No. _____

In The

UNITED STATES SUPREME COURT

GEORGE WINGATE,

Petitioner

v.

SCOTT FULFORD, *et al.,*

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTORARI

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Questions Presented

1. Whether the Court should permit the qualified immunity defense to extend to a court-invented, hypothetical and demonstrably counter-factual justification for a law enforcement officer's unconstitutional arrest, where the arresting officer concededly neither had nor ever articulated such justification at the time of the arrest or thereafter in court.

2. Whether the Court should further limit the scope of its qualified immunity jurisprudence, which has been increasingly criticized for contributing to a culture of law enforcement that tolerates and facilitates police misconduct.

Parties

The Petitioner is George Wingate, plaintiff and appellant below. The Respondents are deputy sheriffs with the Stafford County, Virginia Sheriff's Office, defendants and appellees below: Scott Fulford and Dimas Pinzon.

Prior Proceedings

Wingate v. Fulford, No. 1:18-cv-937, U.S. District Court for the Eastern District of Virginia. Judgment entered May 31, 2019.

Wingate v. Fulford, No. 19-1700, U. S. Court of Appeals for the Fourth Circuit. Amended judgment entered Feb. 5, 2021; *rehearing denied*, Mar. 2, 2021.

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Petition for Writ of *Certiorari*

Petitioner George Wingate respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Court of Appeals for the Fourth Circuit granting qualified immunity on hypothetical and counter-factual grounds to respondent deputy sheriffs for having unconstitutionally arrested him.

Opinions Below

The Fourth Circuit's opinion, 987 F.3d 299 (4th Cir. 2021), appears as Appendix A to this petition. The unpublished district court opinion appears as Appendix B. The unpublished order denying rehearing appears as Appendix C.

Jurisdictional Statement

This court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1), as construed by the Court in *Forsyth v. City of Hammond*, 166 U.S. 506 (1897). The Fourth Circuit's Amended Opinion was handed down on February 5, 2021, and the order denying rehearing *en banc,* on March 2, 2021.

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

42 U.S.C. §1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

Stafford County Ordinance 17-7 provides, in pertinent part: "It shall be unlawful for any person at a public place or place open to the public to refuse to identify himself, by name and address, at the request of a uniformed law-enforcement officer or a properly identified law-enforcement officer not in uniform, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification."

Statement of the Case

While on routine patrol, respondent Deputy Scott Fulford pulled over to render assistance to petitioner George Wingate, whose car was on the side of the road with the hood up and was apparently disabled. App. A at 4. Deputy Fulford demanded that Mr. Wingate, a Black man, produce identification, on the theory that "the driver of a broken-down vehicle creates suspicion of criminal activity by approaching the officer trying to render him aid," *id.* at 11 – something the appellate panel found "defies reason." *Id.* "[T]he innocuous circumstances of this encounter," the panel found, "fall short of indicating that criminal activity was afoot." *Id.* at 9. Deputy Fulford told Mr. Wingate that "he was not free to leave until

he identified himself." *Id.* at 8.[1] Mr. Wingate was arrested under Stafford County ordinance 17-7(c), criminalizing refusal to provide identification "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification." *Id.* at 5. The charges were dismissed, the prosecutor noting he did not want to "risk losing [the ordinance]." *Id.* at 6.

In Mr. Wingate's subsequent suit, the district court granted the deputies' motion for summary judgment on the constitutional merits and as a matter of qualified immunity, and Mr. Wingate appealed. Reversing, the appellate panel found both the initial detention and the arrest to have been unconstitutional: the stop because it was not "supported by reasonable and particularized suspicion" and "not justified at its inception," *id.* at 14, 18, and the arrest because the deputies lacked "constitutionally adequate suspicion of criminal activity between the deputy's initial stop and the Officers' eventual arrest." *Id.* at 18. The panel noted that a valid investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968), was a "constitutional prerequisite to enforcing stop and identify statutes" – a proposition "illustrate[d]" years before by *Brown v. Texas*, 443 U.S. 47 (1979), and *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177 (2004). *Id.* at 17. "*Necessarily so*," the court emphasized. *Id.* (emphasis added).

[1] On appeal, Judge Niemeyer astutely styled this an "ego battle" between Mr. Wingate and Deputy Fulford. Court's recording of oral argument at 24:59 *et seq.*, available at https://www.ca4.uscourts.gov/OAarchive/mp3/19-1700-20201208.mp3. (In his complaint, Mr. Wingate styled his arrest as one for "contempt of cop.")

Deputy Fulford was not immunized from liability for the stop, as prior cases placed him on notice that "suspicion of crime must arise from conduct that was more suggestive of criminal conduct than Mr. Wingate's was." *Id.* at 20. But notwithstanding the court's express finding – tracking the deputies' argument – that the deputies relied exclusively on suspicion of crime to justify their demand for Mr. Wingate's name, the court granted both deputies qualified immunity for Mr. Wingate's arrest. This was so, the court explained, because "[a] reasonable officer *could infer – albeit incorrectly* – that *Terry*'s requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention." *Id.* at 21 (emphasis added). The court thereby extended qualified immunity on a hypothetical, concededly counter-factual basis never offered by the deputies.[2] Mr. Wingate petitioned for rehearing on the grounds that this expansion of qualified immunity was impermissible as well as dangerous in its implications. The court denied Mr. Wingate's petition for rehearing on March 2, 2021, and this petition follows.

[2]The court added that "[u]ntil today, no federal court has prescribed the constitutional limits of § 17-7(c)'s application," App. A at 21, as though it were necessary for a given county ordinance to have been specifically construed by a court in order for its constitutional parameters to be established. There are over 3000 counties in the United States, each with its own ordinances.

Reasons for Granting the Writ

Petitioner respectfully submits that the Court should grant the requested writ to address the following two issues:

1. The decision below dramatically and inappropriately enlarges this Court's qualified immunity jurisprudence. It permits a law enforcement officer's unconstitutional action to be immunized by a court-invented, concededly counter-factual hypothesis never articulated by the officer. On the appellate court's reasoning, an officer who shot a person he knew was unarmed could be granted immunity on the theory that the officer might, hypothetically, have thought the person was armed. Such an unwarranted expansion of this Court's qualified immunity jurisprudence should not be allowed to stand.

2. This Court should, in any event, further limit the scope of its qualified immunity jurisprudence, which contributes to a culture of law enforcement that tolerates and facilitates police misconduct.

A. Qualified Immunity Should Not be Enlarged to Apply Based on Untenable, Concededly Counter-Factual Hypotheses Invented *Sua Sponte* By a Court in Derogation of the Record Before It

The appellate court properly found that, as the deputies argued, their sole concern when arresting Mr. Wingate was with his possible involvement in crime: car thefts, vandalism, and theft of catalytic converters. App. A at 9. Not abstract concern for public safety, but such "suspicion of criminal activity" *id.,* the panel found, drove the arrest. Judges Niemeyer and Richardson emphasized this at

argument.[3]

The appellate court nevertheless granted the deputies qualified immunity for their unconstitutional arrest of Mr. Wingate because it found "[a] reasonable officer *could infer – albeit incorrectly* – that *Terry*'s requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention."[4] *Id.* at 21 (emphasis added). In granting qualified immunity, the Fourth Circuit thus invented, *sua sponte,* a hypothetical (and constitutionally deficient) public safety concern separate from crime, which concern was concededly never broached by the deputies at the time of the arrest or thereafter in trial court or on appeal. But what the deputies hypothetically "could infer – albeit incorrectly," when they did no such thing, nor claimed in court to have done so, does not bear on their entitlement to qualified immunity. Under this Court's jurisprudence, qualified immunity may be granted if a reasonable officer deemed the contested action to be lawful because of

[3]Judge Niemeyer: "You can ask him, but he didn't rely on [public safety] and you didn't rely on that and the court didn't rely on that. Nobody talked about the fact that the public safety was at risk and I now therefore have to get his ID. What they talked about is suspicion of theft at that time of night." Judge Richardson: "It doesn't appear that this [public safety] argument has been made." Recording of oral argument at 41:32 *et seq*. and 12:05 *et seq,* available at https://www.ca4.uscourts.gov/OAarchive/mp3/19-1700-20201208.mp3.

