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Civil Rights Law—Excessive Force Found When Tasing Section 12 Patient, Police Officer Granted Qualified Immunity—Gray v. Cummings, 917 F.3d 1 (1st Cir. 2019)

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CIVIL RIGHTS LAW—EXCESSIVE FORCE FOUND WHEN TASING SECTION 12 PATIENT, POLICE OFFICER GRANTED QUALIFIED IMMUNITY—*GRAY V. CUMMINGS*, 917 F.3D 1 (1ST CIR. 2019).

Law enforcement's use of excessive force is a violation of the Fourth Amendment.[1] In *Gray v.* Cummings,[2] the United States Court of Appeals for the First Circuit determined whether a police officer could be held civilly liable for tasing a mentally ill person who resisted arrest after she had been involuntarily committed.[3] The court held that there were no claims under Title II of the Americans with Disabilities Act ("ADA"), and that the police officer was entitled to qualified immunity, despite his use of excessive force in violation of the Fourth Amendment.[4]

On May 2, 2013, at approximately 4:00 a.m., Judith Gray ("Gray") was admitted to Athol Memorial Hospital after experiencing a manic episode and calling 9-1-1.[5] She was admitted to the hospital pursuant to Mass. Gen. Laws ch. 123, § 12, a statute authorizing state agents to involuntary hospitalize individuals at risk of serious harm by reason of mental illness.[6]

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[1] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . shall not be violated . . . ."); *see also* Aaron Sussman, Comment, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force* Law, 59 UCLA L. REV. 1342, 1344-50 (2012) (detailing excessive force through taser usage); *When Using a Taser is Excessive Force*, HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/when-using-a-taser-is-excessive-force-40805 (last visited Oct. 30, 2019) (explaining excessive force in context of taser use).

[2] 917 F.3d 1 (1st Cir. 2019).

[3] *See id.* at 5 (reviewing lower court's issue).

[4] *See id.* at 9, 13 (affirming lower court's decision). The court also noted that it fairly balanced the competing concerns of the rights of the disabled and the importance of police not being "unduly hampered in the performance of their important duties." *Id.* at 20.

[5] *See id.* at 6 (explaining circumstances of Gray's hospitalization). Gray stated that "she 'really [didn't] know what happened' . . . because she 'was in a full-blown manic phase.'" *Id.* at 5. The court elicited many of the facts from Cummings's account because Gray had no memory of the event. *Id.* at 6; *see also* Harriman v. Hancock Cnty., 627 F.3d 22, 34 (1st Cir. 2010) (finding no factual dispute possible when plaintiff had no memory); Wertish v. Krueger, 433 F.3d 1062, 1065 (8th Cir. 2006) (finding police's version of events "unrefuted" when plaintiff had no memory).

[6] *See Gray*, 917 F.3d at 5 (commenting on plaintiff's mental state); *see also* MASS. GEN. LAWS ANN. ch. 123, § 12 (West 2019) (authorizing involuntary hospitalization). Section 12 authorizes involuntary emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness. *See* § 12. The individual must be involuntarily committed by a physician or a police officer for a period not exceeding three days:

Gray escaped from the hospital later that morning, and hospital staff called the police to request that "'a section 12 patient' – be 'picked up and brought back.'"[7] Officer Cummings ("Cummings") responded and spotted Gray walking barefoot less than a quarter mile from the hospital.[8] Cummings got out of his police cruiser and told Gray that she had to return to the hospital while Gray used profanities and declared that she was not going back to the hospital.[9] Cummings subsequently followed Gray until she stopped, clenched her fists and teeth, flexed her body, and swore at Cummings while walking towards him.[10]

Cummings grabbed Gray's shirt and took her to the ground after he felt her body continue to move toward him.[11] Once on the ground, Cummings repeatedly told Gray to put her hands behind her back and warned that she would be tased if she did not comply.[12] Instead, Gray continued to swear at him—and when Cummings made one last request for her to comply—Gray refused to listen.[13] Ultimately, Cummings arrested Gray after he "removed the cartridge from his [t]aser, placed it in drive-stun mode, and tased Gray's back for four to six seconds."[14]

> Any physician . . . who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility . . . .

Id. Prior to committing the patient to a public facility, "the applicant shall . . . communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person . . . ." *Id.*

[7] *See Gray*, 917 F.3d at 6 (discussing how Gray absconded from hospital).

[8] *See id.* (exploring Cummings' method in attempting to detain Gray).

[9] *See id.* (explaining Cummings' attempt to initially detain Gray). Cummings implored Gray to go back to the hospital on numerous occasions, all of which were met with profanity and Gray eventually walking away from him. *Id.*

[10] *See id.* (detailing escalation of situation that led to Gray's arrest).

[11] *See id.* (exploring how Cummings detained Gray). Additionally, the court noted that "Cummings had a distinct height and weight advantage: he was six feet, three inches tall and weighed 215 pounds, whereas Gray was five feet, ten inches tall and weighed 140 pounds." *Id.*

[12] *See Gray*, 917 F.3d at 6 (explaining course of events that led to Gray's eventual arrest). "She did not comply. Instead, she 'tucked her arms underneath her chest and flex[ed] tightly,' swearing all the while." *Id.*

[13] *See id.* (showing Gray's refusal to obey Cummings's commands). Additionally, Gray told Cummings to "do it" in response to Cummings's warning that she would be tased. *Id.*

[14] *See id.* at 6-7 (detailing culmination of events leading to arrest). Following the taser deployment, Gray allowed Cummings to handcuff her. *Id.* at 7. Cummings then "helped Gray to her feet and called an ambulance, which transported Gray to the hospital." *Id.* Gray also mentioned that she felt "pain all over" and "must have passed out because [she] woke up in Emergency." *Id.*; *see also* Jay M. Zitter, Annotation, *When Does Use of Taser Constitute Violation of Constitutional Rights*, 45 A.L.R. 6th 1-2 (2020) (explaining taser use and effect of drive stun mode on subject).

Charges were filed against Gray for assaulting a police officer, resisting arrest, disturbing the peace, and disorderly conduct; however, the charges were all subsequently dropped.[15] Shortly thereafter, Gray sued Cummings and the Town of Athol ("the Town") in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983, Title II of the ADA, and supplemental state-law claims for assault and battery, malicious prosecution, and the Massachusetts Civil Rights Act.[16] Cummings and the Town filed a summary judgment motion, and a magistrate judge found that: (1) neither Cummings nor the Town violated the Fourth Amendment under § 1983, (2) that there were no viable state-law claims, and (3) that there had been no abridgement of the ADA because Cummings was entitled to employ an "appropriate level of force in response to an ongoing threat."[17] The magistrate judge also noted that Cummings was enti-

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> A taser may also be used as a drive stun or contact stun when the darts from a taser are removed and the taser is placed in direct contact with the subject and then electricity is cycled through. In other words, the electricity goes directly from the taser to the subject without the conduit of wires.

Zitter, *supra* note 14, at 1-2.

> [C]ritics have asserted that although coroners and officials have routinely found other causes for deaths occurring shortly after a tasering . . . many persons have died as the result of tasering by police, many of whom were unarmed, and that the cause was the tasering . . . [f]urthermore, human rights organizations are concerned about the lack of legislation or significant regulation in this area.

Zitter, *supra* note 14, at 1-2; Shaun H. Kedir, Note, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & HEALTH 357, 363-64 (2007) (presenting debate regarding taser safety).

> Several of the medical studies, however, questioned the safety of Tasers on individuals with mitigating health factors, such as illicit drug or alcohol abuse, preexisting heart disease, pacemakers, and pregnancy. Some medical experts involved in the research speculated that individuals with these underlying health problems might be more susceptible to cardiac arrest and recommended further research on the issue. Although none of the research concluded that Taser in and of itself causes death, some studies listed Taser as a contributory cause.

Kedir, *supra* note 14, at 363-64.

[15] *See Gray*, 917 F.3d at 7 (listing charges filed against Gray).

[16] *See id.* at 4, 7. (describing initiation of civil action). The district court referred the motion to a magistrate judge, who in turn suggested that the motion be granted. *Id.*; *see also* Kedir, *supra* note 14, at 368 ("The [§ 1983] claim is independent of, and in addition to, other common law tort actions, such as assault and battery.")

