IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JENNELL BLACK, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Civil Action No. 1:20-cv-03644-CCB
	*	
THOMAS WEBSTER IV, et al.,	*	
	*	
Defendants.	*	

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS THOMAS WEBSTER, GARY MANOS AND DENNIS LANNON

Plaintiffs Jennell Black, individually and as Personal Representative of the Estate of Anton Black; Antone Black, individually and as Personal Representative of the Estate of Anton Black; Katyra Boyce, as mother and next friend of W.B. (together, "Family Plaintiffs"); and the Coalition for Justice for Anton Black (collectively "Plaintiffs"), by and through undersigned counsel, file this Response in Opposition to Defendants' Motion for Summary Judgment, and for cause state:

Plaintiffs respectfully request, pursuant to Federal Rule of Civil Procedure 56, that this Court deny Defendants' Motion for Summary Judgment, as Plaintiffs have raised through competent affidavits, genuine disputes of material facts that warrant denial, and Defendants have not met their burden of establishing that they are entitled to summary judgment based on qualified immunity. If the Court does not deny Defendants' Motion for Summary Judgment because Plaintiffs have raised genuine disputes of material fact, Plaintiffs respectfully request, pursuant to Federal Rule of Civil Procedure 56(d), that the Court deny Defendants' Motion for Summary

Judgment at this stage or defer ruling on Defendants' Motion, as facts necessary for Plaintiffs to oppose Defendants' Motion for Summary Judgment are unavailable to Plaintiffs.

A Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants Thomas Webster IV, Gary Manos and Dennis Lannon's Motion for Summary Judgment is attached.

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS THOMAS WEBSTER, GARY MANOS AND DENNIS LANNON

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I. INTRODUCTION

This lawsuit arises from the wrongful death of Anton Black ("Anton"), a 19-year-old Black college student, who was tragically killed as a result of an excessive use of force by officers from three different police departments on September 15, 2018. Immediately thereafter, public officials conspired to protect the officers involved from the consequences of their excessive use of force.

The three officers who engaged in the excessive force leading to Anton's death -- Thomas Webster, IV, Gary Manos and Dennis Lannon ("Moving Defendants") -- have moved under Rule 56 for partial summary judgment on the grounds that they have qualified and statutory immunity from damages liability. Their motion does not meet their burden of establishing that they are immune. When the evidence is viewed in the light most favorable to Plaintiffs, Plaintiffs have identified ample competent evidence raising multiple, genuine disputes of material fact, including evidence going to the manner and cause of Anton's death. Plaintiffs' significant and overwhelming evidence of genuine issues of material facts includes affidavits from Dr. Francisco J. Diaz, a forensic pathologist, Dr. Tyrone Powers, an expert in the use of force and excessive force, and Dr. Jon Resar, a cardiologist and interventional cardiologist at Johns Hopkins Hospital, all of whom attribute Anton's death to Defendants' actions, thus establishing obvious issues of material facts in dispute, that the trier of fact must decide. Plaintiffs have put forth competent evidence that Defendant Officers applied excessive and ultimately lethal force against Anton in clear violation of his federal and state constitutional rights. There is also clearly established law showing that the conduct of Defendant Officers violated Anton's federal and state constitutional rights. Thus, Defendant Officers are **not** entitled to qualified or statutory immunity. Additionally the Moving Defendants have only moved on Anton's excessive force claim, not his other theories of liability.

Accordingly, for all of these reasons, as set forth herein, the Motion for Summary Judgment must be denied pursuant to Rule 56.

The Moving Defendants' Motion for Summary Judgment on the state law claims is also premature and without merit. Therefore, in the alternative, if the Defendants' Motion for Summary Judgment is not denied pursuant to Fed. R. Civ. Pro. 56(a), Plaintiffs request that the Court deny Defendants' Motion for Summary Judgment pursuant to Fed. R. Civ. Pro. 56(d). As reflected in the accompanying Declarations of Deborah A. Jeon, Esquire and Drs. Diaz, Powers, and Resar, attached hereto as Exhibits 1-4, at this procedural posture, Plaintiffs are deprived of essential facts to refute Webster, Manos, and Lannon's Motion for Summary Judgment prior to the commencement of discovery.

II. COUNTER-STATEMENT OF FACTS

Defendant Thomas Webster IV ("Webster") was hired by Defendants Michael Petyo ("Petyo") and Jeannette L. Cleveland f/k/a Jeannette L. Delude ("Cleveland") and employed by the Greensboro Police Department (hereafter, "Greensboro"), despite Webster's long and documented history of violence and excessive force against Black civilians. Webster gained national attention in 2015 when he was criminally charged with second-degree assault against a Black man when video footage showed that Webster kicked the unarmed man, shattering his jaw, while the man was on his hands and knees. This assault was the latest of *29* documented use of force incidents and likely the incident that led to Webster's forced departure from the Dover police. Yet, despite knowing this history, the Town of Greensboro hired Webster.

In the late summer of 2018, Anton developed serious mental health issues. On August 29, 2018, Antone Black, Anton's father, called the police and advised that Anton was acting strangely. The responding officer safely took Anton into custody for an Emergency Petition and behavioral health screening. Doctors diagnosed Anton with severe bipolar disorder and Anton was discharged

one week later, after the judge overseeing the matter concluded that Anton posed no danger to himself or anyone else. On September 15, 2018, less than two weeks later, still wearing his hospital bracelet, Anton met with X.B., a family friend who was younger than Anton. Anton and X.B. played together for few hours. During this period, they were seen together by numerous people, including Defendants Lannon[1] and Webster. Over the course of the afternoon, X.B. noticed that Anton was acting strangely, talking to himself incoherently and making little sense. A passerby who saw them tussling offered to call the police and X.B. said yes.

Webster responded to the 911 call and after arriving, he turned on his body-worn camera ("BWC"). It is apparent from the videotape that from the beginning of Webster and Anton's encounter, that Anton was experiencing mental health issues. X.B. advised Webster that Anton had been acting strangely and was "schizophrenic." (Def. Mot., ECF 19-2, Webster's Decl. Ex. 10). The video also shows there was no weapon on Anton during their encounter, no one had alleged that Anton was armed, and there was no reasonable suspicion that he might be armed. But, rather than speaking with Anton, Webster immediately instructed him to put his hands behind his back. In response, Anton looked at him, said "I love you, I love you," then slowly turned and began jogging away at a slow pace – as Defendants' own affidavits concede. (Exhibit 5, BWC, 00:12-15.)

Webster got into his cruiser to pursue Anton and updated dispatch, repeating as fact X.B.'s statement that Anton was "schizophrenic." (Ex. 5, BWC, 00:45). As Anton jogged away, Webster enlisted Kevin Clark, a civilian, to assist him with Anton. Anton then encountered Defendant

[1] G. Kazanjian, "Questions linger one year after Anton Black's death," Maryland Matters, Sept. 13, 2019, available at https://www.marylandmatters.org/2019/09/13/questions-linger-one-year-after-anton-blacks-death/

Lannon, who works for the Centreville Police Department but was not on duty and not in uniform. Frightened, Anton turned and jogged back toward Webster, and toward his mother's home, chased by Defendant Lannon, Webster, and the civilian Clark. Defendant Manos, who had been passing by, joined the chase in Webster's police vehicle, which Webster had abandoned in the road to chase Anton on foot.

Anton ran into the mobile home community where his mother lived, pursued by four white men – only one in uniform – coming at him from all different directions. Webster's narration to dispatch gave no indication that he believed Anton might be armed. Anton did not confront the men chasing him nor threaten them in any way. Instead, he ran to something familiar – a family car that was disabled in a driveway with a flat tire – in front of his mother's home. Anton jumped in and locked the doors. He made no effort to start the car or leave. He also did not act in a threatening manner.

Immediately upon Webster's arrival, Webster went to the driver's side of the car, where Anton was sitting in the driver's seat, drew his baton and smashed the window next to Anton's head. (Ex. 5, BWC, 02:34) As glass shattered against him, Anton reacted by moving to the passenger side of the vehicle. Webster immediately reached in and fired his TASER at Anton, yelling "I'm Tasing him" to the others. (Ex. 5, BWC, 02:43) At no time did Webster, or Manos who was present, instruct Anton to exit the vehicle, show his hands, or give him any command. After being struck by the TASER, Anton attempted to get out of the other side of the car. He ran right into Manos. Webster, Lannon and Manos then pinned Anton against the wall of his mother's home. After Manos stated "let's prone him out," (Ex. 5, BWC, 03:51) Anton fell to the ground, with the officers restraining him.

The officers forced Anton into a prone position, as Manos directed, so that his face, chest and stomach were pressed to the ground. After a minute, the officers handcuffed Anton, (Ex. 5, BWC, 04:09) and for the next five minutes (six total), Anton was forcibly pinned face down. Upon pinning Anton in a prone position, the officers handcuffed him, and Officer Webster told them to "take a breather," (Ex. 5, BWC, 05:06) or rest, indicating that no one feared for their safety and that Anton was under control. The officers nevertheless continued holding Anton down -- apparently not as concerned about Anton's ability to breathe as they were about themselves. The officers had Anton's knees bent back to force his feet up, very similar to a hog-tying position. Even though Anton was handcuffed and pinned face down, the officers did not roll him over to his side despite well-documented dangers of prolonged prone restraint and sustained pressure.

The video then shows that Anton was no longer responsive and had not spoken for minutes. The officers propped Anton into a sitting position, but Anton remained nonresponsive, his head dangling to the side. (Ex. 5, BWC, 10:49) Approximately four minutes after propping Anton up the officers eventually attempted unsuccessfully to resuscitate Anton. (Ex. 5, BWC, 14:20) Emergency medical personnel arrived (Ex. 5, BWC, 20:20) and also unsuccessfully tried to resuscitate Anton. Anton was pronounced dead shortly after being taken to the hospital.

Knowing Anton was dead, Defendants began backtracking on their repeated assertions that Anton was merely experiencing a mental health issue. Without evidence, they began claiming he had smoked "spice" and exhibited superhuman strength. They began concocting absurd claims that they thought Anton was dangerous or guilty of some crime. The officers fed this narrative to the medical examiner's office, which parroted this falsehood.