[4]The court's appeal to what "could" have occurred, notwithstanding that the court found that it did not occur, was necessary to immunize an arrest that was plainly unconstitutional under clearly established law, the appellate panel observing that a valid investigatory stop under *Terry* is a "constitutional prerequisite to enforcing stop and identify statutes," and that "the proper reading of *Brown*," decided almost four decades ago, rendered Mr. Wingate's arrest unconstitutional – *"[n]ecessarily so*." App. A at 17, 21 (emphasis added). *See also, e.g., United States v. Yengel*, 711 F.3d 392 (4th Cir. 2013); *United States v. Hill*, 649 F.3d 258 (4th Cir. 2011); *United States v. Neely*, 564 F.3d 346 (4th Cir. 2009) (with facts remarkably similar to those at bar).

an erroneous but reasonable belief given the state of the facts and law. No case stands for the proposition that an officer can be immunized based on an erroneous belief he or she concededly *did not* hold (or, for that matter, later argue in court), but might, hypothetically and counter-factually, have held. The appellate decision dramatically extends the reach of the qualified immunity defense to anything a trial or appellate judge might, *sua sponte,* hypothetically and contra-factually propose afterwards by way of excusing an unconstitutional action. This Court should prohibit such an unwarranted expansion of the doctrine. Qualified immunity is a mighty enough shield without turning it into a sword to be wielded *de novo* by a court in defense of unconstitutional actions, on the basis of judicially-minted hypothetical constructions found never to have been imagined or argued by the defense. The Fourth Circuit's uncabined, potentially massive judicial expansion of this defense should be disavowed by this Court.[5]

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[5] While this petition addresses the appellate expansion of qualified immunity and the utility of this court's re-examination of the qualified immunity defense, Mr. Wingate respectfully notes that the grant of qualified immunity below was improper under current jurisprudence. *Cf. Jones v. Clark,* 630 F.3d 677,683-84 (7th Cir. 2011) ("Where an initial stop is not based on specific, objective facts that establish reasonable suspicion, *Brown* controls rather than *Hiibel*, and the existence of a stop-and-identify statute is irrelevant") and *Gonzalez v. Huerta,* 826 F.3d 854, 858 (5th Cir. 2016) ("[P]rior Supreme Court cases have held that police may not detain an individual solely for refusing to provide identification, see *Brown* and *Hiibel"*) (citations omitted). (The instant case presents no school-based exception that immunized the defendants in *Gonzalez.*) In numerous benign circumstances a person may be required to produce identity, *e.g.* to vote or obtain a passport. But the price of refusing to do so is not arrest; it is simply the denial of the desired benefit. Diligent research has uncovered no case post-dating *Brown* and *Hiibel* challenging the settled law that – as the Fourth Circuit "necessarily" found, App. A at 17. – reasonable suspicion of crime alone justifies a demand for identity enforceable on threat of arrest. The Fourth Circuit nevertheless granted immunity because "[u]ntil today, no federal court has prescribed the constitutional limits of § 17-7(c)'s application." *Id.* at 21. But this conclusion does not follow from the

B. The Court Should Reassess its Qualified Immunity Jurisprudence

1. A Focus on Textual Analysis Suggests The Need To Reassess A Doctrine Lacking Textual Support

Textual analysis is, properly, the initial driver of legal analysis. "As usual, we start with the statutory text." *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (text of Religious Freedom Restoration Act dispositive over contrary arguments). This rule has been deemed unavoidable even in cases reaching judicial conclusions that would concededly have surprised those who crafted the language construed: "[T]he limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) (Title VII of the Civil Rights Act of 1964 forbids discrimination based on sexual orientation or transgendered status notwithstanding that "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.")

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premise. Where prior authority is clear, a given law or procedure need not have been expressly construed by a court in order for its constitutional limitations to be clearly established, as was the case here – "[n]ecessarily." *Id.* at 17. *Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020); *District of Columbia v. Wesby*, 138 S.Ct. 577, 589-90 (2018); *Tolan v. Cotton,* 572 U.S. 650, 656 (2014) (per curiam); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Section 1983 does not present the same anomaly as was at issue in *Bostock*. The law was passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, to help combat racist lawlessness in the southern states. This purpose would have been undone by anything resembling modern qualified immunity jurisprudence, as the law's animating principles were novel, not "clearly established." Had § 1983 been understood to incorporate our current qualified immunity doctrine, Congress' attempt to address rampant civil rights violations would have been toothless.

The law itself states:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1983 (emphases added). It has long been recognized that "the statute on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986)[6].

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[6]Certain immunities were so well established in 1871, when § 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish them." *Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). This is what Congress did in limiting suits against judicial officers – and only judicial officers. The expression of a single limitation implies the exclusion of other such limitations. *Cipollone v. Liggett Grp*., 505 U.S. 504, 517 (1992). Historically, the sole historical defense against constitutional torts was *legality*. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J.) (presidential instructions "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.") This strict rule of personal official

The questionable legal grounding of qualified immunity in light of this statutory mandate has been raised on numerous times in this Court, most expansively by Justice Thomas:

> In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. In the decisions following *Pierson [v. Ray*], we have "completely reformulated qualified immunity along principles not at all embodied in the common law." Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.
>
> Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act. Our qualified immunity precedents instead represent precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to make. We have acknowledged, in fact, that the "clearly established" standard is designed to "protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties." The Constitution assigns this kind of balancing to Congress, not the Courts.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72, (2017) (Thomas, J., concurring) (citations omitted). *See also Kisela v. Hughes,* 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting); *Salazar-Limon v. City of Houston,* 137 S. Ct. 1277 (2017) (Sotomayor, J., dissenting). In recent years, lower courts have increasingly called for such reassessment, several in unusually compelling terms, *e.g., Jamison v.*

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liability persisted into the twentieth century. *Anderson v. Myers,* 182 F. 223, 230 (C.C.D. Md. 1910), *aff'd sub nom Myers v. Anderson*, 238 U.S. 368 (1915). *See generally,* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 101 (2018).

McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020). *See generally Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020); Zadeh *v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); Thompson *v. Clark*, No. 14-cv-7349, 2018 WL 3128975, at *6-12 (E.D.N.Y. June 26, 2018); *Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 (D. Kan. Aug. 7, 2018).[7]

In a rare turn of events, judicial concern with current qualified immunity jurisprudence has in recent years found expression in non-judicial forums as well as memorandum opinions. *See* James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/; Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, AM. CONST. SOC'Y. EXPERT FORUM (Jan. 12, 2018), https://acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights/; Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219 (2015); Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-

[7]While concern with qualified immunity has grown exponentially in recent years, judicial criticism of the doctrine is hardly new. *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); Crawford-*El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

d6005beac8b3_story.html. And academic criticism of current qualified immunity, dating at least to John C. Jeffries, *What's Wrong With Qualified Immunity*, 62 FLA. L. REV. 851 (2010), has burgeoned in recent years, including a symposium constituting an entire volume of the Notre Dame Law Review: Symposium, *The Future of Qualified Immunity,* 93 NOTRE DAME L. REV. 1793-2113 (2018); *see also* Baude, *Is Qualified Immunity Unlawful?, supra* at 10, n.6.

It is appropriate for this Court to assess its qualified immunity jurisprudence in the face of this ongoing and growing collegial judicial and academic concern.

2. The Court Should Take The Lead In Revising Its Own Jurisprudence

As of this writing, roiling public dissatisfaction with law-enforcement violence generally and qualified immunity specifically has not abated.[8] This has led to legislative action to address the resulting problems. Laws abolishing qualified immunity as a defense in state court have passed in Colorado (2020 Colo. Sess. Laws, Ch. 110 (S.B. 20-217), effective July 1, 2023) and New Mexico (2021 N.M. Laws, Ch. 119 (H.B. 4), effective July 1, 2021). New York City has done so as well (Local Law No. 48 of 2021 (Int. No. 2220-A)). Bills abolishing or severely limiting this defense

[8]Influential commentators and publications on both sides of the political spectrum are on record criticizing qualified immunity. *See* George F. Will, *This doctrine has nullified accountability for police. The Supreme Court can rethink it*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html; Editorial Board, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html; *Police Brutality Goes On,* WASH. POST, May 2, 2021, at A26. On-line archives of videos of questionable law enforcement use of force are ubiquitous, particularly for the period following the 2020 deaths of Breonna Taylor and George Floyd.

remain pending in California (2021 CA S.B. 2), Illinois (2021 IL H.B. 1727), Louisiana (2021 LA H.B. 609), Maine (2021 ME H.P. 149; 2021 ME S.P. 466), Massachusetts (2021 MA H.B. 1479), Minnesota (2021 MN S.F. 580), Oklahoma (2021 OK H.B. 2917), and Wisconsin (2021 WI S.B. 295). While not abolishing qualified immunity in its courts, a new Connecticut law permits state law *respondeat superior* claims against local jurisdictions arising out of law enforcement abuse. (2020 Conn. Pub. Acts 20-1 (H.B. 6004)). *See generally,* https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx And in Congress, the George Floyd Justice in Policing Act of 2021 and the Ending Qualified Immunity Act were reintroduced in 2021. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021); Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021).

Mr. Wingate respectfully submits that it is appropriate for the increasing chorus of concerns with this Court's qualified immunity jurisprudence to inform the Court's decision whether to reassess this jurisprudence. At issue is not anti-police sentiment. Humans being what they are, law enforcement is necessary if our lives are not to be "solitary, poor, nasty, brutish and short." THOMAS HOBBES, LEVIATHAN 77 (1651). The challenge facing any legal system is to balance the rights of the public and the needs of officers charged with keeping the public safe.

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop.

Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020). This court

cannot make it "stop." But if our current qualified immunity jurisprudence does not cause such police abuses, in immunizing many of them, it facilitates all of them. To that extent, this Court can indeed help it "stop."

Conclusion

For these reasons, the court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

GEORGE WINGATE,

By counsel

Dated: May 18, 2021

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1700

GEORGE WINGATE,

Plaintiff - Appellant,

v.

SCOTT FULFORD; DIMAS PINZON,

Defendants - Appellees,

and

S. A. FULFORD,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:18-cv-00937-AJT-IDD)

Argued: December 8, 2020 Decided: February 4, 2021
Amended: February 5, 2021

Before GREGORY, Chief Judge, NIEMEYER, and RICHARDSON, Circuit Judges.

Affirmed in part, reversed in part, vacated in part, and remanded with instructions by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Niemeyer and Judge Richardson joined. Judge Richardson wrote a concurring opinion.

ARGUED: Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Alexander Francuzenko, COOK CRAIG & FRANCUZENKO, PLLC, Fairfax, Virginia, for Appellees. **ON BRIEF:** Bernadette E. Valdellon, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Michael D. Arena, COOK CRAIG & FRANCUZENKO, PLLC, Fairfax, Virginia, for Appellees.

