RECORD NO. 20-1420

In The

United States Court of Appeals

For The Fourth Circuit

MICHAEL BILLIONI,

Plaintiff – Appellant,

v.

SHERIFF BRUCE BRYANT,
individually and in his official capacity as York County Sheriff,

Defendant – Appellee,

and

YORK COUNTY DETENTION CENTER;
YORK COUNTY SHERIFF'S OFFICE; YORK COUNTY,

Defendants,

WCNC-TV INC,

Respondent,

CONNIE MCMILLAN; CHRISTOPHER PENLAND;
JAMES MOORE; LINDSAY HENSON; CAROL SUTTON;
FRANCINE WEYERS; JAMES BRACKETT,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT ROCK HILL

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1420 Caption: Michael Billioni v. Sheriff Bruce Bryant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sheriff Bruce Bryant
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Christopher W. Johnson Date: April 27, 2020

Counsel for: Defendant-Appellee

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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No. 20-1420 Caption: Michael Billioni v. Sheriff Bruce Bryant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

York County
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: s/Christopher W. Johnson Date: April 27, 2020

Counsel for: Defendant-Appellee

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Statement of Issues

1. Did the district court correctly determine that Plaintiff's First Amendment interest in providing limited information to the media about an in-custody death that left out important facts and that occurred during an on-going investigation was outweighed by the Sheriff's legitimate interest in maintaining discipline and ensuring dissemination of accurate information to the public?
2. If the district court erroneously determined the balance of interests, would Sheriff Bryant nonetheless be entitled to qualified immunity on Plaintiff's § 1983 cause of action for violation of Plaintiff's First Amendment right to free speech under the facts of this case, which include that Plaintiff violated Sheriff's Office rules on confidentiality of information, that he did so during an ongoing investigation, and that he lied about his conduct to his superiors?

Statement of the Case

This is an employment action by former Detention Officer Michael Billioni ("Plaintiff" or "Billioni") against the former Sheriff of York County, Bruce Bryant,[1] asserting a cause of action under § 1983 for retaliation in violation of the First

[1] Sheriff Bryant retired from office in January 2017 upon the assumption of office of his elected successor and after serving York County for over 20 years. In June 2017, he was elected to the South Carolina General Assembly as a member of House of Representatives. (South Carolina Legislature website, https://www.scstatehouse.gov/member.php?code=0234090881, last visited September 14, 2020.)

Amendment to the United States Constitution. Plaintiff filed suit in July 2014 against the Sheriff, York County, the Detention Center, and the Sheriff's Office. He initially alleged claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*.; 42 U.S.C. § 1983 for violation of First Amendment and Due Process rights; and several state laws.

Defendants answered and moved to dismiss York County as a party and to dismiss the FLSA claim and all state law claims. Prior to a ruling on the motion to dismiss, Plaintiff amended his complaint to dismiss York County as a defendant and realleged all claims against the Sheriff, the Sheriff's Office, and the Detention Center. Following the amendment, Defendants moved again to dismiss the FLSA and state law claims and to dismiss the § 1983 claims against the Sheriff's Office and Detention Center, which is a component of the Sheriff's Office. On August 18, 2015, the district court granted the motion, leaving only the § 1983 claims against Sheriff Bryant in his individual and official capacities.

On March 29, 2016, Plaintiff again moved to amend, this time seeking leave to file a Second Amended Complaint to reallege his § 1983 claims against York County as well as the Sheriff. The district court granted the motion on May 31, 2016, and the Second Amended Complaint is the operative complaint for this appeal. (J.A. 24)

Following completion of discovery, Defendants moved for summary judgment on all remaining causes of action – that is, First Amendment and Due Process. (J.A. 90) In an Order filed on June 20, 2017, the district court granted summary judgment to York County on all claims. (J.A. 1452) As to the Sheriff, the court granted summary judgment on the § 1983 Due Process claim but denied summary judgment on the § 1983 First Amendment claim, both on the merits and on the Sheriff's defense of qualified immunity. (*Id.*) The Sheriff noticed an immediate appeal of the denial of qualified immunity on July 12, 2017. (J.A. 1480)

On appeal from the denial of qualified immunity, this Court held that the district court had applied the wrong legal standard in assessing whether Plaintiff met the second prong of the *McVey*[2] test, which "balances the plaintiff's interest in the speech against the employer's interest in avoiding disruption of its internal operations." *Billioni v. Bryant*, 759 Fed. Appx. 144, 151 (4th Cir. Jan. 2, 2019) (internal quotation and citation omitted). Specifically, the Court held that, "By looking to whether Sheriff Bryant made a 'showing of disruption within the YCSO' instead of whether Sheriff Bryant made a showing that he reasonably apprehended a disruptive effect from Billioni's speech, the district court committed legal error." *Id.* Accordingly, the Court remanded the case to the district court "to use the correct legal standard to determine whether the evidence permits a conclusion that … Sheriff

[2] *McVey v. Stacy*, 157 F.3d 271, 277-79 (4th Cir. 1998).

Bryant reasonably apprehended disruption within the YCSO as a result of Billioni telling his wife about the surveillance video that outweighs Billioni's interest in speaking out about the surveillance video." *Id.*

On remand the district court held that Plaintiff's "speech is not protected by the First Amendment as a matter of law" because the "evidence is uncontroverted that Plaintiff's speech substantially interfered with the efficient operation of the YCSO and the investigation into the events surrounding Joshua Grose's death[.]" (J.A. 1575-76) Plaintiff moved for reconsideration, which the district court denied. (J.A. 1621) This appeal followed.

Statement of Facts

In the early morning hours of Sunday, October 20, 2013, Joshua Grose, who was being held at the York County Detention Center on charges of murder, died while in custody of the Detention Center. (J.A. 206-7) Sheriff Bryant immediately called in South Carolina's State Law Enforcement Division (SLED) to investigate the death. (J.A. 523-24) Sheriff Bryant's Public Information Officer, Trent Faris, held a press conference that same morning (October 20) to advise the public of the death, that SLED had been called in to investigate, and that SLED was already on the scene investigating. (J.A. 1244). At the press conference, Faris described generally that Grose had been combative and, as a result, was restrained, and that he

continued to be combative after being restrained. Faris did not disclose the identities of the detention officers involved or how Grose was restrained. (J.A. 1242-1250)

Plaintiff was appointed a detention officer by Sheriff Bryant in November 2010. (J.A. 128, 186) Several years later, Plaintiff was promoted to corporal and assigned to the position of Master Control Specialist. (J.A. 199-200) Master Control functions as the eyes and ears of the Detention Center and controls access to various areas within it. (J.A. 198) In that position, Plaintiff was in a central control area and had access to the video system in the Detention Center. (J.A. 198)

Plaintiff was not on duty or at the Detention Center when Grose died, but he worked the next night (October 21). (J.A. 206-7) During his shift, he used the video system in Master Control to view the video of what happened the night Grose died. (J.A. 265-66) In fact, Plaintiff viewed the video several times back-to-back. (J.A. 213) Plaintiff testified that he saw a struggle between Grose and detention officers and that during the struggle one of the detention officers punched Grose twelve times. (J.A. 214)

Detention Center policy restricts detention officers from disclosing information about persons held in custody at the Detention Center, information about ongoing investigations, and information that might compromise security at the Detention Center. (J.A. 387; 763-767) Despite that policy, when Plaintiff returned home from work on the morning of October 22, he discussed details of what he saw

in the Detention Center video system with his wife, who was an employee of WCNC, a local NBC television station in Charlotte, North Carolina. (J.A. 223, 230-31, 236) That same day, Plaintiff's wife passed the information that Plaintiff divulged to her on to WCNC, and a reporter from the station called the Sheriff's then-general counsel, Kristie Jordan, for more information. (J.A. 824-826)

Sheriff Bryant testified that the reporter had "time by the minute" detail, including officers' names and ranks and precise descriptions of what happened. (*Id*.) Sheriff Bryant was particularly concerned that the reporter had informed Ms. Jordan that he (the reporter) understood that Grose had been struck in the head by the detention officers, which was not information the Sheriff had previously received. (J.A. 824-826; 940-945) As a result, Bryant ordered his staff to look into the reporter's allegations and determine if there was a witness who saw something that had not been reported. (*Id*.)

