NO. 18-10791

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OMAR ALSTON

Plaintiff-Appellant,

v.

MARK SWARBRICK, ET AL.,

Defendant-Appellee.

On Appeal From the United States District Court for the Middle District of Florida's January 25, 2018 Order

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BRIEF OF APPELLANT

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September 10, 2018

CERTIFICATE OF INTERESTED PERSONS

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Appellant Omar Alston files his updated Certificate of Interested Persons.

1. Alston & Bird LLP
2. Alston, Omar, Plaintiff/Appellant
3. Dean, Edward, Former Sheriff, Marion County Sheriff's Office
4. Denault, Duane, Sergeant, Marion County Sheriff's Office
5. Dixon, FNU, Captian, Marion County Sheriff's Office
6. Doe, John, Sergeant, Marion County Sheriff's Office
7. Doe, John, Supervisor, Marion County Sheriff's Office
8. Green, John M., Jr., Attorney for Appellees
9. Harmon, Benjamin, Attorney for Appellant Omar Alston
10. Hodges, William Terrell, Senior Judge U.S. District Court
11. Kelly, James Mark, Lieutenant, Marion County Sheriff's Office
12. Lammens, Philip R., U.S. Magistrate Judge
13. Rolls, Moshoji J., Captain, Marion County Sheriff's Office
14. Sheriff of Marion County, Florida, Defendant/Appellee
15. Swarbrick, Mark, Defendant/Appellee
16. Trammel, Daniel, Defendant/Appellee
17. Tuck, Andrew, Attorney for Appellant Omar Alston

18. Winchenbach, Linda LeVines, Attorney for Appellees

There are no publicly traded companies or corporations that have an interest in the outcome of this case.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Omar Alston respectfully requests oral argument and believes it would assist this Court in the resolution of the issues in this fact-bound case.

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STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had subject matter jurisdiction over Appellant Omar Alston's claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal from the Final Judgment the District Court entered on January 25, 2018, pursuant to 28 U.S.C. § 1291. (Doc. 163.)

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that Officer Swarbrick is entitled to qualified immunity as to Mr. Alston's False Arrest claims where Officer Swarbrick arrested Mr. Alston merely for using profanity to express frustration—which had no effect on anyone standing nearby—as Mr. Alston followed instructions and walked away from the scene of events, and where Officer Swarbrick subsequently arrested Mr. Alston for resisting despite the fact that Mr. Alston was already handcuffed from behind and secured in the back of the patrol car by the time of the second arrest.

2. Whether Officer Swarbrick subjected Mr. Alston to excessive force under clearly established law when, among other things, he used pepper spray on Mr. Alston—who was arrested for a minor infraction, seated securely in the back of a police vehicle in handcuffs, posing no threat—based on a heated verbal exchange.[1]

[1] The District Court's erroneous conclusions that Officer Daniel J. Trammel is not liable for failing to intervene and that the Sheriff of Marion County is not liable were both based on the rulings presented here, and should therefore also be reversed in the event the Court reverses on the issues presented above.

STATEMENT OF THE CASE

On June 27, 2011, police falsely arrested Omar Alston for disorderly conduct and resisting arrest, and subsequently used excessive force, injuring him significantly. Leading up to the false arrest, an Officer questioned Mr. Alston, the suspected *victim* of domestic violence, and Mr. Alston declined to answer, so the Officer instructed him to leave the scene. Mr. Alston did so, but as he walked away from the scene and towards his home, he voiced frustration and outrage at the police's presence, yelling several obscenities directed at police while doing so. Rather than wait for Mr. Alston to continue his retreat into the neighborhood and away from the scene of events, the Marion County officer chased him down, tackled him from behind, and arrested him for "disorderly conduct." Subsequently, the same officer used excessive force when he yanked Mr. Alston from the back of his police cruiser, where Mr. Alston was handcuffed and secure, and pepper sprayed him repeatedly. Any and all charges against Mr. Alston relating to the incident were dropped, and Mr. Alston filed this suit under 42 U.S.C. § 1983.

I. Procedural History

In his Third Amended Complaint, the operative pleading, Mr. Alston alleged various violations of his constitutional rights, including claims against the Sheriff and a number of deputies within the Marion County Sheriff's office in both their official and personal capacities. (Doc. 41, at 3-15.) He also alleged violations under

Florida law. *Id.* At the initial pleadings stage, the District Court dismissed all of the official capacity claims, as well as all claims under Florida law.[2] (Doc. 106, at 12.) Additionally, the Court dismissed all claims against Defendants Kelly, Rolls, Denault, and Doe(s). *Id.*

Remaining were Mr. Alston's claims that (1) Marion County Officer Mark Swarbrick falsely arrested him and subjected him to excessive force in violation of the Fourth Amendment; (2) his claim that Marion County Officer Daniel Trammel failed to intervene and prevent the use of excessive force; and (3) his claim that the Sheriff of Marion County maintained a custom or policy of using excessive force and failing to train and supervise its deputies. (Doc. 162, at 5.)

The three remaining defendants subsequently moved for summary judgment, and the Court granted their motion. (Docs. 145; 162, at 26.) The Court found that Officers Swarbrick and Trammel were entitled to qualified immunity as to each of the claims against them, and, because the Court found no constitutional violation, Mr. Alston could not sustain a cause of action against the Sheriff. *Id.* Mr. Alston timely filed his notice of appeal. (Doc. 164.)

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[2] Mr. Alston previously brought suit in Florida State Court on the basis of the same facts alleged in his Third Amended Complaint. The Court dismissed that suit with prejudice, and the District Court found that res judicata applied. (Doc. 106, at 6-7.)