Anton's death was homicide by asphyxiation; the involved police officers caused Anton's death by interfering with his ability to breathe—creating positional asphyxia. Anton died because

police used excessive force, laying him prone on his stomach, and forcibly pinning him down in a prone position for approximately six minutes (five of those minutes after he was handcuffed), and folding his legs towards the sky in a manner that further compromised his ability to breathe.[2] The Medical Examiner concocted autopsy notes that "myocardial tunneling" and an "anomalous right coronary artery" caused Anton's death. However, the "myocardial tunneling" (the proper medical term is bridging) in Anton's heart is an extremely common physical variation and was not the cause of his death. And the evidence shows that it is objectively unreasonable for any medical professional to conclude that an anomalous right coronary artery caused Anton's death. Likewise, Anton's bipolar disorder, a psychiatric illness also noted as a contributing cause of death, did not contribute in fact to his death. The medical evidence shows that Anton's death was caused by asphyxiation.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) states:

> MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

In reviewing the evidence related to a motion for summary judgment, the Court must consider undisputed facts, as well as the disputed facts in the light most favorable to the non-moving party. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *George & Co., LLC v. Imagination Ent. Ltd.*, 575 F.3d 383, 391-92 (4th Cir. 2009); *Dean v. Martinez*, 336 F. Supp. 2d 477, 480 (D.

[2] As a result of Anton's death, both chambers of the Maryland General Assembly have voted out Anton's Law (SB 0178/HB 120). However, until now, Defendants have escaped any responsibility for Anton's death.

Md. 2004). **For purposes of summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.** *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) (citing *Adickes v. H. Kress & Co*., 398 U.S. 144, 158-159 (1970)). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether she is ruling on a motion for summary judgment or for a directed verdict. *Anderson*, 477 U.S. at 255. Thus, the Court should not "weigh the evidence" and determine the truth of the matter, nor will it make credibility determinations. *Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991). Additionally, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962). Finally, "[f]acts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth*., 597 F.3d 570, 576 (4th Cir. 2010). An issue of material fact is "'genuine'[] . . . if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Anderson*, 477 U.S. at 257 (1986).

IV. RULE 56(C) STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS

Defendants' narrative of the events leading up to, and ultimately causing the death of Anton Black, is vigorously contested by Plaintiffs, and genuinely disputed by the evidence in the record, including review of the currently available evidence by Plaintiffs' experts, such as the video recording of the incident and medical records. With regard to materiality, "disputes of facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[A] material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for

the nonmoving party." *Id*. While there are numerous genuine disputes of material fact in this matter, examples of some of the key disputes are categorically grouped below. As stated in *Anderson*, in reviewing these material disputes of facts for purposes of summary judgment the Court *must* believe the evidence of Plaintiffs, the nonmovants, and all justifiable inferences are to be drawn in Plaintiffs' favor:

V. USE OF FORCE

Defendants: "When Officer Webster used his baton, he did not do so to strike or injure Mr. Black, he used it to gain access to a locked car that held a suspect who had fled and whose status as criminal, drug user, or mentally ill, was unknown." (Def. Mot. ECF 19-2 at 28)

Plaintiffs: Officer Webster was certainly aware that Anton was suffering from a mental illness while he was chasing, then tasing, handcuffing, and pinning Anton down to the ground. Specifically, Officer Webster states in his affidavit that upon his initial encounter with X.B. and Anton, X.B. told Officer Webster that "…he [Anton] has schizophrenia" (Def. Mot. ECF 19-2, Webster's Affidavit, Ex. 10); Webster also told dispatch that Anton was schizophrenic (Ex. 5, BWC at 00:45); Officer Webster also told Chief Manos that Anton was schizophrenic, and Chief Manos noticed that Mr. Black was wearing a hospital mental health bracelet. (Def. Mot., ECF 19-2 at 13; Ex. 5, BWC 03:22, 13:54); and Officer Webster cautioned everyone that Anton was schizophrenic (Def. Mot., ECF 19-2 at 14; Ex. 5 , BWC 00:45, 04:23)); As they pinned Anton down. Officer Webster (or another officer) asked Anton's mother, "Do you have a diagnosis for him?" (Ex. 5, BWC 06:45); Officer Webster stated that "this is a mental health emergency, we're not treating this like a crime" (Ex. 5, BWC 09:15); Officer Webster (or another officer) stated, "He's not with us right now,…we're gonna get him some help" (Ex. 5, BWC 09:23); Anton's mother informed the officers, "I had him evaluated 2 weeks ago" (Ex. 5, BWC 09:28); One of the officers responded, "It's not a good thing, they won't hold him long" Ex. 5, BWC 09:40); Anton's mother asked, "So he's not getting locked up?" and Officer Webster responded, "No, he's not getting locked up, we're taking him to the hospital" Ex. 5, BWC 09:46); One of the officers asks. "Does he take any medication or anything like that?" (Ex. 5, BWC 11:07).

Moreover, Officer Webster knew that his use of force was unconstitutional because the Defendants' Greensboro Police Handbook instructs that "control devices" such as batons should be used only "when a decision has been made to control, restrain, or arrest a person who is violent or demonstrates the intent to be violent." *Greensboro Police Department, Greensboro Police Dept. Policy Manual*, Chapter 3, Policy 302.3, Issuing, Carrying and Using Control Devices. (Ex. 3C, Greensboro Hndbk., attachment to Powers Decl.) Additionally, Chapter 4, Policy 415, Crisis Intervention Incidents of the Greensboro Handbook instructs that "taking no action or passively monitoring the situation may be the most reasonable response to a mental health crisis." It also instructs officers to try to de-escalate mental health crises by being "patient, polite, calm, courteous and [not] overreacting," to "speak and move slowly and in a non-threatening manner," and not to

"corner a person who is not believed to be armed, violent, or suicidal," or "argue, speak with a raised voice or use threats to obtain compliance," among other things. *Id.*

Plaintiffs' use of force expert, Dr. Powers, opines that no reasonable police officer under these circumstances would believe that smashing a window next to a nonviolent teenager having a mental health crisis is an acceptable use of a control device. Dr. Powers also opines that a reasonable police officer under these circumstances would have attempted to de-escalate the situation (Ex. 3, Powers Decl.)

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Defendants: "…not one of the Officers used excessive force in contravention of the Fourth Amendment as a matter of fact. …When, in turn, Mr. Black scrambled over the console in further attempt to escape, it was more than objectively reasonable that he or any reasonable officer in his place would use the less lethal force available [sic] escalated the situation; in this case, a Taser, and its use failed." (Def. Mot., ECF 19-2 at 23)

Plaintiffs: Anton Black was locked in a vehicle, surrounded by three police officers and a civilian. He did not present a threat to anyone and was making no effort to leave the locked car. He did not utter any threat nor brandish any weapon. Anton Black was simply experiencing a mental health crisis, as known and reported to dispatch by Officer Webster. Plaintiffs' use of force expert, Dr. Powers, opines that the Officers should have de-escalated, consistent with the Defendants' Handbook, when Anton locked himself in the vehicle. Dr. Powers further opines that it was not objectively reasonable for the officer to use a baton to smash the car window and then use a Taser on Anton who was unarmed, and known to the Officer(s) as a person suffering from a mental illness. Based upon Dr. Powers' experience, training, and review of Defendants' Handbook, Dr. Powers also opines that the Officers violated multiple provisions of the Handbook and Anton's constitutional rights, including through their failure to instruct Anton to vacate the vehicle, their failure to give a verbal warning *before* deploying the Taser, and their failure to provide Anton an opportunity to comply. (Ex. 3, Powers Decl.)

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Defendants: "Certainly, the use of handcuffs to restrain Mr. Black cannot be questioned as excessive. Neither can the use of leg shackles." (Def. Mot., ECF 19-2 at 29)

Plaintiffs: Plaintiffs' use of force expert, Dr. Powers, opines that excessive force was applied by the Defendant Officers when they pinned Anton Black down in a prone position restricting his breathing for several minutes *while* he was handcuffed and then shackled. (Ex. 3, Powers Decl.)

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Defendants: "At no point after Mr. Black was taken to the ground, was he choked in any way nor was the full body weight of the Officers applied to restrain him." (Def. Mot., ECF 19-2 at 30)

Plaintiffs: Plaintiffs' expert forensic pathologist, Dr. Diaz, opines that choking or applying one's full body weight are not necessary to cause asphyxiation. In this case, the handcuffing and shackling of Anton Black while keeping his chest pressed against the ground - as opposed to

turning him on his side to allow him to breathe – and holding his legs in a position similar to hogtying caused asphyxiation. (Ex. 2, Diaz Decl.);

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Defendants: "Significantly, there is no evidence that the Officers applied any kind or degree of force to Mr. Black's neck area." (Def. Mot., ECF 19-2 at 23)

Plaintiffs: Plaintiffs expert forensic pathologist, Dr. Diaz, opines that asphyxia does not require force to the neck area. Forcibly restraining one in a prone position for several minutes can cause asphyxiation. In this case, the handcuffing and shackling of Anton Black while keeping his chest pressed against the ground - as opposed to turning him on his side to allow him to breathe – and holding his legs in a position similar to hogtying caused asphyxiation. (Ex. 2, Diaz Decl.)

[Manner And Cause Of Death]

Defendants: "…no evidence was found that restraint by law enforcement directly caused or significantly contributed to the decedent's death; in particular, no evidence was found that restraint led to the decedent being asphyxiated." (Def. Mot., ECF 19-2 at 18)

Plaintiffs: Plaintiffs' expert forensic pathologist, Dr. Diaz, opines that the cause of death is homicide by asphyxia due to physical restraint by the Defendant Officers. In this case, the handcuffing and shackling of Anton Black while keeping his chest pressed against the ground - as opposed to turning him on his side to allow him to breathe – and holding his legs in a position similar to hogtying caused asphyxiation. (Ex. 2, Diaz Decl.)

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Defendants: "The cause of death was identified as "Accident", specifically "Sudden Cardiac Death" caused by "Anomalous Right Coronary Artery and Myocardial Tunneling of the Left Anterior Descending Coronary Artery." (Def. Mot., ECF 19-2 at 18)

Plaintiffs: Plaintiffs' expert, Dr. Jon Resar, a cardiologist and interventional cardiologist at Johns Hopkins Hospital, states that the proper medical term is myocardial bridging, not myocardial tunneling. Dr. Resar opines that myocardial bridging is an extremely common physical variation and studies estimate it is found in at least one third of all autopsies. Myocardial bridging does not impact the flow of blood and cardiologists generally consider myocardial bridging to be a benign condition. It is objectively unreasonable to claim that myocardial bridging caused Anton's sudden death. It was also noted on autopsy that Anton had and anomalous right coronary artery. Dr. Resar opines that it is objectively unreasonable for any medical professional to conclude after the fact that an anomalous right coronary artery caused Anton's death. Based on well-recognized and accepted standards of medicine, Drs. Alexander and Fowler, the State medical examiners, should have concluded that anomalous right coronary artery was present, but did not cause Anton's death. Dr. Resar opines that Anton Black's death was caused by asphyxiation. (Ex. 4, Resar Decl.) In addition, Plaintiffs' expert forensic pathologist, Dr. Diaz, agrees with Dr. Resar's opinions and further opines that the cause of death is "Homicide", death at the hands of another who committed a harmful volitional act directed at the victim – not an "Accident". In this case, the handcuffing and shackling of Anton Black while keeping his chest pressed against the ground - as opposed to

turning him on his side to allow him to breathe – and holding his legs in a position similar to hogtying caused asphyxiation. (Ex. 2, Diaz Decl.)

