UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appeal #19-1700

GEORGE WINGATE,

Appellant,

v.

SCOTT FULFORD, *et al.,*

Appellees,

BRIEF OF APPELLANT GEORGE WINGATE

On Appeal From The United States District Court For
The Eastern District Of Virginia, Alexandria Division

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Jurisdictional Statement

The court below had jurisdiction under 28 U.S.C. §1331 over this civil rights case brought pursuant to 42 U.S.C. §1983. This court has jurisdiction under 28 U.S.C. §1291 over this appeal from the final order and judgment granting defendant/appellees' motion for summary judgment entered May 31, 2019. The notice of appeal was filed June 27, 2019.

Statement of Issues Presented for Review

1. Whether the district court erred in finding as a matter of law that a sheriff's deputy possessed reasonable suspicion of criminal activity to detain a driver stopped for engine problems at night, in an area where vehicular larcenies had recently increased, where no particularized inculpatory circumstances whatsoever were in evidence.

2. Whether the district court erred in finding that the following particularized circumstances helped justify the driver's detention: he had stopped by the side of the road; left his headlights and taillights on; raised the hood of his car; exited his car to greet the deputy; was dressed in dark clothing; and informed the deputy that his check-engine light had come on.

3. Whether the district court erred in finding the *duration* of the deputy's seizure of the driver to be reasonable, where the deputy made no effort to confirm that the driver's check-engine light had come on as the driver had claimed, refused to check the code-reading technology on the driver's smartphone that would have confirmed the engine problem, and instead arrested the driver for refusing to give his name.

4. Whether the district court should have granted summary judgment on liability to the driver, who was arrested for failing to give his name to deputy sheriffs who demanded it in the absence of reasonable suspicion to believe that he was engaged in any sort of unlawful activity.

Statement of the Case

On July 30, 2018, appellant George Wingate filed suit against appellee Sheriff's Deputy Scott Fulford of Stafford County, Virginia in the United States District Court for the Eastern District of Virginia. Mr. Wingate claimed that the deputy had unreasonably seized him in violation of the Fourth Amendment for not identifying himself. He also brought pendent state law claims for false arrest and malicious prosecution against Dep. Fulford. Mr. Wingate's motion to add appellee Lieutenant Dimas Pinzon of the Stafford County Sheriff's Office – who

helped with his arrest – was granted on February 13, 2019. After discovery closed, the parties cross-moved for summary judgment. On May 31, 2019, the district court, per Trenga, J., denied Mr. Wingate's motion and granted the deputies' motion, dismissing all Mr. Wingate's claims on the grounds that Dep. Fulford had reasonable suspicion to conduct an investigatory stop, and that he and Lt. Pinzon had probable cause to arrest Mr. Wingate because he refused to identify himself. The court also ruled that the deputies were entitled to qualified immunity. This appeal followed.

Factual Background[1]

At close to 2 A.M. on April 25, 2017, Mr. Wingate – a law-abiding man with no record of arrests – was driving south on Jefferson Davis Highway in Stafford County, Virginia, when his check-engine light came on. JA 51, ¶2. The car was a new one on which Mr. Wingate depended for his livelihood as a driver for Uber. He immediately pulled off to the side of the road in front of a car dealership, about four feet from the roadway and under an illuminated street light

[1]Counsel for all parties agree that the facts in this case are not in dispute. Hearing transcript __.

(see JA 58-59). He left his car's headlights and taillights on, and in the dark night the car stood out in full view of anyone in the vicinity. (JA 52, 58-59.)

Mr. Wingate, who had worked for some time as a car mechanic, thought he might be able to fix his car, depending on the problem. He looked under the hood of his car with a flashlight to see if anything was wrong. Finding nothing evidently amiss, he left the car hood up and engine running and reentered his car to try to diagnose the problem using the Auto Doctor application on his smartphone. His phone could receive automotive codes from his car while it idled, via a small Bluetooth device connected to the car. JA 212-13; 139, ¶39; 140-45. The code reader confirmed there was a problem with one cylinder. JA 52.

Dep. Fulford was traveling north on Jefferson Davis Highway when he saw Mr. Wingate's car, stopped on the side of the road with its lights on and its hood up. JA 72:5-10; 82:11 - 83:2. Dep. Fulford called in to dispatch that he had come across "an apparently disabled vehicle." JA 99:2-9. Dep. Fulford later explained: "[W]hen I pulled in I thought that he was, you know, I thought he was disabled." JA 80:17-18.

Dep. Fulford parked behind Mr. Wingate's vehicle, trying "to help them out." JA 117:15-22. He later explained to Mr. Wingate:

Dep. Fulford: Yeah, and I see some -- I drive by and I see somebody with the hood up. So, guess what I'm going to do as a police officer?

Mr. Wingate: Why -- why are you --

Dep. Fulford: I'm going to pull over and I'm going to try to help that person.

JA 52, ¶6; 119 a 3:05.

Dep. Fulford confirmed his initial intent at the deposition:

Q. [Y]ou try to explain to him that if you see what seems to be a passenger in distress, what are you going to do as police officer. You are going to stop and see if you can help, right?

A. Correct.

Q. And that's in fact why you did stop and how the whole thing at least started; is that fair to say?

A. Correct.

JA 107:16 - 108:2.

Dep. Fulford exited his car. JA 72:12. Mr. Wingate responded by walking over to greet him, because "Well, I saw the sheriff approaching the car. And, you know, he pulled behind. I figured, hey, he's probably coming to check on me." JA 341:15-18. They met between their two cars. JA 53, ¶7. When Dep. Fulford asked Mr. Wingate what was going on, Mr. Wingate said he was having engine

trouble and was checking the car's automotive codes. JA 91-19 - 92:2; 103:12-14. Dep. Fulford did not ask Mr. Wingate if he had a code reader. JA 106:6-7.

In response to Dep. Fulford's questions, Mr. Wingate answered that he had come from Alexandria and was going to his girlfriend's house in Stafford. JA 53, ¶9. Defendants did not otherwise seek clarification of where Mr. Wingate had come from or was going. Instead, he asked Mr. Wingate to identify himself by name, in response to which Mr. Wingate asked why that was necessary. From that moment, Dep. Fulford's focus thereafter remained solely on Mr. Wingate's declining to provide identification, with no attention paid to the original reason for his stop – to assist a motorist in distress. JA 101:8 - 102:20; 53, ¶9.

