APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-1514
CRAIG STRAND,

Plaintiff-Appellee,

v.

CURTIS MINCHUK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:15-cv-149 – **James T. Moody**, *Judge.*

ARGUED AUGUST 7, 2018 – DECIDED NOVEMBER 8, 2018

AS AMENDED ON PETITION FOR REHEARING DECEMBER 6, 2018

Before KANNE, SCUDDER, and ST. EVE, *Circuit Judges*.

SCUDDER, *Circuit Judge.* We consider whether the district court erred at summary judgment in denying qualified immunity to a police officer who, in the context of an argument and fist fight over parking tickets, shot a semi-truck driver. The officer fired the shot after the driver stopped fighting, stepped back from the officer, and—with his hands in the air—twice said "I surrender." The district court concluded that a material question of fact existed as to whether the driver continued to pose a threat at the exact moment the officer fired the shot.

We affirm. We cannot read the facts in the light most favorable to the plaintiff and, on the record as it presently stands, conclude as a matter of law that the officer is entitled to qualified immunity. Doing so would mark a stark departure from clearly established law regarding an officer's use of deadly force. A trial is necessary to determine the precise timeline and circumstances leading to and surrounding the officer's deployment of such force.

I

A

Our retelling of the facts tracks the district court's account at summary judgment. See *Estate of Clark v. Walker*, 865 F.3d 544, 547 (7th Cir. 2017).

Craig Strand drives an 18-wheeler. On May 20, 2013, he stopped in Merrillville, Indiana, to take a mandatory drug screening test. Unable to find parking at the drug-testing facility, Strand received

permission to park his rig outside a nearby Planned Parenthood office.

Curtis Minchuk, a police officer with the Town of Merrillville, was working security at Planned Parenthood the same day. He did so in uniform with authorization from the Town. Upon reporting to work, Minchuk noticed a semi-truck parked in the lot. Unable to find the driver, he wrote two parking tickets and left them on the truck's windshield.

Upon returning to his truck, Strand found the tickets and went into Planned Parenthood to ask about them. An employee directed Strand to meet a police officer by his truck. Strand tried to discuss the tickets with Officer Minchuk, explaining that he did not see any no-parking signs in the lot, and also had received permission to park there. Minchuk had no interest in discussing the tickets beyond, as the district court observed, allegedly soliciting a bribe from Strand. After Strand declined to pay, Minchuk drove to the back of the Planned Parenthood facility.

Strand started his rig, but before driving away used his cell phone to take pictures of the parking lot, thinking he might need them to show the absence of no-parking signs to contest the tickets. Observing from a distance, Officer Minchuk returned to the truck and ordered Strand to leave immediately. Strand said he would leave as soon as he finished taking pictures. Minchuk responded by saying he was calling a tow truck and telling Strand he had two minutes to leave.

The situation then escalated. Stepping toward Strand, Officer Minchuk admonished, "I told you to

get the f*** outta here," and slapped Strand's cell phone to the ground. Minchuk then demanded Strand's identification; Strand refused and countered by demanding Minchuk's badge number. Minchuk replied, "I said, give me your I.D." and grabbed S trand b y h is s hirt a nd n eck, r esulting in Strand's shirt tearing off his body. Minchuk attempted to push and tackle Strand to the ground, with Strand resisting by holding on to Minchuk's arm.

At that point, both men fell to the ground, with Strand then punching Minchuk at least three times in the face and placing his hands on Minchuk's throat. Minchuk testified that this caused him to see stars, to feel as if he would pass out, and to fear for his life. He worried that, if he passed out, Strand would take his gun and shoot him.

The fist fight ceased when Strand stood up, backed four to six feet away from Officer Minchuk, put his hands up, and said, "I surrender. Do whatever you think you need to do. I surrender, I'm done." While still on the ground, Minchuk responded by removing his gun from its holster and firing a shot at Strand, striking him in the abdomen. Strand survived the gunshot wound. (In a subsequent proceeding in Indiana state court, Strand was convicted of committing felony battery of a police officer.)

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Strand brought suit under 42 U.S.C. § 1983 against Officer Minchuk and the Town of Merrillville for the use of excessive force in violation of the Fourth Amendment. The defendants moved for summary

judgment, contending that undisputed facts showed that Officer Minchuk could have reasonably believed Strand was not subdued—and therefore continued to present a danger—at the moment Minchuk chose to use deadly force. The defendants further argued that regardless of the district court's ruling on the merits of the excessive force claim, Minchuk was entitled to qualified immunity.

The district court denied the Town and Minchuk's motion for summary judgment, concluding that a material fact remains unresolved and contested between the parties: whether sufficient time passed upon Strand's surrender to result in Strand being "subdued prior to Officer Minchuk's use of deadly force." Putting the same point another way, the district court determined that Strand's substantive Fourth Amendment claim and Officer Minchuk's corresponding request for qualified immunity could not be resolved on summary judgment because the record leaves "unclear whether the rapidly-evolving nature of the altercation justified Officer Minchuk's use of force, or whether he had time to recalibrate the degree of force necessary, in light of plaintiff's statement of surrender."

In emphasizing that these questions could not be answered on summary judgment, the district court was able to make the limited observation that, "[a]t some point at the start of the physical altercation Officer Minchuk called for assistance over his radio." The court further observed that twenty-one seconds passed from Minchuk's radio call for backup to the report of the shooting, which the record shows came from a Planned Parenthood employee who called 911.

Officer Minchuk now appeals, urging us to reverse the district court's denial of qualified immunity.

II

A

We begin, as we must, by evaluating our jurisdiction over Officer Minchuk's appeal. Although the denial of summary judgment ordinarily does not constitute an appealable final order under 28 U.S.C. § 1291, the collateral-order doctrine affords an exception for a denial of qualified immunity. See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Thompson v. Cope*, 900 F.3d 414, 419 (7th Cir. 2018).

The Supreme Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995) teaches that the exception is not absolute, however. Immediate appeal is available only if we can evaluate the denial of qualified immunity as a legal matter. See *id.* at 319–20. Here that requires us to view the facts as the district court did in ruling on Officer Minchuk's motion for summary judgment—in the light most favorable to Strand as the plaintiff and non-moving party. See *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011). Only then do we evaluate the constitutionality of Officer Minchuk's conduct. See *Thompson*, 900 F.3d at 419– 20; *Jones*, 630 F.3d at 680–81.