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Defendants: "In the setting of short-duration chest compression, such as that typically encountered during handcuffing, fatal compression asphyxia, due to ineffective breathing, probably requires a flail chest injury since diaphragmatic breathing can support life even with the chest restricted. Id. There was no such injury here." (Def. Mot., ECF 19-2 at 37)

Plaintiffs: Plaintiffs' expert forensic pathologist, Dr. Diaz, opines that a flail chest injury is a life-threatening medical condition that occurs when a segment of the rib cage breaks due to trauma and becomes detached from the chest wall. A flail chest injury is not necessary to cause death by asphyxia. In this case, the handcuffing and shackling of Anton Black while keeping his chest pressed against the ground - as opposed to turning him on his side to allow him to breathe – and holding his legs in a position similar to hogtying caused asphyxiation. (Ex. 2, Diaz Decl.)

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Defendants: "…there is little or no scientific evidence that hog-tying causes positional asphyxiation. See id. at 1238 (noting that the scientist who first claimed that hog-tying causes positional asphyxiation and whose work others in the field relied upon heavily now says that hog-tying is physiologically neutral in the face of a new study that refutes his claims; concluding that "like a house of cards, the evidence for positional asphyxia has fallen completely")." (Def. Mot., ECF 19-2 at 39)

Plaintiffs: Plaintiffs' expert, Dr. Diaz, disagrees with Defendants' assertion regarding the scientific evidence, specifically he disagrees that the concept of compression asphyxia as a cause of arrest-related or custodial deaths has been thoroughly debunked. Dr. Diaz opines that Anton Black died because police employed excessive force, laying him out prone on his stomach, and forcibly restraining him in that position for approximately six minutes and approximately five minutes after he was handcuffed, and folding his legs towards the sky in a manner that further compromised his ability to breathe, very similar to hog-tying. The pressure and positioning prevented him from being able to breathe, depriving him of the oxygen necessary for his brain and heart to function correctly, which led to his death. (Ex. 2, Diaz Decl.)

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Defendants: "A significant contributing condition was identified as bipolar disorder." (Def. Mot., ECF 19-2 at 18)

Plaintiffs: Plaintiffs' expert forensic pathologist, Dr. Diaz, opines that Anton Black's history of bipolar disorder did not contribute to his death. (Ex. 2, Diaz Decl.)

This non-exhaustive list of genuine disputes of material fact outlined above lies at the core of liability and the defense of qualified immunity asserted by the Officers, as discussed below. And as noted, this Court, in deciding Defendants' Motion for Summary Judgment, *must* credit the opinions of Plaintiffs' experts over Defendants' rendition of disputed facts. Accordingly, as a matter of law, this case must be submitted to a jury to decide whether the Defendant Officers exceeded the level of force that an objectively reasonable officer would have used under the circumstances.

VI. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

A. The Court Must Consider the Facts in the Light Most Favorable to the Party Opposing Qualified Immunity.

When considering a request for qualified immunity,

> "[C]ourts are required to view the facts and draw reasonable inferences *in the light most favorable* to the party opposing the summary judgment motion. In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1774–75, 167 L.Ed.2d 686 (2007) (internal quotations, alterations, and citations omitted).
>
> At the same time, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. at 1776. In particular, where, as here, the record contains an unchallenged videotape capturing the events in question, we *must* only credit the *plaintiff's version* of the facts to the extent it is not contradicted by the videotape."

Iko v. Shreve, 535 F.3d 225, 230 (4th Cir. 2008) (emphasis supplied) (holding that a supervising officer violated inmate's right to be free from excessive force involving use of pepper spray, and thus was not entitled to qualified immunity); *see also Henry v. Purnell*, 652 F.3d 524, 533 (4th Cir. 2011) (record viewed in the light most favorable to the injured party, in determining that officer's actions were not objectively reasonable to warrant granting of qualified immunity); *Gray-Hopkins v. Prince George's Cnty.*, 309 F.3d 224, 231 (4th Cir. 2002) (affirming denial of qualified

immunity where, "[b]ased on the **plaintiff's version** of the events giving rise to this case,. . . he was not posing a threat to the safety of the officers or others [A] trier of fact could clearly conclude that a Fourth Amendment violation occurred") (emphasis supplied); *Meyers v. Baltimore Cty.*, 981 F. Supp. 2d 422, 434 (D. Md. 2013) (noting that the Fourth Circuit reviewed the facts in the light most favorable to plaintiffs as the non-moving parties).

Here this Court must consider all of the material disputes of fact discussed above in Plaintiffs' favor. Those material disputes require denial of the Moving Defendants' claim of qualified immunity. The record in this matter includes a videotape capturing significant and material portions of the events in question. Although Defendants disagree with Plaintiffs and Plaintiffs' experts' interpretation of the video and medical records, the Court must consider, at this procedural posture, only Plaintiffs' version of the facts to the extent it is not contradicted by the videotape. Plaintiffs, supported by their experts, assert that the videotape and other evidence demonstrate: (a) all three officers knew Anton was experiencing a mental health issue and was not armed; (b) the three officers failed to de-escalate when Anton retreated to the car and was secured in the car; (c) Webster's deployment of his baton and Taser without warning were unreasonable/excessive force - and Manos and Lannon failed to intervene; Rather, Manos encouraged Webster's Tasing of Anton; (d) all three officers directly participated in the takedown of Anton, or failed to intervene to prevent the takedown, and all three kept Anton in a prone position *while cuffed* with Manos using force to restrain him in the prone position for six minutes; and (e) none of the officers called for medical assistance or administered CPR for approximately four minutes after Anton was propped up and no longer breathing. When viewing the evidence in the light most favorable to Plaintiffs as the law requires, Defendants' Motion for Summary Judgment must be denied, and the disputes of material fact must be submitted to a jury.

The recent holding by the Maryland Court of Appeals in *Estate of Blair v. Austin*, 469 Md. 1 (2020), supports denial of Defendants' Motion for Summary Judgment; specifically, when there is video evidence that lends itself to interpretation by a jury.[3] In reversing the Court of Special Appeals' decision granting summary judgment to police officers on the issue of excessive force, the Court of Appeals in *Blair* stated:

> The Court [of Special Appeals] rejected the jury's factual findings, thereby invading "the jury's province[.]" The Court [of Special Appeals] erred in overturning the jury's factual findings **based on its own interpretation of the video camera evidence** because it had no power to review the finding of the jury upon matters of fact.

469 Md. at 18–19 (internal citations and quotations omitted) (emphasis supplied).

Here, as Drs. Diaz and Powers[4] opine, and the video confirms, the Defendant Officers used excessive force in pinning Anton Black to the ground in a prone position for a prolonged period of time, leading to his death. Under basic principles of summary judgment, it is for the jury to weigh all the evidence, including the video, to determine Defendants' liability for Anton's death. Genuine disputes of material fact – evident even before the outset of discovery – control any decision on qualified immunity, thus precluding summary judgment.

B. Defendants are not Entitled to Qualified Immunity Due to Their Violation of Anton Black's § 1983 Fourth Amendment Rights.

Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) explains the threshold approach to resolving questions of qualified immunity: "Following the Supreme Court's recent decision in *Pearson* [ ], we exercise our discretion to use the two-step procedure of *Saucier* [ ], that asks first whether a constitutional violation occurred and second whether the right violated was clearly

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[3] Although *Estate of Blair v. Austin* was further along in procedural posture than this matter, it explains how courts are prohibited from usurping the jury's role of deciding material disputes of facts, even at a later stage of the case. 469 Md. at 17-18.

[4] Dr. Powers was also the Plaintiffs' expert in *Blair*.

established." *Id.* It is well-established that "[i]t is the defendants' burden to show they are entitled to qualified immunity." *Krell v. Queen Anne's Cty.*, No. CV JKB-18-637, 2018 WL 6523883 at * 9 (D. Md. Dec. 12, 2018).

Here, as noted, the material facts genuinely in dispute preclude a finding of qualified immunity. Plaintiffs have alleged numerous violations of Anton's constitutional rights and the defendants are not entitled to qualified immunity for any of them. When the facts are viewed in the light most favorable to Plaintiffs, it is clear that the Defendant Officers violated Anton's constitutional rights when: 1) they made a decision to escalate their efforts to seize him after it was clear that Anton did not present an imminent threat to anyone; 2) Webster smashed the car window with a baton and Tased unarmed Anton who was secured in the car; 3) they used excessive force to pin Anton down in a prone position with his chest pressed against the ground, in handcuffs, and kept him in that position for a total of six (6) minutes, which restricted his breathing; 4) they failed to intervene to prevent the other officer(s) from violating Anton's constitutional rights; such as the Tasing and the prolonged pinning of Anton; and 5) they failed to immediately administer emergency medical care to Anton after they propped him up, when he was unresponsive. Ex. 3, Powers Decl.; Ex. 2, Diaz Decl.; Ex. 4, Resar Decl.

The Fourth Amendment protects citizens from "unreasonable seizures," and thus prohibits the use of **excessive force** by police officers to seize a free citizen. *Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir. 2003) (emphasis supplied); *see also Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). In this matter, in the light most favorable to Plaintiffs, the evidence shows that Defendants violated Anton's constitutional right to

be free from excessive use of force by applying deadly force when Anton did not pose an imminent threat of death or serious physical harm to the officers or others.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that, "*all* claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard". *Id.* (emphasis supplied). The analysis of the reasonableness of a particular use of force "*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." *Id*. at 396. (emphasis supplied). *See also Jones v. Buchanan*, 325 F.3d 520, 529 (4th Cir. 2003) (concluding that an excessive force claim survived summary judgment because, under the factors set forth in *Graham*, "[a] fact finder *could* conclude that [the] evidence demonstrates that [the suspect] posed no immediate threat to anyone before [law enforcement] entered the processing room and used force" (emphasis supplied)). "Both before and after November 1999, courts have consistently applied the *Graham* holding and have consistently held that officers using unnecessary, gratuitous, and **disproportionate force** to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Bailey v. Kennedy*, 349 F.3d 731, 744–45 (4th Cir. 2003) (emphasis supplied). When viewing the facts, as discussed *infra*, in the light most favorable to the Plaintiffs, the factors listed in *Graham* weigh heavily in Plaintiffs' favor requiring denial of qualified immunity.