In deposition, Dep. Fulford testified that he asked for Mr. Wingate's identification because he perceived what he deemed "red flags." *See* JA 72:11-14. He identified these red flags as follows:

> Q. And I want to review once again, just to lock it in, the factors that went into play at the time that you first told him that you required his name. Okay. And that is that it was 2:00 in the morning, that he was parked in a used car lot, under circumstances where in this period of time, these months as you have indicated, there were thefts from cars happening, that he was dressed all in black, that he walked away from the car and towards you, that he said he had engine trouble but so far as you could hear his car was running. Those were the things that had taken place before –
>
> A. Correct.

Q. -- you initially told him that he was required to give you his name; is that correct?

A. Correct.

Q. Okay. Were there any other factors other than the ones that I've just listed that were in play when you first told him that you wanted his name? Or have I listed them all?

A. I believe that's all of them.

JA 97:20 - 98:18.

All of Dep. Fulford's "red flags" except for his dark clothing and his going to greet the deputy – *i.e.,* the lateness of the hour, the location of Mr. Wingate's car in front of a used car lot, and his awareness that thefts from cars had occurred, and the indicia of apparent engine problems – were known to him when he told dispatch that he was stopping, not to investigate suspicious circumstances in front of the used car lot, but to assist "an apparently disabled vehicle." JA 99:5-6. It was only when Mr. Wingate declined to give his name that he called for back-up. JA 74:10-75:4.

While Dep. Fulford testified that he considered it a "red flag" when Mr. Wingate walked over to greet him, JA 75:9-11, he does not claim that Mr. Wingate was aggressive when he approached him. JA 78:22-79:2. Nor did he ask Mr. Wingate to get back in his car. JA 53, ¶7; JA 80:4-6. Nor did he inspect or ask to

inspect Mr. Wingate's car. JA 53, ¶8.

Because Mr. Wingate's car "seemed to be running and idling just fine," Dep. Fulford claims to have believed that Mr. Wingate was not actually having engine problems. JA 111:2-5. While Dep. Fulford may have heard Mr. Wingate's car running relatively smoothly, what he did not see, as he did not bother to look, was that the car's check-engine light was on, which he learned only after he had arrested Mr. Wingate. JA 118:2-5, 20-22. Nor did he ask to see, or learn, how Mr. Wingate had checked his engine codes. Had he done so, he would have learned of the problem reported with one cylinder. JA 52, ¶4.[2]

Dep. Fulford also considered Mr. Wingate's black clothing to be a "red flag" because, he explained, vehicle larcenies had been committed throughout Stafford County by darkly-clad people. JA 79:7-10, 14-17; JA 241, response to interrogatory 12.

In response to Mr. Wingate's refusal to identify himself, Dep. Fulford activated his body microphone and dashboard camera and requested backup on a non-emergency basis. JA 74:22 - 75:4, 94:6-12. Pursuant to *Scott v. Harris*, 550

[2]Ignorant that Mr. Wingate's cell phone was able to receive his automobile codes (he never asked), after Mr. Wingate's arrest Dep. Fulford opined to his colleagues that he doubted Mr. Wingate had been checking his codes at all because free-standing no code reader had been found. JA 119 at 19:02.

U.S. 372 (2007), the audio/video recordings constitute the dispositive evidence of what transpired once Dep. Fulford activated the recording devices and Mr. Wingate respectfully refers the court to this audio/video as the best evidence of what occurred. JA 119. Material portions of the dialogue are set forth below:

Officer Fulford tells Mr. Wingate that he must identify himself:

Dep. Fulford:	Well, in Stafford County --
Mr. Wingate:	Have I committed a crime?
Dep. Fulford:	-- it's required.
Mr. Wingate:	Have I committed a crime?
Dep. Fulford:	No. I didn't say you did.
Mr. Wingate:	All right then.
Dep. Fulford:	You're still required to --
Mr. Wingate:	Am I free to go?
Dep. Fulford:	-- identify yourself.
Mr. Wingate:	Am I free to go?
Dep. Fulford:	Not right now, no.
Mr. Wingate:	Am I being detained?
Dep. Fulford:	You're not detained.
Mr. Wingate:	Am I free to go?

Dep. Fulford:	No.
Mr. Wingate:	Am I being detained? If I'm not being detained, then I'm free to go.
Dep. Fulford:	You're not free to go until you identify yourself to me.

JA 119 starting at 0:31.

Dep. Fulford:	Okay. So are you -- are you not going to give me your license?
Mr. Wingate:	Unless I've committed some type of crime, I don't feel the need to.
Dep. Fulford:	It's not -- it's not about committing a crime, man. It's about -- it's just identifying yourself.

JA 119 starting at 1:46.

Lt. Pinzon arrived at the scene, JA 109:6-9. He told Mr. Wingate that he was required to identify himself because of catalytic converter thefts in the county. Mr. Wingate still did not identify himself. Fulford Depo. at 192:12-15. The following colloquy occurred:

Lt. Pinzon:	Okay. Can we have it [your ID] please?
Mr. Wingate:	Have I committed a crime? Why do I need to issue an ID?
Lt. Pinzon:	You are committing a crime now because you're required to give us your ID.

Mr. Wingate:	Have I committed a crime?
Lt. Pinzon:	Right this second, yes. It's County Code 17-7 which requires you to show your ID.
Mr. Wingate:	You guys pulled over initially – you guys initially came over to check on what's going on with my car. Now you're approaching a whole different situation.

JA 55-56, ¶7; 119 starting at 4:34. Mr. Wingate found this conflicting information unsettling and confusing. JA 138-39, ¶20.

