Courts, Cops, and Consequences:
The Effects of Qualified Immunity on the National Interest in Racial Equity

Wednesday, February 17, 2021

This program will be presented by the Harrell/Castle pupilage of the Rhone-Brackett American Inn of Court using the Zoom.com platform. With the increasingly mainstream visibility of racial equality movements, such as Black Lives Matter, public interest in and discourse around qualified immunity has grown. Those in favor of qualified immunity indicate that many government officials, particularly police, need to have the reassurance of no-liability discretion to address emergencies. Those that would like to abolish or limit qualified immunity argue that it poses a known threat of unchecked abuse, particularly by un-elected officials, and reinforces institutionalized racism.

The Inn has invited Judge Reeves from the United States District Court for the Southern District of Mississippi to discuss *Jamison v. McClendon,* a case that he decided August 4, 2020. The court granted qualified immunity; however, Judge Reeves's opinion provided a strong factual and historical rebuke of the law the court was required to apply.

AGENDA

- 5:30-5:50 Reception
- 5:50-6:00 Introduction (Courtney and Ellen)
- 6:00-7-00 Presentation by Judge Reeves
- 7:00-7:30 Q & A

MATERIALS

A. Synopsis: The Law of Qualified Immunity (Keyes)
B. *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 U.S. Dist. LEXIS 139327 (S.D. Miss. Aug. 4, 2020).
C. *Jamison* Motions:
    - Defendant's Renewed Motion for Summary Judgment
    - Memorandum in Opposition to Renewed Motion for Summary Judgment
    - Reply to Response to Motion
D. Other References
E. CLE Accreditation

FACULTY LEADER

Hon. Carlton W. Reeves, U. S. District Court, S.D. Miss.
Judge Reeves served as Chief of the Civil Division for the Office of the Unites States Attorney for the Southern District of Mississippi, served on the boards of the ACLU of Mississippi and the Mississippi Center for Justice, and was appointed to his current seat by President Barack Obama in 2010.

WHAT IS QUALIFIED IMMUNITY?

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J.D. Candidate 2023
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An officer uses a chokehold. An officer fires his gun in the line of duty. An officer unlawfully detains a citizen. What happens next?

Qualified Immunity dictates the aftermath of situations like this. Unfortunately, as articulated by Judge Reeves in *Jamison v. McClendon*, "in real life it operates like absolute immunity."

Qualified Immunity is a vestige of Sovereign Immunity that protects government officials from personal liability for decisions and actions they make in the performance of their official work. The standard that officials must meet for qualified immunity to apply has shifted from requiring the decision be in good faith and objectively reasonable to a more relaxed Clearly Established Law requirement. Even officials that commit constitutional violations are sheltered by qualified immunity if the law is not clearly established. As applied, if the facts of a case can be distinguished from existing relevant case law, the clearly established law requirement defers to the discretion of the government official and grants qualified immunity.

With the increasingly mainstream visibility of racial equality movements, such as Black Lives Matter, public interest in and discourse around qualified immunity has grown. Those in favor of qualified immunity indicate that many government officials, particularly police, need to have the reassurance of no-liability discretion to address emergencies. Those that would like to abolish or limit qualified immunity argue that it poses a known threat of unchecked abuse, particularly by un-elected officials, and reinforces institutionalized racism.

The Rhone Brackett Inn has invited Judge Reeves from the United States District Court for the Southern District of Mississippi to discuss *Jamison v. McClendon, decided August 4, 2020.* The court granted qualified immunity, but Judge Reeves's opinion provided a strong factual and historical rebuke of the law the court was required to apply.

Judge Reeves served as Chief of the Civil Division for the Office of the Unites States Attorney for the Southern District of Mississippi, served on the boards of the ACLU of Mississippi and the Mississippi Center for Justice, and was appointed to his current seat by President Barack Obama in 2010. We are honored to have him join us for this presentation of Courts, Cops, and Consequences.

OTHER REFERENCES

Cornell Law School: https://www.law.cornell.edu/wex/qualified_immunity

Stanford Law School: https://www.stanfordlawreview.org/online/spotlight-qualified-immunity/

Minnesota Law School: https://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf

https://theappeal.org/the-lab/explainers/qualified-immunity-explained/

https://www.acslaw.org/expertforum/law-enforcement-officials-qualified-immunity-and-the-absolute-immunity-of-anonymity/

https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity

Jamison v McClendon

Synopsis: Motorist brought § 1983 action against police officer after he was stopped and detained for two hours, alleging prolonged stop and lack of consent to search. Officer filed motion for summary judgment. Holdings: The District Court, Carlton Reeves, J., held that: [1] officer's insertion of arm into motorist's car during traffic stop was an unreasonable search; [2] motorist's alleged consent to search was a product of an unconstitutional search and thus not voluntary; [3] even absent initial constitutional violation, genuine issue of material fact as to whether motorist's consent to search was voluntary precluded summary judgment; and [4] it was not clearly established that officer's actions violated the Fourth Amendment, and thus officer had qualified immunity. Motion granted. Procedural Posture(s): Motion for Summary Judgment

Jamison v. McClendon

United States District Court, S.D. Mississippi. | August 4, 2020 | --- F.Supp.3d ---- | 2020 WL 4497723

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Outline

2020 WL 4497723
Only the Westlaw citation is currently available.
United States District Court, S.D. Mississippi.

Clarence JAMISON, Plaintiff,
v.
Nick MCCLENDON, in his individual capacity, Defendant.

No. 3:16-CV-595-CWR-LRA
|
Signed 08/04/2020

Synopsis

Background: Motorist brought § 1983 action against police officer after he was stopped and detained for two hours, alleging prolonged stop and lack of consent to search. Officer filed motion for summary judgment.

Holdings: The District Court, Carlton Reeves, J., held that:

[1] officer's insertion of arm into motorist's car during traffic stop was an unreasonable search;

[2] motorist's alleged consent to search was a product of an unconstitutional search and thus not voluntary;

[3] even absent initial constitutional violation, genuine issue of material fact as to whether motorist's consent to search was voluntary precluded summary judgment; and

[4] it was not clearly established that officer's actions violated the Fourth Amendment, and thus officer had qualified immunity.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (37)

[1] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity doctrine protects all officers from § 1983 liability, no matter how egregious their conduct, if the law they broke was not clearly established. 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[2] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For the law to be clearly established, as required for a § 1983 claim, it must have been beyond debate that the officer broke the law. 42 U.S.C.A. § 1983.

[3] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

An officer cannot be held liable under § 1983 unless every reasonable officer would understand that what he is doing violates the law; it does not matter that people are morally outraged, or the fact that the collective conscience is shocked by the alleged conduct, because it does not mean necessarily that the officials should have realized that the conduct violated a constitutional right. 42 U.S.C.A. § 1983.

[4] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Even evidence that the officer acted in bad faith is considered irrelevant when considering whether a right is "clearly established" for purposes of

qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

[5] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

When considering whether a right is "clearly established" for purposes of qualified immunity in a § 1983 action, a district court opinion does not clearly establish the law in a jurisdiction, nor does a circuit court opinion, if the judges designate it as "unpublished"; only published circuit court decisions count. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[6] **Civil Rights** Government Agencies and Officers

Civil Rights Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

There are generally two steps in a qualified immunity analysis; first, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right, and second the court must decide whether the right at issue was clearly established at time of the defendant's alleged misconduct. 42 U.S.C.A. § 1983.

[7] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In Fourth Amendment cases, determining whether an official violated clearly established law, for qualified immunity purposes, necessarily involves a reasonableness inquiry. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[8] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In general, the doctrine of qualified immunity protects government officials from § 1983 liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question beyond debate. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[9] **Automobiles** Inquiry; license, registration, or warrant checks

In a valid traffic stop, an officer may request a driver's license and vehicle registration and run a computer check. U.S. Const. Amend. 4.

[10] **Automobiles** Inquiry; license, registration, or warrant checks

In a valid traffic stop, officers are permitted to require passengers to identify themselves. U.S. Const. Amend. 4.

[11] **Automobiles** Inquiry; license, registration, or warrant checks

While waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop. U.S. Const. Amend. 4.

[12] **Automobiles** Conduct of Arrest, Stop, or Inquiry

Officers are not allowed to unreasonably intrude into a person's vehicle during a traffic stop. U.S. Const. Amend. 4.

[13] **Searches and Seizures** Expectation of privacy

While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. U.S. Const. Amend. 4.

[14] **Searches and Seizures** Vehicles

An officer's intrusion into the interior of a car constitutes a search. U.S. Const. Amend. 4.

[15] **Searches and Seizures** Circumstances Affecting Validity of Warrantless Search, in General

Searches and Seizures Scope, Conduct, and Duration of Warrantless Search

The intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as reasonable. U.S. Const. Amend. 4.

[16] **Searches and Seizures** Motor Vehicles

The key inquiry in automobile search cases is whether the officer acted reasonably when he intruded; the question is highly dependent on the facts of each case. U.S. Const. Amend. 4.

[17] **Automobiles** Object, Product, Scope, and Conduct of Search, Seizure, or Inspection

Officer's insertion of arm into motorist's car during traffic stop was an unreasonable search in violation of the Fourth Amendment, where physical features of the car did not make it difficult for officer to question motorist, officer admitted that his objective was to get motorist's consent to search the car, and officer could see motorist and lacked any reason to put his arm in the car. U.S. Const. Amend. 4.

[18] **Searches and Seizures** Voluntary nature in general

Consent to a search is valid only if it is voluntary. U.S. Const. Amend. 4.

[19] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

If an individual gives consent to a search after being subject to an initial unconstitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation. U.S. Const. Amend. 4.

[20] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

Factors that inform whether the consent to search, after an initial unconstitutional search, was an independent act of free will include the temporal proximity of the illegal conduct and the consent, whether there were any intervening circumstances, and the purpose and flagrancy of the misconduct. U.S. Const. Amend. 4.

[21] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

Motorist's alleged consent to search of car was contemporaneous with officer's unconstitutional intrusion into motorist's car, and thus was not an independent act of free will, but rather a product of an unconstitutional search and thus not voluntary; motorist relented and agreed to the search only after officer escalated his efforts and placed his arm inside the car, and officer's intrusion into car was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. U.S. Const. Amend. 4.

[22] **Searches and Seizures** Questions of law or fact

The voluntariness of consent to a search is a question of fact to be determined from the totality of all the circumstances. U.S. Const. Amend. 4.

[23] **Searches and Seizures** Voluntary nature in general

To determine whether a person's consent to a search was voluntary, the Court considers the voluntariness of the suspect's custodial status, the presence of coercive police procedures, the nature and extent of the suspect's cooperation, the suspect's awareness of his right to refuse consent, the suspect's education and intelligence, and the suspect's belief that no incriminating evidence will be found; in this analysis, no single factor is determinative, and courts may consider other factors relevant to the inquiry. U.S. Const. Amend. 4.

[24] **Federal Civil Procedure** Civil rights cases in general

Even absent initial constitutional violation, genuine issue of material fact as to whether motorist's consent to search of vehicle was voluntary precluded summary judgment for officer on motorist's § 1983 claim alleging violation of his Fourth Amendment rights. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[25] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

A "clearly established right," for purposes of qualified immunity from a § 1983 claim, is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. 42 U.S.C.A. § 1983.

[26] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For purposes of qualified immunity from a § 1983 claim, clearly established law must be particularized to the facts of a case; thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate. 42 U.S.C.A. § 1983.

[27] **Civil Rights** Defenses; immunity and good faith

When seeking to show a clearly established right defeating qualified immunity from a § 1983 claim, it is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality. 42 U.S.C.A. § 1983.

[28] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

When seeking to show a clearly established right defeating qualified immunity from a § 1983 claim, the plaintiff must point to controlling authority, or a robust consensus of persuasive authority, that defines the contours of the right in question with a high degree of particularity. 42 U.S.C.A. § 1983.

[29] **Civil Rights** Sheriffs, police, and other peace officers

It was not clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment, and thus officer had qualified immunity from motorist's § 1983 claim that officer violated his Fourth Amendment rights by falsely stopping

him, searching his car, and detaining him. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[30] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For purposes of qualified immunity in a § 1983 action, an officer's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff. 42 U.S.C.A. § 1983.

[31] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Federal district court's opinions cannot serve as "clearly established" precedent defeating qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[32] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Clearly established law must be particularized to the facts of the case in order to defeat qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

[33] **Federal Civil Procedure** Matters considered

Police officer forfeited challenge to motorist's separate § 1983 claim for damage to his car which he alleged came during officer's search, even if officer had qualified immunity from § 1983 claim for prolonged search, where, while officer sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to the damage to property claim. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[34] **Courts** Previous Decisions as Controlling or as Precedents

Stare decisis is not supposed to be the art of methodically ignoring what everyone knows to be true.

[35] **Jury** Rights of Action and Procedure in Civil Cases

Judges err when they impermissibly substitute a jury determination with their own. U.S. Const. Amend. 7.

[36] **Courts** Nature of judicial determination

Judges err when they invent legal requirements that are untethered to the complexity of the real world.

[37] **Jury** Bias and Prejudice

Like any actor in the legal system, juries may succumb to unintentional, institutional, or unconscious biases.

Attorneys and Law Firms

Victor I. Fleitas, Victor I. Fleitas, P.A., Tupelo, MS, for Plaintiff.

Gregory Todd Butler, Phelps Dunbar, LLP, Jackson, MS, for Defendant.

ORDER GRANTING QUALIFIED IMMUNITY

Carlton W. Reeves, United States District Judge

***1** Clarence Jamison wasn't jaywalking. [1]

He wasn't outside playing with a toy gun. [2]

He didn't look like a "suspicious person." [3]

He wasn't suspected of "selling loose, untaxed cigarettes." [4]

He wasn't suspected of passing a counterfeit $20 bill. [5]

He didn't look like anyone suspected of a crime. [6]

He wasn't mentally ill and in need of help. [7]

He wasn't assisting an autistic patient who had wandered away from a group home. [8]

He wasn't walking home from an after-school job. [9]

He wasn't walking back from a restaurant. [10]

He wasn't hanging out on a college campus. [11]

He wasn't standing outside of his apartment. [12]

He wasn't inside his apartment eating ice cream. [13]

***2** He wasn't sleeping in his bed. [14]

He wasn't sleeping in his car. [15]

He didn't make an "improper lane change." [16]

He didn't have a broken tail light. [17]

He wasn't driving over the speed limit. [18]

He wasn't driving under the speed limit. [19]

No, Clarence Jamison was a Black man driving a Mercedes convertible.

As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.

Nothing was found. Jamison isn't a drug courier. He's a welder.

Unsatisfied, the officer then brought out a canine to sniff the car. The dog found nothing. So nearly two hours after it started, the officer left Jamison by the side of the road to put his car back together.

Thankfully, Jamison left the stop with his life. Too many others have not. [20]

The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called "qualified immunity." In real life it operates like absolute immunity.

In a recent qualified immunity case, the Fourth Circuit wrote:

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. [21]

This Court agrees. Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. [22] Countless more have suffered from other forms of abuse and misconduct by police. [23] Qualified

immunity has served as a shield for these officers, protecting them from accountability.

***3** This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted.

But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.

As the Fourth Circuit concluded, "This has to stop." [24]

I. Factual and Procedural Background [25]

On July 29, 2013, Clarence Jamison was on his way home to Neeses, South Carolina after vacationing in Phoenix, Arizona. Jamison was driving on Interstate 20 in a 2001 Mercedes-Benz CLK-Class convertible. He had purchased the vehicle 13 days before from a car dealer in Pennsylvania.

As Jamison drove through Pelahatchie, Mississippi, he passed Officer Nick McClendon, a white officer with the Richland Police Department, who was parked in a patrol car on the right shoulder. [26] Officer McClendon says he decided to stop Jamison because the temporary tag on his car was "folded over to where [he] couldn't see it." Officer McClendon pulled behind Jamison and flashed his blue lights. Jamison immediately pulled over to the right shoulder. [27]

As Officer McClendon approached the passenger side of Jamison's car, Jamison rolled down the passenger side window. Officer McClendon began to speak with Jamison when he reached the window. According to McClendon, he noticed that Jamison had recently purchased his car in Pennsylvania, and Jamison told him that he was traveling from "Vegas or Arizona."

Officer McClendon asked Jamison for "his license, insurance, [and] the paperwork on the vehicle because it didn't have a tag." Jamison provided his bill of sale, insurance, and South Carolina driver's license. Officer McClendon returned to his car to conduct a background check using the El Paso Intelligence Center ("EPIC"). The EPIC check came back clear immediately. Officer McLendon then contacted the National Criminal Information Center ("NCIC") and asked the dispatcher to run a criminal history on Jamison as well as the VIN on his car.

According to Officer McClendon, he walked back to the passenger side of Jamison's car before hearing from NCIC. [28] He later admitted in his deposition that his goal when he returned to Jamison's car was to obtain consent to search the car. Once he reached the passenger side window, Officer McClendon returned Jamison's documents and struck up a conversation without mentioning that the EPIC background check came back clear. Thinking he was free to go after receiving his documents, Jamison says he prepared to leave.

This is where the two men's recounting of the facts diverges. According to Officer McClendon, he asked Jamison if he could search his car. Jamison asked him, "For what?" Officer McClendon says he responded, "to search for illegal narcotics, weapons, large amounts of money, anything illegal," and that Jamison simply gave his consent for the search.

***4** According to Jamison, however, as he prepared to leave, Officer McClendon put his hand over the passenger door threshold of Jamison's car and told him to, "Hold on a minute." Officer McClendon then asked Jamison – for the first time – if he could search Jamison's car. "For what?" Jamison replied. Officer McClendon changed the conversation, asking him what he did for a living. They discussed Jamison's work as a welder.

Officer McClendon asked Jamison – for the second time – if he could search the car. Jamison again asked, "For what?" Officer McClendon said he had received a phone call reporting that there were 10 kilos of cocaine in Jamison's car. [29] That was a lie. Jamison did not consent to the search.

Officer McClendon then made a third request to search the car. Jamison responded, "there is nothing in my car." They started talking about officers "planting stuff" in people's cars.

At this point, Officer McClendon "scrunched down," placed his hand into the car, and patted the inside of the passenger

door. As he did this, Officer McClendon made his fourth request saying, "Come on, man. Let me search your car." Officer McClendon moved his arm further into the car at this point, while patting it with his hand.

As if four asks were not enough, Officer McClendon then made his fifth and final request. He lied again, "I need to search your car ... because I got the phone call [about] 10 kilos of cocaine."

Jamison would later explain that he was "tired of talking to [Officer McClendon]." Jamison kept telling the officer that there was nothing in the car, and the officer refused to listen.

Officer McClendon kept at it. He told Jamison that even if he found a "roach," [30] he would ignore it and let Jamison go. The conversation became "heated." Jamison became frustrated and gave up. He told Officer McClendon, "As long as I can see what you're doing you can search the vehicle."

Officer McClendon remembers patting Jamison down after he exited the car. Both agree that Officer McClendon directed Jamison to stand in front of the patrol car, which allowed Jamison to see the search. As Jamison walked from his vehicle to the patrol car parked behind, he remembers asking Officer McClendon why he was stopped. Officer McClendon said it was because his license plate – a cardboard temporary tag from the car dealership – was "folded up." In his deposition, the Officer would later explain, "When you got these two bolts in and you're driving 65 miles an hour down the highway, it's going to flap up where you can't see it." Jamison testified, however, that it was not curled up and "had four screws in it." [31]

Officer McClendon later testified that he searched Jamison's car "from the engine compartment to the trunk to the under-carriage to underneath the engine to the back seats to anywhere to account for all the voids inside the vehicle."

As he started the search, NCIC dispatch called and flagged a discrepancy about whether Jamison's license was suspended. Officer McClendon told the dispatcher to search Jamison's driving history, which should have told them the status of Jamison's license. NCIC eventually discovered that Jamison's license was clear, although it is not apparent from the record when Officer McClendon heard back from the dispatcher.

***5** According to Jamison, Officer McClendon continued speaking to Jamison during the search. He brought up "the 10 kilos of cocaine," asserted that the car was stolen, asked Jamison how many vehicles he owned, and claimed that Jamison did not have insurance on the car. Jamison kept saying that there was nothing in his car. At one point, Jamison heard a "pow" that "sounded like a rock" coming from inside the car, so he walked up to the car to see what had caused the noise. Officer McClendon told him to "Get back in front of my car." During the search, Jamison also requested to go to the bathroom several times, which Officer McClendon allowed.

Officer McClendon admitted in his deposition that he did not find "anything suspicious whatsoever." However, he asked Jamison if he could "deploy [his] canine." Jamison says he initially refused. Officer McClendon asked again, though, and Jamison relented, saying "Yes, go ahead." Officer McClendon "deployed [his] dog around the vehicle." The dog gave no indication, "so it confirmed that there was nothing inside the vehicle."

Before leaving, Officer McClendon asked Jamison to check his car to see if there was any damage. He gave Jamison a flashlight and told Jamison that he would pay for anything that was damaged. Jamison – who says he was tired – looked on the driver's side of the car and on the backseat, told Officer McClendon that he did not see anything, and returned the flashlight within a minute.

In total, the stop lasted one hour and 50 minutes. [32]

Jamison subsequently filed this lawsuit against Officer McClendon and the City of Pelahatchie, Mississippi. He raised three claims.

In "Claim 1," Jamison alleged that the defendants violated his Fourth Amendment rights by "falsely stopping him, searching his car, and detaining him." Jamison's second claim, brought under the Fourteenth Amendment, stated that the defendants should be held liable for using "race [as] a motivating factor in the decision to stop him, search his car, and detain him." Jamison's third claim alleged a violation of the Fourth Amendment by Officer McClendon for "recklessly and deliberately causing significant damage to Mr. Jamison's car by conducting an unlawful search of the car in an

objectively unreasonable manner amounting to an unlawful seizure of his property."

Jamison sought actual, compensatory, and punitive damages against Officer McClendon. He testified that he received an estimate for almost $4,000 of physical damage to his car. He described the damage as requiring the replacement of the "whole top" of the car and re-stitching or replacement of his car seats. In his deposition, Jamison said he provided pictures and the estimates to Officer McClendon's counsel.

Jamison also sought damages for the psychological harm he sustained. During his deposition, he described the emotional toll of the traffic stop and search in this way:

> When I first got home, I couldn't sleep. So I was up for like – I didn't even sleep when I got home. I think I got some rest the next day because I was still mad just thinking about it and then when all this killing and stuff come on TV, that's like a flashback. I said, man, this could have went this way. It had me thinking all kind of stuff because it was not even called for....
>
> ***6** Then I seen a story about the guy in South Carolina, in Charleston, a busted taillight. They stopped him for that and shot him in the back, [33] and all that just went through my mind ....
>
> I don't even watch the news no more. I stopped watching the news because every time you turn it on something's bad.

On December 1, 2017, the defendants filed a motion for summary judgment. The motion said it would explain "why all claims against all defendants should be dismissed as a matter of law." The motion, however, failed to provide an argument as to Jamison's third claim.

Prior to the completion of briefing on the motion, the parties agreed to dismiss the City of Pelahatchie from the case.

On September 26, 2018, the Court entered an order granting in part and deferring in part the motion for summary judgment. [34] The Court found that Officer McClendon had shown he was entitled to summary judgment as to Jamison's Fourteenth Amendment claim for a racially-motivated stop. [35] The Court also found that Officer McClendon was protected by qualified immunity as to Jamison's claims that Officer McClendon did not have reasonable suspicion to stop him. However, after a hearing, the Court requested supplemental briefing to "help ... determine if McLendon is entitled to qualified immunity on Jamison's lack of consent and prolonged stop claims." The present motion followed.

II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [36] A dispute is genuine "if the evidence supporting" the non-movant, "together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party." [37] A fact is material if it is one that might affect the outcome of the suit under the governing law. [38]

***7** A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute. [39] That evidence may include "depositions, ... affidavits or declarations, ... or other materials." [40]

When evaluating a motion for summary judgment, courts are required to view all evidence in the light most favorable to the non-moving party and must refrain from making credibility determinations. [41]

III. Historical Context

In accordance with Supreme Court precedent, we begin with a look at the "origins" of the relevant law. [42]

A. Section 1983: A New Hope

Jamison brings his claims under 42 U.S.C. § 1983, a statute that has its origins in the Civil War and "Reconstruction," the brief era that followed the bloodshed. If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too. "Reconstruction

was the essential sequel to the Civil War, completing its mission."[43] During Reconstruction, the abolitionists and soldiers who fought for emancipation sought no less than "the reinvention of the republic and the liberation of blacks to citizenship and Constitutional equality."[44]

The Reconstruction-era Congress passed "legislation to protect the freedoms granted to those who were recently enslaved."[45] One such piece of legislation created the Freedman's Bureau, a War Department agency that educated the formerly enslaved, provided them with legal protection, and "relocate[ed] them on more than 850,000 acres of land the federal government came to control during the war."[46] Another successful legislative effort was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the "Reconstruction Amendments."[47]

The Thirteenth Amendment "represented the Union's deep seated commitment to end the 'badges and incidents of servitude,' [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain."[48] The Fourteenth Amendment reversed *Dred Scott v. Sanford*.[49] While the amendment was "unpassable as a specific protection for black rights,"[50] it made all persons born in the United States citizens of this country and guaranteed due process and equal protection of the law. "The main object of the amendment was to enforce absolute equality of the races."[51] President Grant called the Fifteenth Amendment "the most important event that has occurred[ ] since the nation came into life ... the realization of the Declaration of Independence."[52] "Each Amendment authorized Congress to pass appropriate legislation to enforce it."[53] Taken together, "Reconstruction would mark a revolutionary change in the federal system, with the national government passing laws forcing the states to fulfill their constitutional responsibilities."[54]

***8** For the first time in its history, the United States saw a Black man selected to serve in the United States Senate (two from Mississippi, in fact – Hiram Revels and Blanche K. Bruce),[55] the establishment of public school systems across the South,[56] and increased efforts to pass local anti-discrimination laws.[57] It was a glimpse of a different America.

These "emancipationist" efforts existed alongside white supremacist backlash, terror, and violence.[58] "In Mississippi, it became a criminal offense for blacks to hunt or fish,"[59] and a U.S. Army General reported that "white militias, with telltale names such as the Jeff Davis Guards, were springing up across" the state.[60] In Shreveport, Louisiana, more than 2,000 black people were killed in 1865 alone.[61] "In 1866, there were riots in Memphis and New Orleans; more than 30 African-Americans were murdered in each melee."[62]

"The Ku Klux Klan, formed in 1866 by six white men in a Pulaski, Tennessee law office, 'engaged in extreme violence against freed slaves and Republicans,' assaulting and murdering its victims and destroying their property."[63] The Klan "spread rapidly across the South" in 1868,[64] orchestrating a "huge wave of murder and arson" to discourage Blacks from voting.[65] "[B]lack schools and churches were burned with impunity in North Carolina, Mississippi, and Alabama."[66]

The terrorism in Mississippi was unparalleled. During the first three months of 1870, 63 Black Mississippians "were murdered ... and nobody served a day for these crimes."[67] In 1872, the U.S. Attorney for Mississippi wrote that Klan violence was ubiquitous and that "only the presence of the army kept the Klan from overrunning north Mississippi completely."[68]

***9** Many of the perpetrators of racial terror were members of law enforcement.[69] It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced.[70] When the Klan murdered five witnesses in a pending case, one of Mississippi's District Attorneys complained, "I cannot get witnesses as all feel it is sure death to testify."[71] White supremacists and the Klan "threatened to unravel everything ... Union soldiers had accomplished at great cost in blood and treasure."[72]

Professor Leon Litwack described the state of affairs in stark words:

> How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known. [73] Nor could any accurate body count or statistical breakdown reveal the barbaric savagery and depravity that so frequently characterized the assaults made on freedmen in the name of restraining their savagery and depravity – the severed ears and entrails, the mutilated sex organs, the burnings at the stake, the forced drownings, the open display of skulls and severed limbs as trophies. [74]

"Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.' " [75] It passed The Ku Klux Act of 1871, which "targeted the racial violence in the South undertaken by the Klan, and the failure of the states to cope with that violence." [76]

The Act's mandate was expansive. Section 2 of the Act provided for civil and criminal sanctions against those who conspired to deprive people of the "equal protection of the laws." [77] "Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with Klan or other violence." [78] "The Act was strong medicine." [79]

***10** Section 1 of the Ku Klux Act, now codified as 42 U.S.C. § 1983, uniquely targeted state officials who "deprived persons of their constitutional rights." [80] While the Act as a whole "had the Klan 'particularly in mind,' " Section 1 recognized the local officials who created "the lawless conditions" that plagued "the South in 1871." [81] Thus, the doors to the courthouse were opened to "any person who ha[d] been deprived of her federally protected rights by a defendant acting under color of state law." [82] The Act reflected Congress's recognition that – to borrow the words of today's abolitionists – "the whole damn system [was] guilty as hell." [83]

Some parts of the Act were fairly successful. Led by federal prosecutors at the Department of Justice, "federal grand juries, many interracial, brought 3,384 indictments against the KKK, resulting in 1,143 convictions." [84] One of Mississippi's U.S. Senators reported that the Klan largely "suspended their operations" in most of the State. [85] Frederick Douglass proclaimed that "peace has come to many places," and the "slaughter of our people have so far ceased." [86]

Douglass had spoken too soon. "By 1873, many white Southerners were calling for 'Redemption' – the return of white supremacy and the removal of rights for blacks – instead of Reconstruction." [87] The federal system largely abandoned the emancipationist efforts of the Reconstruction Era. [88] And the violence returned. "In 1874, 29 African-Americans were massacred in Vicksburg, according to Congressional investigators. The next year, amidst rumors of an African-American plot to storm the town, the Mayor of Clinton, Mississippi gathered a white paramilitary unit which hunted and killed an estimated 30 to 50 African-Americans." [89] And in 1876, U.S. Marshal James Pierce said, "Almost the entire white population of Mississippi is one vast mob." [90]

Federal courts joined the retreat and decided to place their hand on the scale for white supremacy. [91] As Katherine A. Macfarlane writes:

> In several decisions, beginning with 1873's *Slaughter-House Cases*, the Supreme Court limited the reach of the Fourteenth Amendment and the statutes passed pursuant to the power it granted Congress. By 1882, the Court had voided the Ku Klux Act's criminal conspiracy section, a provision "aimed at lynchings and other mob actions of an individual or private nature."
>
> As a result of the Court's narrowed construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it, the Ku Klux Act's "scope and effectiveness" shrunk. The Court never directly addressed Section 1 of the Act, but those sections of the Act [were] left "largely forgotten." [92]

For almost a century, Redemption prevailed. "Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede." [93] Jim Crow ruled, and Jim Crow meant that "[a]ny breach of the system could mean one's life." [94] While Reconstruction "saw the basic rights of blacks to citizenship established in law," our country failed "to ensure their political and economic rights." [95] Our courts' "involvement in that downfall and its consequences could not have been greater." [96]

***11** Though civil rights protection was largely abandoned at the federal level, activists continued to fight to realize the broken promise of Reconstruction. The Afro-American League, the Niagara Movement, the National Negro Conference (later renamed the NAACP) and other civil rights groups formed to challenge lynching and the many oppressive laws and practices of discrimination. [97] One group's efforts – the Citizens' Committee – led to a lawsuit designed to create an Equal Protection Clause challenge to Louisiana's segregationist laws on railroad cars. Unfortunately, the ensuing case, *Plessy v. Ferguson*, resulted in the Supreme Court's decision to affirm the racist system of "separate but equal" accommodations. [98] Despite this setback, civil rights activism continued, intensifying after the Supreme Court's *Brown v. Board* decision and resulting in many of the civil rights laws we have today. [99]

It was against this backdrop that the Supreme Court attempted to resuscitate Section 1983. [100] In 1961, the Court decided *Monroe v. Pape*, a case where "13 Chicago police officers broke into [a Black family's] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers." [101] The Justices held that Section 1983 provides a remedy for people deprived of their constitutional rights by state officials. [102] Accordingly, the Court found that the Monroe family could pursue their lawsuit against the officers. [103]

Section 1983's purpose was finally realized, namely " 'to interpose the federal courts between the States and the people, as guardians of the people's federal rights.' " [104] The statute has since become a powerful "vehicle used by private parties to vindicate their constitutional rights against state and local government officials." [105]

Section 1983 provides, in relevant part:

> 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 .... [106]

Invoking this statute, Jamison contends that Officer McClendon violated his Fourth Amendment right to be free from unreasonable searches and seizures.