Detention Center Chief Freddie Arwood learned of the reporter's call in a meeting held the evening of October 22. (J.A. 507-9) Arwood then phoned Assistant Chief Martin, who was on his way home, and told Martin that they needed to track down the source of the reporter's information so that they could follow up on the Sheriff's concern. (J.A. 548-50) Arwood and Martin determined they would start interviewing the shift that was presently on duty. (J.A. 551) Martin told Arwood that he suspected Plaintiff was the source because he recalled that Plaintiff's wife worked

for WCNC, the station where the reporter who called Ms. Jordan worked. (*Id*.) Because Plaintiff was on duty that night (October 22), Arwood and Martin decided to start their interviews with him. (J.A. 551-52)

Before conducting the interview, Chief Arwood advised Plaintiff of his *Garrity*[3] rights – that he was being investigated for internal conduct, that he must respond truthfully, and that no part of his statement would be used against him in any criminal proceedings. (J.A. 262-64) During the interview, Plaintiff said that he had watched the security camera footage of the Grose incident out of sheer curiosity. (J.A. 264-65) Arwood and Martin asked Plaintiff no less than six times if he had discussed the contents of the footage with anyone outside of the Detention Center, and each time Plaintiff responded that he had not. (J.A. 265-66) So emphatic was Plaintiff in his denial that he went so far as to say that "[i]t's nobody's business what I saw." (J.A. 267)

At 6:43 a.m. the following morning, October 23rd, Plaintiff emailed Chief Arwood and Assistant Chief Martin to tell them he was "[s]orry to bother you at this time" but that he had "a very important development I need you to hear…" (J.A. 411) Around 8:00 a.m. Arwood called Plaintiff, who told Arwood that his wife worked at WCNC and that he could get the station to drop the story on Grose's death. (J.A. 283-84; 414) Plaintiff did *not* tell Arwood that he had told his wife details from

[3] *Garrity v. New Jersey*, 385 U.S. 493 (1967).

the video, nor did he disclose that he had *not* told the truth in the previous evening's interview. (J.A. 283-84) Arwood informed Plaintiff that he was not interested in the station dropping its story, but in determining from where the information came. (J.A. 414)

Plaintiff next contacted his supervisors at 1:30 p.m. that afternoon (October 23) with a second email, asking "[i]s there any way I can have a few minutes of your time to call me? I need to get something off my conscience…" (J.A. 417) About two hours later, Plaintiff sent Arwood and Martin an email with the subject line, "I'm responsible." In the email, Plaintiff admitted he had been untruthful in the interview:

> I wanted to talk to you over the phone about this situation but I realize that you both may be busy so I will not take up much of your time. *I am responsible solely for the mess this has created and I accept full responsibility for my actions. I did tell my wife things that were in that video and in turn she, without my knowledge passed that information on. I only learned of this when I told my wife of my investigation, which is also in clear violation of policy*. I didn't expect anything to go any further than her, and she stated she went without my knowledge and without my wishes with that information.[4] After discussions with my wife, she has requested that they discontinue looking into this situation and they have agreed to drop everything on their end. Other than me, my wife and the NBC Charlotte news director nobody else knows of this and it will stop. *I realize that I have not upheld the oath I swore to and all I can say is I am sorry. There is nothing I can do to make this right* other than get this off my chest, and absolve the other people you wish to question that had nothing to do with this. I do realize that I may be burning a bridge that had already been on fire with this situation, *and I know that I did the wrong thing. I take full responsibility for my*

[4] Plaintiff later contradicted this statement when he testified in his deposition that he fully hoped his wife would relay what he had told her to WCNC's news staff. (J.A. 319)

> *actions and I accept any punishment that is due to me. I have no excuse for my lapse in judgment* and believe that I have started to learn my lesson, and I also know I need to do a little soul searching and grow up. If you need me to report in, I am able to be there about or after 5:30 this evening, as I have my child at this time and my wife returns home at 5. Again I am responsible and I want those who weren't directly involved into [sic] my actions to be not held to account for my stupidity.

(J.A. 419 (emphasis added))

On October 25, 2013, Chief Arwood wrote up the results of the internal investigation and concluded that Plaintiff violated the Detention Center's Code of Ethics provisions on confidential information and on employee conduct. The Code of Ethics provided that, "No employee is to divulge information pertaining to inmates and/or employees of the Detention Center except for official business purposes and then only to authorized persons and agencies with official need to know." (J.A. 387) The Code also provided that, "Employees will not make any false statements, or intentionally misrepresent or mislead facts. Employees are required to answer questions and cooperate fully in the course of any internal investigation whether conducted by the Detention Center or other authorized external agency." (J.A. 387, 389 and 415) The Code's requirement of cooperation was consistent with the *Garrity* warning Plaintiff received prior to the interview. (J.A. 262-64) As a result, Arwood and Martin formally recommended to the Sheriff that Plaintiff be dismissed:

> Therefore, based on Corporal Billioni's own admission to knowingly giving false information during an Internal Investigation, it is our

> recommendation that Corporal Billioni's employment with the Office of the York County Sheriff, York County Detention Center be terminated…

(J.A. 415) The Sheriff concurred with the recommendation and on October 25, 2013, dismissed Plaintiff. (J.A. 739, 426)

Summary of Argument

1. The district court properly granted Sheriff Bryant summary judgment on Plaintiff's § 1983 cause of action for violation of the First Amendment right to free speech because the Sheriff reasonably apprehended disruption to his operations from Plaintiff's speaking in the manner he did that was outweighed by his interest in maintaining discipline and ensuring the dissemination of factual information to the public. *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017) ("[T]he second prong of the [balancing] test requires a court to balance the interest of the employee in speaking freely with the interest of the government in providing efficient services.").

In balancing the interests of law enforcement employers, the Fourth Circuit has time and again held that "discipline is demanded … and freedom correspondingly denied to policemen." *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984); *see also*, *Crouse v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017); *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992). Where, as here, a sworn law enforcement officer plaintiff rushes to the media with incomplete facts

about an in-custody death that do not convey the whole story, does so while an investigation is ongoing, and the result is misinformation in the hands of the press, the Sheriff's Office can demonstrate it reasonably apprehended disruption to its operations from Plaintiff's speech.