[17] *See Gray*, 917 F.3d at 7 (finding no violation on any claim Gray brought against Cummings).

tled to qualified immunity as a police officer.[18] The United States Court of Appeals for the First Circuit subsequently affirmed the decision and found (1) that Gray did not have a claim under Title II of the ADA and (2) that Cummings was entitled to qualified immunity, even though a jury could have found there was excessive force in violation of the Fourth Amendment.[19]

Congress enacted § 1983 in 1871 to supply a right of action against a person, "who, under color of any statute . . . depriv[es] [another] of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[20] A police officer violates an individual's Fourth Amendment rights when the officer uses excessive force to arrest said person.[21] The Supreme Court in *Graham v. Connor* decided that courts must use a totality of the circumstances approach—now commonly known as the "*Graham* factors"—to make an excessive force determination.[22] These factors include: "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether [the suspect was] actively resisting arrest or attempting to evade arrest by flight.[23]

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[18] *See id.* (concluding no abridgment of ADA). The magistrate judge further noted that Cummings was entitled to use that amount of force "regardless of Gray's disability." *Id.*

[19] *See id.* at 7, 20 (noting holding of case-in-chief).

> [T]his is a hard case – a case that is made all the more difficult because of two competing concerns: our concern for the rights of the disabled and our concern that the police not be unduly hampered in the performance of their important duties . . . [w]e think that our ruling today . . . satisfies this exacting standard.

Id. at 20.

[20] *See* 42 U.S.C. § 1983 (1996) (detailing rights of action for people who have been deprived rights); *see also* David P. Stoelting, Comment, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243, 244 (1989) (summarizing § 1983 and qualified immunity for police officers). Police officers are never granted absolute immunity; instead, they are entitled to qualified immunity so "long as the officer's conduct did not violate the plaintiff's 'clearly established statutory or constitutional rights.'" Stoelting, *supra* note 20, at 243-44.

[21] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (showing need to balance government's interests and individual's rights). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires 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." *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[22] See *id.* at 396 (explaining reasonableness standard for excessive force claims). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

[23] *See id.* (outlining specific factors courts use to determine reasonableness).

Even when excessive force is found, police officers and other government officials still have the defense of qualified immunity, which provides protection from civil damages for actions taken under color of state law.[24] To invoke the qualified immunity defense, a government official must first show that their actions did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[25] Secondly, they must prove "the allegedly abridged right was not 'clearly established' at the time of the defendant's claimed misconduct."[26] The second prong of the analysis has two facets, the first of which requires the plaintiff to "identify either 'controlling authority' or a 'consensus of cases of persuasive authority' sufficient to send a clear signal to a reasona-

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> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. 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 (quoting Johnson v. Glick, F.2d 1028, 1033 (2d. Cir. 1973)); *see also* Estate of Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016) (holding first *Graham* factor cuts in plaintiff's favor absent any crime). "When the subject of a seizure 'ha[s] not committed any crime, this factor weighs heavily in [the subject's] favor." *Armstrong*, 810 F.3d at 899 (quoting Bailey v. Kennedy, 349 F.3d 731, 743-44 (4th Cir. 2003)). For example, *Estate of Armstrong v. Vill. of Pinehurst* details a case where a bipolar and schizophrenic person left a hospital after being involuntarily committed, was subsequently found by police officers, and tased for not releasing from the four-by-four post. *Id.* at 895. The court analyzed the first *Graham* factor as favoring Armstrong because he had not committed any crime. *Id.* at 899-900. The second and third *Graham* factors weigh more favorably toward the police officer since Armstrong had the possibility of running into the street and endangering others or himself after resisting arrest. *Id.* at 901. While two out of the three *Graham* factors tipped the scale more heavily toward the police officer, the court held that the police officer—although entitled to use some force—was not entitled to use the taser in the manner that he did under the circumstances. *Id.*

[24] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding government officials shielded from liability for unknowingly violating statutory or constitutional rights); *see also* Stoelting, *supra* note 20, at 247 (explaining qualified immunity analysis).

