Case Nos. 13-7034 & 13-7035
(D.C. No. 6:12-CV-00085-FHS)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERMA ALDABA, as personal representative
and next of kin to Johnny Manuel Leija, deceased,,

Plaintiff/Appellee,

v.

BRANDON PICKENS; JAMES ATNIP; STEVE BEEBE;

Defendants/Appellants

APPELLANTS' SUPPLEMENTAL BRIEF

ORAL ARGUMENT NOT REQUESTED

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The Defendants/Appellants in this matter, Brandon Pickens ("Pickens"), James Atnip [1] ("Atnip"), and Steve Beebe ("Beebe")(altogether "Defendants") hereby submit their Supplemental Brief as ordered by this Court.

I. INTRODUCTION

The United States Supreme Court ("Supreme Court") has vacated the opinion rendered in this matter and ordered that the case be reconsidered in light of the Supreme Court's reiteration of the qualified immunity doctrine in the *Mullenix v. Luna* opinion, 136 S. Ct. 305 (November 9, 2015). Applying the qualified immunity doctrine pursuant to the Supreme Court's admonition in *Mullenix* clearly requires reversal of the District Court's denial of summary judgment on the grounds of qualified immunity.

The qualified immunity test reiterated by the Supreme Court in *Mullenix* is quite different from the test used in the prior majority opinion in this matter. This is undisputedly demonstrated by the Supreme Court vacating the opinion of this Court so that the proper test can be applied. In its prior opinion, this Court stated that the relevant inquiry

[1] Counsel for Atnip informs the Court that Defendant Atnip passed away suddenly on December 28, 2015.

for qualified immunity purposes is whether the law put officials "'on fair notice that the described conduct was unconstitutional.'" *Aldaba v. Pickens,* 777 F.3d 1148, 1160 (10th Cir. 2015)(quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). Nevertheless, the majority opinion here pointed to cases with facts that were extremely different from those in the instant case as evidence that the Defendants were not entitled to qualified immunity. However, in *Mullenix*, the Supreme Court (in a *per curiam* opinion) has indicated that some lower courts, such as the Fifth Circuit, have been applying the qualified immunity doctrine too broadly. The Supreme Court provided that for qualified immunity to be denied, precedent must "squarely govern" such that it is "beyond debate" that a constitutional violation occurred in the specific context of the case. *Mullenix, supra*, at 309. The Supreme Court again noted that clearly established law is not to be defined at a high level of generality and courts are not to supplant their own judgment as to the merits of the available options, but rather must simply decide whether the case law renders it beyond debate that a constitutional violation occurred at the time of the incident. *Id.* In *Mullenix*, both the Fifth Circuit and Justice Sotomayor (in sole dissent) refused to

grant the officers qualified immunity, concluding that one option as to use of force (the use of spike strips) would be better than another (attempting to disable a vehicle). The Supreme Court, however, pointed out this was error, and that Justice Sotomayor's dissent was repeating the Fifth Circuit's error. *Id.*

In vacating the majority opinion in this case as well, the Supreme Court clearly indicated that this Circuit applied qualified immunity at too high a level of generality.

Again, the officers in the instant case faced a tense, emergency situation in which there were no clear answers or perfect options. Specifically, the undisputed material facts found by the District Court were clear that the officers were called by a hospital to forcibly detain a deranged, aggressive patient who: i) was clenching and shaking his fists at the officers; ii) had caused hospital staff to be too scared to try to detain him so he could receive what the *hospital* said was necessary treatment; iii) claimed that he had supernatural power and that the hospital staff were trying to kill him; and iv) was bleeding from his arms where he removed his own IV tubing which would expose the Defendants to risk of facial contact with the blood during a hands-on-

altercation. These factors combine to create a scenario which, even in hindsight with the benefit of virtually unlimited time to debate, remains unclear as to the best alternative course of action the Defendants could have taken. It is this precise reality that necessitates the application of qualified immunity.

On these facts, the Defendants reasonably concluded that, after verbal attempts to calm and then warn the individual failed, a Taser should be used to avoid or minimize a potentially hazardous hands-on-encounter with the aggressive person. Even the use of a Taser was ineffective. All three officers were required to use hands-on force, but all the uncontroverted testimony was that the individual resisted each and every attempt until he was on the floor, given a shot by hospital staff, and then unexpectedly lost consciousness. Under numerous Supreme Court opinions, including the recent admonition in *Mullenix*, qualified immunity applies and the denial of summary judgment as to Appellants must be reversed.

