No. _____

In The
Supreme Court of the United States

ERONY PRATT, Individually and as Representative of the Estate of Wayne Pratt, Deceased,

Petitioner,

v.

HARRIS COUNTY, TEXAS; ADRIAN GARCIA, HARRIS COUNTY SHERIFF; MICHAEL MEDINA, DEPUTY; VINCENT LOPEZ, DEPUTY; TARZIS LOBOS, DEPUTY; BRIAN GOLDSTEIN, DEPUTY; TOMMY WILKS, JR., DEPUTY; FRANCISCO SALAZAR, DEPUTY; B.J. AUZENE, DEPUTY; R. DeALEJANDRO, JR., DEPUTY; R.M. GOERLITZ, DEPUTY; E.M. JONES, SERGEANT; M. COKER, SERGEANT,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

ALAN MYGATT-TAUBER
Counsel of Record
LAW OFFICE OF
ALAN MYGATT-TAUBER
10089 Ashley Circle NW
Silverdale, WA 98383
(253) 271-9585
alan@amtappeals.com
Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Do police use excessive force in violation of the Fourth Amendment when they employ a hog-tie technique against a suspect who appears to be under the influence of drugs or alcohol?

2. Is it per se excessive to employ deadly force against a suspect who is only suspected of a misdemeanor?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Erony Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is published at 822 F.3d 174. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 36a) is unpublished, but is available at 2015 WL 224945 (S.D. Tex. Jan. 15, 2015). The court denied a timely petition for rehearing on October 14, 2016 (Pet. App. 73a).

JURISDICTION

The panel opinion was rendered on May 3, 2016, and a timely petition for rehearing was denied on October 14, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE[1]

A. The Death of Wayne Pratt

At 8:11 p.m. on May 12, 2010, the Harris County Sheriff's Department received a call about a minor car accident and the driver of one of the vehicles, later identified as Wayne Pratt, behaving strangely. Pet. App. 37a. By 8:27 p.m. Pratt was lying on his stomach, hog-tied, after having been Tased by police seven times. He had no pulse and was not breathing. At 5:25 a.m. on May 13, 2010, Pratt was pronounced dead. The Petitioner's medical expert determined that prone restraint and multiple Tasings contributed to Pratt's death. Pet. App. 6a. According to the County's attorney, the only crime Pratt had committed was failure to stop and give information, a misdemeanor under TEX. TRANSP. CODE § 550.022. Pet. App. 26a.

Deputy Vincent Lopez was the first of nine deputies to respond to three 911 calls about a minor hit and

[1] As this case is an appeal from a motion for summary judgment, what follows is the petitioner's version of the facts. *Scott v. Harris*, 550 U.S. 372 (2007).

run accident and a man acting strangely.[2] Deputy Lopez testified that when he arrived Pratt ran toward him in an "aggressive manner," stopped five to seven feet away and took an "aggressive stance," causing Deputy Lopez to draw his Taser. Pratt immediately retreated. While the testimony conflicts on the speed of Pratt's retreat (whether a walk or a run), it is undisputed that Pratt retreated and took no other aggressive actions toward Deputy Lopez. Pet. App. 37a-39a.

Two more deputies, Michael Medina and Brian Goldstein, arrived on the scene. They also drew their Tasers and observed Pratt retreat. Despite Pratt's attempts to de-escalate the situation or terminate the encounter, Deputy Lopez deployed his Taser against Pratt. However, Deputy Lopez's Taser failed to properly connect and was therefore ineffective.[3] Deputy Medina then deployed his Taser against Pratt causing Pratt to fall forward onto the ground. Pet. App. 39a. Deputy Goldstein began handcuffing Pratt. While Pratt was prone on the ground, and with no sign of resistance, Deputy Medina cycled his Taser a second time. Taser records show that Medina cycled the Taser

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[2] None of the calls indicated that the suspect was armed or causing a danger to anyone. The initial call was for a minor accident, which was upgraded to a "disturbance" after multiple calls were received.

[3] A Taser works by deploying two metal prongs on the ends of wires. When the prongs connect with the body, they complete a circuit, allowing electricity to flow through, incapacitating the target. In this case, only one of the prongs successfully connected with Pratt.

yet again, employing it three times in 22 seconds. Doc. 83.[4]

Six more deputies arrived, bringing the total number of deputies on scene to nine. Deputy Tarzis Lobos, one of the new arrivals, helped Deputy Goldstein handcuff Pratt. After the handcuffs were successfully applied, Pratt stopped any resistance and stated "okay, okay, I quit . . . I'll stop fighting." Pratt was successfully handcuffed and patted down for weapons. None were found. Pet. App. 4a.

Deputies Goldstein and Francisco Salazar then lifted Pratt and began walking him toward a patrol car. Deputy Tommy Wilks noted that Pratt was unable to stand on his own. Doc. 83. Pratt began pulling away from the deputies, successfully pulling his arm free of Deputy Goldstein's grip. He did not escape, however. Instead, Deputy Salazar immediately took him to the ground for the second time, on his stomach. Doc. 65.

At this point, after having been Tased repeatedly, handcuffed and slammed to the ground, Pratt began kicking his legs. He connected with Deputy Goldstein, kicking him in the thigh/groin area twice, as Goldstein attempted to get control of his legs. Deputy Wilks went to his patrol car to retrieve a nylon hobble, a restraint designed to attach to an arrestee's ankles. Pet. App. 5a.

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[4] "Doc." refers to the document number in the district court record.

Four deputies – Goldstein, Medina, Salazar and Lobos – were attempting to control Pratt. Deputy Medina deployed his Taser a fourth time, this time in drive stun mode,[5] in which the Taser leads make direct contact with the body.[6] Deputy Goldstein was able to gain control of Pratt's legs. He rolled Pratt onto his stomach, crossed Pratt's legs and bent them toward Pratt's buttocks. Sometime during the struggle, Deputy Salazar placed his knee on Pratt's back to maintain compliance. Id.

Deputy Wilks placed the hobble on Pratt's ankles, with the help of Deputy Goldstein. Pratt ceased resisting and stated "Ok I quit. I'm done." Deputies Goldstein and Salazar ceased physically restraining him. Pet. App. 5a. Pratt did not offer any further resistance. Pratt was on the ground, handcuffed and surrounded by between six and nine deputies. Despite this, and in violation of Harris County Sheriff's Department policy, Deputy Wilks attached the hobble to the handcuffs, hog-tying Pratt. This policy is in place because it is widely recognized that, under certain conditions, the use of a hog-tie restraint can lead to the death of the suspect. At no point did any deputy roll Pratt off of his stomach. Doc. 83.

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[5] In "drive stun" mode the Taser is held against the body without firing the projectiles.

[6] While Deputy Medina testified he only employed the drive stun method once, burns on Mr. Pratt's body indicate that he was drive stunned twice.

Shortly after Pratt was hog-tied, EMS arrived on the scene. When they arrived, they found Pratt unresponsive. He had stopped breathing and had no pulse. EMS had to ask that the hobble and handcuffs be removed so that Pratt could be rolled onto his back to receive CPR. He died the following morning. Pet. App. 5a-6a.

Despite Pratt's death, charges against him were forwarded to the Harris County District Attorney's Office. The Assistant District Attorney accepted charges of Failure to Stop and Give Information and resisting arrest, both misdemeanors under Texas law. Doc. 72-15, pg. 26. At no point did any of the officers on the scene testify that they believed Pratt had committed any felonies.

Two internal affairs investigations launched by the Harris County Sheriff's Department found no wrong-doing by any Deputy, despite the fact that hog-tying violates the Department's policies. Pet. App. 7a. Instead, the investigations specifically and independently found that the use of force against Pratt was consistent with Harris County Sheriff's Department policies.

B. The Proceedings Below

Wayne Pratt's mother, Erony Pratt, brought suit against Harris County, the Sheriff's Department, the Sheriff, the individual deputies involved in her son's death and the Sergeants who conducted the Internal Affairs reviews. She alleged the Defendants violated

her son's Fourth Amendment rights and 42 U.S.C. § 1983 by using excessive force, failure to protect, and failure to supervise. She also filed claims against the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) for Unlawful Policy by Acts of Official Policy Maker, Informal Custom and Policy, Failure to Train, Failure to Supervise, and Ratification. Additionally, she filed a wrongful death claim under Texas state law. Doc. 63-2.

Following discovery, the Defendants filed motions for summary judgment, alleging that the deputies were entitled to qualified immunity and that the Plaintiff failed to adduce facts sufficient to sustain a judgment under *Monell*. Docs. 65, 72, and 74. During the course of discovery, Petitioner conducted depositions of the officers during which several of them stated that they believed Pratt was under the influence of alcohol or drugs, or was possibly suffering from a mental illness. Specifically, Deputies Lopez, Wilks and Robert Goerlitz all signed affidavits stating that they believed Pratt was under the influence of drugs. Doc. 72-2. Furthermore, Deputy Wilks testified in his deposition that he was aware that applying a hog-tie would violate the Constitution. Deputy Garret Demilia, the Harris County Force Training Instructor, testified in his deposition that no reasonable deputy would have hog-tied Mr. Pratt under the relevant constitutional standards. Finally, Petitioner's medical expert, Dr. Lee Ann Grossberg, submitted a report indicating that Pratt's death was multi-factorial, and that the use of the hog-tie restraint was a contributing factor. Doc. 83.

Defendants claimed that the Deputies and their supervisors were entitled to qualified immunity because Pratt represented a serious threat of harm to the officers. The District Court granted summary judgment on all claims, holding that the use of a hog-tie on Pratt did not constitute an unreasonable violation of a clearly established constitutional right.[7]

Following a timely appeal, the Court of Appeals for the Fifth Circuit, in a split decision affirmed the judgment of the District Court.[8] The opinion of the court, by Judge Jolly, held that the Deputies did not use excessive force either in deploying their Tasers or in utilizing the hog-tie restraint. Because the Court failed to find a violation of Pratt's rights, it did not address the other claims.

Judge Costa concurred in the judgment, ruling on the question of qualified immunity. He determined that the right not to be hog-tied in these circumstances was not clearly established in 2010. He then relied on

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[7] The District Court held similarly with regards to the use of Tasers by the deputies. Because the court held that the deputies were entitled to qualified immunity, it similarly held that there could be no cause of action for failure to protect or failure to train and supervise. Finally, the court held that since Harris County had a policy against the use of hog-tying, it could not be liable under *Monell*.

[8] The ruling regarding the use of the hog-tie restraint was 1-1-1. Judge Jolly held that there was no constitutional violation. Judge Costa concurred in the judgment only, as discussed more fully below.

the qualified immunity of the officers to dismiss the supervisory liability claims.

Judge Haynes dissented in relevant part. She believed that the right to be free from hog-tying in this situation was clearly established in 2010 and that the force used in this case was excessive ("Wayne Pratt received the death penalty at the hands of three police officers for the misdemeanor crime of failing to stop and give information.").

Judge Haynes noted that the majority opinion by Judge Jolly failed to properly balance the officers' use of deadly force against what she referred to as the "relatively weak interest the officers had in arresting Pratt" as required by *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. App. 25a. Furthermore, Judge Haynes noted the Fifth Circuit had already determined that the use of the hog-tie restraint, when combined with drug use, positional asphyxia and cocaine psychosis, constituted the use of deadly force. Id. (*citing Gutierrez v. City of San Antonio*, 139 F.3d 441, 446-47 (5th Cir. 1998)). Judge Haynes determined that the officers had "sufficient information to lead them to suspect [Pratt] was intoxicated with some kind of unknown substance." Id. She further stated that Deputy Goldstein found a glass pipe in Pratt's hands after he was handcuffed, but prior to being hog-tied. Pet. App. 26a.

Turning to the question of whether Pratt posed a threat of serious physical harm, she concluded that the officers lacked a basis for a reasonable fear. In Judge Haynes' words, Pratt posed only a "relatively mild

threat of physical violence," Pet. App. 26a, having taken an "aggressive stance" early in the encounter and kicking Deputy Goldstein twice in the thigh/groin area after being handcuffed and placed on the ground. Finally, at the time the hog-tie was applied, the officers had been able to compel Pratt's compliance with the use of Tasers and Pratt had indicated he would no longer resist. Thus, Judge Haynes concluded, at the time the hog-tie was applied, there was a factual dispute "as to whether Pratt presented *any* threat of harm to the officers, much less a threat of serious physical harm. . . . " Pet. App. 27a.

Examining the second prong, Judge Haynes found that the use of a hog-tie in these circumstances was clearly established as a violation of a constitutional right. Looking solely at the Fifth Circuit, Judge Haynes found two cases, *Gutierrez v. City of San Antonio*, 139 F.3d 441 and *Hill v. Carroll County*, 587 F.3d 230 (5th Cir. 2009), both addressing the use of the hog-tie restraint. In *Gutierrez*, the court had held it was unreasonably excessive force to use the hog-tie restraint on a suspect who was under the influence of cocaine, just as Pratt was here.

In *Hill*, however, the use of the hog-tie restraint was not excessive where there was no evidence the arrestee was under the influence of drugs or other substances. Additionally, the suspect in *Hill* was undoubtedly a threat to others, as police were responding to a call of a fight, and the suspect assaulted an officer with his own flashlight when he attempted to place her under arrest.

In the present case, the officers suspected Pratt was under the influence of drugs, a suspicion further vindicated by the discovery of a glass pipe in Pratt's hands. Unlike the suspect in *Hill*, Pratt had made no attempt to reach for the officers' weapons, nor did he pose any other serious threat to the officers. Therefore, Judge Haynes concluded that Pratt's case fell squarely in the *Gutierrez* camp. Pet. App. 33a-34a.

REASONS FOR GRANTING THE WRIT

The Federal courts of appeals and State courts are divided over the two questions raised in this case. The federal courts disagree over whether the use of a hog-tie restraint against an individual who is intoxicated constitutes excessive force in violation of the Fourth Amendment. Further, the Fifth Circuit's decision in this case allows the police to use force that is deadly in the arrest of a misdemeanant, in conflict with virtually every other court, state and federal, to consider the question. Because the Fifth Circuit's decision creates an inter- and intra-circuit split, as well as ignores Supreme Court precedent, this Court should use this case to resolve the conflict and hold that the Fourth Amendment prohibits the use of hog-tie restraints against obviously intoxicated individuals, and reinforce the Court's previous holdings that the Fourth Amendment prohibits the use of deadly force against individuals accused solely of a misdemeanor.

I. Federal Courts Are Divided Over Whether The Use Of Hog-Tie Restraints Against Compromised Individuals Constitutes Excessive Force.

1. The Fourth Amendment to the Constitution states that the people have the right to be "secure in their persons, houses, papers and effects against unreasonable searches and seizures. . . ." This Court has held that this protection applies to claims that the police used excessive force when attempting to capture or subdue a suspect. *Saucier v. Katz*, 533 U.S. 194 (2001); *Tennessee v. Garner*, 471 U.S. 1 (1985).

Hog-tying occurs when a suspect is handcuffed, his legs are bound with a hobble and then the hobble is attached to the handcuffs.

It is undisputed that, in certain circumstances, the use of hog-tie restraints can lead to the death of a suspect in custody. The potential for death is heighted when "the suspect is overweight, exerted substantial energy in resisting arrest or in other ways prior to being restrained, and even more so if the suspect has ingested alcohol or drugs, or both, prior to the event." IACP, *Arrest: Concepts and Issues Paper* (June 2006; August 2010), pg. 3, Pet. App. 79a-80a.

2. Courts have examined the use of hog-tie restraints and divided over whether or not the use of such restraint constitutes excessive force. The Tenth Circuit as well as the Fifth Circuit itself have found that the use of hog-tie restraints on an individual

constitutes excessive force when the suspect suffers from an apparent diminished capacity.

In *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) the Tenth Circuit held that it was excessive force to utilize a hog-tie restraint on a suspect who is obviously suffering from diminished capacity due to drug use. Four officers responded to a complaint about a naked man running around. The man, later identified as Thomas Cruz, was yelling, jumping and kicking the air. The officers suspected, correctly, that Cruz was on drugs, but when they asked him what he had taken, Cruz failed to respond. Id. at 1186. After talking Cruz down off a staircase outside his apartment building, Cruz attempted to walk past the officers and struggled with them. After wrestling Cruz to the ground and handcuffing him, the officers applied a nylon hobble, which they then attached to his handcuffs. Cruz stopped breathing and CPR was ineffective. He was pronounced dead and his autopsy indicated he had large amounts of cocaine in his system.

In reviewing the trial court's decision on interlocutory appeal, the Tenth Circuit held that the use of the hog-tie restraint, while not *per se* unconstitutional, may not be used when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an

individual's condition mandates the use of less restrictive means for physical restraint. Id. at 1188. However, because the Tenth Circuit never before had occasion to rule on the legality of the use of the hog-tie restraint on an individual with diminished capacity, it held that the rule it had announced was not clearly established at the time of Cruz's arrest. Id. at 1189.

In *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) the Fifth Circuit held that it is excessive force to utilize a hog-tie restraint on a suspect suffering from cocaine-induced delirium. Two police officers were driving down the street in an area known for high drug use when they observed Rene Gutierrez walking along wearing pants but no shirt, shoes or other clothing.