GREGORY, Chief Judge:

George Wingate III was driving down Jefferson Davis highway around 2 a.m. one morning when his check engine light came on. Mr. Wingate pulled his car over near a streetlight to look under the hood. A Stafford County deputy patrolling the area, Deputy Scott Fulford, saw Mr. Wingate's vehicle. Suspecting the car was disabled, Deputy Fulford pulled behind Wingate, hoping to help. But the officer's roadside assistance quickly transformed into an investigatory stop, then an arrest, after Mr. Wingate declined to comply with Deputy Fulford's request for identification.

This appeal arises out of Mr. Wingate's civil suit, under 42 U.S.C. § 1983 and Virginia common law, challenging his stop, arrest, and subsequent prosecution. The district court denied Mr. Wingate's motion for summary judgment and granted summary judgment to Deputy Fulford and Lt. Pinzon ("the Officers") on each of Mr. Wingate's claims. On appeal, we affirm in part, reverse in part, and remand for a trial on damages.

I.

The parties do not dispute the material facts of this case.

In the early morning hours of April 25, 2017, Mr. Wingate was driving southbound on Jefferson Davis Highway in Stafford County, Virginia. At some point between 1 and 2 a.m., Wingate's check-engine light came on. He pulled his car off to the side of the road and parked it in front of the CarStar car dealership, under an illuminated streetlight. Mr. Wingate left his lights on, popped the hood, and began to investigate. As a former mechanic, he believed that he might be able to resolve the problem. Mr. Wingate circled around to the

trunk of his car where he pulled out a bag of tools. He placed the bag on the front passenger seat, then began to look under the hood. Finding nothing, Mr. Wingate reentered his car and tried to diagnose the issue using an automotive code reader that connected to his phone via Bluetooth. The reader later indicated that one of his engine's cylinders was misfiring.

Around this time, Deputy Fulford was driving northbound on the highway. The deputy saw Mr. Wingate's vehicle off to the side of the road. Deputy Fulford was concerned that the car was "disabled," so he turned around, pulled behind Mr. Wingate, and began to get out of the car. Upon seeing the patrol vehicle, Mr. Wingate got out of his car and walked over to greet the officer. Deputy Fulford asked Mr. Wingate what was going on and where he was going. Mr. Wingate explained that he was driving to his girlfriend's house in Stafford but had experienced some car trouble along the way.

Deputy Fulford then requested Wingate's identification. After Mr. Wingate asked why he had to disclose his identity, Deputy Wingate activated his mic and requested backup. The two men then engaged in the following exchange:

Fulford: Well, in Stafford County —
Wingate: Have I committed a crime?
Fulford: — it's required.
Wingate: Have I committed a crime?
Fulford: No. I didn't say you did.
Wingate: All right then.
Fulford: You're still required to —
Wingate: Am I free to go?
Fulford: — identify yourself.
Wingate: Am I free to go?
Fulford: Not right now, no.
Wingate: Am I being detained?

Fulford: You're not detained.
Wingate: Am I free to go?
Fulford: No.
Wingate: Am I being detained? If I'm not being detained, then I'm free to go.
Fulford: You're not free to go until you identify yourself to me.

Dash Cam Video at 1:40:08–31.

Lt. Pinzon arrived at the scene shortly thereafter. Lt. Pinzon informed Mr. Wingate that there had been "a lot of catalytic converter thefts in [the] area," and noted, "It's kind of weird, it's 2 o'clock in the morning, and you're out here on the side of the road in the same area where the businesses have all been hit." *Id.* at 1:43:32–45. Mr. Wingate responded, "Well, I haven't committed any crimes." *Id.* at 1:43:45–49. Undeterred, the Officers again asked for Mr. Wingate's ID. *Id.* at 1:43:50–52, 1:44:11–13. Mr. Wingate again asked why he needed to identify himself. *Id.* at 1:44:13–1:45:05. Eventually, the Officers attempt to arrest him, citing Stafford County Ordinance § 17–7(c). *Id.* at 1:45:04–1:47:20. Section 17–7(c) makes it a crime to refuse an officer's request for identification "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification." J.A. 322.

Mr. Wingate resisted the Officers' attempts to place him in handcuffs. Eventually, he broke free from the Officers' hold and began to flee, running across the street and out of the dash camera's frame. *Id.* 1:47:18. Mr. Wingate stopped when Lt. Pinzon drew his Taser and pointed it in his direction. Lt. Pinzon then grabbed Mr. Wingate by the shirt, ordered him to the ground, and "threw him to the ground with one arm when [Mr. Wingate] didn't comply." J.A. 291. After a brief struggle, Lt. Pinzon and Deputy Fulford put Mr. Wingate in handcuffs and placed him in the back of the patrol car. The Officers searched

Mr. Wingate's car incident to arrest. The search revealed a bag of tools, a pair of gloves, and a title certificate. Mr. Wingate did not, however, have ramps or a Sawzall—tools commonly used to steal catalytic converter belts. J.A. 114, 138.

Mr. Wingate was criminally charged for failing to identify himself; intentionally preventing a law enforcement officer from lawfully arresting him; knowingly attempting to intimidate or impede a law-enforcement official; and possessing an open certificate of title.[1] But on the date set for trial, the prosecuting attorney assigned to the case dropped all of the charges. The attorney informed Deputy Fulford that defense counsel "had brought up some case law that made [§ 17–7(c)] appear possibly unconstitutional." J.A. 62. Deputy Fulford's understanding was that they dropped the charges because "they didn't want to risk losing [the ordinance]." J.A. 63.

Mr. Wingate filed this suit in July 2018, asserting claims against Deputy Fulford under 42 U.S.C. § 1983 and the Virginia common law. Mr. Wingate then amended his complaint to join Lt. Pinzon as a defendant. Following discovery, the parties filed cross-motions for summary judgment. The district court granted the Officers' motion and denied Mr. Wingate's. Mr. Wingate timely appealed.

II.

We review a district court's grant of summary judgment de novo, using the same standard applied by the district court. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011)

[1] The open certificate of title was for a different car that Mr. Wingate had purchased two weeks before but not yet titled in his own name. J.A. 128.

(*en banc*). Summary judgment is only appropriate if "no material facts are disputed and the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). Ordinarily, when a district court's grant of summary judgment disposes of cross-motions for summary judgment, "we consider each motion separately on its own merits," resolving "all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion." *Id.* Here, however, the parties do not present competing versions of the facts but competing views of the law. Thus, we review the propriety of the district court's rulings on both motions in tandem.

A.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. These protections extend to "brief investigatory stops . . . that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). For investigatory stops, "the balance between the public interest and the individual's right to personal security tilts in favor of a standard less than probable cause." *Id.* To that end, law enforcement need only reasonable, articulable, and particularized suspicion that someone is engaged in criminal activity to justify these brief interactions. *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997).

That this standard requires less than probable cause does not render its burden illusory. "[A]n officer who stops and detains a person for investigative questioning 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). We have often emphasized that the Fourth Amendment

requires particularity—"a *particularized* and objective basis for suspecting *the particular person stopped* of criminal activity." *See, e.g.*, *United States v. Massenburg*, 654 F.3d 480, 486 (4th Cir. 2011) (emphasis in original); *see also United States v. Slocumb*, 804 F.3d 677, 682 (4th Cir. 2015); *United States v. Griffin*, 589 F.3d 148, 154 (4th Cir. 2009). Although the need for reasonable and particularized suspicion is "somewhat abstract," *Arvizu*, 534 U.S. at 274, it unquestionably requires more than "an inchoate and unparticularized suspicion or hunch." *Slocumb*, 804 F.3d at 682.

To be sure, Deputy Fulford did not trigger the Fourth Amendment's protections by merely driving up to Mr. Wingate to provide roadside assistance. Officers may approach someone absent suspicion of criminal conduct and "generally ask questions of that individual," *Florida v. Bostick*, 501 U.S. 429, 435 (1991), request cooperation in a criminal investigation, *United States v. Weaver*, 282 F.3d 302, 311–12 (4th Cir. 2002), or provide assistance, *United States v. Monsivais*, 848 F.3d 353, 356, 358 (5th Cir. 2017). And they routinely do.

But Deputy Fulford then told Mr. Wingate that he was not free to leave until he identified himself. This unambiguous restraint on Mr. Wingate's liberty converted the previously voluntary encounter into a compelled detention—an investigatory stop. *See Santos v. Frederick Cnty Bd. of Com'rs*, 725 F.3d 451, 462 (4th Cir. 2013) (voluntary encounter became an investigatory stop when woman submitted to officer's unambiguous direction remain seated); *Bostick*, 501 U.S. at 434 (explaining that an encounter will "trigger Fourth Amendment scrutiny" when "it loses its consensual nature"); *see also* Dash Cam Video at 1:40:18–20.

Deputy Fulford argued before the district court that the stop was constitutional because, at that point, he reasonably suspected that Mr. Wingate was engaged in criminal activity—specifically, larceny. The court agreed, identifying six factors that, in its view, would give an objectively reasonable officer constitutionally adequate suspicion: (1) Mr. Wingate's vehicle was parked with its hood up near the CarStar lot at roughly 1:39 a.m.; (2) the vehicle was in the "dimly lit parking lot of a closed and empty business late at night . . . despite better lit areas just down the road"; (3) the vehicle was near parked CarStar cars "during a period of increased vehicular larcenies and in an area known for prevalent vehicular crimes"; (4) Mr. Wingate exited his vehicle without prompting as Deputy Fulford exited his cruiser; (5) Mr. Wingate was wearing all-black clothing "similar to the suspects identified and apprehended during the recent increase in late-night vehicular larcenies"; and (6) Mr. Wingate said he was having engine trouble even though the car appeared to be properly idling.