In answering whether a police officer is entitled to qualified immunity as a matter of law, we must avoid resolving contested factual matters. See *Gutierrez v. Kermon*, 722 F.3d 1003, 1011 (7th Cir. 2013); *Weinmann v. McClone*, 787 F.3d 444, 446 (7th Cir.

2015) ("An appeal from a ruling on qualified immunity is not the time for the resolution of disputed facts."). If we detect a "back-door effort" to contest facts on appeal, we lack jurisdiction. *Jones*, 630 F.3d at 680; see also *Gutierrez,* 722 F.3d at 1010 (reiterating limits of appellate jurisdiction over appeal from denial of qualified immunity and stating that a party "effectively pleads himself out of court by interposing disputed factual issues in his argument").

Aware of this jurisdictional limitation, Officer Minchuk emphasizes that he is not contesting any facts and indeed, for purposes of this appeal, accepts them in the light most favorable to Strand as the non-moving party. We take him at his word and proceed to evaluate whether Officer Minchuk is entitled to qualified immunity as a matter of law. See *Jones*, 630 F.3d at 680 ("In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light."); *Knox v. Smith*, 342 F.3d 651, 656–57 (7th Cir. 2003) (following the same approach).

In traveling this path, we cannot retreat from our obligation to avoid trying to answer (as a factual matter) the question the district court emphasized remains unresolved: whether enough time went by between Strand's surrender and Minchuk's use of deadly force such that Strand was subdued at the moment Minchuk fired the shot. The Supreme Court has underscored the necessity for this exact discipline in this exact context—appellate review of a denial of qualified immunity on summary judgment. See *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) ("By weighing

the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party.").

B

In evaluating Officer Minchuk's entitlement to qualified immunity, we undertake the twofold inquiry of asking whether his conduct violated a constitutional right, and whether that right was clearly established at the time of the alleged violation. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). We are free to choose which prong to address first. See *Pearson v. Callahan*, 129 S. Ct. 808, 812 (2009).

The first prong of the inquiry, whether Officer Minchuk used excessive force and thereby violated Strand's Fourth Amendment rights, is governed by the Supreme Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). The law requires an assessment of the totality of the facts and circumstances and a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham*, 490 U.S. at 396). At a more specific level, we owe "careful attention" to "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest

or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

The proper inquiry is one of "objective" reasonableness that proceeds without regard to the subjective "intent or motivation" of the officer. *Id.* at 397. To be sure, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments— in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. So, too, however, have we cautioned that "[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993). After all "[t]he circumstances might materially change," for "[e]ven though an officer may in one moment confront circumstances in which he could constitutionally use deadly force, that does not necessarily mean he may still constitutionally use deadly force the next moment." See *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018).

If the facts and circumstances show that an individual who once posed a threat has become "subdued and complying with the officer's orders," the officer may not continue to use force. See *Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009). And that is especially so when it comes to the use of deadly force: "[A] person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." *Weinmann*, 787 F.3d at

448. As the Supreme Court succinctly stated in *Garner*, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. Wherever "feasible," moreover, the officer should give a warning before deploying deadly force. Id. at 12.

For the law to be clearly established—the second prong of the qualified immunity analysis—the "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The necessary starting point is to define the right at issue with specificity. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). Indeed, the Supreme Court has "'repeatedly told courts . . . not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances he or she faced." *Rickard*, 134 S. Ct. at 2023 (quoting al-Kidd, 563 U.S. at 742); see also *Kisela*, 138 S. Ct. at 1153 (emphasizing importance of defining clearly established law with specificity in the excessive force context).

The demand for specificity is not unyielding or bereft of balance. Assessing whether the law is clearly established does not require locating "a case directly on point." *Kisela*, 138 S. Ct. at 1152. Law enforcement officers, the Court has stressed, "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

C

Whether we approach Officer Minchuk's request for qualified immunity by first assessing the merits of Strand's claim or instead by evaluating whether Minchuk's conduct violated clearly established law, we come to the same barrier: we cannot—as we must—view the facts in Strand's favor and conclude as a matter of law that Minchuk is entitled to qualified immunity on summary judgment.

Officer Minchuk resorted to the use of deadly force at a time when Strand had stopped fighting, separated from Minchuk, stood up, stepped four to six feet away from Minchuk, and, with his hands in the air, said, "I surrender. Do whatever you think you need to do. I surrender, I'm done." The record shows that Strand was unarmed at all points in time. Furthermore, upon standing, raising his hands, and voicing his surrender, Strand never stepped toward Minchuk, made a threatening statement, or otherwise did anything to suggest he may resume fighting or reach for a weapon.

Recall, too, the broader circumstances that led to the shooting. The police were not in hot pursuit of an individual known to be armed and dangerous. Nor had the police responded to a report of violent crime or otherwise arrived at a location only to find an individual engaged in violent or men-acing conduct or acting so unpredictably as to convey a threat to anyone present.

To the contrary, the entire fracas leading to Officer Minchuk's use of deadly force began with his issuance of parking tickets. After Strand declined to make an on-the-spot cash payment and instead sought to take

pictures to show the absence of no-parking signs, Officer Minchuk allowed the situation to escalate and boil over by slapping Strand's cell phone to the ground and then tearing Strand's shirt from his body. The fist fight then ensued, with Strand choosing to stop throwing punches and stand up and offer his express surrender, including by raising his hands above his head. It was then—with no direction to Strand to keep his hands in the air, to fall to his knees, or to lay on the ground—that Officer Minchuk drew his gun and fired the shot.

A reasonable jury could find that Officer Minchuk violated Strand's constitutional right to remain free of excessive force. On these facts and circumstances, considered collectively and in the light most favorable to Strand, Strand no longer posed an immediate danger to Officer Minchuk at the time he fired the shot. The Fourth Amendment does not sanction an officer—without a word of warning—shooting an unarmed offender who is not fleeing, actively resisting, or posing an immediate threat to the officer or the public. See *Garner*, 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

The district court correctly observed that additional fact finding was necessary to determine whether "the rapidly-evolving nature of the altercation" justified Officer Minchuk's use of deadly force or whether "he had time to recalibrate the degree of force necessary, in light of [Strand's] statement of surrender." This fact finding cannot occur on summary judgment (or appeal), so we cannot conclude that the district court committed error in determining

a genuine issue of material fact prevented a resolution of the merits of Strand's claim.