One of the officers suspected Gutierrez was intoxicated and they stopped to speak with him. The officers observed Gutierrez running in circles and then fall over onto his side. When they approached him, Gutierrez claimed he had been shot, although the officers could find no evidence of it. The officers handcuffed Gutierrez for both his safety and theirs.[9] They asked if he was on any drugs and he stated he had "shot some bad coke." Id. at 443.

EMS arrived on the scene, but after Gutierrez kicked one of the technicians in the chest, they refused to transport him, so the officers decided to take him to the back of the squad car. Gutierrez kicked the back of

[9] Although the officers did not arrest Gutierrez, police reports indicate that they intended to later.

the seat, the metal cage, and the windows of the patrol car. The officers therefore applied a hog-tie restraint. Id. By the time the officers arrived at the hospital, Gutierrez was dead. After performing an autopsy, the Chief Medical Examiner determined that drugs were the cause of death. However, after learning that Gutierrez had been hog-tied, he amended the report to state that the hog-tying was a contributing factor to Gutierrez's death. Id. at 443-44.

The Fifth Circuit examined whether the use of the hog-tie restraint constituted deadly force and whether it was clearly established that such force could not be used in these circumstances. The court concluded that, as of 1994, it was clearly established that hog-tying an individual who was under the influence of drugs, specifically cocaine, constituted the use of deadly force. Id. at 446-47.

On the other hand, the Eighth Circuit has held that the use of the hobble restraint[10] does not constitute excessive force when the suspect resisted arrest. *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997). The police visited Elsie Mayard to issue her a citation for selling liquor to an undercover police officer without a license. Although not intending to arrest her, officers escorted Mayard to a police car after she became angry. After struggling with the officers and attempting to pull away, she was handcuffed. She refused to get in the back of the squad car, and when she was placed in

[10] Although the Eighth Circuit describes the restraint as a hobble, the Fifth Circuit classified it as a hog-tie in *Gutierrez*.

the back, she began to kick the seats and struck one of the officers. The police then placed her in a hobble restraint. Id. at 1227. The court held that this was not excessive force in light of Mayard's resistance. Id. at 1228.

The Eleventh Circuit addressed the use of hog-ties in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009), *cert. denied*, 559 U.S. 936 (2010). An officer encountered Donald George Lewis, who was disoriented, stumbling into the road, attempting to flag down passing cars, breathing heavily, grunting incoherently, and appearing to be under the influence of some type of narcotic. After struggling with officers, Lewis was handcuffed. He refused to remain seated at the side of the road and one of the officers suggested that he be restrained with a hobble. The officers placed the hobble tie on Lewis's feet and then bound them to his handcuffs, hog-tying him. Lewis became unconscious. The officers removed the hobble and attempted CPR. Despite the intervention of paramedics, Lewis died. Lewis's mother filed suit against the officers, alleging excessive force. Most of the officers in the case testified that Lewis was not a danger to them and was merely resisting arrest. Nevertheless, the Eleventh Circuit held that the use of a hog-tie in these circumstances, even if excessive, was not a violation of a clearly established right.

The Fifth Circuit, in *Hill v. Carroll County*, 587 F.3d 230 (5th Cir. 2009), held that the use of a "four-point restraint" (a more formal term for "hog-tying") was not *per se* excessive. In this case, two officers

responded to a call about two women fighting. When they arrived, Debbie Loggins had the other woman in a headlock. When the officers attempted to place her in handcuffs, Loggins attacked one of the officers, forcing him to the ground. She then seized his flashlight and began to pummel him about the head and shoulders. After knocking the flashlight away, the officer managed to handcuff Loggins, who then proceeded to curse and kick at the officer. At that point, the officer placed her in leg restraints. As they tried to load her in the back of the patrol car, she continued to resist, twisting and kicking. In response, the officers hog-tied her, linking her leg restraints to her handcuffs. She continued to struggle as she was transferred to another patrol car to be transported to the county jail. Upon arrival, she was unresponsive and had no pulse. Despite attempts to resuscitate her, Loggins died. Her mother filed suit. In reviewing a grant of summary judgment to the officers, the court held that the case was distinguishable from *Gutierrez* because the decedent was not under the influence of drugs or alcohol. Absent such contributing factors, the court reasoned, the plaintiff had not presented evidence that applying a hog-tie is inherently dangerous.

Finally, the Fifth Circuit cemented this intra- and inter-circuit split in *Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 840 (2013), when a divided panel held that "an officer's decision to hog-tie a drug-affected arrestee did not violate a clearly established constitutional right because the restraint was only used briefly and the arresting officers did not

know that the arrestee was under the influence of drugs." Id. at 195-96.[11] Khan was arrested at a grocery store after running around shouting that people were trying to kill him and refusing to leave. He was initially placed in custody by a security officer and an off-duty deputy. When the police arrived, Khan forcefully resisted his removal from the store, thrashed his legs, attempted to bite the officers and, according to one officer, reached for an officer's gun belt. As a result of this behavior, the officers hog-tied Khan. Almost immediately, he stopped breathing. The restraints were removed and CPR was administered. His breathing was restored, but he died later that night. His parents filed suit. The district court granted summary judgment to the officers, ruling that the officers had not used excessive force.

In a split decision, the appeals court affirmed on different grounds. The majority held that there was no clearly established right, distinguishing *Gutierrez* on three grounds: 1) there was no failure to monitor; 2) the study that formed the basis of the *Gutierrez* ruling had been subsequently questioned; and 3) here, the officers had not been informed that Khan was using drugs, though a later autopsy confirmed he had large amounts of methamphetamine in his system. Judge

[11] It must be noted that the Fifth Circuit in *Khan* did *not* hold that the use of the four-point restraint was not excessive. Rather, it relied on the second prong of the *Saucier v. Katz* analysis to hold that the right was not clearly established. Thus, the Court's holding in the instant case, that the use of the four-point restraint on an obviously intoxicated individual was not excessive force, creates an intra-circuit split with *Khan*. See Pet. App. 15a.

Garza dissented, holding that *Gutierrez* controlled and clearly established the right of a drug-affected suspect not to be hog-tied. Judge Garza concluded by suggesting that the court adopt a rule "prohibiting the application of the four-point restraint to individuals who are in an apparent state of diminished mental capacity." 683 F.3d at 200-01 (Garza, J., dissenting) (*citing Cruz*, 239 F.3d 1183, 1188).

In the case at bar, a divided panel of the Fifth Circuit split from its own ruling in *Gutierrez*, holding that, although the officers suspected that Pratt was on drugs, they did not have the actual knowledge that the officers in *Gutierrez* did. Pet. App. 18a. For Judge Jolly's majority, that was enough of a difference to justify a different result. Id. at 14 (*citing Gutierrez*, 139 F.3d at 448-49). ("Significant to that finding, however, was that Gutierrez told the arresting officers he was on drugs.").

II. Federal And State Courts, As Well As This Court, Have Held That Deadly Force May Not Be Used Against Misdemeanants.

Over three decades ago, this Court discussed the common law rule "which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant." *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, this Court held that police were not justified in using deadly force to prevent a fleeing felon in every circumstance, thus cabining the common law, restricting force it would have allowed.

("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id. at 11). However, the Court left untouched the common law's presumption that such force could never be used against a misdemeanant. Paul H. Robinson, *et al.*, *The American Criminal Code: General Defenses*, 7 J. OF LEGAL ANALYSIS 37, 63-64 (Spring 2015). In fact, this Court's ruling in *Garner* only strengthens that presumption.[12]

The Court went on to survey the vast list of cases in which courts held that nearly every American jurisdiction "imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant. . . ." *Garner*, 471 U.S. at 12 (collecting cases, treatises and law review articles). The Court concluded its discussion by emphasizing one particular aspect of the common-law rule: "It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe." Id. at 15 (citations omitted). Since at least 1874, Texas has recognized that deadly force may not be used to stop a fleeing misdemeanant. *Caldwell v. State*, 41 Tex. 86 (1874) (upholding the conviction of a constable who shot an unarmed arrestee who was merely attempting to escape custody).[13]

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[12] It should be noted that the Model Penal Code also prohibits the use of deadly force unless the arrest is for a felony. MODEL PENAL CODE, § 3.07.

[13] Other circuits have also weighed in, prohibiting the use of deadly force against even an armed suspect who is only charged with a misdemeanor. *See, e.g.*, *Ludwig v. Anderson*, 54 F.3d 465,

The Fifth Circuit here held that the police were justified in using the hog-tie restraint, which it acknowledges can be deadly in certain circumstances, despite the fact that the only crime the County's attorney could cite to during oral argument was failure to stop and give information, a misdemeanor. Pet. App. 26a, (Judge Haynes concurring in part and dissenting in part). See also TEX. TRANSP. CODE § 550.022.[14]

The majority opinion failed to address this long-standing principle.[15] Instead, the opinion merely states "neither the circumstances surrounding the arrest nor our precedent support that the decision to hog-tie Pratt

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471-74 (8th Cir. 1995) (unreasonable for an officer to use deadly force against an emotionally disturbed man armed with a knife because man was only suspected of a misdemeanor which placed no one in immediate harm).

[14] The record also indicates that Pratt was charged with resisting arrest. TEX. PENAL CODE § 38.03 defines resisting arrest as a Class A misdemeanor, unless the actor uses a deadly weapon to resist arrest, which raises it to a felony of the third degree. It is undisputed that Pratt was unarmed, and the only force he used in resisting was to kick Deputy Goldstein twice in the thigh/groin area, after being cuffed and Tased multiple times. Thus, there is not even an allegation that Pratt used a deadly weapon or posed a serious threat to any of the officers.

[15] This is surprising in light of the majority's reliance on *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386 (1989)), which applied the appropriate standard. In this case, the court held that when examining claims of excessive force, courts must consider " 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' " *Deville*, 567 F.3d at 167 (quoting *Graham*, 490 U.S. at 396). The majority opinion appears to address only the latter two factors.

was an excessive or unreasonable one." Pet. App. 17a. Because the court had not held that the use of the hog-tie restraint was *per se* unconstitutional, a mere allegation of hog-tying, by itself, did not constitute a claim of excessive force. Id.

Judge Costa's concurring opinion also fails to address the first *Graham* factor. Instead, he rests his decision entirely on the argument that the right to be free from hog-tying was not clearly established in 2010. He relied on *Khan* and the lack of specific knowledge of cocaine use, as well as the court's decision in *Hill* that there was no constitutional violation, to hold that the right was not clearly established.

III. The Question Of Excessive Force Is A Vitally Important One, And The Court Should Act To Resolve It Now.

Despite the well-documented link between the use of the hog-tie restraint and the in-custody deaths of suspects, many police officers continue to employ the hog-tie restraint, even in violation of department policies prohibiting its use. Yet, state and federal courts are split on whether or not the use of this technique against individuals under the influence of drugs or alcohol constitutes unreasonable force. The Court must step in to provide guidance on this pressing issue.

The first studies identifying the increased risk of death in connection with the use of the hog-tie restraint were published in 1992. Final Report of the Custody Task Force, San Diego Police Dept./San Diego

County Medical Examiner, Krosch, Binkerd, & Blackburn (1992). This unpublished study, jointly conducted by the San Diego Police Department and the San Diego County Medical Examiner, found that of the 142 police agencies that responded, 43 (30.1%) authorized officers to use the hog-tie restraint. San Diego sent copies of this study to police departments around the nation. *Gutierrez*, 139 F.3d at 449. That same year, Dr. Donald Reay, King County, Washington Chief Medical Examiner, published a study linking the hog-tying of suspects to in-custody deaths from "positional asphyxia." Donald T. Reay, *et al.*, *Positional Asphyxia During Law Enforcement Transport*, 13 Am. J. Forensic Med. Pathology 90 (1992). Other studies documenting this link followed. See, e.g., C.S. Hirsh, *Restraint Asphyxiation*, 15 Am. J. Forensic Med. Pathology 266 (1994).

As a result of this information, in Fall 1994, the Texas Office of the Attorney General issued an article in its Criminal Law Update noting that several Texas agencies had banned the use of the hog-tie restraint. Garth D. Savage, *et al*., "*Sudden Custody Death Syndrome: The Role of Hogtying*," Criminal Law Update, at 11 (Fall 1994) *cited in Gutierrez*, 139 F.3d at 449. Other large departments, such as the Los Angeles Police Department, have banned the practice.[16] The question of whether the use of the hog-tie restraint constitutes deadly force has been discussed in the law enforcement community since at least 1996. See, e.g.,

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[16] See Adrian Mahar, *Culver City Confidential*, LA Weekly, Sept. 9, 1998 available at http://www.laweekly.com/news/culver-city-confidential-2129837 (last accessed October 20, 2016).

Thomas A. Rosazza, *Hog Tying – Is it the Use of Deadly Force?*, American Jails, January 1996 (available at https://www.jurispro.com/files/articles/Rosazza-Hog%20Tying.pdf) (last accessed Oct. 20, 2016).

The International Association of Chiefs of Police (IACP) and the Commission on Accreditation of Law Enforcement Agencies (CALEA) have both issued standards that state that hog-tying of suspects should be prohibited. The IACP explicitly states that the practice is dangerous because of the risk of positional asphyxia leading to death. Pet. App. 79a-80a.[17]

Yet in spite of guidance from the leading police accreditation agencies, police continue to use the hog-tie restraint, resulting in the deaths of suspects.[18] Indeed,

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[17] At least some in the academy believe that the use of the hog-tie, coupled with face-down placement, as occurred here, should be considered *per se* unreasonable deadly force. See, e.g., Katherine N. Lewis, *Fit to be Tied? Fourth Amendment Analysis of the Hog-Tie Restraint Procedure*, 33 GA. L. REV. 281 (Fall, 1998).

[18] See, e.g., Julie McCormack, "Jail death suit settled for $1.6 million," Kitsap Sun, Oct. 15, 2004 (23 year old man died in jail after being hog-tied); U.S. Dept. of Justice, "Spokane, Wash. Police Officer Convicted of Civil Rights and Obstruction Violations in Connection with Beating Otto Zehm," Nov. 2, 2011 (Police officer convicted for violating civil rights of suspect after striking him with a baton and hog-tying him, resulting in his death); Steven Mayer, "How was Silva restrained, and did it kill him?," Bakersfield.com, July 20, 2013, available at http://www.bakersfield.com/archives/how-was-silva-restrained-and-did-it-kill-him/article_74536601-87ed-5df4-a0ed-c535a9c9fcae.html (last accessed Oct. 21, 2016) (Witnesses state suspect was hog-tied despite police department ban, leading to his death); Brittany Wallman, "Broward settles hogtie death case for $1.85 million," Sun Sentinel, Sept. 13, 2014 (following car accident, police hog-tie man they do not suspect of

Harris County itself has paid at least $4.5 million in jury verdicts to the families of suspects who died in custody after being hog-tied, prior to the death of Wayne Pratt.[19] Yet courts still disagree about whether the use of the restraint constitutes excessive force.[20] This Court must step in.

Turning to the second question, notwithstanding a long history stretching back to the common law, the Fifth Circuit would allow police to use potentially deadly force against those charged only with a misdemeanor. It has long been held that the use of deadly force is only applicable when confronting someone suspected of a felony, and this Court has further

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any crime, leading to his death); Alastair Jamieson and Tim Stelloh, "Troy Goode Died After Being 'Hogtied' by Cops Near Widespread Panic Gig: Lawyer," NBCnews.com, July 21, 2015, available at http://www.nbcnews.com/news/us-news/troy-goode-died-after-being-hogtied-cops-widespread-panic-gig-n395646 (last accessed Oct. 21, 2016) (Intoxicated suspect died after being hog-tied and telling officers he could not breathe).

[19] In 2001, a jury awarded $800,000 to the family of a man who died in custody after being hog-tied in 1994. With interest, the judgment was expected to total $1.5 million. See Bill Murphy, "Jury Awards $800,000 in hogtie case," Houston Chronicle, May 10, 2001, available at http://www.chron.com/news/houston-texas/article/Jury-awards-family-800-000-in-hogtie-case-2037705.php (last accessed Oct. 20, 2016). In a second verdict in 2009, a jury awarded $3 million to the family of a man who died in the Harris County jail. See Peggy O'Hare, "Harris County to review 'hogtying' prisoner restraint," Houston Chronicle, March 4, 2009, available at http://www.chron.com/news/houston-texas/article/Harris-County-to-review-hogtying-prisoner-1621888.php (last accessed Oct. 20, 2016).

[20] See, *supra*, Section II.

restrained the common law to limit the use of deadly force to a situation in which there is a serious threat of bodily harm to the officer or others.[21]

Every court to examine the use of the hog-tie restraint has held that, in certain circumstances, it can lead to death. For this reason, two leading law enforcement organizations have called on police to ban the use of the technique. In spite of this, it is still widely used.[22] One circuit has held that regardless of its potential lethality the police are not prevented from hog-tying those who are suffering from some form of diminished capacity, while two others have held that they are. The Fifth Circuit has split with itself, holding that so long as police only suspect diminished capacity, they may employee the hog-tie and may do so when the arrestee is only suspected of a misdemeanor. Only a ruling by this Court can put an end to this persistent and deepening circuit split.

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[21] Id.

[22] A survey of the 17 largest police departments found that only four, Minneapolis, New York, Phoenix and San Francisco, ban hog-tying. Bonnie Kristian, *Report: Most of America's Largest Police Departments Allow Officers to Choke, Strangle, and Hog Tie People*, THE WEEK, Jan. 20, 2016, available at http://theweek.com/speedreads/600278/report-most-americas-largest-police-departments-allow-officers-choke-strangle-hogtie-people (last accessed July 2, 2016).