Faced with Mr. Wingate's repeatedly declining to give his name, Dep. Fulford and Lt. Pinzon decided they had "had enough," announced to Mr. Wingate that he was under arrest for refusing to give his name, and proceeded to try to handcuff him. JA 61:16-20; 119 starting at 5:29. Scared, convinced that he was being wrongfully arrested, and not thinking properly, Mr. Wingate resisted being handcuffed and tried to run away.[3] Dep. Fulford and Lt. Pinzon immediately pursued him and soon had him in handcuffs. He resisted no further. JA 56, ¶23.

Dep. Fulford confirmed at his deposition that had Mr. Wingate given his identification, there would have been no problem:

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[3]Mr. Wingate, a young African-American, was fearful of what might happen to him at the hands of two armed deputies arresting him for no reason. He does not defend his impulsive flight. The fact that this case was not presented as a race discrimination claim does not diminish the fear that Mr. Wingate felt at being wrongfully stopped at night on a solitary stretch of Jefferson Davis Highway by two sheriff's deputies.

Q. You are talking to Wingate, and you say "Lieutenant Pinzon explained to you as soon as you don't identify yourself or provide us with an identification, you are committing a crime." Do you recall that? Do you recall saying that to him?

A. Yes.

Q. Okay. And then you also told him, "You are not wanted, you are not suspended, you aren't anything. All you had to do was just give us your license. You didn't. And all of this would have been avoided." You told him that too, correct?

A. I believe so. Yes.

Q. Okay. And that was actually a true statement, was it not?

A. Yes. Based on the circumstances and some of the hypotheticals that you presented.

Q. Well, I mean, let me be clear about my question. My question was simply you told him that, and you told him what you believed to be the truth based on whatever information you had, the totality of circumstance that you had at the time?

A. Yes.

Q. Okay.

A. Well, let me clarify that. As long as there was no criminal -- criminal behavior that was – or criminal -- as long as no laws were broken, as long as that happened.

Q. Okay.

A. Because if he had just given us his ID and, you know, then we find other information that would lead to an arrest for something else, then it wasn't just him giving us his ID that would have let him go, but

provided that that was everything checked out clear then yes, he would have been free to go.

Q. Well, by the time you were having this discussion with him, you have run his check on his car. You have got the record on him. You know he doesn't have any warrants. You know he doesn't have any arrests. So you are actually telling him quite accurately, are you not, that if he had given you his name instead of your having to get it after he was arrested, all of this could have been avoided, correct?

A. Yes.

JA 115:4 - 117:5.

Mr. Wingate was charged under Stafford County Code 17-7 with "fail[ing] to identify himself by name and address, at the request of law enforcement officer, if surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification"; and with three offenses arising out of his initial arrest: "intentionally prevent[ing] a law-enforcement officer from lawfully arresting the accused," "knowingly attempt[ing] to intimidate or impede by threats or by force a law-enforcement officer lawfully engaged in duties as such"; and for "possess[ing] in the Commonwealth a certificate of title issued by the Commissioner of the Department of Motor Vehicles to a person other than the holder thereof."[4] JA 128-135.

[4]The certificate was for a different car Mr. Wingate had purchased two weeks before and that he had, lawfully, not yet titled in his own name. JA 128 and *Code of Va.* §46.2-618.

On the date set for Mr. Wingate's criminal trial, the Assistant Commonwealth's Attorney assigned to the case informed Dep. Fulford that County Ordinance 17-7 was believed to be unconstitutional. JA 62:6-11. All charges against Mr. Wingate were dropped without trial, the Stafford County judge writing, on the dismissal notices, that the Commonwealth would not bring any of the charges again. JA 57, ¶27; 128-135.

After Mr. Wingate gave notice of his claim of false arrest, sheriff's deputies were directed no longer to arrest suspects under Ordinance 17-7, and received training to this effect. JA 64:10-17.

Standard of Review

This court reviews *de novo* the legal conclusions of the district court, including its ruling finding reasonable suspicion to stop a suspect. *United States v. Powell*, 666 F.3d 180, 186 (4th Cir. 2011); *United States v. Foster*, 634 F.3d 243, 246 (4th Cir. 2011), citing *Ornelas v. United States,* 517 U.S. 690, 699 (1996). This court reviews the district court's findings of historical fact for clear error. *Id*. In reviewing the grant of summary judgment, this court views the facts in the light most favorable to the non-moving party. *See Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (*en banc*).

Summary of Argument

Terry stops must be based on reasonable particularized suspicion that a person may be involved in criminal activity. A *Terry* stop cannot be justified by merely taking place in a "high crime" area at night and the facts that the subject wears dark clothes and walks up to greet an oncoming officer, who then refuses to learn that the subject's car – standing out in the night like a sore thumb, with its hood up and its lights on – was having engine trouble.

Argument

Under *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000). Such an investigative stop must satisfy two requirements. It must be legitimate at its inception, and the officer's actions during the seizure must be reasonably related in scope and duration to the basis for the stop. *United States v. Bowman*, 884 F.3d 200, 209 (4th Cir. 2018).

To be legitimate at its inception, a *Terry* stop "must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (980); *United States v. Griffin*, 589

F.3d 148, 152 (4th Cir. 2009). To be reasonable in scope and duration, the investigative seizure must utilize "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion); *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (officers are expected to pursue a line of inquiry "likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain" a suspect); *United States v. Digiovanni*, 650 F.3d 498, 507 (4th Cir. 2011), as amended (Aug. 2, 2011) (same). Neither criterion was met in this case. Mr. Wingate was arrested after his check engine light came on at night in an inconvenient location because he was wearing dark clothes, stepped forward to greet the officer who had come to assist him, and then declined to provide his name on demand to the deputy who arrived to assist him.

1. The Lower Court Erred In Finding Reasonable Suspicion Based Solely On General, Non-Particularized Factors

Terry demands that an officer's detention of an individual be based on a particularized suspicion of criminal activity by the person seized. The "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392

U.S. at 22 n. 18. This court has "repeatedly emphasized that to be reasonable under the Fourth Amendment, a search ordinarily must be based on *individualized* suspicion of wrongdoing. In other words, the suspicious facts must be specific and particular to the individual seized." *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (emphasis in original; internal quotation marks and citation omitted). Reasonable suspicion must be based upon "the facts available to the officer at the moment of the seizure." *Terry*, 392 U.S. at 21–22; *see also Florida v. J.L.*, 529 U.S. 266, 271 (2000).