The manner in which Plaintiff spoke diminished the weight to be given his speech relative to the Sheriff's Office's interests. Plaintiff provided little information of any value concerning what happened, and he left out key details. In addition, Plaintiff disclosed the information barely two days after it happened and while knowing that an investigation into the death was underway by outside law enforcement. By contrast, the Sheriff and Plaintiff both testified to the legitimate need to ensure the public receives accurate information about law enforcement activities. Following Plaintiff's release of the information, the press made inquiries into the death citing incorrect facts, and causing the Sheriff's Office to have to investigate the source of the incorrect information. On these facts, the Sheriff's Office's interests in maintaining discipline and ensuring dissemination of accurate information to the public outweighed Plaintiff's comparatively slight interest in rushing to the media with incomplete information.

2. Even if the district court incorrectly balanced the interests of the parties – and it did not – Sheriff Bryant would still be entitled to qualified immunity because

"[o]fficials are not liable for bad guesses in gray areas" but only "for transgressing bright lines." *Maciariello*, 973 F.2d at 298.

"To defeat a qualified immunity defense, a plaintiff must show '(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Crouse*, 848 F.3d at 583 (citing, *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011)). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam) (citing, *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (citing, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Because caselaw did not place "beyond debate" for any reasonable official that the balance of interests would weigh in favor of Plaintiff under the circumstances of this case, such that "every reasonable official [in Sheriff Bryant's place] would have understood that what he [was] doing violate[d] [Billioni's First Amendment] right[,]" Sheriff Bryant is entitled to qualified immunity. *Id*.

Fourth Circuit caselaw holds that "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized

balancing' that is subtle, difficult to apply, and not yet well-defined." *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (citations omitted); *see also, Cannon v. Village of Bald Head Island, N.C.*, 891 F3d 489, 499 (4th Cir. 2018) ("[B]ecause of the 'sophisticated balancing' involved in First Amendment questions, 'only infrequently will it be clearly established that a public employee's speech on a matter of public concern is constitutionally protected.'"); *accord, Calef v. Budden*, 361 F. Supp. 2d 493, 502 (D.S.C. 2005) (Perry, J.) ("It is the infrequent Connick case that will survive a qualified immunity defense.") (citing, *DiMeglio, supra*).

As set forth in Sheriff Bryant's argument in support of the district court's grant of summary judgment, the state of the caselaw at the time of Plaintiff's dismissal was that a sworn law enforcement employee's rush to judge his colleagues without pursuing his concerns through the proper chain of command was of relatively little value when weighed against the Sheriff's interest in maintaining discipline and ensuring dissemination of accurate information to the public. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984); *see also*, *Crouse v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017); *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992). Further, the fact that Plaintiff lied to his superiors about his role in disseminating the information could have led the Sheriff to believe that his interests were that much more great relative to Plaintiff's interest in speaking as he did.

Brickey v. Hall, 828 F.3d 298 (4th Cir. 2016); *Cannon v. Village of Bald Head Island, N.C.*, 891 F3d 489 (4th Cir. 2018).

Standard of Review

Summary judgment is appropriate when 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); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Accordingly, the Court of Appeals reviews a district court's decision to grant summary judgment de novo, applying the same legal standards as the district court and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Grutzmacher v. Howard County*, 851 F.3d 332, 341 (4th Cir. 2017).

Argument

Introduction

"When a government employee claims that he was disciplined because of his speech, [the Court] use[s] a three-prong test to determine if the employee's rights under the First Amendment were violated." *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 582 (4th Cir. 2017) (citing, *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998)).

The first prong goes to whether the employee spoke as a citizen on a matter of public concern, or as an employee on a matter of personal interest. *Crouse*, 848

F.3d at 582. For purposes of this appeal, we can assume that speech concerning an in-custody death of an inmate generally is of public concern.

"[T]he second prong of the test requires a court to balance the interest of the employee in speaking freely with the interest of the government in providing efficient services." *Crouse*, 848 F.3d at 583 (citing, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). For this balancing test, facts matter, and the "test demands a 'particularized' inquiry into the facts of a specific case." *Id*. (citing, *Connick v. Meyers*, 461 U.S. 138, 150 (1983)); *see also, Billioni v. Bryant*, 759 Fed. Appx. at 151 ("Instead of conducting this *fact-intensive balancing* in the first instance, we remand to the district court …") (emphasis added).

The third prong concerns causation – that is, did the employee's speech cause the disciplinary action. *Id.*, at 583. The first two prongs are questions of law for the Court, while the third is a factual inquiry. *Id*. (citing, *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012)).

This appeal concerns the second prong, the balancing of interests. Because the balancing test is a matter of law for the Court, it was appropriate for disposition on summary judgment. *Crouse*, 848 F.3d at 583. Further, because properly applied, the balancing test must be resolved in favor of the Sheriff, the district court was not required to reach the third prong (causation). *Id.* ("*If* a court determines that the

employee's interest outweighed the government employer's interest, the third prong requires…") (emphasis added).

1. The district court properly granted Sheriff Bryant summary judgment on Plaintiff's First Amendment free speech cause of action because the Sheriff's interest in maintaining discipline and efficient operations outweighed Plaintiff's interest in speaking as he did.

The district court concluded that "Sheriff Bryant's evidence sufficiently demonstrates a reasonable apprehension of disruption within the [Sheriff's Office] as a result of Plaintiff's speech." (J.A. 1574) Further, on balancing the interests of the parties, the district court determined that "Plaintiff's interest in rushing to judge his colleagues based on incomplete information does not outweigh the Sheriff's interest in enforcing a policy [or policies] designed to provide the public with accurate information regarding the Grose investigation." (J.A. 1576) Accordingly, the district court granted Sheriff Bryant summary judgment. The district court's conclusion and the grant of summary judgment are amply supported by Fourth Circuit precedent and the facts developed in the record.

a. Fourth Circuit precedent supports the grant of summary judgment.

The Fourth Circuit has long recognized that law enforcement agencies have greater latitude in restricting the free speech of their officers and employees than do

other government employers. In *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868 (4th Cir. 1984), the court stated:

> In considering the second part of the *Pickering-Connick* test[5], courts must give weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency. In so doing, it must be recognized that such effect may vary with the job occupied by the employee. In analyzing the weight to be given a particular job in this connection nonpolicy making employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored. *In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen*.

Id., at 880 (emphasis added). The reason that law enforcement employees' free speech is more limited is that "[p]olice departments, regardless of the historical origin, are para-military organizations and the free speech rights of employees in those departments must thus be evaluated with the special character of the organization in mind." *Id*. (internal quotation omitted).

The Fourth Circuit reiterated this principle in *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992). There, two officers believed their superior engaged in evidence tampering. They conducted their own unauthorized investigation into the matter, including attempting to surreptitiously record a city judge, whom they suspected was involved in the evidence tampering. When the police chief learned of the officers' rogue investigation, the officers were disciplined. Reversing the district court and

[5] That is, the balancing of competing interests.

holding that the police chief was entitled to judgment as a matter of law, the Fourth Circuit wrote:

> A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting, and the effectiveness of the police force might deteriorate. Instead of concentrating on their traditional duties in the community, officers with personal hostilities could become preoccupied with personal investigations of one another. Esprit de corps could collapse into a kafkaesque nightmare of improper investigations into the impropriety of improper investigations.

Id., at 300. "[T]he potential for disruption [from such conduct,]" the court held, "is self-evident." *Id*.

Subsequent Fourth Circuit cases have applied the balancing test to speech by law enforcement officers in ways relevant to this case. In *Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016), a police officer was fired for statements he made while running as a candidate for town council. During the campaign, the officer told the media that he believed money for a program administered by the police department was misused and that the department lacked professionalism. Ultimately, the allegations were found to lack merit. *Id*. at 302. Holding that the town's police chief could have reasonably interpreted the officer's statements to accuse him of incompetence or malfeasance, the Fourth Circuit stated:

> It was clearly established in 2012 that police officials are entitled to impose more restrictions on speech than other public employers because a police force is " 'paramilitary' – discipline is demanded, and

> freedom must be correspondingly denied." Because of this heightened need for discipline, police officials have "greater latitude ... in dealing with dissension in their ranks."

Id., 828 F.3d at 304-05 (internal citation omitted). Addressing the issue of whether the chief could have reasonably apprehended that the potential for the plaintiff's criticism to disrupt the police department's operations outweighed the plaintiff's interest in speaking as he did, the Fourth Circuit held unequivocally that the chief could:

> The context and the extent of disruption of the [Brickey's] D.A.R.E. comments weighed on both sides of the scale. First, Brickey spoke as a political candidate in a public forum. In general terms, speaking as a political candidate weighs in favor of speech. At the same time, however, the public nature of Brickey's comments increased their capacity for disruption. Second, Brickey's speech criticized a superior officer. As our cases reflect, discipline and respect for superior officers are critical in a police force. Because speech accusing a superior officer of incompetence or malfeasance goes to the heart of the superior's authority, [Police Chief] Hall could reasonably have believed that Brickey's comments would undermine his authority in the eyes of the public and within the police department.

Id.

In *Crouse v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017), two officers overheard their lieutenant bragging about "taking down" a suspect. They were not present at the arrest but asked other officers what happened and viewed video of the incident. They then informed their captain that they were concerned with the reports they had heard. The day after they informed the captain of their concern, the officers decided to visit the suspect while they were on their lunch

break. The officers provided the suspect a complaint form, suggested he should file a complaint about their supervisor, and suggested that he should get a lawyer and sue the town. *Id*. at 581. Following their visit, the suspect reported what happened, and the chief ordered an investigation. When the investigation traced the conduct back to plaintiffs, the chief told the plaintiffs they could resign or face discipline, and both resigned. *Id.* at 582.

In their First Amendment challenge to their coerced resignations, the officers argued that police misconduct was a matter of compelling public interest and, therefore, that their speech and activity aimed at exposing such misconduct was protected by the First Amendment.[6] The Fourth Circuit held that notwithstanding the undeniable importance of speech about police misconduct, the chief could have reasonably apprehended that the plaintiffs' speech and expressive conduct undermined his authority to run the department. *Id*. at 586-587. In her concurrence, Judge Motz reflected on First Amendment claims such as Plaintiff's here:

> In an ideal world, police misconduct and abuses would be discovered and disciplined according to established procedures. Sadly, this is not our world. Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined. By permitting officers to speak out in these cases, the First Amendment allows the public to hold a police department accountable *when the normal process fails*.

[6] The *Crouse* plaintiffs were represented by the same counsel as is Plaintiff in this case. The irony of Plaintiff's argument in his opening brief that the *Crouse* plaintiffs' conduct was unworthy of First Amendment protection should not be lost on this Court. (ECF 16, p. 24.)

> However, *the need for such incentives is far less compelling when a police department is not even given a chance to review or investigate an incident. This is especially true when officers rush to speak out about an incident of which they have no personal knowledge.*

Crouse, 848 F.3d at 589 (Motz, J., concurring) (emphasis added). "[R]ush[ing] to speak out about an incident of which [he] ha[d] no personal knowledge" is precisely what Plaintiff Billioni did here.

b. <u>The facts in the record support the grant of summary judgment</u>.

In this case as in *Maciariello* and *Crouse*, Plaintiff jumped to conclusions about a matter of which he had no first-hand knowledge. Plaintiff had not actually witnessed the incident that preceded Grose's death. (J.A. 207) He had only viewed security camera video from a couple of limited angles. (J.A. Vol IV (sealed jail security camera videos)) Plaintiff had not even spoken with any of the officers involved. (J.A. 213) Plaintiff's rush to try his colleagues in the media is distinguishable from the conduct of the plaintiffs in *Maciariello* and *Crouse* in only one key way – Plaintiff here *knew* that the State Law Enforcement Division ("SLED"), an independent state law enforcement agency, was investigating the death. (J.A. 216, 278) He knew SLED had access to the same information and videos he did. (J.A. 278) In fact, SLED had access to more information than Plaintiff because SLED investigators interviewed the officers involved in the incident. (J.A. 278-79) Yet Plaintiff gave SLED's investigation no chance to reach a conclusion before he went to the media to accuse his fellow officers and superiors of

misconduct. Not only did Plaintiff not take whatever concerns he had to his superiors, he did not first take them to SLED, either. (224, 307-08) If the discipline of the officers in *Maciarello* and *Crouse*, where there was no open investigation by another agency, was justified under the First Amendment, then Plaintiff's dismissal here, where SLED was investigating, was that much more justified.

Plaintiff admitted his conduct violated the Sheriff's confidentiality and employee conduct policies. (J.A. 305-07) The result was that misinformation about Grose's treatment was disseminated to the press, causing the Sheriff to have to investigate the source of the conflicting information.[7] Thus, Sheriff Bryant, like the chiefs in *Maciariello, Brickey,* and *Crouse* before him, could have reasonably apprehended that Plaintiff's rush to judgment and the resulting spread of false information would cause disruption within the Sheriff's Office.

[7] That Plaintiff claims he did not tell anyone Grose was hit in the head does not matter for purposes of this analysis. Sheriff Bryant testified without contradiction that the WCNC reporter – worked at the same station as Plaintiff's wife – told his general counsel that Grose was struck in the head. (J.A. 824-26, 941-46) And Plaintiff admits he told his wife that officers struck Grose. (J.A. 259) The question on appeal is, whether the record supports that the Sheriff reasonably apprehended disruption from Plaintiff's speech, not whether Plaintiff was actually the source of the misinformation. Further, Plaintiff's denial that he said Grose was hit in the head does not change the fact that, had Plaintiff followed policy and properly reported whatever concerns he had instead of running to the media, the misinformation would not have gotten to the media in the first place and, therefore, would not have caused Sheriff Bryant to second-guess the thoroughness of SLED's investigation or what his own people were telling him.

In addition, both the Sheriff *and Plaintiff* testified about the importance of ensuring the public has accurate information about law enforcement activities – and the disruptive effect of the public being given false information. Plaintiff admitted that false information in the public would undermine public confidence in law enforcement. (J.A. 259-60) The Sheriff testified about the need to control the flow of information during an investigation to avoid releases that would be "detrimental to the investigation" and that may "prohibit th[e] investigation from being concluded." (J.A. 766-67) He also testified about the particularly disruptive effect of Plaintiff's misconduct:

> We had a reporter to call giving time by the minute, officers' names, their rank, this happened here and this time this happened. And this reporter was making [an] allegation that disturbed me. It disturbed me to a point that I wanted to know who in the world or what did somebody see that my staff has not reported to me.
>
> Did – was – did somebody know something that would be of a criminal nature that this reporter was accusing us of that I have not heard about or seen?
>
> I had an obligation. I had an obligation to the Grose family. I had an obligation to this community to get to the bottom and know what everybody that was a witness or was a potential witness, what they saw.
>
> And these accusations were coming to us that something bad happened that I didn't know anything about. And I had an obligation, a sworn duty, to get to the bottom of it. And that is the reason that we started questioning people as to who knew something, who witnessed something, who saw something and made this report to this man.

