

NO. 22-1788(L)

In the
United States Court of Appeals
For the Fourth Circuit

Kewon English,

Plaintiff-Appellant,

and

Earl Powell,

Plaintiff,

v.

Joseph Clarke; Leon Lott, in his official capacity as Sheriff of Richland County;
Richland County Sheriff's Department,

Defendants-Appellees.

NO. 22-1817

Earl Powell,

Plaintiff-Appellee,

and

Kewon English,

Plaintiff,

v.

Joseph Clarke; Leon Lott, in his official capacity as Sheriff of Richland County;
Richland County Sheriff's Department,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
No. 3:19-cv-02491-JMC (Childs, J.)

**RESPONSE/REPLY BRIEF OF PLAINTIFF-APPELLANT KEWON
ENGLISH AND PLAINTIFF-APPELLEE EARL POWELL**

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STATEMENT OF JURISDICTION

The district court entered judgment in English's case on September 27, 2021. [JA1933]. Following the Mandate and Order from the Fourth Circuit and voluntary dismissal of the initial appeal without prejudice, the district court entered final judgment against English and pursuant to Fed.R.Civ.P. 54(b), certified the portion of its order granting summary judgment on English's claims on July 19, 2022. [JA1963]. Pursuant to 28 U.S.C. § 2107(a), English timely filed a notice of appeal on July 21, 2022. [JA1969]. Clarke, Lott, and RCSD filed a notice of cross appeal on August 2, 2022 regarding the district court's denial of qualified immunity on Powell's malicious prosecution claim. [JA1972]. Powell filed a motion to dismiss this cross-appeal on November 29, 2022 arguing that the Court lacks appellate jurisdiction over the cross-appeal. Dkt. # 23. This Court has appellate jurisdiction over English's appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Plaintiff-Appellant Kewon English (hereinafter “English”) and Plaintiff-Appellee Earl Powell (hereinafter “Powell”), pursuant to 42 U.S.C. § 1983, asserted claims against Joseph Clarke (hereinafter “Clarke”), Sheriff Leon Lott (hereinafter “Lott”), and the Richland County Sheriff’s Department (hereinafter “RCSD”) arising out of, among other things, the deprivation of English and Powell’s constitutional rights for violations of their rights under the First, Fourth, Fifth, and Fourteenth Amendments to freedom from compelled speech, due process, liberty, equal protection, and to be free from unlawful arrest and malicious prosecution. The district court denied summary judgment on Powell’s malicious prosecution claim, and he has not appealed that ruling, although it is now being appealed by Clarke, Lott, and RCSD. The district court, in adopting the magistrate’s Report and Recommendation, found that there is a dispute of fact as to whether English’s and Powell’s statements prepared by Clarke were coerced and obtained despite their demand for counsel. However, the district court granted Clarke, Lott, and RCSD summary judgment on all of English’s claims, including the false arrest and malicious prosecution claim, as it found that notwithstanding the dispute of fact surrounding English’s confession, probable cause otherwise existed for English’s arrest. The district court also found that Clarke was entitled to qualified immunity for English’s First Amendment Claims, and Lott and RCSD are entitled to Eleventh

Amendment sovereign immunity. The court also found that no issues of material fact existed as to English's Fourteenth Amendment claims. English contends that the grant of summary judgment as to these claims was reversible error and that these claims should proceed to a jury trial as required by the Seventh Amendment to the United States Constitution. Furthermore, the district court denied summary judgment on Powell's malicious prosecution claim, finding that there was a genuine issue of material fact as to whether the confessions were coerced. Lott, Clarke, and RCSD has brought a cross-appeal challenging this denial of summary judgment on qualified immunity. Powell asks that the cross-appeal be dismissed, and his malicious prosecution claim be allowed to proceed to a jury trial.

SUMMARY OF THE ARGUMENT

This is a case in which Appellant Kewon English and Earl Powell, two teenage, African-American males, were charged with, prosecuted, and detained for over a year, for a sex crime that they did not commit, based on a false confession from English and Powell knowingly obtained by Clarke. The general reason that the district court's grant of summary judgment on Powell's § 1983 claims was error, was that it was improperly based on factual conclusions that should be properly reserved for the jury to decide. The Report and Recommendation, adopted by the district court in granting summary judgment, repeatedly and improperly bases the recommended outcome on factual conclusions as to the strength or weight of evidence and fails to acknowledge or completely ignores contradictory evidence presented by English, the nonmoving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014).

