No. 21-_____

IN THE

Supreme Court of the United States

RAYMOND GARDNER,
Petitioner,

v.

MATTHEW T. MGLEJ, INDIVIDUALLY,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2008, Utah passed a failure-to-identify statute, Utah Code Ann. § 76-8-301.5(1), which made it a crime for a person subject to a *Terry* stop to refuse to disclose his name when asked to do so by a police officer. In 2011, the petitioner arrested the respondent for failure to identify himself when he refused to hand over identification during a *Terry* stop. At the time, no court had interpreted 76-8-301.5(1) to answer whether the requirement that a person must state his name was violated when a person declined to hand over an identification document.

The question presented is: "Whether it was clearly established in 2011 that an arrest under Utah Code Section 76-8-301.5(1) for refusal to hand over an identification document violates the Fourth Amendment."

PARTIES TO THE PROCEEDING

Petitioner is Raymond Gardner, a Garfield County, Utah, Deputy. Respondent is Matthew T. Mglej. Garfield County did not appeal the district court ruling and is not a part of this proceeding.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

- *Mglej v. Garfield County, et al.*, 2:13-cv-00713-CW-DBP
  In the United States District Court for the District of Utah.
  Qualified immunity denied per memorandum decision and order entered January 11, 2019.

- *Mglej v. Gardner*, No. 19-4015
  In the United States Court of Appeals for the Tenth Circuit.
  Opinion entered September 9, 2020.

- *Mglej v. Garfield County*, No. 15-4002
  In the United States Court of Appeals for the Tenth Circuit.
  Order dismissing appeal entered January 13, 2015.

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The opinion of the United States District Court for the District of Utah, App. 34a–70a, is reported at 2019 U.S. Dist. LEXIS 5799 (D. Utah 2019).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Tenth Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and filed its opinion on September 9, 2020. The Tenth Circuit denied Petitioner's petition for rehearing through its Order of October 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

At the time of the arrest in this case, Utah Code Ann. § 76-8-301.5(1) provided that it is a crime for a person to fail

> to disclose identity if during the period of time that the person is lawfully subjected to a stop as described in Section 77-7-15:
>
> (a) a peace officer demands that the person disclose the person's name;
>
> (b) the demand described in Subsection (1)(a) is reasonably related to the circumstances justifying the stop;
>
> (c) the disclosure of the person's name by the person does not present a reasonable danger of self-incrimination in the commission of a crime; and
>
> (d) the person fails to disclose the person's name.

Utah Code Ann. § 77-7-15 in turn provides:

> A peace officer may stop any individual in a public place when the officer has a reasonable suspicion to believe the individual has committed or is in the act of committing or is attempting to commit a public offense and may demand the individual's name, address, date of

birth, and an explanation of the individual's actions.

STATEMENT OF THE CASE

Petitioner Raymond Gardner is the only police officer in Boulder, Utah, which is an extremely rural town with a population of about 200 located in southern Utah.

On August 8, 2011, Gardner received a call from dispatch that twenty dollars was missing from of the local gas station's till. Gardner called the gas station and spoke to the employee who reported the theft to find out what happened. The employee provided a description of the person who she believed had stolen the twenty dollars that closely matched respondent Mglej. Gardner had encountered Mglej a few days earlier and knew where Mglej was staying. Gardner went to the home where Mglej was staying, knocked on the door, and asked to speak with Mglej outside, calling him by his first name, "Matthew or Matt."

Mglej voluntarily walked outside to speak to Gardner. Gardner explained to Mglej that there was missing money from the gas station's till and that he was a suspect. Mglej denied taking the money. Gardner then asked Mglej for his ID. Gardner told Mglej that he needed to fill out a report about the reported theft and that he needed some basic information that would be contained on an ID to complete the report. When Mglej declined to give the deputy his ID, Gardner placed Mglej under arrest.

Gardner placed Mglej in handcuffs, and drove them both to his house, so he could change into his uniform before the ninety-five-mile drive to the jail. At

Gardner's house, Mglej complained that the handcuffs were too tight. Gardner attempted to loosen them, but was unable to do so without using tools from his garage.

After removing the malfunctioning handcuffs and placing different ones on Mglej, Gardner proceeded to drive them both to the jail. On the way there, Gardner received a call that no money was actually missing from the till at the store. Gardner still took Mglej to jail and booked him on two charges – "Obstructing Justice," and "failure to disclose identity." A judge approved Mglej's continued detention and set bail. Three days later he was released and hitchhiked back to Boulder. The charges were later dropped.

Mglej then sued Gardner under 42 U.S.C. § 1983. Mglej claimed that Gardner violated his Fourth Amendment rights in three ways: by arresting him without probable cause, by using excessive force in applying the handcuffs, and by allegedly initiating a malicious prosecution against him.

The United States District Court for the District of Utah denied summary judgment for Gardner. As it relates to Mglej's illegal arrest claim, which is the sole issue on which Gardner is seeking review before this Court, the district court held that Gardner was not entitled to qualified immunity because Utah Code Ann. § 77-7-15 only required a person to disclose his or her identity on public property and that Gardner and Mglej's interaction took place on private property. The court stated that "the distinction between a public place and a private residence is a matter of common sense at least in the context of a residence and under the facts of this case." (App. 58a.)

The United States Court of Appeals for the Tenth Circuit affirmed the denial of qualified immunity but for a different reason. Interpreting Utah Code Ann. § 76-8-301.5(1)(d) for the first time, the Tenth Circuit held that the arrest was unlawful because, in its view, the statute did not prohibit refusal to hand over an identification document when asked to do so. According to the Tenth Circuit, the statute

> only makes it a crime for a detainee, during an investigative detention, to refuse to provide his name to a police officer under certain circumstances. Deputy Gardner did not just ask Mglej for his name. He instead asked Mglej for his driver's license or some other form of identification, and the deputy arrested Mglej when he failed to provide an ID. There is a significant difference between asking an investigative detainee's name and demanding instead his driver's license or some other form of identification document. Asking for a driver's license or other identification is much more intrusive because, while such a form of identification would have Mglej's name, it would include all sorts of additional personal information that the officer was not authorized under Utah law to demand during an investigative detention. *See* Utah Code Ann. § 77-7-15 (authorizing officer during investigative detention to ask detainee for his name, address and an explanation of his actions).

(App. 15a-16a.) The circuit court went on to interpret this Court's precedent in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), to hold that the

Fourth Amendment only requires a suspect to disclose his name, and not written identification, during a valid *Terry* stop. (App. 16a.) As such, the Tenth Circuit held that Mglej's refusal to provide Gardner with written identification did not create probable cause to arrest him. (*Id.*)

The Tenth Circuit then denied Gardner qualified immunity. According to the Tenth Circuit, the constitutional violation was clearly established because, "based on the plain language of the Utah statutes, Deputy Gardner could not have reasonably believed that he had probable cause to arrest Mglej for violating Utah Code Ann. § 76-8-301.5 when the deputy specifically demanded Mglej's driver's license or some other form of identification." (App. 17a.) The court concluded that "it is clear that Utah Code Ann. § 76-8-301.5 only permits an officer to arrest a suspect for his failure to provide his 'name' during such an investigative stop (provided the other conditions set forth in that statute are met). The Utah statue's language is unmistakably clear." (App. 18a.)

Gardner timely filed a petition for rehearing en banc, which was denied on October 26, 2020. (App. 71a-72a.)

REASON FOR GRANTING THE PETITION

It was not clearly established in 2011 that an officer lacked probable cause to arrest a suspect for failure to disclose his name when the officer asked for the person's ID during a *Terry* stop and the person refused to provide it.

This Court "often corrects lower courts when they wrongly subject individual officers to liability" in

qualified immunity cases. *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774, n.3 (2015) (citing cases).[1] "The Court has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

Petitioner submits that this case should be the next such reversal. As in those prior decisions, the manifest error in the lower court's denial of qualified immunity justifies the Court's intervention. Petitioner asks the Court to reverse the decision below on a specific but crucial issue in the decision below: Whether Gardner was entitled to qualified immunity for arresting Respondent without probable cause.[2] Because it was reasonable for Officer Gardner to believe that his arrest was lawful, he should be entitled to qualified immunity on this claim.

The Tenth Circuit's ruling hinges entirely on a legal interpretation of a statute that had not been

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[1] Cases include: *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Carroll v. Carman*,574 U.S. 13 (2014) (per curiam);*Wood v. Moss*, 572 U.S. 744 (2014); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam);and *Reichle v. Howards*, 566 U.S. 658 (2012).

[2] Although the Tenth Circuit also ruled on Mglej's excessive force and malicious prosecution claims, Gardner is not seeking review of the Tenth Circuit's ruling as to those claims. Rather, Gardner is seeking reversal solely on the probable cause issue and then for remand for further proceedings not inconsistent with the Court's opinion.

interpreted by any court at the time of the arrest. The statute, § 76-8-301.5, was enacted in 2008. *See* Utah Laws 2008, c. 293, § 1, eff. May 5, 2008. When Officer Gardner arrested respondent in 2011, no court had interpreted whether a person violated § 76-8-301.5's requirement that a person must disclose his "name" when he refused to provide identification.

The Tenth Circuit ruled that Officer Gardner should have known that § 76-8-301.5 did not criminalize refusing to hand over an identification document such as a driver's license. Officer Gardner's legal interpretation was so wrong, the Tenth Circuit held, that the interpretation of the new statute was not only unreasonable, but that an arrest based on that interpretation was so obviously without probable cause that it subjected the officer to personal liability.

Petitioner submits that the Tenth Circuit's ruling cannot be squared with the well-known principles of qualified immunity. Qualified immunity must be granted "if a reasonable officer might not have known for certain that the conduct was unlawful." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). It "does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551 (internal citation omitted). This Court has repeatedly told lower courts "not to define clearly established law at a high level of generality." *Sheehan*, 135 S. Ct. at 1776 (internal citation omitted). "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 137 S. Ct. at 552. That is, "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

The Tenth Circuit's ruling violated these principles. When Petitioner Gardner made his arrest, Utah's recently adopted failure-to-identify statute had never been interpreted by any court. In the absence of any caselaw on the statute at all, it was understandable for Officer Gardner to assume that Utah's law prohibiting a person's failure to identify himself was violated when Gardner asked Mglej for his ID and Mglej refused to provide it.

This much is common sense. A major purpose of *Terry* stops is to "check identification," *United States v. Hensley*, 469 U. S. 221, 229 (1985). An obvious way to determine a person's name during a *Terry* stop is to ask for the person's driver's license or other identification document. A driver's license will have the person's photograph and true name. In the absence of any caselaw at all to the contrary, an officer aware of Utah's failure-to-disclose identity statute would understandably assume that the statute's prohibiting a person's "fail[ure] to disclose the person's name" covered refusal to hand over identification documents such as a driver's license.

It was particularly understandable for Officer Gardner to assume his arrest was proper because the situation he faced was nearly identical to the facts of *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), the case on which Utah's statute was based. In *Hiibel*, an officer asked a suspect during a *Terry* stop if the man had "any identification on [him]." *Id.* at 181. The Court explained that this was "a request to produce a driver's license or some other form of written identification." *Id.* "The officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he

continued to refuse to comply, the officer placed him under arrest." *Id.*

Hiibel ruled that the officer's arrest did not violate either the Fourth Amendment or Fifth Amendment under the circumstances of that case. *See id.* at 191. In response, Utah drafted its failure-to-identify statute to adopt the constitutional standard embraced in *Hiibel*. (App. 12a n.6) (noting the similarities between the statute and the holding of *Hiibel*). Given that Utah's statute was designed to match *Hiibel*, and that the relevant facts before Officer Gardner were a virtual replay of the facts of *Hiibel*, it is understandable for Officer Gardner to think his arrest was lawful just as the arrest in *Hiibel* was deemed lawful.

In its opinion below, the Tenth Circuit condemned Gardner's arrest on the ground that Gardner should have interpreted Utah's statute in light of a technical reading of *Hiibel*. *Hiibel* interpreted Nevada's stop-and-identify statute to require a person to disclose his name either by stating it verbally or by providing identification. *Hiibel*, 542 U.S. at 187-88. *Hiibel*'s holding was therefore focused on the Fourth Amendment limits of *Terry* stops in light of laws that require disclosure of a name. (*See* App. 16a) (*citing Hiibel*, 542 U.S. at 187-88). According to the Tenth Circuit, Officer Gardner should have realized this limit to *Hiibel*'s reasoning and interpreted the word "name" in Utah's statute as reflecting it. (App. 17a.)

The Tenth Circuit's reasoning is inconsistent with the principle of qualified immunity. "[Q]ualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This standard does not require officers to be constitutional scholars or legislative experts who interpret novel statutes in light of the reasoning of caselaw that influenced their drafting.

The sparse caselaw on refusal to hand over identification documents during *Terry* stops reaches the same result. Just one month after Gardner arrested Mglej, another federal appellate court interpreting *Hiibel* granted qualified immunity to an officer who asked for identification instead of a name. *See* *Symonette v. City of N. Las Vegas*, 449 F. App'x 683, 685 (9th Cir. 2011). Although the statute in *Hiibel* only required a suspect to state his name, the court noted, "we cannot conclude that the officers violated a clearly established constitutional right by asking [the suspect] to show them a written form of identification." *Id.* *See also* *Mocek v. City of Albuquerque*, 813 F.3d 912, 927 (10th Cir. 2015) (holding that officer was entitled to qualified immunity for arresting suspect who failed to hand over identification documents based on New Mexico's failure-to-identify statute that prohibited "concealing one's true name or identity" because "an officer who reasonably believed identification was required could have also believed that [a suspect's] ongoing failure to show it violated the statute.").

Officer Gardner's interpretation was especially reasonable in light of the reasonable-mistake-of-law principle established in *Heien v. North Carolina*, 135 S. Ct. 530 (2014). In *Heien*, an officer pulled over a car for having a broken rear brake light. The stop led to the discovery of drugs in the car. When a passenger challenged the stop, the North Carolina Court of Appeals ruled the stop invalid because the state's

never-interpreted brake light law was violated only if *all* of the brake lights were out. *See id.* at 535. The question before this Court was whether the officer's incorrect interpretation of North Carolina law could "nonetheless give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment." *Id.* at 534.

Heien held that the stop was constitutional even though it was based entirely on the officer's mistaken interpretation of state law. As long as it "was reasonable for an officer to suspect that the defendant's conduct was illegal," even based on a mistaken interpretation of the law thought to make it illegal, "there was no violation of the Fourth Amendment in the first place." *Id.* at 539. Critically, the stop was reasonable in part because the brake light law "had never been previously construed by North Carolina's appellate courts." *Id.* at 540. The interpretation came after the stop. Because it was reasonable at the time of the stop to believe that the brake light law had been violated, there was sufficient cause to stop the car even though the officer's interpretation proved incorrect *ex post*.

The Tenth Circuit's opinion cannot be reconciled with *Heien*. Here, as in *Heien*, the officer was faced with a statute that had never been interpreted before. Here, as in *Heien*, the officer made a reasonable interpretation of the law's text: here, that Utah's failure-to-identify statute, in permitting arrests when a person refused to state his name, was violated when a person refused to provide identification. Here, as in *Heien*, the Fourth Amendment seizure led a court to interpret the law for the first time. Here, as in *Heien*,

the Court ultimately disagreed with the officer's interpretation.

And yet the Tenth Circuit's ruling could not be more different from *Heien*. While *Heien* ruled that the seizure was reasonable and therefore legal, the Tenth Circuit ruled that the seizure was not only constitutionally unreasonable and therefore illegal, but also that it was so plainly factually unreasonable – so obviously out-of-bounds – that the officer could be held personally liable for making an unlawful arrest based on the interpretation the court later adopted.

In reaching the conclusion that Officer Gardner was not entitled to qualified immunity for the arrest, the Tenth Circuit interpreted the statute below for the first time; ignored the reasonable-mistake-of-law doctrine; and held that the court's new interpretation was so obvious that no officer could have interpreted the statute otherwise and that the arrest was therefore obviously unlawful. The Tenth Circuit's reasoning conflicts with this Court's qualified immunity caselaw and should be reversed.

CONCLUSION

Petitioner respectfully asks the Court to grant the petition for a writ of certiorari and summarily reverse the lower court's ruling that Officer Gardner was not entitled to qualified immunity for the arrest. Petitioner respectfully asks the Court to then remand for further proceedings not inconsistent with its opinion. In the alternative, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted this 28th day of January, 2021.

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-4015
D.C. Docket No. 2:13-CV-00713-CW-DBP

MATTHEW T. MGLEJ,
PLAINTIFF-APPELLEE,

V.

RAYMOND GARDNER, A/K/A/ OFFICER RAYMOND, AN OFFICER OF THE GARFIELD COUNTY SHERIFF'S OFFICE, IN BOTH HIS INDIVIDUAL AND OFFICIAL CAPACITIES,
DEFENDANT-APPELLANT.

[September 9, 2020]

Appeal from the United States District Court
for the District of Utah

Before BRISCOE, EBEL, and HARTZ, Circuit Judges.

Ebel, Circuit Judge:

In this interlocutory appeal, Defendant Raymond Gardner, a Garfield County, Utah, sheriff's deputy, challenges the district court's decision to deny him qualified immunity from Plaintiff Matthew Mglej's 42 U.S.C. § 1983 claims stemming from Gardner's arresting Mglej in August 2011. Mglej alleged that Gardner violated the Fourth Amendment when he arrested Mglej without probable cause, used excessive force in doing so, and then initiated a malicious prosecution against Mglej. Having jurisdiction under 28 U.S.C. § 1291, *see* *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), we AFFIRM the district court's decision to deny Gardner qualified immunity on all three claims.

I. BACKGROUND

Because Deputy Gardner asserted qualified immunity in a summary judgment motion, we view the evidence in the light most favorable to Mglej. *See* *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014). The facts, then, for purposes of this appeal are as follows: In summer 2011, Mglej was on a cross-country trip when his motorcycle broke down in Boulder, an isolated town of approximately two hundred people located in Garfield County, Utah. Chuck Gurle, a mechanic in Boulder, let Mglej stay with him for a few

days while Gurle waited for parts needed to repair the motorcycle.

Raymond Gardner was a Garfield County sheriff's deputy who lived in Boulder and patrolled there. The deputy first met Mglej on or about August 6 when he stopped Mglej for speeding on his motorcycle.[1]

A few days later, on August 8, 2011, while Mglej was still in Boulder awaiting the repair of his motorcycle, Deputy Gardner received a report from a local convenience store/gas station that $20 was missing from the store's register and they suspected someone matching Mglej's description took the money. Deputy Gardner, who was off duty that day, went to Gurle's home, knocked on the door, and asked to speak with Mglej outside, calling him by his first name, "Matthew or Matt." (Aplt. App. 538.) Mglej went outside and spoke with the deputy. When the deputy asked about the missing money, Mglej denied taking it. Gardner then asked Mglej for his "ID"—apparently a document that could serve as a form of identification. (*Id.* 540 ("Q. Did you ask him for his driver's license? A. I believe I asked him for an ID." (Gardner's deposition); *see also id.* 592 (Mglej's deposition).) Deputy Gardner explained to Mglej that, although Mglej denied taking the money, "I had still received a complaint of a criminal act and that as such I needed to do a report, which would require some information from him, to include some basic information usually contained on an ID, a driver's license, for example." (*Id.* 540.) Deputy Gardner told

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[1] Deputy Gardner's account of his first meeting with Mglej differs, but for purposes of this appeal we accept Mglej's version of the facts. *See* *Plumhoff*, 572 U.S. at 768.

Mglej that he needed Mglej's full name, date of birth, driver's license information and address for his report (*id.* 540, 592), and that "it would be easier on all of us if he would just produce that information in the form of an ID or a driver's license" (*Id.* 571 (Gardner's deposition); *see also Id.* 592-93 ("Deputy Gardner told me I had to give him my ID." (Mglej's deposition).) When Mglej declined to give the deputy his ID before consulting with an attorney, Gardner arrested him.

Deputy Gardner then handcuffed Mglej behind his back and placed him in the front seat of the deputy's patrol car. Mglej complained that the handcuffs were too tight, but Gardner told him to stop saying that, because it did not matter.[2]

Before driving Mglej ninety-five miles to the Garfield County jail, Gardner stopped by his home to change into his uniform, leaving the handcuffed Mglej in the unlocked patrol car. When the deputy returned to the car, Mglej again complained that the handcuffs were too tight. Seeing that Mglej's hands were red, the deputy tried to loosen the handcuffs using the key but the handcuffs malfunctioned and the deputy could not loosen or remove them. Using tools from his garage, Deputy Gardner was eventually able to pry the handcuffs off Mglej's wrists after twenty minutes of work, causing Mglej significant pain and injury in the process.

Using a different set of handcuffs, the deputy again handcuffed Mglej and drove him to the Garfield County jail. On their way, Deputy Gardner received a call from an employee at the convenience store who

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[2] Deputy Gardner disputes Mglej's version of these events.

reported that a more thorough examination of the store's register indicated that there was no money missing. The deputy, nevertheless, continued to the county jail, where he booked Mglej on two charges, "Obstructing Justice" and "Failure to disclose identity." (*Id.* 416.) The deputy also completed a written "Statement of Probable Cause for a Warrantless Arrest." (*Id.* 415.) Based on the facts set forth in that statement, a judge approved Mglej's continued detention and set bail. Mglej was released on bail three days after he was arrested. He then had to hitchhike the ninety-five miles back to Boulder, where he found that his motorcycle had been vandalized and his possessions stolen. The charges against Mglej were later dropped.

Mglej then sued Deputy Gardner, among others. Relevant to this appeal, Mglej asserted claims under 42 U.S.C. § 1983 alleging that the deputy violated Mglej's Fourth Amendment protection against unreasonable seizures by 1) arresting him without probable cause, 2) using excessive force in doing so, and 3) initiating a malicious prosecution of Mglej.[3] Gardner moved for summary judgment on these claims, asserting qualified immunity. The district court denied that motion. It is that decision that the deputy challenges in this interlocutory appeal.

We have jurisdiction to consider Gardner's interlocutory appeal only to the extent it raises legal questions. *See Plumhoff*, 572 U.S. at 771-73; *Mitchell*,

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[3] Although Mglej asserted his malicious prosecution violated both the Fourth and Fourteenth Amendments, it is the Fourth Amendment that governs that claim. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 914-20 (2017).

472 U.S. at 530. We have no jurisdiction at this stage of the litigation to consider the district court's determination that Mglej presented sufficient evidence in support of his claims to survive summary judgment. *See Plumhoff*, 572 U.S. at 772-73 (applying *Johnson v. Jones*, 515 U.S. 304 (1995)).

II. DISCUSSION

With these jurisdictional limits in mind, we review de novo the district court's decision to deny Deputy Gardner summary judgment, viewing the evidence in the light most favorable to Mglej. *See Estate of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1169 (10th Cir. 2020); *see also Plumhoff*, 572 U.S. at 768. Once Gardner asserted qualified immunity, it was Mglej's burden to show "that (1) the officers' alleged conduct violated a constitutional right, and (2) that right was clearly established at the time of the violation, such that every reasonable officer would have understood that such conduct constituted a violation of that right." *Estate of Smart*, 951 F.3d at 1168 (internal quotation marks, alteration omitted); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

> To be clearly established, ordinarily "a preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits, must make it apparent to a reasonable officer that the nature of his conduct is unlawful." *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1210 (10th Cir. 2017). In deciding whether a precedent provides fair notice, the Supreme Court has repeatedly admonished courts "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Instead, "the

> clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Although there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 138 S. Ct. at 1152 (*quoting White*, 137 S. Ct. at 551).

Corona v. Aguilar, 959 F.3d 1278, 1285-86 (10th Cir. 2020).

Mglej has met his two-part burden as to each of the three § 1983 claims at issue here to defeat qualified immunity.

A. Claim 1: Arrest without probable cause

In his first claim, Mglej alleged that Deputy Gardner violated the Fourth Amendment because he arrested Mglej without probable cause.

1. Mglej has established a Fourth Amendment violation

This Court has recognized three types of police-citizen encounters: (1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Hammond, 890 F.3d 901, 904 (10th Cir. 2018) (internal quotation marks omitted);

see also *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984). Mglej's first claim, and the parties' arguments and facts addressing it, implicate this entire spectrum of police-citizen encounters.

The parties do not dispute that Deputy Gardner arrested Mglej without a warrant outside the Gurle home after Mglej failed to give the deputy his driver's license or some other form of identification. "Under the Fourth Amendment, a warrantless arrest requires probable cause." *Donahue v. Wihongi*, 948 F.3d 1177, 1189 (10th Cir. 2020) (*citing* *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)). Probable cause exists "if 'the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.'" *Id.* (quoting *Adams v. Williams*, 407 U.S. 143, 148 (1972)). "To determine whether an officer had probable cause for an arrest, 'we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018)* (*quoting* *Maryland v. Pringle*, 540 U.S. 366, 371, (2003) (internal quotation marks omitted)). In claiming qualified immunity, Gardner asserted that there was probable cause to arrest Mglej under Utah law after he failed to produce his driver's license or some other form of identification.

Before turning to consider that contention, however, we clear away some confusion stemming from several of the parties' arguments. In the district court, Deputy Gardner asserted that there was also

probable cause to arrest Mglej for theft. But the district court rejected that argument, and Gardner does not challenge that ruling on appeal. In any event, any probable cause to arrest Mglej for theft dissipated on the way to the jail during which time the convenience store employee called and told the deputy that there was no money missing.

At the jail, Deputy Gardner booked Mglej for both "Failing to disclose identity" and "Obstructing Justice." (Aplt. App. 416.) In this litigation, however, the deputy has not asserted there was probable cause to believe Mglej obstructed justice, and that offense clearly does not apply to the circumstances at issue here. The Utah obstruction of justice statute, Utah Code § 76-8-306(1)(i) (2011), provides that

> [a]n actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense . . . conceals information that is not privileged and that concerns the offense, after a judge or magistrate has ordered the actor to provide the information.

(Emphasis added.) There was no such order in place at the time of Mglej's arrest.

Our focus here, then, is only on whether there was probable cause to arrest Mglej for "Failing to disclose identity." (Aplt. App. 416.) Mglej complains that Deputy Gardner did not originally arrest him for that charge, but instead just thought it up once he got Mglej to the County jail, after any evidence of a theft had dissipated. That argument, however, is

unavailing. Because probable cause is measured by an objective standard, "an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." *Wesby*, 138 S. Ct. at 584 n.2 (*citing* *Devenpeck*, 543 U.S. at 153-55 & 153 n.2).

We turn, then, to the question of whether there was probable cause to arrest Mglej under Utah law after he failed to produce his driver's license or some other form of identification. Deputy Gardner points to a combination of three Utah statutes: one authorizing a police officer to conduct an investigative detention when he has reasonable suspicion a crime is being or has been committed, the second making it a misdemeanor for an investigative detainee to fail to give an officer his name under certain circumstances, and the third authorizing an officer to arrest a detainee for that misdemeanor offense.

The first of these three statutes, Utah Code § 77-7-15, is part of the Utah Code of Criminal Procedure and is entitled "Authority of Peace Officer to Stop and Question Suspect—Grounds." In 2011, that statute provided that

> [a] peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address, and an explanation of the individual's actions.

Utah Code § 77-7-15 (2011; subsequently amended.) This statute "codifies the requirements for an investigative detention" under *Terry v. Ohio*, 392 U.S. 1 (1968), *Oliver v. Woods*, 209 F.3d 1179, 1186 (10th

Cir. 2000); *see also* *Salt Lake City v. Bench*, 177 P.3d 655, 659 (Utah Ct. App. 2008), limiting such investigative detentions to "public" places.[4] But "that statute provides no criminal sanctions for refusing to present identification when requested by an officer, and thus, cannot be used to support the arrest" at issue here.[5] *Oliver*, 209 F.3d at 1188 n.8.

The second statute, Utah Code § 76-8-301.5(1), is part of the Utah criminal code and it does impose criminal sanctions for certain conduct during an investigative detention. This is the statute Mglej was actually charged with violating. In 2011, § 76-8-301.5(1) made it a crime for a person to fail to disclose identity if during the period of time that the person is lawfully subjected to a stop as described in Section 77-7-15:

> (a) a peace officer demands that the person disclose the person's name;
>
> (b) the demand described in Subsection (1)(a) is reasonably related to the circumstances justifying the stop;
>
> (c) the disclosure of the person's name by the person does not present a reasonable danger of self-incrimination in the commission of a crime; and

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[4] *See* infra note 10.

[5] Deputy Gardner's arguments that Mglej "violated" § 77-7-15, therefore, are unavailing because that statute addresses only the authority the State of Utah has given law enforcement officers, not what a detained individual must do to avoid criminal sanctions.

> (d) the person fails to disclose the person's name.
>
> (2011; subsequently amended.)[6] Violation of this statute is a class B misdemeanor, Id. § 76-8-301.5(2) (2011), punishable by up to six months in jail and up to a $1,000 fine, Id. §§ 76-3-204(2), 76-3-301(1)(d).

The third statute, Utah Code § 77-7-2(4), provides that "[a] peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person . . . when the peace officer has reasonable cause to believe the person has committed the offense of failure to disclose identity under Section 76-8-301.5." "Reasonable cause" as used in this statute is "synonymous with 'probable cause.'" *State v. Harker, 240 P.3d 780, 784 n.19 (Utah 2010); see also Donahue*, 948 F.3d. at 1190 n.18.[7]

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[6] The Utah legislature enacted this version of § 76-8-301.5 in 2008. This statute is consistent with the United States Supreme Court's 2004 decision in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 185 (2004). In Hiibel, the Supreme Court considered an arrest under a Nevada "stop and identify" statute that required a person detained during an investigative stop to "identify himself," which the Nevada Supreme Court interpreted to mean that the investigative detainee had to give his name, but not his driver's license or any other document. *Id.* at 181-82, 185. Balancing the intrusion of requiring a person, during an investigative detention, to give an officer his name against the government interests in investigating possible criminal activity, Hiibel held that "requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." *Id.* at 187-88.

[7] The applicability of this statute is directly tied to the scope of § 76-8-301.5, discussed previously.

With these three statutes in mind, "we examine the events leading up to the [§ 1983 plaintiff's] arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause," *Wesby*, 138 S. Ct. at 586 (internal quotation marks omitted), here to arrest Mglej under Utah Code § 76-8-301.5 for failing to disclose his identity. As we explain, the district court correctly concluded on the summary judgment record before it that there was not sufficient probable cause to arrest Mglej under that statute.

As a starting point, Gardner first contends that his encounter with Mglej was consensual and that, during such an encounter, he was entitled to ask Mglej for his driver's license or some other form of identification. In the district court, Deputy Gardner specifically asserted that "Mglej agreed to voluntar[il]y speak with Gardner," but then "refused to provide Deputy Gardner his name or address"; "[a]ccordingly Deputy Gardner felt he had no choice but to arrest Plaintiff" Mglej.[8] (Aplt. App. 168 (emphasis added).) But if this was simply a consensual conversation between Deputy Gardner and Mglej, as the deputy contends, then it would not have implicated Utah Code § 76-8-301.5, because that statute applies only to an officer's investigative detention of a suspect based on reasonable suspicion. *See* *Oliver*, 209 F.3d at 1185-86 (distinguishing between consensual encounters and

[8] Although in his pleadings Gardner's counsel contends that the deputy only asked Mglej for his name and address, the deposition testimony of both Deputy Gardner and Mglej is undisputed that the deputy instead asked Mglej for his driver's license or some other documentary form of identification.

investigative detentions, and noting § 77-7-15 addresses investigative detentions).

Deputy Gardner is correct that an officer's simply questioning an individual usually does not, alone, amount to a seizure for Fourth Amendment purposes. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). Furthermore, during a consensual encounter, an officer can ask to see a person's identification. *See Id.* at 434-35. But the hallmark of a consensual encounter is that, notwithstanding the officer's questions and request for identification, "a reasonable person would feel free 'to disregard the police and go about his business.'" *Id.* at 434 (*quoting California v. Hodari D.*, 499 U.S. 621, 628 (1991)); *see also Oliver*, 209 F.3d at 1185-86. Clearly a reasonable person in Mglej's position, however, would not have felt free to disregard Deputy Gardner's questions and go about his business because the deputy arrested Mglej for failing to produce his driver's license or some other form of identification. *See Delgado*, 466 U.S. at 216-17 (noting that, although an officer's questioning an individual is not sufficient to amount to a detention, "if the person[] refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure").

This, then, was not simply a consensual encounter between Mglej and Deputy Gardner or, if it started as a consensual encounter, it had evolved into an investigation detention. "[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all

the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* at 215 (*quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Gardner next contends that there was reasonable suspicion to believe that Mglej stole $20 from the convenience store to justify the deputy's investigative detention of Mglej.[9] Assuming Deputy Gardner had reasonable suspicion, there still was no probable cause to arrest Mglej under Utah Code § 76-8-301.5(1) when he refused to give Deputy Gardner his driver's license or some other form of identification. Section 76-8-301.5(1) only makes it a crime for a detainee, during an investigative detention, to refuse to provide his name to a police officer under certain circumstances. Deputy Gardner did not just ask Mglej for his name. He instead asked Mglej for his driver's license or some other form of identification, and the deputy arrested Mglej when he failed to provide an ID. There is a significant difference between asking an investigative detainee's name and demanding instead his driver's license or some other form of identification document. Asking for a driver's license or other identification is much more intrusive because, while such a form of identification would have Mglej's name, it would include all sorts of additional personal information that the officer was not authorized under Utah law to demand during an investigative

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[9] The Supreme Court has recognized that, "absent some reasonable suspicion of misconduct, the detention of" an individual simply to determine his identity violates that individual's "Fourth Amendment right to be free from an unreasonable seizure." *Delgado*, 466 U.S. at 216 (*citing Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979)).

detention. *See* Utah Code § 77-7-15 (authorizing officer during investigative detention to ask detainee for his name, address and an explanation of his actions). More importantly here, the Utah Code limits the criminal offense set forth in § 76-8-301.5 to refusing to provide one's "name." This is consistent with the Supreme Court's decision in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), which held that "requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." *Id.* at 187-88 (emphasis added). Hiibel reached this conclusion after balancing the intrusion of requiring a person, during an investigative detention, to give an officer his name against the government interests in investigating possible criminal activity. *See Id.*

Mglej's refusal to provide Deputy Gardner with his driver's license or some other form of identification, then, as Deputy Gardner demanded, did not create probable cause to arrest Mglej under Utah Code § 76-8-301.5(1). Thus, sufficient to defeat summary judgment, the record establishes that Deputy Gardner's decision to arrest Mglej violated the Fourth Amendment. *See Donahue*, 948 F.3d at 1189.[10]

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[10] There are other problems with the probable cause Deputy Gardner claims he had to arrest Mglej under Utah Code § 76-8-301.5(1). Section 76-8-301.5(1) only proscribes conduct during an investigative detention occurring in a "public place," as § 77-7-15 provides, and requires an officer's request for a detainee's name to be reasonably related to the circumstances justifying the "stop." In denying Deputy Gardner summary judgment, the district court noted that there were genuine factual disputes

2. This Fourth Amendment violation was clearly established in August 2011

Mglej has also sufficiently shown that this Fourth Amendment violation was clearly established at the time of Mglej's arrest, in August 2011.

> As a practical matter, "[i]n the context of a qualified immunity defense on an unlawful arrest claim, we ascertain whether a defendant violated clearly established law by asking whether there was arguable probable cause for the challenged conduct." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (*quoting Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012)). Put another way, a defendant is entitled to qualified immunity if she "could have reasonably believed that probable cause existed in light of well-established law." *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014).

Corona, 959 F.3d at 1285.

Here, however, based on the plain language of the Utah statutes, Deputy Gardner could not have reasonably believed that he had probable cause to arrest Mglej for violating Utah Code § 76-8-301.5 when the deputy specifically demanded Mglej's driver's license or some other form of identification. The district court, therefore, correctly denied Deputy Gardner qualified immunity from Mglej's false arrest claim.

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underlying whether these other conditions were met here. We have no jurisdiction to review those factual determinations in this interlocutory appeal.

Mocek v. City of Albuquerque, 813 F.3d 912 (10th Cir. 2015), on which Deputy Gardner relies, is distinguishable. In that case, Mocek alleged that a police officer lacked probable cause to arrest him under a New Mexico statute that made it a crime to conceal one's "true name or identity" under certain circumstances. *Id.* at 922 (*citing* N.M. Stat. § 30-22-3). Because New Mexico courts had not addressed what the statute meant by "identity," the Tenth Circuit held that an objectively reasonable officer could have believed that he had probable cause to arrest Mocek under that statute when Mocek failed to produce his ID upon request, even though this Court doubted the state statute made it a crime not to produce an ID. *Id.* at 925-26. Different from the New Mexico statute at issue in Mocek, it is clear that Utah Code § 76-8-301.5 only permits an officer to arrest a suspect for his failure to provide his "name" during such an investigative stop (provided the other conditions set forth in that statute are met). The Utah statute's language is unmistakably clear. The district court, therefore, correctly denied Deputy Gardner qualified immunity from Mglej's § 1983 unlawful-arrest claim.

B. Claim two: Excessive force in handcuffing Mglej

Next, Mglej alleged that Deputy Gardner violated the Fourth Amendment when he used excessive force to arrest Mglej by handcuffing him too tightly, and then ignoring Mglej's initial complaints that the handcuffs were too tight. *See generally Graham v. Connor*, 490 U.S. 386, 388 (1989) (stating that a claim alleging an officer used excessive force in making an arrest is governed by the Fourth Amendment). Mglej further contended that his injuries from the tight handcuffs were exacerbated when Deputy Gardner

decided to use tools from the deputy's garage to pry the handcuffs off Mglej's wrists when they malfunctioned.

As an initial matter, the district court erred to the extent it linked this excessive force claim to Mglej's false-arrest claim, by holding that, "[b]ecause Officer Gardner lacked probable cause to believe a crime had occurred, any effort to constrain Mr. Mglej's liberty would have been excessive" (Aplt. App. 358). *Cortez v. McCauley*, 478 F.3d 1108, 1127 (10th Cir. 2007) (reh'g en banc) ("reject[ing] the idea . . . that a plaintiff's right to recover on an excessive force claim is dependent on the outcome of an unlawful seizure claim"). Mglej's excessive-force claim is separate from his claim that Deputy Gardner unlawfully arrested him, and requires a separate inquiry. *See Id.*; *see also Maresca v. Bernalillo Cty.*, 804 F.3d 1301, 1308, 1313, 1316 (10th Cir. 2015); *Romero v. Story*, 672 F.3d 880, 890 (10th Cir. 2012).

> [A] plaintiff may argue law enforcement officers unlawfully arrested him. If the plaintiff successfully proves his case, "he is entitled to damages for the unlawful arrest, which includes damages resulting from any force reasonably employed in effecting the arrest." [*Cortez*, 478 F.3d at 1127] (emphasis added). If the plaintiff also alleges excessive force, the district court must conduct a separate and independent inquiry regardless of whether the plaintiff's unlawful arrest claim is successful. *Id.* And if the district court concludes the arrest was unlawful, the court may not automatically find any force used in effecting the unlawful arrest to be excessive. Instead, the district court

must then analyze the excessive force inquiry under the assumption the arrest was lawful. As we said in *Cortez*:

> [T]he excessive force inquiry evaluates the force used in a given arrest or detention against the force reasonably necessary to effect a lawful arrest or detention under the circumstances of the case. Thus, in a case where police effect an arrest without probable cause or a detention without reasonable suspicion, but use no more force than would have been reasonably necessary if the arrest or the detention were warranted, the plaintiff has a claim for unlawful arrest or detention but not an additional claim for excessive force.

Cortez, 478 F.3d at 1126 (emphasis added). If successful in proving his excessive force claim, the plaintiff "is entitled to damages resulting from that excessive force." *Id.* at 1127. Accordingly, "[t]he plaintiff might succeed in proving the unlawful arrest claim, the excessive force claim, both, or neither." *Id.*

Romero, 672 F.3d at 890 (footnote omitted).

Here, then, only for purposes of Mglej's excessive force claim, we assume Deputy Gardner lawfully arrested Mglej, *see Id.*, and determine whether the force the deputy used to handcuff Mglej during that arrest was objectively reasonable, *see Graham*, 490 U.S at 397. Mglej asserts two theories as to why the force Deputy Gardner used in handcuffing Mglej was not objectively reasonable. He first asserts that the

use of any handcuffs at all during his arrest was excessive and, alternatively, that even if it was objectively reasonable to handcuff him, the force Deputy Gardner used to do that was excessive. Mglej's first theory does not survive qualified immunity, but his second theory does.

1. It was not clearly established that handcuffing Mglej at all was objectively unreasonable

Mglej first asserts that handcuffing him at all was objectively unreasonable under the circumstances presented here. But Mglej has failed to identify any relevant case law clearly establishing that Deputy Gardner violated the Fourth Amendment just by handcuffing Mglej. *Cf. A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1152 (10th Cir. 2016) ("conclud[ing] that A.M.'s [excessive force] claim fails because there was no clearly established law indicating that F.M.'s minor status could negate Officer Acosta's customary right to place an arrestee in handcuffs during the arrest").

In fact, relevant case law generally suggests the contrary. The Supreme Court has held that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396; *see also Cortez*, 478 F.3d at 1128. *See generally Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001) (holding arrest for minor offense, which included being handcuffed, placed in a patrol car and driven to the police station, though embarrassing and inconvenient, was not "made in an 'extraordinary manner, unusually harmful to [her] privacy or . . . physical interests.'" (*quoting Whren v. United States*, 517 U.S. 806, 818 (1996)).

Furthermore, the Tenth Circuit has noted that "in nearly every situation where an arrest is authorized . . . handcuffing is appropriate." *Fisher v. City of Las Cruces*, 584 F.3d 888, 896 (10th Cir. 2009); *see also* *A.M.*, 830 F.3d at 1155 ("confidently conclud[ing] here that a reasonable officer in Officer Acosta's position would have understood Atwater's general acceptance of handcuffing incident to a lawful arrest to indicate that, in the ordinary course, handcuffing any arrestee—absent some injury specifically caused by the application of the cuffs—is lawful").[11]

2. However, Mglej has sufficiently alleged a claim that the force Deputy Gardner used to handcuff him was excessive

Mglej next asserts that, even if it was objectively reasonable to handcuff him, it was not objectively reasonable for Deputy Gardner to place the handcuffs on him so tightly and then to ignore Mglej's initial complaints about how tight the handcuffs were. "An excessive force claim that includes a challenge to the '[m]anner or course of handcuffing' requires the plaintiff to show both that 'the force used was more

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[11] The district court faulted Gardner because he always uses handcuffs when he transports an arrestee, instead of making a case-by-case determination as to whether handcuffs are needed in a particular situation. Deputy Gardner's subjective reasons for handcuffing Mglej, however, are not at issue here. "As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397; *see also* *Fisher*, 584 F.3d at 894.

than reasonably necessary' and 'some non-de minimis actual injury.'" *Donahue*, 948 F.3d at 1196 (*quoting Fisher*, 584 F.3d at 897-98). This circuit has previously recognized that, "[i]n some circumstances, unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." *Cortez*, 478 F.3d at 1129; *see also Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1208-09 (10th Cir. 2008). The salient factors we consider in making those determinations include how much force was objectively warranted in arresting Mglej, and any actual injury to Mglej, which aids us in determining whether Deputy Gardner used more force than objectively reasonable under these circumstances to handcuff Mglej.

a. Mglej has sufficiently established that Deputy Gardner used more force than was objectively reasonable

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). In conducting this balancing, we consider the three non-exclusive factors the Supreme Court set forth in *Graham*:

> "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or

> attempting to evade arrest by flight." *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (*quoting Graham*, 490 U.S. at 396).

Donahue, *948 F.3d at 1196*. Applying those factors here, we conclude only minimal force was objectively justified in arresting Mglej. *See Id. at 1196-97*; *Fisher, 584 F.3d at 894-96*.

i. Deputy Gardner arrested Mglej only for a minor misdemeanor

"Under the first [Graham] factor, a 'minor offense supports the use of minimal force.'" *Donahue*, 948 F.3d at 1196 (alteration incorporated) (*quoting Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016)). Deputy Gardner arrested Mglej for a non-violent Class B misdemeanor—failing to provide the deputy with his name. *See* Utah Code § 76-8-301.5. That offense was punishable by no more than six months in jail and/or a fine of no more than $1,000. *Id.* §§ 76-3-204(2), 76-3-301(1)(d). Furthermore, although the parties do not address the question, it appears that the offense Deputy Gardner was investigating when he confronted Mglej—the theft of twenty dollars—is also a non-violent misdemeanor offense. *See Id.* § 76-6-412(1)(d) (listing theft of less than $500 as a Class B misdemeanor).[12]

These minor non-violent offenses clearly weigh against the objective need to use much force against

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[12] At the police station, Deputy Gardner also charged Mglej with obstruction of justice, even though that statutory offense clearly did not apply to the circumstances presented here. Even so, that offense would have been only a misdemeanor. *See Utah Code § 76-8-306(3)* (2011).

Mglej. *See* *Donahue*, 948 F.3d at 1189-90, 1197 (holding arrests under Utah law for misdemeanor offenses of public intoxication and failure to identify oneself warranted only minimal force); *see also* *Koch v. City of Del City*, 660 F.3d 1228, 1246-47 (10th Cir. 2011) (reaching the same conclusion when considering a misdemeanor obstruction offense); *Fisher*, 584 F.3d at 895 (petty misdemeanor); *Fogarty v. Gallegos*, 523 F.3d 1147, 1160 (10th Cir. 2008) (petty misdemeanor disorderly conduct).

ii. Mglej posed no threat to Deputy Gardner's safety or the safety of others

Under the second *Graham* factor, we consider whether Mglej posed "an immediate threat to the safety of the officers or others." *Donahue*, 948 F.3d at 1196 (quotation omitted). "Under the second factor, an officer may use increased force when a suspect is armed, repeatedly ignores police commands, or makes hostile motions towards the officer or others." *Id.* But there is no evidence that anything like that occurred here. Nor is there any evidence that otherwise suggested that Mglej posed any threat to Deputy Gardner's safety or the safety of others. In fact, Deputy Gardner felt comfortable leaving Mglej alone in the unlocked patrol car parked outside Gardner's home, where his wife and kids were, while Gardner ran inside to change into his uniform. He further felt comfortable bringing Mglej into his garage where the deputy then worked to pry off the malfunctioning handcuffs. The fact that there was no evidence that Mglej posed an immediate threat either to Deputy Gardner or others weighs against the use of more than minimal force against Mglej. *See* *Donahue*, 948 F.3d at 1197 (holding evidence that arrestee was unarmed

and made no hostile motions toward officers supported use of only minimal force); *Koch*, 660 F.3d at 1246-47 (holding fact that arresting officer did not argue that the arrestee posed any safety threat weighed in favor of § 1983 plaintiff alleging use of excessive force).

iii. There is no evidence that Mglej was resisting or trying to evade arrest

Under the third *Graham* factor, we consider whether Mglej was actively resisting arrest or attempting to evade arrest by flight. *See Donahue*, 948 F.3d at 1196. There was no evidence at all to suggest that Mglej was trying to resist arrest or flee. *See Id.*; *see also Fisher*, 584 F.3d at 896. In fact, Deputy Gardner testified at his deposition that he felt comfortable leaving the handcuffed Mglej in the unlocked patrol car parked in front of the deputy's home, where his wife and kids were, because Mglej "didn't exhibit any behavior that would lead me to believe that he would try to escape." (Aplt. App. 553.) All three *Graham* factors, then, indicate that only minimal force was objectively reasonable in arresting Mglej. *See Donahue*, 948 F.3d at 1196; *Fisher*, 584 F.3d at 896.

b. Mglej has sufficiently established that the handcuffs caused him an actual injury

The next question is whether Deputy Gardner used more than the minimal force against Mglej that was objectively reasonable. Where, as here, the alleged excessive force is the use of handcuffs that were too tight, Mglej has to show that the handcuffs caused him "some actual injury that is not de minimis, be it physical or emotional." *Cortez*, 478 F.3d at 1129;

see also *Donahue*, 948 F.3d at 1196-97; *Fisher*, 584 F.3d at 898-99. "Because handcuffing itself is not necessarily an excessive use of force in connection with an arrest, a plaintiff must show actual injury in order to prove that the officer used excessive force in the course of applying handcuffs." *Donahue*, 948 F.3d at 1197 n.29 (quoting *Fisher*, 584 F.3d at 897).

Mglej has made a sufficient showing of an actual non-de minimis injury here, based on the medical evidence that he suffered long-term nerve damage to his left hand. *See* *Vondrak*, 535 F.3d at 1209 (explaining that plaintiff's permanent nerve injury from handcuffing established the required "actual injury").

In addition to this long-lasting nerve injury, Mglej also asserted that he suffered prolonged and significant pain during the handcuffing. It is, of course, a fact that handcuffs are not comfortable and arrestees frequently complain about pain caused by their use. *See* *United States v. Rodella*, 804 F.3d 1317, 1328 (10th Cir. 2015) ("Handcuffing inevitably involves some use of force, and it almost inevitably will result in some irritation, minor injury, or discomfort where the handcuffs are applied." (citation, internal quotation marks omitted)). In light of that, conclusory complaints of pain alone are not ordinarily sufficient to support a Fourth Amendment excessive force claim. *See* *Koch*, 660 F.3d at 1247-48 (holding plaintiff's evidence, that she suffered superficial abrasions but did not establish any neurological injury, was insufficient to establish the required actual injury needed to support an excessive force claim based on being handcuffed too tightly).

But in making that determination, we focus on the specific facts presented in a given case. *See generally A.M.*, 830 F.3d at 1151 (noting that "the Supreme Court has said that 'for the most part per se rules are inappropriate in the Fourth Amendment context'" (*quoting United States v. Drayton*, 536 U.S. 194, 201 (2002)). Here, we have the unusual case where there is more than just an uncorroborated sworn statement from Mglej that the handcuffs hurt his wrists. *See Fisher*, 584 F.3d at 900 (holding § 1983 plaintiff had established an actual injury, noting that "[t]his case does not involve only a self-serving affidavit asserting pain alone, without corroborating facts"). Deputy Gardner's own actions corroborated that the handcuffs were too tight. After initially ignoring Mglej's complaints that the handcuffs were too tight, once the deputy checked the handcuffs and saw that Mglej's hands were red, the deputy testified in his deposition that he realized that it was "necessary to remove the handcuffs." (Aplt. App. 553.) This was especially the case, according to the deputy, because it was going to take two hours to drive Mglej to the jail. When the deputy was unable to loosen the handcuffs with the key, Deputy Gardner was sufficiently concerned about how tight the handcuffs were that he deemed it necessary to use his own tools to pry the malfunctioning handcuffs off Mglej. The deputy's initial attempts to remove the malfunctioning handcuffs made them even tighter, causing Mglej further injury and greater pain.

It took Deputy Gardner twenty minutes to pry off the handcuffs, and this was after the initial fifteen to thirty minutes that Deputy Gardner ignored Mglej's complaints that the handcuffs were too tight. "It is possible for someone to be handcuffed for so long that

handcuffing constitutes an unreasonable use of force." *J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255, 1258 n.2 (10th Cir. 2015) (citing *Fisher*, 584 F.3d at 894). Furthermore, the twenty minutes it took the deputy to destroy the handcuffs in order to pry them off intensified the pain, injury and fear Mglej suffered. Then, once the deputy got the malfunctioning handcuffs off, he put a new set of handcuffs on Mglej, which continued to cause Mglej's injured wrists pain, put the handcuffed Mglej back into the patrol car and drove two hours to the jail. *See Fisher*, 584 F.3d at 894 (holding that, even when initial handcuffing is objectively reasonable, other factors, such as prolonged duration, can affect the objective reasonableness calculation).

Viewing the evidence in the light most favorable to Mglej, then, the lasting physical injury he suffered and the extreme prolonged pain inflicted on him is sufficient for Mglej to meet his burden of establishing an actual, non-de minimis injury to support an excessive force claim based on being handcuffed too tightly. *See Cortez*, 478 F.3d at 1129 ("In some circumstances, unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight."); *see also Vondrak*, 535 F.3d at 1208-09.

Furthermore, as the cases cited above indicate, such a Fourth Amendment violation was clearly established in August 2011. *See Vondrak*, 535 F.3d at 1209 (stating that, "at the time of Vondrak's arrest [in 2003], the right to be free from unduly tight

handcuffing was 'clearly established'—as were the contours of the right," *citing* *Cortez*, 478 F.3d at 1129). In particular, this court previously recognized, in 2008, that a claim that overly tight handcuffs caused permanent nerve damage was sufficient to establish a Fourth Amendment excessive force claim. *See Id.* The district court, therefore, did not err in denying Deputy Gardner qualified immunity on this excessive force claim.[13]

C. Count 3: Malicious prosecution

Mglej finally alleged that Deputy Gardner initiated a malicious prosecution against him by booking him into jail on charges of failing to identify himself and obstructing justice. Based on those charges and the written probable cause statement Deputy Gardner completed in support of those charges, a judge approved Mglej's continued detention and set bail. The charges against Mglej were eventually dropped.

> To state a § 1983 claim for malicious prosecution, a plaintiff must show: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the

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[13] The clearly established Fourth Amendment violation that Mglej has alleged is that Deputy Gardner applied the handcuffs too tightly and ignored Mglej's initial complaints that they were too tight. Mglej has not alleged a separate excessive force claim stemming particularly from the deputy's attempts to remove the malfunctioning handcuffs.

> defendant acted with malice; and (5) the plaintiff sustained damages."

Montoya v. Vigil, 898 F.3d 1056, 1066 (10th Cir. 2018) (*quoting Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008)).

In moving for qualified immunity, Deputy Gardner asserted that Mglej could not establish the third and fourth elements of his malicious prosecution claim, the lack of probable cause and that Deputy Gardner acted with malice. As discussed earlier, however, Deputy Gardner lacked even arguable probable cause to charge Mglej with failing to give his name under Utah Code § 76-8-301.5. Moreover, even Deputy Gardner does not contend that there was even arguable probable cause to charge Mglej with obstructing justice.

As for malice, it "may be inferred if a defendant causes the prosecution without arguable probable cause." *Stonecipher*, 759 F.3d at 1146. The plain language of the two statutes under which Deputy Gardner booked Mglej clearly do not apply to the circumstances presented in this case. Moreover, charging Mglej with obstructing justice, which clearly did not apply, supported doubling the bail Deputy Gardner suggested, from $555 to $1,110. The judge set Mglej's bail at $1,000.

Furthermore, Mglej testified in his deposition that, when the intake officer at the jail asked Deputy Gardner on what charges the deputy was booking Mglej, Deputy Gardner responded: "I don't know. Let me look at the book. I am sure I can find something." (Aplt. App. 600.) Mglej contends that the deputy then looked through the Utah criminal code before

charging Mglej under two criminal statutes that, by their plain language, did not apply to the circumstances precipitating Mglej's arrest. Mglej has, thus, sufficiently met the malice element of a malicious prosecution claim.[14]

In the district court, Deputy Gardner did not specifically challenge that this constitutional violation—malicious prosecution—was clearly established in August 2011. In any event, it was. In 2008, the Tenth Circuit stated that "it of course has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures." *Wilkins*, 528 F.3d at 805.

III. CONCLUSION

Viewing the evidence, as we must, in the light most favorable to Mglej, the district court correctly denied

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[14] While ordinarily a Fourth Amendment claim is measured by an objective reasonableness standard, the malice element of a Fourth Amendment malicious prosecution claim focuses on the defendant officer's knowledge or state of mind. *See Young v. City of Idabel*, 721 F. App'x 789, 804 (10th Cir. 2018) (unpublished) (summarizing Tenth Circuit cases holding "malice" element of § 1983 malicious prosecution claim is met when there is evidence that the defendant officer knowingly made false statements or knew there was no probable cause to support prosecution); *see also Stonecipher*, 759 F.3d at 1146 (*citing Wilkins*, 528 F.3d at 800-01, for the proposition that malice may be inferred from a *§ 1983* defendant's intentional or reckless conduct). *See generally Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (noting tension between "subjective bad faith, i.e., malice [which] is the core element of a malicious prosecution claim" and Fourth Amendment's objective reasonableness standard).

Deputy Gardner qualified immunity on Mglej's three § 1983 claims for false arrest, excessive force, and malicious prosecution. We, therefore, AFFIRM the district court's decision to deny Gardner summary judgment on these three claims.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:13-CV-00713-CW-DBP

Matthew T. Mglej, Plaintiff,

v.

Garfield County et al., Defendants.

[January 11, 2019]

MEMORANDUM DECISION AND ORDER

Clark Waddoups, United States District Judge.

Before the court is a Motion for Summary Judgment of Plaintiff Matthew Mglej's § 1983 action filed by Defendants Raymond Gardner and Garfield County.[1] (ECF No. 111.) Defendants contend the events at issue in this action did not violate Mr. Mglej's constitutional rights, and even if they did, Officer Gardner is entitled to qualified immunity.

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[1] The Garfield County Jail and the Garfield County Sheriff's Office are named as separate defendants, but they are not properly included as separate entities from the County. Additionally, Mr. Mglej names Doe defendants who have never been named and therefore are dismissed with prejudice.

They also argue there was no policy or custom in place that creates a basis for county liability. The court heard oral argument on the matter on September 11, 2018. (ECF No. 146.) Having considered the briefing and oral argument, and otherwise being fully informed, the court now GRANTS in part and DENIES in part Defendants' Motion for the reasons stated herein.

FACTS

In the summer of 2011, Plaintiff Matthew Mglej left his home in Oregon and headed by motorcycle across the American West toward Dallas, Texas. (Plaintiff's Response 3, ECF No. 132.) He was going to meet family he had never known. (Mglej Deposition 11: 12-23, ECF No. 132-5.) His plans were disrupted when he experienced mechanical problems outside of Boulder, Utah. (Plaintiff's Response 4, ECF No. 132.) Boulder is a rural town with about 200 residents. (Gardner Declaration ¶ 5, ECF No. 112.) His engine was "burping" and "cutting in and off," and he needed a tire repair. (Mglej Deposition 16: 18-22, 23: 14-16, ECF No. 132-5.s) He went into town and asked around for the mechanic and learned that Chuck Gurle was the only mechanic in town. (*Id.* at 23: 21-24: 20.) When Mr. Mglej could not find Mr. Gurle, he returned to town and eventually found another traveler with whom he camped for the night. (*Id.* at 25: 4-28: 15.)

In Boulder, Mr. Mglej experienced a largely welcoming community where he waited for the local mechanic to repair his bike. Eventually Mr. Mglej found Mr. Gurle, who invited him to stay in his home while he repaired the bike, which required a tire to be

shipped.[2] (Plaintiff's Opposition 11, ECF No. 132; Mglej Deposition 47: 12, ECF No. 132-5.) He spent his days socializing with staff and guests at the Boulder Exchange and the Burr Trail Grill and other local places where he felt the community "took [him] in." (Mglej Deposition 42: 16-46: 21, ECF No. 132-5.). He "made a lot of friends" and "became very close to the community." (*Id.* at 37: 13-14.)

But Mr. Mglej eventually came into contact with law enforcement. Mr. Mglej and Officer Raymond Gardner of the Garfield County Sheriff's Department tell markedly different accounts of their first interaction. Mr. Mglej testified in his deposition that he saw Officer Gardner several times and felt Gardner was "eyeing [him] down, like, who is this guy." (*Id.* at 37: 18-25.) Then "at one point [Mglej] was driving [his] motorcycle and [he] was going to the Boulder Exchange, and [Gardner] pulled [him] over" for speeding, approximately five miles over the limit. (*Id.* at 38: 14-24.) Mr. Mglej testified that Gardner asked him who he was, where he was from, and why he was in town. (*Id.* at 39: 7-12.) Mr. Mglej also asserts that he gave Officer Gardner his ID card during this initial interaction. (*Id.* 54: 25-55: 1.) Mr. Mglej claims that Officer Gardner ultimately gave him a warning and let him go. (*Id.* at 39: 10-12.) Mr. Mglej reports this interaction occurred two or three days after he arrived in town. (*Id.*) Officer Gardner denies he ever pulled

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[2] Defendants argue that the property where Mr. Mglej stayed was a part of a business and therefore public property. But they concede that there was a residence on the property and that residence is where Mr. Mglej spent his time while in Boulder. (Defendants' Motion viii, ECF No. 111.)

Mr. Mglej over for speeding. (Gardner Depo. 27: 24-25.)

Officer Gardner states instead that one day in the summer of 2011, he "was pulled off on the side of the road, patrolling for speeding. (Gardner Affidavit ¶ 8, ECF No. 112.) While doing this, Mr. Mglej rode past . . . on his motorcycle." (*Id.*) He "did not attempt to pull Mr. Mglej over, and [he] remained parked off on the side of the road. However, Mr. Mglej turned around and came back to voluntarily speak with" him. (*Id.*) Officer Gardner's statement is that Mr. Mglej wanted to know how fast he was going and that he "did not ask for [Mr. Mglej's] driver's license at that time," even though he thought "the interaction was strange, which alerted [his] suspicions about Mr. Mglej." (*Id.* ¶ 9.)

Their next encounter occurred on August 8, 2011, around the time Mr. Mglej was preparing to leave town, and resulted in the alleged violation. After "about seven days" of being in Boulder, one day before his eventual arrest, Mr. Mglej's tire arrived, and Mr. Gurle installed it "right away." (*Id.* at 47: 12-22.) The following day, around midday, Mr. Mglej "was completely packed," and he and Mr. Gurle were "saying [their] goodbyes" while "hanging out" playing music. (*Id.* at 51: 22-52: 11.) While this was going on, Officer Gardner came to the front door. (*Id.* at 52: 10-11.) "[H]e came and knocked on the door, and he was completely out of uniform or anything like that. It was very casual. It seemed like . . . it surprised Chuck." (*Id.* at 52: 23-25.) It was his day off, but he is the only officer in town, so Officer Gardner went to Mr. Gurle's house in civilian clothes for the purpose of

investigating an alleged theft. (*Id.* at 35: 4-6, 36: 25-37: 2.)

Apparently, Officer Gardner had come to the Gurle's residence to follow up on a report from the Boulder Exchange, a local convenience store, that twenty dollars were missing from the till. (Plaintiff's Response Brief 6-7; ECF No. 132.) According to Officer Gardner, a female employee "had reported being made to feel uncomfortable by some of Mr. Mglej's comments. [And] this employee" reported "that when she had returned from using the restroom, money was missing from the cash register and [she] believed Mr. Mglej could have been responsible for its disappearance." (Gardner Affidavit ¶ 11, ECF No. 112.) Dispatch, who first received the call from the Boulder Exchange, apparently reported to Officer Gardner that Mr. Mglej was loitering but did not provide a basis for the employee's belief or communicate that Mr. Mglej made the employee uncomfortable. (Gardner Affidavit ¶ 11, ECF No. 112; Gardner Deposition 30:9-11; 31: 16-21.)

Following up on the call from Dispatch, Officer Gardner called the Boulder Exchange and asked about what happened. (*Id.* at 32: 1-3.) The employee who reported the incident told Officer Gardner that she did a "quick cursory check" of the till after briefly stepping outside and reported the apparently missing money, which "she thought" was twenty dollars. (*Id.* at 32: 10-21, 33: 3.) She also described the person she believed to have committed the offense—she described a person who had been newly around town and who was staying with Mr. Gurle while having his bike repaired. (*Id.* at 33: 12-17.) Officer Gardner deduced that she was referring to Mr. Mglej. (*Id.* at 33: 18-21.)

She did not indicate whether there were other patrons in the store at the time of the alleged theft. (*Id.* at 32-33.) She also reported that Mr. Mglej made "inappropriate comments" and that she felt uncomfortable. (*Id.* at 34: 11-19.) Mr. Mglej admits he was at the Boulder Exchange that morning but denies that the employee ever went outside while he was in the store. (Mglej Decl. ¶ 10; ECF No. 132-3.)

According to Officer Gardner, the Gurle residence, where Officer Gardner went after calling the Boulder Exchange, is approximately an eighth of a mile from the Burr Trail Road, which is a county road off of Utah Highway 12. (Gardner Deposition 37: 19-38: 3.) The Gurles live in a single-wide trailer and park a fifth-wheel camper on the property. (*Id.* at 38: 8-12.) They do not own the property. (*Id.* at 39: 1-2.) According to Officer Gardner, the property where the residence and camper are parked is called Belnap Rental. (*Id.* at 39: 3-11.) Officer Gardner contends that Mr. Gurle "does do some business at," what he calls, Belnap Rental. (*Id.* at 39: 14-15.) Mr. Gurle declares, however, that neither he nor his wife does any business from their home.[3] (Gurle Declaration ¶¶ 8-9, ECF No. 132-2.)

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[3] At oral argument, Officer Gardner's counsel argued that even Mr. Mglej said there was a shop on site at Belnap Rental. He conceded, however, that this information was communicated after Mr. Mglej was asked a compound question, creating ambiguity about which question he answered affirmatively, and also conceding that Mr. Mglej was never asked whether Mr. Gurle used the shop for personal or commercial purposes. Because Mr. Gurle has stated there was no commercial activity conducted at his residence, and because the court is required to

When Officer Gardner arrived at the Gurles' home, he knocked and asked for Matt, Mr. Mglej's first name. (Gardner Deposition 39: 23-24; Gurle Declaration ¶ 13, ECF No. 132-2.) When Mr. Mglej came to the door, Officer Gardner asked if they could talk outside, away from the door. (Gardner Deposition 40: 9-13.) Mr. Mglej agreed, and the two began to talk outside the trailer.[4] (*Id.* at 40: 18-23.) The parties disagree about the nature of the area outside the Gurle residence where Officer Gardner and Mr. Mglej had this conversation. Officer Gardner describes the area as a parking lot. (Gardner Declaration ¶ 14, ECF No. 112.) Mr. Mglej describes "a front yard with hard-packed dirt where [the Gurles] keep a fire pit and several lawn chairs." (Mglej Declaration ¶ 8, ECF No. 132-3.) Mr. Gurle's characterization of his residence echoes Mr. Mglej's description. (Gurle Declaration ¶ 7, ECF No. 132-2.)

Officer Gardner told Mr. Mglej that he had received a complaint from the Boulder Exchange, and Mr. Mglej said he was not involved with the missing money. (Plaintiff's Response Brief 9, ECF No. 132.) Officer Gardner stated that, nonetheless, he needed to complete a report that required certain information from Mr. Mglej, specifically Mr. Mglej's full name, date of birth, driver's license information, and

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draw all reasonable inferences in favor of Mr. Mglej as the nonmoving party, the court concludes that on this record there is no basis to conclude as a matter of law that Mr. Gurle conducted commercial business on the property.

[4] Officer Gardner recalls that it was at this point that he mirandized Mr. Mglej. (Gardner Deposition 46: 5-18.) Mr. Mglej denies that Officer Gardner ever read him his Miranda rights. (Mglej Deposition 61: 13-14.)

address. (*Id.* at 10; Gardner Deposition 44: 2-3.) Officer Gardner agreed in his deposition that he believes he asked for Mr. Mglej's ID. (Gardner Deposition 41: 15-19.)

But Mr. Mglej did not believe Officer Gardner was entitled to this information, and he did not want to give it without first conferring with an attorney. (*Id.* at 43: 15-16; Mglej Deposition 54: 12-17.) Officer Gardner 's account is that he told Mr. Mglej he could talk with an attorney, but first he had to disclose his identity. (Gardner Deposition 43: 18-20.) And he did not first provide Mr. Mglej the opportunity to contact an attorney, because he "didn't have a reasonable expectation that [Mr. Mglej] knew of any attorney or had a phone number for an attorney or had worked for an attorney or had any kind of access to an attorney" because he was "on a road trip that eventually led him to Boulder, Utah." (*Id.* at 44: 21-45: 3.) Instead, Officer Gardner warned Mr. Mglej that if he was unwilling to identify himself, he would be placed under arrest. (*Id.* at 45: 14-18; 45: 25-46: 4.) When Mr. Mglej did not answer, Officer Gardner arrested him, using handcuffs even though Officer Gardner concedes that Mr. Mglej was "cooperative physically" and did not behave in a physically threatening manner. (Plaintiff's Response 11, ECF No. 132; Gardner Deposition 46: 19-21, 47: 4-11.) He seated Mr. Mglej in the front seat of his patrol vehicle. (Gardner Deposition 52: 19-21.)

Mr. Mglej's account of the pre-arrest encounter is that while Officer Gardner was asking for his information, Gardner was accusing him of taking the money. (Mglej Deposition 57: 3-9.) "Feel[ing] very uncomfortable," Mr. Mglej refused to answer Officer

Gardner's questions without a lawyer and tried to call a lawyer but, when he reached for his phone, Officer Gardner said that if Mr. Mglej did not "put that phone down right now" he was going to "wrestle [Mr. Mglej] to the ground and tase [him]." (Mglej Deposition 58: 13-59: 4.) Mr. Mglej recalls that he was scared and that the next thing he knew he was in handcuffs and being put in the police car. (*Id.* at 60: 10-13.) Neither party suggests that Officer Gardner ever attempted to acquire a warrant before arresting Mr. Mglej.

Instead of going directly to the county jail, some ninety miles away in Panguitch, Utah, Officer Gardner decided to first stop at his home to change out of his civilian clothes and into his uniform. (Gardner Deposition 51: 2-5; Plaintiff's Response 12; ECF No. 132.) Officer Gardner provided no information that the change was necessary, only that he "thought it best" given the length of the drive. (*Id.* at 51: 4.) While Officer Gardner went inside, Mr. Mglej sat in the car alone with the doors unlocked, limited only by a seat belt and his arms handcuffed in the front. (*Id.* at 52: 22-53:2, 53: 25-54: 4.) Officer Gardner's family was inside the home, but he did not fear Mr. Mglej would try to escape. (*Id.* at 54: 6-8, 60: 15-18.)

During his deposition, Officer Gardner testified that he handcuffed Mr. Mglej "[p]er [Garfield County Sheriff's] department policy" that "whenever someone is placed under arrest, they are handcuffed." (*Id.* 46: 22-25.) He further stated that he had no discretion in deciding whether to handcuff Mr. Mglej. (*Id.* 60: 16-21.) In January of 2018, Officer Gardner supplemented his declaration to inform the court that it is his "practice to handcuff everybody [he] arrest[s]

and transport[s] to jail." (Gardner Supplemental Declaration ¶ 1; ECF No. 137.) He has adopted this policy because he is "stationed so far away from any other law enforcement[5] and must transport persons a long distance to the jail, it is the safest practice for [him] to always handcuff persons [he] arrest[s]." (*Id.* ¶ 2.) He does this for his safety and the safety of the prisoner. (*Id.* ¶ 4.) And when he handcuffed Mr. Mglej, both upon the initial arrest and re-handcuffing after the incident in the garage, he did so "solely for safety reasons." (*Id.* ¶ 7.)

The Garfield County Sheriff's Department Policy related to handcuffing requires:[6] "Handcuffs . . . may be used only to restrain a person's hands to ensure officer safety." (County Policy 306.4, ECF No. 132-6.) It "recommend[s]" handcuffs "for most arrest situations," but reserves discretion to the officer to decide whether the situation "warrants that degree of restraint." (*Id.*) The Policy continues that "deputies should not conclude that in order to avoid risk every person should be handcuffed, regardless of the circumstances." (*Id.*) It also makes clear that "[w]hen feasible, handcuffs should be double-locked to prevent tightening, which may cause undue discomfort or injury to the hands or wrists." (*Id.*) Finally,

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[5] The court takes judicial notice that Garfield County, Utah is a rural, sparsely populated, and far-reaching county and that Boulder is in approximately the middle of the county..

[6] The version of the Policy manual that Mr. Mglej provided to the court is dated May 29, 2015. It is not clear the May 2015 Policy is the same as the Policy at the time of Mr. Mglej's arrest, but Officer Gardner did not object to its foundation or authenticity in his reply brief or at oral argument.

"[h]andcuffs should be removed as soon as it is reasonable or after the person has been searched and safely confined within a detention facility." (*Id.)*

When Officer Gardner returned to his car, now in uniform, Mr. Mglej complained to him that the handcuffs were too tight. (*Id.* at 54:12-14.) Mr. Mglej contends he began complaining about the pain from the handcuffs almost immediately. (Plaintiff's Response 17, ECF No. 132.) When Officer Gardner noticed that Mr. Mglej's hands were red, he first tried to loosen them, but the cuffs malfunctioned and needed to be removed. (Gardner Deposition 54: 18-25, 55: 15-56:1.) Not having the proper tools, Officer Gardner believed he had to improvise and took Mr. Mglej to his garage. (*Id.* at 57: 9-12; Gardner Affidavit ¶¶ 33-34.) Officer Gardner apparently made no attempt to call for help from other officers in the county nor did he attempt to find the proper tools in town. Instead, in his garage, Officer Gardner used Mr. Mglej's hands as a fulcrum and employed various tools in a trial-and-error fashion, including "hand drills, different prongs, different pliers, different screw drivers, and different presses." (Mglej Deposition 75: 8-76: 18.) Eventually Officer Gardner put the handcuffs in a vice grip and worked them free of Mr. Mglej's wrists using two screwdrivers to pop them open in a manner that was extremely painful for Mr. Mglej. (*Id.* at 79: 6-80:10.) Officer Gardner stated that he did not know Mr. Mglej was in pain as he did not verbalize or otherwise express discomfort or pain. (Gardner Deposition 59: 6-11.) After removing the faulty handcuffs, Officer Gardner put new handcuffs on Mr. Mglej, returned to the car, and headed toward Panguitch. (Mglej Deposition 81: 3-5, 81: 25-82: 3.)

About half an hour into the two-hour drive to Panguitch, Officer Gardner received a phone call from the Boulder Exchange employee who had reported the missing money.[7] (*Id.* 82: 4-17.) She was calling to tell him that after "a more thorough examination of the till was made . . . the money was accounted for." (Gardner Deposition 63: 20-22.) Officer Gardner did not, however, release Mr. Mglej upon receipt of the phone call. (*Id.* at 64: 12-18.) Instead he continued on to the Garfield County Jail where he referred to a Utah Code book, completed a "no warrant fact sheet," and booked Mr. Mglej under two separate offenses: obstructing justice and failure to disclose identity.[8] (*Id.* at 64: 18-65: 9, 67: 10-21.)

According to Mr. Mglej, Officer Gardner did not know what charge he intended to book Mr. Mglej under until he got to the jail. (Mglej Deposition 86: 3-11.) Mr. Mglej alleges that when an officer at the jail asked what Mr. Mglej was being booked for, Officer Gardner responded, "I don't know. Let me look in the

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[7] Officer Gardner claims the call came one and a half hours into his drive. (Gardner Deposition 63: 24-25.)

[8] There is no question that Officer Gardner did not have probable cause to arrest Mr. Mglej for obstruction of justice. Officer Gardner specifically listed *Utah Code § 76-8-306(1)(i)* as the charge. It states: "An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense: conceals information that is not privileged and that concerns the offense, after *a judge or magistrate* has ordered the actor to provide the information." *Utah Code § 76-8-306(1)(i)* (emphasis added). Because there was no order of a judge or magistrate, Mr. Mglej could not, at the relevant time, have been guilty of this crime.

book. I'm sure I can find something." (*Id.* at 86: 5-6.) Officer Gardner contradicts Mr. Mglej's testimony. He says he knew at the time he decided to continue on to the jail after receiving the second call from the Boulder Exchange that he had arrested Mr. Mglej for failure to disclose identity and that delays in the booking process resulted from Mr. Mglej's continued refusal to answer questions.[9] (Gardner Affidavit ¶¶ 40, 43.) This was the first time Officer Gardner had ever arrested anyone with a failure to disclose identity. (Gardner Deposition 62: 6-8.)

The following day, August 9, 2011, Judge Russell Bulkley issued a Magistrate's Order that approved Officer Gardner's Statement of Probable Cause for a Warrantless Arrest and set bail for $1,000, reflecting $500 for failure to disclose identity and $500 for obstruction of justice. (Probable Cause Statement and Order, ECF No. 112-1.) But Officer Gardner's statement, upon which the magistrate concluded probable cause existed, did not assert any facts that would show Mr. Mglej was arrested at a public place, nor did the statement provide any facts that would demonstrate the obstruction of justice. (*Id.*)

Mr. Mglej's account of the conditions in jail include taunts by jailers, deprivation of food he could safely eat, and incarceration alongside troubled inmates who harassed him. He told the guards he had a dairy allergy; nevertheless, the guards fed him a sandwich of cheese and mayonnaise and then proceeded to include dairy in each of his remaining meals while in

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[9] It is unclear to the court why this would be the case. Officers had apparently confiscated Mr. Mglej's wallet during the booking process and would have had access to his ID card.

custody. (Mglej Declaration ¶ 15.) He also says that he "was housed with another inmate who apparently suffered from schizophrenia and alcoholism. The guards refused to give the inmate his medication and he started behaving erratically and aggressively toward [Mr. Mglej]," causing him "intense mental and emotional anguish." (*Id.*)

Although bail was set on August 9, 2011, and Mr. Mglej immediately asked for his wallet so he could pay bail, the guards refused to give him his wallet until two days later on August 11. (Mglej Declaration ¶ 14.) At that time, they retrieved his wallet, and Mr. Mglej paid his bail by credit card. (*Id.*; Bail Payments, ECF No. 111-1.) Defendants provide no explanation for the two-day delay in Mr. Mglej's bail payment and release, although he apparently had the means to pay bail immediately. When Mr. Mglej was finally permitted to pay bail, he was released but not provided any transportation from Panguitch to Boulder. (Mglej Declaration ¶ 16.) Instead he "had to hitchhike back to Boulder. When [he] arrived [he] found that [his] bike had been vandalized by joyriders and that [his] possessions, including a digital camera, GPS, and video camera, had been stolen." (*Id.*)

Eventually all charges against Mr. Mglej were dropped (Mglej Deposition 100: 15-101: 9). But he contends he sustained damages from the arrest and initial prosecution. He was deprived of his liberty for several days. His damages also include lost property as previously detailed but also physical damage to his arms resulting from the handcuffing. He describes lasting "burning pain and numbness in [his] fingers that radiated up [his] arm to the elbow. (Mglej Declaration ¶ 17.) He has also "experienced

significant emotional distress as a result of this ordeal. [He] suffer[s] from Asperger's Disorder, anxiety, and PTSD. . . . However, the events the Boulder [sic] in August 2011 have exacerbated [his] symptoms, causing panic attacks, loss of sleep, general anxiety, and flash backs." (*Id.* ¶ 18.)

STANDARD

Summary judgment is proper when the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that may affect the outcome of the litigation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Id.* The nonmoving party may not rest solely on allegations on the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The court must "view the evidence and draw reasonable inferences therefrom in a light most favorable to the nonmoving party." *Commercial Union Ins. Co. v. Sea Harvest Seafood Co.*, 251 F.3d 1294, 1298 (10th Cir. 2001).

ANALYSIS

When an individual believes his or her constitutional rights have been violated by a member of the government, he or she may bring a claim under 42 U.S.C. § 1983. Section 1983 exists to "protect the

people from unconstitutional action under color of state law." *Patsy v. Bd. of Regents*, 457 U.S. 496, 503, (1982). It does so by creating a federal cause of action for the deprivation of constitutionally secured rights. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755, (2005). Here Mr. Mglej has asserted that the various Defendants violated his Fourth, Eight and Fourteenth Amendment rights. (Complaint, ECF No. 2.) Mr. Mglej alleges violations committed by individuals, specifically Officer Gardner as well as unnamed officers at the Garfield County Jail, and against the County and the County Sheriff. Because county liability depends in part on individual liability, the court first analyzes whether any individual could be held liable for the purported violations and then addresses the issue of county liability.

I. Individual Liability

On summary judgment, Officer Gardner argues he is immune from suit under the doctrine of qualified immunity. (Motion, ECF No. 111.) When a defendant raises a qualified immunity defense, the burden shifts to the plaintiff to demonstrate "'(1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue.'" *Lee v. Tucker*, 904 F.3d 1145, 1148 (10th Cir. 2018) (*quoting Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996)). "Under this test, 'immunity protects all but the plainly incompetent or those who knowingly violate the law.'" *Grissom v. Roberts*, 902 F.3d 1162, 1167 (10th Cir. 2018) (*quoting Kisela v. Hughes*, 138 S.Ct. 1148, 1152, (2018)).

A. *Fourth Amendment* Unlawful Arrest and Detention

Mr. Mglej's first cause of action alleges that while acting under the authority of Garfield County and the Sheriff's Office, Officer Gardner arrested him without probable cause and continued to detain him even after learning that in fact no crime had been committed. (Complaint ¶¶ 90-105.) An arrest is unlawful and in violation of the Fourth Amendment if it is not based on probable cause. *United States v. Rodriguez*, 739 F.3d 481, 485 n.2 (10th Cir. 2013). "Probable cause exists where the facts and circumstances known to the officer at the time of arrest, and of which the officer had reasonably trustworthy information, were sufficient to warrant a prudent person in believing defendant had committed or was committing a criminal offense." *Id.* An officer may not have acted on probable cause where there is insufficient information or inadequate corroboration or where his or her conduct amounted to "'clos[ing] her or his eyes to the facts that would help clarify the circumstances of an arrest.'" *Cortez v. McCauley*, 478 F.3d 1108, 1116-17 (10th Cir. 2007) (*quoting BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986)).

Thus, the court must determine "whether a 'substantial probability' existed that the suspect committed the crime, requiring something 'more than a bare suspicion.'" *Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011) (internal citation omitted) (*quoting United States v. Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011)). When evaluating whether probable cause supported an arrest, the court must "ask whether an objectively reasonable officer could conclude that the historical facts at the time of the arrest amount to probable cause," *Cortez*, 478 F.3d at 1116, and must consider "facts supporting probable cause," as well as "those that militate against it."

United States v. Valenzuela, 365 F.3d 892, 897 (10th Cir. 2004).

In *Cortez v. McCauley*, the Tenth Circuit concluded that officers did not rely on probable cause. 478 F.3d at 1117. There, officers grabbed a suspect from his home in the middle of the night while he was wearing only shorts, handcuffed him, mirandized him, locked him in the back of a police car, and questioned him there. *Id.* at 1116. Officers were investigating an alleged sexual assault on a child. *Id.* at 1113. But the only evidence of the crime, or that the accused had committed it, was the statement of a distressed two-year old "that her babysitter's 'boyfriend' had 'hurt her pee pee.'" *Id.* Without any further investigation—without waiting for results of medical exam, without interviewing the alleged victim or her mother, and without ever attempting to obtain a warrant—officers went to the accused's home and executed the arrest. *Id.* The Tenth Circuit, sitting en banc, unanimously concluded that officers' efforts were inadequate to support a finding of probable cause.

Here, Officer Gardner did not have probable cause to believe that a crime occurred or to suspect that Mr. Mglej committed any such crime. He received a phone call from Dispatch, which he attempted to corroborate by calling the source—the Boulder Exchange—but he gathered no more information. He had the statement of one witness that, upon a "quick cursory check," it appeared twenty dollars were missing and that Mr. Mglej had been in the store and made an employee "uncomfortable." As in *Cortez*, Officer Gardner did not conduct even the most basic corroborating investigation. He did not go to the Boulder Exchange, he did not inquire about whether there were other

customers in the Boulder Exchange, he did not ask the employee to recount the till, he did not inquire about why Mr. Mglej's behavior made the employee uncomfortable, he did not ask whether anyone had seen Mr. Mglej at or near the till, and he did not interview Mr. Mglej about the purported theft before arresting him. In other words, he did not have "reasonably trustworthy information" to justify arresting Mr. Mglej for the theft. But even if he initially had probable cause for the arrest, the post-arrest phone call notifying Officer Gardner that all of the money was accounted for vitiated any reasonable belief that Mr. Mglej stole from the Boulder Exchange. Therefore, from the outset he did not have probable cause to arrest Mr. Mglej for the purported theft, but even if he had, he could not base the continued detention on suspicion of theft after he received the second call.

Officer Gardner argues, however, that he also arrested Mr. Mglej for the crime of failure to disclose identity and that probable cause existed for that charge, even if it did not exist for the theft. The Utah Code permits an officer to arrest a person for failure to disclose identity if, "during the period of time that the person is lawfully subjected to a stop as described in Section 77-7-15" the following elements are met:

> (a) a peace officer demands that the person disclose the person's name; the demand described is reasonably related to the circumstances justifying the stop; (c) the disclosure of the person's name by the person does not present a reasonable danger of self-incrimination in the commission of a crime; and

> (d) the person fails to disclose the person's name.

Utah Code §§ 77-7-2 & 76-8-301.5. A person is lawfully stopped under § 77-7-15 if the stop occurs "in a public place when the officer has a reasonable suspicion to believe the person has committed or is in the act of committing or is attempting to commit a public offense and [to] demand the person's name, address, and an explanation of the person's actions." *Id.* § 77-7-15.[10]

Mr. Mglej argues Officer Gardner could not have had probable cause to arrest him for failure to disclose identity because the arrest did not occur in a public place, Officer Gardner did not demand Mr. Mglej's name but instead asked for his ID, Officer Gardner's demand for Mr. Mglej's name was not reasonably related to the circumstances justifying the stop, and Officer Gardner did not actually believe at the time of the arrest that these elements were met but only surmised after the fact of Mr. Mglej's arrest during booking at the Garfield County jail. There is record evidence that supports Mr. Mglej's arguments.

There is strong evidence that the stop, leading to the arrest, occurred in the Gurle's private yard, not a public place. Mr. Mglej testified that the area was a hard-packed driveway with lawn chairs and a fire pit,

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[10] In other words, an officer who is properly conducting an investigatory stop in a public place may require the stopped person to communicate his or her name, address, and an explanation of his or her actions. And if the person refuses to provide his or her name, the officer may move to arrest the individual so long as the demand is reasonably related to the stop.

and Mr. Gurle described the area in the same manner. Mr. Gurle also declared that he conducts no commercial business at his residence. The only evidence to the contrary is Officer Gardner's statement of his unsupported belief that Mr. Gurle conducted business there.[11] At oral argument on the Motion, Officer Gardner's counsel implored the court to infer the Gurle's residence is a public place based on the various cars that are visible in an areal shot of the property, taken some time after the event. It is not the court's role, on summary judgment, to weigh these facts and decide which statements are more credible and which position is more likely true. Instead, because an arrest for failure to disclose identity is only proper if the failure occurred during a stop in a public place, the court concludes this factual dispute is material to resolution of Mr. Mglej's unlawful arrest claim.

There is also evidence to support Mr. Mglej's argument that Officer Gardner asked for and arrested Mr. Mglej for failure to provide his driver's license

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[11] The court notes that Officer Gardner's statements about what kind of business occurred at Belnap Rental have changed over the course of this action. In his deposition, Officer Gardner stated that Chuck Gurle is a mechanic whose "primary place of business is off Highway 12, approximately two miles from his residence" but who "does do some business at [his residence.]" (Gardner Deposition 38: 19-39: 15.) His deposition characterized Belnap Rental as "the name given" to the property where "Chuck rents [his] trailer," which is owned by "absentee property owners with the last name of Belnap." (*Id.* at 39: 1-6.) He then answered affirmatively that "Belnap Rental is not a business." (*Id.* at 39: 7-11.) In his declaration, however, Officer Gardner stated "Belnap Rental is a small agricultural rental business run by Chuck Gurle." (Gardner Declaration ¶ 13, ECF No. 112.)

information, not for failure to state his name. Officer Gardner has acknowledged that he asked for Mr. Mglej's ID and told Mr. Mglej he was required to provide "basic information" including "name, date of birth, driver's license information, address." (Gardner Deposition 43-44, ECF No. 132-4.) The law did not permit Officer Gardner to arrest Mr. Mglej for failure to provide any information other than his name. And there is at least a reasonable inference, which must be drawn in favor of Mr. Mglej as the nonmoving party, that Officer Gardner was not arresting for failure to provide a name, given that he acknowledges he already knew Mr. Mglej's first name. A jury conclusion to this effect would be further supported if it accepted Mr. Mglej's account of his first encounter with Officer Gardner on the roadside during which, Mr. Mglej contends, he gave Officer Gardner his full name and ID card. Similarly there is a question as to whether Officer Gardner's demand for Mr. Mglej's name was reasonably related to the circumstances of the stop. Officer Gardner knew Mr. Mglej's name and did not need it for investigatory purposes, or at least he has not stated a need. These are all factual issues that are material and therefore properly decided by a jury.

Even if the demand for Mr. Mglej's identity occurred in a public place and was reasonably related to the investigative stop, there is conflicting evidence about whether Officer Gardner suspected Mr. Mglej of the crime of failure to disclose identity during the portion of his detention between the second Boulder Exchange phone call and the Panguitch jail. When assessing probable cause, the relevant inquiry is whether the "'facts known to the arresting officer at the time of the arrest'" would prompt an objectively

reasonable officer to believe the individual in question had committed the offense. *See* *Buck v. City of Albuquerque*, 549 F.3d 1269, 1281 (10th Cir. 2008) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 152, (2004)). Officer Gardner has stated he believed at the time he received the phone call that Mr. Mglej had committed the crime of failure to disclose identity. Mr. Mglej on the other hand contends that he observed Officer Gardner ask for and peruse the Utah Code book in search of a charge when they got to the jail.[12] Mr. Mglej's statement supports the conclusion that at the time of the arrest Officer Gardner did not know that failure to disclose identity was an arrestable offense, that he did not, therefore, have probable cause to arrest him for such a charge. This is yet another factual dispute that must be decided by a jury.

Whether the jury agrees with Mr. Mglej that the elements of the charge of failure to disclose identity could not have been met or that Officer Gardner did not know the facts necessary to arrest him for failure to disclose identity at the time of the arrest, it could conclude that the arrest was made without probable cause. Therefore, Mr. Mglej has raised questions of fact material to the probable cause inquiry such that his claim should survive summary judgment.

Nevertheless, because Officer Gardner has raised the defense of qualified immunity, the court must decide whether "the right was clearly established

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[12] Although an out of court statement, Mr. Mglej's account of Officer Gardner's statement is not hearsay because Officer Gardner is a named defendant in this action and therefore a party opponent. See Fed. R. Evid. 801(d)(2).

when the alleged violation occurred." *Cortez*, 478 F.3d at 1117. To satisfy the second prong of the qualified immunity analysis, a plaintiff must show that "[t]he rule's contours [are] so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). In other words, precedent must "be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* It is sufficient to rely on "[general statements of law'" where they "clearly establish a right for qualified immunity purposes if they apply 'with obvious clarity to the specific conduct in question.'" *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018). In other words, "[q]ualified immunity leaves 'ample room for mistaken judgments,' protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Moore v. Godsil*, 505 F. App'x 780, 783 (10th Cir. 2012) (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Here the law was clearly established: Officer Gardner could only arrest Mr. Mglej if he had probable cause to suspect him of the crime alleged, and he does not dispute that requirement. "The law was and is unambiguous: a government official must have probable cause to arrest an individual." *Cortez*, 478 F.3d at 1117. As to the arrest for the theft, *Cortez* made clear that this right includes the requirement that officers conduct some minimal investigation in order to evaluate probable cause. Specifically the Court concluded that at the time of the arrest in question, "it was established law that 'the probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses readily

available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention.'" *Id.* (*quoting* *Romero v. Fay*, 45 F.3d 1472, 1476-77 (10th Cir. 1995)). *Cortez* predates the arrest now before the court; therefore, there is no question that the right not to be arrested for a crime for which the officer has conducted no meaningful investigation existed at the time of these events.

Regarding the arrest allegedly for the failure to disclose identity, the law requiring probable cause was unambiguous as was the law requiring officers to have knowledge of facts supporting probable cause at the time of the arrest. *Id.* at 1116. Similarly, the requirement that the failure to disclose identity occur in a public place for arrest to be proper is defined by statute and the distinction between a public place and a private residence is a matter of common sense, at least in the context of a residence and under the facts of this case. Therefore, if a jury were to believe Mr. Mglej and Mr. Gurle's characterization of the property and assertions that no commercial business is conducted there, Officer Gardner could not have probable cause to believe he could arrest Mr. Mglej for failure to disclose identity because he was on private property. *See Moore v. Godsil*, 505 F. App'x 780, 784 (10th Cir. 2012) ("Here, the district court specifically noted the conflicting material facts related to the incident and articulated how these conflicting facts prevented a finding of probable cause. Viewing the facts in the light most favorable to plaintiff as the nonmoving party, which the court must do when considering summary judgment, a reasonable officer could have believed that he did not have probable cause to arrest plaintiff under clearly established

law."). Mr. Mglej's account of the facts is one of plain incompetence and failure to know the otherwise clearly established law that, if believed, would preclude Officer Gardner from immunity. should not be permitted to avoid liability because he simply did not know the otherwise clearly established law.

B. Fourth Amendment Excessive Force

Mr. Mglej's second cause of action alleges that Officer Gardner used excessive force by handcuffing him so tightly that it caused Mr. Mglej physical pain and loss of feeling in his hands and by taking Mr. Mglej to his garage and removing the handcuffs without the proper tools. (Complaint ¶¶ 106-117.) To survive summary judgment where Defendants have raised the claim of qualified immunity, Mr. Mglej must "show that the force used was impermissible (a constitutional violation) and that objectively reasonable officers could not have not thought the force constitutionally permissible (violates clearly established law)." *Cortez*, 478 F.3d at 1128.

In assessing the reasonableness of the force Officer Gardner used, the court must balance "'the nature and quality of the intrusion'" on Mr. Mglej's interests "against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 397 (1989). It is Mr. Mglej's burden to show (1) that Officer Gardner "used greater force than would have been reasonably necessary to effect a lawful seizure" and (2) that he suffered "some actual injury" as a result of "the unreasonable seizure that is not de minimis, be it physical or emotional." *Cortez*, 478 F.3d at 1129. The reasonableness of the officer's conduct is a fact specific inquiry, which includes consideration of "the severity of the crime at issue, whether the suspect poses an

immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 1125 (quoting *Graham*, 490 U.S. at 396). Force is not excessive if the officer's actions were "'objectively reasonable' in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397 (1989). "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* Here the circumstances surrounding Mr. Mglej's arrest justified only the most minimal force and the use of handcuffs was objectively unreasonable.

The force Officer Gardner used was not reasonable considering the circumstances. Because Officer Gardner lacked probable cause to believe a crime had occurred, any effort to constrain Mr. Mglej's liberty would have been excessive force, as demonstrated by an analysis of the *Graham* factors. Mr. Mglej was alleged to have stolen twenty dollars. It was a petty offense, not a serious crime, even if it had happened, which it did not, the alleged theft did not in any way suggest Mr. Mglej was violent or likely to flee. And while Mr. Mglej refused to provide his name and/or ID as requested, he did not actively resist arrest nor did his conduct suggest he was likely to flee. And certainly the episode at Officer Gardner's home, in which Mr. Mglej sat in the unlocked car, fully undermines any belief Officer Gardner may have had about Mr. Mglej fleeing when he handcuffed Mr. Mglej the second time. In sum, none of the factors to be considered support Officer Gardner's claim that he reasonably used handcuffs to arrest Mr. Mglej.

Officer Gardner argues, instead, that because the use of handcuffs have been deemed reasonable during investigative searches, that of course they are reasonable during an arrest and he had a practice of handcuffing all arrestees. But neither of these arguments is persuasive. While some courts have found handcuffing appropriate, they did so in the context of the facts and circumstances before them, which are distinct from these. For instance, in the case to which Officer Gardner cites to support the proposition that handcuffing is proper during an investigative detention, *Muehler v. Mena*, 544 U.S. 93 (2005), officers were investigating "a gang-related, drive-by shooting" and officers had reason to believe one of the gang members lived at the house they were searching. *Id.* at 95. They further suspected the wanted individual was "armed and dangerous." *Id.* When they searched the residence, they did so using a SWAT team and handcuffed the four occupants and then detained them in the garage, including the plaintiff, using handcuffs. *Id.* at 96.

In *Muehler*, the Supreme Court concluded that the use of handcuffs to restrain were under these circumstances reasonable, but the court emphasized three important details that make the analysis inapposite to this case. First, the search was pursuant to a warrant and officers have categorical authority to detain during a search pursuant to a warrant, so the initial detention was appropriate, making the handcuffing a minimal further intrusion. *Id.* at 99. Second, the Court noted that "this was no ordinary search" and that "governmental interests in . . . using handcuffs[] are at their maximum when . . . a warrant authorizes a search for weapons and a wanted gang member resides on the premises" because of the "risk

of harm to both officers and occupants." *Id.* at 100. Third, the court noted that "the need to detain multiple occupants made the use of handcuffs all the more reasonable." *Id.*

The facts of this case are nothing like those in *Muehler*. Mr. Mglej was the only potential suspect present, he was not violent or suspected of violence, and no search warrant minimized the intrusion as it did in *Muehler. Muehler* does, however, demonstrate an important point in evaluating the use of force: officers must in the moment, and courts must on review, look to the specific facts of an encounter and not make categorical conclusions and inferences like the one Officer Gardner advocates. While it is true that handcuffing is sometimes appropriate in the context of an investigative detention, *Muehler* does not stand for the proposition that it is always appropriate during either an investigative detention or an arrest. *See Fisher v. City of Las Cruces*, 584 F.3d 888 (10th Cir. 2009) (finding issues of fact existed for a jury to decide the reasonableness of the use of handcuffs where an arrestee had shot himself in the stomach and left bicep before police arrived on scene and was no longer in possession of the firearm when they arrived even though the plaintiff had resisted arrest). Thus, *Muehler* does not affect the court's conclusion that Mr. Mglej has stated facts from which a reasonable jury could conclude Officer Gardner used excessive force in arresting him.

And the law was clearly established. Officer Gardner knew he was obligated to make a case specific determination under both *Graham* and Garfield County policy. But he abdicated that requirement. Although the *Graham* factors do not "by

themselves create clearly established law outside an 'obvious case,'" *Kisela v. Hughes*, 138 S.Ct. 1148, (2018), the facts at bar are exceptional. As shown above, none of the *Graham* factors can be read to support a conclusion that force was appropriate. But even if application of the *Graham* factors to this case was not so obvious as to clearly establish the law, *Graham*'s requirement that all uses of force must be objectively reasonable under "the facts and circumstances of each particular case" is clearly established. *Graham*, 490 U.S. at 396-97. In other words, the law clearly established Officer Gardner's obligation to make an individualized determination of his use of force, even if the result of that individualized determination was not clearly established. Therefore, Officer Gardner's failure to make a case-specific determination, and the objectively unreasonable use of force by handcuffing a compliant man for suspicion of theft of twenty dollars, was a violation of a clearly established right.

Even though Officer Gardner's use of force alone was sufficient to satisfy the *Graham* factors and the law was clearly established, the Tenth Circuit has held that "in nearly every situation where an arrest is authorized, or police reasonably believe public safety requires physical restraint, handcuffing is appropriate."[13] *See Fisher*, 584 F.3d at 896 (10th Cir.

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[13] The facts of this case suggest it may be the exceptional circumstance in which handcuffing is not appropriate and the plaintiff is, therefore, not required to show an injury. *See id.* at 896-97. Officer Gardner handcuffed Mr. Mglej based on his mistaken belief that departmental policy required him to do so,

2009). Therefore, the Tenth Circuit has concluded that a plaintiff claiming improper handcuffing must show some actual injury that is not de minimis. *Id.* at 897-98 (finding the plaintiff had alleged an injury sufficient for the issue to go to the jury).

Here Mr. Mglej has alleged he suffered injuries as a result of the tightness including pain and numbness in his fingers that radiates up to his elbows. (Mglej Declaration ¶ 17, ECF No. 132-3.) Although his declaration and the limited medical records he provides are not overwhelming support of a satisfactory injury, they provide some evidence from which a jury could conclude that he was injured by Officer Gardner's attempts to manipulate and remove the handcuffs without the proper tools and, apparently, without regard for further injury to Mr. Mglej in the process. Officer Gardner has not argued that Mr. Mglej's injury was insufficient to survive summary judgment, and the court will not conclude as much here. Further, the right not to be handcuffed in a manner that was unduly tight or that otherwise caused injury was clearly established by *Fisher*. *See also* *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209-10 (10th Cir. 2008) (concluding officers were not entitled to qualified immunity where plaintiff alleged that he suffered from unduly tight handcuffs, that

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not because he believed public safety required the restraint. And although he did arrest Mr. Mglej, there are questions of fact that call into question whether the arrest was authorized. Finally, Defendants have not argued that an injury was required under these circumstances. But even if an injury is required, Mr. Mglej has adequately alleged such an injury as shown herein. The determination turns not on what Officer Gardner may have subjectively believed, but on what a reasonable officer would accept in light of clearly established County policy.

officers ignored his timely complaints, that his wrists began to bleed while he was handcuffed, that the pain had persisted, and that he had been diagnosed with permanent nerve damage); *Cortez*, 478 F.3d at 1129 ("[U]nduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight," but the injury must something more than "red marks that were visible for days."). Therefore, the court cannot decide as a matter of law that Mr. Mglej was not subject to excessive force nor can it conclude that Officer Gardner is entitled to immunity from liability for such a claim.

C. *Fourth* and *Fourteenth Amendment* Malicious Prosecution

Mr. Mglej next contends that he suffered damages as a result of Officer Gardner's conduct which he alleges amount to malicious prosecution. (Complaint ¶¶ 118-24, ECF No. 2.) When analyzing a malicious prosecution claim in a § 1983 action, the court considers the elements of the common law malicious prosecution claim but must ultimately determine "whether plaintiff has proven a deprivation of a constitutional right." *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257-58 (10th Cir. 2007). "A malicious prosecution claim brought under the Fourth Amendment requires a showing that '(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted

with malice; and (5) the plaintiff sustained damages.'" *Stonecipher v. Valles*, 759 F.3d 1134, 1146 (10th Cir. 2014) (*quoting Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir.2008)).

Officer Gardner contests only the third and fourth elements, arguing that Officer Gardner had probable cause to arrest Mr. Mglej and that he did not act maliciously when he did so. (Motion 7, ECF No. 111.) But as the court has already analyzed, there are disputes of fact material to the probable cause analysis and therefore summary judgment is not appropriate. And because "[m]alice may be inferred if a defendant causes the prosecution without arguable probable cause," *Stonecipher*, 759 F.3d at 1146, the court cannot evaluate whether Officer Gardner acted with malice without resolution of the disputed facts related to probable cause. And because there are disputes of material fact, the court cannot yet assess whether the right was clearly established at the time of the arrest. *See Nosewicz v. Janosko*, No. 18-1139, 754 Fed. Appx. 725, 2018 U.S. App. LEXIS 30665, 2018 U.S. App. LEXIS 30665, 2018 WL 5617756, at *8 (10th Cir. Oct. 30, 2018) ("Accordingly, genuine material disputed facts prevent a finding that defendant breached his duty under the Fourth Amendment or is entitled to qualified immunity.").

D. *Eighth Amendment* Denial of Bail

Mr. Mglej next alleges that Doe Officers of the Garfield County Jail denied him the right to post bail. (Complaint ¶¶ 125-36, ECF No. 2.) He does not allege facts that link Officer Gardner to the denial of his bail nor has he come forward with evidence of such a link on summary judgment. And while he asserts compelling facts related to the officers at the jail, he

has made no apparent attempt to identify the alleged Doe Defendants, he has never sought leave of the court to name them, and the court has by this decision dismissed them. *See* *Didymus v. Bivens*, Case No. 3:09-cv-62, 2011 U.S. Dist. LEXIS 1005, 2011 WL 32207, at *7-*9 (E.D. Tenn. Jan. 5, 2011). In other words he contends his rights were violated, but he does not identify any responsible party. Assuming he intends for the County Defendants to be held liable for the conduct of its agents, there is no county liability as a matter of law. Therefore, summary judgment is proper as to this claim.

E. ***Eight Amendment Cruel and Unusual Punishment***

Finally, Mr. Mglej brings an Eight Amendment cruel and unusual punishment claim against each of the various Defendants. (Complaint ¶¶ 137-150, Complaint 2.) He alleges various violations related to the conditions of his detention at the Garfield County jail. Mr. Mglej's description of his detention is deeply troubling. But Mr. Mglej was not at the relevant time a convicted prisoner, and cruel and unusual punishment is therefore not an available cause of action. *See* *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999). But Mr. Mglej now argues that the *Eight Amendment* analysis for convicted prisoners is the same analysis as the Fourteenth Amendment Due Process Analysis, which applies to pretrial detainees like Mr. Mglej. *See id.* While the court is not persuaded that Mr. Mglej can reform his Complaint through his summary judgment papers, the court need not address the question of whether he can proceed with the claim, because even if he had pled the proper Amendment, he has not identified a responsible individual defendant nor has he set forth

a theory for county liability. Therefore, summary judgment is proper.

II. County Liability

Having conclude that Mr. Mglej has provided a factual basis to conclude Officer Gardner violated his Fourth Amendment rights, the court must now turn to the question of whether any County Defendant can be held responsible. "[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). It can, however, be held liable "for [its] own unlawful acts" if the plaintiff shows "the existence of a municipal policy or custom which directly causes the alleged injury." *Pyle v. Woods*, 874 F.3d 1257, 1266 (10th Cir. 2017). The policy or custom requirement is met if plaintiff can show the violative conduct was pursuant to "a formal regulation or policy statement, an informal custom that amounts to a widespread practice, decisions of municipal employees with final policymaking authority, ratification by final policymakers of the decisions of subordinates to who authority was delegated, and the deliberately indifferent failure to adequately train or supervise employees." *Id.* Mr. Mglej has not plausibly identified a policy that can be imputed to Garfield County, the Garfield County Sheriff's Department, or the Garfield County Jail.

Mr. Mglej argues that the county can be held liable for the conduct of Officer Gardner as well as the Doe defendants because "the facts . . . show the County exhibited deliberate indifference in its failure to train and supervise municipal employees." (Plaintiff's

Response 48, ECF No. 132.) Specifically, he alleges that the "egregious" nature of the violations reveals the County's failures. (*Id.*) In order to make out a claim for "deliberate indifference for purposes of failure to train," a plaintiff must ordinarily show "[a] pattern of similar constitutional violations by untrained employees." . *Connick v. Thompson*, 563 U.S. 51, 62 (2011). In other words, the municipality must have some notice that its "training is deficient in a particular respect" and ignore the deficiency. But he does not point to any specific conduct that can be attributed to any of the County Defendants, much less a pattern of indifference resulting in violations sufficient to put the county on notice and trigger liability. Because Mr. Mglej has not shown that Officer Gardner's conduct was pursuant to a County policy or custom, the County Defendants cannot be held liable and are dismissed from this action.

CONCLUSION

Therefore, the court dismisses the Doe Defendants and GRANTS Defendants' Motion for Summary Judgment with regard to the County Defendants. It also GRANTS Defendants' Motion as to the Eight Amendment Denial of Bail and Cruel and Unusual Punishment claims. But it DENIES Summary Judgment of the Fourth Amendment claims for unlawful arrest, excessive force, and malicious prosecution because there are disputes of material fact. The court will hold a status conference on January 31, 2019, at 2:30 p.m. to set a trial date.

DATED this 10th day of January, 2019.

BY THE COURT:

/s/ Clark Waddoups

Clark Waddoups
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-4015
D.C. Docket No. 2:13-CV-00713-CW-DBP

MATTHEW T. MGLEJ,
PLAINTIFF-APPELLEE,

V.

RAYMOND GARDNER, A/K/A/ OFFICER RAYMOND, AN OFFICER OF THE GARFIELD COUNTY SHERIFF'S OFFICE, IN BOTH HIS INDIVIDUAL AND OFFICIAL CAPACITIES,
DEFENDANT-APPELLANT.

ORDER
[October 26, 2020]

Appeal from the United States District Court
for the District of Utah

Before BRISCOE, EBEL, AND HARTZ, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk