

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JONATHAN ANTHONY LEE TORRES,

Appellant,

v.

**NATHAN BALL, SERGEANT, DANE R. ONDERDONK,
DEPUTY, AND TIMOTHY R. TAYLOR, DEPUTY,**

Appellees.

On Appeal from the United States District Court
For the Western District of North Carolina (1:19-cv-00094-MR)

OPENING BRIEF

Daniel S. Harawa
Counsel of Record

Daniel J. Cook
Zachary L. Sanders
Sophie Spears
Student Counsel

Counsel for Appellant

NEW YORK UNIVERSITY
SCHOOL OF LAW
Federal Appellate Clinic
245 Sullivan Street
Room 620
New York, NY 10012
(212) 998-6430
dh33544@nyu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....III

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES2

STATEMENT OF THE CASE3

SUMMARY OF THE ARGUMENT17

ARGUMENT19

I. SGT. BALL’S INCONSISTENT STATEMENTS REGARDING WHY HE STOPPED MR. TORRES AND OTHER UNRESOLVED MATERIAL FACTS PRECLUDE SUMMARY JUDGMENT IN SGT. BALL’S FAVOR.20

 A. Material Inconsistencies Regarding Why Sgt. Ball Stopped the Green Honda Preclude Summary Judgment.....21

 B. Material Inconsistencies Regarding the Confidential Informant’s Tip Preclude Summary Judgment.23

 C. Questions Surrounding Sgt. Ball’s Credibility Preclude Summary Judgment.....27

II. EVEN IF THE DISTRICT COURT WAS CORRECT IN ADOPTING THE VERSION OF EVENTS IN SGT. BALL’S AFFIDAVIT, SGT. BALL VIOLATED THE FOURTH AMENDMENT BY ACTING WITHOUT REASONABLE ARTICULABLE SUSPICION.....31

 A. The Anonymous Tip Lacked Sufficient Indicia of Reliability to Provide Sgt. Ball with Reasonable Suspicion to Stop Mr. Torres.....31

 B. The Anonymous Tip Did Not Support Reasonable Articulate Suspicion Because It Was Vague and Generic and Sgt. Ball Failed to Sufficiently Corroborate the Tip’s Assertion Connecting Mr. Torres to the Green Honda Accord and Flat Top Mountain Road.....36

CONCLUSION46

REQUEST FOR ORAL ARGUMENT47

CERTIFICATE OF COMPLIANCE48
CERTIFICATE OF SERVICE.....49

TABLE OF AUTHORITIES

Cases

<u>Adams v. Williams</u> , 407 U.S. 142 (1973).....	23, 31, 32, 36
<u>Alabama v. White</u> , 496 U.S. 325 (1990).....	23, 31, 32
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).....	19, 26
<u>Assa’ad-Faltas v. Richland Cnty. Sherriff’s Dep’t</u> , No. 3:18-00578-MGL, 2020 WL 1303141 (D.S.C. Mar. 19, 2020).....	26
<u>Berkemer v. McCarty</u> , 468 U.S. 420 (1984).....	21
<u>Davis v. Zahradnick</u> , 600 F.2d 458 (4th Cir. 1979)	27
<u>Delaware v. Prouse</u> , 440 U.S. 648 (1979).....	44
<u>Erickson v. Pardus</u> , 551 U.S. 89 (2007).....	19
<u>Estelle v. Gamble</u> , 429 U.S. 97 (1976).....	19
<u>Florida v. J.L.</u> , 529 U.S. 266 (2000).....	passim
<u>Harris v. Pittman</u> , 927 F.3d 266 (4th Cir. 2019)	19
<u>Hupp v. Cook</u> , 931 F.3d 307 (4th Cir. 2019)	19
<u>Hyatt v. Miller</u> , No. 1:19-cv-00250-MR-WCM, 2022 WL 3130108 (W.D.N.C. Aug. 3, 2022) .	29
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983).....	23
<u>Jacobs v. N.C. Admin. Office of the Courts</u> , 780 F.3d 562 (4th Cir. 2019)	26
<u>Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.</u> , 831 F.2d 77 (8th Cir. 1987)	27
<u>Pahls v. Thomas</u> , 718 F.3d 1210 (10th Cir. 2013)	4
<u>Philips v. Pitt Cnty. Mem’l Hosp.</u> , 572 F.3d 176 (4th Cir. 2009)	4

<u>Raynor v. Pugh,</u> 817 F.3d 123 (4th Cir. 2016)	25, 27
<u>Sartor v. Arkansas Gas Corp.,</u> 321 U.S. 620 (1944)	28
<u>Scott v. Harris,</u> 550 U.S. 372 (2007)	19, 28
<u>State v. Benters,</u> 766 S.E.2d 593 (N.C. 2014)	33, 34
<u>State v. Hughes,</u> 539 S.E.2d 625 (N.C. 2000)	passim
<u>Terry v. Ohio,</u> 392 U.S. 1 (1968)	22, 32
<u>Tolan v. Cotton,</u> 572 U.S. 650 (2014)	19, 27, 28, 29
<u>United States v. Arlington Cnty., Va.,</u> 702 F.2d 485 (4th Cir. 1983)	3
<u>United States v. Arvizu,</u> 534 U.S. 266 (2002)	22
<u>United States v. Brack,</u> 188 F.3d 748 (7th Cir. 1999)	33
<u>United States v. Christmas,</u> 222 F.3d 141 (4th Cir. 2000)	34, 35
<u>United States v. Cortez,</u> 449 U.S. 411 (1981)	29
<u>United States v. Foster,</u> 824 F.3d 84 (4th Cir. 2016)	30
<u>United States v. Gondres-Medrano,</u> 3 F.4th 708 (4th Cir. 2021)	23, 24, 33, 37
<u>United States v. Griffin,</u> 589 F.3d 148 (4th Cir. 2009)	34, 35
<u>United States v. Hensley,</u> 469 U.S. 221 (1985)	20
<u>United States v. Hudson,</u> 405 F.3d 425 (6th Cir. 2005)	20
<u>United States v. Johnson,</u> 592 F.3d 442 (3d Cir. 2010)	33
<u>United States v. Leon,</u> 468 U.S. 897 (1984)	20
<u>United States v. Mitchell,</u> 963 F.3d 385 (4th Cir. 2020)	35

<u>United States v. Perea-Rey</u> , 680 F.3d 1179 (9th Cir. 2012)	4
<u>United States v. Perkins</u> , 363 F.3d 317 (4th Cir. 2004)	32, 35
<u>United States v. Real Prop. Located at 3234 Washington Ave. N., Minneapolis, Minn.</u> , 480 F.3d 841 (8th Cir. 2007)	27
<u>Utah v. Strieff</u> , 579 U.S. 232 (2016).....	20, 38
<u>Vathekan v. Prince George’s Cnty.</u> , 154 F.3d 173 (4th Cir. 1998)	27
Statutes	
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
42 U.S.C. § 1983	1
N.C. Gen. Stat. Ann. § 14-225 (West 2022)	34, 35
Rules	
Fed. R. App. P. 32(a).....	48
Fed. R. App. P. 32(f)	48
Fed. R. App. P. 34(a).....	47
Fed. R. App. P. 4(a)(1)(A).....	1
Fed. R. Civ. P. 56(a).....	1, 19
Other Authorities	
“Police 10 Codes,” CopRadar.com (last visited Oct. 5, 2022), https://copradar.com/tencodes/	7
10A Wright, Miller & Kane, <u>Federal Practice and Procedure: Civil</u> § 2726 (4th ed. 2022)	28
Dep’t of Just., Bureau of Just. Stat., <u>Survey of State Criminal History Information Systems, 2014</u> , Table 5a (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (last visited Nov. 19, 2022)	38
Fed. R. Civ. P. 56(e) advisory committee’s note to 1963 amendment.....	27
Joel Burgess, “Another Black resident has sued over strip search in Asheville traffic stop,” Asheville Citizen Times (Oct. 24, 2022, 5:16 A.M.), https://www.citizen-times.com/story/news/local/2022/10/24/asheville-another- black-resident-sues-over-traffic-stop-strip-search/69577814007/	29
Joel Burgess, “Buncombe resident awarded \$50k after sheriff’s deputy Asheville gas station strip search,” Asheville Citizen Times (Aug. 4, 2022, 12:37 P.M.),	

<https://www.citizen-times.com/story/news/2022/08/04/black-man-awarded-50000-after-asheville-gas-station-strip-search/10234583002/>29

Joel Burgess, “Judge: Buncombe deputy McDonald guilty of assault; kneed man lying handcuffed facedown,” Asheville Citizen Times (Feb. 11, 2022, 5:46 P.M.), <https://www.citizen-times.com/story/news/2022/02/11/buncombe-deputy-guilty-assault-kneeing-man-handcuffed-facedown/6755374001/>29

Joel Burgess, “Officer under investigation put on leave; Buncombe County deputy facing SBI investigation for alleged excessive force,” Asheville Citizen Times, Apr. 6, 2022, at A1.....29

North Carolina Department Of Public Safety, “Jonathan Torres,” Offender Public Information (last visited Nov. 21, 2022), <https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0715405&searchLastName=torres&searchFirstName=jonathan&searchDOBRange=0&listurl=pagelistoffendersearchresults&listpage=1>12

STATEMENT OF JURISDICTION

On March 27, 2019, Appellant Jonathan Anthony Lee Torres filed an action pursuant to 42 U.S.C. § 1983 against Appellees Nathan Ball, Dane Onderdonk, and Timothy Taylor in the United States District Court for the Western District of North Carolina.¹ The district court had jurisdiction under 28 U.S.C. § 1331.

On March 15, 2021, the district court granted Sgt. Ball's motion for summary judgment pursuant to Fed. R. Civ. P. 56(a). On March 24, 2021, Mr. Torres filed a timely notice of appeal. See Fed. R. App. P. 4 (a)(1)(A) (providing that a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from"). This Court has jurisdiction under 28 U.S.C. § 1291.

¹ This brief focuses on Sgt. Ball, the defendant who conducted the stop at issue in this appeal.

STATEMENT OF THE ISSUES

- I. Did material inconsistencies between Sgt. Ball's post-arrest report, affidavit in support of summary judgment, and body camera footage preclude the District Court from granting summary judgment in Sgt. Ball's favor?

- II. Did Sgt. Ball have reasonable articulable suspicion to stop any green Honda based on a vague, bare-bones tip from a virtually anonymous informant that Mr. Torres, who had warrants out for his arrest, was driving a green Honda?

STATEMENT OF THE CASE

In the early morning hours of Saturday, March 3, 2018, Sergeant Nathan Ball stopped Jonathan Anthony Lee Torres on a dark, rural mountain road and ordered him out of his car at gunpoint. Mr. Torres did not understand why Sgt. Ball stopped him, and Sgt. Ball did not immediately tell him. J.A. 187, J.A. 369 at 01:28-01:49, 02:04-02:08. However, Mr. Torres understood that his life was at risk and immediately complied with Sgt. Ball's commands to avoid further danger to himself and his fiancée, who was in the car with him. Although Sgt. Ball arrested Mr. Torres that night, the State ultimately dropped all charges stemming from the incident. Mr. Torres initiated this Section 1983 action against Sgt. Ball for violating his Fourth Amendment rights by stopping him without reasonable articulable suspicion or probable cause.

Sgt. Ball's body camera captured the events of that night, and Mr. Torres's sworn account is consistent with that footage.² In contrast, Sgt. Ball's accounting of events, comprised of his initial Police Report and an Affidavit that he filed in support of his motion for summary judgment, contain critical inconsistencies about why he

² Mr. Torres swore under penalty of perjury that the facts asserted in his Summary Judgment Memorandum were accurate and true. See J.A. 175–278, J.A. 298. See also United States v. Arlington Cnty., Va., 702 F.2d 485, 490 (4th Cir. 1983) (holding that factual assertions made by *pro se* litigants under penalty of perjury rise to the evidentiary significance of a sworn affidavit).

stopped Mr. Torres. When read together, these contrasting accounts demonstrate extant material questions of fact inappropriate for resolution at summary judgment.

I. Body Camera Footage and Mr. Torres’s Account

Mr. Torres visited a friend at 130 Flat Top Mountain Road during the early morning hours of Saturday, March 3, 2018. J.A. 186. Located about a mile up Flat Top Mountain, 130 Flat Top Mountain Road lies approximately 200 feet from the street down a steep incline. See Image 1.³ Heavily wooded and rural, no streetlights illuminate Flat Top Mountain Road, making it incredibly dark at night. See id.



Image 1

³ All images are Google Maps satellite images. The images contextualize Mr. Torres’s statement that “there is no street light’s [*sic*] on Flat Top Mountain Rd any where [*sic*], and 130 Flat Top Mountain is located off road at angle.” J.A. 304. The Court can take judicial notice of the images. See, e.g., Philips v. Pitt Cnty. Mem’l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (holding that the Court may properly take judicial notice of matters of public record); see also Pahls v. Thomas, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of a Google map and satellite image because the accuracy of the source could not “reasonably be questioned” (quoting United States v. Perea-Rey, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012))).

Around 3:10 AM, Mr. Torres and his fiancée left 130 Flat Top Mountain Road and began the drive home to Hendersonville, North Carolina. J.A. 186. Before leaving the Fairview area, however, they decided to stop at a friend’s house at 714 Old Fort Road. J.A. 186. Only 1.4 miles, or four minutes driving, separate 130 Flat Top Mountain Road and 714 Old Fort Road. See Image 2.

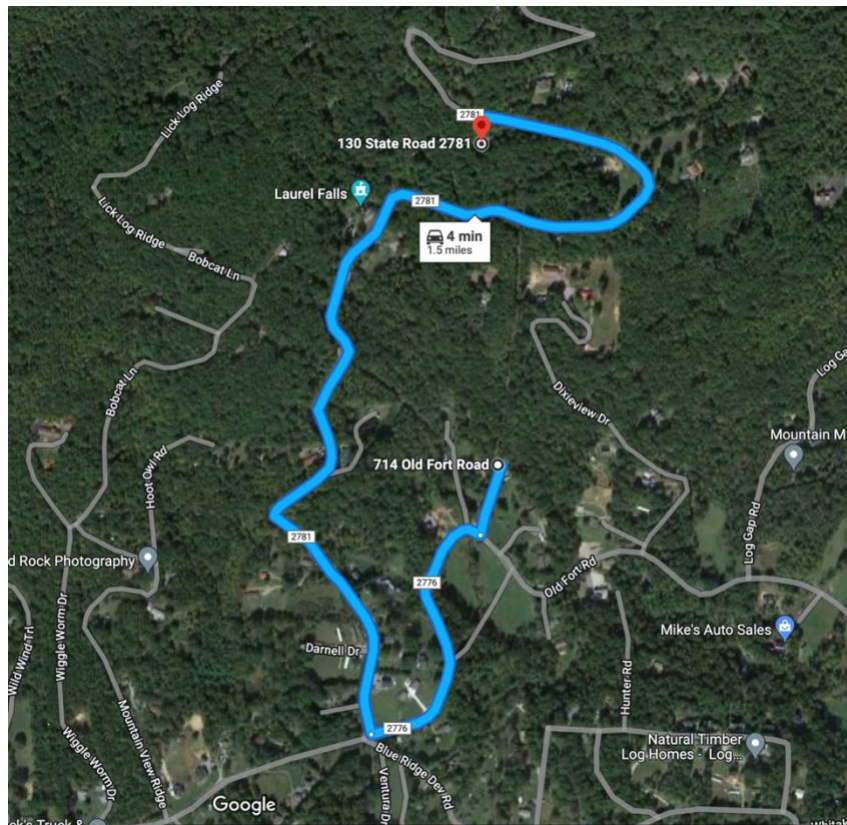


Image 2

As Mr. Torres turned onto Old Fort Road, he noticed a sheriff’s SUV behind him. J.A. 186, J.A. 369 at 00:58-01:15. Once Mr. Torres made the left turn into the driveway at 714 Old Fort Road, he saw the sheriff vehicle’s blue lights flashing. J.A. 186. Sgt. Ball’s body camera shows that Sgt. Ball activated his blue lights *before* he called in Mr. Torres’s license plate. J.A. 369 at 01:14-01:17, 01:18–01:22.

Mr. Torres pulled up to the end of the driveway and rolled down his windows. J.A. 186–187. Sgt. Ball closed his patrol car door, J.A. 369 at 01:28, unholstered and cocked his firearm, J.A. 369 at 01:29, pointed it towards Mr. Torres, J.A. 187, took six quick steps towards the green Honda, J.A. 369 at 01:30–01:33, and yelled “HANDS!” twice in an aggressive, demanding tone, J.A. 369 at 01:32–01:34. Mr. Torres complied instantly—the body camera footage shows his hands poking out of the car window before Sgt. Ball issued his second command, for Mr. Torres to “step out of the vehicle.” J.A. 369 at 1:33–1:39. Mr. Torres again immediately complied. J.A. 369 at 01:39. Mr. Torres exited the Honda, slowly, deliberately, and with his hands raised, and Sgt. Ball yelled, “on your belly—ON YOUR BELLY!” J.A. 369 at 01:40–01:42. As Mr. Torres moved to the ground, J.A. 369 at 1:43, Sgt. Ball further commanded, “get down, all the way—hands behind your back.” J.A. 369 at 01:45–01:49.

While complying with Sgt. Ball’s instructions, Mr. Torres asked his fiancée to record the interaction. J.A. 369 at 01:51. She asked Sgt. Ball, “why are you arresting him?” and Mr. Torres echoed, “yeah, what’d you pull me over for? What’s your probable cause?” J.A. 369 at 02:02–02:08. Sgt. Ball did not respond to any of these questions, nor did he ask Mr. Torres for his name or any other identifying information.

After Sgt. Ball handcuffed Mr. Torres and sat him upright, he received a call that the green Honda was “10-75”—a police code that indicates “wanted/stolen” J.A. 369 at 02:35–02:39.⁴ Thus, by the time Sgt. Ball had probable cause to believe that the green Honda was stolen, Sgt. Ball had already pointed his gun at Mr. Torres, handcuffed him, and placed him under arrest.

A minute later, Sgt. Ball called on his radio and asked to “confirm” a “Jonathan Torres.” J.A. 369 at 05:17. Sgt. Ball paused, asked Mr. Torres for his date of birth, and repeated it into his radio. J.A. 369 at 05:20–05:28. Sgt. Ball then reported that Mr. Torres had several warrants in Buncombe County. J.A. 369 at 06:06. Mr. Torres responded that they were misdemeanors and supposed to be dismissed, and Ball agreed, “that may be, but you’ve got a bunch of warrants.” J.A. 369 at 06:11–06:17. Mr. Torres responded, “wow.” J.A. 369 at 06:18. Sgt. Ball walked towards his squad car and the relevant footage ends. J.A. 369 at 07:26–07:30.

II. Sergeant Ball’s Inconsistent Statements Regarding the Lead-Up to and Actual Arrest of Mr. Torres

Two sources comprise Sgt. Ball’s narratives about the lead up to and actual events of March 3, 2018. Immediately after Mr. Torres’s arrest, Sgt. Ball filled out a Police Report and drafted a “Reporting Officer Narrative.” J.A. 122–123. *Over two years later*, after the release of Sgt. Ball’s body camera footage and Mr. Torres’s

⁴ See “Police 10 Codes,” CopRadar.com (last visited Oct. 5, 2022), <https://copradar.com/tencodes/>.

initiation of the present action, Sgt. Ball prepared an Affidavit in support of his Motion for Summary Judgment. Compare J.A. 122–23 with J.A. 90–96.

Sgt. Ball’s Affidavit contradicts the initial Police Report on significant details. In particular, before the release of his body camera footage and after, Sgt. Ball’s justification for pulling over the green Honda changed. In the Police Report, Sgt. Ball claimed he conducted the stop after a “NCIC inquiry showed that the [green Honda] was stolen.” J.A. 122. But in his Affidavit, Sgt. Ball disclaimed this version of events and instead stated that he pulled the car over because he “believed” Mr. Torres was driving the green Honda based on a tip from a “confidential informant” who provided “reliable information in the past.” J.A. 91, J.A. 93.

The details of Sgt. Ball’s awareness of Mr. Torres prior to the traffic stop also changed between the Police Report and Sgt. Ball’s Affidavit. In the Police Report, Sgt. Ball said that he learned Mr. Torres had outstanding warrants sometime in “February 2018.” J.A. 122. In his Affidavit, Sgt. Ball specified when and how he learned about Mr. Torres, reporting that he received an Attempt to Locate (“ATL”) for Mr. Torres on February 26, 2018. J.A. 91.

The Police Report gives no context as to whether Sgt. Ball knew anything else about Mr. Torres, such as what Mr. Torres looked like. However, Sgt. Ball’s

Affidavit clarified that he saw an image of Mr. Torres at a police department meeting held on February 27, 2018. J.A. 91, J.A. 103.

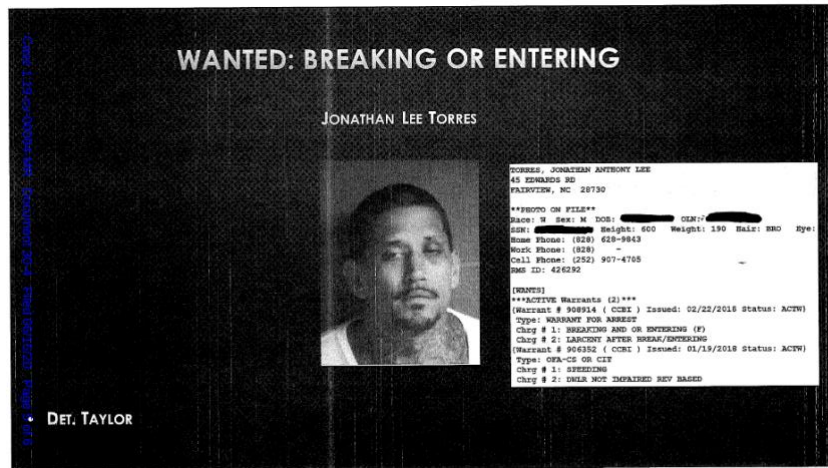


Image 3 (J.A. 103)

This 1.5-inch by 1-inch headshot of Mr. Torres was included in a PowerPoint presentation at a police briefing on various people in the area who had warrants out for their arrest. J.A. 103.

According to the Police Report, at some unspecified point, Sgt. Ball allegedly spoke to a Confidential Source of Information (“CSI”). J.A. 122. The CSI allegedly informed Sgt. Ball that Mr. Torres “frequent[ed]” 130 Flat Top Mountain Road. J.A. 122. In the Police Report, Sgt. Ball further claimed that the CSI described Mr. Torres’s car as a “dark green Honda car with dark tinted windows.” J.A. 122. Sgt. Ball provided no other information about this CSI or his relationship with them. See J.A. 122.

Sgt. Ball’s description of the CSI and the details surrounding the tip that the CSI provided evolved by the time of litigation. Once the body camera footage proved

that Sgt. Ball conducted the traffic stop prior to hearing the green Honda was stolen, his justification for the traffic stop relied more heavily on the information this alleged CSI provided. In his Affidavit, Sgt. Ball, for the first time, asserted that the CSI “provided [him] with reliable information in the past.” J.A. 91. Still, Sgt. Ball provided no further elaboration about when and how he communicated with the CSI, what kind of reliable information the CSI provided in the past, or any information about the basis of the CSI’s knowledge of Mr. Torres. See J.A. 91.

Moreover, in his Affidavit, Sgt. Ball modified his account of what the CSI purportedly told him about the connection between Mr. Torres and 130 Flat Top Mountain Road. Now, instead of Mr. Torres “frequenting” 130 Flat Top Mountain Road, Sgt. Ball claimed that the CSI described Mr. Torres as “staying” there. J.A. 91. The description of the car evolved, too. Sgt. Ball’s Affidavit alleged that the CSI told him Mr. Torres was driving a “dark green Honda *Accord* with dark tinted windows,” J.A. 91 (emphasis added). Sgt. Ball’s first description of the CSI’s tip did not include the model of the car. See J.A. 122.

Sgt. Ball also alleged to have received additional information about Mr. Torres from other officers in his department. J.A. 92, J.A. 122. According to the Police Report, Sgt. Ball claimed that, sometime after receiving the ATL, he spoke with Agent Jerry Burrell who told him that he had heard that “[Mr.] Torres had

supposedly stolen a couple of cars.” J.A. 122. This secondhand assertion was entirely absent in Sgt. Ball’s Affidavit. See J.A. 92.

Instead, Sgt. Ball’s Affidavit alleged that Agent Burrell had told him that Mr. Torres “had been seen” at a location on Hickory Tree Road, J.A. 92, which is approximately 11.6 miles away from 130 Flat Top Mountain Road.

Sgt. Ball also apparently spoke with Detectives David Stevens and Eric Taylor prior to March 3. J.A. 92, J.A. 122. Detective Taylor allegedly provided Sgt. Ball with 45 Edwards Road as another possible address for Mr. Torres and asked Sgt. Ball to notify him if he located Mr. Torres. J.A. 92, J.A. 122. 45 Edwards Road is at least 4.8 miles away from 130 Flat Top Mountain Road.

Based on the foregoing, on the morning of Saturday, March 3, 2018, all the information Sgt. Ball had to locate Mr. Torres was a claim that Mr. Torres was driving a green Honda (or green Honda Accord, depending on which version of Sgt. Ball’s narrative one reads), two addresses (45 Edwards Road, and 130 Flat Top Mountain Road), and a street (Hickory Tree Road) covering a 12.5-mile area between Asheville and Fairview, North Carolina. And all that Sgt. Ball knew about Mr. Torres’s appearance was that he was a 6-foot-tall white male weighing 190 pounds with brown hair, a mustache and beard, and a tattoo on his neck.⁵

⁵ Although the police presentation identified Mr. Torres’s race as “white,” J.A. 103, he is of Latino descent. See North Carolina Department Of Public Safety,

After the police officer meeting on February 27, Sgt. Ball began patrolling 45 Edwards Road and 130 Flat Top Mountain Road, looking for Mr. Torres. J.A. 92, J.A. 122. Neither the Police Report nor Sgt. Ball’s Affidavit indicated how many times he patrolled 45 Edwards Road and 130 Flat Top Mountain Road before the events of March 3, 2018. See J.A. 122–123, J.A. 90–96.

Around 3:00 AM on March 3, 2018, Sgt. Ball allegedly drove by 130 Flat Top Mountain Road and saw a dark green Honda with an open trunk. J.A. 92, J.A. 122. Sgt. Ball claimed he saw a figure moving around outside near the vehicle. J.A. 92, J.A. 122. Significantly, in his Police Report, Sgt. Ball provided *zero* details describing this figure—not even any information about their gender or appearance. See J.A. 122. Sgt. Ball simply stated that he saw “someone . . . outside walking around.” J.A. 122.⁶ Over two years later, after the release of the body camera footage, Sgt. Ball clarified in his affidavit that this figure was a “male person.” J.A. 92.

“Jonathan Torres,” Offender Public Information (last visited Nov. 21, 2022), <https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0715405&searchLastName=torres&searchFirstName=jonathan&searchDOBRange=0&listurl=pagelistoffendersearchresults&listpage=1> (listing Mr. Torres’s “Ethnic Group” as “Hispanic/Latino”).

⁶ In his Response in Opposition to Sgt. Ball’s Motion for Summary Judgment, Mr. Torres pointed out that Sgt. Ball could not have seen a car or a person walking around in the driveway of 130 Flat Top Mountain Road because “[t]here is no street light’s [*sic*] on Flat Top Mountain Rd any where [*sic*], and 130 Flat Top Mountain is located off road at angle—that one can not [*sic*] see clearly—let alone at 3 AM in the morning.” J.A. 304.

Sgt. Ball claimed that he pretended to exit the area by driving past 130 Flat Top Mountain Road towards Old Fort Road. J.A. 92, J.A. 122. When he was far enough down Flat Top Mountain Road, Sgt. Ball backed his vehicle into a driveway, cut his lights, and waited to see if the green Honda drove past. J.A. 92, J.A. 122.

When the green Honda drove past his hiding spot, Sgt. Ball began following it. J.A. 92, J.A. 122. In the Police Report, Sgt. Ball claimed that he called the Honda's license plate into dispatch as he followed the car along Old Fort Road and learned that the Honda was stolen. J.A. 122.

However, the release of the body camera footage contradicted Sgt. Ball's narrative in the Police Report by definitively showing that Sgt. Ball called in the license plate *after* activating his blue lights and initiating the stop. J.A. 369 at 01:14-01:17, 01:18–01:22. Sgt. Ball therefore retracted the sequence of events described in the Police Report. In his Affidavit, Sgt. Ball “emphasize[d] that [he] did not learn the Vehicle was stolen until after Mr. Torres was in custody.” J.A. 95. In this later narrative, Sgt. Ball specifically asserted that “the stolen vehicle alert was not a basis for” the initial stop. J.A. 95.

Sgt. Ball claimed the green Honda did not immediately stop. J.A. 93, J.A. 122. Sgt. Ball finally called in the license plate once the green Honda stopped. See J.A. 369 at 0:18-01:22. He got out of his police vehicle without waiting for a response from dispatch. J.A. 93, J.A. 369 at 01:28.

When Sgt. Ball exited the police vehicle, he drew his gun and gave loud verbal commands ordering the driver to place his hands outside the car. J.A. 93, J.A. 122, J.A. 369 at 01:32–01:34.

As for the stop itself, prior to approaching the green Honda, Sgt. Ball did not see the driver. Sgt. Ball stated this in both the Police Report and his Affidavit, where he admitted that only *after* approaching the green Honda did he see that the driver was Mr. Torres. J.A. 93, J.A. 122. Sgt. Ball asserted that prior to approaching the green Honda, he did not know the driver’s identity and merely “believed” that Mr. Torres was in the car. See J.A. 92, J.A. 122. Sgt. Ball’s Police Report also entirely omitted that he drew his gun as he approached the car. See J.A. 122. His Affidavit, however, acknowledged that he drew his firearm but claimed that he did not point his gun at either the driver or the passenger. J.A. 93.⁷

III. Procedural History

All of the charges stemming from the March 3, 2018 arrest were eventually dropped on March 12, 2019, after Mr. Torres’s criminal defense attorney prepared a motion to suppress the evidence collected incident to the arrest. J.A. 23–29, J.A. 181. The state dismissed the case before the court could rule on Mr. Torres’ motion to

⁷ Mr. Torres was arrested for possession of a stolen vehicle and drug possession; Sgt. Ball found two baggies of what he believed to be drugs while patting down Mr. Torres. J.A. 94, J.A. 123.

suppress.⁸ On March 27, 2019, Mr. Torres initiated the present action, *pro se*,⁹ in the District Court for the Western District of North Carolina. J.A. 7–40.

On June 15, 2020, Sgt. Ball moved for summary judgment. J.A. 60. Sgt. Ball argued that he did not violate Mr. Torres’s constitutional rights because the information Sgt. Ball received from the alleged confidential information provided reasonable articulable suspicion. J.A. 72–74, J.A. 93. Importantly, Sgt. Ball then disclaimed that the stolen car was the basis for the stop. J.A. 95.

On August 13, 2020, in his reply in opposition to Sgt. Ball’s Motion for Summary Judgment,¹⁰ Mr. Torres raised many of the inconsistencies described above and argued that they foreclosed the court’s grant of summary judgment in Sgt. Ball’s favor. For instance, Mr. Torres pointed out Sgt. Ball’s failure to demonstrate that he engaged in an investigation prior to arresting Mr. Torres on March 3, 2018. J.A. 190–191, J.A. 303–304 (“In Sgt. Ball’s original report, he never states whether . . . [he] took the time to engage in extensive independent

⁸ Mr. Torres pled guilty in a separate case that related to the warrants that were out for his arrest at the time of this incident. J.A. 181.

⁹ From the beginning, Mr. Torres’ litigation efforts were hampered by his incarceration. Mr. Torres litigated this action without the benefit of a law library or the ability to watch the body camera footage that is so crucial to this case. Mr. Torres watched the body camera footage just once, in March 2019, just prior to the dismissal of his criminal case. Further, during the pendency of this action, he was transferred to different facilities six times, making it more difficult for him to communicate with the court and stay apprised of this litigation. See J.A. 41, J.A. 43, J.A. 45, J.A. 55, J.A. 57, J.A. 173.

¹⁰ Mr. Torres also cross moved for summary judgment. See J.A. 175.

corroboration . . . of the details of informant’s tip[.]”). Mr. Torres highlighted that the body camera footage contradicted Sgt. Ball’s Police Report, necessitating Sgt. Ball’s subsequent reliance on the CSI tip as justification for the traffic stop in his Affidavit. J.A. 305 (“[Sgt. Ball] also says he pulled out of driveway and began to follow vehicle. This isn’t what happened as seen on video. He chased down vehicle [and] blue lighted before having any FACTS, not like report says.” (emphasis in original)). Mr. Torres also argued that the CSI’s tip could not have provided Sgt. Ball with reasonable articulable suspicion because “not one time does Sgt. Ball provide a date nor time when he spoke with this (CSI)[.]” nor does he explain “whether [he] took time to engage in . . . independent corroboration . . . of the details of [the] informant’s tip, in order to establish its reliability[.]” J.A. 303–304.

On March 13, 2021, the District Court granted Sgt. Ball’s Motion for Summary Judgment. J.A. 318. The District Court held that Sgt. Ball had reasonable suspicion to pull over the green Honda on March 3, 2018 based on the ATL Sgt. Ball received on February 26, 2018; the information Sgt. Ball learned at the police officer meeting on February 27, 2018; the warrants check Sgt. Ball conducted on February 27, 2018; and the information the CSI purportedly provided about the green Honda and 130 Flat Top Mountain Road. J.A. 318–343.

This appeal followed. J.A. 345.

SUMMARY OF THE ARGUMENT

This case turns on whether Sgt. Ball had reasonable articulable suspicion to pull over the green Honda that Mr. Torres had been driving. Yet why Sgt. Ball pulled over the car is a disputed fact at this juncture. Before litigation, Sgt. Ball claimed that he pulled over the green Honda Mr. Torres was driving because he learned it was stolen. Sgt. Ball's own bodycam footage conclusively disproves this account, as it reveals that he only learned that the car was stolen *after* he had already stopped the car and ordered Mr. Torres out of it at gunpoint. As a result, in litigation, Sgt. Ball changed his story. Now he claims that he stopped the green Honda because he believed that Mr. Torres, who had warrants out for his arrest, was its driver. Sgt. Ball's shifting and inconsistent justifications for his actions precluded a grant of summary judgment in his favor.

But even looking at the narrative for the stop that Sgt. Ball crafted for this litigation—which the District Court erroneously credited—Sgt. Ball still did not have reasonable articulable suspicion to believe that Mr. Torres was the driver of the green Honda that he violently pulled over that fateful night.

The only basis for Sgt. Ball's belief that Mr. Torres was driving the green car was an alleged tip from a confidential informant that Mr. Torres was staying near a particular address and was allegedly driving a green Honda. Based on this revised story, the District Court held that Sgt. Ball had reasonable articulable suspicion for

the stop. The Fourth Amendment's reasonableness requirement is not so easily satisfied.

The alleged tip did not provide Sgt. Ball with reasonable articulable suspicion to pull over the green Honda Mr. Torres was driving. There is no information in the record about this "confidential informant" and whether they have provided reliable information in the past other than Sgt. Ball's one-sentence conclusory assertion. Sgt. Ball failed to corroborate any connection between Mr. Torres and the allegations contained in the tip. And the tip was too vague and generic to provide the particularized suspicion demanded by the Fourth Amendment. Thus, Sgt. Ball's attempts to elude responsibility for this unconstitutional stop fail.

Were the District Court's ruling to stand, Sgt. Ball would have been justified in stopping any green Honda he found in Fairview, North Carolina, and ordering the driver out of the car at gunpoint, simply because he received a tip from an informant that a person with outstanding arrest warrants was driving a green Honda and staying at an address within the town. That cannot be the law. The District Court's decision to grant summary judgment in Sgt. Ball's favor must be reversed.

ARGUMENT

Summary judgment is appropriate only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). As this Court has explained, a material fact is one that would affect the substantive outcome of the court’s analysis under governing law. Hupp v. Cook, 931 F.3d 307, 317 (4th Cir. 2019). At summary judgment, it is axiomatic that “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” Tolan v. Cotton, 572 U.S. 650, 651 (2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). When video evidence is involved in a summary judgment determination, summary judgment is inappropriate if the moving party’s story is “blatantly contradicted by the record[.]” Scott v. Harris, 550 U.S. 372, 380 (2007). In resolving a summary judgment motion, a court cannot make “credibility determinations,” as those are reserved for the factfinder. Anderson, 477 U.S. at 255. And because Mr. Torres was *pro se* below, his pleadings must be “liberally construed.” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

This Court reviews a district court’s grant of summary judgment *de novo*. Harris v. Pittman, 927 F.3d 266, 272 (4th Cir. 2019).

I. SGT. BALL’S INCONSISTENT STATEMENTS REGARDING WHY HE STOPPED MR. TORRES AND OTHER UNRESOLVED MATERIAL FACTS PRECLUDE SUMMARY JUDGMENT IN SGT. BALL’S FAVOR.

There are genuine disputes of material fact regarding whether Sgt. Ball had reasonable articulable suspicion to stop the green Honda that Mr. Torres was driving. When police “have been unable to locate a person suspected of involvement in a past crime,” they may “stop that person and ask questions, or check for identification.” United States v. Hensley, 469 U.S. 221, 229 (1985). Here, Sgt. Ball alleged that he knew Mr. Torres had warrants out for his arrest. J.A. 91, J.A. 126. As a result, he had probable cause to arrest Mr. Torres *once* he was able to locate him. See, e.g., Utah v. Strieff, 579 U.S. 232, 240 (2016) (explaining that a warrant is a “judicial mandate to an officer to conduct a search or make an arrest” (quoting United States v. Leon, 468 U.S. 897, 920 n.21 (1984))); United States v. Hudson, 405 F.3d 425, 435 (6th Cir. 2005) (stating that even when police arrest a wanted suspect under valid arrest warrants, they must demonstrate that they have verified the identity of the person they are arresting).

But the “existence of an arrest warrant is of no moment on the question whether a particular person police officers come across is in fact the subject of the warrant.” Hudson, 405 F.3d at 438 n.9. Police officers must still perform an adequate investigation to confirm the identity of a suspect *before* stopping them. Id. at 435. “The warrant supplies the officers with probable cause to arrest the person it names

and describes, not a license to duck the reasonable suspicion requirement and stop someone they only have a subjective hunch is that person.” Id. at 438 n.9.

A. Material Inconsistencies Regarding Why Sgt. Ball Stopped the Green Honda Preclude Summary Judgment.

It is undisputed that Sgt. Ball was only able to identify Mr. Torres *after* he had pulled over the green Honda Mr. Torres happened to be driving. J.A. 93, J.A. 122. And Sgt. Ball does not allege that the green Honda committed any traffic violations that would have justified him stopping the car. The question, then, is on what basis did Sgt. Ball stop the green Honda that March night? And was that basis sufficient to provide Sgt. Ball with reasonable articulable suspicion to believe that the driver of the car had committed a crime, or that the driver of the car was Mr. Torres? See Berkemer v. McCarty, 468 U.S. 420, 439 (1984). Sgt. Ball has given inconsistent accounts of why he stopped the green Honda that night, and one of his statements is contradicted by uncontroverted video evidence. These material inconsistencies preclude summary judgment.

In his Police Report, Sgt. Ball justified stopping the green Honda by claiming he had probable cause to believe that the car was stolen. See J.A. 122. But the body camera footage definitively disproved this account, showing that Sgt. Ball received the “10-75” code indicating the green Honda was stolen only *after* he had stopped the car and detained its occupants at gunpoint. J.A. 369 at 02:35–02:39. Therefore, if this version of events is to be believed, it is clear that Sgt. Ball *did not* have

reasonable articulable suspicion to pull over the green Honda. In fact, summary judgment would have to be granted in Mr. Torres' favor.

During the course of litigation and with his Police Report definitively disproven, Sgt. Ball changed his story for why he stopped the car, acknowledging in his Affidavit that he did not learn the car was stolen until *after* he had restrained Mr. Torres. See J.A. 95. Sgt. Ball claimed that he suspected Mr. Torres was driving the green Honda at the time of the stop because knowledge that a person has outstanding warrants ordinarily provides probable cause to arrest that person. J.A. 93.

If this were the true basis for the stop (Police Report notwithstanding), Sgt. Ball had to have reasonable articulable suspicion, and not just a hunch, that Mr. Torres was indeed the driver of the car *before* he was permitted to stop it. Terry v. Ohio, 392 U.S. 1, 27 (1968) (rejecting stops based on unparticularized suspicion or hunches); United States v. Arvizu, 534 U.S. 266, 274 (2002) (observing that an officer's reliance on a mere "hunch" is insufficient to justify a stop (quoting Terry, 392 U.S. at 27)). And according to Sgt. Ball's Affidavit, he stopped the green Honda because he believed, "[b]ased on . . . information from [an] informant and [his] corroboration of the informant's information . . . that [Mr.] Torres was operating the Vehicle and that Mr. Torres had . . . outstanding warrants for his arrest[.]" J.A. 93.

B. Material Inconsistencies Regarding the Confidential Informant's Tip Preclude Summary Judgment.

There are at least two factual disputes in the record that undermine the reliability of this alleged confidential informant's tip that a factfinder must resolve.

First, Sgt. Ball's statements about the informant are internally inconsistent. For instance, in the Police Report, Sgt. Ball described the tipster as a "Confidential Source of Information" without further qualification or detail regarding the informant's background or prior history of working with the police. J.A. 122. In the Affidavit, Sgt. Ball added that the informant had provided Sgt. Ball "with reliable information in the past." J.A. 91. Because only tips possessing sufficient "indicia of reliability" may provide part of the basis for reasonable articulable suspicion, Florida v. J.L., 529 U.S. 266, 270 (2000), and an objective track record of providing reliable information in the past is a powerful indicator of reliability, United States v. Gondres-Medrano, 3 F.4th 708, 717 (4th Cir. 2021), the inconsistencies in how Sgt. Ball described the informant's background are critical to determining the tipster's reliability and whether their tip could contribute to the basis for reasonable articulable suspicion. J.L., 529 U.S. at 270; Adams v. Williams, 407 U.S. 143, 147 (1972); Alabama v. White, 496 U.S. 325, 330 (1990); see also Illinois v. Gates, 462 U.S. 213, 233-34 (1983) (explaining how to apply the "totality of the circumstances" test to tips).

Second, the content of the informant’s tip changed between the Police Report and Affidavit. In the Police Report, Sgt. Ball claimed the tipster alleged that Mr. Torres “*had been frequenting* 130 Flat Top Mountain [Road]” and “was operating a dark green Honda car with dark tinted windows.” J.A. 122. In the Affidavit, Sgt. Ball stated that the informant alleged that Mr. Torres “has been *staying* at 130 Flat Top Mountain Road” and “has been driving a dark green Honda *Accord* with dark tinted windows.” J.A. 91 (emphasis added). Tips which lack sufficient “indicia of reliability” may provide part of the basis for reasonable articulable suspicion only after police corroborate the tipster’s predictions of the suspect’s future movements. See Alabama, 496 U.S. at 329. Thus, these inconsistencies raise questions about both the substance of the tip—whether it contained any predictions evincing the tipster’s awareness of the target’s affairs—and the extent to which Sgt. Ball corroborated those predictions. See J.L., 529 U.S. at 271 (finding an anonymous tip lacked sufficient indicia of reliability because it did not contain predictive information by which the police could test the informant’s knowledge or credibility). Moreover, whether the tipster alleged a specific model (“Accord”), or Sgt. Ball invented this extra detail after stopping the car plays a crucial role in evaluating the vagueness and genericness of the tip. Cf. Gondres-Medrano, 3 F.4th at 717 (holding that vague tips may defeat probable cause even when provided by reliable informants).

There are also factual questions about the level of investigation Sgt. Ball performed to corroborate the tip, because the only “corroboration” that Sgt. Ball did was going to Flat Top Mountain Road, and there are material disputes as to what he saw there.

In the Police Report, Sgt. Ball claimed that he saw “someone” walking around a green Honda at 130 Flat Top Mountain Road. J.A. 122. Later, in his Affidavit, Sgt. Ball’s story morphed, and he now claimed that he saw a “male person” walking around the car while it was parked who Sgt. Ball “believed” to be Mr. Torres. J.A. 92–93. And Mr. Torres called into question Sgt. Ball’s entire account, explaining that there are no “street lights on Flat Top Mountain Rd.” and “130 Flat Top Mountain is located off road at [an] angle” and therefore the driveway cannot be seen “clearly” from the street, “let alone at 3 AM in the morning.” J.A. 304 (which is corroborated by maps of the scene). Therefore, there are factual questions about what Sgt. Ball saw before he decided to follow a green Honda and pull it over, and those factual questions are important to whether he had reason to believe that Mr. Torres was the driver of the car. Summary judgment “cannot lie” where there are “conflicting versions of the facts which require credibility determinations.” See Raynor v. Pugh, 817 F.3d 123, 130 (4th Cir. 2016).

Not only did the District Court impermissibly credit Sgt. Ball’s account of events in his Affidavit, it also improperly drew inferences in Sgt. Ball’s favor. Cf.

Anderson, 477 U.S. at 255 (“The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

When holding that Sgt. Ball has reasonable articulable suspicion for the stop, the District Court remarked that Sgt. Ball “observed a male entering a dark green Honda Accord and leaving 130 Flat Top Mountain Road,” J.A. 332, even though Sgt. Ball only attested to seeing “a male person walking around the area where the Vehicle was located” and never mentioned seeing that person get in the car. J.A. 92. The District Court also accepted the implication that this figure was Mr. Torres. J.A. 332. But this conclusion ignored Mr. Torres’s statements that Sgt. Ball’s alleged observations were physically implausible because of the lack of visibility at 130 Flat Top Mountain Road. See generally J.A. 301. The credibility of those alleged observations is critical to determining whether Sgt. Ball obtained the corroboration required for anonymous tips. See J.L., 529 U.S. at 270.

There are here, plainly, disputes as to material facts germane to determining whether Sgt. Ball possessed the reasonable articulable suspicion required by the Fourth Amendment. See Assa’ad-Faltas v. Richland Cnty. Sherriff’s Dep’t, No. 3:18-00578-MGL, 2020 WL 1303141 (D.S.C. Mar. 19, 2020) (holding that contradictory statements material to a finding of reasonable suspicion in conducting a traffic stop preclude summary judgment in a Section 1983 action) (citing Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 569 (4th Cir. 2019)). Given the

competing assertions regarding material facts of Mr. Torres’s encounter with Sgt. Ball, the District Court impermissibly credited Sgt. Ball’s version of events and discarded Mr. Torres’s. Tolan, 572 U.S. at 657 (“By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly ‘weigh[ed] . . . evidence’ and resolved disputed issues[.]”).¹¹

C. Questions Surrounding Sgt. Ball’s Credibility Preclude Summary Judgment.

Moreover, given that Sgt. Ball has given inconsistent reasons for stopping the green Honda, a jury should decide whether he is credible at all. See Fed. R. Civ. P. 56(e) advisory committee’s note to 1963 amendment (“Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.”). As the Eighth Circuit has explained, “where specific facts are alleged that if proven would call the credibility of the moving party’s witness into doubt, summary judgment is improper.” United States v. Real Prop. Located at 3234 Washington Ave. N., Minneapolis, Minn., 480 F.3d 841, 845 (8th Cir. 2007) (quoting Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81 (8th Cir. 1987)); see also Sartor

¹¹ See also Raynor, 817 F.3d at 130 (holding that “where ‘affidavits present conflicting versions of the facts which require credibility determinations,’ summary judgment cannot lie (quoting Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979)); Vathekan v. Prince George’s Cnty., 154 F.3d 173, 180 (4th Cir. 1998) (holding that a conflict between sworn statements “create[] question[s] about . . . credibility . . . for the jury to resolve”).

v. Arkansas Gas Corp., 321 U.S. 620, 628 (1944) (emphasizing that resolving a case on summary judgment robs the factfinder of the ability to assess “trustworthiness of testimony” by cross-examination); 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2726 (4th ed. 2022) (“Doubts as to the credibility of the movant’s affiants or witnesses may lead the court to conclude that a genuine issue of material fact exists.”).

Here, Sgt. Ball’s reason for the stop changed during the course of litigation after it was revealed that his own bodycam footage “clearly contradicts the version of the story told [in his Police Report].” Scott, 550 U.S. at 378.¹² And with his earlier story conclusively disproven, the details regarding the confidential informant evolved during the course of this litigation now that Sgt. Ball had to rely on that alleged tip as providing reasonable suspicion for the traffic stop. Under these circumstances, a factfinder could infer that Sgt. Ball crafted the words in his

¹² In Scott v. Harris, the Supreme Court held that the presence of dashcam footage capturing the police conduct challenged in a Section 1983 action presented a “wrinkle” in the summary judgment analysis. 550 U.S. at 378. There, the Court held that the videotape contradicted the plaintiff, thus making it impossible to credit the nonmoving party’s version of events. Id. at 380-81. But in this case, the opposite is true: the videotape contradicts the moving party, the *defendant*, in at least two critical places. J.A. 369 at 02:35-02:39 (showing that Ball did not know that the green Honda was stolen prior to initiating the traffic stop) and J.A. 369 at 05:19 (showing that Ball did not positively identify Mr. Torres until after he was already restrained). Because the Scott v. Harris “wrinkle” is not present in this case, the court can (and indeed, must) view all facts in the light most favorable to the nonmoving party. Tolan, 572 U.S. at 651

Affidavit “in an attempt to clothe a totally anonymous source with ‘genuine substance.’” See United States v. Bynum, 293 F.3d 192, 198 (4th Cir. 2002) (discrediting affiants whose apparent tactics suggest they know they lack the requisite cause). These types of credibility questions must go to a jury.¹³

The glaring inconsistencies on the record before the District Court regarding the justification for the stop, when Sgt. Ball learned the car was stolen, whether the tipster had provided reliable information in the past, the content of the informant’s tip, and what Sgt. Ball observed when he allegedly scouted 130 Flat Top Mountain Road are all disputed facts critical to resolving the reasonable articulable suspicion issue. See United States v. Cortez, 449 U.S. 411, 417 (1981) (requiring consideration

¹³ A finding that Sgt. Ball violated Mr. Torres’ rights would not be an aberration for his department; the Buncombe County Sherriff’s Department has been the subject of numerous lawsuits. See Joel Burgess, “Buncombe resident awarded \$50k after sheriff’s deputy Asheville gas station strip search,” Asheville Citizen Times (Aug. 4, 2022, 12:37 P.M.), <https://www.citizen-times.com/story/news/2022/08/04/black-man-awarded-50000-after-asheville-gas-station-strip-search/10234583002/>; Hyatt v. Miller, No. 1:19-cv-00250-MR-WCM, 2022 WL 3130108 (W.D.N.C. Aug. 3, 2022); Joel Burgess, “Another Black resident has sued over strip search in Asheville traffic stop,” Asheville Citizen Times (Oct. 24, 2022, 5:16 A.M.), <https://www.citizen-times.com/story/news/local/2022/10/24/asheville-another-black-resident-sues-over-traffic-stop-strip-search/69577814007/>; Joel Burgess, “Officer under investigation put on leave; Buncombe County deputy facing SBI investigation for alleged excessive force,” Asheville Citizen Times, Apr. 6, 2022, at A1; Joel Burgess, “Judge: Buncombe deputy McDonald guilty of assault; kneed man lying handcuffed facedown,” Asheville Citizen Times (Feb. 11, 2022, 5:46 P.M.), <https://www.citizen-times.com/story/news/2022/02/11/buncombe-deputy-guilty-assault-kneeing-man-handcuffed-facedown/6755374001/>.

of “the totality of the circumstances—the whole picture”); United States v. Foster, 824 F.3d 84, 94 (4th Cir. 2016) (holding that a small detail that “tied all of the factors into a coherent whole” was critical in finding that an officer had reasonable suspicion). In sum, there are a number of genuine disputes of material fact that are left to be resolved. This Court should reverse the District Court’s grant of summary judgment.

II. EVEN IF THE DISTRICT COURT WAS CORRECT IN ADOPTING THE VERSION OF EVENTS IN SGT. BALL'S AFFIDAVIT, SGT. BALL VIOLATED THE FOURTH AMENDMENT BY ACTING WITHOUT REASONABLE ARTICULABLE SUSPICION.

Even crediting the version of events outlined in Sgt. Ball's Affidavit, the District Court erred as a matter of law because the facts as outlined in the Affidavit fail to support the District Court's conclusion that Sgt. Ball possessed reasonable articulable suspicion to stop the green Honda.

A. The Anonymous Tip Lacked Sufficient Indicia of Reliability to Provide Sgt. Ball with Reasonable Suspicion to Stop Mr. Torres.

According to his prepared-for-litigation Affidavit, Sgt. Ball stopped the green Honda because he had believed "[b]ased on . . . information from [an] informant and [his] corroboration of the informant's information . . . that [Mr.] Torres was operating the Vehicle and that Mr. Torres had . . . outstanding warrants for his arrest" J.A. 93. This tip alleged that Mr. Torres "ha[d] been staying at 130 Flat Top Mountain Road" and "driving a dark green Honda Accord," but did not allege that Mr. Torres had engaged in criminal conduct. J.A. 91.

In cases where an informant's tip supply part of the basis for reasonable suspicion, courts must ensure that the tip possessed sufficient "indicia of reliability." J.L., 529 U.S. at 270; Adams, 407 U.S. at 147; White, 496 U.S. at 326-27. This requirement applies to tips, such as the one at issue here, that allege how to identify a person but do not directly allege that the person is engaged in criminal conduct.

Cf. J.L., 529 U.S. at 272 (requiring a tip asserting illegality to be reliable in its “assertion of illegality” *as well as* its “tendency to identify a determinate person”). The indicia of reliability requirement applies to tips asserting identity alone because “tips, completely lacking in indicia of reliability . . . either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.” White, 496 U.S. at 329 (quoting Adams, 407 U.S. at 147). An unreliable tip does not “warrant a man of reasonable caution in the belief” that [a stop] was appropriate.” Id. (quoting Terry, 392 U.S. at 22).

Whether Sgt. Ball’s tip possessed sufficient indicia of reliability depends principally on analyzing the identity of the alleged tipster. See United States v. Perkins, 363 F.3d 317, 323 (4th Cir. 2004) (comparing reliability of face-to-face and known informants with anonymous tipsters). Sgt. Ball claimed the informant was a known informant who had previously provided him reliable information in the past. J.A. 91. Whether or not this tipster was known is significant because tips from known informants are generally regarded as reliable whereas tips from anonymous informants are not. J.L., 529 U.S. at 270. Known informant tips are distinguished from anonymous source tips based on the presence of sufficient indicia of reliability, including the informant’s track record of providing reliable information in the past, whether the informant can be held criminally liable for misleading or deceiving police, the informant’s readily observable demeanor, the informant’s proximity to

the reported activity, and the possibility that the tipster could face retribution at the hands of the accused. See, e.g., United States v. Johnson, 592 F.3d 442, 449 (3d Cir. 2010) (describing several factors informing the assessment of the reliability of an informant’s tip).

None of the aforementioned indicia of reliability are present in this case. First, while Sgt. Ball claimed his informant was reliable, confidential informants must be *proven* trustworthy through objective track records that show a history of providing reliable information. See Gondres-Medrano, 3 F.4th at 716 (requiring corroboration of the informant’s tip when there is no “track record” of reliability); State v. Hughes, 539 S.E.2d 625, 628 (N.C. 2000) (requiring proof that the informant had been previously used and was reliable); State v. Benters, 766 S.E.2d 593, 599 (N.C. 2014) (requiring a “track record” of providing reliable information). In the present case, the only indicum of reliability regarding the informant’s trustworthiness in Sgt. Ball’s Affidavit is Ball’s own assertion that the informant had provided “reliable information in the past.” J.A. 91. This conclusory assertion is not enough to make the tip reliable. See, e.g., United States v. Brack, 188 F.3d 748, 755 (7th Cir. 1999) (holding that an affidavit stating that affiants “ha[d] received reliable information from a credible person” was so conclusory that the tip would be treated as though it had been “obtained from an informant of ‘unknown reliability’”).

Second, Sgt. Ball’s confidential informant’s tip lacks reliability because the informant could not be held criminally liable for the information that they provided to Sgt. Ball. United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000) (explaining that the tipster was more reliable because she exposed herself to the repercussions of misleading or deceiving police); United States v. Griffin, 589 F.3d 148, 152 (4th Cir. 2009); see also Hughes, 539 S.E.2d at 628–29 (tying reliability to whether the informant’s statement was against their penal interest); Benters, 766 S.E.2d at 599 (same). In Christmas, for example, this Court held that the informant’s tip that their neighbor had guns and drugs on their porch was reliable because the tipster faced criminal liability if it turned out that her report was false. 222 F.3d at 144. Here, in contrast, there was no risk the informant would face criminal liability if the police were unable to substantiate the tip’s connection between Mr. Torres, a green Honda Accord, and 130 Flat Top Mountain Road, as the tip did not lodge any accusation of criminal activity. Cf. Christmas, 222 F.3d at 144 (placing primacy on the ability of police to hold the informant liable for falsely alleging the presence of drugs and guns).¹⁴

¹⁴ In North Carolina, it is not a crime to make a false, deliberately misleading, or unfounded report to law enforcement unless the person made the report to interfere with the law enforcement agency or hinder or obstruct the officer in the performance of their duties. N.C. Gen. Stat. Ann. § 14-225 (West 2022). The allegations lodged by the informant here—that Mr. Torres “has been staying at 130 Flat Top Mountain Road” and “driving a dark green Honda Accord”—would not

Third, tips provided face-to-face are regarded as more reliable than tips relayed secondhand or over the phone, because they allow police to personally evaluate the tipster's credibility and demeanor. Christmas, 222 F.3d at 144; Perkins, 363 F.3d at 323; Griffin, 589 F.3d at 152; United States v. Mitchell, 963 F.3d 385, 393 (4th Cir. 2020). The record is silent as to how Sgt. Ball received this alleged tip. See J.A. 91 (failing to describe how Sgt. Ball communicated with the informant). There is no evidence he received the tip in person or over the phone, and therefore, no evidence Sgt. Ball observed and assessed the tipster's demeanor.

Finally, tips provided while the tipster is still near the alleged criminal activity are regarded as reliable because proximity suggests direct observation of the alleged criminal activity, and reporting near the activity places the tipster at risk of reprisal. Christmas, 222 F.3d at 144; Perkins, 363 F.3d at 322; Griffin, 589 F.3d at 152-53; Mitchell, 963 F.3d at 394. There is no evidence that the tipster relayed this information to Sgt. Ball while physically proximate to Mr. Torres or reported this information publicly such that the tipster faced a risk of reprisal. See J.A. 90–96. (failing to describe how the informant obtained this information). Nor is there any

have been rendered false, misleading, or unfounded merely by Sgt. Ball's inability to prove the tip's veracity. J.A. 91. Rather, to hold the informant legally liable, Sgt. Ball would have faced the nearly insurmountable burden of proving that Mr. Torres had *never* driven a dark green Honda or stayed at 130 Flat Top Mountain Road. Cf. N.C. Gen. Stat. Ann. § 14-225 (proscribing "false," "deliberately misleading," or "unfounded" reports).

indication that the tipster knew that Mr. Torres had been involved in any alleged criminal activity.

When other indicia of reliability are absent, courts treat informants as anonymous tipsters, notwithstanding contrary assertions that the informant had provided reliable information in the past. See J.L., 529 U.S. at 270 (treating a tipster as anonymous because the informant’s identity was not known, their reputation could not be assessed, and they could not be held responsible if their allegations turned out to be fabricated (citing Williams, 407 U.S. at 146–47)); see also Hughes, 539 S.E.2d at 629 (refusing to apply the “confidential and reliable informant standard” because there were insufficient indicia of reliability despite the officer’s assertion that the informant was confidential and reliable). The District Court should have subjected Sgt. Ball’s alleged informant to the reliability standard for anonymous informants. See Hughes, 539 S.E.2d at 629 (refusing to apply the “confidential and reliable informant standard” to a conclusory assertion of reliability). Had it done so, it would have been clear that the tip in question did not provide Sgt. Ball with reasonable articulable suspicion to pull over the green Honda.

B. The Anonymous Tip Did Not Support Reasonable Articulable Suspicion Because It Was Vague and Generic and Sgt. Ball Failed to Sufficiently Corroborate the Tip’s Assertion Connecting Mr. Torres to the Green Honda Accord and Flat Top Mountain Road.

The anonymous tipster could not have provided Sgt. Ball with reasonable articulable suspicion unless the tipster predicted Mr. Torres’s movements and

actions in a manner indicating the tipster's familiarity with or insider knowledge of Mr. Torres's affairs. See J.L., 529 U.S. at 271 (finding an anonymous tip lacked sufficient indicia of reliability because it did not contain predictive information by which the police could test the informant's knowledge or credibility). If Sgt. Ball had corroborated the informant's predictions prior to the stop, then the tip and corroboration together may have given rise to reasonable articulable suspicion. See id. at 270–71. However, corroboration is unavailing if the tip is so bare-bones and vague that the predicted details apply to too many people. Hughes, 539 S.E.2d at 632. And a vague and generic tip may defeat reasonable articulable suspicion even when provided by a known reliable informant. Cf. Gondres-Medrano, 3 F.4th at 717 (“[O]utlandish, vague, or contradictory information provided by a known reliable informant, even an informant who had given verified tips before, may defeat probable cause.”).

When an anonymous tipster alleges identity alone, the requisite corroboration has a different quality than in the typical case where a tipster alleges criminality. Cf. J.L., 529 U.S. at 272 (distinguishing reliability as to identification from reliability as to the likelihood of criminal activity). Here, Sgt. Ball needed to corroborate the connection between the subject of the tip, Mr. Torres, and the tipster's identifying information, namely the green Honda Accord and the address at 130 Flat Top Mountain Road. Otherwise, an alleged informant could use the police to harass an

innocent third party by falsely reporting that a bundle of observations—e.g., a particular make and model of car, driven near a particular address—corresponded to the subject of an arrest warrant, such as Mr. Torres, when it in fact corresponded to the person the tipster sought to harass. Cf. J.L., 529 U.S. at 272. And the existence of an arrest warrant does not undermine the potential for harassment given that over 7.8 million Americans have outstanding warrants, often for minor offenses such as traffic violations, and are therefore at risk of having their identities used in this manner by harassers. See Strieff, 579 U.S. at 249-50 (Sotomayor, J., dissenting) (explaining that “[o]utstanding warrants are surprisingly common” (citing Dep’t of Just., Bureau of Just. Stat., Survey of State Criminal History Information Systems, 2014, Table 5a (2015), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf> (last visited Nov. 19, 2022))).

For instance, an anonymous aggrieved homeowner who disliked their neighbor and knew that police were actively searching for a suspect could have called Sgt. Ball, and told him that the suspect was driving the neighbor’s green Honda and frequenting the neighbor’s home address. If Sgt. Ball arrived to investigate, he would have most likely observed a green Honda near the address. However, this could not have provided reasonable articulable suspicion, as nothing about those observations indicated that the tipster was familiar with the suspect’s affairs. See J.L., 529 U.S. at 271 (“All the police had to go on in this case was the

bare report of an unknown, unaccountable informant who neither explained how he knew about the [subject's identifying behaviors] nor supplied any basis for believing he had inside information about [the subject].”). Only by corroborating that the green Honda or address were connected to the suspect—e.g., through direct observation of someone resembling the suspect entering the car, or public records indicating that the suspect lived at the address—could Sgt. Ball establish the informant's reliability with respect to knowledge of the suspect's identity and thereby obviate the risk of harassment.

Sgt. Ball failed to obtain the corroboration required to establish the anonymous informant's reliability. As a threshold matter, the tipster's allegations did not predict Mr. Torres's future movements. See J.A. 91 (alleging that Mr. Torres “*has been staying*” at a particular address and “*has been driving*” a particular car (emphasis added)). Although these allegations seemingly described Mr. Torres's present conduct, they did not indicate whether that conduct would continue. J.A. 91. Importantly, because the record does not indicate when Sgt. Ball received the tip, or when the informant acquired the information constituting the tip, it is not possible to infer the time period over which the conduct described by the tipster allegedly occurred. J.A. 91. If the tip was based on months-old information, then even the Affidavit, which used the present progressive tense, described past conduct. J.A. 91.

Even if the tipster impliedly predicted that Mr. Torres would be driving a green Honda near 130 Flat Top Mountain Road sometime in the future, the fact that Sgt. Ball actually observed a green Honda near 130 Flat Top Mountain Road failed to corroborate the alleged connection between Mr. Torres (i.e., the subject of the tip), the green Honda, and the address (i.e., the information by which the tipster alleged Mr. Torres could be located). Nothing about observing a green Honda near 130 Flat Top Mountain Road supported the inference that the informant knew anything about Mr. Torres's affairs, unless Sgt. Ball assumed that Mr. Torres was linked to the car and the address. But the source of that assumption could only be the anonymous informant whose reliability had not yet been established. Therefore, Sgt. Ball needed to corroborate the informant's assertion of a link between Mr. Torres and the car or the address before Sgt. Ball could rely on the informant's tip. Cf. J.L., 529 U.S. at 272 (discussing reliability as to identification). Because Sgt. Ball did not confirm Mr. Torres was driving the car or observe any physical characteristics of the driver of the green Honda until *after* he stopped it, Sgt. Ball failed to corroborate any link between the car and Mr. Torres. See J.A. 92–93 (indicating no observations of the driver's physical characteristics). In fact, other than the anonymous informant's uncorroborated tip, there is no evidence in the record indicating a link between the address and Mr. Torres at all. See J.A. 91, J.A. 122.

Furthermore, Sgt. Ball’s Affidavit narrative that he observed the green Honda while it was parked at 130 Flat Top Mountain Road, and that he observed a “male person” walking near the vehicle is of dubious credibility and insufficient to corroborate the tip. See J.A. 92.¹⁵ Even if these alleged observations were credible, they were insufficient to establish any link between Mr. Torres and the car or the address. “Male person” is almost entirely nondescriptive and contains no information about height, weight, race, ethnicity, or other distinguishing features. Nor did Sgt. Ball claim to see the “male person” get into the car. Notably, Sgt. Ball did not claim to see the driver until *after* he stopped the vehicle. See J.A. 92–93. Hence, Sgt. Ball’s observation of a “male person” linked Mr. Torres to the green Honda no more than it linked any other “male” resident of the area to the car in question.

The Supreme Court of North Carolina has already grappled with the amount of corroboration required for vague and generic tips. In State v. Hughes, the Supreme Court of North Carolina held that a tip containing information about a suspect’s race,

¹⁵ The house at 130 Flat Top Mountain Road is several hundred feet away from the end of the driveway, downhill, and obscured entirely by dense woods. See Image 1. There are no streetlights on Flat Top Mountain Road, yet Sgt. Ball claimed he was able to observe the car, and a “male person” walking around the car, at 3:00 AM. See J.A. 92. Sgt. Ball did not explain in either his Police Report or Affidavit how he was able to distinguish between a dark green Honda or a black, navy or brown car, in the pitch-black night. See J.A. 92. Moreover, he did not describe how he was able to discern that the unidentified figure was a “male person,” as opposed to a woman. See J.A. 92.

gender, height, weight, age and clothing along with the allegation that the suspect would be carrying cocaine and “‘sometimes’ came to Jacksonville on weekends, ‘sometimes’ took a taxi from the bus station, ‘sometimes’ carried an overnight bag, and would be heading” to a specific location was altogether not specific enough to provide officers with reasonable suspicion even after police corroborated several of its details. Hughes, 539 S.E.2d at 631. The court found that even with this amount of information, officers did not possess reasonable articulable suspicion because the tip “did not contain the ‘range of details’ required . . . to sufficiently predict defendant’s specific future action, [and] was . . . peppered with uncertainties and generalities.” Id.

If the tip in Hughes was insufficient, the tip here must certainly fail too, as the information the alleged tipster gave Sgt. Ball was far less detailed and was “peppered with uncertainties and generalities.” Id. At most, the tipster alleged that Mr. Torres “has been staying at 130 Flat Top Mountain Road” and “has been driving a dark green Honda Accord with dark tinted windows.” J.A. 91. The tip provided no information about *when* Mr. Torres could be found at 130 Flat Top Mountain Road, and it failed to provide additional identifying features of the car, such as the vehicle’s year, the state of registration, the license plate number, or other features by which the vehicle could be identified. See J.A. 91. Because *any* green Honda driving in the vicinity of Fairview, North Carolina would have satisfied the description

contained in the tip, Sgt. Ball's observations were insufficient to corroborate the vague tip and establish reasonable articulable suspicion. See Hughes, 539 S.E.2d at 631. ("Although the informant's description of [the suspect] himself was more detailed, [corroboration of] this description alone is not enough, as it could be attributed to any number of travelers.").

Furthermore, Sgt. Ball noted while he followed the Honda that it had Tennessee plates. J.A. 93. The fact that the green Honda had Tennessee license plates undermined the inference that the driver was Mr. Torres, because according to Sgt. Ball, he believed Mr. Torres was living in North Carolina and there is nothing in the record connecting Mr. Torres to Tennessee. Cf. J.A. 91, J.A. 103 (indicating Mr. Torres's address is in North Carolina). Finally, Sgt. Ball never observed Mr. Torres "frequenting" or "staying at" 130 Flat Top Mountain Road. Nor did he confirm Mr. Torres was near 130 Flat Top Mountain Road until after he stopped the green Honda over a mile away. See Image 2. In fact, the alleged tipster was wrong—Mr. Torres did not live at 130 Flat Top Mountain Road. See J.A. 103 (listing Mr. Torres' known address as 45 Edwards Rd, Fairview, NC.).

Had the informant's tip contained detailed assertions with a predictive, temporal quality, and had Sgt. Ball made realistic, detailed observations connecting Mr. Torres to the car or the address, the tip would have more closely approached the requirements of the Fourth Amendment. For example, the tipster could have asserted

that Mr. Torres would be seen *entering* a green Honda and driving *away from* 130 Flat Top Mountain Road *early in the morning* of March 3. Sgt. Ball could have then driven past the green Honda and observed the driver's physical characteristics. Or, he could have simply waited to initiate the stop until after he finished running the vehicle's plates.

However, the tip did not predict Mr. Torres's future movements, rendering it insufficient to establish the informant's reliability. Even if the tip is charitably characterized as predicting Mr. Torres's future movements, Sgt. Ball did not obtain the requisite corroboration. By upholding this stop based on a vague, uncorroborated tip, the District Court increased the risk that *many* innocent drivers will be stopped at gunpoint in the future, simply because they drive a make and model of car named in an anonymous informant's tip. Such "standardless and unconstrained discretion" is constitutionally intolerable. Delaware v. Prouse, 440 U.S. 648, 661 (1979).

Sgt. Ball knew when crafting his Affidavit that he had to assert either that the alleged informant had been reliable in the past or that he had corroborated elements of the alleged informant's tip. Sgt. Ball did neither. By framing his "confidential source of information" as a "known informant," Sgt. Ball nodded to courts' traditional aversion to tips from anonymous sources. Furthermore, by explicitly claiming to have "corroborat[ed] . . . the informant's information," Sgt. Ball

acknowledged that his tip lacked the requisite indicia of reliability. J.A. 93. Unfortunately, Sgt. Ball's efforts to head off these issues also created material inconsistencies and factual disputes which precluded summary judgment. But even from this contested record, it is apparent that Sgt. Ball violated Mr. Torres's Fourth Amendment rights. This Court should reverse the District Court's grant of summary judgment.¹⁶

¹⁶ In addition to challenging the legality of the initial stop, Mr. Torres argued to the District Court that his arrest was unlawful, Sgt. Ball used excessive force, the vehicle search was illegal, and he was illegally charged and falsely imprisoned. See J.A. 10–11, J.A. 19–22. Because each of Mr. Torres's claims stemmed from the illegality of the initial stop, the District Court must address each of Mr. Torres's remaining claims, including his excessive force claim, on remand.

CONCLUSION

For these reasons, this Court should reverse the judgment of the District Court and remand for further proceedings.



Daniel S. Harawa (Counsel of Record)
Daniel J. Cook (Student Counsel)
Zachary L. Sanders (Student Counsel)
Sophie Spears (Student Counsel)
NEW YORK UNIVERSITY SCHOOL OF LAW
Federal Appellate Clinic
245 Sullivan Street
Room 620
New York, NY 10012
(212) 998-6430
dh33544@nyu.edu

REQUEST FOR ORAL ARGUMENT

Mr. Torres respectfully requests that oral argument be granted in this case, pursuant to Rule 34(a) of the Federal and Local Rules of Appellate Procedure. The factual and legal issues presented in this case are sufficiently complex that oral argument would aid this Court in its decisional process.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 10,677 words.



Daniel S. Harawa

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.



Daniel S. Harawa