We evaluate these considerations both separately and in the aggregate, recognizing that "factors 'susceptible to innocent explanation' individually may 'suffice[] to form a particularized and objective basis' when taken together." *Slocumb*, 804 F.3d at 682 (quoting *Arvizu*, 534 U.S. at 277) (modification in original). Ultimately, we conclude that the innocuous circumstances of this encounter fall short of indicating that criminal activity was afoot.

First, Mr. Wingate's vehicle was parked with its hood up near the CarStar lot at roughly 1:39 a.m. Alone, this fact does little to suggest criminal activity. In fact—and as Fulford initially reasoned—it indicates a very specific, non-criminal enterprise: attempting to identify and remedy car problems.

Second, Mr. Wingate's vehicle was in the "dimly lit parking lot of a closed and empty business late at night . . . despite better lit areas just down the road."[2] J.A. 45. We have previously held that "there is nothing inherently suspicious about driving at night on an interstate highway." *Williams*, 808 F.3d at 248. The natural corollary of this proposition should go without saying: there is nothing inherently suspicious about engaging in conduct attendant to nighttime highway travel—for example, experiencing car troubles. Within this context, the fact that Wingate parked his car at a closed business or in a "dimly lit area" are mere proxies for the fact that it was, indeed, late at night.

Third, Mr. Wingate parked near CarStar cars "during a period of increased vehicular larcenies and in an area known for prevalent vehicular crimes." J.A. 45. This factor, too, is insufficiently particular. Courts may consider whether a person is in a "high crime area," but simply being in an area where crime is prevalent is minimally probative in the reasonable suspicion analysis. *United States v. Curry*, 965 F.3d 313, 331 (4th Cir. 2020) ("A person's presence in a high-crime area cannot alone create reasonable suspicion to justify a *Terry* stop."); *Black*, 707 F.3d at 542 (denouncing the suggestion that "mere presence in a high crime area at night is sufficient justification for detention by law enforcement"); *Williams*, 808 F.3d at 248 (affording "very little weight" to the fact that individuals were driving down a highway known as "drug corridor"). This is all the more true when the "high-crime area" identified comprises an entire county. *See* J.A. 79 ("The

[2] Deputy Fulford's suggestion that Mr. Wingate knew or should have known there was a better-lit area up the road is unsupported by the record. We do not expect prescience from officers when evaluating their conduct. Nor do we expect it from lay people with even less reason to be aware of their surroundings.

county had been getting hit pretty hard with vehicle larcenies throughout that month, and I believe also in the previous month."); J.A. 241 ("Deputy Fulford was aware that there had been increased vehicle larcenies throughout Stafford County."). CarStar itself had only had 8 larcenies over the course of six years. J.A. 287. Within the larger grid—the 820-foot area surrounding CarStar—there were 18 larcenies over the course of six years. *Id.*

Fourth, Mr. Wingate exited his vehicle without prompting as Fulford exited his cruiser. At Fulford's deposition, he testified that this was a "red flag" for him. J.A. 72. From his experience, "when somebody exits their vehicle and begins to walk away from their vehicle, it's because they are [] trying to get the attention off of the vehicle if there's something in plain view that [an officer] might see." J.A. 75. Deputy Fulford went on to say, "[G]enerally if somebody's broken down on the side of the road, they stay inside their vehicle. And when they get out, a lot of times that causes alarm." J.A. 78. To be sure, if a person gets out of her vehicle without prompting following a for-cause traffic stop, there may be cause for concern. But the notion that the driver of a broken-down vehicle creates suspicion of criminal activity by approaching the officer trying to render him aid, put candidly, defies reason. Although we generally defer to officers' claimed training and experience, we withhold that deference when failing to do so would erode necessary safeguards against "arbitrary and boundless" police prejudgments. *Black*, 707 F.3d at 541. That is the case here.

Fifth, Mr. Wingate was wearing all-black clothing "similar to the suspects identified and apprehended during the recent increase in late-night vehicular larcenies." Dark attire might be necessary to successfully engage in larceny. But it is far from sufficient. Indeed,

wearing dark clothing is often as innocuous as following the latest fashion trends. This is not to say that distinctive items of clothing may never substantially aid in the reasonable suspicion analysis. But when a nondescript style of clothing is commonplace for both criminal suspects and an immeasurable subset of the law-abiding population, it is of little investigatory value.

Finally, Mr. Wingate said he was having engine trouble even though the car appeared to be properly idling. As any seasoned driver knows, a vehicle that runs is not always a vehicle that runs well. It is therefore unreasonable for an officer to assume deceit from a person claiming car trouble simply because the vehicle appears functional at a glance. The record indicates that the only reason that Deputy Fulford found the properly idling car suspicious was because of his own mistaken prejudgment that it was "disabled." J.A. 80. Mr. Wingate never told Fulford that his car was disabled. J.A. 212. Lt. Pinzon testified that, when he approached, "there was nothing obvious to say it was a disabled vehicle." J.A. 321(b). And neither Deputy Fulford nor Lt. Pinzon testified that, based on their training and experience, people experiencing engine trouble do not pull off the road unless their cars are completely disabled. Deputy Fulford's assessment of Wingate's credibility was untethered to any objective criteria. It therefore had little value in suggesting that criminal activity was afoot. *Black*, 707 F.3d at 540 (declining to give weight to an officer's "irrational" observation).

These factors do not fare better when viewed together. We need look no further than Deputy Fulford's own words to conclude that the first three factors—even when viewed as a whole—indicated a car in distress, not criminal activity. In the dash cam video,

Deputy Fulford explained why he pulled over behind Mr. Wingate: "I drive by and I see somebody with the hood up. So, guess what I'm going to do as a police officer? . . . I'm going to pull over and I'm going to try to help that person." Dash Cam Video at 1:42:41–49. Then, again, during his deposition, Deputy Fulford explained, "For Mr. Wingate with his hood up initially, like I said[,] when I pulled in I thought he was, you know, I thought he was disabled." J.A. 80. The question then becomes whether Deputy Fulford's remaining concerns—that Mr. Wingate exited his properly idling vehicle in all-black clothing—can carry the weight that the district court afforded them. The answer? They can't.

The insufficiency of Deputy Fulford's suspicion is apparent when we compare it to the type of suspicion found adequate in other cases. *C.f. Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (officer had particularized suspicion of criminal activity when person in area of heavy narcotics trafficking engaged in unprovoked flight upon seeing police); *United States v. Bumpers*, 705 F.3d 168, 175 (4th Cir. 2013) (officers had reasonable and particularized suspicion that someone was trespassing when seen loitering in a high-crime area of a shopping center, without shopping bags, in front of a sign that said "no trespassing"); *United States v. Hernandez-Mendez*, 626 F.3d 203, 206, 209–10 (officer's surveillance, professional training, and extensive personal experience with a particular high school's gang activity created reasonable suspicion of criminal activity). One of the more striking points of comparison is our decision in *Perkins*, where we held that an officer's stop was supported by reasonable suspicion when, before stopping a red car outside 2740 Knox Avenue, the officer knew:

> (1) Knox Avenue was a high-crime, drug-ridden neighborhood in which children were commonly present; (2) he had taken part in four or five drug investigations on Knox Avenue; (3) the duplex at 2740 Knox Avenue was a known drug house under investigation by the police's drug unit; (4) Officer Burdette had personally arrested the residents of one of the units in that duplex on several occasions; (5) an unnamed caller had reported observing two white males pointing rifles in various directions in the front yard of that duplex; (6) these men reportedly arrived in a red car with a silver or white stripe; (7) Mrs. Hayes, a resident who lived directly across the street from the duplex, normally reported this type of conduct to the police; (8) Mrs. Hayes had given reliable information about illegal activity in this area at least six to ten times before; (9) shortly after the phone call to the police, there were indeed two white males in a red car bearing a silver or white stripe, parked next to another car right outside the duplex at 2740 Knox Avenue; (10) the passenger in the car was Mark Freeman, a well-known drug purchaser who lived in the neighborhood; and (11) the red car pulled away when the officers arrived.

United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004).

Deputy Fulford, by contrast, first began to suspect criminal activity when a man that he intended to help approached him in dark clothing. That is not enough. As Mr. Wingate argues, the level of objective, reasonable, and particularized suspicion in this case is more akin to that which we found lacking in cases like *Slocumb*, 804 F.3d at 682–84, *Black*, 707 F.3d at 531, 539–42, *Williams*, 808 F.3d at 247–53, and *Massenburg*, 654 F.3d at 489–91. The district court therefore erred in finding Fulford's stop was supported by reasonable and particularized suspicion.[3]

[3] Mr. Wingate also argues that the unreasonable scope and duration of his detention made the seizure unconstitutional, even if it was justified at its inception. Because we hold that the encounter became unconstitutional as soon as Deputy Fulford told Mr. Wingate that he was not free to leave, we need not address Mr. Wingate's alternative argument.

B.

Mr. Wingate's arrest was likewise unlawful. "[E]very arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 692, 700 (1981). J.A. 322. Deputy Fulford and Lt. Pinzon argue that they had probable cause to arrest Mr. Wingate after he failed to identify himself. But, guided by *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 187–88 (2004) and *Brown v. Texas*, 443 U.S. 47, 52 (1979), we hold that this ordinance is unconstitutional when applied outside the context of a valid investigatory stop.