> Puts you in a precarious predicament when you think that maybe the media knows of a potential witness to a crime [that you missed].

(J.A. 825-26)

What concerned Sheriff Bryant in particular was the allegation conveyed by the reporter that Grose was struck multiple times in the head. (J.A. 837, 942) The Sheriff's Chief of the Detention Center, Freddie Arwood, also testified to the disruptive nature of Plaintiff's conduct.

> It was a concern, but it was because someone apparently was divulging information during a death investigation that was ongoing. *And a lot of times that can create problems because a person is disseminating not factual information*.
>
> *So you're potentially having to go track down a lot of rumors*, so the information that was released was factual. We want to make sure all the facts – that we had everything there before we tried to piecemeal a press conference together or disseminate information.

(J.A. 547) Arwood also confirmed that the particular misinformation in this case was, "He [Plaintiff] said the individual [Grose] was struck in the head numerous times, which did not occur." (J.A. 548)

Weighed against the Sheriff's legitimate need to ensure the public has accurate information about an in-custody death, its policies designed with that goal in mind, and the obvious misinformation that wound up in the press, the district court properly found that Plaintiff's interests in speaking when he did were comparatively slight. Like the *Crouse* plaintiffs, Plaintiff here had relatively little information – only what he saw on recorded surveillance footage. He also testified that he gave his

wife relatively little information. In particular, he did not share important information about the Detention Center's efforts at keeping Grose from harming himself, Grose's attempt at suicide, EMS's refusal to treat Grose, or Grose's continued combativeness. (J.A. 232, 235-39) Further, Plaintiff conceded that he did not discuss his concerns about the Grose matter with anyone in his chain of command, or with anyone who could investigate it. (J.A. 307-08) Most importantly, Plaintiff rushed to take the tiny bit of information he had to the media just two days after the incident, *knowing* that SLED had just begun its investigation and not giving it any time to complete its investigation. (J.A. 278) This last fact alone was a significant factor in the district court's decision and is supported by caselaw. (J.A. 1631 n.11) *Orange v. District of Columbia*, 59 F.3d 1267, 1273 (D.C. Cir. 1995) (government interest in maintaining integrity of investigation outweighed employee interest in speaking before investigation's conclusion); *Barnard v. Jackson Co., Mo.*, 43 F.3d 1218, 1223-24 (8th Cir. 1995) (government interest not having legislators blindsided by legislative audit findings of which they had not been notified yet outweighed employee's interest in speaking about audits' findings); *Signore v. City of Montgomery, AL.*, 354 F. Supp. 2d 1290, 1296-97 (M.D. Ala. 2005) (government interest in maintaining integrity of investigation outweighed employee's interest in notifying press of theft of detective's vehicle); *accord*, *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007) (Noting that "those who accept positions of trust

involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.").

c. <u>That the subject matter of Plaintiff's speech may have been a matter of public concern does not redeem its potential for disruption coming as it did during an ongoing investigation and conveying little useful information</u>.

In his brief, Plaintiff directs most of his argument to what he perceives as the inconsistency between this Court's finding that speech about an in-custody death is of "high public concern"[8] and the district court's ruling that Plaintiff's particular speech "had insignificant value." (ECF 16, pp. 14 and following.) Plaintiff confuses the relative importance of the *subject* about which he spoke – an in-custody death – with the relative unimportance of his *actual speech*, which was misleading by omission and was made in violation of Sheriff's Office policy due to the ongoing investigation into Grose's death.

In fact, Plaintiff's entire case centers on his claim that speech about police misconduct must be given extra weight when balancing the interests. Plaintiff's argument fails for at least two reasons. First, as noted above, circumstances matter, and Plaintiff's speech imparted very little about what actually occurred, and led to a member of the press erroneously believing that Grose had been struck multiple times

[8] A finding that Plaintiff's speech was of "high public concern" does not appear at the place cited by Plaintiff, nor does it appear elsewhere in the Court's opinion from this case's previous appeal. (J.A. 1489.)

in the head. (J.A. 232, 235-39, 824-26, 941-46) The speech also violated a Sheriff's Office policy that was designed to prevent misinformation about law enforcement activities. (J.A. 363) Second, the cases on which Plaintiff relies do not line up factually with the case at bar.

In *Andrew v. Clark* the plaintiff believed that an officer-involved shooting had not been handled properly and that non-lethal means could have been used. The plaintiff, a district commander, submitted a report to the police commissioner on December 17, 2003, which the commissioner ignored. Only after his report to his superiors was ignored did the plaintiff approach the media. 561 F.3d 261, 265 (4th Cir. 2009). This is in keeping with the teaching of *Crouse* that police officers must first work through the chain of command before rushing to judge their fellow officers. *Crouse*, 848 F.3d at 589. It is also in stark contrast to Plaintiff's conduct here, in which he ran to the media barely two days after Grose's in-custody death, having only viewed security camera footage and knowing an outside investigation was underway. Further, *Andrew* was decided on a motion to dismiss and revolved around whether the plaintiff spoke as a citizen on a matter of public concern, or in his official capacity as part of his job under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). 561 F.3d at 265-267. This goes to the first prong of the *McVey*[9] test, whereas this case concerns the second, namely, whether a reasonable jury could find on the

[9] *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998).

facts that the Sheriff reasonably apprehended disruption that outweighed Plaintiff's interest in speaking as he did. Moreover, unlike the record in *Andrew*, the record in this case is fully developed.

Durham v. Jones is similarly inapposite. In *Durham*, the plaintiff, a deputy sheriff, was involved in a motor vehicle stop in which he reported using force that apparently raised concerns among his superiors. The plaintiff was instructed to rewrite his report to omit reference to his use of force or to suffer prosecution. Under duress, the plaintiff rewrote the report, but he immediately filed a grievance over the matter. As neither the county nor the sheriff's office adjusted his grievance, Jones then reported the misconduct by his superiors to a number of outside government officials – including the local state's attorney – and the media. The plaintiff was ultimately terminated. *Durham v. Jones*, 737 F.3d 291, 294-97 (4th Cir. 2013).

Unlike the present case, in which Plaintiff had no engagement with his chain of command and knew that SLED was still investigating the matter, the plaintiff in *Durham* was thoroughly involved with his chain of command throughout the misconduct he sought to report. Afterall, it was Durham's superiors who were forcing him to "revise" an incident report to omit important facts under threat of prosecution. Moreover, when Durham tried to work through the internal grievance process, he was immediately demoted and then suspended. Further, Durham also had the best information about what had happened – he was the arresting officer in

the underlying report and he experienced *firsthand* the misconduct by his superiors. By contrast, Plaintiff in our case had no firsthand information about any aspect of Grose's in-custody death, having only watched recorded security camera footage.

Plaintiff's attempted comparison of his actions to those of Durham does Durham an injustice. Given the level of misconduct by the sheriff's office in *Durham*, it is no surprise that Durham's interest in speaking out – had he not, after all, who else would have exposed the misconduct? – outweighed the sheriff's interest in not having to look into the allegations. Here, however, our Plaintiff, Billioni, knew SLED was already investigating the matter and was in a much better position than he to learn what happened. Yet, Plaintiff gave SLED no chance to finish its investigation before taking the little bit of information he had and passing it on.

