2008), non-published opinion.

III. This Case is Not an Ideal Vehicle for Review of the Questions Presented

That this case is factually simple and because the incident can be viewed on YouTube (as conveniently but unnecessarily advertised in the Petition) does not make it the ideal case to decide device-specific standards for the use of force by law enforcement officers.

Good science has been and is being done on the bio and electro-mechanics of the operation of the Taser. These studies are being done by not only its manufacturer, but independent researchers, and even the United States Military. For example, on October 18, 2004, the Department of Defense issued its report on "Human Effectiveness and Risk Characterization of Electromuscular Incapacitation Devices." Last year academic researchers at Wake Forest University, Virginia Commonwealth University, George Washington University and Louisiana State University published "Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects."

Though Petitioner has repeatedly commented that Tasers deliver a 50,000 volt current, this record provides no scientific context informing whether that factoid has any meaning beyond that it sounds "shocking."

With an appropriate science and technology supported record the court could consider, in proper scientific context, that the Taser, though high voltage is needed to deliver an incapacitating stun, is a low current system that delivers only about 3.8 milliamps, or less than 4/1000 of an amp. From a proper record the court could evaluate a given use of force armed with the knowledge that static-electricity from a door knob after walking on carpet in stocking feet during winter might yield a 50,000 volt shock. There are numerous cases among the more than one hundred federal court decisions referenced in the Petition where the Supreme Court's record would be supported by not only a video but depositions and expert testimony from which an opinion could be rendered based upon other than a mere videotape and the repeated chanting of 50,000 volts in a scientific void.

CONCLUSION

The Petition should be denied. The Eleventh Circuit's narrowest holding on which the majority of judges would both agree, is that Deputy Rackard's decision to deploy a Taser to a continuously actively, though not violently, resisting person after repeated warnings to accomplish a lawful arrest was entitled to qualified immunity is not erroneous. Conflicts among the circuits have not been shown to exist, and this scant record provides very little for this court to

work from to define standards of nationwide application.

Respectfully submitted,

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