NO. 21-6447

In The

United States Court Of Appeals

For The Fourth Circuit

JONATHAN ANTHONY LEE TORRES,

Plaintiff - Appellant,

v.

NATHAN BALL, Sergeant, Buncombe County Sheriff Office, individual capacity; DANE R. ONDERDONK, Deputy, Buncombe County Sheriff Office, individual capacity; TIMOTHY R. TAYLOR, Deputy, Buncombe County Sheriff Office, individual capacity,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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

No. 21-6447 Caption: Torres v. Ball

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nathan Ball
(name of party/amicus)

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

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

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

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

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

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

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

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

Signature: /s Curtis W. Euler Date: 1-12-2023

Counsel for: Appellee

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-6447 Caption: Torres v. Ball

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dane Onderdonk
(name of party/amicus)

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

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Signature: /s Curtis W. Euler Date: 1-12-2023

Counsel for: Appellees

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 21-6447 Caption: Torres v. Ball

Pursuant to FRAP 26.1 and Local Rule 26.1,

Timothy Taylor
(name of party/amicus)

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

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s Curtis W. Euler Date: 1-12-2023

Counsel for: Appellees

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ISSUES PRESENTED

I. Whether Sergeant Nathan Ball had reasonable articulable suspicion sufficient to justify an investigatory stop of Jonathan Anthony Lee Torres on March 3, 2018, based on all the facts, information, and circumstances known to Sergeant Ball at the time.

II. Whether Jonathan Anthony Lee Torres presented the district court with a genuine dispute over any material fact such that it precluded summary judgment in Defendants' favor.

III. Whether Defendants are entitled to qualified immunity.

STATEMENT OF THE CASE

On March 27, 2019, Plaintiff-Appellant Jonathan Anthony Lee Torres ("Torres") filed a complaint in the United States District Court for the Western District of North Carolina against Nathan Ball, a Buncombe County Sheriff's Office ("BCSO") patrol sergeant ("Sergeant Ball"); Dane R. Onderdonk ("Deputy Onderdonk") and Timothy Taylor ("Deputy Taylor"), BCSO patrol deputies (collectively, "Defendants") arising from a traffic stop and subsequent search, seizure, and arrest resulting therefrom approximately one year earlier. (J.A. 8-37). Following the district court's frivolity review, Torres' remaining claims included alleged violations of his Fourth Amendment rights to be free from excessive force, unreasonable search and seizure, false imprisonment, and malicious

prosecution pursuant to 42 U.S.C. § 1983, as well as violations of the North Carolina Constitution. [Doc. 6].

A. Law Enforcement's Attempts to Locate Torres

On February 26, 2018, the BCSO issued an Attempt to Locate ("ATL") for Torres (J.A. 91, J.A. 97). The ATL notified Sergeant Ball that Torres had outstanding warrants for felonious breaking and entering and felony larceny after breaking and entering, and nine plus warrants in Henderson County (J.A. 91, J.A. 97). The ATL said that Torres was staying at 45 Edwards Road, Fairview, NC 28730 (J.A. 97). In addition, on February 27, 2018, in a Command Staff Meeting ("ComStat") meeting, the BCSO notified Sergeant Ball to be on the lookout for Torres and that Torres had a number of outstanding warrants in Buncombe County and Henderson County, North Carolina (J.A. 103). In response to these notices, on or around February 27, 2018, Sergeant Ball went into the County's computer system to verify that Torres had outstanding warrants (J.A. 91). Sergeant Ball also saw Torres' prior criminal history which included multiple charges of assault with a deadly weapon, intimidating witness, communicating threats, and possession of drugs (J.A. 105-121). In an effort to locate Torres, Sergeant Ball talked to a confidential informant ("CI"). This CI had given Sergeant Ball reliable information in the past (J.A. 91). The CI told Sergeant Ball that Torres

had been staying at 130 Flat Top Mountain Road, Fairview, NC 28730 (J.A. 91). The CI also stated that Torres was driving a dark green Honda Accord with dark tinted windows (J.A. 91). When not responding to calls for service, Sergeant Ball was attempting to locate Torres. Sergeant Ball would drive by 45 Edwards Road and 130 Flat Top Mountain Road to see if he could locate Torres (J.A. 92).

B. <u>Sergeant Ball Locates Torres in the Early Morning of March 3, 2018</u>.

On March 3, 2018, the moon was waning gibbous meaning it was one day after the full moon.[1] Ninty-seven percent (97%) of the moon was illuminated. At 3 AM, the moon would be around its highest point in the sky before starting to set. *Id.* Historical weather information recorded by weather station KNCFAIRV11, which is on top of Flat Top Mountain and records conditions every five (5) minutes, indicated that it was clear and cold (28°F) with humidity around 35% and zero precipitation.[2]

Additionally, since it was early March, there was little foliage on the trees. Defendants submit the following picture from Buncombe County's GIS website of a 2015 Ariel Photograph of 130 Flat Top

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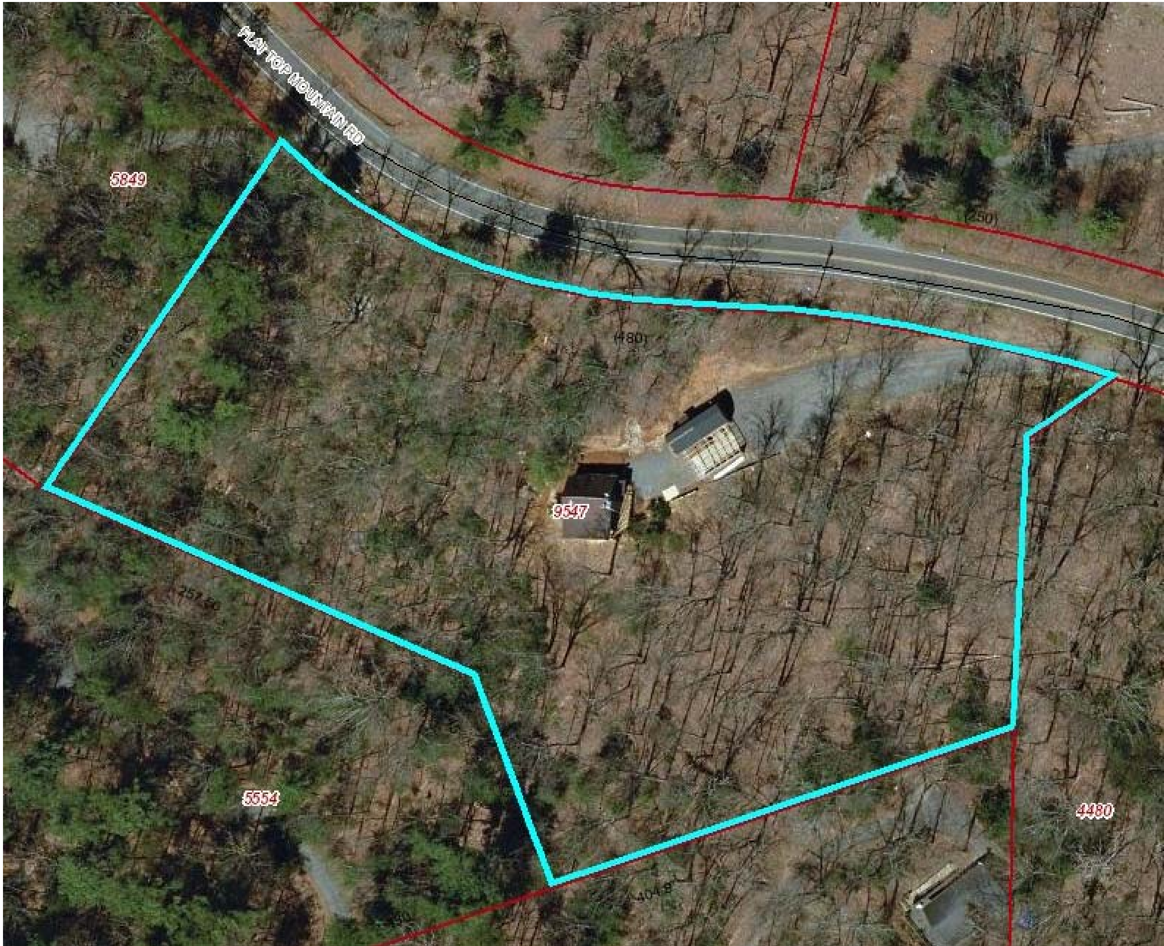
[1] https://www.moongiant.com/phase/3/03/2018/

[2] *See* https://www.wunderground.com/dashboard/pws/KNCFAIRV11/table/2018-03-3/2018-03-3/daily

Mountain Road, Property Identification Number 969712954700000 which is a better representation of the foliage around that time of year.[3]



In the early morning of March 3, 2018, at approximately 3:00 a.m., Sergeant Ball drove past 130 Flat Top Mountain Road and noticed that a dark green Honda Accord, the same make, model, and color vehicle that the CI said Torres was driving, ("the Vehicle") was parked with its trunk open (J.A. 92). Sergeant Ball also noticed a male person walking near

[3] https://gis.buncombecounty.org, PIN Number 969712954700000

the Vehicle (J.A. 92). Sergeant Ball believed that the Vehicle would not leave 130 Flat Top Mountain Road until the patrol car drove off (J.A. 92). Sergeant Ball drove towards Old Fort Road, parked in another driveway and turned off his lights (J.A. 92). A few minutes later the Vehicle drove past Sergeant Ball heading towards Old Fort Road (J.A. 92). Sergeant Ball pulled out of the driveway and followed the Vehicle (J.A. 92). The Vehicle turned left on to Old Fort Road and then turned onto a private driveway at 714 Old Fort Road (J.A. 92-93) (J.A. Vol II at 0:55). Fearing a foot chase, Sergeant Ball activated his body camera (J.A. 93) (J.A. Vol II at 0:59).

Based on the information Sergeant Ball had received from Sergeant Ball's CI regarding Torres staying at 130 Flat Top Mountain Road, and that Torres was driving a dark green Honda Accord, as well as Torres having a number of outstanding warrants for his arrest, Sergeant Ball's believed he had reasonable suspicion that Torres was operating the Vehicle (J.A. 93). About halfway up the driveway, Sergeant Ball turned on his blue lights and called in the traffic stop to Communications (J.A. 93) (J.A. Vol II at 1:15). At first, the Vehicle did not stop (J.A. 93) (J.A. Vol. II 1:15-1:25). Sergeant Ball noticed that the Vehicle had a Tennessee

License Plate No. R8234L and he called in the plate number to Communications (J.A. 93) (J.A. Vol. II at 1:19). As the Vehicle was coming to a stop at the end of the driveway, Sergeant Ball was worried that Torres was going to flee (J.A. 93). Believing that Torres was operating the Vehicle, after the Vehicle came to a complete stop, Sergeant Ball exited his vehicle, drew his weapon, pointing it towards the ground and in a loud voice ordered the driver to show his hands (J.A. 93) (J.A. Vol. II at 1:33). Sergeant Ball approached the Vehicle, shining his flashlight at the driver (J.A. Vol II at 1:34). The driver complied with Sergeant Ball's commands (J.A. 93) (J.A. Vol. II at 1:35). As Sergeant approached the Vehicle, he confirmed that Torres was operating the Vehicle (J.A. 93).

Sergeant Ball opened the driver's side door and in a loud voice ordered Torres to lay on his belly on the ground (J.A. 93) (J.A. Vol. II at 1:39). Torres got out of the Vehicle and lied face down on the ground (J.A. 93) (J.A. Vol. II at 1:42-1:47). Sergeant Ball immediately put handcuffs on Torres and did a brief pat down for weapons (J.A. 93-94) (J.A. Vol. II at 1:59). Sergeant Ball asked Torres if he had any weapons on him (J.A. 94) (J.A. Vol. II at 2:13). Sergeant Ball then told Torres to roll onto his

side (J.A. 94) (J.A. Vol. II at 2:18). Sergeant Ball also asked Torres whether he had any outstanding warrants (J.A. 94) (J.A. Vol. II at 2:19). Sergeant Ball conducted a pat down for weapons (J.A. 94) (J.A. Vol. II at 2:23). Torres responded that he does not know of any outstanding warrants (J.A. 94) (J.A. Vol. II at 2:28).

Sergeant Ball received a call back from Communications letting him know that the Vehicle was reported stolen (J.A. 94) (J.A. Vol. II at 2:36). Sergeant Ball conducted another pat down and discovered two cellophane wrappers containing a white powdery substance on Torres' person (J.A. 94) (J.A. Vol. II at 3:06 – 3:35). Based on Sergeant Ball's training and experience, he believed that these packages were illegal drugs (J.A. 94). Based on the texture of one of the white powdery substances and his training and experience, Sergeant Ball believed that substance to be methamphetamine (J.A. 94). Sergeant Ball believed the other package to be heroin (J.A. 94).

Sergeant Ball also called in Torres' full name and date of birth into Communications to confirm Torres' outstanding warrants (J.A. 94) (J.A. Vol. II at 5:15-5:30). Sergeant Ball explained to Torres that he has a lot of outstanding warrants (J.A. 94) (J.A. Vol. II at 6:03). Sergeant Ball

allowed Torres to have a cigarette (J.A. 94) (J.A. Vol. II at 6:26). Sergeant Ball takes Torres to another patrol vehicle (J.A. Vol. II at 7:15).

Deputy Onderdonk and Deputy Taylor searched the interior of the Vehicle and found drug paraphernalia inside the Vehicle (J.A. 148). The drug paraphernalia consisted of two glass smoking pipes with residue and rubber tourniquets (J.A. 148). Deputy Onderdonk collected the evidence and turned it over to Sergeant Ball for processing (J.A. 149).

Sergeant Ball arrested Torres on the two outstanding warrants for felony breaking and entering and felony larceny after breaking and entering (J.A. 95). Sergeant Ball told Defendant Taylor to charge Torres with possession of a stolen vehicle, possession of methamphetamine and possession of drug paraphernalia (J.A. 95).

Deputy Taylor brought Torres to the Buncombe County Detention Facility (J.A. 151). Detective Aaron Lawson served Torres with the outstanding felony warrants for breaking and entering and larceny after breaking and entering (J.A. 170). Based on the information provided by Deputy Taylor, the Magistrate issued criminal warrants for possession of a stolen vehicle, possession of methamphetamine and possession of drug paraphernalia in connection with the March 3, 2018 traffic stop (J.A. 151-152).

Sergeant Ball completed the felony paperwork for the charges of possession of a stolen vehicle, possession of methamphetamines and possession of drug paraphernalia (J.A. 95). Sergeant Ball also had drug samples from the two packages found on Torres' person sent to the state laboratory for testing (J.A. 95).

Procedural History

A. Torres' Criminal Case.

On November 7, 2018, Doug Edwards, Assistant District Attorney dismissed Torres' possession of methamphetamine charge because the State lab never tested the substance (J.A. 95-96, J.A. 156-157, J.A. 159).

On March 12, 2019, Torres entered into a plea agreement with the State of North Carolina. Torres agreed to plead guilty to the following offenses, 18 CRS 254 habitual felon, 18 CRS 348 habitual felon, 18 CRS 651 possession of schedule I, 18 CRS 652 possession of schedule II, 18 CRS 653 possession of schedule I, 18 CRS 81828 felony breaking and entering and felony larceny after breaking and entering and 18 CRS 85123 resisting a public officer (J.A. 157, J.A. 161-164). In exchange for the guilty plea, the State agreed to dismiss the following charges 18 CRS 255 habitual felon, 18 CRS 654 possession of heroin, and 18 CRS 655

possession of schedule II fentanyl, 18 CRS 82169 possession of drug paraphernalia, 18 CRS 82170 possession of a stolen motor vehicle, and 18 CRS 85122 possession of a firearm by a felon (J.A. 157, J.A. 161-164). Torres accepted the plea agreement on March 12, 2019 (J.A. 157, J.A. 161-164).

B. **Torres' Civil Case Against Defendants.**

Torres filed this lawsuit against the Defendants on March 27, 2019 (J.A. 8). On October 23, 2019, the Defendants filed an answer to Torres' complaint (J.A. 47-54). On June 15, 2020, Defendants filed a motion for summary judgment against Torres. (J.A. 60-172). The District Court issued Torres a Roseboro Order on June 17, 2020 [Doc. 31]. On June 24, 2020, Torres filed his motion for summary judgment against Defendants (J.A. 176-179). Torres' motion included Defendants' discovery responses (J.A. 201-213, J.A. 259-276), BCSO policies (J.A. 215-238), an incident report of OCA 2018-001756 (J.A. 239-240), an event report (J.A. 241-242), the warrants for his arrest (J.A. 243-245), the reporting officer's narrative (J.A. 247-248), body camera footage (J.A. Vol. II), a motion to suppress from criminal court (J.A. 249-255), other court documents (J.A. 256-258) and body camera footage (J.A. Vol. II).

Torres, in the fact section of his memorandum supporting his motion for summary judgment, claimed that on March 3, 2019, he was at a friend's house at 130 Flat Top Mountain Road (J.A. 186). At approximately 3:10 a.m., Torres and his fiancé were going to head back to their apartment in Hendersonville, NC (J.A. 186). However, before going home, Torres had to drop off an amp at a friend's place (J.A. 186). Upon pulling in "his friend's" driveway, Torres noticed headlights fast approaching and noticed it to be a Sheriff's SUV (J.A. 186). As soon as the SUV pulled in the driveway, the deputy activated his blue lights to make a traffic stop (J.A. 186). Torres pulled into the parking lot and rolled the windows down like any normal traffic stop (J.A. 186-187). At which time, Sergeant Ball runs up to the vehicle with his gun pointed at Torres, yelling commands (J.A. 187). Sergeant Ball opened Torres' vehicle door, holding him at gun point and ordered Torres to the ground (J.A. 187).

Defendants filed a response in opposition to Torres' motion for summary judgment on July 8, 2020 (J.A. 279). On July 20, 2020, Torres filed a handwritten document attempting to swear to the contents of his summary judgment memorandum (J.A. 298). On August 17, 2020, Torres

also submitted an unverified response to Defendants' motion for summary judgment (J.A. 302).

When reviewing the motions for summary judgment, the Honorable Judge Martin Reidinger documented the conflicts between Torres' evidence and the Defendants' evidence as it relates to the traffic stop as follows:

> The Plaintiff asserts that Defendant Ball did not know at the time of the vehicle stop and search that the Plaintiff had active warrants and that Ball did not discover this fact until the end of the incident. [citation omitted]. Plaintiff, however, cites to no evidentiary basis for this assertion (J.A. 324).
>
> The Plaintiff asserts that Defendant Ball's statement that he believed the vehicle's operator to be the Plaintiff was a hunch and, if he had known that the Plaintiff was known to be driving a dark Honda he would have included that information in his report to Communications. (J.A. 325)
>
> Sergeant Ball asserts that he did not point his weapon at the driver but pointed it at the ground (J.A. 325).

After reviewing all the evidence submitted to the district court, Judge Reidinger granted Defendants' motion for summary judgment and dismissed all of Torres' claims against the Defendants (J.A. 318-343).

On March 24, 2020, Torres filed his notice of appeal to the United States Court of Appeals for the Fourth Circuit. (J.A. 345).

SUMMARY OF ARGUMENT

Sergeant Ball had reasonable articulable suspicion to pull over Torres' vehicle in the early morning of March 3, 2018. Sergeant Ball had been trying to locate Torres since the BCSO issued an "Attempt to Locate" for Torres on February 26, 2018. Torres had outstanding criminal warrants for his arrest including felony breaking and entering and felony larceny after breaking and entering. In addition, Torres had nine outstanding warrants for his arrest in Henderson County, North Carolina. On February 27, 2018, during a BCSO ComStat meeting, Sergeant Ball was informed that Torres was a person of interest and had a number of outstanding warrants.

Sergeant Ball verified that Torres' outstanding warrants were active, and that Torres had an extensive criminal history including but not limited to charges of assault with a deadly weapon, drug possession and carrying a concealed weapon.

Sergeant Ball also talked a CI who had provided him with reliable information in the past. The CI stated that Torres had been staying at 130 Flat Top Mountain Road, Fairview, North Carolina, 28730. The CI also told Sergeant Ball that Torres was driving a dark green Honda Accord with dark tinted windows.

On March 3, 2018, at approximately 0300 hours, Sergeant Ball drove by 130 Flat Top Mountain Road and saw a dark green Honda Accord with its trunk open. Sergeant Ball pulled his vehicle over and observed a male person walking around the vehicle. Fearing that no one would leave the residence until they saw Sergeant Ball's patrol vehicle leave the area, Sergeant Ball drove to another driveway. As soon as Sergeant Ball got out of sight of the residence, he backed his vehicle into a neighboring driveway, and turned his lights off waiting to see if the dark green Honda Accord would leave.

A few moments later a vehicle passed Sergeant Ball's location. The vehicle was a dark green Honda Accord and it was the same vehicle Sergeant Ball saw at 130 Flat Top Mountain Road a few minutes earlier. Sergeant Ball pulled out of the driveway and began following the vehicle. The dark green Honda Accord turned left on to Old Fort Road. Sergeant Ball followed the dark green Honda Accord and the dark green Honda Accord turned into a private driveway at what appeared to be 714 Old Fort Road.

Fearing that there might be a foot chase, Sergeant Ball activated his body camera. Based on the information from the CI and Sergeant

Ball's corroboration of the CI's information on March 3, 2018, seeing a male walk around the vehicle at 130 Flat Top Mountain Road and the outstanding warrants for Torres' arrest, Sergeant Ball believed that Torres was operating the dark green Honda Accord. Sergeant Ball also believed he had reasonable suspicion to conduct a traffic stop on the dark green Honda Accord. About halfway up the driveway, Sergeant Ball activated his blue lights and called the traffic stop into Communications. The dark green Honda Accord did not immediately stop when the blue lights came on.

Sergeant Ball is entitled to summary judgment on the undisputed facts. Based on Torres having outstanding warrants for his arrest, the information from the CI, Sergeant Ball's verification of the vehicle and the location specified by the CI, seeing a male walk around the vehicle, and the vehicle not stopping when the blue light came on, Sergeant Ball had an objective reasonable basis for stopping Torres' vehicle on the night of March 3, 2018 to arrest Torres for the outstanding warrants.

ARGUMENT

The gravamen of Torres' instant appeal is a broad challenge to the propriety of his stop. Indeed, all his claims rise and fall with whether

reasonable articulable suspicion existed to pull him over on March 3, 2018. Yet, as the district court correctly found, there was ample evidence forecasted to establish this already reduced standard for Torres' stop. *Illinois v. Wardlow,* 528 U.S. 119, 123, 120 S. Ct. 673 (2000) (reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence").

Torres had eleven outstanding warrants for his arrest. An ATL was issued for Torres, of which Sergeant Ball received. A CI with whom Sergeant Ball was familiar and was reliable in the past told him the specific make, model, and color of the car Torres was eventually found operating, and the location at which Torres could be, and was, found. Sergeant Ball had a photograph and description of Torres prior to locating him. And, upon locating the vehicle he was told Torres was driving at the location he was told Torres could be, Sergeant Ball noticed a male figure walk around the vehicle. In spite of this, Torres insists that more information was needed. In essence, Torres would elevate the standard applicable to Sergeant Ball from reasonable and articulable suspicion to certain and indisputable precision. However, "sufficient

probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 804, 91 S. Ct. 1106, 1111 (1971). "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest," or in this case reasonable suspicion to stop, "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145, 92 S. Ct. 1921, 1922–23 (1972).

The district court's decision and judgment should be affirmed. (J.A. 318-344).

STANDARD OF REVIEW

Appeals from a district court's award of summary judgment is reviewed *de novo*. *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 331 (4th Cir. 2007). The Court should view all facts in the light most favorable to the nonmoving party and draw all reasonable inferences in his favor. *Graves v. Lioi*, 930 F.3d 307, 311 (4th Cir. 2019), *cert. denied sub nom. Robinson v. Lioi*, 140 S. Ct. 1118 (2020). However,

> only "reasonable" inferences from the evidence need be considered by the court . . . . In the end, the non-moving party must do more than present a "scintilla" of evidence in its favor . . . . Rather, the non-moving party must present sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence" for the non-movant, . . . "for

> an apparent dispute is not 'genuine' within the contemplation of the summary judgment rule unless the non-movant's version is supported by sufficient evidence to permit a reasonable jury to find the fact[s] in his favor." . . . Thus, if the evidence is "merely colorable" or "not significantly probative," a motion for summary judgment may be granted.

Sylvia Dev. Corp. v. Calvert Cnty., Md., 48 F.3d 810, 818 (4th Cir. 1995). If, after the Court's review, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact," then "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

I. TORRES FAILED TO ADDRESS SEVERAL ISSUES AND HAS ABANDONED THEM

Torres' Opening Brief fails to address his claims for excessive force, false arrest, false imprisonment, malicious prosecution and state law claims, nor does it address the issue of qualified immunity, all of which the district court found in favor of Defendants. To be sure, Torres appears to at least acknowledge the existence of *some* (though not all) of these issues in his closing footnote, but otherwise provides no discussion of them. *See* [Doc. 38 at 45, n.16]. This is insufficient to preserve these issues on appeal under Federal Rules of Appellate Procedure 28(a)(5) and (a)(8). *See Bender v. Brumley*, 1 F.3d 271, 275 (5th Cir. 1993) ("As to the

motion for a directed verdict, Bender fails to discuss in his appellate brief the court's denial of his directed verdict motion. It is well settled that the failure to argue an issue posed for consideration is deemed an abandonment of that issue."); *accord United States v. Henoud*, 28 F.3d 1211 n.2 (4th Cir. 1994) (table) (citing, *inter alia*, *Bender*, and recognizing merely referencing an issue in briefing but failing to discuss it may constitute abandonment).

Consequently, Torres abandoned these affirmative claims and his opposition to qualified immunity. *See Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 376-77 (4th Cir. 2012) ("A party's failure to raise or discuss an issue in [its] brief is deemed to be abandonment of that issue." (internal quotation marks omitted)); *ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 20-1915, 2021 WL 4782687, at *2 n.1 (4th Cir. Oct. 13, 2021) (citing *Mayfield*).

II. TORRES' CLAIMS UNDER SECTION § 1983 FAIL

Pursuant to 42 U.S.C. § 1983, Torres alleges violation of his Fourth Amendment rights to be free from (i) excessive force, (ii) unreasonable search and seizure, (iii) false imprisonment, and (iv) malicious prosecution. As discussed above, his claims for excessive force related to

Sergeant Ball's display of his duty weapon while approaching the car and ordering Torres out of it, unreasonable search and seizure related to the investigatory search incident to that stop, unreasonable seizure related to the seizure of Torres' person and contraband, false imprisonment related to Torres' stop and arrest, and malicious prosecution related to the same were all abandoned because Torres failed to address them in his Opening Brief. However, even if he had not abandoned them, they would still fail. Each of these claims rises and falls with whether Sergeant Ball had reasonable and articulable suspicion to effectuate the initial stop. He did, and the district court was correct in granting summary judgment in Defendants' favor on this basis.

A. **Sergeant Ball Had Reasonable and Articulable Suspicion to Stop Torres.**

Under the Fourth Amendment, a traffic stop constitutes a seizure and must be justified by reasonable suspicion of criminal activity or some other exception to the generally applicable warrant requirement. *See Kansas v. Glover*, __ U.S. __, ___, 140 S. Ct. 1183, 1187 (2020). "[I]f police have a reasonable suspicion, grounded in specific articulable facts, that a person they encounter was involved in or is wanted in connection

with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229 (1985).

Whether an officer's suspicion is "reasonable" and "articulable" depends on the totality of circumstances. *See United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981) (reasonable suspicion involves the "totality of the circumstances—the whole picture"); *see also Walker v. Donahoe*, 3 F.4th 676, 682 (4th Cir. 2021). "Thus, factors which by themselves suggest only innocent conduct may amount to reasonable suspicion when taken together." *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004).

Torres' outstanding warrants, alone, provided sufficient basis to stop him. *See United States v. Cortez*, 449 U.S. 411, 417 n.2, 101 S. Ct. 690 (1981) ("Of course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct."); *see also United States v. Shields*, 519 F.3d 836, 837 (8th Cir. 2008) (officers attempting to execute a valid arrest warrant were justified in stopping a vehicle descripted in a tip). Nevertheless, the totality of remaining circumstances provided ample justification for Sergeant Ball's investigatory stop.

Sergeant Ball received an ATL for Torres due to eleven outstanding warrants. (J.A. 91, J.A. 97-98). He was advised at a ComStat meeting that Torres was a person of interest. (J.A. 901, J.A. 99-104). Sergeant Ball then verified the existence of Torres' outstanding warrants and had researched Torres' lengthy criminal history. (J.A. 91, J.A. 105-21); *accord Hensley*, 469 U.S. at 231, 105 S. Ct. 675 ("[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."). Finally, a reliable CI advised Sergeant Ball that Torres had been staying at 130 Flat Top Mountain Road and driving a dark green Honda Accord with dark tinted windows. (J.A. 91).

Equipped with all this information, Sergeant Ball spoke with detectives, confirmed a potential supplemental location for Torres' whereabouts, and further confirmed the BCSO was actively looking for Torres. (J.A. 92). Sergeant Ball then proceeded to 130 Flat Top Mountain Road where, on March 3, 2018, at approximately 3:00 am, he observed a male walking around the dark green Honda Accord with the

trunk open, (J.A. 92), and then witnessed that same vehicle pass his patrol vehicle moments later. (J.A. 92).

Sergeant Ball then followed the vehicle. (J.A. 92). He signaled Torres to pull over. (J.A. 93). Torres, however, continued. (J.A. 93, J.A. 122). This further provided Sergeant Ball reasonable suspicion sufficient to justify an investigatory stop. *See United States v. Smith*, 396 F.3d 579, 587 (4th Cir. 2005); *United States v. Walraven*, 892 F.2d 972, 975–76 (10th Cir. 1989) (holding that reasonable suspicion existed for investigatory stop in part because vehicle failed to stop promptly in response to police lights). The district court was correct in deciding that all this evidence, taken together, provided sufficient cause to stop Torres' vehicle. (J.A. 332).

In spite of all this, Torres argues that Sergeant Ball operated off, at best, a hunch. [Doc. 38 at 21-22]. "While an officer's 'hunch' will not justify a stop, . . . we 'give due weight to common sense judgments reached by officers in light of their experience and training.'" *United States v. Washington*, 346 F. App'x 950, 952 (4th Cir. 2009) (quoting, first, *Terry*, 392 U.S. at 27, 88 S. Ct. 1868, and then *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004)).

Torres launches a three-sided attack on the sufficiency of this evidence to establish reasonable and articulable suspicion to justify his stop. First, he argues there are "material inconsistencies" between Sergeant Ball's "Synopsis" in his report and his affidavit. [Doc. 38 at 21-22]. Second, he argues there are "material inconsistencies" in the tip Sergeant Ball received from his CI. [*Id.* at 23-27]. Third, he attacks Sergeant Ball's credibility. [*Id.* at 27-30]. However, none of these arguments establish the existence of a genuine issue of material fact as to whether Sergeant Ball had reasonable, articulable suspicion to stop Torres.

i. Sergeant Ball's statements are not inconsistent.

As set forth above, Torres' argument that there are inconsistencies between the case synopsis and affidavit should be rejected. The Record does not indicate the accounts are inconsistent or, if they were, that those inconsistencies were not material.

As an initial matter, impeachment evidence standing alone cannot be used to create a material issue of fact at summary judgment. *Mt. Valley Pipeline, LLC v. 0.47 Acres of Land*, 853 F. App'x 812, 815-16 (4th Cir. 2021). "[W]hen challenges to witness' credibility are *all* that a

plaintiff relies on, and he has shown no independent facts--no proof--to support his claims, summary judgment in favor of the defendant is proper." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008). Torres latches on to what he interprets as material discrepancies between the case synopsis, (J.A. 122), and Sergeant Ball's affidavit in support of summary judgment, (J.A. 90). These inconsistencies (which, as discussed below, are not inconsistent at all), are all Torres relies upon. Without more, he cannot avoid summary judgment.

Moreover, Torres' burden is to show *genuine* issues of *material* fact—not create only "some metaphysical doubt as to the material facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007). At best, these minor differences—at least two of which are nothing more than semantics—are "merely colorable." *Sylvia Dev. Corp.*, 48 F.3d at 818; *cf.* [Doc. 38 at 24 (arguing there is some substantive, smoking gun difference between the use of "staying at" as opposed to "frequenting" 130 Flat Top Mountain Road) or ("dark green Honda car" as opposed to "dark green Honda Accord")]. Torres presents no other evidence which would allow a jury to transform these minor differences into a finding in his favor. *Id.* ("[F]or an apparent dispute is not 'genuine' within the contemplation of

the summary judgment rule unless the non-movant's version is supported by sufficient evidence to permit a reasonable jury to find the fact[s] in his favor."). This difference is non-substantive and does not preclude summary judgment or the district court's analysis.

Substantively, the case synopsis and Sergeant Ball's affidavit are consistent. Incorrectly, Torres argues that Sergeant Ball "justified stopping the green Honda by claiming he had probable cause to believe that the car was stolen." [Doc. 38 at 21 (citing J.A. 122)]. Torres misreads the case synopsis. Nowhere in Sergeant Ball's case synopsis does he state that he stopped Torres *because* it was reported stolen. Sergeant Ball's case synopsis is accurate in that Sergeant Ball did call in the license plate number and discover that the vehicle was stolen. This fact also corroborates what he was told from fellow officers regarding Torres' recent suspected car thefts. (J.A. 122). Thus, there is no inconsistency, and, in fact, Sergeant Ball confirmed under oath that the vehicle being stolen was not a basis for the stop. (J.A. 95).

That said, notwithstanding whether the stop was based in part of the vehicle being stolen, there remains ample forecasted admissible evidence establishing reasonable suspicion to stop Torres. The

reasonable suspicion standard is objective. *United States v. Powell*, 666 F.3d 180, 186 (4th Cir. 2011). "[I]f sufficient objective evidence exists to demonstrate reasonable suspicion, a Terry stop is justified regardless of a police officer's subjective intent." *United States v. Adams*, 462 F. App'x 369, 374 (4th Cir. 2012). "[W]e must uphold a police officer's actions -- regardless of the officer's subjective intent -- if sufficient objective evidence exists to validate the challenged conduct." *United States v. Rooks*, 596 F.3d 204, 210 (4th Cir. 2010). Sergeant Ball's case synopsis, and again in his sworn affidavit, document his search for Torres, his conversation with a CI and fellow officers, his observations at 130 Flat Top Mountain Road on March 3, 2018, and Torres' conduct leading to and following the stop. Torres largely ignores this in his briefing.

Torres marshals no evidence other than his own allegations and self-serving declaration (in the form of a sworn memorandum in support of summary judgment).[4] This is insufficient. *See Harris v. Home Sales Co.*, 499 F. App'x 285, 294 (4th Cir. 2012) (noting that a court should not "find a genuine dispute of material fact based solely on . . . self-serving

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[4] Torres attempted to swear his memorandum in support of his motion for summary judgment pursuant to 28 U.S.C. § 1746 (J.A. 298).

testimony"). Indeed, it is axiomatic that "the party opposing summary judgment may not rest on mere allegations or denials, and the court need not consider 'unsupported assertions' or 'self-serving opinions without objective corroboration.'" *Fordham v. Keller*, No. 1:13CV617, 2017 WL 1091876, at *7-8 (M.D.N.C. Mar. 22, 2017) (quoting *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996)). Further, a genuine factual dispute requires more than "some metaphysical doubt as to the material facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Torres presents nothing more than this. Consequently, the inconsistencies he alleges do not carry his burden to establish a genuine issue of material fact.

ii. The tip from Sergeant Ball's confidential informant supported reasonable and articulable suspicion.

Next, Torres devotes the vast majority of his Opening Brief to attack the veracity and reliability of the tip Sergeant Ball received from his CI. *See, e.g.,* [Doc. 38 at 23-27, 31-45]. Sergeant Ball's reasonable suspicion must be evaluated against the totality of circumstances, and while the tip, itself, was not the sole basis for Sergeant Ball's reasonable suspicion, it was a major contributor to the broader swath of information

and circumstances known to Sergeant Ball. It was appropriate to consider and rely on the tip.

1. <u>The tip as described in the case synopsis and as described in Sergeant Ball's affidavit are not inconsistent</u>.

In his Opening Brief, Torres questions the reliability of the CI's tip based small differences between the case synopsis and Sergeant Ball's affidavit. This is the first time Torres raises this argument in this ligation and it should be rejected.[5]

Torres' argument amounts to form over substance. The case synopsis attached to Sergeant Ball's report was not meant to exhaustively document his stop and arrest of Torres. It was, by title and definition, a "synopsis" or, "[a] brief or partial survey; a summary or

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[5] *Garey v. Farrin*, 35 F.4th 917, 928 (4th Cir. 2022) ("[i]t is well established that this court 'does not consider issues raised for the first time on appeal,' 'absent exceptional circumstances.'" *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (alterations omitted) (quoting *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009)). "Rather, 'when a party in a civil case fails to raise an argument in the lower court and instead raises it for the first time before us, we may reverse only if the newly raised argument establishes "fundamental error" or a denial of fundamental justice.'" *Id.* (alterations omitted) (quoting *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014)). "This rigorous standard is an even higher bar than the 'plain error' standard applied in criminal cases, and the burden is on the party who has failed to preserve an argument to show that the standard is met." *Id.* (internal citation omitted).

outline." Synopsis, BLACK'S LAW DICTIONARY (11th ed. 2019). Its purpose was to give the District Attorney's Office a summary of what happened during an arrest. The fact that there is more detail in Sergeant Ball's affidavit should be of no surprise as *its* purpose is to confirm and supplement the case synopsis. Of course, Sergeant Ball's affidavit would have been unnecessary had Torres deposed him or conducted any substantive discovery. Nevertheless, Sergeant Ball maintained his account of this information under oath well prior to his "prepared-for-litigation Affidavit." [Doc. 38 at 31]; *see* (J.A. 201-05 (April 9, 2020, responses to Torres' first set of interrogatories)), J.A. 207-210 (April 3, 2020, responses to Torres' first requests for admission)).

Finally, there are no "factual questions about what Sergeant Ball saw[.]" [Doc. 38 at 25]. Sergeant Ball submitted an affidavit in support of his motion for summary judgment. The burden shifted to Torres to present admissible evidence sufficient to show a genuine dispute of material fact to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 n.3 (1986). Yet, his only evidence was his own allegations and statements, which are insufficient. He otherwise presents no admissible evidence, only conjecture and newly raised arguments. Torres

has failed to establish there are any inconsistencies in the evidence Sergeant Ball presented, and consequently, failed to refute Defendants' entitlement to summary judgment.

2. <u>The tip was reliable</u>.

Torres argues the tip "lacked sufficient indicia of reliability" to support reasonable, articulable suspicion. [Doc. 38 at 31]. Torres supports this, in large part, by pointing out that the tip did not specifically identify Torres. (*Id.* at 31-32). This is an argument that appears for the first time on appeal and should be rejected.[6] But even if it were raised earlier, it would not carry the day for Torres. Sergeant Ball testified that the CI provided him with the make, model, color, and specific features of the vehicle he could find Torres' driving. The CI also provided Sergeant Ball with the specific address where he could, and ultimately did, find Torres. And, most importantly, Sergeant Ball testified that he knew this CI, and the CI had provided him reliable information in the past.

Torres presents no admissible evidence countering these facts. Nor did he develop any such evidence in discovery. Rather, he now presents

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6 *See Garey,* 35 F.4th at 928.

only speculation, argument, and innuendo. But the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkt. Inc. v. J.D. Assoc.'s, LLP*, 213 F.3d 175, 180 (4th Cir. 2000). And, of course, prior inconsistent statements do not constitute the affirmative evidence required to defeat summary judgment. *Hedquist v. Walsh*, 786 F. App'x 130, 135 n.7 (10th Cir. 2019). Without more, the district court was correct in accepting this testimony.

3. The tip was sufficiently corroborated.

Torres attempts to discredit the corroboration of the tip and what Sergeant Ball observed at 130 Flat Top Mountain Road in three ways: by using his own statements to create a genuine issue of material fact, by attempting to highlight alleged inconsistencies between the report and Sergeant Ball's affidavit, and by arguing the district court improperly credited inferences in favor of Sergeant Ball. However, none of these successfully preclude summary judgment.

First, Torres attempts to use his own statements to create a "conflicting version" of events to foreclose summary judgment by citing his own representation that the angle of the address relative to the topography and the lack of streetlights precluded Sergeant Ball from

observing what he swears in his affidavit to have observed that night.[7] [Doc. 38 at 25]. However, Torres cannot use his own unsworn statement to create a genuine issue of material fact to preclude summary judgment in Defendants' favor. "[T]he party opposing summary judgment may not rest on mere allegations or denials, and the court need not consider 'unsupported assertions' or 'self-serving opinions without objective corroboration.'" *Fordham v. Keller*, No. 1:13CV617, 2017 WL 1091876, at *3 (M.D.N.C. Mar. 22, 2017) (quoting *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996)); *accord Harris v. Home Sales Co.*, 499 F. App'x 285, 294 (4th Cir. 2012) (noting that a court should not "find a genuine dispute of material fact based solely on [the non-movant's] self-serving testimony").

Second, Torres cannot use credibility determinations to manufacture a genuine issue of material fact. *See* [Doc. 38 at 27]. As an initial matter, the case synopsis was not sworn testimony, unlike Sergeant Ball's affidavit. The value of Sergeant Ball's affidavit

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[7] Mr. Torres is relying on statements from an unsworn response to Defendants' motion for summary judgment (J.A. 304). This response was not sworn to pursuant to 28 U.S.C. § 1746.

supersedes that of the case synopsis.[8] Nevertheless, even if they were both considered "testimony" from an evidentiary standpoint, "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the [witness's] testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) (citation omitted).

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[8] This is particularly true given threshold questions about the report's admissibility, at least for the purposes Torres offers it. Only evidence admissible at trial may be considered on summary judgment. *Kennedy v. Joy Technologies, Inc.*, 269 F. App'x 302, 308 (4th Cir. 2008). The admissibility of police reports, however, is nuanced. While an incident report, itself, may meet the public records exception to the hearsay rule, a report's *contents* are inadmissible where they are offered for the truth they assert. *See United States v. Burruss*, 418 F.2d 677, 678 (4th Cir. 1969) (hearsay within police report inadmissible); *see also Graham v. Jersey City Police Dep't*, 2014 WL 7177362, at *3 (D.N.J. Dec. 16, 2014) (despite being public record, contents inadmissible if offered "to establish the truth of the matters set forth in the report").

Nevertheless, Sergeant Ball's report is admissible to establish probable cause, or, in this case, reasonable suspicion. *See Bryant v. Town of Bluffton*, No. CV 9:17-0414-DCN-BM, 2019 WL 6176160, at *3 n.5 (D.S.C. June 14, 2019) (statements in police reports admissible if offered to establish the existence of probable cause (collecting cases)), *report and recommendation adopted*, No. 9:17-CV-0414-DCN, 2019 WL 4439435 (D.S.C. Sept. 17, 2019). To the extent Torres offers the report to establish its truth as a vehicle to impeach the affidavit, the report is inadmissible and may not be considered. If Torres offers it to establish reasonable suspicion—the purpose for which Sergeant Ball offers it—the report supports judgment in Sergeant Ball's favor, not Torres'.

Additionally, impeachment evidence standing alone cannot be used to create a material issue of fact at summary judgment. *Mt. Valley Pipeline*, 853 F. App'x at 815-16. Torres cannot rely exclusively on such evidence to avoid summary judgment. *Springer*, 518 F.3d at 484. Of course, Torres could have tested the credibility he now challenges in discovery, but he elected not to. He cannot now use his inaction in the case he filed to avoid its summary disposition.

B. **The District Court Properly Drew All Reasonable Inferences in Torres' Favor and Appropriately Decided That Defendants Were Entitled to Summary Judgment.**

Finally, Torres claims that his own self-serving statements command inferences in his favor and any inferences for Sergeant Ball are improper. [Doc. 38 at 26]. "When determining a motion for summary judgment, the court need not credit the non-movant with every possible inference that can be drawn from the evidence. Only reasonable inferences warrant consideration." *Brown v. Rose's Stores, Inc.*, 145 F.3d 1323 (4th Cir. 1998) (table). "A reasonable inference is one that is within the range of reasonable probability." *Id.* "Whether an inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary." *Sylvia*, 48 F.3d at 818. The

Court need not consider an inference that is "so tenuous that it rests merely upon speculation and conjecture." *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir.), *cert. denied*, 358 U.S. 908, 79 S. Ct. 234 (1958).

Torres claims that the district court "ignored Mr. Torres' statements that [Sergeant] Ball's alleged observations were physically implausible because of the lack of visibility at 130 Flat Top Mountain Road." [Doc. 38 at 26]. However, even assuming his self-serving statements may be considered, construing Torres' preferred inferences against "competing inferences' to the contrary," *Sylvia*, 48 F.3d at 818, the Record refutes them. *See* "Statement of the Case", § B, *infra*.

Indeed, accepting Torres' proposed inferences would depart from the clear Record "and rely instead on unfounded conjecture." *Lee v. Bevington*, 647 F. App'x 275, 281 (4th Cir. 2016). Further, Torres cannot use his own unsworn statement to create an inference against what Sergeant Ball did or did not see because Torres is not competent to testify as to Sergeant Ball's observations. In short, accepting Torres' proposed inferences would depart from the clear Record "and rely instead on unfounded conjecture." *Lee v. Bevington*, 647 F. App'x 275, 281 (4th Cir.

2016). Accordingly, his invitation to foray into "fanciful inferences" should be rejected. *Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 640 (4th Cir. 1997).

C. Even if not Abandoned, Torres' Remaining Claims under Section 1983 Fail.

i. The force used was not excessive.

Based on what Sergeant Ball knew and could perceive in the moment his conduct following the stop was also objectively reasonable under the circumstances. Fourth Amendment excessive force claims are subsumed in a claim for unlawful arrest. *See, e.g.*, *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000) ("[A] claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim."). The Fourth Circuit evaluates the reasonableness of force under the factors enunciated in *Graham v. Connor*, 490 U.S. 386 (1989). These include: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. These factors are not exclusive, and there could be other "objective circumstances potentially relevant to a determination of excessive force." *Kingsley v. Hendrickson*,

576 U.S. 389, 397 (2015). The Court considers the situation at the moment force is used, "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

"[T]raffic stops . . . are inherently dangerous for police officers." *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017); *accord Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("[R]oadside encounters between police and suspects are particularly hazardous."). Accordingly, an officer is "authorized to take such steps as [are] reasonably necessary to protect [his] personal safety and to maintain the status quo during the course of [a Terry] stop." *Hensley*, 469 U.S. at 235.

Sergeant Ball testified, and was confirmed by the bodycam footage, that he never pointed his weapon at Torres, but merely had it ready if needed. (J.A. 93). But, as the district court correctly held, even if he did point his weapon at Torres, it would have been objectively reasonable. (J.A. 336 (collecting cases)). Torres had eleven warrants out for his arrest, and a criminal history of violence, possessing weapons and drug crimes. As the district court correctly found, based on his criminal history, it was reasonable for Sergeant Ball to suspect him of being armed

and dangerous. (J.A. 336-37). When signaled by Sergeant Ball, Torres refused to immediately stop. What is more, in his Opening Brief, Torres argues that at the time of the stop, visibility was exceptionally low. [Doc. 38 at 4, 41 n.15]. Of course, meteorological data from that night—of which the Court may take judicial notice—readily refutes that contention. *See Statement of Case*, § B, *infra*.

Nevertheless, even accepting Torres' version of the facts, under the totality of circumstances, Sergeant Ball's decision to draw his duty weapon in order to effectuate the stop and subsequently order Torres' exit from the vehicle was objectively reasonable. "'[A]pproaching a suspect with [a] drawn weapon[] is an extraordinary measure,' but this level of intrusion can be justified 'as a reasonable means of neutralizing potential dangers to police and innocent bystanders.'" *Dalton v. Liles*, No. 5:19-CV-00083-MR, 2021 WL 3493150, at *16 (W.D.N.C. Aug. 9, 2021) (quoting *United States v. Sinclair*, 983 F.2d 598, 602 (4th Cir. 1993)). This is particularly true in light of the threats posed by the circumstances—threats exacerbated by the night, Sergeant Ball being the lone responding officer at the time, and his reasonable perception of risk given Torres' criminal history and charges against him. *See, e.g.*,

Pennsylvania v. Mimms, 434 U.S. 106, 110-11, 98 S. Ct. 330 (1977) (per curiam) (police may order driver out of vehicle during traffic stop to protect officer safety). In short, Sergeant Ball "[was] not required to wait for the Plaintiff to pull a weapon . . . before using reasonable force to detain him." *Dalton*, 2021 WL 3493150, at *4.

"[G]iven the importance of officer safety and the Supreme Court's repeated recognition that '[t]raffic stops are "especially fraught with danger to police officers,"'" *United States v. Buzzard*, 1 F.4th 198, 204 (4th Cir.) (quotations omitted), *cert. denied*, 142 S. Ct. 728 (2021), Sergeant Ball's actions in approaching Torres and having him exit the car were justified. Further, the bodycam footage blatantly contradicts Torres' claims of excessive force such that his claim is "so utterly discredited by the record that no reasonable jury could have believed him." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

ii. The search and seizure of Torres and his stolen vehicle were reasonable.

"A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467,

477 (1973). Given the knowledge Sergeant Ball possessed at the time of Torres' criminal history and outstanding warrants, the initial pat-down as part of the investigative stop was justified. *Terry*, 392 U.S. at 30-31 (pat-down for weapons permitted where office reasonably believes subject is armed and dangerous). The search of Torres' pockets after Sergeant Ball was notified in real time that the vehicle was stolen was also appropriate under the Fourth Amendment. *See Robinson*, 414 U.S. at 218 (inspecting contents of crumpled cigarette package in defendant's pocket found incident to arrest was reasonable).

Torres is also foreclosed from challenging the search of the stolen vehicle. "'[A] person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile.' . . . No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car." *Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 141, 99 S. Ct. 421, 429 (1978)).

iii. Torres' arrest was proper.

The Fourth Amendment is not violated by an arrest based on probable cause. *Graham*, 490 U.S. at 396; U.S. CONST. AMEND. IV ("no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). "Probable cause exists when the facts and circumstances known to the officer 'would warrant the belief of a prudent person that the arrestee had committed or was committing an offense.'" *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) (internal citations omitted). Courts look to the totality of the circumstances available to the officer at the time of arrest, *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995), and consider the suspect's conduct as known to the officer and the contours of the offense thought to be committed by that conduct. *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992).

There is no dispute that Torres had outstanding warrants at the time of his arrest. Sergeant Ball testified to having known that prior to arresting Torres and provided discovery responses months prior to that affidavit testimony confirming the same. Further, he confirmed the existence of those warrants with fellow officers. "In the Fourth Circuit, an arrest is acceptable under the Fourth Amendment if made pursuant to a valid arrest warrant." *Souder v. Toncession*, No. AW-07-1996, 2009 WL 4348831, at *9 (D. Md. Nov. 30, 2009) (citing *Peacock v. Mayor & City*

Council of Balt., 199 F. Supp. 2d 306, 309 (D. Md. 2002)); *see also Mitchell v. Aluisi*, 872 F.2d 577, 579 (4th Cir. 1989); *Wilson v. Detweiler*, No. CV BPG-20-869, 2021 WL 3188329, at *15 (D. Md. July 28, 2021) (holding that arrest pursuant to valid warrant was proper where, *inter alia*, officers presented evidence that they knew of the warrants prior to arresting the plaintiff), *appeal dismissed*, No. 21-1923, 2021 WL 7084934 (4th Cir. Oct. 27, 2021).

Finally, the fact that the car was stolen provided additional probable cause. *Tinch v. United States*, 189 F. Supp. 2d 313, 319 (D. Md. 2002) ("Probable cause was unquestionably established by the fact that the car was reported as stolen in the NCIC, thereby precluding the Fourth Amendment claim."); *see also Miller v. City of Nichols Hills Police Dep't*, 42 Fed. App'x 212, 216 (10th Cir. 2002) ("The NCIC report indicating that the vehicle had been reported as stolen, as relayed to the officers by the dispatcher, was sufficient to provide probable cause for the arrest."); *Rohde v. City of Roseburg*, 137 F.3d 1142, 1144 (9th Cir. 1998) ("If an officer has reliable information, such as a police report, indicating that the vehicle has been stolen, he thus has probable cause to believe that the driver has committed the crime of either stealing the car or knowingly operating a stolen vehicle."); *Pittman v. City of New York*, No.

CIV 14–4140 ARR/RLM, 2014 WL 7399308, at *13 (E.D.N.Y. Dec. 30, 2014) ("[T]he electronic record indicating plaintiffs' vehicle was still reported as being stolen, though inaccurate, was sufficient to establish probable cause to stop the plaintiffs and investigate the matter . . . ."); *Palmer v. Town of Jonesborough*, No. CIV 08–345, 2009 WL 1255780, at *16 (E.D. Tenn. May 1, 2009) ("At the time of the arrest, Rice and Hawkins knew that Plaintiff had possession of a vehicle reported to the NCIC as stolen and, therefore, had probable cause to arrest Plaintiff.").

iv. Torres' malicious prosecution and false imprisonment claims fail together.

The district court properly granted summary judgment against Torres' malicious prosecution and false imprisonment claim, as well. Section 1983 provides a federal cause of action for false arrest, false imprisonment, and malicious prosecution in violation of the Fourth Amendment. To prevail on such claims, a plaintiff must show that "the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in the plaintiff's favor." *Humbert v. Mayor & City Council of Balt. City*, 866 F.3d 546, 555 (4th Cir. 2017) (quoting *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012)).

First, Torres' arrest was supported by probable cause. A facially valid arrest warrant provides the arresting officer with sufficient probable cause to arrest the individual identified in the warrant and thus his malicious prosecution claim fails. *Snider v. Seung Lee*, 584 F.3d 193, 202 (4th Cir. 2009) ("To prevail on a Fourth Amendment malicious prosecution claim under § 1983, a plaintiff must show that: (1) the defendant initiated or maintained a criminal proceeding; (2) the criminal proceeding terminated in the plaintiff's favor; (3) *the proceeding was not supported by probable cause*; and (4) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." (emphasis added)). For the same reason, the same fate befalls his false imprisonment claim. *See Sowers v. City of Charlotte*, 659 Fed. App'x 738, 739 (4th Cir. 2016) ("To state a claim for false arrest or imprisonment under § 1983, a plaintiff must demonstrate that he was arrested without probable cause."); *Rogers v. Pendleton*, 249 F.3d 279, 294 (4th Cir. 2001) (describing false arrest and false imprisonment claims as "essentially claims alleging a seizure of the person in violation of the Fourth Amendment").

Second, the dismissal of charges related to his March 3, 2018, stop and arrest were pursuant to a plea agreement, (J.A. 156-58), though Torres evades this fact in his Opening Brief. *See* [Doc. 38 at 3, 14].

Dismissal pursuant to a plea agreement does not constitute a termination in Torres' favor. *See White v. Brown*, 408 F. App'x 595, 599 (3d Cir. 2010) ("That the dismissal of those charges resulted from [the plaintiff's] plea agreement with the prosecution, and not his innocence, means that he cannot establish favorable termination for purposes of a § 1983 action for malicious prosecution."); *Key v. Miano*, C/A No. 1:11–1613–DCN–SVH, 2012 WL 5398194, at *9 (D.S.C. Oct. 10, 2012) ("Because there is no indication in the record that [the][p]laintiff's indictment was *nolle prossed* for reasons consistent with his innocence, this was not a favorable disposition of [the] [p]laintiff's charge."); Restatement (Second) of Torts § 660 (1977) ("A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if (a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused . . . .").

v. Torres cannot bring state constitutional claims against Defendants individually.

As the district court correctly held, Torres' claims under the North Carolina constitution fail because he did not bring them against Defendants in their official capacities. "Claims brought under the North

Carolina Constitution may be asserted only against state officials acting in their official capacities." *Love-Lane v. Martin*, 355 F.3d 766, 789 (4th Cir. 2004) (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, 293 (1992)). Therefore, summary judgment on these claims in favor of Defendants was proper.

III. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

In spite of the foregoing, even if Torres could possibly demonstrate any violation of his constitutional rights, Defendants are protected by qualified immunity on the reasonable suspicion claim. Indeed, while Torres devotes no attention to whether Defendants are entitled to qualified immunity, *see generally* [Doc. 38], the issue is dispositive.[9]

Qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992).

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[9] As argued above, *see* Section I, *infra*, Torres' failure to address this issue abandons it.

A Court reviewing qualified immunity first considers whether "the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). If there has been no constitutional violation, the officer is entitled to qualified immunity. *Id.* If the facts could establish a constitutional violation, the Court must analyze whether the constitutional right alleged to have been violated was "clearly established" at the time of the officer's actions. *Id.* In *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009), the Supreme Court granted courts discretion over the order of application of the *Saucier* analysis, while recognizing that conducting the analysis in order is often beneficial. *Id.* at 236, 129 S. Ct. at 818.

The inquiry into whether a right is clearly established must "be undertaken in light of the specific context of the case" and "not as a broad general proposition. . . ." *Saucier*, 533 U.S. at 194, 121 S. Ct. at 2153. The law is "clearly established" for qualified immunity purposes by decisions of the U.S. Supreme Court, Fourth Circuit Court of Appeals, or the highest court of the state where the case arose. *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (en banc). This inquiry is limited to the law at the time of the incident, as "an official could not be reasonably expected

to anticipate subsequent legal developments." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

Since Sergeant Ball had reasonable and articulable suspicion, Defendants committed no constitutional violation, and are therefore entitled to summary judgment both on the merits and on the basis of qualified immunity. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (internal citations omitted) (noting that courts addressing qualified immunity may first ask "'whether a constitutional violation occurred'" before asking "'whether the right violated was clearly established, . . . [because] [i]f [an officer] did not violate any right, he is hardly in need of any immunity and the analysis ends right then and there.'").

Nevertheless, it is not clearly established in the Fourth Circuit that engaging in an investigatory stop of an individual for whom there are nearly a dozen outstanding warrants, for whom the officer has been reliable, corroborated information from a known confidential informant, and who refuses to stop when signaled by that officer constitutes a constitutional violation. Furthermore, it *is* clearly established that Torres' constitutional rights are not violated by a search incident to that investigatory stop, nor by an additional search and inspection of items

found in his pockets after verifying the likelihood that he was actively engaged in criminal activity *during* that stop, or by the subsequent search of his *stolen* vehicle. Therefore, Defendants are entitled to qualified immunity on Torres' federal claims.

CONCLUSION

For the reasons stated herein, the order granting summary judgment in favor of Defendants should be affirmed.

Respectfully submitted this the 17th day of January, 2023.

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REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument in this matter.

Respectfully submitted this the 17th day of January, 2023.

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