Plaintiff cites the *Durham* court's pronouncement that speech concerning corrupt police misconduct requires a similarly substantial disruption to the employer's operation when balancing the interests. (ECF 16, p. 16.) *Durham*, 737 F.3d at 302. But *Crouse* recognizes that the opposite is also true: uninformed and misleading speech requires relatively little showing of disruption. *Crouse*, 848 F.3d at 585-86 ("Moreover, [plaintiffs] were not providing a particularly informed opinion. They did not witness the alleged use of excessive force and had never, in fact, witnessed [their supervisor] using excessive force. … [Thus,] Chief Caldwell

could reasonably have surmised that the lessened public interest in the speech meant that his freedom of action was correspondingly broader.").

The Sheriff offered plenty of reasons why he reasonably apprehended disruption: the fact of the ongoing SLED investigation, the misinformation in the hands of the press, and the need to track down the source of the misinformation and confirm the veracity of what had already been reported to the Sheriff. (J.A. 824-26, 941-46) Compounding the matter was the fact that Plaintiff lied to his superiors when questioned about divulging information about the investigation. (J.A. 312) The potential for disruption from having a sworn law enforcement officer who not only violated confidentiality policies but who also repeatedly lied about doing so when his actions caused the Sheriff's Office to go on a wild goose chase "is self-evident." *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992).

Plaintiff's appeal to the holding in *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000), is similarly misplaced. In *Goldstein*, a firefighter made numerous complaints concerning the safety of operations of the fire department to the department's executive committee and its president. The department ultimately suspended the firefighter, then terminated his employment during the suspension for allegedly unrelated reasons. *Id*. at 349-51. The Fourth Circuit held in *Goldstein* that the mere recitation of possible disruption to operations

from a firefighter speaking out about safety concerns was not enough to tip the balance in favor of the employer. *Id*. at 354-56.

Unlike the numerous safety-related complaints in *Goldstein*, Plaintiff here conveyed almost no useful information about the Grose matter to his wife and what little he did convey was not based on first-hand knowledge but on watching a video recording. Unlike the *Goldstein* plaintiff who engaged his chain of command over the safety issues, Plaintiff never reported his alleged concerns to anyone within the Sheriff's Office. And unlike the hypothetical possibility of disruption cited by management in *Goldstein*, the Sheriff here was actually confronted with misinformation in the hands of the press, the need to rundown that misinformation, and a sworn law enforcement officer plaintiff who lied about it.

Lane v. Anderson, cited by Plaintiff, also misses the mark. In *Lane*, the plaintiff police officer was shot in the face while participating in serving an arrest warrant. As a result of the shooting, the suspect was shot and killed. The plaintiff believed, contrary to an internal investigation finding, that he was shot by friendly fire – *i.e.*, by one of his fellow officers. The plaintiff raised his concerns with his chain of command and was told to "forget about it." 660 Fed. Appx. 185, 187 (4th Cir. 2016). Over two years later, the plaintiff discussed his concerns with the media, leading to his dismissal. *Id*.

Once again, unlike Billioni, the *Lane* plaintiff had firsthand information to support his claim – he was at the scene and he was the one who was shot. Also unlike our Plaintiff, the *Lane* plaintiff took his concerns up his chain of command and gave his employer plenty of time to investigate the matter – over two years – before taking his claims to the media after being rebuffed by his supervisors. In contrast to the evidence of record in our case from Sheriff Bryant and Chief Arwood about the apprehended disruption that prompted the investigation into the source of misinformation, *Lane* was decided on a motion to dismiss. At that stage, the Fourth Circuit unsurprisingly held that, based on "generalized statements, we cannot conclude that Sheriff Anderson has met his burden of justifying Appellant's termination on legitimate grounds…" 660 Fed. Appx. at 193.

Plaintiff's citation of *Hunter v. Town of Mocksville* is no more on point, as that case was not decided on the second prong of the *McVey* test. Rather, the police chief in *Hunter* argued that the plaintiffs spoke as police officers on a matter of internal concern instead of as citizens on a matter of public concern. 789 F.3d 389, 396-397 (4th Cir. 2015). Rejecting that argument, the Fourth Circuit took up the police chief's next argument: causation, which is the third prong of the *McVey* test. That is, the chief argued that he did not dismiss the officers due to their speech, but for misconduct. *Id*. at 400. However, because the case was appealed on qualified immunity, that issue of fact could not be reached. *Id*.

Here, district court did not decide the case on the first prong – whether Plaintiff spoke as a citizen on a matter of public concern, nor on the third prong – causation, which is only reached if the first and second prongs are met by Plaintiff. *See McVey*, 157 F.3d at 277-278; *Crouse*, 848 F.3d at 583. This case was decided on the second prong, balancing the Sheriff's interests against those of Plaintiff, which is a question of law for the Court. *Id*. The *Hunter* case did not address the balancing of interests and, therefore, is not helpful to the Court's analysis. Moreover, the facts in *Hunter* are materially different. Like the plaintiffs in the other cases cited by Billioni, and unlike Billioni's own conduct in this case, the plaintiffs in *Hunter* took their concerns about the police chief up the chain of command to the town manager. Only after the town manager ignored their concerns and the plaintiffs began to experience retaliation did they take the issue outside the town, and even then they sought to report the matter to the state's attorney general. 789 F.3d at 393-394. Our Plaintiff, Billioni, gave the internal and external investigations already under way no chance to conclude before running to the media with no firsthand information, and having made no report to anyone in his chain of command or at SLED who could investigate his suspicion.

Lacking support in the record or caselaw for his claim that his speech was of significant enough importance to outweigh the Sheriff's showing of apprehension of

disruption, Plaintiff opts for the legal equivalent of a "Hail Mary" by attempting to characterize the Sheriff's interest as one of trying to cover up wrongdoing or avoiding "the possibility of low morale at being outed for beating a restrained inmate[.]" (ECF 16, p. 22, 28.) There is not a shred of evidence that the Sheriff's Office attempted to cover anything up. SLED was called in to investigate the death as soon as it happened. (J.A. 278, 523-24) Further, Plaintiff's claim that Grose was beaten while restrained is belied by the video evidence, which is clear that Grose was not restrained and continued to resist officers' attempt to gain control of him. (J.A. Vol IV (sealed jail security camera videos))

Hyperbole and factually unsupported speculation are not competent to defeat a properly supported motion for summary judgment. Hence, Plaintiff's "Hail Mary" argument fails.

Because Plaintiff cannot show that his interest in providing half-facts to his wife – and by extension, the media – about an in-custody death that had just occurred and was under investigation by outside authorities outweighs the Sheriff's interest in ensuring dissemination of accurate information and preserving order within his Office, the district court's order granting summary judgment to Sheriff Bryant should be upheld.

2. Even if Plaintiff could show that Sheriff Bryant violated his First Amendment right to free speech, Sheriff Bryant would be entitled to qualified immunity because it was not clearly established that Plaintiff's right to speak as he did would outweigh the Sheriff's interest in maintaining discipline and efficient operation of his office.

The district court did not reach qualified immunity in its decision on remand, granting Sheriff Bryant summary judgment instead because it found no violation of Plaintiff's right to free speech at the second prong of the *McVey* test. (J.A. 1576 n.8) *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."). However, because this Court may affirm a judgment for any reason appearing in the record, Sheriff Bryant argues in the alternative that he would be entitled to qualified immunity were the Court to find a violation of Plaintiff's rights. *See Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (courts of appeal "review judgments, not opinions," and may "affirm the district court on any ground that would support the judgment in favor of the party prevailing below.").

a. It was not clearly established in October 2013 that Plaintiff's right to speak as he did would outweigh Sheriff Bryant's interest in maintaining discipline and ensuring dissemination of accurate information to the public.