[25] *See* Conlogue v. Hamilton, 906 F.3d 150, 154 (1st Cir. 2018) (quoting *Harlow*, 457 U.S. at 818) (explaining qualified immunity standard). "[T]he doctrine's prophylactic sweep is broad. We view claims of qualified immunity through the lens of objective reasonableness. So viewed, only those officials who should have known that their conduct was objectively unreasonable are beyond the shield of qualified immunity and, thus, are vulnerable to the sword of liability." *Id.* at 154; *see also* City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (analyzing objectively reasonable officer and unlawfulness of actions). In stressing the importance of the reasonable person analysis, the Court stated that "[w]hile there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate." *City of Escondido*, 139 S. Ct. at 504.

[26] *See Conlogue*, 906 F.3d at 155 (quoting McKenney v. Mangino, 873 F.3d 75, 81 (1st Cir. 2017)) (noting requirements of second prong).

ble official that certain conduct falls short of a constitutional norm."[27] Second, the plaintiff must demonstrate that "an objectively reasonable official in the defendant's position would have known that their conduct violated that rule of law."[28]

As of May 2013, *Estate of Armstrong v. Vill. of Pinehurst*, *Parker v. Gerrish*, and *Ciolino v. Gikas* were the most directly related cases to the case-in-chief.[29] The plaintiff in *Armstrong*, a bipolar and paranoid schizophrenic, left the hospital after being committed and was subsequently found by police officers wrapped around a four-by-four post.[30] Armstrong was tased five times in drive stun mode after being warned that he would be tased, and the court found that since the law was "not so settled at the time [April 2011] they acted such that 'every reasonable official would have understood that' tasing Armstrong was unconstitutional" under the circumstances.[31] In *Parker*, the plaintiff also originally resisted arrest; however, even though he eventually complied, he was still tased.[32] The *Parker* court held that a jury could have found that the police officer violated the Fourth Amendment by tasing an unarmed suspect who "presented no significant 'active resistance' or threat."[33] Lastly, *Ciolino* involved a police officer who grabbed the plaintiff and forced him to the ground without giving any warning; ultimately, the court held that because "[the plaintiff] was not given a chance to submit peacefully to arrest before significant force was

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[27] *See* Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017) (examining first facet of second prong); *see also* Ciolino v. Gikas, 861 F.3d 296, 305-06 (1st Cir. 2017) (showing more measured approach could have been taken before throwing person to ground); *Armstrong*, 810 F.3d at 907-08 (holding "right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure" not clearly established); Hagans v. Franklin Cnty. Sheriff's Off., 695 F.3d 505, 507 (6th Cir. 2012) (finding qualified immunity applied to officer when suspect died from taser); Parker v. Gerrish, 547 F.3d 1, 11 (1st Cir. 2008) (showing taser use after failure to be arrested properly was excessive force); Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (examining police officer's taser use against noncompliant individual not outlier).

[28] *See Alfano*, 847 F.3d at 75 (detailing second facet of second prong).

[29] *See Ciolino*, 861 F.3d at 305-06 (holding officer not entitled to qualified immunity when throwing individual to ground for little reason); *Armstrong*, 810 F.3d at 899 (finding officer entitled to qualified immunity when tased mentally ill individual multiple times); *Parker*, 547 F.3d at 11 (holding taser use was excessive force when suspect presented no active resistance or threat).

[30] *See Armstrong*, 810 F.3d at 896 (detailing facts of *Armstrong*).

[31] *See id.* at 908 (noting court ruling of established caselaw).

[32] *See Parker*, 547 F.3d at 5 (showing relevant caselaw). The defendant was stopped for suspicion of driving while intoxicated after speeding. *Id.* at 3. It is disputed as to whether the defendant actually complied, but the court was required to defer to the defendant due to the posture of the case. *Id.* at 4-5.