With respect to English's Fourth Amendment claims for false arrest and malicious prosecution, the district court disregarded contradictory evidence and made the factual conclusion that, despite there being a dispute of fact regarding English's coerced confession, probable cause still existed based on the totality of the other circumstances known to law enforcement at the time that permitted the arrest of Appellant. *See* ECF No. 79, at 15 [JA1947]. This holding was in error, as there was no "reliable identification" by the victim that rose to the level necessary to

establish probable cause, and there are certainly disputed facts on this issue. At best, the victim provided in her various statements that she overheard the name “Kewon” during the attack without being able to give any physical description of this alleged “Kewon” or positively identify this “Kewon” as anyone she knew. This situation is akin to the facts of *Smith v. Munday*, 848 F.3d 248 (4th Cir. 2017), where despite that an informant stated he purchased drugs from an “April Smith,” the Fourth Circuit found that this alone did not give probable cause to arrest someone living in the area named “April Smith.” S.C. Code Ann. § 16-3-657 does not stand for the proposition that an uncorroborated victim’s statement to law enforcement in a criminal sexual conduct case satisfies the probable cause standard. Instead, as shown by this Court’s precedent, the officer must still ensure that there is probable cause for arrest and conduct further investigation if necessary.

As questions of fact exist as to whether there was probable cause to arrest Appellant, the district court should have also allowed the jury to consider Appellant’s malicious prosecution claim. Further, the district court erred in weighing contradictory evidence to hold that Appellant’s “continued detention after the DNA test results cannot be attributed to Clark.” [JA1821]. Such a holding ignored contradictory evidence in the record from Clark and Fourth Circuit precedent finding that if police officers have been “instrumental” in an individual’s “continued confinement or prosecution, they cannot escape liability by pointing to

the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him.” *Goodwin v. Metts*, 885 F.2d 157, 162-63 (4th Cir. 1989), *overruled on other grounds by Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994).

Lott, Clarke, and RCSD’s contention that the “district court erred in applying the exclusionary rule” to exclude the confessions of English and Powell in the analysis of whether probable cause existed to arrest and prosecute them mischaracterizes the district court’s Order and provides no grounds for reversal of the district court’s decision on Powell’s Fourth Amendment malicious prosecution claim or its analysis of the confessions on English’s claims. The court did not exclude these coerced confessions, but rather it relied on Fourth Circuit precedent in *Gilliam v. Sealey*, 932 F.3d 216 (4th Cir. 2019) to find that because disputed issues of fact existed regarding whether these confessions were coerced, the issue must be decided by the jury. Lott, Clarke, and RCSD have presented no other evidence other than these coerced confessions that could conceivably have established probable cause to prosecute Powell.

Clarke is not entitled to qualified immunity as to English’s First Amendment claims against him. The district court erred in finding that “the First Amendment right to be free from state compelled speech was not clearly established in the context of coerced confessions in 2015.” [JA1940-1941]. While the district court found that there was no precedent establishing such a First Amendment right under these

circumstances, the Fourth Circuit holds “[t]hat there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful.” *Dean v. McKinney*, 976 F.3d 407, 418 (4th Cir. 2020). The First Amendment right to be free from compelled or coerced speech has been clearly established for decades, and Clarke was on notice that a government official compelling speech from a criminal suspect violates these First Amendment rights. *See W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

The district court improperly granted summary judgment on Appellant’s Fourteenth Amendment claims. As to the equal protection claim, contradictory evidence in the record creates an issue of fact as to whether English’s arrest and prosecution were done with discriminatory purpose and effect, including racially charged text messages from Clark. *See* ECF No. 49-3 & 49-4 [JA686-703]. Moreover, as to the “shock the conscience” claim, all of the circumstances surrounding English’s arrest, coerced confession, and continued prosecution should have been allowed to be considered by the jury, and the district court made an improper factual finding in granting summary judgment on this claim.

Finally, Lott and RCSD are not entitled to Eleventh Amendment sovereign immunity as found by the district court, as they are not “arms of the state.” RCSD is self-insured and performs law enforcement activities locally in Richland County,

South Carolina. [JA707 line 24 – JA708 line 2] . Thus, all of the factors established by the Fourth Circuit in *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm.*, 822 F.2d 456 (4th Cir.1987) for determining if an entity is an “arm of the state,” weigh against a finding of sovereign immunity, and English’s *Monell* claims should have been allowed to proceed against RCSD and Lott.

STANDARD OF REVIEW

A district court’s grant of summary judgment is reviewed de novo. *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017). This Court determines whether the grant of summary judgment was erroneous by considering “whether any genuine issues of material fact exist for the jury and if not, whether the district court erred in applying the substantive law.” *Id.* (citation and internal quotation marks omitted). In making this determination, the Court “must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations.” *Id.* (citation, alterations, and internal quotation marks omitted).