"To defeat a qualified immunity defense, a plaintiff must show '(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Crouse v. Town of Moncks*

Corner, 848 F.3d 576, 583 (4th Cir. 2017) (citing, *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011)). Assuming that Plaintiff could establish the first prong – and he cannot[10] – the Court would then determine if the right was "clearly established."

As this Court recently reminded:

> [Qualified immunity] gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowing violate the law. Accordingly, even if a court finds or assumes that a government official violated an individual's constitutional rights, the official is entitled to immunity so long as the official did not violate clearly established law.

Barrett v. PAE Government Services, Inc., --- F.3d ---, 2020 WL 5523552, *8 (4th Cir. Sept. 15, 2020) (citations omitted).

"To be clearly established, a right must be sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam) (citing, *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *see also Barrett, supra*. "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (citing, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)); *see also, Barrett, supra*.

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[10] *See* **Argument 1**, *supra*. Courts of appeal may begin the analysis of qualified immunity at the first or second prong, as they see fit. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If the Court affirms the district court's determination that Plaintiff's constitutional rights were not violated, it need not analyze qualified immunity any further. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The question to be answered here, then, is whether in October 2013, when Plaintiff was dismissed, caselaw placed "beyond debate" for any reasonable official that the balance of interests would weigh in favor of Plaintiff under the circumstances of this case, such that "*every* reasonable official [in Sheriff Bryant's place] would have understood that what he [was] doing violate[d] [Billioni's First Amendment] right." *Id*. This Court has long held that "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined." *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (citations omitted); *see also, Cannon v. Village of Bald Head Island, N.C.*, 891 F3d 489, 499 (4th Cir. 2018) ("[B]ecause of the 'sophisticated balancing' involved in First Amendment questions, 'only infrequently will it be clearly established that a public employee's speech on a matter of public concern is constitutionally protected.'"); *accord, Calef v. Budden*, 361 F. Supp. 2d 493, 502 (D.S.C. 2005) (Perry, J.) ("It is the infrequent *Connick*[11] case that will survive a qualified immunity defense.") (citing, *DiMeglio, supra*). In other words, qualified immunity in cases involving the balancing of interests is the rule, not the exception.

[11] *Connick v. Myers*, 461 U.S. 138 (1983).

Whether a right is "clearly established" is not determined at a "general or abstract level, but at the level of its application to the specific conduct being challenged." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1995). Put another way, circumstances matter. "[T]he right [an] official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[T]he manner in which this right applies to the actions of the official must also be apparent." *Maciariello*, 973 F.2d at 298. "For qualified immunity to be surrendered, *preexisting law must dictate, that is truly compel* . . . the conclusion *for every like-situated*, reasonable government agent that what [he] is doing violates federal law *in the circumstances*." *Volkman v. Ryker*, 736 F.3d 1084, 1090 (7th Cir. 2013) (internal quotations omitted) (first emphasis added; second emphasis and alterations original); *see also, City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015) ("We have repeatedly told courts … not to define clearly established law at a high level of generality."); *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017) (per curiam) ("Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality.") (citations omitted).

Existing precedent in October 2013, when Plaintiff was dismissed, established that law enforcement agencies had far more latitude than other public employers to restrict the free speech of their law enforcement officers. As far back as 1984, the Fourth Circuit recognized that "nonpolicy making employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored. *In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen*." *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984) (emphasis added). The principle has since been reiterated time and again. *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992); *Brickey v. Hall*, 828 F.3d 298, 304-05 (4th Cir. 2016) ("*It was clearly established in 2012* that police officials are entitled to impose *more* restrictions on speech than other public employers because a police force is 'paramilitary' – discipline is demanded, and freedom must be correspondingly denied. Because of this heightened need for discipline, police officials have 'greater latitude ... in dealing with dissension in their ranks.'") (citations omitted) (emphasis added); *Cannon*, 891 F.3d at 500 ("This Court has recognized on several occasions that 'police officials are entitled to impose more restrictions on speech than other public employers because a police force is 'paramilitary' – discipline is demanded, and freedom must be correspondingly denied.'") (citations omitted).

As previously noted, Plaintiff's interest in speaking at the time and in the manner he did could reasonably have been perceived by Sheriff Bryant to be relatively less important than the Sheriff's need to maintain discipline. *Crouse*, 848 F.3d at 584 (Police chief "could reasonably have viewed [the plaintiffs'] conversation with [criminal suspect] as surreptitious conduct designed to foment complaints and litigation against a supervisor with whom they did not get along."). Plaintiff did not convey much information at all to his wife. And Plaintiff divulged this information while the SLED investigation was ongoing and only two days after the in-custody death had occurred. The result was misinformation getting out – that Grose had been struck multiple times in the head – to a reporter who called the Sheriff's Office.

Sheriff Bryant testified to his need and desire to ensure that accurate information about his Detention Center was released to the public, a need Plaintiff concedes is important. (J.A. 259-60, 766-67) The Fourth Circuit held that in 2012, a year before Plaintiff's termination, a police chief could reasonably apprehend disruption from misleading or false information being released to the public by one of the chief's subordinate officers. *Brickey*, 828 F.3d at 308.

On the facts that the Sheriff had before him in October 2013, he could not have known that a court would rule that his interest in avoiding disruption to the effective and efficient administration of law enforcement throughout York County

would be outweighed by Plaintiff's desire to rush to judgment about the Sheriff and Plaintiff's fellow officers with incomplete information. *See Crouse*, 848 F.3d at 589-90 ("No one is well served when officers rush to try their superiors in the court of public opinion. Under these circumstances, a reasonable officer in Chief Caldwell's positions could conclude that the department's interest outweighed that of the detectives.") Put another way, "[i]t was not 'beyond debate' which way the scales tilted." *Id*. (citing, *al-Kidd*, 563 U.S. at 741). The simple fact that this case is on its second trip to the Court of Appeals on the issue of disruption leads to the conclusion that qualified immunity is appropriate. *Swanson v. Powers*, 937 F.2d 965, 968 ("Since qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, it surely must be appropriate when reasonable jurists can do so.") (citation omitted). Because "[o]fficials are not liable for bad guesses in gray areas" but only "for transgressing bright lines[,]" Sheriff Bryant is entitled to qualified immunity. *Maciariello*, 873 F.2d at 298.

b. <u>The Court may also consider the fact that Plaintiff lied to his superiors during the Sheriff's investigation of how misinformation wound up in the press in determining the Sheriff's entitlement to qualified immunity.</u>

Whether Plaintiff was dismissed for lying as opposed to dismissed for his speech is an issue the Court would have to consider at the third prong of the *McVey* test – causation. However, the Court may – and should – consider the impact of Plaintiff's lying on the second prong's balancing of interests, which is a matter of law for the Court. *See Crouse*, 848 F.3d at 583. As the Fourth Circuit previously explained on appeal in this case:

> Of course, this does not mean that the presence of both lawful and unlawful motivations cannot be dispositive in the context of the second prong of the *McVey* test. In *Cannon*, 891 F.3d 489, we considered a series of text messages sent between police officers that were alternatively a matter of public concern and "disruptive and insubordinate." *Id.* at 500. We concluded that this combination of messages meant that the officers' First Amendment expression did not outweigh the police department's interest in maintaining order and discipline, such that we reversed the district court's determination that the department was not shielded by qualified immunity from the retaliation claims. *Id*. at 501.