Here, the record reflects that the Defendant Officers were not arresting Anton for committing a crime and he was not evading arrest, but rather Defendants were seizing Anton due

to a health crisis. This is clear from the Defendants' **own motion** and the bodyworn camera footage, which emphasize that the Officers were seizing Anton due to a health crisis and *not* arresting him:

- "Officer Webster advised that, instead of arresting Mr. Black, he would be treating this as an "Emergency Petition due to a mental health emergency."" (Def. Mot., ECF 19-2 at 15);
- "…Officer Webster told Chief Manos that Mr. Black was schizophrenic…Chief Manos later noticed that Mr. Black was wearing a hospital mental health bracelet." (Def. Mot., ECF 19-2 at 13); (Ex. 5, BWC 03:22, 13:54)
- "…Officer Webster cautioned everyone that Mr. Black was schizophrenic" (Def. Mot., ECF 19-2 at 14); (Ex. 5, BWC 00:45, 04:23), and
- "…it was explained to Mr. Black's mother that he was not going to be locked up." (Def. Mot., ECF 19-2 at 14); (Ex. 5, BWC 09:47).

As to "whether the suspect poses an immediate threat to the safety of the officers or others," it is undisputed that Anton was unarmed and that he did not pose any immediate threat to the safety of the officers or others when the Officers applied an excessive amount of force. Given the presence of multiple police officers who surrounded Anton while he was unarmed in a locked and disabled vehicle, in conjunction with the officers' knowledge of Anton's identity and home address, Anton's slight build, and knowledge that he was a frightened teenager experiencing a mental health crisis, Plaintiffs' use of force expert concludes that any reasonable officer would have recognized that Anton did not present a danger to anyone. Ex. 3, Powers Decl. In addition, Plaintiffs' use of force expert concludes that a reasonable police officer would have recognized that Anton was in a controlled situation. Ex. 3, Powers Decl. As such, it was an ideal time to use de-escalation techniques to seek a peaceful resolution with the assistance of mental health services. Ex. 3, Powers Decl. Instead, the Defendant Officers escalated the situation by smashing the window of the vehicle with a baton near Anton's head and Tasing him. Furthermore and most important, once Anton was handcuffed, Defendant Officers held him in a prone position for

approximately six minutes when Anton, an unarmed and subdued teenager, was clearly not presenting an imminent threat of death or serious bodily harm to anyone. Ex. 3, Powers Decl. In fact, as noted, upon pinning Anton in a prone position and handcuffing him Officer Webster told the other officers to "take a breather," (Ex. 5, BWC, 05:06) or rest, indicating that no one feared for their safety at that time and that Anton was under control. The officers nevertheless continued holding Anton down apparently not as concerned about Anton's ability to breathe as they were about themselves. Plaintiffs have produced evidence by way of declarations, and will produce evidence at trial, that this was a **disproportionate and unconstitutional use of force**. Ex. 3, Powers Decl. In sum, the application of all *Graham* factors (severity of crime, imminent danger, resistance of arrest) in this case demonstrate that the Defendant Officers' have failed to meet their burden of establishing that their actions satisfy the Fourth Amendment's "objective reasonableness" standard, and therefore they are not entitled to qualified immunity.

C. It Was Clearly Established That Defendants' Actions Were Unconstitutional.

Plaintiffs have alleged numerous violations of Anton's constitutional rights and Defendants are not entitled to qualified immunity for any of them. As demonstrated below, it was clearly established that each of Defendants' actions was unconstitutional.

1. The Excessive Application of Force on Anton during a mental health crisis.

At the time of Anton's death, it was clearly established that placing unnecessary weight on a handcuffed young man lying in a prone position for six (6) minutes was excessive force. There is clear precedent that controls the conduct of Defendant Officers in this matter. In *Bailey v. Kennedy*, 349 F.3d 731, 743 (4th Cir. 2003), the Fourth Circuit held that the use of unreasonable force in the seizure of an individual for a mental health crisis is excessive. Specifically, the *Bailey* Court explained that "[t]he extent of the plaintiff's injury is also a relevant consideration" in

determining the reasonableness of an officer's actions in claims alleging excessive use of force. In *Bailey*, police officers seized plaintiff for an emergency mental evaluation. As a result of the officers' excessive use of force in seizing Mr. Bailey for this purpose, Mr. Bailey suffered abrasions to his mouth and lip requiring stitches, and injury to his shoulder caused by the officer pulling him up by his arms while he was lying face down on the floor with his hands and feet bound. *Id.* at 744. The Fourth Circuit held that the force used by police officers in subduing Mr. Bailey was excessive and the officers were not entitled to qualified immunity. In comparison, the injury suffered by Anton -- his death at the hands of the Defendant Officers -- was far greater than the injury suffered by Mr. Bailey. Defendant Officers are not entitled to qualified immunity because, in viewing the evidence in the light most favorable to Plaintiffs, a jury could conclude the Defendant Officers used excessive force in the seizure of Anton during a mental health crisis.

(a) The Unconstitutional Use of Unnecessary, Gratuitous and Disproportionate Force on an Unarmed Individual (Use of Baton and Taser)

It was also well-established law that it is unconstitutional to use unnecessary, gratuitous or disproportionate force in the seizure of an *unarmed* individual. *Yates v. Terry*, 817 F.3d 877 (4th Cir. 2016), explains that: "[I]t was clearly established **in 2008** that a police officer was not entitled to use unnecessary, gratuitous, or disproportionate force by repeatedly tasing a nonviolent misdemeanant who presented no threat to the safety of the officer or the public and who was compliant and not actively resisting arrest or fleeing." *Id.* at 887 (emphasis supplied); *see also Meyers v. Baltimore Cnty.*, 713 F.3d 723, 734–35 (4th Cir. 2013) ("We also have stated in forthright terms that officers using unnecessary, gratuitous, and disproportionate force to seize a *secured, unarmed citizen*, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity.") (internal quotations and citation omitted); *Jones* 325 F.3d at 532 (recognizing same); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) (citing *Graham v. Connor*

factors to assess reasonableness inquiry, including "'the severity of the [suspected] 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.'") (quoting *Graham*, 490 U.S. at 396); *Parker v. Gerrish*, 547 F.3d 1, 9–11 (1st Cir. 2008).

In *Yates*, Officer Terry activated his lights and sirens to pull Mr. Yates over for a traffic stop. Once Mr. Yates stopped his vehicle, the Officer forced Yates out of the vehicle and informed him that he was under arrest, which prompted Yates to inquire about the basis of the arrest. *Id.* Without provocation, and with Yates' hands on top of the car, Officer Terry Tased Yates which caused Yates to fall to the ground, where he was Tased two additional times. Mr. Yates brought a § 1983 action against Officer Terry. The United States District Court denied Officer Terry's motion for summary judgment on qualified immunity grounds. Officer Terry filed an interlocutory appeal. *Yates*, 817 F.3d at 887. In affirming the denial of qualified immunity, the Court of Appeals explained: "[d]eploying a taser is a serious use of force, that is designed to inflict[ ] a painful and frightening blow. For these reasons, it may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser." *Id.* at 886 (internal quotation marks and citations omitted). The Court of Appeals, citing *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892 (2016) stated: "As we held in *Estate of Armstrong*, '[t]he subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance-even when that resistance includes physically preventing an officer's manipulation of his body.'" *Yates*, 817 F.3d at 886 (quoting *Estate of Armstrong*, 810 F.3d at 899-900). The *Yates* Court ultimately held:

> The objective facts, when viewed in the light most favorable to Yates, as we must do at this point in the proceedings, show that he was neither a dangerous felon, a flight risk, nor an immediate threat to Terry or anyone else. Yates has thus established that [in spite of the ruling in *Armstrong*,

> so heavily relied upon by Defendants,] Terry's use of his taser constituted excessive force in violation of Yates' Fourth Amendment rights. *Yates*, 817 F.3d at 886.

Then, the *Yates* Court, addressing the clearly established standard observed "Although our decisions in *Meyers, Bailey,* and *Jones* dealt with individuals who were secured when they were subjected to excessive force, our precedent nonetheless provided Terry with fair notice that the force he used against Yates under the facts of this case was unconstitutionally excessive." *Yates v. Terry*, 817 F.3d at 887. The Court further noted that, "a right need not be 'recognized by a court in a specific context before such right may be held 'clearly established' for purposes of qualified immunity.'" *Id.* (quoting *Meyers*, 713 F.3d at 734).

The *Meyers* Court further stated that the use of any "unnecessary, gratuitous, and disproportionate force," whether arising from a gun, **a baton, a taser**, or other weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured." *See Park v. Shiflett*, 250 F.3d 843, 852-53 (4th Cir. 2001) (concluding that an officer's use of "pepper spray" to subdue an unarmed subject was irresponsible and excessive when the subject was not a threat to the officer or the public, and that the officer was not entitled to qualified immunity); *see also Orem v. Rephann*, 523 F.3d 442, 449 (4th Cir. 2008) (concluding that use of a taser to "punish or intimidate" a pretrial detainee is not objectively reasonable and is contrary to clearly established law.

As noted, prior to this incident, it was clearly established that use of a Taser on an unarmed citizen was a serious use of force and appropriate only when there was some immediate danger. For example, in *Estate of Armstrong ex rel. Armstrong*, 810 F.3d 892, the Fourth Circuit held that Tasers are an appropriate "proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser." *Id.* at 903 (emphasis in original). The Fourth Circuit continued and noted that

"[d]eploying a taser is a serious use of force" and that a Taser is "designed to cause excruciating pain." *Id*. at 902 (internal quotations and citation omitted). As such, Tasers can only be deployed by a police officer when "confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser." *Id*. at 909; *see also Moore v. Peitzmeier*, No. TDC-18-2151, 2020 WL 94467 (D. Md. Jan. 7, 2020) ("[T]here is controlling [Fourth Circuit precedent] holding that assaulting an unarmed, subdued subject or arrestee violates the Fourth Amendment.").

Here, Webster had no justification whatsoever to Tase Anton because he was not an "immediate safety risk": there was no indication that Anton was armed, Webster knew Anton was mentally ill or having a mental health crisis and Webster clearly could see that Anton was defenseless inside of a disabled vehicle. Anton was not making any threatening or aggressive moves directed towards Webster or anyone else while inside the vehicle. As such, Plaintiffs' expert has opined that Anton was not, while locked in a disabled car, a threat to anyone, including any of the Defendant Officers and a jury could so reasonably conclude.