II. Material Findings of Fact of the District Court

The District Court below set out findings as to the undisputed facts in his opinion ruling on the summary judgment motions of Appel-

lants. Based on that opinion, the following are the material undisputed facts of this record:

1) On the morning of March 24, 2011, Mr. Leija voluntarily presented himself to Integris Marshall Memorial Hospital in Madill, Oklahoma, where he was evaluated and diagnosed with severe pneumonia in both lungs and dehydration. (4/5/13 Order of District Court, pgs. 2-3).

2) By that evening, Leija became delusional and aggressive, disconnected his oxygen, refused to take his medication, removed his IV tubing, and claimed that hospital personnel were telling him lies and secrets, and were trying to poison him. (4/5/13 Order of District Court, pgs. 3-4).

3) Leija told a hospital nurse "I am Superman. I am God. You are telling me lies and trying to kill me." (4/5/13 Order of District Court, pg. 4).

4) The treating physician and the medical personnel were concerned that Leija was harming himself by removing his oxygen and IV and refusing his medication, and concluded that they needed to resort to

calling law enforcement to restrain Leija so that he could be given his medication. (4/5/13 Order of District Court, pg. 4).

5) When Defendants Pickens, Atnip, and Beebe arrived on the scene, Leija was standing in the hallway, visibly agitated and upset, and yelling and screaming that people were trying to poison and kill him. (4/5/13 Order of District Court, pg. 5).

6) Despite Pickens' attempts to talk Leija into returning to his room and letting the hospital staff help and treat him, Leija refused and said that the hospital staff were trying to kill him, and continued down the hallway toward the lobby area. (4/5/13 Order of District Court, pg. 5).

7) "Leija continued with his aggressive behavior by pulling the remaining IV from his arms causing blood to come out. After speaking with Pickens, Leija faced the officers and clenched and shook his fists." (4/5/13 Order of District Court, pg. 5).

8) Leija then removed the gauze and tape from his arms, raised his arms, and stated that this was his blood. (4/15/13 Order of District Court, pg. 5).

9) "Atnip and Beebe contend that they gave Leija several commands to step back, calm down, and get on his knees. They warned Leija that if he did not comply they would use a Taser on him. After Leija did not comply with their demands, Beebe fired the Taser at Leija with one prong hitting him in the upper torso. The Taser did not appear to affect Leija." (4/5/13 Order of District Court, pg. 5- 6).

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

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

(4/5/13 Order of District Court, pg. 6).

III. Argument & Authorities

A. The Qualified Immunity Standard Under *Mullenix*.

Mullenix involved a situation in which a state trooper fatally shot a fleeing motorist while attempting to disable the vehicle, before spike strips were used on the vehicle. The motorist was reportedly intoxicated, had led police on a 25-mile chase at speeds of between 85 and 110 miles per hour, twice during his flight had called police dispatch and threatened to shoot police officers if they did not abandon the pursuit, and was approaching an officer who was manning spike strips that had been placed on the freeway. *Id.* at 306-07. The trooper decided to attempt to shoot the engine block of the vehicle, thus disabling the engine. However, the trooper had no training on this disabling tactic, and the trooper's supervisor instructed him to "stand by" and "see if the spikes work first." In *Mullenix*, the Supreme Court reiterated the long-held standard that the "relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances "beyond debate." *Id.* at 308. There must be case law that

"*squarely governs*" the case, rendering it beyond debate that the officer acted unreasonably. *Id.* (emphasis added by Supreme Court).

The Supreme Court further reiterated in *Mullenix*, that it has repeatedly told courts . . . not to define clearly established law at a high level of generality. *Id.* The dispositive question is whether the law is clearly established that the particular conduct at issue is a violation of law. The inquiry must be undertaken in light of the specific facts and circumstances of the case. For the law to be clearly established, the Court must be able to "say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have engaged in the conduct at issue." *Id.* The Supreme Court determined that the Fifth Circuit had looked at qualified immunity at far too high a level of generality, had relied on factually distinct cases, and failed to consider the question in the specific context of the case. *Id.* at 310-312. The Supreme Court found that the clearly established law actually revealed a "hazy legal backdrop," without any case denying qualified immunity under circumstances remotely similar to the case. *Id.* at 309-310. The Supreme Court concluded that "Because the constitutional rule applied by the Fifth Circuit was not 'beyond debate', we grant Mullenix's petition for

certiorari and reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity." *Id.* at 312 (internal quotations omitted).