IV. The Fifth Circuit's Decision In This Case Was Wrongly Decided.

This Court's intervention is all the more critical because the decision below was wrong. The Fifth Circuit, in determining that the use of force here was not excessive, failed to properly apply this Court's guidance in *Graham v. Connor*, 490 U.S. 386 (1989). There, the Court laid out a three-prong analysis which examines "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396.

1. Here, the court looked only at the third prong, whether Mr. Pratt was actively resisting arrest. The only statements made by the court below regarding the *Graham* factors were that Pratt "aggressively evaded Lopez and Medina's attempts to apprehend him," Pet. App. 12a, and that he "aggressively evaded their attempts to apprehend him, even after promising compliance." Id. at 17a. The majority further held that he "renewed resistance, broke free from the officers' grips, and kicked at officers attempting to restrain him (eventually kicking one officer in the groin twice)." Id. The majority concluded its analysis by holding that "in light of Pratt's 'on again, off again' commitment to cease resisting, his recurring violence, and the threat he posed while unrestrained, it was not, under the totality of the circumstances, 'clearly excessive' or 'unreasonable' for HCSD officers to restrain him as they did." Id. at 18a.

It is plain from a reading of the Fifth Circuit's opinion that the panel incorrectly applied *Graham*. Neither the majority nor the concurrence address the severity of Pratt's alleged crime.[23] Had it done so, it would have determined that the first *Graham* factor counsels in favor of finding the officers' conduct unreasonable, as the only crimes of which he was accused were misdemeanors.

2. Additionally, the majority failed to thoroughly examine the second prong of the *Graham* analysis. The majority's conclusion briefly mentions the threat that Pratt posed to the arresting officers, but it did not engage in any actual analysis of the question, merely asserting that Pratt posed a threat, despite being surrounded by nine deputies, handcuffed and prone at the time he allegedly kicked Deputy Goldstein. Furthermore, Pratt had ceased resisting after his legs were hobbled, making the need to connect the hobble to his handcuffs unnecessary.

At no point during his encounter with the Harris County Sheriff's Department did Pratt evidence any serious threat to himself or others yet the police chose to deploy force against him. He did not strike, swing at, or kick Deputy Lopez, the first officer on the scene. He did not make any verbal threats. He did not have a weapon, nor did he make any motions as if he was reaching for one. He approached Deputy Lopez,

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[23] The concurrence did not address the question of excessive force at all, relying solely on the argument that the right at issue was not clearly established at the time of Pratt's arrest and death.

stopped five to seven feet away and took an "aggressive stance." When Lopez reached for his Taser, rather than escalating, Pratt turned and immediately attempted to retreat from any confrontation.

At the time, Deputy Wilks deployed the hobble, Deputy Goldstein had seized control of Pratt's legs and Deputy Salazar was kneeling on Pratt's shoulder. Furthermore, after Pratt's ankles were hobbled, he ceased struggling, Deputy Salazar was kneeling on his back, and he was surrounded by nine deputies. Therefore, there was absolutely no need to connect the hobble to the handcuffs, hog-tying Pratt. The second *Graham* factor thus mitigates against a finding of reasonableness here.

3. The only *Graham* factor that potentially supports the Fifth Circuit's finding is the final factor – that Pratt was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The Fifth Circuit held that Pratt "aggressively evaded [the deputies'] attempts to apprehend him, even after promising compliance." Pet. App. 17a. While it is true that Pratt fled from the police when they attempted to Tase him, this alone does not justify the deployment of deadly force. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Overall, the *Graham* analysis indicates that the Harris County Sheriff's Deputies deployed excessive force against Pratt in violation of his Fourth Amendment rights.

4. Furthermore, the court below cannot rely on the alternative grounds, put forth by Judge Costa in

his concurrence, that the right was not clearly established at the time. The concurrence failed to engage in any sort of searching analysis of the state of the law regarding hog-tying in 2010. Instead, it relied on two cases from the Fifth Circuit.

The first, *Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 840 (2013), took an unnecessarily narrow view of *Gutierrez* in determining that there was no clearly established law in 2007. According to the concurrence, *Khan* distinguished *Gutierrez*

"because the arrestee 'was not left face down in the four-point restraint for an extended period of time,' he 'remained under constant supervision' and the officers had not been told that the arrestee was in a cocaine-induced psychosis.'" Pet. App. 20a. However, as this Court has made clear, there is no need for the "very action in question" to have previously been made unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See also Mullenix v. Luna*, 136 S. Ct. 305, 314 (2015) (Sotomayor, J. *dissenting*). ("the crux of the qualified immunity test is whether officers have 'fair notice' that they are acting unconstitutionally." (*citing Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

In 2010, at the time the officers encountered Pratt, the Fifth Circuit had decided *Gutierrez* and the Tenth Circuit had decided *Cruz*. The IACP and CALEA had issued guidance that the hog-tie restraint should be prohibited and Harris County had a policy which did, in fact, prohibit its use. Additionally, the Harris County Sheriff's Department was specifically on notice that

the use of a hog-tie restraint constituted the use of excessive force, because a year before the encounter with Pratt, it had already been found liable for the death of a suspect in 2009 after using the hog-tie restraint. *See Harris County v. Nagel*, 349 S.W.3d 769 (2011) (upholding the jury's 2009 verdict awarding $3 million against Harris County for use of Tasers and the hog-tie restraint against a mentally compromised individual), *petition for review denied*, 2012 Tex. LEXIS 1078 (Tex. Dec. 14, 2012), *petition for review denied*, 2013 Tex. LEXIS 157 (Tex. Feb. 22, 2013), *cert. denied*, 134 S. Ct. 117 (2013). Therefore, the deputies were on notice that the use of the hog-tie against a suspect believed to be under the influence of drugs or alcohol constituted the use of deadly force.

The concurrence also looked to *Hill v. Carroll County*, 587 F.3d 230 (5th Cir. 2009). However, in *Hill* there was no indication that the suspect was suffering from any sort of diminished capacity. As the IACP's guidance makes clear, it is the existence of diminished capacity, specifically the use of drugs, that renders the hog-tie deadly. Therefore, the fact that a court had determined it was not excessive to hog-tie a healthy, uncompromised individual, does nothing to undercut the notion that it was clearly established that the use of the hog-tie restraint on a suspect who was believed to be under the influence of drugs was excessive.

Given the weight of the evidence from other circuits, the medical information available, and the guidance from accreditation agencies, in 2010 it was clearly

established that the use of a hog-tie against an individual suffering from an obvious diminished capacity constituted an unconstitutional use of force. To hold otherwise, as the concurrence did here, was error.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

ALAN MYGATT-TAUBER
Counsel of Record
LAW OFFICE OF
ALAN MYGATT-TAUBER
10089 Ashley Circle NW
Silverdale, WA 98383
(253) 271-9585
alan@amtappeals.com
Attorney for Petitioner

Jan. 12, 2017

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-20080

[United States Court of Appeals Fifth Circuit]
[Filed]
[May 3, 2016]
[Lyle W. Cayce]
[Clerk]

ERONY PRATT, Individually, and as Representative of the Estate of Wayne Pratt, Deceased	)
Plaintiff-Appellant	)
v.	)
HARRIS COUNTY, TEXAS; ADRIAN GARCIA, Harris County Sheriff; MICHAEL MEDINA, Deputy; VINCENT LOPEZ, Deputy; TARZIS LOBOS, Deputy; BRIAN GOLDSTEIN, Deputy; TOMMY WILKS, JR., Deputy;	)

FRANCISCO SALAZAR, Deputy; B.J. AUZENE, Deputy; R. DEALEJANDRO, JR., Deputy; R.M. GOERLITZ, Deputy; E.M. JONES, Sergeant; M. COKER, Sergeant,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas

BEFORE JOLLY, HAYNES, and COSTA, Circuit Judges

E. GRADY JOLLY, Circuit Judge:

Erony Pratt, the mother of the deceased, filed this 42 U.S.C. § 1983 lawsuit alleging that officers of the Harris County Sheriff's Department ("HCSD"), in Harris County, Texas, caused her son's death by using excessive force in restraining him during his arrest. Furthermore, she asserted, under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), that Harris County was also liable for his death. The district court granted qualified immunity to HCSD officers in their individual capacity and denied Pratt's claims under *Monell*. Pratt appealed. Finding no error, we AFFIRM.

I.

A.

In reviewing an appeal from summary judgment, we "view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *See Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009). The majority of the facts in this opinion, therefore, are adopted from the appellant's briefing before this Court.

Wayne Pratt ("Pratt") was involved in a minor traffic accident. In response to a disturbance call, HCSD Deputy Vincent Lopez, upon arrival at the scene, observed a vehicle with front-end damage resting in a ditch and Pratt "running in circles . . . imitating a boxer."[1] HCSD Deputies Brian Goldstein and Michael Medina arrived shortly. All three officers attempted to interact with Pratt. Pratt did not respond, but began to walk away. All three officers requested that he stop walking away. Pratt still did not respond, and remained in an uncooperative state.

After several warnings, Pratt began approaching Lopez and came within 5-7 feet of Lopez. Lopez then unholstered his taser and commanded Pratt to stop. At this point, Goldstein and Medina unholstered their tasers as well and Pratt began to run away. Lopez deployed his taser, but was inef-

[1] Officer Lopez also testified that Pratt "appeared to be intoxicated, and his behavior was erratic." There is no evidence in the record, however, that Officer Lopez relayed this information to any other officer upon their arrival at the scene.

fective in stopping Pratt.[2] Lopez cycled his taser two more times in the next forty seconds, which also failed to stop Pratt. Around this time, deputies Tommy Wilks, Tarzis Lobos, Francisco Salazar, B. J. Auzene, R. DeAlejandro, and R. M. Goerlitz arrived at the scene.

Because Lopez's efforts to subdue Pratt were ineffective, Medina deployed his taser. Pratt fell to the ground. Goldstein attempted to handcuff Pratt but, because of Pratt's continued resistance, he was able to secure only one of Pratt's arms in a handcuff. Medina cycled his taser two more times in the next thirty seconds. Pratt continued to struggle. When Lobos began aiding Goldstein in handcuffing Pratt, however, he stopped resisting and said "okay, okay, I'll quit. . . . I'll stop fighting." Goldstein then secured both of Pratt's arms in handcuffs. Pratt was patted down for weapons. None were found.

After Pratt was in handcuffs, Salazar aided Goldstein in lifting Pratt and walking him toward the patrol car. After a few steps, however, Pratt again began to resist and broke free from Goldstein's grip. Salazar returned Pratt to the ground.

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[2] 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.

While on the ground, Pratt began kicking at Goldstein and Salazar. Pratt kicked Goldstein in the groin twice during the exchange. Witnessing this exchange, Wilks retrieved a hobble restraint (i.e., handcuffs that attach to an arrestee's ankles) from his patrol car.

As Pratt continued to struggle, Salazar, Lobos, and Medina attempted to aid Goldstein in controlling him. During this struggle Medina tasered Pratt once again, this time in "drive stun mode" (in which the taser leads make direct contact with the arrestee's body), and Goldstein was able to gain control of Pratt's legs. Goldstein then rolled Pratt onto his stomach, crossed Pratt's legs, and bent them towards his buttocks. Salazar also placed his knee on Pratt's back in order to maintain compliance. When Wilks returned with the hobble restraint, Goldstein aided him in attaching it to Pratt's legs. Pratt ceased resisting and said "Ok I quit. I'm done." Goldstein and Salazar also ceased physically restraining him. At this point, Pratt's handcuffs were connected to the hobble restraint behind his back. Pratt was "hog-tied".

Shortly, EMS arrived at the scene.[3] EMS paramedics requested that the hobble restraint and

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[3] The exact duration of Pratt's restraint has not been alleged by either party. The taser log indicates that Pratt's last tasing (which took place immediately before he was hog-tied) occurred at 20:27:18. The paramedics began treating Pratt at approximately "20:27." Although these timelines seem inconsistent, it is important that the timeline established by the taser log was automated, while the timeline established by Paramedic William Slagle's testimony was entered manually sometime after the incident, and "[s]ome of the [times en-

handcuffs be removed so CPR could be administered. Pratt did not have a pulse and had ceased breathing. Upon treatment, Pratt regained a pulse, but did not resume independent breathing until after arriving at the hospital. Pratt died the following morning.

Following his death Dr. Darshan Phantak conducted Pratt's autopsy and concluded that "[t]he cause and manner of the death . . . [wa]s best classified as 'UNDETERMINED'". Dr. Phantak based this conclusion on the fact that he could not "definitively separate[]" the effect of Pratt's ingestion of cocaine and ethanol, from the other possible contributing factors—which, at least, included Pratt's car accident, various altercations, tasing, and hog-tying—that culminated in his asphyxiation.

Dr. Lee Ann Grossberg, Pratt's expert witness, also submitted an affidavit to the district court, which differed from the findings of Dr. Phantak. Specifically, rather than leaving the cause of death undetermined, Dr. Grossberg described the cause of death as "multi-factorial" and "list[ed] the factors that contributed to the death." In Dr. Grossberg's opinion, "the cause of death . . . [wa]s due to the combined effects of prone restraint and cocaine and ethanol toxicity" and "[c]ontributing factors also include[d] TASER use, dilated/hypertrophic cardiomyopathy, obesity and chronic drug use." Dr.

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tered] [we]re rough guesstimates . . . about when each event took place." Nevertheless, it appears that Pratt was restrained for a very brief period.

Grossberg further concluded that Pratt's death was "complex and multi-factorial" and that "no single factor is 100% responsible"; rather, it was "the combination of events and factors in a susceptible individual that cause[d] the 'perfect storm' . . . [that] result[ed] in death."

At the time of Pratt's arrest, the HCSD had a policy that prohibited officers from using hog-tie restraints, prompting the HCSD to conduct an "In Custody Death Review" of Pratt's death. The results were presented to a grand jury, and Goldstein, Medina, and Lopez were no-billed by the grand jury. A second internal investigation was conducted, reviewing specifically the use of the "hog-tying" restraint by Goldstein and Wilks. The Administrative Disciplinary committee found Goldstein and Wilks's alleged misconduct "not sustained."

B.

As earlier indicated, Erony Pratt, individually and as representative of Pratt's estate, brought this § 1983 cause of action alleging various violations of Pratt's Fourth Amendment rights against individual officers and Harris County. The HCSD officers moved for summary judgment, asserting defenses of qualified immunity. Harris County also moved for summary judgment contending that Pratt failed to sufficiently plead *Monell* liability as a matter of law. On summary judgment, the district court granted qualified immunity to the HCSD officers, denied Pratt's *Monell* claims against Harris County, and dismissed the complaint. *Pratt v. Harris*

Cnty., Tex., No. H-12-1770, 2015 WL 224945 (S.D. Tex. Jan. 15, 2015).

On appeal, Pratt challenges the district court's grant of qualified immunity, contending unconstitutional conduct by HCSD officers as follows: 1) Deputies Lopez and Medina's excessive use of force by tasing Pratt; 2) Deputies Wilks, Goldstein, and Salazar's excessive use of force by hog-tying Pratt; 3) Deputies Auzenne, DeAlejandro, Goerlitz, and Lobos's failure to assist Pratt during either allegedly excessive use of force; and 4) Sergeants M. Coker and E. M. Jones, and Sheriff Adrian Garcia's failure to train and/or supervise the nine deputies present at the scene of Pratt's arrest. Furthermore, Pratt maintains that Harris County is liable under *Monell* for: 1) tasing and hog-tying customs that fairly represented municipal policy; 2) failure to train and/or supervise; and 3) ratification of the unconstitutional conduct of the HCSD officers.

II.

We review the district court's grant of summary judgment de novo, also applying the same standards as the district court. *See Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "On a motion for summary judgment, [we] must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009).

To establish a claim under § 1983, "a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014). Additionally, "[c]laims under § 1983 may be brought against persons in their individual or official capacity, or against a governmental entity." *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)).

A municipality and/or its policymakers may be held liable under § 1983 "when execution of a government's policy or custom . . . by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . ." *Monell*, 436 U.S. at 694; *see also Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (requiring plaintiffs asserting *Monell*-liability claims to show "(1) an official policy (2) promulgated by the municipal policymaker (3) [that was also] the moving force behind the violation of a constitutional right").

III.

We will first address the § 1983 claims against various HCSD officers. Because the officers were sued in their individual capacity, they asserted qualified immunity defenses. *See Goodman*, 571 F.3d at 395; *see also Pratt*, 2015 WL 224945 at *8. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). We must also assess the reasonableness of each defendant's actions separately, even if those defendants acted in unison. *See Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir. 2007).

When evaluating a qualified immunity defense, we conduct a "well-known" two-prong inquiry. *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 490 (5th Cir. 2001). "In order to overcome a qualified immunity defense, a plaintiff must *allege* a violation of a constitutional right, and then must show that 'the right was clearly established . . . in light of the specific context of the case.'" *Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir. 2014) (emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Furthermore, we "may address these two elements in either order, and need not proceed to the second where the first is resolved in the negative." *Id.* (citations omitted).

We first turn to whether Pratt has shown the violation of a constitutional right.

A.

Pratt argues that HCSD officers violated her son's Fourth Amendment rights of reasonable search and seizure by using excessive force in his arrest. Furthermore, Pratt contends that the HCSD officers' conduct was unconstitutionally ex-

cessive, i.e., unreasonable, in two ways: by tasering her son unnecessarily and by hog-tying him.