The lower court correctly framed the issue central to Mr. Wingate's *Terry* claim as follows: "whether Deputy Fulford had constitutionally sufficient suspicion of criminal activity to warrant a brief investigatory *Terry* stop of Mr. Wingate when he was first seized." JA 43.[5] But the district court relied on general, non-particularized factors to conclude that the stop was valid, even to the point of acknowledging that Mr. Wingate's particularized behavior, absent these general non-particularized facts, would not have given rise to constitutionally sufficient suspicion:

[5]The district court correctly found that Mr. Wingate was seized when Dep. Fulford first told him that he was not free to leave until he identified himself. JA 42.

> Here, Deputy Fulford was aware of multiple factors that when weighed together amounted to reasonable suspicion sufficient to convert what was initially a stop to assist a disabled vehicle to a brief, permissible investigatory stop under *Terry*.
>
> * * * *
>
> Critical to that determination is the time of the encounter (early morning) and the location of Mr. Wingate's vehicle, *viz*., partially on a private used car lot, adjacent to used cars, of a closed business that had been the victim of criminal activity in the past and at a time when vehicular related crime had spiked *throughout the county*.[6] And although *without these facts, the Court would reach a different conclusion*, Mr. Wingate also engaged in other conduct that, when considered in light of these critical facts pertaining to time and location, further justified the *Terry* stop (*even though that conduct was insufficient by itself*), including (1) immediately exiting his vehicle without any prompting as Deputy Fulford exited his cruiser; (2) wearing all-black clothing similar to the suspects identified and apprehended during the recent increase in late-night vehicular larcenies in Stafford County; and (3) explaining his presence in the used car lot as the result of engine trouble given that the car appeared to be running and idling without issue.

JA 45 (emphasis supplied). The district court thus relied on the general, non-individualized circumstances in which Mr. Wingate found himself – stopped in the early morning in front of a business that had been closed for hours and in a "high

[6]It was uncontested below that the county comprises 280 square miles.

crime" area – to justify Dep. Fulford's detention.[7]

This court's decision in *United States v. Slocumb*, 804 F.3d 667, 683 (4th Cir. 2015) exemplifies the inappropriateness of the district court's criminalization of non-individualized circumstances:

> The objective factors mentioned by the district court – the high crime area, the lateness of the hour, and the fact that the business had been closed for many hours – are permissible factors that can contribute to a finding of reasonable suspicion in the totality-of-the-circumstances analysis. But these objective factors do little to support the claimed particularized suspicion as to Slocumb.

See also United States v. Massenburg, 654 F.3d 480, 486 (4th Cir. 2011): "We emphasize that the Constitution requires a *particularized* and objective basis for suspecting the *particular person stopped* of criminal activity" (emphasis in original; internal quotation marks and citation omitted); *Black*, *supra*, 707 F.3d at 540 ("[T]he suspicious facts must be specific and particular to the individual seized."); *United States v. See*, 574 F.3d 309, 314 (6th Cir. 2009) (high-crime location and lateness of the hour are "context-based factors that would have pertained to anyone in the [area] at that time and should not be given undue weight").

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[7]The additional, specific, behaviors of Mr. Wingate's identified by the court are discussed at 21-30, *infra*. The court noted, JA 380:2-6, that Mr. Wingate's refusal to give his name could not give rise to suspicion justifying the demand that he give his name.

The lower court's ruling cannot be reconciled with these settled principles. In *Slocumb*, for example, officers arrived at the parking lot of a salvage business that was closed for the night located in a high-crime area where drugs were known to be bought and sold. The officers were there as a staging area to execute a search warrant across the street. There, near midnight, they encountered Mr. Slocumb, He claimed that he was picking up his girlfriend whose car, he said, had broken down. He appeared nervous and refused to give permission to be searched. He was arrested, following which searches yielded incriminating evidence of drug trafficking and self-incriminating statements. The district court having denied Mr. Slocumb's motion to suppress the incriminating evidence, Mr. Slocumb appealed. This court reversed, finding that "Slocumb's behavior – the only substantial basis for particularized suspicion – was insufficient to support reasonable suspicion." *Slocumb*, 804 F.3d at 683.

Slocumb's caveat regarding over-reliance on non-individualized factors all but controls the instant case, which virtually mirrors the factors deemed by this court to be insufficient to justify the detention – with the exception that unlike Mr. Slocumb, Mr. Wingate was never shown to have engaged in any illegal activity. The lower court's *Terry* justification is fatally flawed.

2. The Seizure of Mr. Wingate Lacked Particularized Indicia of Criminal Activity

The lower court identified three behaviors by Mr. Wingate that "further justified" the stop: his being dressed in black, his leaving his car to greet Dep. Fulford, and his explaining that he was having engine problems notwithstanding the deputy's impression that the car sounded to be running smoothly.[8] In assessing whether these behaviors were sufficiently suspicious to justify concerns of possible criminality, this court separately addresses each of the behaviors before evaluating them together. *United States v. Bowman*, 884 F.3d at 214; *United States v. Powell*, 666 F.3d at 187–88; *see United States v. Williams*, 808 F.3d 238, 247 (4th Cir. 2015).

Before turning to that analysis, however, it bears noting that one aspect of Mr. Wingate's particularized behavior is glaringly absent from lower court's analysis. After stopping, four feet from the roadway near a street light, Mr. Wingate left his headlights and taillights on and raised the hood of his car. As Dep. Fulford's video makes clear, his car stood out like a sore thumb in the dark night. JA 58, 53 ¶¶3-4. It is difficult to imagine behavior more inconsistent with a

[8]Dep. Fulford, who is not a mechanic and was ignorant of modern code-checking technology, offered no evidence that engine trouble causing a check-engine light to turn on must be audible as a car idles.

desire to engage in clandestine criminal activity. Mr. Wingate presented himself to all who might see as someone with car trouble late at night. And in fact this is precisely what Dep. Fulford radioed to dispatch when he first came upon the scene, a conclusion that is hardly surprising.[9] How the three subsequent behaviors of Mr. Wingate identified by the lower court could reasonably overcome this manifest appearance of car trouble, to the point of objectively suggesting criminality, is a mystery that the lower court failed to address.

