NO. 23-1620

United States Court of Appeals

for the

Fourth Circuit

CARON NAZARIO,

Plaintiff-Appellant,

– v. –

JOE GUTIERREZ, In his Personal Capacity;
DANIEL CROCKER, In his Personal Capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

BRIEF OF APPELLEES

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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. 23-1620 Caption: Caron Nazario v. Joe Gutierrez, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Joe Gutierrez
(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/ Jessica A. Swauger Date: 6/20/2023

Counsel for: Joe Gutierrez

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- 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. 23-1620 Caption: Caron Nazario v. Joe Gutierrez & Daniel Crocker

Pursuant to FRAP 26.1 and Local Rule 26.1,

Daniel Crocker
(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
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Signature: _____ Date: 06/20/2023

Counsel for: Daniel Crocker

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

JURISDICTIONAL STATEMENT

This appeal arises from a civil suit in the Eastern District of Virginia, Norfolk Division under 42 U.S.C. Section 1983 and related state law claims. Caron Nazario ("Nazario") filed a lawsuit against Officers Daniel Crocker ("Crocker") and Joe Gutierrez ("Gutierrez") (together, the "Officers") of the Windsor Police Department concerning a traffic stop which occurred on the evening of December 5, 2020. JA29. The parties filed cross-motions for summary judgment. The District Court granted summary judgment to the Officers based on qualified immunity on Count I (Unreasonable Seizure), Count II (Excessive Force), and Count IV (First Amendment). The District Court granted summary judgment to Nazario against Crocker only on Count III (Illegal Search) and on Count VIII (Illegal Search under Virginia law). The District Court deferred ruling on Count III and Count VIII (Illegal Search) as to Gutierrez. JA761-800.

In its summary judgment rulings, the District Court held that the Officers had probable cause to charge Nazario with eluding, obstruction of justice, and failure to obey. The District Court deferred ruling on the companion Virginia common law claims against the Officers for assault, battery, and false imprisonment. JA761-800.

After a 5-day jury trial, the jury found Gutierrez liable only for assault and awarded $2,685.00 in compensatory damages ($0.00 in punitive damages). As to Crocker on the illegal search counts, the jury awarded $1,000.00 in punitive damages

upon the directed verdict of the District Court for which punitive damages were mandatory under Virginia law, and $0.00 in compensatory damages for both the federal and state law claims. The jury did not find the Officers liable for battery or false imprisonment. The jury did not find Crocker liable for assault. The jury did not find Gutierrez liable for illegal search. JA927.

Nazario filed post-trial motions but did not raise anew his arguments related to the District Court's factual probable cause rulings on summary judgment. Following post-trial motions, the District Court awarded an additional $2.00 in compensatory damages against Crocker on the two illegal search counts ($1.00 on each) for which the District Court previously granted summary judgment to Nazario. JA926. The District Court denied Nazario's motion for a new trial. JA926.

STATEMENT OF THE ISSUES

The Officers have no changes to Nazario's Statement of Issues Presented for Review with the exception of whether Nazario has waived his appeal for fact-based arguments from the trial court's rulings on summary judgment, as set forth herein.

STATEMENT OF THE CASE

On December 5, 2020, Nazario was traveling westbound on U.S. Route 460[1] in his 2020 Chevrolet Tahoe which had heavily tinted windows and no visible license

[1] On November 7, 2020, just one month prior to the traffic stop at issue, Nazario was traveling on the same stretch of road when he was stopped by Officer Bill Owens of the Windsor Police Department for exceeding the speed limit by traveling 54 mph

tag. At approximately 6:34 p.m., Crocker observed Nazario's vehicle without a visible license tag. Crocker initiated a traffic stop by activating the blue lights and sirens of his marked police cruiser. The entire traffic stop is recorded in high-definition video from the body worn cameras of each officer and from Nazario's cell phone video. *See* JA Vol. III, CN-1 - CN-5.[2] Nazario filed the videos as exhibits to his Complaint. There was no dispute as to the authenticity of the videos. *See* JA30.