ARGUMENT

I. **Issues of Fact Exist on English’s False Arrest Claims, As No Reliable Identification of English Was Ever Made by the Victim to Give Lott, Clarke, and RCSD Probable Cause.**

The district court erred in finding as a matter of law that probable cause existed apart from consideration of the coerced confession to arrest English, as the

alleged victim never made any reliable identification of English, and there was no evidence connecting English to the crime.

Lott, Clarke, and RCSD are incorrect in their assertion that this “Court has recognized that the complaint of a single witness or a putative victim alone is generally sufficient to establish probable cause.” ECF No. 26-1, at 20 (emphasis added). Instead, the standard set forth in *Torchinsky* is that the victim must make a “reliable identification of his attacker.” *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991). The alleged victim in this case never made a reliable identification as contemplated by this Court.

In *McKinney v. Richland County Sheriff’s Department*, 431 F.3d 415 (4th Cir. 2005), which Lott and RCSD cite to for the above proposition, the allegation was that a nine-year-old elementary school student was choked by her teacher, and there was no question regarding who the victim identified as her attacker or the reliability of the identification. *Id.* at 416. As this Court held, “The warrant was based primarily on the victim’s identification of her attacker. . . . The victim made that identification on two separate occasions to two separate officers, and her account was supported by documented evidence of physical injury and by the fact that another of McKinney’s students had made similar allegations. This evidence was ‘sufficient to warrant a prudent man in believing that [McKinney] had committed or was committing an offense’ and it therefore gave rise to probable cause.” *Id.* In

other words, the victim in *McKinney* unequivocally identified her teacher by name as her alleged attacker, and there was no doubt as to which “McKinney” she was referring or as to the reliability of her identification.

While Lott, Clarke, and RCSD are correct that courts have held that a law enforcement officer “is not required to conduct an error-free investigation or to pursue every possible lead before an arrest warrant is obtained,” they still must perform a sufficient investigation to establish probable cause. *See* ECF No. 26-1, at 21. This Court has held that “[a]n investigating officer need not ‘exhaust[] every potential avenue of investigation.’ . . . But an investigating officer must still conduct some sort of investigation and assemble individualized facts that link the suspect to the crime.” *Smith v. Munday*, 848 F.3d 248, 254 (4th Cir. 2017) (emphasis added). In so holding, in a case where an informant merely identified an “April Smith” as the person from whom he bought drugs, the Court held:

In short, [the investigating officer] had no evidence about Smith’s conduct, let alone whether she was a participant in, connected to, or even physically present near the drug sale in question. His only information about Smith was that she had previously been convicted for selling drugs in years past, that she was a black woman, and that she was “near” the site of the drug sale because her home address was eleven miles away. If this amount of evidence were sufficient for probable cause, then officers would have probable cause to obtain arrest warrants for any local residents who fit the generic description of the day—be it “black woman,” “black man,” or otherwise—so long as they had a criminal history and an unfortunately common name. Such scant evidence barely meets the threshold of “mere suspicion,” let alone the threshold of probable cause.

Id. at 254.

Here, the alleged victim did not reliably “identity” English “as one of the assailants at least three separate and distinct times” as alleged by Clarke, Lott, and RCSD. Dkt. # 26-1, at 18. Instead, as set forth in English’s original brief, the alleged victim at first told the doctor at the hospital that she was attacked by an “unknown assailant.” *See* ECF No. 49-14, 00414-A-099 [JA1641]. When Clarke made contact with the alleged victim, he himself relayed to the alleged victim “what [he] had been told concerning a suspect named Kewon.” [JA1657]. At some point prior to 9:45 a.m., the alleged victim provided a history of what happened with Clarke present, and Clarke’s handwritten notes identify “Kewan” 5’6 140 pounds as one of the suspects and “Shakim” 5’2 125 pounds as the other suspect. [JA1658]. It is undisputed that Kewon was not 5’6” 140 pounds at the time, and this description did not match the physical description of English. Finally, at 9:45 am on August 5, 2015, the alleged victim allegedly gave a statement to Clarke. [JA309-311]. In her statement, the alleged victim claims that one of the alleged attackers said the name “Kewon” during the attack but indicated she was not sure if “Kewon” was actually the attacker. *Id.* The alleged victim kept her head down during the entire encounter, and she could not see the alleged perpetrators or what they were doing. *Id.* Thus, at most, the alleged victim stated that she may have heard the name “Kewon” during

the attack, but she never actually identified English as her attacker or provided any evidence connecting English to the crime.