Stafford County Ordinance § 17–7(c) makes it a crime "for any person at a public place or place open to the public to refuse to identify himself . . . at the request of a uniformed law-enforcement officer . . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification." J.A. 322. The Supreme Court's seminal cases on "stop and identify" statutes such as § 17–7(c) are *Hiibel*, 542 U.S. at 187–88 and *Brown*, 443 U.S. at 49–52. *Brown* involved a Texas law that made it a criminal offense for someone to "intentionally refuse[] to report . . . his name and residence address" to an officer "who ha[d] lawfully stopped him and requested the information." *Id.* at 49 n.1. Invoking this statute, the officers stopped Brown and asked that he identify himself. *Id.* at 49–50. Although Brown was walking in a "high crime" area and "looked suspicious," the officers did not "suspect [him] of any specific misconduct." *Id.* at 50. Upon failing to identify himself, Brown was arrested, charged, and ultimately convicted under the Texas statute—a conviction the Supreme Court reversed. *Id.* at 49–50, 52–53. *Brown* recognized that the Texas statute was "designed to

advance a weighty social objective in large metropolitan centers: prevention of crime." *Id.* at 52. Still, it held that a worthy objective did not "negate Fourth Amendment guarantees." *Id.* ("[E]ven assuming that [crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.")

Hiibel then answered the question that *Brown* left open: whether a state may compel someone to disclose her name during an otherwise valid *Terry* stop. 542 U.S. at 185–86; *see also Brown*, 443 U.S. at 53 n.3. The Supreme Court upheld the use of stop and identify statutes within this context "because it properly balance[d] the intrusion on the individual's interests with the promotion of legitimate government interests." *Id.* at 186–88. *Hiibel* also found that, in many respects, the individual and government interests implicated by stop and identify statutes were coextensive with those implicated by *Terry* itself. *Id.* at 188. On the government-interest side of the ledger, "[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop" and "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity." *Id.* Moreover, the request rarely imposes additional burdens on individuals' interests in being free from government intrusion. An identity request ordinarily "does not alter the nature of the stop itself: it does not change [the stop's] duration, [] or its location []." *Id.* (citing *United States v. Place*, 462 U.S. 696, 709 (1983); *Dunaway v. New York*, 442 U.S. 200, 212 (1979)).

Because identity requests implicate the same interests as *Terry* stops, they are also subject to the same constitutional limits. When pressed on the risk of arbitrary policing, *Hiibel* explained that the safeguards inherent in *Terry* likewise constrained an officer's authority to compel disclosure of someone's identity. *Id.* at 189 (quoting *Terry*, 392 U.S. at 20) ("Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and 'reasonably related in scope to the circumstances which justified the initial stop.'"). For example, "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* Nor may the request impermissibly extend the stop, suggesting "an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence." *Id.*

Read together, *Brown* and *Hiibel* illustrate that a valid investigatory stop, supported by *Terry*-level suspicion, is a constitutional prerequisite to enforcing stop and identify statutes.[4] Necessarily so. The prevailing seizure jurisprudence flows from the idea that, short of an investigatory stop, a person is "free to disregard the police and go about his business." *Cf. California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Brendlin v. California*, 551 U.S. 249, 254–55 (2007); *I.N.S. v. Delgado*, 466 U.S. 210, 216–17 (1984). To be sure, officers may always request someone's identification during a voluntary encounter. *Bostick*, 501 U.S. at 434–35; *Delgado*, 466 U.S. at 216–17. But they may not compel it by

[4] This holding establishes a constitutional floor for enforcing stop and identify statutes. Notably, an ordinance may impose additional statutory prerequisites to enforcement. Here, for example, § 17–7(c) also requires that a public safety interest justify the compelled disclosure of someone's identity.

threat of criminal sanction. Allowing a county to criminalize a person's silence outside the confines of a valid seizure would press our conception of voluntary encounters beyond its logical limits. We therefore decline to do so here.

As discussed, Deputy Fulford's initial stop was not justified at its inception. The Officers do not argue, nor does the record suggest, that they acquired constitutionally adequate suspicion of criminal activity between the deputy's initial stop and the Officers' eventual arrest.[5] Accordingly, the Officers enforced Stafford County's stop and identify statute outside the context of a valid *Terry* stop, and arrested Mr. Wingate on that basis. The arrest was therefore unconstitutional. The district court erred in holding otherwise.

C.

The question remains whether Deputy Fulford and Lt. Pinzon are entitled to qualified immunity for their violations of Mr. Wingate's Fourth Amendment rights. Qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine shields government officials from

[5] The Officers do not argue that Mr. Wingate's failure to disclose his identity, in itself, created reasonable suspicion of criminal activity sufficient to justify a stop. Properly so. Implied in our holding that stop and identify statutes are only constitutionally enforceable during a valid *Terry* stop is the assumption that the stop is predicated on suspicion of criminal activity *distinct from* a person's failure to disclose her identity. *See Hiibel*, 542 U.S. at 188–89 (cautioning against using an identity request to *create* suspicion of criminal activity). In other words, an officer cannot initiate an investigatory stop based on suspicion that someone would refuse an identity request during a valid investigatory stop.

liability for civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The burden of establishing a qualified immunity defense rests on the official asserting the defense. *Meyers v. Baltimore County*, 713 F.3d 723, 731 (4th 2013). The officer must show either that she did not violate a constitutional right or that the right was not clearly established at the time her conduct occurred. *Id.*

Deputy Fulford is not entitled to qualified immunity for his unconstitutional investigatory stop. As Mr. Wingate argues, the circumstances here are nearly indistinguishable from those in *Slocumb*, 804 F.3d at 682–84—a case where we found officers lacked the requisite suspicion to conduct an investigatory stop. The officers in *Slocumb* saw a man, woman, and two infant children near two cars in a parking lot known for illegal drug transactions. *Id.* at 679–80. The two adults were transferring a child's car seat from one car to another. *Id.* at 680. One of the officers approached the group and "noticed that the man appeared to be hurrying the woman." *Id.* When asked, the man told the officer that his girlfriend's car had broken down and that he had come to pick her up. *Id.* During this seconds-long conversation, the officer concluded the man was "acting evasively" because he "did not make eye contact and gave mumbled responses to officer's questions," and conducted an investigatory stop. *Id.* We found the officer lacked reasonable suspicion, explaining that the government failed to explain how Slocumb's innocent acts "were likely to be indicative of some more sinister activity," *id.* at 684, and cautioning the government that it "must do more than simply label a behavior as suspicious to make it so." *Id.* (internal quotation marks omitted). *Slocumb* put Deputy Fulford on

notice that the circumstances present here were too innocuous to give rise to reasonable suspicion.

This conclusion is only bolstered by pre-*Slocumb* cases like *Black* and *Massenburg*. In *Black*, 707 F.3d 541–42, we explained that a person's presence "in a high crime area at night" is of little investigatory value and warned officers against making "irrational assumptions based on innocent facts." *Id.* at 542. We also highlighted four of our previous decisions, where "we admonished against the Government's misuse of innocent facts as indicia of suspicious activity." *Id.* at 539 (quoting *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011); *Massenburg*, 654 F.3d at 480; *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011); and *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011)). One of those cases was *Massenburg*. There, we held that an officer lacked reasonable suspicion to stop and frisk an individual who (1) was found in the vicinity of several gunshots, (2) responded nervously when approached by the police, and (3) was reluctant to consent to a pat down. *Massenburg*, 654 F.3d at 489. We said in no uncertain terms: "[The government] cannot simply proffer whatever facts are present, no matter how innocent, as indicia of suspicious activity." *Id.* (internal quotation marks omitted).

Deputy Fulford's suspicion of criminal activity in this case is on par with that which we found insufficient in *Slocumb*, and pales in comparison to that which we found lacking in *Massenburg*. Because these cases placed Deputy Fulford on notice that suspicion of criminal activity must arise from conduct that is more suggestive of criminal involvement than Mr. Wingate's was, he is not entitled to qualified immunity for his unlawful investigatory stop.

The Officers are, however, entitled to qualified immunity for their unlawful arrest under Stafford County Ordinance § 17–7(c). Until today, no federal court has prescribed the constitutional limits of § 17–7(c)'s application. And although the proper reading of *Brown* encompasses Stafford County's ordinance, it was not "plainly incompetent" for the Officers to believe that § 17–7(c) fell outside the decision's reach. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). The law at issue in *Brown* criminalized a person's refusal to identify himself to an "officer who ha[d] lawfully stopped him." *Brown*, 443 U.S. at 49 n.1. Because the Texas provision only applied in the context of lawful investigatory stops, the need to comply with *Terry*'s requirements was evident from the text of the statute. Stafford County's ordinance, on the other hand, does not predicate enforcement upon the investigation of criminal activity. Rather, it criminalizes a person's refusal to provide his identity upon an officer's request "if the surrounding circumstances are such as to indicate to a reasonable man that the *public safety* requires such identification." J.A. 322 (emphasis added). A reasonable officer could infer—albeit incorrectly—that *Terry*'s requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention.

Deputy Fulford and Lt. Pinzon violated Mr. Wingate's Fourth Amendment rights by enforcing § 17–7(c) outside the context of a valid *Terry* stop. But because this right was not clearly established at the time of the arrest, the Officers are entitled to qualified immunity on this claim.

III.

Finally, we review the district court's grant of summary judgment on Mr. Wingate's claims under the Virginia common law: false arrest and malicious prosecution. The district court found that these claims were derivative of Wingate's unlawful arrest claim—each required a showing that the Officers lacked probable cause to arrest Mr. Wingate and charge him with a crime. J.A. 48–49. Since the district court held Deputy Fulford and Lt. Pinzon's arrest was supported by probable cause, it granted the Officers summary judgment on the pendant common law claims as well. *Id.* We affirm the district court's grant of summary judgment on these claims. But because the court's ruling is rooted in an incorrect probable-cause determination, we affirm on separate grounds.