Turning to the three behaviors that "further justified" Mr. Wingate's seizure, none of them suggests criminality of any sort, nor do they collectively constitute the sort of unusual conduct suggestive that "criminal activity may be afoot." *Terry*, 392 U.S. at 30.

There is nothing inherently suspicious about a motorist, stranded on the roadside in the middle of the night, alighting from his car to greet a law enforcement officer who has stopped to inquire if assistance is needed. In response to this supposed concern, Dep. Fulford did not instruct Mr. Wingate to

[9]All he was aware of was a general spike that month in vehicular larcenies throughout the 280 square miles of Stafford County.

return to and remain in this car.[10]

Law enforcement officers "must do more than simply label a behavior as 'suspicious' to make it so." *Massenburg*, *supra*, 654 F.3d at 490. The same can be said of the criminalizing of Mr. Wingate's dark clothing. The fact that some persons apprehended for larceny wore black does not permit the conclusion that people who do so are likely to be acting criminally. There is nothing in the record below or in common sense to suggest that a disproportionate – or even a significant – number of people who wear black in the evening do so for the purpose of engaging in criminal activity. Labeling this perfectly commonplace feature as "suspicious" does not operate to "eliminate a substantial portion of law-abiding persons" who may be out after dark wearing dark clothing, *United States v. McCoy*, 513 F.3d 405,413 (4th Cir. 2008), such as ministers, priests, funeral parlor staff, and many restaurant workers and stage hands. The Fourth Amendment does not countenance such an approach when it comes to detaining persons. *See United States v. Williams*, 808 F.3d 238 at 247-48 (inference of suspicion from factors

[10]Both cooperation with law enforcement – *see United States v. Black*, *supra* – and non-cooperation – *see United States v. Massenburg, supra* – have been described as "suspicious." This exemplifies the damned-if-you-do, damned-if-you-don't approach to reasonable suspicion that the Fourth Circuit has criticized. *See Bowman*, 884 F.3d at 215, discussing law enforcement use of both avoiding eye contact and making direct eye contact as "suspicious."

capable of both innocent and suspicious interpretation must serve to eliminate a substantial portion of innocent travelers, without which the factor is entitled to little weight).

The final suspicious behavior relied upon by the lower court focused on Mr. Wingate's explanation to Dep. Fulford of why he had pulled over. Mr. Wingate said, truthfully, that he had stopped because the check-engine light came on while he was driving. He described the problem to Dep. Fulford as the engine "stuttering". Dep. Fulford claims to have found this explanation suspicious because the engine seemed to be running smoothly.[11] But whatever speculation he may have entertained at the onset could and should have been rapidly laid to rest had he not focused instead like a laser on Mr. Wingate's identity. Dep. Fulford exhibited a willful refusal to view, and see, the illuminated check-engine light. He could have inquired and readily learned how Mr. Wingate was reading engine codes, and monitored Mr. Wingate's use of his telephone's diagnostic code reader application to learn that there was, in fact, a problem with one cylinder, just as Mr. Wingate stated.

Mr. Wingate had done everything within his power to make his presence known. He had raised the hood of his car and left the headlights on, behavior

[11] *See* n.8 at 21, *supra*.

universally signaling engine trouble and utterly inconsistent with being clandestine. His explanation of what he was doing – reading engine codes – was consistent with all his behavior and with common sense and could have been quickly and reliably corroborated by looking at the illuminated check-engine light on his dashboard. Dep. Fulford's claim that this factor was a cause for suspicion is compromised by his failure to have made the slightest effort to corroborate Mr. Wingate's truthful explanation.

Mr. Wingate's seizure presents circumstances less capable of legal justification than was the case in *Slocumb*. In *Slocumb*, the officer in charge initially concluded that Mr. Slocumb's presence in the parking lot was suspect. Here, Dep. Fulford concluded the very opposite: based on his experience and training, and aware as he was of a county-wide spike in auto larcenies, he nevertheless reasonably concluded Mr. Wingate was having car trouble, and so called into dispatch. He reached this conclusion cognizant of the very non-particularized factors that both he and the court later invoked to justify Mr. Wingate's seizure: the lateness of the hour, and the location where other crimes had occurred in the past.

In numerous recent cases, this court has insistently reminded law enforcement officers of their obligation to do more than merely label behavior as

suspicious for purposes of a *Terry* stop. This court has rejected claims of reasonable suspicion under circumstances apparently less benign than those presented by Mr. Wingate to Dep. Fulford. *See,* apart from *Slocumb*: *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011) (no reasonable basis for seizing suspect with known criminal record who suddenly appears from crouched position in a parked car and executes frenzied arm movements); *United States v. Massenburg*, 654 F.3d 480 (no particularized suspicion given report of shots fired within four blocks of suspect's location in a high crime area and suspect's nervous behavior including not consenting to a frisk); *United States v. Williams*, 808 F.3d 238 (no reasonable suspicion to extend traffic stop and conduct dog sniff when suspect was traveling in a rental car, on a known drug corridor, at 12:37 AM, with travel plans inconsistent with the rental agreement, and could not provide a home address in New York despite claiming to live there part-time and having a New York driver's license); *United States v. Bryant*, 654 Fed. Appx. 622 (4th Cir. 2016) (no reasonable suspicion based on detailed anonymous tip about suspect with criminal record who became nervous when told about the tip); *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018 (no particularized suspicion when suspect and his companion appeared nervous; suspect could not provide name and address of his "girlfriend" after having picked her up there; when suspect, who stated that

he had been laid off, had recently purchased a Lexus).

Diligent research has found no cases in any circuit in which a court has found a *Terry* stop to be valid based on general factors alone, and certainly none where, as here, the officer at the scene, with knowledge of those factors, initially – and correctly – concluded that the situation was *not* suspicious. In the closest case research has found – *Martiszus v. Washington County*, 325 F. Supp. 2d 1160 (D. Or. 2004), the officer's motion for summary judgment in the ensuing §1983 litigation was denied, not granted.