Likewise, Lott, Clarke, and RCSD's reliance on S.C. Code Ann. § 16-3-657 is misplaced and does not support the grant of summary judgment. S.C. Code Ann. § 16-3-657 does not stand for the proposition "that an uncorroborated victim's statement to law enforcement in a CSC case satisfies the probable cause standard." Dkt. # 26-1, at 21. That code section states, "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657. A court in the District of South Carolina has recently rejected an attempt by a defendant in a §1983 case to use this code section to argue that police officers can ignore conflicting evidence in determining whether probable cause exists when they have a victim's statement. The court held "that an objectively reasonable officer would not infer that he may ignore conflicting evidence simply because section 16-3-657 states that a victim's testimony does not need to be corroborated. Even if corroboration is not necessary, it does not follow that an uncorroborated statement is a sufficient basis for an arrest, especially when that statement lacks clarity and there is conflicting evidence." *Iacopelli v. Town of Port Royal*, C/A No.: 9:16-cv-287-PMD-BM, at *10 (D.S.C. Aug. 15, 2018). In other words, Lott, Clarke, and RCSD's "argument oversimplifies the probable cause analysis. While the statute specifies that a victim's testimony need not be

corroborated, it does not instruct an officer that he may ignore evidence creating uncertainty and calling for further investigation.” *Id.* at *7.

This is in line with this Court’s holdings that in establishing probable cause “an investigating officer must still conduct some sort of investigation and assemble individualized facts that link the suspect to the crime” and that “an officer may not disregard readily available exculpatory evidence of which he is aware.” *Wadkins v. Arnold*, 214 F.3d 535, 541 (4th Cir. 2000); *Smith*, 848 F.3d at 254; *see Stoot v. City of Everett*, 582 F.3d 910, 919 (9th Cir. 2009) (“Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects. But such information does not, on its own, support a finding of probable cause if the information is not reasonably trustworthy or reliable.”). Here, at a minimum there is conflicting evidence in the record as to whether Lott, Clarke, and RCSD had a reliable identification of English by the alleged victim, such that they still had to do further investigation to establish probable cause to arrest him and actually link him to the scene, which they did not do. Therefore, it was error for the district court to usurp the role of the jury in weighing this competing evidence, and summary judgment on English’s claims was not proper.

II. The District Court Did Not Apply the Exclusionary Rule, But Rather Applied This Court’s Holding in *Gilliam* to State that the Jury Must Determine Whether the Confessions Were Coerced.

Lott, Clarke, and RCSD’s contention that the “district court erred in applying the exclusionary rule” to exclude the confessions of English and Powell in the analysis of whether probable cause existed to arrest them mischaracterizes the district court’s Order and provides no grounds for reversal of the district court’s decision on Powell’s Fourth Amendment malicious prosecution claim or its analysis of the confessions on English’s claims. Contrary to Appellants’ contention, the district court in ruling as it did on these claims did not apply an exclusionary rule. *See* Dkt. # 26-1, at 24. Instead, in adopting the Report and Recommendation, Judge Childs explicitly stated, “**Rather than applying the exclusionary rule**, the Report notes that there is a factual dispute as to whether English’s confession was coerced and obtained despite his demand for counsel and his request to have a parent present, considering the fact that he was a minor at the time.” [JA1945]. The court then held that “whether probable cause existed to arrest and prosecute Powell turns on whether the confessions obtained by Clarke were coerced, **which is a factual question.**” [JA1945] (emphasis added).

In so holding, the court cited to this Court’s ruling in *Gilliam v. Sealey*, 932 F.3d 216 (4th Cir. 2019). There, in a case brought pursuant to 42 U.S.C. § 1983, the Fourth Circuit held that it is clearly established “that an arrest in the absence of probable cause was a violation of an individual’s Fourth Amendment rights, and that a coerced confession could not form the basis of probable cause for an arrest.” *Id.*

at 235. The Court further held that whether confessions “were coerced or fabricated must be determined by the jury.” *Id.* at 234. Based on these principles, the Fourth Circuit held:

Viewing the facts recited by the district court in the light most favorable to Appellees, there is no basis for us to conclude that Appellants had probable cause to arrest Appellees as a matter of law. A coerced or fabricated confession that police know to be coerced -- as Appellees assert here, based on the use of coercive interrogation tactics, the age and intellectual disabilities of Appellees, and the inconsistencies between the confessions and the crime scene -- does not give police probable cause to arrest the suspect as a matter of law.

Id. Thus, in ruling that whether the confessions obtained by Lott, Clarke, and RCSD in this case were coerced is a “factual dispute” that must be determined by the jury, the district court correctly followed the established law set forth by *Gilliam*.

Lott, Clarke, and RCSD’s reliance on the *Chavez* and *Burrell* decisions is inapposite, as those cases are inapplicable. As summarized by Lott, Clarke, and RCSD, those cases “provide that a Fifth Amendment right is implicated only where a coerced confession is used against the witness *in a criminal trial*.” ECF No. 26-1, at 27 (emphasis added). As held in *Burrell* when discussing *Chavez*, this Court held, “On the reasoning of either the *Chavez* plurality or Justice Souter’s concurrence in the judgment, Burrell’s Fifth Amendment section 1983 claim fails to state a claim. He does not allege any *trial* action that violated his Fifth Amendment rights; thus, *ipso facto*, his claim fails on the plurality’s reasoning.” *Burrell v. Virginia*, 395 F.3d 508, 513-14 (4th Cir. 2005) (citing *Chavez v. Martinez*, 538 U.S. 760 (2003)). Thus,

Chavez and *Burrell* deal exclusively with claims that a coerced confession not used in a trial violates the Fifth Amendment. They have no bearing regarding a coerced confession's consideration on a motion for summary judgment on other alleged Constitutional violations under § 1983, including violations of the Fourth Amendment for an "arrest in the absence of probable cause." *Gilliam*, 932 F.3d at 235.

This is in line with other federal courts of appeal decisions. For instance, in *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006) when discussing a Fourteenth Amendment due process claim under § 1983, the Seventh Circuit held, "The facts in the record before us certainly do not establish, as a matter of law, that Teresa's confession was free of police coercion. . . . Moreover, the parties vehemently dispute which threats Officers Sheppard and Riley actually made to Teresa and when the officers made those threats. These issues of fact preclude summary judgment." *Id.* at 1023. Similarly, in *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008), the Tenth Circuit held:

[W]hether Plaintiffs have presented sufficient evidence of fabricated testimony bears on Plaintiffs' malicious prosecution claim because, as the district court explained . . . If those statements were indeed involuntary, then the officers who carried out the alleged coercion could not reasonably rest their determination of probable cause upon those statements. On the other hand, if Defendants did not coerce the statements from the witnesses, then it would be proper for Defendants to . . . base their determination of probable cause on those statements. . . . For purposes of the malicious prosecution claim, then, disputed factual issues remain not only whether Nieto's and Popeleski's

statements were involuntary and false, but also whether a reasonable officer would have known so.

Id. at 800; *see Halsey v. Pfeiffer*, 750 F.3d 273, 301 (3d Cir. 2014) (“In reviewing the disposition of this action against appellees . . . we set the confession aside when considering the probable cause issue, because, for purposes of this case, we find that the confession was invalid inasmuch as appellees fabricated it.”).

Thus, the district court did not “exclude” the confessions from the probable cause determination as argued by Lott, Clarke, and RCSD, but rather, it simply held that whether the confessions were coerced or not is a factual issue for the jury to decide and not the court.

III. Clarke Is Not Entitled to Qualified Immunity on Powell’s § 1983 Malicious Prosecution Claim Due to the Coerced Confession of Powell.¹

In denying Clarke summary judgment on his qualified immunity defense, the district court held, “Clarke would not be entitled to qualified immunity on Powell’s malicious prosecution claim because, as discussed above, viewing the facts in the light most favorable to Powell, a reasonable jury could find the conduct violated

¹ As an initial matter, Clarke’s appeal of the district court’s denial of qualified immunity is not properly before this Court on interlocutory review, as the order was based on the fact that the court found a genuine issue of fact for trial, and such a ruling is not immediately appealable. This is fully set forth in Powell’s Motion to Dismiss the cross-appeal in this case (Dkt. # 23), which Powell incorporates fully herein by reference. The Court has deferred ruling on that motion at this time, but for the reasons set forth therein, Powell requests that the cross-appeal be dismissed. *See* Dkt. #32.

Powell’s constitutional rights and such right was clearly established at the time of the alleged misconduct.” [JA1823].

“Qualified immunity protects government officials from liability for violations of constitutional rights so long as they could reasonably believe that their conduct did not violate clearly established law.” *Gilliam*, 932 F.3d at 229 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Clarke argues that he is entitled to qualified immunity because “if the confessions of English and Powell are considered, there is no question that probable cause existed for the arrest of Powell.” Dkt. # 26-1, at 33. However, as set forth above, the district court found that there was a genuine issue of material fact as to whether these confessions were coerced, and Clarke’s participation in obtaining the coerced confessions in this case precludes summary judgment on his qualified immunity defense. This Court’s decision in *Gilliam* repudiated the claim that Clarke is attempting to make here—that even if the confessions were coerced, he is still entitled to qualified immunity. In rejecting such an argument the Court held:

[T]he circumstances of Appellees’ interrogations easily fall within the bounds of coercive police conduct outlined in *Ashcroft*, *Haley*, *Ferguson*, and other established precedent as “so inherently coercive that its very existence is irreconcilable with the possession of mental freedom” by Appellees. . . . Therefore, the district court did not err by concluding that Appellees’ right not to be arrested without probable cause based on a coerced and fabricated confession was clearly established in 1983, **and the district court was correct to deny summary judgment to Appellants on the basis of qualified immunity in light of the numerous material disputes of fact.**

Gilliam, 932 F.3d at 237 (emphasis added).

Other federal courts of appeal have also found summary judgment on qualified immunity is inappropriate under such circumstances. In *Livers v. Schenck*, 700 F.3d 340 (8th Cir. 2012), the court held as follows regarding an investigator's claim that an allegedly coerced confession entitled him to summary judgment on qualified immunity:

[A] jury could find Livers' confession was coerced. No reasonable officer could believe statements from a coerced confession could alone provide probable cause to arrest Sampson. Investigator Schenck knew of the circumstances surrounding Livers' confession because he participated in it. The district court properly denied qualified immunity on Sampson's Fourth Amendment claims against Investigator Schenck.

Id. at 358; *see Hill v. Coppleson*, 627 F.3d 601, 606 (7th Cir. 2010) ("And because we cannot determine whether Rogers coerced Hill's confession without resolving the discrepancies between Hill's and Rogers's accounts of the events, we lack jurisdiction to consider Rogers's qualified immunity claim on interlocutory appeal."); *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997) ("[A] reasonable jury could find, based on the evidence, that defendants . . . violated the plaintiffs' clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict. These defendant police officers are not entitled to summary judgment on

the ground of qualified immunity.”); *Weaver v. Brenner*, 40 F.3d 527, 537 (2d Cir. 1994).

It has been clearly established since at least 1986 that an officer who procures “the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.” *Malley v. Briggs*, 475 U.S. 335 (1986). Thus, Clarke’s reliance on the unpublished decision of *Orem v. Gillmore*, 813 F. App’x 90 (Unpub. 4th Cir. 2020) for the proposition that there need to be only “arguable” probable cause for qualified immunity to apply does not change this outcome, as “[n]o reasonable officer could believe statements from a coerced confession could along provide probable cause.” *Livers*, 700 F.3d at 358. Clarke points to no other evidence other than the coerced confession to attempt to establish that he had probable cause, and the district court therefore properly denied Clarke qualified immunity on Powell’s malicious prosecution claim.

IV. The District Court Erred in Granting Summary Judgment on English’s Malicious Prosecution Claim.

The district court erred in dismissing English’s § 1983 malicious prosecution claim. Lott, Clarke, and RCSD are incorrect that “there is no evidence that Clarke or any RCSD deputy tainted or effected the decision-making of the prosecutor as to whether to nolle pros the charges or not.” Dkt # 26-1, at 34. Fourth Circuit precedent is clear that police officers remain liable for a wrongfully indicted defendant “when they have lied to or misled the prosecutor,” “failed to disclose exculpatory evidence

to the prosecutor,” or “unduly pressured the prosecutor to seek the indictment.” *Evans v. Chalmers*, 703 F.3d 636, 648 (4th Cir. 2012). In other words, “a prosecutor’s decision to charge, a grand jury’s decision to indict, a prosecutor’s decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.” *Massey v. Ojanit*, 759 F.3d 343, 355 (4th Cir. 2014) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)).

As set forth in the initial brief, Clarke admitted that without the coerced confessions he obtained from English and Powell, there would not have been probable cause to charge them or prosecute them:

Q. I said without his confession and without Kewon’s confession, would there have been probable cause to charge them or prosecute them to begin with? . . .

A. **At this – at that point, no.** . . .

[JA1181] (emphasis added). English’s criminal counsel, Robert Bank, testified in an affidavit submitted to the district court that after the DNA results were released on May 4, 2016, he saw Clarke at a restaurant on May 10, 2016, and Clarke expressed to him that “he thought Mr. English was innocent” and that Mr. Bank “encouraged him to share this with the Assistant Solicitor so that she would drop the charges.” [JA102]. Mr. Bank also spoke with the Assistant Solicitor on May 16, 2016 and indicated to her that he had asked her and Clarke to dismiss the charges,

to which she responded that “the case has been keeping me up at night.” [JA102]. Despite these conversations, the prosecution of English continued until his charges were dismissed on December 21, 2016. [JA103].