Officer Minchuk urges a contrary conclusion. He argues that Strand's "sudden and unexpected gesture of surrender," after having just finished beating Officer Minchuk about the face and head while pressing down on Officer Minchuk's throat, proves as a matter of law that a reasonable officer could have believed the use of deadly force was objectively warranted to prevent Strand from inflicting additional serious harm. Officer Minchuk goes even further, contending that "[t]here is no dispute in this case that [Strand], who was standing over Officer Minchuk just a few feet away from him completely unrestrained, was not subdued at the time that Officer Minchuk deployed deadly force."

Factual disputes do not resolve on the force of say so, however. What Officer Minchuk sees as undisputed—whether Strand continued to pose a threat at the moment Minchuk deployed deadly force—is actually unresolved and indeed vigorously contested by Strand. For Minchuk to prevail at this stage, the record must show that he fired while Strand still posed a threat. Instead, the record shows that Strand had backed away, voiced his surrender, and up to five, ten, or fifteen seconds may have elapsed while Strand stood with his hands in the air. And that is why the district court rightly determined, after a close and careful analysis of the record, that Minchuk was not entitled to qualified immunity as a matter of law at summary judgment on the merits of Strand's claim.

This same factual dispute also prevents us from concluding, as Officer Minchuk urges, that Strand's clearly established constitutional rights were not violated, the second prong of the qualified immunity inquiry. We analyze whether precedent squarely governs the facts at issue, mindful that we cannot define clearly established law at too high a level of generality. Yet we can look at the facts only with as much specificity as the summary judgment record allows.

It is beyond debate that a person has a right to be free of deadly force "unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." *Weinmann*, 787 F.3d at 448; see also *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016) (emphasizing that it is "well-established that police officers cannot continue to use force once a suspect is subdued"). But the district court could not determine whether—at the point Minchuk used deadly force—Strand posed an imminent harm to Officer Minchuk. The record left unclear precisely how much time went by from the moment the fist fight stopped to the moment Officer Minchuk pulled the trigger.

All the record shows is that twenty-one seconds passed between Officer Minchuk radioing for assistance and the police department receiving the 911 call from the Planned Parenthood employee who reported the shooting. However much time elapsed between the end of the fighting and the gunshot had to be enough for Strand to bring the ground brawl to an end, to stand up and step back four to six feet, and

then to raise his arms and say to Officer Minchuk, "I surrender. Do whatever you think you need to do. I surrender, I'm done." Perhaps all of this took ten seconds. Or perhaps it took seven seconds or maybe fifteen. At some point, though, enough time may have passed that it would have been objectively unreasonable for Officer Minchuk to continue to believe that he was in imminent danger. But, as the district court observed, the record at this stage does not answer whether Strand continued to pose a threat when Minchuk fired. And this is the hurdle—the unresolved material question of fact—that Officer Minchuk cannot clear on summary judgment.

Officer Minchuk points to our decision in *Johnson v. Scott*, 576 F.3d 658 (7th Cir. 2009), which he sees as "controlling and dispositive in this case," to contend that there is no way to conclude that he violated clearly established law in using deadly force in the circumstances he faced here. Read fairly, however, *Johnson* lends little support to Officer Minchuk, at least at the summary judgment stage. Facts matter, and the facts of *Johnson* were quite different. The crimes leading to arrest in *Johnson* were severe—a shooting and then reckless flight in a car and by foot from the police. See 576 F.3d at 660. The suspect had "used every method at his disposal to flee" but encountered a fence "too high for him to jump over." *Id.* At that point, cornered, he put his hands up in the air and attempted to surrender, just as the officer, in a split-second reaction, deployed force on the suspect. *Id.* at 659. Critical to the court's decision that the officer was entitled to qualified immunity was that "it could not have been more than one second between

[the suspect's] surrender and the use of force by [the officer]." *Id.* at 660.

The contrast is clear: Strand's confrontation with Officer Minchuk involved no high-speed car and foot chase, no report of a violent crime, and no reason to believe an offender was armed. Far from undermining the clearly established law that the use of deadly force against a person posing no risk of imminent harm is unreasonable, *Johnson* underscores that the circumstances of the surrender and the timeline surrounding the use of force are critical. And here, unlike in *Johnson*, the circumstances are unclear such that we cannot discern with any confidence whether Strand continued to pose a threat to Officer Minchuk.

The clearly established law comes from cases in which we have emphasized that a subdued suspect has the right not to be seized by deadly or significant force, a right which has been well-established for decades. See, *e.g.*, *Abbott v. Sangamon County, Ill.*, 705 F.3d 706, 732 (7th Cir. 2013) (citing cases dating back to 1995 and concluding that "it was well-established in this circuit that police officers could not use significant force on nonresisting or passively resisting suspects"); *Wynalda*, 999 F.2d at 247 (concluding that an officer was not entitled to qualified immunity where he shot a fleeing suspect who no longer presented any immediate threat because "[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity"); see also *Becker*, 821 F.3d at 929 (upholding a denial of qualified immunity where an officer used force on a suspect who was not fleeing, was out in the open, and

had surrendered with his hands above his head); *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014) (holding that an officer was not entitled to qualified immunity at the summary judgment stage where, at the point the officer used force, the suspect was visible to the officer and "had been motionless for upwards of ten seconds").

Weinmann also instructs that a dispute of fact regarding the circumstances surrounding an officer's use of force may prevent us from determining whether an individual's clearly established rights have been violated. 787 F.3d at 451. There the summary judgment record left unresolved whether a suicidal man with a gun presented an immediate threat to an officer who arrived on the scene. See *id.* at 448. Under one version of the facts, the officer's use of force would have been reasonable; under another, clearly established law would have made it unreasonable. See *id.* at 449–50. And it was this uncertainty as to a material fact that "preclude[d] a ruling on qualified immunity" on summary judgment. *Id.* at 451.

We chart the same course here. The existence of the substantial factual dispute about the circumstances and timing surrounding Minchuk's decision to shoot Strand precludes a ruling on qualified immunity at this point. This is not to foreclose the availability of qualified immunity to Officer Minchuk at trial. At trial a jury may resolve these disputed facts in Officer Minchuk's favor, and the district court could then determine he is entitled to qualified immunity as matter of law. See *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) ("When the issue of qualified immunity remains unresolved at the

time of trial, as was the case here, the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity."). But we cannot make such a determination at this stage on this record.