II. Statement of Facts[3]

After an argument on the morning of June 27, 2011, Omar Alston's stepson "QDB," a minor, had gone next door to ask the neighbor for a knife with which to kill Alston. (Doc. 41, at 6.) In response, the neighbor called the police, and Officers Swarbrick and Trammel of the Marion County Sherriff's Department arrived just before noon. *Id.* When they arrived, both deputies began questioning QDB near the entrance of Greenfield Subdivision, as Mr. Alston looked on from a distance. (Doc. 41, at 6, 17.) After the deputies arrested QDB and placed him in Officer Trammel's police car, Officer Swarbrick approached Mr. Alston, who he understood to be the possible victim of domestic violence, while Officer Trammel stayed behind with Tamekia Morris, QDB's mother, and her other minor son "LDB," Mr. Alston's stepson. (Docs. 41, at 17; 145-1, at 2.) A crowd of onlookers had already formed. (Doc. 41, at 16.)

Without introducing himself, Officer Swarbrick approached Mr. Alston who had been patiently waiting off to the side and was not suspected of any crime. *Id.* Officer Swarbrick immediately began aggressively questioning Mr. Alston,

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[3] These facts are derived from Mr. Alston's sworn affidavit attesting to the facts alleged in his complaint. Because, in most instances, Mr. Alston's affidavit incorporates by reference the more detailed version of the facts set forth in the complaint, references are generally to the complaint unless Mr. Alston has provided supplemental detail in his affidavit. (Docs. 41, 153.) The District Court improperly accepted Appellee's version of the facts in numerous instances identified and described below.

demanding that he explain what had occurred. *Id.* Mr. Alston, taken off guard by Officer Swarbrick's unwarranted aggressive and unprofessional manner, politely responded, "Good morning." *Id.* Ignoring the greeting, Swarbrick curtly repeated his question, and Mr. Alston once again insisted that they greet one another. *Id.* After another round of this, Officer Swarbrick finally responded, though he immediately re-assumed his aggressive and demanding approach. *Id.* Mr. Alston stated that he had nothing to say. (Docs. 41, at 16; 145-1, at 11.).

Done with his questioning, Officer Swarbrick instructed Mr. Alston to leave scene, so Mr. Alston began to walk back into the subdivision towards his home. (Docs. 41, at 16; 145-1, at 8.) As he did so, he yelled, "F[**]k you, I don't have to answer anything." (Doc. 41, at 16.) And although Mr. Alston was walking away from the scene as instructed when he yelled, Officer Swarbrick chased down Mr. Alston from behind, blindsided him, and body-slammed him into the street. (Doc. 41, at 17.) As Officer Trammel, Ms. Morris, LDB and the onlookers that had previously gathered watched, Officer Swarbrick and an off-duty plainclothes officer handcuffed Mr. Alston behind his back. (Docs. 41, at 17; 153, at 10.) Officer Swarbrick dragged him twenty to thirty feet before throwing him into the back seat of his police car without searching him. (Doc. 41, at 17.) Being tackled and dragged across the ground while handcuffed from behind caused Mr. Alston significant pain and injury. (Doc. 153, at 3.)

Alarmed by what was happening, Mr. Alston managed to access his cell phone in his pants pocket while his hands remained handcuffed behind him. (Doc. 153, at 3.) He called his aunt, Joyce. A. Parker, with whom he spoke for six minutes, explaining what had happened. (Doc. 153, at 3, 26.)

The District Court usurped the jury's role and "f[ound] that this allegation [about a phone call] is consistent with Plaintiff's restrained hands being moved to the front of his body where he could make a phone call." (Doc. 162 at 18.)

> Here, Plaintiff would have the Court believe that he was able to reach his phone, make a call to his aunt, and carry on a 6 minute conversation about the events that were unfolding all while his hands were restrained behind his back. Plaintiff's 'version of events is so utterly discredited by the record that no reasonable jury could believe him.' As such, the evidence shows that Plaintiff re-positioned his hands to the front of his body while in the patrol car as the officers attest occurred.

Id. at 18-19. Contrary to this improper fact-finding, in the light most favorable to Mr. Alston, his hands remained cuffed behind his back.[4] (Doc. 153 at 3.)

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[4] Taking a phone out of one's pocket and activating voice dialing while handcuffed from behind takes no special effort with a modern cell phone. Judge Hodges could just as easily have said: "The officers would have the Court believe that Mr. Alston was able to reposition his hands, while handcuffed, from behind his body to the front while locked in the back seat of the police car. The officers' 'version of events is so utterly discredited by the record that no reasonable jury could believe them.' As such, the evidence shows that Mr. Alston reached into his pocket with his hands cuffed behind his back and used voice-activated dialing and speakerphone to call his aunt."

Next, Officer Trammel noticed Mr. Alston was on a call, approached the cruiser and took Mr. Alston's cell phone from him without incident. (Doc. 41, at 17.) Right behind him, however, was Officer Swarbrick. He jerked Mr. Alston from the back seat and threw him up against the vehicle. (Doc. 41, at 17-18.) He then proceeded to search Mr. Alston, and in the process, pulled Mr. Alston's shorts down, exposing both his genitals and his buttocks to his family, his neighbors, and the remaining crowd of onlookers, to his great embarrassment. *Id.* In the process of the search, Officer Swarbrick recovered an additional cell phone, which belonged to Tamekia Morris, and keys. *Id.*

Following the search, an agitated Officer Swarbrick re-secured Mr. Alston in the back seat of his patrol vehicle and got into the front seat. (Doc. 41, at 18.) Ms. Morris approached to request that Officer Swarbrick turn over the phones and keys obtained from Mr. Alston to her. *Id.* Once again shunting aside any modicum of professionalism, Officer Swarbrick belittled Mr. Alston's family, forcing Ms. Morris to beg for the phones before Officer Swarbrick finally turned them over to her. *Id.*

Officer Swarbrick and Mr. Alston continued to engage in a heated verbal exchange for several minutes. *Id.* During the exchange Mr. Alston remained handcuffed behind his back, and a metal divider physically separated the back and front seats. (Docs. 153 at 4; 152 at 29, 33.) But inflamed by the exchange, Officer Swarbrick jumped out of the vehicle and went around to the passenger-side rear

door. (Doc. 41, at 18.) He forcefully reached for Mr. Alston, who was sitting in the middle of the vehicle, and quickly attempted to yank him from the vehicle by his right armpit. (Doc. 41, at 18-19; 153, at 4-5.) Immediately Mr. Alston yelled out in pain and explicitly told Officer Swarbrick that his foot was stuck beneath the metal backing on the front seats. *Id.* Heated and emotional, Officer Swarbrick ignored Mr. Alston's pleas and instead pulled harder, at some point placing his foot on Mr. Alston's shoulder, inflicting further pain. (Docs. 41, at 19; 153, at 4-5.) Eventually, half of Mr. Alston's body was hanging out of the vehicle, while his lower body remained inside. *Id.*

Unable to remove Mr. Alston from the vehicle, Officer Swarbrick sprayed him with pepper spray at close range, repeatedly. *Id.* Although Officer Trammel stood nearby, he never intervened to stop any of Officer Swarbrick's activity. (Doc. 41, at 18-19.) Officer Trammel's only action during the episode was to circle to the driver-side rear door, open it, and free Mr. Alston's foot from the metal backing. *Id.* Officer Swarbrick once again yanked Mr. Alston from the vehicle and onto the ground, where he continued spraying him with pepper spray for several minutes. (Doc. 41, at 19-20.) Mr. Alston of course continued to yell out in pain, to which Officer Swarbrick callously responded by telling him to "shut up" because it wasn't that bad. *Id.* Mr. Alston's nine-year-old stepson was so enraged by the incident that he approached Officer Swarbrick, calling him racist and demanding that he find a

black officer to come to the scene. *Id.* Officer Swarbrick kicked at the child as his mother was attempting to restrain him and eventually turned and sprayed them both with pepper spray. *Id.*

Subsequently, Officer Swarbrick lifted Mr. Alston, who remained restrained from behind and was wheezing and short of breath, from the ground and detained him. (Doc. 41, at 20.) It is at this point that Officer Swarbrick alleges he arrested Mr. Alston for resisting arrest. (Doc. 145-1, at 4.)

Eventually, paramedics arrived on the scene and decontaminated Mr. Alston and provided him with a breathing treatment. (Doc. 41, at 20.) He was then transported to the Marion County Jail, where he was booked for Disorderly Conduct and Resisting or Obstructing an Officer without Violence. (Doc. 41, at 20; *see also* Fla. Stat. §§ 873.03, 843.02.) The State of Florida later entered its announcement of nolle prosequi with regard to both charges on October 24, 2011, stating that "the likelihood of conviction at trial is minimal." (Docs. 41, at 22; 153, at 88.)

After bonding out during the early hours of the following morning, Ms. Morris and LDB escorted Mr. Alston to Ocala Regional Medical Center where he was treated for injuries to his knees, chest, wrist, neck, and shoulder, as well as contusions. (Docs. 41, at 20; 153, at 7, 63-87.) The doctors provided him with a sling for his arm, as well as pain medication for this and other injuries he suffered as

a consequence of Officer Swarbrick's inability to manage his temper. *Id*. Mr. Alston avers that the pain was significant. (Doc. 41, at 20.)

After several unsuccessful attempts to file complaints with the Sheriff's office, Mr. Alston, proceeding *pro se*, filed this suit under 42 U.S.C. § 1983. (Docs. 41, at 21-24; 162, at 1.) He appeals the District Court's award of summary judgment to Defendants. (Doc. 164.)

III. Standard of Review

This Court reviews *de novo* a District Court's grant of summary judgment based on qualified immunity, applying the same legal standards as the district court. *Stephens v. DeGiovanni*, 852 F.3d 1298, 1313 (11th Cir. 2017). The Court must "resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts." *Id.* (citation and internal quotation marks omitted). This Court treats the nonmovant's evidence as true and draws all justifiable inferences in their favor. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014). "With the facts so construed, [this Court has] the plaintiff's best case . . . therefore, material issues of disputed fact are not a factor in the court's analysis of qualified immunity and cannot foreclose the grant or denial of summary judgment based on qualified immunity." *Stephens*, 852 F.3d at 1314 (citation and internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The only way the District Court could conclude that Officers Swarbrick and Trammel were entitled to qualified immunity as to Mr. Alston's False Arrest and Excessive Force claims was by ignoring this Court's precedent and resolving several key factual disputes in favor of the Officers rather than Mr. Alston. Supreme Court and Eleventh Circuit precedent have made it abundantly clear that deciding the issue of qualified immunity requires first resolving all disputes of material fact in the Plaintiff's favor. Only then can courts decide issues of qualified immunity without the interference presented by disputed issues of fact.

The District Court first ignored this Court's precedent when it determined that Mr. Alston's use of profanity caused a crowd of onlookers to gather and incited his wife and stepson to run towards Officer Swarbrick, giving Officer Swarbrick arguable probable cause to arrest Mr. Alston for disorderly conduct. The Court reached these factual conclusions despite the fact that Mr. Alston clearly avers that a crowd of onlookers had already formed prior to his interaction with Officer Swarbrick and that his wife and stepson remained on the sidelines with Officer Trammel during the episode. Absent these unjustified factual conclusions, Officer Swarbrick's only basis for arresting Mr. Alston was the mere use of profanity as Mr. Alston retreated from the scene in outrage and frustration. Under clearly established Florida law, the mere use of profanity, without more, does not provide the requisite

probable cause for arrest. No reasonable officer presented with these circumstances could have concluded otherwise.

Additionally, in order to conclude that Officer Swarbrick is entitled to qualified immunity as to Mr. Alston's claims of False Arrest (for resisting arrest) and Excessive Force, the District Court determined that Mr. Alston could not possibly have reached his cell phone to make a phone call while handcuffed behind his back in the rear of Officer Swarbrick's patrol vehicle. Instead, the Court resolved this key factual dispute in favor of the Officers, adopting their story that Mr. Alston somehow moved his handcuffed hands from behind his back to the front of his body. This, the Officers claimed, posed a safety risk and required them to remove Mr. Alston from the vehicle to reposition his handcuffs. Mr. Alston's claim that he reached into his pocket for his phone and called his aunt while handcuffed from behind was not impossible "under the laws of nature," as the Court found, but rather just as plausible as the Officers' version of events. Had the Court adopted Mr. Alston's version of events, as Supreme Court and Eleventh Circuit precedent required, it would have concluded differently as to the outstanding qualified immunity claims.

Once Officer Swarbrick effectuated the arrest, handcuffed Mr. Alston, completed his search upon discovering the phone, and secured him in the back seat of the vehicle, the arrest was complete. No reasonable officer could have concluded

that there was probable cause to arrest Mr. Alston for resisting arrest where the arrest was already complete and there was no legitimate law enforcement need to remove him from the vehicle once more.

Similarly, absent the need to reposition Mr. Alston's handcuffs twice out of concern for officer safety, there was no legitimate law enforcement need to remove Mr. Alston from the back seat of the patrol vehicle and use pepper spray on him repeatedly. In fact, drawing all inferences in favor of Mr. Alston compels the conclusion that Officer Swarbrick used excessive force when he lost his temper following a verbal argument inside the patrol vehicle—where Mr. Alston was secure in the back seat, behind a metal divider, and handcuffed behind his back—and responded by yanking Mr. Alston from the vehicle and using pepper spray on him repeatedly. No reasonable officer could have concluded that such retaliatory force was warranted under the circumstances.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Officer Swarbrick Is Not Entitled To Qualified Immunity From Mr. Alston's False Arrest Claims

A police officer acting within his or her discretionary authority is entitled to qualified immunity from suit unless a plaintiff is able to establish that the officer violated his or her constitutional rights and that such rights were clearly established at the time of the alleged misconduct. *See Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347, 1352-53 (11th Cir. 2015) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Where a police officer affects an arrest without a warrant or probable cause, the result is a violation of the Fourth Amendment. *See Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996). Probable cause exists where a police officer has reasonably trustworthy information that would cause a prudent person faced with those same circumstances to conclude that the suspect "has committed, is committing, or is about to commit an offense." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003) (internal citation omitted).

However, qualified immunity shields officers from personal liability in the event the officer wrongly concludes there is probable cause, provided the conclusion, albeit wrong, was nevertheless reasonable. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Thus, an officer need only have "arguable" probable cause to remain shielded by qualified immunity from claims for false arrest. There is arguable probable cause for arrest when "a reasonable officer in the same

circumstances and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in the light of well-established law." *Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997); *see also, Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002). The standard is an objective one. *Id.*

A. Officer Swarbrick Lacked Even Arguable Probable Cause To Arrest Mr. Alston For Disorderly Conduct

The District Court erred in concluding that Officer Swarbrick had at least arguable probable cause to arrest Mr. Alston for disorderly conduct for two reasons.

First, two Florida cases clearly establish that even very loud, vulgar, and obnoxious words directed toward a police officer in the presence of onlookers, or which cause onlookers to gather in curiosity, do not amount to probable cause for arrest where the words do not incite the onlookers to any particular response. In *Smith v. State*, the court concluded that the evidence did not support a conviction for disorderly conduct where the defendant directed "very loud and very obnoxious" language toward a police officer outside of a bank and in front of onlookers. 967 So.2d 937, 938 (Fla. Dist. Ct. App. 2007). When the officer asked the man to leave and advised that he would otherwise be arrested, the defendant "responded in very vulgar and threatening terms." *Id.* Clarifying and applying the limits the Florida Supreme Court placed on the application of § 877.03, the Court cited *Barry v. State*, a factually similar case, and determined that the facts of the case did not "meet the

limited application of 877.03 as dictated by the supreme court in *Saunders*." *Id.* at 939. That the defendant used loud, vulgar, and threatening language, directed toward a police officer and in front of a crowd, did not matter. The only relevant inquiry was whether any of the onlookers were incited to engage in an immediate breach of the peace. The Court found they were not and instead were either curious or annoyed. *Id.* at 940.

Similarly, in *Barry v. State*, the Court reversed a father's conviction for disorderly conduct where he had screamed insults and obscenities at a police officer outside of his child's elementary school, causing a crowd to gather. 934 So.2d 656, 659 (Fla. Dist. Ct. App. 2006). The mere fact that the defendant's actions caused a crowd to gather was insufficient. The Court held that there must be evidence that the crowd is "actually responding to the defendant's words in some way that threatens to breach the peace" or presents safety concerns. *Id.* at 659.

These two cases, taken together, make clear that mere words, however vulgar and obnoxious, cannot support a conviction for disorderly conduct where the defendant's only actionable conduct is shouting expletives.[5] For an officer to have

[5] Nor could the statutes curtail speech more than in the limited respects set out in *Smith* and *Barry*. The First Amendment protects anything beyond the narrow "fighting words" exception from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942), and the "incitement to violence" exception largely curtailed in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). To the extent Officer Swarbrick did not have arguable reason to believe Mr. Alston had gone beyond these narrow

probable cause to arrest for disorderly conduct, the totality of the circumstances, viewed in the light most favorable to the nonmoving party, must support the conclusion that a reasonable officer faced with those circumstances could have concluded that the crowd was responding in some way that threatened to breach the peace.

Evaluating the facts in the light most favorable to Mr. Alston compels a conclusion that Officer Swarbrick lacked even arguable probable cause to arrest Mr. Alston for disorderly conduct. It is undisputed that Mr. Alston only began yelling obscenities towards the officers *after* he and Officer Swarbrick concluded their conversation and Officer Swarbrick asked Alston to leave the scene. (Doc. 41, at 16; 145-1, at 2.) As Mr. Alston walked away towards his home, he yelled several obscenities in outrage and frustration. (Doc. 41, at 16.) According to Mr. Alston, the only person who responded to his words was Officer Swarbrick, who chased him down from behind and arrested him for disorderly conduct. (Doc. 41, at 17.)

Although Officer Trammel contends Ms. Morris and her son were incited by Mr. Alston's words, Mr. Alston avers that they remained on the sidelines, alongside Officer Trammel, while the events transpired.[6] *Id.* Had the Court viewed these facts

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exceptions, Officer Swarbrick could not have reasonably believed he had probable cause to arrest Mr. Alston.

[6] When the District Court suggests that Mr. Alston "provides no evidence to support his argument" disputing that his words caused Ms. Morris and her son to run over,

in the light most favorable to Mr. Alston, as it was required to do, it would have also been compelled to find that no reasonable officer could have concluded that there was probable cause for arrest.

Second, in reaching its conclusion, the Court drew several factual inferences in favor of the Officers rather than in favor of Mr. Alston. This Court's precedent is clear that when evaluating whether arguable probable cause exists, courts examine the totality of the circumstances, viewing them "in the light most favorable to the nonmoving party." *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). "[W]hen conflicts arise between the facts evidenced by the parties, [this Court credits] the nonmoving party's version." *Id.* (quoting *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005)). The District Court took the opposite approach.

The Court incorrectly suggests that Mr. Alston's expressions of outrage are what caused the onlookers to gather and concludes that his words caused Ms. Morris and her son to run over. Neither is supported by the record and in fact represent conclusions the Court reaches by impermissibly and repeatedly drawing inferences in favor of the Officers. The record is clear that, by the time Officer Swarbrick approached Mr. Alston, his stepson had already been arrested and the crowd of onlookers had assembled. (Doc. 41, at 16.) Thus, the onlookers did not appear as a

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the Court ignores Mr. Alston's sworn Third Amended Complaint, in which he very clearly states that Ms. Morris and her son watched from the sidelines, alongside Officer Trammel. (Doc. 41, at 17; 153, at 3.)

consequence of Mr. Alston's words but in fact were already gathered. Additionally, crediting the nonmoving party's version of events here requires crediting Mr. Alston's statement that Officer Trammel stood back and watched along with Ms. Morris and her son as he was dragged to the police car. (Docs. 41, at 17; 153, at 3.) They were not incited; they did not make a run at Officer Swarbrick.

Reaching a contrary conclusion requires adopting Officer Trammel's version of events, not Mr. Alston's or Officer Swarbrick's. In fact, Officer Swarbrick never mentions Ms. Morris or her son approaching as a factor in his probable cause affidavit or incident report. (Doc. 145-1, at 8-11.) Officer Swarbrick adds these factual claims to the affidavit submitted in support of the Officers' Motion for Summary Judgment, but, even there, it appears Officer Swarbrick only became aware of Ms. Morris and her son after he began to arrest Mr. Alston. (Doc. 145-1, at 2.) Moreover, as Officer Trammel describes it in his incident report, Ms. Morris and her son begin running towards Swarbrick and Alston *after* Swarbrick decides to physically engage Mr. Alston and arrest him, revealing that, as a matter of logic, Ms. Morris and her son could not have factored into Officer Swarbrick's probable cause determination because he had made that determination and decided to arrest Mr. Alston before they approached.[7] (Doc. 145-2, at 8-12.) In short, Officer Swarbrick

[7] Even under Officer Trammel's version of events, the facts reveal only that Ms. Morris and her son were incited by the violent takedown and arrest of their relative

determined that he had probable cause to arrest Mr. Alston for disorderly conduct based on mere words, albeit profane words, yelled in outrage while Mr. Alston attempted to walk away from the scene. No reasonable officer could have concluded he or she had probable cause to arrest under such circumstances.

B. No Reasonable Officer in Officer Swarbrick's Position Could Have Believed There Was Probable Cause To Arrest Mr. Alston For Resisting Arrest

As an initial matter, Officer Swarbrick lacked even arguable probable cause for arrest for resisting because the underlying arrest was unlawful, as established in Part II.A, *supra*. In 2011, Florida Statutes § 843.02 provided:

> Whoever shall resist, obstruct, or oppose any officer . . . or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082.

To sustain a charge for resisting arrest without violence, Florida law requires a showing that the officer was lawfully executing a legal duty and the arrestee's actions amounted to obstruction of or resistance to that duty. *See S.G.K. v. State*, 657 So.2d 1246, 1247 (Fla. Dist. Ct. App. 1995). "[A]n essential element of the offense of resisting a law enforcement officer without violence is that the arrest must be lawful." *Guitterrez v. State*, 837 So.2d 1095, 1096 (Fla. Dist. Ct. App. 2003); *see*

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rather than the words he said earlier and to which no one had any response. (Doc. 145-2, at 2.)

also Smith v. State, 546 So.2d 459, 460 (Fla. Dist. Ct. App. 1989). Thus, if this Court agrees that Officer Swarbrick lacked arguable probable cause to arrest for disorderly conduct, it follows that the same reasonable officer would have also concluded that he also lacked arguable probable cause to arrest for resisting arrest pursuant to §843.02.

Second, had the Court not usurped the role of the jury and disbelieved Mr. Alston's sworn testimony that he remained handcuffed behind his back the entire time, it would have been compelled to conclude that there was absolutely no justifiable legal basis to support a charge of resisting without violence where all facts the Defendants reference for support occurred after the arrest was fully effectuated and complete.

As the District Court recognized, the position of Mr. Alston's handcuffs is of central importance to this case's resolution. The issue is critical because analyzing whether an officer is entitled to qualified immunity proceeds considerably differently where a § 1983 plaintiff was un-cuffed and resisting arrest (Defendants' version of events) or handcuffed behind the back and at the officer's mercy. *Compare Hoyt v. Cooks*, 672 F.3d 972, 976-980 (11th Cir. 2012) (finding officers entitled to qualified immunity where plaintiff physically resisted the entire time police attempted to handcuff him) *with Slicker v. Jackson*, 215 F. 3d 1225, 1233 (11th Cir. 1995) (finding officers not entitled to qualified immunity where they

repeatedly hit non-resisting, handcuffed plaintiff's head on pavement, knocking him unconscious).

Before this Court can address the legal issue of qualified immunity, it must first settle on a factual universe on which it will rely in making the determination. Under this Court's precedent, the nonmoving party's version of events is the version it should analyze, drawing all justifiable inferences in favor of the nonmovant. *Stephens v. DeGiovanni*, 852 F.3d at 1313. Only then can the Court resolve issues of qualified immunity without the interference of unresolved material disputes of fact. *Id.* at 1314.

The District Court improperly made a credibility determination and adopted the Defendants' version of events regarding the positioning of the handcuffs, without any legal basis for doing so. *See supra* at 7 & n.5. According to Mr. Alston, once Officer Swarbrick handcuffed him following the initial arrest for disorderly conduct, he remained handcuffed behind his back until he arrived at the Marion County Jail later that evening. (Doc. 153, at 2-7.) However, according to the District Court, Mr. Alston must have moved the handcuffs from behind his body to the front, because it is "inherently incredible" and "inconceivable" that Mr. Alston could have accessed his cell phone and made a phone call, as he avers in his complaint, while remaining handcuffed behind his back. (Doc. 162, at 18.) For support, the District Court cites this Court's decision in *United States v. Calderon*, where, under different procedural

circumstances, this Court determined that testimony is incredible as a matter of law where it is facially unbelievable and "could not have occurred under the laws of nature." 127 F.3d 1314, 1325 (11th Cir. 1997). The District Court's inability to imagine several ways in which Mr. Alston could have made a phone call while restrained from behind—including both the possibility of voice-activated dialing and speakerphone—is in no way equivalent to a clear determination that such events are impossible under the laws of nature. *See id.* The District Court treats this determination as if it were somehow a matter of obvious reality, but it is far from that. In reality, the Court's adoption of the Officer's version of events represents an impermissible credibility determination where the Court was in fact required to resolve this key factual dispute in favor of Mr. Alston for purposes of its qualified immunity analysis.

The District Court may not adopt the version of the facts it prefers or invent new factual circumstances that neither party alleges. *See Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014); *see also, Hadley v. Gutierrez,* 526 F.3d 1324, 1327-28 (11th Cir. 2008) (adopting nonmoving party's version of events despite clear differences in narratives). Instead, the District Court must rest its qualified immunity analysis on the version of the facts set forth by the nonmoving party, in this case Mr. Alston. *Id.* Accordingly, the Court should have performed its qualified immunity analysis

believing that Mr. Alston remained handcuffed behind his back from the time of his initial arrest until his arrival at the Marion County Jail.

Absent the factual claim that Mr. Alston moved his hands from behind his back to the front, there was no justifiable law enforcement need to remove Mr. Alston from the rear of the police car the second time. The District Court's determination that there was arguable probable cause for arrest relies entirely on (1) the act of moving his handcuffs to the front of the body, which was error; (2) the "exchange of verbal insults" between the parties inside the vehicle (with attendant First Amendment considerations as set forth in n.7); and (3) the subsequent struggle to remove Mr. Alston from the rear of the vehicle. (Doc. 162, at 23-25.)

If, as Mr. Alston avers, Officer Swarbrick simply lost his temper and yanked him, still handcuffed behind the back, out of the vehicle and pepper sprayed him in retaliation, then there is no arguable probable cause for resisting arrest. After Officer Swarbrick searched Mr. Alston and secured him back inside the rear of the patrol car with his arms handcuffed behind his back, the arrest was already fully effectuated and complete. *See, Buckley v. Haddock,* 292 F.App'x 791, 794-795 (11th Cir. 2008). Mr. Alston plainly could not have been resisting arrest after the arrest was complete. Where Officer Swarbrick was merely retaliating against Mr. Alston as a consequence of the verbal exchange of insults inside the vehicle, no reasonable officer could have concluded he had probable cause to arrest.

II. Officer Swarbrick Used Excessive Force When He Lost His Temper and Yanked Mr. Alston—Who Was Handcuffed and Secured In The Back Of the Patrol Vehicle—Out Of the Car and Pepper Sprayed Him Repeatedly

Where a police officer is operating within the bounds of his or her discretionary authority, a plaintiff claiming the officer used excessive force must demonstrate both that his allegations, if true, amount to a constitutional violation and that such a violation was clearly established at the time of the alleged violation. *See Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002); *see also*, *Saucier v. Katz*, 533 U.S. 194, 201 (2002). A court is free to address the inquiries in whichever order it prefers. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Courts evaluate whether an officer used excessive force on a case-by-case basis, determining whether an objectively reasonable officer on the scene would believe the level of force used was necessary. *See Vinyard*, 311 F.3d at 1347. When evaluating the need for the use of force, the court must consider the severity of the underlying crime, the threat level the suspect poses to himself or others, and the degree to which the suspect attempts to resist arrest. *See Graham v. Connor,* 490 U.S. 386, 396 (1989). The level of force used must be reasonably proportionate to the officer's need to use force considering "(1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted." *Graham*, 490 U.S. at 390.

A. Officer Swarbrick Lacked Arguable Probable Cause To Arrest Mr. Alston for Disorderly Conduct And Was Therefore Not Entitled To Use Any Degree Of Force Against Him.

As an initial matter, should this Court agree with the false arrest analysis above, the absence of any lawful authority to arrest Mr. Alston necessarily requires an accompanying determination that *any* amount of force used was excessive. *See Reese v. Herbert,* 527 F.3d 1253, 1272 (11th Cir. 2008) ("[E]ven de minimis force will violate the Fourth Amendment if the officer is not entitled to arrest or detain the suspect.") (internal quotes and citation omitted). Thus, because Officer Swarbrick lacked even arguable probable cause to arrest Mr. Alston for disorderly conduct, any and all forced used against him violated the Fourth Amendment.

B. No Objectively Reasonable Officer Would Have Thought It Necessary To, Among Other Things, Violently Yank Mr. Alston—Who Was Handcuffed Behind His Back and Secured in the Back Seat of the Police Car—From the Vehicle and Pepper Spray Him

Had the Court properly resolved the contested factual issues in Mr. Alston's favor—most importantly, the positioning of the handcuffs—analyzing the totality of the circumstances facing Officers Swarbrick and Trammel would reveal that all of the *Graham* factors weigh heavily in Mr. Alston's favor, compelling a conclusion that no reasonable officer facing the same circumstances as Officer Swarbrick would have believed that the level of forced used was necessary.

First, Officer Swarbrick used a gratuitous and unnecessary level of force when, instead of allowing Mr. Alston to spout off a few words of profanity as he

followed instructions and walked away from the scene, he blindsided Mr. Alston from behind, tackling him to the ground. If, instead of losing his temper in response to Mr. Alston's choice of words, Officer Swarbrick had allowed Mr. Alston to continue his retreat into the neighborhood, he could have de-escalated the situation. Thus, no force was necessary, and all of the *Graham* factors support a conclusion in Mr. Alston's favor. *See Graham*, 490 U.S. at 396.

Second, the linchpin of the Court's analysis concluding that Officer Swarbrick used a reasonable amount of force is the Court's resolution of the factual dispute concerning the positioning of the handcuffs in the Officers' favor, rather than Mr. Alston's. The premise that underlies and justifies Officer Swarbrick's decision to attempt to remove Mr. Alston from the rear of the vehicle is that Mr. Alston had moved his handcuffs to the front of his body, posing a safety risk to officers. However, this Court evaluates questions of qualified immunity only after having resolved all factual disputes in favor of the nonmoving party—here, Mr. Alston. *See Stephens*, 852 F.3d at 1313.

As set forth above, it is far from inherently incredible that Mr. Alston accessed his phone to call his aunt, and the District Court erred in disregarding Mr. Alston's version of the facts. Additionally, even if the District Court were correct in adopting the Officers' allegation that Mr. Alston moved the handcuffs to the front of his body in order to make a phone call, it would still have been error for the District Court to

conclude that Mr. Alston repositioned the handcuffs on two separate occasions. Neither the Officers nor Mr. Alston alleges that he repositioned his handcuffs twice. Thus, the District Court's resolution of this issue required it to adopt a combination of Mr. Alston's version of events with the Officers', supplying facts of the Court's own making in the process. Resolving the question of qualified immunity in this way runs afoul of this Circuit's requirement that courts decide questions of qualified immunity in a manner that ensures "material issues of disputed fact are not a factor in the court's analysis." *Bates v. Harvey*, 518 F.3d 1233, 1239 (11th Cir. 2008).

Adopting Mr. Alston's version of the facts renders this case remarkably analogous to *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002). There, this Court noted that, in its application of the *Graham* factors this Court has unequivocally established that "using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else." *Vinyard*, 311 F.3d at 1348.

Analyzing the facts of both cases under the *Graham* factors yields nearly identical results. In both cases, the crimes were disorderly conduct and obstruction, crimes "of minor severity." *Id.* at 1347. Once Mr. Alston was secured in the back seat, still handcuffed from behind, the arrest was complete and Mr. Alston, like Ms. Vinyard, posed no risk to the officers or anyone else. Mr. Alston admits that, just as Ms. Vinyard screamed and used foul language from the back seat of the patrol car,

after Officer Swarbrick insulted and belittled his wife, he and Officer Swarbrick began a heated verbal exchange. However, he, like Ms. Vinyard, remained handcuffed from behind with a metal partition separating him from Officer Swarbrick, further eliminating any arguable risk posed to Officer Swarbrick. This sort of conduct may be "a nuisance but [it is] not a threat." *Id.* at 1348.

When, in the midst of a heated verbal exchange, Officer Swarbrick lost his temper, emerged from the vehicle, and ran around to the rear passenger-side door in order to yank Mr. Alston from the vehicle and pepper spray him, there was no legitimate law enforcement rationale for doing so. Thus, in the absence of any need for the application of force, the use of pepper spray was disproportionate by definition.[8] The use of force—specifically, the use of pepper spray—in this case was, as in *Vinyard*, excessive.[9]

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[8] The District Court found that "the officer reasonably believed that [Mr. Alston] was resisting arrest even if his foot was caught," but this finding ignores both that Mr. Alston loudly announced that his foot was stuck under the seat's metal backing, information Officer Swarbrick ignored, and that Officer Swarbrick was unreasonably acting in retaliation, making any perceived resistance on Mr. Alston's part significantly less relevant. (Docs. 162, at 24; 41, at 18.)

[9] In *Vinyard*, this Court noted that, in at least one respect, what distinguished the case from "de minimis force and injury cases" such as *Gold v. City of Miami*, 121 F.3d 1442, 1444 (11th Cir. 1997), was the use of pepper spray. *Vinyard*, 311 F.3d at 1348 n.13.

"Based on [Alston's] account of the facts, it is abundantly clear . . . that . . . [Swarbrick] used force that was plainly excessive, wholly unnecessary, and indeed grossly disproportionate under *Graham*. . . . [Alston] was under arrest for offenses of minor severity, handcuffed, secured in the back of a patrol car, and posing no threat to Officer [Swarbrick], [himself] or the public." *Vinyard*, 311 F.3d at 1347. Officer Swarbrick's use of force violated Mr. Alston's Fourth Amendment right to be free from the use of excessive force during an arrest.[10]

III. Because Mr. Alston Has Established That Officer Swarbrick Violated His Constitutional Rights, He Has a Viable Cause of Action Against Officer Trammel for Failure to Intervene.

"An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance." *Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008) (internal quotation marks and citation omitted). Mr. Alston avers that Officer Trammel stood by and did nothing as he observed Officer Swarbrick unjustifiably yank him from the patrol vehicle and repeatedly spray him with pepper spray.

[10] *Vinyard* does not stand alone in denying officers qualified immunity for excessive force where the crime is minor and the suspect is under control, not resisting, and poses no threat. *See Stephens v. DeGiovanni,* 852 F.3d 1298, 1320–24 (11th Cir. 2017); *Saunders v. Duke*, 766 F.3d 1262, 1265-66 (11th Cir. 2014); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 927 (11th Cir. 2000); *Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000); *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *Smith v. Mattox*, 127 F.3d 1416, 1419–20 (11th Cir. 1997); *see also Vinyard,* 311 F.2d at 1348 n.11 (collecting cases from other circuits).

However, the Court determined that because Mr. Alston failed to establish excessive force, no reasonable jury could find Officer Trammel liable for failing to intervene. Given that Officer Swarbrick is not entitled to qualified immunity as to excessive force, this Court should remand Mr. Alston's claim against Officer Trammel for resolution by a jury.

IV. Because Mr. Alston Has Established Violations of His Constitutional Rights, He Has a Viable Cause of Action Against the Sheriff of Marion County Under § 1983.

The District Court limited its analysis of the Sheriff's liability as to whether or not Mr. Alston had established a constitutional violation. (Doc. 162, at 26.) In the absence of such a violation, no cause of action is available. *See Case v. Enslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009); *see also Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1998). However, the arguments above have established several violations of Mr. Alston's rights under the Fourth Amendment to the Constitution, namely false arrest for both disorderly conduct and resisting arrest, and use of excessive force. Accordingly, the Sheriff of Marion County is not entitled to summary judgment, and this Court should remand this case to the District Court for further proceedings in which Mr. Alston may pursue his claim against the Sheriff.

CONCLUSION

For all these reasons, this Court should reverse the District Court's summary judgment decision and remand for further proceedings.[11]

This 10th day of September, 2018.

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[11] In addition, Mr. Alston believes that the concept of qualified immunity is not supported by the text of 42 U.S.C. § 1983 and should be reassessed. *See Zadeh v. Robinson*, No. 17-50518, 2018 WL 4178304, at *10–11 (5th Cir. Aug. 31, 2018) (Willett, J., concurring) (questioning "entrenched, judge-made . . . Kevlar-coated" doctrine of qualified immunity" (citing Symposium, *The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1793 (2018)). Mr. Alston raises this argument here, but understands this Court is bound by current Supreme Court precedent. *See, e.g., Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this document complies with the required word limit as it contains 7,926 words.

Pursuant to Fed. R. App. P. 32(a)(5) and (6), I hereby certify that this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that on September 10, 2018, I electronically filed the foregoing Appellant's Brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter.

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