"When a plaintiff alleges excessive force during an investigation or arrest, the . . . right at issue is the Fourth Amendment right against unreasonable seizures." *Tolan v. Cotton*, 134 S. Ct. 1861, 1865-66 (2014) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Furthermore, determining "whether this right was violated requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the *intrusion*.'" *Id.* (emphasis added) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

When a plaintiff alleges a violation of his Fourth Amendment rights due to excessive force, we are presented with a legal question concerning the reasonableness of the officer's conduct, which is embodied in the claim itself. Specifically, to establish a claim of excessive force under the Fourth Amendment, Pratt "must demonstrate: '(1) [an] injury, (2) which resulted directly and only from a use of force that was *clearly excessive*, and (3) the excessiveness of which was clearly *unreasonable*." *Deville*, 567 F.3d at 167 (emphasis added) (quoting *Tarver v. City of Edna,* 410 F.3d 745, 751 (5th Cir. 2005)). "Excessive force claims are necessarily fact-intensive." *Id.* Therefore, "whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case", and we must "consider . . . 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest

or attempting to evade arrest by flight.'" *Id.* (citing *Graham*, 490 U.S. at 396).

1.

First, Pratt contends that Deputies Lopez and Medina violated her son's Fourth Amendment rights by using excessive use in tasing him unnecessarily. Pratt, however, has not demonstrated by facts, or alleged facts subject to dispute, that the officers used unnecessary or unreasonable force under the circumstances.

Construing the facts in the light most favorable to him, Pratt ignored multiple requests and warnings from both Lopez and Medina. Indeed, Pratt aggressively evaded Lopez and Medina's attempts to apprehend him. Only after he continuously failed to comply, did either deputy deploy tasers; Medina used his taser only after Lopez's efforts to subdue Pratt were ineffective. The evidence showed that Medina cycled his taser only when Pratt continued to resist handcuffing. Once Pratt complied, and Goldstein was able to handcuff him, Medina stopped using his taser. But, when Pratt kicked an officer after being taken to the ground, Medina used his taser again; and, once again, officers were able to control him. It 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." *See Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012) (citations omitted).

In sum, Pratt has not shown that Lopez and Medina's use of tasers was "clearly excessive" or "unreasonable." Accordingly, we hold that the district court did not err in granting both Lopez and Medina qualified immunity in this respect.

2.

Next, Pratt contends that Deputies Wilks, Goldstein, and Salazar violated her son's Fourth Amendment rights by using excessive force in hog-tying him. Although hog-tying is a controversial restraint, we have never held that an officer's use of a hog-tie restraint is, per se, an unconstitutional use of excessive force. We have, however, previously addressed the excessiveness and reasonableness of the restraint.

In *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), Gutierrez resisted arrest, was violent towards officers, and was hog-tied (by having his "legs [drawn] backward at a 90–degree angle in an 'L' shape" and connected, behind his back, to his hands). *Id.* at 443. Gutierrez, still resisting, was then placed face down in the back of a patrol car and driven to a hospital for the treatment of injuries sustained during his arrest. *Id.* Upon arrival at the hospital, Gutierrez had stopped breathing. *Id.* Shortly thereafter, he was pronounced dead. *Id.* Against this background we said that "hog-tying may present a substantial risk of death or serious bodily harm only in a limited set of circumstances—i.e., when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position." *Id.* at 451. In the context of that case, we found a triable

issue in using a hog-tie restraint. Significant to that finding, however, was that Gutierrez had told the arresting officers he was on drugs. *Id.* at 448-49 ("Gutierrez told [Officer] Walters that he had used bad cocaine. . . . Viewing these disputed facts in the light most favorable to Gutierrez, the summary judgment record shows that the officers knew that Gutierrez was under the influence of drugs . . . ."). The *Gutierrez* court took particular care to add: "In conclusion, our holding today is very limited." *See id.* at 451.

Over ten years later, this Court again addressed the constitutionality of hog-tie restraints. In *Hill v. Carroll Cnty., Miss.*, 587 F.3d 230 (5th Cir. 2009), we held that an officer's use of a "four-point restraint"—the more formal term for "hog-tying"—was not a "per se unconstitutionally excessive use of force." *Hill*, 587 F.3d at 235 ("*Gutierrez* does not hold four-point restraint a per se unconstitutionally excessive use of force. . . ."). Like Gutierrez, Loggins resisted arrest, was violent towards officers, and was hog-tied. *Id.* at 232-33. Also, like Gutierrez, Loggins was placed face down in the back of a patrol car while hog-tied and transported for approximately 30 minutes to the nearest hospital. *Id.* at 233. Like Gutierrez, Loggins ceased breathing, and was pronounced dead upon arrival at the hospital. *Id.* Unlike Gutierrez, however, Loggins was not under the influence of drugs or alcohol during her arrest. *Id.* Furthermore, at trial, Loggins's medical expert testified specifically that she "died from positional asphyxia (suffocation)". *Id.*

On appeal, however, we determined that "[t]he exact cause of Loggins's death [wa]s unclear" because although her "body temperature at the time

of death was recorded at 107.5°F, an elevation consistent with the official autopsy diagnosis of fatal hyperthermia[,] Loggins was also obese and hypertensive". *Id.* Furthermore, we said that "[w]hile characterizing [hog-tie] restraints as dangerous when applied to a morbidly obese woman . . . [Loggins's expert's] testimony fail[ed] to raise a material fact issue that the use of four-point restraints was objectively unreasonable." *Id.* at 236. Accordingly, we held that "deputies cannot be held responsible for the unexpected, albeit tragic result, of their use of necessary force", because "[j]udged from the perspective of an officer at the scene of Loggins's arrest and transportation, as *Graham* . . . requires, the deputies had no objective basis not to use four-point restraints." *Id.* at 237. Consequently, there was no "material fact issue" whether "the deputies' use of four-point restraints was unnecessary, excessively disproportionate to the resistance they faced, or objectively unreasonable in terms of its peril to [the arrestee]". *Id.*

Since *Hill*, this Court has spoken only once, in *Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012), on the constitutionality of hog-tying. In *Khan* we held that an officer's decision to hog-tie a drug-affected arrestee did not violate a clearly established constitutional right because the restraint was used only briefly and the arresting officers did not know that the arrestee was under the influence of drugs.[4] *See id.* at 195-96.

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[4] Specifically, in *Khan* we held that "Khan's treatment did not violate a clearly established right" because "[u]nlike in *Hill*, Khan was not left face down in the four-point restraint for an

On appeal, Pratt argues that it is significant that the HCSD had a policy prohibiting the hog-tying of arrestees. Pratt also points out that Officer Wilks, the primary facilitator of Pratt's hog-tying, acknowledged his belief that hog-tying was unconstitutional.[5] Pratt further contends that her son had stopped resisting, at least temporarily, at the time he was hog-tied, but acknowledges that he had to be subdued earlier after "giving up".[6] But, the constitutionality of an officer's actions, is neither guided nor governed by an officer's subjective

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extended period of time." *Khan v. Normand*, 683 F.3d 192, 195 (5th Cir. 2012). Moreover, in *Khan* we also held that "the brevity of Khan's restraint and the constant supervision similarly distinguish[ed] [*Khan*] from *Gutierrez*; and, "*Gutierrez* [also] dealt with officers who knew the decedent had—as he told the officers—'shot some bad coke.' . . . [whereas] [t]he record contain[ed] no similar knowledge by the officers in the field." *Id*. at 195-96.

[5] Wilks Dep. 48:25-49:1-2 ("Q: [Y]ou were aware that [hog-tying Pratt] would not be constitutional. Correct? A: Yes.")

[6] *See* Goldstein Dep. 119:17-21, Jan. 13, 2014 ("When I put the hobble on, he said, okay, I quit. I'm done. Sorry. Whatever. He stopped resisting. He had no resistance whatsoever. So I believe Deputy Salazar had the long end of the hobble. And I just got up."); Wilks Dep. 46:1-11 ("Q: After you hobbled him . . . was he still kicking? A: No. Q: Was he still swinging his legs? A: No. Q: Swinging his arms? A: No, ma'am."); Salazar Incident Rep., May 12, 2010 ("During this time, as Deputy Goldstein and I were attempting to hold the suspect down, Deputy M. Medina . . . dry stunned the suspect, the suspect then became compliant."); *see also* Lobos Aff., at 2 ("Deputy M. Medina moved in and deployed a drive stun to Mr. Pratt's back . . . in an attempt to gain control and compliance. This was effective because Deputy Goldstein was able to take control of Mr. Pratt's legs as he had now stopped resisting.").

beliefs about the constitutionality of his actions or by his adherence to the policies of the department under which he operates. *See, e.g.*, *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986) ("The claim is that the mere failure . . . to follow their [departmental] regulations was a constitutional violation. There is no such controlling constitutional principle."). Instead, we must examine whether the HCSD officers' conduct was excessive or unreasonable under the "circumstances of [this] particular case." *Deville*, 567 F.3d at 167. Considering the record evidence, neither the circumstances surrounding the arrest nor our precedent support that the decision to hog-tie Pratt was an excessive or unreasonable one.

First, as earlier observed, we have never held that hog-tying is a per se unconstitutional technique of controlling a resisting arrestee. Thus, an assertion of hog-tying alone does not constitute a claim of excessive force. Instead, Pratt "must demonstrate: '(1) [an] injury, (2) which resulted directly and only from a use of force that was *clearly excessive*, and (3) the excessiveness of which was clearly *unreasonable*." *Id.* (emphasis added).

Turning to the excessiveness and unreasonableness of Deputies Wilks, Goldstein, and Salazar's conduct, the record evidence shows that Pratt ignored multiple requests and warnings from all three officers; and, he aggressively evaded their attempts to apprehend him, even after promising compliance. Construing the facts in the light most favorable to him, it is clear from the record that Pratt did not follow through on his offers to comply with the officers' requests. Instead, Pratt renewed resistance, broke free from the officers'

grips, and kicked at officers attempting to restrain him (eventually kicking one officer in the groin twice). Furthermore, unlike the arrestee in *Gutierrez*, the officers who hog-tied Pratt were unaware of his use of drugs or alcohol when they hog-tied him, and Pratt does not contend that her son volunteered such information. Additionally, unlike the arrestees in *Gutierrez* and *Hill*, neither party contests that Pratt was only restrained for a very brief period. Thus, in the factual context of this case, the use of the hog-tie restraint was not unconstitutionally excessive, or unreasonable.

To conclude, in the light of Pratt's "on again, off again" commitment to cease resisting, his recurring violence, and the threat he posed while unrestrained, it was not, under the totality of the circumstances, "clearly excessive" or "unreasonable" for HCSD officers to restrain him as they did. For these reasons, we hold that the district court did not err in granting Wilks, Goldstein, or Salazar qualified immunity.

IV.

In sum, the record evidence, read in the light most favorable to Pratt, does not show that his Fourth Amendment rights were violated.[7] The district court's judgment is, in all respects

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[7] The remainder of Pratt's claims—that other deputies failed to intervene on his behalf, that supervisory officers (in their individual capacity) failed to sufficiently train the deputies who participated in Pratt's arrest, and that the County violated his rights by not preventing the tasering and hog-tying practices—are premised on a violation of his constitu-

AFFIRMED.

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tional rights. Because, as discussed above, Pratt cannot show such a violation, we need not address these claims.

GREGG COSTA, Circuit Judge, concurring in the judgment:

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. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

Khan v. Normand, 683 F.3d 192 (5th Cir. 2012), alone supports the application of qualified immunity. That decision assessed the state of "hog- tying" law as of 2007. *Id.* at 193. It thus binds us in assessing the state of that law in 2010 given the absence of any intervening authority. *See Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) ("In concluding that a particular right is clearly established, courts must rely only on authority that existed at the time of the disputed conduct; conversely, courts may consider newer contrary authority as evidence that the asserted right is *not* clearly established." (emphasis in original) (citing *Wilson v. Layne*, 526 U.S. 603, 614, 617–18 (1999))). *Khan* found no violation of clearly established law because the arrestee "was not left face down in the four-point restraint for an extended period of time," he "remained under constant supervision," and the officers had not been told that the arrestee was in a cocaine-induced psychosis. 683 F.3d at 195–96. The same facts exist here.

Hill v. Carroll County, 587 F.3d 230 (5th Cir. 2009), provides even stronger support for qualified

immunity. It found no constitutional violation—not just the absence of a clearly established violation—when the obese arrestee remained hog-tied and alone in the back seat of a patrol car during a 29 mile drive to jail. 587 F.3d 232–33, 237. In doing so, it emphasized factors that are again present here: the arrestee's continued resistance to the officers and the absence of a cocaine-induced psychosis such as the one the officers knew about in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).[1] *Id.* at 237. With *Hill* on the books when Pratt was restrained for a much briefer time, it is difficult to find that a holding opposite the one in *Hill* would have been clearly established in 2010.

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[1] Recognizing that the officer's actual notice of cocaine use that existed in *Gutierrez* is not present here, Judge Haynes finds that "they had sufficient information to lead them to suspect that he was intoxicated with some kind of unknown substance." Dissent at ___. But irrational behavior existed in all our hog-tying cases; that is what led to the use of the restraint in the first place. In *Khan*, for example, the officers thought the arrestee was "suffering from a mental illness," but that was not sufficient to support a finding that they should have suspected cocaine use. 683 F.3d at 196. And it's not just use of "some kind of unknown substance" that led to the decision in *Gutierrez*, but use of cocaine in particular as one report had found that hog-tying created a substantial risk of death when applied to persons suffering from a cocaine-induced psychosis. 139 F.3d at 451; *but see Hill*, 587 F.3d at 235 (noting that a more recent study had cast doubt on the study relied on in *Gutierrez* and therefore it did not "extend beyond its facts").

On this ground of qualified immunity, I would affirm the judgment.[2]

[2] Because qualified immunity provides a defense for the deputies involved in the use of force, it also warrants dismissal of the supervisory liability claims. *See Doe v. Taylor I.S.D.,* 15 F.3d 443, 454 (5th Cir. 1994) (en banc) (explaining that for supervisory liability claims the qualified immunity "clearly established" standard applies to the underlying violation as well as the duty to provide better supervision concerning that right). And I agree with Judge Haynes that any constitutional violation is not attributable to the County as its policy prohibits hog-tying.

HAYNES, Circuit Judge, concurring and dissenting:

Wayne Pratt received the death penalty at the hands of three police officers for the misdemeanor crime of failing to stop and give information. The majority opinion concludes that the deputies' decision to hog-tie Pratt and apply force to his back while he was in this position was a reasonable response to Pratt's failure to stop and identify himself following an accident and his failure to comply with their instructions. Qualified immunity "protect[s] police officers from the sometimes hazy border between excessive and acceptable force," *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (citation omitted), but here, the border is not hazy. Qualified immunity cannot be interpreted to license officers to use deadly force under these facts. Because it was clearly established that officers in Deputies Wilks, Goldstein, and Salazar's position should not have hog-tied Pratt in the manner they did, I respectfully dissent from the portion of the majority opinion affirming the district court's grant of summary judgment on qualified immunity grounds for Deputies Wilks, Goldstein, and Salazar's alleged use of excessive force in hog-tying Pratt. I concur in the remainder of the judgment.

I.

When confronting a claim of qualified immunity, a court asks two questions: (1) whether the officer in fact violated a constitutional right, and (2) whether the contours of the right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Sauci-*

er, 533 U.S. at 201–02 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Supreme Court emphasized in *Tolan v. Cotton* that, in answering these questions, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." 134 S. Ct. 1861, 1866 (2014) (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004)). Rather, "a court must view the evidence 'in the light most favorable to the opposing party.'" *Id.* (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

Here, plaintiff contends that Deputies Wilks, Goldstein, and Salazar violated the Fourth Amendment's prohibition on unreasonable seizures by using excessive force in detaining Pratt. "The inquiry into whether [the Fourth Amendment] right was violated requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 1865–66 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). "This balancing 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Lytle v. Bexar Cty.*, 560 F.3d 404, 411 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). With respect to the "clearly established" prong of the qualified immunity analysis, "[t]he salient question . . . is whether the state of the law at the time of an incident provided fair warning to the defend-

ants that their alleged [conduct] was unconstitutional." *Tolan*, 134 S. Ct. at 1866 (citation omitted).

The majority opinion does not reach the second prong of the qualified immunity analysis because it concludes that, in the factual context of this case, the use of the hog-tie restraint was not unconstitutionally excessive or unreasonable. In particular, the majority opinion points to the fact that Pratt "ignored multiple requests and warnings" from the officers and "aggressively evaded their attempts to apprehend him, even after promising compliance."

The majority opinion fails, however, to balance the officers' use of what amounted to deadly force against the relatively weak interest the officers had in apprehending Pratt.

