UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anthony Randal-Ashley Villebrun,

Plaintiff,

Case No. 0:24-cv-00504-KMM-LIB

v.

Brandon Keith Nienaber,

Defendant.

Defendant's Reply in Support of Motion for Summary Judgment

Introduction

It is undisputed that Brandon Nienaber was a White Earth Tribal Police Officer, wearing a White Earth Police Department uniform and driving a White Earth Police Department marked squad vehicle, when he arrested White Earth Tribal member Anthony Villebrun on the White Earth Reservation on October 23, 2021. It is also undisputed that the arrest was within Officer Nienaber's authority under Tribal law. As a result, Nienaber was acting under color of Tribal law for Section 1983 purposes, and Villebrun's Section 1983 claim must fail.

Even if Officer Nienaber could be considered to have been acting under color of state law during Villebrun's arrest, Villebrun cannot demonstrate that

Nienaber violated Villebrun's clearly established constitutional rights during the arrest. When Villebrun's arrest is viewed—as it must be—from the perspective of a reasonable police officer at the scene, Nienaber's actions in tasing Villebrun were objectively reasonable. The undisputed facts include that (1) Villebrun led Officer Nienaber on a prolonged high-speed chase, (2) Villebrun told Officer Nienaber that someone else was driving the car, (3) Officer Nienaber was the only officer on the scene, and (4) Villebrun refused to follow commands to get into a position from which Nienaber could safely (from the perspective of a reasonable officer alone in the woods) handcuff him. Thus, it was reasonable for Officer Nienaber to use a taser on Villebrun to subdue him, and Officer Nienaber is entitled to qualified immunity for his actions.

Defendant's Reply to Plaintiff's Statement of Facts

As noted in Nienaber's memorandum in support of summary judgment, there is no reasonable dispute of material fact in this case because Officer Nienaber's squad-car dash camera and body-worn camera captured his pursuit and arrest of Villebrun. Def.'s Mem. of Law in Supp. of Summ. J., ECF 23 ("Def.'s Mem."), at 2. This allows the factfinder to compare the parties' factual allegations with video footage of the incident. Nevertheless, Villebrun attempted to rewrite

the narrative of this case by embellishing, omitting, or otherwise misrepresenting certain parts of the incident in his statement of facts. The Court must reject Villebrun's version of events to the extent that it conflicts with the video footage:

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. . . . When opposing parties tell two different stories, one of which is blatantly contradicted by the [video] record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Scott v. Harris, 550 U.S. 372, 380 (2007).

For example, Villebrun argued that "[t]he facts relied upon by Nienaber to justify his taser use are disputed or false," and states that "Nienaber did not observe a bag of narcotics thrown from Villebrun's vehicle while he was fleeing." Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., ECF 28 ("Pl.'s Mem."), at 19. Instead, he claims that his vehicle "ran over a bag in the roadway" that "was later found to be a fast-food bag with napkins." *Id.* at 3 (citing ECF 25-2 at 1:59 and ECF 25-4 at 5). But whether Villebrun threw or ran over the bag, and what the bag actually contained, is not material to the excessive-force and qualified-immunity issues in this case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under

the governing law will properly preclude the entry of summary judgment.").

What *is* material to these issues is the information Officer Nienaber possessed when he arrested Villebrun. *See Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (noting that "objective legal reasonableness" of officer's use of force must be judged "in light of the information he possessed at the time" of the use of force); *see also Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019) (acknowledging that courts "judge the relevant facts from the perspective of a reasonable officer on the scene, not with 20/20 hindsight vision"). It cannot reasonably be disputed that, at the time of the pursuit and arrest, and without the benefit of hindsight, Officer Nienaber believed Villebrun had thrown a bag that contained narcotics from his vehicle. *See* Rishovd Decl. Ex. 1, ECF 25-2 ("Squad Video"), at 1:59-2:07 (squad-car dash camera footage of Officer Nienaber observing the bag and immediately reporting to dispatch, "He just threw out a bag with several large packages of drugs."); Rice Decl. Ex. 2, ECF 29-2 ("Nienaber Dep."), at 30:22-25 ("The vehicle fled. I pursued, and it wasn't that far along after when I observed what I believed, at the time, to be narcotics that were discarded from the vehicle."). This, in turn, caused Officer Nienaber to believe that there were additional safety risks at play when arresting Villebrun. *See*