The facts in *Martiszus* resemble those presented here. A deputy sheriff was on patrol at about 2 A.M. when he saw a car sitting idle on the side of the road. The car lights were not on, but the driver's side door was open and a leg was visibly extended out of the open door. The deputy sheriff stopped behind the car to determine whether the driver, Mr. Martiszus, needed help. *Id*. at 1163. The parties disagreed about what was said by whom after the deputy exited his patrol car and approached, each accusing the other of foul language.[12] The import of Mr. Martiszus' remarks to the deputy, however, was that he wished to be left alone. He also refused to produce his driver's license. In response, the deputy drew his

[12]In the instant case we have a video and audio of the relevant events. There is no doubt of Mr. Wingate's calm demeanor until being notified that he was under arrest. JA 119, passim.

gun, handcuffed Mr. Martiszus, and placed him in the back of the patrol car. After viewing Martiszus' license and confirming that he owned the car and that there were no outstanding warrants for him, the deputy released the handcuffs and allowed him to resume repairing his car.

In the ensuing §1983 litigation by Mr. Martiszus for, *inter alia*, an unlawful *Terry* stop, the deputy moved for summary judgment, claiming that when he observed Mr. Martiszus' leg extending out of the car on the side of the road at 2 in the morning, he had reasonable suspicion that Mr. Martiszus may have been drunk or involved in an assault. The court rejected this argument based in significant part on the deputy's own report which, like Dep. Fulford's radio communication to dispatch, indicated that he stopped not because he suspected criminal activity on Mr. Martiszus' part, but to check on Mr. Martiszus' welfare and determine if he needed assistance. *Id*. at 1169. The court also concluded that on the record before it, a reasonable juror could conclude that Mr. Martisuzs' detention was based, not on suspicion of criminal activity, but on his failure to provide identification and respond fully to the deputy's questions. *Id*. at 1170. That conclusion is precisely what the lower court failed to permit a jury to consider here.

Mr. Wingate's misfortune was simply that of having run into engine problems where he did and when he did, wearing dark clothes, stepping up to greet

an officer who had come to help him out, and encountering an officer who did not know much about diagnosing engine problems. For these "red flag" reasons, Dep. Fulford and then Lt. Pinzon concluded that Mr. Wingate was required to identify himself under Stafford County Ordinance 17-7. JA 97:20 - 98:18. This constituted precisely what the Fourth Circuit has condemned in "admonish[ing] against the Government's misuse of innocent facts as indicia of suspicious activity." *United States v. Black*, 707 F.3d at 539.

This case is *a fortori* to *Bowman*, *Slocumb*, *Black*, *Foster*, *Williams* and *Massenberg*. Those cases were all criminal appeals, in which this court viewed the facts in the light most favorable to the government, with all reasonable inferences drawn in its favor. Even under these favorable circumstances – the opposite of what faced Dep. Fulford on his own summary judgment motion – the court reversed rulings that had denied motions to suppress inculpatory evidence, having found a lack of particularized suspicion sufficient to justify a *Terry* stop. This should have occurred below.

What the Fourth Circuit said in *Bowman*, *supra*, 884 F.3d at 218-19, applies here word for word:

> [E]ven if the totality of the circumstances here could have been viewed as vaguely suspicious, the government has failed to articulate why Bowman's behavior is likely

> to be indicative of some more sinister activity than may appear at first glance. Although the nature of the totality-of-the-circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.

3. The Seizure of Mr. Wingate was Unreasonable in Scope and Duration

To the lack of initial reasonable suspicion must be added Mr. Wingate's seizure in the face of his accurate, unimpeachable but ignored explanation of why he stopped his car in the first place. "[A] police officer 'must diligently pursue the investigation for the stop to avoid running afoul of the duration component of *Terry's* second prong.'" *Artiga Carrero v. Farrelly*, 270 F. Supp. 3d 851, 868 (D. Md. 2017), *reconsideration denied sub nom. Carrero v. Farrelly,* 2018 WL 1761957 (D. Md. Apr. 12, 2018). As the Supreme Court explained years ago,

> The investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Fla. v. Royer, *supra*, 460 U.S. at 500.

By his own admission, Dep. Fulford's reason for stopping in the first place was to help a motorist in distress. Instead of doing so, as soon as Mr. Wingate first questioned why he was being asked to give his name, Dep. Fulford, abandoning any efforts to assess Mr. Wingate's explanation of car trouble, called for back-up and focused his attention and authority exclusively on receiving Mr. Wingate's name, on penalty of his being arrested for refusing that demand alone. As evidenced by his dashboard camera video, his remaining dealings with Mr. Wingate were driven by that obsession. As a result, not only can Dep. Fulford not satisfy the first *Terry* prong – reasonable suspicion that Mr. Wingate might be engaged in criminal conduct – but his obsessive focus on ascertaining Mr. Wingate's name, abandoning all investigatory efforts to assess the readily available evidence that Mr. Wingate was indeed experiencing car trouble, dooms the reasonableness of his seizure under *Terry's* second prong as well. *See United States v. Williams*, 808 F.3d at 251 (critical of officer's mere assumption "that the behavior is likely to be indicative of some more sinister activity than may appear at first glance").[13]

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[13] *Cf. Martiszus*, where the court also found that even if the deputy had reasonable suspicion when he first pulled over, there were material fact issues as to whether Mr. Martiszus' detention was reasonably related in scope and duration to the circumstances which justified the initial seizure in light of his explanation for why he had pulled his car to the side of the road. 325 F. Supp. 2d at 1170-71.

4. Mr. Wingate was Unconstitutionally Arrested

Mr. Wingate was not arrested for larceny or attempted larceny. He was arrested for declining to provide his name to the appellees, pursuant to an ordinance that made it:

> unlawful for any person at a public place or place open to the public to refuse to identify himself, by name and address, at the request of a uniformed law-enforcement officer or a properly identified law-enforcement officer not in uniform, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification.

Ordinance 17-7. But settled constitutional principles mandate that he was not required to give his name.