After Crocker initiated the traffic stop, Nazario slowed down below the speed limit and continued to drive for approximately two minutes and 1.1 miles along U.S. Route 460 through downtown Windsor. JACN-4 (18:34:21-18:36:10). Nazario traveled along a well-lit stretch of the road with multiple well-lit areas on the right side of the road where he could have pulled over. JACN-3, JACN-4, JA78.11, JA203, JA802-803, JA838-840. As shown in the videos, Nazario crossed all lanes

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in a 35-mph zone. JACN-3063. During this traffic stop, Officer Owens radioed to Dispatch that Nazario's vehicle did not have a rear tag displayed. JACN-3063 (06:19:14-06:19-18). Nazario informed Officer Owens that a temporary tag was taped inside of the rear window. JACN-3063 (06:20:30-06:20:47). Even though the November traffic stop occurred in broad daylight, the temporary tag, which was expired, was only visible when Officer Owens shined a flashlight through the heavily tinted rear window. JACN-3063 (06:21:27-06:21:44). Thus, Nazario was clearly on notice that his expired temporary tag was not visible as required under Virginia Code Section 46.2-716. *See* Va Code Ann. § 46.2-716(A)(2) and (3), (B) (prohibiting placing any cover, including glass, that obscures license tag or renders any portion of license tag illegible).

[2] Hereafter, citations to Joint Appendix – Volume III of III – Digital Media, will be referenced as JACN-1 through JACN-5, JACN-3063, or JA78.11.

of traffic and finally pulled over by turning into a BP gas station on the left side of the roadway. JACN-4 (18:34:21-18:36:10). Nazario then ignored or refused approximately forty (40) commands of the Officers to put and keep his hands outside of the vehicle's window and exit the vehicle. JACN-4 (18:36:11-18:40:50). Nazario repeatedly told the Officers that he would not do as the Officers commanded. JACN-1 (0:00:21-0:00:44), JACN-1 (1:38-1:51), JACN-4 (18:38:30-18:38:47). Ultimately, in response to Nazario's repeated noncompliance, Gutierrez deployed oleoresin capsicum ("OC") spray and the Officers removed Nazario from his vehicle. JACN-3 (18:39:10-18:40:56), JACN-4 (18:39:07-18:40:50).

After Nazario was in handcuffs, the Officers assisted him with recovery from the effects of the OC spray and opened the windows of his vehicle for the benefit of his dog. JACN-4 (18:42:28-18:48:14). Crocker asked Nazario if he had any weapons in the vehicle. JACN-4 (18:53:04-18:53:19). Nazario identified a loaded handgun in the driver's compartment of the vehicle. JACN-4 (18:53:21-18:53:39). Crocker retrieved the firearm, unloaded it, called in the serial number, and replaced it in the vehicle. JACN-4 (18:53:17-18:54:30). Ultimately, the Officers let Nazario off with a warning.

SUMMARY OF THE ARGUMENT

The basis of Nazario's appeal is that the District Court erred or exceeded its authority in ruling on summary judgment that the Officers had probable cause to

execute the traffic stop and to arrest him for eluding, obstruction of justice, and failure to obey. Dkt. 18 at 21-34.[3] From there, Nazario extrapolates the remainder of his claimed assignments of error, specifically that the District Court erred in its qualified immunity rulings and in giving Jury Instructions 26 and 27-A at trial. *Id.* at 35-45.

For the reasons discussed below, the District Court correctly held, and was within the scope of its authority, on summary judgment that the Officers had probable cause to arrest Nazario for eluding, obstruction of justice, and failure to obey. Because the Officers had probable cause, and their actions were reasonable, the Officers are entitled to qualified immunity. Because the Officers had probable cause, Jury Instructions 26 and 27-A were correct. This Court need not reach this analysis, however, given that Nazario failed to preserve for appellate review the District Court's factual summary judgment rulings in a post-trial motion.

STANDARD OF REVIEW

A factual issue raised and determined at summary judgment must be raised anew in a post-trial motion to preserve the issue for appellate review. *See Dupree v. Younger*, 143 S. Ct. 1382, 1389 (2023).[4]

[3] Citations to Dkt. 18 are citations to Nazario's Opening Brief on appeal.

[4] Probable cause can be a mixed question of law and fact. But where the facts are not in dispute, determination of probable cause is a pure question of law. To the

This Court reviews a district court's grant of summary judgment *de novo*, using the same standard applied by the district court. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Summary judgment is appropriate if "no material facts are disputed and the moving party is entitled to judgment as a matter of law." *Id*. When the parties' versions of events differ, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007). In qualified immunity cases, this usually means adopting the plaintiff's version of the facts. *Id*.