[33] *See id.* at 10 (examining holding of case). The court also notes that a jury could turn to the facts about the "strong incapacitating effect of the taser and the fact that the South Portland Police Department considered the [t]aser just below deadly force in its 'continuum' of force." *Id.*

used . . . an 'objectively reasonable police officer' would have taken a more measured approach."[34]

In *Gray v. Cummings*, the United States Court of Appeals for the First Circuit narrowly addressed the question of excessive force and the application of qualified immunity in Gray's case.[35] In addressing the first prong in the analysis, the appeals court held that Cummings violated Gray's Fourth Amendment rights through his use of excessive force.[36] When applying the first *Graham* factor—the severity of the crime at issue—the court stated that because Gray had not committed any crime, the scale tipped in Gray's favor.[37] The appeals court then held that the second *Graham* factor—whether the suspect posed an immediate threat to the safety of the officers or others—also cut in Gray's favor because Gray posed a danger only to herself because she was bipolar and experiencing a manic phase.[38] However, the appeals court held that the third *Graham* factor—whether Gray was actively resisting arrest—favored Cummings; ultimately,

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[34] *See Ciolino*, 861 F.3d at 304 (quoting Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010)) (holding Fourth Amendment violated when not given chance to submit peacefully).

[35] *See* Gray v. Cummings, 917 F.3d 1, 5 (1st Cir. 2019) (stating holding of case-in-chief).

> This appeal arises at the intersection of constitutional law and disability-rights law. It touches upon a plethora of important issues. Some of these issues relate to the appropriateness of a police officer's use of a Taser in attempting to regain custody of a mentally ill person who, after being involuntarily committed, absconded from a hospital . . . In the end, we decide the case on the narrowest available grounds and affirm the entry of summary judgment for the defendants.

Id.

[36] *See id.* at 8-9 (examining holding of excessive force against Cummings). Conversely, the magistrate judge held that a reasonable jury could not have found that Cummings violated Gray's Fourth Amendment rights by using excessive force. *Id.* at 8.

[37] *See id.* at 9 (applying first *Graham* factor). Unlike the magistrate judge's assessment that this factor cut in favor of Cummings, the appeals court stated:

> [T]his assessment is insupportable: it fails to view the facts in the light most favorable to Gray . . . we think it [is] important that Cummings was not called to the scene to investigate a crime; he was there to return a person suffering from mental illness to the hospital.

Id. at 8. The appeals court also stated that the alleged assault does not tilt the scales because "a reasonable jury could find that the facts did not support the characterization of Gray's actions as an 'assault.'" *Id.* at 9.

[38] *See id.* at 9 (analyzing second *Graham* factor). The magistrate judge held that the second *Graham* factor favored Cummings because the definition of a § 12 patient entails a finding by a qualified medial professional that the "failure to hospitalize would create a likelihood of serious harm by reason of mental illness." *Id.* (quoting MASS. GEN. LAWS ANN. ch. 123, § 12(a) (West 2019)). Additionally, Cummings knew of this fact. *Id.* The appeals court differed in opinion, holding that a reasonable jury could find that "Gray – who was shuffling down the sidewalk barefoot and unarmed – only posed a danger to herself." *Id.*

the *Graham* factors "point in conflicting directions" and did not provide a clear answer.[39] When assessing all three of these factors under the totality of the circumstances, the appeals court held that a reasonable jury could have found that Cummings used excessive force.[40]

In response to Cummings's qualified immunity defense, the appeals court held that Gray's right to be free from the degree of force used was not clearly established at the time of the incident.[41] The court further stated that "an objectively reasonable police officer in May of 2013 could have concluded that a single use of the [t]aser in drive-stun mode to quell a nonviolent, mentally ill individual resisting arrest, did not violate the Fourth Amendment."[42] The appeals court also acknowledged the many cases cited by Ms. Gray, but stated that no such case was factually similar to her own.[43] Ultimately, the Court of Appeals for the First Circuit held

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[39] *See id.* (discussing third *Graham* factor and noting factors point in conflicting directions). The appeals court agreed with the magistrate judge in holding that the final *Graham* factor favored Cummings. *Id.* The court came to this conclusion because Cummings told Gray to put her hands behind her back on numerous occasions and she subsequently refused to do so. *Id.*

[40] *See Gray*, 917 F.3d at 9 (concluding reasonable jury could have found Cummings used excessive force). "Drawing those inferences beneficially to Gray and aware that Cummings not only had her down on the ground but also outweighed her by some seventy-five pounds, a reasonable jury could find that Gray had committed no crime and that she posed no threat to Cummings when he tased her." *Id.*

[41] *See id.* at 10 (restating qualified immunity two-prong inquiry). The court held that the first prong of the qualified immunity analysis, whether the defendant violated the plaintiff's constitutional rights, had been met. *Id.* However, they went on to state that the second prong, whether Gray's right to be free from the degree of force used, had not been clearly established at the time of the incident. *Id.* at 10-12; *see also* Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) (showing force to be used differs with mentally ill persons).