In the absence of reasonable articulable suspicion,

> [t]he person approached *** need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Fla. v. Royer, 460 U.S. at 497-98 (internal citations omitted). In such circumstances, officers "may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage – *as long as the police do not convey a message that compliance with*

their requests is required." *Florida v. Bostick,* 501 U.S. 429, 434-35 (1991) (emphasis added). For years before Mr. Wingate's arrest, it was "clearly established that an investigatory detention of a citizen by an officer must be supported by reasonable articulable suspicion that the individual is engaged in criminal activity." *United States v. Black*, 707 F.3d at 537.

The Supreme Court has made clear in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, Humboldt Cty., 542 U.S. 177 (2003) that arrests pursuant to laws such as Stafford Ordinance 17-7 are permissible only if accompanied by a valid *Terry* justification to temporarily detain and question the individual in the first instance. Absent a valid *Terry* stop, Mr. Wingate's arrest pursuant to this statute was unreasonable under the Fourth Amendment. This is an occasion for the following reminder from the Fourth Circuit:

> In *Terry v. Ohio*, Chief Justice Earl Warren recognized that police officers need discretion to perform their investigative duties. 392 U.S. 1. Since *Terry*, this discretion has been judicially broadened, giving police wide latitude to fulfill their functions. In some circumstances, however, police abuse this discretion, and we must remind law enforcement that the Fourth Amendment protects against unreasonable searches and seizures.

Black, 707 F.3d at 534.

5. Appellees Should Not Have Been Shielded By Qualified Immunity

A. The Doctrine Is In Need of Modification

Mr. Wingate respectfully submits that the doctrine of qualified immunity should be modified or severely limited, as Justice Thomas has suggested in *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring): as an increasing number of judges have more recently urged, *e.g.,* Judge Weinstein in *Thompson v. Clark*, #14-cv-7349, 2018 WL 2997415 (E.D. N.Y. 2018) and Judge Willett in *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018); and as increasing numbers of academic commentators have urged, *e.g.*, Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L.Rev. 101 (2018); Jeffries, *What's Wrong With Qualified Immunity*, 62 Fla.L.Rev. 851 (2010); Bray, *The Future of Qualified Immunity*, 93 Notre Dame L.Rev. 1793 (2018); Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L.Rev. 1797 (2018); Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L.Rev. 1887 (2018); Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L.Rev. 1937 (2018); Preis, *Qualified Immunity and Fault,* 93 Notre Dame L.Rev. 1969 (2018); Michaelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 Notre Dame L.Rev. 1999 (2018); Shapiro *et al., The Horror Chamber: Unqualified Immunity in Prison,* 93 Notre Dame L.Rev. 2021 (2018), Reinert, *Qualified Immunity at Trial*, 93 Notre

Dame L.Rev. 2065 (2018); Smith, *Formalism, Ferguson and the Future of Qualified Immunity*, 93 Notre Dame L.Rev. 2093 (2018).

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1983 (emphases added). "The statute on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The unconditional nature of this provision is confirmed by the succeeding clause, which creates a limited exception for actions against judicial officers. The expression of one limitation alone implies the exclusion of other such limitations. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

This unqualified command makes sense. The statute was passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act to help combat lawlessness in the southern states. This purpose would have been undone by anything resembling modern qualified immunity jurisprudence, as the Fourteenth Amendment had been adopted only three years earlier, and its provisions were obviously not "clearly established law" by 1871. Had §1983 been understood to incorporate qualified immunity, then Congress' attempt to address rampant civil rights violations in the post-war South would have been toothless.

"Certain immunities were so well established in 1871, when §1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish them.'" *Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). While qualified immunity currently immunizes "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, legal history does not justify importing such an astonishingly protective defense into the operation of §1983. On the contrary, the sole historical defense against constitutional torts was *legality*. An example is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). In this case, while federal law authorized the seizure of ships going to France, President John Adams had directed the seizure of ships coming from France as well, and an American naval captain captured a Danish

ship coming from a French port. The question was whether he could rely on the President's instructions as a defense against liability for his otherwise unlawful seizure.

The court rejected the very rationale that would come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id*. at 179. He noted that the captain had acted in good-faith reliance on the president's order, and that the ship had been "seized with pure intention." *Id*. Nevertheless, the court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id*. The officer's only defense was legality, not good faith.

This strict rule of personal official liability persisted through the nineteenth century – see, e.g., *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (town health board members liable for wrongful killing of animal on orders of government commissioners) – and into the twentieth. In *Anderson v. Myers*, 182 F. 223, 230 (C.C.D.Md. 1910), African-American citizens sued Annapolis voting officials for having been denied the right to vote pursuant to a state statute that violated the Fifteenth Amendment. The defendants argued that they could not be

liable for money damages under §1983 because they acted on a good-faith belief that the state statute, never repealed, was constitutional. The circuit court rejected the argument:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). The Supreme Court affirmed. *Myers v. Anderson*, 238 U.S. 368 (1915).

To the extent common law principles provided protections of the sort at issue, they were incorporated into the elements of particular torts, not as a free-standing immunity. As the Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id*. at 556-57. This defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place. *Id*.

Qualified immunity jurisprudence soon discarded this tether to common-law torts permitting a good-faith defense. See *Scheuer v. Rhodes*, 416 U.S. 232, 247

(1974). And in 1982, the Court disclaimed reliance on subjective good faith at all, basing qualified immunity instead on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The rest is history.[14] Qualified immunity functions today as a free-standing, across-the-board defense based on a judicially created "clearly established law" standard that was unheard of before the late twentieth century. The doctrine has become a "freewheeling policy choice" at odds with Congress' judgment in enacting §1983, *Malley*, 475 U.S. at 342, leading to calls for its reconsideration coming from as high as the Supreme Court. Defendants should not have recourse to it.

B. Defendants Are Not Eligible For Qualified Immunity

The burden of proof and persuasion with respect to a defense of qualified immunity rests on the official asserting that defense. *Meyers v. Baltimore City, Md.*, 713 F.3d 723, 731 (4th Cir. 2013). The right at issue here is the right to be free from unreasonable seizure under the particular circumstances of the case.