Nienaber Dep. 33:19-25 ("I . . . suspected that that was . . . illegal narcotics that came out of the car. In general, people who are involved in illegal narcotics; usually, weapons are hand in hand with them situations. So that will heighten the level of safety [concerns], as far as what else was going on with that driver.").

Another problem with Villebrun's statement of facts is his allegation that Officer Nienaber "could have handcuffed [him] or pat searched for weapons" while he was in a kneeling position prior to the first taser deployment. Pl.'s Mem. 4 (citing Nienaber Dep. 45:11-15, 45:19-22). Villebrun similarly claimed, "Nienaber understood that it would have been acceptable to pat frisk or handcuff [him] pursuant to officer training," *id.* (citing Nienaber Dep. 59:7-20), and later characterized the prone handcuffing position as Officer Nienaber's personal preference, *id.* at 20. This misrepresents Officer Nienaber's deposition testimony.

Officer Nienaber acknowledged that it was physically possible to handcuff or pat search Villebrun in a kneeling position, but he went on to clarify that he did not believe it was safe to do so under the circumstances. Nienaber Dep. 45:14-15, 45:21-22. He did not concede that arresting Villebrun in a kneeling position would have been reasonable under the circumstances of this case, and

he never testified that arresting Villebrun in a prone position was merely a matter of personal preference. Rather, he agreed that arresting Villebrun in a kneeling position "would have been acceptable, depending on the circumstances," if the arresting officer "felt safe in doing so." *Id.* at 59:19-20, 60:2. He later explained that he considered "all of the safety issues" involved in the arrest when determining the appropriate level of force to use, including the pursuit, Villebrun's refusal to comply with the command to get on his stomach, Villebrun's resistance to being pushed onto his stomach, the possibility that there were other people in Villebrun's car,[1] and the possibility that Villebrun had a weapon in the car or on his person. *Id.* at 92:1-93:4.

In sum, portions of Villebrun's statement of facts contradict the video

[1] Villebrun claims that the squad-car dash camera footage "shows that Nienaber only engaged with Villebrun and did not appear concerned about any other people in the area," arguing that Officer Nienaber's safety concern about other suspects "appears to be an attempt to retroactively justify the use of a taser on" Villebrun. Pl.'s Mem. 19-20. But again, this claim is contradicted by the video record. It is undisputed that Officer Nienaber did not have time to clear Villebrun's car and the surrounding woods before he arrested Villebrun. *See* Squad Video 8:44. And Villebrun himself suggested that another person was present when he was arrested, stating, "You should have caught the motherfucker that did this shit. He went the other fucking way," after which Nienaber radioed to dispatch, "I'm not sure if there's a second [suspect]." Squad Video 9:25-9:50.

record and mischaracterize Officer Nienaber's deposition testimony. The Court must consider these discrepancies when determining the undisputed facts in this case on summary judgment.

Argument

I. Officer Nienaber's actions throughout the entirety of his encounter with Villebrun were authorized under White Earth Tribal law, notwithstanding any concurrent state authority.