We have already concluded that the use of a hog-tie restraint in certain circumstances constitutes the use of deadly force. Deadly force has been defined as force that "carr[ies] with it a substantial risk of causing death or serious bodily harm." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988)). In *Gutierrez*, we concluded that hog-tying may create a substantial risk of death or serious bodily injury when combined with drug use, positional asphyxia, and cocaine psychosis. *Id.* at 446–47. Those circumstances were present here. Although the officers did not know with certainty at the time of their encounter with Pratt that he was suffering from cocaine psychosis, they had sufficient information to lead them to suspect that he was intoxicated with some kind of unknown substance. When they first arrived at the scene, Pratt was running in circles, flailing his arms above his head, and claiming he

was on fire, and Deputy Goldstein found a glass pipe and lighter in Pratt's hands after he was handcuffed but before he was hog-tied. Despite this evidence, Deputy Wilks placed Pratt in a hog-tie restraint, with assistance from Deputy Goldstein, while Pratt was in a prone position. Officer Salazar simultaneously kneeled on Pratt's back to restrain him, thus applying pressure that further impaired Pratt's ability to breathe. Accordingly, to justify the use of such deadly force, the officers must have had "probable cause to believe that [Pratt] pose[d] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.*

At oral argument, the only crime that counsel for the County could identify as having been violated by Pratt was the failure to stop and give information—a misdemeanor violation under the Texas Transportation Code. *See* TEX. TRANSP. CODE § 550.022. It is undisputed that Pratt was running around the neighborhood behaving erratically and was refusing to comply with the officers' instructions. The officers noted that Pratt was not acting normally and appeared to be having some kind of mental or agitated episode, and they even suspected that he was intoxicated on some unknown substance. But at no point during the encounter did any of the deputies suspect that Pratt was armed with any kind of weapon. The only threat Pratt posed to the officers was at most a relatively mild threat of physical violence—one officer testified that Pratt turned toward an officer in an aggres-

sive manner early in the officers' encounter with Pratt. Additionally, Pratt kicked Deputy Goldstein in his thigh/groin area after the officers had restrained Pratt's hands and placed him on the ground. However, at the time the officers applied the hog-tie restraint, they had been able to compel Pratt's compliance with the use of a taser and Pratt subsequently stated that he would cease resisting. There is no indication in the record that Pratt posed an immediate threat to anyone other than the officers, no "*Manis* act" that would justify the use of deadly force. *See Cole v. Carson*, 802 F.3d 752, 760–61 (5th Cir. 2015) ("The act justifying deadly force is sometimes called a *Manis*[1] act. We have found qualified immunity was inappropriate due to the absence of a *Manis* act . . . ." (footnote omitted)). Thus, there exists at least a fact dispute as to whether Pratt presented *any* threat of harm to the officers, much less a threat of serious physical harm at the time the officers applied the hog-tie restraint.

Recent Supreme Court cases addressing the Fourth Amendment right to be free from the use of excessive force provide guidance regarding how to conduct the balancing analysis. For example, in *Mullenix v. Luna*, 136 S. Ct. 305 (2015), the Court focused on the fact that the suspect was a "reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers,

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[1] *Manis v. Lawson*, 585 F.3d 839, 844–45 (5th Cir. 2009) (Manis's act of reaching under the seat of the vehicle in what looked like a grab for a weapon was the "act" that justified the use of deadly force.).

and who was moments away from encountering an officer," *id.* at 309. The Court held that the officers' use of deadly force in attempting to stop the suspect's high-speed car chase did not violate clearly established law. *Id.* at 312. Similarly, in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), the Court held that officers did not violate the Fourth Amendment in using potentially deadly force where the officers knew that the suspect "had a weapon and had threatened to use it to kill three people," the officers had unsuccessfully attempted to subdue the suspect with pepper spray, and the suspect was only a few feet from a cornered officer, *id.* at 1775. In *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), the Court held that the officers' use of deadly force did not violate the Fourth Amendment where the officers fired 15 shots in an attempt to end a car chase that had "exceeded 100 miles per hour and lasted over five minutes," during which the suspect "passed more than two dozen other vehicles, several of which were forced to alter course," concluding that the car chase "posed a grave public safety risk," *id.* at 2021. The Court emphasized that the suspect posed an actual and imminent threat to pedestrians and other motorists, as well as to the officers involved in the chase.[2] *Id.* at 2021–22.

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[2] Conversely, in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), the Supreme Court reversed a panel of the Fifth Circuit that had affirmed a district court's grant of summary judgment on qualified immunity grounds. The Court held that "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in

In each of these cases, the officers faced an immediate threat of serious harm, as did others who might come into contact with the individual in question. Conversely, in the instant case, there is no indication that Pratt ever posed a serious threat of harm to any of the officers, nor any indication that the officers feared for their safety in any meaningful way that might justify the use of deadly force. This is not the "split second" decision described in the concurring opinion. Thus, balancing Deputies Wilks, Salazar, and Goldstein's use of deadly force against the importance of the gov-

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his favor.'" *Id.* at 1863 (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). In *Tolan*, a police officer mistakenly accused two men of being in possession of a stolen vehicle after keying an incorrect character into the computer in his squad car. *Id.* He confronted the two men outside of the home where Tolan lived with his parents. *Id.* Tolan's parents heard the commotion and exited the front door in their pajamas, insisting that the vehicle was not stolen. *Id.* An additional officer arrived and instructed Tolan's mother to stand against the family's garage door. *Id.* at 1863–64. Tolan and his mother testified that the officer grabbed her arm and slammed her against the garage door with enough force to leave bruises on her arms and back. *Id.* at 1864. Seeing this, Tolan rose to his knees and shouted an expletive, demanding that the officer leave his mother alone. *Id.* The officer then drew his pistol and fired three shots at Tolan with no verbal warning. *Id.* The Supreme Court remanded the case to the Fifth Circuit to correctly credit Tolan's evidence and determine whether the officer's actions violated clearly established law. *Id.* at 1868. On remand, the Fifth Circuit held that a genuine dispute of material fact existed as to whether the officer was entitled to summary judgment based on qualified immunity. *Tolan v. Cotton*, 573 F. App'x 330, 330–31 (5th Cir. 2014).

ernment's interests alleged to justify the intrusion leads inexorably to the conclusion that the deputies' alleged use of force in this case was excessive and constitutes a violation of Pratt's Fourth Amendment rights.[3]

B.

With respect to the second prong of the qualified immunity analysis, viewing the facts in the light most favorable to the plaintiff, it is apparent

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[3] With respect to the "directly and only" element of a claim of excessive force under the Fourth Amendment, I believe plaintiff has submitted sufficient evidence to raise a question of fact regarding whether Deputies Wilks, Goldstein, and Salazar's use of the hog-tie restraint caused Pratt's death. First, no case has held that "directly and only" literally means that no other cause contributed to the death in question. Counsel for both parties conceded during oral argument that they could not find a case in which the term "only" was relied upon to preclude recovery in a situation such as the instant one, where Pratt's death allegedly resulted from multiple factors, but where the plaintiff has presented expert testimony stating that Pratt would not have died but for being hog-tied and having pressure placed on his back while in a prone position. We have explained that a plaintiff need not present evidence that a defendant's excessive use of force was the *exclusive* cause of the alleged injury—rather, "so long as the injury resulted from 'clearly excessive and objectively unreasonable' force, [the plaintiff's] claim is actionable." *Bailey v. Quiroga*, 517 F. App'x 268, 268 (5th Cir. 2013) (quoting *Mouille v. City of Live Oak*, 918 F.2d 548, 553 (5th Cir. 1990)). Here, the record indicates that the hog-tying was the last act of restraint before Pratt went into cardiac arrest and ceased breathing. The plaintiff's expert opined that, but for the prone restraint, Pratt would not have died when he did. This evidence at least creates a fact issue as to causation.

that the officers' actions in using excessive force violated clearly established law. As of May 10, 2010, the date on which the events in this case occurred, the Fifth Circuit had decided two cases directly addressing whether the use of hog-tie restraints constitutes excessive force in violation of the Fourth Amendment: *Gutierrez*and *Hill v. Carroll Cty.*, 587 F.3d 230 (2009).

As discussed previously, in *Gutierrez*, we held that placing a "drug-affected" arrestee in a hog-tie restraint constituted excessive force where hog-tying in addition to drug use, positional asphyxia, and cocaine psychosis was present. 139 F.3d at 444, 446–47. *Gutierrez* presents nearly identical facts to the facts of this case. In *Gutierrez*, police officers approached an individual who was running in circles in the middle of a heavily trafficked intersection and claiming that he had been shot. *Id.* at 442–43. The officers found no bullet wounds on the individual, nor did they see anyone with a gun nearby. *Id.* at 443. The officers suspected that he was intoxicated, noting that his eyes were glassy, his gait was unsteady, and his speech was slurred. *Id.* at 442–43. The individual confirmed upon questioning that he had "shot some bad coke." *Id.* at 443. The officers called an ambulance for possible toxic ingestion overdose, but when the ambulance arrived, the individual became violent. *Id.* He kicked one of the officers in the chest and refused to get in the ambulance. *Id.* At this point, the officers placed him in a hog-tie restraint in a prone position in the backseat of a patrol car so they could transport him in the patrol car to the hospital. *Id.* Upon arriving at the hospital, the individual no longer had a pulse and was pronounced

dead shortly thereafter. *Id.* We reversed summary judgment on qualified immunity grounds in favor of the officers, holding that material fact disputes existed on the question of whether the officers used reasonable force. Importantly, we found that, assuming the evidence regarding the risk of death posed by hog-tying to be true, "hog-tying in [those] circumstances would have violated law clearly established prior to November 1994." *Id.* at 447.

In *Hill v. Carroll Cty.*, we again addressed whether hog-tying constituted excessive force under the Fourth Amendment. In *Hill*, police officers responded to a fight between two women. 587 F.3d at 232. One of the women turned her attention away from the fight to tackle one of the officers, pummeling him with a flashlight. *Id.* Eventually the officer managed to handcuff the woman's wrists behind her back. *Id.* He retrieved leg restraints from his patrol car and attached them, but the woman continued to kick, twist, and otherwise resist the officers as they tried to load her into the patrol car. *Id.* The officers then placed her in a hog-tie restraint, put her in the back of the patrol car, and drove her to a courthouse, where they transferred the woman to another officer's patrol car. *Id.* at 232–33. The woman was placed face down for the half-hour ride to the jail. *Id.* at 233. Upon arrival, she no longer had a pulse and was thereafter pronounced dead. *Id.* We concluded that no reasonable jury could find that the deputies used excessive force to subdue the woman. *Id.* at 234. We distinguished *Gutierrez* on the ground that in *Hill*, there was no evidence of drug abuse or drug-induced psychosis, nor was there evidence that pressure had been placed on the back of the hog-

tied individual. *Id.* at 235–36. Additionally, we noted that the police were called because the woman was in a fight with another individual, and that she assaulted the officer with his own flashlight when he tried to restrain her. *Id.* at 237. Furthermore, the officers tried to put her in a squad car after restraining her hands and legs to no avail, and only then resorted to a hog-tie restraint. *Id.*[4]

The facts of this case fall squarely under the holding in *Gutierrez*.[5] Here, the officers had reason to suspect that Pratt had abused drugs based on his erratic behavior, and the presence of a glass pipe and lighter in his hands takes this from mere unexplained erratic behavior into the "on drugs" camp.[6] Furthermore, Pratt was unarmed and posed a relatively little risk of harm to the officers

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[4] The third case involving hog-tying, *Khan v. Normand*, 683 F.3d 192 (2012), had not been decided at the time of the events at issue in this case. Accordingly, it cannot relied upon to assess what law was clearly established at the time of the dispute. That case is also distinguishable because in that case, the detainee, while resisting, reached for the officer's gun. *Id.* at 193. Under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), our court in *Khan* reached only the second prong of the qualified immunity analysis—whether the officers' actions violated a clearly established right—and declined to address whether the officers' conduct constituted excessive force. *Khan*, 683 F.3d at 194–95.

[5] To the extent that there is any dissonance among *Gutierrez*, *Hill*, and *Khan*, we are bound by the oldest case, *Gutierrez*, under our rule of orderliness. *United States v. Broussard*, 669 F.3d 537, 554–55 (5th Cir. 2012). I thus disagree with the concurring opinion that *Khan* "binds us in assessing the state of that law in 2010." Concurrence at 1.

[6] I disagree with the concurring opinion that the drugs had to be cocaine to fall within *Gutierrez*.

despite his refusal to comply with their commands. At no point did Pratt attempt any kind of violence other than kicking at the officers while he was on the ground. Pratt never attempted to reach for the officers' weapons, nor did he pose any other threat of serious harm to the officers. Additionally, the officers did not discover that Pratt had stopped breathing until after an ambulance arrived, and the amount of time Pratt was actually hog-tied is a disputed fact. Furthermore, distinct from the facts in *Hill*, the officers did not attempt to use leg restraints before placing Pratt in a hog-tie restraint. Most importantly, unlike *Hill*, the officers here used both the hog-tie restraint and put a knee on his back, greatly impairing his ability to breathe. *See Hill*, 587 F.3d at 236.[7]

In light of the holding in *Gutierrez* and the similarities between it and the instant case, the state of the law at the time of the incident was sufficiently established to provide fair warning to Deputies Wilks, Salazar, and Goldstein that their alleged

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[7] Indeed, the absence of drugs and vertical pressure are the reasons the *Gutierrez* study was "discounted" in *Hill*: "Dr. Werner Spitz, Hill's medical expert, also failed to provide the necessary evidence of the risks associated with four-point restraints. He relied heavily on the San Diego Study . . . [but] admitted Loggins did not exhibit evidence of drug abuse or cocaine-induced psychosis, two critical factors in the San Diego Study. He conceded his own publication on positional asphyxia observes that when deaths occurred, the arresting officers had placed pressure on the back of the hog-tied prisoner. *No vertical pressure was applied to Loggins*." *Hill,* 587 F.3d at 236 (emphasis added).

conduct violated Pratt's Fourth Amendment right to be free from the use of excessive force.

Accordingly, I respectfully dissent from Part III.A.2 of the majority opinion affirming the district court's grant of summary judgment on qualified immunity grounds with respect to the plaintiff's excessive force claim against Deputies Wilks, Goldstein, and Salazar for their use of the hog-tie restraint. I would reverse and remand as to those claims. As to plaintiff's other claims, I concur in the disposition set forth in the majority opinion.[8]

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[8] The majority opinion disposes of plaintiff's supervisory and municipal liability claims on the ground that there are no underlying excessive force violations under the Fourth Amendment. Although, as discussed above, I would find that plaintiff has sufficiently alleged a constitutional violation with respect to Deputies Wilks, Goldstein, and Salazar's hog-tying, I concur in the ultimate judgment that her municipal liability claim based on this conduct should be dismissed. To establish a claim for municipal liability under § 1983, a plaintiff "must show the deprivation of a federally protected right caused by action taken 'pursuant to an official municipal policy.'" *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Here, plaintiff has not sufficiently alleged the existence of an official policy. In fact, the record evidence shows that Harris County had a policy *against* using hog-tying as a method of restraint. Accordingly, plaintiff's municipal liability claim based on the deputies' hog-tying is appropriately dismissed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ERONY PRATT, individually and as Representative of the estate of WAYNE PRATT, deceased,	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION NO. H-12-1770**
HARRIS COUNTY, TEXAS, et al.	§	
Defendants.	§	

O R D E R

Pending before the Court are Defendants Sheriff Adrian Garcia ("Sheriff Garcia"), Sergeant M. Coker ("Sergeant Coker"), and Sergeant E. Jones ("Sergeant Jones")'s Motion for Summary Judgment (**Instrument No. 63**); Defendant Harris County, Texas ("Harris County")'s Motion for Summary Judgment

(**Instrument No. 72**); and Defendants Harris County Sheriff's Office Deputies Vincent Lopez ("Deputy Lopez"), Michael Medina ("Deputy Medina"), Brian Goldstein ("Deputy Goldstein"), Francisco Salazar ("Deputy Salazar"), Tarzis Lobos ("Deputy Lobos"), Brian Auzenne ("Deputy Auzenne"), Tommy Wilks ("Deputy Wilks"), Robert DeAlejandro ("Deputy DeAlejandro"), and Robert Goerlitz ("Deputy Goerlitz")'s Motion for Summary Judgment. (**Instrument No. 74**).

I.

A.

This is case of alleged use of excessive force by police officers against a suspect, Wayne Pratt ("Pratt" or "the deceased"), which ultimately ended with the suspect's death. Officers in this case are alleged to have tased, restrained, hog-tied, and otherwise subjected the deceased to excessive force, after he behaved erratically and evasively. Plaintiff Erony Pratt ("Plaintiff"), the mother of the deceased, claims that the responding deputies used excessive and deadly force in violation of the Fourth Amendment. Furthermore, Plaintiff claims that superior officers and the county are liable for the constitutional violations. Defendants have asserted that they are entitled to qualified immunity.

B.

On May 12, 2010, at roughly 8:11 pm, the Harris County Sheriff's Office received numerous calls regarding a minor traffic accident and disturbance, and Deputy Lopez was dispatched to 623 West

Drive. (Instrument No. 74-2 at 2). Witnesses testified to having heard a car accident, and then observing a white male, Pratt, exit his vehicle and begin behaving erratically. (Instrument Nos. 82-20; 82-21). There is some dispute about the exact order of events but the following is the account of the Sheriff's Office's response as recalled by the responding deputies.

Deputy Lopez arrived on the scene and found a vehicle with front end damage resting in a ditch and Pratt "running around in circles with his hands in the air." (Instrument Nos. 74-2 at 2; 82-18 at 10-11). Deputy Lopez testified that he did not know what caused the erratic behavior, but stated that his training told him it could have been a mental health issue, or drugs or alcohol. (Instrument No. 82-18 at 10-11). Pratt was running along a driveway and approached Deputy Lopez's vehicle. *Id*. at 17. Deputy Lopez testified that, when he arrived, Pratt became aggressive and took a "boxer stance." (Instrument No. 82-18 at 17-18).