B. Qualified Immunity: The Empire Strikes Back

Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*. [107]

The doctrine of qualified immunity is perhaps the most important limitation.

Although Section 1983 made no "mention of defenses or immunities, '[the Supreme Court] read it in harmony with general principles of tort immunities and defenses rather

than in derogation of them.' " [108] It reasoned that "[c]ertain immunities were so well established in 1871 [109] ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them." [110]

***12** On that presumption the doctrine of qualified immunity was born, with roots right here in Mississippi. In *Pierson v. Ray*, "15 white and Negro Episcopal clergymen ... attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961." [111] The clergymen were arrested and charged with violation of a Mississippi statute – later held unconstitutional – that made it a misdemeanor "to congregate[ ] with others in a public place under circumstances such that a breach of the peace" may occur and to "refuse[ ] to move on when ordered to do so by a police officer." [112] The clergymen sued under Section 1983. In their defense, the officers argued that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." [113]

The Supreme Court agreed. It held that officers should be shielded from liability when acting in good faith – at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment. [114]

Subsequent decisions "expanded the policy goals animating qualified immunity." [115] The Supreme Court eventually characterized the doctrine as an "attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority." [116]

A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; [117] prison guards who forced a prisoner to sleep in cells "covered in feces" for days; [118] police officers who stole over $225,000 worth of property; [119] a deputy who body-slammed a woman after she simply "ignored [the deputy's] command and walked away"; [120] an officer who seriously burned a woman after detonating a "flashbang" device in the bedroom where she was sleeping; [121] an officer who deployed a dog against a suspect who "claim[ed] that he surrendered by raising his hands in the air"; [122] and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother. [123]

If Section 1983 was created to make the courts " 'guardians of the people's federal rights,' " what kind of guardians have the courts become? [124] One only has to look at the evolution of the doctrine to answer that question.

***13** **[1]** Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not "clearly established."

[2] **[3]** **[4]** **[5]** This "clearly established" requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982. [125] In 1986, the Court then "evolved" the qualified immunity defense to spread its blessings "to all but the plainly incompetent or those who knowingly violate the law." [126] It further ratcheted up the standard in 2011, when it added the words "*beyond debate.*" [127] In other words, "for the law to be clearly established, it must have been 'beyond debate' that [the officer] broke the law." [128] An officer cannot be held liable unless *every* reasonable officer would understand that what he is doing violates the law. [129] It does not matter, as the Fifth Circuit has explained, "that we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct ... [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a constitutional right." [130] Even evidence that the officer acted in bad faith is now considered irrelevant. [131]

***14** The Supreme Court has also given qualified immunity sweeping procedural advantages. "Because the defense of qualified immunity is, in part, a question of law, it naturally creates a 'super-summary judgment' right on behalf of government officials. Even when an official is not entitled

to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – summary judgment can still be granted when the law is not reasonably clear." [132]

And there is more. The Supreme Court says defendants should be dismissed at the "earliest possible stage" in the proceedings to not be burdened with the matter. [133] The earliest possible stage may include a stage in the case before any discovery has been taken and necessarily before a plaintiff has obtained all the relevant facts and all (or any) documents. [134] If a court denies a defendant's motion seeking dismissal or summary judgment based on qualified immunity, that decision is also immediately appealable. [135] Those appeals can lead all the way to the United States Supreme Court even before any trial judge or jury hears the merits of the case. Qualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial. [136]

Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied "in novel factual circumstances," [137] the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement. [138]

Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established "beyond debate" at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable.

Consider *McCoy v. Alamu*, a 2020 case in which a correctional officer violated a prisoner's Constitutional rights when he sprayed a chemical agent in the prisoner's face, without provocation. [139]

The Fifth Circuit then asked if the illegality of the use of force was clearly established beyond debate. The *prison* didn't think the use of force was debatable: it found the spraying unnecessary and against its rules. It put the officer on three months' probation. [140] Yet the appellate court disregarded the warden's judgment and held for the officer. The case involved only a "single use of pepper spray," after all, and the officer hadn't used "the full can." [141] Based on these factual distinctions, the court concluded that "the spraying crossed that line. But it was not *beyond debate* that it did, so the law wasn't clearly established." [142]

***15** These kinds of decisions are increasingly common. Consider another Fifth Circuit case, this time from 2019, in which Texas prisoner Trent Taylor claimed that the conditions of his prison cells violated the Constitutional minimum:

> Taylor stayed in the first cell starting September 6, 2013. He alleged that almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with "massive amounts" of feces that emitted a "strong fecal odor." Taylor had to stay in the cell naked. He said that he couldn't eat in the cell, because he feared contamination. And he couldn't drink water, because feces were "packed inside the water faucet." Taylor stated that the prison officials were aware that the cell was covered in feces, but instead of cleaning it, [Officers] Cortez, Davison, and Hunter laughed at Taylor and remarked that he was "going to have a long weekend." [Officer] Swaney criticized Taylor for complaining, stating "dude, this is Montford, there is shit in all these cells from years of psych patients." On September 10, Taylor left the cell.
>
> A day later, September 11, Taylor was moved to a "seclusion cell," but its conditions were no better. It didn't have a toilet, water fountain, or bunk. There was a drain in the floor where Taylor was ordered to urinate. The cell was extremely cold because the air conditioning was always on. And the cell was anything but clean.
>
> Taylor alleged that the floor drain was clogged, leaving raw sewage on the floor. The drain smelled strongly of ammonia, which made it hard for Taylor to breathe. Yet, he alleged, the defendants repeatedly told him that if he needed to urinate, he had to do so in the clogged drain instead of being escorted to the restroom. Taylor refused. He worried that, because the drain was clogged, his urine would spill onto the already-soiled floor, where he had to sleep because he lacked a bed. So, he held his urine for twenty-four hours before involuntarily urinating on himself. He stayed in the seclusion cell until September 13. Prison officials then tried to return him to his first, feces-

covered cell, but he objected and was permitted to stay in a different cell. [143]

Taylor spent a total of six days in feces-covered cells. [144] To make matters worse, the trial court found that Taylor "was not allowed clothing and forced to endure the cold temperatures with nothing but a suicide blanket." [145]

The correctional officers didn't submit much to contradict Taylor's evidence of filth. [146] Yet they were granted qualified immunity because it "wasn't clearly established" that "only six days" of living in a cesspool of human waste was unconstitutional. [147] The Fifth Circuit reasoned, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short violated the Constitution.... It was therefore not 'beyond debate' that the defendants broke the law." [148]

***16** Never mind the 50 years of caselaw holding that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." [149] Never mind the numerous [150] Fifth [151] Circuit [152] decisions [153] concluding that prisoners who live in "filthy, sometimes feces-smeared, cells" can bring a Constitutional claim. [154] Never mind that in other states, it is clearly established that only *three* days of living in feces-covered cells is unconstitutional. [155] And never mind that the Supreme Court had acknowledged warmth as an "identifiable human need" and that "a low cell temperature at night combined with a failure to issue [a] blanket[ ]" may deprive an inmate of such. [156] None of that mattered after 2011, the year the Supreme Court ratchetted up the standard to require that the unlawfulness be "beyond debate." [157]

Fifth Circuit Judge Don Willett has succinctly explained the problem with the clearly established analysis:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. [158]

To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting. [159] If you've been a Circuit Judge since 1979—sitting on the bench longer than any current Justice—you might expect a more forgiving reversal. [160] Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days.

***17** It is also unnecessary to blame the doctrine of qualified immunity on ideology. "Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court." [161] Judges disagree in these cases no matter which President appointed them. [162] Qualified immunity is one area proving the truth of Chief Justice Roberts' statement, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges." [163]

There are numerous critiques of qualified immunity by lawyers, [164] judges, [165] and academics. [166] Yet qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court.

[6] **[7]** **[8]** Here is the exact legal standard applicable in this circuit:

> There are generally two steps in a qualified immunity analysis. "First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of

> a constitutional right. Second ... the court must decide whether the right at issue was clearly established at time of the defendant's alleged misconduct." However, we are not required to address these steps in sequential order.
>
> In Fourth Amendment cases, determining whether an official violated clearly established law necessarily involves a reasonableness inquiry. In *Pearson*, the Supreme Court explained that [an] officer is "entitled to qualified immunity where clearly established law does not show that the conduct violated the Fourth Amendment," a determination which "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." However, "a reasonably competent public official should know the law governing his conduct." In general, "the doctrine of qualified immunity protects government officials from ... liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate.*" [167]

***18** The Court will now consider Jamison's claims under these two steps.

IV. Qualified Immunity Analysis

A. Violation of a Statutory or Constitutional Right

The Court has already determined that Officer McClendon is entitled to qualified immunity for his decision to pull over Jamison. [168] The Court now turns to the stop itself.

1. Physical Intrusion

[9] **[10]** **[11]** "In a valid traffic stop, an officer may request a driver's license and vehicle registration and run a computer check." [169] Officers are also permitted "to require passengers to identify themselves," and "[w]hile waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop." [170]

[12] **[13]** **[14]** Officers are not allowed to unreasonably intrude into a person's vehicle. "While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." [171] It follows that an "officer's intrusion into the interior of [a] car constitute[s] a search." [172]

[15] **[16]** "[T]he intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as 'reasonable.' " [173] Accordingly, "the key inquiry" in these cases is whether the officer "acted reasonably" when he intruded. [174] The question is highly dependent on the facts of each case. [175]

[17] Here, Jamison argues that Officer McClendon "physically prevent[ed] Mr. Jamison from resuming his travel by placing his arm inside Mr. Jamison's automobile." [176] Viewing the evidence in the light most favorable to the non-movant, the Court must conclude for present purposes that the stop happened in this way. Officer McClendon's insertion of his arm into Jamison's vehicle is an "intru[sion] inside a space that, under most circumstances, is protected by a legitimate expectation of privacy." [177] The Court must therefore consider whether Officer McClendon acted reasonably when he intruded.

In *United States v. Pierre*, Border Patrol Agent Lonny Hillin stopped a GMC Jimmy at a fixed checkpoint in Texas. [178] The Jimmy was a "two-door vehicle ... equipped with tinted fixed rear windows." [179] The defendant, Pierre, "was lying down in the back seat." [180] During the stop, Agent Hillin "ducked his head in the window to get a clear view of the back seat and to talk to Pierre about his citizenship." [181] The Fifth Circuit considered the following to determine if the agent's intrusion was reasonable: (1) whether the officer intruded upon an area for which there is a reasonable expectation of privacy; (2) whether the officer's "actions were no more intrusive than necessary to accomplish his objective"; and (3) whether the intrusion was reasonable to ensure the safety of the officer. [182]

***19** As to the first consideration, the Fifth Circuit found that "passengers of vehicles at fixed checkpoints near the border of the United States do not have a reasonable expectation of privacy in not being stopped and questioned about their citizenship." [183] The court reasoned that "occupants of a vehicle stopped at a checkpoint have no expectancy that they will not be required to look an agent in the eye and answer questions about their citizenship." [184] In *Pierre*, the "physical features of the Jimmy made it difficult for Agent Hillin to speak with Pierre and verify his citizenship." [185] These considerations weighed toward finding that the agent's intrusion – in this case, sticking his head into the car – was reasonable. [186]

The Fifth Circuit also found that the sole purpose of Agent Hillin's intrusion was to ask about the passenger's citizenship. Again, the Court noted that vehicle's physical features did not allow Agent Hillin "to see and communicate with Pierre." [187] The court observed that "Agent Hillin's action in sticking his head in the driver's window was certainly less intrusive than requiring Pierre to get out of the vehicle." [188]

Finally, "in evaluating the reasonableness of the search," the Fifth Circuit "considered the safety of the officer." [189] It held that "[a]n agent at a checkpoint, for his own safety, would have good reason to position himself so he could see the person with whom he is speaking." [190]

Here, Jamison had no reasonable expectation of privacy as to being questioned during a lawful stop. [191] However, there is no evidence that the physical features of Jamison's car or any other circumstance made it difficult for Officer McClendon to question Jamison. Accordingly, this first consideration weighs against finding that Officer McClendon acted reasonably when he put his arm into Jamison's car.

Turning to the second consideration, Officer McClendon admitted that his objective was to get Jamison's consent to search the car. He had no reason to physically put his arm into the car to accomplish that objective. This situation is inapposite to *Pierre*, where the agent had to intrude in to the car to "see and communicate with Pierre." [192]

As to the third consideration, the same principle discussed in *Pierre* obviously applies here: officers have good reason to see the person they have pulled over. Officer McClendon, however, could already see Jamison. There was no reason to put his arm into Jamison's car to request that he consent to a search, and nothing in this record or the parties' briefs attempts to support that view.

In *Pierre*, the Fifth Circuit emphasized that officers do not have "carte blanche authority" to intrude into vehicles. [193] All of the considerations discussed in *Pierre* point toward a finding that Officer McClendon acted unreasonably.

For these reasons, Officer McClendon's physical intrusion into Jamison's car was an unreasonable search in violation of the Fourth Amendment.

2. Subsequent Vehicle Search

Officer McClendon then argues that Jamison consented to the search of his car. Jamison concedes that he "consented" but argues that his consent was involuntary.

[18] **[19]** **[20]** "Consent is valid only if it is voluntary." [194] "Furthermore, if an individual gives consent after being subject to an initial unconstitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation." [195] Factors that inform whether the consent was an independent act of free will include the "temporal proximity of the illegal conduct and the consent," whether there were any intervening circumstances, and "the purpose and flagrancy" of the misconduct. [196]

***20** **[21]** The Court has found a constitutional violation in Officer McClendon's intrusion into Jamison's vehicle. Jamison's "consent to search ... was contemporaneous with the constitutional violation, and there was no intervening circumstance." [197] Viewing the evidence in the light most favorable to Jamison, as the legal standard requires, he relented and agreed to the search only after Officer McClendon escalated his efforts and placed his arm inside the car. Officer McClendon's intrusion into Jamison's car

was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. "Thus, under the circumstances of this case, the consent to search was not an independent act of free will, but rather a product of" an unconstitutional search. [198]

[22] **[23]** Even absent the initial constitutional violation, there is a factual dispute as to whether Jamison's consent was voluntary. "The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances." [199] To determine whether a person's consent was voluntary, the Court considers six factors: "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found." [200] "In this analysis, no single factor is determinative" [201] and courts consider other factors relevant to the inquiry. [202]

[24] Viewing the evidence in the light most favorable to Jamison, three factors weigh toward finding voluntary consent. Jamison was aware of his right to refuse consent; he refused to give consent after being asked four times by Officer McClendon. Jamison graduated from high school and there is nothing in the record showing that he "lack[ed] the requisite education or intelligence to give valid consent to the search." [203] Finally, Jamison believed – rightly so – that no incriminating evidence would be found.

The remaining factors weigh against finding voluntary consent. Jamison's custodial status was not voluntary: he was not free to leave. Jamison was also polite but unwilling to let Officer McClendon search his car the first four times the Officer asked. It is difficult to accept that Jamison truly wanted to give consent, since the exchange became "heated." Moreover, when Officer McClendon brought out his canine, Jamison says that he initially refused to consent to the dog sniff.

The parties disagree about whether Officer McClendon's actions were coercive. Jamison mainly points to Officer McClendon's intrusion into the car and repeated requests for consent. Officer McClendon, on the other hand, points to a number of cases where (he claims) other courts cleared officers who used greater restraints on a person's freedom. [204]

Jamison also points to "promises" and other "more subtle forms of coercion" that might have affected his judgment. [205] The existence of a promise indeed constitutes a relevant factor in the Court's determination. [206]

***21** There is a genuine factual dispute about whether Officer McClendon's actions amount to coercive procedures. There is evidence of omissions, outright lies, and promises by the officer: he did not inform Jamison that the EPIC check had come back clear, he lied about a call saying Jamison was transporting drugs, and he promised Jamison that he would allow him to leave if he found a roach in the car. A jury could reasonably conclude that Officer McClendon's lies reasonably caused Jamison to fear that the officer would plant drugs in his car, or worse. McClendon's statement to "Hold on a minute" and his physical intrusion into the interior of Jamison's car, while separately a constitutional violation, had the effect of physically expressing to Jamison that he was not free to leave – even though Jamison reasonably believed he could go after Officer McClendon returned his documents.

For these reasons, the Court finds a genuine factual dispute about whether Jamison voluntarily consented to the search.

A reader would be forgiven for pausing here and wondering whether we forgot to mention something. [207] When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive? [208]

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman. [209] Pelahatchie is also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man. [210] Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities.

For Black people, this isn't mere history. It's the present.

By the time Jamison was pulled over, more than 600 people had been killed by police officers in 2013 alone.[211] Jamison was stopped just 16 days after the man who killed Trayvon Martin was acquitted.[212] On that day, Alicia Garza wrote a Facebook post that said, "Black people. I love you. I love us. We matter. Our lives matter, Black lives matter."[213] And that week, "thousands of demonstrators gathered in dozens of cities" to commemorate Martin "and to add their voices to a debate on race that his death ... set off."[214] A movement was in its early stages that would shine a light on killings by police and police brutality writ large – a problem Black people have endured since "states replaced slave patrols with police officers who enforced 'Black codes.' "[215]

***22** Jamison's traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives.[216] Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike.[217] United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as "the world's greatest deliberative body."[218] The "vast majority" of the stops were the result of "nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial."[219]

The situation is not getting better. The number of people killed by police each year has stayed relatively constant,[220] and Black people remain at disproportionate risk of dying in an encounter with police.[221] It was all the way back in 1968 when Nina Simone famously said that freedom meant "no fear! I mean really, no fear!"[222] Yet decades later, Black male teens still report a "fear of police and a serious concern for their personal safety and mortality in the presence of police officers."[223]

***23** In an America where Black people "are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,"[224] who can say that Jamison felt free that night on the side of Interstate 20? Who can say that he felt free to say no to an armed Officer McClendon?

It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison's consent being involuntary, a situation where he felt he had "no alternative to compliance" and merely mouthed "pro forma words of consent."[225]

Accordingly, Officer McClendon's search of Jamison's vehicle violated the Fourth Amendment.

B. Violation of Clearly Established Law

The Court must now determine whether Officer McClendon "violated clearly established constitutional rights of which a reasonable person would have known."[226]

[25] **[26]** "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' "[227] "Clearly established law must be particularized to the facts of a case. Thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate."[228] District courts in this Circuit have been told that "clearly established law comes from holdings, not dicta."[229] We "are to pay close attention to the specific context of the case" and not "define clearly established law at a high level of generality."[230]

[27] **[28]** "It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality."[231] To meet this high burden, the plaintiff must "point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."[232]

[29] It is here that the qualified immunity analysis ends in Officer McClendon's favor.

Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not.

Jamison identifies a Tenth Circuit case finding that an officer unlawfully prolonged a detention "after verifying the temporary tag was valid and properly displayed."[233] That court wrote that "[e]very temporary tag is more difficult to read in the dark when a car is traveling 70 mph on the interstate. But that does not make every vehicle displaying such a tag fair game for an extended Fourth Amendment seizure."[234] Aside from the fact that a Tenth Circuit case is not "controlling authority" nor representative of "a robust consensus of persuasive authority,"[235] the case is unavailing here since Officer McClendon was awaiting NCIC results when he began to question Jamison. As discussed above, questioning while awaiting results from an NCIC check is "not inappropriate."[236] Officer McClendon's initial questioning was not in and of itself a Fourth Amendment violation.

***24** As to Officer McClendon's "particular conduct" of intruding into Jamison's vehicle, making promises of leniency, and repeatedly questioning him, Jamison primarily argues that "a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison's alleged consent to allow the Defendant McLendon to search his car."[237] He contends that a grant of "qualified immunity [is] inappropriate based on those factual conflicts."[238]

To prevail with this argument, Jamison must show that the factual dispute is such that the Court cannot "settl[e] on a coherent view of what happened in the first place."[239] Further, "[Jamison's] version of the violations [should] implicate clearly established law."[240] That is not the case here.

[30] While Jamison and Officer McClendon's recounting of the facts differs, the Court is able to settle on a coherent view of what occurred based on Jamison's version of the facts.[241] Considering the evidence in a light "most favorable" to Jamison,"[242] Jamison has failed to show that Officer McClendon acted in an objectively unreasonable manner. An officer's "acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff."[243]

[31] While Jamison contends that Officer McClendon's intrusion was coercive, Jamison fails to support the claim with relevant precedent. He cites to this Court's opinion in *United States v. Alvarado*, which found it unreasonable to detain a person on the side of the highway for an hour "for reasons not tied to reasonable suspicion that he had committed a crime or was engaged in the commission of a crime."[244] However, this Court's opinions cannot serve as "clearly established" precedent.[245] Moreover, the facts of that case are distinguishable since the defendant in *Alvarado* was unlawfully held after background checks came back clear.[246]

[32] The cases the Court cited above regarding physical intrusions – *United States v. Pierre* and *New York v. Class* – are also insufficient. While it has been clearly established since at least 1986 that an officer may be held liable for an unreasonable "intrusion into the interior of [a] car,"[247] this is merely a "general statement[ ] of the law."[248] "[C]learly established law must be particularized to the facts of the case."[249]

In *Pierre*, the officer could not see into the suspect's back seat and had to put his head inside to speak to the suspect. In *Class*, the suspect had been removed from his car and the officer put his hand inside to move papers so that he could see the car's VIN. Neither case considered a police officer putting his arm inside a car while trying to get the driver to consent to a search. Both cases also found the officer's conduct to be reasonable, thus not providing "fair and clear warning" of what constitutes an unreasonable intrusion into a car.

***25** Given the lack of precedent that places the Constitutional question "beyond debate," Jamison's claim

cannot proceed.[250] Officer McClendon is entitled to qualified immunity as to Jamison's prolonged detention and unlawful search claims.

V. Jamison's Seizure of Property & Damage Claim

[33] Jamison's complaint pleads a separate claim for the "reckless[ ] and deliberate[ ]" damage to his car he alleges occurred during Officer McClendon's search. Jamison points out, however, that although Officer McClendon sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to this third claim.

Jamison is correct. Officer McClendon's failure to raise the argument in his motions for summary judgment means he has forfeited its resolution at this juncture.[251] And his attempt to shoehorn it into his reply in support of his renewed motion for summary judgment was too late, since "[a]rguments raised for the first time in a reply brief are waived."[252] The question of whether to grant or deny summary judgment as to Jamison's "Seizure of Property & Damage Claim" is simply not before the court. Accordingly, the claim will be set for trial.

VI. The Return of Section 1983

Our nation has always struggled to realize the Founders' vision of "a more perfect Union."[253] From the beginning, "the Blessings of Liberty" were not equally bestowed upon all Americans.[254] Yet, as people marching in the streets remind us today, some have always stood up to face our nation's failings and remind us that "we cannot be patient."[255] Through their efforts we become ever more perfect.

The U.S. Congress of the Reconstruction era stood up to the white supremacists of its time when it passed Section 1983. The late Congressman John Lewis stared down the racists of his era when he marched over the Edmund Pettus Bridge. The Supreme Court has answered the call of history as well, most famously when it issued its unanimous decision in *Brown v. Board of Education* and resigned the "separate but equal" doctrine to the dustbin of history.

***26** The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity.

A. The Supreme Court

That the Justices haven't acted so far is perhaps understandable. Not only would they likely prefer that Congress fixes the problem, they also value *stare decisis*, the legal principle that means "fidelity to precedent."[256]

[34] *Stare decisis*, however, "isn't supposed to be the art of methodically ignoring what everyone knows to be true."[257] From TikTok[258] to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice.

Justice Kennedy "complained"[259] as early as 1992 that in qualified immunity cases, "we have diverged to a substantial degree from the historical standards."[260] Justice Scalia admitted that the Court hasn't even "purported to be faithful to the common-law immunities that existed when § 1983 was enacted."[261] Justice Thomas wrote there is "no basis" for the "clearly established law" analysis[262] and has expressed his "growing concern with our qualified immunity jurisprudence."[263] Justice Sotomayor has noted that her colleagues were making the "clearly established" analysis ever more "onerous."[264] In her view, the Court's doctrine "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[265] It remains to be seen how the newer additions to the Court will vote.[266]

***27** Even without a personnel change, recent decisions make it questionable whether qualified immunity can withstand the *stare decisis* standard.[267] In 2018, *Janus v. AFSCME* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); in 2019, *Knick v. Township of Scott* overruled *Williamson County v.*

Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and in 2020, *Ramos v. Louisiana* overruled *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). Perhaps this Court is more open to a course-correction than its predecessors.

So what is there to do?

I do not envy the Supreme Court's duty in these situations. Nor do I have any perfect solutions to offer. But a Fifth Circuit case about another Reconstruction-era statute, 42 U.S.C. § 1981, suggests vectors of change. The case has been lost to the public by a fluke of how it was revised. I share its original version here to give a tangible example of how easily legal doctrine can change.

B. Section 1981 and Mr. Dulin

Section 1981 "prohibits racial discrimination in making and enforcing contracts."[268] It reads,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[269]

You don't need a lawyer to understand this statute. The language is simple and direct. It calls for "full and equal benefit of all laws and proceedings" regardless of race.

A few years ago, George Dulin invoked this law in a suit he brought against his former employer. Dulin was a white attorney in the Mississippi Delta. He had represented the local hospital board for 24 years. When he was replaced by a Black woman, Dulin claimed that the Board had discriminated against him on the basis of race. He said that no Board member had complained about his job performance, some of the Board members had made racist remarks, and he was better qualified than his replacement.[270]

Despite being simply stated, Section 1981 is not simply enforced. In Section 1981, as with its cousin Section 1983, federal judges have invented extra requirements for plaintiffs to overcome before they may try their case before a jury.

In Dulin's case, the trial judge and two appellate judges thought he couldn't overcome those extra hurdles. Specifically, the Fifth Circuit majority explained that although some evidence showed that no one *complained* about Dulin's job performance, other evidence revealed that the Board was *silently* dissatisfied with his work.[271] They held that Dulin's evidence of racist remarks was from too long ago—it failed the "temporal proximity" requirement.[272] Then they found that his evidence of superior qualifications could not overcome a legal standard which says that "differences in qualifications are generally not probative evidence of discrimination unless those disparities are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."[273] For the moment, Dulin had lost.

***28** To be clear, these judges in the majority hadn't "gone rogue." They were simply attempting to follow precedent that had long since narrowed the scope of Section 1981.

Judge Rhesa Barksdale filed a 22-page dissent. He argued that the many factual disputes should be resolved by a jury, given the Seventh Amendment right to jury trials.[274] He wrote that the temporal proximity test was too stringent since a savvy Board could have "*purposely* waited a year to terminate Dulin in order for that decision not to appear to be motivated by race."[275] He noted the evidence suggesting that the Board was lying about its motives, since "the Board never discussed Dulin's claimed poor performance."[276] Judge Barksdale then

flatly disagreed that the court "must apply the superior-qualifications test," given evidence that the Board never cared to even discuss the qualifications of Dulin's replacement.[277] He "urged" the full court to rehear the case en banc.[278]

[35] **[36]** Judges err when we "impermissibly substitute[ ]" a jury determination with our own—the Seventh Amendment tells us so.[279] We err again when we invent legal requirements that are untethered to the complexity of the real world.[280] The truth is, Section 1981 doesn't have a "temporal proximity" requirement. It says everyone in this country has "the same right ... to the full and equal benefit of all laws and proceedings for the security of persons and property." We should honor it.

[37] Judge Barksdale's powerful defense of the Seventh Amendment eventually persuaded his colleagues. They withdrew their opinion and issued in its place a two-paragraph, per curiam order directing the district court to hold a full trial on Dulin's claims.[281] Dulin subsequently presented his case to a jury of his peers, and the judiciary didn't collapse under a flood of followon litigation.[282] That he won his trial hardly matters: the case affirmed Judge Browning's point that "jury trials are the most democratic expression" of which official acts are reasonable and which are excessive.[283] , [284]

***29** I have told this story today because of its obvious parallels with § 1983. In both situations, judges took a Reconstructionera statute designed to protect people *from the government*, added in some "legalistic argle-bargle,"[285] and turned the statute on its head to protect the government *from the people*. We read § 1983 against a background of robust immunity instead of the background of a robust Seventh Amendment.[286] Then we added one judge-made barrier after another. Every hour we spend in a § 1981 case trying to parse "temporal proximity" is a distraction from the point of the statute: to determine if there was unlawful discrimination. Just as every hour we spend in a § 1983 case asking if the law was "clearly established" or "beyond debate" is one where we lose sight of why Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights.

There is another, more difficult reason I have told this story, though. When the Fifth Circuit withdrew its first opinion, Westlaw deleted it and the accompanying dissent. Other attorneys and judges have thus never had the benefit of Judge Barksdale's analysis and defense of the Seventh Amendment —one forceful enough to persuade his colleagues to reverse themselves.[287] That is a loss to us all.

And, although the panel in *Dulin* ultimately permitted the case to proceed to a jury trial, this fell short of equal justice under the law. Instead of seeking en banc review to eliminate the judge-created rules that prohibited Mr. Dulin's case from moving forward, the panel simply decided his case would be an exception to the rules. They provided no explanation as to why an exception, rather than a complete overhaul, was appropriate. The "temporal proximity" requirement still applies to § 1981 claims in the Fifth Circuit today. *Dulin* shows us an example of judges recognizing the inconsistencies and impracticalities of an invented doctrine, but not going far enough to correct the wrong.

In *Dulin*, federal judges decided that a Reconstruction-era law could accommodate the claims of an older, white, male attorney. They had the imagination to see how their constricting view of § 1981 harmed someone who shared the background of most federal judges. That same imagination must be used to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers.

Instead of slamming shut the courthouse doors, our courts should use their power to ensure Section 1983 serves all of its citizens as the Reconstruction Congress intended. Those who violate the constitutional rights of our citizens must be held accountable. When that day comes we will be one step closer to that more perfect Union.

VII. Conclusion

Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine

of "separate but equal," so too should it eliminate the doctrine of qualified immunity.

Earlier this year, the Court explained something true about wearing the robe:

> Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. [288]

Let us waste no time in righting this wrong.

***30** Officer McClendon's motion is **GRANTED**, and the remaining claim in this matter will be set for trial in due course.

SO ORDERED, this the 4th day of August, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 4497723

Footnotes

1 That was Michael Brown. *See* Max Ehrenfreund, *The risks of walking while black in Ferguson*, WASH. POST (Mar. 4, 2015).

2 That was 12-year-old Tamir Rice. *See* Zola Ray, *This Is The Toy Gun That Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017).

3 That was Elijah McClain. *See* Claire Lampen, *What We Know About the Killing of Elijah McClain*, THE CUT (July 5, 2020).

4 That was Eric Garner. *See* Assoc. Press, *From Eric Garner's death to firing of NYPD officer: A timeline of key events*, USA TODAY (Aug. 20, 2019).

5 That was George Floyd. *See* Jemima McEvoy, *New Transcripts Reveal How Suspicion Over Counterfeit Money Escalated Into The Death Of George Floyd*, FORBES (July 8, 2020).

6 That was Philando Castile and Tony McDade. *See* Andy Mannix, *Police audio: Officer stopped Philando Castile on robbery suspicion*, STAR TRIB. (July 12, 2016); Meredith Deliso, *LGBTQ community calls for justice after Tony McDade, a black trans man, shot and killed by police*, ABC NEWS (June 2, 2020).

7 That was Jason Harrison. *See* Byron Pitts et al., *The Deadly Consequences When Police Lack Proper Training to Handle Mental Illness Calls*, ABC NEWS (Sept. 30, 2015).

8 That was Charles Kinsey. *See Florida policeman shoots autistic man's unarmed black therapist*, BBC (July 21, 2016).

9 That was 17-year-old James Earl Green. *See* Robert Luckett, *In 50 Years from Gibbs-Green Deaths to Ahmaud Arbery Killing, White Supremacy Still Lives*, JACKSON FREE PRESS (May 8, 2020); *see also* Robert Luckett, *50 Years Ago, Police Fired on Students at a Historically Black College*, N.Y. TIMES (May 14, 2020); Rachel James-Terry & L.A. Warren, *'All hell broke loose': Memories still vivid of Jackson State shooting 50 years ago*, CLARION LEDGER (May 15, 2020).