As Villebrun recognizes, he can only sustain a Section 1983 claim against Officer Nienaber if he can show that Nienaber "exercised power possessed by virtue of state law and made possible *only* because" he was "clothed with the authority of state law." Pl.'s Mem. 9 (quoting *West v. Atkins,* 487 U.S. 42, 49 (1988)) (emphasis added). Based on that standard, the ultimate question for the Court is whether Officer Nienaber's actions were authorized under *only* state law, not under *both* state and Tribal law. Because Officer Nienaber's actions in observing, pursuing, stopping, and arresting Villebrun were all consistent with his authority as a Tribal police officer, Villebrun's section 1983 claim against him must fail.[2]

[2] Officer Nienaber's opening memorandum listed five factors courts typically consider when analyzing whether tribal officers acted under color of tribal law versus color of state law, Def.'s Mem. 9-10, and set out the caselaw addressing

Villebrun does not contend that Nienaber's actions were outside the scope of Tribal authority or contrary to Tribal law, but instead he asserts that "concurrent [state] authority existed" and that "Villebrun was subject to both tribal and state law." Pl.'s Mem. 13-14. But the fact that Villebrun was subject to the laws of overlapping jurisdictions is not inconsistent with Officer Nienaber's position that he acted under Tribal authority when pursuing and arresting Villebrun for crimes committed within the Reservation. *See* Def.'s Mem. 12 (citing *Howard v. Weidemann*, No. 20-cv-1004 (ECT/LIB), 2021 WL 6063630, at *4 (D. Minn. Dec. 22, 2021) (finding officers' actions in enforcing potential violations of White Earth Traffic Code probative of officers acting under color of Tribal law)).

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these factors, *id.* at 10-14. We cited *McDonough v. Toles* for the proposition that the color-of-law test is fact-intensive, *id.* at 10. We did not intend to imply that *McDonough* set out a five-factor test, contrary to Villebrun's suggestion. *See* Def.'s Mem. 10. Regardless, federal courts have used the five factors we listed to determine when tribal officers act under color of tribal law or color of state law. *See, e.g.*, *Genskow v. Prevost*, No. 19-C-1474, 2020 WL 1676960, at *5 (E.D. Wis. Apr. 6, 2020) (whether arrestee is Indian or non-Indian); *Bressi v. Ford,* 575 F.3d 891, 895-96 (9th Cir. 2009) (whether the events at issue took place within the territorial jurisdiction of the tribe); *Coleman v. Duluth Police Dep't*, No. 07-cv-473 (DWF/RLE), 2009 WL 921145, at *24 (D. Minn. Mar. 31, 2009) (whether the arrestee was in violation of state or tribal law); *Howard v. Weidemann*, No. 20-cv-1004 (ECT/LIB), 2021 WL 6063630, at *4 (D. Minn. Dec. 22, 2021) (the individual appearance and/or conduct of the officer in holding himself out as a tribal official and the arrestee's awareness that tribal authority was being used against them).

And Officer Nienaber need not establish, as Villebrun suggests, that "[T]ribal law was the exclusive authority in this incident or that state law could not apply." Pl.'s Mem. 15. In fact, as noted above, the reverse is true: Villebrun must establish that Nienaber was acting *only* under color of state law. *West*, 487 U.S. at 49 (internal citations omitted); *cf. Ten Eyck v. United States*, 463 F. Supp. 3d 969, 989 (D.S.D. 2020) (finding tribal officer had acted under color of federal law for *Bivens* claim involving off-reservation enforcement activities under a federal contract because "[t]ribal police do not otherwise have authority to assist with state law matters on non-tribal land").

Villebrun cites *State v. Manypenny* for the contention that the state has broad criminal jurisdiction over the Reservation. Pl.'s Mem. 15 (citing 682 N.W.2d 143, 149 (Minn. 2004)); *see* 18 U.S.C. § 1162 (2002).[3] The existence of state jurisdiction to prosecute certain crimes committed by Indians on the White Earth Reservation in no way precludes concurrent Tribal jurisdiction, however. *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) ("[W]e agree with the district court's

[3] 18 U.S.C. § 1162 is part of what's commonly known as "Public Law 280," a federal statute that extended state jurisdiction over "offenses committed by or against Indians" in certain areas of Indian country (including the White Earth Reservation) in a handful of states, including Minnesota.