At that time, roughly 8:18 pm, Deputies Medina and Goldstein arrived on the scene in separate vehicles. *Id*. at 20. Deputy Medina also testified that when he arrived, Pratt appeared as though he was attempting to assault Deputy Lopez. (Instrument No. 74-3 at 3). Deputies Lopez and Medina approached Pratt and Deputy Lopez, and Deputy Goldstein testified that he asked Pratt if he was ok. (Instrument No. 74-4 at 2). According to Deputy Goldstein, Pratt did not respond. *Id*. Because of Pratt's aggression, Deputy Lopez testified that he unholstered his taser and that Pratt then began to walk away from him. *Id*. at 18. According to Deputy Lopez, he commanded Pratt to stop and Pratt con-

tinued to walk. *Id*. at 18-20. Statements by citizen witnesses confirm the deputies's claims that they asked Pratt to stop running on numerous occasions. (Instrument No. 82-21).

According to Deputy Lopez, at the time, Pratt had no visible injuries. (Instrument No. 82- 19 at 18). However, Deputy Medina testified that Pratt was bleeding from both arms when he arrived at the scene. (Instrument No. 74-3 at 2). Deputy Goldstein also testified that Pratt appeared to be holding something in his left hand, but he could not identify what it was, until later when he identified that it was a lighter. (Instrument No. 74-4 at 3).

According to Deputies Lopez, Medina, and Goldstein, as they got closer to Pratt he began running to avoid them. (Instrument No. 74-4 at 3). At some point Pratt turned and appeared as though he might run into traffic. (Instrument Nos. 82-18 at 22; 74-4 at 3). At that time, Deputy Lopez deployed his taser, but he testified that Pratt continued to run into the street. (Instrument No. 82-18 at 23-24). According to Deputy Lopez, only one probe struck Pratt, and so the taser was ineffective. (Instrument No. 74-2 at 3). Deputies Goldstein and Medina also testified that they ordered Pratt to stop and get on the ground during this time. (Instrument Nos. 82-18 at 25- 26; 74-4 at 3). As Pratt continued to cross the street, Deputy Medina also deployed his taser, which struck Pratt. (Instrument Nos. 74-2 at 3; 74-3 at 3).

After Deputy Medina deployed his taser, Pratt fell to the ground. (Instrument No. 82-18 at 25-26). At this time, Deputy Goldstein ordered Pratt to put his hands behind his back, but the deputies testified that he resisted. (Instrument Nos. 74-2 at 3; 74-4 at 3). Accordingly, Deputy Medina cycled his taser

again. (Instrument No. 74-2 at 3-4). Pratt continued to resist, and Deputies Goldstein and Lopez attempted to handcuff him. (Instrument No. 74-2 at 4). Deputy Medina testified that it was difficult to handcuff Pratt "because he was bloody, sweaty and fighting them." (Instrument No. 74-3 at 4). At this time, the deputies informed dispatch of the taser deployment and personnel notified Emergency Medical Services and patrol supervisor Sergeant Coker of the incident. (Instrument No. 74-2 at 4). Around this time, Deputies Wilks and Salazar arrived at the scene as backup, as did Deputy Auzenne and Deputy DeAlejandro, who was a probationary patrol deputy. (Instrument Nos. 74-5 at 2; 74-7 at 2; 74-8 at 2). Deputies Lobos and Goerlitz also arrived at the scene some time after the deployment of the tasers. (Instrument No. 74-6 at 2).

With the assistance of Deputies Lobos and DeAlejandro, Deputy Goldstein was able to handcuff Pratt while he was on his stomach. (Instrument Nos. 74-2 at 4; 74-3 at 4; 74-4 at 4; 74-6 at 2). Deputies Goldstein and Salazar then rolled Pratt over and attempted to get him to his feet, to move him off of the street. (Instrument Nos. 74-2 at 4; 74-3 at 4; 74-5 at 3). Deputies Goldstein and Salazar eventually got Pratt to his feet, but as they were walking him towards the squad car, he pulled away from Deputy Goldstein and tried to flee. (Instrument Nos. 74-3 at 4; 74-4 at 4). At that time, Deputy Salazar returned Pratt to the ground, at which point Pratt began rolling around and kicking at the deputies. (Instrument Nos. 74-4 at 4; 74-5 at 3). Deputy Goldstein testified that he was kicked in the groin twice before he was able to control Pratt's legs. (Instrument No. 74-4 at 4). Deputy

Salazar also testified that, during this time, he restrained Pratt by holding his left arm, and placing his right knee in Pratt's upper back. (Instrument No. 74-5 at 3). During this time, Deputy Wilks returned to his squad car to retrieve a nylon hobble. (Instrument No. 74-7 at 3). Deputy Medina testified that he cycled his taser again, in the middle of Pratt's back in what is referred to as a "drive stun." (Instrument No. 74-3 at 5). Downloads of the tasers after the incident showed that Deputy Lopez cycled his taser twice during this whole incident, each for five seconds, and that Deputy Medina cycled his taser five times during this incident, also for five seconds each time. (Instrument No. 82-16).

Deputy Goldstein continued to hold Pratt's ankles to prevent him from kicking or fleeing. (Instrument Nos. 74-3 at 5; 74-4 at 4). The deputies testified that Pratt's legs were crossed and his knees were bent, such that his feet were by his buttocks. (Instrument No. 74-6 at 3). Deputy Wilks then tied the hobble to Pratt's ankles. (Instrument No. 74-3 at 5; 74-7 at 3). Deputy Salazar testified that a hobble was deemed necessary because Pratt was such a large man, and was uncooperative and out of control. (Instrument No. 74-4 at 4). According to Deputy Goldstein, Pratt was mumbling incoherently during this time, and was on his stomach for one or two minutes before the hobble was applied. (Instrument No. 74-4 at 4-5). Multiple deputies testified that Pratt was behaving erratically and possibly on drugs. (Instrument Nos. 74-7 at 3; 74-10 at 2).

According to the deputies, the loose end of the hobble was held by Deputy Wilks, and was not secured to the handcuffs. (Instrument Nos. 74-3 at 5;

74-6 at 3-4; 74-7 at 3). Furthermore, multiple deputies testified that, while secured by the hobble, Pratt's legs were extended and flat. (Instrument No. 74-8 at 2). Deputy Lopez initially reported that the hobble was attached to the handcuffs, but later testified that he only "assumed" that Deputy Wilks had used this technique. (Instrument No. 82-18 at 8-10). The deputies' account contradicts the reports by a responding EMS paramedic and by the Internal Affairs Department ("IAD"), both of which said that Pratt was "hog-tied." (Instrument Nos. 82-3 at 43-44; 82-35 at 4). Pratt was on his stomach at this time, and according to Deputy Medina, was held by deputies in that position for two or three minutes until Channelview Emergency Medical Services ("EMS") arrived on the scene. (Instrument No. 74-3 at 5).

EMS arrived on the scene at roughly 8:26 pm to treat Pratt. (Instrument Nos. 74-2 at 4; 82-35 at 3). Deputies Medina and Goldstein testified that Pratt was still talking when EMS arrived. (Instrument Nos. 74-3 at 4; 74-4 at 5). One of the EMS paramedics, Billy Slagle ("Slagle"), reported that, upon their arrival, Pratt was "hog-tied" and face down. (Instrument No. 82-35 at 3). According to Slagle, hog-tied meant that his hands and feet were both handcuffed and then attached to each other. (Instrument No. 82-35 at 3). Slagle also testified that, upon EMS's arrival, Pratt was not talking, and in fact was not breathing and had no pulse. (Instrument No. 82-35 at 4). The deputies, however, reported that it was not until EMS had removed the final taser probe that Pratt became non-responsive, and EMS had to begin CPR. (Instrument Nos. 74-2 at 4; 74-3 at 5). Deputy Goerlitz even testified that

he was the first to notice that Pratt had appeared to stop breathing, and so had informed EMS to check his vitals again. (Instrument No. 74-10 at 3). Upon the request of EMS, the deputies removed Pratt's handcuffs and hobble at that time. (Instrument Nos. 74-2 at 4; 74-3 at 5). EMS performed CPR for three or four minutes and then placed Pratt on a stretcher and put him in the ambulance. (Instrument No. 74-3 at 5-6). Deputy Wilks then contacted Sergeant Coker and advised him of Pratt's condition. (Instrument No. 74-4 at 4).

During this time, Deputy Goldstein investigated Pratt's vehicle and found a Brillo pad and two full bottlers of beer. (Instrument No. 74-4 at 5). At that time, Deputy Goldstein informed EMS that drugs may have been involved in the accident. (Instrument No. 74-4 at 5). Deputy Goldstein then found numerous pieces of broken glass near where Pratt had struggled with the deputies, with what appeared to be crack cocaine residue. (Instrument No. 74-4 at 5). The broken glass later tested positive for cocaine. (Instrument No. 74-4 at 4).

Sergeant Coker arrived at the scene at roughly 9:05 pm and was advised of the incident. (Instrument No. 74-2 at 5). During this time, Deputies Auzenne and DeAlejandro interviewed witnesses about the car accident. (Instrument Nos. 74-2 at 5; 74-9). According to witnesses, Pratt had gotten into a car accident with another driver at the corner of West Road and South Drive and had attempted to flee the scene. (Instrument Nos. 74-4 at 5; 74-9 at 2). The other driver then observed Pratt drive into the ditch where his car was found, whereupon he exited the vehicle and began to behave erratically. (Instrument No. 74-9 at 2-3). According to witnesses, he be-

gan to remove his clothes, and jump up and down, and "behaved as if he were on fire." (Instrument No. 74-9 at 3).

Deputies Wilks and Salazar followed EMS to the hospital to maintain custody of Pratt. (Instrument No. 74-5 at 4). Upon arrival, they were informed that Pratt was breathing on his own again. (Instrument No. 74-5 at 4). EMS paramedic Slagle reported that Pratt did have a pulse again at 8:59 pm while at the hospital. (Instrument No. 82-35 at 4). Deputies Wilks and Salazar remained with Pratt until the night shift relieved them. (Instrument No. 74-5 at 5). Pratt was pronounced deceased at 5:25 am the following morning, on May 13, 2010. (Instrument No. 83-3 at 38).

An autopsy was conducted on Pratt on the date of death, May 13, 2010, by Darshan Phatak, M.D. ("Dr. Phattak"). (Instrument No. 82-6). Dr. Phattak identified numerous blunt force injuries, as well as evidence of the use of tasers, and the presence of cocaine and ethanol in Pratt's blood. (Instrument No. 82-6 at 24). Ultimately, Dr. Phattak determined the cause and manner of death to be "UNDETERMINED." (Instrument No. 82-6 at 24). Dr. Phattak noted that the ingestion of cocaine and ethanol could not be separated from the contribution of asphyxiation during restraint. (Instrument No. 82-6 at 24). Furthermore, numerous injuries, including a rib cage fracture, could have been attributed to the car accident, the police restraints, or the resuscitation attempts. (Instrument No. 82-6 at 24).

However, Plaintiff's expert, Lee Ann Grossberg, M.D. ("Dr. Grossberg"), a forensic pathologist, disputes the conclusions in the autopsy report. (Instrument No. 82-36 at 8). Dr. Grossberg found nu-

merous indicators of trauma inconsistent with Dr. Phattak's report. First, she noted that the hemhorrhage under the chin and on the neck were consistent with compressive force to the neck (Instrument No. 82-36 at 8). She also noted that some of the blunt force injuries would not have been caused by falls, a struggle on the ground, or a car accident, particularly contusions on the right side of Pratt's torso. (Instrument No. 82-26 at 8-9). Dr. Grossberg concluded that the cause of death was multifactorial, including the presence of drugs in Pratt's system, Pratt's existing health issues, the use of tasers, and the restraint of Pratt in a prone position and possible use of choke holds. (Instrument No. 82-26 at 10-11).

C.

Plaintiff Erony Pratt, mother of the deceased, filed suit individually and as representative of Pratt on May 11, 2012, in the 295th Judicial Court of Harris County, Texas, against Harris County, Sheriff Garcia, Sergeant's Jones and Coker, and Deputies Medina, Lopez, Goldstein, Wilks, Salazar, Lobos, Auzenne, DeAlejandro, Goerlitz. (Instrument Nop. 1-2 at 4). Plaintiff brought 42 U.S.C. § 1983 actions under the Fourth Amendment for excessive force, failure to protect, and failure to supervise; § 1983 claims against Harris County for unlawful policies, failure to train, failure to supervise, and ratification; and a wrongful death claim under the Texas Tort Claims Act and Texas Civil Practices and Remedies Code §§ 71.002 and 71.021. (Instrument No. 1-2 at 10-23). On June 13, 2012, Defendants filed to remove the case to the Southern District of Texas pur-

suant to this Court's federal question jurisdiction and jurisdiction over civil rights cases under 28 U.S.C. §§ 1331, 1443. (Instrument No. 1). On September 10, 2012, Plaintiff filed an Amended Complaint. (Instrument No. 16).

On August 28, 2014, Defendants Sheriff Garcia and Sergeants Coker and Jones filed a motion for summary judgment. (Instrument No. 63). On November 5, 2012, Plaintiff filed a response, and on November 12, 2014, Defendants filed a reply. (Instrument Nos. 84; 86).

On September 16, 2014, Defendant Harris County filed a motion for summary judgment. (Instrument No. 72). On November 5, 2014, Plaintiff filed a response, and on November 24, 2014, Defendants filed a reply and objections. (Instrument Nos. 83; 88).

On September 16, 2014, Defendants Deputies Lopez, Medina, Goldstein, Salazar, Lobos, Auzenne, Wilks, DeAlejandro, and Goerlitz filed a motion for summary judgment. (Instrument No. 74). On November 5, 2014, Plaintiff filed a response, and on November 18, 2014, Defendants filed a reply and objections. (Instrument Nos. 82; 87).

II.

As a preliminary matter, Defendants have filed 26 objections to summary judgment evidence offered by Plaintiff in response to Defendant's motions for summary judgment. (Instrument Nos. 87; 88). The majority of Defendants' objections are as to the relevance of statements and evidence related to dangers associated with certain police practices and whether

the deputies in question were trained on those dangers. Fed. R. Evid. 401.

On a motion for summary judgment, "the admissibility of evidence . . . is subject to the usual rules relating to form and admissibility of evidence." *Munoz v. Int'l Alliance of Theatrical Stage Emps. & Moving Picture Mach. Operators of U.S. & Can.*, 563 F.2d 205, 213 (5th Cir. 1977). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The hearsay rules as prescribed by Federal Rules of Evidence 801 and 802 apply with equal force in the summary judgment context. *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006). Furthermore, conclusory statements, unsubstantiated and subjective beliefs, and speculative statements are not proper summary judgment evidence. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

As the Court's analysis will show, the Court did not need to rely upon the evidence objected to by Defendants. Much of the evidence was duplicative of other evidence properly received and considered, and therefore, the Court's consideration of contested pieces of evidence was unnecessary to the resolution of these motions. *See Floyd v. Hefner*, 556 F.Supp.2d 617, 636 (S.D. Tex. 2008) (overruling objections to evidence which was duplicative of other evidence in the summary judgment record), *see also Romero v. Lynaugh*, 884 F.2d 871, 879 (5th Cir. 1989) (holding that failure to object to evidence which was duplicative of evidence properly received is not prejudicial). Accordingly, Defendants' objections are **OVERRULED**. (Instrument No. 87; 88). *Brantley v. In-*

spectorate Am. Corp., 821 F. Supp. 2d 879, 886 (S.D. Tex. 2011) (Gilmore, J.).

III.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322; *Warfield v. Byron,* 436 F.3d 551, 557 (5th Cir. 2006).

The "movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex*, 477 U.S. at 322-25). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate

the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*,

402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

After the moving party has met its burden, in order to "avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The party opposing summary judgment cannot merely rely on the contentions contained in the pleadings. *Little*, 37 F.3d at 1075. Rather, the "party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim," *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 457, 458 (5th Cir. 1998); *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). Although the court draws all reasonable inferences in the light most favorable to the nonmoving party, *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008), the nonmovant's "burden will not be satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Boudreaux*, 402 F.3d at 540 (*quoting Little*, 37 F.3d at 1075). Similarly, "unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of

law are insufficient to defeat a motion for summary judgment." *Clark v. Am's Favorite Chicken*, 110 F.3d 295, 297 (5th Cir. 1997).

In deciding a summary judgment motion, the district court does not make credibility determinations or weigh evidence. *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 612 n.3 (5th Cir. 2009). Nor does the court "sift through the record in search of evidence to support a party's opposition to summary judgment." *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 379-80 (5th Cir. 2010); *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003); *Ragas,* 136 F.3d at 458; *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (it is not necessary "that the entire record in the case ... be searched and found bereft of a genuine issue of material fact before summary judgment may be properly entered"). Therefore, "[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Malacara*, 353 F.3d at 405.

IV.

42 U.S.C. § 1983 provides a private right of action for the deprivation of rights, privileges, and immunities secured by the Constitution or laws of the United States. "Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citations omitted). "The first step in any such claim is to

identify the specific constitutional right allegedly infringed." *Id*.