For these reasons, we AFFIRM.

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appeal, we lack jurisdiction. *Jones*, 630 F.3d at 680; see also *Gutierrez,* 722 F.3d at 1010 (reiterating limits of appellate jurisdiction over appeal from denial of qualified immunity and stating that a party "effectively pleads himself out of court by interposing disputed factual issues in his argument").

Aware of this jurisdictional limitation, Officer Minchuk emphasizes that he is not contesting any facts and indeed, for purposes of this appeal, accepts them in the light most favorable to Strand as the non-moving party. We take him at his word and proceed to evaluate whether Officer Minchuk is entitled to qualified immunity as a matter of law. See *Jones*, 630 F.3d at 680 ("In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light."); *Knox v. Smith*, 342 F.3d 651, 656–57 (7th Cir. 2003) (following the same approach).

In traveling this path, we cannot retreat from our obligation to avoid trying to answer (as a factual matter) the question the district court emphasized remains unresolved: whether enough time went by between Strand's surrender and Minchuk's use of deadly force such that Strand was subdued at the moment Minchuk fired the shot. The Supreme Court has underscored the necessity for this exact discipline in this exact context—appellate review of a denial of qualified immunity on summary judgment. See *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) ("By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that

at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party.").

B

In evaluating Officer Minchuk's entitlement to qualified immunity, we undertake the twofold inquiry of asking whether his conduct violated a constitutional right, and whether that right was clearly established at the time of the alleged violation. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). We are free to choose which prong to address first. See *Pearson v. Callahan*, 129 S. Ct. 808, 812 (2009).

The first prong of the inquiry, whether Officer Minchuk used excessive force and thereby violated Strand's Fourth Amendment rights, is governed by the Supreme Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). The law requires an assessment of the totality of the facts and circumstances and a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham*, 490 U.S. at 396). At a more specific level, we owe "careful attention" to "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

The proper inquiry is one of "objective" reasonableness that proceeds without regard to the subjective "intent or motivation" of the officer. *Id.* at 397. To be sure, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. So, too, however, have we cautioned that "[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993). After all "[t]he circumstances might materially change," for "[e]ven though an officer may in one moment confront circumstances in which he could constitutionally use deadly force, that does not necessarily mean he may still constitutionally use deadly force the next moment." See *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018).

If the facts and circumstances show that an individual who once posed a threat has become "subdued and complying with the officer's orders," the officer may not continue to use force. See *Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009). And that is especially so when it comes to the use of deadly force: "[A] person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." *Weinmann*, 787 F.3d at 448. As the Supreme Court succinctly stated in *Garner*, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471

U.S. at 11. Wherever "feasible," moreover, the officer should give a warning before deploying deadly force. *Id.* at 12.

For the law to be clearly established—the second prong of the qualified immunity analysis—the "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The necessary starting point is to define the right at issue with specificity. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). Indeed, the Supreme Court has "'repeatedly told courts . . . not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances he or she faced." *Rickard*, 134 S. Ct. at 2023 (quoting *al-Kidd*, 563 U.S. at 742); see also *Kisela*, 138 S. Ct. at 1153 (emphasizing importance of defining clearly established law with specificity in the excessive force context).

The demand for specificity is not unyielding or bereft of balance. Assessing whether the law is clearly established does not require locating "a case directly on point." *Kisela*, 138 S. Ct. at 1152. Law enforcement officers, the Court has stressed, "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

C

Whether we approach Officer Minchuk's request for qualified immunity by first assessing the merits of

Strand's claim or instead by evaluating whether Minchuk's conduct violated clearly established law, we come to the same barrier: we cannot—as we must—view the facts in Strand's favor and conclude as a matter of law that Minchuk is entitled to qualified immunity on summary judgment.

Officer Minchuk resorted to the use of deadly force at a time when Strand had stopped fighting, separated from Minchuk, stood up, stepped four to six feet away from Minchuk, and, with his hands in the air, said, "I surrender. Do whatever you think you need to do. I surrender, I'm done." The record shows that Strand was unarmed at all points in time. Furthermore, upon standing, raising his hands, and voicing his surrender, Strand never stepped toward Minchuk, made a threatening statement, or otherwise did anything to suggest he may resume fighting or reach for a weapon.

Recall, too, the broader circumstances that led to the shooting. The police were not in hot pursuit of an individual known to be armed and dangerous. Nor had the police responded to a report of violent crime or otherwise arrived at a location only to find an individual engaged in violent or menacing conduct or acting so unpredictably as to convey a threat to anyone present.

To the contrary, the entire fracas leading to Officer Minchuk's use of deadly force began with his issuance of parking tickets. After Strand declined to make an on-the-spot cash payment and instead sought to take pictures to show the absence of no-parking signs, Officer Minchuk allowed the situation to escalate and

boil over by slapping Strand's cell phone to the ground and then tearing Strand's shirt from his body. The fist fight then ensued, with Strand choosing to stop throwing punches and stand up and offer his express surrender, including by raising his hands above his head. It was then—with no direction to Strand to keep his hands in the air, to fall to his knees, or to lay on the ground—that Officer Minchuk drew his gun and fired the shot.

A reasonable jury could find that Officer Minchuk violated Strand's constitutional right to remain free of excessive force. On these facts and circumstances, considered collectively and in the light most favorable to Strand, Strand no longer posed an immediate danger to Officer Minchuk at the time he fired the shot. The Fourth Amendment does not sanction an officer—without a word of warning—shooting an unarmed offender who is not fleeing, actively resisting, or posing an immediate threat to the officer or the public. See *Garner*, 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

The district court correctly observed that additional fact finding was necessary to determine whether "the rapidly-evolving nature of the altercation" justified Officer Minchuk's use of deadly force or whether "he had time to recalibrate the degree of force necessary, in light of [Strand's] statement of surrender." This fact finding cannot occur on summary judgment (or appeal), so we cannot conclude that the district court committed error in determining a genuine issue of material fact prevented a resolution of the merits of Strand's claim.

Officer Minchuk urges a contrary conclusion. He argues that Strand's "sudden and unexpected gesture of surrender," after having just finished beating Officer Minchuk about the face and head while pressing down on Officer Minchuk's throat, proves as a matter of law that a reasonable officer could have believed the use of deadly force was objectively warranted to prevent Strand from inflicting additional serious harm. Officer Minchuk goes even further, contending that "[t]here is no dispute in this case that [Strand], who was standing over Officer Minchuk just a few feet away from him completely unrestrained, was not subdued at the time that Officer Minchuk deployed deadly force."

Factual disputes do not resolve on the force of say so, however. What Officer Minchuk sees as undisputed—whether Strand continued to pose a threat at the moment Minchuk deployed deadly force—is actually unresolved and indeed vigorously contested by Strand. For Minchuk to prevail at this stage, the record must show that he fired while Strand still posed a threat. Instead, the record shows that Strand had backed away, voiced his surrender, and up to five, ten, or fifteen seconds may have elapsed while Strand stood with his hands in the air. And that is why the district court rightly determined, after a close and careful analysis of the record, that Minchuk was not entitled to qualified immunity as a matter of law at summary judgment on the merits of Strand's claim.

This same factual dispute also prevents us from concluding, as Officer Minchuk urges, that Strand's clearly established constitutional rights were not violated, the second prong of the qualified immunity

inquiry. We analyze whether precedent squarely governs the facts at issue, mindful that we cannot define clearly established law at too high a level of generality. Yet we can look at the facts only with as much specificity as the summary judgment record allows. It is beyond debate that a person has a right to be free of deadly force "unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." *Weinmann*, 787 F.3d at 448; see also *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016) (emphasizing that it is "well-established that police officers cannot continue to use force once a suspect is subdued"). But the district court could not determine whether—at the point Minchuk used deadly force—Strand posed an imminent harm to Officer Minchuk. The record left unclear precisely how much time went by from the moment the fist fight stopped to the moment Officer Minchuk pulled the trigger.

All the record shows is that twenty-one seconds passed between Officer Minchuk radioing for assistance and the police department receiving the 911 call from the Planned Parenthood employee who reported the shooting. However much time elapsed between the end of the fighting and the gunshot had to be enough for Strand to bring the ground brawl to an end, to stand up and step back four to six feet, and then to raise his arms and say to Officer Minchuk, "I surrender. Do whatever you think you need to do. I surrender, I'm done." Perhaps all of this took ten seconds. Or perhaps it took seven seconds or maybe fifteen. At some point, though, enough time may have passed that it would have been objectively

unreasonable for Officer Minchuk to continue to believe that he was in imminent danger. But, as the district court observed, the record at this stage does not answer whether Strand continued to pose a threat when Minchuk fired. And this is the hurdle—the unresolved material question of fact—that Officer Minchuk cannot clear on summary judgment. Officer Minchuk points to our decision in *Johnson v. Scott*, 576 F.3d 658 (7th Cir. 2009), which he sees as "controlling and dispositive in this case," to contend that there is no way to conclude that he violated clearly established law in using deadly force in the circumstances he faced here. Read fairly, however, *Johnson* lends little support to Officer Minchuk, at least at the summary judgment stage. Facts matter, and the facts of *Johnson* were quite different. The crimes leading to arrest in *Johnson* were severe—a shooting and then reckless flight in a car and by foot from the police. See 576 F.3d at 660. The suspect had "used every method at his disposal to flee" but encountered a fence "too high for him to jump over." *Id.* At that point, cornered, he put his hands up in the air and attempted to surrender, just as the officer, in a split-second reaction, deployed force on the suspect. *Id.* at 659. Critical to the court's decision that the officer was entitled to qualified immunity was that "it could not have been more than one second between [the suspect's] surrender and the use of force by [the officer]." *Id.* at 660.

The contrast is clear: Strand's confrontation with Officer Minchuk involved no high-speed car and foot chase, no report of a violent crime, and no reason to believe an offender was armed. Far from undermining the clearly established law that the use of deadly force

against a person posing no risk of imminent harm is unreasonable, *Johnson* underscores that the circumstances of the surrender and the timeline surrounding the use of force are critical. And here, unlike in *Johnson*, the circumstances are unclear such that we cannot discern with any confidence whether Strand continued to pose a threat to Officer Minchuk.

The clearly established law comes from cases in which we have emphasized that a subdued suspect has the right not to be seized by deadly force. See, *e.g.*, *Weinmann*, 787 F.3d at 448; see also *Becker*, 821 F.3d at 929 (upholding a denial of qualified immunity where an officer used force on a suspect who was not fleeing, was out in the open, and had surrendered with his hands above his head); *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014) (holding that an officer was not entitled to qualified immunity at the summary judgment stage where, at the point the officer used force, the suspect was visible to the officer and "had been motionless for upwards of ten seconds").

Weinmann also instructs that a dispute of fact regarding the circumstances surrounding an officer's use of force may prevent us from determining whether an individual's clearly established rights have been violated. 787 F.3d at 451. There the summary judgment record left unresolved whether a suicidal man with a gun presented an immediate threat to an officer who arrived on the scene. See *id.* at 448. Under one version of the facts, the officer's use of force would have been reasonable; under another, clearly established law would have made it unreasonable. See *id.* at 449–50. And it was this uncertainty as to a

material fact that "preclude[d] a ruling on qualified immunity" on summary judgment. *Id.* at 451.

We chart the same course here. The existence of the substantial factual dispute about the circumstances and timing surrounding Minchuk's decision to shoot Strand precludes a ruling on qualified immunity at this point. This is not to foreclose the availability of qualified immunity to Officer Minchuk at trial. At trial a jury may resolve these disputed facts in Officer Minchuk's favor, and the district court could then determine he is entitled to qualified immunity as matter of law. See *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) ("When the issue of qualified immunity remains unresolved at the time of trial, as was the case here, the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity."). But we cannot make such a determination at this stage on this record.

For these reasons, we AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CRAIG STRAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:15 CV 149
	)	
TOWN OF MERRILLVILLE,	)	
INDIANA, *et al.*,	)	
	)	
Defendants.	)	

OPINION and ORDER

This matter is before the court on the motion for summary judgment filed by the defendants, the Town of Merrillville, Indiana ("the Town"), and Merrillville police officer Curtis Minchuk. For the reasons stated below, defendants' motion (DE # 33) will be denied.

I. BACKGROUND

The following facts are not in dispute for purposes of defendants' motion for summary judgment. On May 20, 2013, plaintiff Craig Strand parked his semi-truck tractor-trailer ("semi-truck") in the parking lot of the Planned Parenthood clinic in Merrillville, Indiana, where defendant Officer Minchuk was assigned to patrol. (DE # 1 at 2.) Plaintiff parked the vehicle and left to take a drug test at a nearby laboratory. (DE #

36 at 2.) Plaintiff asked a woman smoking outside the Planned Parenthood if he could park his semi-truck in the parking lot and she told him that he could. (*Id.*)

When Officer Minchuk subsequently reported for work at the Planned Parenthood, he saw the truck and attempted to locate the driver. (DE # 34 at 6.) After some investigation, he was unable to locate the driver and issued two traffic citations, which he placed on the semi-truck. (*Id.*) When plaintiff returned to the truck and saw the tickets, he asked to speak to Officer Minchuk. (*Id.*) Officer Minchuk drove his patrol car to where the semi-truck was parked and plaintiff explained why he had parked in the lot. (*Id.*) Plaintiff asked Officer Minchuk to void the tickets because there was not a sign indicating that he could not park in the lot, and in fact had been told he could park in the lot. (*Id.*) Plaintiff claims that Officer Minchuk solicited a bribe from him, but that he refused the solicited offer. (DE # 36 at 2.)

Officer Minichuk then drove his patrol car to the rear of the Planned Parenthood facility, where he was able to observe plaintiff at a distance. (DE # 34 at 7; DE # 36 at 2.) Instead of leaving the lot, plaintiff began taking photographs of the area, to establish the absence of any "No Parking" signs. (DE # 36 at 2.) Officer Minchuk observed plaintiff in the lot for three to five minutes and then returned to speak with plaintiff. (DE # 34 at 7.) He told plaintiff to leave, and plaintiff explained that he would, but wanted to first take photographs to show to the judge. (*Id.*) Officer Minchuk told plaintiff that he was calling a tow truck and that plaintiff had two minutes to leave the

parking lot. (*Id.*) Plaintiff told Officer Minchuk that he would be gone before the tow truck arrived. (*Id.*)

Officer Minchuk then told plaintiff, "I told you to get the fuck out of here," stepped toward plaintiff, slapped the phone out of plaintiff's hand, and demanded plaintiff's driver's license. (*Id.*) Plaintiff refused to provide his identification, stating, "No, I'm not gonna give you my fuckin' I.D. I don't have to give you shit. As a matter of fact, who are you? What's your badge number? What's your I.D.? What gives you the right to attack somebody who is acting in a peaceful manner; who's simply come to a place to try and do business?" (DE # 34 at 8.) Officer Minchuk responded, "I said, give me your I.D.," and grabbed plaintiff by the shirt and neck. (*Id.*) Plaintiff's shirt was ripped off and both men fell back a few steps. (*Id.*) Officer Minchuk again tried to grab plaintiff and attempted to push him onto the ground. (*Id.*) Plaintiff pushed him off, but Officer Minchuk continued to try to take plaintiff to the ground. (*Id.*) Plaintiff began to fall, grabbed Officer Minchuk's arm, and both men fell to the ground. (*Id.*) Officer Minchuk fell onto his back and plaintiff fell onto his side. (*Id.*) Plaintiff then reached over and grabbed Officer Minchuk by the neck and punched him in the face. (*Id.*) Plaintiff punched Officer Minchuk in the face at least three times while the officer was on his back, and while plaintiff's hand was on the officer's throat. (*Id.*) Officer Minchuk argues that he feared for his life, saw stars, and felt that he would pass out if plaintiff hit him again. (*Id.*) He worried that if he passed out plaintiff might be able to take his gun and kill him. (*Id.*)

Plaintiff then rose off the ground, stood four to six feet away from Officer Minchuk, put his hands in the air and stated, "I surrender. Do whatever you think you need to do. I surrender, I'm done." (*Id.* at 9.) Officer Minchuk, who was still on the ground, unholstered his gun and fired one bullet which struck plaintiff in the abdomen. (*Id.*) Plaintiff survived and was later charged and convicted of felony battery. (*Id.*)

The parties dispute how much time elapsed between plaintiff's statement of surrender and Officer Minchuk's use of force. Plaintiff testified in his deposition that he had his hands in the air between ten seconds and one minute before he was shot. (*Id.*) However, defendants point to objective evidence that the entire physical altercation took place in less than thirty seconds. At some point at the start of the physical altercation Officer Minchuk called for assistance over his radio. (DE # 34 at 7.) The evidence demonstrates that he radioed again to report the shooting 21 seconds later. (*Id.* at 11.) Plaintiff does not challenge the accuracy of this evidence in his response brief, nor does he dispute the time line set forth by defendants.

Plaintiff's complaint alleges that defendants are liable pursuant to 42 U.S.C. § 1983 for Officer Minchuk's alleged use of excessive force. Plaintiff argues that Officer Minchuk is personally liable, and that the Town of Merrillville is liable pursuant to *Monell v. Dept. of Social Svcs.*, 436 U.S. 658 (1978). Defendants argue that Officer Minchuk is entitled to judgment in his favor as a matter of law because his decision to employ the use of deadly force was objectively reasonable. (DE # 34 at 4.) Defendants

argue that the Town is likewise entitled to judgment in its favor because there is no evidence that it had any policy, custom, or practice that was the moving force behind Officer Minchuk's alleged excessive force. (*Id.*) Defendants argue, in the alternative, that they are entitled to qualified immunity because defendants did not violate any of plaintiff's clearly established constitutional rights. (*Id.* at 12.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In responding to a motion for summary judgment, the non-moving party must identify specific facts establishing that there is a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Palmer v. Marion County*, 327 F.3d 588, 595 (7th Cir. 2003). In doing so, the non-moving party cannot rest on the pleadings alone, but must present fresh proof in support of its position. *Anderson*, 477 U.S. at 248; *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If no reasonable jury could find for the non-moving party, then there is no "genuine" dispute. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The court's role in deciding a summary judgment motion is not to evaluate the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249-50; *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995).

III. ANALYSIS

A. Fourth Amendment Legal Standard for Use of Deadly Force

The touchstone of any Fourth Amendment analysis is reasonableness. *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546–47 (2017). "[R]easonableness is generally assessed by carefully weighing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (*quoting Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

The question whether the use of force during an arrest is proper under the Fourth Amendment depends on the objective reasonableness of the officer's actions, judged on the basis of the conditions the officer faced. *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Force is reasonable only when exercised in proportion to the threat posed, and as the threat changes, so too should the degree of force." *Cyrus v.*

Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010) (internal citations omitted). In order to assess objective reasonableness, the court must consider all the circumstances, including "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*; *see also Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009). An officer may use deadly force only to seize a fleeing felon who has committed a violent crime or who presents an immediate danger to the officer or to others. *Garner*, 471 U.S. at 11.

B. Defendants' Argument

Defendants argue that this court should find as a matter of law that plaintiff was not subdued at the time Officer Minchuk employed deadly force. Defendants point to two precedential cases in which a court was able to determine, as a matter of law, that the plaintiff-suspect was not subdued at the time that the defendant-officer utilized force, and thus the use of force was reasonable. *See Johnson v. Scott*, 576 F.3d 658, 659 (7th Cir. 2009) and *City and Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015).

In *Johnson*, the plaintiff, a suspect in a shooting, fled police capture by car and then by foot. 576 F.3d at 659. As the defendant police officer and his canine companion cornered the plaintiff by a fence, the plaintiff made a last-minute surrender, put his hands in the air and stated, "I give up." *Id.* At the time, the defendant and his canine companion were only six to eight feet from the plaintiff. *Id.* The defendant's

canine companion seized the plaintiff's arm, the officer took the plaintiff to the ground. *Id.* The plaintiff continued to struggle in order to escape the canine's grasp, the officer struck the plaintiff several times to subdue him, and the officer was able to place handcuffs on the plaintiff. *Id.* at 659-660. The plaintiff subsequently alleged that the officer's use of force was excessive because he had already surrendered prior to the use of force. *Id.*

The Seventh Circuit affirmed the district court's decision to grant summary judgment in favor of the officer on the basis that the officer's use of force was reasonable as a matter of law. *Id.* The Court found that the *Graham* factors both weighed heavily in favor of a finding of reasonableness. *Id.* The Court emphasized the severity of the plaintiff's suspected offense, plaintiff's reckless flight from the police, and the officer's reasonable belief that the plaintiff was armed. *Id.* The Court found that the officer was not required to take the plaintiff's surrender at face-value under the circumstances because the plaintiff surrendered at the very moment he realized he was cornered. *Id.*

The second case cited by defendants is *City and County of San Fransisco, Calif. v. Sheehan*, in which the Supreme Court considered the liability of defendant police officers who utilized deadly force to subdue a violent, knife-welding, mentally-ill woman. 135 S. Ct. at 1771. In *Sheehan*, local authorities had made several attempts to subdue the plaintiff in order to provide her with a mental health evaluation and treatment. *Id.* at 1770. Each time local authorities entered the plaintiff's room, she threatened them with

a knife. *Id.* The defendant officers first used pepper spray in an attempt to subdue her. *Id.* at 1771. When she refused to drop the knife, one of the defendants shot her two times, but she did not collapse and did not drop the knife. *Id.* The second defendant officer then fired several more shots, and she finally fell. *Id.*

The question decided by the Supreme Court in *Sheehan* was whether the officers violated the plaintiff's Fourth Amendment rights when they decided to enter her room to restrain her by force, *id.* at 1775, however, here the defendants cite this case for another proposition. Defendants point to a footnote in which the Court noted that the parties' dispute regarding whether Sheehan had fallen to the ground before the second officer fired was not material. The Court stated that even if Sheehan had been on the ground before the second round of shots were fired, "'she was certainly not subdued.'" *Id.* (internal citation omitted). Defendants argue that this finding supports their position that Officer Minchuk acted reasonably in shooting plaintiff because plaintiff, like Sheehan, was not subdued at the time he was shot. (DE # 34 at 18.)

C. Defendants' Reliance on Johnson *and* Sheehan *is Misplaced*

Defendants urge that, in light of *Johnson* and *Sheehan*, this court must find in their favor. This is an overreaching application of the law. Pursuant to *Johnson*, a court *may* find as a matter of law that an officer acted reasonably in employing force, in spite of a suspect's verbal statement of surrender. *Johnson* identifies circumstances that are sufficient, but not

necessary, to grant an officer summary judgment. Other cases, however, identify circumstances in which an officer's use of force after a suspect's surrender created a material question of fact to be determined by a jury. *See e.g. Alicea v. Thomas*, 815 F.3d 283 (7th Cir. 2016) (genuine issues of material fact remained regarding reasonableness of officers' use of force, and degree of force used, after suspect "had ceased flight, was effectively trapped, and [] immediately complied with police orders.").

Johnson and *Sheehan* are distinguishable from the present case based on the very factors that determine the reasonableness of an officer's use of force. *See Graham*, 490 U.S. at 396. First, in this case, the underlying crime at issue was a parking violation. This is significantly less serious than the crime in *Johnson*, where the plaintiff was the suspect in a shooting.

Second, unlike in *Johnson* or *Sheehan*, there was no reason for Officer Minchuk to believe that plaintiff was armed with a deadly weapon. Thus, a jury could reasonably conclude that once plaintiff stepped away from Officer Minchuk and placed his hands in the air he was no longer an imminent threat to Officer Minchuk.

Third, a jury could find that the degree of force that Officer Minchuk employed was not proportional to the threat plaintiff posed. While Johnson was suspected of involvement in a shooting and was believed to be in possession of a firearm, the force employed against him was a dog bite. In this case, however, plaintiff had committed a parking violation and there was no

reason for Officer Minchuk to suspect plaintiff was armed; yet, Officer Minchuk utilized deadly force.

Fourth, this case is distinguishable from *Johnson* and *Sheehan* because a jury could reasonably find that plaintiff had been subdued prior to Officer Minchuk's use of force. Here, plaintiff voluntarily extracted himself from the altercation with Officer Minchuk, stood and walked four to six feet away, placed his hands in the air, and stated, "I surrender. Do whatever you think you need to do. I surrender, I'm done." (DE # 34 at 9.) In *Johnson* and *Sheehan*, however, the inference that the suspect had not surrendered or been subdued was much stronger. Johnson had made a prolonged attempt to evade arrest and only surrendered at the moment he was cornered and could run no more. Thus, a police officer could reasonably conclude that Johnson's surrender was disingenuous. Likewise, even if Sheehan had fallen to the ground after the first two shots, she continued to brandish her knife at an officer who was cornered a few feet away, and thus she obviously had not been subdued.

The final reason that this case is distinguishable from *Johnson* and *Sheehan* concerns Officer Minchuk's own actions immediately prior to shooting plaintiff. Unlike the cases cited by defendants, in this case Officer Minchuk was the initial aggressor. The Seventh Circuit has held that "the sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances." *Williams v. Indiana State Police Dep't*, 797 F.3d 468, 483 (7th Cir. 2015). An officer's conduct, and any dangerous

circumstances created by that officer, provide context in determining whether the use of deadly force was objectively reasonable. *Id.* "When an officer's unreasonable (and unconstitutional) conduct proximately causes the disputed use of force, that conduct is part of the 'totality of the circumstances' that should be considered to determine if the use of force was reasonable . . . ." *Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017).

The Court's reasoning in *Doornbos* is instructive. In *Doornbos*, a plainclothes police officer allegedly failed to identify himself as a police officer during a stop-and-frisk, escalating the encounter into a physical confrontation and arrest. *Id.* at 577. In holding that the jury should have been instructed on police frisks, the Court stressed that an officer's actions that needlessly escalate a confrontation are relevant in determining the reasonableness of those actions under the Fourth Amendment. The Court considered, for example, whether the police tactic would provoke panic, hostility, needless risk, or a fight-or-flight response – emphasizing that self-defense is a basic right. *Id.* at 586. The Court ultimately held that because the officer's conduct "proximately caused the violent confrontation[,] [t]his information was relevant for the jury in assessing whether [the officer's] use of force was reasonable 'under the totality of the circumstances.'" *Id.* at 583 (internal citation omitted). "[P]olice officers 'who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force.'" *Id.* at 584 (*quoting Catlin v. City of Wheaton*, 574 F.3d 361, n. 7 (7th Cir. 2009)).

Applying this reasoning to plaintiff's case, a jury could find that Officer Minchuk's use of deadly force was not reasonable because he needlessly provoked the physical altercation with plaintiff that later served as the basis of his use of force. There was no indication that plaintiff might pose a danger to Officer Minchuk until after the officer had slapped plaintiff's cell phone out of his hands and grabbed him by the neck and shirt forcefully enough to rip plaintiff's shirt off. (DE # 34 at 7-8.) In fact, but for Officer Minchuk's alleged aggressions, the encounter likely would have been limited to a routine parking citation.

Defendants urge the court to find Officer Minchuk's use of force reasonable based on his necessity for split-second decision-making. While this court is certainly mindful that it must evaluate the reasonableness of Officer Minchuk's use of force based on the perspective of a reasonable officer on the scene, and not with the 20/20 vision of hindsight, *Alicea*, 815 F.3d at 288, this alone is not sufficient to find in defendants' favor. "To be sure, an officer will not be held liable if the circumstances under which the force was used evolved so rapidly that a reasonable officer would not have had time to recalibrate the reasonable quantum of force." *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 733 (7th Cir. 2013). However, "[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993). *See Miller v. Gonzalez*, 761 F.3d 822, 829–30 (7th Cir. 2014) (question of fact existed regarding whether suspect had been subdued at the time officer employed force where suspect had only been motionless for ten seconds before officer

broke suspect's jaw to effectuate arrest). Here, it is unclear whether the rapidly-evolving nature of the altercation justified Officer Minchuk's use or force, or whether he had time to recalibrate the degree of force necessary, in light of plaintiff's statement of surrender. In light of these questions of fact, summary judgment will be denied.

B. Defendants' qualified immunity defense

Defendants argue, in the alternative, that they are entitled to qualified immunity. (DE # 34 at 25.) Defendants contend that (i) Officer Minchuk did not violate plaintiff's Fourth Amendment rights when he employed deadly force, or else (ii) the contours of plaintiff's rights were not so clearly established that no reasonable officer in Officer Minchuk's position could have believed that deadly force was justified. (*Id.*)

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (*quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "To be clearly established the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right.'" *Becker v. Elfreich*, 821 F.3d 920, 928–30 (7th Cir. 2016) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[A] case directly on point is not required for a right to be clearly established and 'officials can still be on notice that their conduct violates established law even in novel

factual circumstances.'" *Id.* (internal citation omitted). In undertaking this analysis, the court takes care to "look at the right violated in a 'particularized' sense, rather than 'at a high level of generality.'" *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011) (internal citation omitted).

It is, of course, "clearly established that a police officer may not use excessive force in arresting an individual." *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 687 (7th Cir. 2001). Moreover, it is well established that an officer may not continue to use force after an individual has been subdued and has ceased resisting. *See e.g.* Johnson v. Scott, 576 F.3d 658, 660 (7th Cir. 2009) ("It is well established that a police officer may not continue to use force against a suspect who is subdued and complying with the officer's orders.").

Here, however, there remains a question of fact as to whether plaintiff was subdued prior to Officer Minchuk's use of deadly force. Thus, the court must reserve the question of defendants' qualified immunity until this factual question has been resolved. *See Weinmann v. McClone*, 787 F.3d 444, F.3d 448–451 (7th Cir. 2015) ("The existence of a factual dispute about the circumstances surrounding [the defendant's] decision to fire on [plaintiff] precludes a ruling on qualified immunity at this point."); *Abbott*, 705 F.3d at 729–34 (fact dispute precluded ruling on qualified immunity at summary judgment stage).

IV. CONCLUSION

For these reasons, the court **DENIES** defendants' motion for summary judgment (DE # 33); **GRANTS** defendants' motion for leave to file excess pages in support of their motion for summary judgment (DE # 30); and **GRANTS** defendants' motion to seal Exhibits E, G, I, K to their motion for summary judgment (DE # 32). The court **ORDERS** the parties to file a joint status report regarding their willingness to engage in a settlement conference before a Magistrate Judge by **March 2, 2018**. A trial date will be set under a separate order.

SO ORDERED.

Date: February 7, 2018

s/James T. Moody
JUDGE JAMES T. MOODY
UNITED STATES DISTRICT COURT

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 2018

Before

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 18-1514

CRAIG STRAND *Plaintiff-Appellee*, *v.* CURTIS MINCHUK, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 2:15-cv-149 James T. Moody, *Judge*.

O R D E R

On November 21, 2018, defendant-appellant filed a petition for panel rehearing and rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the

judges of the original panel have voted to deny the petition for panel rehearing.

IT IS HEREBY ORDERED that the petition for panel rehearing and rehearing en banc is DENIED.

IT IS FURTHER ORDERED that this court's opinion dated November 8, 2018, is amended in a separately filed opinion released today.

APPENDIX E

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.