While the dissent and the Fifth Circuit disputed the conclusions of the officers at the time of the incident, concluding that they should have used spike strips (also a dangerous option) *prior* to attempting a less conventional method, the Supreme Court pointed out this was clearly error. *Id.* at 310-311. The Supreme Court stated: "Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'"

B. Under the Specific Context of this Case, it was Not Beyond Debate that the Conduct at Issue Violated the Constitution, as Required by *Mullenix*

For the protection of qualified immunity to be lifted, there must be clear authority rendering it beyond debate in a reasonable officer's mind that the conduct constituted a constitutional violation. Given the facts in this case, however, there is no such clear authority. To the contrary, there were numerous cases that would have lead a reasonable officer in the Defendants' position to believe that the conduct in this case was

permissible. At the very least, the state of the law was far too "hazy," to use the Supreme Court's language, for the conduct to be considered a clearly established violation.

Specifically, binding case law provides that a Taser can be used against a threatening or aggressive person who must be detained. In *Hinton v. City of Elwood*, the 10th Circuit held that it was not excessive for officers to use an "electrical stun gun" on a man after grabbing him and wrestling him to the ground when the man was actively resisting and the officers warned him that he would be arrested for disorderly conduct "if he engaged in one more outburst." 997 F.2d 774, 776-77, 781 (10th Cir. 1993). The Court ruled this way even though the man was only stopped for the misdemeanor of disturbing the peace, and he was not an immediate threat to the police or the public. *Id.* at 781. In this case, Leija was a danger to the police and the hospital staff too, which is why the officers were called in the first place.

Similarly, in *Draper v. Reynolds,* 369 F.3d 1270 (11th Cir.2004), the Eleventh Circuit held it reasonable to fire a Taser at a truck driver who refused to provide his insurance information or a bill of lading and was yelling loudly at a police officer who pulled him over. In that case,

the officer had not advised the truck driver that he was under arrest. *Id.* at 1276 – 77. However, the court found an electric shock from the Taser "reasonably proportionate" to the situation because the truck driver was belligerent and hostile, and because he had refused five commands to retrieve his documents from the cab of his truck. *Id.* at 1278.

In *Nichols v. Davison*, the Western District of Oklahoma found that the use of a Taser did not constitute excessive force when an individual continued to resist law enforcement officials. 2005 WL 1950361 at *3 (W. D. Okla., July 26, 2005)(unpublished opinion attached as Exhibit 1). In *Sanders v. City of Fresno*, the Eastern District of California found that "officers may utilize a Taser, even multiple times, when they are physically struggling or wrestling with a suspect in order to gain control of the suspect." 551 F. Supp. 2d 1149, 1173 (E. D. Cal. 2008). The Court further stated that since three officers were unable to control the individual, where the first Taser application was wholly ineffective, a second Taser shot was reasonable and did not violate Plaintiff's constitutional rights. *Id.*

Despite the case law addressed above, this Court's majority opinion cited *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007), as well as rulings from the 11th Circuit, and District Court rulings from Colorado and Alabama, before determining that the "pertinent authorities sufficiently put the officers on notice that it was not objectively reasonable to employ a Taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first." *Aldaba v. Pickens,* 777 F.3d 1148, 1160-61(10th Cir. 2015).

The 10th Circuit cases cited above are clearly inapposite, and in no way would make it clear to a reasonable official in Defendants position that their conduct violated the constitution. In fact, *Casey* involved a situation where an individual posed no threat, was not warned, and was then tackled and Tasered twice and had his face repeatedly banged into the concrete for no apparent reason, whereas here Mr. Leija was warned, and there was a pressing need to subdue Mr. Leija to get him his needed medical treatment. 509 F.3d at 1285. In *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) too, the circumstances were ex-

tremely different than the present case, as they did not involve the use of a Taser, but rather the use of a technique called hog-tying of a combative individual. Moreover, the Court there *granted* the Defendants qualified immunity, as this Court could not say that a rule prohibiting such a restraint in this situation was clearly established at the time of the incident. *Id.* at 1190.

Contrary to Respondent's claim that the warning is irrelevant, the *Casey* opinion explicitly states: "The absence of any warning—or of facts making clear that no warning was necessary—makes the circumstances of this case especially troubling." *Casey, supra*, 509 F.3d at 1285. It further states "We do not know of any circuit that has upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey. Therefore, Officer Lor is not entitled to qualified immunity from this excessive force suit." *Id.* at 1286. Petitioners are at a loss to understand how Respondent interprets *Casey,* a case where the individual was tackled and Tasered twice for no apparent reason without warning, to give fair notice to the officers in this case, where Mr. Leija was warned and was actively resisting.

Respondent also now cites to *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2007) which had not been cited by the 10th Circuit in this case as "clearly established" authority. *Cavanaugh* is inapplicable for the same reasons as *Casey*. The lack of a warning, and the lack of aggression and resistance, were the reasons for the Court's decision in *Cavanaugh*. In the instant matter, the District Court found that it was undisputed as a matter of law that Leija was acting aggressively; the hospital would not have called law enforcement to detain Leija if he were not acting aggressively and resisting.

The non-binding cases from outside the 10th Circuit cited above, used in this proceeding as support for denying qualified immunity, not only involved situations of far more egregious and shocking uses of force, but importantly, they involved detainees who were clearly not aggressive, and not posing a threat, and who were not provided a warning. The cases even specifically state this important fact in their analysis. In fact, these cases would support the proposition that one may be able to use a Taser on a person who is acting in an aggressive fashion and posing a threat. *See Oliver v. Florin*, 586 F.3d 898, 901, 906-07 (11th Cir. 2009) (finding clearly established violation, only where detainee was not

aggressive or threatening and was tasered 8 to 12 time, for five seconds each, while laying on hot pavement, without warning); *Borton v. City of Dotham*, 734 F. Supp. 2d 1237, 1249-50 (M.D. Ala. 2010) (finding clearly established violation, where detainee posed no threat due to being strapped to a gurney yet was Tasered three times, including once on her face, without warning for being too loud, as she screamed "I give up"); *Asten v. City of Boulder*, 652 F.Supp.2d 1188, 1194 (D. Colo. 2009)(after a mentally ill woman denied police entry into her home, an officer cut the screen on her door and used it to fire his Taser into her stomach, never warning her or telling her of their intent to take her into custody). This case is differentiated from the cases discussed above because it is undisputed that Leija was aggressive, placed people in fear, posed a threat, *and* was warned.

It is important to remember that in the instant case the Defendants had limited options available to them. The hospital had already called the law enforcement to restrain someone they clearly were too afraid to restrain themselves. Had the officers allowed Leija to walk outside, bleeding, in a deranged state, surely their risk of liability could have increased. As this Court's own dissent postulated, had the De-

fendants not acted in the way they had "it is not hard to imagine the officers being sued for *not* using the taser." *Aldaba v. Pickens,* 777 F.3d 1148, 1164 (10th Circuit 2015). The dissent continued to discuss an important consideration; namely judgment should be from an "on-scene perspective" and that the Supreme Court has cautioned against using 20/20 vision in hindsight. *Id* at 1165. The plain reality of this discussion or, to use a synonym, *debate*, places the current case squarely under the guidance of *Mullenix*. Qualified immunity must apply to protect the officers in this case.

For the foregoing reasons, the case law was not clear that the conduct at issue here was a violation of law. The officers were asked by the hospital to detain Leija because no one else would. Use of a Taser before resorting to the necessary hands-on-contact to detain him was not such a clear violation that it was "beyond debate" based on squarely governing case law.

C. Additional guidance from *Mullenix*.

Defendants believe that the Supreme Court, in vacating this Court's majority opinion with instructions to reconsider the case in light of *Mullenix*, was primarily instructing this Court to review the case in

light of the facts of the case, rather than at a high level of generality. However, the factual situation the Court confronted in *Mullenix* has additional guidance to this Court, which further strengthens Defendants' case for qualified immunity.

In *Mullenix*, the officer was entitled to qualified immunity where he shot at a moving car hoping to hit the car's engine and stop the suspect from fleeing. This was so, even where the officer had no training in the tactic, where the officer's supervisor instructed the officer to "stand by" and "see if the spikes work first." The officer's decision to stop the fleeing vehicle with a firearm rather than first using a spike strip was proposed by the Fifth Circuit as an alternative method to stop the vehicle. The Supreme Court ruled, however, that it was not proper for the District Court or the Fifth Circuit to dispute the merits or wisdom of the option used where there were reasons for the officer's conduct, in this specific instance minimizing a perceived threat to officer safety. Thus, since the officer in question reasonably believed the suspect in the car had made threats to kill law enforcement and that the suspect was placing other officers at a risk of harm, he was protected by qualified immunity when he decided to fire six rounds at the fast moving vehicle,

despite instructions to "stand by" and the obvious risk such conduct posed to the suspect.

Thus, even beyond the general admonition to consider qualified immunity pursuant to the specific facts of the case rather than at a high level of generality, *Mullenix* additionally provides support for the proposition that a Court should encompass the perceived risk to the officers and the others present at the time of the use of force, when examining qualified immunity. Therefore, pursuant to *Mullenix*, the analysis of qualified immunity must at the least encompass the fact that the use of a Taser (after warning and verbal attempts to detain failed) was for the purpose of avoiding or minimizing the potentially dangerous hands-on-encounter with a deranged person whose behavior was found by the District Court as being aggressive, including clenching and shaking his fists at an officer with blood dripping from his arms. It is beyond question that Leija was very deranged, aggressive, and unpredictable, with bodily fluid coming from his arms. This posed a threat to the officers such that a reasonable officer could conclude under the law that use of a Taser to avoid or minimize a hands-on-encounter was justified before resorting to necessary hands-on-force. Unlike the conduct involved in

Mullenix, it was not highly likely that the use of force in this case would cause serious injury to the person being detained. The deceased resisted every attempt to be detained. There was no question that the individual had to be detained (an issue that is not even before this Court). In fact, there has never been any concrete answer to what else the Defendants should have done under the circumstances in this case. [2]

The Supreme Court clearly admonished this Court to consider the claim of qualified immunity pursuant to the specific facts of the case. Moreover, in *Mullenix*, there was an alternative to what the officer did, and there was an extremely high probability that the use of force would cause injury, yet qualified immunity was still granted. The necessity of granting qualified immunity is even clearer in this case, as there was no plain alternative to what the officers did, aside from the unrealistic option of doing nothing at all, which would obviate the very reason they were called to the hospital. The officers were called by the hospital to detain a man with force who the hospital could not safely detain. Further, unlike in *Mullenix*, it is simply not clear in this case that the con-

[2] Plaintiff has essentially suggested the officers should have done nothing or just let Leija leave the hospital. But this was not a realistic available option with the medical personnel requesting that the officers detain this man so he could receive the necessary treatment.

duct the Defendants engaged in would have caused the harm that it did, particularly when the medical personnel were the ones asking for the man to be detained and were present during the entire incident. Police officers are permitted to protect themselves from risks of harm in carrying out their duties. The analytical framework applied to the facts and circumstances of *Mullenix* additionally demonstrates the necessity of qualified immunity in this case.

IV. Conclusion

The District Court specifically found the undisputed fact that Leija was acting in an aggressive fashion. There is no evidence to the contrary in fact. No cases have been cited in this proceeding, nor found by Appellants, clearly establishing that an officer, after giving a verbal warning, cannot use a Taser where the person-to-be-seized is acting aggressively and posing a threat to officers. The case law indicates the opposite. The Supreme Court, in vacating this Court's original majority opinion with instructions to reconsider pursuant to *Mullenix*, clearly indicated that this Court examined the case law at too high a level of generality, and that it would not be clear to a reasonable official in the Defendants' position that their conduct violated the law. Moreover, the

very facts of *Mullenix* itself provide additional support for the granting of qualified immunity. In reconsidering this Court's original majority opinion, it is beyond reasonable dispute that this Court must now grant qualified immunity to all Defendants. The Supreme Court would not have vacated the original majority opinion if it thought otherwise.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was served on January 8, 2016 via the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I, Clark Crapster, certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 4,968 words, including Table of Contents, Table of Authorities and Certificates of Compliance and Digital Submissions.

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I further certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have

been scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program are free of viruses.

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Statement Regarding Oral Argument

Appellant does not request oral argument.