"Claims that law enforcement officers used excessive force are analyzed under the Fourth Amendment." *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). "The Fourth Amendment's protection against unreasonable seizures of the person has been applied in causes of action under 42 U.S.C. § 1983 to impose liability on police officers who use excessive force against citizens." *Colstent v. Barnhgart*, 130 F.3d 96, 102 (5th Cir. 1997). To show excessive force in violation of the Fourth Amendment, "a plaintiff must establish: (1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Harris v. Serpas*, 747 F.3d 767, 772 (5th Cir. 2014) (citations omitted). Courts must assess the reasonableness of each defendant's actions separately even if those defendants are found to be acting in unison. *Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir. 2007).

The Supreme Court has held that courts must consider the "totality of the circumstances" when assessing the reasonableness of law enforcement officer's use of force. *Graham v. Connor*, 490 U.S. 386, 396 (1989). "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force paying careful attention to the facts and circumstances of each particular case." *Luna v.*

Mullenix, 765 F.3d 531, 537 (5th Cir. 2014). Courts, therefore, consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Reasonableness is assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (citing *Graham*, 490 U.S. at 396.

The Supreme Court has long held that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Tennessee v. Garner, 471 U.S. 1, 11-12 (1985). Therefore, the "[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others." *Mace*, 333 F.3d at 624. "[N]either the Supreme Court nor [the Fifth Circuit] has ever

held that *all* of the *Graham* factors must be present for an officer's actions to be reasonable; indeed, in the typical case, it is sufficient that the officer reasonably believed that the suspect posed a threat to the safety of the officer or others. *Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011).

A.

Plaintiff claims that Deputies Wilks, Medina, Salazar, Goldstein, and Lopez used excessive force in violation of the Fourth Amendment, through their use of tasers, prone restraint, hog-tying, and other unreasonable physical force. Plaintiff claims that Deputies Auzenne, DeAlejandro, Goerlitz, and Lobos were present and failed to protect Pratt from this excessive force. Plaintiff also claims that Sheriff Garcia and Sergeants Coker and Jones violated Pratt's Fourth Amendment rights by failing to supervise the deputies in question. All of the individual Defendants have asserted the defense of qualified immunity.

Qualified immunity is an affirmative defense that exists to shield government officials from liability "when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370-31 (5th Cir. 2011). The defense is available to government officials who perform discretionary functions "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The standard serves to protect constitutional rights, while allowing government officials to effectively perform their duties. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

Although qualified immunity is an affirmative defense, the plaintiff bears the burden of negating qualified immunity once it has been properly raised by the defendant. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). To meet this burden, the plaintiff must show that the defendant committed an unreasonable violation of a clearly established constitutional right, or demonstrate that there is an issue of fact for the jury on this issue. *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005). The plaintiff cannot rest on conclusory allegations and assertions, but rather must demonstrate genuine issues of material fact regarding the reasonableness of the official conduct. *Id.*

Courts apply a two-prong test to determine whether a plaintiff has met this burden: (1) whether a constitutional right would have been violated on the facts alleged, and (2) whether the right at issue was "clearly established" at the time of the misconduct, rendering the conduct objectively unreasonable. *Saucier v. Katz*, 533 U.S. 193, 201 (2001). Courts are, however, permitted to exercise their sound discretion in determining which of the two prongs to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). A right is deemed to be clearly established when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right." *Wernecke v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009). "That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citations

omitted). The Fifth Circuit has clarified that the plaintiff must "point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 371-72.

1.

First, Plaintiff has presented no evidence that Pratt's death resulted directly and only from an excessive use of force by Deputies Wilks, Medina, Lopez, Goldstein, and Salazar. *See Harris*, 747 F.3d at 772. The autopsy report found that the cause of death was undetermined, because the ingestion of cocaine and ethanol could not be separated from the deputies' potential contributions to Pratt's asphyxiation. *See* (Instrument No. 82-6 at 24). Furthermore, Plaintiff's own expert, Dr. Grossberg, concluded that the cause of death was multifactorial, based on the conduct of the deputies, the presence of drugs in Pratt's system, and Pratt's existing health issues. *See* (Instrument No. 82-26 at 10-11). Insofar as Plaintiff asserts that Pratt's death is the injury in this claim, there is no evidence that it was caused directly and only by excessive force. *See Graniczny v. City of El Paso, Tex.*, 809 F. Supp. 2d 597, 610 (W.D. Tex. 2011) ("The Officers cannot be held responsible for the unexpected, albeit tragic result, of their use of necessary force."). However, there is ample evidence in the record that Pratt may have sustained numerous other physical injuries, including taser burns, neck injuries, and other blunt force injuries as a direct result of the use of force by the deputies. *See* (Instrument No. 82-6 at 24).

Plaintiff may overcome the presumption of qualified immunity in this case, by showing that there is a fact issue as to whether any of these Defendants unreasonably violated a clearly established constitutional right. *See Michalik*, 422 F.3d at 262. The Fifth Circuit has recognized the complexity of analyzing qualified immunity in the context of an excessive force claim, because of the "overlapping objective reasonableness inquiries." *See Lytle v. Bexar County, Texas*, 560 F.3d 404, 410 (5th Cir. 2009). The plaintiff must show that Defendants unreasonably violated Pratt's clearly established constitutional rights, in this case by causing injury through unreasonably excessive force. *See Harris*, 747 F.3d at 772.

In *Deshotel v. Marshall*, 454 F. App'x 262 (5th Cir. 2011), the Fifth Circuit considered the use of force in subduing a burglary suspect. The court found that officers' straddling of the suspect, pulling on his arms, kneeling on his shoulder, and folding of his legs to stop him from kicking were all objectively reasonable, considering the size of the suspect and his immediate attempts to flee. *Id.* at 267-68.

The Fifth Circuit has also addressed when the use of a taser constitutes excessive force. The Fifth Circuit has noted that the use of a taser is not comparable to the use of a firearm and does not necessarily constitute deadly force. *Batiste v. Theroit*, 458 F. App'x 351, 354 (5th Cir. 2012) (Noting in the context of a deadly force analysis that there is no support "for the inference that the use of a taser is comparable to discharging a firearm. There are no cases in this circuit that support this proposition and we decline to so rule."). Courts have recognized that the question of whether a taser constitutes excessive force often turns on whether the

taser is used while the suspect is resisting, as opposed to when the suspect is either not resisting or has ceased resisting. *See Cockrell v. City of Cincinnati*, 468 F. App'x 491, 495-96 (6th Cir. 2012); *Williams v. City of Cleveland, Miss.*, No. 2:10CV215-SA-JMV, 2012 WL 3614418, at *8 (N.D. Miss. Aug. 21, 2012) *aff'd*, 736 F.3d 684 (5th Cir. 2013). Use of a taser in cases where the person is suspected only of a minor crime and does not attempt to flee or resist arrest, or has ceased resisting, is often found to be unreasonable. *See e.g. Newman v. Guedry*, 703 F.3d 757, 762 (5th Cir. 2012) *cert. denied sub nom. Guerdry v. Newman*, 134 S. Ct. 162 (2013); *Anderson v. McCaleb*, 480 F. App'x 768, 773 (5th Cir. 2012). On the other hand, the Fifth Circuit has found that force, including the use of a taser, is often appropriate or at least entitled to qualified immunity, where the arrestee is resisting or violent. *See Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012), *see also Rakestrau v. Neustrom*, No. 11-CV-1762, 2013 WL 1452030, at *10 (W.D. La. Apr. 8, 2013) (describing the state of the law in the Fifth Circuit and elsewhere, and noting that whether the use of a taser constitutes excessive force generally turns on whether the arrestee is resisting or otherwise violent).

The Fifth Circuit has also, on multiple occasions, considered whether an officer's use of a hog-tie restraint constitutes excessive force. In *Gutierrez v. City of San Antonio*, 139 F.3d 441, 442-43 (5th Cir. 1998), the officers identified an undressed person walking through a crowded intersection, who informed them that he was on cocaine. The officers called an ambulance, and utilized a hog-tie after the man struggled with them and kicked an EMT in the

chest. *Id.* at 443. The officers then placed the man in the back of their squad car and drove him to the hospital. *Id.* Upon arriving at the hospital, he was pronounced dead. *Id.* The Fifth Circuit held that in a very limited set of circumstances hog-tying may constitute excessive force. *Id.* at 451. The court focused on the existence of a study showing that hog-tying a person experiencing cocaine psychosis could result in death. *Id.* at 446-47, 449-51. The Fifth Circuit later clarified that to defeat qualified immunity under *Gutierrez*, a plaintiff must show: (1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hog-tying. *See Wagner v. Bay City, Texas*, 227 F.3d 316, 323-24 (5th Cir. 2000).

The Fifth Circuit revisited this issue in *Hill v. Carroll County, Miss.*, 587 F.3d 230 (5th Cir. 2009). In *Hill*, the police responded to a fight between two women, and ultimately used a hog-tie on one of the women who continued to kick and resist after being handcuffed. *Id.* at 232- 33. The officers then placed that women in the backseat of their squad car, and when they arrived at the jail, she was pronounced dead. *Id.* at 233. The Fifth Circuit noted the limited nature of the *Gutierrez* opinion, and held that there was no excessive force, because the study on which *Gutierrez* relied had been called into question, and because of an absence of evidence that the present officers were aware of the study. *Id.* at 235-37. The Fifth Circuit has more recently held that the officers must be aware that the arrestee is on drugs, and thus at a heightened risk, for the rule in *Gutierrez* to apply. *Khan v. Normand*, 683 F.3d 192, 195-96 (5th Cir. 2012). The court has also continued to call into question the findings of the study relied upon in *Gutierrez*. *Id.*

Deputy Wilks is the officer alleged to have hog-tied Pratt during the altercation. While Deputy Wilks denies that he cuffed Pratt's feet to his hands, there is evidence to the contrary, and therefore there is a factual dispute about whether or not a hog-tie was employed. *See* (Instrument Nos. 82-3 at 43-44; 82-35 at 4). Nevertheless, in this context, the Court cannot find that Deputy Wilks's use of a hog-tie constituted an unreasonable violation of a clearly established constitutional right. *See Saucier*, 533 U.S. at 201. The fact that Deputy Wilks later testified that he believed hog-tying was unconstitutional speaks only to his awareness of the potential illegality of the practice, but does not inform this Court's determination of whether or not the underlying conduct was in fact unconstitutional. (Instrument No. 82-14 at 15-16). Furthermore, the fact that the practice may have been against departmental policies does not demonstrate a constitutional violation. *See Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986). In this case, it is undisputed that Pratt was resisting the officers, and that, even after being cuffed, he continued to kick his legs at Deputy Goldstein. *See* (Instrument Nos. 74-2 at 3; 74-4 at 3-4)**.** Plaintiff argues that Pratt was not resistant based on the witness statements of Cynthia Dean ("Ms. Dean") and Mike Holder ("Mr. Holder"). However, Plaintiff misrepresents these statements. Both Ms. Dean and Mr. Holder testified that they observed the incident from their windows, but both noted that parts of the incident were obscured. (Instrument Nos. 82-20; 82-21). Furthermore, both witnesses testified to Pratt's erratic, aggressive, and evasive behavior. *Id*. Mr. Dean specifically noted that Pratt was "scary looking," and that the deputies consist-

ently asked for Pratt to stop running or stop resisting, and that they only utilized force when he was non-compliant. (Instrument No. 82-21). At no point, does either witness state that Pratt had ceased all aggression or resistance prior to some use of force by the deputies. Furthermore, there is no evidence that Deputy Wilks had any knowledge of Pratt's drug use. While Deputy Wilks testified that Pratt's erratic behavior suggested her might have been on drugs, (Instrument No. 74-7 at 3), there is no evidence that Pratt informed the deputies of his drug use, as the deceased had in *Gutierrez*. There is also ample testimony that Pratt was a very large man, and that the numerous responding deputies had struggled to restrain him. *See* (Instrument Nos. 74-4 at 4; 82-20; 82-21). The use of a hog-tie, has been found to be a reasonable use of force in restraining violently resisting arrestees, particularly where the officer is not expressly aware of factors such as drug use which might aggravate the risks of using such force. *Hill*, 587 F.3d at 235-37; *Khan*, 683 F.3d at 195-96. Assuming all disputed facts in favor of Plaintiff, Deputy Wilks is entitled to qualified immunity for his actions in restraining Pratt, because hog-tying Pratt under these circumstances did not constitute unreasonably excessive force. *See Saucier*, 533 U.S. at 201.

Deputy Medina is the primary officer alleged to have deployed his taser during the altercation. Deputy Medina responded to an accident and complaints of a disturbance, and, according to his testimony, found Pratt, apparently preparing to assault Lopez. (Instrument No.s 74-3 at 3). There is no dispute that Medina deployed his taser while in pursuit of Pratt, who was evading Lopez at the time.

(Instrument No. 74-2 at 3; 74-3 at 3). The taser downloads demonstrate that his taser was used five times, which is largely consistent with the testimony of the deputies; that Deputy Medina tased Pratt in probe mode while chasing him, and tased him numerous times in drive mode, while he was resisting the deputies' restraint. (Instrument No. 82-16). Courts have consistently found that the use of a taser where the suspect is resisting arrest or posing a threat to officers is reasonable, and that officers are entitled to qualified immunity in such cases. *See Poole*, 691 F.3d at 629; *Rakestrau*, 2013 WL 1452030, at *10. Assuming the facts in the light most favorable to Plaintiff, Deputy Medina responded to Pratt with measured and ascending actions, including the use of the taser to subdue Pratt. *See Poole*, 691 F.3d at 629. Assuming all disputed facts in favor of Plaintiff, Deputy Medina is entitled to qualified immunity for his use of a taser against Pratt, because tasing Pratt five times under these circumstances did not constitute unreasonably excessive force. *See Saucier*, 533 U.S. at 201.

The remaining deputies employed other force as they assisted Deputies Medina and Wilks in the restraint of Pratt. Deputy Salazar testified that he placed his knee on Pratt's back while he was being restrained by other deputies. (Instrument No. 74-5 at 3-4). Deputy Goldstein helped to restrain and handcuff Pratt, and while Pratt resisted, he held his legs, crossed them, and bent his knees so that his feet were close to his buttocks. (Instrument Nos. 74-2 at 3-4; 74-3 at 3-5; 74-4 at 3). Deputy Lopez was the first officer at the scene, and attempted to discharge his taser after Pratt appeared aggressive and then attempted to flee. (Instrument Nos. 82-18 at

23-24; 74-2 at 3). There is a dispute about precisely when Pratt was on his back or on his stomach, but the level of force used by these deputies was reasonable given the size of Pratt, his numerous attempts to resist and escape, and his overall erratic behavior. *See Deshotel*, 454 F. App'x at 267-68. Based on a totality of the circumstances, the conduct of Deputies Salazar, Goldstein, and Lopez entitles them to qualified immunity. *See Saucier*, 533 U.S. at 201.

Accordingly, Deputies Wilks's, Medina's, Salazar's, Goldstein's, and Lopez's motion for summary judgment on Plaintiff's Section 1983 actions is GRANTED.

2.

Plaintiff also alleges that Deputies Auzenne, DeAlejandro, Goerlitz, and Lobos were present and failed to protect Pratt from this excessive force. An officer can be liable under Section 1983 for failing to prevent another officer's use of excessive force where the bystanding officer: (1) knew that a fellow officer was violating an individual's constitutional rights, (2) had a reasonable opportunity to prevent the violation, and (3) chose not to act. *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013).

The Court has already found that the deputies who engaged in direct conduct with Pratt were entitled to qualified immunity. Therefore, the bystander deputies are entitled to qualified immunity on the issue of whether they knew a fellow officer was violating Pratt's constitutional rights. *See Whitley*, 726 F.3d at 646.

Accordingly, Deputies Auzenne's, DeAlejandro's, Goerlitz's, and Lobos's motion for summary judgment on Plaintiff's Section 1983 actions is GRANTED.

3.

Paintiff also claims that Sheriff Garcia and Sergeants Coker and Jones violated Pratt's Fourth Amendment rights by failing to supervise the deputies in question. (Instrument No. 84)

In § 1983 actions, supervisors cannot be held vicariously liable for the actions of subordinate government officials on a pure *respondeat superior* theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Rather, plaintiffs "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id*. Liability is found where supervisory officials affirmatively participate in acts that cause the constitutional violation or where they implement unconstitutional policies that result in injury. *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987). Furthermore, where the supervisor is not personally involved in a constitutional violation, he or she may still be held liable for violations by subordinate employees where the supervisor acts, or fails to act, with deliberate indifference to the violations. *Atteberry v. Nocona General Hosp*., 430 F.3d 245, 254 (5th Cir. 2005). Where a plaintiff claims that a supervisor failed to train or supervise a subordinate officer, he or she must show the following elements: (1) the supervisor either failed to supervise or train the subordinate; (2) a causal link exists between the failure to train or supervise and the violation

of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference to the constitutional right allegedly violated. *See Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381-82 (5th Cir. 2005).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that the municipal actor disregarded a known or obvious consequence of his action." *Board of County Comm'rs of Bryan Cty v. Brown*, 520 U.S. 397, 410 (1997). The plaintiff cannot simply show negligence, or even gross negligence, but rather must demonstrate that the official was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also draw the inference." *Estate of Davis ex rel. McCully v. city of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (citing *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)). As applied to supervisor liability, government supervisors are found liable not only where there is a "substantial risk of serious harm," but where some deficiency by the supervisor is "obviously likely to result in a constitutional violation." *Estate of Davis*, 406 F.3d at 381.