Clarke was bullish and continues to be bullish about his belief that the prosecution of English and Powell should have continued. He testified:

Q. So it – it sounds like, if you had your druthers, the cases against Kewon and Earl would have continued on all the way through trial to conviction; is that correct?

A. Absolutely.

[JA1189].

Moreover, former RCSD employee and Clarke’s girlfriend, Nicole Noel Williams, was asked explicitly in her deposition whether Clarke caused the prosecution of English and Powell to continue after receipt of the DNA results and testified as follows:

Q. Did Joseph Clarke ever tell you that he expressed to Bobby Bank during the conversation at the Publick House that, upon receipt of the DNA results, he knew that Kewon English and Jamal Powell were innocent of all the crimes that they had been charged with?

A. I plead the Fifth.

Q. Did Joseph Clarke ever tell you that he was going to cause the prosecution of Kewon English and Jamal Powell to continue even though he knew that Jamal Powell and Kewon English were innocent of the crimes they had been charged with?

A. I plead the Fifth.

[JA1878]. “[S]ilence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause.” *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). In fact, “[i]n a civil proceeding, a fact-finder is entitled to draw adverse inferences from a defendant’s invocation of the privilege against self incrimination.” *Eplus Technology, Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002). Thus, this evidence, when considered in the light most favorable to English, contradicts the district court’s improper factual conclusion that “no evidence shows that at that *later* point in the prosecution, the defendants—as opposed to the prosecutor—were the cause of English’s continued detention and prosecution.” [JA1821]. As such, English’s malicious prosecution claim should have been allowed to proceed to trial.

V. **English’s First Amendment Right to Be Free from Compelled Speech Was Clearly Established in 2015.**

Lott, Clarke, and RCSD are simply wrong that English “has cited no authority in existence in 2015 (or even since 2015) recognizing a First Amendment protection against coerced confessions or coercive interrogation techniques.” Dkt. # 26-1, at 37. Again, this Court has held “[t]hat there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful.” *Dean v. McKinney*, 976 F.3d 407, 417 (4th Cir. 2020). “[P]ublic officials ‘can still be on notice that their conduct violates established law even in novel factual circumstances,’ so long as the law provided ‘fair warning’ that their conduct was wrongful.” *Id.* Further, “we need not—and

should not assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two.” *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018). The First Amendment right of individuals to be free from compelled or coerced speech by the government has been clearly established for decades. *See W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (“We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District court.”); *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 186 L.Ed.2d 398, 81 USLW 4476 (2013) (“The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.”). Thus, it would have been common sense to Clarke in 2015 that he, as a government official, could not compel English to speak, and that such a coerced confession would be violative of the First Amendment. Therefore, the district court incorrectly granted summary judgment on this claim.

VI. The District Court Erred in Granting Summary Judgment on English's Equal Protection and "Shock the Conscience" Claims Under the Fourteenth Amendment.

The district court erred in granting summary judgment on English's claims under the Fourteenth Amendment. As to English's equal protection claim, plaintiffs prove a claim for violation of Fourteenth Amendment equal protection rights when they demonstrate that they were "treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011) (citing *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). In other words, "[t]o prevail on an equal protection claim under the 'Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose.'" *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir., 2012).

Lott, Clarke, and RCSD are incorrect in their assertion that English has failed to point specific evidence showing that they were motivated by a "discriminatory purpose" or that their application of the law against English had a "discriminatory effect." Dkt. # 26-1, at 37. Again, the district court ignored evidence in the record that creates an issue of fact as to the motivation of English's arrest as well as the discriminatory effect it had. In their brief, Lott, Clarke, and RCSD fail to acknowledge that in addition to the deposition testimony of Captain Vincent

Goggins, English presented the text messages in the record that demonstrate a racial animus on the part of Clarke, and create a clear issue of fact on this matter. *See* ECF No. 49-3 & 49-4 [JA686-700]. Moreover, Nicole Williams testified:

Q. Did Joseph Clarke ever tell you that he treated Kewon English and Jamal Powell differently because they were black males than he would have treated them if they were Caucasian?

A. I plead the Fifth.

[JA1862]. She also testified:

Q. Did Joseph Clarke ever admit to you that the decisions that he made with regard to the initiation and continuation of the prosecution of Kewon English and Jamal Powell were motivated by racial bias like what we saw in the text messages between him and Ben Fields? . . .

A. I plead the Fifth.

[JA1878]; *see Eplus Technology, Inc.* at 179.

Lott, Clarke, and RCSD take further issue with English's citation to the entirety of Goggins' deposition transcript for the proposition that RCSD made a policy decision to target black gang members to put them in prison, but not Caucasian gangs that were also operating in the same area. Dkt. # 26-1, at 38. However, a cursory review of this deposition shows this proposition to be true, as Goggins testified:

Q. . . . Would you agree that because of the reality of what y'all consider to be a gang and the demographics of what you have with gangs in the fifth circuit, that your dismantling function is

primarily targeted towards predominantly black and Hispanic folks? . . .

- A. It's historically we are – the gangs that we dismantle are predominantly black or Hispanic.

[JA533-34]. Therefore, with these genuine issues of material fact, the district court should not have granted summary judgment on English's equal protection claim under the Fourteenth Amendment.

Lott, Clarke, and RCSD are also incorrect that the “shock the conscience” standard “does not present a factual question for a jury.” Dkt. # 26-1, at 38. For instance, in *Temkin v. Frederick County Com'rs*, 945 F.2d 716 (4th Cir. 1991), this Court held that “[t]he primary question raised by the district court's entry of summary judgment in the face of the [plaintiffs'] Rule 56(f) motion and its subsequent denial for the Rule 59(e) motion is whether the evidence produced by further discovery would have created a genuine issue of material fact or would have led the court to conclude that, viewing the evidence in a light most favorable to the [plaintiffs], **a jury might reasonably conclude that Deputy Sheriff Selby's conduct met the 'shocks the conscience' standard.**” *Id.* at 725.

Here, the a jury certainly might reasonably conclude that the conduct in this case in coercing a sixteen-year-old child into signing a false confessions without his mother present, ignoring a request for an attorney, pulling a chair out from under English and causing him to fall, and informing English he could go home if he signed

the false confession, coupled with the other evidence of racial animus “shocks the conscience,” and therefore, summary judgment was inappropriate.

VII. Lott and RCSD Are Not Arms of the State and Are Not Entitled to Eleventh Amendment Immunity.

Finally, the district court also improperly concluded that “RCSD and Sheriff Lott, in his official capacity, are arms of the state and thus entitled to Eleventh Amendment immunity as to Plaintiffs’ claims.” [JA1940]. Again, the question of Eleventh Amendment Immunity under § 1983 comes down to whether the entity or official is an “arm of the state” or a local official. This Court set forth a “four-part, nonexclusive test” for determining whether an entity is an alter ego of the state and thus entitled to sovereign immunity in *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm.*, 822 F.2d 456 (4th Cir. 1987). The first, and “**most important consideration**” is whether the state treasury will be responsible for paying any judgment that might be awarded.” *Id.* The other three inquiries include, but are not necessarily limited to, 1) whether the entity exercises a significant degree of autonomy from the state; 2) whether it is involved with local versus statewide concerns, and 3) how it is treated as a matter of state law. *Id.*

The district court acknowledged that under these factors, “[t]he ‘largely, if not wholly, dispositive’ factor in determining whether an entity is properly characterized as an arm of the state is whether the state treasury will be liable for the judgment.” *See* ECF No. 79, at 7 [JA1939] (quoting *Cromer v. Brown*, 88 F.3d

1315, 1332 (4th Cir. 1996)). Lott and RCSD incorrectly assert that “there is no evidence in the record as to the sources for funding for the Sheriff’s Department.” Dkt. # 26-1, at 42. As stated in English’s original brief, Lott and RCSD admitted in their interrogatory answers that they are self-insured. Specifically, Lott and RCSD admitted:

5. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy, including all primary, excess, umbrella, homeowner’s, or any other policies that could afford liability insurance coverage based on the allegations of the complaint.

ANSWER:

This is not applicable. By way of explanation, Richland County is self-funded with no excess insurance. The County maintains coverage sufficient to cover the statutory caps on liability under the South Carolina Tort Claims Act.

[JA1730].

Thus, it is clear that the state treasury will not be responsible for paying any verdict. Like the district court, Lott and RCSD mistakenly take as determinative other cases finding sheriffs from other South Carolina counties to be arms of the state. This is not dispositive, as this Court has held that “[s]ome cases have mistakenly treated a state court decision as to whether an entity is a state actor as determinative.” *Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996). No citation is made to any case dealing with a self-funded South Carolina sheriff by Lott and

RCSD, and thus, the court decisions cited to by Lott and RCSD are not authoritative. Accordingly, because RCSD is self-insured and the state treasury is unaffected by any judgments against RCSD, the *Ram Ditta* factors regarding sovereign immunity weigh against RCSD and Lott, and English's *Monell* claims should have been allowed to proceed against them.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court as to English's claims and remand for further proceedings. As to Powell's malicious prosecution claim, the Court should affirm the district court's denial of qualified immunity and summary judgment.

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No. 22-1788(L) Caption: Kewon English v. Joseph Clarke, et al.

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