10 That was Ben Brown. *See* Notice to Close File, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (Mar. 24, 2017), *available at* https://www.justice.gov/crt/case-document/benjamin-brown-notice-close-file; *see also* Jackson

State Univ., Center for University-Based Development, *The Life of Benjamin Brown, 50 Years Later*, W. JACKSON (May 11, 2017).

11 That was Phillip Gibbs. *See* James-Terry & Warren, *supra.*

12 That was Amadou Diallo. *See Police fired 41 shots when they killed Amadou Diallo. His mom hopes today's protests will bring change.*, CBS NEWS (June 9, 2020).

13 That was Botham Jean. *See* Bill Hutchinson, *Death of an innocent man: Timeline of wrong-apartment murder trial of Amber Guyger*, ABC NEWS (Oct. 2, 2019).

14 That was Breonna Taylor. *See* Amina Elahi, *'Sleeping While Black': Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020).

15 That was Rayshard Brooks. *See* Jacob Sullum, *Was the Shooting of Rayshard Brooks 'Lawful but Awful'?*, REASON (June 15, 2020).

16 That was Sandra Bland. *See* Ben Mathis-Lilley & Elliott Hannon, *A Black Woman Named Sandra Bland Got Pulled Over in Texas and Died in Jail Three Days Later. Why?*, SLATE (July 16, 2015).

17 That was Walter Scott. *See* Michael E. Miller et al., *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, WASH. POST (Apr. 8, 2015).

18 That was Hannah Fizer. *See* Luke Nozicka, *'Where's the gun?': Family of Sedalia woman killed by deputy skeptical of narrative*, KANSAS CITY STAR (June 15, 2020).

19 That was Ace Perry. *See* Jodi Leese Glusco, *Run-in with Sampson deputy leaves driver feeling unsafe*, WRAL (Feb. 14, 2020).

20 *See, e.g.*, Mike Baker et al., *Three Words. 70 cases. The tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020) (discussing the deaths of Eric Garner, George Floyd, and 68 other people killed while in law enforcement custody whose last words included the statement, "I can't breathe.").

21 *Estate of Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020).

22 Mark Berman et al., *Protests spread over police shootings. Police promised reforms. Every year, they still shoot and kill nearly 1,000 people.*, WASH. POST (June 8, 2020) ("Since 2015, police have shot and killed 5,400 people."); *see also* Alicia Victoria Lozano, *Fatal Encounters: One man is tracking every officer-involved killing in the U.S.*, NBC NEWS (July 11, 2020), ("As of July 10, Fatal Encounters lists more than 28,400 deaths dating to Jan. 1, 2000. The entries include both headline-making cases and thousands of lesser-known deaths.").

23 *See, e.g.*, Jamie Kalven, *Invisible Institute Relaunches The Citizens Police Data Project*, THE INTERCEPT (Aug. 16, 2018) (discussing "a public database containing the disciplinary histories of Chicago police officers .... It includes more than 240,000 allegations of misconduct involving more than 22,000 Chicago police officers over a 50-year period."); Andrea J. Ritchie, *How some cops use the badge to commit sex crimes*, WASH. POST (Jan. 12., 2018) ("According to a 2010 Cato Institute review, sexual misconduct is the second-most-frequently reported form of police misconduct, after excessive force.").

24 *Estate of Jones*, 961 F.3d at 673.

25 The facts are drawn from the parties' depositions.

26 That night, Officer McClendon was working in Pelahatchie pursuant to an interlocal agreement between the Richland and Pelahatchie Police Departments.

27 Jamison testified that there were two other officers on the scene. The record does not contain any evidence from these individuals.

28 This part of Officer McClendon's testimony is undisputed. Jamison testified that he did not know if Officer McClendon heard back from NCIC prior to returning to Jamison's car.

29 Officer McClendon denies saying such a thing.

30 "A 'roach' is what remains after a joint, blunt, or marijuana cigarette has been smoked. It is akin to a cigarette butt." *United States v. Abernathy*, 843 F.3d 243, 247 n.1 (6th Cir. 2016) (citation omitted).

31 When Officer McClendon was shown the cardboard tag during his deposition, it showed no signs of being creased. The officer claimed that it either could have folded without creasing or that someone had ironed out the crease.

32 This explains why he was tired. Here he was, standing on the side of a busy interstate at night for almost two hours against his will so Officer McClendon could satisfy his goal of searching Jamison's vehicle. In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas. *See* Lee Pfeiffer, *The Wizard of Oz*, ENCYCLOPEDIA BRITANNICA (Mar. 19, 2010) (noting the 101-minute run time of the 1939 film). If Jamison was driving at 70 MPH before being stopped, in the 110 minutes he was held on the side of the road he would have gotten another 128 miles closer to home, through Rankin, Scott, Newton, and Lauderdale counties and more than 40 miles into Alabama.

33 Given the timeline – Jamison filed this suit in 2016 – he may be referring to the 2015 killing of Walter Scott by former South Carolina policeman Michael Slager. A bystander captured video of Slager shooting Scott in the back as he ran away, leading to "protests across the U.S. as demonstrators said it was another example of police officers mistreating Blacks." Meg Kinnard, *South Carolina officer loses appeal over shooting conviction*, ASSOC. PRESS (Jan. 8, 2019). Another news source noted that Scott was shot in the back five times. Meredith Edward & Dakin Andone, *Ex-South Carolina Cop Michael Slager gets 20 years for Walter Scott Killing*, CNN (Dec. 7, 2017). "At the time of the shooting, Scott was only the latest black man to be killed in a series of controversial officer-involved shootings that prompted 'Black Lives Matter' protests and vigils." *Id.* Slager pleaded guilty to federal criminal charges that he deprived of Scott of his civil rights and was sentenced to serve 20 years in prison. State murder charges were dropped. The fact that Slager was convicted is an anomaly; law enforcement officers are rarely charged for on-duty killings, let alone convicted. *See generally* Janell Ross, *Police officers convicted for fatal shootings are the exception, not the rule*, NBC NEWS (Mar. 13, 2019); Jamiles Lartey et al., *Former officer Michael Slager sentenced to 20 years for murder of Walter Scott*, THE GUARDIAN (Dec. 7, 2017).

34 Docket No. 62.

35 Jamison provided no evidence of comparative discriminatory treatment of those among similarly-situated individuals of different classes. *See id.* at 7–8.

36 Fed. R. Civ. P. 56(a).

37 *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (citation omitted).

38 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

39 Fed. R. Civ. P. 56(c)(1).

40 *Id.* at 56(c)(1)(A).

41 *Strong v. Dep't of Army*, 414 F. Supp. 2d 625, 628 (S.D. Miss. 2005).

42 *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1394, 206 L.Ed.2d 583 (2020).

43 RON CHERNOW, GRANT 706 (2017); *see also* Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi 1870-1890*, 53 J. S. HIST. 421, 421 (Aug. 1987), http://www.jstor.org/stable/2209362 (describing the era as Mississippi's first civil rights struggle and noting that the federal government sought to "secure black civil and political equality in the years after the Civil War.").

44 DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 2 (2001).

45 Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 660 (2018) (citation omitted); *see* BLIGHT, *supra* at 47.

46 CHERNOW, *supra* at 562.

47 *United States v. Cannon*, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., concurring).

48 Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542 (2002) (quotations and citation omitted).

49 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1857).

50 DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 47 (6th ed. 2008).

51 Margaret Bush Wilson and Diane Ridley, *The New Birth of Liberty: The Role of Thurgood Marshall's Civil Rights Contribution*, 6 NAT'L BLACK L.J. 67, 75 n.26 (1978)

52 CHERNOW, *supra* at 685–86.

53 THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES 442 (Kermit L. Hall et al. eds., 2d ed. 2005).

54 *Id.*

55 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 353–57 (1988). Black Mississippians were also elected to local, state, and federal posts. John R. Lynch, a former slave, would serve as Speaker of the House in the Mississippi Legislature and would later represent Mississippi in Congress. *See* JOHN R. LYNCH, REMINISCENCES OF AN ACTIVE LIFE: THE AUTOBIOGRAPHY OF JOHN ROY LYNCH xii–xv (1970). James Hill, also formerly enslaved, would too serve as Speaker of the House and was later elected as Mississippi's Secretary of State. *See* GEORGE A. SEWELL & MARGARET L. DWIGHT, MISSISSIPPI BLACK HISTORY MAKERS 48 (2d ed. 1984).

56 FONER, *supra* at 365–67. During this period, Mississippi's Superintendent of Education was Thomas Cardozo, a Black man. *See History*, THOMAS CARDOZO MIDDLE SCHOOL, https://www.jackson.k12.ms.us/domain/616 (last visited July 10, 2020).

57 FONER, *supra* at 368–71.

58 The chasm between these two visions of America was embodied by President Johnson, who in his official capacity led a nation founded in the belief "that all men are created equal," yet in his individual capacity "side[d] with white supremacists," "privately referred to blacks as 'niggers,' " and had "a morbid fascination with miscegenation." CHERNOW, *supra* at 550; *see generally* FONER, *supra* at 412–59; NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

59 CHERNOW, *supra* at 563.

60 *Id.*

61 *Id.* at 568.

62 *See, well, Moore v. Bryant*, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016) (citation omitted).

63 Macfarlane, *supra* at 660.

64 CHERNOW, *supra* at 588.

65 *Id.* at 621.

66 *Id.* at 571, 703.

67 *Id.* at 703.

68 Cresswell, *supra* at 426.

69 *See* Robin D. Barnes, *Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1099 (1996); Randolph M. Scott-McLaughlin, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1371 (1992); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 24–25 (2004); *see also* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE 21ST CENTURY 77–84 (2007); FONER, *supra* at 434 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.").

70 *See* Barnes, *supra* at 1094.

71 CHERNOW, *supra* at 702; *see also* Cresswell, *supra* at 432 ("Attorneys, marshals, witnesses and jurors suffered abuse and assault, were ostracized by the white community, and some were even murdered.").
72 CHERNOW, *supra* at 707.
73 At least 2,000 Black women, men, and children were killed by white mobs in racial terror lynchings during Reconstruction. *See Reconstruction in America*, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america/ (last visited July 16, 2020). "Thousands more were assaulted, raped, or injured in racial terror attacks between 1865 and 1877." *Id.*
74 LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 276–77 (1979).
75 *Baxter v. Bracey*, —— U.S. ——, 140 S. Ct. 1862, —— L.Ed.2d —— (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983)).
76 Macfarlane, *supra* at 661 (quotations and citations omitted); *see also* *Monroe v. Pape*, 365 U.S. 167, 172–83, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
77 Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (citations omitted).
78 *Id.*
79 *Id.*
80 *Id.*
81 *Monroe*, 365 U.S. at 174, 81 S.Ct. 473.
82 Zach Lass, *Lowe v. Raemisch: Lowering the Bar of the Qualified Immunity Defense*, 96 DENV. L. REV. 177, 180 (2018) (citation omitted).
83 @ignitekindred, TWITTER (Apr. 25, 2016, 6:39 PM) https://twitter.com/ig-nitekindred/status/724744680878039040.
84 CHERNOW, *supra* at 708.
85 *Id.* at 710.
86 *Id.* at 709.
87 *Reconstruction vs. Redemption*, NAT'L ENDOWMENT HUMAN. (Feb. 11, 2014); *see also* BLIGHT, *supra* at 101–02.
88 BLIGHT, *supra* at 137–39.
89 *Moore*, 205 F. Supp. 3d at 840 (quotations, citations, and brackets omitted).
90 Cresswell, *supra* at 429.
91 That is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both. *See Barnes, supra* at 1099 ("judges, politicians, and law enforcement officers were fellow Klansmen"); PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 193 (2016) ("a near majority" of Article III judges appointed in the wake of Reconstruction were former Confederates). L.Q.C. Lamar, the only Mississippian to ever serve on the Supreme Court, was on the side of these renegades. *See generally* DENNIS J. MITCHELL, A NEW HISTORY OF MISSISSIPPI 199–200 (2014). As an attorney, Lamar was noted for "wielding a chair" in open court and attacking a U.S. Marshal, "breaking a small bone at the cap of the [Marshal's] eye." Cresswell, *supra* at 434.
92 Macfarlane, *supra* at 661–62 (citations omitted).
93 *Id.* at 662.
94 *Id.*
95 BELL, *supra* at 48.
96 *Id.* at 49.
97 Macfarlane, *supra* at 663.

98 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), *overruled on other grounds by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

99 *See generally* Macfarlane, *supra* at 665.

100 Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1722 (1989).

101 365 U.S. at 169, 81 S.Ct. 473.

102 *Id.* at 187, 81 S.Ct. 473.

103 *Id.*

104 *Haywood v. Drown*, 556 U.S. 729, 735, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972)).

105 Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002 (2002).

106 42 U.S.C. § 1983.

107 *See* John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 803 (2003) (noting that we "have witnessed the restriction of rights developed during" the Civil Rights Movement, including Section 1983).

108 *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1870, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

109 Several scholars have shown that history does not support the Court's claims about qualified immunity's common law foundations. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter *The Case Against Qualified Immunity*].

110 *Ziglar*, 137 S. Ct. at 1870 (citations omitted).

111 386 U.S. 547, 549, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

112 *Id.*

113 *Id.* at 555, 87 S.Ct. 1213.

114 *Id.* ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

115 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 14 (2017) (citations omitted).

116 *Harlow v. Fitzgerald*, 457 U.S. 800, 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

117 *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, No. 19-679, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3146693 (U.S. June 15, 2020).

118 *Taylor v. Stevens*, 946 F.3d 211, 220 (5th Cir. 2019).

119 *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied* No. 19-1021, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2515813 (U.S. May 18, 2020).

120 *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019), *cert. denied*, No. 19-682, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2515455 (U.S. May 18, 2020).

121 *Dukes v. Deaton*, 852 F.3d 1035, 1039 (11th Cir. 2017).

122 *Baxter v. Bracey*, 751 F. App'x 869, 872 (6th Cir. 2018), *cert. denied*, —— U.S. ——, 140 S. Ct. 1862, —— L.Ed.2d —— (2020).

123 *Willingham v. Loughnan*, 261 F.3d 1178, 1181 (11th Cir. 2001), *cert. granted, judgment vacated*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002).

124 *Haywood*, 556 U.S. at 735, 129 S.Ct. 2108 (citation omitted).

125 *See* *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 81 (2018). Previously, the Court had used "clearly established" as an explanatory phrase to better understand good faith. *See, e.g.,* *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (finding compensatory damages "appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.").

126 *Malley*, 475 U.S. at 341, 106 S.Ct. 1092; *see also* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61 (2012). *Malley* was also the first time "objectively unreasonable" appeared in a Supreme Court qualified immunity decision.

127 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (citations omitted) (emphasis added).

128 *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020) (citation omitted). That leads us to another rabbit hole. A district court opinion doesn't clearly establish the law in a jurisdiction. *Id.* at 233 n.6 (citation omitted). Nor does a circuit court opinion, if the judges designate it as "unpublished." *Id.* Only *published* circuit court decisions count. *See* *id.* Even then, the Supreme Court has "expressed uncertainty" about whether courts of appeals may ever deem constitutional law clearly established. *Cole v. Carson*, 935 F.3d 444, 460 n.4 (5th Cir. 2019) (Jones, J., dissenting) (collecting cases).

129 *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074. As Professor John Jeffries explains, "[t]he narrower the category of cases that count, the harder it is to find a clearly established right." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010) [hereinafter *What's Wrong with Qualified Immunity?*]. This restrictive approach bulks up qualified immunity and makes its protections difficult to penetrate. When combining the narrow view of relevant precedent to the demand for "extreme factual specificity in the guidance those precedents must provide, the search for 'clearly established' law becomes increasingly unlikely to succeed, and 'qualified' immunity becomes nearly absolute." *Id.*

130 *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (quotations and citation omitted).

131 *See* *Mullenix v. Luna*, —— U.S. ——, 136 S. Ct. 305, 316, 193 L.Ed.2d 255 (2015) (Sotomayor, J., dissenting) ("an officer's actual intentions are irrelevant to the Fourth Amendment's 'objectively reasonable' inquiry") (citing *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

132 Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 195 (2008).

133 *Saucier v. Katz*, 533 U.S. 194, 200–01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

134 *See* *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 443 (5th Cir. 2015) (citation omitted) ("[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming and intrusive."); *see also* Lass, *supra*, at 188.

135 *See* *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994).

136 Brown, *supra* at 196.

137 *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

138 *See generally Baude, supra* at 83 ("[A]ll but two of the [Supreme] Court's awards of qualified immunity reversed the lower court's denial of immunity below. In other words, lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct."); *see also* *Mullenix*, 136 S. Ct. at 310 (reversing and reminding lower courts that the Supreme Court "has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity"); *White v. Pauly*, —— U.S. ——, 137 S. Ct. 548, 552, 196 L.Ed.2d 463 (2017) (per curiam) (reversing and chastising the appellate court for "misunderst[anding] the 'clearly established' analysis").

139 950 F.3d at 231.

140 *Id.*

141 *Id.* at 233.

142 *Id.* A dissent argued that the majority was stretching qualified immunity to rule for the officer, since it was already clearly established that correctional officers couldn't use their fists, a baton, or a taser to assault an inmate without provocation. *Id.* at 234–35 (Costa, J., dissenting).

143 *Taylor*, 946 F.3d at 218–19 (brackets and footnotes omitted).

144 *Id.* at 218 & n.6.

145 *Taylor v. Williams*, No. 5:14-CV-149-BG, 2016 WL 8674566, at *3 (N.D. Tex. Jan. 22, 2016), *report and recommendation adopted*, No. 5:14-CV-149-C, 2016 WL 1271054 (N.D. Tex. Mar. 29, 2016), *aff'd in part, vacated in part, remanded*, 715 F. App'x 332 (5th Cir. 2017).

146 *Taylor*, 946 F.3d at 219.

147 *Id.* at 222.

148 *Id.* (citations omitted). It would appear that correctional officers in this Circuit can now just put inmates in feces-covered cells for *five* days or less and escape liability.

149 *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972).

150 *Bienvenu v. Beauregard Par. Police Jury*, 705 F.2d 1457, 1460 (5th Cir. 1983) ("Bienvenu's statements that the defendant ... intentionally subjected him to a cold, rainy, roach-infested facility and furnished him with inoperative, scum-encrusted washing and toilet facilities sufficiently alleges a cause of action cognizable under 42 U.S.C. § 1983.")

151 *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (concluding that plaintiff stated a Constitutional claim when "his only option was to urinate and defecate in the confined area that he shared with forty-eight other inmates").

152 *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004) (affirming injunction where "cells were 'extremely filthy' with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles").

153 *Cowan v. Scott*, 31 F. App'x 832, at *2 (5th Cir. 2002) (finding that prisoner stated a Constitutional claim when he alleged that "he was forced to lie in feces for days without access to a shower").

154 *Harper v. Showers*, 174 F.3d 716, 717 (5th Cir. 1999).

155 *See, e.g.,* *McBride v. Deer*, 240 F.3d 1287, 1291 (10th Cir. 2001); *Sperow v. Melvin*, 182 F.3d 922 (7th Cir. 1999); *see also* *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) (holding that "forcing inmates to work in a shower of human excrement without protective clothing and equipment" for as little as 10 minutes stated a claim). Judge Wilson of the Eleventh Circuit once wrote that "there is remarkably little consensus among the United States circuit courts concerning how to interpret the term 'clearly established.' " Charles R. Wilson, "*Location, Location, Location*": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). "One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (collecting cases).

156 *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

157 *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074.

158 *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

159 *See, e.g.,* *White*, 137 S. Ct. at 552 (per curiam) (chastising the appellate court for "misunderst[anding] the 'clearly established' analysis"). Professor Baude says the Court has been on a "crusade." Baude, *supra* at 61.

160 *See* *White*, 137 S. Ct. at 552.

161 Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 909 (2016).

162 *See, e.g.,* *Pratt v. Harris Cty., Tex.*, 822 F.3d 174, 186 (5th Cir. 2016).

163 Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018).

164 *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (No. 18-1287) 2019 WL 2370285.

165 *See, e.g., Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part); *Zadeh*, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *10 (E.D.N.Y. June 26, 2018); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 283 (Iowa 2018) (Appel, J., dissenting); James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake*, WASH. POST (June 12, 2020).

166 *See, e.g., The Case Against Qualified Immunity, supra*; Baude, *supra*; Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305 (2018); *What's Wrong with Qualified Immunity?, supra*; Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 678 (1997).

167 *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017) (citations and brackets omitted).

168 *See* Docket No. 62.

169 *United States v. Estrada*, 459 F.3d 627, 631 (5th Cir. 2006) (citation omitted).

170 *United States v. Spence*, 667 F. App'x 446, 447 (5th Cir. 2016) (citations omitted).

171 *New York v. Class*, 475 U.S. 106, 114–15, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

172 *United States v. Pierre*, 958 F.2d 1304, 1309 (5th Cir. 1992); *see also* *United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993).

173 *Pierre*, 958 F.2d at 1309 (citation omitted).

174 *Id.*

175 *See* *id.*

176 Docket No. 68 at 21.

177 *Ryles*, 988 F.2d at 15 (citations omitted).

178 *Pierre*, 958 F.2d at 1307.

179 *Id.*

180 *Id.*

181 *Id.* (quotations and brackets omitted).

182 *Id.* at 1309–10.

183 *Id.* at 1309.

184 *Id.* at 1310.

185 *Id.* at 1309.

186 *Id.* at 1310.

187 *Id.*

188 *Id.*

189 *Id.* (citation omitted).

190 *Id.*

191 *See* *Spence*, 667 F. App'x at 447.

192 *Pierre*, 958 F.2d at 1310.

193 *Id.*

194 *United States v. Gomez-Moreno*, 479 F.3d 350, 357 (5th Cir. 2007) (citation omitted), *overruled on other grounds by* *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

195 *Id.* (quotations and citation omitted).

196 *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002) (citation omitted).

197 *United States v. Santiago*, 310 F.3d 336, 343 (5th Cir. 2002) (citations omitted).

198 *Id.*

199 *United States v. Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993) (quotations and citation omitted).

200 *United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017) (citation omitted).

201 *United States v. Macias*, 658 F.3d 509, 523 (5th Cir. 2011) (citation omitted).

202 *United States v. Tompkins*, 130 F.3d 117, 122 (5th Cir. 1997) (citation omitted).

203 *United States v. Cooper*, 43 F.3d 140, 148 (5th Cir. 1995).

204 *See, e.g.,* *Tompkins*, 130 F.3d at 122; *United States v. Olivarria*, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011).

205 *United States v. Hall*, 565 F.2d 917, 921 (5th Cir. 1978).

206 *See United States v. Fernandes*, 285 F. App'x 119, 124 (5th Cir. 2008).

207 *Cf.* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1151 n.81 (2012) (identifying cases in which the Supreme Court failed to recognize the potential impact of race and racism).

208 *Cf.* *United States v. Mendenhall*, 446 U.S. 544, 558, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (noting that the race, gender, age, and education of a young Black woman who "may have felt unusually threatened by the officers, who were white males" were all relevant factors in determining whether the woman voluntarily consented to a seizure).

209 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE 1964 MURDERS OF MICHAEL SCHWERNER, JAMES CHANEY, AND ANDREW GOODMAN 7–8 (2018), *available at* https://www.justice.gov/crt/case-document/file/1041791/download.

210 Albert Samaha, *"This Is What They Did For Fun": The Story Of A Modern-Day Lynching*, BUZZFEED NEWS (Nov. 18, 2015); *see also* Press Release, U.S. Dep't of Justice, Three Brandon, Miss., Men Plead Guilty for Their Roles in the Racially Motivated Assault and Murder of an African-American Man (Mar. 22, 2012) *available at* https://www.justice.gov/opa/pr/three-brandon-miss-men-plead-guilty-their-roles-racially-motivated-assault-and-murder-african.

211 *See* MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ (last accessed June 15, 2020).

212 Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013).

213 Elazar Sontag, *To this Black Lives Matter co-founder, activism begins in the kitchen*, WASH. POST (Mar. 26, 2018); *see also* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1095 (2018).

214 Channing Joseph & Ravi Somaiya, *Demonstrations Across the Country Commemorate Trayvon Martin*, N.Y. TIMES (July 21, 2013).

215 Hannah L.F. Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1189 (2015); *see also* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 1 ANN. REV. CRIMINOLOGY 2.1, 2.3 (forthcoming 2021); Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, in POLICING THE BLACK MAN 139–40 (Angela J. Davis ed., 2018); Brandon Hasbrouck, *The 13th Amendment Could End Racist Policing*, SLATE (June 5, 2020).

216 *See, e.g.*, Ron Stodghill, *Black Behind the Wheel*, N.Y. TIMES (July 14, 2020); Helen Sullivan et al., *Thousands continue protesting across US as Minneapolis vows to dismantle police department – as it happened*, THE GUARDIAN (June 12, 2020). "There's a long history of black and brown communities feeling unsafe in police presence." *United States v. Curry*, 965 F.3d 313, ——, 2020 WL 3980362, at *13 (4th Cir. 2020) (Gregory, C.J., concurring).

217 *See* Crystal Bonvillian, *Video: Black Miami doctor who tests homeless for COVID-19 handcuffed, detained outside own home*, KIRO 7 (Apr. 14, 2020); David A. Harris, *Racial Profiling: Past, Present, and Future?*, ABA CRIM. JUSTICE MAG. (Winter 2020) (recounting the suit and settlement achieved by Robert Wilkins, U.S. Circuit Judge for the D.C. Circuit); Louis Nelson, *Sen. Tim Scott reveals incidents of being targeted by Capitol Police*, POLITICO (July 13, 2016).

In a moving speech delivered from the Senate floor just last month, Senator Scott said,

> As a black guy, I know how it feels to walk into a store and have the little clerk follow me around, even as a United States Senator. I get that. I've experienced that. I understand the traffic stops. I understand that

when I'm walking down the street and some young lady clutches on to her purse and my instinct is to get a little further away because I don't want any issues with anybody, I understand that.

See U.S. Senator Tim Scott, Senator Tim Scott Delivers Fiery Speech on Senate Floor After Senate Democrats Stonewall Legislation on Police Reform Across America (June 24, 2020), *available at* https://www.scott.senate.gov/media-center/press-releases/senator-tim-scott-delivers-fiery-speech-on-senate-floor-after-senate-democrats-stonewall-legislation-on-police-reform-across-america.

218 Tim Scott, *GOP Sen. Tim Scott: I've choked on fear when stopped by police. We need the JUSTICE Act.*, USA TODAY (June 18, 2020).

219 Nelson, *supra* ("Scott also shared the story of a former staffer of his who drove a Chrysler 300, 'a nice car without any question, but not a Ferrari.' The staffer wound up selling that car out of frustration after being pulled over too often in Washington, D.C., 'for absolutely no reason other than for driving a nice car.' He told a similar story of his brother, a command sergeant major in the U.S. Army, who was pulled over by an officer suspicious that the car Scott's brother was driving was stolen because it was a Volvo.... Scott pleaded in his remarks that the issues African-Americans face in dealing with law enforcement not be ignored.").

220 *See, e.g.*, John Sullivan et al., *Four years in a row, police nationwide fatally shoot nearly 1,000 people*, WASH. POST (Feb. 12, 2019).

221 Niall McCarthy, *Police Shootings: Black Americans Disproportionately Affected [Infographic]*, FORBES (May 28, 2020) ("Black Americans ... are shot and killed by police [at] more than twice ... the rate for white Americans.").

222 Adam Shatz, *The Fierce Courage of Nina Simone*, N.Y. REV. OF BOOKS (Mar. 10, 2016).

223 Smith Lee & Robinson, *That's My Number One Fear in Life. It's the Police*": *Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 146 (2019) (citation omitted).

224 *Curry*, 965 F.3d at ——, 2020 WL 3980362, at *14 (Gregory, C.J., concurring).

225 *United States v. Ruigomez*, 702 F.2d 61, 65 (5th Cir. 1983).

226 *Samples v. Vadzemnieks*, 900 F.3d 655, 662 (5th Cir. 2018) (quotations, citations, and ellipses omitted).

227 *Mullenix*, 136 S. Ct. at 308 (citation omitted).

228 *Id.* (quotations and citation omitted).

229 *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (citations omitted).

230 *Anderson v. Valdez*, 913 F.3d 472, 476 (5th Cir. 2019) (quotations and citations omitted).

231 *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019) (quotations and citation omitted).

232 *McLin v. Ard*, 866 F.3d 682, 696 (5th Cir. 2017) (quotations and citation omitted).

233 Docket No. 68 at 20 (citing *United States v. Edgerton*, 438 F.3d 1043, 1051 (10th Cir. 2006)).

234 *Edgerton*, 438 F.3d at 1051.

235 *Palko*, 920 F.3d at 294.

236 *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995).

237 Docket No. 68 at 23.

238 *Id.* at 24 (citing *Jordan v. Wayne Cty., Miss.*, No. 2:16-CV-70-KS-MTP, 2017 WL 2174963, at *5 (S.D. Miss. May 17, 2017)).

239 *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993); *see also* *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994).

240 *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1061 (5th Cir. 1994).

241 *Contra* *Lampkin*, 7 F.3d at 435 ("The facts leading up to these mistakes are not consistent among various officers' testimony and affidavits.").

242 *Id.*

243 *Thompson v. Upshur Cty., TX*, 245 F.3d 447, 457 (5th Cir. 2001).

244 *United States v. Alvarado*, 989 F. Supp. 2d 505, 522 n.21 (S.D. Miss. 2013).

245 *See* *McCoy*, 950 F.3d at 233 n.6.

246 *Alvarado*, 989 F. Supp. 2d at 522.

247 *Pierre*, 958 F.2d at 1309; *see also* *Class*, 475 U.S. at 114–15, 106 S.Ct. 960.

248 *White*, 137 S. Ct. at 552 (quotations and citation omitted).

249 *Id.* (quotations and citation omitted).

250 *Id.* at 551 (quotations and citation omitted).

251 *See Bank of Am. Nat'l Ass'n v. Stauffer*, 728 F. App'x 412, 413 (5th Cir. 2018). The situation is inapposite to the cases in Officer McClendon's reply brief. Both *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), and *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1156 (5th Cir. 1983), concerned cases in which a party argued for summary judgment on claims and the opposing party failed to address at least one of the theories of recovery in its response. In such cases, the Fifth Circuit held that the nonmoving party "abandoned its alternative theories of recovery [or defenses] by failing to present them to the trial court." *Vela*, 276 F.3d at 678–79. Here, however, Officer McClendon failed to raise an argument in his original brief as to Jamison's third claim.

252 *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015); *see also Dugger v. Stephen F. Austin State Univ.*, 232 F. Supp. 3d 938, 957 (E.D. Tex. 2017) (collecting cases demonstrating that "courts disregard new evidence or argument offered for the first time in the reply brief").

253 U.S. CONST. pmbl.

254 *Id.*

255 John Lewis, Speech at the March on Washington (Aug. 28, 1963), *available at* https://voicesofdemocracy.umd.edu/lewis-speech-at-the-marchon-washington-speech-text/.

256 *See* *June Med. Servs. L.L.C. v. Russo*, —— U.S. ——, 140 S.Ct. 2103, 2134, —— L.Ed.2d —— (2020) (Roberts, C.J., concurring).

257 *Ramos*, 140 S. Ct. at 1405 (citation omitted).

258 *See, e.g.*, @thekaranmenon, TIKTOK (June 7, 2020), https://vm.tiktok.com/JLVfBkn/.

259 That's Professor Baude's word, not mine. Baude, *supra* at 61.

260 *Wyatt v. Cole*, 504 U.S. 158, 170, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (Kennedy, J., concurring).

261 *Crawford-El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., joined by Thomas, J., dissenting) (citation omitted).

262 *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from the denial of certiorari).

263 *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part).

264 *Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1158, 200 L.Ed.2d 449 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *see also* *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

265 *Id.* at 1162.