Generally, proof of more than a single instance of lack of training or supervision causing a violation of constitutional rights is required to show deliberate indifference. *See Estate of Davis,* 406 F.3d at 381.

> To rely on the "single incident" exception, a plaintiff must prove that the "highly probable" consequence of a failure to train or supervise would result in the specific injury suffered,

> and that the failure to train or supervise represents the moving force behind the Constitutional violation.

Khansari v. City of Houston, No. CIV.A. H-13-2722, 2014 WL 1401857, *17 (S.D. Tex. Apr. 9, 2014) (citing *Estate of Davis*, 406 F.3d at 385-86). A failure to train claim must be based on an underlying constitutional violation. *Whitley*, 726 F.3d at 648.

The Court has already found that the deputies who engaged in direct conduct with Pratt were entitled to qualified immunity. Therefore, the supervisory officials are entitled to qualified immunity on the issue of whether they were deliberately indifferent to Pratt's constitutional rights through some failure to train or supervise the deputies. *See Whitley*, 726 F.3d at 648.

Furthermore, Plaintiff has offered no evidence to show that Sheriff Garcia or Sergeants Coker and Jones were deliberately indifferent to a constitutional violation in their failure to train or supervise the deputies. *See Estate of Davis*, 406 F.3d at 381-82.

Plaintiff argues that the supervisors were on notice of the need for training with respect to prone restraint, tasing, and hog-tying. Plaintiff notes that, in February of 2009, a jury in a Harris County case found the County liable for the death of a man in custody who was repeatedly tased, restrained, and hog-tied. (Instrument No. 84-42). Plaintiff also relies on the testimony of Deputy Garrett Demilia, an Academy Trainer, who testified that his general training for depuites did not cover hog-tying specifically. (Instrument No. 84-28 at 21). However, Deputy Demilia specifically notes that the practice is outlawed, and that he does not know if hog-tying is

addressed in other trainings. *Id.* Moreover, all of the deputies were trained to state standards and on the procedures of the Harris county Sheriff's office and were licensed by the State of Texas as peace officers. (Instrument No. 63-3 at 2). There is no evidence that the training program in question did not "enable officers to respond properly to the usual and recurring situations with which they must deal." *See Benavides v. Cnty. of Wilson*, 955 F.2d 968, 973 (5th Cir. 1992) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391 (1989)). Furthermore, Plaintiff has offered no evidence that any of the supervisors had actual knowledge of any prior incidents or of a risk of constitutional violations, so as to demonstrate deliberate indifference. *See McClendon v. City of Columbia,* 305 F.3d 314, 326 (5th Cir. 2002). Nor does one prior incident demonstrate that the department's alleged failure to specifically train on these issues was likely to result in constitutional violations. *See Estate of Davis*, 406 F.3d at 381. There is no evidence that the failure to train or supervise in this case amounts to deliberate indifference to the constitutional right allegedly violated. *Id.*

Therefore, Sheriff Garcia and Sergeants Coker and Jones are entitled to qualified immunity. *See Saucier*, 533 U.S. at 201. Accordingly, Sheriff Garcia's and Sergeants Coker's and Jones's motion for summary judgment on Plaintiff's Section 1983 actions is GRANTED.

B.

Plaintiff also claims that Harris County is liable for violations of Pratt's constitutional rights. Plaintiff offers numerous theories of liability based on the

County's official policies, informal policies, failure to train, failure to supervise, and ratification. (Instrument No. 83).

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), the Supreme Court held that municipalities are persons subject to lawsuits under 42 U.S.C. § 1983. However, as in the case of supervisory liability, municipalities cannot be held liable on a *respondeat superior* basis. *Monell*, 436 U.S. at 690-91. Rather, for a municipality to be held liable under Section 1983, the municipality itself must cause a violation of constitutional rights. *Monell*, 436 U.S. at 694-95.

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694-95. To state a claim for municipal liability under § 1983, a plaintiff must identify: (a) a policy maker, (b) an official policy, custom, or widespread practice, and (c) a violation of constitutional rights whose moving force is the policy or custom. *See Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir.2001). A plaintiff must do more than identify conduct attributable to the municipality; he or she must demonstrate that the municipality was the "moving force" behind the injury alleged. *Bryan County*, 520 U.S. at 404. "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and

must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S. at 404.

An official policy under *Monell* is a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984). Alternatively, a policy may be a "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Bennett*, 735 F.2d at 862. "Allegations of an isolated incident are not sufficient to show the existence of a custom or policy." *Fraire v. City of Arlington,* 957 F.2d 1268, 1278 (5th Cir.1992). "Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Bennett*, 735 F.2d at 862.

A municipality may also be liable on a "ratification" theory, if the "subordinate's decision is subject to review by the municipality's authorized policymakers" and "the authorized policymakers approve [the] subordinate's decision and the basis for it[.]" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). "For example, if a school board-a policymaker . . . approves a superintendent's decision to transfer an outspoken teacher, knowing of the superintendent's retaliatory motive for doing so, the government entity itself may be liable; but if the school board lacks such awareness of the basis for the

decision, it has not ratified the illegality and so the district itself is not liable." *Milam v. City of San Antonio,* 113 F. App'x. 622, 626 (5th Cir.2004). "Whether a governmental decision maker has final policymaking authority is a question of law." *Pembauer v. City of Cincinnati,* 475 U.S. 469, 483 (1986).

"For a municipality to be liable on account of its policy, the plaintiff must show, among other things, either (1) that the policy *itself* violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality's policymakers with deliberate indifference as to its known or obvious consequences[.]" *Johnson v. Deep E. Texas Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (citations omitted). The latter showing "generally requires that a plaintiff demonstrate at least a pattern of similar violations." *Burge v. St. Tammany Parish,* 336 F.3d 363, 370 (5th Cir.2003).

Inadequate training may be the basis of municipal liability in a limited number of circumstances. *City of Canton*, 489 U.S. at 388. As in the case of supervisory liability, municipality liability applies "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. The Fifth Circuit has identified "two ways in which a plaintiff can establish a municipality's deliberate indifference to the need for proper training." *Kitchen v. Dallas Cnty., Tex.*, 759 F.3d 468, 484 (5th Cir. 2014). One way is to demonstrate that the municipality had notice of "a pattern of similar violations," which were "fairly similar to what ultimately transpired," and where the

"prior act . . . involved injury to a third party." *Sanders-Burns v. City Of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). The other approach, allows for liability based on a single incident in a "narrow range of circumstances where a constitutional violation would result as the highly predictable consequence of a particular failure to train." *Kitchen*, 759 F.3d at 484 (internal quotations omitted).

In this case, Plaintiff cannot show that Harris County had an official policy that authorized the purported constitutional violations. In fact, the Harris County Sheriff's Department had an express policy on the use of force by deputies which stated: "A Deputy is authorized only to use the necessary and reasonable amount of force to effect an arrest and deter any aggression or resistance on the part of the subject being arrested. The Deputy's actions will be guided by the offender's level of resistance, as identified above." (Instrument No. 83-41 at 18). Furthermore, the department had an explicit policy against the use of hog-tying. (Instrument No. 83-22).

Nor has Plaintiff demonstrated that certain practices were so persistent and widespread "as to constitute a custom that fairly represents municipal policy." *Bennett*, 635 F.2d at 862. Plaintiff relies on evidence that between 2007 and 2010, taserswere deployed more than three times during one incident on at least 24 occasions. (Instrument Nos. 83-43; 83-44). However, without knowing the circumstances of these cases, the most that can be said is that there was widespread usage of tasers. This says nothing of the reasonableness of taser usage on a given occasion. Plaintiff also notes that numerous deputies testified that they could not recall trainings on dangers

associated with multiple tasings, or tasing somebody who is restrained or in an excited state. (Instrument Nos. 83-13 at 20; 83-19 at 21-22). However, that deputies do not recall training on this says nothing of whether or not some unconstitutional conduct was so widespread as to constitute an unofficial custom of Harris County. There is simply no evidence of a persistent and widespread practice fairly representing municipal policy. *See Bennett*, 735 F.2d at

862. Furthermore, the Court found that the force utilized in this case was not unreasonable, and therefore, Plaintiff cannot show a violation of constitutional rights whose "moving force" is some policy or custom. *See Piotrowski,* 237 F.3d at 578.

Plaintiff also alleges that Harris County failed to properly train its officers on prone restraint, use of tasers, and implementation of crisis intervention techniques. Plaintiff's arguments here are largely the same as those asserted in the failure to train claim against the supervisory officials; specifically that deputies were not trained on hog-tying or on proper taser use. It is not enough to simply show that a particular officer is unsatisfactorily trained. *See City of Canton*, 489 U.S. at 390. The Court has already found that the conduct by the deputies in question was not unreasonable and that the supervisors are not liable on a failure to train theory of liability. Here too, Plaintiff has offered no evidence either that there was a pattern of similar violations or that a constitutional violation was a highly predictable consequence of the failure to train in this manner. *See Kitchen*, 759 F.3d at 484.

Plaintiff's final theory of municipal liability is that Harris County ratified certain unconstitutional

conduct by failing to discipline deputies or change its policies following the IAD investigation of this incident. (Instrument No. 83 at 41-42). Plaintiff, specifically notes that the IAD investigation concluded that Pratt was hog-tied, and that the practice is prohibited. *See generally* (Instrument No. 83-3). The ratification theory is reserved for "extreme factual situations." *See Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986). Even were this Court to find that the IAD investigation somehow ratified the underlying conduct of the deputies in this case, because the Court has found that conduct was reasonable, Plaintiff cannot show that the IAD investigation was the moving cause of any constitutional violation. *See Piotrwoski*, 237 F.3d at 578.

Therefore, Plaintiff has failed to provide any evidence of a violation of constitutional rights whose moving force was the policy or custom of Harris County. *See Piotrowski*, 237 F.3d at 578. Accordingly, Harris County's motion for summary judgment on all *Monell* liability constitutional claims is GRANTED.

V.

Plaintiff has also sued Defendants for the wrongful death of Pratt under Texas Civil Practices and Remedies Code §§ 71.002, 71.021 and the Texas Tort Claims Act. However, a "plaintiff cannot pursue pendent state claims under the Texas Tort Claims Act where they are based on a single event, an event alleged under a contemporaneous § 1983 cause of action to be an intentional tort." *Drain v. Galveston Cnty.*, 979 F. Supp. 1101, 1104-05 (S.D. Tex. 1997) (*citing Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir.

1994). In this case, the "negligent" conduct alleged in Plaintiff's state law claim, is precisely the same as the intentional conduct alleged in the Section 1983 claims. *See generally* (Instrument No. 16). Plaintiff has offered no response on this issue.

Accordingly, Defendants motions for summary judgment on Plaintiff's claims under Texas Civil Practices and Remedies Code §§ 71.002, 71.021 and the Texas Tort Claims Act are GRANTED.

VI.

Based on the foregoing, IT IS HEREBY ORDERED THAT Defendants Sheriff Garcia's and Sergeants Coker's and Jones's motion for summary judgment (**Instrument No. 63**) is **GRANTED**. IT IS FURTHER ORDERED THAT Defendant Harris County's motion for summary judgment (**Instrument No. 72**) is **GRANTED**. IT IS FURTHER ORDERED THAT Defendants Deputies Lopez's, Medina's, Goldstein's, Salazar's, Lobos's, Auzenne's, Wilks's, DeAlejandro's, and Goerlitz's motion for summary judgment (**Instrument No. 74**) is **GRANTED.**

The Clerk shall enter this ORDER and provide a copy to all parties.

SIGNED on this 15th day of January, 2015, at Houston, Texas.

s/ Vanessa D. Gilmore
Vanessa D. Gilmore
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-20080

ERONY PRATT, Individually, and as Representative of the Estate of Wayne Pratt, Deceased	)
Plaintiff-Appellant	)
v.	)
HARRIS COUNTY, TEXAS; ADRIAN GARCIA, Harris County Sheriff; MICHAEL MEDINA, Deputy; VINCENT LOPEZ, Deputy; TARZIS LOBOS, Deputy; BRIAN GOLDSTEIN, Deputy; TOMMY WILKS, JR., Deputy; FRANCISCO SALAZAR, Deputy; B.J. AUZENE, Deputy; R. DEALEJANDRO, JR., Deputy; R.M. GOERLITZ, Deputy; E.M. JONES,	)

Sergeant; M. COKER, Sergeant,)
)
Defendants-Appellees)
_____)

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion May 3, 2016, 5 Cir., _____, _____ F.3d _____)

BEFORE JOLLY, HAYNES, and COSTA, Circuit Judges.

PER CURIUM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active

service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE

APPENDIX D

EXCERPT OF AFFIDAVIT OF MICHAEL D. LYMAN, PH.D.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ERONY PRATT, individually and as Representative of the estate of WAYNE PRATT, deceased,	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION NO. H-12-1770**
HARRIS COUNTY , TEXAS, et al.	§	
Defendants.	§	

AFFIDAVIT OF MICHAEL D. LYMAN, PH.D.

II. The use of the four-point restraint technique by Deputies Wilks, Medina, Goldstein and Salazar against Mr. Pratt was improper, reckless and inconsistent with departmental policy and nationally recognized standards of care.

"Another concern in this case is evidence that Mr. Pratt was handcuffed and in custody, he began to walk away and was forcefully directed to the asphalt by Deputy Salazar. At this time Deputy Wilks and Goldstein hobbled his feet with his legs bent back toward his buttocks and then adjoined with the handcuffs in a "four-point" or "hog-tie" position. Mr. Pratt's four-point or "hog-tie" position is supported by the Internal Affairs report which states,

> 'The description provided in the incident report on how the hobble was applied appears to be consistent with 'hog-tying,' which is prohibited per department manual.[45] The report further stated, 'While Mr. Pratt was turned on his stomach, Deputy Wilkes [sic] applied a nylon hobble to Mr. Pratt's ankles then attached the hobble to the handcuffs to prevent Mr. Pratt from kicking the deputies any further. The hobble was on Mr. Pratt for approximately a minute.[46]

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[45] Internal Affairs Case Summary Report by K. Malveaux dated September 27, 2010, p. 43

[46] Internal Affairs Case Summary Report by K. Malveaux dated September 27, 2010, p. 43

"This resulted in Pratt remaining in a face down, prone position on the asphalt while handcuffed in the back – a clear violation of department policy.[47] Allowing a handcuffed subject to remain in this position, in-and-of-itself is dangerous, as by virtue of being on one's stomach and hobbled in a "hog-tie" position, a person's ability to breath freely is likely to be inhibited. A reasonable officer would know this.

The International Association of Chiefs of Police (IACP): The IACP has addressed the concern about the use of four-point restraints for a number of years. Their cautions to law enforcement are clear:

'…arrestees should not be restrained face-down in the four-point restraint (that is, with hands and feet bound behind their back) unless the arrestee is violently resisting and is placed on his or her side to facilitate breathing.'[48]

"The IACP further states,

> 'To briefly summarize concerns over the four-point restraint, for years numerous deaths have occurred among suspects who, while in custody of the police, have been restrained in the four-point restraint or what has been referred to as the hog-tie position. Studies have indicated that when a suspect is facedown on his or her stomach, respiration is impaired and the result may be position asphyxia—in effect, the sus-

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[47] Medina's statement found in Internal Affairs Case Summary Report by K. Malveaux dated September 27, 2010, p. 23

[48] International Association of Chiefs of Police. Arrest: Concepts and Issues Paper (June 2006; August 2010), p. 3

> pect dies of suffocation. The potential is more likely in situations where the suspect is overweight, has exerted substantial energy resisting arrest or in other ways prior to being restrained, and even more so if the suspect has ingested alcohol or drugs, or both, prior to the event.[49]

Harris County Sheriff's Department Policy: Less Lethal Impact and Restraining Devices: Policy 502. Contained in this policy is the following statement:

'Restraining a prisoner through a procedure commonly known as 'hog-tying' shall not be utilized (CALEA standard 70.2.1)'[50]

"Both the IACP and Harris County Sheriff's policy 502 are clear that officers should not restrain a subject by 'hog-tying' them due to the risk of suffocation to the arrested person. That said, the sheriff's policies are contradictory and confusing because (1) deputies are authorized to use a hobble but yet (2) are prohibited from using the procedure commonly known as 'hog-tying. [sic] Nowhere in the Harris County Sheriff's policy is 'hog-tying' defined.

According to the IACP a four-point restraint is the same thing as 'hog-tying' because the subject's hands and feet are bound behind their back. Employment of a hobble is a method for employing the

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[49] International Association of Chiefs of Police. Arrest: Concepts and Issues Paper (June 2006; August 2010), p. 3

[50] Harris County Sheriff's Department Policy: Less Lethal Impact and Restraining Devices: Policy 502, p. 5

four-point restraint. Thus to use the hobble in this fashion is effectively to 'hog-tie' a subject.

"The hobble is a tool that enables 'hog-tying.' When deputies are forbidden to use the 'hog-tying' procedure but at the same time are authorized to use a hobble, it is little wonder why Mr. Pratt was subject to restrain [sic] in the manner described by the defendant officers. This is especially so considering there are no statements in the department policy making it clear exactly what 'hog-tying' is or identifying the hazards of 'hog-tying.'