conclusion that Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law.").[4]

Nor does the Tribe's cooperative agreement with Becker County somehow eliminate Officer Nienaber's authority to act as a Tribal police officer enforcing Tribal laws and upholding public safety within the Reservation. Villebrun himself recognizes that the cooperative agreement encompasses the exercise of concurrent state and Tribal jurisdiction. Pl.'s Mem. 15-16. That recognition of concurrent authority is consistent with the language of the cooperative agreement, which aims to "preserve the parties' respective jurisdictions on the White Earth Reservation so that neither the Reservation nor the County is conceding any claim to jurisdiction by entering into this cooperative agreement." Rishovd Decl. Ex. 5, ECF 25-6, at 1.

Villebrun also relies on *Yassin v. Weyker*, a case involving a St. Paul police officer who had been cross-deputized "as a federal agent to investigate an

[4] *See also* Rishovd Decl. Ex. 4, ECF 25-5, at § 1 ("This Traffic Code is enacted pursuant to the inherent sovereign authority of the White Earth Tribal Council a/k/a a [sic] RTC, as the governing body of the White Earth Band of Chippewa, as granted by Article VI of the Revised Constitution of the Minnesota Chippewa Tribe, and as recognized by the United States under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476.").

interstate sex-trafficking scheme." 39 F.4th 1086, 1087-88 (8th Cir. 2022). The *Yassin* court cited the *West* test and found that "[s]tate law had nothing to do with the nature and circumstances of [the officer's] conduct." *Id.* at 1090. This was because the officer was in Nashville, working on a federal investigation, when she committed the acts at issue. *Id.* at 1090-91. Here, by contrast, Officer Nienaber was serving as a Tribal police officer throughout his encounter with Villebrun, was acting within the scope of Tribal authority, and was policing conduct on the White Earth Reservation that violated Tribal and state laws. And as the court in *Yassin* recognized, "federal and state officers work together all the time without clouding their distinct sources of authority." *Id.* at 1089 n.2. The same is true here: the cooperative agreement enshrines the cooperation between the state and Tribe without clouding or otherwise divesting either sovereign of its law-enforcement authority.

Villebrun also relies on *Bressi v. Ford,* arguing that the Ninth Circuit's holding in *Bressi* "would require tribal officers enforcing state and tribal law to adhere to constitutional standards." Pl.'s Mem. 10 (citing *Bressi v. Ford,* 575 F.3d 891, 897 (9th Cir. 2009)). But *Bressi* involved unique facts, easily distinguishable from this case.

In *Bressi*, tribal officers were conducting random stops using a roadblock on a public highway running through the tribe's reservation. 575 F.3d at 893. The officers stopped Bressi, a non-Indian, and detained him when he refused to provide identification. *Id.* Tribal law authorized the roadblock, but ultimately, the tribal officers, who were authorized to enforce state law "by virtue of their certification with the Arizona Peace Officer Standards and Training Board," cited Bressi for violating two state laws. *Id.* at 894. When Bressi brought a Section 1983 claim, the tribal officers argued that they were acting under color of tribal law, precluding a Section 1983 claim.

The Ninth Circuit acknowledged that the tribe had "full law enforcement authority over its members and nonmember Indians on that highway," but that "in the absence of some form of state authorization [], tribal officers have no inherent power to arrest and book non-Indian violators." *Id.* at 896. The court found that if a tribal officer stops someone and "the violator turns out to be a non-Indian, the tribal officer may detain the violator and deliver him or her to state or federal authorities. *Id.* The court concluded that

> a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not

> they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or included searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians.

Id. at 896-97. Thus, the court found that once the officers "departed from, or went beyond the inquiry to establish that Bressi was not an Indian, they were acting under color of state law." *Id.* at 897.