Billion v. Bryant, 759 Fed. Appx. 144, 151n.2 (4th Cir. Jan. 2, 2019).

Here, the disruption Sheriff Bryant could have reasonably apprehended from Plaintiff's speech must be viewed not only in the light of Plaintiff's speech violating the confidentiality rule, but also in light of Plaintiff's lying repeatedly about that violation. There is no dispute that Plaintiff lied in the course of an internal

investigation into how the information about Grose was released to the press. He admitted his lies both to his superiors (J.A. 419) and in his deposition. (J.A. 312) Whatever, if any, weight a jury might give the lying on the third (causation) prong, there is no question that when balancing the parties' respective interests as required in the second prong under *McVey*, Sheriff Bryant could not have in his wildest dreams imagined that Plaintiff's First Amendment interest in disclosing confidential information and then lying about it would outweigh his own interest in maintaining discipline.

The state of the law in October 2013 was that lies had no protection under the First Amendment. *Gibson v. Mayor and Council of City of Wilmington*, 355 F.3d 215, 227 (3d Cir. 2004) (citing, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771 (1976)). Thus, Plaintiff had zero protectable interest in lying. By contrast, Sheriff Bryant had a very keen interest in being able to punish lying by his sworn law enforcement subordinates. The Sheriff maintained a policy requiring truth and full cooperation in internal investigations. (J.A. 389, ¶ 16) A law enforcement officer who is known by his boss to have lied is virtually useless to the Sheriff's Office. Should Plaintiff ever have to testify in court, the prosecution would be obligated to disclose to the defense the facts and circumstances of his lie. *See Giglio v. United States*, 405 U.S. 150 (1972) (criminal defendants have a right to be informed of evidence affecting a government witness's

credibility). If order and discipline in law enforcement are at risk from misleading information and rogue investigations – as *Brickey*, 828 F.3d 208; *Maciariello*, 973 F.2d at 300; and *Crouse*, 848 F.3d at 589-90 all establish – then they are even more so at risk when the officer is engaged in deliberate dishonesty. *See Gibson*, 355 F.3d at 228 ("The WPD has advanced a legitimate and important state interest in support of its honesty directive, namely the preservation of the public's trust as well as the unimpeded operation of the police department's work where an officer's credibility on the witness stand can play a crucial role.").

It is not possible to separate Plaintiff's speech about Grose's in-custody death in violation of the confidentiality rule from his lying about whether he engaged in that speech. Grose died while in custody early the morning of October 20, 2013. (J.A. 206) Plaintiff was not present then but viewed the security camera footage on his next tour of duty, which began at 5:30 p.m. on October 21. He spoke to his wife the following morning, October 22, when he got off his 12-hour shift. (J.A. 231) Yet, when he was interviewed by Chiefs Arwood and Martin, later that same day, he falsely stated that he had not disclosed any information about Grose to anyone. (J.A. 208) Plaintiff's speech and his lying about it did not happen piecemeal over time such that they could be considered separately – they occurred over less than 24 hours and were reported to the Sheriff by Arwood and Martin at the same time. (J.A. 422-23) Thus, from the Sheriff's "perceptions at the time of the incident in question[,]"

Crouse, 848 F.3d at 583 (quoting, *Rowland*, 41 F.3d at 173), the disruption to his operations was not just Plaintiff's violation of confidentiality that resulted in a wild goose chase to track down the source of misinformation in the press, it was also Plaintiff's lying in an attempt to cover up his role in it.

The Sheriff's officers, including Plaintiff, were informed at the outset of their appointments that, "The Sheriff and the law enforcement/detention profession require integrity, honesty, and character. These are absolutes." (J.A. 379) The need for honesty in law enforcement officers – and the potential for disruption that would be caused by dishonesty – is "self-evident." *Maciariello*, 973 F.2d at 300. Law enforcement officers, including detention officers, wield the power of the state to forcibly deny its citizens liberty and, in some cases, life. The need for public confidence in law enforcement institutions is, therefore, great, and the potential for disruption if that confidence is eroded is also great. Indeed, "police officers are members of quasi-military organizations, called upon for duty at all times, … and exercising the most awesome power and dangerous power that a democratic state possesses with respect to its residents – the power to use lawful force to arrest and detain them." *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Washington Township*, 850 F.2d 133, 141 (3rd Cir. 1988). For that reason, "[l]aw enforcement agencies are entitled to deference, within reason, in the execution of policies and administrative practices that are designed to preserve and maintain security,

confidentiality, internal order, and esprit de corps among their employees." *Driebel v. City of Milwaukee*, 298 F.3d 622, 648 (7th Cir. 2002).

Because there was no First Amendment protection for Plaintiff's lying, Plaintiff's dishonesty adds nothing to the side of the scale that weighs his interest in speaking. On the other hand, because the Sheriff's interest in maintaining public confidence in his officers is great, the fact that Plaintiff lied about the speech weighs heavily in the Sheriff's favor in balancing the interests of the parties. As explained in **Argument 2.a.**, *supra*, Sheriff Bryant could not have known in October 2013 that the balance of interests would weigh against him for disciplining an officer whose violation of confidentiality in an ongoing investigation led to misinformation in the press. Even if that were a close call, the Sheriff would still be entitled to qualified immunity. *See Maciariello*, 973 F.2d at 298 ("… that reasonable minds may differ over whether [plaintiffs] engaged in protected speech … would, if correct, strongly support [defendants'] qualified immunity defense."). When viewing all of the facts available to Sheriff Bryant at the time – that is, Plaintiff's speech in violation of the confidentiality rule and his lying to cover it up – there is simply no way that the Sheriff could have perceived in October 2013 that the balance of interests would weigh in Plaintiff's favor. Just as the combination of text messages in *Cannon*, that were of public concern and insubordinate and disruptive, led to the conclusion that the officers' interest in speaking was not outweighed by the chief's interest in

maintaining order and discipline, 891 F.3d at 500-01, the combination of Plaintiff's speech and his lying could have led Sheriff Bryant to reasonably believe that his interest in maintaining public confidence in the Sheriff's Office outweighed Plaintiff's interest in speaking as he did. Accordingly, and for this additional reason, Sheriff Bryant is entitled to qualified immunity.

Conclusion

Because Sheriff Bryant's interest in ensuring accurate information is disseminated to the public and maintaining discipline in his Office outweighs Plaintiff's comparatively slight interest in speaking as he did, summary judgment in favor of the Sheriff on Plaintiff's First Amendment free speech claim was proper and should be affirmed. Even if Plaintiff's dismissal did violate his First Amendment rights, it was not clearly established in October 2013 that Plaintiff's right to speak as he did would outweigh the Sheriff's interests, particularly when taking into consideration that Plaintiff lied about his violations of Sheriff's Office policy. Thus, Sheriff Bryant would be entitled to qualified immunity even if this Court disagreed with the district court's balancing of the interests. Accordingly, the Court should affirm the district court's grant of summary judgment.

Respectfully submitted,

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Dated: September 25, 2020

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I hereby certify that on this 25th day of September, 2020, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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