Furthermore, the application of the Taser, coupled with the use of the police baton to smash the window so that the Taser could be deployed, served to significantly escalate the incident in a manner that was reasonably foreseeable. Specifically, the use of the baton and the Taser, when Anton was not a threat to anyone and was contained within a car, directly caused Anton to flee the car which then led to him being physically restrained. *See Rowland*, 41 F.3d 167 (faulting officer who took a situation where there obviously was no need for the use of any significant force and through use of force quickly escalated the matter to a violent encounter). As noted, the *Meyers* Court stated in "forthright terms that officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen . . . whether arising from a gun, **a baton**, a taser, or other

weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured." *Meyers*, 713 F.3d at 734-35. (citing *Park*, 250 F.3d at 852-53 (emphasis supplied).

(b) The pinning of Anton to the ground and the obstruction of his airway is the application of excessive and unconstitutional force.

There was also clearly established law putting the Defendant Officers on notice regarding the risk and danger of death or serious injury from positional asphyxiation. In *Estate of Saylor v. Regal Cinemas, Inc*., 54 F. Supp. 3d 409 (D. Md. 2014), *aff'd sub nom. Estate of Saylor v. Rochford*, 698 F. App'x 72 (4th Cir. 2017), Ethan Saylor ("Mr. Saylor"), died after three off-duty Frederick County Deputy Sheriffs tried to force him to leave a movie theatre because he was attempting to view a movie for the second time without paying for the second showing. *Id*. at 413. Mr. Saylor, who had Downs Syndrome, struggled with the Deputies and, in the ensuing struggle, suffered a fractured larynx that led to his death by asphyxiation. The Court denied the Sheriff's Deputies' Motion to Dismiss, finding support for the clearly established prong of the analysis in *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994). In *Rowland*, an officer chased the plaintiff after the plaintiff picked up a five-dollar bill that had been dropped at a ticket window. Id. at 171. According to the plaintiff in the *Rowland* case, the officer subsequently grabbed his collar and jerked him around. *Id*. at 171-172. As the plaintiff attempted to free himself, the officer applied disabling force to gain control. In the course of the struggle, the officer injured the plaintiff's leg causing a serious knee injury. *Id*. The *Saylor* Court, relying on *Rowland*, held that the conduct of the officers "is not to be viewed as [an] artificially divided sequence of events, [and] gave fair warning to the Deputies that their conduct was unreasonable, at least under the facts as alleged in First Amended Complaint." Id. at 421. Accordingly, Fourth Circuit case law is clear that courts should use a "'totality of the circumstances' analysis" in excessive force actions such as this one. Id. at 417 (*quoting Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

The *Saylor* Court also discussed the "clearly established standard" in *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003), stating:

> The standard is again one of objective reasonableness: the "salient question" is whether "the state of the law" at the time of the events at issue gave the officer "fair warning" that his alleged treatment of the plaintiff was unconstitutional. Officials can still be on notice that their conduct violates established law even in novel factual circumstances. Although earlier cases involving "fundamentally similar" or "materially similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." Even though the facts of a prior case may not be "identical," the reasoning of that case may establish a "premise" regarding an unreasonable use of force that can give an officer fair notice that his conduct is objectively unreasonable.

54 F. Supp. 3d at 420-21 (*quoting Jones*, 325 F.3d at 531-32) (internal citations omitted). The *Saylor* Court then noted that "[p]erhaps the most significant unsettled question is the reason for the escalation in the Deputies' use of force." 54 F. Supp. 3d at 421. Similarly, in this matter, when the video footage from Webster's body camera is viewed in the light most favorable to Plaintiffs, there is no reason why, after Anton was Tased, taken down to the ground, and handcuffed, the Defendant Officers continued to hold him in a prone position applying weight against Anton's incapacitated body with such force that Plaintiffs' experts conclude that Anton died of positional asphyxiation. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and **bound** suspect constitutes objectively unreasonable excessive force.").

Recently, in *Jones v. Chapman*, No. ELH-14-2627, 2017 WL 2472220 (D. Md. June 7, 2017), this Court recognized that "**it has long been clearly established** 'that 'officers using unnecessary, gratuitous, and **disproportionate force** to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity.'" *Id.* at *82 (emphasis supplied) (quoting *Meyers*, 713 F.3d at 734, and *Bailey*, 349 F.3d at 744-45). This

principle is true even as to a citizen who initially offered resistance but was subjected to excessive force after he ceased his resistance. *See, e.g., Bailey,* 349 F.3d at 744-45 (denying qualified immunity where suspect initially resisted arrest but officers continued to use force after he was fully secured); *Kane v. Hargis*, 987 F.2d 1005, 1006-07 (4th Cir. 1993) (denying qualified immunity where suspect initially resisted arrest but police officer, after suspect was secured, "repeatedly push[ed] her face into the pavement, cracking three of her teeth, cutting her nose, and bruising her face"). Indeed, in *Jones*, where summary judgment was denied to the defendants by Judge Hollander, similar to this matter, the plaintiffs' expert concluded that the manner of death was homicide and that the cause of death was positional asphyxia as a result of the decedent being "hog tied" and because an adult male sat on the decedent's back while he was restrained. *Jones,* 2017 WL 2472220, at *27.

Two other cases confirm it has long been settled law in the Fourth Circuit that subduing one in a prone position can cause death and is a violation of one's constitutional rights. First, is *McBeth v. City of Union*, No. 7:15-1473-BHH, 2018 WL 4594987 (D.S.C. Sept. 25, 2018), McBeth, who weighed approximately 255 pounds, was involved in an automobile collision in April 2013 which may have contributed to his mental confusion. *Id.* at *3. After the collision, McBeth was observed repeatedly hitting a subject in the head. *Id.* Police officers intervened, and McBeth, who was unarmed, was Tased in probe mode and also in drive-stun mode, as well as sprayed with Freeze + P spray. *Id*. at *4. After a disputed amount of time attempting to restrain McBeth, the police officer wrestled McBeth to the ground such that: 1. Two officers (Officer Spencer and Deputy Suber, who was laying on top of Officer Spencer) were laying on top of McBeth's torso while McBeth was in the prone position with his hands and feet shackled; 2. Another Deputy, Deputy Johnson, was leaning on McBeth's legs/lower body and standing on the

leg chains while McBeth was in the prone position with his hands and feet shackled; 3. Deputy Childers was leaning over McBeth and putting additional pressure on his chest with her hands, *after McBeth had already been subdued in a supine position*; and 4. Deputy Hill assisted Sheriff Taylor in adjusting the position of McBeth's shackled legs. *Id.* at *25-26. McBeth then became unresponsive and attempts to revive him were not successful. Plaintiff's medical expert, a forensic pathologist, opined that McBeth died as a result of restraint asphyxia while being subdued by the police officer. *Id.* at *15-16. In *McBeth*, relying on clearly established law from 2008, the court stated, "'If . . . the facts plaintiffs proffered are true and the jury draws the inferences most supportive of plaintiffs' position, then the law was clearly established that applying pressure to [the arrestee's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions.'" *Id.* at *45 (quoting *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008)). The *McBeth* Court further explained:

> *We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers*, the public, or the suspect himself. Yet, as explained above, there is evidence that this is what happened here: even after it was readily apparent for a significant period of time (several minutes) that [the arrestee] was fully restrained and posed no danger, the defendants continued to use pressure on a vulnerable person's upper torso while he was lying on his stomach. *A reasonable officer would know these actions present a substantial and totally unnecessary risk of death to the person*.

2018 WL 4594987, at *15 (quoting *Weigel*, 544 F.3d at 1154) (emphasis supplied).

The *McBeth* Court concluded and found:

> [G]iven the conditions that McBeth was unarmed and already secured with handcuffs and leg irons, any reasonable officer would have known that the continued application of a choke hold and the piling of two three-hundred-pound officers on McBeth's torso while he was in the prone position were unnecessary, gratuitous, and **disproportionate** forms of force to prevent a risk of injury to the officers or the public.

2018 WL 4594987, at *15.

Similarly, in this matter, the Defendant Officers were on notice, even if there had not been clearly established law like *Saylor and Jones* and as discussed in *McBeth and Myers*, that the disproportionate force applied to Anton throughout this matter was unreasonable and excessive. As in *McBeth*, Plaintiff's medical expert, a forensic pathologist, opines that Anton died as a result of restraint asphyxia while being subdued by the police officers. And Plaintiff's use of force expert Dr. Powers opines that force was unreasonable and excessive. Here the unreasonable and excessive application of force culminated when the unnecessary weight of the Defendant Officers was on Anton's body when he was handcuffed, face down in the prone position, against the hard ground, not to prevent the risk of injury to any officer or the public. Sadly, this gratuitous and disproportionate force caused Anton's death similar to *McBeth*.

Second, in *Myers v. City of Charleston*, No. 2:19-cv-00757, 2021 WL 925326 (S.D.W. Va. Mar. 10, 2021), two officers arrived at the Myers' residence in September 2017 in response to a call of an "active domestic" where Adam Myers ("Adam"), who had been diagnosed with schizoaffective disorder, major depression, and anxiety, had an altercation with his father, Walter. *Id.* at *2-3. When the police officers arrived, Walter was on the floor and unresponsive. *Id.* at *7. Although Adam resisted, the officers were eventually able to handcuff Adam. *Id.* at *8. The officers then decided to "put him [Adam] down." *Id.* Adam subsequently died while in handcuffs. At summary judgment, it was disputed by the parties how much force was applied to Adam while he was in the prone position and the medical reason that Adam died. Nevertheless, the District Court denied the defendants' motion for summary judgment. Importantly, the District Court, citing cases decided long before this incident, found:

> The video of this incident, as well as the parties' own divergent characterizations of the incident, reveals genuine issues of material fact

> that make qualified immunity inappropriate in this matter. **First, it is clearly established that handcuffing a subject and forcibly keeping him in a prone position, absent further resistance, constitutes excessive force.** *See, e.g., McCue v. City of Bangor, Maine*, 838 F.3d 55, 64-65 (1st Cir. 2016); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008); *Abdullahi v. City of Madison*, 423 F.3d 763, 769 (7th Cir. 2005); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *Drummond ex. rel. v. City of Anaheim*, 343 F.3d 1052, 1056-57 (9th Cir. 2003); *Simpson v. Hines*, 903 F.2d 400 (5th Cir. 2003) (denying qualified immunity to police officers who entered an inmate's cell, placed the inmate in a neck hold, and put strong pressure upon his chest, where the custodial death report attributed the inmate's death to asphyxia as a result of trauma to the neck sustained during the struggle, and a physician's report suggested that the inmate may have died as a result of asphyxiation due to the pressure on his chest). The Court's own research has been unable to locate any Fourth Circuit precedent exactly on point, **but as the Supreme Court has instructed, an exact replica of the facts of this case is not needed for such a determination.** *See al-Kidd*, 563 U.S. at 741.