Here, by contrast, Villebrun is a Tribal member, and the White Earth Nation's "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Villebrun can't point to a single case where a tribal officer arresting a tribal member was found to involve state action, and the undersigned have not found any despite nationwide searches. Moreover, every action Villebrun alleges that Officer Nienaber took in violation of Villebrun's constitutional rights was taken under *Tribal* authority. *See* Compl., ECF 1, at ¶¶ 13-18, 29. The fact that Nienaber cited a Minnesota statute in his White Earth Police Department report or filed a form with the Minnesota BCA, Pl.'s Mem. 13, cannot convert Officer Nienaber's many actions taken under color of Tribal law to actions "made possible *only* because [he was] clothed with the

authority of state law." *West*, 487 U.S. at 49 (emphasis added).

The undisputed facts in the record demonstrate that Officer Nienaber acted under color of Tribal law throughout his seizure of Villebrun. *See generally* Def.'s Mem. 9-15; *see also Yassin*, 39 F.4th at 1090 (holding that although the "under-color-of-law determination" is fact-intensive, it is a question of law appropriate for summary judgment as long as facts are undisputed). Accordingly, Villebrun's Section 1983 claim fails as a matter of law on summary judgment.

II. Officer Nienaber is entitled to qualified immunity because Villebrun failed to establish that Officer Nienaber's use of force was unreasonable and that he violated a clearly established constitutional right.

With respect to the qualified-immunity issue, Villebrun first argues that qualified immunity should not apply to Officer Nienaber's conduct because it is not objectively reasonable for a law-enforcement officer to use a taser on an arrest subject "when the subject is 'no longer acting aggressively, no longer pos[ing] any immediate security concern, and [is] trying to comply with [. . .] orders.'" Pl.'s Mem. 17 (quoting *Jackson*, 944 F.3d at 712). He relies on two other Eighth Circuit cases for the proposition that "[m]erely disobeying commands does not justify the use of a taser." *Id.* (citing *Shekleton v. Eichenberger*, 677 F.3d

361, 366 (8th Cir. 2012); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009)).

Although *Jackson*, *Shekleton*, and *Brown* all involved arrest subjects who failed to comply with an officer's order, the facts of each case are inapposite here. *Shekleton* and *Brown* both involved arrest subjects who were suspected of misdemeanor offenses and did not flee, resist arrest, or act aggressively; these opinions acknowledged that "force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Brown*, 574 F.3d at 499 (quotations omitted); *see Shekleton*, 677 F.3d at 366 (citing *Brown*).

For example, in *Brown*, the plaintiff was a passenger in a car her husband was driving. 574 F.3d at 493. Officers pulled the car over for a traffic stop, and one officer pulled the plaintiff's husband out of the car and handcuffed him in a manner the plaintiff perceived as aggressive and frightening. *Id.* at 494. She called 911 while she remained in the car. *Id.* The defendant officer opened the passenger door and ordered her to get off the phone twice. *Id.* Both times, the plaintiff explained that she wanted to remain on the phone with the 911 operator because she was frightened. *Id.* The officer then tased her, took her phone,

grabbed her hair, and pulled her out of the car by her arm. *Id.*

The Eighth Circuit affirmed the district court's denial of summary judgment for the officer on the basis of qualified immunity. *Id.* at 501. It reasoned that summary judgment was inappropriate in that case because a factfinder could determine the officer's use of force to be unreasonable, given that the plaintiff "posed at most a minimal safety threat to [the defendant] and the other officers and was not actively resisting arrest or attempting to flee." *Id.* at 497. It distinguished these circumstances from the "'tense, uncertain, and rapidly evolving' situation[s]" that would justify the use of greater force. *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

In *Shekleton*, the defendant officer engaged with the plaintiff because he was suspected of arguing outside a bar. 677 F.3d at 363-64. The officer asked the plaintiff to put his arms behind his back twice, and both times, the plaintiff explained that he was unable to do so due to a disability. *Id.* at 364-65. The officer verbally acknowledged that he was aware of the plaintiff's disability and began to handcuff him. *Id.* at 365. The officer lost his grip and both men lost their balance, causing them to fall to the ground. *Id.* The officer thought the plaintiff was attempting to break away or otherwise resist arrest and tased him soon after.

Id. The Eighth Circuit again affirmed the district court's denial of summary judgment for the officer on the basis of qualified immunity. *Id.* at 367. It concluded that the officer's use of force was unreasonable because the plaintiff "was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him." *Id.* at 366.

Unlike the circumstances in *Brown* and *Shekleton*, Villebrun's arrest occurred after a high-speed car chase that constituted a felony fleeing-in-a-motor-vehicle offense. *See* Nienaber Dep. 70:24-71:3. Even after he exited the car, Villebrun continued to flee from Officer Nienaber on foot, and he only stopped fleeing because he tripped, allowing Nienaber to catch up to him. Squad Video 8:38-8:48. At the time of the pursuit and arrest, Officer Nienaber also suspected that a felony narcotics offense could be involved due to the brown bag he observed. Nienaber Dep. 86:21-87:1. Furthermore, Villebrun failed to explain to Officer Nienaber why he was unable or unwilling to comply with Nienaber's orders to lie on his stomach, unlike the plaintiffs in *Brown* and *Shekleton*. *See* Squad Video 8:48-9:20; Villebrun Dep., Rice Decl. Ex. 1, ECF 29-1, at 19:11-13 (conceding that Villebrun did not explain to Officer Nienaber why he did not lie

down on his stomach).

Villebrun argued that *Jackson* applies to this case because it involved two taser deployments, like the conduct at issue here. Pl.'s Mem. 17. He summarized the relevant principles from *Jackson* as follows:

> Even if a subject is initially noncompliant, threatening, or resisting arrest, officers may not use a taser once that behavior has stopped. When an officer uses a taser and causes a subject to writhe on the ground, an officer should give a subject a chance to comply before using the taser again.

Id. (citing *Jackson*, 944 F.3d at 711-13). But again, the circumstances of *Jackson* and the instant case can be distinguished.

In *Jackson*, the plaintiff was initially "aggressive and noncompliant in response to [the defendant officer's] directives," and for this reason, the Eighth Circuit concluded that "the first tasing was objectively reasonable." 944 F.3d at 711. It came to the opposite conclusion with respect to the second taser deployment:

> When the electric probes from the first tasing struck Jackson, he immediately fell to the ground. Before Jackson could respond, and without warning, [the officer] again deployed his Taser. At the time of this second tasing, Jackson did not appear to pose a threat to law enforcement, resist arrest, or flee—he was on his back, writhing on the ground. . . . Jackson did not have time to react with compliance or continued resistance before the second tasing was deployed. His physical body was still reeling from the initial tasing. [The officer]

> argued that he perceived Jackson to kick his legs out and turn his body as if to confront the officers again. The video footage, however . . . clearly shows that Jackson was several feet away from the nearest officer, unable to pose a threat from his position on the ground.
> . . .
> In light of the video footage depicting the quick succession of the tasings and the dispute as to whether Jackson was resisting the officers or posing a threat at the time of the second tasing, we find that there is a genuine issue of material fact as to whether the second tasing amounted to excessive force.

Id. at 711-12.

It is undisputed that Officer Nienaber deployed his taser twice in quick succession, similar to the taser deployments in *Jackson*. The facts diverge at this point, however. The Eighth Circuit noted that the first taser deployment in *Jackson* immobilized the plaintiff, at which point he no longer resisted arrest or refused to comply with commands: "[A]t the time of the second tasing, Jackson did not ignore law enforcement commands; in fact, no commands were given. And, Jackson was writhing on the ground, physically unable to walk away or flee." *Id.* at 712.

Here, Officer Nienaber explained in his deposition that the first taser deployment did not immobilize Villebrun, possibly because one of the taser barbs failed to connect. Nienaber Dep. 62:2-13, 65:6-10; *see Zubrod v. Hoch*, 232 F.