> The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Bryan, 630 F.3d at 829.

[42] *See Gray*, 917 F.3d at 12 (analyzing whether there was controlling authority sufficient to send clear signal to police officer existed). The district court concluded that "the right not to be tased while offering non-violent stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings." *Id.* at 10.

[43] *See id.* at 13 (distinguishing case-in-chief from other cases). The appeals court noted that the case on which Gray most relied, *Parker*, was factually dissimilar to the case-in-chief because Gray never complied with Cummings's command to put her hands behind her back. *Id.* at 12. The appellate court also stated that *Ciolino* was readily distinguishable from the case-in-chief because "Cummings repeatedly told Gray that she needed to return to the hospital, and she adamantly refused to obey." *Id.* The court noted that Gray's argument of "passive" rather than "active" resistance was flawed. *Id.* Additionally, there had been no subsequent taser deployments in this case, and therefore none of the cases in which multiple deployments were made were applicable. *Id.*; *see also* Meyers v. Baltimore Cnty., 713 F.3d 723, 733-34 (4th Cir. 2013) (noting no deploy-

that although there had been a violation of the Fourth Amendment, nevertheless, Cummings had qualified immunity due to a lack of factually similar caselaw.[44]

The court attempted to weigh the values of two important competing concerns: the rights of the disabled, and not hampering police officers in the performance of their duties.[45] However, the court did not place enough emphasis on the rights of the disabled and how these rights play a role in analyzing a qualified immunity defense.[46] The court incorrectly disregarded Gray's illness and its role in the qualified immunity defense analysis; instead, the court played off Cummings' ignorance as forgivable under the circumstances.[47] Although it is true that the "skimpiness of [the] information" would lead the police officer to prepare for the worst, this should neither be an excuse nor a solution for similar, future problems.[48]

Additionally, the Court of Appeals for the First Circuit did not place enough emphasis on existing caselaw.[49] Like Armstrong in *Estate of*

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ment of taser subsequent to an initial taser); Cyrus v. Town of Mukwonago, 624 F.3d 856, 859-63 (7th Cir. 2010) (acknowledging no deployment of taser subsequent to initial taser shock).

[44] *See Gray*, 917 F.3d at 12 (stating holding of case-in-chief).

[45] *See id.* at 20 (noting need to balance rights of mentally ill and protection of police officers executing duties). "We add only that this is a hard case – a case that is made all the more difficult because of two competing concerns: our concern for the rights of the disabled and our concern that the police not be unduly hampered in the performance of their important duties." *Id.*

[46] *See id*. at 12 (showing court placed some emphasis on factor of disability). Although the court stated that "a subject's mental illness is a factor that a police officer must take into account in determining what degree of force, if any, is appropriate," it did not adequately balance the rights of both parties. *Id.* at 11. Rather, the court was lenient with Cummings's failure to consider Gray's condition, reasoning that there was skimpy information. *Id.* at 12.

[47] *See id.* at 12 (criticizing weight placed on mental illness in factor analysis); *see also* Estate of Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016) (showing differing level of force needed for disabled individuals). "Mental illness, of course describes a broad spectrum of conditions that does not dictate the same police response in all situations. But 'in some circumstances at least,' it means that 'increasing the use of force may . . . exacerbate the situation.'" *Armstrong*, 810 F.3d at 900 (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)); Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) (explaining differing level of force needed).

[48] *See Gray*, 917 F.3d at 11-12 (suggesting possible solution not fully discussed). One potential solution not discussed by the court is giving police officer more information about the individual upon dispatch, such as telling him or her what kind of disease from which the person may be suffering from. *Id.* at 9; *seem also* Johnny Rice II, *Why We Must Improve Police Responses to Mental Illness*, NATIONAL ALLIANCE ON MENTAL ILLNESS (Mar. 2, 2020), https://www.nami.org/Blogs/NAMI-Blog/March-2020/Why-We-Must-Improve-Police-Responses-to-Mental-Illness (explaining how increasing police training can develop better knowledge and tools to address these situations). Similarly, providing training on how to interact with a person with mental illness can significantly improve officer response and trust. *See* Rice, *supra* note 48.

[49] *See Gray*, 917 F.3d at 11 (distinguishing relevant caselaw as outlier); *see also* Ciolino v. Gikas, 861 F.3d 296, 305-06 (1st Cir. 2017) (holding no qualified immunity for police officer); *Armstrong*, 810 F.3d at 906 (noting reasonable jury could find officers violated Armstrong's

Armstrong v. Vill. of Pinehurst, Gray did not comply with commands from police while experiencing an episode due to his mental illness.[50] Similarly, Armstrong and Gray were both told that if they did not comply, they would be tased.[51] The court differentiated both *Parker* and *Ciolino* by stating that Gray had ample opportunity to comply with Cummings's commands.[52] However, the amount of force used in this situation was clearly excessive, especially as it was used on a mentally ill person.[53] Given that the facts of *Armstrong*, *Ciolino*, and *Parker* were so similar to those in *Gray*, the court was mistaken in its finding that there was no controlling authority sufficiently available to show that the police officer's conduct would fall short of a constitutional norm.[54]

Although Gray was unable to find relief with any of her claims, future litigants with cases of similar factual bases may have better opportunities for success.[55] Since the court decided that Cummings violated Gray's Fourth Amendment rights, future litigants could successfully bring a § 1983 claim, notwithstanding an asserted qualified immunity defense.[56] Although this will not give Gray the damages she deserved, this adjudication will strengthen the body of law as future cases will be able to point to controlling authority.[57] Practitioners will now be able to cite *Gray* as controlling precedent that demonstrates what acts can constitute a Fourth Amendment violation.[58]

In *Gray v. Cummings*, the Court of Appeals for the First Circuit decided whether a police officer could be held liable for tasing a mentally

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Fourth Amendment rights); Parker v. Gerrish, 547 F.3d 1, 11 (1st Cir. 2008) (holding police officer used excessive force).

[50] *See Armstrong*, 810 F.3d at 897 (showing similar facts to case-in-chief).

[51] *See Gray*, 917 F.3d at 11. (explaining similarities between *Gray* and *Armstrong*).

[52] *See id.* at 12-13 (examining how court differentiates between *Gray* and other cases); *see also Ciolino*, 861 F.3d at 306 (distinguishing from case-in-chief); *Parker*, 547 F.3d at 10 (differentiating amount of time given to comply).

[53] *See Gray*, 917 F.3d at 11-13 (balancing need to arrest versus amount of force used against mentally ill person); *see also Parker*, 547 F.3d at 10 (discussing taser use and excessive force). The court in *Parker* also points to the fact that tasers were listed just below deadly force in its continuum of force. *Parker*, 547 F.3d at 10.

[54] *See Gray*, 917 F.3d at 11-13. (disagreeing with case-in-chief regarding lack of controlling authority).

[55] *See id.* at 10 (reiterating second facet of "identify either 'controlling authority' or 'consensus of cases of persuasive authority' sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm.").

[56] *See id*. (quoting City of Escondido v. Emmons, 139 U.S. 500, 504 (2019)) ("Taken together, these steps normally require that, to defeat a police officer's qualified immunity defense, a plaintiff must 'identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.'")

[57] *See id.* at 11-13 (developing body of caselaw for disabled persons).

[58] *See id.* at 9 (noting which acts will elicit finding of violation).

ill individual in flight from the hospital to which she had been involuntarily committed. Although the court attempted to weigh competing concerns, it did not give enough weight to the rights of the disabled and mentally ill. Additionally, the court could have placed more emphasis on existing caselaw to give Gray a remedy against Cummings. Although there is a need to make sure police officers are not unduly hampered in their duties; here, the police officer's use of a taser was an unreasonable action given the circumstances.

Brandon Vallie