2021 WL 925326, at *12 (emphasis supplied). Then, speaking directly to the defendants' clearly established defense, the District Court held:

> [T]he Fourth Circuit has reasoned that "officers using unnecessary, gratuitous, and **disproportionate force** to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Bailey v. Kennedy*, 349 F.3d 731, 744-45 (4th Cir. 2003) (quoting *Jones v. Buchanan*, 323 F.3d 520, 531-32 (4th Cir. 2003)). Therefore, the Court remains unpersuaded by the Defendants' assertion that Plaintiffs "have had years to come up with controlling authority but failed to do so." Indeed, for quite some time and continuing, courts around the country have recognized and spoken at length of the dangers of exerting force on a prone and handcuffed individual. *See, e.g., Agster v. Maricopa Cnty. Sheriff's Office*, 144 Fed. App'x. 594 at 596-97 (9th Cir. 2005); *McBeth v. City of Union*, Civ. Action No. 7:15-1473-BHH, 2018 U.S. Dist. LEXIS 164121, 2018 WL 4594987 at *14-15 (D.S.C. Sep. 25, 2018); *Hopper v. Montgomery Cnty. Sheriff*, 310 F. Supp. 3d 911, 929 (S.D. Oh. 2017); *Gary v. City of North Chicago*, 160 F. Supp. 3d. 1035, 1042 (N.D. Ill. 2016); *Sweatt v. Doxtader*, 986 F. Supp. 2d 886, 898 (E.D. Mich. 2013); *Howe v. Town of North Andover*, 854 F. Supp. 2d. 131, 143 (D. Mass. 2012); *Pirolozzi v. Stanbro*, No. 5:07-CV-798, 2008 U.S. Dist. LEXIS 36054, 2008 WL 1977504 at *11-*12 (N.D. Oh. 2008). **Under those circumstances where a suspect is detained and is no longer actively resisting or a flight risk, the use of force in keeping him in a prone position is a violation of a clearly established right**.

2021 WL 925326, at *13. (emphasis supplied). Importantly, although *Jones, McBeth* and *Myers* are District Court cases, they rely on well-established Fourth Circuit precedent, including *Bailey*, 349 F. 3d at 744-45, *Jones v. Buchanan*, 325 F.3d 520, 531-32 (4th Cir. 2003) and *Meyers*, 713 F.3d at 733.

In this matter, after securing Anton on the ground and placing handcuffs on Anton while he was in the prone position on the ground, Defendants continued applying unnecessary weight and pressure on Anton's torso, which caused Anton's death by positional asphyxiation, violating the Fourth Amendment. Plaintiff's experts opine that these actions by the Defendant Officers were "unnecessary, gratuitous, and disproportionate" force, not force to prevent any risk of harm to the officers, who were not threatened in any way by Anton. Plaintiff's experts will also opine that this "unnecessary, gratuitous, and disproportionate" force was the sole cause of Mr. Black's death. At this stage, in deciding this Motion for Summary Judgment, the Plaintiff's evidence must be believed by this Court. All of the cases discussed are clearly established law putting Defendant Officers on notice that their actions violated Anton's constitutional rights. This is a jury question and the Defendant Officers' Motion for Summary Judgment based on qualified immunity must be denied.

2. Bystander Liability of Defendant Officers

As set forth herein, each Defendant Officer is individually liable to Plaintiffs for their unconstitutional conduct. However, each Defendant Officer is also liable to Plaintiffs under a theory of bystander liability. "To succeed under a theory of bystander liability, a plaintiff must demonstrate that a law-enforcement officer (1) [knew] that a fellow officer was violating an individual's constitutional rights; (2) ha[d] reasonable opportunity to prevent the harm; and (3) cho[se] not to act. *Stevenson v. City of Seat Pleasant*, Md., 743 F.3d 411, 417 (4th Cir. 2014) (*quoting Randall v. Prince George's Cnty*., 302 F.3d. 188, 204 (4th Cir. 2002). For example, in

Smith v. Aita, CCB-14-3487, 2016 WL 3693713 (2016), *aff'd*, 711 F. App'x 163 (4th Cir. 2018), Smith was sleeping in a car when he awoke to find four (4) officers were surrounding his car. *Id.* at *1. The officers forced open the car, pulled Smith out, and pushed Smith against the side of the car. *Id*. When told by the officers he was going to be searched, Smith attempted to flee. *Id.* After one officer grabbed Smith and pushed him to the ground, Officer Aita ("Aita") beat Smith "viciously and savagely. *Id.* Even after Smith "curled up in a defenseless, 'ball-like' position," Aita pepper-sprayed Smith and continued to punch and kick him. *Id.* Aita only stopped beating Smith when he was told that people were starting to watch. *Id.* at *2. Although ruling on a Motion to Dismiss, this Court's ruling is instructive. Specifically, the Court ruled that the allegation that the three defendant police officers were present when Aita "viciously beat Mr. Smith for another 10-20 seconds after Smith had curled up in a "defenseless, 'ball-like' position and was pepper-sprayed," was a sufficiently pled fact which permitted the Court to draw the reasonable inference that the three officers knew that Aita was subjecting Mr. Smith to excessive force. *Id*. at *10. This Court also ruled that the three officers had an opportunity to stop Aita, but decided not to until they became concerned that people were watching. *Id*. at *11.

In this matter, as set forth herein, Webster, Manos and Lannon each, individually, violated the constitutionally rights of Anton. Additionally, all three Defendants–Webster, Manos and Lannon – if shown not to be actively involved, watched as Anton was Tased, then forcibly pinned to the ground, handcuffed and shackled with his legs facing upwards. Each officer had multiple opportunities to save Anton from death. Tragically, each officer followed the others, choosing not to act, with Anton's death as the result.

3. Additional Unconstitutional Conduct on which Defendant Officers do not seek summary judgment based on qualified immunity.

In addition to the unconstitutional application of force on an individual experiencing a mental health crisis, Section V. C.1 above, Defendant Officers also violated Anton's due process rights by unreasonably delaying the administration of emergency medical care to Anton in deliberate indifference to his medical needs while he was detained. The claim for denial of medical care is governed by the due process clause of the Fourteenth Amendment rather than the Eighth Amendment's prohibition against cruel and unusual punishment. *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring). See also, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (finding that because there had been no formal adjudication of guilt against the arrestee at the time he required medical care, the Eighth Amendment had no application; and holding that the Due Process Clause did, however, require the responsible governmental agency to provide medical care to persons injured while being apprehended by the police). Similarly, *Mays v. Sprinkle*, 2021 WL 1181273 at *2, ___ F.3d___, (4th Cir. 2021) explains that, "[A] pretrial detainee makes out a violation at least where "he shows deliberate indifference to serious medical needs" under cases interpreting the Eighth Amendment. … "[t]he due process rights of a pretrial detainee are at least as great as the eighth amendment protections available to the convicted prisoner". *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). See also, *Martin v. Gentile*, 849 F.2d 863, 870-71 (1998) (stating that the due process clause may require state officials to provide medical care to detainees who have been injured during the course of arrest).

The Fourth Circuit in *Mays* explains that for claims arising "under the Fourteenth Amendment, we have traditionally looked to Eighth Amendment precedents in considering a Fourteenth Amendment claim of deliberate indifference to serious medical needs." *Mays v. Sprinkle*, 2021 WL 1181273 at *2. It further enlightens:

> An Eighth Amendment claim for deliberate indifference to serious medical needs includes objective and subjective elements. The objective element requires a "serious" medical condition. A medical condition is objectively serious when it either is "diagnosed by a physician as mandating treatment" or is "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." And for the subjective element, the prison official must have acted with a 'sufficiently culpable state of mind." The subjective state of mind required is that of "deliberate indifference . . . to inmate health or safety." And deliberate indifference requires that the official have "had actual subjective knowledge of both the inmate's serious medical condition and the excessive risk posed by the official's action or inaction."

Id. at *3 (internal citations and quotation marks omitted). In other words, "[d]eliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." *Id.* (string citations omitted).

In *Mays*, Jeffrey Mays ("Mays") was arrested for public intoxication and was placed in a cell to sober up. Mays was later found dead in his cell. His estate sued the officers, alleging deliberate indifference to Mays' serious medical needs. The officers filed a motion to dismiss which was granted by the District Court. In its reversal of the lower court, the Fourth Circuit held that the officers were not entitled to dismissal based on qualified immunity. The Court found that the allegations in the complaint showed that "the officers had subjective knowledge of Mays' serious medical condition and of the excessive risk posed by their inaction." *Id.* at *6. Specifically, the officers observed that "Mays was lethargic, inactive, … it took multiple officers to assist Mays in the most elementary of movements. …Mays could barely communicate, could not move his extremities without assistance, and could not hold himself up when he sat down." *Id.* Because the officers had actual knowledge of Mays' serious medical condition and failed to provide medical assistance, the Court held that the officers were not entitled to dismissal based on qualified immunity.

While the Court in *Mays* was tasked with deciding a motion to dismiss, here, at pre-discovery summary judgment, this Court must view the evidence in the light most favorable to Plaintiffs. There is sufficient evidence demonstrating that Defendant Officers were deliberately indifferent to Anton's serious medical condition. For example, the bodyworn camera video shows that approximately six minutes after taking Anton to the ground and placing him in a prone position, after his legs were shackled, Manos finally lifted himself off of Anton's body. (Ex. 5, BWC, 09:50-09:55). At this point, long after such warning and action was required by police protocol, Manos stated: "Let's get him on his side so he can breathe", (Ex. 5, BWC, 09:55) illustrating that Manos was aware that pinning Anton face down could cause a serious medical injury and ultimately death. At that point, Anton was no longer responsive as he had not spoken for minutes. Yet, the officers still provided no medical assistance. The video also shows that when the officers propped Anton into a sitting position, he remained unresponsive with his head dangling to the side. Still, no medical assistance was rendered. (Ex. 5, BWC, 10:47). Approximately two minutes after the officers propped Anton up against the wall while assuring his mother that everything was fine, Ms. Black looked into her son's face and saw that he was turning dark. She asked the officers for help. (Ex. 5, BWC, 12:45) Then, not until over four minutes after the officers had initially propped Anton up, did the officers and others on site began administering CPR. (Ex. 5, BWC, 14:21). By the time that emergency personnel arrived, all attempts to resuscitate Anton were unsuccessful. Anton was pronounced dead shortly after being transported to the hospital. The evidence viewed in the light most favorable to Plaintiffs shows that Anton had an objectively serious medical condition – possible asphyxiation and then asphyxiation – and that the Defendant Officers had subjective knowledge of the condition and the excessive risk posed by inaction.