Supp. 3d 1076, 1081 (N.D. Iowa 2017) ("The Taser can cause neuromuscular incapacitation only if both barbs make contact with the body."). The video footage confirms this—although Villebrun did fall from his knees to the ground after the first taser deployment, he then proceeded to roll over, grab at the taser barbs, shout at Officer Nienaber, and struggle against him. Squad Video 9:00-9:20. Officer Nienaber again ordered Villebrun to "get on his belly," and he was attempting to handcuff Villebrun when he deployed his taser a second time. *Id.*

The plaintiff in a Fourth Amendment excessive-force action "must identify controlling authority or a robust consensus of cases of persuasive authority placing the constitutional question beyond debate." *Rudley v. Little Rock Police Dep't*, 935 F.3d 651, 653 (8th Cir. 2019) (quotations and citations omitted). Villebrun has failed to do so here. The cases he identified as dispositive to the excessive-force and qualified-immunity issues are incomparable to the instant case, and as such, this Court should reject Villebrun's arguments in opposition to summary judgment.

III. This Court may consider Chief Bruley's testimony on non-ultimate-issue matters.

Villebrun also argued that this Court must not consider "most of" Chief Bruley's opinions because he "opine[s] on the ultimate issue of whether force

was reasonable." Pl.'s Mem. 20 (citing *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009)). This Court may, however, consider Chief Bruley's non-ultimate-issue opinions. "A police procedure expert's testimony may be proper on issues other than the 'reasonableness' of an officer's conduct under Fourth Amendment standards.'' *Sloan v. Long*, No. 4:16 CV 86 (JMB), 2018 WL 1243664, at *3 (E.D. Mo. Mar. 9, 2018) (quoting *Shannon v. Koehler*, No. C 08-4059-MWB, 2011 WL 10483363, at *30 (N.D. Iowa Sept. 16, 2011)).

"[E]xpert testimony on industry practice or standards is admissible." *Id.* (citing *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003)). Further, "expert opinions 'can embrace the ultimate issue of *fact*, . . . including whether standards or practices are applicable to a given situation and whether those standards or practices were met in the situation." *Id.* at *4 (quoting *K.W.P. v. Kansas City Pub. Sch.*, No. 16-0974-CV-W-SRB, 2017 WL 5505400, at *3 (W.D. Mo. Oct. 31, 2017)). This means, for example, that the Court may consider Chief Bruley's testimony explaining why and when the prone handcuffing position is preferred by officers, and why and when officers use Tasers. These are not opinions on the ultimate excessive-force issue, nor are they devoid of any "standards or framework" to support his conclusion, as Villebrun

alleged. Pl.'s Mem. 21.

Chief Bruley explained that the prone handcuffing technique is common practice for arresting individuals who pose danger to the arresting officer, and that the prone position is considered the safest for the officer, especially when an officer is alone on the scene, as Officer Nienaber was. Hogen Decl. Ex. 1, ECF 24-2, at ¶¶ 30, 32-33, 38. He further explained that officers are trained to target a suspect's back when using a Taser because it "is the safest and generally most effective" target and discusses when and why officers warn suspects of Taser use. *Id.* at ¶¶ 10-41. Thus, the Court may consider Chief Bruley's non-ultimate-issue testimony, which supports a ruling that Officer Nienaber is entitled to qualified immunity in this case.

Conclusion

In the end, the undisputed material facts support summary judgment for Officer Nienaber because he acted under color of White Earth Tribal law during Villebrun's arrest and because even if he had acted under color of state law, he is entitled to qualified immunity from Villebrun's excessive-force claim. Defendant respectfully requests that this Court reject Villebrun's responsive arguments and grant summary judgment in Officer Nienaber's favor.

Dated: August 5, 2025

/s/ Vanya S. Hogen

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