Under Virginia law, false imprisonment is defined as "the restraint of one's liberty without any sufficient legal excuse." *Lewis v. Kei*, 708 S.E.2d 884, 890 (2011). That said, Virginia law provides a defense to officers who subjectively "believed[] in good faith, that [their] conduct was lawful" and whose subjective beliefs were objectively reasonable. *DeChene v. Smallwood*, 311 S.E.2d 749, 751 (1984) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bur. Of Narc.*, 456 F.2d 1339, 1347 (2d Cir. 1972)). Although there is limited guidance on the scope of this defense, *DeChene*'s reliance on *Bivens* suggests that Virginia's good-faith exception is congruent with the federal qualified immunity defense. *See id.* We therefore hold that, because the Officers are entitled to qualified immunity on Mr. Wingate's unlawful arrest claim under federal law, they are also entitled to the good faith defense to Mr. Wingate's false arrest claim under Virginia law.

The Officers are also entitled to summary judgment on Mr. Wingate's malicious prosecution claim. To prove a malicious prosecution claim under Virginia common law, Mr. Wingate must establish that a defendant (1) instituted or procured a criminal prosecution of the plaintiff; (2) without probable cause; (3) acted maliciously; and (4) the prosecution was terminated in a manner not unfavorable to the plaintiff. *Brice v. Nkaru*, 220 F.3d 233, 237 (4th Cir. 2000). Malice exists when the individual who institutes or procures the prosecution has a "*controlling* motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished." *Hudson v. Lanier*, 497 S.E.2d 471, 473 (1998). "Malice is not presumed by law; it must exist in fact and be proven like any other fact." *Montanile v. Botticelli*, No. 1:08-cv-0716(JCC), 2008 WL 5101775, at *4 (E.D. Va. Nov. 25, 2008) (citing *Freezer v. Miller*, 176 S.E. 159, 168 (1934)). The record before the district court is devoid of any evidence of malice as defined by Virginia law. And, on appeal, Mr. Wingate fails to argue to the contrary. The Officers are therefore entitled to judgment on this claim.

Albeit on separate grounds, we affirm the district court's grant of summary judgment for the Officers on Mr. Wingate's claims under the Virginia common law.

IV.

In sum, the district court erred in granting Deputy Fulford summary judgment on Mr. Wingate's claim that the deputy conducted an unconstitutional investigatory stop. We reverse and remand for further proceedings consistent with this opinion. We affirm the

district court's grant of summary judgment for the Officers on Mr. Wingate's remaining federal and common law claims.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

RICHARDSON, Circuit Judge, concurring:

I readily concur with the majority's resolution of this case. But I have one reservation. The majority holds that constitutionally enforcing Stafford County Ordinance § 17-7(c) requires "a valid investigatory stop, supported by *Terry*-level suspicion." Majority Op. 17. And in the circumstances this case presents, I agree that enforcing the ordinance required *Terry*-level suspicion. But I would be clear that we address only this case and not the constitutionality of applying an ordinance like this one outside the context of investigatory stops.

Consider, for example, an officer requiring a driver's identification at a constitutionally proper, but suspicionless, sobriety checkpoint. Or an officer at a border crossing or secure facility who asks for identification from someone seeking entry. In those instances (and others), the encounter *might* constitutionally permit enforcing a law requiring identification. Those circumstances were not addressed in *Brown v. Texas*, 443 U.S. 47 (1979) or *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004). And I would make plain that we are not expanding their guidance here, where we are without briefing on those issues and those circumstances are not before us.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GEORGE WINGATE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:18-cv-937 (AJT/IDD)
	)	
SCOTT FULFORD, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Plaintiff George Wingate, in an early morning encounter with law enforcement officers, refused to identify himself and was arrested. He brings this Section 1983 action claiming Fourth Amendment violations, as well as false arrest/imprisonment and malicious prosecution under Virginia law. The parties have filed cross motions for summary judgment. [Doc. Nos. 66 and 68] (the "Cross Motions"). The Court held a hearing on the Cross Motions on May 24, 2019, following which it took them under advisement. Based on the undisputed facts, the Court concludes that the Plaintiff was subjected to a constitutionally valid *Terry* stop and his subsequent arrest for refusing to identify himself did not violate his constitutional rights under the Fourth Amendment. As explained in more detail below, Plaintiff's motion for summary judgment is accordingly DENIED; Defendants' motion for summary judgment is GRANTED; and this action is DISMISSED.

I. BACKGROUND

The following facts are undisputed:

On April 25, 2017 at or about 1:39 a.m., Defendant Scott Fulford, a Stafford County Sherriff's Office deputy, was on patrol and traveling northbound on Jefferson Davis Highway in

Stafford County, Virginia. Defs.' Statement of Undisputed Facts ¶ 1. As Deputy Fulford passed 3893 Jefferson Davis Highway, he noticed a vehicle stopped on the right side of the southbound lane, partially in the lot owned by the CarStar used car dealership, with its hood up and lights on. *Id.* ¶ 2; Pl.'s Statement of Undisputed Facts ¶ 5. Deputy Fulford turned his cruiser around and pulled up about ten feet behind the vehicle, a 2016 Ford Focus, to see if the driver of what appeared to be a disabled vehicle needed assistance. Defs.' Statement of Undisputed Facts ¶¶ 3-4, 20.

When Deputy Fulford pulled up, the stopped vehicle was idling with its headlights and taillights on, but not its hazard lights. *Id.* ¶ 4; Pl.'s Statement of Undisputed Facts ¶ 3. The CarStar lot was dimly lit and the stopped vehicle was parked partially in the CarStar lot, approximately four or five feet from the nearest vehicles in the lot. Defs.' Statement of Undisputed Facts ¶ 4. The CarStar lot is located in an area with a history of criminal activity, especially pertaining to vehicular crimes, larcenies, and break-ins. *Id.* ¶¶ 15-18. There had also been a recent spike in vehicular larcenies in Stafford County during that month, and Deputy Fulford was aware that County deputies had been looking for vehicular larcenies/break-ins earlier that day, although not specifically in that immediate area. *Id.* ¶ 9.[1]

[1] Plaintiff and Defendants have both presented detailed statistics concerning the level of criminal activity in the area, and Plaintiff disputes the characterization of the location where his vehicle stopped as "a high crime area." *See id.* ¶¶ 16-17; Pl.'s Reply at 4-6. Briefly summarized, those statistics show that: (1) in the seven years prior to this incident, the CarStar property had 8 reported larcenies, 4 suspicious person reports, 6 business alarm triggers, 2 crime prevention checks, and a building check; and (2) in the six to seven years prior to this incident, the 820 foot commercial property area in which the CarStar property is located had 18 reported larcenies, 40 business alarms triggered, 51 suspicious persons and/or suspicious vehicle reports, 20 crime prevention checks, 10 specific building checks, 5 car alarm checks, and 2 vandalisms. Defs.' Statement of Undisputed Facts ¶¶ 16-17. However one characterizes the level of criminal activity at or in the immediate vicinity of the CarStar lot, Deputy Fulford knew generally that Stafford County had experienced a spike in vehicular larcenies in the month prior to this incident and that a teen had been apprehended in connection with vehicular break-ins in the same zone a few days before, although he did not know the specific history of incidents at the CarStar lot and its immediate surroundings. *See id.* ¶¶ 9, 12; *see also* Pl.'s Ex. 4 at 159:14-22.

As Deputy Fulford exited his cruiser, Mr. Wingate immediately got out of his vehicle without being prompted and began walking away from his vehicle and towards Deputy Fulford, conduct that Deputy Fulford considered unusual since in his experience a person whose car is disabled typically stays inside his vehicle when approached by law enforcement. *Id.* ¶¶ 5, 7. Deputy Fulford also noted that Mr. Wingate was wearing all-black clothing, including a black track jacket, black pants, and black shoes, similar to suspects apprehended for a recent string of late-night vehicle larcenies in Stafford County. *Id.* ¶¶ 8, 11.

Deputy Fulford asked Mr. Wingate what was wrong with the vehicle and if he needed help, to which Mr. Wingate responded that he was having "engine troubles" and was checking his engine codes, a response Deputy Fulford considered questionable, given that the car's engine appeared to be running and idling without issue. *Id.* ¶¶ 19-20; Pl.'s Statement of Undisputed Facts ¶ 8. Deputy Fulford then asked Mr. Wingate where he was coming from and going to and Mr. Wingate responded that he was coming from "Alexandria" and going to his "girlfriend's house." Defs.' Statement of Undisputed Facts ¶ 21. When Deputy Fulford followed up by asking Mr. Wingate where his girlfriend lived, he said "Stafford" but did not volunteer any further information. *Id.* ¶ 22. Deputy Fulford then asked Mr. Wingate to provide identification. *Id.* ¶ 25. Mr. Wingate refused and asked Deputy Fulford why he needed to provide identification. *Id.* The situation deteriorated quickly thereafter.

Deputy Fulford pressed for identification; Mr. Wingate continued to refuse. *Id.* ¶¶ 25-26; Pl.'s Opp. at 9. Deputy Fulford activated his body mic, which in turn activated his cruiser dash cam recording, and called for backup. Defs.' Statement of Undisputed Facts ¶¶ 28-29, n.2. He then informed Mr. Wingate that a Stafford County ordinance required him to identify himself. *Id.* ¶ 27. Mr. Wingate again refused to do so and asked if he had committed a crime and if he was

being detained. *Id.* Deputy Fulford informed Mr. Wingate that he was not being accused of a crime at this time, but that he nevertheless needed to identify himself. *Id.* ¶ 30. Mr. Wingate stated that if he was not being detained, he was free to go but Deputy Fulford informed him that he was not free to go until he identified himself. *Id.* ¶ 31.

Before back-up arrived, Deputy Fulford asked Mr. Wingate what specific problems he was having with his engine, and Mr. Wingate said it was "stuttering" and "misfiring," and that he had been "reading the [engine] codes." *Id.* ¶¶ 36-38. Deputy Fulford did not believe this statement to be true because Mr. Wingate did not appear to have an OBD-II code reader and his car was running, although, unknown to Deputy Fulford, Mr. Wingate was referring to his reading codes through an app on his phone while his car idled. *Id.* ¶¶ 39-40; Pl.'s Statement of Undisputed Facts ¶ 4. Deputy Fulford again asked if Mr. Wingate would provide his license, and Mr. Wingate replied that unless he had committed a crime, he did not "feel the need to." *See* Defs.' Statement of Undisputed Facts ¶¶ 41-45.[2]

Defendant Dimas Pinzon, a lieutenant in the Stafford County Sherriff's department, arrived at approximately 1:42 a.m. *Id.* ¶ 47. Lt. Pinzon regularly patrolled the area and considered it to be a high crime area for vehicular larcenies. *Id.* ¶¶ 47-48. Lt. Pinzon observed Mr. Wingate refusing to identify himself to Deputy Fulford, noted Wingate's all-black clothing and the location of the vehicle, saw no obvious signs that the vehicle was disabled, and informed Mr. Wingate that it was strange that he was at that location at nearly two in the morning. *See id.*

[2] The dash cam video of the encounter, which appears to begin a couple minutes after Deputy Fulford's initial encounter with Mr. Wingate, has been submitted. Both parties urge the Court to review and rely on that video, rather than the parties' characterizations of their conduct shown in the video. *See Scott v. Harris*, 550 U.S. 372 (2007). The Court has reviewed the video in detail but, given the reasons for the Court's decision, as set forth in this Order, finds no material issues of fact that need to be resolved based on that viewing because of the parties' respective characterizations of their conduct.

¶¶ 47-52. Mr. Wingate stated that he did not commit any crimes, and Deputy Fulford replied that nobody said he had committed a crime, and that all they were asking for was his ID. *Id.* ¶¶ 53-54.

When Mr. Wingate continued to refuse to provide his ID, Lt. Pinzon informed him that he was now committing a crime, specifically, a violation of Stafford County Ordinance § 17-7(c), which states that it "shall be unlawful for any person at a public place or place open to the public to refuse to identify himself, by name and address, at the request of a uniformed law-enforcement officer if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification." *Id.* ¶¶ 56-58. Mr. Wingate nevertheless continued to refuse to provide his ID; and Lt. Pinzon then informed him that he was now being detained, and that he was on the cusp of being arrested for failure to provide identification. *Id.* ¶¶ 57-61. Lt. Pinzon again asked Mr. Wingate to identify himself and in response, Mr. Wingate laughed and said, "[I]t doesn't matter who I am." *Id.* ¶ 62. The officers then moved to arrest Mr. Wingate, who tensed up, physically struggled with the officers, eventually broke away and ran, and then was brought to the ground and successfully handcuffed. *Id.* ¶¶ 63-66.

Mr. Wingate was subsequently charged with failure to identify himself pursuant to Stafford County Ordinance § 17-7; obstructing justice under former Va. Code § 18.2-460; resisting arrest under former Va. Code § 18.2-479.1;[3] and possession of an "open" (i.e., unsigned by the buyer) automobile title, which was found during an inventory search of Mr. Wingate's vehicle post-arrest, under Va. Code § 46.2-618. *Id.* ¶ 67. On July 20, 2017, the day of Mr. Wingate's trial on these charges, Deputy Fulford learned from the Assistant Commonwealth's Attorney that the Commonwealth would be moving for a *nolle prosequi* dismissal of the charges because Mr. Wingate's defense attorney challenged the constitutionality of Stafford County

[3] Va. Code § 18.2-479.1 was repealed in 2018, and both resisting arrest and obstruction of justice have been re-codified under current Va. Code § 18.2-460.

Ordinance § 17-7 and he did not want to litigate that issue. *Id.* ¶ 68. Several months later, Deputy Fulford was told during a roll call that deputies were not to use Stafford County Ordinance § 17-7 any longer, even though the law remained valid and on the books. *Id.* ¶ 70. Prior to being instructed during this roll call not to rely on § 17-7, Deputy Fulford was never told not to enforce that ordinance. *Id.* ¶ 71.

Plaintiff brought this action on July 30, 2018 [Doc. No. 1] and filed his Second Amended Complaint on February 13, 2019 [Doc. No. 46], in which he brings claims against Deputy Fulford and Lt. Pinzon for (1) Fourth Amendment violations arising out of his seizure and arrest for refusal to give his name (Counts I and II); (2) false imprisonment for refusal to provide his name, obstruction of justice, and resisting unlawful arrest (Counts III, V, and VII); and (3) malicious prosecution for refusal to give his name, obstruction of justice, and resisting unlawful arrest (Count IV, VI, and VIII). Now pending before the Court are the parties' Cross Motions for Summary Judgment.

II. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996). The facts shall be viewed, and all reasonable inferences drawn, in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat

an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247–48.

A "material fact" is a fact that might affect the outcome of a party's case. *Id.* at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *Hooven–Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson*, 477 U.S. at 248. Rule 56(c) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The nonmoving party "cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 331 (4th Cir. 1998) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (internal quotations omitted)). "

"[W]hen faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other." *United States v. Austal USA LLC*, 815 F. Supp. 2d 948, 955 (E.D. Va. Feb. 28, 2011) (quoting *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)) (alteration in original). Instead, the court must ask "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251; *see also Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) ("[T]he court must review each motion

separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" (citations omitted)). The court is not to "weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249.

III. Analysis

As the parties agree, the dispositive issue on the parties' Cross Motions for Summary Judgment is whether Plaintiff's initial seizure and subsequent arrest for refusing to provide identification violated his Fourth Amendment rights. The parties also agree in that regard that the critical inquiry is whether the totality of the circumstances were sufficient for the Defendants to engage in a *Terry* investigative stop of Mr. Wingate.

The Fourth Amendment affords "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. A law enforcement officer is permitted to seize a person for a brief investigatory stop if he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also United States v. Bumpers*, 705 F.3d 168, 179 (4th Cir. 2013). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Courts must look to the totality of the circumstances in determining whether the officer had reasonable suspicion of criminal activity. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.* (internal citation omitted).

In assessing whether Mr. Wingate was subjected to a constitutionally valid *Terry* stop, the Court must first determine when he was "seized" and the totality of the circumstances known to the seizing law enforcement officer at that point in time. "As a general matter, law enforcement officers do not seize individuals 'merely by approaching [them] on the street or in other public places and putting questions to them.'" *United States v. Stover*, 808 F.3d 991, 995 (4th Cir. 2015) (quoting *United States v. Drayton*, 536 U.S. 194, 200 (2002)). "Rather, as the Supreme Court has explained, '[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" *Id.* (quoting *Terry*, 392 U.S. at 19 n. 16). Where "physical force is absent, a seizure requires both a 'show of authority' from law enforcement officers and 'submission to the assertion of authority' by the [person seized]." *Stover*, 808 F.3d at 995 (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991). "'Without actual submission' to the show of authority, "there is at most an attempted seizure, which is not subject to Fourth Amendment protection." *Id.* at 996 (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007)). In determining when a person has been "seized," courts look to when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

Here, based on all the facts and circumstances, the Plaintiff was "seized" by Deputy Fulford for an investigatory stop pursuant to *Terry* prior to Lt. Pinzon's arrival on the scene, when Deputy Fulford first told Mr. Wingate that although he was not under arrest, he was not free to leave until he identified himself.[5] At that point in time, a reasonable person in Mr.

[5] The Court therefore rejects Defendants' contention that Plaintiff did not actually submit to shows of authority from Deputy Fulford and Lt. Pinzon until his physical apprehension and was therefore not effectively "seized" for purposes of the Fourth Amendment until the officers attempted to place him under arrest for violating Stafford County Ordinance § 17-7.

Wingate's position would not feel free to leave after being informed that he was not free to do so and was being detained until he identified himself. Moreover, Mr. Wingate's actions are consistent with a belief that he was not free to leave, as he submitted to Deputy Fulford's order and made no attempt to leave after Deputy Fulford told him he was not free to go until he was placed under arrest. *See United States v. Slocumb*, 804 F.3d 667, 679-80 (4th Cir. 2015) (defendant was seized when he was advised by a police officer that he was not free to leave and abided by that order, though he refused the officer's request to search his person).

The question then becomes whether Deputy Fulford had constitutionally sufficient suspicion of criminal activity to warrant a brief investigatory *Terry* stop of Mr. Wingate when he was first seized. Constitutionally sufficient suspicion is reasonable suspicion. "Reasonable suspicion is a commonsensical proposition. Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street." *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993). Additionally, "individual facts and observations cannot be evaluated in isolation from each other." *United States v. Hernandez–Mendez*, 626 F.3d 203, 208 (4th Cir. 2010). Indeed, factors "susceptible to innocent explanation" individually may "suffice[] to form a particularized and objective basis" for a *Terry* stop when taken together. *Arvizu*, 534 U.S. at 277. And "the existence of a plausible innocent explanation does not preclude a finding of reasonable suspicion." *United States v. Pettit*, 785 F.3d 1374, 1381 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 282 (2015); *see also United States v. Raddon*, 634 F. App'x 216, 219 (10th Cir. 2015) (rejecting defendant's claim that the evidence "could just as easily suggest innocent behavior" because "[e]ven if these possibilities were plausible, they would not preclude reasonable suspicion"). Additionally, "a reasonable belief, even if it is mistaken, can justify an investigative stop." *United States v. Trogdon*, 789 F.3d 907, 913 (8th Cir. 2015).

Reasonableness is "measured by what the officers knew before they conducted their search," not what they learned after the fact. *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

While a person's location in a high crime area is not sufficient standing alone to support a reasonable, particularized suspicion of criminal activity, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124. That a stop occurs in a "high crime area" is among the relevant contextual considerations in a *Terry* analysis, and the Fourth Circuit has regularly found that whether or not a location is in a high crime area, the time of night or lateness of hour and the fact a business has been closed or unoccupied for many hours are permissible, objective factors that can contribute to a finding of reasonable suspicion in the totality-of-the-circumstances-analysis. *See, e.g., United States v. Glover*, 662 F.3d 694, 698 (4th Cir. 2011) (considering the high-crime area and lateness of the hour); *Lender*, 985 F.2d at 154 (same); *United States v. Smith*, 396 F.3d 579, 586-87 (4th Cir. 2005) (considering lateness of the hour where location was not a high crime area). Additionally, furtive movements in response to the officer's presence, evasive and resistant behavior, and contradictory or inconsistent responses are all additional factors upon which law enforcement officers can base reasonable suspicion that criminal activity is afoot. *See e.g., Hernandez–Mendez*, 626 F.3d at 212-13 (defendant being evasive and untruthful in her responses to officer's questions contributed to reasonable suspicion to frisk for weapons); *United States v. Wilson*, 46 F.3d 1129 (4th Cir. 1995) ("Wilson provided multiple evasive and contradictory responses to the agents' questions, appeared nervous at each stage of the questioning, and refused to acknowledge ownership of the suitcase he was carrying"); *United States v. Ghazaryan*, 685 F. App'x 222, 224 (4th Cir. 2017) (officer reasonably believed defendant's answers to initial inquiries about recently visiting banks were

untruthful, and thus had reasonable suspicion of criminal activity under the totality of the circumstances).

Here, Deputy Fulford was aware of multiple factors that when weighed together amounted to reasonable suspicion sufficient to convert what was initially a stop to assist a disabled vehicle to a brief, permissible investigatory stop under *Terry*. Deputy Fulford observed Mr. Wingate's vehicle idling with its hood up at the CarStar lot at roughly 1:39 a.m. The vehicle was located in the dimly lit parking lot of a closed and empty business late at night, near parked CarStar cars, despite better lit areas just down the road, during a period of increased vehicular larcenies and in an area known for prevalent vehicular crimes.

Given the totality of these circumstances, Deputy Fulford had an articulable and objective basis for a brief investigatory *Terry* stop. Critical to that determination is the time of the encounter (early morning) and the location of Mr. Wingate's vehicle, *viz.*, partially on a private used car lot, adjacent to used cars, of a closed business that had been the victim of criminal activity in the past and at a time when vehicular related crime had spiked throughout the county. And although without these facts, the Court would reach a different conclusion, Mr. Wingate also engaged in other conduct that, when considered in light of these critical facts pertaining to time and location, further justified the *Terry* stop (even though that conduct was insufficient by itself), including (1) immediately exiting his vehicle without any prompting as Deputy Fulford exited his cruiser; (2) wearing all-black clothing similar to the suspects identified and apprehended during the recent increase in late-night vehicular larcenies in Stafford County; and (3) explaining his presence in the used car lot as the result of engine trouble given that the car appeared to be running and idling without issue. That Mr. Wingate's explanation for his presence may have proven true, that he understandably viewed Deputy Fulford's insistence on his

identifying himself as an implicit, and unwarranted, accusation of criminal activity, and that from his perspective, he was fully within his rights to refuse to provide identification does not negate that when the totality of the circumstances are viewed from the perspective of Deputy Fulford, Deputy Fulford had a reasonable suspicion "that criminal activity may be afoot" at the time he informed Mr. Wingate that he was not free to go until he identified himself. Defendants are accordingly entitled to judgment as a matter of law as to Count I.

When Mr. Wingate refused to provide identification, Defendants also had sufficient probable cause to arrest him for violating Stafford County Ordinance 17-7 and are thus entitled to summary judgment with respect to Count II. In *United States v. LeFevre*, 685 F.2d 897 (4th Cir. 1985), the Fourth Circuit conducted a Fourth Amendment analysis of Arlington County's Ordinance § 17-13(c), which is essentially identical to Stafford County Ordinance 17-7(c). In *LeFevre*, the officer had knowledge of reports that a gang fight could occur that night in the area, and observed a man sitting on a wall across the street licking two rolling papers with a pack of pre-rolled commercial cigarettes beside him. 685 F.2d at 899. When approached by law enforcement, the man "quickly placed his hands in his pockets" and "became very nervous." *Id.* The officer asked LeFevre who he was and what he was doing, and he gave no answer. *Id.* She repeated her question and LeFevre replied "why," got down off the wall, and began backing away "stating that he was not doing anything and wanted to be left alone." *Id.* The officer then placed LeFevre under arrest for violating Section 17-13(c). *Id.*

The Fourth Circuit held that the officer was initially justified in conducting a *Terry* investigatory stop and had sufficient probable cause to arrest LeFevre pursuant to Section 17-13(c), and, specifically, to believe that the "public safety" required the identification of the suspect. *Id.* at 900. Specifically, the Court found four factors that when viewed collectively

supported a finding of probable cause: (1) the reports of an armed gang fight that was to occur that evening; (2) LeFevre's licking two rolling papers coupled with having a pack of commercial cigarettes; (3) his furtive movements upon being approached by the officer; and (4) his repeated refusal to identify himself. *Id.* The Court deemed these circumstances "sufficient to warrant a prudent person's belief that [LeFevre] was a threat to 'public safety' and should identify himself." *Id.*

Though the exact circumstances here differ from those in *LeFevre*, the totality of the surrounding circumstances could cause a reasonable person to conclude that the public safety required Mr. Wingate to provide identification. Upon Mr. Wingate's continued refusal to do so despite the officers' explanation as to the requirements of the ordinance, there was probable cause for his arrest pursuant to § 17-7(c), and his arrest therefore did not violate the Fourth Amendment.[6] Accordingly, Defendants are entitled to summary judgment with respect to Count II.

Even assuming that Wingate's seizure and arrest pursuant to § 17-7 violated his Fourth Amendment rights, Defendants are entitled to qualified immunity and summary judgment in their favor would therefore be appropriate. Qualified immunity is designed to provide a safe harbor from liability to ensure that officers will be held liable only for transgressing bright lines and not for making "bad guesses in grey areas." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Applied properly, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal

[6] Plaintiff does not challenge the constitutionality of Stafford County Ordinance § 17-7 but rather its application to him here. And even had he done so, "an arrest, made in good faith reliance on an ordinance, which at the time has not been declared unconstitutional is valid regardless of a subsequent judicial determination of its unconstitutionality." *LeFevre*, 685 F.2d at 901 (citing *Michigan v. DeFillippo*, 443 U.S. 31 (1979)). There has been no such judicial determination of § 17-7's unconstitutionality here, although Stafford County deputies have since this incident been directed to no longer charge individuals under the ordinance.

quotation marks omitted). In determining whether officers are entitled to qualified immunity, the Court assesses whether the officer's conduct was reasonable under the circumstances known to the officer at the time of the complained of actions. *Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009). If the officer's conduct does not violate a constitutional right, qualified immunity applies and bars suit. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Even if there is a question as to whether a plaintiff's constitutional rights have been violated, qualified immunity still applies unless the "official's conduct violated a clearly established constitutional right." *Id* In assessing whether the officers' conduct violated a clearly established constitutional right, the relevant question is "the objective (albeit fact-specific) question whether a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). It is within the discretion of the district court to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236.

Deputy Fulford and Lt. Pinzon did not violate a clearly established constitutional right. Based on what Deputy Fulford and Lt. Pinzon saw and knew, they had probable cause to justify an arrest. The officers also had a good faith belief at the time that § 17-7 was valid and constitutional and that they were acting within the scope authorized by that statute. Thus, objective officers in Deputy Fulford's and Lt. Pinzon's positions could reasonably believe, given the circumstances known at the time, that arresting Mr. Wingate following his repeated refusals to identify himself was supported by probable cause.

Finally, because Defendants are entitled to summary judgment as to Plaintiff's Fourth Amendment claims, his remaining state law claims must fail as a matter of law. Because the

seizure was supported by an articulable reasonable suspicion of criminal activity and the arrest was supported by probable cause, Defendants are also entitled to summary judgment with respect to Plaintiff's malicious prosecution and false arrest/imprisonment claims based on Defendants' actions after the initial seizure and subsequent arrest.

IV. Conclusion

For the reasons stated above, based on the undisputed facts, Defendants are entitled to judgment as a matter of law as to all counts. Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment on Liability [Doc. No. 66] be, and the same hereby is, DENIED; and it is further

ORDERED that Defendants' Motion for Summary Judgment [Doc. No. 68] be, and the same hereby is. GRANTED; judgment in favor of defendants and against plaintiff be, and the same hereby is, entered; and this action is DISMISSED.

The Clerk is directed to enter judgment in accordance with this Order pursuant to Fed. R. Civ. P. 58.

/s/
Anthony J. Trenga
United States District Judge

May 31, 2019
Alexandria, Virginia

APPENDIX C

FILED: March 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1700
(1:18-cv-00937-AJT-IDD)

GEORGE WINGATE

Plaintiff - Appellant

v.

SCOTT FULFORD; DIMAS PINZON

Defendants - Appellees

and

S. A. FULFORD

Defendant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk