No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LIVINGSTON MANNERS – PETITIONER

vs.

RONALD CANNELLA, individually,
KARRIE SABILLON, individually, and the
CITY OF HOLLYWOOD, FLORIDA – RESPONDENT(S)

CORRECTED APPENDIX

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Dated: November 26, 2018.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10088

D.C. Docket No. 0:15-cv-62071-BB

LIVINGSTON MANNERS,

Plaintiff - Appellant,

versus

OFFICER RONALD CANNELLA,
individually,
OFFICER KARRIE SABILLON,
individually,
CITY OF HOLLYWOOD, FLORIDA,

Defendants - Appellees,

OFFICER PAUL SCHEEL,
individually,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(June 4, 2018)

APPENDIX A

Before MARCUS, FAY, and HULL, Circuit Judges.

MARCUS, Circuit Judge:

In 2014, Livingston Manners was arrested by City of Hollywood police officers. An altercation ensued. Manners filed suit in federal court regarding the incident and now appeals the district court's grant of summary judgment against his claims -- federal civil rights claims for use of excessive force and for malicious prosecution as well as a companion state common-law claim for false arrest. Because the officers had probable cause to arrest Manners and did not violate clearly established constitutional law during his arrest, the officers were entitled to qualified immunity from the civil rights claims. A finding of probable cause also bars a claim for false arrest. Accordingly, we affirm.

I.

A.

Close to three in the morning on June 24, 2014, Livingston Manners was sitting in his car on the side of Plunkett Street, a residential street in the City of Hollywood, Florida ("the City"), before heading to work. Ronald Cannella, a City of Hollywood police officer, was on patrol "in reference to recent crimes of theft in the area," and he drove past Manners. Soon after Cannella drove by, Manners pulled out and turned south on 26th Avenue. There is a dispute about what

happened next. Cannella said he saw -- through his rearview mirror -- that Manners ran a stop sign. Manners claimed that he came to a complete stop.

Cannella made a U-turn and followed Manners down 26th Avenue. At some point between Plunkett Street and Pembroke Road, a distance of some four or five blocks, Cannella activated his emergency lights and also ran his sirens, although there is some dispute about when exactly this happened. Manners admitted that, some three blocks past Plunkett Street, he saw Officer Cannella behind him and that the officer's lights and sirens were on. Cannella said that he "activated [his] emergency lights and sirens, as [he] hit the intersection of Pembroke Road and 26th Avenue" and that he was directly behind Manners's vehicle at that intersection.

On this record, however, and taking the evidence in a light most favorable to the plaintiff, it is undisputed that Manners did not stop when he saw Cannella behind him, or when he saw Cannella's lights and sirens activated. Manners knew that the vehicle was a police car, that a police officer was instructing him to stop, and that the lights and sirens meant he was required to stop his car. Instead of stopping, Manners continued along 26th Avenue, through a traffic light at Pembroke Road, and stopped at a gas station across the intersection. We know this because Manners has said repeatedly, and explicitly, that he did not stop when

directed to do so. In a sworn deposition, Manners offered the following explanation:

> Q: Why did you not stop?
>
> [Manners]: Because it was dark. It was very dark.
>
> Q: And you had no doubt that it was police officer pulling you over, correct?
>
> A: Yes, ma'am. That's why I slowed down.

Manners has also clearly described why he chose not to stop immediately -- because he was afraid of being hit or killed by a police officer:

> Q: So when an officer puts his lights and sirens on to you that means slow down?
>
> A: No. That means stop, but in this particular -- in this particular instance -- ma'am, I ran into situations before. . . . I've ran into situations before where I've got punched or hit by a police officer because of my [stature]. I'm big and black.

In testimony at his criminal trial in Broward County, Manners offered the following answers:

> Q: Now, did you pull over upon seeing the flashing lights?
>
> [Manners]: No, I d[id] not.
>
> Q: Why didn't you pull over immediately?
>
> A: It was late at night, sir . . . . I was in fear for my life.

Manners offers that because he was afraid, he continued driving until he reached a well-lit gas station where video surveillance was available. By Manners's own account, the distance he intentionally travelled after seeing the officer behind him with lights and sirens, but before coming to a stop, was about three blocks, one-tenth of a mile, or 176 yards. He continued to drive after being directed to stop for 14.4 seconds, or, as he said at another occasion in his deposition, for "[a]bout two minutes, two minutes at the most."[1]

At the gas station, Cannella stopped behind Manners and approached the driver's side of Manners's car. Cannella asked for Manners's driver's license, which Manners provided. A silent video recording of the entire incident at the gas station was taken from surveillance cameras. Cannella can be seen at Manners's driver's side door, and while Cannella looked in the backseat, Manners stepped out of the vehicle. Cannella and Manners spoke, facing one another, for several seconds. There is no dispute that Cannella informed Manners he was under arrest. Manners knew this; in fact, Manners said he asked Cannella to hurry up so that he could get to work and Cannella said "[y]ou're going to jail." According to Cannella, he repeatedly directed Manners to get back into his car, but Manners

[1] At oral argument, counsel for the officer defendants conceded that, whether using Manners's testimony or Cannella's, the time between Cannella activating his emergency lights and Manners pulling over could not have been two minutes. Counsel for the officers also conceded that under Cannella's version of the facts, Manners travelled fewer than 14 seconds after Cannella was directly behind him with lights activated.

refused to do so. Cannella then placed Manners under arrest. Cannella said: "I must have told him at least two to three times [to remain seated in his vehicle] and he said, no, every time." Manners, on the other hand, denied that Cannella ever directed him to stay in the car.

A review of the video recording clearly establishes that a physical struggle ensued when Cannella attempted to place Manners under arrest. Manners's efforts to thwart the arrest are equally evident from the video. The first attempt to handcuff Manners occurred outside the vehicle -- Cannella apparently grabbed Manners's wrist as Manners either sat or fell back into his car. A struggle ensued in the car; Cannella leaned or fell on top of Manners, and he tried to pull Manners out of the vehicle. The parties disagree about what happened inside the car. Manners conceded that he pulled back, asked why he was under arrest, and said Cannella punched him three times while lying on top of him. Cannella, in turn said Manners screamed at him and struck him (Cannella) three to four times.

After the details of an indiscernible struggle occurred inside the car, the video recording shows that Cannella pulled Manners out of the car. Cannella flipped Manners onto the ground and went on top of him. Manners, in turn, is seen shoving at Cannella, and Cannella is seen punching Manners in the head. Cannella then flipped Manners onto his stomach and attempted to bring Manners's arms together behind his back, evidently attempting to handcuff Manners. Manners is

seen pulling his arms away, flailing, and then rolling onto his back. Manners is also seen bringing his leg up and onto Cannella's upper back, and grabbing and holding Cannella's wrists for an extended period.

Officer Sabillon arrived on the scene as backup; she said it "looked like [Cannella] was trying to take Livingston Manners into custody, but he couldn't because of the constant power struggle between the both of them with their hands." On the video recording, Sabillon is seen deploying her taser on Manners's stomach. Manners flailed on the ground, and both Cannella and Sabillon are seen attempting to handcuff him for about a minute, deploying one or both of their tasers. Eventually, Sabillon is seen lying across Manners, while Cannella placed Manners in handcuffs. More officers arrived, and four or five of them surrounded Manners and attempted to fully restrain him. Manners is eventually seen lying on his back, handcuffed, and subdued. At no point thereafter was he struck or tased by the officers.

The parties disagree about what Cannella and Manners said to one another during the incident. Both sides agree, however, that Cannella advised Manners during the incident that he was being placed under arrest. The video recording makes it abundantly clear that Cannella (and later Sabillon) attempted to place Manners under arrest, and Manners is clearly visible resisting those attempts for some time, a little more than three full minutes. The parties agree that at the time

of the incident, Manners was 6 feet 2 inches tall and weighed 240 pounds while Cannella was 5 feet 10 inches tall and weighed 215 pounds.

After the incident, Manners was initially charged by the State Attorney in Broward County with attempted homicide, resisting arrest with violence, and battery on a law enforcement officer. He was detained in a maximum security prison. Manners ultimately went on trial on charges of battery on a law enforcement officer and resisting a police officer without violence; he was acquitted of both counts by a jury. As a result of the charges, he incurred approximately $30,000 in legal fees.

B.

Thereafter, Manners brought this lawsuit in the United States District Court for the Southern District of Florida, lodging four claims relevant to the appeal: two 42 U.S.C. § 1983 civil rights violation claims alleging that Officers Cannella and Sabillon used excessive force in arresting him; a § 1983 claim against Cannella for malicious prosecution; and a common-law false arrest claim arising under Florida law against the City.[2] The officer defendants moved for summary judgment, arguing that they were entitled to qualified immunity. The City also moved for

[2] Another § 1983 claim for failure to intervene was brought against officer Paul Scheel and was later dismissed by stipulation.

summary judgment, arguing that the arrest was supported by probable cause, which constituted a complete defense to Manners's false arrest claim.

The district court granted the defendants' motions for summary judgment. As for the officers, they were entitled to qualified immunity because they violated no clearly established constitutional right. According to the district court, the officers had probable cause to stop and arrest Manners. Canella testified consistently that Manners failed to heed a stop sign, and, the district court reasoned, even accepting Manners's version, a "mistaken but reasonable observation" that Manners had run the stop sign was enough to give Cannella probable cause for the arrest.

The district court also determined that the officers had not used excessive force. The video recording of the incident revealed that Manners repeatedly resisted Cannella's efforts to handcuff him. The district court concluded that the officers had used reasonable force to arrest Manners. As the district court put it, a reasonable officer could have concluded that Manners, a "larger individual, who . . . actively resisted Cannella's efforts," "posed an immediate threat" so that tackling and punching Manners was necessary. Nor was the use of tasers unconstitutionally excessive under Eleventh Circuit precedent. Since no violation of a clearly established constitutional right had been shown, the district court found that the officers were entitled to qualified immunity from the excessive force claims.

Having found probable cause to arrest Manners, the district court also concluded that the defendants were entitled to summary judgment on the malicious prosecution and false arrest counts. Probable cause defeated a § 1983 suit for malicious prosecution as well as the companion state common-law false arrest charge.

The district court denied Manners's motion for reconsideration, and this timely appeal ensued.

II.

We review a grant of summary judgment de novo, and we construe all of the facts in favor of Manners, the non-moving party. See, e.g., Oliver v. Fiorino, 586 F.3d 898, 901 (11th Cir. 2009). Summary judgment is properly granted if there is no genuine issue of material fact and the moving parties demonstrate that they are entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); McCullough v. Antolini, 559 F.3d 1201, 1204 (11th Cir. 2009). The moving parties -- here the officers and the City -- bear the burden of demonstrating that there is no genuine issue of material fact. See Fed. R. Civ. P. 56(a); Shiver v. Chertoff, 549 F.3d 1342, 1343 (11th Cir. 2008). Even where the parties agree on the facts, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." Warrior Tombigbee Transportation Co. v. M/V Nan Fung, 695 F.2d 1294, 1296–97 (11th Cir. 1983). However, the Supreme

Court has held, summary judgment may be appropriate on facts that are revealed through a video recording: "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record [as with a video recording of the incident], so that no reasonable jury could believe it, a court should not adopt that version of the facts." Scott v. Harris, 550 U.S. 372, 380 (2007).

The central question is whether the officers were entitled to qualified immunity. Qualified immunity is total immunity from suit, rather than a defense to a particular charge. Such immunity allows government officials to "carry out their discretionary duties without the fear of personal liability or harassing litigation." Oliver, 586 F.3d at 904; see also Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (quotation marks omitted)). We have described that "[b]ecause qualified immunity is a defense not only from liability, but also from suit, it is important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (quotation marks omitted).

In order to be entitled to qualified immunity, the officers first must establish that they were acting within their discretionary authority during the incident. See, e.g., id. There is no dispute that the officers were acting within their discretionary authority when they conducted a traffic stop and later arrested Manners. "Once the

defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." Id.

Qualified immunity is appropriate if the officers' conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Hill v. Cundiff, 797 F.3d 948, 978 (11th Cir. 2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The qualified immunity inquiry articulated by the Supreme Court provides immunity for law enforcement officers "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)); see also Lee, 284 F.3d at 1194. These two components may be analyzed in any order. See Pearson v. Callahan, 555 U.S. 223, 236 (2009). The Supreme Court has repeatedly admonished the courts that the inquiry into whether law was "clearly established" is not "define[d] . . . at a high level of generality." Wesby, 138 S. Ct. at 590 (quotation omitted). Rather, the law, developed in on-point precedent, "must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Id. We have emphasized, accordingly, that the question of whether constitutional

standards are clearly established is one considering the "specific context of the case." Lee, 284 F.3d at 1194 (quotation omitted).

III.

Each of Manners's claims rises or falls on whether there was probable cause for his arrest. In order to establish probable cause, an arrest must be "objectively reasonable based on the totality of the circumstances." Id. at 1195; see also Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). An arrest is objectively reasonable and there is probable cause where "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995).

Probable cause "does not require convincing proof" that the offense was committed. Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., 956 F.2d 1112, 1120 (11th Cir. 1992). It does not require proof beyond a reasonable doubt or even by a preponderance of the evidence. See, e.g., Lee, 284 F.3d at 1195 ("Although probable cause requires more than suspicion, it does not require convincing proof and need not reach the same standard of conclusiveness and probability as the facts necessary to support a conviction." (quotations and citation omitted)). Rather,

"[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable-cause decision." Florida v. Harris, 568 U.S. 237, 243–44 (2013) (second alteration in original) (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)). "Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules." Wesby, 138 S. Ct. at 586 (quotations and citation omitted). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Id. We cannot examine the facts in isolation but, rather, we "consider the whole picture" because "the whole is often greater than the sum of its parts." Id. at 588 (quotation omitted).

Probable cause for an arrest may be found if there is probable cause to believe any crime was committed, whether or not there is probable cause for the crime the arresting officer actually believed had been committed. See, e.g., Lee, 284 F.3d at 1195–96 ("The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest." (quoting Bailey, 956 F.2d at 1119 n.4 (alteration adopted)). And it is now settled law that there is probable cause for a warrantless custodial arrest even for a seemingly insignificant crime. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor

criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

Moreover, for purposes of granting qualified immunity to law enforcement officers, it is enough that there is "arguable probable cause" for a warrantless custodial arrest. See, e.g., Lee, 284 F.3d at 1195. Arguable probable cause simply means that "reasonable officers in the same circumstances and possessing the same knowledge as the [defendant-officers] could have believed that probable cause existed to arrest." Grider v. City of Auburn, 618 F.3d 1240, 1257 (11th Cir. 2010) (quotation omitted).

Reading together what the defendants argued in the district court and argued before us, four theories are offered in support of probable cause. The defendants first claimed that there was probable cause to arrest Manners for running a stop sign; then they argued that the officers could arrest Manners for obstruction of justice when he allegedly refused to remain in his car, or for resisting arrest with violence; and, finally, they urged that he could be arrested for fleeing or attempting to elude a law enforcement officer. On appeal, only two arguments have been offered -- that Manners was lawfully arrested for running a stop sign, and, alternatively, for fleeing or attempting to elude a law enforcement officer. Because the appellees have dropped the theories of resisting arrest and obstruction of justice, we discuss only the first and fourth rationales. Of the two, only one works,

but that is enough; probable cause need only exist for one offense to justify Manners's warrantless arrest, and on this record there was probable cause for a reasonable officer to arrest Manners for fleeing or attempting to elude a law enforcement officer.

A.

The district court found probable cause to arrest Manners for running a stop sign. Even taking (as we must) Manners's version of the facts to be true -- that he did obey the stop sign -- the district court determined that Cannella's observation could have been mistaken, but a mistaken though reasonable belief could support probable cause. We cannot agree that this resolves the question. Even assuming there would have been probable cause to arrest Manners if he ran the stop sign or if Cannella reasonably but mistakenly believed Manners had done so, on this record, there is an undeniable and material factual dispute that precludes summary judgment. Officer Cannella consistently said that Manners failed to stop at the sign. He testified that "[a]s [he] pulled through the stop sign, a vehicle came flying past [him] and made a left turn[,] disobeying the stop sign." Conversely, Manners consistently said that he stopped as required, indeed, he asserted that he came to a "complete stop." The street was in some state of darkness. On this record, a reasonable factfinder could find that Cannella neither saw nor reasonably thought he saw Manners run a stop sign. In the face of a direct factual dispute, summary

judgment is inappropriate. See Kingsland v. City of Miami, 382 F.3d 1220, 1232–33 (11th Cir. 2004) (due to material factual dispute, "the question whether arguable probable cause for the arrest existed [was] aptly suited for a jury"). The district court was not free to resolve a material factual dispute between Manners and Cannella.

B.

There was, however, both arguable and actual probable cause to arrest Manners for fleeing or attempting to elude a law enforcement officer. Again, probable cause may be found if there was cause to believe any crime was committed. See, e.g., Lee, 284 F.3d at 1195–96. Florida law makes "[f]leeing or attempting to elude a law enforcement officer" a felony. Under the provision cited by the City:

> It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree . . . .

Fla. Stat. § 316.1935(1). Manners's failure to stop when he reasonably and practically could have, and when he knew Officer Cannella was hailing him to stop, provided a sufficient basis for the arrest.

There is no dispute that Officer Cannella put on his flashing lights and used his siren when he was directly behind Manners's vehicle at three in the morning. There is no dispute that Manners knew Cannella was a law enforcement officer and that he had been ordered to stop. And there is no dispute that Manners willfully failed to stop when directed to do so because Manners tells us as much in his deposition. By Manners's own version of the facts, he continued to drive for three blocks, or one-tenth of a mile, or for 14.4 seconds after seeing that Officer Cannella was behind him with the patrol car's lights and sirens on. Manners himself said that he knew the lights and sirens meant he was obliged to stop his vehicle but that he made a conscious decision not to do so. The facts known to Cannella were the same. Cannella said that Manners continued to drive his car until he reached a well-lit gas station. Although Manners offered that his windows were rolled down and he was travelling at a slower rate of speed (some 25 miles per hour), he does not claim he provided any indication to Officer Cannella that he intended to stop.

The facts known to Officer Cannella would cause a prudent person to believe Manners had committed the offense of fleeing or attempting to elude a law enforcement officer. See Williamson, 65 F.3d at 158. A prudent person could reasonably believe that Manners's failure to stop when directed to do so by a law enforcement officer violated the words of the statute. Again, the Florida penal

code makes it a felony for a vehicle operator "to refuse or fail to stop the vehicle" when directed to do so. "Fail" means "to neglect to do something." Webster's Third New International Dictionary 814 (2002). "Refuse" means "to show or express a positive unwillingness to do or comply with." Id. at 1910. "Stop" means "to arrest the progress or motion of" or "bring to a standstill." Id. at 2250. But Manners plainly evinced an unwillingness to comply with the officer's command.

Moreover, the officers had arguable probable cause to arrest Manners on the same basis. To be entitled to qualified immunity on the three § 1983 claims, the officers needed only arguable probable cause. See Grider, 618 F.3d at 1257. A reasonable officer in Cannella's shoes, and cognizant of the facts known to Cannella, could have believed that Manners had committed the offense of fleeing or attempting to elude a law enforcement officer.

It does not alter our evaluation simply because the period of time was short so long as Manners could reasonably and safely have complied with the officer's direction but did not do so. In fact, Florida's courts have found probable cause for the offense of fleeing or attempting to elude a law enforcement officer in the absence of lengthy flight and without a high-speed getaway. Thus, for example, Florida's Fourth District Court of Appeal found probable cause to stop a motorist for fleeing or attempting to elude an officer when the driver continued at ten miles per hour for five minutes, making five turns, while followed by a police vehicle

with lights and sirens activated. State v. Kirer, 120 So. 3d 60, 61 (Fla. Dist. Ct. App. 2013) (noting that, after the officer turned on his lights and ordered the arrestee to stop, the arrestee "kept driving," albeit only at "10 miles an hour"). And Florida's First District Court of Appeal also found reasonable suspicion to justify a stop for flight when, after an officer activated lights and sirens, a motorist slowed down, as if to stop, but proceeded to drive for another "one to two miles, although he could have pulled over on the shoulder during that time." Henderson v. State, 88 So. 3d 1060, 1062 (Fla. Dist. Ct. App. 2012).

Manners argues that any belief he fled or attempted to elude a police officer would be unreasonable. We cannot agree. Even if the short interval between Cannella's command to stop and Manners's compliance undermined the state's ability to prove the offense beyond a reasonable doubt, to reiterate, probable cause is not established by proof beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. That a reasonable officer could believe Manners failed to stop when directed to do so suffices to establish arguable probable cause. Thus, Officer Cannella had arguable probable cause to arrest Manners for fleeing or attempting to elude him.

Manners argues, however, that he did not have to stop when he was told to do so both because Florida's flight statute was unconstitutional and out of necessity. First, he claims that the fleeing-or-eluding provision is

unconstitutionally vague and that it violates the Fourth Amendment as well. We need not, and do not consider today whether Florida's fleeing-or-eluding provision is unconstitutional. Instead, the Supreme Court has instructed us that probable cause for arrest may be found where an officer relies in good faith on a law, even if the law is subsequently found to be unconstitutional. See Michigan v. DeFillippo, 443 U.S. 31, 37–38 (1979). No court, whether in the state or federal system, has ever held that Florida's fleeing-or-eluding statute is unconstitutional because it is vague or for any other reason. That is not surprising because the words used in the statute are clear, unambiguous, and easily understood by the average person. Moreover, the argument that the statute is unconstitutional is an affirmative defense, not one the officer was required to consider at the outset of this encounter. See, e.g., Fridley v. Horrighs, 291 F.3d 867, 873 (6th Cir. 2002) (probable cause does not require officer to inquire into availability of an affirmative defense); cf. Sada v. City of Altamonte Springs, 434 F. App'x 845, 850 (11th Cir. 2011) ("It does not appear, . . . that officers are required to consider affirmative defenses in their probable cause calculations.").

Nor was probable cause lacking because of the affirmative defense of necessity. Manners says he "feared for his life" because he was a black male alone with a law enforcement officer on an empty, dark residential street in the middle of

the night, and he "had no reasonable means of avoiding the danger except by driving to [a] safe, well-lit area." The doctrine of necessity requires that

> 1) the defendant reasonably believed that a danger or emergency existed that he did not intentionally cause; 2) the danger or emergency threatened significant harm to himself or a third person; 3) the threatened harm must have been real, imminent, and impending; 4) the defendant had no reasonable means to avoid the danger or emergency except by committing the crime; 5) the crime must have been committed out of duress to avoid the danger or emergency; and 6) the harm the defendant avoided outweighs the harm caused by committing the crime.

Driggers v. State, 917 So. 2d 329, 331 (Fla. Dist. Ct. App. 2005). A general distrust of all police officers is not enough to establish the real, imminent, and impending nature of the danger requirement. Nor is there any showing on this record that either Officer Cannella or the Hollywood police department posed a direct, real, imminent, and impending danger. Nor, finally, was there any reason for Officer Cannella to know why Manners did not comply with his demand to stop until Manners reached a well-lit gas station. And even if some exigency existed, Cannella had no reason to know of any perceived necessity. Again, probable cause is based on the facts known to the law enforcement officer.

Even if Manners's explanation might satisfy a jury if he were charged, failing to stop because of a generalized fear of police does not provide a legal basis to vitiate probable cause for the offense of flight. Manners by his own account knowingly stopped when he chose to do so, rather than when he was directed to do

so, for reasons that may be understandable, but that in no way deprived the police of probable cause. Moreover, there are strong reasons why stopping at the command of a law enforcement officer is important even if the officer's decision to pull over the motorist is a wrongful one. Thus, for example, the Supreme Court has emphasized the serious risk of injury, armed conflict, and the "[r]isk of violence [that] is inherent to vehicle flight" from the police. Sykes v. United States, 564 U.S. 1, 10 (2011) (overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015)). In short, the undisputed facts yield the conclusion that the officers had probable cause to arrest Manners for flight.

IV.

Having determined that there was both actual and arguable probable cause to arrest Manners, we turn to each of his claims. The § 1983 claims against Officers Cannella and Sabillon for excessive force fail because, with probable cause to arrest Manners, they were entitled to use that quantum of force reasonably necessary and proportionated to effect his arrest. And Manners's § 1983 claim against Officer Cannella for malicious prosecution fails because there was no Fourth Amendment violation. Thus, both officers were entitled to qualified immunity. As for the state common-law false arrest claim against the City of Hollywood, it fails as well, again, because there was probable cause to arrest Manners.

A.

The officers were entitled to qualified immunity on the excessive force claims unless their conduct violated clearly established constitutional law. See, e.g., Wesby, 138 S. Ct. at 589. Manners asserts that a clearly established constitutional violation occurred when the officer defendants used force to arrest him without probable cause. Because we have determined that there was probable cause for the arrest, the officers had the right to use some quantum of force to arrest Manners.

Manners claims that a clearly established constitutional violation occurred even if the arrest was lawful because the officers used unnecessary and gratuitous force when they punched and tased him. But law enforcement officers conducting a lawful arrest have the right to take reasonable physical steps to place a suspect under arrest. In fact, "[w]hen an officer lawfully arrests an individual for the commission of a crime, no matter how minor the offense, the officer is entitled . . . to effectuate a full custodial arrest." Lee, 284 F.3d at 1196. The Fourth Amendment protects persons from the use of excessive force during an arrest. See, e.g., id. at 1197; Graham v. Connor, 490 U.S. 386, 394 (1989).

The Supreme Court has held that "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham, 490 U.S. at 396. The determination of whether the force used

is reasonable "requires careful attention to the facts and circumstances of each particular case." Id. And the events "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. The Graham excessive-force inquiry considers whether officers acted in an objectively reasonable way given the circumstances present during an incident, and the inquiry considers factors such as "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." Id.; see also Lee, 284 F.3d at 1197 ("In order to determine whether the amount of force used by a police officer was proper, a court must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand." (quotation omitted)).

Gratuitous force used during the course of an arrest is excessive. See, e.g., Hadley v. Gutierrez, 526 F.3d 1324, 1330 (11th Cir. 2008) (punching arrestee while he was handcuffed and not struggling or resisting constituted excessive force); Lee, 284 F.3d at 1198 (slamming arrestee's head against a trunk "after she was arrested and secured in handcuffs" was excessive); Saunders v. Duke, 766 F.3d 1262, 1265 (11th Cir. 2014) ("We have repeatedly ruled that a police officer violates the Fourth Amendment . . . if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.").

However, the use of that quantum of force necessary to effect an arrest is not excessive. See, e.g., Graham, 490 U.S. at 396; Gomez v. Lozano, 839 F. Supp. 2d 1309, 1317–18 (S.D. Fla. 2012).

The amount of force used by the officers in this case did not violate the Fourth Amendment. The first Graham factor -- the severity of the crime in question -- cuts in Manners's favor. Manners was only accused of the traffic violation of running a stop sign. The second Graham factor, though, weighs in favor of the officers. A reasonable officer on the scene could believe that Manners posed a threat to Cannella when he moved back into his car and clearly tried to escape Cannella's grasp. Even if, as Manners says, he was merely questioning the arrest and did not use or intend to use any violence against Cannella, we cannot view the facts with the calmness of hindsight. Cannella was alone and was faced with an individual larger than he who plainly was not willing to be arrested. Cannella did not know, at that point, what Manners might have in his vehicle or on his person, or whether Manners intended to hurt him in some way. Indeed, when Officer Sabillon arrived and saw Manners struggling with Cannella, she too could reasonably have concluded that Manners posed a threat to Cannella.

Of the Graham factors, the most relevant one here is resisting arrest. From the video recording, it is abundantly clear that Manners refused to be handcuffed beginning with Cannella's first efforts and continuing throughout a struggle with

many officers who attempted to subdue him for at least three full minutes. Cannella had to "make split-second judgments -- in circumstances that [were] tense, uncertain, and rapidly evolving -- about the amount of force that [was] necessary." Graham, 490 U.S. at 397; see also Merricks v. Adkisson, 785 F.3d 553, 563 (11th Cir. 2015) ("If . . . the force was applied when the officer was trying to take control of the suspect or the situation confronting him, the officer can make a much better claim to the qualified immunity defense [than if force was used when a suspect was compliant].").

Substantial force was needed to secure Manners. Manners struggled against Cannella's repeated attempts to place him in handcuffs through physical actions -- rolling over, bracing his arms, shoving at Cannella, and, indeed, grasping and holding Cannella's wrists for an extended period of time. When Sabillon arrived on the scene, Manners continued to struggle against both officers. Rather than being gratuitous, the force used was proportional to restrain someone who was six-foot-two and 240 pounds and was actively resisting for an extended period.

Furthermore, it was not clearly established, at the time of the incident, that the amount of force employed violated the Constitution. Although the Fourth Amendment guarantees a general right to be free from the use of excessive force during a custodial arrest, see, e.g., Oliver, 586 F.3d at 905, Manners must cite to specific cases or otherwise demonstrate that there was a clear violation of the

Constitution. The videotape establishes, as we've repeated, that Manners thwarted Cannella's efforts to handcuff him for quite some time. The force necessary to handcuff Manners was not excessive under any clearly established precedent.

Nor was the use of tasers by Cannella and Sabillon unconstitutionally excessive. The use of a taser "beyond [the arrestee's] complete physical capitulation" repeatedly in a short period where an arrestee was mostly cooperative and made no attempt to flee would be excessive. Id. at 907 (finding the use of the taser shocks was "grossly disproportionate to any threat posed"). Here, however, the taser was used to restrain, subdue, and handcuff Manners, whose resistance was evident from the outset. It is also clear from the video that the use of the taser, and indeed any force employed by the police, ended once Manners was subdued. He was never tased "beyond his complete physical capitulation."

In short, we agree with the district court's determination that the force used by the officers was not constitutionally excessive, and that no controlling case law suggested otherwise.

B.

As for Manners's § 1983 malicious prosecution claim against Officer Cannella, a finding of probable cause for Manners's arrest made summary judgment appropriate. This Court has determined that malicious prosecution can support a valid § 1983 claim. See, e.g., Wood v. Kesler, 323 F.3d 872, 881 (11th

Cir. 2003). In addition to establishing the elements of the common-law tort of malicious prosecution -- "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused" -- a plaintiff asserting malicious prosecution under § 1983 must establish that there was an unreasonable seizure made in violation of the Fourth Amendment, such as an arrest made without probable cause. Id. at 882; see also, e.g., Grider, 618 F.3d at 1256. Inasmuch as there was probable cause to arrest Manners for flight, the malicious prosecution claim must fail as well.[3]

C.

Finally, Manners's supplemental, state common-law false arrest claim against the City of Hollywood fails for the same reason. In Florida, a claim for false arrest requires the plaintiff to establish three elements: "(1) an unlawful detention and [deprivation] of liberty against the plaintiff's will; (2) an unreasonable detention which is not warranted by the circumstances; and (3) an intentional detention." Lozman v. City of Riviera Beach, 39 F. Supp. 3d 1392, 1409 (S.D. Fla. 2014) (citing Tracton v. City of Miami Beach, 616 So. 2d 457 (Fla. Dist. Ct. App. 1992)). The first element -- an unlawful detention -- cannot be

[3] Manners has not argued that there was any other violation of his Fourth Amendment rights.

found where there is probable cause for the arrest. Under Florida law, probable cause is "a complete bar to an action for false arrest." Bolanos v. Metro. Dade Cty., 677 So. 2d 1005, 1005 (Fla. Dist. Ct. App. 1996); see also Miami-Dade Cty. v. Asad, 78 So. 3d 660, 669 (Fla. Dist. Ct. App. 2012). Florida's courts have characterized probable cause as an affirmative defense to a claim for false arrest. See Willingham v. City of Orlando, 929 So. 2d 43, 48 (Fla. Dist. Ct. App. 2006). Since there was probable cause to arrest Manners, the common-law false arrest claim must fail too.

V.

In short, taking the facts in the light most favorable to Manners, this sad incident cannot entitle him to relief on the claims he has raised. Accordingly, we affirm the district court's grant of final summary judgment to the defendants.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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June 04, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-10088-FF
Case Style: Livingston Manners v. Ronald Cannella, et al
District Court Docket No: 0:15-cv-62071-BB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62071-BLOOM/Valle

LIVINGSTON MANNERS,

Plaintiff,

v.

OFFICER RONALD CANNELLA,
OFFICER KARRIE SABILLON,
OFFICER PAUL SCHEEL, and
CITY OF FORT LAUDERDALE,

Defendants.
_____/

ORDER ON MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon Plaintiff Livingston Manners's ("Plaintiff") Amended Motion For Reconsideration, ECF No. [94] (the "Motion"). The Court has considered the Motion, the parties' filings, the applicable law, and is otherwise duly advised. For the reasons that follow, the Motion is denied.

I. BACKGROUND

On October 25, 2016, the Court granted Defendants Officer Ronald Cannella ("Cannella") and Officer Karrie Sabillon's ("Sabillon") (collectively, "Officer Defendants") and Defendant City of Fort Lauderdale's ("City") (collectively, "Defendants") Motions for Summary Judgment, entered Final Judgment in Defendants' favor, and closed this case. *See* ECF Nos. [89], [90]. Plaintiff now moves the Court to reconsider those decisions.[1]

[1] The Court dismissed Defendant Officer Paul Scheel from these proceedings on August 25, 2016. *See* ECF No. [48]. The Court includes the factual background of this case below, for ease of reference.

APPENDIX B

Plaintiff's claims against Defendants stem from events that occurred on the night of June 24, 2014. That night, at approximately 2:30 a.m., Plaintiff was parked in a swale in front of the residence of Sylvester Petes ("Petes"), waiting to pick Petes up for work. Cannella was patrolling the area due to recent thefts in the neighborhood. Plaintiff's vehicle was the only vehicle on the street. After spotting Plaintiff's vehicle, Cannella continued driving straight through an intersection. Cannella states that he then observed Plaintiff turn left onto 26th Avenue without fully stopping at a stop sign, and so, Cannella turned around and positioned himself behind Plaintiff's vehicle to conduct a traffic stop. Plaintiff saw Cannella, and began to drive slowly down 26th Avenue because he knew Cannella "was going to come." Cannella activated his lights and sirens to execute a traffic stop, but Plaintiff did not immediately pull over. Instead, Plaintiff "traveled for two or three minutes" and "drove right through" the intersection at Pembroke Road and 26th Avenue as the light turned green, pulling into a gas station and stopping at the second pump. Once stopped, Cannella approached Plaintiff's driver side window, and upon request, Plaintiff handed Cannella his license. Plaintiff then exited his vehicle. The parties dispute whether Cannella informed Plaintiff that he was under arrest, but do not dispute that when Cannella attempted to restrain Plaintiff, Plaintiff pulled away from Cannella and leaned back into his vehicle. Cannella then pulled Plaintiff out of his vehicle. A physical altercation ensued; Cannella claims that he attempted to handcuff Plaintiff, while Plaintiff states that he surrendered to Cannella. Plaintiff is 6'2" and 240 pounds, while Cannella is 5'10" and 215 pounds. At the beginning of the altercation, Cannella brought Plaintiff to the ground, with Plaintiff landing on his back and Cannella landing on top of him. Throughout the struggle, Cannella punched Plaintiff at least six or seven times, and at one point, Plaintiff held Cannella's wrists. Plaintiff's arrest was only effectuated after Sabillon arrived, Sabillon and Cannella

deployed their Tasers, and additional officers arrived on the scene. Nearly the entire gas station incident was recorded on video, filed in the record by Officer Defendants.

Plaintiff was initially charged with attempted homicide, resisting arrest with violence, and battery on a law enforcement officer. He was acquitted of all charges brought against him in state court. In these proceedings, he brings claims against Cannella under 42 U.S.C. § 1983 for excessive use of force and malicious prosecution (Counts I and IV), Sabillon under 42 U.S.C. § 1983 for excessive use of force (Count II), and against City for false arrest (Count V). The Court entered Final Judgment in Defendants' favor on all claims after granting Defendants' respective Motions for Summary Judgment, and Plaintiff now moves for reconsideration. Defendants' Response timely followed on November 30, 2016.[2] *See* ECF No. [98].

II. LEGAL STANDARD

Plaintiff seeks reconsideration of the Court's Order on Summary Judgment and Final Judgment, ECF Nos. [89] and [90], pursuant to Fed. R. Civ. P. 59. "While Rule 59(e) does not set forth any specific criteria, the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004) (citing *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)); *see Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Wendy's Int'l, Inc. v. Nu-*

[2] As they did on summary judgment, Officer Defendants have adopted the arguments made in City's Response to Plaintiff's Amended Motion for Reconsideration. *See* ECF No. [100]. Plaintiff did not timely file a Reply or move to extend the filing deadline. *See* ECF No. [105]. Nonetheless, the Court has considered Plaintiff's untimely-filed Reply.

Cape Const., Inc., 169 F.R.D. 680, 685 (M.D. Fla. 1996); *see also Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012). "To prevail on a motion for reconsideration, the moving party must present new facts or law of a strongly convincing nature." *Lomax v. Ruvin*, 476 F. App'x 175, 177 (11th Cir. 2012) (citing *Slomcenski v. Citibank, N.A.*, 432 F.3d 1271, 1276 n.2 (11th Cir. 2005)). "Motions for reconsideration are appropriate where, for example, the Court has patently misunderstood a party." *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003); *see Eveillard v. Nationstar Mortgage LLC*, 2015 WL 1191170, at *6 (S.D. Fla. Mar. 16, 2015). To establish grounds for reconsideration, "the movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania*, 401 F. Supp. 2d at 1283. Simply put, a party cannot attempt through reconsideration to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

III. DISCUSSION

In its Order on Motions for Summary Judgment, the Court made a variety of findings including: (1) Officer Defendants acted within the scope of their discretionary authority, shifting the burden to Plaintiff to show that qualified immunity should not apply in this case; (2) Cannella had sufficient probable cause to arrest Plaintiff; (3) Officer Defendants did not apply an unreasonable degree of force to effectuate Plaintiff's arrest; and (4) no material issue of fact exists regarding the lawfulness of Plaintiff's arrest. ECF No. [89] at 7, 12, 17, 21. Plaintiff moves the Court to reconsider its decision on the basis of "clear errors or manifest injustice," arguing that the Court improperly based its decision on three primary grounds that neither party

raised in its briefs to the Court. *See* Motion at 1-2. A court may grant summary judgment on grounds not raised by a party only after providing reasonable notice and a reasonable time to respond. Fed. R. Civ. P. 56(f)(2); *see Karlson v. Red Door Homes, LLC*, 553 F. App'x 875, 877 (11th Cir. 2014). However, if the "ultimate *issue*" urged by a party moving for summary judgment and the ultimate judgment entered by the court "never changed," or when "something in the record place[s] the parties on notice that the district court could consider the issue," Rule 56(f) is not implicated. *Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161, 1178 (8th Cir. 2011) (emphasis in original); *Karlson*, 553 F. App'x at 877 (citing *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201-02 (11th Cir. 2003)); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1204-05 (11th Cir. 1999)). Through this lens, the Court addresses Plaintiff's arguments.

Plaintiff first contends that neither party raised the issue of whether "Officer Cannella had probable cause to arrest Manners for the traffic stop because Officer Cannella's mistaken observation was not rebutted," and that in any event, the Court failed to consider "potential abuse of authority or motivation to make an arrest." Motion at 1-2. However, the circumstances underlying the stop, and whether Cannella had probable cause to stop and arrest Plaintiff based on Plaintiff's alleged stop-sign violation, have always been central issues in this case. Officer Defendants clearly argued as much in their Motion for Summary Judgment, stating that "[n]ot only did Cannella have arguable probable cause to stop Manners, he had probable cause as he personally witnessed Manners run the stop sign at Plunkett Street and 26th Avenue." ECF No. [58] at 10. Plaintiff, in turn, strenuously contended that he did not run the stop sign, that Cannella was not "mistaken," and that in actuality, Cannella "lie[d] and manufactured reasons to justify the arrest . . . Specifically . . . about the circumstances leading to the traffic stop." ECF

No. [71] at 8. Based on these positions, Plaintiff and the Court devoted considerable attention to *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004), a case that holds "a 'mistaken but reasonable [observation]'" is sufficient to establish requisite probable cause to make an arrest. *Kingsland*, 382 F.3d at 1233 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993)). The Court further distinguished the facts of *Kingsland* from those in this case, determining that Plaintiff's "conclusory and unsubstantiated allegations" did not "create[ ] factual issues as to [Cannella's] honesty and credibility." *See* ECF No. [89] at 11; *see id.* at 11 n.4. Pursuant to *Kingsland* and taking "Plaintiff's version of the facts as true," the Court then declined to "entertain" Plaintiff's unsupported accusations. *See id.* at 11 (quoting *Kingsland*, 382 F.3d at 1227 n.8 (citing *Cunningham v. Gates*, 229 F.3d 1271, 1291-92 (9th Cir. 2000)). Accordingly, whether Officer Cannella had probable cause to arrest Manners for the traffic stop, and whether Plaintiff showed otherwise pursuant to *Kingsland*, was clearly before the Court, based largely on Plaintiff's own arguments and citations. Plaintiff cannot now relitigate the issue through reconsideration.[3] *See Michael Linet, Inc.*, 408 F.3d at 763. To the extent that Plaintiff also argues that the Court did not consider his arguments regarding Cannella's "potential abuse of authority or motivation to make and arrest," Plaintiff is mistaken, and has not proffered "new facts or law of a strongly convincing nature" to warrant reconsideration on the issue. *See* ECF No. [89] at 11; *Lomax*, 476 F. App'x at 177.

Next, Plaintiff argues that neither party raised the issue of whether Cannella had probable cause to arrest Plaintiff for resisting arrest with violence. This is simply untrue. For example, City's Motion for Summary Judgment devotes nearly four pages to the proposition that "Probable cause also existed to arrest Mr. Manners for resisting arrest with violence." ECF No.

[3] The Court notes that it did not decide whether Plaintiff actually ran the stop sign.

[60] at 12; *see* ECF No. [58] at 10 (arguing that because Plaintiff "pulled away and began choking and striking Cannella," Cannella "[u]ndoubtedly, . . . had probable cause to arrest Manners for a litany of crimes that evening."). Plaintiff, in Response, argued that "City's claim that Manners was guilty of resisting arrest with violence also fails," and then devoted two pages of argument to his position. ECF No. [80] at 14. Moreover, the Court expressly considered the fact that Plaintiff was not charged with resisting arrest with violence. *See, e.g.*, ECF No. [89] at 18 n.7. The Court also considered, and rejected, Plaintiff's argument that he had a right to resist without violence, based, in part, on a review of the video recording submitted into the record.

That video recording is the subject of Plaintiff's last challenge to the Court's Order on Motions for Summary Judgment. *See* Motion at 2. Plaintiff takes issue with the Court's reliance on the video, but Plaintiff can hardly claim that the Court improperly reviewed and considered the evidence, as Officer Defendants filed the video into the record before moving for summary judgment, and all parties urged the Court to review it. This includes Plaintiff, who referred to the video at least 23 times in his "statement of facts" opposing Officer Defendants' Motion for Summary Judgment.[4] *See* ECF No. [70] at 3-6. And, while Plaintiff may disagree with the Court's reliance on *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) and its progeny, Plaintiff, again, has not presented "new . . . law of a strongly convincing nature" nor has Plaintiff established that the Court committed a "manifest injustice" such that reconsideration is warranted on this issue. *Lomax*, 476 F. App'x at 177; *Williams*, 320 F. Supp. 2d at 1357-58.

All of the issues identified by Plaintiff were raised by the parties on summary judgment, all of the material evidence cited by Plaintiff was of record at the time the Court ruled, and all of

[4] In his Motion, Plaintiff again urges the Court to review the video to find that Cannella's statements are "contradicted by the video recording of the encounter." Motion at 8 (emphasis omitted).

the relevant authority Plaintiff cites was considered in the Court's prior analysis.[5] As such, Plaintiff's attempt to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment" must be rejected. *Michael Linet, Inc.*, 408 F.3d at 763. Plaintiff has failed to present grounds for the extraordinary remedy of reconsideration, and the Motion is denied.

IV. CONCLUSION

For all of the reasons stated herein, it is **ORDERED AND ADJUDGED** that Plaintiff's Amended Motion for Reconsideration, **ECF No. [94]**, is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 15th day of December, 2016.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

[5] This includes *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007), a case Plaintiff did not cite on summary judgment but which nonetheless has limited applicability to the Court's Order on Motions for Summary Judgment. *See Dyer*, 488 F.3d at 884 (recognizing that *Heck v. Humphrey*, 512 U.S. 477 (1994) "was not intended to be a shield to protect officers from § 1983 suits. It was intended to protect habeas corpus and promote finality and consistency. Provided those goals are met, a § 1983 suit is not barred by *Heck*.").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62071-BLOOM/Valle

LIVINGSTON MANNERS,

Plaintiff,

v.

OFFICER RONALD CANNELLA,
OFFICER KARRIE SABILLON,
OFFICER PAUL SCHEEL, and
CITY OF FORT LAUDERDALE,

Defendants.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court upon Motions for Summary Judgment filed by Defendants Officers Ronald Cannella and Karrie Sabillon, ECF No. [58], and Defendant City of Fort Lauderdale, ECF No. [60], (collectively, the "Motions"). For the reasons given in the Court's Order on Motions for Summary Judgment, entered in this case on October 25, 2016, the Court **GRANTS** the Motions, and enters a **FINAL JUDGMENT**, pursuant to Rule 58 of the Federal Rules of Civil Procedure, in favor of Defendants on all remaining claims asserted by Plaintiff in the Second Amended Compliant, ECF No. [35]. The Court reserves jurisdiction to consider further orders that are proper. The Clerk is instructed to **CLOSE** the case.

DONE AND ORDERED in Miami, Florida this 25th day of October, 2016.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

APPENDIX C

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-62071-BLOOM/Valle

LIVINGSTON MANNERS,

Plaintiff,

v.

OFFICER RONALD CANNELLA,
OFFICER KARRIE SABILLON,
OFFICER PAUL SCHEEL, and
CITY OF FORT LAUDERDALE,

Defendants.
_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Motions for Summary Judgment filed by Defendants Officers Ronald Cannella ("Cannella") and Karrie Sabillon ("Sabillon") (collectively, "Officer Defendants"), ECF No. [58], and Defendant City of Fort Lauderdale ("City"), ECF No. [60] (collectively, the "Motions").[1] The Court has carefully reviewed the Motions, the record, all supporting and opposing filings, the exhibits attached thereto, and is otherwise fully advised in the premises. For the reasons that follow, the Motions for Summary Judgment are granted.

I. BACKGROUND

Plaintiff Livingston Manners' ("Plaintiff") claims against Defendants stem from events that occurred on the night of June 24, 2014. That night, at approximately 2:30 a.m., Plaintiff was parked in a swale in front of the residence of Sylvester Petes ("Petes"), waiting to pick Petes up

[1] The Court dismissed Defendant Officer Paul Scheel from these proceedings on August 25, 2016. *See* ECF No. [48]. Officer Defendants have additionally adopted the arguments made by City in its Motion for Summary Judgment. *See* ECF No. [61].

APPENDIX D

for work. *See* ECF Nos. [60] ¶¶ 1-23 ("City's Facts") ¶ 1; [81] ("Plaintiff's Additional Facts") ¶ 1 (collectively, "Undisputed Facts")[2]; *see also* ECF Nos. [57] ("Officers' Facts") ¶ 1; [70] ("Plaintiff's Facts") ¶ 1 (collectively, "Officers' and Plaintiff's Facts"). Cannella was patrolling the area due to recent thefts in the neighborhood. *See* Undisputed Facts ¶ 3. Plaintiff's vehicle was the only vehicle on the street. *See id.* ¶ 2. After spotting Plaintiff's vehicle, Cannella continued driving straight through an intersection. *Id.* ¶ 4. Cannella states that he then observed Plaintiff turn left onto 26th Avenue without fully stopping at a stop sign. Cannella turned around and positioned himself behind Plaintiff's vehicle to conduct a traffic stop. *See id.* ¶¶ 6-7; Officers' Facts ¶ 12. Plaintiff saw Cannella and began to drive slowly down 26th Avenue because he knew Cannella "was going to come." Undisputed Facts ¶ 8. Cannella activated his lights and sirens to execute a traffic stop, but Plaintiff did not immediately pull over. *See id.* ¶¶ 9, 12. Instead, Plaintiff "traveled for two or three minutes," and "drove right through" the intersection at Pembroke Road and 26th Avenue as the light turned green, pulling into a gas station and stopping at the second pump. *Id.* ¶¶ 13, 14; *see* Officers' and Plaintiff's Facts ¶ 15. Once stopped, Cannella approached Plaintiff's driver side window and, upon request, Plaintiff handed Cannella his license. *See* Undisputed Facts ¶ 15. Plaintiff then exited his vehicle. *See id.* ¶ 16. The parties dispute whether Cannella informed Plaintiff that he was under arrest, but do not dispute that when Cannella attempted to restrain Plaintiff, Plaintiff pulled away from Cannella and leaned back into his vehicle. *See id.* ¶¶ 18, 19. Cannella then pulled Plaintiff out of his vehicle. *See* Officers' and Plaintiff's Facts ¶ 32. A physical altercation ensued; Cannella claims that he attempted to handcuff Plaintiff, while Plaintiff states that he surrendered to

[2] Plaintiff has submitted two statements of facts in response to both motions for summary judgment. As Officer Defendants have adopted the arguments made in City's Motion for Summary Judgment, the Court refers to City's Facts and Plaintiff's Additional Facts unless otherwise indicated. Both sets of Plaintiff's facts contain an additional 27 facts, unaddressed by Defendants.

Cannella. *See* Undisputed Facts ¶ 20. Plaintiff is 6'2" and 240 pounds, while Cannella is 5'10" and 215 pounds. *See id.* ¶ 21. At the beginning of the altercation, Cannella brought Plaintiff to the ground, with Plaintiff landing on his back and Cannella landing on top of him. *See* Officers' and Plaintiff's Facts ¶ 35. Throughout the struggle, Cannella punched Plaintiff at least six or seven times and, at one point, Plaintiff held Cannella's wrists. *See id.* ¶ 37; Undisputed Facts ¶ 22. Plaintiff's arrest was only effectuated after Sabillon and other officers arrived on the scene, and Sabillon and Cannella deployed their Tasers. *See* Undisputed Facts ¶ 23; Officers' and Plaintiff's Facts ¶¶ 45-47. Plaintiff was initially charged with attempted homicide, resisting arrest with violence, and battery on a law enforcement officer. *See* Undisputed Facts ¶ 23.

Plaintiff was acquitted of all charges brought against him in state court. *See* ECF No. [35] ("Second Amended Complaint") ¶ 62. He now brings claims against Cannella under 42 U.S.C. § 1983 for excessive use of force and malicious prosecution (Counts I and IV), against Sabillon under 42 U.S.C. § 1983 for excessive use of force (Count II), and against City for false arrest (Count V). *See* Second Amended Complaint. Officer Defendants and City filed their respective Motions on September 6 and 16, 2016. *See* ECF Nos. [58] and [60]. Plaintiff's Responses, and Defendants' Replies, timely followed. *See* ECF Nos. [71], [78], [80], [87].

II. LEGAL STANDARD

A court may grant a motion for summary judgment "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). The parties may support their positions by citation to the record, including, *inter alia*, depositions, documents, affidavits, or declarations. *See* Fed. R. Civ. P. 56(c). An issue is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F. 3d 1235, 1243

(11th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* (quoting *Anderson*, 477 U.S. at 247-48). The Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in the party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which a jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252. The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007) (quoting *Carlin Comm'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986)).

The moving party shoulders the initial burden to demonstrate the absence of a genuine issue of material fact. *See Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). If a movant satisfies this burden, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Ray v. Equifax Info. Servs., L.L.C.*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Instead, "the non-moving party 'must make a sufficient showing on each essential element of the case for which he has the burden of proof.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The non-moving party must produce evidence, going beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designating specific facts to suggest that a reasonable jury could find in the non-moving party's favor. *Shiver*, 549 F.3d at 1343. But even where an opposing party neglects to submit any alleged material facts in controversy, a court cannot grant summary judgment unless it is satisfied that all of the evidence on the record supports the uncontroverted

material facts that the movant has proposed. *See Reese v. Herbert*, 527 F.3d 1253, 1268-69, 1272 (11th Cir. 2008); *United States v. One Piece of Real Prop. Located at 5800 S.W. 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1103 n.6 (11th Cir. 2004).

III. DISCUSSION

Officer Defendants move for summary judgment on the basis of qualified immunity. City moves for summary judgment, asserting probable cause as a complete defense. The Court addresses Defendants' arguments in turn.

A. Qualified Immunity

"Qualified immunity . . . offers complete protection for individual government officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hill v. Cundiff*, 797 F.3d 948, 978 (11th Cir. 2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "This formulation of the qualified immunity inquiry is intended to protect government officials 'from undue interference with their duties and from potentially disabling threats of liability.'" *Jordan v. Doe*, 38 F.3d 1559, 1565 (11th Cir. 1994) (quoting *Harlow*, 457 U.S. at 806); *see also Jackson v. Humphrey*, 776 F.3d 1232, 1241-42 (11th Cir. 2015) ("The purpose for qualified immunity is to permit officials to act without fear of harassing litigation as long as they can reasonably anticipate before they act whether their conduct will expose them to liability."). "Qualified immunity is an immunity from suit rather than a mere defense from liability," *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007), and "[e]ntitlement to immunity is the rule, rather than the exception." *Samarco v. Neumann*, 44 F. Supp. 2d 1276, 1291 (S.D. Fla. 1999) (citing *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) *abrogated on other grounds by Hope v. Pelzer*, 536 U.S. 730 (2002) ("That qualified

immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities.")). "'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel . . . the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*'" *McMillian v. Johnson*, 88 F.3d 1554, 1562 (11th Cir.), *opinion amended on reh'g*, 101 F.3d 1363 (11th Cir. 1996) (emphasis in original) (quoting *Lassiter*, 28 F.3d at 1150).

1. Discretionary Authority

To enjoy qualified immunity, Officer Defendants must first establish that they acted within their discretionary authority during the incident in question. *See Oliver v. Fiorino*, 586 F.3d 898, 905 (11th Cir. 2009); *see also O'Rourke v. Hayes*, 378 F.3d 1201, 1205 (11th Cir. 2004) ("To be even potentially eligible for qualified immunity, the official has the burden of establishing that he was acting within the scope of his discretionary authority.") (citation omitted). "A government official proves that he acted within the purview of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.'" *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990) (quoting *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988)). As cautioned by the Eleventh Circuit, "[i]nstead of focusing on whether the acts in question involved the exercise of actual discretion," a court must "assess whether they are of a type that fell within the employee's job responsibilities." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004). This requires the court to "ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to

utilize." *Id.* (citing *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 n.17 (11th Cir. 1994)). As to the first prong, a court must look to the "general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Id.* at 1266. Put another way, a court asks whether a defendant was "performing a function that, *but for* the alleged constitutional infirmity, would have fallen within his legitimate job description." *Id.* (emphasis in the original).

As police officers, Officer Defendants clearly had the authority to seize and arrest Plaintiff. In addition, the creation of a probable cause affidavit falls within Cannella's "legitimate job-related function[s]." *Holloman*, 370 F.3d at 1265. Plaintiff does not argue that Officer Defendants acted beyond the scope of their discretionary authority. Accordingly, the burden shifts to Plaintiff to show that qualified immunity should not apply because (1) Officer Defendants violated his constitutional right(s); and (2) the right(s) was clearly established at the time of the incident. *See id.* at 1267; *Randall v. Scott*, 610 F.3d 701, 715 (11th Cir. 2010).

2. *Plaintiff's clearly established constitutional rights*

The Fourth Amendment affords Plaintiff the constitutional right to be free from an unreasonable search and seizure. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Under established precedent, "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Accordingly, to show that qualified immunity does not apply because Officer Defendants used excessive force, Plaintiff must establish "(1) that a seizure occurred; and (2) that the force used to effect the seizure was unreasonable." *Troupe v. Sarasota*

Cty., Fla., 419 F.3d 1160, 1166 (11th Cir. 2005) (citing *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997)); *see also Graham*, 490 U.S. at 394 (citing *Garner*, 471 U.S. at 7-22). Plaintiff has established that a seizure occurred. *See Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) (a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied."). The question before the Court, therefore, is whether Plaintiff has sufficiently established that a reasonable jury could determine that Officer Defendants used unreasonable force to effect the seizure. *See Troupe*, 419 F.3d at 1166.

a. The arrest

"When an officer lawfully arrests an individual for the commission of a crime, no matter how minor the offense, the officer is entitled under controlling Supreme Court precedent to effectuate a full custodial arrest." *Lee v. Ferraro*, 284 F.3d 1188, 1196 (11th Cir. 2002) (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001)). "The right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" *Bashir v. Rockdale Cty., Ga.*, 445 F.3d 1323, 1332 (11th Cir. 2006) (quoting *Graham*, 490 U.S. at 396). Plaintiff argues that under *Bashir*, "any force by Officers Cannella and Sabillon was excessive" because Cannella lacked probable cause to arrest Plaintiff. ECF No. [71] at 11. Plaintiff, however, misreads *Bashir*, as the *Bashir* Court *rejected* a similar argument and held that "where an excessive force claim is predicated . . . on allegations the arresting officer lacked the power to make an arrest, the excessive force claim is entirely derivative of, and subsumed within, the *unlawful arrest* claim." 445 F.3d at 1332 (emphasis added). Plaintiff does not bring an unlawful arrest claim against Officer Defendants; basing his Section 1983 causes of action solely on the force utilized and his subsequent prosecution. *See* Second Amended Complaint. Accordingly, Plaintiff cannot overcome Officer Defendants' qualified

immunity solely on the basis of the lawfulness (or lack thereof) of the arrest. Whether Cannella had probable cause to arrest Plaintiff, however, is relevant to many of the issues presented in this case. As such, the Court addresses the matter.

Officer Defendants claim that Cannella had probable cause to stop and arrest Plaintiff because Plaintiff (1) did not fully stop at a stop sign; (2) fled and eluded Cannella before stopping at the gas station[3]; and (3) refused commands, punched Cannella, and generally resisted arrest. *See* Officer Defendants' Motion at 6-7. "The standard for determining whether probable cause exists is the same under Florida and federal law." *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). "To show probable cause, the arresting officer must have had reasonable grounds to believe that the arrestee committed a crime." *Lozman v. City of Riviera Beach*, 39 F. Supp. 3d 1392, 1409 (S.D. Fla. 2014). "This standard is met when 'the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" *Rankin*, 133 F.3d at 1435 (quoting *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995)).

Cannella claims that he pulled Plaintiff over because Plaintiff failed to stop at a stop sign. Specifically, Cannella testified that "a vehicle came flying past me and made a left turn disobeying the stop sign . . . After I passed through it, he passed through the stop sign behind me to make a left turn south." ECF No. [53-1] at 6:18-19, 21-22 ("Cannella Depo."). Cannella's Incident Report similarly documents that "[t]he defendant disobeyed the stop sign at south 26th Avenue before executing a left turn (south) on south 26th Avenue," and that at the end of the incident, "the defendant was issued a uniform traffic citation to wit: disobey stop sign." ECF

[3] The Court includes this argument because Officer Defendants have adopted the arguments made by City in its Motion for Summary Judgment. *See* ECF No. [61].

No. [79-1] at 3, 5. Cannella also testified during Plaintiff's criminal trial that he "noticed in [his] rear view mirror that the vehicle which was occupied by Mr. Manners accelerated from the swale it was parked in front of and pulled behind me and pulled through the stop sign without stopping before it made a left turn which was south on 26th Avenue." ECF No. [69-1] at 29:5-9; *see id.* at 53:14-25–54:1-14; ECF No. [69-2] at 6:4-8, 7:24 ("Yes, I pulled him over for a stop sign violation."). Plaintiff, however, claims that he stopped at the stop sign, and thus, that Cannella lacked probable cause to pull him over. *See* ECF No. [52-1] at 40:13-14 ("Plaintiff's Depo.") ("I stopped at the stop sign. I made a left, and I was going down -- south on 26th Avenue . . . ."); *see also* ECF No. [64-1] at 13:5-6 ("When I got to the stop sign, I stopped at the stop sign, proceeded to make a left southbound on 26th Avenue."). Plaintiff does not contest that he was issued a traffic citation, but argues that consistent with *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004), a material issue of fact exists regarding the basis for the traffic stop. The Court disagrees.

Cannella has steadfastly stated that he witnessed Plaintiff drive through a stop sign without making a full stop. Even taking Plaintiff's version of the facts as true and assuming that Cannella was mistaken in his observation, "a 'mistaken but reasonable [observation]'" is sufficient to establish the requisite probable cause to make an arrest. *Kingsland*, 382 F.3d at 1233 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993)); *see Draper v. Reynolds*, 369 F.3d 1270, 1276 (11th Cir. 2004) ("That the tag light was working to an unknown extent during daylight does not directly contradict Reynolds's position that the registration plate was not clearly legible from fifty feet away on the night of the stop and is insufficient to create a genuine issue of material fact in this record."); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (officers who reasonably but mistakenly conclude that probable cause exist are entitled to

immunity). In this case, the street was dark and Cannella states that he observed Plaintiff through his rear-view mirror, circumstances Plaintiff does not challenge and that could have reasonably resulted in a mistaken observation. Unlike in *Kingsland*, relied upon heavily by Plaintiff, the record does not contain evidence of "conduct [that] creates factual issues as to [Cannella's] honesty and credibility." *Id.* To the contrary, the record shows that Cannella consistently testified and documented that Plaintiff failed to fully stop at the stop sign, going so far as to issue a traffic citation even after the incident had escalated beyond a mere stop sign violation. Plaintiff and his counsel's conclusory and unsubstantiated allegations constitute the only evidence in the record – circumstantial or otherwise – that Cannella fabricated the basis of the stop, and as such, the Court "need not entertain" the accusations.[4] *Id.* at 1227 n.8 (citing *Cunningham v. Gates*, 229 F.3d 1271, 1291-92 (9th Cir. 2000) (dismissing plaintiffs' conclusory allegations of fabrication where the plaintiffs produced "not an iota of evidence" to suggest that the defendant officers fabricated evidence)). A court may not employ "[h]indsight [to] determin[e] whether a prior arrest was made on probable cause," *Lozman*, 39 F. Supp. 3d at 1409, and "[a] driver is required to stop regardless of the lawfulness of the police decision to direct the vehicle to stop." *DeRosa v. Rambosk*, 732 F. Supp. 2d 1285, 1295 (M.D. Fla. 2010), *aff'd in part sub nom. DeRosa v. Sheriff of Collier Cty., Florida*, 416 F. App'x 839 (11th Cir.

[4] Unlike the record in this case, the *Kingsland* plaintiff presented circumstantial evidence of officer falsification as follows: "(1) despite supposedly detecting an odor of cannabis, the officers chose not to conduct a search of Kingsland's vehicle, her person, or her passengers to corroborate their testimony; (2) the officers did not call in drug-sniffing dogs to confirm their suspicions of drug use; (3) no drugs were ever found or produced; (4) Kingsland tested negative for cannabis; (5) Kingsland's vehicle was not impounded as evidence, nor was her allegedly odoriferous clothing retained; (6) the defendants stated in their arrest affidavit that Kingsland ran the red light, allegedly without taking statements from available witnesses or from Kingsland herself; [ ] (7) the officers decided to charge Kingsland with DUI-cannabis rather than DUI-alcohol, and simultaneously destroy an initial arrest affidavit, only after she passed Breathalyzer tests; . . . [and] [8] the arrest affidavit makes no mention of a cannabis odor emanating from the truck." 382 F.3d at 1226-27. No comparable circumstantial evidence exists in this case.

2011). Accordingly, no material issue of fact exists regarding the lawfulness of Plaintiff's arrest.[5] *See Lee*, 284 F.3d at 1196.

b. Excessive force

Having determined that Cannella had probable cause to arrest Plaintiff, the Court moves to the issue of excessive force. While an officer may "use some degree of physical coercion or threat thereof to effect" an arrest, *Bashir*, 445 F.3d at 1332, determining the reasonableness of force used in a given case requires a careful balancing of the nature and quality of the intrusion on the individual's rights against government interests. *See Garner*, 471 U.S. at 8; *Crosby v. Paulk*, 187 F.3d 1339, 1351 (11th Cir. 1999). "[G]enerally no bright line exists for identifying when force is excessive." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). The use of force "must be judged on a case-by-case basis 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Post*, 7 F.3d at 1559 (quoting *Graham*, 490 U.S. at 394). "When making an arrest or stop, officers can use force that is 'necessary in the situation at hand' but they violate a constitutional right if they use excessive force." *Gomez v. Lozano*, 839 F. Supp. 2d 1309, 1317 (S.D. Fla. 2012) (Jordan, J.) (quoting *Lee*, 284 F.3d at 1197). While an officer's "subjective intent is irrelevant to the inquiry," an officer may not apply force that "exceed[s] the force a reasonable officer would believe is necessary under the circumstances." *Samarco*, 44 F. Supp. 2d at 1290 (citing *Graham* 490 U.S. at 397; *Hutton*, 919 F.2d at 1540); *Gomez*, 839 F. Supp. 2d at 1317 (citing *Penley v. Eslinger*, 605 F.3d

[5] As explained further below, Cannella later obtained probable cause to arrest Plaintiff, at a minimum, for resisting arrest and battery upon a police officer. *See Morris v. Town of Lexington Alabama*, 748 F.3d 1316, 1325 (11th Cir. 2014) ("once Morris punched Bradford, the officers had probable cause, or at the very least arguable probable cause, to believe that Morris had committed an assault. Therefore, the officers' arrest of Morris after he punched Bradford cannot be considered a violation of Morris's Fourth Amendment right not to be seized without probable cause."); *see also N.H. v. State*, 890 So. 2d 514, 517 (Fla. 3d DCA 2005) ("refusing to identify himself, refusing to sit and thus comport himself so that the officers could investigate and finally physically threatening them . . . is sufficient to support the finding" that defendant resisted an officer).

843, 849 (11th Cir. 2010)). As counseled by the Supreme Court, a reasonableness determination requires a court to analyze the totality of the circumstances, including a consideration of (1) the severity of the crime; (2) whether the suspect poses an immediate threat; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight (hereinafter, "*Graham* test" or "*Graham* factors"). *See Graham*, 490 U.S. at 396. A court should not apply these factors "with mathematical precision; rather, they must be evaluated within the context of how the seizure was carried out." *Samarco*, 44 F. Supp. 2d at 1285 (citing *Ortega v. Schramm*, 922 F.2d 684, 695 (11th Cir. 1991); *see Buckley v. Haddock*, 292 F. App'x 791, 798 (11th Cir. 2008) ("The circumstances that call on police to use some intermediate force – between no force and deadly force – remain the cases where the law of excessive force is most ambiguous.").

The parties tell two competing narratives of the arrest. As told by Defendants, after the vehicles stopped at the gas station, Plaintiff shouted at Cannella, exited his car, and refused to return to his vehicle despite multiple orders to do so. *See* Officers' Facts at 18, 20, 22-23; Cannella Depo. at 9:19-22. Cannella warned Plaintiff that he would be arrested if he did not return to his vehicle. After Plaintiff failed to comply, Cannella told Plaintiff to put his hands behind his back to be handcuffed. *See* Officers' Facts at 24-25; Cannella Depo. at 10:19-20, 12:15-20. Plaintiff refused and began to resist by "bracing and tensing his body." Officers' Facts at 26. Cannella attempted to place handcuffs on Plaintiff, but Plaintiff pulled away into his vehicle, requiring that Cannella "wrestle him onto his back in the front seat of his vehicle." *Id.* at 29. Plaintiff struck Cannella three or four times while in the vehicle, and after a few seconds, Cannella pulled Plaintiff out of the driver's-side door. *See id.* 31-32; Cannella Depo. at 13:11-12. Cannella brought Plaintiff to the ground in an attempt to handcuff him, but because Plaintiff resisted by stretching out his arms, Cannella punched him six or seven times. *See* Officers' Facts

at 33, 35-37. Plaintiff began to scream and punch Cannella, at one point, even grabbing Cannella by the throat and choking him. *See id.* at 38-39; Cannella Depo. at 15:22-25. The parties continued to struggle and Plaintiff continued to resist, managing to wrap his legs around Cannella and grab hold of Cannella's wrists and arms. *See* Officers' Facts at 42-44. Cannella states that he momentarily lost consciousness, and that throughout the incident, he feared for his life. *See* Cannella Depo. at 22:5-7, 21-22. The struggle did not end until Sabillon arrived, at which point Cannella "got up" from his "straddling position" atop Plaintiff, and Sabillon deployed her Taser in stun mode. *See* Officers' Facts at 45; Cannella Depo. at 17:7-8; ECF No. [54-1] at 9:10-11 ("Sabillon Depo."). Because Plaintiff continued to resist arrest, Sabillon and Cannella deployed their Tasers three or four more times in the aggregate, and with the assistance of additional officers, eventually handcuffed and arrested Plaintiff. *See* Cannella Depo. at 17:17-25–18:1-6; Sabillon Depo. at 14:8-15, 16:3-25.

Plaintiff tells a different story. Pertinently, Plaintiff states that he never shouted at Cannella, but rather, asked Cannella whether he could "hurry things up," to which Cannella punched him in the face. Plaintiff's Facts at 63, 65; *see* Plaintiff's Depo. at 41:20-22; 69:16-23 ("Q: That was all that was said and then you were immediately punched? A: Yes ma'am. Q: All right. When you were immediately punched, what did you do next? A: I leaned back -- as he was trying to -- he was trying to put -- he was telling me he was going to take me to jail. I leaned into the vehicle . . . ."), 70:25–71:1 ("I was already leaning back into the car. When he punched me, he was on top of me, punching me."). According to Plaintiff, Cannella never told him to return to his vehicle, and Plaintiff "complied with all of Officer Cannella's commands." Plaintiff's Facts at 67. During the struggle, Plaintiff threw out his arms, but did not brace his body to resist Cannella's attempt to handcuff him, and at no point did Plaintiff "choke, strike, or

kick" Cannella or "resist Cannella's efforts to arrest him." *See id.* at 67, 68, 70; Plaintiff's Depo. at 442:6-7, 43:2 ("I never touched this guy."). Plaintiff admits, however, that he grabbed Cannella's wrists. *See id.* at 44.

If the record contained only this competing testimony, summary judgment on the basis of qualified immunity may be improper. *See Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253-54 (11th Cir. 2013) ("As a general principle, a plaintiff's testimony cannot be discounted on summary judgment unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law, meaning that it relates to facts that could not have possibly been observed or events that are contrary to the laws of nature." (citing *Scott v. Harris*, 550 U.S. 372, 380-81 (2007); *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1537 (11th Cir. 1987); and *United States v. Flores*, 572 F.3d 1254, 1263 (11th Cir. 2009))). When, however, "opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. In the Eleventh Circuit, "exhibits govern" when they contradict a plaintiff's general and conclusory allegations. *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009). When videotape evidence contradicts a plaintiff's version of facts, a court properly views the facts "in the light depicted by the videotape." *Scott*, 550 U.S. at 381. Defendants in this case have produced an uncontested videotape that, while lacking audio, documents nearly the entire arrest. *See* ECF No. [51]. A review of that video reflects the following:

- Cannella approaches Plaintiff's vehicle and speaks with Plaintiff while Plaintiff sits in the driver seat. As Cannella looks into the back seat of Plaintiff's vehicle, Plaintiff exits his vehicle and stands next to Cannella. *See* Video at 3:00:00-3:00.37.

- Plaintiff and Cannella speak face to face and Plaintiff's mannerisms convey dissatisfaction and frustration. Plaintiff then stands to the side and Cannella further investigates the vehicle's front seat. *See id.* at 3:00.37-3:00.57.

- Cannella speaks to and points at Plaintiff in a manner that upsets Plaintiff, and Plaintiff responds orally and gestures animatedly. Plaintiff then reenters his vehicle. *See id.* at 3:00.57-3:01.01.

- Cannella reaches into the vehicle and grabs Plaintiff's arm in an apparent attempt to handcuff him. Imperceptible movements occur inside the vehicle and, after a few seconds, Cannella pulls Plaintiff out by his head. *See id.* at 3:01.01-3:01.19.

- Cannella places Plaintiff in a standing position such that Plaintiff's head is facing the ground, and Plaintiff spreads both arms out to either side. Cannella flips Plaintiff to the ground, with Plaintiff landing on his back and Cannella atop Plaintiff's stomach. Cannella pushes his forearm across Plaintiff's face. *See id.* at 3:01.19-3:01.23.

- Plaintiff pushes at Cannella two or three times, resulting in Cannella taking his forearm off Plaintiff's face. Cannella punches Plaintiff in the head a number of times. Plaintiff has his arms braced between himself and Cannella, pressed against Cannella. *See id.* at 3:01.23-3:01.36.

- Cannella succeeds in flipping Plaintiff to his stomach and attempts to place handcuffs on Plaintiff. Plaintiff resists, tensing and stretching his arms out towards the ground in fists. Plaintiff then convulses, bringing his legs and arms around in an apparent attempt to lock Cannella. The parties roll and Cannella punches Plaintiff in the head. *See id.* at 3:01.36-3:02.05.

- Having again rolled to his back, Plaintiff wraps his legs around Cannella and stretches his arm(s) into Cannella's face or upper body. Cannella moves his body up and Plaintiff grabs a hold of Cannella's wrists. The parties continue to struggle, with Plaintiff holding Cannella's wrists. Plaintiff does not let go until Sabillon arrives, releasing his hold just before Sabillon discharges her Taser. *See id.* at 3:02.05-3:02.44.

- With the officers close by and speaking to Plaintiff, Plaintiff roles towards Cannella, and a second struggle ensues between Sabillon, Cannella, and Plaintiff. During this skirmish, both officers appear to attempt to place Plaintiff in handcuffs. *See id.* at 3:02.44-3:03.45.

- After approximately one minute, many more officers arrive and swarm Plaintiff. A police dog also appears on leash approximately ten feet away from Plaintiff. Plaintiff is eventually handcuffed, laying on his back. The police officers disperse, and the police dog leaves. *See id.* at 3:03.45-3:04.47.

See also ECF No. [55-1] (still-frame photographs). As reflected above, the video materially contradicts large portions of Plaintiff's account, and supports many of the facts stated by Defendants. Rather than fully comply with Cannella, Plaintiff clearly behaves in a resistive, confrontational manner before Cannella attempts to place Plaintiff in handcuffs. By his own testimony, Plaintiff resisted Cannella's efforts to arrest him. *See, e.g.*, Plaintiff's Depo. at 71:25–72:1-2 ("He tried to restrain me. At that time, I pulled away, pulled back into the car and asked him what he was doing").[6] At no point prior to entering the vehicle does Cannella punch Plaintiff in the face. Plaintiff appears to brace his body and move inside the vehicle, making it difficult for Cannella to handcuff him, but the remaining struggle is indiscernible. Once the scuffle begins and the men are on the ground, Plaintiff clearly pushes at Cannella's face or upper body, squeezes Cannella with his legs and arms, and generally resists Cannella's efforts to handcuff him, for over three minutes. At a minimum, this contradicts Plaintiff's statement that he "did not put a hand on any officers." Plaintiff's Depo. at 73:4; *see id.* at 94:5 ("I did not touch or strike any officers.").

Under these circumstance and applying the *Graham* factors, Officer Defendants applied a reasonable degree of force to effectuate Plaintiff's arrest. While the video does not depict the words uttered or their tone, Plaintiff clearly behaves in a hostile manner prior to Cannella's attempt to handcuff him. When Cannella attempts to handcuff Plaintiff, Plaintiff resists, and continues to resist for over three minutes, retreating into his car, pushing Cannella, outstretching

[6] Plaintiff further testified that Cannella told Plaintiff that he was going to jail, and that when Cannella went to grab Plaintiff's arm, Plaintiff retreated into his car. *See* Plaintiff's Depo. at 72:3-11.

his arms, rolling on the ground, wrapping his legs, and holding Cannella's wrists. Plaintiff does not stop holding Cannella until Sabillon arrives. Plaintiff's frustration notwithstanding, under Florida law, when a police officer attempts to effectuate an actual arrest, "[a] person is not justified in the use or threatened use of force to resist . . . if the law enforcement officer was acting in good faith." Fla. Stat. Ann. § 776.051(1); *see Tillman v. State*, 934 So. 2d 1263, 1270 (Fla. 2006); *see also Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371, 1378 (S.D. Fla. 2002). Under Eleventh Circuit precedent, Cannella was entitled to use a "degree of physical coercion or threat thereof to effect" the arrest. *Bashir*, 445 F.3d at 1332. While Cannella initially stopped Plaintiff based on a traffic violation, Cannella did not "exceed the force a reasonable officer would believe is necessary under the circumstances" that transpired. *Gomez*, 839 F. Supp. 2d at 1317. After Cannella and Plaintiff fell to the ground, Plaintiff clearly resisted physically, resulting in initial charges for attempted homicide, resisting arrest with violence, and battery on a law enforcement officer, all severe crimes under the *Graham* test.[7] As to the second *Graham* factor, the Eleventh Circuit has explained that it "can be reduced to a single question: 'whether, given the circumstances, [the suspect] would have appeared to reasonable police officers to have been gravely dangerous.'" *Penley*, 605 F.3d at 851 (alternations in the original) (quoting *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002)). Here, Cannella struggled by himself with a larger individual, who, by his own testimony, actively resisted Cannella's efforts. *See, e.g.*, Plaintiff's Depo. at 71:25–72:1-2, 81:3-10, 85:1-4. At the time, Cannella had yet to even run a background check on Plaintiff. Under these circumstances, the Court believes that a "reasonable officer on the scene" could have concluded that Plaintiff posed an immediate

[7] The fact that Plaintiff was not ultimately charged or convicted of certain of these crimes does not affect this analysis. *See Lee*, 284 F.3d at 1195-96 ("'[t]he validity of an arrest does not turn on the offense announced by the officer at the time of the arrest.'" (quoting *Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., Fla.*, 956 F.2d 1112, 1119 n.4 (11th Cir. 1992) in turn, quoting *United States v. Saunders*, 476 F.2d 5, 7 (5th Cir.1973) and citing *State v. Cote*, 547 So. 2d 993, 996 (Fla. 4th DCA 1989)).

threat, and that the force Cannella used – punching Plaintiff – was necessary. *Post*, 7 F.3d at 1559 (quoting *Graham*, 490 U.S. at 394). "The government has a weighty interest in protecting members of the public and police officers from the threat of force," and use of even severe force does not violate the Constitution "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Penley*, 605 F.3d at 851 (internal citations and quotations omitted). The video shows that Cannella could have reasonably believed that Plaintiff posed such a threat. The Court also finds that the third *Graham* factor favors Officer Defendants, as Plaintiff was actively resisting arrest.

Regarding the use of Tasers after Sabillon arrived on the scene, the Court finds that Officer Defendants' use did not violate Plaintiff's constitutionally established rights. Prior to the incident in question, the Eleventh Circuit held that a Taser's use against a suspect who is resisting arrest, even three times, does not constitute excessive force. *See Hoyt v. Cooks*, 672 F.3d 972, 980 (11th Cir. 2012); *Floyd v. Corder*, 426 F. App'x 790, 792 (11th Cir. 2011); *see also Fils v. City of Aventura*, 647 F.3d 1272, 1289 (11th Cir. 2011) ("Of course, the use of tasers or other weapons does not violate the Fourth Amendment *per se*. Such force could be appropriate where an officer reasonably believes the suspect is violent."). In fact, the Eleventh Circuit has found an officer's use of a Taser "reasonably proportionate to the difficult, tense and uncertain situation" faced during a traffic stop in which a suspect acted in a "hostile, belligerent, and uncooperative" manner, even though "(1) the suspect was not armed, (2) was not attempting to flee, and (3) there was no violence or report of violence concerning the suspect." *Floyd*, 426 F. App'x at 792 (quoting and describing the facts of *Draper*, 369 F.3d at 1272-74, 1278). In this case, Plaintiff did not stop holding Cannella's wrists until just before Sabillon applies her Taser. Plaintiff then *continued* to resist both officers' attempts to handcuff him. Under these

circumstances, recognizing that "police officers make split-second decisions . . . in tough, tense situations," *Gomez*, 839 F. Supp. 2d at 1317, and cognizant of "the context of how the seizure was carried out," *Samarco*, 44 F. Supp. 2d at 1285, the Court finds that Cannella and Sabillon used an amount of force reasonably "'necessary in the situation at hand.'" *Gomez*, 839 F. Supp. 2d at 1317 (quoting *Lee*, 284 F.3d at 1197); *see Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008); *see also Nolin v. Isbell*, 207 F.3d 1253, 1255 (11th Cir. 2000) ("qualified immunity applies unless application of the standard would inevitably lead every reasonable officer in the position of the defendant officer to conclude the force was unlawful." (internal alteration and quotations omitted)). Accordingly, the Court finds that Plaintiff has failed to establish that Officer Defendants used excessive force such that they violated a clearly established constitutional right. *See Holloman*, 370 F.3d at 1267. Officer Defendants are entitled to qualified immunity as to Counts I and II of the Second Amended Complaint.

B. Malicious Prosecution and False Arrest

Having largely rejected Plaintiff's version of events and conclusory allegations due to the video recording and other uncontested record evidence, the Court quickly dispenses with Plaintiff's remaining claims. "To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures." *Kingsland*, 382 F.3d at 1234 (citing *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003), *cert. denied*, 540 U.S. 879 (2003)). However, "the existence of probable cause defeats a § 1983 malicious prosecution claim." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1256 (11th Cir. 2010). "To receive qualified immunity, an officer need not have actual probable cause, but only 'arguable' probable cause," which "exists where 'reasonable officers in the same circumstances and

possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff.'" *Id.* at 1257 (quoting *Kingsland*, 382 F.3d at 1232). In this case, the uncontroverted record shows that Cannella believed Plaintiff had failed to stop at the stop sign. The video evidence additionally shows that Plaintiff resisted arrest, and that Plaintiff arguably battered Cannella. Accordingly, Cannella had sufficient probable cause to arrest Plaintiff and the Court grants summary judgment in Cannella's favor as to Count IV of the Second Amended Complaint. For the same reason, the Court grants City's Motion as to Count V, Plaintiff's sole claim for false arrest.[8] *See Bolanos v. Metro. Dade Cty.*, 677 So. 2d 1005, 1005 (Fla. 3d DCA 1996) ("Since probable cause is a complete bar to an action for false arrest and false imprisonment, summary judgment was properly entered in the County's favor." (citing *White v. Miami Home Milk Prods. Ass'n*, 143 Fla. 518 (1940); *Metropolitan Dade County v. Norton*, 543 So. 2d 1301 (Fla. 3d DCA), *rev. denied*, 551 So. 2d 462 (Fla. 1989); and *Rothstein v. Jackson's, Inc.*, 133 So. 2d 331 (Fla. 3d DCA 1961))).

IV. CONCLUSION

For the reasons stated herein, it is **ORDERED AND ADJUDGED** as follows:

1. Officer Defendants' Motion for Summary Judgment, **ECF No. [58]**, is **GRANTED**;
2. City's Motion for Summary Judgment, **ECF No. [60]**, is **GRANTED**;
3. Plaintiff's Motion in Limine, **ECF No. [59]**, is **DENIED** as moot. All outstanding motions are **DENIED** as moot;
4. The Clerk shall administratively **CLOSE** the case.
5. Final Judgment will be entered by separate order.

[8] Because the Court finds that probable cause and/or arguable probable cause existed to arrest Plaintiff for a traffic violation and for resisting arrest, the Court does not analyze City's additional argument based on Fla. Stat. § 316.1935, and does address Plaintiff's constitutional challenge.

DONE AND ORDERED in Miami, Florida this 25th day of October, 2016.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record