However, when the disputed events are captured on video in the record and "blatantly contradict" the plaintiff's story "so that no reasonable jury could believe it," the plaintiff is entitled to no such deference. *See id*. For example, in *Scott v. Harris*, the Supreme Court reversed the Eleventh Circuit's denial of qualified immunity because the police videotape showed the officers had probable cause to use force. *Id*. at 386. In *Scott*, the plaintiff alleged that he had posed little threat to others while fleeing from police. *Id*. at 379. The Supreme Court, however, found video tape in the record that "tells quite a different story." *Id*. The video showed the suspect racing down narrow streets, swerving around other cars, and running multiple red lights while being chased by police cars. *Id*. Because the plaintiff's

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extent that Nazario's arguments related to the District Court's probable cause determinations are fact-based, such are arguments are procedurally waived.

version of events in *Scott* was clearly contradicted by video evidence, the Supreme Court held the lower courts erred by failing to grant the officers summary judgment on qualified immunity. *Id*. at 386. The Court reasoned:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Id. at 380-81.

This Court reviews the district court's decision to give or not give a jury instruction, and the content of an instruction, for abuse of discretion. *United States v. Savage*, 885 F.3d 212, 222 (4th Cir. 2018). Whether a district court's instructions to the jury were correct statements of the law is reviewed de novo. *See Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 233 (4th Cir. 2016). "Even if a jury was erroneously instructed, however, we will not set aside a resulting verdict unless the erroneous instruction *seriously* prejudiced the challenging party's case." *Id.* (emphasis in original) (quotation omitted).

ARGUMENT

I. TO THE EXTENT NAZARIO ALLEGES ERROR IN THE DISTRICT COURT'S FACTUAL DETERMINATIONS ON SUMMARY JUDGMENT, HE DID NOT PRESERVE SUCH ARGUMENTS BY RAISING THE FACTUAL ISSUES ANEW IN A POST-TRIAL MOTION.

To the extent that Nazario raises factual issues on appeal, the Court need not reach the merits of such issues because Nazario's appeal is procedurally barred. Nazario did not raise factual objections to the District Court's probable cause rulings at summary judgment anew in his post-trial motions. *See* District Court Dkt. Nos. 244-45, 249-52, 269. A party must raise a factual issue raised and determined at summary judgment anew in a post-trial motion to preserve the issue for appellate review. *Dupree*, 143 S. Ct. at 1389. In *Dupree*, the Supreme Court held:

> Some interlocutory district-court rulings . . . are unreviewable after final judgment because they are overcome by later developments in the litigation. . . . Factual challenges depend on, well, the facts, which the parties develop and clarify as the case progresses from summary judgment to a jury verdict. Thus, "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." So after trial, a district court's assessment of the facts based on the summary-judgment record becomes "ancient history and [is] not subject to appeal." Fact dependent appeals must be appraised in light of the complete trial record.

Dupree, 143 S. Ct. at 1389 (internal citations omitted). Nazario failed to preserve the District Court's rulings on summary judgment when he did not raise the issues anew in a post-trial motion. To the extent that Nazario's appeal is based on claims

that the District Court erred in its *factual* summary judgment rulings, the appeal must be dismissed.

II. THE DISTRICT COURT PROPERLY DETERMINED ON SUMMARY JUDGMENT THE OFFICERS HAD PROBABLE CAUSE TO CHARGE NAZARIO WITH ELUDING, OBSTRUCTION OF JUSTICE, AND FAILURE TO OBEY.

The District Court is granted broad discretion in ruling on summary judgment. The parties filed cross-motions for summary judgment, and all motions included argument with respect to probable cause – a central component of the claims at issue. *See* JA767-769. Even if probable cause was not explicitly raised on summary judgment (it was), the District Court would have been within its power to grant summary judgment *sua sponte* based on information in the record. *See Simarjeet Kaur v. Police Officer Pollack #5597*, 2023 U.S. Dist. LEXIS 73507, *32 (D. Md. April 26, 2023) (citing *Penley v. McDowell Cnty. Bd. of Educ.*, 876 F.3d 646, 661 (4th Cir. 2017)).

Probable cause exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S 31, 37 (1979). Contrary to Nazario's Opening Brief, probable cause does not require evidence sufficient for a conviction at trial. *Taylor v. Waters*, 81 F.3d 429, 434 (4th

Cir. 1996) ("Probable cause must be supported by more than a mere suspicion, but evidence sufficient to convict is not required.") (citation omitted).

Probable cause can exist even if the suspect has not actually committed a crime. "[A]n arrest, though warrantless, is valid where the officer had probable cause to believe that a misdemeanor was committed in his presence, even though the action he observed did not in fact constitute a misdemeanor." *Carter v. Khan*, 2015 U.S. Dist. LEXIS 149955, at *15 (E.D. Va. Nov. 4, 2015). Here, the District Court, after viewing the encounter on video, correctly determined that the Officers were justified in stopping Nazario for violations of Virginia Code Sections 46.2-715 and 716 (display of license tag and how license tag fastened to vehicle, respectively).[5] The District Court also correctly held that the Officers had probable cause to arrest Nazario for eluding, obstruction of justice, and failure to obey.

Nazario correctly recognizes that the video controls. Dkt. 18 at 20 (citing *Scott v. Harris*). Yet Nazario's narrative version of events is so wholly contradicted by the video record that it seems implausible that Nazario is describing the same incident. Because the video is clear, Nazario's narrative should be disregarded.

[5] Although Nazario continues to imply that his failure to display a license tag should have been overlooked due the COVID pandemic, he admits that no COVID extensions were in effect on December 5, 2020. Dkt. 18 at 24, n.7.

A. The District Court Properly Found the Officers had Probable Cause for Eluding.

The District Court correctly held that the Officers had probable cause to arrest Nazario for misdemeanor eluding under Virginia Code Section 46.2-817(A) which provides:

> Any person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal or who attempts to escape or elude such law-enforcement officer whether on foot, in the vehicle, or by any other means, is guilty of a Class 2 misdemeanor.

Va. Code Ann. § 46.2-817(A). The District Court found the Officers' concerns regarding Nazario's manner of driving were reasonable. JA773. The District Court found "the vehicle (1) failed to yield to a marked patrol car utilizing lights and sirens, (2) passed by several well-lit areas, and (3) was traveling at slower than usual speeds without any attempt to stop." JA773. The District Court further found "Defendant Crocker found this indicative of occupants searching for a place to escape or preparing for an assault on police officers." JA773. The District Court concluded that "[i]t was reasonable for Defendant Crocker's suspicions to be heightened based on these factors." JA773.

Nazario's Opening Brief misstates the law. Nazario apparently believes that if he did not endanger the public while refusing to stop for police, his willful refusal to stop was perfectly legal. Dkt. 18 at 22-24. This argument is plainly wrong. Under

Virginia law, a person may be convicted for misdemeanor eluding if he drives his vehicle "in a willful and wanton manner in disregard of a police signal, *or attempts to escape or elude such law-enforcement officer whether on foot, in the vehicle, or by any other means* . . . ." Va. Code Ann. § 46.2-817(A) (emphasis added). In other words, a person can be convicted of misdemeanor eluding in either of two ways: (1) by willfully and wantonly disregarding a police signal; *or* (2) by attempting to elude via any other means. There is no requirement that a suspect wantonly endanger the public to be convicted of *misdemeanor* eluding.

In contrast, Virginia Code Section 46.2-817 contains sub-section (B) for felony eluding. Unlike misdemeanor eluding, felony eluding requires that the suspect operate his vehicle "so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person." Va. Code Ann. § 46.2-817(B). "Danger to the safety of others" is not a requirement for misdemeanor eluding under Virginia law.

Nazario also confuses probable cause to *arrest* with the legal standard required to *convict*. Nazario relies upon *Bazemore v. Commonwealth*, 42 Va. App. 203 (2004) for his "wanton and willful" argument. Dkt. 18 at 22. In *Bazemore*, the issue presented was whether the evidence showed that a *conviction* for felony eluding (not misdemeanor eluding) was proper. The words "probable cause" do not appear in that opinion. *Id*.

The Officers clearly had probable cause to arrest Nazario for misdemeanor eluding. Nazario did not pull over and traveled for more than a mile, passing multiple, well-lit locations on the right side of the road with two marked police cars with lights and sirens activated in pursuit. *See* JACN-4 (18:34:21-18:36:10), JACN-3 (18:34:10-18:36:10). Only after driving nearly all the way through town and upon approaching an intersection where the traffic light was red did Nazario abruptly cut across the oncoming traffic lanes and stop in a BP gas station parking lot on the other side of the road. *See* JACN-4 (18:36:00), JACN-3 (18:36:10). As the District Court correctly found, this was more than sufficient probable cause to arrest Nazario for misdemeanor eluding.

Nazario argues that even if probable cause existed to arrest him for eluding, it disappeared when he explained his motivations for not stopping to the Officers. Dkt. 18 at 24. This overlooks the fact that Nazario's explanation did not occur until after the incident was over and after the Officers had already developed probable cause to arrest Nazario for at least two additional crimes (obstruction of justice and failure to obey). An after-the-fact explanation, even if valid, does not defeat probable cause. *See Carter*, 2015 U.S. Dist. LEXIS 149955, at *15 ("[A]n arrest, though warrantless, is valid where the officer had probable cause to believe that a misdemeanor was committed in his presence, even though the action he observed did not in fact constitute a misdemeanor.").

B. The District Court Properly Found the Officers had Probable Cause for Obstruction of Justice.

The District Court properly held that the Officers had probable cause to arrest Nazario for misdemeanor obstruction of justice. JA769. Virginia Code Section 18.2-460(A) imposes a Class 1 misdemeanor when "any person without just cause knowingly obstructs . . . any law enforcement officer . . . in the performance of his duties as such or fails or refuses without just cause to cease such obstruction when requested to do so . . . ." Va. Code Ann. § 18.2-460(A). The Virginia Supreme Court has made clear that a violation of Section 18.2-460(A) does not require that a suspect physically assault an officer. *Ware v. James City Cty.*, 652 F. Supp. 2d 693, 707 (E.D. Va. Sept. 3, 2009) (citing *Jones v. Commonwealth*, 141 Va. 471, 478-79, 126 S.E. 74 (1925)). Rather, any act which clearly indicates an intention to prevent the officer from performing his/her duty constitutes obstruction of justice. *Id.*; *see also Craddock v. Commonwealth*, 40 Va. App. 539, 544-45, 580 S.E.2d 454, 457 (2003) (holding that "physically resist[ing] a lawful search" was "obstructive behavior" that was sufficient to demonstrate intent to prevent the officers from performing their duties).

For example, in *Carter v. Khan*, officers conducted a traffic stop for a malfunctioning brake light. 2015 U.S. Dist. LEXIS 149955. After pulling his vehicle into a motel parking lot, Carter exited the vehicle and refused repeated commands to get back inside. *Id.* at *4-5. After asking repeatedly why he had been pulled over,

Carter finally began to walk back towards his truck. At that point Officer Khan deployed a taser and arrested him. *Id*. at *5. The Court determined Officer Khan had probable cause to arrest Carter for obstruction of justice under Virginia Code Section 18.2-460(A), among other possible charges. *Id*. at *15.

Nazario argues that his failure to comply should be excused because he claims the officers gave several conflicting commands. Dkt. 18 at 34. The video evidence, however, shows there is no doubt Nazario heard and understood the Officers' repeated, lawful commands to exit the vehicle. *See, e.g.*, JACN-4 (18:38:30-18:38:47), JACN-1 (1:38-1:51) (showing: i) Nazario arguing with the Officers, repeating "What's going on?"; ii) pronouncing "I have not committed any crimes" numerous times; and iii) telling the Officers, "For a traffic violation I do not have to get out of the vehicle."). At no point did Nazario advise the Officers he was confused about the orders – instead, he clearly stated he did not have to obey the Officers' lawful order to exit the vehicle.

As the video evidence shows, Nazario did not merely verbally object to the Officers' attempts to perform their duties, but instead, Nazario actively resisted the Officers' attempts to lawfully detain him. Faced with Nazario's refusal to exit the vehicle, Gutierrez tried to remove Nazario from the vehicle, but Nazario pulled away and told Gutierrez to "Get your hands off me" multiple times. JACN-3 (18:38:40-18:38:48). When Crocker attempted to open the driver's side door, Nazario used his

elbow to pull the door closed and lock it. JACN-3 (18:38:57-18:39:10). And when the Officers were finally able to get him out of the vehicle, Nazario continued to struggle and actively resist their attempt to handcuff him for almost two full minutes. JACN-4 (18:40:48-18:42:22). Nazario's active resistance to the Officers' attempts to safely secure him required the involvement of both Crocker and Gutierrez to handcuff him. JACN-4 (18:40:50-18:42:23). Nazario failed to obey at least forty-seven separate commands to show his hands and/or exit the vehicle, closed and locked the door, and physically resisted the Officers' attempts to handcuff him. All of these actions are more than enough to establish probable cause for Virginia's obstruction of justice statute.

C. The District Court Properly Found the Officers had Probable Cause for Failure to Obey.

The District Court properly held that probable cause existed to arrest Nazario for failure to obey lawful police commands under Virginia Code Section 18.2-464. Nazario's claim that the District Court erred by considering failure to obey because the Officers did not explicitly inform him that he could be arrested for violation of Virginia Code Section 18.2-464 is without merit. There is no such requirement and Nazario cites no legal authority to support this claim. To the contrary, probable cause exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about

to commit an offense." *DeFillippo*, 443 U.S at 37. As shown in the video evidence, the facts and circumstances within the Officers' knowledge were sufficient to warrant a prudent person in believing that Nazario committed (and was committing) an offense under Virginia Code Section 18.2-464. JACN-1-5. The timing of the Officers' assertion of the same is not relevant to whether probable cause existed. *DeFillippo*, 443 U.S at 37.

Nazario also argues that under a strict legal interpretation of Virginia Code Section 18.2-464, he did not technically violate the law. Dkt. 18 at 34. Nazario is wrong. The standard for probable cause to arrest is considerably lower than the standard for conviction at trial. *See Waters*, 81 F.3d at 434. Nazario cannot reasonably argue that his refusal to obey at least forty-seven commands to show his hands and/or exit the vehicle, and his resistance of attempts to open his door and to place him in handcuffs, did not give rise to probable cause to arrest for failure to obey.

Accordingly, the District Court properly determined that the Officers had probable cause to arrest Nazario for failure to obey.

III. THE DISTRICT COURT PROPERLY DETERMINED THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY FOR COUNTS I, II, AND IV AND DISMISSED THEM ON SUMMARY JUDGMENT.

A. Qualified Immunity Overview.

Qualified immunity is an immunity from suit; not an affirmative defense to liability. As such, qualified immunity should be decided at the earliest possible stage of litigation. *See, e.g.*, *Ussery v. Mansfield*, 786 F.3d 332, 337 (4th Cir. 2015). Qualified immunity protects law enforcement and other government officials from civil damages liability for alleged constitutional violations stemming from their discretionary functions. *Raub v. Campbell*, 785 F.3d 876, 880-81 (4th Cir. 2015). The protection is broad. It extends to "all but the plainly incompetent or those who knowingly violate the law, and officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id*. at 881.

For a right to be clearly established, the law must have been sufficiently clear that every reasonable officer would understand that what he is doing is unlawful. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (legal principle must be settled law, dictated by controlling authority or robust consensus of cases; it is not enough that rule is suggested by then-existing precedent). Before concluding that an officer violated a right, a case must be identified where an officer acting under similar circumstances was held to have violated the right in the same way. *Id.*; *see also City of Escondido, California v. Emmons*, 139 S. Ct. 500, 202 L. Ed. 455, 459-

60 (2019) (specificity in identifying clearly established right especially important in Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to factual situation).

When determining whether an officer is entitled to qualified immunity, a court must take into account the facts and circumstances of the particular case. *Graham v. Gagnon*, 831 F.3d 176, 182 n.1 (4th Cir. 2016) (framing a Fourth Amendment right in general terms "would mean that the 'clearly established' prong would automatically be met in every suit alleging an arrest [or search] without probable cause . . . eliminating the 'breathing room' to make reasonable mistakes."). Here, the task of determining whether the Officers acted reasonably is made immeasurably easier because the entire encounter is preserved on video. When the videos are viewed in their entirety, it becomes clear the Officers used reasonable force in the face of a non-compliant and resisting suspect. JACN-1-5. The District Court correctly determined the Officers are entitled to qualified immunity. JA777, JA784, JA796.

B. The District Court Properly Dismissed Count I (Unreasonable Seizure) on Summary Judgment Based on Qualified Immunity.

If the seizure was reasonable, the officers are entitled to qualified immunity. For a traffic stop to be an unreasonable seizure, the stop must be initiated without probable cause. *See, e.g., Hupp v. Cook*, 931 F.3d 307, 318 (4th Cir. 2019) ("A seizure is unreasonable under the Fourth Amendment if it is not based on probable

cause."). If there is probable cause to initiate the stop, the only remaining issue is whether the officers prolonged the traffic stop beyond the time reasonably required to safely complete the encounter. *Rodriguez v. United States*, 575 U.S. 348, 356 (2015) ("Traffic stops are 'especially fraught with danger to police officers,' [internal citation omitted], so an officer may need to take certain negligently burdensome precautions in order to complete his mission safely.")

Here, Nazario concedes that the Officers had probable cause to initiate the traffic stop for failure to properly display a license tag. JA771. Moreover, the District Court stated, "there was also probable cause for misdemeanor eluding." *Id.* Thus, the only issue is whether the Officers prolonged the traffic stop beyond the time reasonably required to safely complete the encounter. *Rodriguez*, 575 U.S. at 356.

Nazario's repeated and unjustified refusal to exit his vehicle prolonged the traffic stop. There is no question the Officers were lawfully permitted to order Nazario out of his vehicle. JA 773 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (holding that once traffic stop has been initiated, police officers may ask the occupants to exit the vehicle without violating Fourth Amendment's proscription of unreasonable searches and seizures)). Likewise, there is no question that Nazario refused to obey this lawful order multiple times, which prolonged the encounter with police. JACN-4 (18:37:02-18:40:49). That alone defeats Nazario's unreasonable seizure claim.

In addition to his refusal to exit the vehicle, Nazario displayed multiple cues which reasonably caused the Officers concern for their safety and for the safety of the public. Aside from the fact that the heavily tinted vehicle had no visible license plate, Nazario also failed to yield after a marked patrol vehicle initiated lights and sirens in an attempt to stop him and passed by several locations that would be reasonable, common places for a vehicle to pull over. *See* JA772, JACN-78.11. Nazario also traveled at slower than usual speeds without any attempt to stop, which is indicative of occupants searching for a place to escape a vehicle or preparing for an assault on police officers. *See* JACN-4, JA772-774. With this video evidence, the District Court correctly recognized that it was "reasonable for [the Officers'] suspicions to be raised based on these factors." JA774 (citing *Biggs v. City of Maryland Heights*, No. 4:20-cv-1499, 2022 WL 1451670, at *1 (E.D. Mo. May 9, 2022)). Moreover, even after Nazario finally exited the vehicle, he continued to struggle with the Officers and resist their attempts to handcuff him. JACN-4 (18:40:48-18:42:22).

Nazario's conduct throughout the course of the encounter provided probable cause to arrest him for eluding, obstruction of justice, and failure to obey. It was his own actions, not those of the Officers, which prolonged the traffic stop. Accordingly, the District Court properly granted summary judgment based on qualified immunity as to Count I (Unreasonable Seizure).

C. The District Court Properly Dismissed Count II (Excessive Force) on Summary Judgment Based on Qualified Immunity.

The Supreme Court has explained: "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. at 22-27). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973)). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

To prove excessive force, the plaintiff must show "that the officer's use of force to achieve arrest was objectively unreasonable under the circumstances." *Miller v. Parrish*, No. 3:12cv873, 2013 U.S. Dist. LEXIS 63162, at *7 (E.D. Va. May 2, 2013) (citing *Graham*, 490 U.S. at 395). Objective reasonableness is a fact dependent standard in which the court considers the totality of the circumstances "judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight." *Carter*, 2015 U.S. Dist. LEXIS 149955, at *20 (citing

Gray v. Bd. of Cnty. Com'r of Frederick Cnty., 551 F. App'x 666, 672-73 (4th Cir. 2014)).

As the District Court explained, when determining whether the use of force was reasonable under the circumstances, the Court weighs the following factors from *Graham v. Connor*: (1) the severity of the crime at issue, (2) whether the plaintiff posed an immediate threat to the safety of the officers or the public and, (3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight. JA779 (citing *Graham*, 490 U.S. at 396). "In the Fourth Circuit, Courts also weigh a fourth factor: the extent of the plaintiff's injuries." *Id*. (citing *Hupp*, 931 F.3d at 322 (4th Cir. 2019); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994)). "However, these factors are not exclusive." JA779-780 (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). The overarching test is whether the force was proportional under the circumstances. JA780 (citing *Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015)).

As Nazario correctly states, police officers are entitled to qualified immunity unless the Graham factors *strongly* favor the plaintiff. Dkt. 18 at 36 (citing *Smith*, 781 F. 3d at 102 and *Rowland*, 41 F.3d at 174). In this present case, the District Court properly weighed the *Graham* factors and found in favor of the Officers. JA779-784.

Nazario cites *Housley v. Holquist*, 879 F. Supp. 2d 472 (D. Md. Aug. 30, 2011) for his contention that the Officers' suspicions regarding his behavior were

unfounded. Dkt. 18 at 38, n.15. This is misleading. In *Housley*, the court denied summary judgment because each side told vastly conflicting stories as to how the plaintiff came to be placed in a chokehold, pepper sprayed, tased, and shot by police. The plaintiff alleged that he was "calm and cooperative throughout the event;" however, the police claimed plaintiff was violent and threatening. *Id*. at 478-79. There is no indication that any of these events were recorded on camera. Because the versions of the events varied so dramatically, summary judgment was not appropriate. The widely conflicting accounts were questions of fact which could "only be reconciled by a jury." *Id*. at 481.

Unlike *Housley*, the entire encounter here is recorded on video. *See Scott*, 550 U.S. at 378 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). The video clearly shows that the Officers used reasonable force when confronted with a non-complaint and actively resisting suspect. The Officers attempted to deescalate the situation numerous times and used the least amount of force necessary given the circumstances. *See generally* JACN-1-5.

The Officers' actions were reasonable. The District Court correctly held the Officers are entitled to qualified immunity on Count II (Excessive Force). JA783-784.

D. The District Court Properly Dismissed Count IV (First Amendment Retaliation) on Summary Judgment Based on Qualified Immunity.

The Supreme Court has made it clear that a retaliation claim cannot stand if the officers had probable cause for the arrest. "A claim for First Amendment retaliation has three elements: (1) the plaintiff engaged in constitutionally protected activity; (2) the defendant took an action that adversely affected that protected activity; and (3) there was a causal relationship between the plaintiff's protected activity and the defendant's conduct." JA794 (citing *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686-87 (4th Cir. 2000); *Blankenship v. Manchin*, 471 F.3d 523, 528 (4th Cir. 2006); *Roncales v. Cty. of Henrico*, 451 F. Supp. 3d 480, 495 (E.D. Va. Mar. 31, 2020)). The existence of probable cause shows a lack of retaliatory motive, and therefore defeats the third element. *See Hartman v. Moore*, 547 U.S. 250, 261 (2006); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1728 (2019).

Nazario concedes in his Opening Brief that if the Officers had probable cause, *Nieves* applies and defeats Nazario's First Amendment violation claim. Dkt. 18 at 42. As set forth in Section II *supra*, the Officers had probable cause to arrest Nazario for eluding, obstruction of justice, and failure to obey. Accordingly, the District Court correctly held the Officers are entitled to qualified immunity for the First Amendment Retaliation claim. JA796.

The District Court's decision to grant summary judgment in favor of the Officers based on qualified immunity was further validated by the jury's verdict on the companion claims under Virginia state law. After viewing the video several times, the jury found neither of the Officers liable for battery or false imprisonment. The jury further found no assault committed by Crocker and that the "assault" perpetrated by Gutierrez was so minor that it warranted only $2,685.00 in compensatory damages (the jury declined to award punitive damages). The jury was correct. The District Court was correct. The entire incident is captured on video, and the video speaks for itself.

IV. THE DISTRICT COURT PROPERLY GAVE JURY INSTRUCTION NOS. 26 AND 27-A.

Nazario argues that the District Court erred in giving Jury Instruction Nos. 26 and 27-A because he claims the District Court's determination of probable cause was incorrect. Dkt. 18 at 45-47. As explained above, the District Court correctly held that probable cause existed to arrest Nazario for eluding, obstruction, and failure to obey. JA768-769. Therefore, the Jury Instructions were correct and proper. JA895, 897.

Assuming arguendo the Court considers Nazario's argument that the Jury Instructions were improper, with respect to Jury Instruction 27-A, Nazario's arguments have been waived. The District Court noted in ruling on Nazario's post-trial motions:

> As to Instruction 27-A, the Court added this instruction after conferring with the parties and soliciting their drafting input, all of which occurred on the record. Plaintiff accordingly contributed to the very drafting of this instruction. Based on this drafting history and Plaintiff's lack of contemporaneous objections, Plaintiff has waived his ability to raise these issues in moving for a new trial.

District Court Dkt. No. 269 at 14. Nazario has waived his argument with respect to Jury Instruction 27-A.

Additionally, the instructions could not have seriously prejudiced Nazario. During closing arguments, Nazario told the jury: "Now, sure, Defendant Crocker has probable cause for a couple of misdemeanors and a traffic violation, but that does not give them carte blanche to do what they did." JA865. Given the statements Nazario made to the jury in closing, the jury instructions could not have seriously prejudiced Nazario's case. *See Snoeyenbos v. Curtis*, 60 F.4th 723, 729 (4th Cir. 2023) (holding that even if jury was erroneously instructed, resulting verdict will not be set aside unless the instruction seriously prejudiced challenging party's case).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment.

Dated: November 1, 2023.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 23-1620 **Caption:** Caron Nazario v. Joe Gutierrez

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