Accordingly, Defendant Officers are not entitled to qualified immunity, and their summary judgment motion should be denied.

As Defendant Officers did not move for summary judgment on this theory, the motion should be denied.

4. Defendant Officers are incorrect to argue that there has to be an exact precedent to satisfy the clearly established standard.

Defendant Officers attempt to narrow the "existing precedence" standard by arguing that "[a]t the time of the events in this case, there was no precedent from either the Supreme Court or the Fourth Circuit governing the circumstances that the Officers encountered on September 15, 2018." (Def. Mot., ECF 19-2 at 31) (footnote omitted). As Plaintiffs have demonstrated, Defendants are wrong -- there were numerous precedents that held that use of excessive force and Defendants' other conduct under these circumstances was unconstitutional. Additionally the law is clear that in analyzing whether or not existing precedent is sufficient to put Defendants on notice of the unreasonableness of their actions, the Court must assess whether "pre-existing law ma[de] the unlawfulness of the conduct in question – as alleged by [Plaintiffs], and drawing all reasonable inferences in [Plaintiffs'] favor – apparent." *Harris v. Pittman*, 927 F.3d 266, 281 (4th Cir. 2019) (internal quotations and citation omitted). Ultimately, the clearly established determination is "based on the simple fact [whether] the officer took a situation where there obviously was no need for the use of any significant force and yet took an unreasonably aggressive tack[.]" *Smith v. Ray*, 781 F.3d 95, 104 (4th Cir. 2005).

When examining the relevant case law, it is clear that direct precedent existed which controlled the events that occurred in this case. However, even if there was not direct precedent, the Fourth Circuit has repeatedly held that "when the 'unlawfulness' of the conduct would be "apparent" to any reasonable person, a right may still be recognized as "clearly established," even

when there is no existing precedent directly on point. *See Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Accordingly, "the 'exact conduct at issue need not' previously have been deemed unlawful for the law governing an officer's actions to be clearly established." *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018) (quoting *Amaechi v. West*, 237 F.3d 356, 362 (4th Cir. 2001)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] **sufficiently clear** that every reasonable official would [have understood] that what he is doing violates that right. **We do not require a case directly on point**, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotations and citations omitted) (emphasis supplied). "[T]he nonexistence of a case holding the defendant's **identical** conduct to be unlawful does not prevent the denial of qualified immunity." *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (emphasis supplied). Defendant Officers rely on *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) (*per curiam*) to argue that their conduct "violated no clearly established right, or any other right for the matter, and they are entitled to immunity." ECF 19-2, at 21. Defendants' reliance is misplaced. The Fourth Circuit, after *Mullenix*, held that "there is *no* requirement that the very action in question [must have] previously been held unlawful" for a reasonable official to have notice that his conduct violated that right. *Scinto v. Stansberry*, 841 F.3d. 219, 236 (4th Cir. 2016) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). (emphasis supplied); *See also*, *Taylor v. Rioj*as, 141 S. Ct 52, *53-54 (2020).

These holdings refine the clearly established standard so that "[p]recedent involving *similar facts* can help move a case beyond the otherwise 'hazy border between excessive and acceptable force[.]'" *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (*quoting Mullinex v. Luna*, 577 U.S.

7, 18 (2015)). Thus, the clearly established assessment is essentially a general **notice** requirement. As this Court recently recognized:

> A right is clearly established when the unlawfulness of violating the right is apparent in light of pre-existing caselaw. *Yates* [*v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016)]. But, "the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity." *Edwards v. Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999); *see* [*Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)] ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional debate beyond debate.") . . . In practical terms, the issue of clearly established law is one of notice. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). "[E]ven in novel factual circumstances," officials can still be on notice that their conduct violates established law." *Id.*

Krell v. Queen Anne's Cnty., No. JKB-18-637, 2018 WL 6523883, at *28 (D. Md. Dec. 12, 2018) *affirmed in relevant part in Krell v. Braightmeyer*, 828 F. App'x 155 (4th Cir. 2020). With this rule in mind, there is a long line of precedent that supports Plaintiffs' positions when the facts are viewed in the light most favorable to Plaintiffs, plainly showing that the Defendant Officers have not met their burden of establishing that clearly established law did not place them on notice that their conduct was unlawful and unconstitutional.

VII. STATE CLAIMS

A. Defendants Are Not Entitled to Statutory Immunity Against Plaintiffs' Non-Constitutional State Claims.

Just as with qualified immunity, the question of whether the Officers are entitled to statutory immunity on the common law claims under §5-507 of the Courts & Judicial Proceedings Article depends on disputes of material fact that must be resolved by a jury. As Defendants acknowledge, there is no immunity under §5-507 for claims involving allegations of actual malice or gross negligence. Def. Br. 47-48. *Barbre v. Pope*, 402 Md. 157, 187 (2007) (police officers are not immune under the Maryland Tort Claims Act from claims of gross negligence.) *See also,*

Koffman v. Garnett, 265 Va. 12, 574 S.E.2d 258, 260 (2003) (finding no immunity for claim of gross negligence). Here, Plaintiffs have alleged grossly negligent or malicious torts. (FAC ¶¶239, 272, 276). Viewing the facts in the light most favorable to Plaintiffs, Plaintiffs have presented sufficient evidence through the video tape and expert testimony that the Defendant Officers acted in reckless disregard of the consequences as affecting the life of Anton in their attempt to seize him for a medical evaluation. Specifically, Plaintiffs' experts opine that Anton died because the Defendant Officers employed excessive force laying him out prone on his stomach, placing the pressure of their bodies on him and forcibly restraining him in a prone position for approximately six minutes, and approximately five minutes after he was handcuffed, and folding his legs towards the sky in a manner that further compromised his ability to breathe. Ex. 3, Powers Decl.; Ex. 2, Diaz Decl.; Ex. 4, Resar Decl. Accordingly, a fact finder could conclude that the Defendant Officers acted with gross negligence, thus obviating the protections of statutory immunity.

B. Defendants Are Not Entitled to Summary Judgment on the Battery Claim.

In response to Defendants' claim that "if the force used is not excessive, battery can only occur when there is no legal authority or justification for the arresting officer's actions" (Def. Mot., ECF 19-2 at 46), as explained *supra* in Section III, the Defendant Officers' use of force was clearly excessive, which creates a dispute of material fact to be submitted to a jury. Accordingly, Defendants are not entitled to summary judgment on the Plaintiffs' battery claim.

C. Defendants Are Not Entitled to Summary Judgment on the Conspiracy Claim.

Defendants argue in their Motion that "dismissal of Plaintiffs civil conspiracy claim is proper" (Def. Mot., ECF 19-2 at 48) because "civil conspiracy is not recognized as a separate cause of action in Maryland and, therefore, is improperly alleged as a separate count" (Def. Mot., ECF 19-2 at 47). What Defendants fail to acknowledge is that Count 13 of Plaintiffs' First Amended

Complaint alleges a civil conspiracy regarding violations of Plaintiffs' rights guaranteed under Arts. 24, 26, and 40. In other words, Plaintiffs' civil conspiracy claim is premised upon the conspiring Defendants' violations of Anton's state constitutional rights. "Under Maryland law, civil conspiracy . . . serves to extend liability to co-conspirators once the plaintiff has established some other tortious wrong." *Hovatter v. Widdowson*, No. CIV.CCB-03-2904, 2004 WL 2075467, at *10 (D. Md. Sept. 15, 2004). Here, Plaintiffs allege a claim of civil conspiracy deriving from Defendants' collaboration in violating Anton's state constitutional rights. As this Court recently explained "…a claim under Maryland state law for civil conspiracy requires "(1) a confederation of two or more persons by agreement or understanding; (2) some unlawful or tortious act done in furtherance of the conspiracy or use of lawful or tortious means to accomplish an act not in itself illegal; and (3) actual legal damages resulting to the plaintiff." *McPherson v. Baltimore Police Dep't*, No. CV SAG-20-0795, 2020 WL 6063479, at *10 (D. Md. Oct. 14, 2020). In the First Amended Complaint, "Plaintiffs aver that, on information and belief, Defendants conspired together and among themselves to violate Plaintiffs' rights to due process and access the courts under Articles 24, 26, and 40 of the Maryland Declaration of Rights by intentionally and falsely misrepresenting facts and events that led to the death of Anton in a collective effort to protect themselves, evade accountability and obscure official responsibility for Anton's death." (FAC ¶309.) As Plaintiffs have sufficiently pled a cause of action of civil conspiracy to violate Plaintiffs' state constitutional rights claims, Count 13 of the First Amended Complaint should move forward.

D. Defendants Are Not Entitled to Summary Judgment on the Emotional Distress Claim.

Defendants' request for summary judgment on Plaintiffs' claim of intentional infliction of emotional distress should also be denied. "To prove a claim of intentional infliction of emotional distress, Plaintiff must show: (1) Defendants' conduct was intentional or reckless; (2) the conduct

was extreme and outrageous; (3) a causal connection existed between the conduct and the emotional distress; and (4) the emotional distress was severe (the "severity" prong). *Vincent v. Prince George's Cty., MD,* 157 F. Supp. 2d 588, 596 (D. Md. 2001). In this matter, the record shows that all of the Defendant Officers were aware of Anton's emotional distress and took actions to exacerbate it. Specifically, Officer Webster directly observed Anton's erratic behavior on September 15, 2018, and was explicitly told by X.B. that Anton was schizophrenic at that time. (Body Worn Camera "BWC", Ex. 5; Def. Mot. ECF 19-2, Webster's Decl. Ex.10) Officer Webster relayed this information over the radio, and also informed Chief Manos and Officer Lannon of this information. *Id.* As the officers pinned Anton down, Anton began to scream for his mother and cry hysterically, and Officer Webster told Chief Manos, "He's schizophrenic," to which Manos replied, "Yeah, yeah, yeah." *Id.* The body camera shows Anton pinned underneath the officers and continuing to plead for his mother, repeating "I love you," and calling out "You were always there! Thank you!" *Id.* Approximately two minutes after the officers handcuffed Anton, Webster told Lannon that "This is gonna be an [Emergency Petition]." And in response to questions from Anton's mother, Webster told her that "This is a mental health emergency, we're not treating this like a crime." *Id.*

With this knowledge, the Defendant Officers, collectively and individually, acted intentionally and/or recklessly in their dealings with Anton to further his distress. Each officer knew that Anton was experiencing a mental health crisis when they encountered him on September 15, 2018. Instead of treating Anton as a person who needed medical attention, the Defendant Officers treated him like a criminal, and they knew that their actions were causing Anton distress. The conduct of Defendants was extreme and outrageous.

Because of Defendants' intentional and/or reckless actions, Anton, who was already in the midst of a mental health crisis, was chased by four white individuals (only one of whom was in uniform), Tased, taken to the ground, and restrained in a prone position with significant compression of his upper body for approximately six minutes. Defendants' extreme and outrageous actions directly caused Anton severe emotional distress in the moments before his death. The facts in this case, taken in the light most favorable to Plaintiffs, meets the rigorous test of outrageousness to sustain a cause of action of intentional infliction of emotional distress.

E. Defendants Are Not Entitled to Summary Judgment on the Wrongful Death and Survival Claims.

Lastly, as the Court of Special Appeals held in *Clark v. Prince George's County*, 211 Md. App. 548, 557-558 (2013), Maryland law is well-settled that a county (or municipality) generally enjoys immunity only against certain common law tort liability, not statutory claims, *citing*, *Dipino v. Davis*, 354 Md. 18, 4 (1999). Inasmuch as wrongful death and survival actions are not common law actions, but, instead statutory actions under the Maryland Code, Courts and Judicial Proceedings, § 3-901, *et. seq.*, and § 6-401, *et. seq.*, this type of immunity is inapplicable, meaning neither the Towns nor the Defendant Officers are entitled to immunity for the Count 1 Wrongful Death claim and the Count 2 Survival action.

F. State Constitutional Claims

Defendants' assertion that they are entitled to qualified immunity for all the Maryland State Constitutional claims asserted under Counts 4, 5, 6, and 13 fails for two reasons.

First, qualified immunity is not a defense to claims brought under Articles 24 and 26 of the Maryland Declaration of Rights. *See Littleton v. Swonger*, 502 F. App'x 271, 274 n.2 (citing *Okwa v. Harper*, 360 Md. 161 (2000)); *Wallace v. Poulus*, No. DKC 2008-0251, 2009 WL 3216622, at *15 (D. Md. Sept. 29, 2009) (qualified immunity is not a defense to an Article 24 claim);

Cunningham v. Baltimore Cnty., 246 Md. App. 630, 672-73 (2020) ("Qualified immunity does not apply to Maryland state constitutional claims[.]").

Second, even if the claims under Articles 24 and 26 were subject to a qualified immunity defense, those claims are to be interpreted, at minimum, *in pari materia* with their analogous federal constitutional claims. *Dent v. Montgomery Cnty. Police Dep't*, 745 F. Supp. 2d 648, 661 (D. Md. 2010); *Littleton v. Swonger*, 502 F.App'x 271, 274 (4th Cir. 2012) ("Articles 24 and 26 are construed in pari materia with the Fourth and Fourteenth Amendments of the U.S. Constitution[.]"); *Att'y Gen. v. Waldron*, 289 Md. 683, 704 (1981) (applied "in like manner and to the same extent" as the Fourth and Fourteenth Amendment such that decisions interpreting the Fourth and Fourteenth Amendments "are practically direct authorities."); *Canaj, Inc. v. Baker & Div. Phase III*, 391 Md. 374, 424 (2006); *State v. Smith*, 305 Md. 489, 513-14 (1986), *cert. denied*, 476 U.S. 1186, 106 S. Ct. 2925, 91 L. Ed. 552 (1986).

Accordingly, because summary judgment must be denied for the federal constitutional claims, it must be denied under Articles 24 and 26 as well. Defendants' Motion for Summary Judgment on Plaintiffs' Counts 4, 6, 13, and 14 under Articles 24 and 26[5] of the Maryland State Constitution must also be denied.

G. Alternatively, Summary Judgment should be denied if the Court determines that Plaintiffs have not presented facts essential to the defense of a Motion for Summary Judgment prior to discovery

Federal Rule 56(d) states:

> (d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

[5] Plaintiffs also filed Count 13 under Article 40 of the Maryland State Constitution. Defendants have not requested summary judgment on any claims under Article 40.

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

As set forth herein, Plaintiffs assert and emphatically believe the law requires that the Court deny Defendants' Motion for Summary Judgment under Rule 56(a). However, if the Court does not deny Defendants' Motion for Summary Judgment under Rule 56(a) and somehow finds that no genuine disputes of material facts currently exist, Plaintiffs request that the Court deny Defendants' Motion for Summary Judgment pursuant to Rule 56(d), to allow Plaintiffs the opportunity to develop the facts necessary to justify their further opposition to Defendants' Motion. As a general matter, "summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray v. Maryland Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014). Accordingly, "[a] Rule 56(d) motion must be granted 'where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Id.* at 483-484 (quoting *Anderson*¸477 U.S. at 250 n.5). Thus, such Rule 56(d) motions are broadly favored and should be liberally granted in order to protect non-moving parties from premature summary judgment motions." *McCray*, 741 at 484 (quoting *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F. 3d. 264, 281 (4th Cir. 2103).

Accordingly, granting summary judgment prior to the completion of discovery is inappropriate. *Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988); *Visa Int'l Serv. Ass'n v. Bankcard Holders*, 784 F.2d 1472, 1475 (9th Cir. 1986); *see also* Celotex *Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (summary judgment appropriate only "after adequate time for discovery"). This is especially important in an excessive force inquiry

that is highly fact - dependent, and "'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the [plaintiff] pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight[.]" *Milstead v. Kibler*, 243 F.3d. 157, 162 (4th Cir. 2001) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Thus, if this Court does not deny Defendants' Motion for Summary Judgment under Rule 56(a), Plaintiffs should be able to conduct discovery before the Court makes its judgment on what facts have been developed so that Plaintiffs can discover information essential to their opposition. *See Pisano v. Strach*, 743 F.3d 927, 931 (4th Cir. 2014); *Evans v. Tech. Applications & Serv. Co.*, 80 F. 3d 954, 961 (4th Cir. 1996).

Much of Defendants' Motion for Summary Judgment is supported only by self-serving affidavits of the Defendant Officers and the autopsy report that itself is challenged in this litigation. If Defendants' Motion for Summary Judgment is not denied under Rule 56(a), then in order to properly defend Defendants' Motion for Summary Judgment, Plaintiffs will need to thoroughly depose all of the Defendant Officers, Municipal officials, and Defendants Alexander and Fowler, as well as any defense experts, regarding the conduct of the Defendant Officers, as well as the manner and cause of the death of Anton Black. Specifically, in addition to deposing Defendants Alexander and Fowler and any of Defendants' experts, Plaintiffs will need to depose Webster, Manos, Lannon, and other personnel on the scene, such as medic Shawn Starkey, who is overheard on the BWC claiming that Anton was using spice as well as other eyewitnesses like civilian Kevin Clark, to inquire about the following:

a. Their assumption that Anton was abducting an individual;

b. The recruitment by Defendant Officer of a civilian motorcyclist to assist in the pursuit of Anton;

c. The actions of Anton and his reactions to the conduct of the Defendant Officers;

d. The use of a baton to smash the window of a car when Anton was contained within the car and not an imminent threat to anyone, including the Defendant Police Officers;

e. The reasons for Webster's deployment of a Taser against Anton even though Anton had entered and secured himself inside of a disabled motor vehicle;

f. The amount of time that Anton was in the prone position, the exact position of his body in the prone position, the exact location of each officer when Anton was in the prone position, the restraints employed onto the body of Anton, the amount of force applied by each officer while Anton was in the prone position when the Defendants knew that Anton was not armed and clearly not an imminent threat to anyone;

g. Whether the chase of Anton, the recruitment of a civilian motorcyclist to assist in the pursuit of Anton, the use of a baton to smash a car window, the use of a Taser, the takedown of Anton, the use of restraints on Anton while he was in the prone position, the handcuffing of Anton, and the use of the body weight of Defendants on the prone, handcuffed body of Anton were, at each step, a proper escalation of force under the use of force continuum;

h. The reason(s) why the crisis intervention unit was not contacted or consulted;

i. The basis for the medical conclusions reached by the Medical Examiners, Drs. Alexander and Fowler;

j. Why each Defendant failed to intervene to prevent the other officers from violating Anton's Constitutional Rights;

k. Why each Defendant failed to render timely medical care to Anton;

l. Why each Defendant failed to de-escalate the situation as a reasonable officer would have done;

m. Whether Defendants Officers were provided, reviewed and were familiar with their respective police department handbooks;

n. Whether Defendant Officers were trained consistent with their respective police department handbooks;

o. Any use of force training Defendant Officers received from their respective police departments;

p. Any training Defendant Officers received from their respective police departments regarding positional asphyxiation; and

q. Any training Defendant Officers received from their respective police departments regarding the use of Tasers.[6]

VIII. CONCLUSION

As set forth herein, Defendants' Motion for Summary Judgment under Rule 56(a) must fail as there are numerous genuine disputes of material fact including but not limited to disputes surrounding the Defendants' use of excessive force in the arrest of Anton and the cause and manner of death of Anton while he was in the custody of Defendants. Inasmuch as Defendants are not permitted to shield their actions under either qualified immunity or any statutory immunities, Defendants' Motion for Summary Judgment must be Denied.

[6] Defendants failed to present any argument in support of their motion for summary judgment as to Count 14 (Equal Protection) of Plaintiffs' Amended Complaint, therefore summary judgment on this Count must also be denied.

Respectfully Submitted,

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Index of Exhibits in Support of Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment as to Defendants Thomas Webster, Gary Manos and Dennis Lannon

Exhibit	Description
1	Deborah A. Jeon's Declaration of April 5, 2021.
2	Dr. Francisco Diaz's Declaration of April 5, 2021 and accompanying exhibits.
3	Dr. Tyrone Powers' Declaration of April 5, 2021 and accompanying exhibits.
4	Dr. Jon Resar's Declaration of March 31, 2021 and accompanying exhibits.
5	Body-Worn Camera Video

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2021, a copy of the foregoing memorandum of law and its accompanying exhibits was electronically filed in this case through the ECF system and served electronically upon counsel of record.

/s/ John A. Freedman
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