266 According to one analysis, Justice Gorsuch's record on the Tenth Circuit signaled that he "harbors a robust —though not boundless—vision of qualified immunity" and "is sensitive to the practical concerns qualified immunity is meant to mollify—namely, the realities of law enforcement." Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (2017). On the Court of Appeals, however, those were the concerns then-Judge Gorsuch was supposed to honor. The genius of the law is that, as now-Justice Gorsuch observed in 2019, "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Gamble v. United States*, —— U.S. ——, 139 S. Ct. 1960, 2006, 204 L.Ed.2d 322 (2019) (Gorsuch, J., dissenting) (quoting Justice Brandeis). Sometimes our understanding of words changes, too, as we glean new insight into the meaning of an authoritative text. *See, e.g.*, *Bostock v. Clayton Cty., Georgia*, —— U.S. ——, 140 S. Ct. 1731, —— L.Ed.2d —— (2020). Justice Gorsuch's majority opinion in *Bostock* emphasized that "no court should ever" dispense with a statutory text "to do as we think best," adding, "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them." *Id.* at 1753. Yet that is exactly what the Court has done with § 1983.

267 *See* *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2481, 201 L.Ed.2d 924 (2018); *June Med. Servs.*, 140 S.Ct. at 2134-35 (Roberts, C.J., concurring).

268 *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020) (citation omitted).

269 42 U.S.C. § 1981(a). "[W]hile the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976).

270 *Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 586 F. App'x 643, 645-46 (5th Cir. 2014).

271 *See* *George Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 657 F.3d 251, 252 (5th Cir.2011).

272 *Id.* at 255.

273 *Id.* at 258 (quotations and citation omitted). This standard is awfully subjective.

274 *Id.* at 258-59 (Barksdale, J., dissenting).

275 *Id.* at 272.

276 *Id.* at 274.

277 *Id.* at 281-82.

278 *Id.* at 283.

279 *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *see also* *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000).

280 The most confounding made-up standard might have been from the Eleventh Circuit. For years, that court held that a plaintiff could prove discrimination based on her superior qualifications "only when the disparity in qualifications is so apparent as virtually to jump off the page and *slap you in the face*." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57, 126 S.Ct. 1195, 163 L.Ed.2d 1053 (2006) (emphasis added) (quotations and citation omitted). The Supreme Court eventually rejected the standard as "unhelpful and imprecise." *Id.* at 457, 126 S.Ct. 1195.

281 *See Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 657 F.3d 251, 251 (5th Cir. 2011).

282 We have many tools at our disposal to stop frivolous suits at any stage of litigation. *See, e.g.*, 28 U.S.C. § 1915; Fed. R. Civ. P. 11, 12, 37, and 56; *Link v. Wabash R. Co.*, 370 U.S. 626, 629, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Even after a jury has reached a verdict, a judge may set aside the decision or take other corrective actions if the judge believes a reasonable jury could not have reached the decision. *See, e.g.*, Fed. R. Civ. P. 50, 59 and 60. And where the trial court errs, the appellate court is given the opportunity to correct.

283 *Manzanares*, 331 F. Supp. 3d at 1294 n.10.

284 The Court recognizes that juries have not always done the right thing. As the Supreme Court noted in *Ramos*, some states created rules regarding jury verdicts that can be "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities' " on their juries. 140 S. Ct. at 1394. As other courts have noted, "racial discrimination remains rampant in jury selection." *State v. Saintcalle*, 178 Wash. 2d 34, 35, 309 P.3d 326 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017). Like any actor in our legal system, juries may succumb to "unintentional, institutional, or unconscious" biases. *Id.* at 36, 309 P.3d 326. However, the federal courts' adoption and expansion of qualified immunity evinces an obvious institutional bias in favor of state actors. With its more diverse makeup relative to those of us who wear the robe, a jury is best positioned to "decide justice." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701-02 (1995) (citation omitted); *see also* Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019) ("Today, more than 73 percent of sitting federal judges are men and 80 percent are white. Only 27 percent of sitting judges are women .... while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.") (citations omitted).

285 *United States v. Windsor*, 570 U.S. 744, 799, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (Scalia, J., dissenting).

286 Afterall, "[q]uite simply, jurors are the life's blood of our third branch of government." *Marchan v. John Miller Farms, Inc.*, 352 F. Supp. 3d 938, 947 (D. N.D. 2018) (citation omitted).

287 Fortunately, the dissent is readily found on Google searches and an official copy was preserved on the District Court's docket.

288 *Ramos*, 140 S. Ct. at 1408.

3:16cv595, Jamison V. Town Of Pelahatchie Et Al

US District Court Docket

US District Court for the Southern District of Mississippi

(Northern Jackson)

This case was retrieved on 10/01/2020

Header

Case Number: 3:16cv595
Date Filed: 07/28/2016
Assigned To: District Judge Carlton W. Reeves
Referred To: Magistrate Judge Linda R. Anderson
Nature of Suit: Other Civil Rights (440)
Cause: Civil Rights Act
Lead Docket: None
Other Docket: None
Jurisdiction: Federal Question

Class Code: Closed
Closed: 08/04/2020
Statute: 42:1983
Jury Demand: Plaintiff
Demand Amount: $0
NOS Description: Other Civil Rights

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Town of Pelahatchie
[Terminated: 12/11/2017]
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Proceedings

#	Date	Proceeding Text
1	07/28/2016	COMPLAINT against Nick McClendon, Town of Pelahatchie (Filing fee $ 400 receipt number 34643040430), filed by Clarence Jamison. (Attachments: # 1 Exhibit A - Picture, # 2 Exhibit B - Courtesy Warning, # 3 Civil Cover Sheet)(MGB) (Entered: 07/28/2016)
2	07/28/2016	Summons Issued as to Nick McClendon, Town of Pelahatchie. (MGB) (Entered: 07/28/2016)
3	10/21/2016	Unopposed MOTION for Extension of Time to File Answer re 1 Complaint Or Otherwise Respond to Plaintiff's Complaint by Town of Pelahatchie (Butler, Gregory) (Entered: 10/21/2016)
4	10/21/2016	NOTICE of Appearance by Gary E. Friedman on behalf of Town of Pelahatchie (Friedman, Gary) (Entered: 10/21/2016)
5	10/21/2016	ORDER granting 3 Motion for Extension of Time to Answer re 1 Complaint Town of Pelahatchie answer due 12/13/2016. Signed by Magistrate Judge Linda R. Anderson on 10/21/2016 (WG) (Entered: 10/21/2016)
6	10/25/2016	MOTION for Extension of Time to Serve Processon the Defendant Nick McClendon by Clarence Jamison (Fleitas, Victor) (Entered: 10/25/2016)
7	10/26/2016	ORDER granting unopposed 6 Motion for Extension of Time to Serve Process. Plaintiff granted until 1/24/2017 to serve process on Nick McClendon. Signed by Magistrate Judge Linda R. Anderson on 10/26/2016. (ACF) (Entered: 10/26/2016)
8	11/30/2016	Unopposed MOTION for Extension of Time to File Answer re 1 Complaint Or Otherwise Respond to Plaintiff's Complaint by Town of Pelahatchie (Butler, Gregory) (Entered: 11/30/2016)
9	11/30/2016	ORDER granting 8 Motion for Extension of Time to Answer re 1 Complaint. Town of Pelahatchie answer due 1/24/2017. Signed by Magistrate Judge Linda R. Anderson on 11/30/2016. (WG) (Entered: 11/30/2016)
10	01/23/2017	Defendants', Town of Pelahatchie, Mississippi and Nick McLendon, ANSWER to 1 Complaint and Affirmative Defenses To Plaintiff's Complaint by Nick McClendon, Town of Pelahatchie.(Butler, Gregory) (Entered: 01/23/2017)
11	01/24/2017	Rule 16(a) Initial Order Telephonic Case Management Conference set for 2/28/2017 09:30 AM before Magistrate Judge Linda R. Anderson (WG) (Entered: 01/24/2017)
12	02/27/2017	NOTICE of Service of Defendants' Pre-Discovery Disclosure by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 02/27/2017)
	02/28/2017	Minute Entry for proceedings held before Magistrate Judge Linda R. Anderson: Telephonic Case Management Conference held on 2/28/2017. Participants: Clarence Jamison, plaintiff; Clarence Jamison, plaintiff; Todd Butler, counsel for defendant. Case Management Order to be entered. (WG) (Entered: 02/28/2017)

#	Date	Proceeding Text
13	02/28/2017	CASE MANAGEMENT ORDER Disclosure due by 3/14/2017 Motions for Amended Pleadings due by 3/31/2017 Motions for Joinder of Parties due by 3/31/2017 Designate Experts Plaintiff Deadline due by 7/21/2017 Designate Experts for Defendant Deadline due by 8/21/2017 Discovery due by 10/19/2017 Motions due by 11/2/2017 Settlement Conference set for 10/12/2017 09:00 AM before Magistrate Judge Linda R. Anderson at the Jackson Federal Courthouse, 501 E. Court Street, Suite 6.150, Jackson, MS Pretrial Conference set for 3/9/2018 09:00 AM before District Judge Carlton W. Reeves Jury Trial set during a two-week trial calendar beginning on 4/2/2018 09:00 AM in Courtroom 5B (Jackson) Reeves before District Judge Carlton W. Reeves Signed by Magistrate Judge Linda R. Anderson on 2/28/2017 (WG) (Entered: 02/28/2017)
14	03/09/2017	NOTICE of Service of First Set of Interrogatories by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 03/09/2017)
15	03/09/2017	NOTICE of Service of First Set of Request for Production by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 03/09/2017)
16	05/02/2017	NOTICE of Service of Plaintiff's Pre-Discovery Disclosure by Clarence Jamison (Fleitas, Victor) (Entered: 05/02/2017)
17	06/14/2017	NOTICE of Service of Response to Interrogatories by Clarence Jamison (Fleitas, Victor) (Entered: 06/14/2017)
18	06/14/2017	NOTICE of Service of Response to Request for Production by Clarence Jamison (Fleitas, Victor) (Entered: 06/14/2017)
19	06/27/2017	NOTICE of Service of Interrogatories to Defendant McClendon Interrogatories by Clarence Jamison (Fleitas, Victor) (Entered: 06/27/2017)
20	06/27/2017	NOTICE of Service of Requests for Production of Documents to Defendant McClendon Request for Production by Clarence Jamison (Fleitas, Victor) (Entered: 06/27/2017)
21	06/27/2017	NOTICE of Service of Requests for Admissions to Defendant McClendon Request for Admissions by Clarence Jamison (Fleitas, Victor) (Entered: 06/27/2017)
22	07/11/2017	NOTICE of Service of Defendant's Response to Request for Admissions by Nick McClendon (Butler, Gregory) (Entered: 07/11/2017)
23	07/18/2017	NOTICE of Service of Defendant's Response to Interrogatories by Nick McClendon (Butler, Gregory) (Entered: 07/18/2017)
24	07/18/2017	NOTICE of Service of Defendant's Response to Request for Production by Nick McClendon (Butler, Gregory) (Entered: 07/18/2017)
25	07/21/2017	NOTICE of Service of Defendants' First Supplemental Pre-Discovery Disclosure by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 07/21/2017)
26	07/25/2017	NOTICE OF INTENT TO SERVE SUBPOENA DUCES TECUM by Nick McClendon, Town of Pelahatchie (Attachments: # 1 Exhibit A. Subpoena Duces Tecum being served on Corporation Service Company)(Butler, Gregory) (Entered: 07/25/2017)
	08/09/2017	NOTICE OF RESETTING: Settlement Conference reset for 10/26/2017 09:00 AM before Magistrate Judge Linda R. Anderson due to conflict of the Court (WG) (Entered: 08/09/2017)
27	08/10/2017	NOTICE of Service of Defendants' Second Supplemental Pre-Discovery Disclosure by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 08/10/2017)
28	08/16/2017	NOTICE OF INTENT TO SERVE SUBPOENA Duces Tecum by Nick McClendon, Town of Pelahatchie (Attachments: # 1 Exhibit A - Subpoena Duces Tecum)(Butler, Gregory) (Entered: 08/16/2017)
29	08/16/2017	Subpoena Returned Executed as to Tom Masano Auto Group, Inc., by Brian Ingham. (Butler, Gregory) (Entered: 08/16/2017)
30	08/23/2017	Subpoena Returned Executed (Subpoena Duces Tecum) as to Registered Agent: Corporation Service Company for Fluor Daniel Services Corporation. (Butler, Gregory) (Entered: 08/23/2017)
31	08/24/2017	NOTICE OF INTENT TO SERVE SUBPOENA Duces Tecum by Nick McClendon, Town of Pelahatchie (Attachments: # 1 Exhibit A - Subpoena Duces Tecum)(Butler, Gregory) (Entered: 08/24/2017)
32	08/28/2017	Subpoena Returned Executed (Subpoena Duces Tecum) as to Magistrate's Office, Bamberg County, South Carolina. (Butler, Gregory) (Entered: 08/28/2017)
33	09/12/2017	NOTICE of Service of Supplemental Response to Request for Production by Nick McClendon (Butler, Gregory) (Entered: 09/12/2017)
34	09/20/2017	Joint MOTION to Amend/Correct Case Management Deadlines by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 09/20/2017)
	09/21/2017	TEXT-ONLY ORDER granting for good cause shown 34 Joint Motion to Amend Case Management Deadlines. Amended deadlines set forth in docket entry immediately following. Signed by Magistrate Judge Linda R. Anderson on 9/21/2017. NO FURTHER WRITTEN ORDER WILL ISSUE. (WG)

#	Date	Proceeding Text
		(Entered: 09/21/2017)
	09/21/2017	Set/Reset Scheduling Order Deadlines/Hearings: Discovery due by 11/17/2017 Motions due by 12/1/2017 Settlement Conference set for 12/12/2017 09:00 AM before Magistrate Judge Linda R. Anderson Pretrial Conference set for 4/6/2018 09:00 AM before District Judge Carlton W. Reeves Jury Trial set during a two-week term of court beginning on 5/1/2018 09:00 AM in Courtroom 5B (Jackson) Reeves before District Judge Carlton W. Reeves (WG) (Entered: 09/21/2017)
35	10/09/2017	NOTICE of Service of Second Supplemental Response to Request for Production by Nick McClendon (Butler, Gregory) (Entered: 10/09/2017)
36	10/09/2017	NOTICE to Take Deposition of Plaintiff, Clarence Jamison by Nick McClendon (Butler, Gregory) (Entered: 10/09/2017)
37	10/10/2017	NOTICE OF INTENT TO SERVE SUBPOENA Duces Tecum by Nick McClendon (Attachments: # 1 Exhibit A - Subpoena Duces Tecum)(Butler, Gregory) (Entered: 10/10/2017)
38	10/10/2017	Subpoena Returned Executed (Subpoena Duces Tecum) as to TracFone Wireless, Inc. (Straight Talk Wireless). (Butler, Gregory) (Entered: 10/10/2017)
39	10/12/2017	NOTICE to Take Deposition of Plaintiff Clarence Jamison (RE-NOTICE OF DEPOSITION) by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 10/12/2017)
40	10/17/2017	NOTICE OF INTENT TO SERVE SUBPOENA Duces Tecum (Re-Notice) by Nick McClendon (Attachments: # 1 Exhibit A - Subpoena Duces Tecum)(Butler, Gregory) (Entered: 10/17/2017)
41	10/17/2017	Subpoena Returned Executed (Subpoena Duces Tecum) as to TracFone Wireless, Inc. (Straight Talk Wireless) c/o Corporate Creations Network, Inc.. (Butler, Gregory) (Entered: 10/17/2017)
42	11/06/2017	NOTICE of Service of Third Supplemental Response to Request for Production by Nick McClendon (Butler, Gregory) (Entered: 11/06/2017)
43	11/14/2017	NOTICE of Service of Defendants' Third Supplemental Pre-Discovery Disclosure by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 11/14/2017)
44	11/14/2017	NOTICE to Take Deposition of Nick McClendon by Clarence Jamison (Fleitas, Victor) (Entered: 11/14/2017)
45	11/17/2017	NOTICE of Service of Defendants' Fourth Supplemental Pre-Discovery Disclosure by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 11/17/2017)
46	12/01/2017	MOTION for Summary Judgment by Nick McClendon, Town of Pelahatchie (Attachments: # 1 Exhibit A - Interlocal Agreement, # 2 Exhibit B - Officer McLendon's CV, # 3 Exhibit C - Excerpts from Officer McLendon's Deposition, # 4 Exhibit D - Excerpts from Clarence Jamison's Deposition, # 5 Exhibit E - Clarence Jamison's Driver's License, # 6 Exhibit F - Clarence Jamison's Vehical Purchase Agreement, # 7 Exhibit G - Excerpts from Clarence Jamison's Recorded Statement, # 8 Exhibit H - Clarence Jamison's South Carolina Driving Record, # 9 Exhibit I - Officer McLendon's Law Enforcement Certification)(Butler, Gregory) (Entered: 12/01/2017)
47	12/01/2017	MEMORANDUM in Support re 46 MOTION for Summary Judgment filed by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 12/01/2017)
	12/06/2017	NOTICE OF RESETTING: Settlement Conference reset for 1/30/2018 09:00 AM before Magistrate Judge Linda R. Anderson per request and representations of counsel. (WG) (Entered: 12/06/2017)
48	12/11/2017	STIPULATION of Dismissal by Town of Pelahatchie (Butler, Gregory) (Entered: 12/11/2017)
49	12/15/2017	MOTION for Extension of Time to File Response/Reply as to 46 MOTION for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 12/15/2017)
	12/18/2017	TEXT-ONLY ORDER granting 49 Unopposed Motion for Extension of Time to File Response re 46 MOTION for Summary Judgment. Response due on 12/29/2017. Signed by District Judge Carlton W. Reeves on 12/18/2017. NO FURTHER WRITTEN ORDER SHALL ISSUE ON THIS MOTION. (AC) (Entered: 12/18/2017)
50	12/20/2017	ORDER dismissing Town of Pelahatchie. Signed by District Judge Carlton W. Reeves on 12/20/2017. (AC) (Entered: 12/20/2017)
51	12/27/2017	Second MOTION for Extension of Time to File Response/Reply as to 46 MOTION for Summary Judgment Motion for Further Extension of Time to Respond to Motion for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 12/27/2017)
52	01/08/2018	Third MOTION for Extension of Time to File Response/Reply as to 46 MOTION for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 01/08/2018)
53	01/16/2018	RESPONSE in Opposition re 46 MOTION for Summary Judgment filed by Clarence Jamison (Attachments: # 1 Exhibit "A" Statement of Clarence Jamison, # 2 Exhibit "B" Deposition of Clarence Jamison, # 3 Exhibit "C" Deposition of Nick McLendon, # 4 Exhibit "D" Photograph of Temporary Tag, # 5 Exhibit "E" Courtesy Warning Pelahatchie Police Department)(Fleitas, Victor) (Entered: 01/16/2018)

#	Date	Proceeding Text
54	01/16/2018	MEMORANDUM in Opposition re 46 MOTION for Summary Judgment filed by Clarence Jamison (Fleitas, Victor) (Entered: 01/16/2018)
55	01/19/2018	Fourth MOTION for Extension of Time to File Response/Reply as to 46 MOTION for Summary Judgment Motion Out of Time for Extension of Time to Respond to Motion [Doc. 46] for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 01/19/2018)
56	01/22/2018	Unopposed MOTION for Extension of Time to File Response/Reply in Support of Motion for Summary Judgment by Nick McClendon (Butler, Gregory) (Entered: 01/22/2018)
	01/23/2018	TEXT-ONLY ORDER re 51 52 55 56 Motions for Extension of Time. The requested relief is granted. Signed by District Judge Carlton W. Reeves on 1/23/2018. NO FURTHER WRITTEN ORDER SHALL ISSUE ON THESE MOTIONS. (AC) (Entered: 01/23/2018)
57	01/23/2018	REPLY to Response to Motion re 53 Response in Opposition to Motion, 46 MOTION for Summary Judgment filed by Nick McClendon (Attachments: # 1 Exhibit J. Additional Excerpts from Clarence Jamisons Deposition, # 2 Exhibit K. Additional Excerpts from Officer McLendons Deposition)(Butler, Gregory) (Entered: 01/23/2018)
58	01/23/2018	MEMORANDUM IN SUPPORT re 57 Reply to Response to Motion, 46 MOTION for Summary Judgment filed by Nick McClendon (Butler, Gregory) (Entered: 01/23/2018)
	01/30/2018	Minute Entry for proceedings held before Magistrate Judge Linda R. Anderson: Settlement Conference convened on 1/30/2018. Appearances: Gregory Todd Butler, counsel for defendant. Plaintiff and counsel for plaintiff failed to appear. The Court contacted plaintiff's counsel by phone and was advised that counsel was ill. Conference will be rescheduled. (WG) (Entered: 01/30/2018)
	01/30/2018	NOTICE OF RESETTING: Settlement Conference reset for 2/27/2018 09:00 AM before Magistrate Judge Linda R. Anderson at the Jackson Federal Courthouse, 501 E. Court Street, Suite 6.150, Jackson, MS (WG) (Entered: 01/30/2018)
	02/08/2018	Set/Reset Hearings as to 46 MOTION for Summary Judgment. Motion Hearing set for 2/26/2018 at 1:30 PM in Courtroom 5B (Jackson Federal Courthouse) before District Judge Carlton W. Reeves. (AC) (Entered: 02/08/2018)
	02/13/2018	TEXT-ONLY ORDER cancelling settlement conference set for 2/27/2018 per request and representations of counsel. Signed by Magistrate Judge Linda R. Anderson on 2/13/2018. NO FURTHER WRITTEN ORDER WILL ISSUE. (WG) (Entered: 02/13/2018)
	02/26/2018	Minute Entry for proceedings held before District Judge Carlton W. Reeves: Motion Hearing held on 2/26/2018 re 46 MOTION for Summary Judgment filed by Nick McClendon. Appearances: Gregory Todd Butler and Victor I. Fleitas. Court heard from the parties on the issues and shall take the matters under advisement for a ruling at a later date. Court Reporter/Transcriber Gina Morris, Telephone Number : 601-608-4187. (JS) (Entered: 02/26/2018)
59	03/16/2018	NOTICE: of Judge Reeves April 2018 Pretrial Conferences and May Civil Trial Calendar. (JS) (Entered: 03/16/2018)
	03/16/2018	Set Hearing: Pretrial Conference set for 4/6/2018 at 10:00 AM before District Judge Carlton W. Reeves. (JS) (Entered: 03/16/2018)
60	03/21/2018	Unopposed MOTION to Withdraw as Attorney by Nick McClendon (Friedman, Gary) (Entered: 03/21/2018)
61	03/22/2018	ORDER granting 60 Motion to Withdraw as Attorney. Attorney Gary E. Friedman terminated. Signed by Magistrate Judge Linda R. Anderson on 3/22/2018. (WG) (Entered: 03/22/2018)
	04/04/2018	TEXT ONLY ORDER cancelling the Pretrial Conference originally scheduled for 4/6/2018. The Court will reschedule if it finds there is a need for one. NO FURTHER WRITTEN ORDER SHALL BE ISSUED. Signed by District Judge Carlton W. Reeves on 4/4/2018. (JS) (Entered: 04/04/2018)
62	09/26/2018	ORDER granting in part and deferring in part 46 Motion for Summary Judgment. Signed by District Judge Carlton W. Reeves on 9/26/2018. (AC) (Entered: 09/26/2018)
63	10/31/2018	MOTION for Summary Judgment (RENEWED) by Nick McClendon (Butler, Gregory) (Entered: 10/31/2018)
64	10/31/2018	MEMORANDUM in Support re 63 MOTION for Summary Judgment (RENEWED) filed by Nick McClendon (Butler, Gregory) (Entered: 10/31/2018)
65	11/14/2018	MOTION for Extension of Time to File Response/Reply as to 63 MOTION for Summary Judgment (RENEWED) Motion for Extension of Time to Respond to Renewed Motion for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 11/14/2018)
66	12/05/2018	Unopposed MOTION for Extension of Time to File Response/Reply as to 63 MOTION for Summary Judgment (RENEWED) Motion for Further Extension of Time to File Response to Renewed Motion for Summary Judgment by Clarence Jamison (Fleitas, Victor) (Entered: 12/05/2018)

#	Date	Proceeding Text
	12/06/2018	TEXT-ONLY ORDER granting 65 and 66 Unopposed Motions for Extension of Time to File Response re 63 MOTION for Summary Judgment (RENEWED). The new response deadline is 12/10/2018. Signed by District Judge Carlton W. Reeves on 12/6/2018. NO FURTHER WRITTEN ORDER SHALL ISSUE ON THESE MOTIONS. (AC) (Entered: 12/06/2018)
67	12/10/2018	RESPONSE in Opposition re 63 MOTION for Summary Judgment (RENEWED) filed by Clarence Jamison (Fleitas, Victor) (Entered: 12/10/2018)
68	12/10/2018	MEMORANDUM in Opposition re 63 MOTION for Summary Judgment (RENEWED) filed by Clarence Jamison (Fleitas, Victor) (Entered: 12/10/2018)
69	12/11/2018	Unopposed MOTION for Extension of Time to File Reply to Response to Renewed Motion for Summary Judgment, document 63 , by Nick McClendon (Butler, Gregory) Modified on 12/11/2018 (PKM). (Entered: 12/11/2018)
	12/11/2018	DOCKET ANNOTATION as to 69 : Clerk's office has modified entry to show a relationship to document 63 , MOTION for Summary Judgment (RENEWED) (PKM) (Entered: 12/11/2018)
70	12/11/2018	ORDER granting 69 Motion for Extension of Time. Defendant McClendon shall have until January 7, 2019 to reply to Plaintiff Clarence Jamison's Response to the Renewed Motion for Summary Judgment. Signed by District Judge Carlton W. Reeves on 12/11/18 (TRS) (Entered: 12/11/2018)
71	01/03/2019	REPLY to Response to Motion re 63 MOTION for Summary Judgment (RENEWED), 67 Response in Opposition to Motion For Summary Judgment (Renewed) filed by Nick McClendon (Butler, Gregory) (Entered: 01/03/2019)
72	08/04/2020	ORDER granting 63 Motion for Summary Judgment. Signed by District Judge Carlton W. Reeves on 8/4/20. (AC) (Entered: 08/04/2020)
73	08/04/2020	STIPULATION of Dismissal of All Claims Against All Defendants by Nick McClendon, Town of Pelahatchie (Butler, Gregory) (Entered: 08/04/2020)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON — PLAINTIFF

VERSUS — NO. 3:16CV595 CWR-LRA

TOWN OF PELAHATCHIE
AND NICK MCCLENDON,
In His Individual Capacity — DEFENDANTS

JURY TRIAL DEMANDED

COMPLAINT

This is a civil action to recover actual, compensatory, and punitive damages for the Defendants' violations of Mr. Jamison's rights pursuant to the Fourth Amendment and Fourteenth Amendment made actionable pursuant to 42 U.S.C. § 1983. For cause, Mr. Jamison shows the Court as follows:

PARTIES

1. The Plaintiff, Clarence Jamison, is an adult resident citizen of Neeses, South Carolina 29107.

2. The Defendant, Town of Pelahatchie ("Pelahatchie"), is a municipal corporation organized pursuant to the laws of Mississippi. The Defendant Pelahatchie may be served with process by service of a summons and complaint upon its City Clerk, Ms. Bettye Massey, 705 Second Street, Pelahatchie, Mississippi 39145.

3. The Defendant Nick McClendon, is an adult resident citizen of Rankin

County, Mississippi. The Defendant McClendon may be served with process by service of a summons and complaint upon him at 108 South Brooks Street, Pelahatchie, Mississippi 39145.

JURISDICTION & VENUE

4. This Court has subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 (Federal Question), and 28 U.S.C. § 1343(a)(3) (Civil Rights).

5. Venue is proper in the Southern District of Mississippi, pursuant to 28 U.S.C. § 1391, since substantial part of the events and omissions giving rise to this claim occurred in this judicial district.

CAUSE OF ACTION

6. On or about July 29, 2013, Mr. Jamison found himself driving home to South Carolina, from a vacation in Las Vegas, Nevada. Mr. Jamison traveled home through Mississippi East-bound on Interstate 20.

7. Upon entering the jurisdiction of the Town of Pelahatchie, on I-20, Mr. Jamison passed a patrol car sitting on the right hand side of the interstate.

8. After passing the patrol car Mr. Jamison was immediately blue-lighted and pulled over.

9. Mr. Jamison had not committed any traffic violation and no objectively reasonable basis existed for him to have been pulled over.

10. Mr. Jamison was stopped at approximately 7:30 p.m., while there was still daylight.

11. The Defendant McClendon, who ultimately refused to identify himself despite several requests from Mr. Jamison, approached Mr. Jamison's car and asked for his license and registration.

12. Mr. Jamison complied by producing his valid license and registration and the Defendant McClendon returned to his patrol car.

13. When the Defendant McClendon returned to Mr. Jamison's car, he handed back the license and registration to Mr. Jamison. At that point, Mr. Jamison asked the Defendant McClendon why he had been pulled over.

14. The Defendant McClendon responded that he pulled over Mr. Jamison because the temporary tag on his car was curled at the bottom.

15. This statement by the Defendant McClendon was untrue, as the temporary tag was bolted onto the car as shown in the photograph attached to this Complaint as Exhibit "A" and fully incorporated into this Complaint by reference.

16. Despite fully resolving the stated pretextual reason for stopping Mr. Jamison, the Defendant McClendon began asking Mr. Jamison questions regarding where he was traveling from and going to.

17. This roadside inquisition by the Defendant McClendon needlessly extended

Mr. Jamison's stop beyond the time necessary to resolve the stated pretextual reason for the stop.

18. Mr. Jamison answered the Defendant McClendon's questions and, assuming he was now free to leave, prepared to drive off and resume his travel home.

19. However, prior to Mr. Jamison driving off, the Defendant McClendon placed his hand and arm inside Mr. Jamison's car, physically barring Mr. Jamison from driving off, and told Mr. Jamison to hold on a minute.

20. The Defendant McClendon then asked if he could search Mr. Jamison's car. When Mr. Jamison asked the Defendant McClendon "Why?," he told Mr. Jamison that he had received a call that there were 10 kilos of cocaine in his car. Mr. Jamison told the Defendant McClendon there was no cocaine in his car.

21. The Defendant McClendon's statement that he wanted to search Mr. Jamison's car, due to an alleged call regarding drugs, was either a deliberate falsehood, making his earlier assertion that he stopped Mr. Jamison due to the tag a falsehood, or did not constitute reasonable suspicion to justify stopping and detaining Mr. Jamison.

22. Despite Mr. Jamison's desire to continue on his way, the Defendant McClendon physically prevented Mr. Jamison from driving off.

23. While unable to drive away due to the Defendant McClendon physically keeping his arm in Mr. Jamison's car, the Defendant McClendon continued to ask Mr.

Jamison, if he could search the car.

23. Mr. Jamison, cognizant of the fact that he had nothing illegal in his car and that his continuing refusal to give consent would only further delay his trip home, relented to the Defendant McClendon's restraint of his freedom to continue on his travel and told the Defendant McClendon that he would allow a search of his car if he was within view of and present during the search.

24. Mr. Jamison's consent to search was not voluntarily and freely given but was coerced by the Defendant McClendon's physical restraint of Mr. Jamison's freedom to continue his travel.

25. Mr. Jamison was asked to step out of the car and submit to a pat down. Mr. Jamison complied and the Defendant McClendon, finding nothing, told him to step to the front of the patrol car.

26. Once Mr. Jamison was standing in front of the patrol car, the Defendant McClendon began searching Mr. Jamison's car. The Defendant McClendon thoroughly searched the passenger area of Mr. Jamison's car, finding nothing.

27. The Defendant McClendon saw Mr. Jamison's cell phone in the car and began looking through it. The Defendant McClendon then resumed searching the rest of the car, again, finding nothing.

28. The Defendant McClendon then took Mr. Jamison's cell phone back to his

patrol car and continued to look through it. It appeared to Mr. Jamison as if the Defendant McClendon placed a call from his phone.

29. The Defendant McClendon returned Mr. Jamison's phone to him and questioned him again about where he was driving from. Mr. Jamison informed the Defendant McClendon, again, and the Defendant McClendon told Mr. Jamison that his "story" just wasn't "panning out."

30. Mr. Jamison had been detained for approximately 45 minutes, at this point, when the Defendant McClendon searched Mr. Jamison's car a second time.

31. The second search of Mr. Jamison's car took approximately 45 more minutes. The Defendant McClendon told Mr. Jamison that when he got a "hunch" about a vehicle, that nine out of ten times, his hunch proved true.

32. At that point, Mr. Jamison asked another officer at the stop if he would be allowed to use the bathroom and, with that officer's permission, proceeded to the edge of some woods to relieve himself.

33. When Mr. Jamison returned to the front of the patrol car, the Defendant McClendon made a false allegation by suggesting that Mr. Jamison's license was suspended. Mr. Jamison told the Defendant McClendon there was no way his license was suspended.

34. The Defendant McClendon then went into his patrol car and retrieved a

borescope to search Mr. Jamison's car..

35. The Defendant McClendon told Mr. Jamison that he would not arrest him if he found a "roach" in the car, he just wanted the 10 kilos of cocaine.

36. The Defendant McClendon then searched Mr. Jamison's car a third time taking another approximately 30-45 minutes to do so.

37. By this time it was completely dark outside. The Defendant McClendon returned to the patrol car again and spoke into his radio.

38. The Defendant McClendon then falsely stated to Mr. Jamison that the vehicle check came back stolen. Mr. Jamison told the Defendant McClendon that he was out of his mind.

39. The Defendant McClendon returned to Mr. Jamison's car and began to search it yet again.

40. Mr. Jamison asked to use the bathroom again and was allowed to go to the edge of the woods to relieve himself.

41. The Defendant McClendon then told Mr. Jamison that he had a K-9 unit present and he was going to use the K-9 to search his car. The K-9 searched the interior and exterior of Mr. Jamison's car without alerting to the presence of drugs. The Defendant McClendon put the K-9 unit back in a patrol car and proceeded to search Mr. Jamison's car again.

42. While Mr. Jamison stood where instructed, at the front of the patrol car, an 18-wheeler passed by and Mr. Jamison heard a loud popping noise.

43. Feeling unsafe, Mr. Jamison moved to the side of his car, but was told to return to the front of the patrol car by the Defendant McClendon.

44. The Defendant McClendon then told Mr. Jamison that he did not like his attitude. Mr. Jamison, wanting to avoid being goaded into a confrontation by the Defendant McClendon, kept quiet.

45. Another officer then called the Defendant McClendon to return to the driver's side of the patrol car. The two officers spoke, out of earshot of Mr. Jamison.

46. The Defendant McClendon then asked Mr. Jamison for his driver's license again. Mr. Jamison complied with this request.

47. The Defendant McClendon returned to his patrol car with the license for approximately 10-15 minutes. The Defendant McClendon got out of the patrol car and handed Mr. Jamison his license.

48. Mr. Jamison, assuming he was finally going to be allowed to leave, started walking towards his car with the Defendant McClendon. The Defendant McClendon then asked Mr. Jamison for his license again, walked back to his patrol car with the license, and talked on the radio some more.

49. When he stopped talking on his radio, the Defendant McClendon handed

Mr. Jamison his license and returned to searching the open hood area of Mr. Jamison's car with the borescope.

50. When he finished searching with the borescope, the Defendant McClendon returned to his patrol car and grabbed a screwdriver.

51. The Defendant McClendon returned to the hood area of Mr. Jamison's car with the screwdriver, but Mr. Jamison was unable to see what he was doing. The Defendant McClendon then returned to the patrol car.

52. At this point, the Defendant McClendon told Mr. Jamison that he could return to his car. The Defendant McClendon told Mr. Jamison to open and close the convertible top so that he could inspect it. Mr. Jamison's belongings were then returned to his car by two other officers.

53. The Defendant McClendon handed Mr. Jamison his flashlight and asked him to check the car for damage. Due to the darkness and his haste to leave, Mr. Jamison did not notice the damage done to his car during the Defendant McClendon's multiple searches.

54. The Defendant McClendonr finally handed Mr. Jamison his keys and asked him if they were "okay."

55. Mr. Jamison told the Defendant McClendon that he wanted some information from him. The Defendant McClendon responded that he could "charge"

Mr. Jamison with something and asked when he could come back to deal with the charge. Mr. Jamison did not respond to the Defendant McClendon's threat.

56. The Defendant McClendon then handed Mr. Jamison a "Courtesy Warning," which is attached hereto as Exhibit B and is fully incorporated into this Complaint by reference.

57. Mr. Jamison was finally allowed to leave at approximately 11:30 p.m.

58. The Defendant McClendon consciously took Mr. Jamison's race into consideration when he stopped, searched and detained Mr. Jamison.

59. Only later did Mr. Jamison notice that significant damage had been done to his car during the Defendant McClendon's search.

60. The Defendant Pelahatchie maintained a *de facto* policy, practice, custom, or usage which authorized its officers to make illegal stops of motorists, particularly African-American motorists, as a pretext for conducting drug searches.

61. The Defendant Pelahatchie authorized, condoned and ratified the unconstitutional stop, search and detention of Mr. Jamison, by the Defendant McClendon.

62. The Defendant McClendon was at all times relevant to this civil action acting under color of state law.

63. The Defendant McClendon, at all times relevant to this civil action, acted

with reckless disregard towards Mr. Jamison's federally protected rights.

Claim 1 (Fourth Amendment - Stop, Search & Detention)

64. The Defendant McClendon and the Defendant Pelahatchie are liable to Mr. Jamison for falsely stopping him, searching his car, and detaining him in the absence of any objectively reasonable basis for the stop, search and detention, and in the absence of either reasonable suspicion or probable cause to stop, search, and detain Mr. Jamison.

65. As a direct and proximate result of the Defendants' acts which violated Mr. Jamison's constitutional rights, he suffered financial and emotional injury.

Claim 2 (Fourteenth Amendment - Equal Protection)

66. The Defendant McClendon and the Defendant Pelahatchie are liable to Mr. Jamison for using his race a motivating factor in the decision to stop him, search his car, and detain him in the absence of any objectively reasonable basis for the stop, search and detention, and in the absence of either reasonable suspicion or probable cause to stop, search, and detain Mr. Jamison.

67. As a direct and proximate result of the Defendants' acts which violated Mr. Jamison's constitutional rights, he suffered financial and emotional injury.

Claim 3 (Fourth Amendment - Seizure of Property & Damage)

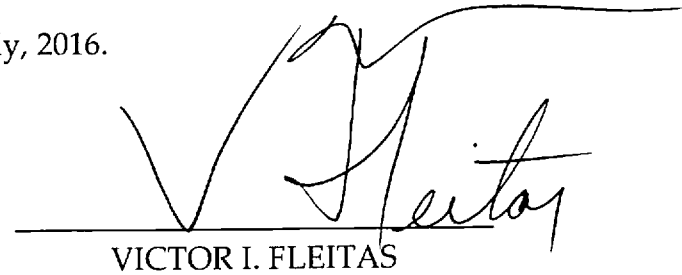
68. The Defendant McClendon is liable to Mr. Jamison for recklessly and deliberately causing significant damage to Mr. Jamison's car by conducting an unlawful

search of the car in an objectively unreasonable manner amounting to an unlawful seizure of his property.

69. As a direct and proximate result of the Defendant McClendon's acts which violated Mr. Jamison's constitutional rights, he suffered financial and emotional injury.

WHEREFORE, PREMISES CONSIDERED, Mr. Jamison prays for actual and compensatory damages against all defendants, in an amount to be determined by the trier of fact, for punitive damages against the Defendant McClendon, in his individual capacity, in an amount to be determined by the trier of fact, for a reasonable attorney's fee pursuant to 42 U.S.C. § 1988, for all allowable costs of this civil action, and for any and all other relief to which Mr. Jamison is entitled in law or equity.

Respectfully submitted, this the 27th day of July, 2016.



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Attorney for Clarence Jamison

2342-436

COURTESY WARNING

PELAHATCHIE POLICE DEPARTMENT

DATE: 7-29-13 HOUR: 2011

DRIVER NAME (LAST)	FIRST	MI	DOB	SEX	R.
Tomson	Clarence	JR	9-26-71	M	B

ADDRESS	CITY	STATE	ZIP
118 Ladybug Rd	Morton	MS	39117

VEHICLE MAKE & TYPE	LICENSE NO.	STATE	D.L. NO.	STATE
MFRZ CLK 430	2342436	PA	10879963	MS

COUNTY	LOCATION & ROUTE	CONST. ZONE	WORKERS PRESENT
Rankin	I-20 East @ MM 69	☐ YES ☒ NO	☐ YES ☐ NO

VEHICLE SEARCH	TYPE OF SEARCH	CONSENT	INCIDENT TO ARREST	INVENTORY	CONTRABAND FOUND	TYPE OF CONTRABAND	CHARGES FILED
YES ☐ NO ☐		PC ☐	☐	☐	YES ☐ NO ☐	DRUGS ☐ WEAPONS ☐ CURRENCY ☐ OTHER ☐	YES ☐ NO ☐

VIOLATION (1) N/A Tag

VIOLATION (2)

THIS IS A WARNING ONLY for an infraction of the traffic laws committed to a minor degree or with extenuating circumstances present. No penalty will be assessed and no further action on your part is necessary other than to comply with the traffic laws in the future. This does not become a part of your driving record.

This warning is given to you in an effort to secure your cooperation in better observance of the traffic laws thus helping to prevent traffic accidents. This department believes that good citizens will comply with traffic laws when reminded of their provisions and of the importance of strict compliance with them.

ISSUED BY [signature] I.D. NO. 379

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFF**

VS. **CIVIL ACTION NO.: 3:16-CV-595-CWR-LRA**

TOWN OF PELAHATCHIE ET AL. **DEFENDANTS**

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants the Town of Pelahatchie, Mississippi and Nick McLendon move for summary judgment under Rule 56. The contemporaneously filed memorandum in support explains why all claims against all defendants should be dismissed as a matter of law. In addition to the memorandum, the defendants offer the following exhibits in support:

A. Interlocal Agreement;

B. Officer McLendon's CV;

C. Excerpts from Officer McLendon's Deposition;

D. Excerpts from Clarence Jamison's Deposition;

E. Clarence Jamison's Driver's License;

F. Clarence Jamison's Vehicle Purchase Agreement;

G. Excerpts from Clarence Jamison's Recorded Statement;

H. Clarence Jamison's South Carolina Driving Record; and

I. Officer McLendon's Law Enforcement Certification.

For the reasons explained in the memorandum in support, this case should be dismissed, and a final judgment should be entered in the defendants' favor.

Dated: December 1, 2017.

Respectfully submitted,

PHELPS DUNBAR, LLP

BY: */s/G. Todd Butler*

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the foregoing *MOTION* with the Clerk of the Court, using the CM/ECF system, which sent notification of such filing to the following counsel of record:

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Telephone: (662) 840-0270
fleitasv@bellsouth.net

ATTORNEY FOR PLAINTIFF

THIS, 1st day of December 2017.

/s/ G. Todd Butler
G. TODD BUTLER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFFS**

VS. **CIVIL ACTION NO.: 3:16-cv-00595-CWR-LRA**

TOWN OF PELAHATCHIE ET AL. **DEFENDANTS**

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

One day before the three year statute of limitations period expired, Plaintiff Clarence Jamison filed this 42 U.S.C. § 1983 action against Defendants Nick McLendon and the Town of Pelahatchie.[1] It alleges violations of the Fourth and Fourteenth Amendments in relation to a traffic stop conducted on Interstate 20.[2] Because there are no genuine issues of material fact, summary judgment should be granted under Rule 56.

BACKGROUND

There is an interlocal agreement between the City of Richland and the Town of Pelahatchie, which permits Richland law enforcement officers to police I-20 running through Pelahatchie.[3] I-20 "is a common drug-trafficking route[.]"[4] *See, e.g., United States v. Cruz,* 2009 WL 3448836, *3 (S.D. Miss. 2009). McLendon is employed by Richland and "has worked highway interdiction for the City of Pearl and the City of Richland Police Departments since the year 2008."[5] In that time period, he "has self-initiated over 103 criminal interdiction cases involving bulk smuggling of contraband" and has "assisted in over 100 criminal interdiction

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[1] Complaint, Doc. No. 1.

[2] *Id*.

[3] Interlocal Agreement, Ex. A_.

[4] *See also* Scott Simmons, *Task Force: I-20 becoming major drug pipline*, WAPT NEWS, *available at* http://www.wapt.com/article/task-force-i-20-becoming-major-drug-pipeline-1/2085442 (last visited November 30, 2017).

[5] McLendon CV, Ex. B.

cases" as well.[6] Officer McLendon's efforts have "led to the disruption of several Drug Trafficking Organizations."[7] He is "recognized as an expert witness in the fields of Criminal Interdiction and Drug Trafficking [by] the States of Mississippi and Louisiana."[8]

Officer McLendon's patrol vehicle is equipped with a License Plate Recognition ("LPR") system.[9] LPR "is a computer assisted device with a camera which reads and interprets license plates of other vehicles[.]" *See, e.g., United States v. Williams*, 2014 WL 2573299, *2 (E.D. Mo. 2014). "It gives an alert by way of a computer screen on the inside of the vehicle which is generated and operated by cameras on the exterior of the car which takes pictures of the license plate." *Id.*

This civil lawsuit grew out of a stop conducted by Officer McLendon on July 29, 2013.[10] Officer McLendon was situated on the side of the Interstate near Pelahatchie, scanning tags through use of his LPR system.[11] When Jamison passed by, Officer McLendon's LPR system did not recognize the tag because Jamison's vehicle did not have an official license plate.[12] It instead had a temporary tag.[13]

Officer McLendon pulled onto the Interstate and behind Jamison.[14] He was unable to clearly view the temporary tag and blue lighted Jamison.[15] Jamison pulled over to the right shoulder of the interstate.[16]

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6 *Id.*
7 *Id.*
8 *Id.*
9 McLendon Depo. at 20-25, Ex. C.
10 Complaint, Doc. No. 1.
11 McLendon Depo. at 26-27, Ex. C.
12 *Id.* at 27.
13 *Id.*
14 *Id.* at 27-28.
15 *Id.*
16 Jamison Depo. at 50, Ex. D.

Upon walking up to Jamison's vehicle, Jamison informed Officer McLendon that he was traveling from Phoenix, Arizona.[17] Officer Jamison, an experienced interdiction officer, was aware that Phoenix is a major drug corridor.[18] Jamison provided Officer McLendon a South Carolina Driver's License as well as vehicle papers showing that Jamison's Mercedes Convertible had been purchased in Reading, Pennsylvania 13 days earlier.[19]

Officer McLendon called in Jamison's information to his dispatcher.[20] While dispatch was checking Jamison's Driver's License and VIN number, Officer McLendon returned to Jamison's vehicle.[21] Officer McLendon was awaiting a return phone call from his dispatcher.[22]

Back at the vehicle, Officer McLendon requested permission to search Jamison's car.[23] Jamison initially questioned Officer McLendon about why he wanted to conduct a search but later provided permission as long as Jamison "could see what [Officer McLendon was] doing[.]"[24] As Officer McLendon began the search, the dispatcher phoned him and informed him that they were have difficulties confirming that Jamison's license was not suspended.[25] Jamison's driving record shows that his license was suspended various times prior to July 2013 for alcohol-related offenses.[26]

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17 *Id*. at 45; McLendon Depo. at 30, Ex. C.

18 McLendon Depo. at 30, Ex. C.

19 Jamison Depo. at 53-54, 88, Ex. D; Jamison Driver's License, Ex. E; Jamison's Purchase Agreement, Ex. F.

20 Jamison Depo. at 54-55, Ex. D; McLendon Depo. at 38-41, Ex.C.

21 McLendon Depo. at 38-40, Ex. C.

22 *Id*. at 47-48.

23 Jamison Recorded Statement at 5-7, Ex. G; Jamison Depo. at 56-62, Ex. D.

24 *Id*.

25 McLendon Depo. at 47-48, Ex. C.

26 Jamison South Carolina Driving Record, Ex. H.

Officer McLendon's search uncovered nothing illegal.[27] Officer McLendon then asked Jamison if he could deploy his K-9 to complete the search, and Jamison agreed to Officer McLendon's use of the K-9.[28] The K-9 likewise uncovered nothing illegal.[29]

At the conclusion of the search, Officer McLendon gave Jamison his flashlight and instructed him to let him know if anything was damaged.[30] Officer McLendon told Jamison that he would pay for any damages.[31] Jamison told Officer McLendon that he did not see any damage.[32]

This lawsuit followed on July 28, 2016, nearly three years later.[33] Jamison alleges that Officer McLendon caused approximately $4,000.00 in property damage to his vehicle, even though he said there was no property damage at the time of the stop and even though he admits that he has never made repairs to the vehicle.[34] Jamison also alleges that Officer McLendon caused him "emotional distress," even though he admits that Officer McLendon was friendly towards him and even though he has never sought any medical treatment for the alleged emotional distress.[35] Discovery has concluded.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted when there are no genuine issues of material fact. A fact is material if it is essential under the applicable theory of recovery, and, without it, the nonmovant is unable prevail. *See Celotex v. Catrett*, 477 U.S. 317 (1986). The movant's burden is to merely point out the absence

27 McLendon Depo. at 53, Ex. C.
28 Jamison Depo. at 72, Ex. D.
29 *Id*. at 73.
30 *Id*. at 78-79.
31 *Id*. at 78.
32 *Id*. at 79.
33 *See* Complaint, Doc. No. 1.
34 Jamison Depo. at 97, 100-101, Ex. D.
35 *Id*. at 63, 101-03.

of evidence supporting the nonmovant's case. *See Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996).

Once the movant meets his or her burden, the nonmovant must go beyond the pleadings and "identify specific evidence in the record, and articulate the 'precise manner' in which that evidence support[s] [his] claim." *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). Allegations without substance will not defeat summary judgment. *See Celotex*, 477 U.S. at 321. If the nonmovant fails to meet his or her burden, then summary judgment should be granted. *See Stults*, 76 F.3d at 656-57 (citing *Tubacex, Inc. v. M/V Risan*, 45 F. 3d 951, 954 (5th Cir. 1995)). "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment[.]" *See Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006) (internal quotation marks omitted).

ARGUMENT & AUTHORITIES

Jamison brings his Section 1983 claims against the Town of Pelahatchie and Officer McLendon in his individual capacity.[36] In particular, Jamison alleges violations of his Fourth and Fourteenth Amendment rights.[37] According to Jamison, both Officer McLendon's stop and subsequent search were unconstitutional.[38]

The applicable legal standards that govern are settled. Actions against municipalities are analyzed under a framework that requires a plaintiff to show both (1) that a violation of the Constitution or federal law occurred and (2) that a governmental policy or custom was the moving force behind the violation. *See, e.g., Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 209 (5th Cir. 2011). Alternatively, individual-capacity defendants enjoy the qualified-immunity defense, meaning that a plaintiff must show both (1) that a violation of the Constitution or federal law

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[36] Complaint, Doc. No. 1.
[37] *Id.*
[38] *Id.*

occurred and (2) that the individual-capacity defendants' actions were objectively unreasonable under clearly established law. *See, e.g., Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252-53 (5th Cir. 2005).

Jamison's claims are deficient in their totality. Most fundamentally, there can be no liability against any of the defendants because Jamison cannot prove a constitutional violation. Moreover, even if Jamison could make such a showing, there still would be no liability because he cannot establish a "governmental policy or custom" against Pelahatchie or objectively unreasonable conduct under clearly established law against Officer McLendon. The analytical path towards dismissal is addressed in turn.

No Constitutional Violation. Jamison's Fourth and Fourteenth Amendment claims are aimed at the same conduct, specifically Officer McLendon's stop and subsequent search.[39] But the claims require different standards of proof for liability purposes. The Fourteenth Amendment claim, on the one hand, requires a showing that Officer McLendon's actions were motivated by Jamison's race. *See, e.g., Whren v. United States*, 517 U.S. 806, 813, (1996).[40] The Fourth Amendment claim, on the other hand, requires a showing that there was a lack of legal justification for Officer McLendon's actions, i.e. reasonable suspicion, probable cause, consent, etc. *See, e.g., United States v. Turner*, 839 F.3d 429, 432-33 (5th Cir. 2016) (explaining that the Fourth Amendment's "reasonableness" inquiry requires sufficient justification for governmental action). Neither claim has merit.

Fourteenth Amendment. Jamison acknowledged at his deposition that Officer McLendon told him that he stopped him because of his tag.[41] Once stopped, Officer McLendon

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[39] *Id.*

[40] *See also Suber v. Guinta*, 927 F.Supp.2d 184, 202 (E.D.Pa. 2013) ("Intentional or purposeful discrimination is a necessary element of an equal protection claim.").

[41] Jamison Depo at 83-84, Ex. D.

had good reason to be suspicious of Jamison, but it did not have anything to do with Jamison's race. Jamison was driving from a known drug location on the West Coast (Phoenix, Arizona),[42] he was driving down a known drug route (Interstate 20),[43] he was driving a car that had been purchased on the East Coast 13 days prior,[44] he handed Officer McLendon a South Carolina Driver's License,[45] and the vehicle he had a temporary tag from Pennsylvania.[46] Nothing other than Jamison's own speculative opinion has been offered in the way of evidence on the Equal Protection claim.[47] *See Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003) (explaining that "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment").

Jamison simply cannot prove what he must prove to succeed under the Fourteenth Amendment. Aside from having no evidence of a racial animus, he has no evidence that Officer McLendon treated him differently than any other similarly situated drivers. *See, e.g., Lawson v. Martinez*, 2015 WL 1966069, *4 (W.D. Tex. 2015) (outlining the substantive requirements of a Fourteenth Amendment claim). The Equal Protection claim fails. *See, e.g., McNight v. Eason*, 227 Fed. App'x 356 (5th Cir. 2007) (holding that conclusory allegations of racial discrimination cannot support a viable equal protection claim).

Fourth Amendment. Officer McLendon needed only reasonable suspicion to pull Jamison over. *See, e.g., United States v. Wright*, 2012 WL 1636087, *1 (M.D. La. 2012) ("Investigatory stops, such as pulling over a vehicle, require reasonable suspicion to pass muster under the Fourth Amendment."). Reasonable suspicion is "an objectively reasonable suspicion

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[42] *Id*. at 45; McLendon Depo. at 30, Ex. C.
[43] *See, e.g., Cruz*, 2009 WL 3448836 at *3.
[44] Jamison Depo. at 53-54, 88, Ex. D; Jamison's Purchase Agreement, Ex. F.
[45] Jamison Driver's License, Ex. E.
[46] McLendon Depo. at 27, Ex. C.
[47] Jamison Depo. at 83-86, Ex. D.

that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle." *See United States v. Lopez–Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). "While 'an officer's reliance on a mere "hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" *See United States v. Gutierrez-Parra*, 2017 WL 4679266, *3 (5th Cir. Oct. 17, 2017) (quoted case omitted).

There was reasonable suspicion in this case for Officer McLendon to believe that Jamison was in violation of Mississippi law, which requires that "vehicles operated on Mississippi's highways must have tags 'conspicuously displayed on the vehicle being operated in such a manner that it may be easily read.'" *See Gonzalez v. State*, 963 So.2d 1138, 1143 (Miss. 2007) (quoting Miss. Code § 27–19–323); *see also* Mississippi Code § 27-19-40(1)(c) (providing that temporary tags must be displayed in "plain view"). Officer McLendon stopped Jamison because his LPR system did not recognize Jamison's temporary tag and because he could not clearly confirm its validity when he pulled behind Jamison.[48] *See, e.g., Wade v. State*, 33 So.3d 498, 504-06 (Miss. Ct. App. 2009) (holding that officer was justified in stopping individual with temporary tag); *see also Twenty Thousand Eight Hundred Dollars ($20,800.00) in U.S. Currency v. State ex rel. Miss. Bureau of Narcotics*, 115 So. 3d 137, 140 (Miss. Ct. App. 2013) (explaining that reasonable suspicion existed where officer mistakenly thought temporary out-of-state tag was expired because "a Mississippi [officer] [cannot] be charged with perfect knowledge of other states' conventions regarding temporary tags").

[48] McLendon Depo. at 27-28, Ex. C

In addition to the stop, Officer McLendon's search likewise was justified.[49] Officer McLendon sought Jamison's consent after learning of the following facts: (1) that Jamison was driving from a known drug location on the West Coast (Phoenix, Arizona), (2) that Jamison was driving down a known drug route (Interstate 20), (3) that Jamison was driving a car that had been purchased on the East Coast 13 days prior, (4) that Jamison had a South Carolina Driver's License, and (5) that the vehicle Jamison was driving had a temporary tag from Pennsylvania. Jamison provided consent,[50] and "[c]onsent is a well-established exception to the requirements of a warrant and probable cause." *See, e.g., United States v. Saleem*, 236 F.Supp.2d 625, 627-28 (N.D. Tex. 2002).[51]

Jamison alleges that his consent was not "voluntary,"[52] but that contention is unfounded. "To determine whether a person's consent is voluntary, [the Fifth Circuit] considers six factors: (1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found." *See United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017). Jamison is without sufficient evidence to combat the validity of his admitted consent. *See Stults*, 76 F.3d at 656 (explaining that the movant's burden is to merely point out the absence of evidence).[53]

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[49] Any "detention" likewise was justified because, as will be explained, Jamison had no legal right to leave until the traffic stopped concluded and, once consent to search was provided, Jamison voluntarily remained on the scene.

[50] Jamison Recorded Statement at 5-7, Ex. G; Jamison Depo. at 56-62, Ex. D.

[51] *See also United States v. Rounds*, 749 F.3d 326, 338 (5th Cir. 2014) ("A search conducted pursuant to consent . . . remains one of the well-settled exceptions to the Fourth Amendment's warrant and probable-cause requirements.").

[52] *See* Complaint at ¶24, Doc. No. 1.

[53] Any argument about the duration of Officer McLendon's interaction with Jamison is without merit. With respect to the initial stop, Officer McLendon had a right to detain Jamison until he received information back from the dispatcher. *See Spence*, 667 F. App'x at 447 ("While waiting for the results of

According to Jamison, Officer McLendon engaged in coercive tactics because Officer McLendon did not allow him to leave as soon as he returned his Driver's License.[54] Significantly, however, at the time Officer McLendon returned Jamison's Driver's License, he had not yet received information back from the dispatcher.[55] As such, the traffic stop was not complete, and Jamison had no legal right to leave. *See, e.g., United States v. Spence*, 667 F. App'x 446, 447 (5th Cir. 2016) (holding that "the purpose of the traffic stop had not been completed" when consent was requested and obtained because the computer checks were not finished) (citing *U.S. v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993)). Officer McLendon would have had the right to hold Jamison's Driver's License until the traffic stop was complete, and it is legally immaterial that Officer McLendon returned Jamison's Driver's License before receiving a return call from the dispatcher. *See U.S. v. Brown*, 567 F. App'x 272, 280 n.5 (5th Cir. 2014).

Neither is it material that Jamison claims that Officer McLendon placed his arm in the vehicle while asking for consent.[56] Again, at the time Jamison alleges this took place, Officer McLendon had not yet received a return call from the dispatcher[57] and thus Jamison had no legal right to leave. *See, e.g., Spence*, 667 F. App'x at 447. Plus, courts in this district have found coercive police tactics absent where restraints on a person's freedom were far greater. *See, e.g., U.S. v. Olivarria*, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011) (finding no coercive police tactics where suspect was handcuffed when consent was given). Jamison was not handcuffed, threatened, or otherwise intimidated by Officer McLendon. *See U.S. v. Tompkins*, 130 F. 117,

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computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop."). With respect to the subsequent search, any duration was justified by Jamison's consent. *See U.S. v. Nguyen*, 553 F. App'x 391, 392 (5th Cir. 2014) (explaining that driver consented to prolonged detention by giving voluntary consent to search); *U.S. v. Kelly*, 981 F.2d 1464, 1470 (1993) (concluding that any unreasonable detention caused by officer's questioning was cured by voluntary consent).

[54] *See* Complaint at ¶24, Doc. No. 1.

[55] McLendon Depo. at 71, Ex. C.

[56] Jamison Depo. at 61, Ex. D.

[57] McLendon Depo. at 71, Ex. C.

122 (5th Cir. 1997) (concluding that coercive police tactics were absent where there was no such conduct by officer).

In *Brown*, the Fifth Circuit made a determination that consent was valid. 567 F. App'x at 280. There, the driver was stopped for a traffic violation. *Id.* at 274. After requesting a computer check of the driver's license, the officer twice asked the driver for consent to search the vehicle. *Id.* Both requests were refused. *Id.* The officer continued to question the driver and then asked to search the car a third time after additional officers arrived on the scene. *Id.* The driver eventually agreed to the search, which revealed the presence of drugs. *Id.* The Fifth Circuit noted that, although the driver was not free to leave, no "threats, force, or intimidation were used to obtain [] consent," he was cooperative, and he was aware of the right to refuse consent as he had declined it twice. *Id.* at 280. These factors supported a finding of voluntariness. *Id.*

Like in *Brown*, Jamison alleges that Officer McLendon repeatedly asked for consent to search the vehicle.[58] But the *Brown* Court did not find that repeated requests for consent constituted coercion, and neither should this Court. What's more is that several other factors favor a finding of voluntariness. Jamison was cooperative throughout the traffic stop, and he was aware of the right to refuse consent, as he admitted to refusing a breathalyzer on two prior occasions.[59] His alleged denial of Officer McLendon's initial request for consent provides further evidence that Jamison was aware of the right to refuse. As a high school graduate with some college education there is no indication that Jamison lacked understanding.[60] Plus, Jamison knew with certainty that the search would not reveal incriminating evidence.[61] Given

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[58] Officer McLendon vehemently denies this allegation. McLendon's Depo. at 46, Ex. C.

[59] Jamison's Depo. at 64, Ex. D.

[60] *Id.* at 25.

[61] *Id.* at 64.

the totality of the circumstances, the consent was voluntary. *See Shabazz*, 993 F.2d at 438 (explaining that "no single factor is dispositive.").

Qualified Immunity. At a minimum, it cannot be said that – under "clearly established law" – Officer McLendon acted unconstitutionally. "Qualified immunity is a powerful defense that protects 'all but the plainly incompetent or those who knowingly violate the law.'" *See Jordan v. Brumfield*, 687 Fed. App'x 408, 412 (5th Cir. 2017) (quoted cases omitted) (emphasis added). "[F]or a [law] to be clearly established, 'existing precedent must have placed the . . . constitutional question beyond debate.'" *See Surratt v. McClarin*, 851 F.3d 389, 392 (5th Cir. 2017) (quoted cases omitted) (brackets in original). "This is done only when [courts] can 'identify a case where an officer acting under similar circumstances . . . was held to have violated the [Constitution].'" *Id*. (quoted case omitted) (ellipsis in original).

Jamison will not be able to point to any authority that places the constitutional questions at issue in this case – whether there was reasonable suspicion for Officer McLendon's stop and whether Jamison's consent was voluntary – beyond debate. With respect to the first question, the Fifth Circuit has held that "[a]ny analysis of reasonable suspicion is necessarily fact-specific[.]" *See, e.g., United States v. Ibarra–Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999) (footnote and citations omitted). With respect to the second, courts similarly have recognized that "voluntariness is an issue particularly subject to qualified immunity." *Jordan v. Garrison*, 2014 WL 1379157, *12 (W.D. La. 2014).[62] This Court may grant Officer McLendon qualified immunity without even reaching the underlying constitutional questions. *See Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (holding that courts may skip straight to the question of

[62] *See also Rogers v. City of Winnsboro, Texas*, 2016 WL 8730189, *5 (E.D. Tex. 2016) ("[E]ven if [the law enforcement officers] reasonably—albeit mistakenly—believed that Rogers's consent was valid, then they are protected by qualified immunity.").

whether an individual defendant violated clearly established rights, without first addressing whether the conduct at issue was constitutional).[63]

Municipal Policy. There is no municipal policy or custom for which the Town of Pelahatchie could be held liable. To establish municipal liability under Section 1983, proof of the following elements are required: "(1) a policymaker; (2) an official policy; and (3) violation of constitutional rights whose moving force is the policy or custom." *Hampton Co. Nat'l Sur., LLC v. Tunica Cnty.*, 543 F.3d 221, 227 (5th Cir. 2008). No such proof exists on these facts.

At his deposition, when asked why he sued the Town of Pelahatchie, Jamison responded that the only reason was because he thought that Officer McLendon was employed there.[64] Such a reason cannot serve as a basis for liability because it is well settled that municipalities cannot be held vicariously liable under Section 1983 for the acts of employees. *See Evett v. DETNTFF*, 330 F.3d 681, 689 (5th Cir. 2003) (citation omitted) ("Section 1983 does not create vicarious or respondeat superior liability."). Plus, as a factual matter, Officer McLendon is an employee of Richland.[65]

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[63] With respect to the search, there is an additional avenue for qualified immunity besides consent: arguable probable cause. Officer McLendon is entitled to qualified immunity so long as "a reasonable officer could have believed . . . [his] warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed." *See Payne v. Olive Branch*, 130 Fed. App'x 656, 662 (5th Cir. 2005) (emphasis in original) (quoted case omitted); *see also Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) ("[T]o be entitled to qualified immunity from a Fourth Amendment claim, an officer need not have actual probable cause, but only 'arguable probable cause'" -- that is, "the facts and circumstances must be such that the officer reasonably could have believed that probable cause existed."). A reasonable officer could have believed that there was probable cause to search the vehicle based on these facts: (1) that Jamison was driving from a known drug location on the West Coast (Phoenix, Arizona), (2) that Jamison was driving down a known drug route (Interstate 20), (3) that Jamison was driving a car that had been purchased on the East Coast 13 days prior, (4) that Jamison had a South Carolina Driver's License, and (5) that the vehicle Jamison was driving had a temporary tag from Pennsylvania.

[64] Jamison Depo. at 44, Ex. D.

[65] McLendon CV, Ex. B.

Officer McLendon, at the time of his interaction with Jamison, was certified by the State of Mississippi and had years of experience as police officers.[66] *See O'Neal v. City of San Antonio*, 344 Fed. App'x 885, 888 (5th Cir. 2009) ("This court has held that if the training of police officers meets state standards, there can be no cause of action for a failure to train absent a showing that 'this legal minimum of training was inadequate to enable [the officers] to deal with the 'usual and recurring situations' faced by jailers and peace officers.'"); *Burton v. City of Senatobia*, 2008 WL 619301, *11 (N.D. Miss. 2008) (holding plaintiff did not establish a municipal policy based on failure to train under nearly identical facts). Jamison's attempt to hold Pelahatchie liable fails.

CONCLUSION

This case offers several paths of dismissal. Most straightforward, Jamison cannot overcome Officer McLendon's entitlement to qualified immunity or demonstrate an unconstitutional policy or custom with respect to the Town of Pelahatchie. Jamison alternatively cannot demonstrate a constitutional violation. Summary judgment is warranted.

Dated: December 1, 2017.

Respectfully submitted,

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[66] McLendon Law Enforcement Certification, Ex. I; McLendon CV, Ex. B.

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CERTIFICATE OF SERVICE

I, Todd Butler, certify that I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which sent notification of such filing to the following counsel of record:

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Dated: December 1, 2017.

/s/ G. Todd Butler
G. TODD BUTLER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON — PLAINTIFF

VERSUS — 3:16CV595-CWR-LRA

NICK MCLENDON,
In His Individual Capacity — DEFENDANT

MEMORANDUM IN OPPOSITION TO MOTION
[DOC. 46] FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Clarence Jamison, by and through counsel of record and files his Memorandum in Opposition to Motion [Doc. 46] for Summary Judgment. For cause, Mr. Jamison shows the Court as follows:

I. STATEMENT OF FACTS

On July 29, 2013, Clarence Jamison found himself traveling home, to Neeses, South Carolina, after vacationing in Las Vegas, Nevada and Phoenix, Arizona. (Jamison Dep. at 44-45.) Mr. Jamison was driving a 2001 model silver Mercedes Benz C Class convertible which he had finalized the purchase of and picked up on July 16, 2013 from a dealership in Pennsylvania, after purchasing it on the internet by putting a deposit on the car almost a month before picking it up. (Id. at 86-88.) While driving eastbound on Interstate 20, in Mississippi, Mr. Jamison passed a patrol vehicle on the right hand shoulder of the road. (Id. at 49.) Immediately after passing the patrol vehicle, it pulled out behind Mr. Jamison and followed him for approximately a minute before blue-

lighting him. (Id. at 49-50.) Mr. Jamison immediately pulled over to the right side of the Interstate. (Jamison Dep. at 50.)

At the time of the stop, Mr. Jamison was not speeding and had his seatbelt on. (Id. at 51.) The patrol vehicle stopped approximately two to three steps behind Mr. Jamison's car and the officer waited in his vehicle two or three minutes before approaching Mr. Jamison's passenger-side window. (Id. at 52-53.) The officer, the Defendant Nick McLendon, asked Mr. Jamison for his driver license, registration, and proof of insurance and Mr. Jamison complied by providing the requested documents. (Id. at 53-54.) The Defendant McLendon then informed Mr. Jamison that he stopped him for not having a tag. (McLendon Dep. at 37.) Despite this statement, Mr. Jamison had a valid temporary tag issued by the State of Pennsylvania through the dealership which was properly displayed, *i.e.* bolted to the car. (Jamison Dep. at 90-92; McLendon Dep. at 25, 35, 37.)

The Defendant McLendon believes or pretends to believe that a temporary tag is *per se* illegal to display in Mississippi and amounts to driving with no tag in Mississippi regardless of its proper display or validity. (McLendon at 27-28, 65.) When asked to provide the legal or statutory basis for his belief that an otherwise valid temporary tag is illegal to display in Mississippi, the Defendant McLendon references the "no tag" statute. (Id.)

According to the Defendant McLendon, the sole reason that he stopped Mr. Jamison was due to his temporary tag. (Id. at 45.) In his deposition, the Defendant McLendon initially justified his stop of Mr. Jamison based on his allegation that Mr. Jamison's tag could not be read by his computerized tag reading system and he couldn't see the tag with his eyes. (Id. at 28.) The Defendant McLendon then backed away from part of this justification when he acknowledged that the inability of his computerized tag reading system to read Mr. Jamison's tag was not a cause for stopping Mr. Jamison since even vehicles with reflective permanent tags cannot be read if the tags are dirty. (Id. at 29.) Ultimately, the only justification advanced by the Defendant McLendon for stopping Mr. Jamison was his disputed allegation that Mr. Jamison's temporary tag was folded over and he could not read the tag. (Id. at 28, 31-32.) This disputed factual allegation by the Defendant McLendon is refuted by Mr. Jamison's testimony that his temporary tag was held firmly in place and could not fold over and the Defendant McLendon's admission that the original cardboard temporary tag he looked at during his deposition showed no signs of creasing consistent with having been folded over. (Jamison Dep. at 90-92; McLendon Dep. at 32-33.)[1]

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[1]In his defense, the Defendant McLendon suggested that any crease in the cardboard temporary tag could have been "ironed out." (McLendon Dep. at 33-34.)

> Q. Okay. For purposes of your testimony, you agree there's nothing to indicate a crease was ever in that tag and the only suggestion you could offer me is that maybe somebody ironed it?

While walking to Mr. Jamison's passenger side window ostensibly to initiate contact and speak with him regarding the temporary tag, the Defendant McLendon could see that the temporary tag on Mr. Jamison's car was not expired. (Id. at 35.)

> Q. Was the tag in date?
>
> A. I don't remember but I assume from what's been said here.
>
> Q. Okay. It's written on the tag --
>
> A. Yes, sir.
>
> Q. -- if you'll believe me. And it's also been documented that the tag at that time was not expired.
>
> ---
>
> MR. BUTLER: Object to the form.
>
> BY MR. FLEITAS:
>
> Q. Is that --
>
> A. The only thing I can tell you is the night I stopped him and it was folded or I couldn't visibly see the tag.
>
> Q. Understood. And you agree with me that the tag you're looking at today which was the tag that was on the car that night doesn't have any folds on it?
>
> A. Yes.
>
> Q. Okay. But the reason you stopped him was because the tag was folded over to where you couldn't see it?
>
> A. Yes, sir.

(Id.)

A. Yes, sir.

Q. Okay. So did you realize that when you went up to talk to Mr. Jamison?

A. Yes, sir.

Q. Okay. Because I'm assuming if the real reason you stopped him was the tag and you were only stopping him because you wanted to make sure that he was driving with a valid tag, by the time you got up to him you'd already seen that the tag was in date. Correct?

A. Yes, sir. But it can't be verified on NCIC. You've got to run the VIN number.

(Id.)

After getting Mr. Jamison's driver license, bill of sale, and proof of insurance, the Defendant McLendon returned to his patrol vehicle where he remained for approximately 10-15 minutes. (Jamison Dep. at 54-55.) During that time he examined Mr. Jamison's driver license, and paperwork, and conducted a computerized check on Mr. Jamison's information. (McLendon Dep. at 38-39.) The computerized database check performed by the Defendant McLendon showed that Mr. Jamison was clear. (Id.) The Defendant McLendon then contacted dispatch and requested a NCIC check on Mr. Jamison and the VIN for the car. (Id. at 39-40.)[2]

[2]According to the Defendant McLendon he received verification from dispatch that Mr. Jamison's driver license and car were clear within approximately 5-10 minutes of requesting the information while initiating a consent search of Mr. Jamison's car. (McLendon Dep. at 47-48.) Mr. Jamison's deposition testimony contradicts this assertion since he testified that the Defendant McLendon took 10-15 minutes in his

While allegedly awaiting the information he requested from dispatch, the Defendant McLendon returned to Mr. Jamison's car for the purpose of finding a reason to search the car or get Mr. Jamison's consent to search the car. (Id. at 44.)

> Q. Great. Now, you go and you engage him in conversation which you engaged him in as part of your training as an interdiction officer?
>
> A. Yes, sir.
>
> Q. Your purpose when you left his vehicle was to try to get him to consent to let you search the vehicle?
>
> A. Depending on what he told me and any other indicators I might have received from him.
>
> Q. That was your goal?
>
> A. Goal? What?
>
> Q. To get a search of his vehicle.
>
> A. Yes, sir.
>
> Q. When you got out of your vehicle to engage him, your goal was I want to search his vehicle?
>
> A. Yes, sir.
>
> Q. And everything that you did in your interactions with him was focused

---

patrol vehicle before returning to his car and handing him back his driver license. (Jamison Dep. at 54-55.) Crediting Mr. Jamison's testimony means that the Defendant McLendon knew that Mr. Jamison's record was clean and the ostensible reason for stopping and detaining him was resolved, before returning to Mr. Jamison's car and purposely prolonging the stop in order to engage in a snipe-hunt for non-existent narcotics.

on that purpose. That was your mission?

A. I wouldn't say mission. Wait on his license to come back.

Q. Okay. Now, at the point that you went back to talk to him, you had no evidence of any illegality. Correct?

A. No, sir.

Q. And the only reason you'd stopped him was because of this tag issue.

A. Yes, sir.

(Id. at 44-45.) The Defendant Mclendon had the choice to wait in his patrol vehicle for the information from dispatch but purposefully left his vehicle to engage in a captive audience conversation with Mr. Jamison in an effort to search his car as part of his (drug) interdiction mission. (McLendon Dep. at 42-43.)

As already noted, Mr. Jamison waited in his car for 10-15 minutes, before the Defendant McLendon returned with his driver license, bill of sale, and insurance information. (Jamison Dep. at 55.) When the Defendant McLendon handed back Mr. Jamison's documentation, he made no mention of any irregularity with respect to his driver license, or vehicle, or the need to await additional information from dispatch. (Id. at 63.) The Defendant McLendon asked Mr. Jamison for consent to search his car. (Id. at 56, 62.) Mr. Jamison refused consent and the Defendant McLendon changed the subject to start talking about Mr. Jamison's work as a welder. (Id. at 57.)

After making small-talk geared towards establishing a rapport with Mr. Jamison

and securing consent or some reason to justify a search, the Defendant McLendon asked Mr. Jamison for consent again.[3] (Jamison Dep. at 58; McLendon Dep. at 42.) Again, Mr. Jamison refused consent and the Defendant McLendon then told Mr. Jamison that he had received an anonymous tip that there were ten kilograms of cocaine in his car. (Jamison Dep. at 58, 63-64.) The Defendant McLendon was rude in making the allegation regarding the ten kilograms of cocaine in Mr. Jamison's car and generally about his insistence in wanting to search Mr. Jamison's car. (Id. at 63.) When Mr. Jamison asked why the Defendant McLendon insisted in wanting to search his car, the Defendant McLendon repeatedly made reference to there being ten kilograms of cocaine in Mr. Jamison's car. (Id. at 63-64.)

Despite telling the Defendant McLendon several times that there were no drugs in his car, the Defendant McLendon persisted in asking Mr. Jamison for consent to search while keeping his arm inside of Mr. Jamison's car thus preventing him from going on his way. (Id. at 59-60.) In addition to telling Mr. Jamison that he had received an anonymous call regarding there being ten kilograms of cocaine in his car, the Defendant McLendon told Mr. Jamison that his license was suspended, that his car was

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[3]Though not relevant for summary judgment purposes, the Defendant McLendon denies repeatedly asking Mr. Jamison for consent to search while keeping his arm inside of Mr. Jamison's car to keep him from driving away. (McLendon Dep. at 47.) According to the Defendant McLendon he simply asked Mr. Jamison for consent to search one or two times and Mr. Jamison gave him consent to search. (Id. at 46-47, 71.)

stolen, and that he did not have insurance. (Id. at 83-85.) The Defendant McLendon also attempted to encourage Mr. Jamison to consent to a search by saying that he would not arrest him if he only found a small amount of drugs in the car.[4] (McLendon Dep. at 78.) The Defendant McLendon also told Mr. Jamison that when he had a hunch there

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[4]The Defendant McLendon's candid testimony about securing "consent" in this manner is noteworthy:

> Q. Back on the record after a short break. Did you ever make a remark to Mr. Jamison about a roach?
>
> A. Probably.
>
> Q. All right. Why do you say probably?
>
> A. *Because sometimes if people -- you know, they can get kind of hesitant on giving consent because they got a dime bag of marijuana in the car or a roach in the ashtray, and I always tell the people hey, if you've just got a small amount of marijuana you give it up, you go on about your road, I pull the case, I destroy it just to kind of alleviate wasting ti[m]e.*
>
> Q. Did you ever make any statement to him to the effect of look, man if you've got a little roach or something like that I'm not worried about that. I'm just going to throw that away?
>
> A. Possibly.
>
> Q. All right. That's not a truthful statement, is it?
>
> A. Sometimes. *If it's just a little roach, I make them play soccer on the side of the road with it, kick it in the dirt. Sometimes if it's a bag I pull a case and destroy it.*

(McLendon Dep. at 78-79 (emphasis added).)

were drugs in a car, he was right 90% of the time. (Id. at 77.)

After asking Mr. Jamison four or five times for consent to search his car, Mr. Jamison finally relented given that the Defendant McLendon kept his arm in his car and refused to allow Mr. Jamison to go on his way without permitting him to search. (Jamison Dep. at 61; Jamison Statement at 33-35.)

Mr. Jamison, concerned that drugs might be planted in his car, requested that any search of his vehicle be conditioned on being able to see the Defendant McLendon conduct the search. (Jamison Dep. at 61.) At this point, the Defendant McLendon came around to the driver side of Mr. Jamison's car, asked him to step out of the car and patted him down, before instructing him to stand in from of his patrol vehicle. (Jamison Dep. at 64-66; McLendon Dep. at 49-50.) The Defendant McLendon's search of Mr. Jamison was extremely thorough and time consuming. (Jamison Dep. at 67.) At one point during the search, Mr. Jamison complained that he could not see what the Defendant McLendon was doing and sought to withdraw his consent to search. (Id. at 69-70.) The Defendant McLendon told Mr. Jamison that he could not withdraw his consent once given and continued searching Mr. Jamison's car.[5] (Id.)

In conducting his search of Mr. Jamison's car, the Defendant McLendon caused

[5]According to the Defendant McLendon, Mr. Jamison did not talk to him about withdrawing his consent to search. (McLendon Dep. at 50.) The Defendant McLendon admitted that Mr. Jamison was not free to leave the stop unless he withdrew his consent to search. (Id.)

damage to a driver side vent, the seats, and the convertible top (Id. at 75-76.) After the search, the Defendant McLendon handed Mr. Jamison a small flashlight and told him to look over his car in the dark for damage and that he would pay for any damage to his car. (Id. at 78-79.) A tired Mr. Jamison looked for approximately a minute before telling the Defendant McLendon that he could not see any damage to his car. (Jamison Dep. at 78-79.) The Defendant McLendon then issued Mr. Jamison a "Courtesy Warning" for driving with "no tag." (Jamison Dep. at 97-98; McLendon Dep. 64-65.) In all, Mr. Jamison felt as though he had been detained on the side of the road for approximately three-and-a-half hours. (Jamison Dep. at 80.) According to the Defendant McLendon, he detained Mr. Jamison for one hour and fifty minutes. (McLendon Dep. at 26.) Despite having a K-9 officer in his patrol vehicle the entire time, the Defendant McLendon did not ask Mr. Jamison for permission to use the K-9 until the end of his search and the encounter. (Jamison Dep. at 70; McLendon Dep. at 57-58.) The K-9 did not alert to the presence of drugs in Mr. Jamison's car. (McLendon Dep. at 57-58.)

The Defendant McLendon admitted that the only reason he stopped Mr. Jamison was because he viewed his temporary tag as amounting to driving with no tag and/or because he could not read the temporary tag because it was folded over. (Id. at 44-45, 65.) Mr. Jamison had committed no other infraction which would have justified stopping him. (Id.) Once he stopped Mr. Jamison and approached his car, the

Defendant McLendon could see that Mr. Jamison's car had a properly mounted and in date temporary tag issued by Pennsylvania. (Id. at 34-35.) Mr. Jamison's driver license was valid; his bill of sale and other documentation proved his lawful ownership of the car; and he had proof of insurance for the car. (Id. at 36, 69.)

From the start of his encounter with Mr. Jamison, the Defendant McLendon's sole goal was to conduct a search of Mr. Jamison's car for narcotics. (McLendon Dep. at 44-46.) Ultimately, the Defendant McLendon's lack of an objective basis to stop Mr. Jamison's car and his admitted absence of articulable suspicion or probable cause to search the car condemn his claim to an entitlement to be summarily dismissed from this civil action:

> Q. All right. Now, what probable cause did you have to stop Mr. Jamison?
>
> A. I had reasonable suspicion, no tag.
>
> Q. Tell me what probable cause you had or what -- tell me what articuable [sic] suspicion you had at the time you requested consent.
>
> A. I didn't need any, but the recently purchased vehicle, traveling all the way across the country, coming from Phoenix, Arizona, a source area, and headed back to South Carolina.
>
> Q. And for those reasons you believe that you didn't even need his consent?
>
> A. Yes. If I didn't need his consent I would have just searched it.
>
> Q. Did you need his consent?

A. That or probable cause.

Q. You didn't have probable cause.

A. Not at that time.

Q. And you didn't get probable cause?

A. No, sir.

Q. All right. So the only lawful basis that there would have been for the search of the vehicle that you agree with me is the allegation. There's the question of consent.

MR. BUTLER: Object to the form. You can answer.

BY MR. FLEITAS:

Q. Outside of the consent there was no basis for you searching Mr. Jamison's vehicle. Correct?

MR. BUTLER: Object to the form.

A. I don't understand the question.

BY MR. FLEITAS:

Q. If he had said I'm not giving you consent --

A. I would have ran my police department canine.

Q. All right. And it would have shown nothing.

A. Possibly.

Q. Well, it didn't.

A. Yes.

Q. I mean, you ran it. It showed nothing.

A. Yes, that's true.

Q. So you would have run the canine. At that point he would have been there -- what? -- 10, 15 minutes?

A. Maybe.

Q. You would have run the canine. Right?

A. Yes, sir.

Q. First?

A. Yes, sir. If he would have refused consent.

Q. And it wouldn't have indicated?

A. No, sir.

Q. Because that process can never be manipulated. Right?

A. It can be.

Q. It sure can.

A. Mine is not.

Q. I understand.

A. Not on a Mercedes.

Q. I'm just saying. So you would have run the dog. The dog would have shown nothing and --

A. He'd have been free to go.

Q. He'd have been free to go. So you agree with me there was no probable cause to search Mr. Jamison's vehicle?

MR. BUTLER: Object to the form.

BY MR. FLEITAS:

Q. The search was solely lawful based on consent?

MR. BUTLER: Same objection.

A. Correct.

BY MR. FLEITAS:

Q. All right. Absent consent if he had just said no, no, no, no, no. Okay, well, I'm going to run my dog. You run your dog. The dog doesn't indicate.

A. He's free to go.

Q. All right. I'm just trying to make sure what the issues are in the case. I'm not trying to be difficult.

A. That's fine.

Q. And I understand we have a fundamental disagreement about what you gentlemen said to one another on the side of the road. That's why we're here. Having said that, though, I just want to make sure that there's not some other basis other than consent that you would be alleging justified you to search that vehicle. So outside of the consent no search. Correct?

MR. BUTLER: Object to the form.

A. Correct.

(Id. at 56-59.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual " issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party," and "'material' if its resolution could affect the outcome of the action." Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc., 482 F.3d 408, 411 (5th Cir. 2007). In reviewing a summary judgment, all facts and inferences must be construed in the light most favorable to the non-moving party. Burrell, 482 F.3d at 411.

The party seeking summary judgment carries the burden of demonstrating that there is no evidence to support the nonmovant's case. " Hirras v. National R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255.

III. QUALIFIED IMMUNITY STANDARD

The doctrine of qualified immunity protects public officials acting within the

scope of their official duties 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." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In order to overcome the Defendant McLendon's assertion of qualified immunity in this case, Mr. Jamison must establish (1) that he has asserted the violation of a constitutional right; (2) that was clearly established at the time of the Defendant McLendon's actions; and (3) that the Defendant McLendon's actions were objectively unreasonable. Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1305 (5th Cir. 1995) (citing Siegert v. Gilley, 500 U.S. 226, 232 (1992)). Where factual disputes exist regarding the assertion of qualified immunity during summary judgment, the Mr. Jamison's version of the facts is accepted as true. Kinney v. Weaver, 367 F.3d 337, 348 (5th Cir. 2004).

IV. ARGUMENT & AUTHORITIES

The Defendant McLendon asserts that he is entitled to summary judgment with respect to Mr. Jamison's Fourth Amendment and Fourteenth Amendment claims based on the absence of any genuine issues of material fact and based on qualified immunity. Stated succinctly, the Defendant McLendon's claim to any such an entitlement fails.

Factually and legally, two disputed questions of fact preclude summary judgment. First, though there is no dispute that the sole reason the Defendant McLendon stopped Mr. Jamison, in the first place, had to do with his temporary tag, it

is disputed whether or not the Defendant McLendon's claim that he could not see Mr. Jamison's tag, thus justifying his stop, is truthful. Second, though there is no dispute that the Defendant McLendon conducted a search of Mr. Jamison's and detained him for at least one hour and fifty minutes, it is entirely disputed whether or not the Defendant McLendon unlawfully extended the traffic stop, and unlawfully detained Mr. Jamison in order to coerce him into giving permission to search his car.

The resolution of these disputed factual issues, in light of the clearly established law, augers that this civil action must ultimately be resolved by the trier of fact and not by summary disposition.

A. The Defendant McLendon's Initial Stop of Mr. Jamison Violated the Fourth Amendment.

In his brief, the Defendant McLendon says that he initially blue-lighted Mr. Jamison because his tag recognition system could not read Mr. Jamison's temporary tag and because he could not confirm its validity. With respect to the failure of his tag recognition system to read Mr. Jamison's tag, the Defendant McLendon admitted that this did not justify his stopping Mr. Jamison. (McLendon Dep. at 29-30.) With respect to not being able to confirm the validity of the tag, what the Defendant McLendon actually said in his deposition was that the tag was folded over and he could not read it. (Id. at 31-33.) Another reason given by the Defendant McLendon for stopping Mr. Jamison, but tellingly not mentioned in his brief, was his mistaken belief that driving

with a temporary tag in Mississippi was *per se* illegal and amounted to a violation of the "no tag" statute. (Id. at 37-38, 56.)

Summary judgment cannot be granted based on the Defendant McLendon's disputed allegation that Mr. Jamison's temporary tag could not be read because it was folded over. Granted, if this allegation were true, the Defendant McLendon, would have had a legitimate reason to stop Mr. Jamison, until he could ascertain the validity of the temporary tag. See Miss. Code Ann. § 27-19-323. Regrettably for the Defendant McLendon, this factual assertion is hotly disputed and provably false. First, Mr. Jamison testified that his temporary tag was properly affixed to the rear of his car with bolts to prevent it from folding over and to ensure it could be read. (Jamison Dep. at 90-92.) Making matters worse for the Defendant McLendon, when he was shown the temporary tag at his deposition he had to admit that the tag showed no signs of ever having been folded over. (McLendon Dep. at 32-34.) Simply stated, either the temporary tag was folded over to where the Defendant McLendon could not read it, in which case he was justified in stopping Mr. Jamison, or the Defendant McLendon is intentionally fabricating the allegation of an unreadable tag as a way to justify the stop and fend off this litigation. Either way, only the jury can decide which is which.

There exists one other possibility regarding the Defendant McLendon's stop of Mr. Jamison. The Defendant McLendon could have stopped Mr. Jamison because he

either believed that driving with a temporary tag is illegal in Mississippi or pretending to believe it was. Several facts support this as the actual reason that the Defendant McLendon stopped Mr. Jamison. First, the Defendant McLendon told Mr. Jamison he stopped him for driving with "no tag." Second, the courtesy warning given to Mr. Jamison by the Defendant McLendon stated the warning was for, "no tag."

The Defendant McLendon's cited authorities in support of the proposition that he could stop Mr. Jamison solely for displaying a temporary tag do not, in fact, support that proposition. The use of a temporary tag in Mississippi is unquestioningly and perfectly legal so long as it is properly displayed and readable. See Miss. Code Ann. § 27-19-40©. The authorities cited by the Defendant McLendon upheld stops only where the temporary tags, valid in themselves, were improperly displayed or unreadable. See Twenty Thousand Eight Hundred Dollars ($20,800.00) in U.S. Currency v. Mississippi Bureau of Narcotics, 115 So. 3d 137, 140 (Miss. App. 2013) (faded and partially obscured temporary tag with dating system unreadable from a distance justified stop); Wade v. Mississippi, 33 So. 3d 498, 504-05 (Miss. App. 2009) (improperly displayed and unreadable tag justified stop); Gonzalez v. Mississippi, 963 So. 2d 1138, 1143 (Miss. 2007) (same). None of these facts justifying the stops in the cases cited by the Defendant McLendon are present in this case and the Defendant McLendon made no allegation that Mr. Jamison's temporary tag could not be read, only that he could not read it

because it was folded up.

What the Defendant Mclendon does allege justified his stop of Mr. Jamison was the "fact" that a car with a temporary tag was in violation of the law in Mississippi. The Defendant McLendon stated several times that he was fully justified in stopping Mr. Jamison based solely on the temporary tag. This fundamental mistake of law by the Defendant McLendon invalidates his stop of Mr. Jamison.

The law in the Fifth Circuit has been clearly established for decades that an officer's mistake of law regarding the reason for initiating a traffic stop does not justify the stop and violates the Fourth Amendment. See United States v. Miller, 146 F.3d 274, 278-79 (5th Cir. 1998) (stating where statute did not prohibit the alleged actions of defendant, no justification for stop); United States v. Lopez-Valdez, 178 F.3d 282, 288 C(5th Cir. 1999) (holding where statute did not prohibit driving with cracked taillight, officer could not have an objectively good faith belief that he had cause for stop). Here, the Defendant McLendon's wrong-headed belief that driving along an interstate in Mississippi with a temporary tag authorizes a stop violated Mr. Jamison's right to be free from an unlawful stop.

The disputed issues of fact regarding the actual reason why the Defendant McLendon stopped Mr. Jamison and the actual condition of the temporary tag at the time of the stop preclude the summary disposition of Mr. Jamison's Fourth Amendment

claim for being illegally stopped.

B. The Defendant McLendon's illegal search of Mr. Jamison's car and his prolonged detention of Mr. Jamison violated the Fourth Amendment.

The Defendant McLendon asserts that his search of Mr. Jamison's car and his prolonged detention of Mr. Jamison, lasting a minimum of almost two hours, pass constitutional muster. Contrary to the Defendant McLendon's assertion, the disputed material facts regarding the circumstances under which he conducted the search and prolonged Mr. Jamison's detention provide a textbook example of abuse of authority.

As already noted, once the Defendant McLendon stopped Mr. Jamison, he asked for and received Mr. Jamison's driver license, proof of ownership, and proof of insurance. (Jamison Dep. at 54.) According to Mr. Jamison, the Defendant McLendon then took these items to his patrol vehicle and remained there for approximately 10-15 minutes. (Id. at 55.) Upon returning to the passenger side of Mr. Jamison's car, the Defendant McLendon returned the items that Mr. Jamison had handed him previously and Mr. Jamison believed he had completed the check on his driver license. (Jamison Statement at 5-7, 13-14.) As Mr. Jamison was preparing to go, the Defendant McLendon put his arm inside of Mr.. Jamison's car and prevented him from resuming his travel while telling Mr. Jamison to, "hold on!" and that he received a call saying that there were ten kilograms of cocaine in the car. (Id. at 6.) It was then that the Defendant McLendon made clear to Mr. Jamison through word and deed that he would not be

permitted to leave until he gave "consent" to search his car. (Id. at 7.)

It is axiomatic that, "[o]nce the purpose of a valid traffic stop has been completed and an officer's initial suspicions have been verified or dispelled, the detention must end unless there is additional reasonable suspicion supported by articulable facts." United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006). Also, an investigative traffic detention "may last no longer than required to effect the purpose of the stop." United States v. Jenson, 462 F.3d 399, 404 (5th Cir. 2006). Here, competent summary judgment evidence supports the conclusion that the Defendant McLendon prolonged Mr. Jamison's detention, after the illegal stop, by physically preventing Mr. Jamison from resuming his travel after the initial alleged reason for the stop, some issue with his temporary tag, was resolved.

The Defendant McLendon attempts to independently bolster his prolonged detention of Mr. Jamison and his illegal search by focusing on several entirely innocent facts: (1) Mr. Jamison drove from Phoenix, Arizona, a "known drug location;"[6] (2) Mr. Jamison drove on Interstate 20, a "known drug route;"[7] Mr. Jamison drove a car he

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[6]Narcotic drugs in the United States are ubiquitous. Is any place in this Nation, urban or rural, not a known drug location or not subject to being referred to as such?

[7]Other "known drug routes" include every Interstate in the United States. See https://www.justice.gov/archive/ndic/pubs11/18862/transport.htm. According to the National Drug Threat Assessment 2006, by the National Drug Intelligence Center, "[v]irtually every interstate and highway in the United States is used by traffickers to transport illicit drugs to and from distribution centers and market areas throughout the

purchased in Pennsylvania only thirteen days before being stopped with money he lawfully earned and obtained; Mr. Jamison was in possession of a valid driver license issued by the State in which he resided; and Mr. Jamison had a valid temporary tag issued by the State where he had purchased his car. As this Court noted in United States v. Alvarado, No. 3:12CR113-CWR-FKB at 8 (S.D. Miss. Oct. 2, 2013), "[s]uspicions clearly based on lawful conduct, or at least conduct in which law-abiding citizens are just as likely to be engaged, are not reasonable." United States v. Lopez, 817 F. Supp. 2d 918, 926n.57 (S.D. Miss. 2011) (citing United States v. Rangel-Portillo, 586 F.3d 376, 381 (5th Cir. 2009)).

The Defendant McLendon's suggestion that Mr. Jamison freely and voluntarily consented to the search of his car lacks arguable merit on this record. Consent is a recognized exception to the Fourth Amendment requirement that a search be supported by a warrant or probable cause. United States v. Scroggins, 599 F.3d 433, 440 (5th Cir. 2010). The Defendant McLendon has the burden of proving that the consent was voluntary. United States v. Arias-Robles, 477 F.3d 245, 248 (5th Cir. 2007). In considering the voluntariness of the consent, a court should consider the following relevant factors: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's

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country, and every highway intersection provides alternative routes to drug markets." Id. Interstate 20 through Mississippi did not crack the top eight. Id.

cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. Arias-Robles, 477 F.3d 248.

First, the Defendant McLendon admitted that Mr. Jamison's interactions with him were neither voluntary nor consensual as he was never free to leave at any time until after the search was conducted. Second, Mr. Jamison was physically kept from resuming his travel home, after having his driver license and other documents returned to him, when the Defendant McLendon placed his arm inside his car and badgered him for consent. Third, though Mr. Jamison cooperated with the Defendant McLendon's requests, their exchanges became heated, as the Defendant McLendon repeatedly leveled false allegations and encroached on Mr. Jamison's liberty. Fourth, though aware of his right to refuse consent, Mr. Jamison was aware that without relenting to the Defendant McLendon's repeated demands for consent, he might never get back home.[8] Fifth, Mr. Jamison has a high school education, is intelligent, and works as a

[8]In his brief, the Defendant McLendon makes gratuitous references to Mr. Jamison's driver license being suspended previously and his refusing a breathalyser on two prior occasions. These gratuitous statements are meant solely to make Mr. Jamison look bad in the Court's eyes. The truth is that Mr. Jamison has never been convicted of any alcohol-related driving offense. Further, the suspensions of his driver license were due to unpaid property tax (due to his prolonged absence from South Carolina due to work), from May 18, 2016 until June 9, 2016, and due to an administrative suspension pursuant to South Carolina's implied consent law from March 27, 2010 until June 24, 2010.

skilled tradesman. Sixth, Mr. Jamison knew to a certainty that no drugs would be found in his car unless law enforcement planted them.

Taking all of these factors together, in light of the disputed facts, a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison's consent to search. When this factually disputed question of voluntariness is considered in light of a detention which lasted for a minimum of almost two hours, a summary disposition of this civil action in favor of the Defendant McLendon is not justified. See Alvarado, No. 3:12CR113-CWR-FKB at 26 n.21 ("For an entire hour, he stood along the side of the highway for reasons not tied to reasonable suspicion that he had committed a crime or was engaged in the commission of a crime. This is unacceptable.")

C. A genuine issue of material fact exists regarding the Defendant McLendon's race-based motive for stopping and detaining Mr. Jamison in violation of the Fourteenth Amendment.

The Defendant McLendon asserts that he is entitled to summary judgment with respect to Mr. Jamison's Fourteenth Amendment Equal Protection claim for racial discrimination. Given evidence that the Defendant McLendon was aware of Mr. Jamison's race before he stopped him and the Defendant McLendon's pretextual assertions for why he stopped Mr. Jamison, a reasonable inference can be drawn that Mr. Jamison's race was a motivating factor in the stop.

Prior to stopping Mr. Jamison, the Defendant McLendon was aware of his race

because the two of them had made eye contact as Mr. Jamison drove past him on Interstate 20. (Jamison Dep. at 107-08.) The Defendant McLendon immediately pulled in behind Mr. Jamison and quickly blue-lighted him. (Id. at 50.) Mr. Jamison was neither speeding nor breaking any other traffic laws at the time that the Defendant McLendon stopped him. (Id. at 83-84.) Further, the Defendant McLendon fabricated the reason for the stop by claiming the tag could not be read and launched into a series of false allegations towards Mr. Jamison regarding cocaine, a suspended driver license, a stolen car, and no insurance. (Id. at 83-85.)

In order to establish a violation of Equal Protection based on race-based animus, Mr. Jamison must show that his race was a motivating factor in the Defendant McLendon's decision to stop him. See Wallace v. Texas Tech, Univ., 80 F.3d 1042, 1047 (5th Cir. 1996) (§ 1983 Equal Protection employment discrimination case applying Title VII evidentiary framework). As in any other case, Mr. Jamison may prove his case through direct or circumstantial evidence. In the absence of direct evidence of discriminatory intent, Mr. Jamison could rely on circumstantial evidence to support his race discrimination claim. Circumstantial evidence of discrimination can be proven where the trier of fact finds that a defendant's stated reason for taking an action is not true, but is instead a pretext for discrimination or that a defendants' reason, while true, is only one of the reasons for its conduct and another motivating factor is race. Rachid

v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

The Defendant McLendon claims that Mr. Jamison's race had nothing to do with the traffic stop. However, accepting Mr. Jamison's testimony as true, a reasonable juror could conclude that the Defendant McLendon had absolutely no reason to stop Mr. Jamison in the absence of any arguable traffic offense. Such a finding by the trier of fact would permit the inference the Defendant McLendon's stated reason(s) for stopping Mr. Jamison constitutes a pretext masking discriminatory intent.

Summary judgment with respect to Mr. Jamison's Fourteenth Amendment claim would be inappropriate in light of the permissible inferences of discriminatory intent which can be drawn from the Defendant McLendon's unjustified stop of Mr. Jamison.

D. The Defendant McLendon is not entitled to qualified immunity.

The Defendant McLendon contends that even in the face of a constitutional violation he is entitled to qualified immunity because no guiding precedents would have made him aware that his actions were unlawful. This argument fails based solely on the cited precedents in this memorandum which specify the unlawfulness of the Defendant McLendon's actions towards Mr. Jamison and the unresolvable factual dispute which precludes summary disposition of Mr. Jamison's claim through qualified immunity.

This case presents two distinct factual disputes: (1) whether Mr. Jamison

committed a vehicle tag violation justifying a traffic stop; and (2) whether or not the Defendant McLendon's search of his car was voluntary or coerced. Mr. Jamison's testimony unequivocally establishes that he neither committed a traffic violation nor voluntarily gave consent to search. The Defendant McLendon's testimony is entirely to the opposite. "The jury's role has not been entirely abolished in qualified immunity cases." Jordan v. Wayne County, No. 2:16CV70-KS-MTP at 4 (S.D. Miss. May 17, 2017) (citing Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993)). "'Rule 56 still has vitality in qualified immunity cases if the underlying historical facts in dispute . . . are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them.'" Jordan, No. 2:16CV70-KS-MTP at 4 (quoting Lampkin, 7 F.d3 at 435). Where material facts are in dispute a finding of objective reasonableness is not appropriate on summary judgment. Id. (citations omitted).

Accepting Mr. Jamison's account of the facts as true, the Defendant McLendon's acts were not objectively reasonable. The resolution of the disputed facts necessary to a determination of objective reasonableness can only be undertaken by the trier of fact. The Defendant McLendon is not entitled to summary judgment based on qualified immunity.

V. CONCLUSION

For the reasons stated above and premised on the existence of genuine issues of material fact, Mr. Jamison requests that the Court deny the Defendant McLendon's Motion [Doc. 46] for Summary Judgment.

Respectfully submitted, this the 16th day of January, 2018.

/s/ Victor Israel Fleitas

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 16th day of January, 2018.

/s/ Victor Israel Fleitas

VICTOR I. FLEITAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFFS**

VS. **CIVIL ACTION NO.: 3:16-cv-00595-CWR-LRA**

TOWN OF PELAHATCHIE ET AL. **DEFENDANTS**

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

After Defendants Nick McLendon and the Town of Pelahatchie filed their summary judgment motion, Plaintiff Clarence Jamison stipulated to the dismissal of the Town of Pelahatchie from this case. Doc. Nos. 48 & 50. That leaves only Fourth Amendment and Equal Protection claims against Officer McLendon in his individual capacity, which Jamison brings under 42 U.S.C. § 1983. *See* Doc. No. 54 *generally*. Because Officer McLendon is at a minimum entitled to qualified immunity, a final judgment should be entered in his favor. Jamison's oppositional response does nothing to undercut Officer McLendon's request for summary judgment.

REBUTTAL ARGUMENT

I. Jamison cannot demonstrate an Equal Protection violation.

Officer McLendon's opening brief highlighted the evidentiary standard that applies to Equal Protection claims in the traffic-stop context. *See* Doc. No. 47 at pp.6-7. In particular, Officer McLendon cited to *Whren v. United States*, 517 U.S. 806, 813 (1996), which explains that targeting racial minorities for enforcement of traffic laws can run afoul of the Fourteenth Amendment. *See also United States v. Lopez*, 817 F.Supp.2d 918, 927 n.58 (S.D. Miss. 2011) (Reeves, J.). Jamison's oppositional response does not survive *Whren*'s requirements, namely,

that Officer McLendon's actions had a discriminatory effect and were motivated by a discriminatory purpose. *See, e.g., Gilkey v. Livingston*, 2007 WL 1953456, *4 (N.D. Tex. 2007).

The starting point is that Jamison completely ignores discriminatory effect. *See* Doc. No. 54 at pp. 26-28. His oppositional response discusses only discriminatory intent, which alone is insufficient even if he could prove it. *See Gilkey*, 2007 WL 1953456 at *4. Equal Protection claims require satisfaction of both requirements, and Jamison does not have sufficient evidence of either. *Compare id. with* Doc. No. 54 at pp.26-28.

With respect to the first requirement, Jamison has not produced any evidence of discriminatory effect. *See* Doc. No. 27 at pp.26-28. The discriminatory effect inquiry requires proof that the plaintiff was treated differently from other similarly situated persons of a different race. *See, e.g., Pinedo v. City of Dallas, Tex.*, 2015 WL 221085, *9 (N.D. Tex. 2015) (citing *Priester v. Lowndes Cnty.*, 354 F.3d 414, 424 (5th Cir. 2004)). Jamison conducted no discovery on the issue of how Officer McLendon conducts stops of white drivers, and he certainly has not identified a white driver that he believes was treated more favorably under "nearly identical circumstances." *See, e.g., Ray v. GEO Group, Inc.*, 2013 WL 870105, *5 (S.D. Miss. 2013) (Reeves, J.) (granting summary judgment on race discrimination claim because plaintiff "ha[d] pointed to no similarly situated individuals or incidents"). Nor has Jamison pointed to any statistical data in support of his claim. *See, e.g., Starr v. Oklahoma*, 2007 WL 2874826, *4 (N.D. Okl. 2007) (explaining that, in addition to comparator evidence, a plaintiff might offer statistical evidence proving "that members of a protected racial group receive less favorable treatment than nonmembers"). Jamison has not satisfied -- or even attempted to satisfy -- the requirement of discriminatory effect.

With respect to the second requirement, Jamison similarly has not produced sufficient evidence of discriminatory motive. He makes two claims in support of his position -- that

Officer McLendon was aware of his race prior to pulling him over and that Officer McLendon had a pretextual reason for stopping him -- but neither claim carries Jamison where he wants to go. *See* Doc. No. 54 at pp. 26-28.

It is unbelievable that Officer McLendon and Jamison made eye contact while Jamison was traveling 60 miles-per-hour down the interstate,[1] *see* Jamison Depo. at 51, Ex. J, but such an allegation is legally immaterial in any event. Discriminatory intent cannot be inferred from "[t]he mere fact that [a] plaintiff and [a] defendant[ ] are of different races[.]" *See, e.g., Johnson v. City of N.Y.*, 669 F.Supp.2d 444, 450 (S.D. N.Y. 2009). Any contrary conclusion would, as one court put it, "blindly ascribe to race all personal conflicts between individuals of different races[,]" causing "a 'litigious cauldron of racial suspicion.'" *See Cheatam v. Blanda*, 2010 WL 2209217, *5 (E.D. Tex. 2010) (quoted case omitted). The law is not inherently skeptical of all law enforcement interactions.

Nor is it enough that Jamison wages allegations of pretext. Officer McLendon testified, and Jamison does not dispute, that Officer McLendon's LPR system did not recognize Jamison's temporary tag. *See* McLendon Depo. at 27, Ex. C; Jamison Depo. at 80, Ex. J. Officer McLendon further testified that, once behind Jamison, he could not read Jamison's tag. *See* McLendon Depo. at 27-28. Jamison theorizes that Officer McLendon should have been able to read his tag, but such self-serving testimony has long been rejected by courts in this context. *See, e.g., Washington v. Vogel*, 880 F.Supp. 1542, 1544 (M.D. Fla. 2005) (explaining that "[t]he mere denial by the driver or occupants of a vehicle that the driver committed a traffic violation is insufficient, without more, for a reasonable jury to find that [a] traffic stop was pretextual[.]"). Jamison, who was driving his vehicle at a speed of 60 m.p.h. and therefore not in a position to

[1] This allegation by Jamison brings into play the rule that, at the summary judgment stage, courts are not required to credit a version of the facts that is too incredible to be believed. *See, e.g., Chenari v. George Washington U.*, 847 F.3d 740, 747 (D.C. Cir. 2017) (discussing parameters of the rule).

observe his own tag going down the Interstate, can do nothing more than speculate about Officer McLendon's perception of his tag. *See, e.g., Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003) (citation omitted) ("Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment.").

Even if Jamison could demonstrate pretext, however, that alone would not satisfy the second requirement. Jamison must show that the stop was racially motivated, not just that Officer McLendon did not really pull him over because of the readability of his tag, i.e. pretext. *See Whren*, 517 U.S. at 813 (explaining that the Equal Protection Clause forbids race-based stops); *cf. Reynolds v. Sovran Acquisitions, L.P.*, 2015 WL 6501552, *11 (N.D. Tex. 2015) (granting summary judgment where plaintiff demonstrated pretext but failed to produce evidence of discrimination). Jamison's Equal Protection claim is severely undercut by his Fourth Amendment argument, which alleges that Officer McLendon believed he had the right to stop Jamison simply because of his temporary tag. *See* Doc. No. 54 at p.21. If Officer McLendon stopped Jamison merely because he had a temporary tag, such action would not constitute discrimination on the basis of race.[2] *See Mitchell v. Township of Willingboro Municipality Government*, 2011 WL 3203677, *5 (D. N.J. 2011) (explaining that there was no evidence that the "particular improper stop was a result of racial targeting instead of, say, the tinted windows or out-of-state plates on the car"). Countless cases within this Circuit underscore that Jamison's conclusory allegations are insufficient to satisfy the discriminatory purpose requirement. *See Lawson v. Martinez*, 2015 WL 1966069, *4 (W.D. Tex. 2015); *Garcia v. Dallas Police Dept.*, 2013 WL 5433502, *8 (N.D. Tex. 2013); *Paris v. Dallas Police Dept.*, 2012 WL 2520779, *5-6

[2] Tellingly, Jamison's very response confesses that "there is no dispute that the sole reason [Officer] McLendon stopped Mr. Jamison, in the first place, had to do with his temporary tag[.]" *See* Doc. No. 54 at p.17 (emphasis added).

(N.D. Tex. 2012); *Grant v. Acevado*, 2008 WL 1924241, *2-3 (W.D. Tex. 2008); *Longmire v. Starr*, 2005 WL 2990908, *3 (N.D. Tex. 2005).

This Court should dismiss the Equal Protection claim. Jamison has the burden of proving both discriminatory effect and discriminatory purpose. Because he can prove neither, summary judgment is appropriate.

II. Even if Jamison could demonstrate an Equal Protection violation, Officer McLendon is entitled to qualified immunity.

In addition to proving a constitutional violation, Jamison must overcome the qualified immunity doctrine. When, as here, the defendant has asserted qualified immunity, the plaintiff shoulders the burden of proving that the defendant's conduct violated "clearly established law." *See Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. Nov. 13, 2017) (en banc). The Supreme Court's most recent discussion of qualified immunity came in *District of Columbia v. Wesby*, No. 15-1485, slip op. at 13 (Jan. 22, 2018), and it stresses that qualified immunity presents a "demanding standard" that is difficult for plaintiffs to overcome. Jamison has not come close to satisfying his burden in this case.

To be sure, Jamison has pointed to no clearly established law on the discriminatory effect or discriminatory purpose requirements of his Equal Protection claim. *See* Doc. No. 54 at pp. 26-28. In fact, both cases he cites in his oppositional response are employment cases, not law enforcement cases. *Id*. (citing *Wallace v. Tex. Tech U.*, 80 F.3d 1042 (5th Cir. 1996) and *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004)). Jamison's failure to identify a case where a law enforcement officer has been held to have committed a constitutional violation under similar circumstances provides an alternative ground for dismissal of the Equal Protection Clause claim. *See White v. Pauly*, 137 S.Ct. 548, 552 (Jan. 9, 2017) (reversing a denial of qualified immunity where the plaintiff "failed to identify a case where an officer acting under

similar circumstances . . . was held to have violated the [Constitution]"); *see also Wesby*, No. 15-1485, slip op. at 15 ("[W]e have stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the [Constitution, for]" only in "the rare 'obvious case'" may a plaintiff avoid pointing to a specific case that supposedly clearly establishes the law.).

III. Jamison cannot demonstrate a Fourth Amendment violation.

Summary judgment likewise is appropriate on Jamison's Fourth Amendment claims. He challenges both Officer McLendon's initial stop and subsequent search, but both were constitutionally reasonable. *See Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."). Flaws in Jamison's position are addressed in turn.

Officer McLendon's Stop. As an initial matter, all of Jamison's discussion about Officer McLendon's motive and intent is irrelevant. *See* Doc. No. 54 *generally*. Unlike with the Equal Protection claim, "the constitutional reasonableness of traffic stops under the Fourth Amendment does not depend on the actual motivations of the individual officers involved." *See Morrow v. Washington*, 277 F.R.D. 172, 198 (E.D. Tex. 2011) (citing *Whren*, 517 U.S. at 812-13)). Jamison quotes Officer McLendon's testimony at length about the reason he decided to stop Jamison, but this Court must ignore such purported evidence. *Id*. All that matters is whether there was reasonable suspicion from an objective standpoint. *See U.S. v. Lopez-Moreno*, 420 F.3d 420, 432 (5th Cir. 2005) ("Supreme Court and Fifth Circuit precedent has made clear that an officer's subjective intentions have no impact on analyzing reasonable suspicion[.]").

The undisputed facts are that Jamison was driving a car with a temporary tag that Officer McLendon's LPR system did not recognize. Jamison attempts to create a fact issue by challenging Officer McLendon's assertion that he stopped the car, in part, because he was unable

to read the temporary tag due to it flapping in the wind. In doing so, Jamison points to an exhibit of the tag—produced more than three years after the incident—as evidence that the tag could not have been curled or flapping at the time of the stop because it does not have a crease in it now. *See* Docket No. 54 at p.3. The probative value of such evidence obviously is lacking due the possibility that the tag could have been manipulated throughout the years and is, therefore, not an accurate reflection of its appearance at the time of the stop. *See, e.g., U.S. v. Barragan-Espino*, 2008 WL 4661627, *4 (W.D. La. 2008) (explaining that the defendant's photographs of the tag, taken after the fact, "do not depict what [the officer] saw under the circumstances at the time that he saw it," which was "at night while traveling 60-70 m.p.h.").

Regardless, though, there is no need to consider the issue about the flapping tag because Officer McLendon's reasonable belief, even if mistaken, that Jamison's temporary tag was invalid under Mississippi law was enough to establish reasonable suspicion justifying the investigatory stop.[3] *See* McLendon Depo. at 37, Ex. K; McLendon Depo. at 38, Ex. C. The Supreme Court unequivocally has held that reasonable suspicion may be based on a reasonable mistake of law. *See Heien v. North Carolina*, 135 S.Ct. 530, 540 (2014). In determining whether the officer's mistake was objectively reasonable, the *Heien* Court assessed whether the law at issue was ambiguous and whether courts had addressed the ambiguity. *See id.* at 535; *see also, U.S. v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015).

Mississippi Code § 27-19-40(2) governs the validity of temporary tags. It states that such tags are "valid for a period of seven (7) full working days . . . after the date the motor vehicle is purchased." *Id.* The statute, however, only speaks to temporary tags issued in Mississippi. It is

[3] The reasoning from *Wesby* makes clear that, if it was reasonable for Officer McLendon to believe that he could stop Jamison simply because of the temporary tag, then the issue about whether the tag was flapping is wholly irrelevant. *See* No. 15-1485, slip op. at 14 n.2 ("Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking.").

silent regarding the validity of temporary out-of-state tags. In light of this silence, Mississippi case law acknowledges that "a Mississippi [law enforcement officer cannot] be charged with perfect knowledge of other states' conventions regarding temporary tags." *See Twenty Thousand Eight Hundred Dollars ($20,800.00) in U.S. Currency v. State ex rel. Miss. Bureau of Narcotics*, 115 So.3d 137, 140 (Miss. Ct. App. 2013). Officer McLendon's belief that Jamison's temporary out-of-state tag was invalid, even if mistaken, was therefore objectively reasonable.

Jamison's oppositional response wrongly suggests that, for Officer McLendon's stop to have been permissible, Jamison actually had to be in violation of Mississippi's traffic laws. Aside from the fact that his argument is in clear contradiction to *Heien*,[4] reasonable suspicion merely requires the possibility that there might be criminal activity afoot. *See United States v. Brigham*, 382 F.3d 500, 509 (5th Cir. 2004); *see also United States v. Pack*, 622 F.3d 383 (5th Cir. 2010). The Supreme Court has been adamant that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *See United States v. Arvizu*, 534 U.S. 266, 277 (2002). "The law requires far less than perfect certainty of a traffic violation before an officer may initiate a stop." *United States v. Garcia-Patino*, 2018 WL 306729, *3 (D. Kan. 2018); *see also United States v. Montes–Hernandez*, 350 Fed. App'x 862, 867-68 (5th Cir. 2009) ("To have an objectively reasonable suspicion, an officer does not have to determine that a suspect has in fact violated the law.").

Ultimately, the undisputed fact that Officer McLendon's stop was premised on Jamison driving a car with a temporary tag from Pennsylvania that his LPR system did not detect is dispositive. *See* Doc. No. 54 at p.16 (stating that "there is no dispute that the sole reason [Officer] McLendon stopped Mr. Jamison [ ] had to do with his temporary tag"). Officer

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[4] Tellingly, the Fifth Circuit cases Jamison cites on this point were decided before *Heien*. *See United States v. Miller*, 146 F.3d 274, 278-79 (5th Cir. 1998); *United States v. Lopez-Valdez*, 178 F.3d 282, 288(5th Cir. 1999).

McLendon was justified in stopping Jamison and investigating whether he was committing a crime. *See, e.g., United States v. Smith*, 164 Fed. Appx. 825, 826-27 (11th Cir. 2006) (finding traffic stop supported by reasonable suspicion where officer stopped vehicle after observing "the vehicle had a 'paper car lot tag'" and wanted to "confirm the validity of the paper tag"). The actions at issue here satisfy the "low threshold" that is reasonable suspicion. *See, e.g., Windham v. Harris County, Tex.*, 875 F.3d 229, 240 (5th Cir. 2017).[5]

Officer McLendon's Search. Officer McLendon's actions following the stop also were consistent with the Constitution. Jamison argues that Officer McLendon unlawfully prolonged the stop and then conducted an unlawful search, but Jamison's position is without merit.

Once Officer McLendon pulled Jamison over, it was permissible for him to engage in "ordinary inquiries incident to [the] traffic stop." *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Such ordinary inquiries included "checking [Jamison's] driver's license, determining whether there [were] outstanding warrants against [Jamison], and inspecting [Jamison's] automobile's registration and proof of insurance." *See Rodriguez v. United States*, 135 S.Ct. 1609, 1611 (2015). It also was permissible for Officer McLendon to question Jamison about other things, such as where he was traveling from. *See Brigham*, 382 F.3d at 508 ("An officer may also ask about the purpose and itinerary of a driver's trip during the traffic stop.").

Governing law simply does not support Jamison's prolonged-stop argument. *Rodriguez* makes clear that checking for "outstanding warrants" constitutes a permissible traffic stop inquiry, so Officer McLendon had every right to detain Jamison until he received the requested information back from the dispatcher. *See* 135 S.Ct. at 1611. Plus, in this case, Officer McLendon's initial inquiries revealed various important things: (1) that Jamison was driving

[5] By comparison, the Supreme Court said in *Wesby* that "[p]robable cause 'is not a high bar.'" *See* No. 15-1485, slip op. at 7. We of course know that reasonable suspicion presents "a much lower standard" than probable cause. *See, e.g., United States v. Johnson*, 655 Fed. App'x 247, 249 (5th Cir. 2016).

from a known drug location on the West Coast (Phoenix, Arizona), (2) that Jamison was driving down a known drug route (Interstate 20), (3) that Jamison was driving a car that had been purchased on the East Coast 13 days prior, (4) that Jamison had a South Carolina Driver's License, and (5) that the vehicle Jamison was driving had a temporary tag from Pennsylvania. *See* Doc. No. 47 at pp.6-7 (collecting record citations). Reasonable suspicion is an evolving concept, meaning that information Officer McLendon learned after the stop's inception provided further justification for extending the scope of the stop. *See, e.g., United States v. Pauyo*, 341 Fed. App'x 955 (5th Cir. 2009) (holding that law enforcement officer's "actions were justified as a graduated response to emerging facts").

Jamison tries to discount these facts by arguing that they could be suggestive of completely innocent conduct. *See* Doc. No. 54 at p.24. While that certainly may be true, reasonable suspicion is not so demanding. Supreme Court precedent is clear that "the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts." *See United States v. Sokolow*, 490 U.S. 1, 10 (1989) (quoted case omitted). Courts consistently apply this rule without fail. *See, e.g, United States v. Bernal*, 2017 WL 5662299, *6 (E.D. Ky. 2017) (explaining that, although facts standing alone were suggestive of completely innocent conduct, together they "pass[ed] the relatively low reasonable suspicion threshold"). The Fifth Circuit, for example, recently reiterated that "[f]actors that ordinarily constitute innocent behavior may provide a composite picture sufficient to raise reasonable suspicion in the minds of experienced[6] officers." *See United States v. Rivera-*

[6] As explained in the opening brief, Officer McLendon certainly is an "experienced" law enforcement officer, having "self-initiated over 103 criminal interdiction cases involving bulk smuggling of contraband[,]" having "assisted in over 100 criminal interdiction cases[,] having worked to "disrupt[ ] [ ] several Drug Trafficking Organizations[,]" and having been "recognized as an expert witness in the fields of Criminal Interdiction and Drug Trafficking [by] the States of Mississippi and Louisiana." *See* Doc. No. 47 at pp.1-2 (collection record citations).

Alonso, 690 Fed. App'x 273, 274 (5th Cir. 2017) (quoting *United States v. Jacquinot*, 258 F.3d 423, 427-28 (5th Cir. 2001)).[7]

Jamison has not demonstrated that the length of time he was stopped prior to providing consent was unreasonable, for "[t]here is . . . no constitutional stopwatch on traffic stops." *See Bringham*, 382 F.3d at 511. Underscoring the point is a case decided approximately three months ago, where the Fifth Circuit held that a 90-minute traffic stop was consistent with the Constitution. *See Windham*, 875 F.3d 229 at 241. Jamison has not pointed to any evidence that Officer McLendon's pre-consent stop lasted anywhere near 90 minutes. *See, e.g., RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 858 (5th Cir. 2010) (explaining that "the party opposing summary judgment is required to identify specific evidence in the record and to articulate precisely how this evidence supports his claim."). His argument about a prolonged detention must be rejected.

Having shown that the duration of the stop, pre-consent, was lawful, the inquiry then turns to Officer McLendon's search. This is so because a law enforcement officer needs no justification to prolong the encounter once consent is provided. *See U.S. v. Machuca-Barrera*, 261 F.3d 425, 435 (5th Cir. 2001). Jamison admits that he provided consent, but wrongly maintains that his consent was involuntary. *See* Doc. No. 54 at pp.24-26.

To be sure, Jamison has not demonstrated that the six factors used to determine whether consent was voluntary weigh in his favor. Those factors are "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating

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[7] *Wesby* likewise goes into great detail about such an "innocent facts" argument. *See* No. 15-1485, slip op. at 11-12. The Supreme Court chided the D.C. Circuit for "mistakenly believ[ing] that it could dismiss outright any circumstances that were 'susceptible of innocent explanation.'" *Id.* The "relevant inquiry[,]" the Court said, "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* (quoted case omitted).

evidence will be found." *See United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017).[8] It is undisputed that the last two factors support a finding of voluntariness. *See* Doc No. 54 at 25-26 (admitting that Jamison is intelligent and "knew to a certainty that no drugs would be found"); *United States v. Beltran*, 650 F. App'x 206, 207 (affirming district court's finding that appellant's intelligence and belief that drugs would not be discovered weighed in favor of voluntariness). The remaining factors are discussed in turn.

The fact that Jamison was not free to leave prior to giving consent does not hold significant weight, as this was only because Officer McLendon was waiting for a return on his license check. *See U.S. v. Padilla*, 2011 WL 2110305, at *6 (S.D. Miss. May 25, 2011) ("The Fifth Circuit has repeatedly held that a roadside stop based on reasonable suspicion may continue until all computer checks come back clear.") (collecting cases); *U.S. v. Huerta*, 252 F. Appx 694, 697 (5th Cir. 2007) (concluding that consent was voluntary where defendant was "not free to leave while the license check was being conducted"). For this same reason, Jamison's assertion that Officer McLendon placed his arm in the car to prevent him from leaving does not constitute coercion. Even though Jamison vaguely alleges that his exchange with Officer McLendon became heated, he admits to being cooperative throughout the encounter. Docket No. 54 at 25. Jamison also concedes that he was aware of his right to refuse consent. *Id.*[9] The insistence that

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[8] Officer McLendon has explained why his stop was lawful, but, even if it was not, the lawfulness of the stop is not dispositive of the search inquiry. Where consent follows an unlawful detention, courts must consider three additional factors to determine whether it was an act of free will: "(1) [t]he temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct." *U.S. v. Johnson*, 264 F.3d 1140, at *2 (5th Cir. 2001). When coercive police tactics are absent and the person is aware of his right to refuse consent, "these factors constitute intervening circumstances sufficient to purge the taint of an unreasonable detention." *Id.* Thus, even if the Court were to find that the initial stop was unlawful, these factors, discussed in more detail later, demonstrate that Jamison's consent was still valid.

[9] Jamison's assertion that the opening brief referenced his prior license suspensions for refusal to use a breathalyzer in an attempt to make him look bad is unfounded. The evidence was pointed out to show Jamison's awareness of his right to refuse consent. The Fifth Circuit considers such evidence of prior refusals relevant to determining whether consent was voluntary. *See United States v. Beltran*, 650 F.

Officer McLendon asked Jamison to consent multiple times after declining does not militate against a finding of voluntariness. In fact, it reinforces a determination that consent was freely given. *See United States v. Brown*, 567 F. App'x 272, 280 (5th Cir. 2014) (concluding that consent was voluntary, in part, because defendant had twice declined the officer's request for consent, evidencing awareness of his right to refuse). The balance of these factors establishes that Jamison voluntarily consented to the search of his car.

As a final resort, Jamison alleges that he attempted to withdraw consent during the search, and Officer McLendon told him that consent cannot be withdrawn once given. *See* Doc. No. 54 at 10.[10] For withdrawal of consent to be effective, however, there must be "an unequivocal act or statement of withdrawal." *U.S. v. Alfaro*, 935 F.2d 64, 67 (5th Cir. 1991); *see also United States v. Mata*, 517 F.3d 279, 291 (5th Cir. 2008) (holding defendant did not effectively withdraw consent by saying "Maybe I should speak with my lawyer"); *United States v. $304,980.00 in U.S.Currency*, 732 F.3d 812, 820 (7th Cir. 2013) (explaining that "withdrawal must be clearly communicated to the searching officers in order to be effective"); *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir. 2004) ("[I]ntent to withdraw consent must be made by unequivocal act or statement."); *United States v. Kubbo*, 17 F. App'x 543, 545 (9th Cir. 2001) ("Mere reluctance to a continued search, once an explicit and unambiguous statement of consent has been provided, is not necessarily sufficient to imply a withdrawal [of] such consent.").

Jamison points to following deposition testimony as evidence that he withdrew consent:

App'x at 207 (using testimony that defendant "had declined consent to search his person during a prior arrest" to find that defendant was aware of his right to refuse consent). The prior license suspensions are also relevant because they provide an explanation as to the length of time with regard to the computer check and why Officer McLendon initially thought Jamison's license was suspended.

[10] Tellingly, Jamison discusses this issue only in his fact section and not in his argument section. Courts frequently hold that arguments are waived where a litigant makes only a passing reference in support of a claim. *See, e.g., United States v. Thames*, 214 F.3d 608, 611 n. 3 (5th Cir. 2000). Such a rule is especially appropriate when, as here, the defendant is protected by the doctrine of qualified immunity.

A. All right. He told me to go back to his patrol car in front and then he was searching a little bit. Then he came back around and he got something out of his car. It was a lot of back and forth out of his car and my car.
Q. Uh-huh.
A. And I said, We didn't agree -- I said, I didn't agree to this.
Then he was like, You gave me consent. That's all I need.
Q. Okay. What was your response to that?
A. And I said that's what I didn't say. I said, I didn't say that.
Q. What did he say then?
A. He went on because we was like -- it was getting heated then.

See Doc. No. 53-2 at p.70:5-20. This testimony falls far short of an unequivocal statement of withdrawal. Jamison never told Officer McLendon to stop the search. He merely expressed some reluctance towards its continuation, which does not constitute an effective withdrawal. *See $304,980.00 in U.S. Currency*, 732 F.3d at 820 ("[P]olice officers do not act unreasonably by failing to halt their search every time a consenting suspect equivocates."). Because he did not clearly communicate his intent to withdraw consent, Officer McLendon's continued search of the vehicle did not violate the Fourth Amendment.

* * * *

All of Jamison's Fourth Amendment arguments fail. Officer McLendon's initial stop was valid and so were his actions thereafter. Summary judgment should be granted for failure to prove a constitutional violation.

IV. Even if Jamison could demonstrate a Fourth Amendment violation, Officer McLendon is entitled to qualified immunity.

It is important, as an initial matter, to clarify precisely what is required for Jamison to defeat Officer McLendon's assertion of the "powerful defense" of qualified immunity. *See Jordan v. Brumfield*, 687 Fed. App'x 408, 412 (5th Cir. 2017). It is not enough that he identify genuine factual disputes between the parties. *See, e.g., Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015). Instead, he must demonstrate that the factual disputes he can identify are "material," meaning that he would prevail under "clearly established law" if they were resolved in his favor.

Id. The "clearly established law" component requires Jamison to show that Officer McLendon's "particularized" actions were constitutionally "beyond debate" on July 29, 2013 *See White*, 137 S.Ct. at 552; *see also Pena v. City of Rio Grande City*, 2018 WL 386661, *5 (5th Cir. Jan. 12, 2018) (explaining that the qualified immunity inquiry turns on whether the was "clearly established at the time of the incident").

Jamison's oppositional response includes a mere 1 and ½ pages on the issue of qualified immunity, making no attempt to tie Officer McLendon's specific actions to any particular legal precedents. *See* Doc. No. 54 at pp.28-29. This alone demonstrates that he has not satisfied his "heavy burden[.]" *See, e.g., Lincoln v. Maketa*, 2018 WL 443394, *9 (10th Cir. Jan. 7, 2018) ("The assertion of qualified immunity imposes a heavy burden on the plaintiffs, requiring them to point to existing precedent or the clear weight of authority establishing the existence of a constitutional violation. None of the plaintiffs has met that burden."). Because this Court may grant qualified immunity to Officer McLendon without tackling any of the underlying constitutional questions previously discussed, *see Pearson v. Callahan*, 555 U.S. 223, 227 (2009),[11] Officer McLendon highlights various points related to Jamison's Fourth Amendment claims.

First, there is no clearly established law demonstrating that what Officer McLendon observed did not amount to reasonable suspicion. The Fifth Circuit has been adamant that the reasonable suspicion inquiry is precisely the type of issue for which qualified immunity is appropriate. *See, e.g., Gonzalez v. Huerta*, 826 F.3d 854 (5th Cir. 2016). Although the Fifth Circuit harbored "serious doubts" as to whether there was reasonable suspicion in *Gonzalez*, the

[11] Indeed, *Wesby* makes clear that, if a case can be resolved on the issue of qualified immunity, courts ordinarily should not address the underlying constitutional question: "We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." *See* No. 15-1485, Slip op. at 13 n.7 (quoted case omitted).

court nonetheless held that the plaintiff could not overcome the "high level of specificity" required to defeat qualified immunity. *Id.* at 857-58. The same is true here, where Jamison's vehicle had a temporary tag from Pennsylvania that could not be read by Officer McLendon's LPR system. *See Wesby*, No. 15-1485, slip op. at 15 ("[W]e have stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.").[12]

Second, even under Jamison's theory that Officer McLendon wrongly believed that he could stop Jamison simply because of his temporary tag, Officer McLendon still is entitled to qualified immunity. Jamison grossly misstates the law by asserting "that an officer's mistake of law regarding the reason for initiating a traffic stop . . . violates the Fourth Amendment." *See* Doc. No. 54 at p.21. Quite differently, the law is settled that both reasonable mistakes of fact and reasonable mistakes of law are constitutionally permissible. *See Heien*, 135 S.Ct. at 539. Courts in other jurisdictions have applied the rule in the precise context presented here, explaining that an officer does not violate the Fourth Amendment by misinterpreting state law regarding temporary tags. *See, e.g., United States v. Figueroa-Rivera*, 2016 WL 9819518, *4 (D. New Mexico 2016) ("[E]ven if Armijo's traffic stop was exclusively based on his misapprehension of Colorado law regarding temporary tags, the mistake of law alone could provide a constitutional basis for the stop under *Heien*."). And the law is even more compelling in Mississippi where it has been explained that law enforcement officers cannot "be charged with

[12] The corollary is that it is not enough for a plaintiff to simply identify any case that outlaws the conduct at issue. *See, e.g., Vincent v. City of Sulphur*, 805 F.3d 543, 548-49 (5th Cir. 2015) (holding that "two out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit"). Rather, the plaintiff must point to controlling authority from the Supreme Court or Fifth Circuit or to a "robust consensus" of persuasive authority. *See, e.g., Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011).

perfect knowledge of other states' conventions regarding temporary tags." *See Twenty Thousand Eight Hundred Dollars ($20,800.00) in U.S. Currency*, 115 So.3d at 140.[13]

Third, there is no clearly established law demonstrating that the duration of the Officer McLendon's stop, prior to consent, violated the Fourth Amendment. Officer McLendon was initially justified in stopping Jamison, and the law is settled that Officer McLendon did not unlawfully extend the duration of the valid stop by questioning Jamison while waiting for the license check to clear.[14] *See U.S. v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993) ("Because the officers were still waiting for the computer check at the time that they received consent to search the car, the detention to that point continued to be supported by the facts that justified its initiation."). Furthermore, Officer McLendon acquired additional information during the course of the stop after learning the following facts: (1) that Jamison was driving from a known drug location on the West Coast (Phoenix, Arizona), (2) that Jamison was driving down a known drug route (Interstate 20), (3) that Jamison was driving a car that had been purchased on the East Coast 13 days prior, (4) that Jamison had a South Carolina Driver's License, and (5) that the vehicle Jamison was driving had a temporary tag from Pennsylvania. This information would have justified an extension of the stop even after license check returned. *See U.S. v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006) ("[I]f additional reasonable suspicion arises in the course of the stop and before the initial purpose of the stop has been fulfilled then the detention may continue until the new reasonable suspicion has been dispelled or confirmed."). Jamison simply cannot

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[13] Another recent case for consideration is *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), where the Fifth Circuit considered whether citizens have a First Amendment right to video the police. It ultimately was determined that such a right indeed exists, but qualified immunity nonetheless was awarded because, "a]t the time in question, neither the Supreme Court nor [the Fifth Circuit] had determined whether First Amendment protection extends to the recording or filming of police." *See Turner*, 848 F.3d at 686. Similarly here, Jamison has pointed to no Supreme Court or Fifth Circuit precedent holding that a law enforcement officer does not have reasonable suspicion to investigate out-of-state temporary tags.

[14] *See* Doc. No. 46-3 at p.20:12-17 (explaining that the question took place while waiting for the computer check results).

point to any clearly established law at the time of the stop showing that the duration of the stop was objectively unreasonable.[15]

Fourth, there is no clearly established law demonstrating that Jamison's consent was involuntary. Because it is not always obvious that consent was the result of coercion, "voluntariness is an issue particularly subject to qualified immunity." *Jordan v. Garrison*, 2014 WL 1379157, *12 (W.D. La. April 8, 2014). Moreover, consent has been deemed voluntary on worse facts than those before the Court. *See, e.g, U.S. v. Estrada*, 459 F.3d 627, 634 (5th Cir. 2006) (holding consent voluntary where there was evidence that defendant was uneducated and unaware of his right to refuse consent); *U.S. v. Olivarria*, 781 F. Supp.2d 387, 395 (N.D. Miss. 2011) (concluding that consent was voluntary even though it was given while suspect was handcuffed). Even to the extent that the issue could be deemed a "close question," close questions warrant qualified immunity. *See, e.g., Howell v. Town of Ball,* 827 F.3d 515, 525 (5th Cir. 2016).

Fifth, there is no clearly established law demonstrating that Jamison withdrew his admitted consent. Any withdrawal would have to have been "unequivocal," *see Alfaro*, 935 F.2d at 67, and Jamison has pointed to no case involving similar circumstances. Courts, again, correctly have acknowledged that consent issues are "particularly subject to qualified immunity." *See Jordan*, 2014 WL 1379157 at *12.

Finally, there is no clearly established law demonstrating that, even if Jamison's consent could be deemed involuntary, Officer McLendon lacked at least "arguable probable cause" to search Jamison's vehicle. Officer McLendon highlighted in his opening brief that, for purposes of qualified immunity, there need not have been actual probable cause even if Jamison had not

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[15] Because the incident occurred in 2013, any limitations imposed by *Rodriguez v. U.S.*, 135 S. Ct. 1609 (2015) are irrelevant to the determination of whether Officer McLendon's actions were objectively unreasonable under clearly established law at the time.

consented. *See* Doc. No. 47 at p.13 (collecting cases). Instead, absent the consent, there needed only be a basis for finding that a reasonable officer might believe that there was probable cause. *Id*. Jamison ignores this alternative argument entirely, and the undisputed facts show that there was at a minimum arguable probable cause. *See Wesby*, No. 15-1485, slip op. at 16 ("Even assuming the officers lacked actual probable cause[,] the officers are entitled to qualified immunity because they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'").

There ultimately are many reasons why Officer McLendon is entitled to qualified immunity. All of them sound in Jamison's failure to show specific material factual disputes that are tied to specific precedents placing Officer McLendon's actions beyond legal debate. Because Jamison has not carried his burden, dismissal is appropriate. The Supreme Court recently emphasized that qualified immunity "is 'especially important in the Fourth Amendment context.'" *See Wesby*, No. 15-1485, Slip op. at 5.

CONCLUSION

For the reasons explained here and in the opening brief, Officer McLendon should be granted summary judgment.

Dated: January 23, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Todd Butler, certify that I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which sent notification of such filing to the following counsel of record:

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Dated: January 23, 2018.

/s/ G. Todd Butler
G. TODD BUTLER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFF**

VS. **CIVIL ACTION NO.: 3:16-CV-595-CWR-LRA**

NICK MCCLENDON,
IN HIS INDIVIDUAL CAPACITY **DEFENDANT**

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

In connection with this Court's September 26, 2018 order, Defendant Nick McLendon renews his request for summary judgment. *See* Doc. No. 62 at p.10. McLendon's prior summary judgment papers, *see* Doc. Nos. 46, 47, 57, & 58, supplemented by the memorandum being filed contemporaneously herewith, show why McLendon should be granted qualified immunity and dismissed from this case with prejudice.

Dated: October 31, 2018.

Respectfully submitted,

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THIS, the 31st day of October, 2018.

/s/ G. Todd Butler
G. Todd Butler

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFFS**

VS. **CIVIL ACTION NO.: 3:16-cv-00595-CWR-LRA**

NICK MCLENDON, IN HIS INDIVIDUAL CAPACITY **DEFENDANTS**

DEFENDANT'S MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

On September 26, 2018, this Court granted summary in favor of Defendant Nick McLendon on Plaintiff Clarence Jamison's equal protection and *Terry* stop claims. *See* Doc. No. 62. What's left is Jamison's claims regarding the length of Officer McLendon's stop and Officer McLendon's search of Jamison's car. *Id*. at p.10. This Court asked for supplemental briefing on whether these claims were subject to qualified immunity, so Officer McLendon now files this renewed summary judgment motion in compliance.

The answer to this Court's question is "yes." Because Jamison can point to no "controlling authority" showing that the "specific" conduct at issue violated Jamison's "clearly established" Fourth Amendment rights, Officer McLendon is entitled to qualified immunity. Officer McLendon incorporates his prior summary judgment filings and supplements them as instructed. *See* Doc. Nos. 46, 47, 57, 58, & 62.

SUPPLEMENTAL ARGUMENT & AUTHORITIES

Unlike in the ordinary summary judgment context, it is not enough in the qualified immunity context for a court to hold that there are genuine issues of material fact. *See, e.g., Colston v. Barnhart*, 146 F.3d 282, 284 (5th Cir. 1998). Courts instead must determine whether the facts of the case, viewed in the light most favorable to the plaintiff, constitute a violation of the plaintiff's "clearly established" rights. *See Cantrell v. City of Murphy*, 666 F.3d 911, 919

(5th Cir. 2012). A district court's denial of qualified immunity on this question is subject to immediate appellate review because "qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial[.]'" *See White v. Pauly*, 137 S.Ct. 548, 551-52 (2017) (quoted case omitted).[1]

Determining whether a plaintiff's "clearly established" rights were violated involves a two-step process.[2]

The first step is the nomination phase, illustrated by the Fifth Circuit's recent decision in *Vann v. Southaven*, 884 F.3d 307 (5th Cir. 2018). The panel initially reversed a grant of qualified immunity on a Fourth Amendment claim due to perceived factual disputes, but, after rehearing, the opinion was vacated. *See Vann*, 884 F.3d at 309. Unlike the original opinion, the revised opinion properly recognized that "[i]t is the plaintiff's burden to find a case in his favor[.]" *Id*. at 310. The plaintiff had "cited nary a pre-existing or precedential case . . . showing specific law on point[,]" so qualified immunity was reinstated. *Id*.

The second step, if a particular case has been identified, is to determine if the identified case qualifies as "clearly established law." This qualification determination involves inquiry into whether the identified case is both "authoritative" and "specific." *See District of Columbia v. Wesby*, 138 S.Ct. 577, 591-93 (2018). The Supreme Court reversed the D.C. Circuit in *Wesby* for "not follow[ing] this straightforward analysis." *Id*. at 591.

Qualified immunity, to be sure, "is a powerful defense" that "is 'especially important in the Fourth Amendment context.'" *See id*. at 590 (quoted case omitted); *Jordan v. Brumfield*, 687 Fed. App'x 408, 412 (5th Cir. 2017). The Fifth Circuit recently emphasized that, "[r]ight or

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[1] Relatedly, courts must rule on the issue of qualified immunity before trial and may not carry the issue of qualified immunity along with the case. *See Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986).

[2] A recent Mississippi district court opinion discusses the two-step process in detail. *See Carr v. Hoover*, 2018 WL 3636563, *8-9 (N.D. Miss. 2018).

wrong, the very premise of qualified immunity is that not every constitutional violation suffered by [a] plaintiff[ ] is redressable." *See Samples v. Vadzemnieks*, 900 F.3d 655, 663 (5th Cir. 2018). Governing law requires that Officer McLendon be given qualified immunity in this case, regardless of whether there was a constitutional violation.

A. The length of the stop leading up to Officer McLendon's search

This Court previously held that Officer McLendon could not be held liable for the initial stop of Jamison's car, so the question then becomes whether the length of the stop gives rise to liability. Doc. No. 62 at p.10. Although the order "assume[s] that Jamison's tag was entirely visible[,]" *id*. at p.9, that does not answer the question about the length of the stop. Case law makes clear that, even if Officer McLendon saw that the tag was in order upon stopping Jamison, Officer McLendon was authorized "to conduct 'ordinary inquiries incident to' a traffic stop[,] even if those inquiries [were] unrelated to the purpose the stop." *See Stewart v. Holder*, 2017 WL 4479612, *8 (E.D. Va. 2017) (collecting Supreme Court and Circuit precedent on the issue); *see also* Doc. No. 58 at pp.9-10 (collecting authority).

Jamison's summary judgment response details the "inquiries incident to the stop" that were made in this case, including Officer McLendon asking Jamison for his driver's license, registration, and proof of insurance; Officer McLendon calling dispatch to conduct a license check; and Officer McLendon requesting a NCIC check. *See* Doc. No. 54 at pp.2-5. It also is undisputed that Jamison told Officer McLendon that he was traveling from the West Coast. *See* Doc. No. 47 at p.3 (collecting both Jamison's and Officer McLendon's deposition testimony on this point). Case law again makes clear that each of these inquiries was constitutionally permissible. *See Rodriguez v. United States*, 135 S.Ct. 1609, 1611 (2015) (explaining that license, registration, and insurance checks were all permissible inquiries incident to a stop); *United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004) (explaining that asking the driver

for the purpose and itinerary of his trip is a permissible inquiry incident to a stop); *Flora v. Southwest Iowa Narcotics Enforcement Task Force*, 292 F.Supp.3d 875, 890 (S.D. Iowa 2018) (explaining that a NCIC check is a permissible inquiry incident to a stop).

While the NCIC check was being conducted, Officer McLendon engaged Jamison in conversation at his car. *See* Doc. No. 54 at p.6. This conversation was undoubtedly lawful. *See, e.g., United States v. Spence*, 667 Fed. App'x 446, 447 (5th Cir. 2016) ("While waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop.").

Jamison says that Officer McLendon engaged him in conversation "for the purpose of finding a reason to search the car or get [ ] Jamison's consent to search the car[,]" *id.*, but Officer McLendon's intent is entirely irrelevant. A police officer's subjective motivation plays no role in the Fourth Amendment analysis. *See, e.g., United States v. Toussaint,* 838 F.3d 503, 508 (5th Cir. 2016) (collecting cases). Courts instead must determine whether there is an "objectively reasonable basis" that supports the officer's actions.[3] *Id*. at 508-09.

Significantly, the inquiries that had been conducted at the time Officer McLendon was awaiting the results of the NCIC check revealed the following: (1) that Jamison was driving from a known drug location on the West Coast (Phoenix, Arizona), (2) that Jamison was driving down a known drug route (Interstate 20), (3) that Jamison was driving a car that had been purchased on the East Coast 13 days prior, (4) that Jamison had a South Carolina Driver's License, and (5) that the vehicle Jamison was driving had a temporary tag from Pennsylvania. *See* Doc. No. 47 at pp.6-7 (collecting record citations). All of this information contributes to the "emerging facts"

[3] This Court's summary judgment order accepts that Officer "McLendon's goal was to search Jamison's vehicle." *See* Doc. No. 62 at p.5. While this fact was relevant to the equal protection claim that already has been dismissed, it is completely irrelevant to the remaining Fourth Amendment claim. Again, an objective – rather than a subjective – standard applies.

that existed after the initial stop. *See United States v. Wolfe*, 370 Fed. App'x 549, 550 (5th Cir. 2010); *see also* Doc. No. 58 at p.10 (collecting authority).

To be clear, none of these facts were even necessary for Officer McLendon to seek Jamison's consent. It is perfectly lawful for a police officer to request consent to search during the time period when the officer is awaiting the results of a NCIC check. *See, e.g., United States v. Zucco*, 71 F.3d 188, 191 (5th Cir. 1995) (authorizing a request for "consent to search before or during the time of the NCIC check"). But it is no wonder that Officer McLendon sought Jamison's consent in light of the suspicious facts outlined above.[4]

Jamison of course does not deny that he provided Officer McLendon consent to search his vehicle; his argument instead is that consent was involuntarily given. *See* Doc. No. 54 at pp.24-26. This issue is addressed below, but it is mentioned here because of its relevance to the length of the encounter. If the consent was valid, then Jamison's duration argument falls by the wayside. "After [a suspect] consent[s] to a search, [an officer] need[s] no justification to prolong the encounter." *See United States v. Machuca-Barrera*, 261 F.3d 425, 435 (5th Cir. 2001). In other words, once Jamison provided consent, duration is no longer relevant.

B. The search of Jamison's car

Resolution of the consent question is governed by the six-factor test set forth in Officer McLendon's original summary judgment briefs. *See* Doc. No. 47 at p.9; Doc. No. 58 at pp.11-12 (identifying these six factors: voluntariness of the plaintiff's custodial status, presence of coercive police procedures, nature and extent of plaintiff's cooperation, plaintiff's awareness of

[4] In his summary judgment response, Jamison tried to discount all of the suspicious facts by arguing that they could be suggestive of completely innocent conduct. *See* Doc. No. 54 at p.24. The Supreme Court, however, recently rejected Jamison's argument. *See Wesby*, 138 S.Ct. at 588-89. *Wesby* explains that completely innocent conduct can nonetheless be suspicious and thus contribute to the reasonableness of an officer's actions. *Id*. at 588 ("[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.") (quoted case omitted).

his right to refuse, plaintiff's education and intelligence level, and plaintiff's belief that no incriminating evidence will be found). Application of these factors shows that Jamison's consent was voluntary.

Two fundamental principles provide the starting point for addressing the question of consent. First, it is the plaintiff's burden in the civil context to establish that consent was involuntary. *See, e.g., Kaniff v. United States*, 351 F.3d 780, 789 (7th Cir. 2003); *see also Adair v. Bell*, 1995 WL 1945487, *8 (N.D. Miss. 1995).[5] Second, since the issue of consent is governed by a multi-factored test, it is precisely the type of issue for which qualified immunity ordinarily is appropriate. *See, e.g., McNeal v. Roberts*, 129 Fed. App'x 110, 110 (5th Cir. 2005); *see also Jordan v. Garrison*, 2014 WL 1379157, *12 (W.D. La. 2014) ("Plaintiff does not contend that his consent was not voluntary, but even had such a claim been made, voluntariness is an issue particularly subject to qualified immunity.").[6]

Jamison cannot overcome Officer McLendon's entitlement to qualified immunity where it is beyond dispute that four of the six factors weigh in favor of voluntariness. To be sure, Jamison admitted in his original summary judgment opposition that he was intelligent, that he "knew to a certainty that no drugs would be found[,]" that he was cooperative with Officer McLendon, and that he was aware of his right to refuse consent. *See* Doc. No. 54 at pp.25-26. Of the remaining two factors, it is far from clear that those weigh in Jamison's favor, but it does not matter in any event. The Fifth Circuit expressly has concluded that a suspect's consent was voluntary where he was not free to leave while awaiting a license check, and district courts in

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[5] *See further Fortner v. Young*, 582 Fed. App'x 776 (10th Cir. 2014) ("[T]he burden to show consent was involuntary rests on the plaintiff in a civil case.").

[6] This Court's prior summary judgment order acknowledges this point in the ruling. *See* Doc. No. 62 at p.9 (discussing Fifth Circuit precedent holding that the fact-intensive reasonable suspicion inquiry was "precisely the type of issue for which a qualified immunity analysis is most appropriate").

this Circuit have held that far more coercive tactics[7] than placing an arm in a window did not invalidate consent. *See United States v. Huerta*, 252 Fed. App'x 694, 697 (5th Cir. 2007) (consent provided while license check was being conducted was voluntary); *United States v. Olivarria*, 781 F.Supp.2d 387, 395 (N.D. Miss. 2011) (consent provided while handcuffed was voluntary).

The just-provided analysis shows that Jamison's consent was voluntary. Significantly, however, Jamison's consent need not even actually have been voluntarily for Officer McLendon to be entitled to qualified immunity. The test is whether it is arguable that Jamison's consent was voluntary, not whether Jamison's consent was actually voluntary. *See, e.g., Lopera v. Town of Coventry*, 640 F.3d 388, 398 (1st Cir. 2011) ("We cannot say that no officer of reasonable competence could have reached the conclusion" that there was valid consent.); *see also McNeal*, 129 Fed. App'x at 110 (holding that there were genuine issues of material fact as to whether the plaintiff's consent was actually voluntary but nonetheless granting qualified immunity). The very fact that this Court has asked for supplemental briefing on the subject shows that there is at least reasonable debate on the issue, which is all that is necessary to grant Officer McLendon qualified immunity.[8]

Although the summary judgment order requested supplemental briefing on the voluntariness of Jamison's consent, *see* Doc. No. 62 at p.10, there is an alternative basis for the search: arguable probable cause. *See Banuelos-Romero*, 597 F.3d at 767 ("[I]f probable cause

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[7] This Court's summary judgment order says that Officer McLendon made "repeated requests" to search Jamison's car and "plac[ed] his arm in Jamison's passenger window[,]" *see* Doc. No. 62 at p.6, but, even if this Court finds such conduct coercive, the Fifth Circuit recently emphasized that "coercion is only one of many factors courts consider in deciding if consent was knowing and voluntary." *See United States v. Cisneros*, 2018 WL 4492476, *1 (5th Cir. Sept. 18, 2018).

[8] Jamison's original summary judgment response hinted at a withdrawal-of-consent argument in the fact section of the brief, but he provided no corresponding discussion in the argument portion of the brief. *See* Doc. No. 54 at p.10. The reason Jamison failed to argue this point is because it is wrong as a constitutional matter and especially so as a qualified immunity matter. *See* Doc. No. 58 at pp.13-14 (collecting cases).

existed, Appellant's consent was not required for Trooper Dollar to search.").[9] Like with the issue of consent, Officer McLendon was not required to have actual probable cause. *See Wesby*, 138 S.Ct. 591 (explaining that, in the qualified immunity context, an officer is not required to have "actual probable cause"). "Arguable probable cause" is sufficient to trigger Officer McLendon's immunity. *See Carr*, 2018 WL 3636563, *8 ("The plaintiff bears the significant burden of showing that Officer Hoover did not have at least arguable probable cause under the two-step qualified immunity analysis.").

All of the suspicious facts recited above provided arguable probable cause to search Jamison's car for drugs. The Supreme Court recently emphasized that "[p]robable cause 'is not a high bar.'" *See Wesby*, 138 S.Ct. at 586 (quoted case omitted). If probable cause presents a low bar, then "arguable" probable cause of course presents an even lower bar. *See, e.g., Cottam v. City of Wildwood*, 2018 WL 4293307, *1 (11th Cir. Sept. 10, 2018) ("Arguable probable cause is a lower standard than actual probable cause[.]"). The search in this case satisfies the very minimal standard[10] that applies to Officer McLendon's conduct.

Indeed, a reasonable officer in McLendon's shoes could have believed that there were drugs in the car, since Jamison was traveling from a known drug location down a known drug route in a car that had been purchased halfway across the country 13 days prior. Add on the facts that Jamison had a South Carolina Driver's License and was driving a car with a temporary tag from Pennsylvania, and the search becomes even more reasonable. "Arguable probable cause exists if, under all of the facts and circumstances, an officer reasonably could—not necessarily

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[9] *See also U.S. v. Vazquez-Villa*, 2012 WL 1473443, *6 (D. Kan. 2012) ("[T]he Court finds the validity or voluntariness of consent immaterial, because the search was legal even without consent. Consent to search a vehicle is unnecessary where probable cause exists.").

[10] To illustrate the minimal test for arguable probable cause, consider the recent case of *Alexandre v. City of Miami*, 2018 WL 2463904 (S.D. Fla. June 1, 2018). Although the court found "it questionable whether the Individual Defendants had probable cause to arrest Plaintiff for inciting a 'riot[,]'" "the Court [wa]s compelled to find arguable probable cause for the arrest[,]" since "the bar is so low[.]" *See Alexandre*, 2018 WL 2463904 at *3.

would—have believed that probable cause was present." *See, e.g., Crosby v. Monroe Cnty.*, 394 F.3d 1328, 1332 (11th Cir. 2004).

For all of these reasons, the facts obtained by Officer McLendon provided him with arguable probable cause to search Jamison's vehicle or, at a minimum, arguable reason to believe Jamison's consent was voluntary. *See, e.g., U.S. v. Banuelos-Romero*, 597 F.3d 763, 767 (5th Cir. 2010) (explaining that an officer needs either probable cause or consent to search a vehicle, not both). Qualified immunity is appropriate.

CONCLUSION

Qualified immunity can be "disquiet[ing]" to courts because it necessarily leaves some victims of constitutional violations without a civil remedy. *See Zadeh v. Robinson*, 2018 WL 4178304, *10-11 (5th Cir. Aug. 31, 2018) (Willett, J., concurring). To be sure, the doctrine has received heavy criticism from all sides of the political spectrum. *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amci Curiae in Support of Petitioner, *Almighty Supreme Born Allah v. Lynn Milling*, No. 17-8654 (2018), 2018 WL 3388317. No matter: Qualified immunity is the Law of the Land, with the Supreme Court having reversed at least 14 denials of qualified immunity within the past seven years. *See Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (collecting 11 reversals prior to several more in 2017 and 2018).

Officer McLendon is entitled to qualified immunity because Jamison cannot identify any particularized case decided before July 29, 2013 that holds that Officer McLendon's conduct was unconstitutional. *See Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (holding that the law must be "clearly established at the time" of the alleged misconduct). In fact, the authority cited in Officer McLendon's original filings and throughout this supplemental brief show that far more

egregious conduct has been held inactionable. Summary judgment on the remaining claims should be granted.

Dated: October 31, 2018.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Todd Butler, certify that I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which sent notification of such filing to the following counsel of record:

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ATTORNEY FOR PLAINTIFF

Dated: October 31, 2018.

/s/ G. Todd Butler
G. TODD BUTLER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON — PLAINTIFF

VERSUS — 3:16CV595-CWR-LRA

NICK MCLENDON,
In His Individual Capacity — DEFENDANT

RESPONSE IN OPPOSITION TO RENEWED
MOTION [DOC. 63] FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Clarence Jamison, by and through counsel of record, and files his Response in Opposition to Renewed Motion [Doc. 63] for Summary Judgment. For cause, Mr. Jamison shows the Court as follows:

Pursuant to Fed. R. Civ. P. 56 the Defendant McLendon's Renewed Motion for Summary Judgment must be overruled based on the presence of disputed genuine issues of material fact regarding the violation of Mr. Jamison's civil rights.

In support of this response, Mr. Jamison relies on his Memorandum in Opposition to Renewed Motion for Summary Judgment, his Memorandum in Opposition to Motion for Summary Judgment, and the evidentiary materials submitted with his Response in Opposition to Motion for Summary Judgment, including:

1. Statement of Clarence Jamison,

2. Deposition of Clarence Jamison w/o Exhibits,

3. Deposition of Nick McLendon,

4. Photograph of Temporary Tag,

5. Courtesy Warning Pelahatchie Police Department,

WHEREFORE, PREMISES CONSIDERED, Mr. Jamison requests that the Defendants' Renewed Motion [Doc. 63] for Summary Judgment be denied in its entirety.

Respectfully submitted, this the 10th day of December, 2018.

/s/ Victor Israel Fleitas

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I hereby certify that on December 10, 2018 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 10th day of December 2018.

/s/ Victor Israel Fleitas

VICTOR I. FLEITAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CLARENCE JAMISON **PLAINTIFF**

VS. **CIVIL ACTION NO.: 3:16-cv-595-CWR-LRA**

NICK MCCLENDON, IN HIS INDIVIDUAL CAPACITY **DEFENDANT**

STIPULATION OF DISMISSAL

It is stipulated that all claims against all defendants are dismissed with prejudice pursuant to the terms of a Confidential Release of Claims and Settlement Agreement entered into between the parties, which includes full provisions for any and all claims of attorneys' fees and costs arising in this action. The parties agree that this case should be closed on the Court's docket.

Dated: August 4, 2020.

Respectfully submitted,

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AGREED TO AS TO FORM AND CONTENT

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I certify that I have electronically filed this *STIPULATION* with the Clerk of the Court, using the CM/ECF system, which sent notification to the following counsel of record:

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THIS the 4th day of August 2020.

/s/ G. Todd Butler
G. Todd Butler