[14]Apart from its doctrinal failings, the defense fails to deliver the prophylactic benefits it is supposed to provide to state actors, and police officers in particular, in terms of relieving them of the burdens and costs of litigation. *See* Schwartz, *How Qualified Immunity Fails,* 127 Yale L. J. 2 (2017).

Graham v. Gagnon, 831 F.3d 176, 184 (4th Cir. 2016); *Pritchett v. Alford*, 973 F.2d 307, 313–14 (4th Cir. 1992). Dep. Fulford loses his immunity if it would have been clear to a reasonable officer in his position that he lacked reasonable grounds to detain Mr. Wingate in the first place, and he and Lt. Pinzon lose their immunity if it would have been clear to reasonable officers in their position that there was no *Terry* justification to detain Mr. Wingate and no reasonable construction of Ordinance 17-7 that required him to identify himself to the appellees. Appellees' immunity turns, in short, on the "objective legal reasonableness" of their conclusion that there was reasonable particularized suspicion that Mr. Wingate was involved in criminal activity. *Graham*, 831 F.3d at 184.

The analysis set forth above explains why no reasonable officer would have found grounds to turn Mr. Wingate's automotive distress into a criminal inquiry. A simple question – "How are you checking the engine codes?" – would likely have put to rest even unreasonable hunches. A simple glance at the illuminated check-engine light would have done the same. No "split-second" decision was here at issue. A reasonable officer would have understood that an inference of criminality no more arose from Mr. Wingate's declining to give his name than from the clothes he was wearing or his walking over to greet a helpful sheriff's

deputy. And a reasonable officer would have understood that abandoning inquiry into Mr. Wingate's car problems and focusing instead on why he had to give his name was certain to run afoul of *Terry*'s second prong – scope and duration – as well.

6. Mr. Wingate's State Law Claims Rise Or Fall With The Disposition Of His Claim For Unconstitutional Arrest For Failing To Give His Name

Mr. Wingate's state law claims for false arrest and malicious prosecution arising out of his arrest and prosecution for obstruction of justice and resisting arrest rise and fall with the disposition of his federal claim. This is so because state law conferred on Mr. Wingate the authority reasonably to resist an unlawful arrest:

> It has long been held in Virginia that where an officer attempts an unlawful arrest, the officer is an aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable." This principle of law treats the unlawful arrest as an unauthorized touching and, thus, a battery against the attempted arrestee.

McCracken v. Commonwealth, 39 Va. App. 254, 269–70, 572 S.E.2d 493, 500–01 (2002) (internal citations omitted). This is long-settled law. *See, e.g., Broaddus v. Standard Drug Co.*, 211 Va. 645, 652 (1971). When an arrest is unlawful, the subject enjoys "the right to resist upon self-defense principles. The

Commonwealth cannot expunge that right even by showing the officers acted in 'good faith.'" *Brown v. Commonwealth*, 27 Va. App. 111, 118, 497 S.E.2d 527, 530 (1998). The "'provocation' of an illegal arrest ... operates to excuse an assault directed at thwarting the unlawful arrest." *Commonwealth v. Hill*, 264 Va. 541, 546–47 (2002).

> [W]here an officer attempts an unlawful arrest, the officer is an aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable." If the officers lacked probable cause to arrest the plaintiff, then the arrest was unlawful and he had the right to resist it.

Blevins v. Cabela's Wholesale Inc., No. 1:18CV00002, 2018 WL 2187445, at *7, n.4 (W.D. Va. May 11, 2018). *Accord, Foote v. Commonwealth*, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990).[15]

Here, Mr. Wingate simply refused to cooperate with the deputies' attempt to put his hands into handcuffs and then tried to run away. JA 56, Exh. 1 at ¶23. *Compare Broaddus*, *supra* (arrestee's physically fighting with arresting officer permissible resistance to unlawful arrest); *Brown*, *supra* (arrestee's kicking to keep arresting officers at bay permissible resistance to unlawful arrest); *Foote*, *supra* (arrestee's firing shots at arresting officer permissible resistance to officer's

[15]This common law defense is available to statutory crimes as well as common law crimes. *Diffendal v. Commonwealth*, 8 Va. App. 417, 420–21, 382 S.E.2d 24, 25–26 (1989) (statutory offense of brandishing firearm).

shooting at him in unlawful arrest).

Each of the three additional criminal charges brought against Mr. Wingate arose, temporally and factually, out of his arrest for failure to give his name. This is self-evidently so with regard to the charges of obstruction of justice and resisting arrest, both of which specifically targeted his concededly uncooperative, but entirely lawful, reactions to his arrest for declining to give his name. The other charge – being in possession of someone else's car title – was added after the title certificate was found in the trunk of Mr. Wingate's car when it was searched pursuant to his unlawful arrest for failure to give his name. JA 56, ¶24.[16]

If Mr. Wingate's arrest for refusing to give his name is unconstitutional, all the charges brought against him arising out of that arrest and its consequences are nullified as a matter of law as fruit of the poisonous tree. The charges of resisting arrest and obstruction of justice also fail because he had a right reasonably to resist and obstruct his wrongful arrest. This overall defense makes it unnecessary for the court to reach the question of whether the elements of the add-on offenses were ever met.

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[16]The title charge is palpably so much piling on by deputies who either did not know or did not care that Mr. Wingate had 30 days within which to apply for his own title certificate for the car he had purchased twelve days before. JA 136-137; *Code of Va.* §46.2-618. *N.B.*: this was not the car he was then driving.

Conclusion

Dep. Fulford detained Mr. Wingate, and Dep. Fulford and Lt. Pinzon thereafter arrested him, for having refused to give his name under circumstances where there was no basis for reasonable individualized suspicion that he was implicated in criminal activity. Mr. Wingate's detention and arrest were unconstitutional under settled law. This court should thus reverse the ruling of the district court below granting appellees' motion for summary judgment, and remand the case with direction for summary judgment to be granted to Mr. Wingate.

Respectfully submitted,

GEORGE WINGATE,

By counsel

Dated: November 18, 2019

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Certificate of Compliance

Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 18th day of November 2019, I electronically filed the foregoing Brief of Appellant George Wingate with the clerk of the court.

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